The re-election of President Barack Obama in 2012 signifies many things. First and foremost, it means that Barack Obama will continue as the Forty-Fourth President of the United States for another four years and join Presidents Bush (II), Clinton, Reagan, and Eisenhower as a two-term President in the post-World War II era. On a political level, President Obama’s re-election may signify a near permanent shift of the national electorate to the middle, which portends poorly for the Grand Old Party (GOP) and other Conservatives. However, the re-election of President Obama means something quite different and ominous for the future of race relations in the United States: I contend the re-election resulted in the solidification of the Tea Party Movement (TPM) and established the Tea Party as a permanent fixture on the American political landscape.

The TPM, which arose simultaneously with the development of Barack Obama’s political career and his ascendancy to the Presidency in 2008, was initially regarded as a temporary political phenomenon and viewed by some as primarily an antidote to the initial election of President Obama. Indeed, if the initial election of Obama is viewed as the primary causative agent or irritant for the maintenance and growth of the TPM since its birth at the end of the Bush (II) administration, it is plausible to believe that some hoped that President Obama’s ultimate removal from the political
scene and political power would cause the dissipation of the Tea Party as a powerful political movement. But, I predict that will not be the case.

Instead, the central thesis of this Article is that President Obama’s re-election and the changing racial demographics in the United States means that the TPM will remain a potent political force in United States politics for the next several election cycles and decades. That re-election in 2012 also means that race relations in the United States are changing and will continue to evolve over the next several decades. Given TPM’s antipathy for true equality in racial relations, the evolution in race relations will not be a smooth or positive one leading swiftly to harmonious racial relations.6

Pursuing a chronological approach, this Essay is divided into four parts. The first part focuses on the claim that President Obama’s 2008 election demonstrated that racism was eradicated in American society. In contrast to this claim, I argue that the 2008 election and the consolidation and strengthening of the TPM demonstrate the virulence and strength of racism in contemporary American society.

I next reveal the development of what I characterize as “racial exceptionalism”—the historical progeny of tokenism. Given the current social embrace of color-blindness, the accomplishments of exceptional minorities (especially African-Americans) are highlighted and emphasized to demonstrate the alleged lack of societal racism as an impediment for persons of color to excel. Racial exceptionalism is thus used to obscure the fact that racism remains endemic in American society. Moreover, it obscures the fact that many persons of color are not in a position to take advantage of the opportunities successfully navigated by a few exceptional African-Americans.

In a perverse way, this dichotomous result—exceptional attainment by a few minorities with continued subordination of the vast majority of most persons of color—provides fodder for those who claim that racism is no longer an inhibiting factor in American society. The success of the few is used to condemn the lack of success of the many and to attribute failure to factors within the control of those who fail. This allows societal racism to be explained away at the individual level. The problem, however, with identifying individuals who are examples of racial exceptionalism as exemplars of racial progress and equality is that they represent just that: the exceptions to race relations in American society. Moreover, the use of racial exceptionalism...
alism to exalt racial equality masks the hegemony of whites in race relations that produces the subordination of persons of color.

Indeed, other than the development and use of racial exceptionalism, current race relations and the racial progress made to date is reminiscent of so-called advances in racial progress that took place two generations ago in the middle of the twentieth century. The election of President Obama is similar to the important judicial and legislative victories achieved by the Civil Rights Movement in the Fifties9 and Sixties10 that seemed to portend improved race relations in the United States.

That an African-American was elected President does represent a form of racial progress, but that progress should not obscure the fact that President Obama’s election is largely symbolic in nature and does not alter the fundamental relationship between whites and blacks in the United States. To paraphrase W.E.B. Dubois, the problem of the twenty-first century is not the color line but the continued subordination of people of color under the guise of equal treatment under the law.11 We have not yet fully achieved racial equality in American society.12

Beginning in the Sixties, when the Civil Rights Act13 and the Voting Rights Act14 were passed and lauded, America seemed poised to finally address and eliminate racism that had been part of this country’s history and heritage since its foundation. That legislation, which was the product of the Civil Rights Era, created hope that these epochal laws would lead to the elimination of racism in American society. This hope that repressive racism would abate and eventually disappear existed both within and outside the African-American community.

The election of President Obama as our Forty-Fourth President inspired the same type of hope in the early 2000s. However, and as detailed in Part I, the hope for racial equality and harmony produced by the Civil Rights Era gave way to the Post-Civil Rights Era, which was symbolized by the presidential election of Ronald Reagan in 1980. Any gains realized in the Civil Rights Era were reversed and African-Americans and others, who embraced the integrationist philosophy of the Warren Court,15 were worse off as a group in the 1990s and 2000s. The focus in Part I is on the parallel between the post-Civil Rights Era and the post-Obama election era in order to expose and explore the lessons that can be gleaned from Obama’s electoral triumphs.

9. See infra notes 16-17 and accompanying text.
10. See id.
11. To that end, the absurd statement made by the Chief Justice of the United States Supreme Court in Parents Involved in Community Schools v. Seattle School District, No. 1, 551 U.S. 701, 747 (2010), that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race” reflects the unrealistic and a contextual view that race is no longer a salient characteristic in this society and that the legal system should ignore race and treat issues and cases like racism and its pernicious effects as no longer existing in American society. That absurdity and the type of legal formalism it produces, which has the effect of entrenching racism of the past and the present, is addressed infra in Part III.
15. Integrationism is addressed infra at notes 157-66 and accompanying text.
Part II explores the recent racial progress made in American society and the creation of racial exceptionalism by focusing on the reaction to that progress: the rise and evolution of the TPM. Part II demonstrates that the primary factor that largely unites and animates the TPM is the specter of multiculturalism and the impending racial makeup in the U.S. in the coming years. What unifies this admittedly disparate movement is fear: fear that whites (especially white males) will lose their privileged, hegemonic position at the top of American society. Consequently, President Obama’s election symbolized the possible loss of white privilege and supremacy in America. The TPM represents an attempt to turn back the racial clock by sixty years, when racial roles were explicit and unchallenged. Just as progress was trumpeted in race relations and race was lauded as a unitary rather than divisive factor in the election of President Barack Obama, a combination of right-wing politics epitomized by the TPM and judicial conservatism continue to check and preclude any gains in racial progress.

The United States Supreme Court is the ultimate instrument and defender of elite hierarchical values. The makeup of the Court demonstrates the current state of white supremacy in American society. Because the majority of the Court has benefitted from white privilege, the Court undermines, rather than exemplify, the vision of the Court as a liberating institution seeking to achieve justice. In sum, recent U.S. Supreme Court decisions and the rise of the TPM presage a return to an era similar to the post-Civil Rights Era unless action is taken to expose the TPM and the racism it represents. Finally, the activist role of the U.S. Supreme Court as a super legislator in overruling or limiting the appropriate scope of legislation that benefit communities of color must also be exposed for the judicial activism and politicization it represents.

Part III extrapolates the lessons learned from both the Civil Rights Era and the post-Civil Rights Era to expose a cyclical process in which race relations gains, typified by Civil Rights Era legislation and the recent re-election of President Obama, create the impetus for reactionary events in which race relations gains are erased to protect the existing white hegemony. The cycles of improved race relations create positive responses that result in racial progress.

17. See, e.g., John Nichols, After O’Connor, ALTERNET (July 1, 2005), http://www.alternet.org/story/23312/after_o%27connor.

[People for the American Way President Ralph] Neas understands his history well. The contemporary image of the Supreme Court as a defender of civil liberties and civil rights, and an ally of progress, is one that developed over the course of the 20th century. It was not always so. And there are no guarantees that it will remain so. [. . .] If the court moves backward to the bad old days, so too will the nation. With a court guided by a majority determined to reverse the progress made on issues ranging from reproductive freedom to privacy rights, affirmative action, church-state separation, environmental protection, consumer safeguards and worker rights, Neas warns, America would return to a time when the judicial branch took as its mandate the preservation of the status quo against the march of social progress. (Emphasis added). See infra note 175-90 and accompanying text; United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

Furthermore, these epochal race relations victories have been eroded by a legal system that promotes formalism over substance. That formalism comes with a cost: nested within these formalistic victories are the kernels of philosophical principles that entrench existing racial dynamics with whites on the top and people of color, especially African-Americans, on the bottom. Consequently, these formalistic victories have proven costly as rhetoric employed in the decisions exalts equality and establishes equal process while providing no meaningful opportunity for those on the bottom to access procedural equality in a meaningful and substantive manner.

The case that gave birth and impetus to the Civil Rights Movement, Brown v. Board of Education,19 played a key role in the rise of the Post-Civil Rights Era and the demise of meaningful racial progress in American society. The philosophy of integrationism, first embraced by the Supreme Court in Brown v. Board of Education,20 is the primary impediment to the true improvement in race relations and the attainment of meaningful racial equality. That philosophy of integrationism is premised on the tenet of equal opportunity for all and a philosophy of individualism that is antithetical to improved race relations and is instead productive of racial exceptionalism. The philosophy of integrationism produced a remedy—affirmative action—that became politicized, ineffective, and became the vehicle for the reification of equal opportunity that solidified the formal gains produced by Brown and its progeny, but limited any meaningful substantive gains.

I conclude Part III by exhuming the debate over the efficacy of affirmative action. The opposition to affirmative action is premised on a formalistic notion of equality that is antagonistic to the demands of substantive equality. I contend that the U.S. Supreme Court’s recent no-decision in Fisher v. University of Texas21 delays the Court’s inevitable ban on affirmative action. This ban will entrench a notion of formal color-blindness that is calculated to maintain white hegemony while appearing to embrace racial equality. This ban is the twenty-first century’s version of “separate but equal.” One positive attribute of the current iteration of that odious doctrine is the fact that the forced separation of the races is not officially sanctioned by the law.22

Part IV calls upon racial equality supporters to reject racial exceptionalism and to minimize or ignore any progress attributable to formal equality. Supporters should instead demand and measure racial progress by metrics of substantive equality. Results must triumph over process and rights. In order to truly achieve Dr. Martin Luther King, Jr.’s dream that all will be treated equally,23 those who are truly

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20. Id.
21. 631 F.3d 213 (5th Cir. 2011), rehearing en banc denied by 771 F.3d 274 (5th Cir. 2014).
22. Indeed, probably the only thing that precludes Tea Partiers from asking for a return to legalized separate but equal is the example of the South African system of apartheid that failed with disastrous results for the Boer class that previously ruled the country. See, e.g., P. Eric Louw, THE RISE, FALL, AND LEGACY OF Apartheid (2004).
23. In that famous speech, Dr. King stated:
I say to you today, my friends, though, even though we face the difficulties of today and tomorrow, I still have a dream. It is a dream deeply rooted in the American dream. I have a dream that one day
committed to racial justice must thwart those who merely nod to its sentiment.24 The fight for racial equality has been hijacked by those who give lip service to its meaning and hide behind pronouncements like: “[t]he way to stop discrimination on the basis of race is to stop discrimination on the basis of race.”25 Statements like this one mask a state of racial inequality that they are intent on maintaining. The one ineluctable fact we have learned from Obama’s election and re-election is that racism and its pernicious societal effects will not die quickly or easily.

The election of an African-American as President of the United States has only served to embolden those who wish to continue to subjugate people of color under the guise of equal treatment under the law. Supporters of improved race relations and the elimination of racism must also call for the elimination of the Tea Party and what it stands for as a political movement and expose it for the racist, xenophobic, and largely white organization26 dedicated to the maintenance of white hegemony and the continued subordination of persons of color, especially African-Americans. Finally, one must acknowledge that true equality and harmonious race relations cannot be achieved until the post-Civil Rights Era Supreme Court justices are removed from the Court and replaced with justices who embrace true racial equality. Furthermore, true racial equality is measured by these new justices as outcomes (concrete results) rather than articulated as an exposition of neutral principles (i.e., “the way to end discrimination is not to discriminate”27). When these new justices are the majority, they will then be able to remove the last vestiges of the inhibiting, reactionary restraints created by the post-Civil Rights Era.

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24. One victory achieved by the Civil Rights Movement is that it is no longer fashionable to be overtly racist. No sane responsible person or politician is willing to voice sentiments that are clearly racist. Of course the election of President Obama has emboldened former Tea Party Express leader Mark Williams to voice expressly racist sentiments when he authored an allegedly “satirical” letter from “colored people” that praises slavery and mocks African-Americans. Mr. Williams is the same individual who had called President Obama “an Indonesian Muslim turned welfare thug.” See Helen Kennedy, Tea Party Express Leader Mark Williams Kicked Out Over ‘Colored People’ Letter, N.Y. DAILY NEWS (July 18, 2010, 4:18 PM), http://www.nydailynews.com/news/politics/tea-party-express-leader-mark-williams-kicked-colored-people-letter-article-1.438854.


26. In a 2010 New York Times/CBS News Poll of Tea Party Supporters, only 1% identified themselves as African-American. See KATE ZERNIKE, BOILING MAD: INSIDE TEA PARTY AMERICA, 27 (2010). This belies the claim of Tea Party supporters that the Tea Party Movement is demographically similar to the country as whole, with a significant number of African-American and other minority members. See, e.g., SCOTT RASMUSSEN & DOUGLAS SCHOEN, MAD AS HELL: HOW THE TEA PARTY MOVEMENT IS FUNDAMENTALLY REMAKING OUR TWO-PARTY SYSTEM 10 (2010).

27. See Parents Involved 551 U.S. at 748 (2010).
PART I: IT WAS THE BEST OF TIMES; IT WAS THE WORST OF TIMES

The 2008 election of Barack Obama, an African-American, as the Forty-Fourth President of the United States represented a watershed event in the history of American race relations. The fact that an African-American captured the highest electoral office in the country exemplified the ideal that any child could grow up to become President of the United States. The fact that an African-American could garner the majority of votes cast in a national election for the country’s highest office (and do it again four years later in an overwhelming electoral victory) is an accomplishment that I, along with many other African-Americans, believed we would never live to see.

