TEMPORALITY IN A TIME OF *TAM*, OR TOWARDS A RACIAL CHRONOPOLITICS OF INTELLECTUAL PROPERTY LAW

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ABSTRACT

This Article examines the intersections of race, intellectual property, and temporality from the vantage point of Critical Race Intellectual Property ("CRTIP"). More specifically, it offers one example of how trademark law operates to normalize white supremacy by and through judicial frameworks that default to Euro-American understandings of time. I advance its central argument—that achieving racial justice in the context of intellectual property law requires decolonizing Euro-American conceptions of time—by considering how the equitable defense of laches and the judicial power to raise issues sua sponte operate in trademark law. I make this argument through a close reading of the racial chronopolitics of three cases: Harjo v. Pro-Football, Inc. *(2005),* Matal v. Tam *(2018), and* Pro-

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Football, Inc. v. Blackhorse *(2015). Through this critical examination, I aim to illuminate where and how time works to hinder racial justice in trademark law and encourage lawyers and judges invested in progressive intellectual property to intentionally decolonize their Euro-American temporal defaults.*

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INTRODUCTION

After Joseph Biden won the 2020 presidential election, in an episode hosted by Dave Chappelle, *Saturday Night, Live!* led with a trademark skit.[1] A lot of people have lost their jobs recently, Chappelle reminded us, including unfortunately a lot of Black people.[2] "Sadly," he said, "these two Black people may never get their jobs back."[3] The skit then cut to a non-descript skyscraper, followed by a board room, before zooming in on Maya Rudolph in a red sweater with a white bow, a yellow bandana, bright red lipstick, and pearl earrings sitting across from two white men and a white woman, played by Alec Baldwin, Mikey Day, and Heidi Gardner.[4] The emotional scene began with Rudolph:

> "Who doesn't love my pancakes?!?"
> "*Everyone* loves your pancakes, Aunt Jemima."
> "It's you. You're the problem."
> "Me? What did I do?"
> "It's not what you did. It's how you make us feel about what we did."
> "But you can't fire me. I'm a slave! That's the only good thing about your job, is the job security!"[5]

The two white men and one white woman in the room proceeded to fire Aunt Jemima, as well as Uncle Ben and Count Chocula, with the Allstate Man, who defended

[1] *Saturday Night Live: Uncle Ben*, (NBC television broadcast Nov. 7, 2020), https://www.nbc.com/saturday-night-live/video/uncle-ben/4262856 [https://perma.cc/2XNH-LM5V].
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*

himself by saying "I sell security, my deep Black voice makes white people feel safe, like they're in good hands,"[6] barely escaping the same fate as the fictitious characters next to him despite pointing out that he's a real person. The joke, of course, was that these familiar, long-lived trademarks were finally being canceled, because white people were no longer comfortable with their potential costs not because they recognized the injustice of their ways.[7]

Beyond the apparent critique of racist trademarks, this sketch makes a pointed commentary on anti-Black racism. Like the fictional characters in the room, Chappelle's Allstate Man is treated as a potential liability. Even after he reminds his employers that he's a real person, Baldwin persists because it is "better to be safe."[8] The audience is reminded that anti-Blackness extends far beyond trademarked images. This skit showcases the tendency of branding to operate as racial practice and white liberalism to center superficial solutions, such as changing trademarks, at the expense of genuine equity, such as employing Black people.[9] Baldwin's comments reveal that the object of the

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[6] *Id.*

[7] In summer 2020, a number of racist trademarks were retired by their owners. But as attempts to revive those trademarks show, brand culture is deeply linked with race. Beth Kowitt, *Inside the Cottage Industry Trying to Revive Aunt Jemima and Other Brands with Racist Roots*, FORTUNE (Dec. 8, 2020), https://fortune.com/2020/12/08/aunt-jemima-uncle-bens-eskimo-pie-brands-racist-roots-revived-black-lives-matter-movement-trademarks/ [https://perma.cc/P9EA-WEK5].

