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The Legal Foundations of White Supremacy

Erika K. Wilson
University of North Carolina School of Law, wilsonek@email.unc.edu

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THE LEGAL FOUNDATIONS OF WHITE SUPREMACY

ERIKA K. WILSON[1*]

[1*] Erika K Wilson is a Reef C. Ivey II Term Associate Professor of Law at the University of North Carolina at Chapel Hill. She has obtained both a baccalaureate degree from the University of Southern California and a law degree at UCLA School of Law.

I. INTRODUCTION

The election of former President Barack Obama, the country's first African-American president, temporarily changed the discourse around race in America. Despite America's sordid racial history, President Obama's election was hailed as evidence that race was no longer a salient factor in meting out opportunities—that the country was finally "post-racial."[2]Indeed, some even went so far as to suggest that his election signified "the gradual erosion of 'whiteness' as the touchstone of what it means to be American."[3]

Recent events have upended this "post-racial" narrative. In the wake of the racially charged election of Donald J. Trump and the violent white supremacist rally in Charlottesville, Virginia, race generally and white supremacy specifically are again taking center stage.[4] For many, the reemergence of the kind of overt manifestations of white supremacy that were unveiled in Charlottesville was particularly jarring. It forced many people to grapple with the reality that white supremacy, a phenomenon that many believed had been relegated to a historical footnote, still exists and is stronger than ever.

Yet those such as myself who examine race critically have long been aware that the fissures caused by race generally and white supremacy specifically, never went anywhere, notwithstanding the election of the country's first self-identified African-American president.[5] Race generally and white supremacy specifically are embedded into the framework of most American social institutions. As a result, now more than ever, it is imperative that we critically examine all forms and manifestations of white supremacy.

This paper focuses on a very important part of white supremacy — the legal foundations of white supremacy. The central thesis of this paper is that American law has historically played a vital

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[2] *See* Tim Rutten, *The Good Generation Gap,* L.A. TIMES (Feb. 6, 2008), http://articles.latimes.com/2008/feb/06/opinion/oe-rutten6 (noting that Obama "personifies and articulates the post-racial America in which most of our young people now live."); Shelby Steele, *Obama's Post-Racial Promise*, L.A. TIMES, (Nov. 05, 2008), http://www.latimes.com/opinion/opinion-la/la-oe-steele52008 nov 05-story.html.

[3] *See* Hua Hsu, *The End of White America*, THE ATLANTIC ONLINE, (Jan. - Feb. 2009), http://www.theatlantic.com/magazine/archive/2009/01/the-end-ofwhiteam erica/7208/.

[4] Joy-Ann Reid, *The Seeds of Trump's Victory Were Sown The Moment Obama Won*, NBC NEWS (OCT. 17. 2017), https://www.nbcnews.com/think/opinion /seeds-trump-s-victory-were- sownmoment-obama-won-ncna811891 (noting that "[e]conomic anxiety" didn't elect Trump. The desire of millions of Americans, from the farms to the suburbs, to see Mexican immigrants deported, a wall erected across the U.S. southern border and Muslims banned from entering this country did."); Matt Stevens, *White Nationalists Reappear in Charlottesville in Torch-Lit Protest*, N.Y. TIMES (Oct. 8, 2017), https://www.nytimes.com/2017/10/08/u s/richard-spencercharlottesville.html?mtrref=www.google.com&gwh=D4830E7 ACCD653651410036790CC5D51&gwt=pay.

[5] Kimberle Crenshaw, *The Court's Denial of Racial Societal Debt*, 40 AMERICAN BAR ASSOCIATION (2014), https://www.americanbar.org/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_1_50_years_later/court_denial_racial_debt.html; Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009).

role in constructing white supremacy. While America has eliminated overt race-conscious laws that favor whites, the law continues to play a critical role in maintaining white supremacy today. Unless and until we commit to understanding the history of the law in constructing white supremacy and the ways in which modern iterations of law continue to perpetuate white supremacy, white supremacy will remain an enduring feature of American society.

