ARTICLES

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 a deep and generalized past detached from race, whereas those movements seeking some form of recognition or reparation emphasize that slavery is "not even past."[1] 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) as temporary deviations.

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1. THOMAS J. SUGRUE, NOT EVEN PAST: BARACK OBAMA AND THE BURDEN OF RACE (2010).

I. INTRODUCTION

"The past isn't dead and buried. In fact, it isn't even past."[2] 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.[3] We continue to wrestle with the memory of slavery and with its lasting legacies. And we are not alone. Former slave-trading empires in 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 have been shaped by) contemporary racial politics.[4] 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 this outpouring of memory of slavery comes 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.[5] 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 previously been reserved for the Holocaust in Europe.[6] In the United States, the success of Holocaust reparations claims

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2. Barack Obama, Presidential Campaign Speech at the Constitution Center in Philadelphia: A More Perfect Union (March 18, 2008) (transcript available at http://www.latimes.com/news/nationworld/nation/la-na-campaign19mar19-speech,0,3568071.story). This was a slight misquote of WILLIAM FAULKNER, REQUIEM FOR A NUN 73 (1951) ("The past is never dead. It isn't even past.").

3. *See* THOMAS J. SUGRUE, *Foreword* to NOT EVEN PAST: BARACK OBAMA AND THE BURDEN OF RACE (2010).

4. JOHANN MICHEL, GOUVERNER LES MÉMOIRES: LES POLITIQUES MÉMORIELLES EN FRANCE (2010).

5. *See generally*, Michelle E. Lyons, Note: *World Conference Against Racism: New Avenues for Slavery Reparations?*, 35 VAND. J. TRANSNAT'L L. 1235 (2002).

6. Loi 2001-434 du 21 mai 2001 tendant à la reconnaissance de la traite et de l'esclavage en tant que crime contre l'humanité [Law 2001-434 of May 21, 2001 for the recognition of trafficking and slavery as a crime against humanity] LEGIFRANCE: LE

against Swiss banks and other institutions sparked a renewed interest in slavery reparations and spawned a series of lawsuits against corporations and other entities (eventually consolidated in the Northern District of Illinois, where they were summarily dismissed).[7] At the same time, a number of universities in the North and South began to examine their own histories with slavery, and several museums and historical societies launched major exhibitions about slavery and abolition.[8] In both the United Kingdom and France, national commemorations took place in the late 1990s and early 2000s marking the anniversaries of the abolition of their slave trades.[9]

SERVICE PUBLIQUE DE LA DIFFUSION DU DROIT [LegiFrance: A Public Service for the Dissemination of the French Laws], *available at* http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000405369.

7. 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, 1182 (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, 922 (2009). 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. *See generally* MARY FRANCES BERRY, MY FACE IS BLACK IS TRUE: CALLIE HOUSE AND THE STRUGGLE FOR EX-SLAVE REPARATIONS 239 (2005); Martha Biondi, *The Rise of the Reparations Movement*, 87 RADICAL HIST. REV. 5 (2003); Brophy, *supra* note 7, at 1182; Hutchinson, *supra* note 7, at 922.

8. Emory University recently had a 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 UNIV. STEERING COMMITTEE ON SLAVERY & JUSTICE, SLAVERY AND JUSTICE (2006), *available at* http://brown.edu/Research/Slavery_Justice/. The largest museum exhibition was staged at the New York Historical Society, funded by the Gilder-Lehrman Center at Yale University. New York Historical Society, *About the Exhibit,* SLAVERY IN NEW YORK, http://www.slaveryinnewyork.org/about_exhibit.htm (last visited Apr. 5, 2012). Richard Gilder and Lewis Lehrman, both Republicans, are two of the largest funders for slavery studies in the United States today. *See* Howard Holzer, *Prizing History: An Interview with Richard Gilder and Lewis Lehrman,* AMERICAN HERITAGE, May/June 2000, www.americanheritage.com/category/article-keywords/gilder-lehrman-center-study-slavery.

9. The United Kingdom commemorated the Bicentenary of the Abolition of the Slave Trade in 2007. *Bicentenary of the Abolition of the Slave Trade*, NATIONAL ARCHIVES, May 19, 2010, http://webarchive.nationalarchives.gov.uk/+/www.direct.gov.uk/en/slavery/DG_065859. In France, the sesquicentennial of the abolition of slavery was celebrated in 1998. IL Y A 150 ANS: ABOLITION DE L'ESCLAVAGE ("It has been 150 years: abolition of slavery") (Réseau France Outremer 1998), *available at* http://www.ina.fr/video/CAC98016201/il-y-a-150-ans-abolition-de-l-esclavage.fr.html

Yet significant differences in legal regimes and historical contexts have meant sharp contrasts in the ways nations, even those that share certain contemporary political trends, remember slavery through law. In this Article, 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 rather to signal that politicians, courts, and legislatures, as well as museum exhibits, films, and other artifacts of popular culture generate the historical narratives that I highlight.[10]

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.[11] 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. 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

(video outlining the history and celebrations of the 150th anniversary of slavery's abolition in France).

10. For a more in-depth discussion and bibliography of French works on history and memory, see Ariela Gross, *The Constitution of History and Memory*, *in* LAW AND THE HUMANITIES: AN INTRODUCTION 416 (Austin Sarat, Matthew Anderson & Cathrine O. Frank eds., 2010); Marie-Claire Lavabre, *For a Sociology of Collective Memory*, CNRS, http://www.cnrs.fr/cw/en/pres/compress/memoire/lavabre.htm (last visited Jan. 23, 2012); Ariela Gross, *Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640 (2001) [hereinafter Gross, *Beyond Black and White*]. As a historian of law and culture, I am particularly interested in the way legal and cultural narratives reinforce one another; for more on cultural-legal history, see generally Gross, *Beyond Black and White*, *supra* note 10.

11. Eric Fassin, *"Good to Think": The American Reference in French Discourses of Immigration and Ethnicity*, *in* MULTICULTURAL QUESTIONS 224, 231, 237 (Christian Joppke & Steven Lukes eds., 1999).

Vichy and Nazism.[12] As law professor Julie Suk and other scholars 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.[13] 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.[14] 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.[15] Whereas descendants of slaves make up a significant minority of the population in the continental United States, in France it has been easier to "forget" slave descendants tucked away in the former slave colonies—now overseas departments—or

12. 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.").

13. ERIK BLEICH, RACE POLITICS IN BRITAIN AND FRANCE: IDEAS AND POLICYMAKING SINCE THE 1960S 181–82 (2003); Erik 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, 172 (Herrick Chapman & Laura L. Frader eds., 2004); Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. UNIV. L. REV. 1315 (2008) [hereinafter Suk, *Procedural Path Dependence*]; Jacqueline S. Gehring, One European Directive, Two Dramatically Different Responses: Explaining the Divergence in French and German Racial Anti-Discrimination Policy After the Race Directive (Sept. 2005) (unpublished Ph.D. dissertation, University of California, Berkeley), *available at* http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/4/2/6/6/pages42661/p42661-1.php.

14. On ethnic identification in cultural rather than racial terms, see MICHÈLE LAMONT, THE DIGNITY OF WORKING MEN: MORALITY AND THE BOUNDARIES OF RACE, CLASS, AND IMMIGRATION (2000). On cultural racism, see Etienne Balibar, *Is There a "Neo-Racism"?*, *in* RACE, NATION, CLASS: AMBIGUOUS IDENTITIES 17, 21 (Etienne 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 L. Frader, *Introduction* to RACE IN FRANCE: INTERDISCIPLINARY PERSPECTIVES ON THE POLITICS OF DIFFERENCE 1 (Herrick Hapman & Laura L. Frader eds., 2004).