[8] *Saturday Night Live: Uncle Ben*, *supra* note 1.

[9] Lauren Berlant traces how (white) American identity was forged through differentiation from people of color represented in popular brands. *See generally* LAUREN BERLANT, THE FEMALE COMPLAINT: THE UNFINISHED BUSINESS OF SENTIMENTALITY IN AMERICAN CULTURE (2008). *See also* Rosemary J. Coombe, *Marking Difference in American Commerce: Trademarks and Alterity at Century's End*, 19 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 105, 106, 108 (1996) (showing that trademarks are integral to the negotiation of identity in the public sphere); Sarah Banet-Weiser & Charlotte Lapsansky, *RED is the New*

firings is to make white people comfortable, not repair the damage of structural racism. The Allstate Man's response, that his voice makes white people feel safe, comedically highlights the coded dance of racism by hyperfocusing on the experiences and feelings of white people to avoid getting fired. Unlike the Allstate Man, who reminds the audience that his real name is Man from *Waiting to Exhale*, Aunt Jemima appeals to her *own* feelings, not those of the white people hiring and firing her. Her appeals fail, partly due to her (quasi-)fictional status and partly due to their focus on her own interiority.[10] Whiteness prevails, even in anti-racism, because it centers the wishes of white people.

Black: Brand Culture, Consumer Citizenship and Political Possibility, 2 INT'L J. OF COMMC'N 1248, 1261 (2008) (arguing that race itself can operate as a brand in a culture that values "wokeness").

[10] *See, e.g.*, Eden Osucha, *The Whiteness of Privacy: Race, Media, Law*, 24 CAMERA OBSCURA: FEMINISM, CULTURE, & MEDIA STUD. 67, 78, 97 (2009). Osucha observes how white people were assumed to have an interiority that needed protecting, contra their Black and Brown counterparts:

> By "representational protocols" I mean to suggest how racial difference was elaborated in visual culture through the conjunction of honorific deployments of photography with a thoroughly repressive grammar of popular stereotype related to the taxonomic gaze established in the visual practices of science and the state. The nonindividuating modes of representation conventional for the depiction of people of color stand in contrast to the routine signification of whiteness in nineteenth-century visual culture through explicitly individuating forms of image making — most prominently, the commercially produced, privately circulated photographic portrait. Such practices affirmed whites' supposedly natural endowment with capacities for "self-elaboration" and also aligned white subjectivity with the very notion of self-possessive interiority that [Samuel] Warren and [Louis] Brandeis describe as the natural basis of the privacy rights claim. *Id.* at 78 (internal quotation marks omitted).

The *SNL* skit also highlights that branding creates *temporal* problems as well as racial ones. The trademarks in the sketch represent the past and present of American racial politics, weaving a complex narrative of when and how race has operated in the nation. Aunt Jemima, played by the racially ambiguous Rudolph, bridges the Antebellum with the Postbellum. The character is dressed in her "updated" attire, in Quaker Oat's vision of post-civil rights era apparel.[11] Situated alongside Uncle Ben, she reminds the viewer that both trademarks were created in order to reproduce the racial order of the American South in a post-Emancipation era.[12] Count Chocula, a character who came out of the 1960s, stirred up controversy for reasons more related to Dracula than to race.[13] He is fired even though he arguably never represented a Black man at all.[14] The Allstate Man, like Aunt Jemima 2.0, represents the racial present, as well as the inequalities that mark it. He also demonstrates that, though white people's comfort level about their own racism has evolved over time, Black

[11] This, of course, misses the reality that Aunt Jemima originated from minstrel shows and racialized labor. Her character, I would argue, is forever inseparable from "the afterlives of slavery." M. M. MANRING, SLAVE IN A BOX: THE STRANGE CAREER OF AUNT JEMIMA 60, 66–67 (1998); SAIDIYA V. HARTMAN, LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE TRADE ROUTE TERROR 6 (2007). *See also* Devon Powers & Ashley Pattwell, *Immortal Brands? A Temporal Critique of Promotional Culture*, 13 INT'L J. OF MEDIA & CULTURE 202 (2015).

