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DOG WHISTLING, THE COLOR-BLIND
JURISPRUDENTIAL REGIME, AND THE
CONSTITUTIONAL POLITICS OF RACE

DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS. By Ian Haney López.¹ New York, N.Y.: Oxford University Press. 2014. Pp. ix + 277. \$24.95 (cloth).

*Calvin TerBeek*²

Ian Haney López's new book, *Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class*, has a provocative thesis. López contends that dog whistling, that is, coded racial rhetoric, "explains how politicians backed by concentrated wealth manipulate racial appeals to win elections and also to win support for regressive policies that help corporations and the super-rich, and in the process wreck the middle class" (p. xii). López does not ignore other factors that led to the rise of the New Right political regime, but to him, dog whistling is first among equals (pp. 7–8, 29–30). If this thesis holds up to scrutiny, it has much explanatory purchase, not only for understanding ordinary or "low" politics, but perhaps for helping us navigate the Court's turn to racial conservatism over the past 40-plus years.

López's argument is consonant with the relevant literature. "Many white Americans hold negative views of African Americans, and these racial predispositions are powerful predictors of opinions on a host of political issues."³ Or as Rogers Smith and Desmond King put it in their elegant study: "on issue

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3. Gregory A. Huber & John S. Lapinski, *The "Race Card" Revisited: Assessing Racial Priming in Policy Contests*, 50 AM. J. POL. SCI. 421, 421 (2006) (citing studies by Lawrence Bobo and Martin Gilens among others).

after issue involving a wide range of the most foundational structures in American life, almost all of the same actors have lined up on one side or the other of positions framed by support for or opposition to race-conscious policies designed to alleviate material racial inequalities.”⁴ However, when one digs down further, López’s argument cannot carry all the water he claims. As we will see, dog whistling has perhaps given politicians a new way to talk about race, but dog whistling has not “wrecked” the middle class. What is more, López does not advance the ball in understanding the Supreme Court’s latest iteration of racial conservatism.⁵

But this hardly obviates the interest with which we should engage López’s argument. López has identified an interesting aspect of contemporary politics, and has ably told a story integral to understanding the politics of race. When one party is as racially homogenous as the modern Republican Party—eighty-eight percent of the people who voted for Republican presidential candidate Mitt Romney were white (p. 1)—surely race must have some explanatory factor. Moreover, as Jack Balkin recently noted, the two major political parties have not been this polarized since the Civil War.⁶ López has then perhaps identified one of the culprits—dog whistle racism.

The careful reader will have noticed that López’s explicit thesis is about politicians, but the Court plays a role in his story as well. However, López’s analysis of the Court is discursive. This is unfortunate. To fully vet López’s thesis, we need to include the Supreme Court—a political actor (high politics, yes, but a political institution nonetheless)—as a central player. That is, if we are to fully understand López’s claim and finger the dog whistling coming from all relevant political actors, we need to look at what the Supreme Court has been doing to support the policies of racial conservatives. As Cornell Clayton and J. Mitchell Pickerill have put it: “[r]ather than a check on majority power, the federal courts often function as arenas for extending, legitimizing, harmonizing or protecting the policy agenda of political elites or groups within the dominant governing coalition.”⁷

4. DESMOND S. KING & ROGERS M. SMITH, *STILL A HOUSE DIVIDED: RACE AND POLITICS IN OBAMA’S AMERICA* 258 (2011).

5. *Id.* at 35–89.

6. Jack M. Balkin, *The Last Days of Disco: Why the American Political System is Dysfunctional*, 101 B.U. L. REV. 1159, 1189 (2014).

7. Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court’s Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1391 (2006).

What is more, perhaps some of the justices engage in dog whistling of a jurisprudential sort. Recall that Justice Scalia, in 2011, writing in dissent in *Brown v. Plata* (the California prison case) stated: “many [of the released prisoners] will undoubtedly be fine physical specimens who have developed intimidating muscles pumping iron in the prison gym.”⁸ This rhetoric was pointless to any legal issue presented in the case and was both anachronistic and largely inaccurate.⁹ To give one more example: we know that President Reagan wanted to appoint anti-affirmative action judges to the federal courts such that the judiciary could carry out the “politically charged” work of ending affirmative action.¹⁰ Thus, it is crucial to address the Supreme Court for a full examination of racial conservatism.¹¹

This review essay will proceed in the following fashion: I will follow López’s political narrative, stopping, as he does, at each successive presidential election, but I will supplement his analysis—and, where needed, question it—with an assessment of what the Court was doing during and in between the elections in regard to race and constitutional politics. In other words, we need to analyze what I will call the *color-blind jurisprudential regime*¹² of the New Right—is this regime acting in concert with Republican elites to help implement racial conservatives’ preferences?

Before beginning, though, let us set forth a full-fledged definition of our analytical set-piece: what is dog whistling? López gives a lengthy definition of dog whistle politics complete with a fighting metaphor (pp. 3-5). The most insightful aspect of López’s definition is the plausible deniability it gives its users because the

8. *Brown v. Plata*, 131 S. Ct. 1910, 1953 (2011) (Scalia, J., dissenting).

9. Brian Palmer, *Do Prisoners Really Spend All Their Time Lifting Weights?*, SLATE (May 24, 2011, 6:02 PM), http://www.slate.com/articles/news_and_politics/explainer/2011/05/do_prisoners_really_spend_all_their_time_lifting_weights.html.

10. KING & SMITH, *supra* note 4, at 124.

11. For an important caveat to the regime politics approach, see Matthew E.K. Hall, *Rethinking Regime Politics*, 37 LAW & SOC. INQUIRY 878 (2012) (arguing that the regime politics literature does not conform to the Court’s actual actions when striking down federal statutes); see also Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 LAW & SOC. INQUIRY 511 (2007) (arguing that the regime politics literature can be overdeterministic when taken too far).

12. Howard Gillman, *Regime Politics, Jurisprudential Regimes, and Unenumerated Rights*, 9 U. PA. J. CONST. L. 107, 114 (2006) (defining a jurisprudential regime as “the way in which judges translate their political ideologies and identities into a preferred legal analysis. This legal analysis is made up of a set of rules, concepts, doctrines, precedents, and tests that collectively establish a standard operating procedure for the treatment of certain kinds of claims.”), citing Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305, 308 (2002).

whistler never explicitly mentions race. But one would be hard-pressed to improve on Lee Atwater's infamous definition (which López cites):

You start out in 1954 by saying, "Nigger, nigger, nigger." By 1968 you can't say "nigger"—that hurts you, backfires. So you say stuff like, uh, forced busing, states' rights, and all that stuff, and you're getting so abstract. Now, you're talking about cutting taxes, and all these things you're talking about are totally economic things and a byproduct of them is, blacks get hurt worse than whites "We want to cut this," is much more abstract than even the busing thing, uh, and a hell of a lot more abstract than "Nigger, nigger."¹³

The first politician that jumps to mind when reading Atwater's quote is George Wallace. López explains Wallace's electoral gambit (pp. 13-17),¹⁴ but the story of how the modern political parties became racially identifiable (the Democrats as racial liberals and the Republicans as racial conservatives), starts in 1964, as López rightly notes. Political scientists have persuasively shown this presidential election as the partisan cleavage point in the modern era of racial politics.¹⁵

At around this same time, "History's Warren Court" (1962-1968) was hitting its stride. As Lucas Powe argues, the Warren Court was a partner with the Kennedy and Johnson

13. Rick Perlstein, *Exclusive: Lee Atwater's Infamous 1981 Interview on the Southern Strategy*, THE NATION, Nov. 13, 2012, available at <http://www.thenation.com/article/170841/exclusive-lee-atwaters-infamous-1981-interview-southern-strategy#>. Perlstein also provides some useful context for Atwater's remarks.

14. Wallace said after losing his 1958 gubernatorial bid in Alabama, "no other son-of-a-bitch will ever out-nigger me again" (p. 14). As Wallace biographer Dan T. Carter has noted, there is some question whether this is the precise quote, but the weight of the evidence tends in that direction. See DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* 96 (1995).