15. *See* Suk, *supra* note 12, at 18–33 (discussing both the public discourse regarding racism against North Africans, and the legal framework resulting from a historic emphasis on racism against European Jews under the Vichy government).

to overlook even a significant number of migrants from the Antilles to the metropole.[16]

Yet, as Pierre Nora and other historians of memory remind us, it is the silence of public memory, the forgetting and amnesia, that shape the present as much as the official commemorations.[17] 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 emphasize 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 blunts the 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 a deep and generalized past detached from "race," whereas those seeking some form of recognition or reparation emphasize that slavery is "not even past."[18] Furthermore, in both countries, the originary revolutionary moment—in France, associated with the Declaration of the Rights of Man and "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) a temporary deviation.

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16. 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 ASYLON(S) NO. 8: RADICALISATIONS DES FRONTIÈRES ET PROMOTION DE LA DIVERSITÉ, July 2010, http://www.reseau-terra.eu/article946.html [hereinafter Célestine, *Mobilisations et Identité chez les Antillais en France*]; Audrey Célestine & Leïla Wuhl, *Comment Peut-On Être Antillais hors des Antilles?*, HOMMES ET MIGRATIONS, July–Aug. 2005, at 76, *available at* http://www.hommes-et-migrations.fr/docannexe/file/5494/dossier_1256_dossier_1256.pdf [hereinafter Célestine & Wuhl, *Comment Peut-On Être Antillais hors des Antilles?*].

17. Pierre Nora, *Introduction* to RETHINKING FRANCE: LES LIEUX DE MÉMOIRE VOL. 3, at vii (Pierre Nora ed., 2009).

18. I draw this phrase from Thomas Sugrue's book, *Not Even Past: Barack Obama and the Burden of Race.* SUGRUE, *supra* note 1.

II. 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 and 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. History professor 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.[19] In France, Caribbean historians Myriam Cottias and Francoise Vergès demonstrate the way successive generations of Caribbean politicians built their society on the forgetting of slavery.[20] French professor Doris Garraway 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

19. DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 264–65 (2001); 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 (1998); BROWN UNIV. STEERING COMMITTEE ON SLAVERY & JUSTICE, *supra* note 8. *See also* ELIZABETH RAUH BETHEL, THE ROOTS OF AFRICAN-AMERICAN IDENTITY: MEMORY AND HISTORY IN ANTEBELLUM COMMUNITIES (1999);; RON EYERMAN, CULTURAL TRAUMA: SLAVERY AND THE FORMATION OF AFRICAN AMERICAN IDENTITY (2001); Frederick C. Harris, *Collective Memory, Collective Action, and Black Activism in the 1960s*, *in* BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR 154 (Martha Minnow ed., 2002); IYUNOLU FOLAYAN OSAGIE, THE AMISTAD REVOLT: MEMORY, SLAVERY, AND THE POLITICS OF IDENTITY IN THE UNITED STATES AND SIERRA LEONE (2000); SLAVERY AND PUBLIC HISTORY: THE TOUGH STUFF OF AMERICAN MEMORY (James Oliver Horton & Lois E. Horton eds., 2006); WHERE THESE MEMORIES GROW: HISTORY, MEMORY, AND SOUTHERN IDENTITY (W. Fitzhugh Brundage ed., 2000); Ira Berlin, *American Slavery in History and Memory and the Search for Social Justice*, 90 J. AM. HIST. 1251 (2004); Shelley Fisher Fishkin, *Race and the Politics of Memory: Mark Twain and Paul Laurence Dunbar*, 40 J. AM. STUD. 283 (2006); Saidiya Hartman, *The Time of Slavery*, 101 S. ATL. Q. 757 (2002); Julie Saville, *Circuits of Memory: Routes to Slave Pasts*, 83 GA. HIST. Q. 539 (1999) (reviewing EDWARD BALL, SLAVES IN THE FAMILY (1998) & REMEMBERING SLAVERY: AFRICAN-AMERICANS TALK ABOUT THEIR PERSONAL EXPERIENCES OF SLAVERY AND EMANCIPATION (Ira Berlin, Marc Favreau & Steven F. Miller eds., 1998)).

20. 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 293 (Fred Constant & Justin Daniel eds., 1997); Myriam Cottias, *Le Triomphe de L'oubli ou la Mémoire Tronquée?*, *in* DE L'ESCLAVAGE AUX RÉPARATIONS 95 (Serge Châlons ed., 2000); FRANÇOISE VERGÈS, LA MÉMOIRE ENCHAÎNÉE: QUESTIONS SUR L'ESCLAVAGE (2006).

and symbolic—towards those it once enslaved."[21] 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."[22] 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 Alex Haley's television drama, *Roots*.[23] 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, committing theft, breaking tools, and feigning illness. They also revised the history of abolition and emancipation by emphasizing the African American perspective; this revealed a world of Black abolitionists and fugitive slaves who pushed emancipation to the center of politics.[24]

Civil rights jurisprudence during that era drew on progressive histories of slavery and Jim Crow laws, emphasizing the active role ex-slaves played in battles to secure the rights to full freedom. The liberal justices of the United States Supreme Court during the Warren, Burger, and Rehnquist courts drew on what some have called a "redemptive" history of the

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21. Doris L. Garraway, *Memory as Reparation? The Politics of Remembering Slavery in France from Abolition to the Loi Taubira (2001)*, 11 INT'L J. FRANCOPHONE STUD. 365, 366 (2008).

22. *Id.* at 378.

23. *See* J.B. Bird, *Roots*, Museum Broadcast Comm., http://www.museum.tv/eotvsection.php?entrycode=roots (last visited Mar. 19, 2012). *See also* Richard Severo, *David L. Wolper is Dead at 82: Produced Groundbreaking 'Roots,'* N.Y. TIMES, Aug. 12, 2010, at 128 ("One of the highest-rated entertainment programs in television history, [*Roots*] went on to win nine Emmy Awards and ignited a lively national discussion about race.").

24. Among the most important works are: HERBERT APTHEKER, AMERICAN NEGRO SLAVE REVOLTS (5th ed., 1983); IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH (1992); JOHN W. BLASSINGAME, THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH (1979); EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1976); LAWRENCE W. LEVINE, BLACK CULTURE AND BLACK CONSCIOUSNESS: AFRO-AMERICAN FOLK THOUGHT FROM SLAVERY TO FREEDOM (1977). On the political importance of fugitive slaves, see JAMES OAKES, SLAVERY AND FREEDOM: AN INTEGRATION OF THE OLD SOUTH (1998).

struggle for Black freedom from slavery to the 1960s.[25] The Justices 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 1978 dissent in *Regents of the University of California v. Bakke*, he argued against color-blind constitutionalism by reminding Americans of the history of Jim Crow after slavery.[26] Justice Brennan believed that Jim Crow was as prominent as slavery and color-blindness could be achieved only if progress continued:

> 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." . . . [E]ven today officially sanctioned discrimination is not a thing of the past. Against this background, claims that law must be "colorblind" . . . must be seen as aspiration rather than as description of reality. . . . [W]e cannot . . . let color blindness become myopia . . . .[27]

Similarly, 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.[28] He further noted that even favorable court decisions did not stop segregation or make African Americans equal.[29] "The legacy of years of slavery and of years of second-class citizenship in the wake of emancipation could not be so easily eliminated."[30] Finally, he concluded that: "The experience of

25. Ariela Gross, *When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CALIF. L. REV. 283 (2008) [hereinafter Gross, *When Is the Time of Slavery?*]; Amy Kapczynski, *Historicism, Progress, and the Redemptive Constitution*, 26 CARDOZO L. REV. 1041 (2005) (quoting Walter Benjamin on "redemptive history").

26. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 326–27 (1978) (Brennan, J., dissenting).

27. *Id.*

28. *Id.* at 387–94 (Marshall, J., dissenting).

29. *Id.* at 394.

30. *Id.*

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."[31]

This progressive liberal jurisprudential version of history took a particular approach to constitutional interpretation that has become known as the "living Constitution" view. Justice 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."[32] Instead, he contended, 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 as fundamental today."[33] According to Marshall, the Constitution of 1976 was a different document from the 1787 Constitution; it had literally been transformed, rather than merely amended.[34] Accordingly, 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 toward freedom, which is 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 broader international sphere. 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 accomplishments of white abolitionist leader Victor Schoelcher. Jacques Chirac, France's President at the time of the sesquicentennial of the abolition of slavery, gave a speech at the

31. *Id.* at 400.

