FROM "COLORBLIND" WHITE SUPREMACY TO AMERICAN MULTICULTURALISM

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Our last great Republican president—Abraham Lincoln—spoke of government "of the people, by the people, and for the people."[1] But we know that, for most of our history, this promise has been honored mostly in the breach. I state this not as a "PC" indictment, but rather as a simple fact. Despite all of the wonderful things about our history, it has also been characterized by violent atrocities and massive thefts of land committed against Native Americans, the kidnapping and enslavement of millions of African-Americans, and the systematic disenfranchisement of minorities, the poor, and women. Now, to obscure this history or to suggest, as Glenn Loury did,[2] that racial thinking somehow began on the left, is simply to run away from the truth. That running away, that willful escape from history, is the very antithesis of enlightenment. We must confront the truth as it really is. Otherwise, we remain seduced and blinded by ideology.

Our society was not founded on colorblindness. Quite the contrary. But after the Fourteenth Amendment was enacted,[3] Supreme Court Justice John Marshall Harlan stated in his famous dissent in *Plessy v. Ferguson*[4] that "[t]here is no caste here. Our Constitution is color-blind."[5] That sounds wonderful, and many of us support that principle in some sense. However, conservatives have begun to fetishize this turn of phrase. Chief Justice William Rehnquist and Justice Antonin Scalia, for example,

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1. 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 23 (Roy P. Basler ed., Rutgers Univ. 1953).

2. *See* Glenn C. Loury, *Individualism Before Multiculturalism*, 19 HARV. J.L. & PUB. POL'Y 723 (1996).

3. *See* U.S. CONST. amend. XIV (granting equal rights and citizenship to persons of all races).

4. 163 U.S. 537 (1896).

5. *Id.* at 559. At that time, Justice Harlan was the progressive member of the Court who was upholding the idea of colorblindness against the idea that the State legitimately could segregate citizens.

gleefully cite Justice Harlan on this point.[6] But these citations are incomplete; the modern Justices fail to quote the sentences that precede this seemingly noble locution. The almost always excluded passage reads:

> The white race deems itself to be the dominant superior race in this country, and so it is in prestige and achievements and education and wealth and in power. So I doubt not it will continue to be for all time only if it remains true to its great heritage and holds fast to the principles of constitutional liberty, but in view of the Constitution and in the eyes of law, there is in this country no superior dominant ruling class of citizens, there is no caste here. Our Constitution is colorblind.[7]

Thus, at its very inception, the doctrine of juridical colorblindness was deemed to be perfectly compatible with the perpetuation of white supremacy in the economic field, in the political field, and in the cultural field in the United States. It is important for those who champion the principle of "colorblindness" today to remember its origin and complete context. It was seen by its author as a principle of formal neutrality that would allow white people to continue their absolute dominance of American life.[8] It has taken American conservatism one-hundred years to catch up with Justice Harlan, but I am afraid that it is too little, too late.

The real glory of the American polity—and the reason I believe that the United States is the greatest nation on earth—is that we define ourselves not by exclusion, but rather by the struggle *against* exclusion, by the never-ending demand on the part of oppressed groups for freedom, respect, and equal ability to participate in society. These struggles for inclusion produced the Thirteenth,[9] Fourteenth, Fifteenth,[10] and Nineteenth[11]

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6. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment); Fullilove v. Klutznick, 448 U.S. 448, 522-23 (1980) (Stewart, J., dissenting) (joined by then-Justice Rehnquist).

7. *Plessy*, 163 U.S. at 559.

8. *But see* T. Alexander Aleinkoff, *Re-Rereading Justice Harlan's Dissent in* Plessy v. Ferguson*: Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 961 (arguing that Justice Harlan's writing employed rhetoric as a strategy aimed at attacking white supremacy).

9. *See* U.S. CONST. amend. XIII (outlawing slavery).

10. *See* U.S. CONST. amend. XV (stating that the right cannot be abridged on the basis of race).

11. *See* U.S. CONST. amend. XIX (stating that the the right to vote cannot be abridged on the basis of gender).

