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Critical Race Materialism: Theorizing Justice in the Wake of Global Neoliberalism

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Critical Race Theory's (CRT's) first two decades produced a rich and diverse literature deconstructing law and society using a racial lens. CRT's emergence and rise occurred at a moment in history where the U.S. was still the uncontested unipolar superpower whose privileged elites enjoyed unprecedented prosperity and status. Despite its dominant standing in the world economy and polity, prevailing "social structures of accumulation" within the United States were already in decline. For CRT's next iteration, we argue that a critical race materialist approach is necessary to interpret the history of how economic and social structures of identity are inextricably linked. We believe such a "turn" is necessary due to two relatively new developments taking shape at the sunset of the twentieth and dawn of the twenty-first centuries—the end of the "golden era" reign of the U.S. as the world's hyperpower and the advent of global neoliberalism as the newest social structure of accumulation. We consider the role of critical race materialism in a historical moment of acute, persistent, and even growing, structural and identitatrian inequalities operationalized at both the micro and macro levels of society through legal colorblindness, political post-racialism, globalized neoliberalism, and their variegated interactions. This Article offers critical race materialism as an approach to guide the uncompleted project of racial and social justice. By adopting this term, we mean to capture and underscore the dynamic, multifaceted yet tightly collusive relationship between cultural and material exercises of legalized power to govern human lives, fortunes and destinies based on identitarian constructs like race, class, gender, or sexuality.

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Critical Race Materialism: Theorizing Justice in the Wake of Global Neoliberlism

FRANCISCO VALDES* & SUMI CHO†

I. INTRODUCTION: CRITICAL RACE THEORY AT 20 RETROSPECT—RACIAL DOMINATION IN THE ERA OF UNIPOLAR COLD WAR HEGEMONY

Although Critical Race Theory (CRT) has produced an impressive, if not wide-ranging, set of scholarly and political projects deconstructing law in the past two decades, we suggest a new iteration to theorizing justice that we call "critical race materialism." Critical race materialism signifies an approach to interpreting law and society by reading the past to understand how "race" (in an intersectional, non-essentialized sense) and economics are deeply constitutive. In this sense, law is reflective of synergistic cultural practices and values that are raced (gendered, sexed) and classed, and identity categories are constructed and reinstantiated by law. By adopting this term, we hope to emphasize the primacy of an inter-imbricated analysis of culture and material structure as mutually-reinforcing that returns to CRT's original ambition twenty years ago. Going forward, we argue that two undeniable forces—global neoliberalism and its attendant "social structures of accumulation," combined with the decline of the U.S. as the unipolar hyperpower in the existing world-system—demand that a structural economic analysis that exceeds the boundaries of the nation-state figures more prominently alongside a structural racial/identitarian analysis in our critical assessments of law and society. Such restructuring to our analyses also requires an accompanying restructuring to agenda-setting and organizing to achieve racial and social justice in the wake of global neoliberalism.[1]

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* Professor of Law, University of Miami. I thank the many persons who have originated, developed, and sustained critical race theory and praxis, including the contributors and editors who together produced this volume. Many warm thanks also to my co-author, Sumi, for a wonderful and enriching collaboration. All errors I share with Sumi.

† Professor of Law, DePaul University College of Law. The author thanks Lilian Jimenez, Neil Kelley, and Kevin O'Bryan for their research assistance, Gil Gott for his theoretical contributions, and Frank Valdes for a meaningful collaboration. The authors are indebted to Kimberlé Williams Crenshaw for a body of groundbreaking work that inspires this volume and the *Connecticut Law Review* for the foresight to assemble this twentieth anniversary commemoration.

[1] We borrow the term "global neoliberalism" from radical economists theorizing "social structures of accumulation" or "SSA" who argue that contemporary capitalism is best understood as reflecting the rise of both neoliberalism and global economic integration commonly referred to as "globalization." David M. Kotz & Terrence McDonough, *Global Neoliberalism and the Contemporary*

Our analysis helps shed light on an intriguing question posed by Kimberlé Williams Crenshaw in her lead Article to this volume that, she points out, is seldom-asked: "Why did [Critical Race Theory] emerge out of law, and perhaps not some of the other fields where similar pressures were percolating?"[2] We consider this question from the particular temporal and spatial vantage point of CRT's emergence and dissemination in the late stages of the Cold War era within the world economic system. In short, CRT sprung from law here, in the United States, because core elites in *this* nation-state most successfully have used law not only to create markets for oppression and injustice, but to do so along intensely racialized grids of political, cultural, and material stratification. Intentionally and insistently, privileged elites in the U.S. have deployed to incentivize racialized exploitation of humans and the planet's resources with great zeal and for greater profits. Yet, these dispossessing accumulations, which disproportionately impact the subalterns in the U.S., are accompanied by facial neutrality, and by intensified racial erasure that increasingly is pushed both from within and without that existing framework of nation-states.

Within the traditional nation-state,[3] the legal regime of colorblindness

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Social Structure of Accumulation, in CONTEMPORARY CAPITALISM AND ITS CRISES: SOCIAL STRUCTURE OF ACCUMULATION THEORY FOR THE 21ST CENTURY 95–96 (Terrence McDonough, Michael Reich, and David M. Kotz, eds., 2010) [hereinafter CONTEMPORARY CAPITALISM]. The authors define neoliberalism as "a coherent, multileveled entity whose core features include political-economic institutions, policies, theories, and ideology. . . . Neoliberal ideology is marked by a glorification of individual choice, markets, and private property; a view of the state as inherently an enemy of individual freedom and economic efficiency; and an extreme individualist conception of society." *Id.* at 94. Social scientists speak of global neoliberalism as manifesting in two ways. In its purest form, global neoliberalism exists at the transnational level through international institutions such as the World Bank, World Trade Organization, and International Monetary Fund. Global neoliberalism also can be understood as the spread (uneven as it has been) of neoliberal policies adopted by individual nation-states—most comprehensively throughout the former socialist eastern and central European countries, and most significantly in developed capitalist countries such as the U.K. and the United States. *Id.* at 113–16.

[2] Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back To Move Forward*, 43 CONN. L. REV. 1253, 1272 (2011). Crenshaw provides a compelling analysis of the temporal, institutional, and political factors that gave rise to CRT as a social and intellectual movement. She draws upon Aldon Morris's frame alignment analysis to argue that CRT developed by confronting the frame *mis*alignment that inhered in standard accounts of racial jurisprudence dominant at the time in Critical Legal Studies and liberal civil rights scholarship. We agree with Crenshaw's frame misalignment approach, and with the temporal, institutional and political factors she perceptively identifies in her Article, including how a dynamic understanding of these formative factors better prepares us to engage contemporary race discourses, such as the increasingly ubiquitous declarations of the United States as a "post-racial" society. She notes that this question is seldom asked, despite the proliferation of Critical Race Theory's (CRT) influence across disciplines. *Id.* at 1259.

[3] We adopt the critical approach to conceptualizing the "nation-state" which acknowledges the nation-state as a construction of nationalism (and modernity), with inherent contradictions and tensions. *See generally* BENEDICT R. ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1991); ETIENNE BALABAR, RACE, NATION, AND CLASS: AMBIGUOUS IDENTITIES (with Immanuel Wallerstein, 1991); ERNEST GELLNER, NATIONS AND NATIONALISM (1983).

and its new normative counterpart, post-racial politics and discourse, combine to erase liberational color consciousness. Beyond the nation-state, and in the service of a world economic system, the fundamentalist ideology that the profit motive and "free" trade treat all humans equally inhibits racialized or identity-based analysis and problem-solving in ways that predictably entrench the racial hierarchy of colonialism and imperialism under the banner of global neoliberalism. In this sense, the practice of racialized colorblindness and post-racialism (think anti-affirmative action statutes upheld as constitutional that demand elimination of "racial preferences," effectively excluding racial minorities from viable remedies) within the nation-state or within the world-system *is* the colorline of the twenty-first century, both in content and consequence. In each of these contexts—within and beyond the traditional nation-state—law proves central to race, and the strategic erasure of cultural and material subordination based on identity in the service of white privilege is the racial project of the moment.

Residing in the belly of this beast, CRT is positioned like no other formation to understand, map and challenge the continuation of this status quo: CRT work during the past two decades has helped to make plain that, for so long as legal profits are made by racialized subjugation, racialized subjugation not only will continue but also flourish.[4] This view, we hope,

[4] This collaborative effort is certainly not the first attempt to seriously engage left and critical race analyses. As Kimberlé Williams Crenshaw described CRT at its origins, it was both a "left intervention into race discourse and a race intervention into left discourse. *See* Kimberlé Williams Crenshaw, *Introduction, in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xix (Kimberlé Crenshaw, et al. eds., 1995) [hereinafter CRITICAL RACE THEORY: THE KEY WRITINGS]. For a sampling of some of the CRT literature engaging left discourses, theories, and histories, see Keith Aoki, *Space Invaders: Critical Geography and the "Third World" in International Law and Critical Race Theory*, 45 VILL. L. REV. 913 (2000) (probing the connection between "Third World" and Critical Race Theory by examining the salience of globalization, flexible accumulation, and critical geography); Maria Grahn-Farley, *Race and Class: More than a Liberal Paradox*, 56 BUFF. L. REV. 937 (2008) (advocating for a shift to "ClassCrit" analysis that views race and class as distinct but interdependent concepts); *Anthony Paul Farley, Accumulation*, 11 MICH. J. RACE & L. 51 (2005) (contending that the rule of law is the endless unfolding of the primal scene of accumulation); Anthony Paul Farley, *The Colorline as Capitalist Accumulation*, 56 BUFF. L. REV. 953 (2008) (providing a helpful glossary of left economic terms for critical legal and critical race theorists); Cheryl I. Harris, *Whiteness as Property*, HARV. L. REV. (1993) (tracing the law's recognition of the material value of whiteness as a form of property); Beverly Moran & Stephanie M. Wildman, *Race and Wealth Disparity: The Role of Law and the Legal System*, 34 FORDHAM URB. L. J. 1219 (2007) (examining how legal institutions create and sustain racialized wealth disparities); Tayyab Mahmud, *"Surplus Humanity" and the Margins of Legality: Slums, Slumdogs, and Accumulation by Dispossession*, 14 CHAP. L. REV. 1 (2010) (arguing that urban slums are produced by three inter-linked and enduring features of capitalism that have been accentuated by neoliberalism: accumulation by dis-possession, the labor reserve army, and an informal sector of the economy); Audrey G. MacFarlane, *Race, Space and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 301 (1999) (wedding critical race and Marxist insights to develop a critical theory of social justice that allows one to transcend issues of distribution to directly confront forms of oppression that are relevant to the lived urban reality of affluence and poverty in the city); Audrey G. McFarlane, *Redevelopment and Four Dimensions of Class in Land Use*, 22 J. L. & POLITICS 33 (2006) (providing a typology of four dimensions of class as it affects land use law through which one may critically examine the role that

helps to explain not only why CRT emerged where it did during the closing decades of the last century, but also why it remains uniquely positioned to unmask and resist the latest practices of racial injustice both within and beyond the nation-state. We will then consider challenges confronting CRT's relevance in this century, where the struggle for social justice under global neoliberalism must be understood to transcend the boundaries of the nation-state.

We begin in Part I with a brief materialist account of the larger world economic system[5] and its "social structures of accumulation" that evolve following World War II that allow core identitarian elites in the United States to enjoy a "golden age" of unprecedented economic prosperity and political prominence. CRT emerges at the moment of accumulation crisis due to the decline of these established social structures of accumulation, and prior to the emergence of the new social structures of accumulation not yet consolidated or identified at the time. Part I also elucidates the connection between this transitional moment in capital accumulation and its connection to law, hegemony, and counter-hegemonic movements. We conclude Part I with a summary of the fundamental role of law in the constitution both of society and of hegemonic Euro-heteropatriarchy as an

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law and class have played in U.S. patterns of socio-economic segregation); Tayyab Mahmud, *Is It Greek or Déjà Vu All over Again?: Neoliberalism and Winners and Losers of International Debt Crises*, 42 LOY. U. CHI. L.J. 629 (2011) (arguing that global financial institutions create unsustainable international debts, which in turn, trigger international debt crises that must be managed to further advance neoliberal prescriptions for global finance and national economies, ultimately resulting in transfer of wealth from the poor to the rich); Athena D. Mutua, *Introducing ClassCrits: From Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56, BUFF. L. REV. 859 (2008) (introducing the first volume to publish works by "ClassCrit" scholars devoted to the sustained study of issues of class, identity, and law); Daria Roithmayr, *Left(Over) Rights*, 22 CARDOZO L. REV. 1113 (2001) (reconsidering the rights debate between Critical Race and Critical Legal theorists); Kendall Thomas, *Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case, in* CRITICAL RACE THEORY: THE KEY WRITINGS, *supra*, at 465 (reclaiming the story of the Angelo Herndon case and his participation in the Communist Party USA to better understand constitutional history). In addition to these works, there were at least three recent symposia volumes devoted to the topic of race and class in critical legal scholarship: *Going Back to Class?: The Re-Emergence of Class in Critical Race Theory*, 11 MICH. J. RACE & L., Issue 1 (2005); *ClassCrits: Toward a Critical Legal Analysis of Economic Inequality*, 56 BUFF. L. REV., Issue 4 (2008); *Critical Race Theory and Marxism*, 1 COLUM. J. RACE & L. (forthcoming 2011). In addition to these symposia volumes, an excellent legal casebook on Economic Justice was recently published examining identity, law and markets. *See* EMMA COLEMAN JORDAN & ANGELA P. HARRIS, ECONOMIC JUSTICE: RACE, GENDER, IDENTITY, AND ECONOMICS (2d ed. 2011).

[5] Immanuel Wallerstein conceptualized the world economic system in which the "world-system," and not the nation-state, is the relevant unit of social analysis. The world-system is characterized by an unequal, axial division of labor in different zones that Wallerstein labels as core, periphery, and semiperiphery. National economic development must be understood as part of global capitalist development. According to world-systems theory, there is a fundamental tension between a capitalist economy that has a tendency toward exchange and interconnectedness on the one hand, and a global polity that is marked by competition between dominant states at the center with the greatest economic, military, and cultural capacities and less developed peripheral states on the other. IMMANUEL WALLERSTEIN, THE MODERN WORLD-SYSTEM: CAPITALIST AGRICULTURE AND THE ORIGINS OF THE EUROPEAN WORLD-ECONOMY IN THE SIXTEENTH CENTURY (1974) [hereinafter WALLERSTEIN, MODERN WORLD-SYSTEM].

expression of that system (and the nation-state), ending with the promise of CRT as a counter-hegemonic ideology

We then turn in Part II to similar dynamics and concerns regarding law and race under the increasingly globalized politics and world system of domination and subjugation based on old, racialized patterns of colonial and imperial power politics and on the prophesized rise of the so-called "market-state."[6] Throughout this account, we observe how both national and transnational trajectories of legal politics and rule-making dovetail today in the practice of neocolonial racial erasure, in order to help discern future projects and pending priorities for a next generation of CRT scholarship and praxis. In related future work, we will continue this analysis to help identify key features of the new and current social structure of accumulation—global neoliberalism—and identify the ways in which the law is deployed in its service to perpetuate identity-based systems of privilege and oppression established during colonial and imperial eras. We will also suggest how CRT might operate with a mid-term agenda to attempt to counteract and resist global neoliberalism's structuring of accumulation, and the particular challenges and difficulties of doing so as (mostly) law professors from the Global North.

Although in this Article we focus chiefly on the race question, we remind ourselves at the outset that the stories we sketch below at all times implicate multiple identities and politics. In our view, race is but the tip of the iceberg: in the story of law, modernity, the nation-state, and world-system, elite forces consistently and strategically have constructed and orchestrated identitarian politics using race intersectionally to fabricate and sustain self-interested material hierarchies. These forces have structured these material hierarchies into the form of the modern, faciliating nation-state using both the brute force and legitimizing aura of law. Through the historical processes known as colonialism, imperialism, and globalization, elites have used identitarian politics at the local, national, regional, and now global level to establish and consolidate the systems of control justified under the Rule of Law. It is this great masquerade that CRT began to reveal—along with other critical studies—since the 1980s. In the limited space here, we cannot hope to etch a specific substantive agenda for CRT's future work, although we hope that our analysis below will help

[6] Although Phillip Bobbitt recently coined the "market-state," critical theorists have long been describing the interaction between free markets, nation-states, and the world economic system. We use the term here to refer to the rise of global neoliberalism and market imperatives, and the decline of the traditional nation-state and liberal Keynesian policies with accompanying social safety nets, but view these shifting ascendencies as tied to a larger world economic system. *See* PHILLIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY (2002); PHILIP BOBBITT, TERROR AND CONSENT (2008). Indeed, Wallerstein argues that the nation-state is not the appropriate unit of analysis, although nation-states facilitate and perpetuate the core economic regions of the world-system. As legal scholars, however, we afford more centrality to the nation-state than Wallerstein, but less than Bobbitt given the constitutive nature between law and the nation-state.

critical race scholars collectively do so sooner rather than later.

A. *Social Structures of Accumulation Within the Mid-Century Hyperpower and Three Hegemonic[7] Phenomena*

The twentieth century witnessed the consolidation of internationalized capitalist markets and a hierarchical world-system of nation-states built upon the architecture of colonialism and imperialism, a material and cultural architecture designed substantially and persistently in the forms of identitarian systems of stratification, including racialized (and gendered) stratification.[8] Thus, the transnational dynamics of colonial and imperial subjugation never did stop, and certainly not at the gates of any particular nation or state. That century thereby occasioned both the consolidation of public, national sovereignties in the form of nation-states that enabled established identitarian elites to construct the modern world-system and its exploitation-based economy, and continued colonial and imperial power logics that increasingly (and ironically) have put the nation-state itself under new pressures.

The story of the world-system, the state and the market interacting with identity formation are thus historically, politically, and structurally intertwined. The story of colonialism, imperialism, and globalization are similarly intertwined. These are the macro dynamics that frame the analysis that we unfold in order to situate the present and future of justice theorizing in this age of global neoliberalism. These intersecting stories converge to produce the shared architecture that today produces the substantive imperatives and theoretical trajectories of critical race materialism. Despite this shared architecture across nation-states, the manifestation of identity-based systems of domination from the mid- to late-twentieth century could be solipsistically understood to lie within the boundaries of the United States as hyperpower nation-state. The American

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[7] Andrew Gamble offers two important approaches to understanding hegemony that are useful to this Article. In the "world-systems" analysis conceptualized by Immanuel Wallerstein, hegemony occurs when one state in the international state system is so economically dominant that it can either cajole or coerce a system of international rights or norms unchallenged by any other state or combination of states. Hence, the focal point of hegemony in the worlds-systems approach is structural or economic in nature. In contrast, the second useful approach to hegemony that Gamble references is that of Antonio Gramsci, which emphasizes the ideological or cultural nature of hegemony and how dominant power is accepted or legitimated through a myriad of educational, cultural, and political institutions, organizations, and agencies. In this Article, we embrace a definition of hegemony that embraces both its structural and ideological dimensions as identified by Gamble. Andrew Gamble, *Hegemony and Decline: Britain and the United States*, *in* PATRICK KARL O'BRIEN & ARMAND CLESSE, TWO HEGEMONIES: BRITAIN 1846–1914 AND THE UNITED STATES 1941–2001, at 127–40 (2002).

[8] MICHAEL HARDT & ANTONIO NEGRI, EMPIRE 169–82 (2000). According to Wallerstein, the world-system's division of labor in European core and non-European periphery generated uneven development that originated in and was constitutive of colonialism and imperialism. WALLERSTEIN, MODERN WORLD-SYSTEM, *supra* note 5.