Obama’s 2008 presidential election was truly a remarkable event for a variety of reasons, including: the rejection of the continuation of the policies and programs epitomized in the Senator John McCain and former Governor Sarah Palin Republican ticket, the election of a one-term Senator who was unknown nationally a decade ago to the most powerful position in the world, the fervor of President Obama’s supporters, and the vitriol and antipathy of those opposed to the new President. An author can write a book on why Obama’s first presidential election was so remarkable. Although there are myriad reasons why “remarkable” aptly describes the results of the 2008 election, the most remark-

28. CHARLES DICKENS, A TALE OF TWO CITIES I (1859).
29. Given that no woman has ever been elected President or Vice-President, it may be more accurate to note that the statement is true for all males today.
30. See infra note 37 for a discussion of the fact that President Barack Obama is an African-American in two meanings of the word.
32. In his reelection in 2012, President Obama garnered 51.1% of the vote to Mitt Romney’s 47.2% and amassed 332 electoral votes to Romney’s 206. See Election Results, HUFFINGTON POST, http://elections.huffingtonpost.com/2012/results (last visited Feb. 14, 2015).
33. See, e.g., 105-Year-Old-Meets the President, TOPIX (Sept. 29, 2010), http://www.topix.com/forum/city/ashland-va/T38I61R1JJIK8RMLCQ (“There have been 19 U.S. presidents since Virginia Shelton was born 105 years ago, but there’s only one close to her heart. ’I never thought I’d live to see a black president,’’ she said.”); Emily Friedman, Black Leaders React to Obama’s Inauguration, ABC NEWS (Jan. 20, 2009), http://abcnews.go.com/Politics/Inauguration/story?id=6682054 (“Martin Luther King Jr.’s 81-year-old sister, Christine King Farris [. . .] told ABC news she didn’t think she would live to see the day where a black man was elected president”).
34. In the immediate aftermath of his initial election to the Presidency, President-Elect Obama was regarded by many as messiah-like by his supporters. See Cheryl K. Chumley, Barbara Walters Admits ‘We’ Thought Obama was the Next Messiah!, (Dec. 18, 2013), http://www.washingtontimes.com/news/2013/dec/18/barbara-walters-admits-we-thought-obama-was-next-ml/.
35. See infra notes 123-137 and accompanying text (focusing on the vehement and, I contend, racist opposition to President Obama, who has been in office for fifty-two months at the time of the finalization of this Essay).
Some even claim that President Obama won the election because he is African-American.\textsuperscript{38}

In the aftermath of the 2008 election, pundits, commentators, and academics proclaimed that the election of an African-American as President marked a watershed event in the history of race relations in the United States. Many asserted that Obama’s election symbolized a turning point in American race relations and presaged the end of racism in American society.\textsuperscript{39}

Almost seven years after the election, the prominent voices proclaiming the attainment of racial harmony are now muted.\textsuperscript{40} Obama’s popularity has waned, criticism

\textsuperscript{37} President Obama is both literally and figuratively an African-American. As is well known, President Obama’s father is a Kenyan (African) and his mother a white American. Hence, the literal use of the term African-American, with African connoting his father’s continent of origin and American connoting his mother’s country of origin, be more precise, President Obama should be literally regarded as a Kenyan-American. Unfortunately, given our history of race relations, this country does not make fine distinctions between people of color born on another continent. Asian-Americans include individuals from India to Korea with no respect or differentiation between them. With respect to “figuratively,” elsewhere I have argued and agreed with others that race is not a scientific but a social concept. See Alex M. Johnson, Jr., \textit{Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law}, 84 CAL. L. REV. 887, 895 (1996) [hereinafter \textit{Destabilizing}]. As such, President Obama is considered an African-American because of the dark pigmentation of his skin (hence, African) and the fact that he grew up in Hawaii (hence, natural-born American). In other words, President Obama would not be considered an African-American in the figurative sense if the inane birthers were actually correct and it was proven that he was born in Africa. One persistent and infamous claimant (birther) that President Obama was not born in the United States is the megalomaniac Donald Trump. See, e.g., Morgan Little, \textit{Trump Doubles Down on’ Birther’ Beliefs Prior to Romney Fundraiser}, L.A. TIMES (May 29, 2012), http://articles.latimes.com/2012/may/29/news/la-pn-trump-doubles-down-on-b birther-beliefs-prior-to-romney-fundraiser-20120529 (last visited Feb. 14, 2015). If that were true, then he would simply be considered African. Of course, then he would not be eligible to be President given Article II, Section 1 of the Constitution which states:

\begin{quote} 
No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.
\end{quote}

U.S. CONST. art. II § 1, cl. 4.


How did president-elect Barack Obama win the election? Not by transcending race, but because of his race, according to an article published by a pair of Massachusetts Institute of Technology political science in the Boston Review. Using exit-poll numbers, Stephen Ansolabehere and Charles Stewart III build an argument that “Obama won because of race—because of his particular appeal among black voters, because of the changing political allegiances of Hispanics, and because he did not provoke a backlash among white voters.”

\textsuperscript{39} See generally ROY L. BROOKS, RACIAL JUSTICE IN THE AGE OF OBAMA, x-xiv (2009) (responding to the conservative critique that class inequality has replaced racial inequality in the ‘Age of Obama’).

\textsuperscript{40} See Dana Milbank, \textit{Modern-day McCarthyism}, WASH. POST (Aug. 8, 2012), http://www.washingtonpost.com/opinions/dana-milbank-modern-day-mccarthyism/2012/08/08/0c6090fc-e1a5-11e1-98e7-89d6599c106_story.html.

Events of the past few days make that happy chatter four years ago about a “post-racial” America seem especially naïve. On Sunday, a white supremacist allegedly killed six people at a Sikh temple in Wisconsin. On Tuesday [August 7, 2012] Mitt Romney began to attack President Obama as soft on
of his economic policies has intensified,\textsuperscript{41} and the positive focus on President Obama’s race has all but disappeared.\textsuperscript{42}

In response to the 2008 presidential election, a new movement arose that is critical of the President and his policies and is fueled by the fact of the President’s skin. I refer to the Tea Party Movement (TPM) that has roiled electoral politics, especially during the 2010\textsuperscript{43} and 2012\textsuperscript{44} elections when several of its self-proclaimed candidates won election to the United States Senate.\textsuperscript{45} The juxtaposition of these two events


\textsuperscript{42} By this, I mean the positive focus or spin on the election of an African-American as President of the United States. The negative focus or spin, the racially tinged attacks on President Obama, continue and are expected to intensify as the upcoming election nears. A case in point is Newt Gingrich’s recent charge that President Obama is a “food-stamp president.”

In response to Mr. Williams’ quixotic second attempt to coax the former speaker of the House into acknowledging that insistently call Barack Obama “the food-stamp president” smacks of racial politics, Mr. Gingrich rejoined: “First of all, \textit{Juan}, more people have been put on food stamps by Barack Obama than any president in history.” This incredibly misleading claim sent the [South Carolina Debate] crowd into an ecstasy of delight. [...] Of course, Barack Obama has put \textit{no one} on food stamps. Population growth together with the most severe recession since the advent of the modern American welfare state, which was in full swing when Mr. Obama came into the office, conspired to make a record number eligible for government food assistance. [...] A thought experiment: On Twin Earth, does anyone call President John McCain the “food-stamp president”? Is it “politically incorrect” there to call him that? Or is it just so tactically weird to pin that label on a white Republican who inherited a huge recession that the idea simply never occurred to anyone? If, back in our world, it’s not “politically correct” and not tactically weird to pin that label on a black Democrat who inherited a huge recession, then why not?


\textsuperscript{43} There were nine Tea Party Senate Nominees in 2010: Sharon Angle (Nevada); Ken Buck (Colorado); Ron Johnson (Wisconsin); Mike Lee (Utah); Joe Miller (Alaska); Rand Paul (Kentucky); Christine O’Donnell (Delaware); Marc Rubio (Florida); and Pat Toomey (Pennsylvania). There was also one prominent Tea Party Republican gubernatorial candidate, Carl Paladino (New York). Jill Lawrence, \textit{Tea Party Coups: O’Donnellfor Senate in Delaware, Paladino for New York Governor}, POLITICS DAILY (Aug. 14, 2010), http://www.politicstoday.com/2010/09/14/tea-party-notches-huge-upset-with-odonell-se.

\textsuperscript{44} In 2012, there were sixteen senatorial candidates endorsed by the Tea Party. Most of the senatorial candidates, including most notably Ted Akin, Missouri, and Richard Mourdach, Indiana, lost, creating the view among some that Tea Party extremism cost the Republican Party control of the Senate in 2012. \textit{Tea Party Election Results: Conservative Movement of 2010 Takes a Pounding in 2012}, HUFFINGTON POST (Nov. 7 2012), www.huffingtonpost.com/2012/11/06/tea-party-election-results_N_2084056.html.

\textsuperscript{45} In 2010, five of the nine Tea Party candidates were successful: Ron Johnson (Wisconsin); Mike Lee (Utah); Rand Paul (Kentucky), Marco Rubio (Florida); and Pat Toomey (Pennsylvania). Winslow T. Wheeler, \textit{Memo to Tea Party Senators}, HUFFINGTON POST (Nov. 29, 2010), http://www.huffingtonpost.com/winslow-t-wheeler/memo-to-tea-party-senator_b_789139.html. In 2012, the most successful electoral Tea Party victor was Ted Cruz, elected Senator of Texas. \textit{Tea Party-backed Ted Cruz wins Senate Race in Texas}, FOX NEWS (Nov. 6, 2012), http://www.foxnews.com/politics/2012/11/06/tea-party-backed-ted-cruz-wins-senate-race-in-texas/.
during President Obama’s first term is jarring: an African-American President and some Tea Party candidates who could be viewed as openly racist elected to the powerful United States Senate.\footnote{I am specifically referring to Senator Rand Paul, who the citizens of the great state of Kentucky saw fit to elect as their Senator notwithstanding his views on the efficacy and use of the Civil Rights Act. See Earl Ofari Hutchinson, Race Trips up Rand Paul Too, HUFFINGTON POST (May 20, 2010), http://www.huffingtonpost.com/earl-ofari-hutchinson/race-trips-up-rand-paul-t_584319.html.}

That startling juxtaposition is the focus of this Essay. Given the rise and vehemence of the TPM, its hostility to African-Americans, recent electoral victories,\footnote{The power of the Tea Party to roil elections did not end in 2008. It continues today. The recent primary victory of Tea Party candidate Ted Cruz for the Republican nomination for Governor of Texas over the party-backed “establishment” candidate, Lieutenant Governor David Dewhurst, is a testament to its staying power, at least in rabidly right-wing, red states: Erik Eckholm, Tea Party Favorite Wins Texas Runoff, N.Y. TIMES (July 31, 2012), http://www.nytimes.com/2012/08/01/us/politics/cruz-defeats-dewhurst-for-gop-nomination-in-texas-senate-race.html?pagewanted=all&rr=0.} and attacks on President Obama and his policies, questions remain regarding the demise of racism in American society.\footnote{As I detail infra, the TPM is premised in large part on its racial hostility to persons of color. See Alan I. Abramowitz, Partisan Polarization and the Rise of the Tea Party Movement, AMER. POL. SCI. ASSOC. (Sept. 1, 2011), http://faculty.washington.edu/jwilker/353/AbramowitzTea.pdf; infra notes 139-50 and accompanying text. Studies reveal that the increased conservativism of Republicans has played a major role in its formation. Abarmowitz, supra note 48.} The TPM proves that racism is alive and flourishing in the U.S. and cannot be eradicated until the TPM is defunct and impossible to replicate in American society. So long as the TPM has relevance in American national politics, the goal of achieving true racial equality will not be attainable.

This Essay argues that the TPM would not exist as a viable movement if Senator McCain had won the 2008 presidential election and that the presidential election of President Obama is the primary causative agent for the creation, evolution, and growth of the TPM.\footnote{To be sure, the election of President Obama is not the sole causative agent for the formation of this movement. Studies reveal that the increased conservativism of Republicans has played a major role in its formation. Id.} Given the rise of the TPM, what do the elections of Barack Obama mean for race relations in America in the twenty-first century?\footnote{The short answer at this point is that to the extent that formal racial equality has been achieved in the United States it creates opportunities for what I characterize as racial exceptionalism. President Obama’s election is an example of that racial exceptionalism. However, racism still persists to subordinate the vast majority of African-Americans in the United States. Racial exceptionalism is a product of formal racial equality and is used by those opposed to true racial equality to thwart same. This theory of racial exceptionalism is discussed in greater detail infra at notes 60-68 and accompanying text.} Are those election results anomalous or do they signify a new era in race relations in the United States? What does the birth and continued viability of the TPM mean for the future of race relations in the twenty-first century?\footnote{In addition to an affirmation of the continued existence of racism, the TPM represents an attempt to maintain white hegemony in the face of changing demographics that will soon result in whites no longer}
achieving racial equality do to help achieve that goal.552

A. "For the First Time, I See My Students Really Believing that Skin Color Doesn’t Matter"63,

The initial election of President Barack Obama represented the best of times for race relations in American history, symbolizing that racism had been eradicated from American society. To some degree, that accomplishment represented progress for all African-Americans and other subordinated persons. The “Change,” promised by Barack Obama’s election as President, signified more than political change. It was a purported shift in race relations that caused many to proclaim that race no longer mattered in American society (i.e., that being an African-American in the United States is not a negative attribute).54 Immediately after the election, the number of African-Americans who viewed American society as fair and decent improved considerably.55

One quote worthy of full rendition sums up the general feeling and mood of the country immediately following the 2008 election of President Obama:

Parallels from the past risk seeming irrelevant and antique given the enormity of the historic moment. A nation whose Constitution enshrined slavery has elected an African-American president within living memory of days when blacks were denied fundamental human rights—including the right to vote. Hyperbole around comprising a majority of the country’s populace. The impending threat of America becoming a majority-minority country is discussed infra at notes 136-139 and accompanying text.

