

**All Born to Freedom?  
Comparing the Law and Politics of Race and  
the Memory of Slavery in the U.S. and France Today**

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**Abstract**

Both the United States and France have seen a burgeoning of memorialization of slavery and abolition in recent years, and France has even passed a memorial law declaring slavery a crime against humanity. This Essay compares law, racial politics, and the memory of slavery in two nations trying to come to terms with their slave pasts. Despite important differences in their histories and civil rights regimes, I argue that in both France and the U.S., movements that oppose race-conscious law portray slavery as part of the deep past, and a generalized past detached from race, whereas those seeking some form of recognition or reparation emphasize that slavery is “not even past.” In both countries, the originary revolutionary moment – in France, associated with the Declaration of the Rights of Man, and in the U.S. with the 1787 Constitution – is invoked to create a sense of the timeless continuity of the principle of color-blindness, with slavery (and race-conscious legal remedies today) temporary deviations.

**Introduction**

“The past isn’t dead and buried. In fact, it isn’t even past.” As Barack Obama reminded us in his most famous speech to date, “A More Perfect Union,” the United States’ history of slavery and racial injustice lives on in the present.<sup>1</sup> We continue to wrestle with the memory of slavery and with its lasting legacies. And we are not alone. Former slave-trading empires in

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<sup>1</sup> This was a slight misquote of William Faulkner, REQUIEM FOR A NUN (“The past is never dead. It isn’t even past.”) See THOMAS J. SUGRUE, NOT EVEN PAST: BARACK OBAMA AND THE BURDEN OF RACE (2010).

Europe and West Africa, and former slaveholding colonies in the Americas, all participate in the “politiques mémorielles” (memorial politics) of slavery, which have inevitably shaped (and been shaped by) contemporary racial politics.<sup>2</sup> Yet the election of Barack Obama, heralded in the United States as the beginning of a post-racial society, and greeted in France with the kind of excitement usually reserved for pop stars, has been supposed by some to mean the end of “race,” and the end of that history. How is it that we see this outpouring of memory of slavery at precisely this “post-racial” moment in the United States as well as in “pre-racial” France? Why have even very conservative political figures participated in this memory work, which we might think harbored radical implications for the governments of former slaveholding empires?

A number of events in recent years have brought the slave past to the forefront of debates about race, law and politics in the United States as well as in Europe. First, in 2001, the Conference on Race and Racism in Durban, South Africa made the question of international reparations for slavery prominent in discussions of race for the first time. In the same year, the passage in France of the Taubira Law, declaring slavery and the slave trade a crime against humanity, marked a new kind of legal memorialization that had before then been reserved for the Holocaust in Europe.<sup>3</sup> In the United States, the success of Holocaust reparations claims against Swiss banks and other institutions sparked a renewed interest in slavery reparations, and a series of lawsuits against corporations and other entities (eventually consolidated in the Northern

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<sup>2</sup> The phrase “politiques mémorielles” is from JOHANN MICHEL, *GOUVERNER LES MÉMOIRES: LES POLITIQUES MÉMORIELLES EN FRANCE* (2010).

<sup>3</sup> Loi n°2001-434 du 21 mai 2001 tendant à la reconnaissance de la traite et de l'esclavage en tant que crime contre l'humanité, version consolidée au 23 mai 2001, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000405369> (last visited July 28, 2011).

District of Illinois, where they were summarily dismissed).<sup>4</sup> At the same time, a number of universities North and South began to examine their own histories with slavery, and several museums and historical societies launched major exhibitions regarding slavery and abolition.<sup>5</sup> In both the U.K. and France, national commemorations took place in the late 1990s and early 2000s marking the anniversaries of the abolition of their slave trades.<sup>6</sup>

Yet significant differences in legal regimes and historical contexts have meant sharp contrasts in the ways even nations that are sharing certain contemporary political trends remember slavery through law. In this paper, I will compare law, racial politics and the memory of slavery in two nations trying to come to terms with their slave past, the U.S. and France. I use the term “memory” not to denote a sharp break between history and collective memory, but

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<sup>4</sup> Reparations for slavery have been an ever-present demand in African American politics but have only begun to receive public attention in recent years. Historians Martha Biondi and Mary Frances Berry have recently published histories of black reparations movements, beginning with that of Callie House and the campaign for ex-slave pensions after the Civil War. Civil rights activists from Martin Luther King Jr. to black nationalist leaders demanded reparations for slavery. Martha Biondi, *The Rise of the Reparations Movement*, 87 RADICAL HIST. REV 5 (2003); Mary Frances Berry, MY FACE IS BLACK IS TRUE: CALLIE HOUSE AND THE STRUGGLE FOR EX-SLAVE REPARATIONS (2005). Reparations discourse may appear more prominent today to the extent that other avenues to racial justice have been closed off. Al Brophy argues that reparations debates represent “another front on...the culture wars.” Alfred L. Brophy, *The Cultural War Over Reparations for Slavery*, 53 DEPAUL L. REV. 1181 (Spring 2004). Darren Hutchinson chronicles the discourse of “racial exhaustion,” the argument prominent in many court opinions from the 1883 Civil Rights Cases to the present, that we have done enough about race. Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917 (2009).

<sup>5</sup> The recent Emory University Conference on Slavery and the University chronicled numerous such efforts at universities across the U.S. including Emory’s own “Transforming Community” project. See, e.g., BROWN UNIVERSITY STEERING COMMITTEE ON SLAVERY AND JUSTICE, SLAVERY AND JUSTICE, (2006), available at [http://brown.edu/Research/Slavery\\_Justice/](http://brown.edu/Research/Slavery_Justice/) (last visited July 28, 2011), for the Report of Brown University’s Steering Committee on Slavery and Justice. The largest museum exhibition was staged at the New York Historical Society, funded by the Gilder-Lehrman Center at Yale University. Richard Gilder and Lewis Lehrman, both Republicans, are two of the largest funders for slavery studies in the United States today.

<sup>6</sup> In the U.K., the Bicentenary of the Abolition of the Slave Trade was commemorated in 2007. In France, the sesquicentennial of the abolition of slavery was celebrated in 1998.

rather to signal that the historical narratives I am highlighting are generated by politicians, courts, and legislatures as well as museum exhibits, films, and other artifacts of popular culture.<sup>7</sup>

The comparison between France and the United States is one most frequently made by French scholars and commentators. As Eric Fassin has written, the comparison is “good to think” in matters of immigration and ethnicity, because the U.S. serves as a foil for French policies of assimilation and republican citizenship.<sup>8</sup> The comparison is interesting from the U.S. point of view as well, given our own “neo-conservative” (or some might say “neo-liberal”) political moment, in which “color-blindness” has been the rationale for repudiating affirmative action measures and eschewing the possibility of reparations for slavery or other past racial harms. For race-blindness has been the hallmark of French republican political ideology and law in a far more thoroughgoing fashion than in the United States.

One way of casting the differences between legal and political regimes regarding race in France and the U.S. is in light of the different histories that undergird the two nations’ racial policies. According to this view, while the slave past animates U.S. efforts to eradicate racial discrimination, French laws against racism are motivated instead by the more recent past of

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<sup>7</sup> For a more in-depth discussion of history and memory, please see Ariela Gross, *The Constitution of History and Memory*, in *INTRODUCTION TO LAW AND THE HUMANITIES XX* (Austin Sarat ed., et al., 2010). See also Marie-Claire Lavabre, “For a Sociology of Collective Memory,” available at <http://www.cnrs.fr/cw/en/pres/compress/memoire/lavabre.htm> (last visited August 15, 2011), for an excellent bibliography of French works on history and memory. As a historian of law and culture, I am particularly interested in the ways legal and cultural narratives reinforce one another; for more on cultural-legal history, see Ariela Gross, *Beyond Black and White: Cultural Histories of Race and Slavery*, 101 *COLUM. L. REV.* 640 (2001).

<sup>8</sup> Eric Fassin, “Good to Think”: *The American Reference in French Discourses of Immigration and Ethnicity*, in *MULTICULTURAL QUESTIONS* 224-241 (Christian Joppke & Steven Lukes eds., 1999).

Vichy and Nazism.<sup>9</sup> As Julie Suk and others have shown, French civil rights law has developed with a lack of race-conscious data collection, criminal rather than civil enforcement mechanisms, and relatively weak enforcement, with a focus on acts of violence or hate speech rather than on discrimination in employment, housing, or education.<sup>10</sup> Further, in France, ethnic identification – and to some extent racism itself – has taken cultural forms, so that “race,” until recently, was neither a subject for explicit public discussion nor for academic analysis.<sup>11</sup> Also until recently, the slave past has not been the touchstone for debates about ethnicity and discrimination in France as it has in the U.S.; instead, issues of religious or cultural assimilation, and discourses involving European Jews on the one hand, and North African Muslim immigrants on the other, have dominated any discussion of racism. Whereas descendants of slaves make up a significant minority of the population in the mainland United States, in France it has been easier to “forget”

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<sup>9</sup> Julie Chi-Hye Suk, *Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295, 299 (2007) (“The French collective memory of historically specific experiences, namely anti-Semitism and the Vichy regime, account for the differences [between French and U.S. antidiscrimination law]. . . . The unique American history of eradicating race-based slavery and the unintended consequences of this history explain these distinctive features of U.S. antidiscrimination law”).

<sup>10</sup> Julie C. Suk, *Procedural Path Dependence: Discrimination and The Civil-Criminal Divide*, 85 WASH. UNIV. L. REV. 1315 (2008); Erik Bleich, RACE POLITICS IN BRITAIN AND FRANCE (2003); Bleich, *Anti-racism without Races: Politics and Policy in a “Color-blind” State*, in RACE IN FRANCE: INTERDISCIPLINARY PERSPECTIVES ON THE POLITICS OF DIFFERENCE 162-88 (Herrick Chapman & Laura L. Frader eds., 2004); Jacqueline S. Gehring, Paper at the Annual Meeting of the American Political Science Association: *One European Directive, Two Dramatically Different Responses: Explaining the Divergence in French and German Racial Anti-discrimination Policy after the EU Race Directive* (2005).

<sup>11</sup> On ethnic identification in cultural rather than racial terms, see, e.g., Michèle Lamont, THE DIGNITY OF WORKING MEN: MORALITY AND THE BOUNDARIES OF RACE, CLASS AND IMMIGRATION (2000); on cultural racism, see Étienne Balibar, *Is There A Neo-Racism?*, in RACE, NATION, CLASS: AMBIGUOUS IDENTITIES 83 (Étienne Balibar & Immanuel Wallerstein eds., 1991) The literature on French rejection of “race” is too great to canvas here, but will be cited in greater detail infra. For an excellent summary of the main issues and references to the literature, see, Herrick Chapman & Laura Frader, Introduction, in *Race in France*, supra note 10.

slave descendants tucked away in the former slave colonies, now overseas departments, or to overlook even a significant number of migrants from the Antilles to the metropole.<sup>12</sup>

Yet, as Pierre Nora and other historians of memory remind us, it is the silences of public memory, the forgetting and amnesia, that shape the present as much as the official commemorations.<sup>13</sup> The memory – and amnesia – of slavery has shaped French discourse on “race,” and discrimination law, as surely as it has in the United States.