Century had begun.[9] World War II and the beginning of the Cold War realigned the constellation of political powers to leave two regional superpowers standing—the United States and the Soviet Union. Within the capitalist core, the United States was the undisputed unipolar hyperpower. For the citizenry of the economic and military hegemon, opportunity seemed boundless, at least for those deemed to fit within established parameters of the worthy, law-abiding citizen.

With the understanding that the world-system and its supporting nation-state structure was *always already* racialized in multiple intersectional ways, it should be no surprise that the most pertinent color lines of the twentieth century hyperpower nation-state were those drawn racially *within* its boundaries by dominant core elites. Part of the reason the American Century's racial domination was largely understood to exist within the boundaries of the United States has to do with the development of three hegemonic phenomena from the mid- to late-twentieth century: (1) Pax Americana and the rise of global multilateral organizations that consolidated and cloaked the racialized international order; (2) domestic social structures of accumulation and their implicit accords that produced and exacerbated racial and social disparitites; and (3) the self-serving "rule of law" that cruelly declared formal (racial and social) equality while simultaneously limiting its reach. These three hegemonic phenomena all produced shared understandings of the hyperpower nation-state that underwrote unprecedented post-war material prosperity and cultural legitimation of the neocolonial status quo for members of ensconced in-groups. This unprecedented prosperity and accompanying hegemonies allowed mid-twentieth century U.S. mainstream society to adopt an inward-looking stance during a time of expanding transnational developments.

But beginning with the 1973 oil crisis, and continuing through the close of the twentieth century, the smoothly skewed accumulation of capital eventually was disrupted by inherent contradictions within the world economy and accumulation process, thereby reshaping the settled understandings of these legitimating phenomena. These contradictions included, principally, the unsustainability of the various domestic accords due to the inherent tension between class interest and competition on the one hand, and capital's ongoing quest for ever-more enhanced profitability on the other.[10] Consequently the emergence of CRT in the mid-1980s was

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[9] Henry R. Luce famously declared "the American Century" following the end of World War II in *The American Century, reprinted in* THE AMBIGUOUS LEGACY: U.S. FOREIGN RELATIONS IN THE "AMERICAN CENTURY" 11, 11–13 (Michael J. Hogan ed., 1999).

[10] David Kotz, *Interpreting the SSA Theory, in* SOCIAL STRUCTURES OF ACCUMULATION: THE POLITICAL ECONOMY OF GROWTH AND CRISIS 57 (David M. Kotz, Terrence McDonough & Michael Reich, eds. 1994) (explaining the inherent contradictions including class conflict and competition that lead to the decline of a particular social structure of accumulation).

well-timed and well-positioned to take advantage of the pending rupture and crisis of these domestic U.S. hegemonies and related identitarian arrangements: because the nation-state system was already chromosomally racialized (and gendered) through centuries of colonial and imperial conquest of the South and East by the North and West, the dynamics of legalized power also have been unavoidably and pervasively racialized (and gendered) along the familiar color/sex lines of the twentieth century.

1. *The Global Accord: The Rise of Multilateral Organizations and Pax Americana*

In the wake of World War II, the United States adopted an approach to traditional colonization that favored "facial independence" for the colonized of Africa, Asia, and Latin America, or the "Global South," while simultaneously constructing multilateral organizations and "rules of the game" that would foster economic and political dependence, and thereby disadvantage in enduring ways, newly-independent nations (as well as serve to maintain its own colonial interests in the Caribbean and Pacific).[11] As the racially dominant capitalist power, the United States was best poised to benefit from new inter-governmental economic organizations like the International Monetary Fund and the International Bank for Reconstruction and Development (IBRD, which evolved into one of the five organizations in the World Bank Group), the proposed International Trade Organization (ultimately realized in the 1995 formation of the World Trade Organization or WTO), and the General Agreement on Tariffs and Trade (GATT).[12] Indeed, as we explain below, the modern rules of neoliberal globalization always have been skewed in favor of former colonial and imperial nation-states and their identity-inflected elites.

Through these processes, the United States worked closely to develop

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[11] In July 1944, the burgeoning United Nations convened a Monetary and Financial Conference in Bretton Woods, NH, popularly referred to as the Bretton Woods Conference. Represented were major economists from several nations in Europe and North America including James W. Angel, William Brown, Jr., Edward M. Bernstein, Alvin H. Hansen, John H. Williams, John Parke Young, Emmanuel A. Goldenweiser, and Harry D. White from the United States; John Maynard Keynes, Dennis H. Robertson, and Lionel Robbins of the United Kingdom; Leslie G. Melville of Australia, Arthur F.W. Plumtree, and Louis Raminsky of Canada; and Robert Moss of France. The basic objective of this conference was to establish a monetary fund for the then forming United Nations to utilize to help stabilize countries throughout the world. RAYMOND F. MIKESELL, THE BRETTON WOODS DEBATES: A MEMOIR, ESSAYS IN INTERNATIONAL FINANCE, NO. 192, 1–2 (Princeton Dep't of Economics, Int'l Finance Section ed., 1994).

[12] Several International Monetary Organizations emerged out of the Bretton Woods Conference including the International Monetary Fund and International Bank for Reconstruction and Development. John W. Pehle, *The Bretton Woods Institutions*, 55 YALE L.J. 1127, 1127 (1946). GATT also began its life in the conversations surrounding Bretton Woods but was not established formally until 1947. MIKESELL, *supra* note 11, at 4, 47. The ITO was chartered on the basis of GATT, but its final charter from 1948 never entered force, blocked in part by the Unites States, and instead GATT became the WTO in 1995. Michael Hart, *Twenty Years of Canadian Tradecraft: Canada at Gatt, 1947–1967*, 52 INT'L J. 581, 581, 589 (1997).

international economic systems to valorize and promote "free trade" and "free markets" while undermining those articulated goals by maintaining economic and political advantages and preferential treatment through byzantine institutional arrangements and carefully-constructed "rules of the game."[13] This new transnational regime reflected and projected existing racial hierarchies constructed through colonial and imperial historical processes despite their facial neutrality.[14] For example, in constructing the global system of fixed exchange rates, set forth in the IMF and IBRD, the original plan provided for a world currency unit against which all national currencies would be pegged.[15] None other than John Maynard Keynes suggested at the 1944 United Nations Monetary and Financial Conference (a.k.a. the "Bretton Woods" conference) that the world currency unit be the "bancor."[16] The U.S. Bretton Woods delegation, however, objected to the bancor and instead prevailed in its lobby for a gold-backed dollar standard, or "dollar hegemony,"[17] allowing the Euro-American elites of the United States and their allies to underwrite massive trade deficits.[18]

The international economic system constructed at Bretton Woods would be particularly disabling to developing nations of the South and their (post-)colonial colored multitudes. With its dollar-backed convertible monetary system in place, the United States was able to trade at great profit to obtain raw materials from poor nations.[19] Those profits would in turn be re-invested in industrial infrastructure in those nations to produce new markets.[20] These new markets similarly projected and protected existing identitarian hierarchies.

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[13] *See* Balakrishnan Rajogopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41 HARV. INT'L. L.J. 529 (2000).

[14] ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005); Bhupinder Chimni, *Past, Present and Future of International Law: A Critical Third World Approach*, 8 MELB. J. INT'L. L. 499 (2007); James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013 (2007).

[15] MIKESELL, *supra* note 11, at 12–14.

[16] John Maynard Keynes's "bancor" was an international currency that would be tied to the value of gold with added ability for adjustments to the value possible by vote of the International Clearing Union. *Id.*

[17] *Id.* at 15–16, 25, 59. Dollar hegemony is a termed coined by Henry C.K. Liu in 2002 that stands for the proposition that after the Bretton Woods establishment of the dollar as the standard world currency and especially after Nixon took the dollar off the gold standard, the dollar has become a commodity which only the United States can produce by fiat and to which the rest of the world must conform regardless of its value or the deficits the United States runs. Henry C.K. Liu, *US Dollar Hegemony Has Got To Go*, ASIA TIMES ONLINE (Apr. 11, 2002), http://www.atimes.com/global-econ/DD11Dj01.html.

[18] *See* Rohini Hensman & Marinella Correggia, *U.S. Dollar Hegemony: The Soft Underbelly of Empire*, 40 ECON. & POL. WKLY. 1091, 1091, 1093 (2005) (discussing the relationship between dollar hegemony and running massive deficits).

[19] *See id.* at 1093 (discussing dollar hegemony's leverage in acquiring raw materials from the Global South and poor nations); Henry C.K. Liu, *Breaking Free From Dollar Hegemony*, ASIA TIMES ONLINE (July 30, 2008), http://www.atimes.com/atimes/China_Business/JG30Cb01.html (discussing how oil and other important commodities are designated by fiat dollars).

[20] *Id.*

Racialized U.S. economic and military interests were similarly safeguarded through the development of the North Atlantic Treaty Organization (NATO) and the U.N. Security Council. U.S. dominance in the formation of these security formations combined with U.S. economic advantage in the international economic system provided for the unprecedented role as "global policeman."[21] In its unchallenged role as global policeman, the United States was free to prop up authoritarian regimes friendly to the United States and the cultural or material agendas of its elites, as well as undermine or eliminate democratically-elected regimes unfriendly to the United States.[22] Moreover, the international monetary system's dollar hegemony initially facilitated trade surpluses to underwrite U.S. military presence abroad in the furtherance of its economic and foreign affairs prerogatives.[23]

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[21] Michael Cox, *Empire, Imperialism and the Bush Doctrine*, 30 REV. OF INT'L STUD. 585, 596–97, 602, 604–05 (2004).

[22] The global policeman role applied to authoritarian and democratic governments with interest convergence with U.S. interests as a pre-requisite. Jeffrey Sommers, *Dollar Crisis and American Empire*, ZNET (June 20, 2003), http://www.zcommunications.org/dollar-crisis-and-american-empire-by-jeffrey-sommers.

[23] Ironically, one of the most eloquent critics of dollar hegemony for its connection to military intervention comes not from the Left but the Right. In his February 15, 2006 speech before the U.S. House of Representatives, 2008 presidential candidate Ron Paul articulated this linkage:

> But the truth is that paying the bills for this aggressive intervention is impossible the old-fashioned way, with more taxes, more savings, and more production by the American people. Much of the expense of the Persian Gulf War in 1991 was shouldered by many of our willing allies. That's not so today. Now, more than ever, the dollar hegemony—it's [sic] dominance as the world reserve currency—is required to finance our huge war expenditures. This $2 trillion never-ending war must be paid for, one way or another. Dollar hegemony provides the vehicle to do just that.
>
> . . . .
>
> Though we don't occupy foreign countries to directly plunder, we nevertheless have spread our troops across 130 nations of the world. Our intense effort to spread our power in the oil-rich Middle East is not a coincidence. But unlike the old days, we don't declare direct ownership of the natural resources—we just insist that we can buy what we want and pay for it with our paper money. Any country that challenges our authority does so at great risk.
>
> Once again Congress has bought into the war propaganda against Iran, just as it did against Iraq. Arguments are now made for attacking Iran economically, and militarily if necessary. These arguments are all based on the same false reasons given for the ill-fated and costly occupation of Iraq.
>
> Our whole economic system depends on continuing the current monetary arrangement, which means recycling the dollar is crucial. Currently, we borrow over $700 billion every year from our gracious benefactors, who work hard and take our paper for their goods. Then we borrow all the money we need to secure the empire (DOD budget $450 billion) plus more. The military might we enjoy becomes the "backing" of our currency. There are no other countries that can challenge our military superiority, and therefore they have little choice but to accept the dollars we declare are today's "gold." This is why countries that challenge the system—like Iraq, Iran and Venezuela—become targets of our plans for regime change.
>
> Ironically, dollar superiority depends on our strong military, and our strong military depends on the dollar. As long as foreign recipients take our dollars for real

Trade surpluses initially produced from uneven advantage trading with poor countries in the Global South (and, for a time, devastated European economies) thus allowed additional capital for unfettered deployment of military personnel in strategic areas. Dollar hegemony, however, was understood to be sustainable only through the consistent production of U.S. trade deficits to allow the flow of dollars into the global system to prevent dollar shortages.[24] Yet, the ongoing requisite maintenance of balance of trade deficits to ensure adequate circulation of the dollar led to an inherent instability and lack of confidence in the reliability of the dollar, calling into question the dollar standard itself by the early 1970s.[25] Ultimately, the decline of the dollar standard due to the demise of Bretton Woods was short-lived, as the oil crisis triggered the need for a petro-currency to which oil could be "anchored," giving rise to "petro-dollar" recycling.

The exclusive pricing of oil transactions in U.S. dollars on a global scale retriggered the dollar as the international reserve currency yet again. In addition to the re-deployment of the dollar as international reserve currency to oil, another factor accounted for the dollar's new pole position—trade deficits with Asian and European countries.[26] This redeployment of the dollar as the international reserve currency again reflected and projected existing racial hierarchies in favor of Northern and

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> goods and are willing to finance our extravagant consumption and militarism, the status quo will continue regardless of how huge our foreign debt and current account deficit become.

Hon. Ron Paul, The End of Dollar Hegemony, Speech before the U.S. House of Representatives (Feb. 15, 2006), *available at* http://paul.house.gov/index.php?option=com_content&task=view&id=184&Itemid=60; *see also* Thomas I. Palley, *Why Dollar Hegemony Is Unhealthy*, YALEGLOBAL ONLINE MAG., June 20, 2006, http://yaleglobal.yale.edu/3305 (forwarding the argument that U.S. military power protects the global market system and the special role of the U.S. dollar as the world's reserve currency); Jutta Schmitt, *International Financial Crisis and End of the Dollar Hegemony: United States versus ABLA*, OPEDNEWS.COM, Sept. 22, 2009, http://www.opednews.com/articles/International-Financial-Cr-by-Jutta-Schmitt-090916-148.html (arguing that the "astronomical costs" of U.S. military spending and supremacy would "come down like a house of cards" if dollar hegemony is eroded); Mike Whitney, *Doomsday for the Greenback? Dollar Madness*, COUNTERPUNCH, Apr. 10, 2007, www.counterpunch.org/whitney04112007.html (characterizing the "War on Terror" as a public relations ploy to "disguise the use of military and covert operations to secure dwindling resources to maintain dollar supremacy").

[24] *See* Liu, *Breaking Free*, *supra* note 19 (discussing the unsustainability of "dollar hegemony").

[25] Dollar hegemony declined in the 1970s with pressures building from the late 1960s. For this history, see generally FRED BLOCH, THE ORIGINS OF INTERNATIONAL ECONOMIC DISORDER (1977); BARRY EICHENGREEN, GLOBALIZING CAPITAL: A HISTORY OF THE INTERNATIONAL MONETARY SYSTEM (2d ed. 2008); JOANNE GOWA, CLOSING THE GOLD WINDOW: DOMESTIC POLITICS AND THE END OF BRETTON WOODS (1983); INTERNATIONAL ECONOMIC RELATIONS OF THE WESTERN WORLD 1959–1971, VOL. 2: INTERNATIONAL MONETARY RELATIONS (Susan Strange et al. eds., 1976); ROBERT TRIFFIN, GOLD AND THE DOLLAR CRISIS (1988); *see also* Ramaa Vasudevan, *Finance, Imperialism, and the Hegemony of the Dollar*, MONTHLY REV., Apr. 2008, *available at* http://monthlyreview.org/2008/04/01/finance-imperialism-and-the-hegemony-of-the-dollar (identifying Japan's post-war competitiveness, the devaluation of the British sterling, the speculative pressure on gold prices, and the ongoing finance demands of the Vietnam War that led to the "closing of the gold window" in 1971 by the United States, setting up the "floating" of the dollar by 1973).

[26] Schmitt, *supra* note 23.

Western elites still ruling former colonial and imperial nation-states.[27]

Undergirding this (new) economic and political world order has been the rule of (white) law. International treaty law, inter-governmental organizations, and specialized agencies to the United Nations have comprised the set of global institutions, organizations, and agreements that have constituted "imperial globality."[28] As a result, two legal constructs are at the crux of today's world system: the nation-state and the so-called free market. Both the state and the market are, in fact, products of law; each is created, constructed, operated, limited, modified, and protected by law. And each, in turn, produces much law—directly or otherwise. In fact, as just described, much law is devoted both directly and indirectly to the maintenance and administration of the nation-state, the so-called free market, and the myriad actors that operate within and across each of these.[29]

Yet, the race- and gender-privileged beneficiaries of the accords in the mid- to late-twentieth century were mostly blissfully unaware of the set of global arrangements that teed up the American Century. Rather than understand these global inter-governmental organizations for the self-serving arrangements that they were, post-war Americans chose instead to view their place in the world grandiosely. As Michael Omi and Howard Winant described U.S. mid-century hegemony and its corresponding gestalt in the Epilogue to their classic, *Racial Formation in the United States*:

> The United States apparently had limitless opportunities: to develop and extend its unparalleled economic and commercial position, to project its political and military power globally, and to institutionalize its vision of political democracy and social justice as a model for the world to emulate. Americans delighted in their country's unprecedented preeminence; they viewed themselves as the world's saviors.[30]

This convenient blissful ignorance or nonchalance of imperial globality[31] promoted an understanding that U.S. post-war economic

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[27] For background reading, see ERIC T.L. LOVE, RACE OVER EMPIRE: RACISM AND U.S. IMPERIALISM, 1865–1900 (2004); RUBIN FRANCIS WESTON, RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893–1946 (1972); *see also* SCOTT NEARING & JOSEPH FREEMAN, DOLLAR DIPLOMACY: A STUDY IN AMERICAN IMPERIALISM (1925).

[28] ARTURO ESCOBAR, TERRITORIES OF DIFFERENCE: PLACE, MOVEMENTS, LIFE, REDES 4 (2008).

[29] For some relatively recent efforts to grapple with these kinds of questions, see JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 3–17 (1983); THE POLITICS OF INFORMAL JUSTICE 1–13 (Richard L. Abel ed., 1982).

[30] MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 137 (2d ed. 1994).

[31] ESCOBAR, *supra* note 28, at 18–21.

prosperity derived not from systemic and racialized global advantage but from "exceptional" productivity and ingenuity at a national and individual level. In other words, the invisibility of imperial globality and international organizations/law to the operation of the U.S. domestic economy allowed a bounded understanding of U.S. post-war economic prosperity as residing purely within the superpower nation-state and the labors of its productive (white, male) citizens. This solipsist rendering in turn also allowed for an equally bounded understanding of racial domination as inhering primarily or purely within the nation-state, unaided by the additional structures of legalized power we discuss below. In fact, that unprecedented prosperity was the result of particular (and untenable) accords at both the international and national levels—accords with implicit consensual agreements enabled by elites to manipulate international economic policy, as well as internal labor groups and civil society.