Amendments. These gains were achieved at the price of much blood and sacrifice, for, as that other great Republican, Frederick Douglass, observed, "[p]ower concedes nothing without a demand."[12] The civilizing struggles of the 1960s and 1970s, the civil rights movement, the women's movement, the gay and lesbian movement, and the youth movement, have made this country a richer, freer, and more democratic nation than it was thirty-five years ago. And yet, our nation today is in the throes of a backlash against "multiculturalism," the progressive and, to my mind, inescapable cultural changes unleashed by the anti-authoritarian movement of the last several decades.

The backlash against multiculturalism masquerades as a defense of colorblindness and neutrality, but the veneer is very thin. Scratch colorblindness, and white supremacy comes to the surface pretty quickly. Colorblindness is now the main rhetorical device mobilized to defend racial privilege and dominance. Consider, for example, James Kilpatrick, who recently wrote, "I worry about racial tension, and I worry about all of the posturing gestures of diversity and multiculturalism and affirmative action. I worry they're just making bad matters worse. Our country, ideally, should be colorblind. We have become color-obsessed."[13] This high-minded sentiment might have been a little bit easier to swallow had Kilpatrick not been a leading champion of massive resistance to school desegregation in Virginia in the 1950s. In this earlier era, Kilpatrick wrote:

> In terms of enduring values—the kind of values respected wherever scholars gather, in the East no less than in the West—in terms of values that last, and mean something, and excite universal admiration and respect, what has man gained from the history of the Negro race? The answer, alas, is "virtually nothing." From the dawn of civilization to the middle of the twentieth century, the Negro race, as a race, has contributed no more than a few grains of sand to the enduring monuments of mankind.[14]

In those days, his commitment to "colorblindness" apparently

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12. Frederick Douglass, *Speech Before the West Indian Emancipation Society* (Aug. 4, 1857), *in* 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLAS 437 (Philip S. Foner ed., 1950).

13. James J. Kilpatrick, Editorial, *A Kind of Farewell*, BALTIMORE SUN, Jan. 4, 1993, at 11A.

14. James J. Kilpatrick, *The Southern Case For School Segregation* 49-50 (1962), *quoted in* Garrett Epps, *Of Constitutional Seances and Color-blind Ghosts*, 72 N.C. L. REV. 401, 451 n.294 (1994) [hereinafter *Constitutional Seances*].

was just forming.[15]

Or consider Dinesh D'Souza, who professes nostalgia for colorblind meritocracy and sympathy for African-Americans and other minorities who he believes are harmed by the stigma of affirmative action. In his clever book, *Illiberal Education*, he concluded that, with affirmative action and its associated symptoms, the university now teaches "that standards and values are arbitrary," "that individual rights are a red flag signaling social privilege, and should be subordinated to the claims of group interest," "that double standards are acceptable as long as they are enforced to the benefit of minority victims," and "that the multiracial society cannot be based on fair rules that apply to every person but must rather be constructed through a forced rationing of power among separatist racial groups."[16] In this forlorn world of meritocracy lost, D'Souza's most passionate concern is for "the young blacks, Hispanics and other certified minorities in whose name the victims' revolution is being conducted," for they "are the ones least served by the American university's abandonment of liberal ideals."[17]

Noble sentiment all, but compare them to the early-1980s *Dartmouth Review* feature story that founding editor Dinesh D'Souza published on affirmative action. The article, written in what was supposedly a parody of black speech and entitled *Yo, Man, This Sho' Ain't No Jive* included sentences like: "Now we be comin' to Darmut and be up over our 'fros in studies, but we still be not graduatin' Phi Beta Kappa."[18] D'Souza's defiant editorship of the *Dartmouth Review* also produced an interview with a former KKK chieftain (which was adorned with a staged photograph of an African-American man swinging by neck from a tree on the Dartmouth campus), prominent display of the quaint aphorism—"The only good Indian is a dead Indian," and the publication—against their express wishes—of the name of members of the Gay Student Alliance.[19] Perhaps D'Souza is tell-

15. *See Constitutional Seances, supra* note 14, at 445 ("No one even remotely familiar with Kilpatrick's earlier views can be deceived about his color-blind agenda."); *see also* Garrett Epps, *The Littlest Rebel: James Kilpatrick and the Second Civil War*, 10 CONST. COMMENTARY 19 (1993) (describing James Kilpatrick's actions towards desegregation).