15. The seminal study is EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* 73 (1989) ("[T]he 1964 campaign appears to have set in motion an issue realignment among citizens."). It would take us too far afield to review the events leading up to 1964, but some of the best work for understanding such includes: MICHAEL W. FLAMM, *LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S* (2005); JOSEPH E. LOWNDES, *FROM THE NEW DEAL TO THE NEW RIGHT: RACE AND THE SOUTHERN ORIGINS OF MODERN CONSERVATISM* (2008); Pamela Brandwein, *Reconstruction, Race, and Revolution*, in *RACE AND AMERICAN POLITICAL DEVELOPMENT* 125 (Joseph Lowndes, Julie Novkov & Dorian T. Warren eds., 2008); Naomi Murakawa, *The Origins of the Carceral Crisis: Racial Order as "Law and Order" in Postwar American Politics*, in *RACE AND AMERICAN POLITICAL DEVELOPMENT* 234 (Joseph Lowndes, Julie Novkov & Dorian T. Warren eds., 2008); Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 *STUDIES AM. POL. DEV.* 230 (2007).

Administrations in supporting the New Deal coalition and dragging a recalcitrant South into line with national expectations regarding its treatment of largely African American criminal defendants.¹⁶ An in-depth history of the Warren Court's criminal procedure jurisprudence is unnecessary here (it has been recounted countless times), but a reminder of its "greatest hits" is useful: *Gideon v. Wainwright*,¹⁷ *Escobedo v. Illinois*,¹⁸ and *Miranda v. Arizona*.¹⁹ These were the cases that the liberals cheered and the conservatives blanched at.²⁰

And as much as liberalism seemed ascendant in 1964,²¹ not all were on board. When Chief Justice Warren was invited to speak at Georgia Tech University in 1963, "Bircher" Frank H. Benning distributed signs imploring "Help Impeach Earl Warren."²² These were Goldwater voters. Movement conservatives in the "Draft Goldwater" camp, with an efficiency that Lenin would have admired, had systematically overtaken the levers of power in the Republican Party²³ and removed moderate Republican New York Governor Nelson Rockefeller from serious consideration on Goldwater's way to the nomination. Citing no sources, López contends that Goldwater "probably harbored prejudiced views" (p. 35). The evidence suggests otherwise. Goldwater had been a member of the NAACP, helped found the National Urban League chapter in Phoenix, and was "a strong supporter of voluntary integration."²⁴ Indeed, when his lagging campaign created a political ad that was overtly racial, Goldwater refused to run the ad, stating: "I'm not going to be made out to be a racist. You can't show it."²⁵

16. LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000).

17. 372 U.S. 335 (1963) (holding indigent criminal defendants are entitled to a lawyer during trial).

18. 378 U.S. 478 (1964) (holding accused are entitled to a lawyer during police interrogations under the Sixth Amendment).

19. 384 U.S. 436 (1966) (setting forth the procedures police must follow in order to extract a confession from a suspect).

20. For a powerful critique of the unintended consequences of the Warren Court's criminal procedure revolution, see WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 227–36 (2011).

21. RICK PERLSTEIN, *NIXONLAND 4* (2008) ("Lyndon Johnson had spent 1964, the first year of his accidental presidency, redeeming the martyr: passing, with breathtaking aplomb, a liberal legislative agenda that had only known existence as wish during John F. Kennedy's lifetime.").

22. *The South: Hello, Earl*, *TIME*, Feb. 22, 1963, at 24.

23. LOWNDES, *supra* note 15, at 62.

24. FLAMM, *supra* note 15, at 36.

25. LOWNDES, *supra* note 15, at 75.

But if Goldwater was not a racist, some of his supporters decidedly were.²⁶ And, at all events, López is correct that Goldwater knew full well how to blow the dog whistle: “We’re not going to get the Negro vote as a bloc in 1964 and 1968, so we ought to go hunting where the ducks are,” Goldwater said (p. 18). Other examples in historian Michael Flamm’s telling abound, including Goldwater’s convention speech where he decried “the license of the mob and of the jungle.”²⁷ The jungle, needless to say, was the urban environment. What is more, consistent with López’s analysis, the Goldwater camp consistently denied that any of their rhetoric was racialized in nature.²⁸ Goldwater also attacked the Supreme Court for its criminal procedure decisions.²⁹ In reaction to *Escobedo*, Goldwater invoked “law and order” and tied the Court to the (putatively)³⁰ rising crime rate. And it was none other than a young staffer named William Rehnquist who devised a “non-racial,” in Goldwater’s eyes, color-blind approach to the issue of integration: the right to associate (or not) (pp. 83-84).³¹

One might question, however, if Goldwater was not dog whistling so much as, to mix metaphors, preaching to the already racially conservative choir. Sociologist Katherine Beckett has shown that it was political elites, like Goldwater, who raised the issue of crime via the rhetoric of “law and order”—that is, crime was not a concern in public opinion polls when Goldwater, among others, began talking about it.³² However, as Beckett also notes, those who said they were most concerned about crime were also much more likely to be racially conservative.³³ Moreover, dog whistling is what social psychologists call “priming.”³⁴ That is to say, campaigns use priming to “remind prospective voters of the electoral relevance of *pre-existing* political attitudes and perceptions.”³⁵ López assumes that dog whistling necessarily

26. *Id.* at 56, 69, 72–73. And, as López notes, using racial appeals to attempt to win votes, surely does not absolve Goldwater (pp. 48–50).

27. FLAMM, *supra* note 15, at 31. *See also id.* at 33, 42–43.

28. *Id.* at 43.

29. *Id.* at 42.

30. Scholars have raised questions about the adequacy of the statistics showing that the crime rate spiked in the 1960s. *See* Weaver, *supra* note 15, at 233.

31. LOWNDES, *supra* note 15, at 74.

32. KATHERINE BECKETT, MAKING CRIME PAY 32 (1997).

33. *Id.* at 84.

34. Larry M. Bartels, *Priming and Persuasion in Presidential Campaigns*, in CAPTURING CAMPAIGN EFFECTS 78, 84–92 (Henry E. Brady & Richard Johnston eds., 2006).

35. *Id.* at 84–85 (emphasis added). What is more, Bartels concludes that priming (*e.g.*, dog whistling) probably does not much matter electorally. *Id.* at 92.

causes people to vote in a certain way, but provides little evidence to support this assumption.

Whichever way the causal direction runs (a point to which we will return), Goldwater was far from alone in using the Warren Court as a rhetorical punching bag. South Carolina Senator Strom Thurmond of “Dixiecrat” fame (officially named the States Rights Democratic Party) used the confirmation hearing of Justice Abe Fortas to replace Earl Warren as Chief Justice to drive home the “law and order” theme (one might also recall that Homer Thornberry from Texas was going to take Fortas’s seat had things gone according to plan; they did not). In the summer of 1968, when the hearings began, Thurmond wasted little time in going for Fortas’s jugular:

Does not that decision, *Mallory*—I want that word to ring in your ear—*Mallory* . . . a man who raped a woman, admitted his guilt, and the Supreme Court set him loose on a technicality . . . Is not that type of decision calculated to bring the courts and the law and the administration of justice into disrepute? Is not that type of decision calculated to encourage more people to commit rapes and serious crimes? Can you as a Justice of the Supreme Court condone such a decision as that? I ask you to answer that question.³⁶

According to historian Rick Perlstein, Fortas sat silent for a *full minute*—it is difficult to imagine the “optics” of such in today’s media culture—before declining to answer.³⁷ No doubt Thurmond knew that Fortas was not on the bench when *Mallory* was decided and the “technicality” was exactly the sort of Southern police conduct the Warren Court was concerned about,³⁸ but the damage Thurmond sought to inflict was done (although what finally did in Fortas was his financial improprieties).³⁹

As Thurmond’s treatment of Fortas shows, “law and order” was ascendant as a political catchphrase in the 1960s. No doubt, law and order was a coded racial appeal, but it cannot be overlooked that part of the catchphrase’s cogency was “due to the widespread loss of popular faith in liberalism’s ability to ensure

36. *Nominations of Abe Fortas and Homer Thornberry: Hearings before the Committee on the Judiciary*, 90th Cong., 2d Sess. 191, available at <http://www.loc.gov/law/find/nominations/thornberry/hearing-pt1a.pdf>.