32. Thurgood Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association (May 6, 1987) (transcript available at http://www.thurgoodmarshall.com/speeches/constitutional_speech.htm).

33. *Id.*

34. *Id.*

commemoration that referred to abolition as a "decisive moment in history" that "reinforced the unity of the Nation."[35] The official government slogan, "Tous nés en 1848,"[36] captured this sense of abolition effacing the memory of slavery as the nation was born, and presumably all were reborn, in 1848.[37] Celebrating the 1848 abolition also erased the memory of earlier abolitions, especially the Haitian Revolution.[38]

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.[39] President Clinton likewise told an audience in Uganda that it was wrong for the U.S. to have benefited from slavery, but both President Bush and President Clinton stopped short of an apology.[40] A number of institutions and government entities in the U.S., including private and public

35. Jacques Chirac, President of the Republic of France, Speech at the Reception in Honour of the Slavery Remembrance Committee: Mémoire de l'esclavage (Jan. 30, 2006) (transcript available at http://www.ambafrance-uk.org/Memoire-de-l-esclavage, English translation of certain excerpts available at http://www.ambafrance-uk.org/Speech-by-M-Jacques-Chirac,6848.html) ("L'abolition de 1848 est un moment décisif de notre histoire: l'un de ceux qui ont forgé l'idée que nous nous faisons de notre pays, en tant que terre des Droits de l'Homme. . . . C'est ainsi qu'un peuple se rassemble, qu'il devient plus uni, plus fort.") ("The Abolition of 1848 was a decisive moment in our history: one of those that forged the idea that we have of our country as the land of the Rights of Man. . . . This reinforces the unity of our nation."). *See also* ELIZABETH KOWALESKI-WALLACE, THE BRITISH SLAVE TRADE & PUBLIC MEMORY 207–08 (2006); CATHERINE A. REINHARDT, CLAIMS TO MEMORY: BEYOND SLAVERY AND EMANCIPATION IN THE FRENCH CARIBBEAN (2006) (describing the commemoration of slavery in the former French colonies of Martinique, Guadeloupe, and Haiti); Christine Chivallon, *Bristol and the Eruption of Memory: Making the Slave-Trading Past Visible*, 2 SOC. & CULTURAL GEOGRAPHY 347 (2001).

36. This translates to: "All born in 1848."

37. *Tous nés en 1848: 150ème Anniversaire de l'abolition de l'esclavage. 1848–1998*, MINISTÉRE DE LA CULTURE ET DE LA COMMUNICATION, http://www.culture.gouv.fr/culture/actual/abolition/esclavage.htm (last visited Jan. 20, 2011).

38. *See, e.g.*, LAURENT DUBOIS, LES ESCLAVES DE LA RÉPUBLIQUE: L'HISTOIRE OUBLIÉE DE LA PREMIÈRE ÉMANCIPATION, 1789-1794 (1998). On erasing the memory of the Haitian Revolution in France, see Alyssa Sepinwall, *Atlantic Amnesia? French Historians, the Haitian Revolution, and the 2004-2006 CAPES Exam*, 34 PROC. OF THE W. SOC'Y FOR FRENCH HIST. 300 (2006), *available at* http://quod.lib.umich.edu/cgi/p/pod/dod-idx?c=wsfh;idno=0642292.0034.019.

39. George W. Bush, President of the U.S., Remarks at Goree Island, Senegal (July 8, 2003) (transcript available at http://georgewbush-whitehouse.archives.gov/news/releases/2003/07/20030708-1.html).

40. *Tous nés en 1848: 150ème Anniversaire de l'abolition de l'esclavage. 1848–1998*, *supra* note 37. *See also* Bush, *supra* note 39.

universities, states and cities, have offered "expressions of regret" for their participation in slavery.[41]

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.[42] The resolution not only detailed the history of slavery and its aftermath in quite strong language, but also 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.[43]

The resolution also "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 the future."[44] Notably, however, the Senate Resolution ends with an official disclaimer that "[n]othing in this resolution . . . authorizes or supports any claim against the United States."[45]

Official public commemorations have been matched by popular cultural representations that celebrate the freedom story. The Underground Railroad has been a central focus of the U.S. National Park Service's new museum exhibitions on slavery.[46] 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

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41. *See, e.g.*, *Emory Officials Express Regret over University's Ties to Slavery*, CHRON. HIGHER EDUC., Jan. 21, 2011, http://chronicle.com/blogs/ticker/emory-officials-express-regret-over-universitys-ties-to-slavery/29903; Wendy Koch, *Va. 1st State to Express 'Regret' over Slavery*, USA TODAY, Feb. 25, 2007, http://www.usatoday.com/news/nation/2007-02-25-apology_x.htm; Phillip Rawls, *Alabama Governor Signs Slavery Apology*, HUFFINGTON POST (May 31, 2007, 4:02 PM), http://www.huffingtonpost.com/huff-wires/20070531/slavery-apology/ (last visited Jan. 23, 2012).

42. H.R. Res. 194, 110th Cong. (2008). S. Con. Res. 26, 111th Cong. (2009).

43. *Id.*

44. *Id.*

45. S. Con. Res. 26.

46. In 1998, the National Park Service began a collaboration with the Freedom Center to commemorate the Underground Railroad. NAT'L UNDERGROUND R.R. FREEDOM CTR., www.freedomcenter.org/underground-railroad (last visited Apr. 18, 2012).

compared with the 350 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*,[47] *Glory*,[48] and *Amistad*.[49] 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 toward racial equality.[50] 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 history.[51] At the same time, then-Governor Douglas Wilder of Virginia proposed a National Slavery Museum at Fredricksburg, Virginia, a project that at first raised significant funds for an ambitious plan, but then quickly unraveled as taxes went unpaid and the property was repossessed.[52]

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 deeply

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47. AMAZING GRACE (Samuel Goldwin Films et al. 2006) (following William Wilberforce, a white member of the British Parliament, and his efforts to pass a bill abolishing slavery in Britain).

48. GLORY (Tri-Star Pictures 1989) (depicting white Union Army officer Robert Gould Shaw as he leads the first all-Black regiment in the Civil War).

49. AMISTAD (Dreamworks Pictures 1997) (chronicling former president John Quincy Adams's and young property lawyer Robert Sherman Baldwin's legal battles to give Africans rescued from the slave ship Amistad their freedom).

50. Kate Taylor, *The Thorny Path to a National Black Museum*, N.Y. TIMES, Jan. 22, 2011, at A1.

51. Faith Davis Ruffins, *Culture Wars Won and Lost, Part II: The National African-American Museum Project*, 70 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, http://www.npr.org/2011/05/24/136605926/the-root-segregated-museums-mirror-history.

52. Gail Pennybacker, *Virginia Slave Museum's Property to Be Repossessed*, ABC7, July 18, 2011, http://www.wjla.com/articles/2011/07/virginia-s-slave-museum-property-to-be-repossessed-63845.html; Dionne Walker, *National Slavery Museum Project Stalls*, USA TODAY, Mar. 18, 2008, http://www.usatoday.com/travel/news/2008-03-18-national-slavery-museum_N.htm.

resonates 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.[53] The focus on abolition rather than slavery itself can lead to the celebration of the West, the nation, or whites more generally, as saviors 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 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 it is perhaps even safe to congratulate oneself for commemorating slavery precisely because it cannot be redressed and because it was not us.