Importantly, in using the term white supremacy, I do not mean the kind of white supremacy used in popular discourse to mean individual animus or hate towards individuals or groups who are not white. While that kind of white supremacy is certainly invidious and worth paying attention to,[6] that is not the kind of white supremacy on which this paper is focused. Instead, I use the term white supremacy as defined by legal scholar Professor Frances Lee Ansley to mean:

> A political, economic and cultural system in which whites overwhelmingly control power and material resources, and in which white dominance and non-white subordination exists across a broad array of institutions and social settings.[7]

Notably, this definition of white supremacy focuses primarily on the institutional arrangements that underlie white supremacy and only secondarily on individual race-based animus. More importantly, it emphasizes the ways in which white supremacy undergirds the way we organize our society, and the ways in which we distribute resources and power.

There is often a fair amount of resistance to discussing white supremacy outside the context of individual race-based animus.[8] Discourse that highlights institutionalized white supremacy is often cast as victim blaming or playing the race card.[9] Yet the reality of the kind of institutionalized white supremacy articulated by Professor Frances Lee Ansley's is ever apparent. While people of color, particularly African-Americans, made sizeable gains in obtaining resources and power in the last three decades, whites continue to own a disproportionate share of resources in this society and to exercise a significant amount of power.

Two concrete examples of this are seen in the racial wealth gap and the demographics of the United States Congress. With respect to the racial wealth gap, data shows that whites families had 8 times more wealth than Black families in 1983.[10] By 2016, that number had grown to ten times the amount.[11] Further, the racial wealth gap between white and Hispanic families is also

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[6] Overt expressions of white supremacy as manifested in individual hate ideology is on the rise. *See e.g.*, Meghan Keneally, *The State of White Supremacy and Neo Nazi Groups in the US*, ABC NEWS (Aug. 15, 2017), http://abcnews.go.com/US/ state-white-supremacy-neo-nazigroupsus/story?id=49 205764 (describing the rise of white supremacist hate groups and the domestic threat they pose to the U.S.).

[7] Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n. 129 (1989).

[8] *See e.g.*, Shelby Steele, *The Exhaustion of American Liberalism*, WALL STREET JOURNAL (Mar. 5, 2017), https://www.wsj.com/articles/the-exhaustion-ofamer ican-liberalism14887 51826, (arguing that "[t] he Trump election suggests an exhaustion with the idea of white guilt, and with the drama of culpability, innocence and correctness in which it mires us").

[9] *Id.*

[10] *See* Nine Charts About Wealth Inequality in America, Oct. 5, 2017, http://apps. urban.org/features/wealth-inequality-charts/.

[11] *Id.*

stark, with whites having 11 times as much wealth as Hispanics in 1983 and 8 times as much in 2016.[12] Recent research makes clear that the racial wealth gap is the result of racialized policies that infused the American economy with "racism and the ongoing authority of white supremacy" at every point.[13]

Similarly, with respect to the demographics of the United States Congress, notwithstanding the growing racial and ethnic diversity in the United States, 90% of our U.S. Senators are white.[14] The demographics of state legislatures are equally bereft of diversity.[15]

With the operational definition of white supremacy provided by Professor Frances Lee Ansley and the above two examples in mind, I will now turn to the role that the law played, and continues to play, in constructing and maintaining white supremacy. I suggest that there were three primary ways in which the law served to initially construct and later maintain white supremacy. I call these the three pillars of the legal foundations of white supremacy.

Under the first pillar, the law initially operated to construct white supremacy by codifying race as a concept and creating a racial hierarchy that continues to exist today. Under the second pillar, the law operated to sustain white supremacy by implementing a race-conscious system of laws governing the distributing resources in a way that favored those raced as white over everyone else. Lastly, under the third pillar, though overt race-conscious laws that favored whites were eventually dismantled, the law shifted to a purported "color blind," and then later to a "post-racial," legal regime without affirmatively dismantling the effects of the previous race-conscious system of resource distribution. This shift has allowed white supremacy to not only continue, but to proliferate. The sections that follow will describe and analyze each of these three pillars.

A. Pillar Number One: The Role of The Law In Constructing Race and Racial Hierarch

In discussing race generally and white supremacy specifically, it is important to note that there is no such thing as biological race. What I mean by this is that there is no "Black" gene or "white"

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[12] *Id*.