37. PERLSTEIN, *supra* note 21, at 286.

38. *Mallory v. United States*, 354 U.S. 449, 450–52 (1957).

39. PERLSTEIN, *supra* note 21, at 382. Fortas’s nomination for Chief Justice was ultimately filibustered, but he remained on the Court as an associate justice. However, after Nixon’s election, his financial improprieties came to light and he stepped down, thus allowing Nixon two appointments early in his first Term.

personal security. The reaction against the Great Society was likewise rooted significantly in the perception that it had failed to curb social unrest—and may have even contributed to it.”⁴⁰ López, however, spends one solitary sentence discussing this social unrest—*e.g.*, the riots in Harlem and elsewhere in 1964, the Watts riot of 1965, the “long hot summer” of 1967, the rise of the “Black Power” movement—that had been seared into the national consciousness in the intervening years. López then spends just over two pages identifying Nixon’s dog whistling in 1968. According to López: “Nixon had mastered Wallace’s dark art” (p. 24). Q.E.D.

But scholars who have carefully studied the 1968 Campaign come to a more nuanced conclusion. Nixon, with Wallace flanking his right, and Humphrey his left, positioned himself as a racial moderate, knowing that Wallace’s overheated racial rhetoric was not palatable to the larger voting public.⁴¹ Indeed, Joseph Lowndes’ study of the modern Right comes to the conclusion that Nixon’s appeal to racial conservatives late in the campaign was to not “waste” their vote on Wallace because it would simply help Humphrey.⁴² Historian Joan Huff has noted: “Far from being a bland supporter of civil rights, Nixon’s record was better than any of the political opponents he ran against . . . with the exception of Hubert Humphrey.”⁴³ As Nixon’s Health, Education and Welfare Secretary, Robert Finch, told a group of mostly African American visitors regarding desegregation: “You’d be better informed if instead of listening to what we say you watch what we do.”⁴⁴

Indeed, Nixon’s electoral margin of victory in 1968 was slim, and it was his 1972 demolition of liberal lion George McGovern, as opposed to 1968, where Nixon better connected with voters on the law and order *cum* “racial problem” issue.⁴⁵ In sum, it seems like a more nuanced conclusion must be arrived at *vis-à-vis* Nixon’s rhetoric in 1968. In that year, it was Wallace, not Nixon, who carried the Deep South states of Louisiana, Mississippi, Alabama, Georgia and South Carolina, while Nixon focused on the border South states.⁴⁶ Law and order certainly had a racial and

40. FLAMM, *supra* note 15, at 9.

41. KEVIN J. MCMAHON, *NIXON’S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS CONSEQUENCES* 56–60 (2011).

42. LOWNDES, *supra* note 15, at 119, 130–31.

43. JOAN HOFF, *NIXON RECONSIDERED* 78 (1994).

44. MCMAHON, *supra* note 41, at 65.

45. *Id.* at 236–37.

46. *Id.* at 56–57. López fails to note that as far back as 1968, the Democrats were engaged in their own dog whistling (as we will see, López erroneously traces it back to

racist component to it, but there is murkiness to Nixon's dog whistling, such as it was, during the 1968 campaign.

To be sure, Nixon's dog whistling did pick up after his election in 1968, but it is inaccurate to assert, as López does, that 1972 was Nixon's "first full dog whistle campaign" (p. 26). Despite discussing Nixon's generalized dog whistling during his first-term, López fails to analyze the results of the 1970 mid-term elections. Nixon and Agnew campaigned hard for their preferred candidates on the "permissiveness" theme, attacked the federal courts and banged the law and order drum.⁴⁷ The rhetoric failed to register with voters in 1970. As the *New York Times* gloated in a post-mortem: "outside of Tennessee," the "'Southern strategy' encountered disaster everywhere," further noting that Nixon failed in pushing the "crime-violence issue;" "rarely," the Editorial Board continued, "has a Chief Executive laid down such a hard, aggressive line and pushed it so persistently."⁴⁸ In short, the 1970 mid-term elections pose a problem for López's thesis.

During this same time-frame, Federal Appeals Court judge Warren Earl Burger was appointed Chief Justice, Southerners Clement Haynsworth and G. Harrold Carswell went down to ignominious defeats in the Senate, and Harry Blackmun was confirmed as an Associate Justice. Half of the "Nixon Four" were in place. Both these Justices were part of the Court's unanimous opinion in *Griggs v. Duke Power*,⁴⁹ which López calls the "high-water mark for anti-discrimination law" (p. 86)—correctly from a race-conscious perspective—but he fails to note that the Nixon Justice Department filed two briefs *arguing* that the Court should rule in the employees' favor (which it of course did).⁵⁰

While Blackmun would drift to the left over the years, eventually becoming a reliable liberal vote, Burger would stay in the conservative fold at least insofar as criminal cases were

Jimmy Carter with a similarly erroneous analysis of Carter's alleged dog whistling). At a 1968 Democratic primary debate against Eugene McCarthy, Bobby Kennedy, in response to McCarthy's answer to a question about public housing said: "You say you're going to take ten thousand black people and move them into Orange County? It is just going to be a catastrophe." FLAMM, *supra* note 15, at 150. Given Orange County's well-known conservatism, this was dog whistling at its finest. LISA MCGIRR, *SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT* (2001).

47. MCMAHON, *supra* note 41, at 136–38.

48. Quoted in MCMAHON, *supra* note 41, at 140.

49. 401 U.S. 424 (1971) (setting forth a disparate or adverse impact test in the employment discrimination context regardless of the employer's intent or motive).

50. MCMAHON, *supra* note 41, at 198–99.

concerned; he would move further to the right in the 1980s.⁵¹ But compared with Nixon's nomination and subsequent confirmation of Justice "Renchburg,"⁵² Burger was moderate. Nixon's fourth and final appointment was the conservative Lewis Powell (though he remained committed to *Roe v. Wade* throughout his time on the bench).⁵³

Nixon, though, did not care much about abortion and the administration's reaction to *Roe* was muted, at most. As Kevin McMahon has shown, Nixon was not particularly ideological vis-à-vis all the issues that came before the Supreme Court, but crafted his rhetoric and nomination strategy for electoral gain, focusing on the law and order and school desegregation issues in 1972.⁵⁴ Scholars agree that bussing was the central racial issue of the 1972 campaign, pitting Nixon versus McGovern.⁵⁵ While López is correct that Nixon campaigned heavily on racial issues in 1972 (p. 26), it cannot be omitted (as López does) that by 1972 voters were able to accurately place McGovern and Nixon in their respective ideological spaces on racial issues—this partially explains Nixon's outsized performance with "urban ethnics" in the North.⁵⁶ Again, we have to contend with the question of which way the causal connection is running—preaching or whistling?

Regime politics scholars would fall into the preaching camp, at least insofar as the newly appointed Justices implementing a president's agenda goes. And the Court, with all of Nixon's appointees in the majority (along with Justice Stewart's concurrence) largely placed an end to the bussing issue with *Milliken v. Bradley*.⁵⁷ Given Nixon's agenda, also unsurprising was the Burger Court's slow but steady devolution of the Warren Court criminal procedure decisions. Assessing the Burger Court's work in 1984, Charles Whitebread concluded: "it is now clear that

51. Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When and How Important?*, 101 NW. U. L. REV. 1483, 1498, 1504–05 1515–17 (2007).