[12] *See* Richard Schur, *Legal Fictions: Trademark Discourse and Race*, *in* AFRICAN AMERICAN CULTURE AND LEGAL DISCOURSE 191 (Lovalerie King & Richard L. Schur eds., 1st ed. 2009); *see also* Coombe, *supra* note 9, at 106.

[13] Jake Rossen, *The Weirdly Controversial History of Count Chocula, Franken Berry, and Boo Berry*, MENTAL FLOSS (Oct. 20, 2016), https://www.mentalfloss.com/article/87686/when-count-chocula-courted-controversy [https://perma.cc/EFK7-JRX8] (arguing that the controversies around Count Chocula had to do with everything but race).

[14] *Id.*

Peoples' situations have remained dire, with events like economic depression and global pandemic having a disproportionate effect on their well-being and survival.[15]

I begin with this skit because it offers an important entrée into the subject of this Article: the intersecting politics of race and time in intellectual property law. Temporal concerns, as legal scholars have repeatedly observed, are inescapable in legal contexts.[16] They are also the product of cultural *choices*, not immutable facts.[17] Thinking about time, specifically how it operates and the implications of its flows, is valuable to understanding, as Orly Lobel puts it, "the contingency and range of possibilities for regulating temporalities and social interaction."[18] I build on existing interdisciplinary work at the intersections of law and time by attending to the contours of temporality in the context of intellectual property law, as they implicate racial justice. I show how, in trademark law, the decision to default to Euro-American imaginaries of time work in the service of whiteness. More specifically, I show that courts have considerable discretionary authority to invoke and impose "racial time maps,"[19] which they have exercised in trademark law to the detriment of Indigenous Peoples specifically and people of color more generally.

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[15] *See, e.g.*, Steven Greenhouse, *The Coronavirus Pandemic Has Intensified Economic Racism Against Black Americans*, THE NEW YORKER (July 30, 2020), https://www.newyorker.com/news/news-desk/the-pandemic-has-intensified-systemic-economic-racism-against-black-americans [https://perma.cc/QG7J-3LNJ]. This, of course, is after a period in which white nationalism and overt racism once again became commonplace.

[16] As Todd D. Rakoff writes: "there is a lot of law that has a substantial impact on how we organize and use time." TODD D. RAKOFF, A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE 2 (2002).

[17] *Id.* at 3.

[18] Orly Lobel, *Book Review: The Law of Social Time*, 76 TEMPLE L. REV. 357, 361 (2003).

[19] Charles W. Mills, *The Chronopolitics of Racial Time*, 29 TIME & SOC'Y 297, 299–300, 303 (2020).

Charles Mills incisively writes: "Whose *space* it is depends in part on whose *time* it is, on which temporality, which version of time, can be established as hegemonic."[20] Margaret Chon's term "procedural gaslighting"[21] provides a framework for thinking about how such temporal management can operate as a mechanism through which courts deny and invalidate the realities of marginalized groups through the workings of legal procedure. In brief, she contends that gaslighting, "the act of undermining another person's reality by denying facts, the environment around them, or their feelings,"[22] can occur through the strategic use of legal procedure. The impact of this can be significant as "targets of gaslighting are manipulated into turning against their cognition, their emotions, and who they fundamentally are as people."[23] I maintain that one strand of procedural gaslighting functions through the invocation of one conception of time over another, with considerable racial implications. Racial time maps, as Mills understands them, are cultural and political topographies of race and temporality, built around the perspectives of particular groups of people. Racial time maps are a means of understanding "racial chronopolitics;"[24] they help to home in on the relationships between social and political choices, race, and time. Mills explains: "The past is 'packaged' through 'schemata' that can be likened to 'mental relief maps' designed to accommodate particularly 'historical narratives'…that purport to establish 'defining moments.'"[25]