[13] *See* William Darity Jr. et al., *What We Get Wrong About Closing the Racial Wealth Gap,* SAMUEL DUBOIS COOK CENTER ON SOCIAL 1, 3 (April 2018), https://socialequity.duke.edu/sites/socialequity.duke.edu/files/siteimages/FINAL%20COMPLETE%20REPORT_.pdf.

[14] Sheryl Estrada, *The 115th Congress Not a Model for Diversity*, DIVERSITY INC., Jan. 4, 2017, http://www.diversityinc.com/news/115th-congress-not-modeldiver sity/.

[15] *See* Amber Phillips, *The Striking Lack of Diversity in State Legislatures*, WASH. POST (Jan. 16, 2016) (stating that only 14% of the members in state legislatures identify as persons of color), https://www.washingtonpost.com/news/thefix /wp/2016/01/26/the-real-problem-with-diversifying-congress-state-egislatures-are-even-lessdiverse/?noredirect=o n&utm_term=.6297714a9328.

gene common to all individuals who are raced as "Black" or "white." In fact, scientific research demonstrates that intraracial genetic variation is greater than interracial genetic variation.[16]

To be clear, I am not claiming that there are no genetic differences among humans of different races; clearly there are variations in things like genes that produce pigmentation that results in different humans having different skin tones. But there is no gene or set of genes that corresponds to the taxonomy of culturally significant racial categories, which we label as Black or white. Put another way, there is nothing biologically innate about those racially designated as Black that would constrict their abilities and lead them to be in a position such that they have less wealth or political representation than whites.

Instead, race is entirely socially constructed, lacking any meaningful grounding in biological fact. The distinction between biological race and race as a social construct is an important one. To conceptualize race as biological suggests that group differences are deeply embedded in nature and highly determinative of group character; under this approach, racial identity is both fixed and easily known.[17] In contrast, conceptualizing race as a social construct acknowledges the reality that both race and their associated characteristics are the products of social practices.[18]

Once one accepts that race is indeed a social construction, then the next question becomes why race was constructed in the manner that it was in the United States, or — why did the United States ended up with the taxonomy of culturally significant racial categories that we currently have?

To answer that question, we must begin with the story of chattel slavery of Africans. Africans in America were present in the Colonies as early as 1619. [19] However, the social status of Africans was varied, not fixed. In other words, there was no "irrebuttable presumption that all Africans were "slaves" or that slavery was the only appropriate status for them." [20]

Instead, Blacks in some colonies held the same rights as white indentured servants — they were permitted to own property and get married for example.[21]After completing the terms of their servitude, they were freed, and had the *status* of free men.[22] Distinctions between African and white indentured labor grew over time, however. The distinction began to happen in part due to strife with white laborers and inability to control white laborers, which lead to decreasing terms of service being introduced for white laborers.[23]

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[16] *See generally*, D. J. Witherspoon et al., *Genetic Similarities Within and Between Human Populations*, 176 GENETICS 351–59 (2007).
[17] *See* Ian F. Haney Lopez, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143, 1164 (1997).
[18] *Id*.
[19] *See* William M. Wiecek, *The Origins of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1741 (1996).
[20] Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1716-17 (1993).
[21] *See* JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 167-72 (8th ed. 2000) (describing how some slaves during the colonial period were successful in limiting their period of servitude and obtaining substantive rights).
[22] Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1718 (1993).
[23] *Id.*

While strife with white laborers was occurring, the demand for labor was intensifying in the colonies. This resulted in in a greater reliance on African laborers, who were easier to mark as laborers and control due to their skin color.[24]

Gradually, this led to more legal rights for white laborers and fewer rights for African or Black laborers. Although the precise causes of the increasing gap between the status of African and white labor is contested by historians, there is no question that, by the 1660s, the law began to degrade the status of Africans, making them a permanent underclass as a matter of law by virtue of the color of their skin. For example, in 1664, the Maryland legislature enacted a statute that said that, "All Negroes or other slaves already within the province, and all Negroes and other slaves to be hereafter imported into the province, shall serve durante vita [hard labor for life]."[25]

In additions to statutes like the Maryland statute, between 1680 and 1682, the first slave codes appeared, codifying the extreme deprivations of liberty for Africans that already existed as a matter of social practice.[26] The slave codes, among other things, prohibited Blacks from owning property, traveling without permits, assembling in public, owning weapons, or receiving education.[27] Laws like the slave codes turned racial identity into a legal status: Black" racial identity marked who was subject to enslavement, while "white" racial identity marked who was "free" or, at minimum, not a slave. Thus, *slavery itself was a legal status*.