16. DINESH D'SOUZA, ILLIBERAL EDUCATION 229 (1991).

17. *Id.* at 230.

18. Louis Menand, *Illiberalisms*, THE NEW YORKER, May 20, 1991, at 101 (reviewing *id.*).

19. *Id.*

ing us that he was driven to such vicious extremes because affirmative action creates "a malignance that spreads through university life"[20]—and he caught it. At any rate, one may be forgiven for wondering at what point in his career D'Souza started worrying about the stigmatization of minorities.

But let us let bygones be bygones (even if they went by rather recently). Let us charitably assume that the attack on multiculturalism is something more than white backlash. How would we defend multiculturalism? First, we must define it. I view multiculturalism as the contemporary expression in America of what Hegel called the "human struggle for recognition."[21] People who have been locked out, disenfranchised, and silenced finally enter the public space. They want to be seen. They demand to be heard. They want to participate in the construction of curricula in public schools. They want to participate in the construction of public policy. They want to be rendered visible in the body politic.

This process is legitimate and essential in a modern democracy. Multiculturalism is a demographic reality, and it always has been. Native Americans and African-Americans were mentioned in the Declaration of Independence and the Constitution; the former are referred to as "merciless Indian Savages,"[22] and the latter appear as "three fifths" of persons for purposes of political reapportionment in the Constitution.[23] Such was multiculturalism under a regime of white supremacy. Today, however, the new demographic reality stares America in the face. Whites are now a minority in many of our large cities and on many college campuses across the country. Sometime early in the next century, a majority of people living in California will be people of color.[24]

These demographic changes might scare a lot of white people. They could spur us to close down the borders, to persecute immigrants, to repeal affirmative action programs, to proclaim

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20. Charles Trueheart, *Big Man Off Campus, Author Dinesh D'Souza, Leading the Politically Incorrect Crusade*, WASH. POST, Apr. 16, 1991, at B1 (paraphrasing D'Souza's speech "laying the lash to affirmative action").

21. G.W.F. HEGEL, THE PHENOMENOLOGY OF THE MIND 179-213 (J.B. Baillie trans., rev. 2d ed. George Allen & Unwin Ltd. 1949).

22. THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776).

23. U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. 14, § 2.

24. *See* Alexandra Natapoff, *Trouble in Paradise: Equal Protection and the Dilemma on Interminority Group Conflict*, 47 STAN. L. REV. 1059, 1060 n.8 (1995).

white genetic superiority, and to declare the purity of "Western civilization"—a mythical construct that now somehow includes only William Shakespeare and Alexis de Tocqueville, but excludes fascism and Adolf Hitler and American slavery and lynching, the Western as well as radicals like Thomas Paine, Susan B. Anthony, Dr. Martin Luther King, Jr., and Henry David Thoreau—the very people who made Western civilization something worth fighting and dying for. Alternatively, our multicultural reality could become the occasion and catalyst for Americans getting to know the world, for intercultural learning, for integration, and for the uplifting of our moral sensibility. We can close ourselves down or open ourselves up.

The choice is nicely captured by the brewing controversy over English as an official language.[25] A recent article in *The Washington Post* discussed a speech in which Senator Bob Dole stated that America must stop using multilingual education as a means of instilling ethnic pride, as therapy for low self-esteem, or out of elitist guilt over culture built on the traditions of the West.[26] The article was very interesting. The journalist interviewed the principal, the teachers, and the students at a bilingual school, and the interviewees claimed that by having classes taught in Spanish as well as in English, the students were learning English a lot more quickly than otherwise. Students noted that although English was their favorite language, they also used Spanish.[27] In the new multicultural global society, why would we want to keep our students from learning second and third languages?