52. President Nixon, in discussing Rehnquist in 1971, said: "you remember the meeting we had when I told that group of clowns we had around there. Renchburg and that group. What's his name? . . . Yeah, Renchquist." DAVID L. HUDSON, JR., *THE REHNQUIST COURT: UNDERSTANDING ITS IMPACT AND LEGACY* 6 (2006). Despite mangling it twice, Nixon got it right when he announced his nomination of Rehnquist to the Court.

53. See, e.g., Linda Greenhouse, *Powell: Moderation amid Divisions*, N.Y. TIMES, June 27, 1987, at 32 ("On abortion he remained committed, with a shrinking majority, to the 1973 precedent that established it as a constitutional right.").

54. See generally MCMAHON, *supra* note 41.

55. *Id.* at 233.

56. *Id.*

57. 418 U.S. 717 (1974) (holding that a "multidistrict, areawide remedy to a single-district *de jure* segregation problem" was beyond the scope of the equal protection clause).

the crime control model of the criminal process commands a majority of the present Court. This majority is eager to accommodate what it perceives as legitimate needs of effective law enforcement and to assist the police by eliminating legal obstacles whenever possible.”⁵⁸ The color-blind jurisprudential regime was thickening.

While the Burger Court was slowing the pace of racial liberalism in the 1970s, Nixon was forced to resign as a result of Watergate and Vice-President Gerald Ford assumed the Oval Office. In 1976, Ford ran against Georgia Governor Jimmy Carter. López wants to place the outcome of the 1976 election as turning on Jimmy Carter’s putative dog whistling in contrast to Gerald Ford’s alleged refusal to do so: “Moreover, Carter’s racial pandering— and Ford’s principled failure— seemed to cement the political logic of race-baiting” (p. 56). López hinges his argument on one quote by Carter about ethnic neighborhoods and forced integration by government.⁵⁹ López then puzzlingly avers that Carter actually won because of the black vote—African Americans were “still furious at Nixon’s dog whistling” (p. 56).

But Carter was a racial moderate, if not a racial liberal,⁶⁰ and Ford was no shrinking violet when it came to confronting racial politics. In their first debate, centering on domestic politics, Carter stated: “We have got a sharp distinction drawn between white collar crime. The big shots who are rich, who are influential, very seldom go to jail. Those who are poor and who have no influence quite often are the ones who are punished.” Meanwhile, Ford talked about mandatory-minimums: “We believe that we can do a better job in the area of crime, but that requires tougher sentencing-mandatory, certain prison sentences for those who violate our criminal laws.”⁶¹

58. Charles H. Whitebread, *The Burger Court’s Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN L. J. 471, 471 (1984).

59. That quote being: “I have nothing against a community that’s made up of people who are Polish or Czechoslovakian or French-Canadian, or who are blacks trying to maintain the ethnic purity of their neighborhoods. This is a natural inclination on the part of the people. I don’t think government ought to deliberately try to break down an ethnically oriented neighborhood by artificially injecting into it someone from another ethnic group just to create some form of integration” (pp. 55-56). Carter swiftly apologized for the remark—in other words, this does not fit into López’s definition of dog whistling, where the dog whistler denies any racist intent and instead accuses the *initial* accuser of playing the race card (pp. 129–34).

60. SEAN WILENTZ, *THE AGE OF REAGAN: A HISTORY 1974-2008*, 69, 122 (2008).

61. Debate with President Gerald Ford (Domestic Issues) Sept. 23, 1976, available at <http://millercenter.org/president/speeches/detail/5546>.

Carter, for his part, stated in the candidates' third and final debate: "I think the greatest thing that ever happened to the South was the passage of the civil rights acts and the opening up of opportunities to black people, to have a chance to vote, hold a job, buy a house, go to school, and participate in public affairs."⁶² Meanwhile, the 1976 Republican Party Platform stated:

Every American has a right to be protected from criminals. Violence has no place in our land. A society that excuses crime will eventually fall victim to it. The American people have been subjected to an intolerable wave of violent crime. The victim of a crime should be treated with compassion and justice. The attacker must be kept from harming others. Emphasis must be on protecting the innocent and punishing the guilty. Prevention of crime is its best deterrent and should be stressed.⁶³

Indeed, in an April 1975 speech Ford stated, in what appears to fit López's definition of dog whistling quite well: "Too many Americans had forgotten that the primary purpose of imprisonment was not to rehabilitate the convicted criminal so that he could return to society, but to punish him and keep him off the streets."⁶⁴ Here we see Ford and the Republican Party apparatus hitting all the high-notes from Goldwater's law and order operetta. 1976, then, turns López's dog whistle thesis on its head.

Meanwhile, the "Nixon Court" was continuing to flex its muscles during the transition from Carter to Reagan. In 1976, a scant four years after declaring Georgia's death penalty scheme unconstitutional—Justices Brennan and Marshall had it that the death penalty was always unconstitutional—the Court reversed track in *Gregg v. Georgia*.⁶⁵ All four of Nixon's appointees (Blackmun concurred) sidelined *Furman v. Georgia*.⁶⁶ This is as the regime politics literature would predict. Carter, to use Stephen Skowronek's term, was a "disjunctive" president, the last of the New Deal coalition/Civil Rights regime presidents, about

62. Debate with Gerald Ford, Oct. 22, 1976, available at <http://www.presidency.ucsb.edu/ws/?pid=6517>.

63. 1976 Republican Platform: A Safe and Just Society, available at <http://www.fordlibrarymuseum.gov/library/document/platform/safejust.htm>.

64. Reproduced at http://www.ontheissues.org/celeb/Gerald_Ford_Crime.htm.

65. 428 U.S. 153 (1976) (reinstating the death penalty after a four-year moratorium).

66. 408 U.S. 238 (1972) (finding that Georgia's death penalty scheme was arbitrary and thus violated the Eighth Amendment). A case challenging the Texas death penalty scheme was consolidated with *Furman*.

to give way to a “reconstructive” president: Ronald Reagan.⁶⁷ The Justices appointed by Nixon—Justice Stevens, appointed by Ford, had not yet bolted for the liberal side and also joined the Nixon Four in *Gregg*—were beginning to limit or obviate precedent from the previous racially liberal jurisprudential regime.

Another sign that racial conservatism had captured the Court was that “color-blindness” began to pervade the Court’s decisions, for example in *Personnel Administrator of Massachusetts v. Feeney*.⁶⁸ Although many commentators have traced the “discriminatory intent” requirement back to *Washington v. Davis*,⁶⁹ López, in a separate piece of scholarship, has persuasively argued that *Feeney* marked the death knell for many discrimination claims.⁷⁰ The Court now commanded that the challenged government action must have been *because of* instead of *in spite of* the adverse or disparate impact. In other words, a litigant could no longer simply show a discriminatory impact, she would have to show the government acted, essentially, because it wanted to discriminate (a nearly impossible burden to meet, even in 1979). Here again, we can see the work of the Nixon Four continuing to build a color-blind jurisprudential regime: all four Nixon Justices were on board in *Feeney*; and only Brennan and Marshall dissented. The stage was set for the reconstructive presidency of Ronald Reagan and his desire to reorient the federal judiciary.⁷¹

Of course, Reagan needed to be elected first. López correctly notes that Reagan was a master of the dog whistling genre. Besides the oft-noted example of his 1980 campaign speech at a county fair just outside of Philadelphia, Mississippi—the site of the lynching of three civil rights workers in 1966—with an appeal to state’s rights (p. 58), López points us toward two of Reagan’s favorite campaign speech stories (p. 58). The first concerns the Cadillac-driving “welfare queen.” In one such telling, Reagan recounted: “In Chicago, they found a woman who holds the record. She used 80 names, 30 addresses, 15 telephone numbers to collect food stamps, Social Security, veterans’ benefits for four

67. STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON*, 399–400, 413–19 (2000). Though Skowronek is now exploring the possibility that reconstructive presidencies may no longer be able to occur. Stephen Skowronek, *Twentieth-Century Remedies*, 94 B.U. L. REV. 795 (2014).