Laws constructing chattel slavery in America were the very foundation of the social construction of race. They resulted in Black and white racial designations becoming much more than a designation of physical difference. Instead, they resulted in Black and white racial designations becoming polar constructs, in terms of rights and access to material resources and power.[28]

Even after slavery ended, the Black-white polar construct in terms of rights and access to resources and power remained. Laws such as Black codes continued to merge racial identity with legal status.[29] Black codes had the effect of restricting Black people's freedom, allowing whites to obtain a cheap or free supply of labor (by imprisoning Blacks if they violated a Black code), and generally continuing to consign Blacks to a second-class inferior status.

The merging of racial identity with legal status laid the foundation for what Critical Race Theory ("CRT") scholars call our current "racial hierarchy."[30] According to CRT scholars, a racial hierarchy exists in which whites occupy the top positions with respect to resources, power, wealth, and status; Blacks occupy the bottom rung, and all other races are slotted somewhere

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[24] *Id.*

[25] *See* Ross Kimmel, *Blacks Before the Law in Colonial Maryland*, (Nov. 14, 2000), http://msa.maryland.gov/msa/speccol/sc5300/sc5348/html/chap4.html.

[26] Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1718 (1993).

[27] *Id*.

[28] *Id*.

[29] *See* Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 297 (2017) (noting that "a racial hierarchy emerged in which Blackness was linked with bondage and whiteness linked with freedom; in this way, the slave codes provided the foundation for the initial racial classification system in America.").

[30] *Id*. at 297.

between Black and white, depending upon their ability to approximate whiteness. [31] Thus, the law's role in constructing race and racial hierarchy was the first foundational pillar in establishing white supremacy.

B. PILLAR NUMBER TWO: RACE CONSCIOUS LAWS USED TO DISTRIBUTE POWER AND RESOURCES

The second legal foundational pillar in constructing white supremacy was the use of race-conscious laws to distribute both resources and power in a way that favored whites over everyone else. While many people may be familiar with the famous Judge Harlan quote from the dissent *in Plessy v. Ferguson*, in which he says "our constitution is colorblind,"[32] the reality is that much of American law for much of this country's history was indeed very race-conscious. Race-conscious laws formed the foundation for the white supremacy —again using the operational definition provided by Professor Frances Ansley Lee — that exists today. I will use three examples to illustrate this point: the foundational conception of legally enforceable property rights, immigration, and laws and policies regarding housing.

1. Property Rights

At its inception, property rights in the United States were governed by what is known as the Doctrine of Discovery.[33] Under the Doctrine of Discovery, when European, Christian visitors arrived on new lands, they automatically gained sovereignty and property rights in the lands if the indigenous inhabitants of that land were non-European and non-Christian.[34] This was the case even though the indigenous inhabitants of the land already owned, occupied, and used the lands in ways that they saw fit.[35] Nevertheless, under the guise of the Doctrine of Discovery, the European Christian visitors to the land were deemed to establish property rights in the land on the grounds that they "discovered" it. The property right was defined "as being essentially an exclusive fee title held by the 'discovering' European country but subject to the Indian occupancy right."[36]

Importantly the courts played an important role in codifying the Doctrine of Discovery. In the seminal case *Johnson v M'intosh*, [37] the Supreme Court upheld the basic parameters of the Doctrine of Discovery. They did so by finding that Native Americans did not have title to the land that they occupied prior to the arrival of the European visitors; instead, they only had a form of possession that they could not convey.[38]

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[31] *Id.* at 300.
[32] Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).
[33] *See generally***,** Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1 (2005).
[34] *Id*. at 4.
[35] *Id*.
[36] *Id*. at 5.
[37] Johnson v. M'Intosh, 21 U.S. 543 (1823).
[38] *Id.* at 574.

The Doctrine of Discovery upheld by the Court in M'intosh was undergirded by the normative belief that Christian Europeans were of a superior race and culture to Native Americans. Ultimately, the United States enforced this Doctrine of Discovery against Native Americans and led the United States' expansion across the continent.[39] Thus, from the country's inception, race-conscious laws were used to establish enforceable property rights, with those laws favoring whites and disfavoring Native Americans. The Doctrine of Discovery is still good law today.