Why would we want to impose a bar of linguistic correctness on the citizenry? Why do we want to bureaucratize the English language and identify it with repression and thought control? And why do we want to close the borders of the English language, effectively shutting doors to other ways of describing and understanding the world? It is essential to recall that multiculturalism is not a radical departure from the American political

25. *See* Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (en banc) (striking down Arizona's "English only" law under the First Amendment), *cert. granted sub nom.* Arizonans for Official English v. Arizona, 64 U.S.L.W. 3639 (U.S. Mar. 25, 1996) (No. 95-974). For a description of this case, see Scott H. Angstreich, Recent Case, *Speaking in Tongues: Whose Rights at Stake?* Yniguez v. Arizonans for Official English, 19 HARV. J.L. & PUB. POL'Y 634 (1996).

26. *See* William Raspberry, *Official English: What is This Fight About?*, WASH. POST, Jan. 1, 1996, at A15.

27. *See id.*

ethic. In fact, even the hero of the Federalist Society—James Madison—recognized the plural nature of American society and the virtues of diversity in political arrangements. Madison, of course, was very concerned about "factions," particularly tyranny by the majority faction.[28] Although Madison was concerned about protecting the economic elite and propertied class from the tyranny of the mob, which he feared might try to redistribute property, his views could be transposed to the nation's struggle over race. Indeed, the white majority faction has tyrannized racial minorities in this country from the outset, and the proliferation of groups that Madison advocated as a check against majority tyranny could be viewed as an antidote to the tyranny of the racist white majority. We will become a much healthier society and political culture when no racial group can dominate any other.

In the real world today, the only alternative to multiculturalism is a return to cultural and political white supremacy. There are many examples, but consider in this context *Shaw v. Reno*,[29] the 1993 Supreme Court decision involving what the Court saw as racially "gerrymandered" congressional districts. In that case, the Court applied "strict scrutiny" analysis under the Equal Protection Clause to districts shaped to create numerical majorities of African-Americans and Latinos. The majority concluded that drawing bizarre-shaped districts with nonwhite majorities bore "an uncomfortable resemblance to political apartheid."[30] The ruling cast doubt on the validity of the Twelfth Congressional District of North Carolina, which had elected Eva Clayton, the first African-American elected in North Carolina since 1901, and the first African-American woman ever elected to Congress from North Carolina.

Several striking aspects of this case reflect the fact that the only alternative to multiculturalism in America is a return to white supremacy. First, the case represents a radical and novel doctrine. The Supreme Court had never before required that congressional districts conform perfectly to a particular geometric shape, but the moment that majority black and Latino dis-

28. *See* Natapoff, *supra* note 24, at 1086.

29. 113 S. Ct. 2816 (1993). For a description of this case, see Jonathan M. Sperling, Recent Development, *Equal Protection and Race-Conscious Reapportionment:* Shaw v. Reno, 17 HARV. J.L. & PUB. POL'Y 283 (1994).

30. *Shaw*, 113 S. Ct. at 2827.

tricts were created under the Voting Rights Act,[31] the Court generated a new aesthetic doctrine to find that "unsightly" districts sometimes offend the sensibility of the Court. Historically, the question of drawing district lines has been treated as a political question for the individual States. The term "gerrymandering" actually originated in 1812—not 1965 or 1982—and is as American as apple pie.[32]

Second, Justice O'Connor employed "apartheid" to describe the Twelfth Congressional District in North Carolina—which happens to be the most integrated district in the history of the State, with fifty-three percent of its population black, and forty-seven percent white.[33] Amazingly, none of the conservatives who signed on to Justice O'Connor's opinion had ever before used the word *apartheid* in a Supreme Court opinion to describe the history of American racial oppression, segregation, Jim Crow, disenfranchisement, white primaries, poll taxes, or any of the other mechanisms of racial exclusion. Now, suddenly, the word *apartheid* was being used to describe the most racially balanced Congressional district in the state's history, and the first district to elect a black since Reconstruction. What could be wrong with such a district, unless you assume that white people have a presumptive constitutional right to be in the majority? After all, if the percentages had been reversed—if the district had been fifty-three percent white and forty-seven percent black—it is simply unthinkable that the Rehnquist Court would have ruled the district invalid. Yet this is the essence of a racial double standard and what Charles Lawrence deemed "unconscious racism."[34]

Remarkably, the case was marked by a complete absence of injury. The white voters who challenged the district lines did not even live in the district. Moreover, those nonresident white challengers, and the resident white population, continued to have

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31. *See* 42 U.S.C. § 1973c (1988).