68. 442 U.S. 256 (1979).

69. 426 U.S. 229 (1976).

70. Ian Haney López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1825–26, 1829–34 (2012).

71. SKOWRONEK, *supra* note 67, at 413–19.

nonexistent deceased veteran husbands, as well as welfare. Her tax-free cash income alone has been running \$150,000 a year.”⁷²

Many liberals believed she was a figment of Reagan’s imagination—he did have a penchant for exaggerating—however, the Chicago welfare queen was an actual person (Linda Taylor), and, in fact probably committed crimes far worse than welfare fraud.⁷³ But even if she didn’t exist, as the saying goes, someone would have invented her. López correctly contends that Reagan’s goal was to connect an indolent black woman and a racialized welfare system in white voters’ minds (Taylor was African American, though she passed herself off as various different races when the situation suited her pecuniary interests).

Perhaps even more explicit than the welfare queen whistle was the second of Reagan’s stories, this one about a “strapping young buck ahead of you [in the grocery store checkout line] to buy a t-bone steak [with food stamps]” while “you were waiting in line to buy hamburger” (p. 59). As López notes, the “strapping young buck” eventually morphed into a “young fellow” as the former was too reminiscent of Wallacian overt racial rhetoric (p. 59).

It is difficult to disagree with López that Reagan’s rhetoric is not classic dog whistling. It is, however, more complicated to assert, as López does, that one can draw a causal line from Reagan’s coded rhetoric to his electoral victory (p. 59). Political scientist John Sides has shown that the “Reagan Democrats”—such as they can even be said to exist outside of a media construct—most likely voted for Reagan based on more mundane concerns such as the economy rather than dog whistling:

The “New Republicans” [i.e., Reagan Democrats] were not drawn disproportionately from the middle to lower strata of the population; their conservatism was not more marked on social issues than on economic issues; they were neither more religiously oriented nor more alienated from government than other voters; finally, they bore little similarity to the constituency that provided the core support for Wallace in 1968.⁷⁴

72. Josh Levin, *The Welfare Queen*, SLATE (Dec. 19, 2013, 12:41 AM) http://www.slate.com/articles/news_and_politics/history/2013/12/linda_taylor_welfare_queen_ronald_reagan_made_her_a_notorious_american_villain.html.

73. *Id.*

74. John Sides, *Who Were the Reagan Democrats?*, THE MONKEY CAGE, June 16, 2008, http://themonkeycage.org/2008/06/16/who_were_the_reagan_democrats/ (citing Jerome L. Himmelstein & James A. McRae, Jr., *Social Conservatism, New Republicans, and the 1980 Election*, 48 PUB. OPINION Q. 592 (1984)).

Sides continues: “Himmelstein and McRae find that these New Republicans supported Reagan for much more ordinary reasons: they disapproved of the performance of President Carter, especially with regard to the economy. This kind of behavior—retrospective voting based on the performance of the national economy—is well-documented and, well, a lot more pedestrian than prevailing theories either then or now.”⁷⁵ Contemporaneous polling supports Sides’ argument.⁷⁶

Moreover, as political scientist Martin Gilens shows in his careful study of welfare, the stereotype of “blacks are lazy” dates back centuries, thus undercutting the notion that Reagan happened on a novel way to appeal to racial conservatives.⁷⁷ And while it is true that those who still believe in the canard that “blacks are lazy” are more likely to want to cut welfare and food stamp benefits,⁷⁸ I come back to my earlier question: is this dog whistling or fellow feeling?

Gilens also shows how the media helped create the perception of “poor = black” (and thus in need of welfare) well before 1980,⁷⁹ and also points out the confounding factor that, “[e]ven programs strongly associated with blacks can enjoy high levels of popular support if the programs are seen as providing benefits to those who are trying to help themselves.”⁸⁰ In light of the evidence, it is a bridge too far to state that Reagan won the 1980 election because of coded racial appeals.

But what is certain is that more important than mere rhetoric was Reagan’s ability to remake the federal judiciary and the Supreme Court. Reagan appointed, in succession, Justice O’Connor, Justice Scalia and Justice Kennedy, in the interim elevating Justice Rehnquist to the center seat. When President Bush then secured the nomination of Justice Thomas there was a contingent, to varying degrees, of five racial conservatives on the Court. (As the Right’s intonation, “No more Souters,” from the aughts appointments of Roberts and Alito suggests, that

75. Sides, *supra* note 74. Kevin McMahon has argued that the term “Reagan Democrats” is a misnomer and properly placed in electoral time, they might better be called “Nixon Democrats.” MCMAHON, *supra* note 41, at 246–48.

76. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 305 (2009).

77. MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA AND THE POLITICS OF ANTIPOVERTY POLICY* 154–56 (1999).

78. *Id.* at 76–77.

79. *Id.* at 102–53.

80. *Id.* at 214.

appointment did not turn out as planned).⁸¹ Their racial conservatism can be seen through this lens. The Reagan Justice Department's stated goal was to roll back the liberal federal judiciary.⁸² Attorney General Edwin Meese gave speeches expressing the desire to limit the reach of the Warren Court's criminal procedure decisions and end affirmative action.⁸³

Outside of the higher education affirmative action context, the Court has accomplished these racially conservative goals. During the 1980s and the 1990s, the Court fought over the proper standard of review for affirmative action programs. The names of these cases are well-known to students of the Court: *Fullilove*,⁸⁴ *Croson*,⁸⁵ *Metro Broadcasting*⁸⁶ and *Adarand*.⁸⁷ As the liberal Justices left the Court, Justice O'Connor, in *Adarand*, won the long war and the Court eventually settled on strict scrutiny for racial classifications. Of course, the standard of review was critical because contrary to the Court's judicial rhetoric, strict scrutiny, insofar as race-conscious claims are concerned, is almost always fatal in fact.

The Rehnquist Court's criminal law jurisprudence also shows the color-blind jurisprudential regime in action. Some have tried to argue to the contrary. Rachel Barkow, for example, has argued for a revisionist interpretation of the Rehnquist Court's criminal justice cases.⁸⁸ Using the attitudinalists as (an easily knocked down) straw man,⁸⁹ Barkow argues that the Court's conservatives

81. Jeffrey Rosen, *No More Souters*, MINNEAPOLIS STAR-TRIBUNE, (May 6, 2009, 7:02 AM), <http://www.startribune.com/opinion/44410512.html>.

82. Robert Post & Reva Siegel, *Originalism as Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 545, 547 (2006).

83. Edwin Meese, *Constitution Day Speech*, Sept. 17, 1985 available at <http://www.heritage.org/initiatives/first-principles/primary-sources/returning-to-original-meaning-attorney-general-meese-looks-to-the-declaration-and-the-constitution>.

84. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

85. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

86. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

87. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

88. Rachel Barkow, *Originalists, Politics and Criminal Law on the Rehnquist Court*, 74 *GEO. WASH. L. REV.* 1043 (2006).

89. MARK A. GRABER, *A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM*, x (2013); EILEEN BRAMAN, *LAW, POLITICS, AND PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING* (2009) (showing that legal norms are a non-nominal factor affecting the justices' voting behavior); Cornell W. Clayton, *The Supreme Court and Political Jurisprudence: New and Old Institutionalisms*, in *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 15, 22-30 (Cornell W. Clayton & Howard Gillman eds., 1999); see also Cornell Clayton & Howard Gillman, *Introduction*, in *THE SUPREME COURT IN AMERICAN POLITICS 2* (Howard Gillman & Cornell Clayton eds., 1999) (describing the new institutionalism as "[s]cholars seeking to explore the broader cultural and political contexts of judicial decision making"); Charles R. Epp, *External Pressure and the Supreme Court's Agenda*, in *SUPREME COURT*

sometimes voted in surprising ways in non-death penalty cases. But pointing to Justice Scalia's Confrontation Clause revival⁹⁰ or the Court's sentencing guidelines cases⁹¹ as evidence of the Rehnquist's Court putative mixed or limited partiality to criminal defendants is not persuasive.