Whereas popular discourse, and many academic commentators, emphasizes the contrasts between France and the United States, I will argue here that despite the legal and ideological differences between the two, there are striking similarities in the historical narratives undergirding political and legal approaches. To some extent, liberal and conservative political movements can join together in certain forms of slavery memorialization, especially those that emphasize the moment of abolition, or the narrative of slavery to freedom, in a way that serves to blunt more radical demands of racial politics. In France and the United States, the movements to oppose race-conscious law to redress the harmful legacies of slavery and its aftermath – whether the Taubira law or affirmative action – portray slavery as part of the deep past, and a generalized past detached from “race,” whereas those seeking some form of recognition or reparation emphasize that slavery is “not even past.” Furthermore, in both countries, the originary revolutionary moment – in France, associated with the Declaration of the Rights of Man and

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<sup>12</sup> The overseas departments, or “DOM,” include Martinique, Guadeloupe, Réunion, and Guyane. On the Antillean migrations to “l’hexagone,” see Audrey Célestine, *Mobilisations et identité chez les Antillais en France: le choix de la différentiation*, REVUE ASYLN(S) 8 (July 2010) available at <http://www.reseau-terra.eu/article946.html> (last visited July 28, 2011); and Audrey Célestine & Leila Wuhl, *Comment peut-on être Antillais hors des Antilles?*, 1256 HOMMES ET MIGRATIONS 76 (July-Aug. 2006), available at [http://www.hommes-et-migrations.fr/docannexe/file/5494/dossier\\_1256\\_dossier\\_1256.pdf](http://www.hommes-et-migrations.fr/docannexe/file/5494/dossier_1256_dossier_1256.pdf) (last visited August 8, 2011).

<sup>13</sup> Pierre Nora, LIEUX DE MÉMOIRE, 3 vol., (1984-1992).

“republicanism,” and in the U.S., with the 1787 Constitution, the Declaration of Independence, and the vision of the “Founding Fathers” – is invoked to create a sense of the timeless continuity of the principle of color-blindness, with slavery (and affirmative action) temporary deviations.

### **From Amnesia to Memory**

In both the U.S. and France, public amnesia, the collective *forgetting* of slavery after it came to an end, allowed reconciliation and unification of the nation through the forgetting of the victims of slavery and its aftermath – colonization in France, Jim Crow in the U.S. David Blight’s *Race and Reunion* and Nina Silber’s *The Romance of Reunion* tell the story of the U.S. North and South united in the post–Civil War era by a joint commitment to white supremacy and to burying the memory of slavery. Joanne Pope Melish and Brown University’s Committee on Slavery and Justice remind us of the way New Englanders and other Northerners “disowned” their own history of slavery.<sup>14</sup> In France, Caribbean historians Myriam Cottias and Francoise

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<sup>14</sup> David Blight, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* (2002); Nina Silber, *THE ROMANCE OF REUNION: NORTHERNERS AND THE SOUTH, 1865-1900* (1997); Joanne Pope Melish, *DISOWNING SLAVERY: GRADUAL EMANCIPATION AND RACE IN NEW ENGLAND, 1780-1860* (2000); BROWN UNIVERSITY STEERING COMMITTEE ON SLAVERY AND JUSTICE, *SLAVERY AND JUSTICE*, (2006), available at [http://brown.edu/Research/Slavery\\_Justice/](http://brown.edu/Research/Slavery_Justice/) (last visited July 28, 2011). See also Ron Eyerman, *CULTURAL TRAUMA: SLAVERY AND THE FORMATION OF AFRICAN AMERICAN IDENTITY* (2001); Iyunolu Folayan Osagie, *THE AMISTAD REVOLT: MEMORY, SLAVERY, AND THE POLITICS OF IDENTITY IN THE UNITED STATES AND SIERRA LEONE* (2000); Saidiya Hartman, *The Time of Slavery*, 101 *SO. ATL. Q.* 757 (2002); Shelley Fisher Fishkin, *Race & the Politics of Memory: Mark Twain and Paul Laurence Dunbar*, 40 *J. AM. STUD.* 40, 283 (2006); Elizabeth Rauh Bethel, *THE ROOTS OF AFRICAN-AMERICAN IDENTITY* (1997); Ira Berlin, *American Slavery in History and Memory and the Search for Social Justice*, 90 *J. AM. HIST.* 1251 (2004); Fredrick Harris, *Collective Memory, Collective Action, and Black Activism in the 1960s*, in *BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR XX* (Martha Minow, ed., 2002); Julie Saville, *Circuits of Memory: Modern Routes to Slave Pasts*, 83 *GA. HIST. Q.* 539 (1999); W. Fitzhugh Brundage, ed., *WHERE THESE MEMORIES GROW:*



Vergès demonstrate the way successive generations of Caribbean politicians built their society on the forgetting of slavery.<sup>15</sup> Doris Garroway argues that “both the official recollection and the forgetting of slavery have been instrumental to attempts on the part of the French state to resolve or to displace the question of its possible obligations – legal, ethical, material and symbolic – towards those it once enslaved.” She explores the history of emancipation in 1848 and departmentalization of the former colonies in 1946 as moments marked by “an ideology of reconciliation that obliged the population of the departments to forget slavery and imagine colonial history as one of emancipation, salvation and socio-economic uplift by Republican France.”<sup>16</sup> Thus, in both countries, reconciliation has entailed a collective and official forgetting of slavery, even as “resistant memories” continued to surface in literature and other cultural forms.

In the United States, the Second Reconstruction of the 1960s and 1970s inaugurated a wave of new histories of slavery, both academic and popular, epitomized by the national phenomenon of Alex Haley’s television drama, *Roots*. These new histories emphasized the agency of slaves themselves, and the resilience of the families, communities and culture of enslaved people. They also explored the myriad ways in which slaves resisted their masters, whether through large-scale revolts and rebellions or smaller-scale acts of running away, theft, breaking tools, and feigning illness. The history of abolition and emancipation was also revised

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HISTORY, MEMORY, AND SOUTHERN IDENTITY (2000); James Oliver Horton & Lois E. Horton, eds., *SLAVERY AND PUBLIC HISTORY: THE TOUGH STUFF OF AMERICAN MEMORY* (2006).

<sup>15</sup> Myriam Cottias, “*L’oubli du passé contre la citoyenneté*”: *Troc et ressentiment à la Martinique (1848-1946)*, in 1946-1996: CINQUANTE ANS DE DÉPARTEMENTALISATION OUTRE-MER (Fred Constant & Justin Daniel eds., 1997); Myriam Cottias, *Le triomphe de l’oubli ou la mémoire tronquée?*, in *DE L’ESCLAVAGE AUX REPARATIONS*, 95-103 (Serge Chalon ed., 2000); Francois Vergès, *LA MÉMOIRE ENCHAÎNÉE: QUESTIONS SUR L’ESCLAVAGE* (2006).

<sup>16</sup> Doris L. Garroway, *Memory as Reparation: The Politics of Remembering Slavery in France from Abolition to the Law Taubira* (2001), 11 INT’L J. FRANCOPHONE STUD. 366 (2008).

from the African American perspective to reveal a world of black abolitionists, as well as fugitive slaves who pushed emancipation to the center of politics.<sup>17</sup>

Civil rights jurisprudence during that era drew on progressive histories of slavery and Jim Crow, emphasizing the active role played by ex-slaves in battles to secure the rights to full freedom. The liberal justices of the Warren, Burger and Rehnquist courts drew on what some have called a “redemptive” history of the struggle for black freedom from slavery to the 1960s.<sup>18</sup> They emphasized that the harms of slavery continued in the practices of Jim Crow, and could still be felt in contemporary America; they portrayed historical change not as inevitable but as the result of centuries of striving, conflict, and setbacks. For example, in Justice Brennan’s dissent in *Bakke v. Regents of California*, in 1976, he argued against color-blind constitutionalism by reminding Americans of the history of Jim Crow after slavery:

The Fourteenth Amendment, the embodiment in the Constitution of our abiding belief in human equality, has been the law of our land for only slightly more than half its 200 years. And for half of that half, the Equal Protection Clause of the Amendment was largely moribund. . . .Worse than desuetude, the Clause was early turned against those whom it was intended to set free, condemning them to a “separate but equal” status before the law, a status always separate but seldom equal. Not until 1954—only 24 years ago—was this odious doctrine interred. . . .Even then inequality was not eliminated with “all deliberate speed.” . . .even today officially sanctioned discrimination is not a thing of the past. Against this background, claims that law must be

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<sup>17</sup> Among the most important works were John Blassingame, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* (1979); Eugene D. Genovese, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1976); Herbert Aptheker, *AMERICAN NEGRO SLAVE REVOLTS* (5<sup>th</sup> ed., 1983); Lawrence W. Levine, *BLACK CULTURE AND BLACK CONSCIOUSNESS: AFRO-AMERICAN FOLK THOUGHT FROM SLAVERY TO FREEDOM* (1974); Ira Berlin, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* (1974); on the political importance of fugitive slaves, see James Oakes, *SLAVERY AND FREEDOM: AN INTERPRETATION OF THE OLD SOUTH* (1990).

<sup>18</sup> Amy Kapczynski, *Historicism, Progress, and the Redemptive Constitution*, 26 *CARDOZO L. REV.* 1041 (2005) (quoting Walter Benjamin, on “redemptive history”); Ariela Gross, *When Is The Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 *CALIF. L. REV.* 283 (2008).

“colorblind”. . . must be seen as aspiration rather than as description of reality. . . we cannot. . . let color blindness become myopia. . .<sup>19</sup>

In Brennan’s opinion, Jim Crow is as prominent as slavery; and color-blindness can be achieved only if progress continues. After discussing slavery in his *Bakke* dissent, Justice Marshall went on to catalogue the sorry history of the Black Codes, the Civil Rights Cases, *Plessy v. Ferguson*, Jim Crow in the South and North, segregation in the military, public schools, and other institutions. He further noted that even favorable court decisions did not put a stop to segregation or make African Americans equal. “The legacy of years of slavery and of years of second-class citizenship in the wake of emancipation could not be so easily eliminated.”<sup>20</sup> Finally, he concluded that “[t]he experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured.”<sup>21</sup>

This progressive liberal jurisprudential version of history took the form of a particular approach to constitutional interpretation that has become known as the “living Constitution” view. Thurgood Marshall, at the Bicentennial of the 1787 Constitution, famously evoked this metaphor when he explained that he did not celebrate the Constitution of 1787, because he did not “believe that the meaning of the Constitution was forever ‘fixed’ at the Philadelphia Convention”; instead the government of the Framers was “defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold

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<sup>19</sup> *Bakke v. U.C. Board of Regents*, 438 U.S. 265, 326-27 (1976).

<sup>20</sup> *Id.* at 394.

<sup>21</sup> *Id.* at 400.

as fundamental today.”<sup>22</sup> According to Marshall, the Constitution of 1976 was a different document from the 1787 Constitution; it had literally been transformed, rather than merely amended. If the principles behind the Constitution have changed with the times, rather than being timeless traditions, then slavery cannot be seen as an aberrant deviation. Instead, we observe a continuous evolution and struggle from slavery towards freedom, as yet unattained.