52. One obvious and quick answer at this point is that these individuals should vehemently oppose the viability of the TPM, their candidates, and their proposed policies, especially those that would result in the entrenchment of whites as the hegemonic force in American society and politics. For example, the TPM’s efforts to shrink or reduce government spending to reduce the deficit should be opposed and exposed as an attempt to lessen or eliminate the redistribution of wealth in American society to maintain or exacerbate wealth disparities between the races in American society. For further discussion of this point, see infra notes 154-155 and accompanying text.

53. [T]he transformation in the nation’s attitudes that [Obama] embodied was plain to many black Americans, such as Angela Cox, a 43-year-old Florida high school teacher who gripped a colleague’s hand and wept as Obama took the stage at the Jacksonville Veterans Memorial Arena on the eve of the election. "For the first time, I see my students really believing that skin color really doesn’t matter," she said, shaking.


54. See id.

55. Two days after Barack Obama became the first African-American to be voted into the White House, the percentage of black voters who view American Society as fair and decent jumped 18 points to 42%. [...] Just a month earlier, only 24% of black voters viewed American society as fair and decent.

elections comes easy and cheap, but this is a moment—a year—when even superlatives cannot capture the magnitude of the change that the country voted for [on election day]. “If there is anyone out there who doubts that America is a place where all things are possible; who still wonder if the dream of our Founders is alive in our time; who still questions the power of our democracy, tonight is your answer,” Obama told an adoring yet serious throng in Chicago’s Grant Park. He alluded to the historic nature of the victory only indirectly. “This election had many firsts and many stories that will be told for generations,” he said. He did not need, really, to add anything to that: that he was saying the words was testament enough.\footnote{Jon Meacham, \textit{The Age of Obama}, NEWSWEEK (Nov. 17, 2008, 7:00 PM), http://www.newsweek.com/meacham-age-obama-84875.}

The fact that a majority of voters would select an African-American to the country’s highest elected office was something unattainable (indeed, unbelievable) even as few as twenty years ago.\footnote{Not only was Anthony Kennedy appointed to the Supreme Court in 1988 by President Reagan, an important appointment that continues to symbolize the power and influence of that reactionary era today, \textit{see infra} notes 198-200 for further discussion, but the elder George Bush, who ultimately begat George W. Bush, was elected President. For those too young to remember, one of George Bush’s primary political ads during his first campaign in 1968 depicted the obviously African-American murderer and convict, Willie Horton who was released (paroled) from prison on a weekend furlough during which he raped and killed a woman. \textit{See, e.g., Top Ten Political Ads}, TIME http://content.time.com/time/specials/packages/article/0,28804,1842516_1842514_1842557,00.html (last visited June 21, 2015). Times they do change in twenty years.} But that progress, described in more detail below, also raises some profound questions:

With 43\% of the white vote, Barack Obama was elected the forty-fourth president of the United States of America on November 4, 2008. The “Age of Obama” began on that day, more than three decades into the post-civil rights era. What does the “Age of Obama” mean for racial justice in America? Does it mean that America has now become a postracial society, such that African Americans no longer have to deal with the unspoken or spoken belief that opportunities are limited by race? Is it still about race, or is it now about individual excellence? Does excellence eclipse race in Obama’s America? Has the election of a black president brokered new opportunities for black Americans?\footnote{Robert Staples, \textit{The Illusion of Race Equality: The Black American Dilemma}, in \textit{LURE AND LOATHING: ESSAYS ON RACE, IDENTITY, AND THE AMBIVALENCE OF ASSIMILATION} 227 (Gerald Early ed., 1993).}

Although President Obama’s initial election signified positive change in race relations it also raises two related issues addressed in this Essay. First, just how meaningful is that progress for African-Americans? Second, given the long history of race relations in the United States what can we learn from both elections of Obama and what does it portend for the future?

Consequently, this is not the first time that the claim has been made that race relations have improved or are improving. Pundits often point to the accomplishments of an individual African-American (or a small group of African-Americans) as proof that racism is no long an inhibiting factor in American society.\footnote{\textit{Brooks, supra} note 39.} To the
contrary, the success of the one or of a few African-Americans, even if unattainable twenty years ago, is a species of racial exceptionalism.

B. Racial Exceptionalism

President Obama represents the epitome of racial exceptionalism. Racial exceptionalism represents the confluence of three discrete factors. First, racial exceptionalism occurs when a minority excels in his or her chosen endeavor in society. President Obama’s Harvard law degree, his work as a law professor, community organizer, Senator from Illinois, and election as President qualify him as an African-American who has excelled in American society. Those accomplishments are truly exceptional, regardless of race.

Second, the exceptional racial minority has not only excelled in his or her chosen profession or endeavor when compared to others, but also when compared to those of the same race. The fact that Barack Obama is an African-American only makes those accomplishments more exceptional. His achievements are exceptional and represent an atypical achievement that is rare and would have been impossible before the advent of the Civil Rights Era. 

Third and last, the racial minority member who signifies racial exceptionalism is used as a symbol of racial progress to denote the lessening or end of racism in American society by those largely unsympathetic to the plight of African-Americans and other minority groups. The exceptional African-American is used not only as an example of success, but he or she is held out as visible proof that any African-American can excel if they, to paraphrase noted film director Spike Lee “Do the Right Thing” and follow the rules of American society. That is, obey your parents, go to school, don’t cheat, be honest, work hard, and believe in God. It is also used by those opposed to racial justice and harmony to rebuff claims that race relations have not improved, and, therefore, require additional remedial steps.

Racial exceptionalism is both a product of the debate over the efficacy of affirmative action and a defense against the prospective use of affirmative action. In brief, those opposed to the use of affirmative action often argue, as Chief Justice Roberts did in Parents Involved in Community Schools v. Seattle School District, No. 1, that the way to eliminate racism in American society is to adhere to race neutral policies. In other words, race should not be taken into account either as a positive or a negative metric. Those opposed to affirmative action contend that the use of race denigrates those who are ostensibly benefit from it by stigmatizing them and their

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60. Before the Civil Rights Era, the leaders in the Negro community achieved positions of Reverend, Funeral Director, Teacher, Barber or Beautician, Insurance Agent, Nurse and Doctor, occasionally lawyers, and local politicians representing Negro communities. Those who achieved these positions were the leaders in the community. RALPH JOHNSON BUNCH, A BRIEF AND TENTATIVE ANALYSIS OF NEGRO LEADERSHIP (Jonathan Scott Holloway ed., 2005).


accomplishments as race-related, as opposed to individually attained.\(^{63}\) Also, the argument goes, the continued use of race entrenches the subordinated positions of persons of color and the hegemonic position of whites in American society and precludes opportunity for those on the bottom.\(^{64}\)

Instead of focusing on groups and group identity, the focus should be on the individuals and individual attainment, and the elimination of impediments to that individual attainment. Those opposed to the use or expansion of affirmative action do not advocate for the use of race to either hinder or help individuals. Instead, focusing on the principle of equal opportunity, they call for exactly that, equal opportunity with no thumb on the scale in favor of or against any applicant for, say, admission to a school of higher education.\(^{65}\) Over time, they argue, since all individuals are treated fairly and equally, race will no longer be a factor or variable in awarding entitlements like seats in a law school or a university.

By focusing on the individual and individual merit, the scope of affirmative action becomes miniscule, given the absence of provable racial animus and the fact that the individual claiming discrimination must prove that race was taken into account to produce harm.\(^{66}\) By acting in a race-neutral, color-blind fashion, all individuals, irrespective of race or ethnicity, have an equal chance to attain or succeed. Failure to do so, therefore, is the fault of the individual and not as the result of that individual’s racial or ethnic identification. With the focus on the individual, a racial group’s position at the bottom of the hierarchy of American society becomes irrelevant as long as there is equal opportunity for anyone within the group to excel. The failure to take that opportunity, even if that failure is attributable to harms created by the systemic effects of racism that took place before equality of opportunity was embraced by society as the antidote to racism, is also irrelevant. Thus, group statistics and the plight of an identified racial group become irrelevant as well.

Moreover, to prove that the provision of equal opportunity, unaffected or tainted by race, is the antidote to claims of racial discrimination or inequality, those opposed to the expansion or use of affirmative action need only point to those who have excelled in American society, notwithstanding their identification as a racial minority. The success of someone like President Obama (or yours truly) becomes incontrovertible proof that race is not an inhibiting factor in our society.\(^{67}\) If an African-American can become President of the United States, then, racism is not an impediment to success but

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64. This argument has some merit, and I have argued that the only way to truly eliminate racism in our society is to eliminate racial classifications in totality. See Destabilizing, supra note 37 (arguing that affirmative action should continue to be used as remediation for racial inequities until racial classifications are eliminated from American society).
65. Given the Supreme Court’s recent grant of certiorari in Fisher v. University of Texas, 133 S.Ct. 2411 (2013), this is an apt hypothetical. See also Parents Involved, 551 U.S. 701 (2007).
66. See, e.g., University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517 (2013).
67. Of course, Justice Thomas is also a representative example of racial essentialism and his voice articulated in numerous opinions decrying the use of race and opposing affirmative action takes on added importance because he is an African-American. He represents the power of racial exceptionalism that is used to thwart improved race relations. See United States v. Fordice, 505 U.S. 717 (1992).
an excuse used by those who either lack the ability, the desire, or the work ethos to succeed. That is racial exceptionalism: pointing to the success of the exceptional African-American to demonstrate that racism does not preclude or hinder success in American society.

The key question presented is how American society moved from “separate but equal”\(^68\) to a society in which racial exceptionalism is used to thwart racial progress and limit it to formal equal opportunity. How can progress in race relations, typified by the election of an African-American as President, counterfactually result in the rise of the TPM and further limitation on racial progress? The starting place is with the triggering events—those events that initially signified change and hope, but ultimately elicited societal responses that seemed calculated to maintain the existing power structure and thwart any meaningful racial progress in American society. The place to start is with the first Civil Rights Era of the Sixties and Seventies.

### C. The Civil Rights Era

Most all would agree that any progress in race relations in the twentieth and twenty-first centuries can be traced in large part to the Supreme Court’s decision in *Brown v. Board of Education*,\(^69\) one of the most important events in the history of race relations in the United States.\(^70\) That event, when juxtaposed against President Obama’s election in 2008, presents a finite time-line of fifty-four years (or roughly two generations) by which to measure the improvement in race relations in the United States. Having lived through this historic period and having benefitted from it immeasurably,\(^71\) I chose to divide this epoch into two distinct periods that track the two generations that populated the same movement. The first is the Civil Rights Era of the Sixties and Seventies and the gains produced during that roughly twenty-year period.\(^72\) The second period, which I designate the “post-Civil Rights Period,”

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\(^68\) See, e.g., Michael J. Klarman, *From Jim Crow to Civil Rights* (2004) (exploring racial equal protection jurisprudence from *Plessy* to *Brown*).

\(^69\) See, e.g., Klarman, supra note 12.

\(^70\) I am tempted to state that it is the most important event in the history of race relations in this country for African-Americans. However, that would be ignoring the Emancipation Proclamation, the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, and the passage and subsequent renewal of the Voting Rights Act. See, e.g., Bush signs Voting Rights Act Extension, NBC News (July 27, 2006, 11:27:29 PM) http://www.nbcnews.com/id/14059113/ns/politics/t/bush-signs-voting-rights-act-extension/. Indeed, the latter may be the most significant in terms of achieving meaningful change in the lives of most African-Americans, given that Obama would not have been elected President without the votes of persons of color and those votes would never have been cast without the passage and progress created by the Voting Rights Act.


\(^72\) The election of Richard Nixon in 1968 and, more importantly, his reelection in 1972, his resignation from that office, the elevation of Gerald Ford as President, and the subsequent election of Jimmy Carter as President in 1976, represent a transition period or bridge between the Civil Rights Era and the Post-Civil Rights Era. Indeed, I contend that the lone Democratic presidential electoral victory—Jimmy Carter—in a
begins with the election of Ronald Reagan as the Fortieth President in 1980 and concludes with Barack Obama’s election as the Forty-Fourth President in 2008.\footnote{73}{Although the selection of President Ronald Reagan as the trigger and starting point for the Post-Civil Rights period might seem attributable to Reagan’s reputation and policies which polarized race relations, as I discuss in more detail infra, Reagan’s importance as the initiator of the Post-Civil Rights Period is attributable to the change he wrought in the federal judiciary due to the many judges and justices he appointed to the federal courts (four Supreme Court Justices: Chief Justice Rehnquist, Sandra Day O’Connor, Antonin Scalia, and lastly and perhaps most importantly today, see infra notes 175-90 and accompanying text, the current swing vote, Anthony Kennedy; eighty-three judges to the United States Court of Appeals (including then Judge Roberts and Alito, both of whom have been appointed to the Supreme Court by President Bush), and 290 judges to the United States District Courts for a total of 376 judicial appointments, the most by any President). See Judges of the United States Courts, FEDERAL JUDICIAL CENTER, http://www.fjc.gov/public/home.nsf/hi?isj (last visited Feb. 15, 2015). Others have characterized the Post-Civil Rights Era as beginning earlier in the 1972 with the election of Richard Nixon as President. See BROOKS, supra note 39 at 126.}

The turbulent Fifties produced a monumental legal victory for African-Americans in the Supreme Court’s opinion outlawing “separate but equal” in Brown v. Board of Education.\footnote{74}{Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).} This legal victory did not immediately translate into meaningful integration of American schools or immediately improve racial progress in American society. Instead, as eloquently described by Professor Michael Klarman in his masterpiece, From Jim Crow to Civil Rights, The Supreme Court and the Struggle for Racial Equality,\footnote{75}{KLARMAN, supra note 12, at 344.} the immediate response to the decision in the South was a strategy of massive resistance.