B. Immigration

In addition to race conscious laws related to enforceable property rights, immigration and naturalization laws were also race-conscious from their inception. The Immigration and Naturalization Act of 1790, the country's first immigration and naturalization law, limited citizenship to free whites.[40] The statutory text requiring one to be white to obtain citizenship led to persons litigating the issue of their whiteness to try and prove that they should be entitled to citizenship. In cases often called "racial prerequisite cases," courts were asked to decide which nationalities qualified as white for purposes of being able to become a citizen under the Immigration and Naturalization Act.[41] In these racial pre-requisite cases, courts went to great lengths to articulate who could not be counted as white, typically through a process of exclusion rather than through an articulated statement of criteria for determining whiteness under the statute. [42]

The trajectory of immigration law continued to be race-conscious in a way that favored whites for many years. For example, the 1882 Chinese Exclusion Act limited Chinese immigration and barred them from becoming naturalized U.S. citizens.[43] The Immigration Act of 1924 enacted quotas on immigration, denied entry to Mexicans, and disproportionately excluded Eastern and Southern Europeans and Japanese.[44] Racial quota restrictions based on nationality remained the law of the land until 1965 with the passage of the 1965 Immigration and Naturalization Act.[45]

Importantly, race-conscious immigration laws arguably reified the notion that non-whites were inferior and an "other." Returning to my operational definition of white supremacy, they also

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[39] *See generally***,** Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1 (2005).

[40] The Immigration and Naturalization Act of 1790, ch. 3, 1 Stat. 103 (1790) *repealed* by Naturalization Act of 1795, ch. 20, 1 Stat. 414 (1795).

[41] *See generally* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

[42] *Id*. at 12 ("no court offered a complete typology listing the characteristics of Whiteness against which to compare the petitioner. Instead, the courts defined 'white' through a process of negotiation, systematically identifying who was non-white.").

[43] Chinese Exclusion Act, ch. 126, §14, 22 Stat. 58, 61 (1882) ("That hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed."), *repealed by* Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 60 (1943).

[44] Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924), *amended by* Immigration Act of 1952, 66 Stat. 163 (1952); *see* Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Re-examination of the Immigration Act of 1924*, 89 J. AM. HIST. 67-92 (1999).

[45] Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

helped to entrench white supremacy by feeding the unconscious sense of white superiority and entitlement with respect to citizenship and framing the normative belief regarding who is "really" an America, much of which we can see still strands of in today's immigration debate.[46]

C. Housing Policy

The final example of race-conscious law that helped to entrench white supremacy that I want to highlight are laws and policies related to homeownership. Homeownership is one of the greatest sources of wealth for individuals in America.[47] Disparate rates in homeownership between Blacks and whites can be attributed in large part to the racialized wealth gap that was discussed in Section I. The law played a fundamental role in expanding homeownership for all Americans, and for creating the disparate rates in homeownership between Blacks and whites.

After the Great Depression, the federal government introduced a series of programs to make home ownership widely available to the American public. One of those programs was the creation of the Home Owners' Loan Corporation ("HOLC").[48] The HOLC purchased and refinanced loans for homeowners who were in danger of bank foreclosure due to their failure to keep up with existing mortgage payments or balloon payments.[49] HOLC submitted written appraisals regarding the fitness of properties and communities to receive loan assistance. However, the appraisal process was not race neutral.

Instead, HOLC created a four color Residential Security Map to visually represent the desirability of providing mortgage financing, with green representing the most desirable and most likely to receive loan assistance, blue second, yellow third, and red as the least desirable and least likely to receive loan assistance.[50] Neighborhoods were downgraded if they were non-white, immigrant, or both. Neighborhoods with large non-white populations, especially Black populations, were coded in red, in a practice that became known as "redlining."[51] While the impact of the HOLC program was minimal,[52] the import of the redlining practice it developed was not. The HOLC system was adopted by private institutions in rendering loan decisions, and

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[46] *See generally*, *Homeownership and Wealth Creation*, N.Y. TIMES (Nov. 29, 2014), https://www.nytimes.com/2014/11/30/opinion/sunday/homeownership-an d-wealth-creation.html (analyzing the central role that homeownership plays in wealth creation).