III. 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, such 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.[54] In contrast with the progressive history of slavery described above, emphasizing the contemporary legacies of slavery and the continuing harms of Jim Crow, the dominant historical narrative in both law and politics today, I argue, is the conservative one.[55]

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53. There is a rich literature on "colonial amnesia" in France as well. *See, e.g.*, TODD SHEPARD, THE INVENTION OF DECOLONIZATION: THE ALGERIAN WAR AND THE REMAKING OF FRANCE (2006); BENJAMIN STORA, LA GANGRÈNE ET L'OUBLI: LA MÉMOIRE DE LA GUERRE D'ALGÉRIE, (1991); Robert Aldrich, *Remembrances of Empires Past*, PORTAL J. MULTIDISC. INT'L STUD., Jan. 2010 http://epress.lib.uts.edu.au/ojs/index.pjp/portal/article/view/1176/1640; Interview by Univ. of Portsmouth with Robert Aldrich, *Decolonization, the French Empire and Sites of Memory*, (Jan. 12, 2005), *available at* http://www.port.ac.uk/special/france1815to2003/chapter10/interviews/filetodownload,26394,en.pdf.

54. *See* DAVID HOROWITZ, UNCIVIL WARS: THE CONTROVERSY OVER REPARATIONS FOR SLAVERY 14 (2002).

55. I use the term "conservative" here in its conventional contemporary political sense. It is worth noting that the race blindness associated with conservative constitutionalism in the United States is much stronger on the political left in France. I discuss both conservative and liberal histories of slavery in the U.S. in more detail in Gross, *When Is the Time of Slavery?*, *supra* note 25.

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 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 narrated its history of slavery, in which ex-slaves quickly realized their promised future:

> 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."[56]

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 one of freedom.

The slavery-to-freedom narrative has several important corollaries. One is to celebrate abolitionism as a uniquely Western/American/Christian/white phenomenon.[57] 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 casts 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] already been paid."[58] By focusing on anti-slavery rather than slavery, the

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56. *In re* African Am. Slave Descendants Litig., 375 F. Supp. 2d 721, 780 (N.D. Ill. 2005), *aff'd in part, rev'd in part, and modified in part*, 471 F.3d 754 (7th Cir. 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).

57. *See, e.g.*, DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY (1995).

58. The phrase "[the debt has] already been paid" comes from HOROWITZ, *supra* note 54, at 14 (2002); John McWhorter, *Against Reparations: Why African Americans Can Believe in America*, NEW REPUBLIC, July 23, 2001, at 32 (reviewing RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS (2001); Karl Zinmeister, *Has the Debt Been Paid?*, 12 AM. ENTERPRISE 1 (2001).

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.[59] Furthermore, they argue that the very affirmative action programs against which they have fought are themselves repayment for the debt of slavery.[60]

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.[61]

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."[62] 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. Some unreconstructed 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.[63]

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59. *See generally* HOROWITZ, *supra* note 54.
60. *Id.* at 14–15, 107–09.
61. *In re African-Am. Slave Descendants Litig.*, 375 F. Supp. 2d at 780.
62. *Id.*
63. To be clear, these historians agree that slavery was the chief cause of the Civil War, but explain that the plight of the slaves was not the motivation for a majority on the Union side. *See, e.g.*, ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR (2d ed., 1995). For a typical "unreconstructed" explanation of the causes of the Civil War, ranking the economic systems of North and South, and federal versus states' rights ahead of slavery, see *Civil War—*

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

> 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?[64]

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."[65] By contrast, "[r]ace-preferential affirmative action . . . can fairly be described as a revolutionary project against the Constitution and the laws of the nation."[66]

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; thus, affirmative action is a project against the Constitution.[67] 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 American Dilemma [of race]."[68]

History of the Civil War, AM. HIST. ABOUT.COM, www.americanhistory.about.com/od/civilwarmenu/a/cause_civil_war.htm (last visited Apr. 18, 2012).

64. HOROWITZ, *supra* note 54, at 15 (2002). 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.

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

66. *Id.*

67. *Id.*

68. *Id.*

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," who claim that the original Constitution was flawed by its support for slavery. When Justice Marshall gave his famous speech on May 6, 1987, cautioning against the "flagwaving fervor" of the bicentennial celebration of the Constitution[69], 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.[70] 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.[71]

The narrative that celebrates the Founding moment and the 1787 Constitution, and portrays 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 Party adherents 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 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 . . . ."[72] 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, skipping crucial portions, including the three-fifths clause and the slave trade clause.[73] This is consistent with the celebratory conservative attitude

69. Marshall, *supra* note 32.

70. William Bradford Reynolds, *Another View: Our Magnificent Constitution*, 40 VAND. L. REV. 1343, 1345 (1987).

71. D'SOUZA, *supra* note 57, at 109.

72. Richard Locker, *Tea Parties Issue Demands to Tennessee Legislators*, COM. APPEAL, Jan. 13, 2011, http://www.commercialappeal.com/news/2011/jan/13/tea-parties-cite-legislative-demands/.

73. Jennifer Steinhauer, *House Reading of the Constitution is Not Without Issues*, N.Y. Times, Jan. 6, 2011.

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*,[74] and *The Five Thousand Year Leap*.[75] These books portray the "Founders" as "devout Christians who established the nation based on divinely ordained principles . . . ."[76] In *The Making of America*, Skousen tells the "story of slavery in 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."[77] *The Making of America*, although an outdated history of slavery that has attracted criticism, has been touted by conservator commentator Glenn Beck and is a staple on the conservative lecture and workshop circuit.[78] Similarly, *The Five Thousand Year Leap*—whose thirty year anniversary edition had a forward by Beck—was a 2010 best-seller despite originally being self-published by Skousen in 1981.[79]

Conservatives portray slavery and today's government programs as parallel deviations from timeless constitutional principles of color-blindness. As Clint Bolick, a former assistant to Justice 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

74. W. CLEON SKOUSEN, THE MAKING OF AMERICA: THE SUBSTANCE AND MEANING OF THE CONSTITUTION (1985) [hereinafter SKOUSEN, THE MAKING OF AMERICA].

75. W. CLEON SKOUSEN, THE FIVE THOUSAND YEAR LEAP (rev. ed. 2009).

76. Jared A. Goldstein, *The Tea Party's Constitution*, 88 DENV. U. L. REV. (forthcoming 2011), *available at* http://www.law.du.edu/documents/denver-university-law-review/v88-3/Goldstein.pdf.

77. SKOUSEN, THE MAKING OF AMERICA, *supra* note 74, at 732–34.

78. *See* Kate Zenike, *The Pilgrims Were . . . Socialists?*, N.Y. TIMES, Nov. 21, 2010, at WK1.

79. Kate Zenike, *Movement of the Moment Looks to Long-Ago Texts*, N.Y. TIMES, Oct. 1, 2010, at A9.

followed by "crises" in which the "quest [was] abandoned."[80] Bolick contends 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."[81] 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 a President 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 . . . ."[82]

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."[83] 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. Frantz Kebreau, the National Director of the Florida-based National Association

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80. CLINT BOLICK, CHANGING COURSE: CIVIL RIGHTS AT THE CROSSROADS 13, 49, 53 (1988).

81. CLINT BOLICK, THE AFFIRMATIVE ACTION FRAUD: CAN WE RESTORE THE AMERICAN CIVIL RIGHTS VISION? 38 (1996).

82. *TODAY: Tea Party Candidate Compares Taxes to Slavery* (MSNBC television broadcast June 28, 2011), *available at* http://today.msnbc.com/id/26184891/vp/37987839. *See also* Bob Cesca, *The Tea Party Is All About Race*, HUFFINGTON POST (Mar. 3, 2010 10:04 AM), http://www.huffingtonpost.com/bob-cesca/the-tea-party-is-all-abou_b_484229.html; E.J. Dionne Jr., *The Tea Party: Populism of the Privileged*, WASH. POST (Apr. 19, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/04/18/AR2010041802724.html; *Ridiculous Tea Party Ad Interviews Abe Lincoln About 'Slavery' of Taxes, Welfare*, BUS. INSIDER (Jun. 28, 2010), http://articles.businessinsider.com/2010-06-28/news/30044362_1_income-tax-free-meal-slavery; Joan Walsh, *The Tea Partiers' Racial Paranoia*, SALON (Apr. 15, 2010) http://www.salon.com/2010/04/15/tea_party_racial_paranoia/; Cathy Young, *Tea Partiers Racist? Not So Fast*, REAL CLEAR POLITICS (Apr. 25, 2010), http://www.realclearpolitics.com/articles/2010/04/25/tea_partiers_racist_not_so_fast_105309.html.