32. "Gerrymandering" was coined in 1812 as a combination of "Gerry" and "salamander" for the purpose of describing the "fancied resemblance to a salamander . . . of the irregularly shaped outline of an election district in northeastern Mass. that had been formed for partisan purposes in 1812 during Gerry's governorship" of Massachusetts. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 952 (unabr. ed. 1961).

33. *See Shaw*, 113 S. Ct. at 2827.

34. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, & Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (contending that the notion of disparate impact must be understood in the context of a cultural heritage of racism which gives rise to unintentional racism in the present).

the right to vote, to run for office, and to campaign for the candidates they liked. How were they harmed in any way by the fact of living in a majority-black district? Do they have a constitutional right, which African-Americans and other minorities do not have, to live in legislative districts in which they are part of the racial majority?

To emphasize the injustice of *Shaw*, recall that Justice O'Connor authored the 1984 decision in *Allen v. Wright*,[35] which denied standing to black parents who wanted to challenge the IRS's policy of granting tax exemptions to segregated religious academies. The Court denied these parents standing to challenge the policy because the case involved merely symbolic or stigmatic harm, which in the Court's view did not rise to the level of constitutional injury.[36] But of course, in *Shaw*, mere symbolic harm—if it was even that—was transformed into a constitutional right. The bottom line is that the number of African-American members of the House of Representatives, currently forty, will probably decline to only thirty or fewer.[37]

To complete this charade, last term the Supreme Court rendered a decision in *Miller v. Johnson*,[38] in which the Court decided to drop geography as a factor in scrutinizing majority-minority districts. Instead, the Court held that whenever race is used as a significant factor in districting, the district is preemptively unconstitutional.[39] Of course, genuine application of this doctrine would result in invalidating almost every congressional district in the country because we know that state legislatures are fully conscious of the racial composition of the districts they form. Yet the conservatives on the Court, including Justice O'Connor, who was once President of the Arizona State Senate, act as if state legislators sit down and draw these maps without

35. 468 U.S. 737 (1984).

36. *But cf. Allen*, 468 U.S. at 757 (relying, inter alia, on the rationale that the stigmatic injury in question arose from the conduct of nonparties to the suit).

37. Similar litigation in other federal courts will be responsible for the additional loss of black and Latino districts. One of the districts lost was Congressman Cleo Field's district in Louisiana. *See* Hays v. Louisiana, 839 F. Supp. 1188, 1191 (W.D. La. 1993). Former Ku Klux Klansman David Duke has cheered this decision and announced that he would be a candidate in the newly white majority district. *Cf.* Jesse Jackson, *Diluting Voter Rights Also Weakens Civil Rights*, NEWS TRIB., Aug. 14, 1994, at G3.

38. 115 S. Ct. 2475 (1995). For a description of this case, see Mark S. Nagel, Recent Development, *Constitutional Limits on Racial Redistricting:* Miller v. Johnson, 19 HARV. J.L. & PUB. POL'Y 188 (1995).

39. *See Miller*, 115 S. Ct. at 2486.

understanding the racial and demographic makeup of each district. Fifty majority-white state legislatures, of course, will create as many white majority districts as they can—not necessarily because of racism, but because these state legislators want to go to Congress themselves. Thus, after these appalling cases that really give judicial activism a bad name, the only time that using race as a factor in creating congressional districts will be held unconstitutional is when a State tries to comply with the Voting Rights Act to allow African-Americans, Asian-Americans, and Latinos to take their turn at being able to be in the majority in a legislative district.

This case just gives us a taste of the doctrinal acrobatics that will be performed by unprincipled conservatives striving to shore up the discredited regime of white supremacy. For a while, perhaps, the old baseline of white rule can be restored, but multiculturalism is the new global and American reality that cannot be resisted. That is, it cannot be resisted without intellectual dishonesty and profound damage to the cultural and political ethic of pluralism that has defined what is best in American life.