[47] See Matthew Desmond, *How Homeownership Became the Engine of American Inequality*, N.Y. TIMES (Aug. 2, 2016), https://www.nytimes.com/2017 /05/09/magazine/how-homeownership-became-the-engine-of-american-inequality.html.

[48] *See generally*, Peter M. Carrozzo, *A New Deal for the American Mortgage: The Home Owners' Loan Corporation, the National Housing Act and the Birth of the National Mortgage Market*, 17 U. MIAMI BUS. L. REV. 1 (2008).

[49] *Id*.

[50] *See generally*, Professor Jack Dougherty, *Home Owners' Loan Corp., Residential Security "Redlining Map" and Area Descriptions* (1937), http://magic.lib.uconn.edu/magic_2/vector/37840/primary_source/hdimg_37840_064_1937_holc_nationa l_archives_trinity.pdf (demonstrating that race and social status were considered when redlining neighborhoods in Hartford, Connecticut).

[51] *Id*.

[52] *See generally*, Peter M. Carrozzo, *A New Deal for the American Mortgage: The Home Owners' Loan Corporation, the National Housing Act and the Birth of the National Mortgage Market*, 17 U. MIAMI BUS. L. REV. 1 (2008).

the agency's Residential Security Maps were broadly distributed throughout the lending industry.[53]

In addition to the HOLC program, which aided individuals with distressed mortgages, the federal government also sponsored the Federal Housing Administration ("FHA") lending program. The FHA insurance program offered insurance to private lenders to encourage them to invest in residential mortgages. [54] Essentially, the FHA would insure private loans such that if the lender defaulted, the FHA insurance would cover the cost of the loan. Without the FHA insurance, private lenders were reluctant to lend to borrowers.[55] By the end of 1972, the FHA had assisted 11 million families in buying houses and another 22 million families in making home improvements.[56] The FHA program is widely credited with making homeownership accessible to most Americans and creating the middle-class as we know it today.[57]

Yet the FHA also used race-conscious policies in deciding to whom to lend that had the effect of denying Black borrowers access to loans, thereby denying them access to homeownership and to coveted middle class status. Most notably, the FHA adopted the HOLC residential security maps and the redlining process, which resulted in the FHA not insuring loans in areas marked red on the map, where were predominantly Black areas, and primarily insuring loans in the more desirable blue areas, which were predominately suburbs that had restrictive racial covenants that would not allow Blacks to purchase homes there.

In addition to employing the Residential Security Map, the HOLC also adopted an underwriting policy that contained race-conscious language indicating that they should seek to insure loans that would result in neighborhoods retaining the same racial character, thereby enforcing this segregation,[58] and that would not result in the entry of so called undesirable minority groups.[59] As a result, Blacks were denied access to traditional sources of housing finance by institutionalized procedures that purposely sought to exclude them and to favor whites. This in turn allowed whites to benefit from homeownership insofar as they were able to build equity and use that equity to start businesses, finance education, or purchase additional homes, to use a few examples.[60] Again, returning to the operational definition of white supremacy, race-conscious housing policies entrenched white supremacy.

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[53] *See* Charles L. Nier, III, *Perpetuation of Segregation: Toward A New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617, 623 (1999).

[54] *See* Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 46 ST. LOUIS L. J. 665, 677 (2002) (explaining the import of the FHA program and noting that "the role of FHA was not to make mortgage loans, but to insure them.").

[55] *Id*. ("Because FHA insured lenders against loss, lenders were willing to make loans on terms that were acceptable to FHA; and the terms that FHA set made homeownership affordable to middle-income people for the first time.").

[56] Keith T. Jackson, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES, 213 (1985).

[57] *Id*.

[58] *See* Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 46 ST. LOUIS L. J. 665, 677-78 (2002).

[59] *Id*.

[60] *See* Keith T. Jackson, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985).

C. Pillar Number Three: From Race-Conscious To Color-Blind and Post-Racial

A prolonged period of race-conscious laws helped to construct white supremacy by affording rights based on group based racial identity — from property rights, to citizenship, to home loans, using but a few examples. With the enactment of laws such as the Civil Rights Act, which prohibited discrimination based on race, the hope was that white supremacy would dissipate. But that turned out not to be true. Instead, the law eventually shifted in two ways that helped to sustain white supremacy.