While there is no real equivalent in France to the civil rights jurisprudence of the 1960s and 1970s in the U.S., the 1990s saw an upsurge of memorialization of slavery in popular culture, politics, and law in both the U.S. and France, and in the international sphere more broadly. Although to some extent this burgeoning of public memory came out of nascent movements for reparations for slavery, official public commemorations instead focused on the abolition of slavery, and have for the most part avoided either reparation or apology.

France has commemorated slavery by celebrating the Republican abolition, especially the white abolitionist leader Victor Schoelcher. Jacques Chirac, President at the time of the sesquicentennial of the abolition of slavery, gave a speech at the commemoration that referred to abolition as a “founding act” that “reinforced the unity of the Nation.”<sup>23</sup> The official government slogan, “Tous nés en 1848,” captured this sense of abolition effacing the memory of slavery as

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<sup>22</sup> Thurgood Marshall, Associate Justice of the U.S. Supreme Court, Remarks at the Annual Seminar of The San Francisco Patent and Trademark Law Association (May 6, 1987).

<sup>23</sup> M. Jacques Chirac, President of the French republic, Excerpts of Speech at the reception in honour of the Slavery Remembrance Committee (Jan. 30, 2006), *available at* <http://www.ambafrance-uk.org/Speech-by-M-Jacques-Chirac,6848.html> (last visited Aug. 4, 2011); George W. Bush, President of the U.S., Speech at Goree Island in Senegal (July 8, 2003) *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2003/07/20030708-1.html> (last visited Aug. 4, 2011). See also Elizabeth Kowaleski Wallace, THE BRITISH SLAVE TRADE AND PUBLIC MEMORY 207–8, 212 (2006); Christine Chivallon, *Bristol and the Eruption of Memory: Making the Slave-Trading Past Visible*, 2 SOC. & CULT. GEOGRAPHY 347 (2001); Catherine Reinhardt, CLAIMS TO MEMORY: BEYOND SLAVERY AND EMANCIPATION IN THE FRENCH CARIBBEAN 153 (2006), describing the commemoration of slavery in the former French colonies of Martinique, Guadeloupe, and Haiti.

the nation was born, and presumably all were reborn, in 1848.<sup>24</sup> In the United States, President George W. Bush discussed the horrors of slavery and the slave trade in a speech at Gorée Island, in Senegal, and President Clinton likewise told an audience in Uganda that it was wrong for the U.S. to have benefited from slavery, but both stopped short of an apology. A number of institutions and government entities in the U.S., including private and public universities, states and cities, have offered “expressions of regret” for their participation in slavery.<sup>25</sup>

The leading exception to this trend was the resolution adopted by both the House of Representatives and Senate (in slightly altered form) in 2008 and 2009, which not only detailed the history of slavery and its aftermath in quite strong language, but acknowledged that “African-Americans continue to suffer from the complex interplay between slavery and Jim Crow--long after both systems were formally abolished--through enormous damage and loss, both tangible and intangible, including the loss of human dignity, the frustration of careers and professional lives, and the long-term loss of income and opportunity” and “expresse[d] [Congress’s] commitment to rectify the lingering consequences of the misdeeds committed against African Americans under slavery and Jim Crow and to stop the occurrence of human rights violations in

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<sup>24</sup> *Tous nés en 1848: 150ème Anniversaire de l’abolition de l’esclavage. 1848-1998*, MINISTÈRE DE LA CULTURE ET DE LA COMMUNICATION,

<http://www.culture.gouv.fr/culture/actual/abolition/esclavage.htm> (last visited Aug. 4, 2011)

<sup>25</sup> See, e.g., Wendy Koch, *Va. 1<sup>st</sup> state to express ‘regret’ over slavery*, USA TODAY, Feb. 25, 2007, available at [www.usatoday.com/news/nation/2007-02-25-apology\\_x.htm](http://www.usatoday.com/news/nation/2007-02-25-apology_x.htm) (last visited Aug. 8, 2011); *Emory Officials Express Regret Over University’s Ties to Slavery*, CHRON. OF HIGHER ED., Jan. 21, 2011, available at <http://chronicle.com/blogs/ticker/emory-officials-express-regret-over-universitys-ties-to-slavery/29903> (last visited Aug. 8, 2011); Phillip Rawls, *Alabama Governor Signs Slavery Apology*, HUFFINGTON POST, May 31, 2007, available at <http://www.huffingtonpost.com/huff-wires/20070531/slavery-apology/> (last visited Aug. 8, 2011).

the future.”<sup>26</sup> Notably, however, the Senate Resolution ends with an official disclaimer that “nothing in this resolution supports or authorizes a claim against the United States.”<sup>27</sup>

Official, public commemorations have been matched by popular cultural representations that celebrate the freedom story. The Underground Railroad has been the main focus of the U.S. National Park Service’s museum exhibitions on slavery. By emphasizing the movement from slavery to freedom, and the inevitability of slavery giving way to freedom, telling the story of slavery can lead directly to celebrating the freedom story. In mainstream historiography (not so much in scholarly writing, but in textbooks, media representations, public hagiography), this plays out in the prominence given to histories of the Civil War and the end of slavery as compared to the three hundred and fifty years of the day-to-day experience of slavery. The major films regarding slavery have all featured a white abolitionist leader as the hero rather than a black slave or ex-slave (most recently, *Amazing Grace*; *Glory*; *Amistad*). The viewer identifies with the triumph of liberation, rather than the shame, or the horror, of enslavement.

The controversy over the National African American Museum epitomizes the dilemma of reckoning with the slave past and its legacies while also honoring the inspiring achievements and triumphs of African Americans, and the progress that our nation has made in racial equality.<sup>28</sup> Originally conceived as a slavery museum, to parallel the Holocaust Museum on the National Mall, over time the concept expanded into a more capacious museum of African American

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<sup>26</sup> H. Res. 194, 110<sup>th</sup> Cong. (July 29, 2008), available at <http://www.govtrack.us/congress/billtext.xpd?bill=hr110-194>, and S. Con. Res. 26, 111<sup>th</sup> Cong. (June 18, 2009), available at <http://www.govtrack.us/congress/bill.xpd?bill=sc111-26>.

<sup>27</sup> Id.

<sup>28</sup> Kate Taylor, *The Thorny Path to a National Black Museum*, NEW YORK TIMES, Jan. 22, 2011, available at <http://www.nytimes.com/2011/01/23/us/23smithsonian.html?pagewanted=all> (last visited Aug. 8, 2011)

history.<sup>29</sup> At the same time, then-Governor Douglas Wilder of Virginia proposed a National Slavery Museum at Fredricksburg, Va., which at first raised significant funds for an ambitious plan, but then quickly unraveled as taxes went unpaid and the property was repossessed.<sup>30</sup>

While both France and the United States have begun to overcome the previous century of amnesia about slavery, commemoration of the abolition of slavery has reinforced a narrative about the slave past that I think has deep resonance culturally as well as politically, and has had great influence, I argue, in recent legal developments. This is the narrative of slavery as part of a teleological progression toward freedom, glossing over post-slavery racial injustice: the Jim Crow era in the United States, and the colonial period in France.<sup>31</sup> The focus on abolition rather than slavery itself can lead to the celebration of the West, the nation, or “whites” more generally, as saviours of the slaves, rather than as the guilty parties in the slave trade or the institution of slavery. And dwelling on the history of slavery, in isolation from the hundred years that

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<sup>29</sup> Faith Davis Ruffins, *Culture Wars Won and Lost, Part II: The National African-American Museum Project*, 1998 RADICAL HIST. REV. 78, 84 (1998) (“Would the museum be a memorial to the millions who lived and died in slavery in the way that the Holocaust Museum is a memorial to victims of the Third Reich? Sentiment on behalf of a slavery memorial was particularly reflected in the fact that Tom Mack’s original idea was to have a memorial museum on just this subject. Because slavery is ‘an American holocaust,’ where more appropriate to have its memorial than among the gleaming white monuments on the Mall?”). See also Natalie Hopkinson, *The Root: Segregated Museums Mirror History*, NPR, May 24, 2011, at <http://www.npr.org/2011/05/24/136605926/the-root-segregated-museums-mirror-history>.

<sup>30</sup> Dionne Walker, *National Slavery Museum Project Stalls*, *USA Today*, March 18, 2008, available at [http://www.usatoday.com/travel/news/2008-03-18-national-slavery-museum\\_N.htm](http://www.usatoday.com/travel/news/2008-03-18-national-slavery-museum_N.htm) (last visited Aug. 8, 2011); Gail Pennybacker, *Virginia Slave Museum’s Property to Be Repossessed*, ABC7, July 18, 2011, available at <http://www.wjla.com/articles/2011/07/virginia-s-slave-museum-property-to-be-repossessed-63845.html> (last visited Aug. 8, 2011)

<sup>31</sup> There is a rich literature on “colonial amnesia” in France as well. See, e.g., Benjamin Stora, *LA GANGRÈNE ET L’OUBLI: LA MÉMOIRE DE LA GUERRE D’ALGÉRIE*, EDITIONS LA DÉCOUVERTE, (2005); Robert Aldrich, *Decolonization, the French Empire and Sites of Memory*, UNIV. OF PORTSMOUTH, <http://www.port.ac.uk/special/france1815to2003/chapter10/interviews/filetodownload.26394.en.pdf>, and “*Remembrances of Empires Past*,” 7 PORTAL 1 (January 2010).

followed it, can actually minimize one's sense of contemporary racial injustice, leaving the harms of the past comfortably in the past. When viewed in this light, slavery is safe to commemorate (and even to congratulate oneself for commemorating) precisely because it cannot be redressed, because we were not its perpetrators, because it was not us.

### **Conservative American Narratives of Slavery in Law and Politics**

In the United States, the slavery to freedom story undergirds conservative political narratives in which “the debt [for slavery] has already been paid,” so that the government need not adopt policies to improve the life chances of descendants of slaves, or redress the inequalities that are slavery's legacy. While a progressive history of slavery, which emphasized the contemporary legacies of slavery and the continuing harms of Jim Crow, undergirded the liberal jurisprudence of civil rights that was ascendant in the 1960s and 1970s and embattled in the 1980s to the present day, the dominant historical narrative in both law and politics today, I argue, is the conservative one.<sup>32</sup>

Rather than participate in slavery amnesia, the new far-right populist movement, the Tea Party, draws heavily on the metaphor and narrative of slavery to justify its positions on race and on government activity. The slavery-to-freedom teleology, so resonant in public memorials to slavery, buttresses not only the writings and speeches of conservative movement politicians, but also many of the opinions of conservative judges. For example, in the first substantive legal opinion on reparations for slavery by a federal court, the Northern District of Illinois court narrated its history of slavery, in which ex-slaves quickly realized their promised future:

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<sup>32</sup> I discuss both conservative and liberal histories of slavery in more detail in Gross, *When Is The Time of Slavery?*, supra note 18.