The South’s refusal to legitimize Brown ultimately led to violent confrontations amongst people demanding integration and civil rights, die-hard Southern segregationists intent on maintaining the existing racial hegemony in the South, and protestors bearing the brunt of the injuries and death. Moreover, protestor brutalization, which played out on national television (then a national unifying factor given the paucity of channels and other entertainment options) occurred in large part because officials, like Birmingham’s Sherriff Bull Connor, either participated in brutalizing the protestors or allowed it to occur with their tacit consent and approval.\footnote{76}{See id. at 175-176 (2007) (attributing the change in Northern views on Civil Rights and race relations as a reaction to the televised attacks perpetuated on the protestors by die-hard segregationists like Bull Connor).}

It is undeniable that a cursory analysis of historical events easily leads one to conclude that the “victory” represented by Brown caused the reaction in the South that created an epochal change in race relations. Those changes occurred in the Sixties, led by President Johnson and a Democratic Congress, which passed legislation—specifically, the Civil Rights Act of 1964\footnote{77}{Civil Rights Act of 1964, 42 U.S.C. § 2000a (2012).} and the Voting Rights Act of 1965\footnote{78}{Voting Rights Act of 1965, 52 U.S.C.S. § 10101 (2012).}—that represented significant victories for African-Americans and positive steps for race relations in the United States.\footnote{79}{See KLARMAN, supra note 12, at 178-79.} And the victories were not limited to
legislation alone. The U.S. Supreme Court, in reaction to the intransigence of Southern states in obeying Brown, also issued progressive and significant rulings on race in the Civil Rights Era.  

The Seventies can be viewed as a transitional decade pursuant to which Supreme Court victories begat legislative victories, as well as more Court victories. The period can also be viewed as the decade in which there was a transformation in public opinion about race relations in the United States. In brief, the Sixties and Seventies represented a time of promise for racial progress and racial integration in American society. The advent of the Fair Housing Act, along with expansive and favorable Supreme Court opinions (some of which occurred even before the Civil Rights Era), as well as the increasing use of affirmative action to integrate colleges, universities, and the workplace, all seemed to portend significant changes in race relations in the late Sixties and the Seventies.

In addition, as African-Americans and whites began moving to the suburbs, and as the migration of African-Americans to northern urban cities began to reverse, demographic patterns initially seemed to support meaningful integration. Lastly, economic conditions seemed to favor residential integration due to the fact that African-American income levels were rising in the late Sixties and early Seventies, culminating in the lowest rate of African-American poverty in United States history in 1973.

Concomitantly, as legislative and legal victories proliferated, the Black Power movement developed within the African-American community to trumpet the benefits, uniqueness, and power of the still largely segregated African-American community. As one whose teen years occurred between 1966 and 1973, I remember fondly and favorably the development of an African-American ethos that embraced the phrase, “I am Black and I am Proud” and the palpable change in perception in the African-American community.

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80. See id.


Opinion polls revealed that the percentage of Americans who deemed civil rights to be the nation’s most urgent issue rose from 4 percent before Birmingham [Protest in 1963] to 52 percent afterward. President Kennedy now went on national television to announce that civil rights was a “moral issue as old as the scriptures and as clear as the American Constitution,” and he radically overhauled his earlier civil rights proposal.


83. See Smith v. Allwright, 312 U.S. 649 (1944) (invalidating the “white primary” which ultimately created a revolution in politics in the Urban South).


87. See id. at 60-61.


89. James Brown, Say It Loud—I’m Black and I’m Proud, on Say It Loud—I’m Black and I’m Proud (King Records 1968).
American community regarding its future prospects. A group that began the Civil Rights Movement classified as “negroes” embraced a nomenclature on race that characterized them as “Blacks” and subsequently African-Americans. This significant change in self-perception elicited a view that the hope and dream of racial equality might actually become a reality.

The promise of Brown and the opportunities for African-Americans that followed it were short-lived. Economic decline, combined with a shift in white attitudes in the mid- to late-Seventies (largely attributable to the North’s opposition to housing segregation), the urban race riots that took place in the mid-Sixties and early Seventies, the rise of violent and separatist Black Nationalism and the polarization created by the Vietnam War, closed many of the doors which had previously been opened for African-Americans. Indeed, the economic gains that occurred for African-Americans in the Fifties and Sixties began to reverse itself in the Seventies, causing the economic status of African-Americans, relative to whites, to stagnate and eventually deteriorate.

D. The Post-Civil Rights Era

By 1980, the dream of integration had given way to the reality of increased segregation of our major cities and the problems associated with urban ghettos. Demographers documented what seemed to be counterintuitive in light of the societal embrace of integration:

[In contrast to the steady improvement in black socioeconomic status through 1973, the decade ended in record unemployment, inflation, falling wages, increasing income inequality, and rising rates of black poverty Not only did the ghetto fail to disappear; in many ways its problem multiplied. As segregation persisted, black isolation deepened, and the social and economic problems that had long plagued African American communities worsened. During the 1970s, the ghetto gave birth to the underclass.]

Just as importantly, the increased polarization of American society and the use of race in American presidential politics epitomized by Ronald Reagan’s characterization of certain welfare recipients as “welfare queens” led to his election, the reification of race in politics that continues to exist to this date, and the definitive end to the gains made by African-Americans in the Civil Rights era. That election ushered in and cemented the Post-Civil Rights Era in which any gains realized by African-Americans as a group were quickly reversed. It was, however, a dichotomous period in that it also created the context for the rise of racial exceptionalism.

90. See Johnson, supra note 71.
91. See Klarman, supra note 12, at 189.
93. Massey & Denton, supra note 86 at 61 (endnote omitted).
94. As noted supra at 73, Brooks claims that the Post-Civil Rights Era began in 1972. See Brooks, supra note 39 at 126. I find that claim perfectly reasonable. I think that all would agree that by 1980 and the election of Ronald Reagan, the Civil Rights Era was largely dying or dead.
The election of Ronald Reagan as President in 1980 was almost as symbolic and important as the election of President Barack Obama twenty-eight years later. President Reagan’s election and subsequent reelection represent two of the five Republican presidential election victories produced by the six presidential elections from 1968-1992. In the span of almost a quarter century, the country turned away from the promise of the Civil Rights Era to embrace governmental policies that were racially divisive and typified by the ongoing debate over affirmative action during that period.

President Reagan’s appeal to the politics of racial division, and his immense popularity as a result, symbolized the rejection of democratic policies and the burgeoning welfare state that was its immediate ancestor. His two terms in office also symbolized the rejection of affirmative action or preferential policies based on race and an embrace of formal equality over true equality (culminating in Chief Justice Roberts’ infamous statement in Parents Involved in Community Schools v. Seattle School District, No. 1, that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race”). Perhaps even more importantly, President Reagan’s selection of Supreme Court Justices committed to limiting racial equality.

95. I am not the first to note that the election of President Barack Obama is eerily reminiscent of the election of President Ronald Reagan some twenty-eight years previously:

Barack Obama won the White House by campaigning against an unpopular incumbent in a time of economic anxiety and lingering foreign policy concerns. He offered voters an upbeat message, praised the nation as a land of opportunity, promised tax cuts to just about everyone, and overcome doubts about his experience with a strong performance in the presidential debates. Does this sound familiar? It should. Mr. Obama followed the approach that worked for Ronald Reagan. His victory confirmed that voters still embrace the guiding beliefs of the Reagan era.


Barack Obama’s 2008 campaign was modeled after another successful presidential campaign from an earlier decade. You might think we are talking about Bill Clinton. In fact, we mean Ronald Reagan.

As Scott [Rasmussen] penned in the Wall Street Journal just after the 2008 elections, the Obama campaign followed the Reagan roadmap at several critical junctures on the winding road to the White House.

RASMUSSEN & SCHOEN, supra note 26, at 262.

96. The lone Democratic victory occurred in 1976 when Jimmy Carter was elected President, in large part in response to the Country’s antipathy toward President Nixon created and in no small part because of the crisis created by Watergate:

The country approached the 1976 election season already exhausted by a decade of war and scandal. The divisive Vietnam conflict and Richard Nixon’s Watergate saga had undermined confidence in government and left public spirit at an all time low. Traveling around the country long before other candidates began their campaigns, Carter listened, assessed the national mood, and decided it was a perfect time for an outsider like himself to run.


97. For a discussion of affirmative action and the role it has played in roiling race relations, see infra notes 167-74 and accompanying text.

established a legacy of judicial conservatism that continues to animate and limit racial equality today. 99

However, the paradox created by the Post-Civil Rights Era is that it also ultimately resulted in the election of Senator Barack Obama as the Forty-Fourth President of the United States. Consequently, I believe it is fair to state that the racial progress that was made during the Civil Rights Era, 100 although impaired by Reaganomics and the policies implemented during Reagan’s two terms, neither permanently ended that progress nor totally reversed the gains made during the Civil Rights Era. 101 The picture presented herein is more nuanced. Racial progress continued to be made in the Post-Civil Rights Era, but at a level that some would argue is inconsequential or circumstantial. Meaningful racial progress, the attainment of true integration, 102 the equalization of wealth among whites and African-Americans, 103 the elimination of health disparities and differentials between whites and African-Americans, 104 and the elimination of the educational achievement gap between whites and African-Americans 105 remained largely unattainable as a result of policies embraced in the

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99. For discussion of this point, see infra notes 198-200 and accompanying text.
100. I define racial progress as the attainment of equality of results by those in different racial groups in important metrics such as health, wealth, and education. A fourth metric, beyond the purview of this Essay, is the number of elected officials, which should mirror the racial composition of the United States if true racial progress has been achieved.
101. Some may argue that the progress made in the Civil Rights Era was stalled by Reaganomics and its associated policies. I find that untenable in light of the subsequent election of Present Obama. Nor would I accept the contention that the gains made during the Civil Rights era were reversed in the second generation after Brown. And although I made the argument that the decision in Brown was inimical to African-Americans in Why Integrationism Fails, supra note 88, at 1427. I did not claim that Brown decision resulted in no gains or did not improve race relations in the United States. Quite the contrary, with hindsight and almost forty years of practical application of Brown, I made the contention that the racial progress achieved within the African-American community would have been vastly improved had there been no symbolic victory over “separate but equal” and instead a focus on achieving equality in those social metrics that matter. To be more precise, the shift in the Post-Civil Rights Era to formal equality, as represented by the Supreme Court in numerous decisions, has the effect of minimizing the gains attained as a result of the Brown decision. That is discussed further infra at notes 160-66 and accompanying text.
102. See Alex M. Johnson, Jr., How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods, 143 U. PENN. L. REV. 1595 (1995) [hereinafter Race and Poverty Intersect]. Meaningful integration requires not only a process of integration, but also a philosophy of integration that respects the rights and cultures of others. The product of meaningful integration is the proportionate representation of persons of color in all-important metrics. See Alex M. Johnson, Jr., Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties, 1992 U. ILL. L. REV. 1043 (1992) [hereinafter Defending].
103. Although the focus here is on the differential experiences and outcomes of whites and African-Americans, that focus can easily be expanded to include other people of color including Native Americans, Latinos, and Asians. The limited and narrow focus herein is for ease of exposition and does not mean or intimate that there is not differential between whites and those other people of color. See BROOKS, supra note 39, at Appendix.
104. See Alex M. Johnson, Jr., The Re-Emergence of Race as a Biological Category: The Societal Implications—Reaffirmation of Race, 94 IOWA L. REV. 1547 (2009).
105. See Alex M. Johnson, Jr., Knots in the Pipeline for Prospective Lawyers of Color: The LSAT Is Not the Problem and Affirmative Action is Not the Answer, 24 STAN. L. & POL’Y REV. 379 (2013).
Post-Civil Rights Era that have exalted form over substance and formal legal opportunity over substantive legal outcomes or results.106

E. Confluence of Racial Exceptionalism and Changing Demographics

President Obama’s election represents a positive change in race relations and signifies that progress in race relations has been made. However, instead of ushering in a second Civil Rights Era, the reaction to his election was immediate and vitriolic. The most palpable reaction to the election of President Obama was the evolution and growth of the TPM.107 The very election that symbolizes racial progress and improved race relations was made possible, in large part, by the turnout of voters of color ultimately fueled the creation of the TPM and the tenets for which it stands.