83. THOMAS SOWELL, BLACK REDNECKS AND WHITE LIBERALS 114 (2005).

for the Advancement of Conservative People of all Colors ("NAACPC") lectures widely on the history of slavery, arguing that "slavery was not really about race."[84] He then connects this view to an invocation of the Republican Party as the party of Lincoln, freedom, and civil rights.[85] 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. "Once you got here, we were all the same," she said.[86] "Isn't that remarkable? It is absolutely remarkable."[87] Bachmann named slavery an "evil," and "scourge" and "stain on our history," but detached the founders from that history: "But we also know that the very founders that wrote those documents worked tirelessly until slavery was no more in the United States."[88] Skousen's *The 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.[89]

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84. Julie Ingersoll, *Tea Partiers Say Slavery Not Race-Related*, RELIGION DISPATCHES, June 22, 2010, www.religiondispatches.org/archive/politics/2832/tea_partiers_say_slavery_not_race-related.

85. *Id.*

86. Shail Kapur, *Bachmann: Founding Fathers 'Worked Tirelessly' to End Slavery*, RAW STORY (Jan. 25, 2011), http://www.rawstory.com/rs/2011/01/25/bachmann-founding-fathers-worked-tirelessly-slavery.

87. *Id.*

88. *Id.*

89. SKOUSEN, THE MAKING OF AMERICA, *supra* note 74, at 728–29. *See also* D'SOUZA, *supra* note 57; 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 motivates 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, *supra* note 57, at 80). *See also* THOMAS SOWELL, RACE AND CULTURE: A WORLD VIEW 220 (1994) ("Another distortion of history is to assume a priori that social problems affecting contemporary blacks in the United States are the 'legacy of slavery.'"); David

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

IV. 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 slavery's abolition.[90] 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.[91] 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."[92] 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

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Horowitz, *Ten Reasons Why Reparations for Blacks Is a Bad Idea for Blacks—and Racist Too*, FRONT PAGE MAG, Jan. 3, 2011, http://archive.frontpagemag.com/readArticle.aspx?ARTID=24317; McWhorter, *supra* note 58.

90. *See* Jean-Yves Camus, *The Commemoration of Slavery in France and the Emergence of a Black Political Consciousness*, 11 EUR. LEGACY 647 (2006); Audrey Celestine & Leïla Wuhl, *Comment Peut-On Etre Antillais hors des Antilles?*, 1256 HOMMES & MIGRATIONS 76 (2005).

91. Gado Alzouma, *Ethnic Statistics and Social Classification in France: How the "Black Community" Was Born*, 4 AFR. & BLACK DIASPORA: AN INT'L J. 7, 64 (2011); Abdoulaye Gueye, *Breaking the Silence: The Emergence of A Black Collective Voice in France*, 7 DUBOIS REV.: SOC. SCI. RES. RACE 81 (2010).

92. Loi 2001-434 du 21 mai 2001 tendant à la reconnaissance de la traite et de l'esclavage en tant que crime contre l'humanité [Law 2001-434 of May 21, 2001 for the recognition of trafficking and slavery as a crime against humanity] LEGIFRANCE: LE SERVICE PUBLIQUE DE LA DIFFUSION DU DROIT [LegiFrance: A Public Service for the Dissemination of the French Laws], *available at* http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000405369.

school curricula, museums, monuments, historical research, and other sites of public education and memory.[93] 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.[94] 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.[95] In form, the Taubira Law resembled fairly closely the Gayssot Law, memorializing the Holocaust and making Holocaust denial a crime.[96] 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.[97] From the U.S. perspective, of course, such a law would be an unimaginable violation of the First Amendment protection of speech.[98] However, the law's 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.[99]

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

93. *Id.*

94. *Id.*

95. Garraway, *supra* note 21, at 382–83.

96. Loi 90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xenophobe (1) [Law 90-615 of July 13, 1990 for the suppression of racism, anti-Semitism and xenophobia] LEGIFRANCE: LE SERVICE PUBLIQUE DE LA DIFFUSION DU DROIT [LegiFrance: A Public Service for the Dissemination of the French Laws], *available at* http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000532990&dateTexte=.

97. Loi 2001-434 du 21 mai 2001 tendant à la reconnaissance de la traite et de l'esclavage en tant que crime contre l'humanité [Law 2001-434 of May 21, 2001 for the recognition of trafficking and slavery as a crime against humanity] LEGIFRANCE: LE SERVICE PUBLIQUE DE LA DIFFUSION DU DROIT [LegiFrance: A Public Service for the Dissemination of the French Laws], *available at* http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000405369.

98. U.S. CONST. amend. I.

99. For the activities of the Comité pour la Mémoire de l'Esclavage, created by the Loi Taubira, see *Actualités*, CPMHE, www.cpmhe.fr (last visited, Apr. 18, 2012).

it has engendered.[100] Thus, one key difference between the U.S. and 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. [101] 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.[102] 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 good with market value that one wanted to work as hard as possible. The Jewish genocide and the slave trade were different processes. There is no Richter scale for suffering.[103]

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."[104] It was for these remarks against the Taubira Law, and denying the genocidal character of slavery, for which he was prosecuted.

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100. Doris Garraway 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. Garraway, *supra* note 21, at 383–84.

101. *See* Christian Sauvage, *Un Prix pour les Traits Négrières: Entretien avec Olivier Pétré-Grenouilleau*, JOURNAL DU DIMANCHE, 12 June 2005, *available at* http://www.wasadugu.org/Petre120605.htm.

102. *Id.*

103. *Id.* ("Les traites négrières ne sont pas des génocides. La traite n'avait pas pour but d'exterminer un peuple. L'esclave était un bien qui avait une valeur marchande qu'on voulait faire travailler le plus possible. Le génocide juif et la traite négrière sont des processus différents. Il n'y a pas d'échelle de Richter des souffrances.").

104. *Id.* ("Cela renvoie à un choix identitaire, pas à la réalité. . . . [C]'est choisir parmi ses ancêtres."); Didier Amaud & Hervé Nathan, *Olivier Pétré-Grenouilleau poursuivi par le collectif des Antillais Guyanais-Réunionnais*, LDH TOULON (Nov. 30, 2005), http://ldh-toulon.net/spip.php?article1468; *"L'affaire Olivier Pétré-Grenouilleau": elements de chronologie*, CLIONAUTES (Jan. 4, 2006), http://www.clionautes.org/spip.php?article925. *See also* Pap Nidiaye, *Note critique sur Olivier Pétré-Grenouilleau, 'Les traites négrières. Essai d'histoire globale'*, GRIOO (Apr. 20, 2005), http://www.grioo.com/pinfo4527.html.

The lawsuit was quickly withdrawn after widespread opposition, including from leading proponents of the Taubira Law.[105]

While slavery historians 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.[106] 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.[107] Four hundred historians joined a public "call for the liberty of history" ("appel de la liberté de l'histoire").[108] These historians argue that "history is not a religion" and that the state should have no role in declaring historical truth.[109] 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.[110]

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105. Gert Oostindie, *Public Memories of the Atlantic Slave Trade and Slavery in Contemporary Europe*, 17 EUR. REV. 611, 618 (2009). There has been only one other legal proceeding under the Taubira Law, a state prosecution against Alain Huyghes-Despointes for making declarations regarding "the positive aspects of colonial slavery and criticizing mixed marriages in the name of the preservation of the race," on Canal+ television in February 2009. *16 décembre 2010 – La condemnation d'Alain Huyghes-Despointes pour "apologie de crime contre l'humanité,"* CPMHE Dec. 2010, www.comite-memoire-esclavage.fr/spip.php?article937. ("Le représentant d'une des plus illustres famille de 'békés' de la Martinique avait vanté les côtés positifs de l'esclavage colonial et critiqués les mariages mixtes au nom de la preservation de la race.").