The freed slaves then began another journey, this time not from captivity to slavery, but from slavery to citizenship and equality under the law. . . . the dark clouds following the War were giving way to a future brighter than the great majority could have imagined in 1865. The extremely difficult task of amending the Constitution three times was accomplished in approximately five years, granting former slaves freedom, citizenship, and the right to vote. The citizens of the Union would move onward to meet the challenge made by President Lincoln on March 4, 1865, “to achieve and cherish a just and lasting peace, among ourselves and with all nations.”<sup>33</sup>

Despite some kinks in the system, the Illinois Court tells us, ex-slaves could see a bright future as soon as slavery came to an end, and the real story is the freedom story.

The slavery-to-freedom narrative has several important corollaries. One is to celebrate abolitionism as a uniquely Western/American/Christian/white phenomenon.<sup>34</sup> This story downplays the concept of the slave trade as the great wrong perpetrated by the Western powers against the peoples of Africa; instead, it raises up anti-slavery as the West’s gift to Africa. This version of history undergirds the strongest argument waged against redress or reparations for slavery by political conservatives: that “the debt has been paid already.”<sup>35</sup> By focusing on anti-slavery rather than slavery, the Civil War rather than the 350 years of enslavement, white abolitionists rather than black abolitionists, and white Union soldiers rather than black Union soldiers, conservatives can argue that the debt for slavery was repaid by emancipation.

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<sup>33</sup> In re African American Slave Descendants Litig., 375 F. Supp. 2d 721, 780 (2005), aff’d in part and rev’d in part and modified in part, 2006 U.S. App. LEXIS 30525 (7th Cir. Ill., Dec. 13, 2006). There have been other isolated reparations claims brought by individuals, but these have always been dismissed summarily without reaching any of the central arguments over reparations more broadly. See, e.g., *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995).

<sup>34</sup> See, e.g., Dinesh D’Souza, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* 100 (1995).

<sup>35</sup> The phrase “the debt has been paid already” comes from David Horowitz, *UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY* (2002); Karl Zinmeister, *Has the Debt Been Paid?*, 12 *AMERICAN ENTERPRISE* 1, 6 (July-Aug. 2001), and John McWhorter, *Against Reparations: Why African Americans Can Believe in America*, *NEW REPUBLIC*, July 23, 2001, at 32.

Furthermore, they argue that the very affirmative action programs against which they have fought are themselves repayment for the debt of slavery.

The Illinois court made exactly this historical argument, weighing the harm of slavery against the harm of the Civil War:

It is beyond debate that slavery has caused tremendous suffering and ineliminable scars throughout our Nation's history. No reasonable person can fail to recognize the malignant impact, in body and spirit, on the millions of human beings held as slaves in the United States. Neither can any reasonable person, however, fail to appreciate the massive, comprehensive, and dedicated undertaking of the free to liberate the enslaved and preserve the Union. Millions fought in our Civil War. Approximately six hundred and twenty thousand died. Three hundred and sixty thousand of these individuals were Union troops . . . The enslavers in the United States who resisted or failed to end human chattel slavery sustained great personal and economic loss during and following the four years of the War. Generations of Americans were burdened with paying the social, political, and financial costs of this horrific War. Finally, in 1865, this great human and economic tragedy ended.<sup>36</sup>

In the history told by the Illinois Court, slaveholders paid for any debt the nation owed to slaves with financial losses during the Civil War; Union soldiers paid with their lives, and future generations continued to pay the War's "social, political, and financial costs." Interestingly, the historical link that is assumed here – that the Civil War was in fact fought to end slavery – is one challenged on the political left and right. Many Southerners continue to argue that the South fought for states' rights rather than to defend slavery, while revisionist historians argue that Union soldiers fought to defend white "free labor" from being swallowed up by the "Slave power" rather than to free black slaves.

At its most tendentious, the conservative argument against reparations even suggests blacks should be grateful to whites for the course of American history: David Horowitz, in an advertisement widely distributed in campus newspapers, asked,

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<sup>36</sup> 375 F. Supp. 2d 721, xxx.

What About the Debt Blacks Owe to America? Slavery existed for thousands of years before the Atlantic slave trade, and in all societies. But in the thousand years of slavery's existence, there never was an anti-slavery movement until white Anglo-Saxon Christians created one. . .blacks in America . . . enjoy the highest standard of living of blacks anywhere in the world, and indeed one of the highest standards of living of any people in the world. . .Where is the acknowledgment of black America and its leaders for those gifts?<sup>37</sup>

Conservatives emphasize the inevitable march toward freedom, because freedom was immanent in the 1787 Constitution. As described by conservative historian Herman Belz, “the abolition of slavery and the enfranchisement of blacks [was] a completion of the Constitution.”<sup>38</sup> By contrast, “[r]ace-preferential affirmative action. . .can fairly be described as a revolutionary project against the Constitution and the laws of the nation.”<sup>39</sup>

In this way, conservatives marry the “slavery to freedom” story to the notion that both slavery and affirmative action were deviations from a timeless principle of color-blindness. In Belz’s terms, slavery deviated from the Constitution, but abolition completed the Constitution; affirmative action is a project against the Constitution. The timeless principles of the Constitution, according to Belz, are “equal liberty and citizenship rights”; these are the “principles of the Founding, grounded in reason and justice in the tradition of western civilization,” which were then “written into the Reconstruction amendments” and “embodi[ed] and implement[ed] . . . in the Civil Rights Acts of 1964 and 1965,” which then “resolved the

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<sup>37</sup> David Horowitz, *UNCIVIL WARS*, at 15. Horowitz also writes: “America is the first predominantly white society to free its black slaves, and it did so long before black societies freed theirs. This is the history that needs recognition.” *Id.* at 74.

<sup>38</sup> Herman Belz, *Conservative Principles and Black History: Affirmative Action and Identity Politics*, available at <http://members.cox.net/wcampbell14/belzbh.htm> (last visited July 28, 2011).

<sup>39</sup> *Id.*

American Dilemma [of race].”<sup>40</sup>

This view, that the 1787 Constitution contained within it timeless principles of anti-slavery and equality, is especially important to legal conservatives, who are anxious to vindicate the Framers’ Constitution from criticism by historians or advocates of a jurisprudence of “living constitutionalism,” both of whom claim that the original Constitution was flawed by its support for slavery. When Supreme Court Justice Thurgood Marshall gave his famous speech on May 6, 1987, cautioning against the “flagwaving fervor” of the bicentennial celebration of the Constitution, then-Assistant Attorney General William Bradford Reynolds responded in a speech later that month at Vanderbilt Law School. Reynolds agreed that Justice Marshall was “absolutely right to remind us of . . . the most tragic aspects of the American experience” but rejected the idea that there “are two constitutions, the one of 1787” and a new amended one.<sup>41</sup> According to legal conservatives such as Reynolds, the 1787 Constitution was great because it provided for amendment. Even if it did acknowledge or even lend support to slavery, that support was necessary to the political compromise that secured the document’s ratification.<sup>42</sup>

This narrative, celebrating the Founding moment and the 1787 Constitution, and portraying slavery and Jim Crow as temporary deviations from a continuous American tradition of freedom and color blindness, has picked up steam in the Tea Party Movement. Across the U.S., “Tea parties” have been issuing demands for history textbooks that treat the founders hagiographically rather than critically. Says one Tennessee Tea party spokesman, Fayette County attorney Hal Rounds, “The thing we need to focus on about the founders is that, given

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<sup>40</sup> Id.

<sup>41</sup> William Bradford Reynolds, *Another View: Our Magnificent Constitution*, 40 VAND. L. REV. 1343, 1352 (1987).

<sup>42</sup> D’Souza, THE END OF RACISM, at 109.

the social structure of their time, they were revolutionaries who brought liberty into a world where it hadn't existed, to everybody – not all equally instantly – and it was their progress we need to look at.”<sup>43</sup> The political Right has claimed the Constitution as its own, and the House of Representatives began its 2011 session by reading (almost) the entire Constitution aloud – however, crucial portions were skipped, including the three-fifths clause and the slave trade clause. This is consistent with the celebratory conservative attitude towards the 1787 document, viewing slavery only as a temporary deviation from its timeless principles of equality – one that can be omitted without doing violence to history.

Two books written in the 1980s have been adopted by the Tea Party today as a guide to the Constitution and “bible” of the movement, respectively: W. Cleon Skousen’s *The Making of America: The Substance and Meaning of the Constitution*, and *The Five Thousand Year Leap*. These books portray the “Founders” as “devout Christians who established the nation based on divinely ordained principles.”<sup>44</sup> Skousen tells the “story of slavery in America” in *The Making of America*, including the assertion that slaveholders were “the worst victims of the system”; that white schoolchildren “were likely to envy the freedom of their colored playmates”; and that “[s]lavery did not make white labor unrespectable, but merely inefficient,” because “the slave had a deliberateness of motion which no amount of supervision could quicken.”<sup>45</sup> While Skousen’s outdated history of slavery has attracted criticism, the *Five Thousand Year Leap* is a

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<sup>43</sup> *Tea Parties issue demands to Tennessee legislators*, COMMERCIAL APPEAL (Memphis, TN), Jan. 13, 2011, at xx.

<sup>44</sup> Jared A. Goldstein, “The Tea Party’s Constitution,” (working paper available at <http://ssrn.com/abstract=1679446>), at 10.

<sup>45</sup> W. CLEON SKOUSEN, *THE MAKING OF AMERICA: THE SUBSTANCE AND MEANING OF THE CONSTITUTION* 731-34 (2nd ed., 1985).

best-seller, and *The Making of America*, touted by Glenn Beck, is a staple on the conservative lecture and workshop circuit.

Conservatives portray slavery and today's government programs as parallel deviations from timeless constitutional principles of color-blindness. As Clint Bolick, an assistant to Clarence Thomas at the EEOC and now a prominent conservative litigator, wrote in *Changing Course: Civil Rights at The Crossroads*, "Slavery was a stark anomaly in the midst of the American conception of civil rights," and the Civil Rights Act of 1964 was "the apex of the golden decade in the quest for civil rights. . .Equal opportunity had triumphed"; that apex was immediately followed by "crises" in which the "quest [was] abandoned."<sup>46</sup> Bolick explains that "the great triumphs in the quest for civil rights – the abolition of slavery, the constitutional guarantee of equal protection, the repudiation of Jim Crow—all were informed by this [colorblind, classical liberal] vision."<sup>47</sup> Along with the historical parallelism between slavery and affirmative action, another aspect of Tea Party rhetoric is the recurring comparison between big government – taxation and spending programs – with slavery. A campaign advertisement by a Tea Party-backed candidate in Alabama, Rick Barber, used an Abe Lincoln impersonator to draw this comparison: "Hey Abe, If someone is forced to work for months to pay taxes so that a total stranger can get a free meal, medical procedure or a bailout, what's that called? What's it called when one man is forced to work for another?" The Lincoln impersonator answers, "Slavery."<sup>48</sup>

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<sup>46</sup> Clint Bolick, *CHANGING COURSE: CIVIL RIGHTS AT THE CROSSROADS* 13, 49, 53 (1988).

<sup>47</sup> Clint Bolick, *THE AFFIRMATIVE ACTION FRAUD: CAN WE RESTORE THE AMERICAN CIVIL RIGHTS VISION?* 38 (1996).