First, the law shifted to a paradigm in which the distribution of rights was premised on colorblind liberal individualism. Colorblindness calls for a principled refusal to recognize or make racial distinctions at all.[61] It is premised on the notion that all racial distinctions are invidious. Colorblindness, when adopted as part of legal jurisprudence, strips away the historical meaning of race. Race no longer carries the history of exclusion and denial for Blacks or the corresponding history of inclusion and benefits for whites. Instead, it is simply a benign classification based on phenotype. When this understanding of colorblindness is used to examine laws that contain racial classification, Jim Crow segregation and race-conscious affirmative action programs erroneously become synonymous. On this view, both are invidious because they are based on racial categorizations.

A good example here is the *Parents Involved in Community Schools v. Seattle School District No. 1* school desegregation case.[62] In that case, the Supreme Court struck down a voluntary school desegregation plan constructed by school districts in Seattle and Louisville in order to maintain desegregated schools. In the case of the Seattle district, it used a race-conscious school assignment plan in an attempt to combat racial segregation in housing.[63] In the case of the Louisville school district, it sought to continue using a race-conscious student assignment plan after being released from a federal court school desegregation order.[64] Both the Seattle and Louisville plans called for measures to be taken that allowed racial balancing of schools to ensure that schools remained desegregated. [65] It also meant that students at times could not

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[61] *See* Kimberle Crenshaw, *The Court's Denial of Racial Societal Debt*, 40 AMERICAN BAR ASSOCIATION (2014), https://www.americanbar.org/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_1_50_years_later/court_denial_racial_debt.html (noting that "color blindness's basic claim is that everyone has a race and everyone is treated equally so long as race is not taken into account.").

[62] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

[63] *Id*. at 712 ("Seattle has never operated segregated schools—legally separate schools for students of different races—nor has it ever been subject to court-ordered desegregation. It nonetheless employs the racial tiebreaker in an attempt to address the effects of racially identifiable housing patterns on school assignments. Most white students live in the northern part of Seattle, most students of other racial backgrounds in the southern part.").

[64] *Id.* at 716 ("In 2001, after the decree had been dissolved, Jefferson County adopted the voluntary student assignment plan at issue in this case.").

[65] *Id*. at 711-712 (noting that the Seattle "district employs a series of 'tiebreakers' to determine who will fill the open slots at the oversubscribed schools. The first tiebreaker selects for admission students who have a sibling. The next tiebreaker depends upon the racial composition of the particular school and the

attend the school of their choice because of measures taken to ensure racial balance in the schools.[66]

The Supreme Court struck down the plans, reasoning in part that the "way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[67] The Court relied on the notion that all racial distinctions were problematic, without any consideration of the history of race, and the need to remediate a past history of discrimination.[68] Importantly, the Court "reframed the constitutional wrong wrought by segregation simply as the use of racial classifications,"[69] ignoring the historical asymmetry attached to those racial classifications. Because of the Court's decision, the schools in Seattle have seen increases in racial segregation.[70] The *Parents Involved* case is but one example. However, in practice, a colorblind legal regime results in the law failing to dismantle white supremacy and instead preserving the racial status quo.

The second way that the law continues to perpetuate white supremacy is through post-racialism. Post-racialism jurisprudence declares the end of race and racism.[71] It suggests that there is no need to consider race because race and racism are no longer salient features of American life.[72] While colorblindness jurisprudence is aspirational insofar as it suggests that one should aim to not see race or make racial classification, post-racialism declares that the problems associated with race and racism have been resolved.

Of late, courts have embraced post-racialism in ways that help to sustain white supremacy. A good example here is the supreme court's decision in *Holder v. Shelby County.*[73] In that case the Supreme Court concluded that the preclearance requirements of the Voting Rights Act

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race of the individual student."); *Id*. at 716 (describing the Louisville school desegregation plan and noting that under the plan "if a school has reached the 'extremes of the racial guidelines,' a student whose race would contribute to the school's racial imbalance will not be assigned there.").

[66] *Id*. at 717.