106. 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 (2005), *available at* http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics//054000247/0000.pdf. *See also* Françoise Vergès, *Les Troubles de la mémoire: Traite négrière, esclavage et écriture de l'histoire*, 179-180 CAHIERS D'ÉTUDES AFRICAINES 1143 (2005).

107. Loi no. 2005-158 du 23 février 2005 portant reconnaissance de la Nation et contribution nationale en faveur des Français repatriés [law regarding the recognition of the Nation and national contribution of the repatriated French]. The most controversial section is Article 4, requiring schools to teach "le role positif" of colonization.

108. *L'Appel des 19 Historiens: Liberté pour l'Histoire!*, LDH TOULON (Jan. 9, 2006), http://www.ldh-toulon.net/spip.php?article1086.

109. *Id.* ("L'histoire n'est pas une religion. . . . Dans un Etat libre, il n'appartient ni au Parlement ni à l'autorité judiciaire de définir la vérité historique.") ("History is not a religion. . . . In a free state, it belongs neither to Parliament nor to the judicial authority to define historical truth.").

110. *Id.*; *Appel de 56 Juristes à l'Abrogations des "Lois Memorielles"*, LDH TOULON (Nov. 29, 2006), http://www.ldh-toulon.net/spip.php?page=imprimer&id_article=1683.

Nora argues broadly against the "general criminalization of the past," warning that:

> [t]he 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 Arabs and Africans themselves.[111]

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."[112] 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.[113]

As political scientist 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."[114] These historians seek "to preserve an image of France to guarantee national unity (a national conception of

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111. Translation my own. "Mais avec la loi Gayssot . . . la porte était ouverte à la pression revendicatrice de tous les groupes de victimes. Et la France, seule de toute l'Europe, n'a pas hesité, on le sait, a multiplier généreusement les lois qui qualifiaient criminellement des phenomènes 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 pratiques, comme l'avaient fait les Arabes et les Africains eux-mêmes." Interview by Figaro with Pierre Nora, cofounder of Liberté pour l'histore, "Gare à la criminalization générale du passé!" (May 17, 2006), transcript available at http://www.lph-asso.fr/index.php?option=com_content&view=article&id=15%3Apierre-nora-l-gare-a-la-criminalisation-generale-du-passe-r&catid=4%3Atribunes&Itemid=4&lang=fr; *L'Appel des 19 Historiens: Liberté pour l'Histoire!*, *supra* note 108; *Appel de 56 Juristes à l'Abrogation des "Lois Memorielles"*, *supra* note 110; *L'Affaire Pétré-Grenouilleau*, LDH TOULON (Feb. 5,2006), http://www.ldh-toulon.net/spip.php?article1468.

112. *L'Appel des 19 Historiens: Liberté pour l'Histoire!*, *supra* note 108.

113. Interview by Figaro with Pierre Nora, *supra* note 111.

114. Françoise Vergès, *The African Slave Trade and Slavery: Blind Spots in French Thought* (Mary O'Neill trans.), EUR. INST. FOR PROGRESSIVE CULTURAL POLICIES, http://translate.eipcp.net/transversal/1206/verges/en/base_edit (last visited Jan. 25, 2012).

history shared by Left and Right alike)," in which "the entire colonial experience is part of a linear progression" from shadow into light.[115] Yet as Vergès argues, "the slave haunts the very foundations on which France has been constructed."[116] Historians of slavery, who have spoken out in favor of the Taubira Law, argue for the continuing significance of slavery in the lives of slave descendants. 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.[117]

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."[118] Rather than reparation, it required teaching, research, and memorialization.[119]

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.[120]

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115. *Id.*

116. *Id.*

117. *Marcel Dorigny Réagit à l'Appel des 19 Historiens*, LDH TOULON (Jan. 21, 2006), http://www.ldh-toulon.net/spip.php?article1146 ("[Y] a t il aujourd'hui une communauté identifiable qui puisse se dire directement issue de ces esclaves [grec]? Non, assurément. Alors qu'à l'évidence des dizaines de millions d'afro-américains, y compris les Français des Antilles, sont le résultat direct de la traite négrière et de l'esclavage colonial et que leur quotidien reste profondément marqué par cette histoire douloureuse et récente.").

118. *Id.* ("[La loi Taubira] n'est pas une loi de repentance mais de reconnaissance d'un passé tragique.") ("[The Taubira Law] is not an act of repentance, but recognition of a tragic past.").

119. *Id.*; *Les lois de Mémoire: Contestations, Justifications—Arguments pour un Débat de Fond*, LDH TOULON (Apr. 28, 2006), http://www.ldh-toulon.net/spip.php?article1276. *See also Historian: Removing Anti-Revisionist Laws Is Arrogant*, EUR. JEWISH PRESS (Jan. 24, 2006), www.ejpress.org/article/5399.

120. Jean-Yves Camus, *The Commemoration of Slavery in France and the Emergence of a Black Political Consciousness*, 11 EUR. LEGACY 647, 648–50 (2006). COFFAD, the Collectif des Filles et Fils d'Africains Déportés, is modeled on the Jewish Association des Fils et Filles des Déportés Juifs de France, led by the Klarsfelds. *Id.* at 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.

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.[121] Many advocates of commemoration found this date too celebratory because it "emphasized only the positive aspects of Républicain historiography," and the "grant" of freedom from the white members of the National Assembly to the slaves.[122] Some Black activists favored May 23, the anniversary of a march initiated by 300 Black organizations in 1998.[123] The May 10 date emerged as a compromise, commemorating simply the date of the Taubira law's passage.[124]

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. Political scientist Audrey Célestine describes the birth of a distinct Antillean political identity in metropolitan France around several issues, with slavery memorialization as the key point of departure.[125] Likewise, sociologist 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.[126]

The Antillean organizations Collectif DOM and Comité Marché du 23 Mai 1998 were organized specifically around Antillean identity using a strategy of "differentiation."[127] Yet the most significant development in racial politics in the last several decades in France has been the appearance

121. *Id.* at 648–50.
122. *Id.*
123. *Id.*
124. *Id.*
125. Célestine & Wuhl, *Comment Peut-On Être Antillais hors des Antilles?*, *supra* note 16 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 Classifications in France: How the "Black Community" Was Born*, 4 AFR. & BLACK DIASPORA: AN INT'L J. 57, 64 (2011).
126. Abdoulaye Gueye, *Breaking the Silence: The Emergence of A Black Collective Voice in France*, 7 DU BOIS REV.: SOC .SCI. RES. ON RACE 81, 81–102 (2010). *See also* Alzouma, *supra* note 125, at 68 (identifying the Taubira Law campaign and the suburban riots as the two events that "marked the birth of Black consciousness").
127. Célestine, *Mobilisations et Identité chez les Antillais en France*, *supra* note 16.

on the scene of le Conseil Représentatif des Associations Noires ("le CRAN"). This activist organization, formed in 2005 in the wake of the suburban riots, is organized around a broadly-based "Black" identity.[128] Le CRAN seeks to unite French Blacks, both immigrants from Africa and citizens from the Antilles, and seeks "to use slavery as a starting point for organizing their community as a political lobby."[129] Political analyst 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."[130] 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.[131] Ndiaye argues forcefully that France must recognize race as a social condition, with a history anchored in slavery.[132]

V. FRENCH RACE-BLINDNESS AND REPUBLICANISM AFTER 2005

The 2005 suburban riots and subsequent appearance of le CRAN, as well as the debate over the so-called "ethnic statistics" or "diversity statistics" in the several years that followed the riots, 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 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. Especially on 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 to be part of the French identity. As sociologist Eric Fassin has written, "There are no minorities in France. Or so went dominant discourse, in particular starting

128. Camus, *supra* note 120 at 648–650.

129. *Id.*

130. *Id.* at 649–50, 652, 654. *See also* Gert Oostindie, *Public Memories of the Atlantic Slave Trade and Slavery in Contemporary Europe*, 17 EUR. REV. 611 (2009); Salah Trabelsi, *Memory and Slavery: The Issues of Historiography*, 58 INT'L SOC. SCI. J. 237 (2006).