Most of the exit polls following the presidential election of 2008 showed that while Barack Obama won the majority of the votes,108 he did not win the majority of white votes. In point of fact, Senator McCain beat President Obama in attracting white votes, receiving fifty-five percent of that vote compared to Obama’s forty-three percent.109 If African-American and other persons of color had been excluded from voting as the Republicans are currently attempting to accomplish with their efforts to bring back the equivalent of poll taxes,110 Senator McCain would now be President McCain.111

106. This failure to achieve true racial equality leads to my prescription for those committed to improving race relations addressed in infra Part IV.
107. See infra notes 139-150 and accompanying text.
110. The sheer number of minority voters has led to efforts by Republicans and Tea Party supporters to suppress minority voting through the use and imposition of voter identification laws that many claim are similar to the odious poll tax and other election bars put in place to keep blacks from voting in the South before the passage of the Voting Rights Act of 1965. See, e.g., Benjamin Todd Jealous, The State of Pennsylvania, Voter Suppression and the American People, HUFFINGTON POST (Oct. 22, 2012), http://www.huffingtonpost.com/benjamin-todd-jealous/the-state-of-pennsylvania_b_18214. This month [August 2012] a Pennsylvania judge upheld a strict government voter photo ID requirement that could block nearly 800,000 voters (9 percent of the entire state voting population) from the ballot box on November 6th.
Nationally, strict photo ID laws will have the harshest impact on already marginalized populations. Studies have shown that 25 percent of African-Americans, 16 percent of Hispanics, and 18 percent of individuals over 65 do not even have the documents required to gain the proper photo identification mandated in new voter ID laws . . . Proponents of such tactics continue to proclaim the protection of Election Integrity against voter fraud. In states, including Pennsylvania, these same proponents have unearthed little or no evidence of voter impression fraud. Instead, states have uncovered inconsistencies in their voter rolls and flaws in Election Day recording due to outdated registrar systems and election official errors.
Id.; see also infra notes 132-136 and accompanying text (noting that the United States will become a majority/minority country in 2042 or a little later depending on which demographer you believe).
111. Indeed this point brings to the forefront the fact that the Voting Rights Act, cite, and other legal, social and political efforts to win the franchise for African-Americans and other persons of color is the real victory of the Obama election. See, e.g., Pamela S. Karlan, Lessons Learned: Voting Rights and the Bush
However, the fact that African-Americans voted overwhelmingly for Senator Obama, a Democrat, is not unique. Since the election of Senator John F. Kennedy as President in 1960, African-Americans have overwhelmingly supported Democrats over Republicans notwithstanding Republican efforts to woo them.\textsuperscript{112} What has changed is the number of African-American voters and the other non-white voters who participated in the electoral process for the first time in 2008. Those voters created President Obama’s victories in 2008 and 2012. Although President Obama defeated two conservative opponents in successive presidential elections, those victories have produced more racial animus and division in this country as exemplified by the growth of the TPM.\textsuperscript{113}

How can the country simultaneously move to embrace an African-American as President while a large percentage of whites move politically to the right and seek a return to the halcyon days when separate was equal? What explains this paradox? It is remarkably simple, actually. The answer is change in demographics: the burgeoning population of people of color in the United States will ultimately result in this country becoming majority-minority within the next forty to fifty years depending upon whose estimate you rely.\textsuperscript{114} Surprisingly enough, it is the ongoing change in the racial demographics in the United States that is the primary causal agent for the

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\textit{Administration, A Duke J. Const. L. & Pub. Pol’y 17} (2009). Indeed, Obama’s victory can be traced directly to the passage of the 1965 Voting Rights Act:

The 1965 Voting Rights Act proved to be one of the most effective federal statutes in American history. The Act suspended literacy tests for voter registration in most of the South and authorized the appointment of federal registrars to replace state officials in the most recalcitrant southern countries. Before its enactment, only 6.7 percent of age-eligible blacks in Mississippi were registered to vote, and just 23 percent were registered in Alabama. There years later, black voter registration in both states had climbed to nearly 60 percent. Within a few more years, thousands of blacks had been elected to political office in the South.


Blacks have been the Democrats’ most reliable voting bloc for the last 50 years. And, let’s face it, with Barack Obama in the White House, that’s not going to change in the near future.

On the national level, Democrats typically get around 90 percent of the black vote, even when a black man isn’t running for president as a Democrat, Al Gore got 92 percent of the black vote in 2000; John Kerry got 88 percent in 2004.

\textsuperscript{113} See infra notes 123-137 and accompanying text.

rational progress that has been achieved to date and the election of Senator Barack Obama as President\(^\text{115}\) as well as the rise of the TPM addressed infra.\(^\text{116}\)

**PART II: TAKING BACK OUR COUNTRY: THE RISE OF THE TEA PARTY MOVEMENT**

The recent rise of the TPM has been both populist and, to some degree, unorganized. There is no one party or entity controlling the Tea Party, nor is there any one event that served as the catalyst for the TPM.\(^\text{117}\) Instead, the TPM arose as a result of a number of different events involving several different individuals working apart to express their negative views on current American politics. Although this Essay is not meant to provide a detailed history of the rise of the TPM, some basic facts need to be addressed to situate the movement within the current political milieu.

The TPM has taken the country by storm. The fact that five percent of the new Senators seated in 2011 for the 112th Congress were “tea baggers” is astonishing in that this movement did not exist until 2009.\(^\text{118}\) Although four books have been published recently regarding the creation, evolution, and tenets of TPM,\(^\text{119}\) the fact that TPM is such a recent political development with no centralized hierarchical governance or management structure has raised several questions regarding its evolution developments and tenets. Consequently, in this Part, I begin with a brief analysis of TPM, its leaders, its origins, and its primary or foundational principles gleaned from an analysis of the four books printed to date and items in the popular press regarding TPM.

Next, I take seriously the claims of the TPM that the primary goals of the movement are: 1) to “take back our country”; 2) to demonstrate that the United States was founded as a Christian nation; 3) to severely reduce federal spending and dismantle governmental control and regulation, precluding the redistribution of wealth;\(^\text{120}\) and

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115. See infra notes 132-36 and accompanying text detailing the voting patterns that resulted in that victory.

116. See infra notes 137-52 and accompanying text.

117. Judson Phillips is probably most identified as the national leader of the TPM. He is the Founder of Tea Party Nation, one of the largest and most vocal Tea Party social groups. His activities and views can be found at Tea Party Nation, http://www.teapartynation.com/ (last visited June 21, 2015). It is illuminating that the website describes the Tea Party’s principle philosophy as follows:

   Tea Party Nation is a user-driven group of like-minded people who desire our God-given individual freedoms written out by the Founding Fathers. We believe in Limited Government, Free Speech, the 2nd Amendment, our Military, Secure Borders and our Country.

118. See infra notes 125-27 and accompanying text.


120. It is no surprise that since the Citizens United v. Federal Election Commission, 538 U.S. 310 (2010) decision lifted spending limits for corporations, some of the wealthiest Americans contributed millions of dollars to defeat President Obama’s reelection and continue to support and elect tea party activists and candidates. What unites these super-wealthy Americans with the “grass root” individuals who claim to be the backbone of the TPM is a desire to maintain the status quo. See, e.g., Fredreka Schouten, Who Are the Kochs
4) to be faithful to the Constitution as written. In the abstract, and depending on your political point of view, these goals may be laudable or detestable, or somewhere in between.

Analysis of these tenets reveals one overarching unifying theme that motivates the TPM: racism and a desire to maintain white hegemony and control over the country at a time when that control is threatened by a demographic shift in the country, which will most likely produce a majority-minority country perhaps before the middle of this century. Ignoring isolated and anecdotal events, this paper analyzes the core foundational tenets and considers an American society in which their goals are realized.

The third and concluding section of this Part addresses the societal ramifications of TPM and what it portends for the future of race relations in the United States. Drawing upon insights gleaned from the last huge symbolic racial victory for African-Americans, Brown v. Board of Education, and the Civil Rights Era (Movement) it produced, I make predictions regarding the future of race relations now that the TPM is an entrenched part of the political landscape.

A. The Rise of the TPM: A Brief History of its Origins and an Answer to Why Now?

The TPM has no fixed beginning. No one person consciously awoke one day and decided to begin a movement and label it the TPM. Instead, the TPM birth was spontaneous, and its evolution was sparked by a handful of events that ultimately coalesced. Most individuals point to a financial commentator’s diatribe on CNBC on February 19, 2009, voicing his vehement objection to the federal government’s bailout plan for homeowners in default of their mortgages as the seminal motivating and rallying event that led to the formation of the TPM. Others point to a protest organized by Keli Carender designated as “The Anti-Porkulus Protest” in Seattle, Washington, on February 16, 2009, which drew 120 conservative protestors, as the beginning point of the nascent movement. Irrespective of which event was the causative factor for the formation of the TPM, events in the early months of 2009 were instrumental in the formation of the TPM.
What is most notably different about the TPM is the speed and ferocity with which it developed and the fact that it is a bottom-up movement as opposed to a top-down one. In contrast, the Post-Civil Rights Era’s reversal of the gains of the Civil Rights Era took place largely over two decades and was led, in great part, by the United States Supreme Court and the leadership of the Republican Party (including most notably Presidents Nixon, Reagan, and George H. W. Bush). In other words, it was a top-down process that reversed the gains achieved by African-Americans in the Sixties, and it took over twenty years to accomplish. Yet, the TPM’s response to President Obama’s election was immediate and ferocious.

For the first time in the history of American race relations, an exceptional African-American achieved a position that was inconsistent with the philosophy of integrationism, as describe in Part II.C., infra, because that philosophy was always premised on a notion of intermixture that was and is based on white hegemony. Pursuant to that white hegemony and control of society, African-Americans and others become racial exceptionalists because of their adherence to white norms and values that result in whites retaining control over their respective milieus and society. This type of integration does not respect nor value the ethnicity or norms of those within the African-American community but calls upon those members to embrace the ethnicity and norms of the white community. In other words, the philosophy of integration is premised on assimilation as opposed to meaningful integration. Barack Obama’s election as President threatens that notion of integration and foretells true integration.

I am not making the claim that President Obama is an African-American nationalist who rejects the goal of integration or the philosophy of integrationism. To the contrary, President Obama’s biography, his life to date, represents the epitome of the philosophy of integrationism, which is why I dub him an example of tribal exceptionalism. He is the example that an African-American (notice, “an,” not “all” or “many”) can excel in this society notwithstanding the history, legacy, and continued effects of racism. But that is not what he represents to those supporting the TPM.

To the TPM, President Obama represents a threat, a threat that the philosophy of integrationism could indeed lead to meaningful integration and not simply assimilation. President Obama’s election represents a future in which whiteness does not equate to advantage or racial privilege. President Obama is not an example of the success of integrationism; he is the leader of the country, and as such, can dictate the pace, scope and effectiveness of integrationism. In that leadership capacity, he truly does represent “change.”

125. See infra notes 175-190 and accompanying text.
126. See id.
127. Integration as a process in which whites and African-Americans inhabit the same milieu: be it educational, housing, careers, or otherwise. See infra notes 157-66 and accompanying text.
128. See Why Integrationism Fails, supra note 88, at 1414-1422.
129. See id. at 1422-26.
How President Obama achieved his position as leader presents an even more
telling threat to white hegemony that provided the impetus for the founding and
growth of the TPM. One of the things that has been constant in this country has
been an electoral process that has benefitted whites at the expense of African-
Americans and others on the bottom. That control of the franchise has been main-
tained through force, artifice, and law. And although articles can and have been
written about the continuing denial and restriction of the voting franchise to African-
Americans, that lengthy exegesis is beyond the purview of this Essay. The role that
voting (or the inability or limitation on voting) plays in the subordination of persons
of color is beyond serious dispute.

The 2012 election of President Obama poses a threat to that subordination.
Indeed, it promises to subvert that subordination. Not solely because President
Obama is an African-American, although that plays a large role, but because his
election (by African-Americans, other persons of color, liberals who are supportive of
those groups, and the burgeoning demographic swell of people of color) represents a
threat to a theory of integration that is premised on intermixture—whites and African-
Americans inhabiting important societal positions in proportion to their percentage
in larger society. President Obama’s election is a harbinger of a multicultural political
body in which whites no longer play the dominant role.

In other words, demographics may accomplish what centuries of conflict could
not—true racial harmony, improved race relations, and meaningful integration in
which cultural differences are respected and integrated into the mainstream polity
instead of assimilated—a country in which differences are respected and valued
instead of marginalized and homogenized. Although the United States Census pre-
dicted that non-Hispanic whites will no longer comprise a majority of the country’s
population by 2042, the real import of demographic changes in the American
population is slowly but surely becoming a multicultural society due to high levels of
intermarriage among races and variations in racial and ethnic identities of its
growing mixed-race citizens. Racial identification and even racial classifications
are slowly being obliterated in American society, given the pace of interracial mar-

130. See, e.g., Karlan, supra note 111.
131. See, e.g., id.
132. Current Republican and Tea Party efforts to disenfranchise African-Americans and Hispanics by
requiring voter identification under the guise that voter fraud is prevented represent the modern version of the
Poll Tax or literacy requirements that were once used to suppress minority voters in the South. See id.
133. See U.S. Minorities Will Be the Majority by 2042, Census Bureau Says, IIP DIGITAL (Aug. 15, 2008),
134. Id.
135. Fifteen percent of the marriages in 2010 were interracial marriages according to a recent Pew Re-
RES. CENTER (Feb. 16, 2012), http://www.pewsocialtrends.org/2012/02/16/the-rise-of-intermarriage/. The
number of interracial marriages is now about 1 in 12 and increasing. Hope Yen, Interracial Marriage in US
t/interacial-marriage-us-1.
136. See Anthony Daniel Perez & Charles Hirschman, The Changing Racial and Ethnic Composition of the
riages, immigration, and mixed-race citizens. The threat to white hegemony has created a call to return the country to the “good old days” when America was not only predominantly white, but a country that ignored and even belittled those who were not.

B. The Rise of the TPM—Taking Back our Country

One of the key objectives of the TPM is to turn the clock back (from what?) and in their inestimable turn of a phrase, a fervid desire to “take back our country.” This particular locution seems not only ungrammatical but also odd as a political goal or strategy. It presupposes, of course, that the country has been taken by an individual, group, or entity. Since our country has not been conquered by an outsider or even been attacked on its own soil by another country seeking to annex or assimilate it, the country must have been taken from within. And, given the nexus between the election of President Obama and the rise of the TPM, it is indisputable that those claiming that the country has been taken are claiming that the “taking” was the election of 2008 and the events that followed.