The Confrontation Clause cases necessarily focus on what happens at trial—but the federal criminal trial is dead to all but those who can afford to hire a skilled and expensive lawyer.⁹² Only three percent of federal criminal defendants ever exercise their Seventh Amendment right that will trigger their Sixth Amendment confrontation clause right.⁹³ The same holds true in the sentencing guidelines cases where the Court took away some judicial discretion and placed it back in the jury's hands.⁹⁴ These cases are relatively meaningless in the larger political picture, and fit the picture of cases that the New Right regime does not care about. Indeed, Barkow admits that the conservatives on the Court have voted in ways consistent with the New Right regime in death penalty cases, a line of jurisprudence important to the regime, as seen by the attention Reagan and his successor placed on it.⁹⁵ Moreover, the Rehnquist Court voted in favor of the government nearly 80 percent of the time in Fourth Amendment cases, cases that are central the criminal justice mores of the Republican

DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES DECISION-MAKING 255 (Cornell W. Clayton & Howard Gillman eds., 1999) (undercutting attitudinalists who argue that the Justices grant certiorari to cases to pursue their personal political goals by noting that the Justices can only take those cases that are litigated, and if the ACLU, for example, ceased to bring lawsuits it would be difficult for the judges to pursue a civil liberties agenda as aggressively); Mark A. Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUDIES AM. POL. DEV. 35 (1993).

90. Crawford v. Washington, 541 U.S. 36 (2004).

91. United States v. Booker, 543 U.S. 220 (2005) (holding that the sentencing guidelines were no longer mandatory); Blakely v. Washington, 542 U.S. 296 (2004) (holding judge cannot enhance sentence based on facts not found by a jury or admitted by the defendant); Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding the Sixth Amendment requires aggravating factors that will enhance a sentence must be found by a jury).

92. Indeed, one could cheekily argue that since only those with the financial means can go to trial, perhaps this decision fits the attitudinal model; but this mostly just shows how weak the attitudinal model can be in placing some cases in their proper ideological space.

93. Human Rights Watch, *An Offer You Can't Refuse*, (Dec. 15, 2013), <http://www.hrw.org/reports/2013/12/05/offer-you-can-t-refuse>. The picture does not improve much even when one considers state criminal trials. Richard A. Oppel, Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES, Sept. 25, 2011, at A1.

94. Almost needless to say, the holding of *Booker* regarding deviating from the sentencing guidelines is of huge importance for cases whether tried or pled out, but it is not an issue that the New Right regime cares much about (as opposed to criminal procedure scholars).

95. Clayton & Pickerill, *supra* note 7, at 1415.

Party.⁹⁶ In this instance, the received wisdom about the Rehnquist Court needs no revision.

But our high politics story should not get too far ahead of our low politics story. And there might not be a better example of low politics than the Willie Horton ad that President Bush used against Michael Dukakis in 1988. Willie Horton, in López's recounting, was almost singularly responsible for Bush's victory: "[t]he commercial hit its mark with deadly accuracy. From lagging his opponent, Bush gained ground and took the lead" (p. 106). This is the conventional wisdom held by many commentators. But it is not quite as simple as that. John Sides shows:

The real story of the Willie Horton and the 1988 campaign is about how few people likely saw the ad itself, how it was actually news coverage that brought Horton into Americans' living rooms, and how Horton's impact on voters disappeared before Election Day The Republican convention was particularly important. It took Bush from a double-digit deficit at the beginning of August to a narrow lead at the end of that month. After that, Bush never lost the lead. This is something that conventional accounts of the Willie Horton ad rarely mention: Dukakis was *already behind* when the ad appeared.⁹⁷

The extent to which the Willie Horton ad actually affected the 1988 election is not knowable to a scientific certainty (or anywhere close), but the "Willie Horton ad beat Dukakis" analysis seems more campaign lore than what we know about the larger structural forces (the "fundamentals") that help explain presidential electoral outcomes.⁹⁸

As we have now seen, the dog whistle thesis is beginning to look like it lacks much explanatory purchase. Nevertheless, López remains doggedly devoted to his thesis. To explain President Clinton's victory over President Bush in 1992, López again focuses on dog whistling while downplaying other factors. López seizes on Clinton's "Sister Souljah" moment,⁹⁹ which sent the

96. *Id.*

97. John Sides, *The Real Impact of the Willie Horton Ad*, 2012 (unpublished op-ed on file with the author) (emphasis in original). Indeed, López also puts much stock in Tali Mendelberg's study of the Willie Horton ad (pp. 176–78). However, her critique has been subject to revision.

98. See, e.g., JOHN SIDES & LYNN VAVRECK, *THE GAMBLE: CHOICE AND CHANCE IN THE 2012 PRESIDENTIAL ELECTION* 11–13 (2013).

99. As López explains: "Clinton accepted an invitation to speak at a convening hosted by [Jesse] Jackson, and then to the dismay of the assembled audience used the occasion to upbraid a young rap artist, Sister Souljah, for heated comments about the recent riots in Los Angeles as well as racially offensive lyrics" (p. 109). Sister Souljah had

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national press into a tizzy, and Clinton's decision to fly home to Arkansas during the campaign to preside over the execution of a mentally impaired black man, Ricky Ray Rector. López captures the dog whistling politics of the moment by quoting Clinton as saying: "I can be nicked a lot, but no one can say I'm soft on crime" (p. 109).¹⁰⁰

Curiously, though, López elides here what he characterizes early on as one of the significant components of dog whistling: "As one among a range of 'social issues' used by conservatives, racial dog whistle politics can be understood as part of a larger effort to flimflam voters . . ." (p. 29). López continues: "Righteously attacking social liberalism becomes a surreptitious way to defeat economic liberalism" (pp. 29-30). In other words, López identifies attacking social liberalism as an important corollary to the GOP's strategy to implement economic policy that is "wrecking" the middle class.

However, when attempting to explain Bush's 1992 loss, López finds that "[d]ivisive cultural politics" were "off-putting to moderates" (p. 107); thus, the electorate turned to Clinton. One must wonder, and López does not explain such, why moderate voters did not go for conservatives "stok[ing] cultural divisions as cover for a politics that primarily serves the very wealthy" in 1992 (p. 30). Why do voters sometimes hear the dog whistle, and, apparently, sometimes ignore it?

López also partially misinterprets Clinton's actions while in office, pointing to welfare reform (pp. 109-10). While Clinton did promise on the campaign trail to "end welfare as we know it," once in office he did little toward that end. It was only after the 1994 Republican wave election that Clinton began to act on welfare reform. López states: "Clinton ended Aid to Families with Dependent Children, a welfare program for impoverished children that had been a staple of the New Deal approach since 1936, but which the right had trashed in racist terms for encouraging poor black women to have children out of wedlock" (pp. 109-10). This is a tendentious reading of history. First, Aid for Dependent Children (as the program was initially known), was initially constructed so that benefits would go primarily to poor

stated: "If black people kill black people every day, why not have a week and kill white people?" Sheila Rule, *Rapper, Chided by Clinton, Calls Him a Hypocrite*, N.Y. TIMES, June 17, 1992, at A22.

100. López is fair enough to note that Rector's mental impairment came as a result of a failed suicide attempt *after* Rector had killed a civilian and a police officer, something that most commentators fail to note (p. 108).

whites and not to poor blacks; Southern Democratic Senators saw to this.¹⁰¹ Second, every president from Johnson through Reagan made various attempts to reform welfare.¹⁰² Thus, an effort to reform welfare is not a particularly compelling example of racialized politics.