Through their dominant position among market economies at the end of World War II, U.S. elites were best positioned to take advantage of the weakened position of European sovereigns and Japan in the formation of multilateral organizations that would set forth the new international economic order, underwritten by "Pax Americana." Pax Americana denotes U.S. ascent to a dominant role in this globalizing post-War market economy, combined with an attendant role as "global policeman" based on brute military capability, in exchange for rebuilding war-devastated economies mainly in Europe and providing "security" to market-based nation-states around the world who showed their fidelity as "team players" in favor of U.S elites and their self-identified interests.[32]

Pax Americana's conception can be dated to the Yalta Conference in February 1945, at which the two regional post-war superpowers—the United States and Soviet Union—divided the world militarily, economically, and ideologically. Militarily, each regional hegemon tacitly pledged to refrain from using military force in the other's designated "spheres of influence." Economically, the two hegemons understood that the Soviet bloc would be economically closed in a sort of "collective protectionism" to the capitalist world-economy over which the United States presided. And ideologically, each side understood it was fair game to loudly denounce one another, in part as a strategy to control internal dissent and prevent a critical questioning by military allies of the existing Yalta arrangements.[33] This Pax Americana global accord therefore

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[32] Cox, *supra* note 21, at 586–87, 604–05 (discussing Pax Americana and the United States' ascension to pinnacle); *see also* David Gordon, Thomas E. Weisskopf, & Samuel Bowles, *Power, Accumulation and Crisis: The Rise and Demise of the Postwar Social Structure of Accumulation, in* RADICAL POLITICAL ECONOMY: EXPLORATIONS IN ALTERNATIVE ECONOMIC ANALYSIS 233 (Victor D. Lippit, ed., 1996) [hereinafter Gordon et al., *Power*].

[33] Immanuel Wallerstein, *The Curve of American Power*, 40 NEW LEFT REV. 1, 2–4 (July/Aug. 2006) [hereinafter Wallerstein, *Curve*].

conferred great economic and military privilege and discretion upon the United States, which quickly ascended to the pinnacle of power among the nation-states of the West.[34] Pax Americana also helped to maintain the internationalized racial stratification accomplished through prior centuries of European colonialization and Euro-American imperialism.[35]

2. *The Domestic Accords: The Capital-Labor Accord and the Capital-Citizen Accord*

Just as the global Pax Americana accord facilitated U.S. economic and military dominance in the international arena, two additional accords in the domestic sphere similarly aided the apparently smooth accumulation of capital from the 1940s to the 1970s—an accumulation of course skewed by race, gender, and similar identity categories to help prop up in cultural and material terms the status quo accumulated through centuries of colonial and imperial rule. Radical economists refer to "social structures of accumulation" to describe the "invisible handshake" between capital and labor and capital and civil society.[36] There are two social structures of accumulation put into place in the post-War era that prevailed at least until the oil crisis of 1973—namely, the Capital-Labor Accord and the Capital-Citizen Accord.[37] Like the Pax Americana accord, both of these accords also continued the identity-oriented politics entrenched by colonial and

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[34] JOCHEN HIPPLER, PAX AMERICANA: HEGEMONY AND DECLINE 7–9, 87–91 (1994); ALI PARCHAMI, HEGEMONIC PEACE AND EMPIRE: THE PAX ROMANA, BRITANNICA AND AMERICANA 184 (2009).

[35] Indeed, in his widely read book, *Pax Americana*, written in 1967 during the Vietnam War, Ronald Steel actually entitled one of his chapters on foreign aid as an element of imperialism, "White Man's Burden." RONALD STEEL, PAX AMERICANA (1967); *see also* John Bellamy Foster & Robert McChesney, *American Empire: Pax Americana or Pox Americana*, MONTHLY REV, Sept. 2004, *available at* http://monthlyreview.org/2004/09/01/the-american-empire-pax-americana-or-pox-americana (revealing the unselfconscious disclosure of imperial agendas by Steel).

[36] DAVID GORDON, RICHARD EDWARDS & MICHAEL REICH, SEGMENTED WORK, DIVIDED WORKERS: THE HISTORICAL TRANSFORMATION OF LABOR IN THE UNITED STATES 25–27 (1982). The authors first describe social structures of accumulation as follows:

> We understand the capital accumulation process to be the microeconomic activity of profit-seeking and reinvestment. This activity is carried on by individual capitalists (or firms) employing specific workforces and operating within a given institutional environment. . . .
>
> The inner boundary of the social structure of accumulation, then, divides the capital accumulation process itself (the profit-making activities of individual capitalists) from the institutional (social, political, legal, cultural and market) context within which it occurs.

Id.; *see also* SAMUEL BOWLES ET AL., BEYOND THE WASTE LAND (1984); SAMUEL BOWLES ET AL., AFTER THE WASTE LAND (1989); ROBERT HELIBRONER, THE NATURE AND LOGIC OF CAPITALISM (1985); SOCIAL STRUCTURES OF ACCUMULATION: THE POLITICAL ECONOMY OF GROWTH AND CRISIS (David Kotz et al. eds., 1994).

In a revisit of SSA, radical economists reframe SSA as a "coherent institutional structure that support capitalists profit-making and also provides a framework for accumulation of capital." Martin H. Wolfson & David M. Kotz, *A Reconceptualization of Social Structure of Accumulation Theory*, *in* CONTEMPORARY CAPITALISM, *supra* note 1, at 79.

[37] Gordon et al., *Power*, *supra* note 32, at 47–50.

imperial regimes.

For decades already, a key feature of post-War market economy both within and outside of the U.S. had been the extraction of surplus value from the labor of workers. This ambition, however, to extract as much surplus value or "profit" as possible, encapsulates within it a central tension as workers increasingly pinched for profit begin to "push back." Domestically, the formation of labor unions, the demands for improved wages and workplace conditions, and the prospect of strikes and secondary boycotts all posed disruptive threats that could interrupt the rapid and smooth accumulation of capital. Recognizing that outright repression or coercion of labor has historically produced instability and uncertainty in the source of labor and the return on capital, during this period U.S. capitalists sought another approach to avoid such disruption.

Radical economists identify this alternate approach as the "Capital-Labor Accord," put in place from roughly 1945–73, and consider it central to resolving the inherent instability of capital seeking always to extract maximum "surplus value" from workers that would otherwise result in disruptive (to smooth accumulation) labor strife.[38] Within the United States, the Capital-Labor Accord paved the way for rapid economic growth, with benefits redounding to both sides: on the one hand, workers could gain increased wages and enhanced working conditions, the right to collective bargaining and formation of unions, and ultimately, the ability to undertake labor actions or strikes; on the other hand, domestic capital would gain workforce stability and predictability to enable its smooth and steady accumulation of profits.[39]

But to say that the Capital-Labor Accord was mutually beneficial to both parties is only partially correct. The mutual benefit derived from the accord was discernible for the privileged members of each party, but the overall (and racialized/gendered) advantage remained with capital. The rule of law and the nation-state intervened at various turns to ensure capital's upper hand in the form, for instance, of restricting union membership[40] and labor's right to strike.[41] Likewise, the power and violence of law and its facially-neutral rule led to a determination of (il)legality that worked to cripple secondary boycotts[42] and "wildcat

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[38] BOWLES ET AL., BEYOND THE WASTELAND, *supra* note 36, at 70–75.

[39] *Id.* at 73.

[40] *See* 29 U.S.C. § 157 (2006) (granting the right of self-organization to employees defined by the statute).

[41] *See* 29 U.S.C. § 158(b)(4)(i) (2006) (limiting the right of union members to strike).

[42] *See* 29 U.S.C. § 158(b)(4)(ii)(B) (making it an unfair labor practice for a labor organization or its agents to engage in conduct which coerces any person engaged in an industry affecting commerce to cease using or selling the products of, or doing business with, any other person); Local 761, Int'l Union of Elec., Radio & Machine Workers v. N.L.R.B., 366 U.S. 667, 681–82 (1961) (holding that an employer can create separate entrance gates to its facility, reserve those gates for subcontractors, and thus immunize themselves from secondary picketing); N.L.R.B. v. Denver Bldg. & Constr. Trades

strikes"[43] trying to support labor's struggles with capital, and bestowed a unilateral prerogative upon the Executive to declare "national security" threats under the Taft-Hartley Act that authorized the forced termination of strikes and unionized workers.[44]

Capital's upper hand also was reinforced by the power of law through administrative agencies such as the National Labor Relations Board, appointed by the Executive purportedly to enforce labor's legal right to collective bargaining but repeatedly put to dubious, if not antithetical, uses.[45] Equally important, the nation-state was further able to support the privileges of domestic capital through periodic passage of coercive legislation ("back to work" rules, "right to work" legislation) that used law to maintain class and related categories of hierarchy within the traditional bounds of the nation-state.[46] Inevitably, these legal reinforcements of neocolonial capital within the U.S. also had the effect of buttressing the already-entrenched racial and gendered stratification of this society.

Not surprisingly, then, only some workers were able to unionize, with large swaths of "segmented work forces" populated by peoples of color and women falling outside of the invisible handshake.[47] Further, as labor

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Council, 341 U.S. 675, 689 (1951) (holding that a union commits an unfair labor practice in the construction industry by engaging in a strike with the object of forcing a general subcontractor to terminate its contract with a subcontractor with whom the union had a labor dispute).

[43] *See* 29 U.S.C. § 159(a) (2006) (making the labor organization the exclusive bargaining representative for the purposes of collective bargaining); Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 70 (1975) (finding that unauthorized wildcat activity is unprotected if it is an attempt to bargain with the employer, or if it undermines the effectiveness of the union or collective bargaining).

[44] *See* 29 U.S.C. § 176 (2006) (making it lawful for the President to engage in procedures culminating with an injunction terminating strikes which the President believes imperil national security); United Steelworkers of Am. v. United States, 361 U.S. 39, 43–44 (1959) (holding that the government has the power to require a union to end a strike against the steel companies which imperiled national health and safety).

[45] *See* 29 U.S.C. § 153(a) (2006) (vesting the discretion to appoint members of the National Labor Relations Board in the President, with the advice and consent of the senate); Thomas Frank, *The Tilting Yard: Obama and "Regulatory Capture,"* WALL ST. J., June 24, 2009, at A13 (arguing that corporate interests have used their lobbying power to influence regulatory agencies to effectively render such agencies ineffective, including the Food and Drug Administration, the Environmental Protection Agency, and the Consumer Product Safety commission, all under President George W. Bush).

[46] The Taft-Hartley Act allows for the President to order striking workers "back to work" under an 80 day "cooling off" provision and for states to determine whether to prohibit all workers who benefit from union representation to pay for union representation. Dean Baker, *Right to Work: Representation Without Taxation,* TRUTHOUT (Feb. 28, 2011), http://www.truth-out.org/right-work-representation-without-taxation68110 (arguing that Wisconsin Governor Scott Walker's Right to Work legislation is part of a "union-busting" agenda that would weaken the bargaining power of workers; Kevin Schwaller, *Missouri Lawmakers Revisit "Right to Work" Issue,* OZARKSFIRST (Jan. 7, 2011), http://ozarksfirst.com/fulltext?nxd_id=383387 (disclosing that Missouri would be the 23rd state to adopt a "right to work" law opposed by unions because it "weakens the worker's voice at the collective bargaining table"); Jason Stein & Lee Bergquist, *GOP Leader Floats Right-to-Work Law: Right-to-work legislation is latest idea to surface before new session,* MILWAUKEE J. SENTINEL, Dec. 8, 2010, *available at* http://www.jsonline.com/news/statepolitics/111531154.html.

[47] *See* BOWLES et al., AFTER THE WASTELAND, *supra* note 36, at 57, 67–69; *see also* Alejandro Reuss, *That '70s Crisis,* DOLLARS & SENSE: REAL WORLD ECON. (Nov./Dec. 2009), *available at*

historians like Alexander Saxton, Herbert Hill and, more recently, David Roediger have pointed out, "free labor" (with only few exceptions) was culturally understood to mean "white labor."[48] Further, the nation-state and the law allowed and encouraged unionized labor and union rights to develop over and against race, much as was the case with the accumulation of capital. Indeed, social structures of accumulation theorists conceptualized the capital-labor accord as a "limited capital-labor accord" at the outset, in recognition of the majority of workers left out of the accord given the racial and gender exclusions in the segmented workforce. For this reason, the limited Capital-Labor accord in place from the 1940s to the 1970s constrained unregulated capitalism to better manage mainstream class conflict, in part by racializing the reach of the accord's beneficiaries.

In a similar fashion, the Capital-Citizen accord developed to address the need for domestic capital to better manage racial and other social conflict.[49] In the wake of the Great Depression, it became crystal clear that the unregulated market would not provide security or sustenance for the white citizenry of this nation-state during harsh economic downturns producing high unemployment and related kinds of socio-economic dislocation. The Capital-Citizen accord developed over time in the twentieth century, beginning with President Franklin D. Roosevelt's New

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www.dollarsandsense.org/archives/2009/1109reuss.html. For a sampling of the rich literature documenting the racial and gender-exclusionary practices and policies of organized labor, see generally LUCIE CHENG & EDNA BONACICH, LABOR IMMIGRATION UNDER CAPITALISM: ASIAN IMMIGRANT WORKERS IN THE UNITED STATES BEFORE WORLD WAR II (1984); PHILIP S. FONER, ORGANIZED LABOR AND THE BLACK WORKER, 1619–1973 (1976); IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 53–79 (2005); PAUL D. MORENO, BLACK AMERICANS AND ORGANIZED LABOR: A NEW HISTORY (2005); DAVID E. ROEDIGER, THE WAGES OF WHITENESS (2007); MARY ROMERO, MAID IN THE USA: 10TH ANNIVERSARY EDITION (2002); ROBERT ZIEGER, FOR JOBS AND FREEDOM: RACE AND LABOR IN AMERICA SINCE 1865 (2007); Eveyln Nakano Glenn, *Racial Ethnic Women's Labor: The Intersection of Race, Gender and Class Oppression*, 17 REV. RADICAL POL. ECON., 86, 86–108 (1985).

[48] *See* 1 HERBERT HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW 1–2 (1977) (stating that even a hundred years after the Civil War and the abolition of slavery, the federal government had to create legislation to eliminate barriers that remained to deny black citizens equal opportunity to work and pushed black citizens into subordinate positions in the American labor force); David R. Roediger, *Irish-American Workers and White Racial Formation in the Antebellum United States*, *in* CRITICAL RACE THEORY: ESSAYS ON THE SOCIAL CONSTRUCTION AND REPRODUCTION OF "RACE" 247, 248–52 (E. Nathaniel Gates ed., 1997) (setting forth the struggle of Irish-Americans in becoming part of the "White-labor" force, and how even they needed to assert their whiteness to be fully accepted); Alexander Saxton, *Introduction: Historical Explanations of Racial Inequality*, *in* CRITICAL RACE THEORY, *supra*, at 187, 188–90 (explaining that in the early colonial times, while black servants gradually succumbed to chattel slavery, white servants were allowed to work off their bonds).

[49] Ismael Hossein-Zadeh & Anthony Gabb, *Making Sense of the Current Expansion of the U.S. Economy: A Long Wave Approach and a Critique*, 32 REV. RADICAL POL. ECON. 388, 393 (2000) ("[T]he 'capital-citizen accord,' which reduced income inequality and improved living standards, also greatly contributed to the postwar expansion as it created a robust domestic demand for U.S. products.").

Deal policies[50] and continuing through the Great Society reforms of the late 1960s and early 1970s, which arrived to provide health[51] and welfare baselines to "catch" the most vulnerable (and usually colored)—the unfettered market's ravages and victims.

Of course, like the conceptualization of "free labor" as "white labor" under the Capital-Labor accord discussed above, the New Deal ended up being a raw deal for racial minorities and women, who were disproportionately excluded from its bounty. For instance, as Ira Katznelson established in *When Affirmative Action Was White*, the New Deal was shot through with racial compromise to produce a viable congressional majority reliant upon white Southern Democrats who were intent in preserving Jim Crow apartheid.[52] Thus, it would take another set of more particularized domestic accords to work out another invisible handshake to quell widespread racial and civil unrest across U.S society during this time.

In particular, the Second Reconstruction following the Civil Rights movement of the 1950s and 1960s and Black Power movements of the 1970s brought a more explicit racial valence to the prior "universal" Capital-Citizen accords (that conveniently and disproportionately excluded people of color from equal relief).[53] In order to stave off increasing social turbulence and racial conflict, newly reformed and expanded Capital-Citizen accords provided laws guaranteeing formal equality, such as the Civil Rights Act of 1964,[54] the Voting Rights Act of 1965,[55] the

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[50] *See* Emergency Relief Appropriation Act of 1935, ch. 48, 49 Stat. 115 (codified as amended at 15 U.S.C. § 712a (2006)) (creating the Works Progress Administration); Employment Act of 1946, Pub. L. No. 79-304, 60 Stat. 23 (codified at 15 U.S.C. §§ 1021–24 (2006)) (establishing the federal government's responsibility for economic stability, inflation and unemployment); National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified at 29 U.S.C. §§ 151–69 (2006)) (defining and prohibiting unfair labor practices); Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201–19 (2006)) (establishing a national minimum wage, overtime laws and prohibiting most child labor); Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.) (establishing retirement benefits, benefits for the disabled, unemployment insurance, aid for dependent and disabled children, and welfare benefits); National Industrial Recovery Act of 1933, Pub. L. No. 73-67, 48 Stat. 195 (1934) (establishing a national public works program, protecting collective bargaining rights and permitting regulations for working conditions), *invalidated by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[51] *See* Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified at 26 U.S.C. § 6053, and in scattered sections of 42 U.S.C.) (creating Medicaid and Medicare, health insurance programs for the poor and elderly).

[52] KATZNELSON, *supra* note 47, at 61–63 (2005).

[53] *See* James S. Bowen, *Law, Legitimacy and Black Revolution*, 1 YALE J.L. & LIBERATION 83, 83, 88 (1989) (examining the history and etiology of black student militancy during the protest movements of the 1960s and 1970s); Vernon E. Jordan, Jr., Address, *Civil Rights: Revolution and Counter-Revolution*, 14 COLUM. HUM. RTS. L. REV. 1, 3–4 (1982) (arguing that black people overcame segregation from the bottom up, with the help of some white allies).

[54] Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.) (prohibiting discrimination in employment, private accommodations in public facilities, voter registration, and encouraging school desegregation).

Immigration and Nationality Act of 1965,[56] and executive orders mandating affirmative action in federal contracting.[57] But the raced Capital-Citizen accords likewise retained the upper hand of capital and white elites by restricting access to legal relief through the invention and deployment of legal doctrines that fabricated obstacles to "equal justice under law" where none previously existed, and which necessarily incurred jurisprudential contradictions that subverted the primal claims of law to social and systemic legitimacy, as we discuss in greater detail below.

B. *Structures of Accumulation and the Overarching Role and Rule of Law: Why the State Matters*

The role of law—and the rule of law—are key features of the accumulation structures and histories we etched above. As Michel Foucault observed, "[i]n Western societies since the Middle Ages, the exercise of power has always been formulated in terms of law."[58] In continuing to help contextualize Crenshaw's opening query—"why law?"—we trace in this section how the historical use and misuse of law within the nation-state system emerge as the substantive and structural glue for the status quo that we examine here.

For centuries, during the consolidation of the nation-state world system, human "progress" was the express project of national law.[59] The path toward progress, toward civilization, toward modern, rational, enlightened, and just problem solving, lay in the making of new, more, and better law: law by custom, law by codification, law by regulation, law by adjudication, law by reformation and restatement. Over time, law has become ever-more entangled with every other major social institution—with magic before it became religion, with religion before it became culture, with culture before it became nation, with nation before it became market. Law thus became central to the consolidation of personal identities, social groups and larger communities into the modern nation-state, even as it is now central to the consolidation of nation-states into an increasingly globalized international socio-legal system, formally based on liberal democratic values, such as liberty, property, equality, dignity, and self-determination. Law, in short, consistently has been at the core of

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[55] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.) (outlawing discriminatory voting practices).

[56] Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.) (ending race-based restrictions and gender discrimination in immigration policy).

[57] *See, e.g.*, Exec. Order No. 11,246, 3 C.F.R. 167 (1965) (prohibiting discrimination in federal employment).

[58] 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 87 (Robert Hurley trans., Vintage Books 1990) (1976).