<sup>48</sup> "Tea Party Candidate Compares Taxes to Slavery," *Today*, MSNBC.com, June 28, 2010, available at <http://today.msnbc.msn.com/id/26184891/vp/37987839>, accessed July 28, 2011. See also *Ridiculous Tea Party Ad Interviews Abe Lincoln About 'Slavery' of Taxes, Welfare*, TALKING POINTS MEMO, Jun. 28, 2010; Bob Cesca, *The Tea Party is All About Race*, SOURCE

The final conservative historical narrative seeks to decouple slavery from race. According to this history, most slavery in human history has not been racial slavery; even U.S. slavery was not a racial institution; racism did not cause slavery; and discussing the links between slavery and race is a “distraction and an incitement to counterproductive strife.”<sup>49</sup> By showing that slavery could exist without race, and that other factors besides race could lead to slavery, these authors seek to decouple slavery from race. This in turn serves to weaken the connection of whiteness to responsibility for slavery and of blackness to the harms of slavery.

This narrative is increasingly prominent in Tea Party circles. The Florida-based National Association for the Advancement of Conservative People of all Colors (NAACPC)’s National Director Frantz Kebreau lectures widely on the history of slavery, arguing that “slavery was not really about race.” He then connects this view to an invocation of the Republican Party as the party of Lincoln, freedom, and civil rights. Rep. Michelle Bachmann, Republican Congresswoman from Minnesota, presents an extreme version of this narrative when she explains in her speeches that the United States offered a land of opportunity for all people, no matter their color. As she explained recently, “Once you got here, we were all the same,” she said. “Isn't that remarkable? It is absolutely remarkable.” Bachmann both named slavery an “evil” and “scourge” and “stain on our history” and detached the founders from that history:

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March 3, 2010; E.J. Dionne Jr., *The Tea Party: Populism of the Privileged*, THE WASHINGTON POST, April 19, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/18/AR2010041802724.html>; Joan Walsh, *The Tea Partiers' Racial Paranoia*, SALON, Apr. 15, 2010, [http://www.salon.com/opinion/walsh/politics/2010/04/15/tea\\_party\\_racial\\_paranoia](http://www.salon.com/opinion/walsh/politics/2010/04/15/tea_party_racial_paranoia) (last visited Aug. 8, 2011); Cathy Young, *Tea Partiers Racist? Not So Fast*, REAL CLEAR POLITICS, April 25, 2010, [http://www.realclearpolitics.com/articles/2010/04/25/tea\\_partiers\\_racist\\_not\\_so\\_fast\\_105309.html](http://www.realclearpolitics.com/articles/2010/04/25/tea_partiers_racist_not_so_fast_105309.html) (last visited Aug. 8, 2011).

<sup>49</sup> Thomas Sowell, *The Real History of Slavery*, in BLACK REDNECKS AND WHITE LIBERALS 114 (2006).

“But we also know that the very founders that wrote those documents worked tirelessly until slavery was no more in the United States.”<sup>50</sup> Skousen’s *Making of America* also puts forth the conservative narrative decoupling slavery and race: “In the history of the world, nearly every nation has had slaves. The Chinese kept thousands of slaves. Babylon boasted of slaves from a dozen different countries. The dark-skinned Hittites, Phoenicians, and Egyptians had white slaves. The Moors had black slaves. America had black slaves. . . . So the emancipation of human beings from slavery is an ongoing struggle. Slavery is not a racial problem. It is a human problem.”<sup>51</sup> While the view of slavery as a human problem could support radical action against unequal labor arrangements the world over, it can also lead to denial of the historical bases of racial injustice (therefore existing inequalities must be the fault of the victims), and the reduction

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<sup>50</sup> Shail Kapur, *Bachmann: Founding fathers ‘worked tirelessly’ to end slavery*, THE RAW STORY (Jan. 25, 2009, 11:19 AM), <http://www.rawstory.com/rs/2011/01/bachmann-founding-fathers-worked-tirelessly-slavery/>, (last visited Aug. 8, 2011)

<sup>51</sup> Skousen, *THE MAKING OF AMERICA*, 728. See also Dinesh D’Souza, *The End of Racism: Principles for a Multi-Racial Society* (1995); John McWhorter, *AUTHENTICALLY BLACK: ESSAYS FOR THE BLACK SILENT MAJORITY* 75-76 (2003). There were approximately 3700 black slaveholders in 1830 (this number dropped off in the 1840s and 1850s), less than 2 percent of the free black population; all free blacks made up only 6 percent of the total African American population of the Southern states. The argument about the slave trade is more complicated. See, e.g., David Eltis, *THE RISE OF AFRICAN SLAVERY IN THE AMERICAS* (1999) (in part, discussing the role of African slave traders in building up the trade). Ironically, this version of history keeps strange bedfellows, because it is the Marxists among historians – Eugene Genovese and Barbara Fields in particular—who most strongly make the argument that class rather than race motivated the course of Southern history. D’Souza even cites Eugene Genovese approvingly for the argument that profit, not racism, explains slavery. According to D’Souza, “[t]he Marxist view contains a good deal of truth.” D’Souza, *THE END OF RACISM*, at 80. See also Thomas Sowell, *RACE AND CULTURE: A WORLD VIEW* 220 (1994) (or supra note 49?) (“It is a distortion of history to assume a priori that social problems affecting contemporary blacks in the US are the ‘legacy of slavery’”); David Horowitz, *Ten reasons why reparations for slavery is a bad idea for blacks – and racist too*, reprinted in 31 *THE BLACK SCHOLAR* 48 (Summer 2001); John McWhorter, *Against Reparations*, *THE NEW REPUBLIC*, July 12, 2001, at xx (reviewing Randall Robinson, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2001)).



of the massive European slave trade to merely another form of inequality as exists in all societies.

### **Law and the Memory of Slavery in France**

Whereas in the United States, a conservative color-blind constitutionalism has gone hand-in-hand with a particular form of slavery memorialization (the slavery-to-freedom and slavery-as-temporary-deviation stories), France has followed a somewhat different route with regard to the memory of slavery. The 1998 commemoration of abolition, and especially the slogan “Tous nés en 1848,” galvanized an indigenous Antillean movement for recognition and memorialization of the experience of slavery rather than only its abolition. Political mobilization around slavery memorialization contributed to the formation of new organizations, such as the Collectif DOM and the Comité du Marche 1998, organized around Black, slave-descended identity, for the first time in the former colonies of France. This mobilization led directly to the adoption of the Taubira Law in 2001, the first law passed by a former slaveholding nation declaring slavery and the slave trade a “crime against humanity.” The Taubira Law (as it became known, for Christiane Taubira, the Guyanaian assemblywoman who introduced the bill) decreed that slavery and the slave trade should be “accorded the place they merit” in public school curricula, museums, monuments, historical research, and other sites of public education

and memory.<sup>52</sup> The law also included a provision allowing descendants of slaves or associations representing them to prosecute individuals who violate the law by denying that slavery was a crime against humanity. Although the original draft of the bill contained a provision for an “exploratory committee to examine the question of reparations,” the final version provided instead for a committee that would propose only different ways of memorializing slavery.<sup>53</sup> In form, the Taubira law resembled fairly closely the Gayssot Law, memorializing the Holocaust and making Holocaust denial a crime; however, the sanction of the Taubira law was considerably weaker, as it allowed only a civil remedy against those who denied that slavery was a crime against humanity. From the U.S. perspective, of course, such a law would be an unimaginable violation of the First Amendment protection of speech. However, its most important effects have been the funding of research devoted to the history of slavery; public memorialization of slavery and the slave trade, such as monuments, memorials, and museum exhibits; and revision of the national high school curriculum to include slavery and the slave trade.

Although some critics have argued that the Taubira law was a very limited form of official action, what differentiated the 2001 law from earlier initiatives like the 1998 commemoration was the Black, relatively race-conscious, political mobilization that helped make it possible and that it has engendered.<sup>54</sup> Thus, one key difference between the U.S. and

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<sup>52</sup> Translation my own. Loi no. 2001-434 du 21 mai 2001 tendant à la reconnaissance de la traite et de l’esclavage en tant que crime contre l’humanité, article 2, *available at* <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000405369> (last visited July 28, 2011): “Les programmes scolaires et les programmes de recherché en histoire et en sciences humaines accorderont à ls traite négrière et à l’esclavage la place conséquente qu’ils méritent.”

<sup>53</sup> Garroway, *supra* note 16, at 382-83.

<sup>54</sup> Doris Garroway contends that, like the 1998 commemoration, the 2001 law, because it was disconnected from any form of reparation or apology, could not become the basis of true reconciliation with slave descendants. *Id.*, 385-86.

France is that for some political actors, the memory of slavery has gone together with the first moves against race-blindness in the French public sphere. On the other hand, opponents of the Taubira law have invoked many of the same arguments made by conservatives in the United States to retrench race-blindness and connect it to the slavery-to-freedom narrative.

Opposition to the Taubira Law crystallized only after a lawsuit was brought under the auspices of the law. In 2005, the organization Collectif DOM sued the historian Olivier Pétré-Grenouilleau for statements he made in a newspaper interview about his recently published history of the slave trade. In the interview with the *Journal du Dimanche* (Sunday Journal), he argued that the Taubira law had exacerbated the problem of anti-Semitism in the black community by calling the slave trade a “crime against humanity,” thereby comparing it to the Shoah. According to Pétré-Grenouilleau, “the slave trade was not a genocide. The trade did not have the goal of exterminating a people. The slave was a valuable piece of merchandise that his master wanted to work as hard as possible. The Jewish genocide and the slave trade were different processes. There is not a Richter scale of suffering.” Furthermore, he denied that one could speak of contemporary descendants of slaves, because to call oneself a slave descendant “refers to a choice of identity, not to reality . . . it is to choose among one’s ancestors.”<sup>55</sup> It was for these remarks against the Taubira law, and denying the genocidal character of slavery, for

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<sup>55</sup> Didier Arnaud et Hervé Nathan, *Libération* le 30 novembre 2005, Olivier Pétré-Grenouilleau poursuivi par le collectif des Antillais Guyanais-Réunionnais, <http://www.ldh-toulon.net/spip.php?article1468> (last visited July 28, 2011); Pétré-Grenouilleau nie en effet le caractère génocidaire de l’esclavage, au motif que le but des Occidentaux était de préserver la main-d’oeuvre servile, non de la tuer. See also Pap Ndiaye, Note critique sur Olivier Pétré-Grenouilleau, ‘Les traits négrières. Essai d’histoire globale.’ <http://www.grioo.com/pinfo4527.html>; “L’affaire Olivier Pétré-Grenouilleau”: elements de chronologie, 4 janvier 2006, <http://www.clionautes.org/spip.php?article925>.

which he was prosecuted. The lawsuit was quickly withdrawn after widespread opposition, including from leading proponents of the Taubira law, such as historian Marcel Dorigny.