[67] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

[68] In reaching its conclusion, the court repeatedly emphasized the harm of racial classifications but made no distinction between classifications meant to ameliorate the known harms caused by the segregation. *Id*. at 745-46. ("[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

[69] *See* Kimberle Crenshaw, *The Court's Denial of Racial Societal Debt*, 40 AMERICAN BAR ASSOCIATION (2014), https://www.americanbar.org/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_1_50_years_later/court_denial_racial_debt.html (noting that "color blindness's basic claim is that everyone has a race and everyone is treated equally so long as race is not taken into account.").

[70] *See e.g*., Bryn Tweedale, *Why Are Seattle Schools So Segregated*, THE SEATTLE GLOBALIST, Dec. 12, 2016, http://www.seattleglobalist.com/2016/12/12/seattle-public-schools-still-segregated/59263 (remarking that in the aftermath of *Parents Involved*, "Seattle schools are now trending back toward being racially segregated from neighborhood to neighborhood.").

[71] *See* Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1594 (2009) (suggesting that post-racialism "reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action.").

[72] *Id*.

[73] Shelby County v. Holder, 133 S. Ct. 2612 (2013).

("VRA") were unconstitutional. The preclearance requirements required states with a history of voter suppression based on race to get permission before making changes to their voting policies.[74] They reached that conclusion in large part by relying upon the alleged progress in dismantling racism that had been achieved in the five decades since the statute was enacted. The court used the post-racial logic of racial progress to overturn the preclearance requirements.[75] As a result, states with long histories of voter suppression of minorities were able to make changes to their voting policies, such as requiring voter identification laws, in many cases demonstrably resulting in the suppression of minority votes.[76]

Shelby County is but one example of how post-racialist legal logic, at best, maintains the status quo in a way that fails to disrupt white supremacy and, at worst, allows white supremacy to proliferate. At bottom, post-racialism is effective in keeping us from demanding the redistribution and structural transformation necessary to dismantle white supremacy.

CONCLUSION: TURNING AWAY FROM COLOR BLIND AND POST-RACIAL TO RACE CONSCIOUS

The law plays a critical role in shaping and legitimating social and power relations. The examples provided in this piece are but a small sample of the ways in which race-conscious laws were enacted to construct white supremacy. While modern laws seek to prohibit discrimination, prohibiting discrimination without remediation serves to maintain the existing status quo. Put another way, failure to enact laws that seek to affirmatively dismantle the advantages that race-conscious laws provided to whites furthers white supremacy through the maintenance of the status quo.

By simply issuing an edict to stop discriminating, or to stop considering race at all, the prior race conscious system that favors white becomes naturalized. Even worse, propagating a narrative of post-racialism that suggests that the problem of racism has been solved results in racial disparities becoming normalized in key areas of life, with the blame for those disparities placed on individuals or cultural pathologies.

The wealth gap and power distribution, for example, seems neutral —like a fair distribution of resources — when, in fact, it was not, because the hierarchical significance of race generally and whiteness specifically was produced and/or reinforced by race-conscious laws favoring whites. To dismantle white supremacy, the law must become more race-conscious. By race-conscious, I mean acknowledging the social fact and significance of race, the existence of racial identity and difference, racial inequality, and racial hierarchy. Because the law has been a very significant

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[74] *Id*. at 2612-13 (describing how certain sections of the country came to be covered under Section 4 of the Voting Rights Act.).

[75] *Id*. at 2627–28 ("[c]overage today is based on decades-old data and eradicated practices. The formula captures States by reference to literacy tests and low voter registration and turnout in the 1960s and early 1970s. But such tests have been banned nationwide for over 40 years…. and voter registration and turnout numbers in the covered States have risen dramatically in the years since. Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. *There is no longer such a disparity*) (emphasis added).

[76] *See e.g*., Kara Bradeisky, et al., *Everything That's Happened Since the Supreme Court Rule on The Voting Rights Act*, PRO PUBLICA (Nov. 4, 2014), https://www.propublica.org /article/voting-rights-by-state-map (noting changes made by states previously subject to preclearance requirements and its impact on minority voters).

player in making racial matters what they are today, it is inappropriate to suggest that the law has no place in remediating racial inequality and/or in attempting to dismantle white supremacy. Unless and until that happens, the law will continue to play a critical role in perpetuating white supremacy.