131. *See* Michael Kimmelman, *For Blacks in France, Obama's Rise Is Reason to Rejoice*, N.Y. TIMES, June 17, 2008, at E1.

132. PAP NDIAYE, LA CONDITION NOIRE: ESSAI SUR UNE MINORITÉ FRANCAISE (2009); *Pap Ndiaye, Author of 'The Black Condition'* (France 24 television broadcast June 17, 2008), *available at* http://www.france24.com/en/20080616-interview-pap-ndiaye-author-black-condition-france-historian&navi=DEBATS. *See also* Sylvain Dambrine, Philippe Mangeot & Victoire Patouillard, *Le Noir et le Rose: Entretien avec Louis-Georges Tin*, VACARME, Summer 2006, *available at* http://www.vacarme.org/article671.html.

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."[133] Therefore, to advocate race-conscious government policies, known as "discrimination positive" or "positive discrimination," 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.[134]

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 against racism and discrimination, passed in the shadow of the Nazi and Vichy regimes, with the model of anti-Jewish state activity.[135] 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.[136] The 1972 law also allowed anti-racist NGOs status to intervene on behalf of victims in criminal proceedings, notably Mouvement

133. Eric Fassin, The Black Minority in France—Visible and Invisible 1 (unpublished, revised version of paper for "Race After the Riots in France" panel, Nov. 17, 2006), *available at* http://www.docstoc.com/docs/28947952/The-Black-Minority-in-France---Visible-and-Invisible.

134. One example of this phenomenon are "zones d'éducation prioritaire" (priority education zones). There is a large and growing literature on both sides of the Atlantic comparing civil rights law in France to Britain, Germany, and the U.S., and especially the question of "ethnic statistics" and data collection. *See generally* 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 445 (Manuel Boucher, ed., 2001); 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. HUM. RTS. L. REV. 432 (2008); 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); 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); 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, 189–217 (Herrick Chapman & Laura L. Frader eds., 2004); Julie Ringelheim, *Collecting Racial or Ethnic Data for Antidiscrimination Policies: A U.S.-Europe Comparison*, 10 RUTGERS RACE & L. REV. 39 (2008); Suk, *Procedural Path Dependence*, *supra* note 13.

135. Jacqueline S. Gehring, One European Directive, Two Dramatically Different Responses: Explaining the Divergence in French and German Racial Anti-Discrimination Policy After the EU Race Directive (Sept. 2005) (unpublished paper at the Annual Meeting of the Am. Pol. Sci. Ass'n), *available at* http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/4/2/6/6/pages42661/p42661-1.php.

136. *Id.*

contre le Racism et pour l'Amitié entre les Peuples ("MRAP").[137] The second important law passed regarding race in France was the 1990 Gayssot Law, which was aimed specifically at expressions of racism and xenophobia.[138] The law prohibited Holocaust denial and other hate speech or hate crimes.[139] 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."[140]

Race-blindness also derives from French constitutional law. Both the 1946 and 1958 constitutions banned distinctions based on race and religion. The 1958 Constitution, still in force, declares, following "the victory of the free peoples over the regimes that attempted to enslave and degrade the human person, the French people proclaim once more that every human being, without distinction as to race, religion or creed, possesses inalienable and sacred rights."[141] 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.[142]

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 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.[143] Even when academics compare France with the U.S., the French commitment to

137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Exerpts from the French Constitution October 4, 1958 (Amended Through Oct. 29, 1974)*, JANDA.ORG, http://janda.org/politxts/Major%20Democratic%20Documents/france.htm (last visited Mar. 19, 2012).
142. At the same time, some social scientists note that much more is constitutionally permissible than has sometimes been assumed. *See, e.g.*, *Légalité à bon compte*, LE MONDE, Mar. 17, 2012, at 6 (quoting demographer Patrick Simon, "Les controverses ont rendu le sujet incomprehensible. Plus personne ne sait ce qu'il est possible de faire." ["The controversy has rendered the subject incomprehensible. No one knows any longer what it is possible to do"]).
143. *See* Laurent Dubois, *Republican Anti-Racism and Racism: A Caribbean Geneology*, *in* RACE IN FRANCE: INTERDISCIPLINARY PERSPECTIVES ON THE POLITICS OF DIFFERENCE 23 (Herrick Chapman & Laura L. Frader eds., 2004); Cécile Vidal, *The Reluctance of French Historians to Address Atlantic History*, SO. Q., Summer 2006, at 153.

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.[144] As philosopher Etienne Balibar has pointed out, the aversion to the term "race" has not helped France avoid cultural racism.[145] "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."[146]

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.[147] Most recently, the French government created for the first time an administrative body known as the Haute Autorité de Luttes contre les Discriminations et pour l'Égalité ("High authority of struggle against discrimination for equality") ("HALDE").[148] This development was in part a French response to the EU Race Directive, which was adopted in 2000, but in the universalist French tradition, HALDE is not specifically focused on racial discrimination, but rather on a wide range of discriminations including gender, sexual orientation, disability, and others.[149]

Political scientist Daniel Sabbagh has shown a recent convergence between "diversity" strategies in the United States and France in higher education, despite originating from different starting points in legal and

144. Gérard Noiriel, *"Color Blindness" et Construction des Identités dans l'Espace Public Française*, *in* DE LA QUESTION SOCIALE À LA QUESTION RACIALE?: REPRÉSENTER LA SOCIÉTÉ FRANÇAIS 158 (Didier Fassin & Éric Fassin eds., 2006); Chapman & Frader, *supra* note 14, at 2.

145. Balibar, *supra* note 14.

146. Chapman & Frader, *supra* note 14, at 6.

147. Christian Joppke, *Transformation of Immigrant Integration: Civic Integration in The Netherlands, France, and Germany*, 59 WORLD POL. 243 (2007) (arguing that "distinct national models of dealing with immigrants are giving way to convergent policies of civic integration and antidiscrimination"); 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) [hereinafter Sabbagh, *The Rise of Indirect Affirmative Action*]. For an early and important discussion of the phenomenon, see Didier Fassin, *L'Invention Française de la Discrimination*, 52 REVUE FRANÇAISE DE SCIENCE POLITIQUE 403 (2002).

148. This translates to: High Authority for the Struggle against Discrimination and for Equality.

149. Romain Garbaye, Crossing Paths? The British and French Experiences with Racial and Ethnic Diversity Since 9/11 (Apr. 2007) (draft paper for international conference "Multiculturalism and Its Discontents"), *available at* http://socsci.colorado.edu/~smithms/Garbaye.doc.

constitutional terms.[150] 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 *Regents of University of Califonia v. Bakke* in 1976, to the plurality opinion in *Grutter v. Bollinger* several years ago, a period during which "color-blind constitutionalism" has been ascendant.[151] 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,[152] or first-generation college-goers, or socio-economically disadvantaged individuals.[153] As numerous commentators have argued, these programs, despite their superficial race-neutrality, nevertheless seem to be targeting non-white populations, as evidenced by their rhetoric regarding diversité.[154] 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 favor of the term "statistiques de diversité" as opposed to "statistiques ethniques."[155]

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 between 2005 and 2009 regarding the collection of statistics, with le CRAN in favor, and SOS-Racisme and MRAP

150. Daniel Sabbagh, *Affirmative Action at Sciences Po*, *in* RACE IN FRANCE: INTERDISCIPLINARY PERSPECTIVES ON THE POLITICS OF DIFFERENCE 246 (Herrick Chapman & Laura L. Frader eds., 2004). *See also* Gwénaële Calvès, *Color-Blindness at a Crossroads in Contemporary France*, *in* RACE IN FRANCE: INTERDISCIPLINARY PERSPECTIVES ON THE POLITICS OF DIFFERENCE 219 (Herrick Chapman & Laura L. Frader eds., 2004); Alec G. Hargreaves, *Half-Measures: Anti-Discrimination Policy in France*, *in* RACE IN FRANCE: INTERDISCIPLINARY PERSPECTIVES ON THE POLITICS OF DIFFERENCE 227 (Herrick Chapman & Laura L. Frader eds., 2004).; Garbaye, *supra* note 149 (arguing that there has been a convergence between France and Britain with regard to multiculturalist politics).

151. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Grutter v. Bollinger, 539 U.S. 306 (2003).

152. "Zones d'Éducation Prioritaire."

153. Sabbagh, *The Rise of Indirect Affirmative Action*, *supra* note 147, at 481.

154. *See supra* note 150 and accompanying text.

155. Patrick Lozès, *Statistiques (Dites) Ethniques: Le Retour*, LE BLOG DE PATRICK LOZÈS POUR L'ÉGALITÉ (Sept. 15, 2007, 12:55 PM), http://patricklozes.blogs.nouvelobs.com/archive/2007/09/15/statistiques-dites-ethniques-le-retour.html.

opposed.[156] The Human Rights League ("LDH")[157] favored the collection of statistical data by researchers for scientific purposes, but opposed adding questions to the census or other administrative records.[158] 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.[159] 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."[160] However, the Council also suggested that the provision could have been found unconstitutional as a violation of race-blindness as well.[161] As Sabbagh notes, this could be "an indication of what the Constitutional Council might say [regarding ethnic statistics] in the future."[162] African American and diaspora studies professor 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 modeled after it, and SOS Racisme, essentially absorbed into the French Socialist Party."[163] 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.[164] This survey was widely reported in the media, especially the finding that 56 percent of people who identified themselves as "noirs" said they had personally been victims of racial discrimination.[165] 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

156. Jean-Loup Amselle, *To Count or Not to Count: The Debate on Ethnic and Diversity Statistics in France Today*, ANTHROPOETICS, Spring 2010, n.1, http://www.anthropoetics.ucla.edu/ap1502/1502Amselle.htm (Raphaël Jacquet trans.).

157. "Ligue des Droits de l'Homme."

158. Amselle, *supra* note 156.

159. *Id.*

160. *Id.*

161. *Id.*

162. DANIEL SABBAGH, THE COLLECTION OF ETHNORACIAL STATISTICS: DEVELOPMENTS IN THE FRENCH CONTROVERSY (2008), *available at* http://www.frenchamerican.org/sites/default/files/documents/media_policy _briefs/sabbagh_ethnicstatistics_brief_en.pdf.

163. Trica Danielle Keaton, *The Politics of Race-Blindness: (Anti)Blackness and Category-Blindness in Contemporary France*, 7 DUBOIS REV. 103 (2010).

164. *Le 1er barométre des populations noires de France*, LE CRAN, http://lecran.org/?p=243 (last visited Jan. 17, 2012).

165. *Id.*

Equality, recommending limited expansion of data collection, but without using ethno-racial categories.[166]

The debate about ethnic statistics and the rise of le CRAN suggest an important shift from race blindness to race consciousness in French politics. Fassin argues that the terms of 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).[167] 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 before, as the "embodiment of American-style, un-French racialized identity politics."[168]

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."[169] CRAN spokesman Louis-Georges 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."[170] Likewise, 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.[171] Camus suggests that the emerging civil rights

166. COMITÉ POUR LA MESURE DE LA DIVERSITÉ ET L'ÉVALUATION DES DISCRIMINATIONS, INÉGALITÉS ET DISCRIMINATIONS: POUR UN USAGE CRITIQUE ET RESPONSABLE DE L'OUTIL STATISTIQUE (2010), *available at* http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.FRA.CO.4.Add.2_annex.pdf.

167. Fassin, supra note 133, at 7.

168. *Id.*

169. *Id.* at 9. *See also* Pap Ndiaye, *Questions de Couleur: Histoire, Idéologie et Practiques du Colorisme*, *in* DE LA QUESTION SOCIALE À LA QUESTION RACIALE?: REPRÉSENTER LA SOCIÉTÉ FRANÇAISE 37 (Didier Fassin & Éric Fassin eds., 2006). For SOS-Racisme, see Dominique Sopo, President of SOS-Racisme, Speech at the 2007 Facing Race conference, Facing Race in France (transcript available at http://colorlines.com/archives/2007/04/post_12.html). For le CRAN, see *FAQ sur les Statistiques de la Diversité, Counseil Représentatif des Associations Noires*, LE CRAN (June 21, 2009), http://lecran.org/?m=200906.

170. Louis-Georges Tin, *Who Is Afraid of Blacks in France? The Black Question: The Name Taboo, the Number Taboo*, 26 FRENCH POL. CULT. & SOC. 32 (2008).

171. NDIAYE, *supra* note 132.

movement is distinct from but linked to "a politically conscious black community which aims at gaining public recognition of the part France played in the slavery process, which also has a strong anti-racist content."[172]

Most recently, public attention turned to the question of race when then-Presidential candidate (now President) François Hollande declared that the word "race" should be deleted from the French Constitution because "there is no place in the Republic for race."[173] Although Hollande voiced a traditionally "Republican" view of race-blindness in his speech, delivered in the former slave colony of Guadaloupe, his proposal was met with strong criticism not only from scholars and activists, but from mainstream political figures like then-President Sarkozy.[174] They argued that the Constitution properly recognizes the existence of racism, or discrimination on the basis of race, without postulating that races actually exist, and that such race-consciousness is required to fight racism.

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

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172. Camus, *supra* note 120, at 651.

173. *Hollande propose de supprimer le mot 'race' dans la Constitution*, LE MONDE, Mar. 11, 2012, *available at* http://www.lemonde.fr/election-presidentielle-2012/article/2012/03/11/hollande-propose-de-supprimer-le-mot-race-dans-la-constitution_1656110_1471069.html ("Il n y a pas de place dans la République pour la race."). Hollande reprised a proposal that had been discussed in French academia twenty years ago, and had failed in the legislature ten years ago. *See Suppression du mot "race" de notre legislation* (proposed Apr. 4, 2003), *available at* http://www.assemblee-nationale.fr/12/dossiers/race_legislation.asp; *Mots, décembre 1002, no. 33, "sans distinction de…race,*" PERSEE, http://www.persee.fr/web/revues/home/prescript/issue/mots_0243-6450_1992_num_33_1 (last visited Apr. 18, 2012).

174. Danièle Lochak, *Supprimer le mot race de la Constitution n'éradiquera pas le racism* [Deleting the word race from the Constitution will not eradicate racism], MEDIAPART, Mar. 19, 2012, http://www.mediapart.fr/journal/france/160312/daniele-lochak-supprimer-le-mot-race-de-la-constitution-neradiquera-pas-le-race; *Sarkozy "ridicule" de supprimer le mot "race" de la Constitution*," [Sarkozy ridicules deleting the word "race" from the Constitution] SLATE, March 14, 2012, http://www.slate.fr/france/51397/race-constitution-sarkozy-hollande.

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.

VI. 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 Fassin explains, the French-American comparison is "good to think" because it provides a stark and caricatured contrast between bad differentialism and communitarianism (United States) and good universalism, individualism, and republicanism (France).[175] This contrast has dominated discussion of integration ever since Gérard Noiriel's influential book in 1988, *Le Creuset Français* ("The French Melting Pot").[176] As historian Nancy Green shows, "le melting-pot" has been adopted as a French term to indicate both diversity and cultural assimilation (melting).[177] 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

175. Fassin, *supra* note 11, at 224–41.

176. GÉRARD NOIRIEL, LE CREUSET FRANÇAIS (1988).

177. Nancy L. Green, *Le Melting-Pot: Made in America, Produced in France*, 86 J. AM. HIST. 1188 (1999).

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 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."