While historians of slavery advocated for the Taubira law, and since its passage have worked on committees and in research groups to effectuate its goals, other historians publicly opposed it.<sup>56</sup> The Pétré-Grenouilleau affair led to a reaction against all memorial laws, including the Gayssot Law and a new law in 2005, coming from the political Right, declaring that schools must teach the “positive role” of colonization in the French empire. Four hundred historians joined a public “call for the liberty of history” (appel de la liberté de l’histoire). These historians argue that “history is not a religion” and that the state should have no role in declaring historical truth. Pierre Nora and other historians of memory have been leaders in this effort to separate law from history and memory. They have been joined by jurists (who in the U.S. would be called “law professors”) decrying state involvement in history.<sup>57</sup>

Pierre Nora argues broadly against the “general criminalization of the past,” warning that the Gayssot Law opened the door for pressure from all groups of victims. “And France, alone in all of Europe, did not hesitate, as we know, to multiply generously the laws that criminalized phenomena that dated back several centuries, like the Atlantic slave trade, abolished a century and a half ago, and which all of Europe, not France alone, practiced widely, as did the Africans

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<sup>56</sup> For discussion of the activities of historians and educators in the wake of the Taubira law, see the reports of the Committee for the Memory of Slavery. Comité pour la Mémoire de L’Esclavage: Mémoires de la traite négrière, de l’esclavage et de leurs abolitions, RAPPORT À MONSIEUR LE PREMIER MINISTRE, janvier 2007, novembre 2007, at [www.comité-mémoire-esclavage.fr](http://www.comité-mémoire-esclavage.fr). See also, Françoise Vergès, *Les troubles de la mémoire: Traite négrière, esclavage et écriture de l’histoire*, 304 CAHIERS D’ÉTUDES AFRICAINES, 1143 (2005).

<sup>57</sup> L’appel des 19 historiens: Liberté pour l’histoire!, 9 janvier 2006, <http://www.ldh-toulon.net/spip.php?article1086> (last visited Aug. 8, 2011); appel de 56 juristes a l’abrogations des “lois mémorielles,” 29 novembre 2006, [http://www.ldh-toulon.net/spip.php?page=imprimer&id\\_article=1683](http://www.ldh-toulon.net/spip.php?page=imprimer&id_article=1683).

and Arabs themselves.”<sup>58</sup> The call for the liberty of history, on December 12, 2005, asserted, “History is not morality. . . . History is not the slave of the news. . . . History is not memory. . . . History is not an object of law.” While the historians focus on defining history in scientific and professional terms, distancing themselves from politics, law, and all contemporary concerns, the jurists’ argument rests on freedom of expression. But linked to both of these concerns about scientific history and free speech is also Nora’s substantive historical narrative about slavery as something that is part of the deep past, that took place everywhere and therefore is not centrally part of French identity, and something in which black Africans are implicated as well as whites.

As Françoise Vergès has argued, the opponents of memorial laws are conservative historians seeking to “delegitimize and discredit research. . .rel[ying] on the marked opposition that supposedly exists between memory and history.” These historians “seek to preserve an image of France to guarantee national unity (a national conception of history shared by Left and Right alike),” in which “the entire colonial experience is part of a linear progression” from shadow into light. Yet as Vergès argues, “the slave haunts the very foundations on which France has been constructed.”<sup>59</sup> Historians of slavery, who have spoken out in favour of the Taubira law, argue for the continuing significance of slavery in the lives of slave descendants. Marcel

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<sup>58</sup> Translation my own. “Mais avec la loi Gayssot . . . la porte était ouverte à la pression revendicatrice de tous les groupes de victims. Et la France, seule de toute l’Europe, n’a pas hésité, on le sait, a multiplier généreusement les lois qui qualifiaient criminellement des phénomènes remontant à plusieurs siècles, comme la traite atlantique et l’esclavage, abolis depuis un siècle et demi et que l’Europe tout entière, et pas seulement la France, a aussi largement pratiqués, comme l’avaient fait les Arabes et les Africains eux-mêmes.” Pierre Nora met en garde contre la “criminalisation générale du passé,” [http://www.libéronsllhistoire.com/Pierre-Nora-met-en-garde-contre-la-criminalisation-générale-du-passé; l’appel des 19 historiens; L’appel de 56 juristes; l’affaire Pétré-Grenouilleau, 5 février 2006, <http://www.ldh-toulon.net/spip.php?article1468>.](http://www.libéronsllhistoire.com/Pierre-Nora-met-en-garde-contre-la-criminalisation-générale-du-passé; l’appel des 19 historiens; L’appel de 56 juristes; l’affaire Pétré-Grenouilleau, 5 février 2006, http://www.ldh-toulon.net/spip.php?article1468)

<sup>59</sup> François Vergès, *The African Slave Trade and Slavery: Blind Spots in French Thought* (Mary Neill ed.), EUROPEAN INSTITUTE FOR PROGRESSIVE CULTURAL POLICIES, [http://translate.eipcp.net/transversal/1206/verges/en/base\\_edit](http://translate.eipcp.net/transversal/1206/verges/en/base_edit) (last visited July 28, 2011).

Dorigny, responding to the “Call for the Liberty of History,” wrote, “Is there today an identifiable community who are directly descended from [Greek] slaves? No, assuredly. While evidently tens of millions of Afro-Americans, including the Antillean French, are the direct result of the slave trade and colonial slavery, and their daily lives remain profoundly marked by this tragic and recent history.” In other words, ancient slavery is truly in the deep past, but French citizens still bear the scars of French colonial slavery. Furthermore, Dorigny notes that the Taubira law was not a law of “repentance” but of “recognition of a tragic past.” Rather than reparation, it required teaching, research, and memorialization.<sup>60</sup>

The campaign to recognize publicly France’s role in the slave trade, which culminated in the 1998 commemoration of the 150th anniversary of the abolition of slavery in the French colonies, was spearheaded by a black movement that modeled itself on the Holocaust reparations movement.<sup>61</sup> The date for the 1998 commemoration occasioned vociferous public debate: April 27, the first day chosen, was the day in 1848 that the Republicans, led by Victor Schoelcher, abolished slavery. Many advocates of commemoration found this date too celebratory because it “emphasized only the positive aspects of Républicain historiography,” and the “grant” of

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<sup>60</sup> Marcel Dorigny réagit à l’appel des 19 historiens, 21 janvier 2006, <http://www.ldh-toulon.net/spip.php?article1146>; les lois de mémoire: contestations, justifications – arguments pour un débat de fond, 28 avril 2006, <http://www.ldh-toulon.net/spip.php?article1276>. See also L’historien Pierre Nora, éditeur, du négationniste Pétre-Grenouilleau, évoque une obscénité dans les commémorations de la Shoah, 26 octobre 2005, [http://membres.lycos.fr/dieudosoutien/article.php3?id\\_article=26&\\_ord\\_ =120](http://membres.lycos.fr/dieudosoutien/article.php3?id_article=26&_ord_ =120); Historian: removing anti-revisionist laws is arrogant, 24 Jan. 2006, [www.ejpress.org/article/5399](http://www.ejpress.org/article/5399).

<sup>61</sup> Jean-Yves Camus, *The Commemoration of Slavery in France and the Emergence of a Black Political Consciousness*, 11 THE EUROPEAN LEGACY 647, 648-50 (2006). COFFAD, the Collectif des Filles et Fils d’Africains Déportés, is modeled on the Jewish Association des Filles et Filles des Déportés Juifs de France, led by the Klarsfelds. Id., 651. While a few black supremacists (made notorious by the comedian Dieudonné M’Bala M’Bala’s « Isra-Heil ») compare Zionism with Nazism, for the most part the Black-Jewish comparison has served primarily as an inspiration to activism.

freedom from the white members of the National Assembly to the slaves.<sup>62</sup> Some Black activists favored May 23, the anniversary of a march initiated by 300 black organizations in 1998. The May 10 date emerged as a compromise, commemorating simply the date of the Taubira Law's passage.

The 1998 commemoration itself gave rise to significant mobilization on the part of the black community in the Antilles. The slogan "Tous nés en 1848" galvanized opposition because it denied the lived experience of the slaves and truncated the memory of the Antillean people. Audrey Célestine describes the birth of a distinct Antillean political identity in metropolitan France around several issues, with slavery memorialisation the key point of departure.<sup>63</sup> Likewise, Abdoulaye Gueye marks the campaign for the Taubira law as a major focal point in the "emergence of a Black collective voice in France," even as he argues that Black activism should be seen as a product of Black "resources and skills" rather than solely through the lens of developments in government antidiscrimination policies.<sup>64</sup>

The Antillean organizations Collectif DOM and Comité Marché du 23 Mai 1998 organized specifically around Antillean identity, using a strategy of "differentiation."<sup>65</sup> Yet the most significant development in racial politics in the last several decades in France has been the

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<sup>62</sup> Id., at 649.

<sup>63</sup> Célestine, *Comment peut-on être Antillais hors des Antilles?* at 81. At the same time, Collectif DOM and its leader, Patrick Karam, have resisted the establishment of CRAN "on the grounds that CRAN's claims constituted a violation of universalist principles" and have strenuously opposed ethnic statistics or even surveys of racial discrimination. Gado Alzouma, *Ethnic Statistics and Social Classification in France: How the "Black Community" was Born*, 4 AFRICAN & BLACK DIASPORA: AN INT'L J. 1752 (2011), at 10.

<sup>64</sup> Abdoulaye Gueye, *Breaking the Silence: The Emergence of A Black Collective Voice in France*, 7 DuBois Rev. 81-102 (2010). See also Alzouma, *supra* 63, at 14 (identifying the Taubira law campaign and the suburban riots as the two events that "marked the birth of Black consciousness").

<sup>65</sup> Célestine, *Mobilisation et identité chez les Antillais en France*.

appearance on the scene of le CRAN (Conseil Représentatif des Associations Noires). This activist organization, formed in 2005 in the wake of the suburban riots, is organized around a broadly-based “Black” identity. Le CRAN seeks to unite French Blacks, both immigrants from Africa and citizens from the Antilles, and “to use slavery as a starting point for organizing their community as a political lobby.” Jean-Yves Camus concludes: “‘Black consciousness’ has emerged around the issues of slavery and cultural/racial domination, and today it plays an important role in the fundamental transformation of French society from an assimilationist into a multicultural society.”<sup>66</sup> Pap Ndiaye, a historian of the United States, became one of the leading public intellectuals of race in France when he became an activist in le CRAN in 2005, and published “La Condition Noire” in 2007. Ndiaye argues forcefully that France must recognize race as a social condition, with a history anchored in slavery.<sup>67</sup>

### **French Race-blindness and Republicanism after 2005**

The 2005 suburban riots and subsequent appearance of le CRAN, as well as the debate over so-called “ethnic statistics” or “diversity statistics” in the several years that followed, have for the first time put race explicitly into public discussion in France. These developments have challenged the race-blindness that has traditionally been considered an integral part of French

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<sup>66</sup> Id., 649–50, 652, 654. See also Salah Trabelsi, *Memory and Slavery: the Issues of Historiography*, 58 INT’L SOC. SCI. J. 237–43 (No. 188, June 2006); Anthony Holiday, *Slavery and denial*, 58 Int’l Soc. Sci. J. 203–14 (No. 188, June 2006); Gert Oostindie, *Public Memories of the Atlantic Slave Trade and Slavery in Contemporary Europe*, EUR. REV. INTERDISC. J. OF THE ACAD. EUROPAEA (2009).