How a fair election can be a “taking” is a question for which I have no answer, but to give it credence, at best, the claim can be made that the objection is that the election of President Obama and the policies he represents means that our country’s politics have moved too far to the left for those who did not support then-Senator Obama in 2008. That is a reasonable position to take as our political process does not require unanimity to win an election, nor does it require the losing minority of the electorate to support the practices and philosophy of the candidate and group that won the majority of the vote.

But a close examination of the opposition represented by the TPM and its goal to take its country back reveals some interesting insights about the opposition that is the TPM. Even assuming that the country has not been physically taken or invaded, it is illuminating that the claim is to take back “our” country. That claim presupposes that there is a united “us” and a “them” who currently have control of the country. In other words, it presents an us versus them dichotomy; the “us” who are taking back our country are whites who claim that White America has been taken over by “those”

137. In Destabilizing, supra note 37, I argued that the only certain way to eliminated racism from American society is to eliminate the stable classification of races in American society. That destabilization is being accomplished through the change of the demographic make-up of the American population.

138. The September 9, 2001 terrorist attack in New York City represents such an attack, but that attack, and other similar attempts since, have not been the acknowledged product or goal of a recognized nation-state but the attacks of terrorist groups like Al Qaeda. Nor have even these unsanctioned attacks resulted in the loss of any property or the cessation of sovereignty to any third-party state. See, e.g., NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMM’N REPORT (Aug. 21, 2004), available at http://govinfo.library.unt.edu/911/report/911Report_Exec.pdf.

139. See supra notes 123-37 and accompanying text.

140. The seminal event that followed and motivated the TPM and continues to rile is TARP and other government programs labeled “bailouts” passed by the Democratically controlled Congress prior to the 2010 Congressional election in response to the worst recession since the 1930s created as a result of President Bush’s economically disastrous policies. See infra notes 182-207 and accompanying text.
ethnic or cultural minorities who presumptively support President Obama and who threaten to turn control of the country over to people like President Obama.\footnote{141}

To where do they want to take their country back? To the founding of the country and the Constitution as it existed then. The fact that the Constitution was followed in the presidential election held in 2008 is minimized or ignored in favor of a plea to return to a version of “originalism” that hews to strict adherence to the original version of the Constitution ratified in 1787.\footnote{142} This is more than nostalgia; this represents an idealized view of how the country looked then and how it should look today.

Why the reverence for the founding? Why a strict adherence to the Constitution as it then existed? Perhaps the second class treatment of women, the enslavement of an entire race of people, the genocide committed against another race of people, the class disparities and the lack of educational opportunities for those not so privileged and land owning are viewed as positives because those privileged individuals were white males.\footnote{143} Indeed the Tea Party Nation President recently advocated for a return to the requirement that only property owners be allowed to vote.\footnote{144}

Under the Connecticut or Great Compromise that was reached at the Constitutional Convention, the status of Negroes, as they were then called, was firmly entrenched as those on the bottom in the original Constitution. Under that Compromise, the Federal Government could not regulate the foreign slave trade before 1808, and slaves were counted as three-fifths of a white person for the purpose of determining the number of congressional seats each state would be awarded proportionately.\footnote{145} The status of negroes as property—and property worth less than similarly situated whites—was established as a constitutional truth. Furthermore, that truth would remain as fact for almost a century until the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, after a Civil War over the legal status of negroes.\footnote{146}

\footnote{141. What I have failed to emphasize about the TPM to this point is their rabid xenophobia and antipathy to immigrants, especially for Tea Partiers in the Southwest. See ZERNIKE, supra note 26, at 65. This xenophobia also fueled, to some extent, the birther movement and the claim that Barack Obama was not born in the United States and is a Muslim. See id. at 51.}

\footnote{142. But the point was this: to the Tea Partiers, the Revolutionary War was more than a gimmick, and more than a metaphor. It was a frame of mind. They saw themselves the way they saw the found, as liberty-loving people rebelling against a distant and increasingly overbearing government. By getting back to what the founders intended, they believed they could right what was wrong in the country. Id. at 66.}

\footnote{143. See Matsuda, supra note 8.}

\footnote{144. See Matt Schneider, Tea Party Nation President: Only Allowing Property Owners to Vote "Makes a Lot of Sense", MEDIAITE (Dec. 1, 2010), http://www.mediaite.com/online/tea-party-nation-president-only-allowing-property-owners-to-vote-%E2%80%9Cmakes-a-lot-of-sense%E2%80%9D/.}


\footnote{146. See KLARMAN, supra note 12. The Thirteenth Amendment prohibits involuntary servitude. U.S. CONST. amend. XIII. The Fourteenth Amendment defines citizenship, contains the Privileges and Immunities Clause, the Due Process Clause, the Equal Protection Clause, and addresses legal issues raised by the resolution of the Civil War. U.S. CONST. amend. XIV. The Fifteenth Amendment prohibits the denial of
“Taking back our country” is nothing more than an attempt by those supporting the TPM to maintain white hegemony and to turn the clock back to a time when that hegemony was established by law and respected by all. Taking back our country means a return to racial privilege and to gender roles that elevate men above women and whites above African-Americans. Taking back our country means a return to simpler times when whites rule supreme and Negroes know their place—along with all the other subordinated and disenfranchised groups on the bottom. Taking back our country means a return to a white country with white values where immigrants and their views are not welcome. Taking back our country means rejecting the melting pot metaphor that American Society has actually become given the country’s demographic makeup.

Instead, taking back our country represents returning to a country whose initial citizens, white Northern European immigrants themselves, pull up the gangplank behind them and close the door to those outside the country and close opportunities for those within the country who do not look like them. Taking back our country means concretizing a value system that is antithetical to the Declaration of Independence’s fundamental claim that “all men [and women] are created equal.” What the Tea Partiers fail to recognize is that taking back our country to that time and those ideals exposes the Constitution—at the founding—as a flawed aspirational document as opposed to a document that reflects the existing reality of the treatment of its citizens at the time of the Founding. Returning the country to the values that existed in 1787 reflects a warped view of history and current reality in which the nation’s laws and policies have evolved to achieve many of the goals set out in that original Constitution.

C. Taking Back Our Country: Taking the TPM’s Claims Seriously

Although it is easy to point to isolated events and anecdotes to make the claim that the TPM is premised in large point on racism, I eschew such an approach and give

suffrage based on race and color or previous condition of servitude. U.S. Const. amend. XV. That equalization of legal rights did not translate, however, into true equal status for those negroes then or African-Americans now.

147. See Zernike, supra note 26, at 95.

148. There is not even any acknowledgment that the original inhabitants of this country, Native Americans, have a claim to reparations as a result of having their country taken from them. See, e.g., Ronald L. Trosper, American Indian Reparation, Poverty & Race (Nov. 1994), available at http://www.prrac.org/full_text.php?%20text_id=649&item_id=6623&newsletter_id=17&header=Symposium%20Reparations.

149. The Declaration of Independence para. 2 (U.S. 1776).

150. The fact that the Constitution establishes rights and principles that do not reflect the reality of the society it ostensibly governs is not atypical or new. My colleague, Mila Versteeg, and her co-author, have undertaken a study of constitutions adopted by countries since ours was established and measured the extent to which the constitution reflects the existing reality in that country. She finds that some of the most tyrannical and despotic countries have the most generous human rights provisions, which are clearly ignored. See David S. Law & Mila Versteeg, Sham Constitutionalism, 101 Cal. L. Rev. 863 (2013).

151. It is hard to ignore the racism that was exhibited by some of the early leaders of the “movement” and a few examples will suffice to establish the claim that the movement is indeed racist based as proven by these incidents. One example will suffice: The most egregious and infamous example of innate racism exhibited by some Tea Party leaders was that expressed by Mark Williams, a California radio host and self-proclaimed
the TPM the respect that the supporters of the movement claim it deserves.\textsuperscript{152}

Hence, I will analyze the TPM as though it is devoid of extreme racists and instead accept at face value that those supporting the TPM are correct in their assertion that those making the vitriolic statements do not represent the core of the movement.\textsuperscript{153}

Other than the call to “take back our country,” the TPM has three additional, related tenets, all of which debase the power of the federal government in favor of exalting the rights of the individual. First, and most clearly, the TPM represents a call for smaller government, expressed in many guises, including less regulation and the elimination of the federal budget deficit. Second, the TPM stands for the proposition that there should be fewer or lesser taxes. Third, the TPM promotes States’ rights. These TPM tenets are related in another fashion: if these tenets are realized, that is, if the federal government’s role in our society is minimized in the fashion sought by proponents of TPM, the position of those on the bottom remain unchanged and those on top will remain on top.

The other thing that unites these views is the rejection of any sort of redistributive role of government and the elimination of avenues to effectuate that redistribution through equal opportunity to entitlements like education. Smaller taxes means less money for the federal government to reallocate to those on the bottom pursuant to welfare grants, Pell grants, or even something as race-neutral and productive as

\textbf{leader of the Tea Party Express who called President Obama, among other things, an “Indonesian Muslim turned welfare thug” and went on to post a “satirical letter” from a hypothetical “colored person” addressed to President Lincoln that said, among other things:}

Mr. Lincoln, you were the greatest racist ever. We had a great gig. Three squares, room and board, all our decisions made by the massa in the house.

We coloreds have taken a vote and decided that we don’t cotton to the whole emancipation thing. Freedom means having to work for real, think for ourselves, and take the consequences along with the rewards. This is just far too much to ask of us Colored People and we demand that it stop!


Another well-publicized incident involved a Tea Party rally in Washington, D. C., in which Representative John Lewis, an African-American congressman from Atlanta, Georgia, was called a “nigger” by many of the assembled tea baggers, and Representative Barney Frank, then the only openly gay member of Congress, was called a “homo” and “fag” by members of the same group. \textit{ZERNIKE}, \textit{supra} note 26, at 138.

Lastly, Rand Paul, son of perennial GOP presidential contender, Ron Paul while a nominee for the Senate in Kentucky (which he ultimately won), created a controversy in keeping with his father’s racist philosophy by opining that he disagreed with the passage and provisions in the 1964 Civil Rights Act that requires businesses and restaurants to operate in a non-discriminatory manner citing the “rights” of the owners of said businesses to freely discriminate as being infringed upon by said legislation. \textit{Id.} at 178-80. This is reminiscent of Professor Herbert Wechsler’s infamous claim that \textit{Brown v. Board of Education} was incorrectly decided because it violated whites’ rights of freedom of association because it compelled them to interact with ‘coloreds’ against their will. See Herbert Wechsler, \textit{Toward Neutral Principles in Constitutional Law}, 73 \textit{HARV. L. REV.} 1 (1959).

\textsuperscript{152} In \textit{MAD AS HELL}, Rasmussen and Schoen make claims that although contestable, the TPM deserves at least some consideration and analysis. \textit{RASMUSSEN & SCHOEN}, \textit{supra}, note 95.

\textsuperscript{153} See \textit{id.}
student loans.\textsuperscript{154} A smaller deficit means not only paying down the current deficit, but insuring that there are no future programs subsidized by the federal government which awards entitlements to those citizens in need.

States’ rights mean that the federal government has little or no power to affect citizens at the local level. In essence, it means that that whites can attempt to establish enclaves of states, for example, in which minority rights can be trampled and the federal government is prohibited from interfering. Nor can the federal government establish minimum standards that have to be adhered to by citizens of these states in this idealized view of state rights trumping federalism.

These proposed reductions in programs would result in individuals who have assets retaining what they have and precluding those whom do not from ever obtaining similar assets. If the TPM is successful, it will firmly entrench the existing distribution of wealth and power and solidify the hegemony of the economic elite of society. It will set in place the existing wealth disparities that have been recently exacerbated in American society.\textsuperscript{155} That state of affairs should be deemed unacceptable. “Taking our country back” to the odious days when whites reveled in overt racial privilege is unacceptable and should not be allowed to happen.

Indeed, even if the tenets of TPM cannot be realized, the mere existence of the TPM, its current political influence,\textsuperscript{156} and the propaganda and views it espouses are harmful to race relations and inimical to racial equality. Thus, TPM must be exposed for what it is: racism pure and simple and the view that the country is better off when those relegated to the bottom based on their color and ethnicity remain on the bottom. The discourse must shift to confront TPM and expose its true attraction to those on the right. This country must not return to the Founding, nor can it return to separate but equal. Instead, if TPM is to be rejected, if the philosophy of integrationism can ever become meaningful and true integration, and if racial harmony and equality are to be reached in this society, those supportive of the battle for racial equality should shift their discourse to confront TPM, expose its true attraction to those on the right, and illuminate the path to true racial equality.


\textsuperscript{156} See supra notes 45–47 and accompanying text detailing the Senators elected on the Tea Party platform. Also, the strength of the TPM is reflected in the fact that Paul Ryan, a leading tea bagger, has been added to Governor Romney’s ticket.

The tea party didn’t get its man in Mitt Romney. But the movement got one of its ideological heroes in the Republican presidential ticket’s No. 2 slot. Romney’s selection of Wisconsin Rep. Paul Ryan as his running mate marked a huge victory for the tea party. Its roaring influence helped Republicans take back the House in 2010, gaining 63 seats. Since then, its no-compromise positions on deep budget cuts set the parameters of high-profile fiscal fights on Capitol Hill.

equality must reenergize and unite to expose TPM for what it truly represents: not one step forward but, in actuality, three steps back—racism, sexism, and inequality.