[59] For an account of the United States' context, see generally MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960, at 3–7 (1992).

modernity's constitution.

But this historical process also exploited within and across the emergent nation-states the weaknesses of the human being.[60] Laws repeatedly were crafted to prevent the individual human from fulfilling primal needs without paying a stiff price. So law was constructed to facilitate exploitation of the poor by the rich—of the less able by the more—as an integral element of the formation of nation-states, and even as the emergent ruling elites proclaimed commitments to diametrically opposite values, again like democracy, equality, and autonomy.[61] Similarly, law was constructed to facilitate the exploitation of the non-white by the white, and of the woman by the man, etc. Overtly, law was a liberal and democratic force but covertly it was designed to produce and perpetuate particular systems of stratification and subordination. This was "civilization." Today, we call it global neoliberalism.

From this perspective, we might describe the twentieth century as the time during which humanity perfected its tools and techniques of oppression within the nation-state, and emplaced the conditions for the development of new tools and techniques suited to the imperatives of corporate globalization. During the twentieth century, crude tools like formal (neo)enslavement and explicit exclusion began to give way to the more sophisticated techniques that today travel under the banners of colorblindness (in legal discourses) and post-racialism (in popular discourses).[62] Of course, the crudeness of those rudimentary tools lay in their bare and naked contradiction of the very essence claimed by the identity-obsessed elites of this nation-state for its unique national character: a democracy dedicated in fact to equal justice under law. Their crudity lay in their undisguised, unadulterated hypocrisy but, as such, they also testify to the power of ruling elites over this nation-state in cultural and material terms during those formative decades.

It was this type of contradiction—a fundamental and gigantic contradiction—that enabled raced and gendered elites of past centuries simultaneously to proclaim and enact laws purporting noble purposes with systems and structures of outright subjugation and exploitation. This sort of gigantic contradiction—or hypocrisy—accounts for much of the grief and conflict in the histories that follow. This foundational and operational

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[60] A key example relevant to our discussion is race-based *de jure* slavery, a central feature of the United States nation-state since the very beginning. *See infra* notes 102–05 and accompanying text.

[61] In the example of the United States, see for example, CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 10–18 (1913) (noting that although the language of the Constitution does not secure the property rights of one group over another, in practice the application of the Constitution and statutes have effectively contributed to racial economic disparity); Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) ("When the Founding Fathers used [the phrase 'We the People,'] . . . they did not have in mind the majority of America's citizens.").

[62] *See infra* Part II (describing the evolution of racial domination).

contradiction in the institutionalization of national law gave rise in the past few centuries to the idealized yet simultaneously corrupted form of the modern liberal democracy—corrupted by and because of the systemic, structural dissonance generated constantly by this kind of contradiction (and the imperative of maintaining their force materially and culturally in society). In the case of legal consciousness and Critical Race Theory, one relevant example is the dissonance of a society based explicitly, vociferously and simultaneously on slavery and "liberty" as expressed and enforced by formal law at the most sacred constitutional planes.[63]

Today this gigantic contradiction means that law oftentimes is used mainly if not merely to launder politics. It is used to launder the dirtiest kinds of self-interested factional politics, often repackaged as identiarian politics, which in turn produce yet more "law"—in its many forms—oftentimes mainly to sustain traditional patterns of stratification and inter-group subordination.[64] As a result, law (as we know it) too often is rendered the servant of the "traditional" politics of neocolonialism and subordination rather than the agent of human values and rights formally endorsed by "modern" liberal democracies in their founding charters and related monuments.[65] And, ditto, now, at the international level. Perversely, then, law becomes the tool for implementing expressly repudiated values—like structural, law-based, identity-oriented inequality—and for deflecting formally endorsed social goals, like equal opportunity for *all*.[66]

Through the centuries, this gigantic contradiction has spurred historical and continuing justice claims seeking to harmonize law's material or cultural effects with society's overtly professed values. Typically, these antisubordination claims invoked the formal commitments to civil/human

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[63] For a pithy yet incisive analysis, see LAWRENCE GOLDSTONE, DARK BARGAIN: SLAVERY, PROFITS, AND THE STRUGGLE FOR THE CONSTITUTION 1–7 (2005) (recounting how the southern states would only ratify the new Constitution when they were assured that their slaveholding interests would be preserved).

[64] Although this might seem like a sharp critique of contemporary law and politics, it is in fact the original vision and expectation articulated by the framers of the United States Constitution at the time of the Republic's founding. *See, e.g.*, THE FEDERALIST NO. 51 (James Madison) (Am. Bar Ass'n ed., 2009) (proposing a vision of government as a check and balance of competing interests). For a juicy, factual and insightful analysis, see generally GORE VIDAL, INVENTING A NATION: WASHINGTON, ADAMS, JEFFERSON (2003).

[65] Of course, as the framers of the United States Constitution posited, law has, and always will have, a necessary relationship to politics. *See* THE FEDERALIST NO. 51, *supra* note 64, at 295–96 (noting that although the majority does rule on several levels, there must be a mechanism for the advocacy of minority views in opposition to the political majority). But, even so, a distinction is maintained. *Id.*

[66] In the example of the United States, the "separate but equal" period of the last century and the continuing period of "reverse discrimination" in this one illustrates the phenomenon. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 550–52 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (upholding the separate but equal regime); Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–48 (2007) (upholding the current reverse discrimination regime).

rights embodied in numerous instruments of law, thereby seeking to close the gap between profession and action.[67] These historical antisubordination struggles, including struggles for racial and gender justice, in effect sought to use law to cure or ameliorate the gigantic contradiction established by law to begin with.

But of course, the gigantic contradiction embedded in law (as we know it) ensured these social justice quests would work only at the margins of any given socio-legal framework—typically, during those times, the nation-state. Beyond sporadic and limited SSA's or concessions, the established elites' version of the rule of law has pushed back against structural or material transformation in favor of social justice with effective fury: the reaction of the ruling classes and their agents to social justice claims historically has been to use sovereignty and law itself in order to delay—ideally in perpetuity—any possibility of transformative social justice for traditionally subordinated groups, including people of color, women, and sexual minorities.[68]

Thus, during earlier centuries of bare, naked contradiction under and by law, white settler elites built their private palaces and capitalist fortunes on the stolen opportunities, talents, or goods amassed from indigenous and colored peoples. Both factories in the North and plantations in the South of this nation-state relied on the lives and labors of the enslaved, exploited and marginalized.[69] And the public monuments erected to operate and celebrate this new nation-state were likewise built on enslaved or indentured labor, ranging from the nation's Capitol to its aptly named White House.[70] All of this, the nation-state still tells itself when in "colorblind" or "post-racial" stupors, was/is done in the name of freedom, liberty and equality—even as it has imposed policies and practices leading it today to imprison more of its people (disproportionately of color) than any other nation-state on Earth.[71]

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[67] *See, e.g.*, Dr. Martin Luther King, Jr., I Have a Dream Speech (Aug. 28, 1963) (transcript available at www.mlkonline.net/dream.html) ("When the architects of our republic wrote the magnificent words of the Constitution and the declaration of Independence, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men would be guaranteed the inalienable rights of life, liberty, and the pursuit of happiness.").

[68] White resistance to ending white supremacy through legal fictions like "separate but equal" is just one example of law's use to evade or postpone justice, allowing the social conditions of structural subordination to continue in the 1960s, as decried by Dr. King in 1963, even though slavery formally was abolished by law in the 1860s. *See id.*

[69] RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 3 (2000); Michael Kranish, *At Capitol, Slavery's Story Turns Full Circle; Historians Hope Significance Comes to Light as Obama Takes Office*, BOS. GLOBE, Dec. 28, 2008, A1.

[70] *See id.*

[71] Roy Walmsley, WORLD PRISON POPULATION LIST 1 (8th ed. 2009), http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wppl-8th_41.pdf; *see also* Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1; Adam Liptak, *More than 1 in 100 Adults Are Now in Prison in U.S.*, N.Y. TIMES, Feb. 29, 2008, at A14. For an incisive and inciting analysis of the American criminal justice system, see PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE

In this current historical moment, within the United States, this reactionary phenomenon is seen dramatically in the form of almost evangelical retrenchment and backlash directed at "liberal" law and policy. It is no coincidence that incumbent judicial appointees such as Antonin Scalia have repeatedly invoked these "culture wars" in their formal opinions as the basic backdrop for their exercises of power and discretion over law and its interpretation.[72] These culture wars, which in the context of North American politics stretch back at least to the 1970s, express majoritarian resentment and reaction against civil rights gains and legacies of the New Deal and the Great Society, which had helped open fissures in American society that undermined the hegemony of extreme capitalism within the United States.[73] These culture wars, declared formally, publicly, and explicitly in recent decades chiefly by white politicians, have targeted the very same identity groups that in previous eras were subordinated by the politics of colonialism and imperialism.

Picking up steam in the late 1980s and 1990s, the formal declaration of cultural war proclaimed in 1992 that the very "soul of America" is at issue.[74] This backlash, therefore, has not been waged or understood as a simple case of rough-and-tumble majoritarian politics as usual.[75] On its very own terms, it amounts to a multi-year, multi-faceted conflict waged expressly for the (presumably white and male) "soul" of the nation in the name of traditionally dominant interests—interests defined expressly around identitarian ideologies rooted in class, race, gender, and sexual self-

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(2009).

[72] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("It is clear from this that the Court has taken sides in the culture war"); Romer v. Evans, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) ("I would not myself indulge in such official praise for heterosexual monogamy, because I think it no business of the courts . . . to take sides in this culture war.").

[73] *See* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 42–43 (1991) (discussing the new culture wars, once based on biblical beliefs, and now focused on political disagreements over issues such as abortion, affirmative action, and multiculturalism); JAMES DAVISON HUNTER, BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA'S CULTURE WAR 3–8 (1994) (discussing the culture wars that have erupted as a result of abortion and privacy rights, and the inability of the state to provide a solution to them).

[74] For contemporary news accounts of this remarkable declaration, see Chris Black, *Buchanan Beckons Conservatives to Come "Home,"* BOS. GLOBE, Aug. 18, 1992, at 12 (reporting on the landmark speech of presidential candidate Patrick Buchanan at the 1992 Republican National Convention); *see also* Paul Galloway, *Divided We Stand: Today's "Cultural War" Goes Deeper than Political Slogans*, CHI. TRIB., Oct. 28, 1992, at C1 (providing an analytical view of the culture war).

[75] For now-classic expositions of this backlash, see RAOUL BERGER, GOVERNMENT BY JUDICIARY 1–5 (1977) (providing a historical discussion of the clashes between the original view of the judiciary's role as the police for the boundaries of the Constitution, and the present generation's approval of the court and its libertarian view of the Constitution and Fourteenth Amendment); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 1–13 (1990) (discussing the historical clash between law and politics, and recent judicial opinions that abandon the original understanding of the Constitution); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (arguing for a stronger theory of constitutional law and how courts should evolve constitutional doctrine).

consciousness.[76]

In U.S. law and jurisprudence, this culture war backlash has been spearheaded through organizations like the Federalist Society, which was formed by now-prominent cultural warriors like Antonin Scalia.[77] In U.S. policy and politics, as recent history teaches, culture war agendas have been formed and advanced by politicians like Richard Nixon, Ronald Reagan, and the Bushes.[78] Using law, policy, and politics, backlash warriors slowly but surely have striven to restructure the nation's perspective on its own values and history.[79] Using identity wedge politics to polarize "ins" and "outs," they have endeavored to redraw the U.S. legal landscape relentlessly in favor of "traditional" identity-based elites, spanning categories of doctrine from anti-trust to civil rights.[80] Indeed, they have aimed to restructure the very structure of power, mainly to suit themselves, their sponsors, and their allies both in cultural and material terms.[81]

Of course, the culture wars find "different" out-groups in the United States positioned "differently" vis-à-vis core constitutional commitments, like formal equality, and key structural issues, like democracy and judicial review, and thus vis-à-vis their formal and actual retrenchment through backlash. These differentials mean that the specific aspects or techniques of cultural warfare have been tailored for and directed at "different" groups in group-specific ways—ways that account for each group's standing in relationship both to formal law and to social reality.[82] As the still-ongoing

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[76] *See* Francisco Valdes, Afterword, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality and Responsibility in Social Justice Scholarship—Or, Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409, 1410–16 (1998) (positing that making a difference in society requires antisubordination scholars to understand the current trend of backlash lawmaking through cultural warfare).

[77] *See* Francisco Valdes, *Culture,* "Kulturkampf," *and Beyond: The Antidiscrimination Principle Under the Jurisprudence of Backlash*, *in* THE BLACKWELL COMPANION TO LAW AND SOCIETY 271, 279–80 (Austin Sarat ed., 2004) (describing the establishment and purpose of the Federalist Society).

[78] For an accessible and in-depth account of key figures and events, see RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA (2008).

[79] *See* Francisco Valdes, Afterword, *Culture by Law: Backlash as Jurisprudence*, 50 VILL. L. REV. 1135, 1135–42 (2005) (analyzing the issues denounced by the backlash movement and the struggle over recent liberalism).

[80] *See* Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy and Equality*, 65 OHIO ST. L.J. 1341, 1341–46 (2004) (discussing the court's ambivalence towards its repositioning of sexual minorities in *Lawrence* into a more widely accepted social position, and the apparent impact of the backlash culture on that attitude); Francisco Valdes, Afterword, *"We Are Now of the View": Backlash Activism, Cultural Cleansing, and the Kulturkampf to Resurrect the Old Deal*, 35 SETON HALL L. REV. 1407, 1407–17 (2005) (discussing the causes and consequences of the backlash culture and the way it has framed and informed the emergence and evolution of backlash jurisprudence); *see also infra* notes 85–89 and sources cited therein (discussing backlash and retrenchment).

[81] For an overview focused on the judicial role in this phenomenon, see HERMAN SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION (1988).

[82] *See, e.g.*, Nicolas Espiritu, *(E)Racing Youth: The Racialized Construction of California's Proposition 21 and the Development of Alternate Contestations*, 52 CLEV. ST. L. REV. 189, 189–92 (2005) (focusing on the cultural warfare against youth of color in California through the use of the

California marriage equality controversy illustrates, the tactic with sexual minorities often is refusing to recognize even formal equality,[83] whereas the tactic with racial/ethnic minorities and women typically is to neutralize formal equality by denying substantive or functional equality through procedural tricks, doctrinal manipulations or, sometimes, simple fiat.[84]

Experience thus indicates that the overarching pattern of backlash politics (and jurisprudence) constitutes the pursuit of a self-subscribed "anti-antidiscrimination" agenda in which judicial power and majoritarian power combine to roll back "liberal" laws of the past century that provided fragile life-lines to vulnerable identity-based out-groups.[85] Experience specifically teaches that law is central—integral and pervasive—in the contemporary politics of this cultural warfare, structured around class, race, gender, and sexual lines. Consequently, it is absolutely no coincidence that legal observers of many different stripes have long been detailing and critiquing patterns of willful judicial and related political misbehavior in furtherance of "culture war" agendas against minority civil

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ballot proposition system in that state); Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 122 (1995) (deconstructing the racialized political dynamics of Proposition 187); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 650–58 (1995) (analyzing racial rhetoric and the politics of Proposition 187); Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class*, 42 UCLA L. REV. 1509, 1514–19 (1995) (analyzing identity politics and the social consequences of recent legal "reforms").

[83] *See* David B. Cruz, *Equality's Centrality: Proposition 8 and the California Constitution*, 19 S. CAL. REV. L. & SOC. JUST. 45, 45–49 (2010) (arguing that Proposition 8 violates the equality guarantees of the California constitution); *see also* Valdes, *Beyond Sexual Orientation*, *supra* note 76, at 1410–16 (discussing the landscape of sexual orientation legal scholarship and backlash culture).

[84] Consequently, numerous scholars have critiqued judicial willfulness or other institutional misbehaviors specifically in the context of race/ethnicity or sex/gender. *See, e.g.*, Charles R. Lawrence III, Essay, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 928–32 (2001) (analyzing the liberal argument for affirmative action, namely the need for diversity); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 953–59 (1996) (critiquing affirmative action as it currently exists and proposing methods for rethinking the approach); *see also* Marina Angel, *The Glass Ceiling for Women in Legal Education: Contract Positions and the Death of Tenure*, 50 J. LEGAL EDUC. 1, 1–2 (2000) (analyzing the barriers and limitations to hiring for women in legal education and the same patterns that exist in other forms of higher education); Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 537–39 (1988) (discussing the lack of minorities in law school faculties and the institutional attitudes towards minority professors); Richard Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349, 350–53 (1989) (presenting findings of a study on minority legal professors and their lack of acceptance in law school faculty ranks); Richard Delgado, Essay, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222, 1222 (1991) (analyzing reasons why people, particularly minorities, have "jumped on the bandwagon" of affirmative action, despite meager accomplishments); Rachel F. Moran, *Commentary: The Implications of Being a Society of One*, 20 U.S.F. L. REV. 503, 504 (1986) (examining the presence of women and minorities in the legal field and models for how legal institutions can advance pluralism in their hiring process).

[85] *See* Jeb Rubenfeld, Essay, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1144 (2002) (evaluating current judges' manipulation or disregard of precedent and canons of interpretation in pursuit of their anti-antidiscrimination political agenda).

rights—misconduct that recycles in contemporary times the identity-based hypocrisies defining those earlier centuries of bare, naked contradiction.[86]

This dynamic of identitarian reaction and socio-legal retrenchment has been costly specifically to the legal system—both its capacity and legitimacy—because it requires increasingly patent manipulations by judges and other legal actors of the law/politics distinction upon which the system's logic and authority rests. Hoping to explain away the increasingly apparent incoherence of the legal system on its own terms, these manipulations aim to paper over the ongoing corruption of law produced by the multiplying dynamics of contradiction that aim to functionally uphold identity-based privileges while formally disowning them.[87] But these increasing numbers and kinds of manipulation manage mainly to weigh down a supposedly neutral system purportedly dedicated to equal justice under law with disingenuous, undue, and increasingly obvious yet untenable politicized complexity.[88] Consequently, superficial

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[86] *E.g.*, Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467, 1467–72 (1996); Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1334–36 (1988); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 740–71 (1982); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1050–51 (1978); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 703 (1975); Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 75; Stephanie M. Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265, 266–67 (1984); *see also* Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 547–54 (2003) (focusing on judicial bias against plaintiffs in employment discrimination cases); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 949 (focusing on judicial bias against plaintiffs in employment discrimination cases); William B. Gould, IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485, 1487–88 (1990) (focusing on retrenchment in that key term of the Supreme Court); Charles R. Lawrence III, *"Justice" or "Just Us": Racism and the Role of Ideology*, 35 STAN. L. REV. 831, 831–33 (1983) (reviewing DAVID L. KIRP, JUST SCHOOLS: THE IDEA OF RACIAL EQUALITY IN AMERICAN EDUCATION (1982)) (focusing on race and white supremacy); Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 322 (1989) (critiquing interposition of jurisdictional and prudential barriers to deflect civil rights actions); Robert P. Smith, Jr., Essay, *Explaining Judicial Lawgivers*, 11 FLA. ST. U. L. REV. 153, 153–58 (1983) (surveying techniques of judicial manipulation of facts and doctrine); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 293 (1992) (noting that liberal activist judges are the frequent targets of backlashers, who "promise . . . that their replacements will not be so free-wheeling"); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 781–86 (1983) (questioning the premises and practices of judicial review in recent decades); C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677, 677–78 (1984) (critiquing heightened rules of pleading that various federal judges had erected to rebuff civil rights claimants).

[87] *See* THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 1–13 (2004) (discussing various explanations for the modern role of Supreme Court decisions and factors that have influenced their holdings).