In contrast to his previous analysis, López sees little to no dog whistling during the 2000 campaign.¹⁰³ Instead, López's dog whistling target changes course after 2000.¹⁰⁴ López, because he wants to focus on anti-Muslim American dog whistling during the George W. Bush presidency, points the reader to *Ashcroft v. Iqbal*, where Iqbal was essentially racially profiled and detained.¹⁰⁵ But this case is more likely to end up in a civil procedure textbook, not a constitutional law one. The case turned on the majority's perfunctory application of *Feeney* and a raising of the bar to plead facts with sufficient particularity under the Federal Rules of Civil Procedure. A better example of such high court dog whistling that López omits is Justice Scalia's speech, unveiled after 9/11, titled: *Mullahs of the West: Judges as Authoritative Expositors of the Natural Law?* As I have noted elsewhere, "Scalia, almost needless to say, was analogizing alleged '[liberal] judicial hegemony' with Islamic fundamentalism. Beyond the ten-dollar words, the speech is dog whistling to the right."¹⁰⁶

Though López briefly discusses *Regents of the University of California v. Bakke*¹⁰⁷ (p. 87), he fails to discuss *Grutter v. Bollinger*.¹⁰⁸ The latter poses problems for his thesis that the conservative coalition has used dog whistling to benefit the "super-rich" (p. xii). López does not note, for example, that the U.S. Chamber of Commerce filed an *amicus* brief opposing the affirmative action program in *Bakke*, but 25 years later, as explicitly cited by Justice O'Connor in upholding the University

101. IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE* 43–48 (2005).

102. GILENS, *WHY AMERICANS HATE WELFARE* 179–83 (1999).

103. But this is problematic. One need look no further than the South Carolina primary, when Bush broke Reagan's Eleventh Commandment—an apocryphal progenitor of the saying, as it were—and attacked insurgent John McCain via a whisper campaign that McCain had fathered an African American child out-of-wedlock. Elisabeth Bumiller, *McCain Parries a Reprise of 2000 Smear Tactics*, N.Y. TIMES, Jan. 17, 2008, at A1.

104. López does not discuss Clinton's victory over Bob Dole in 1996.

105. 556 U.S. 662 (2009).

106. Calvin TerBeek, *Rethinking Scalia's Legacy*, BALLS & STRIKES (July 10, 2014), <http://constitutionalpoliticsdotcom.wordpress.com/2014/07/10/rethinking-justice-scalias-legacy/>.

107. 438 U.S. 265 (1978).

108. 539 U.S. 306 (2003) (upholding the University of Michigan Law School's affirmative action program).

of Michigan law school's affirmative action program, corporations had changed their tune—they wanted the program upheld. Fortune 500 companies such as American Express, Coca-Cola, Dow Chemical and General Electric filed a brief in support of the affirmative action program.¹⁰⁹ One scholar has maintained that this seeming contradiction, the Court supporting a race-conscious policy despite its overall bent toward colorblindness, is best explained because the Justices are elites and elite preference is for race-conscious affirmative action policies in the higher education context.¹¹⁰ However, this explanation is on shaky ground. Whether the elites' preferences continue to be taken into account remains to be seen. As *Fisher v. Texas*¹¹¹ works its way back up the judicial ladder (again)—Justice Kennedy dissented in *Grutter*—the color-blind jurisprudential regime may finally realize Reagan's goal of ending affirmative action in all contexts. Perhaps the simplest explanation is that Justice O'Connor was a country-club Republican, a dying breed, and Justice Kennedy, when it comes to racial matters, is not, excepting his proclivity for limiting the death penalty in certain cases.¹¹²

To his credit, López does discuss *Shelby County v. Holder*,¹¹³ where the Court's racial conservatives told us: “We also noted that “[t]hings have changed in the South. Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare.”¹¹⁴ Shortly thereafter, conservative controlled state legislatures, a number of them in the South, passed laws designed to restrict voting.¹¹⁵ In a study of voter-restrictive laws passed in state legislatures from 2006-2011, researchers found that the “proposal and passage [of the laws] are

109. Their collective amicus brief can be found at http://supreme.lp.findlaw.com/supreme_court/briefs/02-241/02-241.mer.ami.sixtyfive.pdf.

110. Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347 (2003); DESMOND & KING, *HOUSE DIVIDED*, *supra* note 4, at 108-09. For a cogent critique of elite higher education policy, see SUZANNE METTLER, *DEGREES OF INEQUALITY: HOW THE POLITICS OF HIGHER EDUCATION SABOTAGED THE AMERICAN DREAM* (2014).

111. *Fisher v. Texas*, 758 F.3d 633 (5th Cir. 2014).

112. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (sexual assault of a child is not death penalty eligible crime); *Roper v. Simmons*, 543 U.S. 551 (2005) (death penalty does not extend to juveniles).

113. *Shelby Cnty v. Holder*, 133 S. Ct. 2612 (2013)

114. *Id.* at 2625, *citing* *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U. S. 193 (2009).

115. Alana Semuels, *New Voter ID Laws: Nothing like it 'since Reconstruction'*, L.A. TIMES (May 4, 2014, 4:53 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-voter-identification-laws-state-by-state-20140504-story.html>.

highly partisan, strategic and racialized affairs.”¹¹⁶ As cultural critic Louis Menand acerbically noted in response to *Shelby County*: “What’s so changed about that?”¹¹⁷

But perhaps the apotheosis of the color-blind jurisprudential regime can be found in Chief Justice Roberts’ opinion in *Parents Involved*.¹¹⁸ Running the gamut of the regime’s cases¹¹⁹ (e.g., *Shaw v. Hunt*,¹²⁰ *Adarand*, *Bakke* and *Milliken*), Roberts struck down school desegregation programs in Seattle and Louisville, then claimed the mantle of *Brown* for the color-blind regime. Roberts ended his opinion with this statement (almost certainly intended to appeal to the media): “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹²¹

One year after *Parents Involved* came down, the nation elected its first black president. The 2008 election was the most racialized election in modern American history, as political scientists David O. Sears and Michael Tesler have shown.¹²² In discussing this election, López focuses largely on the petty crimes of right-wing provocateurs and Sarah Palin, but the McCain campaign team largely refrained from dog whistling.¹²³ This was because McCain did not need to. As an initial matter, racial liberals overwhelmingly supported Obama even in the Democratic primaries, and racially conservative Democrats—despite also being *gender* conservatives—voted for Hilary Clinton: “racial attitudes were so powerful that they actually made Hilary Clinton the preferred choice of modern day *sexists* in the Democratic primaries.”¹²⁴

The general election followed the same arc. Even after controlling for all the relevant variables, Sears and Tesler found that racial resentment was more prominent in 2008 than any other modern presidential contest.¹²⁵ As President Obama’s chief

116. Keith G. Bentele & Erin E. O’Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Politics*, 11 PERSPECTIVES ON POLITICS 1088 (2013).

117. Louis Menand, *The Color of Law*, NEW YORKER, July 8, 2013, at 80, 89.

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

119. Richards & Kritzer, *supra* note 12.

120. 517 U.S. 899, 909–10 (1996) (“an effort to alleviate the effects of societal discrimination is not a compelling interest”).

121. *Parents Involved*, 551 U.S. at 742–43.

122. MICHAEL TESLER & DAVID O. SEARS, *OBAMA’S RACE: THE 2008 ELECTION AND THE DREAM OF A POST-RACIAL AMERICA* (2010).

123. *Id.* at 55. López correctly points out that Hilary Clinton engaged in some of her own coded racial rhetoric in the Democratic primary (pp. 111–12).

124. TESLER & SEARS, *supra* note 123, at 8 (emphasis in original).

125. *Id.* at 59–60.

pollster incisively told Gwen Ifill after Obama's victory: "The thing is, a *black* man can't be president of America, given the racial aversion and history that's still out there . . . However, an extraordinary, gifted, and talented young man who happens to be black can be president."¹²⁶

After López finishes his analysis of Romney's loss in 2012 and the Tea Party,¹²⁷ he attempts to flesh out exactly how the middle class have been dog whistled into misery. Earlier in the book, López asserts that "[r]acial demagoguery convinces many whites to think about government in terms of race, and then to reject liberalism and the lessons of the New Deal in favor of the nostrums promoted by corporate titans and loaded insiders" (p. 74).