<sup>67</sup> Pap Ndiaye, *LA CONDITION NOIRE: ESSAI SUR UN MINORITÉ FRANCAIS* (2008); interview with Pap Ndiaye June 17, 2008, France 24, at <http://www.france24.com/en/20080616-interview-pap-ndiaye-author-black-condition-france-historian&navi=DEBATS>, accessed on July 28, 2011; see also entretien Louis-Georges Tin, Vacarme 36, at <http://www.vacarme.org/rubrique192.html>, accessed July 28, 2011.



Republicanism. In France, the idea of data collection on the basis of race, as well as the use of the term “race,” has had a valence unknown in the United States. Even among the political left, the notion that each person is a separate individual, and that groups cannot be counted or recognized by the state, is a potent one, understood by many as part of the French identity. As Eric Fassin has written, “There are no minorities in France. Or so went dominant discourse, in particular starting in 1989 – at the time of the first debate on the Islamic veil that coincided with the celebration of the Bicentennial of the French Revolution.”<sup>68</sup> Therefore, to advocate race-conscious government policies, or “discrimination positive,” is a radical position. While there are state policies that somewhat resemble affirmative action, they never work on the basis of race, but rather proxies for race, such as geographical residency in an economically disadvantaged area (“zones d’éducation prioritaire,” or ZEP).<sup>69</sup>

The legacy of the Vichy era explains some of the French commitment to race-blindness in civil rights law. Until very recently, France’s civil rights regime consisted of criminal laws

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<sup>68</sup> Eric Fassin, Revised Version of Paper at the “Race After the Riots in France” panel at the AAA Meetings: The Black Minority in France – Visible and Invisible (Nov. 17, 2006).

<sup>69</sup> There is a large and growing literature on both sides of the Atlantic comparing civil rights law in France to Britain, Germany, and/or the U.S., and especially the question of “ethnic statistics” and data collection. See Julie C. Suk, *supra* note 10; Julie Ringelheim, *Collecting Racial or Ethnic Data for Antidiscrimination Policies: A U.S.-Europe Comparison*, 10 RUTGERS RACE & L. REV. 39 (2008); Donna M. Gitter, *French Criminalization of Racial Employment Discrimination Compared to the Imposition of Civil Penalties in the United States*, 15 COMP. LABOR L. & POL’Y J. (1994); Frank Dobbin, *Do The Social Sciences Shape Corporate Anti-Discrimination Practice?: The United States and France*, 23 COMP. LABOR L. & POL’Y J. 829 (2002); Eddie Bruce-Jones, *Race, Space, and the Nation State: Racial Recognition and the Prospects for Substantive Equality under Antidiscrimination Law in France and Germany*, 39 COLUM. HUMAN RIGHTS L. REV. 432 (2008); Manuel Boucher, *Lutte Contre Les Discriminations Ethniques et Injonction De Citoyenneté*, in *DE L’ÉGALITÉ FORMELLE À L’ÉGALITÉ RÉELLE: LA QUESTION DE L’ETHNICITÉ DANS LES SOCIÉTÉS EUROPÉENNES*, (Manuel Boucher, ed., 2001); Robert C. Lieberman, *A Tale of Two Countries: The Politics of Color-Blindness in France and the United States*, in *RACE IN FRANCE: INTERDISCIPLINARY PERSPECTIVES ON THE POLITICS OF DIFFERENCE* 189-217 (Herrick Chapman & Laura L. Frader eds., 2004).

against racism and discrimination, passed in the shadow of the Nazi and Vichy regimes, with the model of anti-Jewish state activity. The first major anti-racism law was passed in 1972, outlawing racial defamation, provocation to racial hatred and violence, and the use of race in employment or trade by private persons as well as the state. The 1972 law also allowed anti-racist NGOs status to intervene on behalf of victims in criminal proceedings, notably MRAP (Mouvement contre le Racisme et pour l'Amitié entre les Peuples). The second important law passed regarding race in France was the 1990 Gayssot Law, which was aimed specifically at expressions of racism and xenophobia. The law prohibited Holocaust denial and other hate speech or hate crimes. As in Germany, French discussion of race and racism was limited to “a particular idea of racism, racism that is about hate speech, violence, and racist ideas.”<sup>70</sup>

Race-blindness also derives from French constitutional law. Both the 1946 and 1958 Constitution banned distinctions based on race and religion. The 1958 Constitution, still in force, declares, “Following the victory won by free people over regimes that attempted to enslave and degrade the human person, the French people proclaim again that every human being, without distinction of race, religion or belief, possesses inalienable and sacred rights.” This constitutional limitation has been invoked not only against the possibility of affirmative action, but even against more recent efforts to allow social scientists to survey the population regarding racial self-identification and discrimination.

As in the United States, the dominant French narrative of republicanism, the idea that French citizenship embodies a color-blind commitment to seeing people only as individuals, not

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<sup>70</sup> Jacqueline S. Gehring, Paper at the Annual Meeting of the American Political Science Association: *One European Directive, Two Dramatically Different Responses: Explaining the Divergence in French and German Racial Anti-discrimination Policy after the EU Race Directive* (2005).

as members of communities or groups, depends on amnesia about slavery and colonialism. The French contribution to the development of racial ideologies, the French empire and slave trade, are seen as aberrations, deviations from the timeless principles of the Declaration of the Rights of Man.<sup>71</sup> Even when academics compare France to the U.S., the French commitment to republicanism is put forward as an explanation for the French aversion to speaking of race or recognizing its social or political existence through state classification of any form.<sup>72</sup> As Etienne Balibar has pointed out, the aversion to the term “race” has not helped France avoid cultural racism.<sup>73</sup> “What makes cultural racism in France potentially so pernicious a mutation of older, more biological notions of racism is that by insisting on the necessity of assimilation, it can bear so striking a resemblance to the avowedly anti-racist republican orthodoxy it rejects.”<sup>74</sup>

Yet there have been some recent shifts in French antidiscrimination law, which have led some commentators to suggest a “convergence” between the French model and that of other European countries as well as the U.S.<sup>75</sup> Most recently, the French government created for the first time an administrative body, modelled on the British Commission for Racial Equality,

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<sup>71</sup> See Laurent Dubois, *Republican Anti-racism and Racism: A Caribbean Genealogy*, in RACE IN FRANCE: INTERDISCIPLINARY PERSPECTIVES ON THE POLITICS OF DIFFERENCE 23-35 (Herrick Chapman & Laura L. Frader, eds. 2004); Cécile Vidal, *The Reluctance of French Historians to Address Atlantic History*, So. Q. 153 (Summer 2006).

<sup>72</sup> Gerard Noiriel, “*Color blindness*” et construction des identités dans l’espace public français,” in DE LA QUESTION SOCIALE À LA QUESTION RACIALE. REPRÉSENTER LA SOCIÉTÉ FRANÇAISE 158-174 (Didier Fassin & Éric Fassin eds., 2006); Herrick Chapman and Laura Frader, *Introduction to RACE IN FRANCE: INTERDISCIPLINARY PERSPECTIVES ON THE POLITICS OF DIFFERENCE* FIRST PAGE OF INTRO, 2 (Herrick Chapman & Laura L. Frader eds., 2004).

<sup>73</sup> Étienne Balibar, *Is There A Neo-Racism?*, in RACE, NATION, CLASS: AMBIGUOUS IDENTITIES xx (Étienne Balibar & Immanuel Wallerstein eds., 1991).

<sup>74</sup> Chapman & Frader, 6.

<sup>75</sup> Christian Joppke, *The Transformation of Immigrant Integration: Civic Integration in The Netherlands, France, and Germany*, 59 WORLD POL. 243, xx (2007 (arguing that “distinct national models of dealing with immigrants are giving way to convergent policies of civic integration and antidiscrimination”); Daniel Sabbagh, *infra* note 77. For an early and important discussion of the phenomenon, see Didier Fassin, *L’Invention Française de la Discrimination*.

known as the HALDE (Haute Autorité de Lutte contre les Discriminations et pour l'Égalité, High authority of Struggle against discrimination and for equality). This development was in part a French response to the EU Race Directive, adopted in 2000. HALDE, like the British agency, is not specifically focused on racial discrimination, but a wide range of “discriminations” including gender, sexual orientation, disability, and others.<sup>76</sup>

Daniel Sabbagh has shown the convergence between “diversity” strategies in the United States in France in higher education in recent years, despite coming from different starting points in legal and constitutional terms.<sup>77</sup> The United States Supreme Court narrowed the permissible justifications for affirmative action to the single “diversity” rationale over the course of the years from Justice Powell’s concurrence in *Bakke* in 1976, to the plurality opinion in *Grutter v. Bollinger* several years ago, a period during which “color-blind constitutionalism” has been ascendant. In France, on the other hand, the idea of “action positive” against discrimination is a very new one in the past decade, but has been limited to race-neutral programs targeting residents of Priority Education Zones (ZEP), or first-generation college-goers, or socio-economically disadvantaged individuals. As numerous commentators have argued, these

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<sup>76</sup> Romain Garbaye, *Crossing Paths? The British and French experiences with racial and ethnic diversity since 9/11*, SOCSCI.COLORADO.EDU, socsci.colorado.edu/~smithms/Garbaye.doc (last visited on July 27, 2011).

<sup>77</sup> Daniel Sabbagh, *The Rise of Indirect Affirmative Action: Converging Strategies for Promoting “Diversity” in Selective Institutions of Higher Education in the United States and France*, 63 *WORLD POL* 470 (2011). See also Sabbagh, *Affirmative Action at Sciences Po*, in *RACE IN FRANCE: INTERDISCIPLINARY PERSPECTIVES ON THE POLITICS OF DIFFERENCE* 246-258 (Herrick Chapman & Laura L. Frader, eds., 2004); Gwénaële Calvès, *Color-Blindness at a Crossroads in Contemporary France*, in *RACE IN FRANCE: INTERDISCIPLINARY PERSPECTIVES ON THE POLITICS OF DIFFERENCE* 219-226 (Herrick Chapman & Laura L. Frader, eds., 2004); Alec G. Hargreaves, *Half-Measures: Anti-Discrimination Policy in France*, *RACE IN FRANCE: INTERDISCIPLINARY PERSPECTIVES ON THE POLITICS OF DIFFERENCE* 227-245 (Herrick Chapman & Laura L. Frader, eds., 2004); Romain Garbaye, *Crossing Paths?* (arguing that there has been a convergence between France and Britain with regard to multiculturalist politics).

programs, despite their superficial race-neutrality, nevertheless seem to be targeting non-white populations, as evidenced by their rhetoric regarding “diversité.” As in the United States, “diversité” has become a euphemism for a person of color, including the phrase “issu de diversité” to replace “issu d’immigration.” Even CRAN leader Patrick Lozès argues in favour of the term “statistiques de diversité” as opposed to “statistiques ethniques.”<sup>78</sup>

As civil rights strategies began to converge, and as the EU Race Directive focused attention on “indirect” racial discrimination (what American lawyers would call “disparate impact”), the question of data collection on race and ethnicity rose to importance in France. A vigorous public debate took place in the years 2005-09 regarding the collection of statistics, with le CRAN in favour, and SOS-Racisme and MRAP opposed. The Human Rights League (LDH) favoured the collection of statistical data by researchers for scientific purposes, but opposed adding questions to the census or other administrative records. SOS-Racisme, through a public campaign against data collection, mobilized opposition to an amendment to France’s immigration law that would have made it easier to collect such statistics. The Constitutional Council, France’s constitutional court, struck down the amendment on the ground that it was “insufficiently related to the main object of the bill.”<sup>79</sup> However, the Council also suggested that the provision could have been found unconstitutional as a violation of race-blindness as well. As Daniel Sabbagh notes, this could be “an indication of what the Constitutional Council might say

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<sup>78</sup> Patrick Lozès, *Statistiques (dites) ethniques: le retour*, LE BLOG DE PATRICK LOZÈS (Sept. 15, 2007), <http://patricklozes.blogs.nouvelobs.com/archive/2007/09/15/statistiques-dites-ethniques-le-retour.html> (last visited Aug. 8, 2011).