[88] *See supra* notes 84–85 and sources cited therein (criticizing recent judicial opinions on these grounds).

law "reform" is as good as it gets under the still-prevalent terms of "interest convergence" that this gigantic contradiction entrenches.[89] Under law reform, what oftentimes changes is (merely) law itself, not society, not ideology, not reality.

But the thickly raced (and gendered) conditions of an increasingly globalized modernity increasingly rendered the maintenance of that gigantic contradiction difficult, perhaps ultimately untenable, in recent decades. These identitarian pressures, as we noted above, required adjustments to the Capital-Labor and Capital-Citizen accords that had provided a veneer of harmony and prosperity to U.S. domestic relations amidst the exploitation, racism and sexism pervading the nation-state during the post-War period. In addition, we now know that judicial termination of formal race-based inequality in 1954—right at the mid-century mark—was backed privately, but explicitly, by the white-controlled political branches of the federal government as part of their international "cold war" with the elites of the former Soviet Union.[90] We now understand, in other words, that the lens of *international* relations helps to explain the timing for the national decision to abandon the fruits of racial injustice in the second half of the past century, as the elites of this country realized that their cold war amounted to a contest for the hearts, minds, and resources of the people that inhabit the lands we now call the Global South—the colored masses across the planet that constitute both the producers and consumers of the future. We can now appreciate the slight move toward less formal inequality and social injustice during the second half of the last century more as a self-serving adjustment to the status quo due to a temporary convergence of elite and colored interests.[91] Nevertheless, in the closing decades of the past century, the gigantic contradiction of racial injustice under the rule of law in the U.S. nationa-state was no longer as naked; it had been clothed with concessions over formal rights, but not abandoned, either normatively or in practice.

C. *The Pillars Crack: The Accords' Demise and Global Neoliberalism's Rise*

With the advent of the 1973 oil crisis, the military, economic, and political pillars undergirding the American Century began to crack. The cracks could be seen in foreign policy and international relations. They

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[89] For more on the difference between reform and transformation, see Charles R. Lawrence III, Foreword, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 822–28 (1995). For more on interest convergence, see Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522–33 (1980).

[90] *See* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 11–17 (2000) (exploring the impact of the Cold War on U.S. civil rights reform).

[91] *See* Bell, Comment, *supra* note 89, at 522–33 (discussing interest convergence).

could be seen also in the foundations of the domestic accords that engendered 1950s feel-goodism for the white middle class. These cracks led to the "liberal" reforms of the 1960s that today's culture wars aim to roll back, and that have resulted in the emergence of global neoliberalism as the prevalent ideology of the moment, both internally and internationally.

In foreign relations, the war in Vietnam was becoming prohibitively costly by the mid-1960s, not only in terms of economic and military resources expended, but also ideologically, in terms of piercing the specter of invulnerability of the U.S. as the dominant superpower and key architect of the Yalta arrangements.[92] Symbolically, Vietnam represented the "Third World" or Global South that rejected Yalta's status quo.[93] The Vietnam stand-off thereby strained American claims of solidarity with the world's unfortunate masses as the Cold War continued. Economically, the "Nixon Shock" and "closing of the gold window" unraveled the dollar as the world currency standard by the mid-1970s.[94] These and similar developments heralded the fraying of Pax Americana and connoted the waning of the American Century.

In domestic arenas, the election of Ronald Reagan as President in 1980 announced an abrupt but definitive end to the Capital-Labor accord, symbolized by his self-righteous breaking of the air traffic controllers' strike in the summer of 1981.[95] Politically, the Capital-Citizen accord began similarly to unravel, as signaled during the 1960s and 1970s by middle-class (mostly white) youth protesting the war in Vietnam, minorities and women protesting racial and gender inequality, and coalitions of all kinds protesting environmental degradation.[96] These social movements helped yield the "Great Society" programs currently under assault from backlashing elites and their agents in Congress, the courts, and civil society as part of the cultural warfare against liberalism, whether in law or society. Thus, the retreat on anti-poverty programs and civil rights begun by Reagan and continued by George H. Bush accelerated in the 1990s, with the evisceration of social welfare policies under Democratic President Bill Clinton.[97] All of this necessarily was deeply and

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[92] Immanuel Wallerstein, *The Eagle Has Crash Landed*, FOREIGN POL'Y (July–Aug. 2002).

[93] *Id.*

[94] *See supra* notes 17, 24–27 and accompanying text.

[95] Michael Wallace, *After Taft-Hartley: The Legal-Institutional Context of U.S. Strike Activity, 1948 to 1980*, 78 SOCIOLOGICAL Q. 769, 773–74 (Fall 2007) (identifying President Ronald Reagan's crushing of the 1981 air traffic controllers' "PATCO" strike as the effective end of the Capital-Labor accord).

[96] Victor Lippit, Social Structure of Accumulation Theory 18 (Nov. 2006) (paper prepared for Conference on Growth and Crises: Social Structures of Accumulation Theory and Analysis) (identifying environmental externalities, civil rights organizing and antiwar protest,as triggers to the decline of the Capital-Citizen accord).

[97] DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005) [hereinafter HARVEY, NEOLIBERALISM]; Martha T. McCluskey, *Efficiency and Citizenship: Challenging the Neoliberal*

structurally racialized (and gendered), both culturally and materially, even if not acknowledged openly or honestly.

In the midst of this tumult, but building on the post-War campaign to globalize Western power through institutional systems of internationalization, a facially colorblind version of "neoliberalism" emerged to replace the global and domestic accords not only within the U.S. nation-state but also transnationally. As Arturo Escobar describes this transition:

> The first decade of this transition represented the apogee of financial capitalism, flexible accumulation, free market ideology, the fall of the Berlin Wall, the rise of the network society, and the so-called new world order. While this picture was complicated in the 1990s, neoliberal globalization still held sway. Landmarks such as the North American Free Trade Agreement (NAFTA), the World Trade Organization, Davos, Plan Puebla, and Plan Columbia were indications of the changing but persistent implantation of capitalist globalization.[98]

As we have recounted thus far, this persistent implantation continues today to reflect and perpetuate the racialized and gendered structure of the state, market, and civil society. It is this "persistent implantation of capitalist globalization" beyond the traditional confines of the nation-state that gives rise to the cultural and material continuities between colonialism, imperialism and globalized neoliberalism.

Consequently, by the mid-1980s and the full ascendancy of the Reagan Revolution, the so-called "golden age" of global and domestic accords that had ushered in unprecedented colorblind prosperity for the accords' beneficiaries within the U.S. and racialized world dominance for the United States was decidedly over. "Corporate responsibility" that oriented capital at least partially towards labor and community under the former accords as a restraint on rank profit-seeking was replaced by "shareholder responsibility" that redirected capital's foremost duty to unfettered profit-seeking, and opened the door to increased financialization of neocolonial capitalism to seek increasingly higher profits, both domestically and globally.[99] As in prior eras, ruling elites during these decades again deployed the rule of law—and its legitimated forms of violence—to help

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Attack on the Welfare State, 78 IND. L.J. 783 (2002); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009).

[98] ESCOBAR, *supra* note 28, at 164.

[99] John Bellamy Foster, *The Financialization of Capital and the Crisis*, 59 MONTHLY REV. 1 (Apr. 2008); Thomas I. Palley, *Financialization: What It Is and Why It Matters* (Oct. 26–27, 2007) (presented at a conference on "Finance-led Capitalism? Macroeconomic Effects of Changes in the Financial Sector," sponsored by the Hans Boeckler Foundation and held in Berlin, Germany).

assure neoliberalism's rise within and beyond the nation-state.[100] Under and by law, neoliberalism has starved social lifelines, maximized privilege, property and profit, and vindicated human rights mostly for corporations.

And this practice continues still: the politically tectonic shift from corporate responsibility to shareholder responsibility is being further entrenched today by the judicial announcement that the corporation is indeed just a "legal fiction" when it comes to responsibilities and liabilities, but fully on par with a "natural person"—a postnatal human being—when it comes to the exercise of legal rights and constitutional protections.[101] Indeed, the present-day process of social and legal retrogression in favor of "traditional" power and neocolonial privilege has continued more broadly during these times through cultural warfare, legal retrenchment and political backlash: as we explain below, the continued forced decline of labor unions, the unrelenting attack on civil rights advances, the tarring of affirmative action, the gutting of social safety net programs, the scandalous deregulation of financial markets, the obscene rise of wealth and income inequality, and the shameless proliferation of outsourcing and downsizing, represent the new "rules of the game" for social justice struggles within the United States, post-accords, under the emerging regime of colorblinded yet racialized neoliberalism.

D. *The Role of CRT: Contesting Erasure Within the Nation-State Under the Legal Politics of Colorblindness—The Case of Post-Racialism*

In light of the three hegemonic phenomena and the rise of global neoliberalism discussed above, we thus can appreciate how the critical race project born during the closing decades of the past century helped to unmask this disguised continuity, and to expose the social realities seething still under the shiny new garments of formal equality. With this oulining of racial (and gender) injustice through time and across systems, we may begin to glimpse some possible answers to the queries Crenshaw has posed: why law as CRT's place of origin? From the perspective of this analysis, law would be the most likely locale *precisely* because law was the site of the gigantic, identity-infused contradiction in American society regarding specifically the formalized commitment to equal liberty *and* the

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[100] HARVEY, NEOLIBERALISM, *supra* note 97, at 64–86 (describing the role of law in the neoliberal state); *see also* DAVID HARVEY, THE ENIGMA OF CAPITAL AND THE CRISES OF CAPITALISM 10 (2010) (describing how the 1970s crises led to a set of pragmatic principles in the 1980s that "[nation-]state power should protect financial institutions at all costs"); WACQUANT, *supra* note 97, at 43 (sketching the role of the nation-state in the U.S. in the age of ascending neoliberalism in which poor populations are managed by downsizing the social-welfare sector and upsizing the carceral sector, forming two sides of the same coin of state restructuring).

[101] The Supreme Court's 5–4 opinion in the *Citizens United* case illustrates the point vividly and very recently, as recognized by contemporary observers of law and society. *See, e.g., infra* notes 158–59 and accompanying text (describing some examples of this ongoing commentary).

operational enforcement of socio-economic caste. It was the contradiction between formal law and lived reality at a systemic and structural level that was normatively encoded in law, violently enforced by law, economically enabled by law, and inter-personally embedded in law. Law was at the center of the boil; well that legal criticalities should prick it open and let out its malodorous truths for the nation-state to consider.

Yet, this intertwining was no coincidence. As this summary sketch of the rise and development of the nation-state world system makes clear, law is inextricably entwined with the very structure of society, both local and global. Indeed, this summation points to the rise of the nation-state system as the Age of Law—a time in which the state and nation consolidated themselves through law, and law entrenched itself through the establishment of the nation-state. And nowhere else, perhaps, is this phenomenon more evident or powerful than in this nation-state—perhaps the most legalistic on Earth today. But the centrality of law here is only one half of the equation helping us to understand "why law"—the second half is the obsession with race, expressed also through law.

Not only was race-based enslavement at the very heart of national conception,[102] but other profoundly racialized and racializing acts of lawmaking during the founding and formative years of the country helped to set the stage for the status quo from which CRT springs in the late-1980s.[103] These acts included, for example, the limitation on naturalized citizenship to "white" persons, enacted into law by the very first Congress and signed into law by George Washington as the Naturalization and Immigration Act of 1790.[104] This restriction was reiterated in various statutory forms until 1952, ensuring that American nation-building would be mostly white by law.[105]

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[102] *See supra* notes 92–97 and accompanying text.

[103] Because this section focuses on colorblindness and post-racialism, we focus here on the constitutive nature of race and law, but this analysis could easily be applied to gender and focus on the common law and its legal institutionalization of patriarchy. Similarly, we could do the same for sexual orientation and other categories of identity formation. For a sampling of the literature on law and patriarchy, see generally CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Diane Polan, *Toward a Theory of Law and Patriarchy*, *in* FEMINIST LEGAL THEORY: FOUNDATIONS (Kelly D. Weisberg ed., 1993); Frances Olsen, *The Sex of Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 1990).

[104] From the very beginning of the federal legislation on naturalization, starting with the first statute in 1790 a few months after the Constitution's ratification, Congress limited naturalization to "any alien, being a free white person who shall have resided within the limits and under the jurisdiction of the United States for the term of two years." Naturalization Acts, ch. 3, § 1, 1 Stat. 103, 103 (1790) (repealed 1795). This whites-only provision endured for 162 years, until 1952. *See* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 20–26 (1996) (providing capsule history of legal definitions of whiteness in various doctrinal categories).

[105] *See* HANEY LÓPEZ, *supra* note 104, at 37–39 (detailing the various restrictive immigration laws in place before Congress passed immigration reform in 1965).

The ongoing reiterations of race-based slavery ranging from black codes, Jim Crow and segregation,[106] to the Orwellian logic of "reverse discrimination," are another key long-term example of law's constitutional entanglement with race and, in particular, white supremacy.[107] The Chinese exclusion laws, Japanese internment and dispossession laws, and similar acts of legal subordination designed to create and enforce racial hierarchy likewise have been part and parcel of incrementally coalescing these United States as a consciously and intentionally white nation-state.[108] The dispossession and destruction of indigenous individuals and nations in explicitly racial terms is yet another example of this long history.[109] And the rank manipulation and exploitation of Latino communities or diasporas for cheap labor and other extractive, subjugating aims is equally a part of the sorry but continuing history of this racialized nation-state.[110] Even the contemporary expression of traditional, neo-colonial power over this nation-state—the culture wars—are identity/color-centric, and waged still through the tools and techniques of law and policy.[111]

In sum, whether focused on black people, yellow people, red people, brown people, or other people, the white majority of this country has been from its inception obsessively conscious of its racial identity, and has used its control over law relentlessly to ensure its racial supremacy politically, culturally, and economically. Beginning with racial enslavement and the very first act of Congress on immigration and naturalization, it has policed its polity, demographics, and borders in resolutely racialized and racializing ways. Through these repeated acts of *de jure* racialization to cohere a sense of *both* nation and state, the white elites and majority of this country have fostered a national addiction to malignant forms of race consciousness. Through these numerous and momentous legal and constitutional choices, they have reared a nation and state apparently

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[106] *See id.* at 122; Howard N. Rabinowitz, *From Exclusion to Segregation: Southern Race Relations, 1865–1890*, 63 J. AM. HIST. 325, 326 (1976) ("[B]efore the resort to widespread de jure segregation—de facto segregation had replaced exclusion as the norm in southern race relations.").

[107] *See* Ronald Turner, Plessy *2.0*, 13 LEWIS & CLARK L. REV. 861, 917–19 (2009) (arguing that the plurality decision in *Parents Involved* resurrects some aspects of *Plessy*, in ignoring racial realities and social meanings of race).

[108] *See generally* SUCHENG CHAN, ASIAN AMERICANS: AN INTERPRETIVE HISTORY (1991); RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS (1998); Keith Aoki, *"Foreign-ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 UCLA ASIAN PAC. AM. L.J. 1, 10 (1996) (describing the difficulties of integrating Asian immigrants into the American bipolar, black or white model of race relations).

[109] *See, e.g.*, Ward Churchill, *The Law Stood Squarely on Its Head: U.S. Legal Doctrine, Indigenous Self-Determination and the Question of World Order*, 81 OR. L. REV. 663 (2002) (providing a critical overview of white law and indigenous peoples in the lands presently known as the United States).

[110] *See generally* IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 1–8 (Juan F. Perea ed., 1997); *see also* KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 2–7 (1992).

[111] *See supra* notes 72–76 and 82–86 and accompanying text.

incapable of acting otherwise. They have nurtured a societal psyche at once patently paranoid about race and also frenetically "blind" to its social and legal articulation—a collective captive to a particular kind of "unconscious consciousness" about race and power under the rule of law that seems aptly designed to enable and normalize white supremacy.[112]

In our view, then, it is this peculiar, idiosyncratic, and combustible mix of race *and* law in the nation-building project of this nation-state that helps explain why CRT emerged from the *legal* academy of *this* country. And it is the unraveling of the post-War socio-legal accords we noted earlier that have helped to keep the mainstream masses tranquilized in modern times. But the unraveling of those accords and conditions opened fissures of opportunity for the development of critical consciousness and discourse.[113] It is the "cracking of pillars" that we sketched above[114] that helps explain "when," but it is socio-legal history of this particular nation-state that helps to explain "why." It is the long historical conjunction of race and law in the national history of the United States, coupled with the tectonic shifts rippling through the nation-state system during the second half of the past century, that we think begin jointly to help explain Crenshaw's opening query, both as to why and as to when.

It therefore should come as no surprise that the historic contradictions of law and racial/identity injustice continue unabated. Rather than abandoned, the project of white supremacy and identitarian systems of privilege simply adapts. The sullied legacy of slavery, exclusion, subordination, and exploitation has been neither disgorged nor abandoned. Instead, today's material and cultural contradictions reify the practice of racial domination and racial erasure within—and increasingly across and beyond—nation-states: law remains central to race, gender and other forms of socio-legal identity today as much, if not more, than yesterday. Under this scenario, formal equality is but a legal formality—a formality upholding a rancid and brittle social fiction.

Yet, while not abandoned, today's contradictions also are not yesterday's, and not just because they now come with fancier disguises than ever. As we discuss below, the combined effect of colorblind legal ideology and post-racial political discourse amounts to the codification of specifically racist vestiges left throughout this nation-state from centuries of *de jure* enslavement and apartheid. Within *this* nation-state, the effects of colorblindness and post-racialism can be no other: given that the legacies of *de jure* white supremacy continue to litter the landscape of the

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[112] *See* Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–23 (1987) (arguing that much of racial discrimination is influenced by unconscious racial motivation).

[113] *See supra* Part I.B.

[114] *See supra* Part I.B.

United States, colorblindness and post-racialism can only mean, in practice, a self-deluding commitment to *not* seeing racially stratified social realities. And, of course, this blindness to racialized realities leaves the neocolonial legacies of racialized injustice in place.

As current events make plain, this determined commitment to denial and delusion is made politically palatable through the politics of racial resentment and identitarian cultural warfare noted earlier.[115] Evoking and activating neocolonial politics of racial identity, this new combination of colorblindness and post-racialism invites both elites and masses of the racial majority to enjoy the spoils of past and present injustice with less chagrin. In this country, law, and only law, makes the extension of this racial pleasure not only possible but also profitable.[116]

Incrementally, perhaps fitfully, these historical, political, and jurisprudential vicissitudes thus have led us to this juncture—a moment in which "post-racialism" is everywhere in vogue, or so it seems. Yet no explanation seems necessary when invoking the term these days; the simple act of intonation seems to announce a self-explanatory meaning, a self-evident truth. But what truth, exactly, if any? As we will next see, the usage of "post" as a prefix can do lots of work, or nothing at all. Depending on perspective or objective, this malleable opacity can be good or bad. From our perspective, post-racialism is the political counterpart to the legal doctrine of colorblindness, and does similar racial work normatively and ideologically within the context of this nation-state.

1. *"Post" as Prefix?*

Critical race theorists have spoken of "post"-civil rights as a time during which CRT emerged, in part to continue the uncompleted socio-legal work of the Civil Rights movement.[117] In various discourses, "post"-Black or "post"-gay have also made their appearance in one way or another to redefine a sense of subjectivity or perspective based on a particular identity—or, perhaps, simply as empty rhetorical flourishes.[118] Of course,

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[115] *See supra* notes 82–86 and accompanying text.

[116] *See, e.g.*, Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457, 493–99 (1997).