To find support for this, López turns to Thomas Frank's polemic *What's the Matter With Kansas*, which he finds "persuasive" (p. 169). Indeed, López thinks Frank's thesis—that conservatives vote for Republicans based on social issues (e.g., "guns, gays and god") instead of voting for Democrats, which is in their economic interest—only fails insofar as it does not understand the power of dog whistle racism: "it's also clear that race contributes to broad-based support for regressive policies that wreck the middle class" (p. 170).

However, Frank's thesis has been thoroughly debunked. Political scientist Larry Bartels, reviewing *What's the Matter With Kansas?*, has shown that the definition of "white working class" utilized by Frank is imprecise at best:

Even in 2004, after decades of increasingly widespread college education, the economic circumstances of whites without college degrees were not much different from those of America as a whole. Among those who voted, 40% had family incomes in excess of \$60,000; and when offered the choice, more than half actually called themselves "middle class" rather than "working class." Meanwhile, among working-class white voters who could even remotely be considered "poor" – those with incomes in the bottom third of the national income distribution

126. *Quoted in* TESLER & SEARS, *supra* note 123, at 56 (emphasis in original).

127. Given the largely economic nature of the issues surrounding the 2012 election, López focuses more on the conservative media provocateurs (e.g., Ann Coulter, Rush Limbaugh, Pat Buchanan, Roger Ailes). López is on point when he sniffs out the racial resentment animating the Tea Party that other scholars have failed to note (p. 151), but when he attempts to connect his thesis to Romney's economic agenda it stretches it to the breaking point (pp. 162–67).

– George W. Bush’s margin of victory in 2004 was not 23 percentage points but less than two percentage points.¹²⁸

Moreover, as Jeffrey Stonecash (another political scientist) shows in his book *Class and Party in American Politics*, “less-affluent whites have not moved away from the Democratic Party and . . . class divisions have not declined in American politics.”¹²⁹ While rich states tend to vote Democratic, rich *persons* vote Republican, and while poor states tend to lean Republican, poorer *voters* vote for the Democratic candidate.¹³⁰ “Indeed, low-income voters’ presidential preferences in 2004 were considerably more influenced by economic [rather] than cultural issues, while high-income voters showed no such differentiation.”¹³¹ The empirical fact is that income has been a strong predictor of support for Republicans among voters since the 1950s.¹³² Simply put, López’s argument that dog whistling has “wrecked” the middle class by convincing working-class and middle class whites to vote based on conservative social issues does not stand up to scrutiny.

So where does that leave us? López’s thesis—that dog whistling has wrecked the middle class—is not borne out by the facts. Dog whistling cannot explain electoral victories, never mind economic inequality, nor does the Court, outside of the idiosyncratic Justice Scalia, appear to dog whistle. Indeed, it may even be too much to say that dog whistling is *reinvented* racism. Naomi Murakawa has argued that one can trace “law and order” rhetoric back to the New Deal: “national leaders explicitly and routinely addressed black civil rights in criminological terms—and they did so nearly two decades . . . before the Goldwater presidential campaign of 1964.”¹³³ Vesla Weaver has come to similar conclusion.¹³⁴

While we can jettison dog whistling as *the* explanation for the New Right regime, it seems clear that López is right to focus on race, even if his specific thesis is lacking. Racial politics matter deeply in the United States and they affect almost every policy

128. Larry Bartels, *What’s the Matter with Kansas?*, 1 *QUARTERLY J. POL. SCI.* 201, 205 (2006).

129. JEFFREY M. STONECASH, *CLASS AND PARTY IN AMERICAN POLITICS* 118 (2000).

130. ANDREW GELMAN ET AL., *RED STATE, BLUE STATE, RICH STATE, POOR STATE* (2008).

131. TESLER & SEARS, *supra* note 123, at 15.

132. Bartels, *supra* note 128, at 208–09.

133. Murakawa, *supra* note 15, at 235.

134. Weaver, *supra* note 15, at 240–42, 265.

area.¹³⁵ White Americans are racially conservative, Republicans and Democrats alike (though the latter somewhat less so).¹³⁶ Indeed, *Latinos* are racially resentful toward African Americans.¹³⁷ Thus, while elites may utilize racial rhetoric, perhaps the more pragmatic explanation is that they are talking to a significant segment of American voters. One is reminded of George Wallace's quote: "I started off talking about schools and highways and prisons and taxes—and I couldn't make them listen. Then I began talking about niggers—and they stomped the floor."¹³⁸ While such rhetoric would be a miserable failure today, the point is that elites will not return to and reshape rhetoric that voters are unresponsive to. From the brief sketch I have given above, preaching to the choir seems a safer causal bet than dog whistling.

Turning back to the Court: because the New Right regime is made of up of racial conservatives, this explains the creation of a color-blind jurisprudential regime that now stretches back to the 1970s, long enough that Chief Justice Roberts can easily rely on friendly precedent to beat back "race-conscious" constitutional arguments. Though the law reviews are beset with criticism of what they term "color-blind jurisprudence" and the obligatory normative call to a "race-conscious" alternative,¹³⁹ they do so in an intellectual vacuum. This does not help us understand *all* the political forces at work, as I have made a modest attempt to do so here. The New Right regime may be in decay—or Obama may be just another Clintonian disjunctive president—but the color-blind jurisprudential regime has grown quite thick since the 1970s. And the Court's racial conservatives—Scalia is the oldest, approaching 80-years old, never mind that two of the Court's racial liberals, Justices Breyer and Ginsburg, may not have much time left—are likely to continue to reject race-conscious policy issues that become constitutionalized in the near future. Affirmative action in the higher education context may soon fall (as noted above), and the color-blind jurisprudential regime will continue to

135. Some scholars have tried to argue that racial conservatism has been subsumed by economic conservatism. NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 2* (2006). But as King and Smith have shown, this is an overreach. KING & SMITH, *supra* note 4, at 258–68.

136. TESLER & SEARS, *supra* note 123, at 19–20.

137. *Id.* at 97–98.

138. CARTER, *supra* note 14, at 109.

139. See, e.g., Tanya Keteri Hernandez, "Multi-Racial Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence," 57 MD. L. REV. 97, 161–70 (1998). López's prescription for ending dog whistling does not much improve on this (p. 221–30).

facilitate law-enforcement goals, in spite of the fact that the War on Drugs has disproportionately affected minorities.¹⁴⁰ After all, “an effort to alleviate the effects of societal discrimination is not a compelling interest.”¹⁴¹ Racial liberals should expect victories in the Court to be few and far between in the foreseeable future.

In sum, before scholars can proceed forward with useful normative claims about racial politics, we need to get the descriptive details correct first. If my analysis above is correct, dog whistling appears to be barking up the wrong descriptive tree. It is difficult, but not impossible, to tease out the role of race in American politics and more empirically-minded scholarship is needed on this point. Indeed, a rich research agenda is begging to be acted on here.¹⁴² What is more, because the Court plays an outsized role in determining the constitutionality of many racial policies, a better understanding of the Court’s role is crucial to the descriptive story as well. Until that much is accomplished, we will simply continue to keep on whistlin’ Dixie.

140. MARK A. R. KLEIMAN, *WHEN BRUTE FORCE FAILS* 23-24 (2009); AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL* 41-45 (2014).

141. *Shaw v. Hunt*, 517 U.S. 899, 909-910 (1996).

142. I have pointed to some of the few scholars who are working toward this goal: Rogers Smith, Desmond King, Vesla Weaver, Naomi Murakawa, the late William Stuntz, Carol Steiker, James Forman, Jr., Jeffrey Fagan, Jennifer Hochschild and Marie Gottschalk, to name a few.