<sup>79</sup> Jean-Loup Amselle, *To Count or Not to Count: The Debate on Ethnic and Diversity Statistics in France Today*, ANTHROPOETICS 15 (spring 2010).

[regarding ethnic statistics] in the future.”<sup>80</sup> Trica Danielle Keaton notes that the “debates about ethno-racial or ‘diversity’ statistics have made strange bedfellows of proponents and opponents . . . and have polarized two of France’s high profile anti-exclusion organizations the CRAN closely associated with the [NAACP] and even described as being modelled after it, and SOS Racisme, essentially absorbed into the French Socialist Party.”<sup>81</sup> Le CRAN also sponsored the only survey to date of racial discrimination against blacks in France, by the polling firm TNS Sofres, in January, 2007. This survey was widely reported in the media, especially the finding that 56% of people who identified themselves as “noirs” said they had personally been victims of racial discrimination.<sup>82</sup> The debate has largely quieted down after a commission headed by François Héran (COMEDD) presented a comprehensive report to Yazid Sabeg, the Commissioner for Diversity and Equality, recommending limited expansion of data collection, but without using ethno-racial categories.<sup>83</sup>

The debate about ethnic statistics, and the rise of le CRAN, suggest an important shift from race blindness to race consciousness in French politics. Eric Fassin argues that the terms of

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<sup>80</sup> Daniel Sabbagh, *The Collection of Ethnoracial Statistics: Developments in the French Controversy, A Policy Brief from the Equality of Opportunity Program*, FRENCH-AMERICAN FOUNDATION, <http://www.frenchamerican.org/cms/policybriefs?nid=40&title=The%20Collection%20of%20Ethnoracial%20Statistics:%20Developments%20in%20the%20French%20Controversy&pic=5> (last visited Aug. 8, 2011).

<sup>81</sup> Trica Danielle Keaton, *The Politics of Race-Blindness: (Anti)Blackness and Category-blindness in Contemporary France*, 7 DU BOIS REV. 103, 108 (2010).

<sup>82</sup> The full survey is available at *Le 1er baromètre des populations noires de France*, COUNSEIL REPRÉSENTATIF DES ASSOCIATIONS NOIRES (22 juin 2007) <http://lecran.org/?p=243> (last visited Aug. 8, 2011).

<sup>83</sup> *Inégalités et discriminations: Pour un usage critique et responsable de l’outil statistique; Rapport du comité pour la mesure de la diversité et l’évaluation des discriminations* (COMEDD) présidé par M. François HÉRAN présenté à M. Yazid SABEG, Feb. 1, 2010, available at [http://combatsdroitshomme.blog.lemonde.fr/2010/02/05/halte-a-la-comeddie-communique-du-carsed-et-rapport-heran-du-comedd/rapport\\_comedd\\_v-finale\\_04-02-10-11265292406pdf/](http://combatsdroitshomme.blog.lemonde.fr/2010/02/05/halte-a-la-comeddie-communique-du-carsed-et-rapport-heran-du-comedd/rapport_comedd_v-finale_04-02-10-11265292406pdf/). ???

debate began to shift in the late 1990s when the Socialist government came to power and public interest in “discrimination positive” began to grow, as well as public rhetoric about “visible minorities” and positive images of multiculturalism (“Black/Blanc/Beur” – Black/White/North African Immigrant). The visibility of Blacks in particular has grown in the last few years, in part because of the prominence of Blacks among the protestors of November 2005, and in part because of the memory wars occasioned by the Taubira law and the Pétré-Grenouilleau affair. Fassin argues that the emergence of a “specifically black lobby – the CRAN would have been “unthinkable” only a few years earlier, “as the “embodiment of American-style, un-French racialized identity politics.”<sup>84</sup>

Yet the CRAN does not in fact engage in multiculturalist identity politics; it defines race in political terms -- Blacks are people who are discriminated against as Blacks. As Fassin argues, it is “minority politics” rather than “identity politics.”<sup>85</sup> CRAN spokesman Louis-George Tin writes, “In response to the question ‘who is black?’ we do not reply with arguments about nature . . . nor with cultural arguments . . . but rather with socio-political arguments.”<sup>86</sup> Likewise, Pap Ndiaye, in his book, *La Condition Noire*, argues for a strategic use of “Black” identity, and of “race” as a tool of social science analysis.<sup>87</sup> Jean Yves-Camus suggests that the “emerging civil rights movement” is distinct from but linked to “a politically conscious black

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<sup>84</sup> Fassin, *supra* note 68.

<sup>85</sup> Id. See also, Pap Ndiaye, *Questions de couleur: Histoire, ideologie, et pratiques du colorisme, in De la Question Sociale A La Question Raciale?*, in *REPRESENTER LA SOCIÉTÉ FRANÇAISE* 37 (Didier & Eric Fassin, eds., 2006). For SOS-Racisme, see Dominique Sopo, *Facing Race in France, 2007*, *COLOR LINES* (April 7, 2007, 8:27 AM), at [colorlines.com/archives/2007/04/post\\_12.html](http://colorlines.com/archives/2007/04/post_12.html); le CRAN, see Le CRAN, *FAQ sur les statistiques de la diversité*, COUNSEIL REPRÉSENTATIF DES ASSOCIATIONS NOIRES, Juin 21, 2009, available at <http://lecran.org/?p=364> (last visited on July 27, 2011).

<sup>86</sup> Louis-Georges Tin, *Who is afraid of Blacks in France?: The Black Question, the Name Taboo, and the Number Taboo*, 26 *FRENCH POL., CULT. & SOC.*, 32, 34-35 (2008).

<sup>87</sup> Pap Ndiaye, *supra* note 67.

community which aims at gaining public recognition of the part France played in the slavery process, which also has a strong anti-racist content.”<sup>88</sup>

Thus, debates over the memory of slavery, and the use of law to remember slavery, have helped to foster a new form of racial politics in France – and in turn, the new Black political formations have spurred continuing attention to the slave past and its connections to the present. As in the United States, remembering slavery, and especially the role of slaves in claiming freedom for themselves, can be empowering for anti-racist movements and can fuel support for race-conscious policies to redress the harms of the past. Yet, in the United States, slavery memorialization has gone hand in hand with racial retrenchment and political reaction. The slavery-to-freedom story, and the slavery-as-temporary-deviation-from-colorblind-equality narrative, the most popular narratives about slavery, are used to justify a colorblind-constitutionalist opposition to race-conscious remedies for injustice. In France, all of these elements are present. Opposition to the slavery memorial law has mobilized the slavery-to-freedom story, and opposition to new race-conscious proposals has forcefully reasserted race-blindness as a timeless republican principle. Will French opponents of race-conscious civil rights policies marry these two historical narratives in the same way American conservatives have done? It is too soon to tell.

### **Reflections on Law and the Memory of Slavery in the U.S. and France**

The United States remains a touchstone for French political debates about diversity, immigration and race. As Eric Fassin explains, the French-American comparison is “good to

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<sup>88</sup> Yves-Camus, *Commemoration of Slavery in France*, at 651.



think” because it provides a stark and caricatured contrast between bad “differentialism” and “communitarianism” (United States) and good “universalism,” “individualism,” and “republicanism” (France).<sup>89</sup> This contrast has dominated discussion of integration ever since Gérard Noiriel’s influential book in 1988, *Le Creuset Français* (The French Melting-Pot). As Nancy Green shows, “le melting-pot” has been adopted as a French term to indicate both “diversity” and cultural assimilation (melting).<sup>90</sup> The contrast continues, as well, to organize public debate over “statistiques ethniques,” “diversité,” and “discrimination positive” in France.

Yet if we look behind the contrast in juridical tradition and supposed ideological gulf regarding race-blindness, we may be struck by what French and American racial politics have in common at the current moment. Certainly it is true that in the 1960s and 1970s, American legislatures and courts developed a robust civil rights regime through a jurisprudence that drew on a progressive history linking the legacies of slavery and Jim Crow to remedial programs of affirmative action, while France in the 1970s was focused on its Vichy past, and concentrated on combating hate speech and acts of violence against minorities. But in the last two decades, both countries have experienced a burgeoning of public memorialization of slavery; and both countries’ public discourse about racial justice have been dominated by “neo-conservative” (or perhaps, “neo-liberal”) narratives of discontinuity between the slave past and the free present.

In the United States, liberal recovery of the memory of slavery and its aftermath as a history of struggle has given way to more celebratory versions of the slavery-to-freedom story, which can be the basis for race-blind suppression of affirmative measures for racial justice. In France, the first efforts to recover slavery memory have gone hand in hand with a new black

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<sup>89</sup> Eric Fassin, *supra* note 8, at 224-241.

<sup>90</sup> Gérard Noiriel, *LE CREUSET FRANÇAIS* (1988); Nancy L. Green, *Le Melting-Pot: Made in America, Produced in France*, 86 *J. Am. Hist.* 1188 (1999).

consciousness, a growing awareness of “race” in public life, and demands by some for an end to total race-blindness. Yet the same conservative trend may be discerned in France as well, as in debates over memorial laws, the slavery-to-freedom story has been used to distance citizens today, and white people more generally, from responsibility for harms to black people. The narrative decoupling slavery from race arises not only in American conservative diatribes against reparations, but also in French arguments against the Taubira Law. Likewise, both American and French politicians and jurists tell the story of timeless constitutional principles of color-blindness, embodied in the 1787 U.S. Constitution and the 1789 Declaration of the Rights of Man, in which slavery was a temporary blot, but not a significant part of the national identity. This version of history, in which abolition becomes simply a “completion of the Constitution,” allows any race-conscious government action to redress harm to slave descendants to appear as a historical parallel to slavery. In its more extreme forms, right-wing politicians in the U.S. use “slavery” to describe any government policies they do not like.

This is not to suggest that any history of anti-slavery is inevitably retrogressive, nor that there may not be a value to societies to putting the past behind us with forward-looking government policies to promote equality and diversity, but simply to note that as political beings we do remember the past, and we imagine the future in terms of different versions of the past. Whatever version of the memory of slavery one ascribes to, we at least can say that it is “not even past.”