[117] *See, e.g.*, Richard Delgado & Jean Stefancic, *Critical Race Theory and Criminal Justice*, 31 HUMAN. & SOC'Y 133 (2007); Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium*, 18 HARV. BLACKLETTER L.J. 1 (2002); Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329 (2006–2007).

[118] *See, e.g.*, Paul C. Taylor, *Post-Black, Old Black*, 41 AFR. AM. REV. 625, 625–26 (2007) ("It may be especially productive to identify and clarify the specific contribution that a distinct notion of post-blackness can make. As it happens, the notion tends to figure in rhetorical gestures more than in fully formed arguments. It seems, in fact, to be a placeholder, an abbreviated, perhaps elliptical invocation of unexcavated theoretical resources. My sense is that if we seek out these resources and flesh out the idea, we will find that it offers more than a way of talking about black art. It may well capture something of the peculiar situation of race theory at the dawn of the twenty-first century.").

"Post"-colonialism is another common usage. No doubt, "post"-modern must rank as the most ubiquitous example of all, employed everywhere mainly to mark a paradigm shift in human outlooks on our sense of social and material reality.[119] As these few examples illustrate, "post" as prefix can signify temporal, historical, intellectual, political, and/or normative beliefs, agendas, and positionalities.

Typically then, it seems that "post" as prefix has at least two dimensions: the temporal/chronological dimension and the social/normative dimension. Depending on usage, "post" signifies structural, social, intellectual, or substantive shifts—the movement from "something" before to "something else" after. Typically, "post" signals a sense of significant difference between the here and now and a prior status quo or situation. These background thoughts clear the table for discussion of "post" racialism.

2. *"Post-" and Race*

Applying these observations to "post" as prefix for "race" is difficult for several reasons. Most importantly—and tellingly—this phrase is typically interposed in conversations as an empty rhetorical gesture without any substantive addendum.[120] Because "post" as prefix for race is used routinely without any effort to articulate anything clearly, we can try to discern the meanings and purposes of this usage only through implication and deduction.

First, context: As a matter of historical fact, "post racial" as a term of public discourse erupted onto the public stage with a vengeance only in 2007. As the chart below graphically illustrates, before 2007, the term appears in major U.S. newspapers only sixty-five times. In the two years since 2007, the term appeared in the same U.S. newspapers nearly one thousand times—more than a tenfold increase in three short years. Notably, as the chart also shows, the term post-racial has yet to make an appearance in any judicial opinion. As of yet, therefore, this terms operates principally in social and cultural contexts; for the moment, post-racial rhetoric circulates in public political discourse only.

Next, contrast these uses and figures with "colorblindness" and we expand the context for this recent advent of post-racial rhetoric even more. While post-racial rhetoric has yet to enter legal or judicial discourses as such, the term "colorblind" presents a very different picture. As the chart

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[119] *See, e.g.*, Derek P. Jinks, *Essays in Refusal: Pre-Theoretical Commitments in Postmodern Anthropology and Critical Race Theory*, 107 YALE L.J. 499 (1998).

[120] *See, e.g.*, Sheryl Gay Stolberg, *Persistent Issue of Race Is in the Spotlight, Again*, N.Y. TIMES, July 23, 2010, at A13 (referring to Obama's election as "suggest[ing] the promise of a postracial future" despite all present evidence to the contrary). For a review of recent literature, see Catarina Fritz & John Stone, *A Post-Racial America: Myth or Reality?*, 32 ETHNIC & RACIAL STUD. 1083 (2009) (book review).

illustrates, the term "colorblind" has appeared numerous times both in the news and in the law. For instance, the term appears 678 times in judicial opinions, including Justice Harlan's famous dissent from *Plessy v. Ferguson* in 1896 employing that term explicitly.[121] In addition, colorblind appears in major U.S. newspapers over 10,000 before 2007 and 1,736 times since 2007. Evidently, colorblind rhetoric is more established and pervasive, both in legal and political discourses, than post-racial rhetoric.

Sources	Results "Colorblind"	Results "Post-Racial"
News Before 2007: Westlaw Database: AllNewsPlus (includes Wires and other news sources, like MSNBC)	10000 (search caps at 10000)	202
News After 2007: Westlaw Database: AllNewsPlus (includes Wires and other news sources, like MSNBC)	8797	4760
Major Newspapers Only Before 2007: Westlaw Database: NPMJ (Major Newspapers) (includes most highly circulated newspapers)	10000 (search caps at 10000)	65
Major Newspapers Only After 2007: Westlaw Database: NPMJ (Major Newspapers) (includes most highly circulated newspapers)	1736	951
Federal Cases Westlaw Database: AllFeds	466	1 (false positive, case actually uses the phrase "past racial")
State Cases Westlaw Database: AllStates	212	0
State And Federal Cases Westlaw Database: AllCases	678	1 (false positive, case actually uses the phrase "past racial")

Many observers, however, have long shown how colorblindness works

[121] Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

as legal ideology to occlude, by law, the socio-economic racial stratification of life itself: colorblindness as modern legal ideology obstructs in manifold ways the nation-state's efforts to sustain legal policies that deliver material remedial relief from racial injustice.[122] Colorblind legal ideology is frequently interposed by judicial appointees—from the Supreme Court on down—to declare that racism is over and that race must now be erased. As Antonin Scalia notoriously asserted, "we are just one race here. It is American."[123] But, as the axiom goes, deeds speak louder than conclusory assertions.[124]

As we argue below, critical race theorists therefore must begin to understand and treat the post-racial move as the socio-cultural twin of colorblind socio-legal ideology.[125] We must begin to recognize that both do the same kinds of work—albeit in different ways, times, and venues: working in tandem, each aims and helps to marshal both law and society behind the assertion that white supremacy is mere distant history rather than harsh, material, and present reality. To remain socially relevant, critical race theorizing must act on the fact that both of these terms work and help to silence the voicing of racial grievances, or to frustrate the viability of any legal remedy for racial injuries.

3. *From Colorblindness to Post-Racialism: Mapping the Move from Law and Policy to Society and Politics*

After so many decades and deployments of colorblindness as legal ideology and policy fixation, what might serve to explain the sudden explosion of post-racial discourses in public politics during the past several years? Why now? Is it just coincidence? Perhaps not.

In 2007, a then little-known Senator from Illinois already calling himself "a skinny kid with a funny name" announced his candidacy for the U.S. presidency.[126] This Senator, Barack Obama, spent the next full year, and then some, on the road campaigning furiously toward that ambition. At the end of 2008, his efforts were rewarded with electoral victory. In January 2009, for the first time, a black family occupied the White House. It is in this unprecedented context that the term "post-racial" arrived on the

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[122] *See generally* Derrick Bell, Lecture, *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 ST. LOUIS U. L.J. 393 (1990); Neil Gotanda, *A Critique of "Our Constitution is Colorblind,"* 44 STAN. L. REV. 1, 2 (1991) (arguing that the Court's use of colorblind constitutionalism fosters white supremacy); Turner, *supra* note 107.

[123] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

[124] *See supra* notes 49–52 (on the history of racist legal acts by the United States; *see also infra* notes 131–42 (recounting similar public deeds today).

[125] Indeed, one of the authors notes as much in a recent work. *See* Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1597–1600 (2009) (acknowledging how both colorblindness and post-racialism converge on the important shared imperative that the state "retreat" from racial remedies, but diverge in strategy and audience).

[126] *See The Media and the Message; Excerpts from Speeches on Broad Variety of Issues at the Convention in Boston*, N.Y. TIMES, July 28, 2004, at P8.

scene, a term seeking desperately to convert this unprecedented moment of racial surprise to paint a seductive picture of sweeping and willful societal transformation.

Despite the mixed and contentious discourse of race and racial blindness today, we can discern two basic usages of post-racialism since 2007. First, the term is used to imply or insinuate that race no longer is an issue, that race has become socially irrelevant regardless of its problematic history. Second, the term is used to signify that race is no longer even cognizable discursively—that is, that race is now the identity that must dare not speak its name.[127] These two meanings are interrelated and mutually reinforcing, even though they are not explicitly asserted, just as was the case with "slavery" itself in the original text and discourse of constitution-making in 1789.[128] These uses, in effect if not intent, continue the long history of actual race consciousness to establish and buttress white supremacy coupled with a formal insistence on "color blindness" to silence or blunt racial dissent and resistance to this supremacy. This gyration is of course doubly Orwellian.

In sum, these two basic uses and significations of contemporary post-racial talk reflect the typical deployments of the term "post" as a prefix, discussed earlier.[129] The first of these uses temporally announces a new era in race relations that follows on the troubled eras of years past, and thus is explicitly sequential or chronological in signification. The second usage asserts a new normativity, mirroring the legal dictum of color blindness. In tandem, we think these temporal and normative claims aim to impose a new regime of reactionary political correctness—a newly strident demand for a rejection of race consciousness that specifically precludes a critical or empirical review of social reality. Together, these claims insist that a new temporal era be accompanied by a new substantive normativity in which "traditional" patterns of racialized stratification become redefined as normal and non-racial.

Responding to these insistent claims, CRT must query with equal insistence: Is post-racialism as used today a coherent notion either temporally or normatively? Are we, in fact, in a new era appropriately calling for a new normativity regarding race, policy, and politics? As we intimated above and explain next, recent events surely counsel against this

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[127] *See* Cho, *supra* note 125, at 1596 (identifying one key effect of post-racialist discourse and politics as circumscribing traditional forms of anti-racist resistance: "Not only are racial remedies and racial discourse off the table, but so are acts of collective political organization and resistance by racialized individuals.").

[128] Although the Constitution nowhere mentions "slavery" explicitly, its text includes three provisions focused intentionally on slavery's legal protection. *See* U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV (three-fifths clause); *id.* at art. I, § 9, cl. 1 (1808 importation clause); *id.* at art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII (deliver up clause).

[129] *See supra* Part III.C.1.

delusion.

4. *Racializing Post-Racial Politics: CRT and Legal Colorblindness Within the Nation-State*

We step back to recall the startling number of highly racialized incidents taking place since the proclamation of this post-racial era: since November 2008, or even earlier—ever since President Obama's announcement in 2007 of his candidacy. These incidents may or may not be interconnected; or perhaps, more precisely, they may be more or less interconnected. While involving different situations or racial groups, these incidents share a key and striking racialism as a common hallmark. More specifically, all these racial and identity-conscious incidents illustrate a highly conscious sense of *white* racial identity, and express a reaction from that identity against racial consciousness in the nation more generally (i.e., among coloreds). In other words, the incidents noted below demonstrate an acute consciousness, culturally and politically, of race and racial groupings among members of the racial majority, even as they propagate post-racialism to obscure or deny this very acuity.

Is it mere post-racial coincidence that the so-called "birthers" continue to question the birthplace of the black sitting President while disregarding the well-known fact that his white opponent was not born in the United States at all?[130] Is it coincidence that so-called populist or grass-roots activists mustered their sense of displacement and rage against the national government only after a black man and his family moved into the White House—after eight years of the very same sort of spend-thrift governmental practices that they now so loudly decry under the rule of two white men: the Bush-Cheney regime of 2000–2008?[131] Is it coincidence that the first-ever direct outburst during a State of the Union address occurred during the first State of the Union by a non-white President?[132] Is it coincidence that a highly famous Harvard professor who happens to be black can be "reasonably" mistaken as a burglar in his own home and

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[130] For some background reading, see Alex Koppelman, Editorial, *Palin Needlessly Fans "Birther" Flames*, CHI. SUN-TIMES, Dec. 5, 2009, at 17; Frank Rich, Op-Ed., *If Only Arizona Were the Real Problem*, N.Y. TIMES, May 2, 2010, at WK10; David G. Savage, *Obama Citizen Appeal Rejected: The Supreme Court Delivers the Latest Setback to Those Who Don't Believe that the President-Elect is Eligible for Office*, L.A. TIMES, Dec. 9, 2008, at A12. Finally, the President deemed it necessary in 2011 to release additional details of his birth in Hawaii. *See* Michael D. Shear, *Citing "Silliness," Obama Shows Birth Certificate*, N.Y. TIMES, Apr. 28, 2011, at A1.

[131] For some background reading, see Paul Krugman, *The New Voodoo*, N.Y. TIMES, Dec. 31, 2010, at A23; Lisa Mascaro, *Who'll Blink First on Debt Ceiling? GOP Leaders Agree It Should Be Raised, but They Want Some Deep Spending Cuts First*, L.A. TIMES, Feb. 8, 2011, at A14; Frank Rich, Op-Ed., *The Tea Party Wags the Dog*, N.Y. TIMES, Jan. 30, 2011, at WK8.

[132] For some background reading, see Gail Collins, *Parsing Mr. Wilson's Apology*, N.Y. TIMES, Sept. 12, 2009, at A21; Kathleen Hennessey, *Congress Strives for Right Dose of Civility; Gestures of Amity for the State of the Union Are Popular, but They May Be Short-Lived*, L.A. TIMES, Jan. 25, 2011, at A8.

arrested there?[133] Is it coincidence that Shirley Sherrod's racist cyber-mugging was planned and tailored specifically to highlight a deceptive sense of anti-white racism?[134] Each of these thoroughly racialized and racializing acts occurred only recently, and each belies the possibility of an authentically post-racial era in this country at this time.

Still looking to the United States, these dynamics of contemporary racial politics can be seen in the public behaviors of many individuals who gather in so-called "Tea Party" events nationwide—behaviors that include gun-toting, race-baiting, tantrum-throwing, and a host of similar behavior patterns that in earlier historical moments would have been considered socially deviant at a minimum, and probably outright antisocial, even criminal.[135] And is it also post-racial coincidence that Arizona's politicians have engaged in racist and nativist fits of lawmaking precisely in the last year or two?[136] Significantly, this ongoing effort is reflected not just in the recent state legislation mandating racial profiling by law,[137] but also by the new Arizona statute banning the teaching of history in full, including the study of identitarian injustice, in that state's public education system.[138] And is the Right Wing's anti-Muslim hate-mongering around mosques in New York and elsewhere really a colorblind post-racial expression of American democracy, freedom, justice or liberty?[139]

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[133] *See* Liz Robbins, *Officer Defends Arrest of Harvard Professor*, N.Y. TIMES, July 24, 2009, *available at* http://www.nytimes.com/2009/07/24/us/24cambridge.html; Sheryl Gay Stolberg, *Persistent Issue of Race Is in the Spotlight, Again*, N.Y. TIMES, July 23, 2010, at A13.

[134] For some background reading, see Jesse Jackson, *Sherrod Controversy Misses Real Message*, CHI. SUN-TIMES, July 27, 2010, at 20; Peter Nicholas & Kathleen Hennessey, *An Extraordinary Apology: The White House Offers to Reinstate a Fired USDA Official*, L.A. TIMES, July 22, 2010, at A1; Brian Stelter, *When Race Is the Issue, Misleading Coverage Sets Off an Uproar*, N.Y. TIMES, July 26, 2010, at B1.

[135] For background information on this "movement," see Paul Froese, *The Tea Party's Unifying Bogeyman: The Socialist*, USA TODAY, Sept. 13, 2010, at 13A; Michiko Kakutani, *The Engine of Right-Wing Rage, Fueled by More than Just Anger*, N.Y. TIMES, Sept. 14, 2010, at C1; Jacob Weisberg, *A Tea Party Taxonomy: The Insurgent Movement Is Indeed Something New In American Politics—But What, Exactly?*, NEWSWEEK, Sept. 27, 2010, at 32.

[136] For examples of political and popular reactions to the explicit racial profiling in Arizona's S.B. 1070, see Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1; Julia Preston, *Fueled by Anger over Arizona Law, Immigration Advocates Rally for Change*, N.Y. TIMES, May 2, 2010, at A22; Nicholas Riccardi & Ashley Powers, *Arizona Strategy: Make Life Tough for Immigrants*, L.A. TIMES, Apr. 15, 2010, at A1; Nicholas Riccardi, *Racial Profiling a Reality Now? An Arizona Sheriff's Illegal-Immigration "Sweeps" Already Target Latinos, Critics Say*, L.A. TIMES, May 1, 2010, at A1; Tim Rutten, *Arizona Must Feel the Pain*, L.A. TIMES, May 1, 2010, at A27; Hector Tobar, *Beauty, Friends and Fears: The New Arizona Landscape*, L.A. TIMES, July, 11, 2010, at A2.

[137] For a description of this ongoing effort, see, for example, Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47 (2010).

[138] For more on this effort, exemplified by the demand that the Tucson Unified School District shut down its ethnic studies program, see Jonathan J. Cooper, *Arizona Ethnic Studies Law Signed by Governor Brewer, Condemned by UN Human Rights Experts*, HUFFINGTON POST (May 11, 2010, 11:50 PM), http://www.huffingtonpost.com/2010/05/12/arizona-ethnic-studies-la_n_572864.html.

[139] For some background reading, see Michael Barbaro, *Lazio Finds an Issue in Furor over Islamic Center*, N.Y. TIMES, Aug. 23, 2010, at A1; Michael Barbaro, *Debate Heating Up on Plans for*

In each of these instances, race and racism were not only involved, not only central, but were literally outcome determinative. In each of these instances, racial consciousness initiated, permeated, and terminated the incident. In these and similar instances, nothing post-racial or colorblind can be found.[140] If these kinds of instances are any indication, it might well be that there is *nothing* post-racial about anything in the United States today.

As if to remove all doubt, the 2008 election cycle was peppered with the public expression of forlorn or arrogant statements from everyday (white) voters saying that they wanted to "take back [their country]."[141] Although we might understand this claim when coming from indigenous peoples, we are puzzled when descendents of white settlers or immigrants assert this claim in this context: we wonder, back from whom? Apparently, we deduce, from the black man in the White House. Indeed, in our view, it is precisely this desire to "take back" this nation-state that explains the explosion of reactionary racism via the incidents we noted above; each is, in its own way, an exertion or expression of this self-righteous desire to "take" and retain in apparent perpetuity operational ownership of this nation-state specifically and consciously in racial, racialized, and re-racializing terms. And all of this while proclamations of a post-racial America loudly abound.

The result is breathtaking, even for this nation-state: precisely when claims of colorblindness and post-racialism are bandied about by judges, pundits and politicians more avidly than ever before, these ongoing social and political incidents affirmatively recirculate and proactively recycle the very racism under active denial. Even as race is more loudly than ever declared erased, white racial politics surge all around us. Even as white "leaders" insistently deny racialized realities, white re-racialization is performed from coast to coast before our very eyes, a public spectacle seemingly without end.

Not coincidentally, then, the rhetoric and politics of this spike in reactionary racism during the past two years, increasingly expressed explicitly in terms of "taking back" this nation-state, directly links up to the broader structure and logic of backlash and retrenchment via the culture wars, which also are framed publicly and repeatedly in terms of

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Mosque near Ground Zero, N.Y. TIMES, July 31, 2010, at A1; Clyde Haberman, *In Islamic Center Fight, Lessons in Prepositions and Fear-Mongering*, N.Y. TIMES, July 27, 2010, at A13; Janet Hook & Tom Hamburger, *Republicans Split over N.Y. Mosque Debate: Some Fear the Dispute Carries Political Risks for the GOP as Elections Near*, L.A. TIMES, Aug. 18, 2010, at A1.

[140] For a similar observation of current events, see Roger Simon, *Post-Racial America? That Didn't Last Long*, CHI. SUN-TIMES, Aug. 9, 2010, at A31.

[141] *See Hardball with Chris Matthews: For February 9, 2011, MSNBC—Part 1* (MSNBC television broadcast Feb, 9, 2011); Michael Luo, *A United Liberal Front*, N.Y. TIMES, Mar. 18, 2008, at A18; Rich, *supra* note 130.