However, before focusing fully on the TPM and its impetus and growth, the U.S. Supreme Court must be addressed. The Supreme Court’s jurisprudence in both the Civil Rights and Post-Civil Rights Eras has created a hospitable environment for both the development of racial exceptionalism and the TPM given its continued focus on formal, rather than substantive, equality of rights by embracing a philosophy of individualism. That jurisprudence created the crucible that allows the TPM to flourish and dominate American politics the last two years.

PART III: ONE STEP FORWARD, TWO, THEN THREE STEPS BACK: A PICTURE OF FORMAL EQUALITY OR EQUAL OPPORTUNITY

As discussed supra, the election and reelection of Barack Obama as President are epochal events for race relations in the United States. Just as those elections seemed to signify significant progress in race relations in America; the Civil Rights Era of the Sixties seemed to represent the same sort of progress in race relations. And, at some level, the Civil Rights Era, nested within the tumultuous decade of the Sixties, began the process that ultimately lead to Barack Obama’s election as President. What the Civil Rights Era also produced was the Post-Civil Rights Era in which the progress in race relations produced by the Civil Rights Era were limited in a way that suggests that those gains were formal and symbolic, focusing on rights and rights discourse rather than substantive and redistributive steps towards improved socioeconomic conditions for those on the bottom.

The gains produced by the Civil Rights Era and the election of Barack Obama as President were not without consequences. Each gain has produced a countervailing reaction, limiting previous gains. The Civil Rights Era produced a countervailing reaction, led by the rightwing Republican Party and the Courts (more particularly, the Federal Courts and most notably the Supreme Court of the United States) that resulted in that movement producing symbolic rather than substantive gains. If the lessons from that reaction are not learned and properly internalized, the election of President Obama has the potential to result in the same symbolic and non-substantive victory.

This Part is divided into three sections. The first section introduces and details the rise of the philosophy of integrationism that was produced by Brown and subsequently the Civil Rights Era. That philosophy of integrationism focuses on the equality of the individual, rather than the equality of the group. With the focus on

157. I find it interesting that the social setting that produced the Civil Rights Movement fostered a leftwing, liberal grassroots movement characterized by free love and drug use while the product of President Obama’s election created a rightwing, conservative grassroots movement known as the TPM. As I explain below, my best guess for the different grassroots movements produced by these phenomenon is that the conservative Fifties preceded preceding the Sixties providing Sixties an impetus to liberalization, whereas the country’s impending demographic change is the trigger for the conservative grassroots TPM. See supra notes 132-36.

158. See Matsuda, supra note 8.
individual and individual accomplishment, the Civil Rights Era produced racial exceptionalism in which the progress of the group is measured by those on the top, instead of those at the bottom.

The second section focuses on the debate over affirmative action and its dual role in creating racial exceptionalism and simultaneously shifting the focus from improved race relations for the group to the provision of equal opportunity for everyone, even if millions are in no position to take advantage of that opportunity.

In the third section, I focus on post-\textit{Brown} opinions outside the milieu of affirmative action and the issue of entitlements in higher education. Again, I demonstrate the causative and critical role played by the Supreme Court in limiting the substantive gains produced by the Civil Rights Era.\textsuperscript{159} Although the Supreme Court’s intent is opaque and unprovable, the actions and result of the Supreme Court in the generation after \textit{Brown} in the Post-Civil Rights Era have created an impenetrable wall of cases that are unified in their embrace of equal opportunity over equal outcomes when measured by wealth, health, access to education, and other important societal metrics.

\textit{A. Integrationism and Equal Opportunity: Flipping the Script!}

The United States Supreme Court embraced the philosophy of integrationism in \textit{Brown v. Board of Education}.\textsuperscript{160} A philosophy that means that racial equality will be achieved via equal treatment of the individual by law according to neutral norms.\textsuperscript{161} It was logical that the Court would react against the existing separate-but-equal doctrine and replace it with one that emphatically embraced equal as opposed to disparate treatment. It was believed then that once equal treatment was the law of the land, meaningful integration would follow given the absence of lawful discrimination. The philosophy of integration would lead to a process of integration pursuant to which schools, electoral bodies, indeed, all important facets of society would be integrated—that is, populated by proportionate numbers of all racial groups.\textsuperscript{162}

\textsuperscript{159.} See id.
\textsuperscript{160.} 347 U.S. 483 (1954).
\textsuperscript{162.} See \textit{Why Integrationism Fails}, supra note 88, at 1423. More particularly, the ideology of integrationism is premised on a philosophy of universalism:

A commitment to a form of universalism, and an association of universalism with truth and particularism with ignorance, forms the infrastructure of American integrationist consciousness. This universalism is the common theme that connects the integrationist analytic distinctions between reason and prejudice, objectivity and bias, neutrality and discrimination, and integration and segregation. Each dichotomy envisions a realm of impersonality, understood as the transcendence of subjective bias and contrasted with an image of a realm of distortion where particularity and stereotype reign.

Peller, supra note 161, at 772 (footnote omitted).
Moreover, the philosophy of integration focuses on the law’s impact or treatment of the individual, not the treatment of the group, and that is perhaps the most important aspect of integrationism. In *Brown*, the Supreme Court embraced an individualist ideology rejecting a communal ideology with its focus on group rights and group attainment. That individualist ideology is premised on a notion of individual responsibility that focuses the blame for injury on the individual injured rather than on the societal conditions that created the injury.

The problem with integrationism’s focus on individualism is twofold. First, it does not address the existing racial or other inequalities that existed at the time the philosophy was embraced. Embracing and declaring equal and neutral treatment as the law of the land does little, if anything, to address the racial inequality that preceded its adoption. Embracing equality as a philosophy and as the rule of law may have an inordinate effect on prospective ordering and relationships, but it serves no remedial purpose. As such, any harm created by the now discredited and repudiated process such as separate but equal is reified societally and remedied.

Furthermore, the philosophy of integrationism is only deemed successful if individuals from all racial groups embrace the opportunities provided and achieve success at proportionate levels. To be concrete, the philosophy of integrationism is only successful in the educational milieu if African-Americans are present proportionately in institutions of higher education like law schools. However, given that fixed and existing societal racial inequality, the process of integration (or “intermixture”) is quite naturally forestalled in certain milieus if individuals are not adequately prepared to take advantage of the newly minted equal opportunity.

Not only does embracing the integrationist philosophy not address existing harm, it ignores and allows the continuation of the existing state of affairs, which has serious consequences for the success of the philosophy of integrationism in the present and future. African-Americans can only integrate and attend law schools if they are prepared to do so. Neglecting or not providing a remedy for past discriminatory practices has serious consequences for those in the present even though the past practices have been outlawed or repudiated. That creates the conundrum that ultimately calls for the use of affirmative action.

This is where past, present, and future collides to preclude the success of the philosophy of integrationism. Given the inequities that are the product of past wrongful practices, those who are currently granted equal opportunity are in no position to take advantage of that equal opportunity. And if there has been no actual change in the results created by the adoption of the philosophy of integrationism,

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163. “Freedom from racial discrimination is but one instance of the historical move from status to contract, from caste to individual liberty. Individualism and universalism are thereby linked together.” *Id.* at 774 (footnotes omitted).
164. See *supra* note 19 and accompanying text.
165. See *Why Integrationism Fails*, *supra* note 88, at 1423.
166. In other words, the philosophy of integrationism presupposes a result that those of different races will occupy the important public spaces, like seats in higher educational institutions, proportionate to their percentage of the larger population. For a discussion of why “integrationism” fails both as a philosophy and as a process. See *id.*
then the policy reeks of failure. Enter the need for and early embrace of affirmative action as a necessary reaction to the philosophy of integrationism.

B. Affirmative Action: The Epitome of Meaningless Equal Opportunity and the Creation of Racial Exceptionalism

The use of affirmative action to benefit those who have been discriminated against by the now discredited policies like “separate but equal” neatly solves the short-term conundrum created by the embrace of the philosophy of integrationism. Affirmative action produces individuals who can take advantage of the equality of opportunity and provide adequate intermixture. As a transitory vehicle, affirmative action has the potential to ultimately produce those in future generations who can take advantage of the equal opportunity without the use or benefit of affirmative action; it provides a nice bridge from past to the future while providing societal benefits for the present generation who can claim that the current intermixture is visible proof of the success of the philosophy of integrationism. 167

The problem with the use of affirmative action is that it is inconsistent with a philosophy of integrationism premised on equality and individualism. At a basic level, awarding an entitlement based on one’s racial or ethnic identification clearly does not treat that person equally with those not so benefitted. Affirmative action fundamentally violates the precept of equal opportunity and is therefore inconsistent with that ideal that it constitutes reverse discrimination in that whites are harmed, discriminated against by its use. 168 In order to deploy it successfully one must argue that the benefit gained as a result of that use outweighs any harm created by the violation of the philosophy of integrationism. 169

Consequently the debate over the efficacy of affirmative action is somewhat tricky and convoluted. In its early stages, what I call the “no-debate stage,” affirmative action is uncontroversial and lauded for the benefits it provides. As a transitory vehicle, the policy of affirmative action provides the first wave of bodies who can take advantage of the equal opportunity decreed as the new law of the land in Brown. Indeed, the use of affirmative action proves the very success of the adoption of equal

167. The use and debate over the efficacy of affirmative action involves three temporal elements: past, present, and future. In one respect, affirmative action is backwards looking to the past to remediate wrongs inflicted by legally sanctioned racism. This is the so-called reparations based justification for affirmative action. See, e.g., Thomas E. Hill, Jr., The Message of Affirmative Action, 8 SOC. PHIL. & POL’Y 108, 117 (1991). The initial beneficiaries of affirmative action—those in the first generation of its use—are most likely to justify its use based on this backwards or past looking approach. Affirmative action, however, also has an impact on the present when used because it provides intermixture or integration and provides a societal benefit by creating improved race relations. Any beneficiary of affirmative action can justify the use of affirmative action pursuant to this rationale as long as persons of color, those previously discriminated against, are disproportionately underrepresented for the position or entitlement for which affirmative action is used. See Defending, supra note 102. Those focusing on the future justify the use of affirmative action as a transitory vehicle that will allow its current recipients to excel and produce future generations who, because of the benefit of affirmative action, will not need affirmative action to excel or exceed the accomplishments of the current beneficiary of affirmative action. See Hill, supra, note 167, at 115-16.


Again, it satisfies all three temporal phases or elements for the use of affirmative action: it remedies past discrimination, provides current beneficiaries who become racial exceptionalists, and creates a class of parents who can produce children who ostensibly will not need affirmative action because of the intergenerational transfer of wealth. This is stage one of the evolution of the affirmative action debate.

Stage two of that evolution takes place several years after the initial embrace of affirmative action when a generation or two has taken advantage of the policy of affirmative action to begin to populate professions that they have largely been excluded. These initial beneficiaries of affirmative action are not only visible proof of the success of the philosophy of integrationism and equal opportunity, but they become ambassadors of their race as a result of their success. In essence, they become exemplars of racial exceptionalism. As such, however, they also serve a separate and important purpose for stage two of the debate. Slowly but surely these examples of racial exceptionalism also become visible evidence of the lack of need for the very policy—affirmative action—that produced them. These examples of racial exceptionalism also produce descendants who, because of the color of their skin, are no longer able to show that they personally experienced in harm as a result of past discrimination.

In the third stage of the debate over the efficacy of affirmative action, those examples of racial exceptionalism not only become visible proof of the success of the philosophy of integrationism, their issue or descendants’ very success begins to undermine the need for affirmative action. Those who benefit from affirmative action become the visible evidence that the policy itself is unnecessary. Lastly, the premise of the philosophy of integrationism, equal opportunity for all, becomes salient in the debate over the efficacy of affirmative action. In Stage One of the debate, the focus on equal opportunity for all is muted or silenced because without affirmative action and its production of racial exceptionalists, the premise is fatally flawed because there are no or too few African-Americans to make a plausible case that it exists. Hence, in Stage One of the debate, the fact that equal opportunity is violated by the use of affirmative action is ignored or acknowledged as an acceptable cost.

In stage three of the debate, however, there are products, or beneficiaries of affirmative action who can be used to prove the effectiveness of the doctrine of equal opportunity and the success of the philosophy of integrationism. Just as importantly, those beneficiaries of affirmative action can be treated as violators of the tenet of equal opportunity espoused by the philosophy of integrationism. A beneficiary of affirmative action is benefitted because of his or her racial or ethnic identification and not because of his or her individual characteristics.

To summarize, Brown correctly repudiates the odious doctrine of separate but equal and embraces a philosophy of integrationism that promotes equal opportunity for all. However, given the pre-existing policy of separate but equal, African-Americans cannot take advantage of that newly granted formal equal opportunity.

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170. See supra note 62-67 and accompanying text.
171. See Radin, supra note 169.
The policy of integrationism cannot succeed without some transitory vehicle like affirmative action that, by definition, violates the philosophy that all people are created equal. Once the debate over affirmative action became politicized, as it was sure to become, the doctrine and use of affirmative action was and is doomed to fail.172 The death knell was initially sounded in Parents Involved in Community Schools,173 and I predict the final rites for the doctrine will be articulated by the United States Supreme Court when it ultimately decides the issues presented in Fisher v. University of Texas.174

C. The Supreme Court: The Ultimate Governor Limiting Racial Progress and Entrenching Equal Opportunity in American Society

With rare exception, whenever the United States Supreme Court has had an opportunity to decide a case that would result in or produce substantive racial equality in the Post-Civil Rights Era,175 it has instead chosen the narrower path and continued to embrace individualism, resulting in formal but not substantive equality. Instead of serving as the protector of minority rights,176 at almost every opportunity the Court has served as a governor on improved race relations by limiting the substantive gains of African-Americans and other minorities. They accomplished this unfortunate feat by embracing formalistic notions of equality and equal opportunity when that formalistic or symbolic equal opportunity cannot be accessed by those on the bottom in any meaningful or systemic manner.