"taking back" the "soul" of this nation-state.[142] This one-sided racial consciousness—on the side of the white-identified elites and majority—coupled with the insistence on formal colorblindness and the pretense of a new post-racial normativity, constitute the new socio-legal regime of strategic racial erasure and structural subordination under the rule of the racialized nation-state. Untangling and exposing this hypocrisy must be high on the CRT agenda if our collective work is to remain socially sharp and materially liberational.

At a minimum, these incidents confirm that this nation-state remains normatively as race-conscious as ever before in its race-conscious history. The original addiction continues: the thickly racialized normative environment that generations of *de jure* racial apartheid implanted in this country makes it impossible now to suddenly be "blind" to race without first having seen it, taken notice of it, and then, and only then, deciding consciously to be blind to it.[143] And only this type of fancy psychological trick can pave the way to a purportedly post-racial era and normativity. The cognitive impossibility of this trick, as evidenced by the numerous recent incidents listed above and countless similar ones repeated across hundreds of millions of American lives on a daily basis in a sustained way, goes to show the fallacy of colorblindness and the disingenuity of post-racialism as preached and practiced today: as illustrated by the long litany of recent incidents confirming a solid sense of white racial consciousness, what legal colorblindness and political post-racialism deliver in fact is a renewed way of disguising, normalizing and perpetuating the social, political, and economic architecture of *de jure* white supremacy and its substantive, structural and cultural legacies. More than anything else, the combination of post-racial popular discourses with colorblind legal fictions is a way of driving deeper underground what already is buried deeply in the nation's collective unconscious.[144] And the likely result of this further entrenchment is the continued virulence of white and related systems of identity privilege under the rule of law.

From our viewpoint, the bottom line thus emerges clearly: in light of these and similar recent incidents, we cannot help but view post-racial rhetoric as a hoax, the latest iteration of white supremacist identity politics. As illustrated by these and similar incidents, we think post-racial identity politics invoke both white racial consciousness and a demand that all other racial consciousness be blinded *and* silenced. From where we stand, post-racial politics properly are viewed as the socio-political counterpart to the

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[142] *See supra* notes 72–76 and accompanying text (describing culture wars and the racial backlash of the actual declaration of the Civil War).

[143] *See* Gotanda, *supra* note 122, at 16–18 (describing non-recognition as the process of noticing but not considering race).

[144] *See* GOLDSTONE, *supra* note 63, at 5–7 (discussing the historical roots of constitutional racism as an unconscious desire for greater labor production by the southern states).

socio-legal notion of colorblindness.

Without much difficulty, however, we *can* find alternative and substantive conceptions of post-racialism that may satisfy in fact the criteria of temporal and normative change noted above. After all, post-racialism, like any human construct, can be made to signify or serve distinctly different possibilities. To review two alternative conceptions and possibilities, and thereby critically contextualize the post-racialism fads of this moment, we turn briefly to Martin Luther King, Jr. and Derrick Bell.

In his famous 1963 address from the Lincoln Memorial, Martin Luther King spoke at the March on Washington about a dream, a dream "that my four children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character."[145] Implicitly but substantively, this dream relates to a vision of a post-racial era where race and color have indeed become operationally irrelevant, giving way to social, political and economic relations grounded in the content of character. This is the vision that today's assertions of post-racialism seem to evoke, even if falsely or delusively so. The difference, of course, is in the delusion itself: whereas Martin Luther King "dreamed" of a post-racial era but understood it was only still a fantasy, today's assertions insist on a reality that, as the incidents above illustrate, remains yet—and perhaps now even more of—a (bad) dream.

More recently, in his 1989 lecture, *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, Derrick Bell invoked a more explicit and different version of this era.[146] Beginning with a review of the history and the present-day state of race relations legally and socially in the United States, Bell compared the 1989 Supreme Court ruling in *Croson* with the 1896 ruling in *Plessy*.[147] Bell found little difference doctrinally in the two cases separated by a near century. From his perspective, both deny evident social reality and assert abstract legal fictions to perpetuate white superiority. With this backdrop set, Bell then launched in this lecture into his now-famous "space traders" chronicle, in which the United States government agrees to trade its entire black population in exchange for much-needed gold and technology.

Here is how Bell describes social reality in material terms:

> The election of blacks to public office, while encouraging, has not had much effect on the dire statistics of unemployment and poverty. Incidents of racial violence are on the rise and the hostility to black progress, now translated into political and judicial enmity, constitute a clear and

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[145] *See supra* note 67.

[146] Bell, Lecture, *supra* note 122, at 396–97.

[147] *Id.*

> present threat to gains made over the last four decades. These multiple manifestations of the end of an era in civil rights progress provide notice that it is time to "Get Real" regarding the prospect of racial equality. Prudence may even dictate a serious look at the future prospects for African American people in this country.[148]

In this chronicle Bell queries:

> Given the current tenuous status of African Americans, the desperate condition of those on the bottom, and the growing resentment of the successes realized by those who are making gains despite the odds, one wonders how this country would respond to a crisis in which the sacrifice of the most basic rights of blacks, would result in the accrual of substantial benefits to all whites?[149]

When we compare King's version of post-racialism with Bell's, several key points come into sharp relief. King, as noted above, envisioned an era where race gives way to character "for real" in everyday life, as well as in formal lawmaking. Twenty-one years later, Bell, reflecting on the possibility of such an era, comes to the despairing conclusion that it never can, and never will, be so. In his "prudent speculations" about this possible "post-racial epoch," Bell concluded that this nation will continue to enact race-conscious decisions socially and legally that sacrifice or disadvantage racialized minority groups. A post-racial era is possible, Bell indicates, only when "black people [leave] the new world as their forebears had arrived"—with "[h]eads bowed, arms linked by chains."[150] Thus, for King, the "hope of racial equality [remained] alive,"[151] although only a dream; one score and one year later, and Bell concludes that, "the hour is growing late for expecting that black people will always keep the hope of racial equality alive."[152]

5. *Post-Racial Rearticulations: Critical Conclusions*

Currently, then, we see post-racialism used predominantly to deny the persistence of manifest and manifold race-based inequalities, and to further affirmatively the persistence of white privilege and supremacist racial consciousness. King's invocation in 1963, on the other hand, invoked the "dream" of a functionally post-racial America and expressed the hope for a socially transformed society in which race, in fact, would yield to

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[148] *Id.* at 394.
[149] *Id.* at 397.
[150] *Id.* at 400.
[151] *Id.* at 405.
[152] *Id.*

character—the critical race project. And for Bell in 1989, post-racialism signified a time in which a final solution for the entrenchment of white supremacy in this country will finally have been found—the final triumph of "traditional" identity politics favoring neocolonial normativities and economies. In short, today's users are claiming that King's vision has triumphed already, socially and materially, while Bell's analysis concludes that King's vision is unlikely and, instead, that we should expect white supremacy to fight to the death. These three different articulations overlap in different ways, but represent strikingly different policy and politics valences.

This brief mapping thus brings into view at least three different articulations of the same trope. The current articulation of post-racialism explicitly asserts as reality the vision that Martin Luther King, Jr. implicitly conjured and that Derrick Bell, Jr. in the intervening time denied could ever take place: the reason why Glenn Beck elects to articulate his post-racial claims from the steps of the Lincoln Memorial is precisely to make this connection, to commandeer this meaning and to deploy that vision as "reality" despite all data on racial inequality to the contrary.[153] Without doubt, unraveling this post-racial Gordian knot is a key and pressing task for critical race theorists today within the context of this nation-state, especially because law remains central to the story of race in each conception or articulation of post-racial possibilities in the United States specifically.

Today's uses of colorblindness and post-racialism effectively if not intentionally commandeer King's vision and legacy to promote a politics of continued racial stratification in social and material terms enabled by a stalwart, formal legal denial of—or blindness to—that very stratification, a willed collective inability to see a stark reality fiercely articulated through legal fictions cooked up precisely for this ignoble purpose. Of course, Bell warned us of this very thing: from Bell, the message is that we should move on from King's hopes and dreams, and anticipate the reactionary racial cynicism and resolute legal manipulation that we in fact encounter in this historical moment to continue the delay of racial and social justice in this nation-state. Despite King's dream, Bell's fear well may be upon us: once again, the lawmaking powers of the nation-state are channeled to postpone any day of racial reckoning, any hope of racial justice. Whichever view one takes, law remains at center-stage. Once again,

[153] For a discussion of Glen Beck's rally at the Lincoln Memorial, see Kathleen Hennessey, *Civil Rights Leaders Decry Rally Plans: Glenn Beck Sets Event for the Same Site and Date as King's "I Have a Dream" Speech*, L.A. TIMES, Aug. 25, 2010, at A15; Bob Herbert, Op-Ed., *America Is Better Than This*, N.Y. TIMES, Aug. 28, 2010, at A19; Mary Mitchell, *Boorish Beck Makes Mockery of King's Dream; Pandering to GOP Extremists, Sticking It to the Civil Rights Leaders*, CHI. SUN-TIMES, Aug. 29, 2010, at A12; Kate Zernike, *Where Dr. King Once Stood, Tea Party Claims His Mantle*, N.Y. TIMES, Aug. 28, 2010, at A9.

therefore, so must CRT.

This brief sketch presents an obviously unfinished tableau, in which the trajectory of race and law remains contested, contingent. The current flux in racial politics within the nation-state, and the ongoing persistence of identitarian stratification under and by law, mean that future conditions regarding race and racial consciousness remain uncertain, and highly volatile. Consequently, critical race theorists have momentous choices to make in the here and now: our positions as legal scholars put us in key positions to influence the unfolding of racial policy in the near and long term future. This unique positionality, in some ways, makes the future of CRT crucial to the future of race relations and policy-making in the country more generally. Thus, the question—"why law?"—remains as persistent as ever when the topic is racial in/justice, and even as the nation-state is said to be morphing into a new kind of market-state within the contemporary frameworks of international law and politics.

As we briefly outline below, today's contradictions and manipulations of legalized power are increasingly linked to the transnational needs of top-down corporate globalization and its ideological sponsors. In many areas of the world, today's contradictions and complexities are just as likely to be found in internationalized frames of analysis and action as within the conventional nation-state. In other words, the practice and structure of identitarian injustice increasingly is a borderless, or at least cross-border, project. To retain substantively sharp social relevance, the practice and structure of racial justice struggles increasingly must be and do the same. In this century, more than last, critical race theorists will need to develop frames of comprehension and intervention that realign antisubordination analysis and action to match the morphing challenges of tomorrow, not just today.

II. PROSPECT: RACIAL DOMINATION UNDER GLOBAL NEOLIBERALISM

The contemporary manifestation of this racialized history and context today is known as corporate neoliberal globalization, which in recent years has dramatically elevated the power of private capital accumulated through centuries of colonial and imperial legalized violence. Now concentrated in the hands of mega multinationals, these massive accumulations of unjust neocolonial enrichment have become extremely inflated in quantity and power, bringing the planet now to the point where the relevance of the nation-state is increasingly brought into question as the march of globalized neoliberalism goes forward like a juggernaut. Under these circumstances, the pertinence of internationalized color lines begins to matter more and more. Under these circumstances, the project of racial and social justice requires a re-alignment of the frames for analysis and action both within and beyond the traditional nation-state. The question

for critical theory and outsider praxis now therefore is: How do we realign frames of antisubordination analysis and action to meet and transcend the challenges of these shifting paradigms beyond the familiar bounds of the traditional nation-state and its peculiar or particular racial or other identity politics?

A. *Across/Beyond the Nation-State: New Sovereigns, New Challenges*

As we discussed above, at the turn of the last century the old order and related hegemonic phenomena began to dissolve in contradictory directions, which in turn now help reveal a key paradox of this historical moment for advocates of social justice. On the one hand, as we begin to explore below, the domestic or internal utilities of the nation-state system are now being called into serious question by the explosion of transnational political economies in the wake of the domestic and international unravelings described above. On the other hand, and simultaneously, is the drift of the old nation-state system dominated by the unipolar hegemony of the United States during the Cold War-era toward the multipolar world we confront today, under a declining empire said to be giving way to a powerful new world system of market-states in the tight grip of globalized neoliberalism. This paradox, from a critical race perspective, raises new and profound questions for determining both the content and the strategies of social justice during the twenty-first century.

Among these questions is how to respond to the strategic erasure of race and other forms of identity under both trajectories that constitute this paradox. Interestingly, both propel us toward selective colorblindness and post-racialism even as they reconstitute the structures of *de jure* subordination entrenched under the "rule of law" that we described above. Whether domestically or internationally, the very meaning of race/identity is under contestation, and the practices of racism, sexism and related identity ideologies increasingly focus on this fundamental new erasure.

Another set of questions focuses on the utilities that either of these trajectories may provide for the project of social justice that CRT may be uniquely positioned to develop? In this moment of such momentous flux, do we cast our lot with the nation-state? Do we make an accord with the market-state? Do we do anything specific? And, what skills, talents or resources are legal scholars uniquely positioned to deploy under current circumstances? In other words, how do we exploit the particularities of this moment from a CRT perspective in response to the new corporate sovereignties[154] rising to challenge those of the traditional nation-state?

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[154] Below we articulate a view of the multinational corporation as approaching the status of a de facto sovereign. We use examples from current events to begin developing this conceptualization of contemporary trends. *See infra* notes 158–65 and accompanying text.

1. *Law, Neoliberalism, and Corporate Globalization: The Rise of the Market-State?*

This emerging paradox of competing sovereignties riveted the world during the second year of the Obama administration when the globe awoke to the BP disaster in the Gulf of Mexico, leading to a standoff between the nation-state's hegemon and a typical actor of the new "market-state" regime—BP.[155] This delicate dance embodied both the flux of power taking place now, and the fascination of the world's masses at the spectacle. As the world watched, we could observe the delicate negotiations taking place between two effective or formal sovereigns, one—the U.S. as nation-state—representing the dissolving present, and the other—B.P. as multinational corporation—representing the emerging future.[156] This dynamic continues the historical processes of the world-system that were created by the nation-state and the corporation to serve the core interests to the detriment of the exploited periphery. This dynamic similarly continues historical processes that link colonialism, imperialism, and globalization to white supremacy, patriarchy and other subordinating identity-based hierarchies. This dynamic, as we note below, operates both from within the nation-state and from without.

For example, even as we write these words, we awake to the following observations from Bob Herbert on the pages of the nation's mainstream media:

> As Jacob Hacker and Paul Pierson wrote in their book, "Winner-Take-All Politics": "Step by step and debate by debate, America's public officials have rewritten the rules of American politics and the American economy in ways that

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[155] For an overview of the BP oil spill saga, see David Barstow et al., *Deepwater Horizon's Final Hours*, N.Y. TIMES, Dec. 26, 2010, at A1; Richard Fausset, *Oil Rig Sinks in Gulf of Mexico; 11 Still Missing; The Search Continues as Officials Begin to Assess Possible Environmental Risks*, L.A. TIMES, Apr. 23, 2010, at A13; Richard Fausset & Jim Tankersley, *Gulf Oil Spill: Coastline at Risk; Crews Rush to Coast as Oil Spreads*, L.A. TIMES, May 1, 2010, at A1; Campbell Robertson, *Oil Leaking Underwater from Well in Rig Blast*, N.Y. TIMES, Apr. 25, 2010, at A14.

[156] For a discussion of the negotiation strategies and international conflict surrounding the aftermath of the BP oil spill, see *Obama v BP: America's Justifiable Fury with BP Is Degenerating into a Broader Attack on Business*, THE ECONOMIST, June 19, 2010, *available at* http://www.economist.com/node/16377269?story_id=E1_TGPSSNGJ; Joel Achenbach & Ed O'Keefe, *Obama to Push BP for Vast Fund*, WASH. POST, June 14, 2010, at A01; Jackie Calmes, *Obama to Press BP to Establish Escrow Account*, N.Y. TIMES, June 14, 2010, at A1; Helene Cooper & Peter Baker, *Administration Opens Inquiries into Oil Disaster*, N.Y. TIMES, June 2, 2010, at A1; Michael Cooper, *Obama Warns BP on Paying Big Dividends amid Oil Spill*, N.Y. TIMES, June 5, 2010, *available at* http://www.nytimes.com/2010/06/05/us/politics/05obama.html; James Oliphant et al., *U.S. to Start Criminal Investigation of BP Oil Spill; Clean Air, Endangered Species Acts May Have Been Violated, AG Holder Says*, CHI. TRIB., June 2, 2010, at C13; Joseph J. Schatz & Coral Davenport, *Spill's Impact Spreads to Washington*, CQ WKLY, May 10, 2010, at 1132; Joseph J. Schatz & Geof Koss, *BP Pressed; Energy Bill Pushed*, CQ WKLY, June 21, 2010, at 1506; John Timpane, *Double-Barreled Disaster; The BP Oil Spill Has Provided the News Media with Two Stories—One Is the Gooey Mess Itself; the Other, the Political Fallout*, PHILA. INQUIRER, June 8, 2010, at D01.

have benefited the few at the expense of the many."[157]

> The corporate and financial elites threw astounding sums of money into campaign contributions and high-priced lobbyists and think tanks and media buys and anything else they could think of. They wined and dined powerful leaders of both parties. They flew them on private jets and wooed them with golf outings and lavish vacations and gave them high-paying jobs as lobbyists the moment they left the government. All that money was well spent. The investments paid off big time.
>
> . . . .
>
> As if the corporate stranglehold on American democracy were not tight enough, the Supreme Court strengthened it immeasurably with its *Citizens United* decision, which greatly enhanced the already overwhelming power of corporate money in politics. Ordinary Americans have no real access to the corridors of power, but you can bet your last Lotto ticket that your elected officials are listening when the corporate money speaks.[158]

He concludes, still sounding similar themes and alarms, with words that bring into sharp relief the contours of creeping transition from the traditional nation-state and the power of public national sovereignties to the new world order of market-states controlled increasingly by private, corporate, multinational sovereignties:

> So what we get in this democracy of ours are astounding and increasingly obscene tax breaks and other windfall benefits for the wealthiest, while the bought-and-paid-for politicians hack away at essential public services and the social safety net, saying we can't afford them. One state after another is reporting that it cannot pay its bills. Public employees across the country are walking the plank by the tens of thousands. Camden, N.J., a stricken city with a serious crime problem, laid off nearly half of its police force. Medicaid, the program that provides health benefits to the poor, is under savage assault from nearly all quarters.[159]

Another episode of this ongoing paradigm shift, taken again from the pages of the nation's mainstream media, was reported last summer when a

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[157] Bob Herbert, *When Democracy Weakens*, N.Y. TIMES, Feb. 12, 2011, at A21.
[158] *Id.*
[159] *Id.*

comment during a board meeting by one of the new multinational moguls was leaked. Stephen Schwarzman, the chairman and co-founder of the Blackstone Group, one of the world's largest private-equity firms, found himself describing the relationship between the national government and his organization: "It's a war," Schwarzman is reported to have said, referring specifically to the struggle with the nation-state over increasing taxes on private-equity firms.[160] "It's like when Hitler invaded Poland in 1939," continued Schwarzman, making explicit his equation between national and corporate sovereignties.[161] A Wall Street executive who knows Schwarzman well capped the report with an explanation chilling for its understatement: "Steve thinks the president lacks an intuitive feeling for the role of capital markets."[162]

Each of the incidents illustrates how the rise and consolidation of the mega-multinationals in recent decades has produced pressures on the state—both from within and from without—that many predict it cannot withstand. Each illustrates how the world system constructed through colonial and imperial enterprise continues to evolve or devolve. Each brings into sharp and concrete relief precisely what justice theorizing in the age of globalized neoliberalism faces today and tomorrow: now that capital accumulated through colonial conquest and imperial thievery may be outgrowing its historical need for markets and systems bounded by nation-states, and given that these trends culturally and materially buttress the neocolonial status quo within and across nation-states, what dangers and opportunities for liberational politics through critical theory can we find or create? If the market-state is our fate, should we be bracing for that eventuality? If the nation-state remains resilient, should we try to reform and reinforce it? The question for critical race theorists today, at this historical juncture, and as illustrated by these and other similar incidents, boils down to this: How is the practice and meaning of anti-racist and antisubordination work to be adapted to these circumstances, in order to advance the cutting edge of CRT for the next two decades, much as has been the case until now? These are the questions we consider next.

2. *Blinded Identities: Race and Racism Under Racialized Globalized Neoliberalism*

As we mentioned above, experience suggests that the market-state overtakes the nation-state both from within and without. Most recently in historical terms, the widespread establishment of multinational corporations, and the intensifying virulence of top-down corporate globalization, have put new and morphing pressures on this uncertain

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[160] Jonathan Alter, *A "Fat Cat" Strikes Back*, NEWSWEEK, Aug. 30, 2010, at 10.
[161] *Id.*
[162] *Id.*

relationship between law and justice in the material, political and constitutional context of the modern liberal democracy.[163] Whereas both laws and corporations are, formally, creatures and creations of the modern nation-state, both laws and corporations seem operationally to have decisively outgrown the limits of their creators.[164]

Perhaps, therefore, this newly complicated interplay of laws, corporations and nation-states now threatens the very viability of the traditional world order based on traditional rule-of-law notions because the efficacy of foundational concepts and premises—borders, territoriality, jurisdiction and the like—seem increasingly antiquated or impotent in the face of challenges and trajectories during this still-young century.[165] Much of law, as we already noted, is devoted both directly and indirectly to the maintenance and administration of the nation-state, the so-called free market, and the myriad actors that operate within and across each.[166] Yet, today, under this rule of law, all three—the nation-state, the free market, and law itself—are said to be in existential crises.[167]

Indeed, the decline or the collapse of the racialized neocolonial nation-state is said to be impending, even as the nation-state continues to be a key pivot point in everything, both sub and supra-national. Under this forecast, nation-states will become increasingly irrelevant because they will become progressively less able to deliver on the traditional goods that justify and undergird their existence. Under this kind of analysis, the nation-state increasingly will become unable to protect itself and its people from increasingly globalized social, economic, and environmental problems, or from increasingly proliferating weapons of mass destruction, or from increasingly Borg-like assimilation of culture and market in the form of corporate globalization. Under this type of account, the nation-state will give way to the market-state, which will be devoted mainly to sustaining the conditions necessary for fundamentalist market capitalism to operate

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[163] For background reading, see, for example, GOVERNING GLOBALIZATION: POWER, AUTHORITY AND GLOBAL GOVERNANCE 1–19 (David Held & Anthony McGrew eds., 2002); Em Fox, *Global Markets, National Law, and the Regulation of Business—A View from the Top*, *in* TRANSNATIONAL LEGAL PROCESSES 135–46 (Michael Likosky ed., 2002).

[164] For some provocative follow-up reading, see STEVEN DROBNY, INSIDE THE HOUSE OF MONEY: TOP HEDGE FUND TRADERS ON PROFITING IN THE GLOBAL MARKETS (2006); ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES (2009).

[165] For a good overview of issues, see CURTIS J. MILHAUPT & KATHARINA PISTOR, LAW & CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD (2008).

[166] For some relatively recent efforts to grapple with these kinds of questions, see AUERBACH, *supra* note 29; THE POLITICS OF INFORMAL JUSTICE, *supra* note 29.

[167] For substantive accounts from different perspectives, see PAUL KRUGMAN, THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008 (2009); BETHANY MCLEAN & JOE NOCERA, ALL THE DEVILS ARE HERE: THE HIDDEN HISTORY OF THE FINANCIAL CRISIS (2010); RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION 1–36 (2009).

much as we know it today, except even more so.[168]

Under this sort of scenario, moreover, traditional identities like race or ethnicity "naturally" tend to become irrelevant; so do relative or diverse cultural and political normativities; all that matters is "the market," in which colorblinded multiculturalism will occur, if at all, organically, as it should, of course. The market-state, however, will be not only colorblind, but identity blind: blind, for example, to the increasingly documented exploitation of traditionally subordinated identity groups—women, indigenous people, children, poor communities, oftentimes of color—throughout the entire planet by the agro-industrial complex owned and controlled by traditionally elite groups.[169] Consequently, under this account the colorblind market-state will help to usher in a new and normalized post-racial sensibility that mirrors the equivalent sensibility being propagated domestically. Under this account, the only color said to count either domestically or transnationally is the color of merit and money—as if the neocolonial color of merit and money can ever be disconnected from the cultural and material stratification of life emplaced through identity-based colonialism and imperialism.

Under this account, in effect, neoliberal globalization and corporate capitalism are a done deal for the world's masses. Our fate is set: "free-market fundamentalism" is the new (colorblind, post-racial) normativity, if one exists at all.[170] If this prognostication is correct, the traditional nation-state increasingly will become (mainly/merely?) a shell for advancing corporate activity—a condition some might say is already the case, and perhaps has been all along.[171]

This predicted (or ongoing) transition from the nation-state to the market-state no doubt will depend in great measure on the management of law—both internal and international, both as written and as applied. Already, however, we can see (again) at the international or transnational level the replication of contradiction, corruption, complexity, and the makings of crisis. The same racialized and identity-inflected dynamics that historically gave shape to law's structural dissonance and systemic dysfunction at the national/domestic level are today giving shape to

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[168] For a widely-noted rendition of this line of thinking, see BOBBITT, THE SHIELD OF ACHILLES, *supra* note 6; BOBBITT, TERROR AND CONSENT, *supra* note 6, at 9.

[169] *See* Julian Agyeman et al., *Joined-up Thinking: Bringing Together Sustainability, Environmental Justice and Equity*, *in* JUST SUSTAINABILITIES: DEVELOPMENT IN AN UNEQUAL WORLD 1–12 (Julian Agyeman et al. eds., 2003). *See generally* AMY CHUA, WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY (2003); BERTA ESPERANZA HERNÁNDEZ-TRUYOL & STEPHEN J. POWELL, JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS (2009).

[170] For more on this concept, see generally Symposium, *Free Market Fundamentalism: A Critical Review of Dogmas and Consequences*, 5 SEATTLE J. FOR SOC. JUST. 497 (2007).

[171] For a chilling but (still) fictional rendition of everyday human life in this predicted future, see GARY SHTEYNGART, SUPER SAD TRUE LOVE STORY (2010). For a non-fictional rendition, see MORRIS BERMAN, DARK AGES AMERICA: THE FINAL PHASE OF EMPIRE 16–34 (2006).

internationalized or transnationalized law.[172] In short, the identitarian frame misalignments that CRT confronted within the nation-state during the past twenty years now await critical race interrogation across the world system of nation-states caught in the riptides of globalized neoliberalism.

3. *Law, Nation-State, and Racialization: From Colonialism to Imperialism to Global Neoliberalism*

Historically, the dominant narrative of international law is that it is the result of practical and political arrangements devised pragmatically by dominant sovereigns on the basis of the nation-state system. This dominant narrative is a colorblind fiction because the origins of international law—like the origins of law generally—are found in the more specific need of the ruler to rule the ruled. International law, like domestic law, is the product of local and national elites constructed through race and gender politics reproducing at the trans-national level the same arrangements imposed at the national and sub-national levels: relationships of domination and subordination in the name of goals and values like justice, equality, and dignity.

Thus, the origins of internationalized law are found in the structural need of (white) colonial elites to control and exploit their (non-white) colonies. It is found in the need of dominant nation-states in the North and West of the globe during the fifteenth through nineteenth centuries to promote their own sense of security, and their self-serving systems of exploitative commerce.[173] More recently, after World War II, as we noted above, we see the emergent and consolidating system of international law take on a tripartite agenda that crystallizes during the twentieth century these original and historical imperatives. The racial and racializing continuities that stretch from colonialism to imperialism and, now, neoliberal globalization underscore the continuities of "domestic" racisms within the nation-state and those that travel and replicate transnationally across the face of this Earth.

Not too surprisingly, the first item on this modern and re-racialized agenda remains the management of former colonies—now denominated as a "third world"—in a manner that still preserves "traditional" neocolonial privilege.[174] Not unconnected to this aim is the second agenda item:

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[172] Of course, oftentimes the two—internal and international—interact, overlap or blur. *See* JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES (2d ed. 2003).

[173] *See generally* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004); NIALL FERGUSON, EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER (2002); NICK ROBINS, THE CORPORATION THAT CHANGED THE WORLD: HOW THE EAST INDIA COMPANY SHAPED THE MODERN MULTINATIONAL (2006).

[174] Indeed, an entire system of international institutions created by nation-states to pursue these interests has been a principal feature of international lawmaking since World War II. *See, e.g.*,

orchestrating the management of Cold War politics at a global level to ensure again the triumph of the (white-controlled) North and West nation-states, and their political or economic preferences, in the "new" world order under construction after the Second World War.[175] And the third item of this modern agenda for internationalized law has been the promotion of economic "globalization" as a process that systematically buttresses neocolonial hierarchies and related socioeconomic arrangements through the care and feeding of mega multinational monsters.[176] These three modern-day and continuing pursuits effectively crystallize the historical racial imperatives and "traditional" political utilities of international law based on colonial, national, imperial and, now, globalized systems of law and power.

Of course, since World War II, international law also has been increasingly influenced by the mobilization of mass social movements, initially organized around national and class interests but more recently organized around other categories of identity such as race, sex, sexual orientation, religion, and other axes of identification and regulation.[177] Thus, the emergence of "civil society" at both the national and transnational levels has added additional actors to the historical makers of international law.[178] More importantly, the emergence of social movements in this increasingly globalized political setting has created an opening for the articulation of antisubordination principles within the making of international law.[179]

Nonetheless, the contemporary transnational status quo engendered by this complex of forces slowly but surely has led to a "neoliberal" conception of globalization and internationalization that effectively demands a normative, political and legal preference for profit over people, especially "surplus" people. As many observers have noted, this neoliberalization of internationalized legal arrangements has promoted human rights mostly for corporations.[180] Despite protest, critique and resistance, neoliberalism, in practice, has amounted to corporate globalization.

This legacy, most recently and ironically, is being consolidated by the

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Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41 HARV. INT'L L.J. 529, 540–41 (2000).

[175] *Id.* at 542–46.

[176] *Id.* at 547.

[177] *Id.* at 561–76; *see also* Balakrishnan Rajagopal, *International Law and Social Movements: Challenges of Theorizing Resistance*, 41 COLUM. J. TRANSNAT'L L. 397, 400 (2003).

[178] *See, e.g.*, NGO INVOLVEMENT IN INTERNATIONAL GOVERNANCE AND POLICY: SOURCES OF LEGITIMACY 1–6 (Anton Vedder ed., 2007).

[179] *See* GAETANO PENTASSUGLIA, MINORITIES IN INTERNATIONAL LAW 46–51 (2002).

[180] *See, e.g.*, B.S. Chimni, *The Past, Present and Future of International Law: A Critical Third World Approach*, 8 MELB. J. INT'L L. 499, 506 (2007) (discussing the features of "a world dominated by capital").

"neoconservative" construction of globalization under internationalized law. Some observers say this neoconservative approach to law, transnationalism and globalization aims to construct an imperial sovereign, or an "imperial sovereignty," to push for a *nationalist* international law.[181] Either way, then, the structural and material bottom line once again remains constant: neoconservatism, like neoliberalism, is perfectly content with a racialized yet colorblinded transnational system of law designed to freeze tops and bottoms in the current global order precisely in their traditional, neocolonial and subordinated/privileged places.

Thus, as it was in the beginning, international law today continues to be a racial and material project of the (white-identified) Global North and West in which the (colored) Global South is the object of material control and political rule. International law, like domestic law, thereby protects the identitarian interests and material legacies of colonialism and imperialism in the name of democracy and human rights. International law, like domestic law, consequently is a project freighted with contradiction, corruption, and complexity. Like domestic law, international law is a recipe for brewing crisis for very similar reasons: both are constructed and controlled by ruling neocolonial elites and their agents to proclaim one thing but to do quite another.

In material and more concrete terms, internationalized law is being used to produce a *global* identity-based economic space, much like domestic law was used to produce a *national* identity-based economic space; much like domestic law has been deployed to produce and prop up a national racial-capitalist class hierarchy, international law is being used to produce and prop up a transnational racial-capitalist class hierarchy. At both levels, legalized injustice is a key hallmark of these socio-legal regimes, which relentlessly commodify both the human species and its habitats in the avowed name of "liberty" but in the actual interest of those racialized, neo-colonial elites who profit most directly from today's version of "free" market fundamentalism. Thus, contemporary international law typically protects the interests of capital over labor, of the corporation over the environment or the community, of exploitation over sustainability. Like traditional forms of domestic law, it thereby effectively and structurally elevates the interests of identity-based elites over similarly identity-based masses. The non-stop chatter about human rights for humans in peril oftentimes remains mostly just that: chatter.

No wonder, then, that international law now is increasingly characterized by the same dynamics of identitarian contradiction under the rule of law that gave shape to domestic law in centuries past. Both levels

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[181] *See* Alejandro Lorite Escorihuela, *Cultural Relativism the American Way: The Nationalist School of International Law in the United States*, 5 GLOBAL JURIST FRONTIERS, no. 1, 2005 at 1, 116–20, 162.

of law are based on noble and inspiring specified values but applied by judicial appointees and other legal actors in direct or indirect repudiation or subversion of them; both are characterized by an overt commitment to justice coupled with a covert sabotaging of that commitment. Like domestic law, international law ensures racialized (and gendered) instability, exploitation, violence, and inequality—all in the name of colorblind development, security, freedom and justice. Like domestic law, international law is driven more by raw power and "traditional" neocolonial identity politics than by principled or colorblind justice.[182]

B. *Critical Race Theory in Law and Society: At the Junction of Racialized Colorblindness Within and Beyond the Nation-State*

Focusing initially on the state of current race-relations affairs within this nation-state, it bears emphasis that the incidents we noted above cut across multiple sectors of American society, and involve both everyday folks from all walks of life and "leaders" from coast-to-coast.[183] The range and scope of these incidents manifestly suggest a society permeated by race consciousness of multiple sorts. Moreover, the mass media's fascination with these incidents demonstrates that a huge market consumes these spectacles avidly.[184]

The flammability of these incidents, and the media frenzy that they repeatedly instigate, show time and again that even this angle of racial injustice produces a profit. Given the racial demographics and the national audience, it is quite evident that the racial majority consumes these racially-conscious incidents as avidly as any other sector of society, if not more: without an attentive and receptive national audience of white Americans, certainly these incidents would receive much less air time. In short, these incidents and their media power illustrate that the long history of malignant racial consciousness instilled deeply in the national character and psyche by the white majority of the founding generation and their successors-in-interest since then through all kinds of invidious lawmaking and racial politics, remains not only alive, but also kicking. That some of these incidents come packaged in post-racial rhetoric is of course the Orwellian part of it all—the key part that critical race truth-telling must pierce.

More stupefying even is how post-racialism itself seems to be a color map of the nation's re-racialization: what can it mean that, in all of the incidents we recite above, we encounter racially charged incidents triggered by members of the racial majority? Put differently, what can it

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[182] For a terrifying insider account, see JOHN PERKINS, CONFESSIONS OF AN ECONOMIC HIT MAN (2004).

[183] *See supra* notes 90–97 and accompanying text.

[184] *See supra* Part II.A.1.

mean to racial and social justice in this particular nation-state when post-racial politics and rhetoric are advocated mostly by white pundits, politicians and similar characters? What can it mean, in other words, when the perspective of individuals on post-racialism is itself a code to their own sense of race, racialization and racial in/justice? It can only mean, as we explain above, that post-racialism is, at best, a claim incoherent on its face and, at worst, a dangerous hoax that serves to perpetuate still-entrenched patterns of racial stratification based on centuries of *de jure* white supremacy.[185]

This very hoax, as we mentioned earlier, is the current iteration of white supremacy that CRT, embedded both within the law and inside this nation-state, is uniquely positioned to unmask and combat—just as twenty years ago, CRT scholars began a similar project focused on the limits and limitations in civil rights lawmaking.[186] Checking the mis/use of legal ideology to undo the promise of equal justice under law in racially-tinged ways is CRT's original antisubordination mission. In the same way that CRT helped to reveal formal equality as a social mirage, CRT must now do the same with colorblindness and post-racialism, even as the nation-state is increasingly challenged both from within and without.

As we sketched above, the identity-centric maneuvers that have marred the integrity of the nation-state and the rule of law now mar the seeming emergence of a new order based on predicted market-states. In the same way that CRT was able to unmask the racial disguises of the traditional nation-state, the question now pressing is whether we can do the same going forward in these times of brackish flux. The foundation we have established since 1989 provides our point of departure for meeting the challenges now on the landscape. Our socially relevant translation of CRT in the coming years and decades to ever-morphing rearticulations of white supremacy and Euro-heteropatriarchy, both within and beyond the nation-state framework, provides both the context and the challenge for our work at *this* historical juncture.

Thus, looking beyond this nation-state, pressing Critical Race questions include: How will we deploy Critical Race theorizing to unmask the facially-neutral racial politics of post-racialism and legal colorblindness both using and transcending the nation-state? Or, how will CRT get ahead of the curve regarding the predicted, and perhaps impending, paradigm shift between nation-state and market-state systems? How will CRT, rooted in the (legal) academy of the United States, engage the Global South to ensure that old and new sovereignties do not converge to rearticulate and reinscribe across this Earth "traditional" patterns of racial stratification? In this brackish moment of traditional and prospective

[185] *See supra* text accompanying notes 112–14.
[186] *See supra* text accompanying notes 3–4.

sovereignties, how will CRT strive to rearticulate citizenship to ensure that this legal concept does not once again revert to a facile tool of white supremacy and anti-color xenophobia? And how will CRT help translate democracy from its current, formalistic practice within weakened nation-states that prop up unjust neocolonial skews to a robust engine of social justice that perhaps could lead to a truly "post"-colonial and functionally post-racial society? How, in other words, should CRT endeavor to interconnect the legal, the socio-legal, and the socio-economic in time of flux and paradox that nonetheless converge again on racial erasure in favor of white-identified capital and "traditional" biases that structurally and culturally privilege whiteness and neocolonial elites in general?

III. CONCLUSION: "WHY LAW?" NOW AND AFTER THE NATION-STATE?

Ending with Crenshaw's orienting question, we now return to the centrality of law in the construction, operation and maintenance of racial injustice within, and increasingly beyond, the nation-state. "Why law?" Because law is at the center of the paradox that maintains racial hierarchy, and because we are uniquely positioned within law *and* within the racist belly of this nation-state beast—the hyperpower able to roil the entire world. So long as law creates a market for exploitation, so long as law guarantees a profit from subjugation, so long as law is the racialized tool of control and oppression, racialized inequality will prosper. The reason why Critical Race theorizing had to and did originate from law is because law is a key, if not the primary, enforcer of the colorline—both within and beyond the nation-state. And this historical reality explains why the Critical Race project, rooted in and informed by a legal criticality of color, cannot falter now—or ever. So long as law is key to social and material racial hierarchy, CRT will be key to actual and substantive racial justice. Crenshaw's opening question and body of work stand as a reminder of this bottom-line in a time of momentous struggle over the meaning of race and justice during this still-young century both within and beyond the nation-state.