The Supreme Court’s recent decision in Parents Involved,177 and its invalidation of a key component of the Voting Rights Act of 1965,178 are current examples of the Supreme Court’s role in limiting the substantive gains of people of color via its continued embrace and expansion of integrationism and the focus on individual rather than group rights.179 As long as the current justices remain united on the

172. Again, it is not hard to predict that the Supreme Court will outlaw the use of affirmative action in higher education in Fisher v. University of Texas. See Parents Involved in Community Schools v. Seattle School District, No. 1, 551 U.S. 701, 747 (2010).
173. See id.
174. 631 F.3d 213 (5th Cir. 2011), rehearing en banc denied by 771 F.3d 274 (5th Cir. 2014).
175. Here is it more appropriate to argue that the Post-Civil Rights Era began in the Seventies given the timing of various regressive court opinions. So, to a limited extent, Professor Brooks is correct in his assertion regarding the advent of the Post-Civil Rights Era. See supra note 39 and accompanying text.
176. The Court assumed the role of protector of minority and minority rights in the famous (or infamous) Footnote Four of Carolene Products:
Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters, . . . or racial minorities. Nixon v. Herndon, supra; Nixon v. Condon, supra; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

179. I am not going to consider Bush v. Gore, 531 U.S. 98 (2000), as part of the Court’s legacy that has inhibited racial equality. I count that as an apolitical decision that had the incidental effect of limiting
Supreme Court, this Court will continue to favor those on the top instead of those on the bottom. Let me turn to the Court’s history to bolster my thesis.

The first case to support my thesis is *Dandridge v. Williams*. In Dandridge, the Supreme Court ruled in favor of the state when an action was brought seeking to declare invalid and permanently enjoin enforcement of regulation of the Maryland Department of Public Welfare placing an absolute limit of $250 per month on the amount of a grant under Aid to Family with Dependent Children (AFDC). This limit was absolute, regardless of the size of the family and its actual need. Given the impact that the decision had on the poor and the issue of redistribution of income from those on the top to those on the bottom, this case represented an opportunity for the Supreme Court to affirm the lower court’s opinion and give some bite to the notion of true equality. Instead, the Supreme Court held that the regulation did not violate the Equal Protection Clause.

The next significant rebuff to the interests of the poor and those on the bottom occurred in *San Antonio Independent School District v. Rodriguez*. The Supreme Court reversed the judgment of the lower court that the method of financing school expenditures in Texas was unconstitutional and a violation of the Equal Protection Clause. In brief, the plaintiffs, parents of poor school children residing in school districts with an impoverished property tax base (property tax base is computed based on the value of the homes and real estate within the district), challenged the Texas system of financing local schools. That method of public school finance was based in large part on property taxes based on housing values in local districts (essentially localities or neighborhoods). The differential assessments, based on the widely disparate housing values created by segregated housing patterns, resulted in tremendous differences in annual spending per pupil depending on where the student resided (students from poorer neighborhoods received less expenditure per student per year as a result). The Supreme Court held that it was inappropriate to invoke strict scrutiny (educational spending was not held to be a suspect class requiring heightened scrutiny) and that the Texas system of financing public school expenditures that permitted and encouraged local control and participation in the school

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181. *Id*.
district was rationally related to a legitimate state purpose. As a result, the Court held that it did not violate the Equal Protection Clause of the Fourteenth Amendment.

The import of this decision cannot be exaggerated. The staggering inequality in wealth attainment is one of the growing problems in our society. Differential wealth attainment impacts those on the bottom in several milieus including, but not limited to, health, housing, and educational opportunity. One way to ameliorate that disparity and to provide vehicles for those on the bottom to escape the bottom is through the delivery of adequate educational opportunity at the elementary through high school level so that students can take advantage of equal opportunity in higher education. *San Antonio Independent School District* represented a chance for the court to effectuate not only a redistribution of wealth, but simultaneously provide meaningful educational opportunity for those sorely in need of same. The Court’s opinion, reifying differential wealth attainment, refused to act to promote true and meaningful equality. The Court’s decision in this case continues to have impact to date.

In a similar vein, *Milliken v. Bradley* represented a challenge to existing school districting plans, contending that the Detroit metropolitan school district could not be adequately desegregated given the City’s existing demographics (the fact that African-American lived in hyper-segregated neighborhoods). The Court of Appeals affirmed the holding of the lower court that a constitutionally adequate system of desegregated schools could not be established within the Detroit school district’s geographic limits and that a multidistrict metropolitan plan was necessary to remediate the effects of de facto segregated schools. The Supreme Court reversed and held that it was inappropriate to impose a multidistrict remedy for a single-district desegregation plan in the absence any claim or finding that school district boundary lines were established with the purpose of fostering racial segregation. The Court also held that it was inappropriate to impose a multidistrict plan on other districts in absence of findings that the other included districts had failed to operate unitary systems previously or had committed acts that effected segregation.

Thus, in school finance and in school desegregation the Supreme Court failed to adequately address endemic problems in American society created by the twin crucibles of poverty and urban residential segregation. To be sure, the problem of residential housing segregation has played a role in maintaining and exacerbating race relations in the United States, and until that issue is adequately addressed, true integration will be impossible to achieve.

Yet the Supreme Court has whiffed on two important issues that could remediate the effects of existing residential housing that has been characterized as “hypersegregation,” meaning that 90% or more of a neighborhoods’ residents are members of one

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188. See id. (addressing these issues in great detail); Richard Ford Thompson, *The Boundaries of Race: Political, Geography in Legal Analysis*, 107 Harv. L. Rev. 1841 (1994).
Those whiffs have created meaningful harm by forestalling racial progress in education that could have had an exponential positive effect on those less fortunate in our society. By allowing meaningful integration and adequate school funding, the Court could have laid the groundwork to educate a generation that could escape the bonds of poverty and overcome the historic legacy of societal racism.

Consequently, the Supreme Court, the guarantor of liberty and protector of freedom, has played a continuing role in the subjugation of people of color. In reality, whenever there has been a significant racial advance, the Supreme Court has acted to limit the substantive progress created by the racial advance by narrowly construing the law and the rights of the poor in a fashion to concretize the plight of the poor and thwart meaningful racial progress.

In sum, the progress represented by the Civil Rights Movement was thwarted by combination of two related factors. First, the Supreme Court developed a philosophy of integrationism premised on individualism and access to equal opportunity, and created the space for racial exceptionalism that deflects attention from race relations between or among groups—instead focusing on the achievements of the few to lay the blame on the failure of the millions at their own feet. Concomitantly, the opinions of the Supreme Court, which shaped the legal discourse of the Post-Civil Rights Movement, focused narrowly on individual rights in support of equal opportunity in a fashion to curtail legislative progress produced by the Civil Rights Movement and to stall the movement for equal rights for those on the bottom.

The question raised by the recent development of the TPM is whether its development, clearly in response to President Obama’s election and his policies, will serve to counter-balance or reverse the improvement in race relations that is symbolized by the election of President Obama. Instead, however, of a top-down movement or limitation led by the Supreme Court, the TPM represents a bottom-up grass roots effort that limits racial progress based on a vision of history, manifest destiny, and an interpretation of court opinions and the notion of “equal opportunity” that equates that principle with stasis or maintaining the status quo.

PART IV: REJECTING EXCEPTIONALISM AND THE TPM: A FOCUS ON SUBSTANTIVE EQUALITY

In the last generation, Critical Race Theorists in legal education have been at the forefront in the battle for racial equality in law and in society. Pioneering theo-
rist such as Richard Delgado, Kimberle Crenshaw-Williams, Mari Matsuda, Angela Harris, Cheryl Harris, and the late Jerome Culp lead the charge to expose the structural effects of racism embedded in the law and to rebut the notion that the law is neutral and color-blind. Instead, these scholars, emboldened by those on the plight of those on the bottom, have worked to expose the hypocrisy embedded in the law and legal system that worked to solidify and entrench racial inequality. These first-generation theorists not only paved the way for new types of scholarship, they also paved the way for a second generation of scholars who have expanded on their pioneering work. 192

Lately, however, these voices have been relatively silent. Some have contended that, like Critical Legal Studies, 193 Critical Race Theory has run its course or can no longer be beneficial for African-Americans on the bottom because of its lack of focus on problems endemic to the African-American community. 194 Quite the contrary, Critical Race Theory is alive and well and flourishing in our law schools and in our society. 195 The second generation of Critical Race Theorists and their work product 196 are visible evidence of that fact. Nevertheless, it is also true that Critical Race Theory, having exposed the myth of the racial neutrality of the law and legal system, has lost its focus in the last decade. The growth and proliferation of Critical Feminist Theory, Asian-American Critical Theory, and Latino Critical Race Theory, among others, has also served to decentralize the inquiries made by those supportive of critical inquiry.

Critical Race Theorists and other like-minded scholars should focus on the impact that the TPM is having on race relations to expose the TPM for what it is, what it represents, and the threat it poses to persons of color and those on the bottom. More than simply expose TPM for its principal philosophy and guiding tenets, Critical Race Theorists must also expose the societal developments that have largely fed into the creation of the TPM.

Consequently, those interested in achieving true racial equality must also expose racial exceptionalism where it exists and call for its elimination. By that I mean, for every Barack Obama or Kenneth Chenault, 197 there are millions of African-Americans who have no chance of escaping their impoverished, segregated, and

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195. See Race and Poverty Intersect, supra note 102.

196. See id.

undereducated condition. Until there is true, equal opportunity for all, racial exceptionalism must be exposed for what it is: the exception and not the rule and an exception that is used to continue to justify the maintenance of the existing hegemony in which integrationism does not amount to equal opportunity. In so doing, these scholars would expose the greater, pervasive racism that continues to exist in American society.

Similarly, I urge Critical Race Theorists to reject as a guiding principal or a societal goal the philosophy of integrationism that focuses on the individual rather than the masses on the bottom. Instead of embracing a philosophy of individualism, I urge those committed to fostering better race relations and meaningful racial progress to embrace a philosophy of communitarianism in which gains are measured by the progress of the lowest member of the group, not by the gains achieved by those leading the group. That, in turn, will lead to a focus on substantive equality instead of the current focus on equal treatment.

As the country evolves into the multicultural melting pot that is the antithesis of the TPM, leaders must emerge to ensure that the evolution continues along a path that creates rather than inhibits growth and opportunity for one and all. In addition, leaders must emerge to protect and respect the rights of all to establish a country in which those rights flourish in a society in which the color of one’s skin or ethnicity plays no role in the award of entitlements nor does it pose an impediment to access to opportunities to obtain those entitlements.

CONCLUSION

The undeniable racial progress that the election of President Obama represents is just one part of a very large picture of race relations in the United States. History demonstrates that whenever there is progress in race relations—whenever blacks (then) or African-Americans (now) make gains in American society, that is, when race relations improve, there are people who perceive this as a catastrophic turn of events. Indeed, there are certain segments of society who see any gain attained by African-Americans as contributing to their loss.

My review of the recent history of race relations proves this point. The Sixties represented a time of hope and gain for African-Americans and created the promise of true equal opportunity. That promise, however, was short-lived, given the turn to the right represented by the election of Richard Nixon and, subsequently, Ronald Reagan as President and their roles in leading the Post-Civil Rights Era. Both Nixon and Reagan appealed to whites’ racial instincts in their campaigns to begin a process of division by race that not only fostered racism, but guaranteed that any improvement in race relations would quickly be reversed.198

The symbolic use of race in presidential politics was, however, not the most divisive or important action taken by either of these presidents. Indeed, the legacy and import of their actions continues to this date. Of course, I am referring to their respective presidential powers to nominate individuals to vacancies on the United States Supreme Court. The Supreme Court Justices placed on the bench by these two presidents—Warren E. Burger and William Rehnquist most notably by President Nixon; current deciding vote Justice Anthony Kennedy; leading right wing rabble rouser, Antonin Scalia; William Rehnquist (again, nominated as Chief Justice); and lastly, the first woman (and staunch conservative at that) Sandra Day O’Connor—have together produced a plethora of opinions that history will view as the yoke placed on persons of color on the bottom, designed to control their place and influence in American society. These justices were the authors and supporting votes that produced the opinions that solidified existing racial hegemony and subverted the philosophy of integrationism adopted in Brown to produce a paean to individualism and incrementalism that has created and exalted racial exceptionalism. This oligarchy of justices has done more to hinder race relations and racial progress than any other group in American society. And that oligarchy must be challenged along with the TPM. Coupled together, a bottom-up movement and a top-down interpretation of the law have the potential not only to reverse gains made in the last fifty years, but, if TPM is true to its goals, to return the country to a time when African-Americans and women were happily regarded and kept as second-class citizens who knew their place in society and had little chance of improving that place. That state of affairs is not only unacceptable, it is antithetical to the animating principles of today’s Constitution and represents a view of our society that must be eliminated at once and forever.


199. President Nixon also successfully nominated Harry Blackmun and Lewis Powell to the Supreme Court. KEVIN J. MCMAHON, Nixon’s Court: His Challenge to Judicial Liberalism and its Political Consequences (2011).

200. Justice Kennedy was perhaps President Reagan’s most important appointment to the Court given his very prominent role as the deciding or swing vote on several crucially important cases. See, e.g., Peter Coy, Anthony Kennedy, the Justice Everyone is Watching, BLOOMBERG (June 27, 2012), http://www.bloomberg.com/bw/articles/2012-06-27/anthony-kennedy-the-justice-everyone-is-watching.


202. See MCMAHON, supra note 199.

203. See supra notes 175-190 and accompanying text.

204. See supra notes 157-166 and accompanying text.}