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[20] *Id.* at 301 (emphasis added).
[21] Unpublished Phone Conversation Between the Author and Margaret Chon (Feb. 7, 2021).
[22] Robin Stern, *Gaslighting, Explained*, VOX (Jan. 3, 2019, 10:22 AM), https://www.vox.com/first-person/2018/12/19/18140830/gaslighting-relationships-politics-explained [https://perma.cc/G95L-PYGX].
[23] *Id.*
[24] Mills, *supra* note 19; *see also* LISA M. CORRIGAN, BLACK FEELINGS: RACE AND AFFECT IN THE LONG SIXTIES 34–35 (2020).
[25] Mills, *supra* note 19, at 300 (internal citation omitted).

For instance, as Mills argues, a racial time map centered by Judaism necessarily conflicts with a racial time map centered by Islam when differing narratives of history, memory, religion, property, and resources collide.[26] In an example that resonates strongly for many in this moment in its references to Al Nakba, land ownership is determined by racialized temporalities.[27] In this instance, the reading of Al Nakba as completed event v. ongoing struggle is shaped by race, ethnicity, and religion.

This Article reflects on the relationships among race, intellectual property, and temporality from the vantage point of Critical Race Intellectual Property ("CRTIP").[28] More specifically, it offers one example of how trademark law operates to normalize white supremacy by and through judicial frameworks that default to Euro-American racial time maps. I advance its central argument—that achieving racial justice in the context of intellectual property law requires decolonizing Euro-American conceptions of time—by considering how the equitable defense of laches and the judicial power to create issues sua sponte operate in trademark law. I make this argument through a close reading of the intersections of race and time in three cases: *Harjo v. Pro-Football, Inc.* (2005), *Matal v. Tam* (2018), and *Pro-Football, Inc. v. Blackhorse* (2015). Through this critical examination, I aim to illuminate where and how time works to hinder racial justice in trademark law and encourage lawyers and judges invested in progressive intellectual property to intentionally decolonize their Euro-American

[26] *Id.* at 301–02.
[27] *Id.*
[28] Anjali Vats & Deidré Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. 735, 736 (2018). Keller and I previously used "Critical Race IP" as the shorthand to speak about the intersections of Critical Race Theory and intellectual property. However, CRTIP seems to have gained purchase in race and intellectual property communities.

temporal defaults. The Article is divided into three parts, followed by a brief conclusion.

Part I tells the stories of *Blackhorse* and its antecedents and *Tam* and its antecedents and situates both cases in the larger context of CRTIP. *Blackhorse* followed *Harjo*, a disparaging trademark case that ended with the defendants invoking a laches defense that the deciding court found to be dispositive.[29] *Tam* was decided on First Amendment grounds after the appellate court sua sponte requested briefing on the free speech issues raised by Section 2(a) of the Lanham Act despite the fact that, prior to *Tam*,[30] courts had long used *In re McGinley* (1981) as precedent to justify the constitutionality of disparaging and scandalous trademark provisions in the statute.[31] *Tam* and *Blackhorse* collided in *Iancu v. Brunetti* (2019),[32] which struck down Section 2(a)'s ban on scandalous trademarks on the grounds that its content-based determinations violate the First Amendment. Adopting an intersectional CRTIP approach focused on racial chronopolitics reveals why and how these cases turned out as they did.

The remainder of the Article considers how the temporal politics of *Harjo*, *Blackhorse*, and *Tam* are embedded in larger histories of race and colonialism. Put succinctly, making the Euro-American racial time maps of *Blackhorse* and *Tam* visible reveals how the attorneys and

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[29] *See* Pro-Football, Inc. v. Harjo, 284 F. Supp. 2d. 96 (D.D.C. 2003).

[30] In re Tam, 808 F.3d 1321, 1334 (Fed. Cir. 2015), *as corrected* (Feb. 11, 2016), *aff'd sub nom.* Matal v. Tam, 137 S. Ct. 1744 (2017).

[31] Mark Conrad, *Matal v. Tam: A Victory for the Slants, A Touchdown for the Redskins, But an Ambiguous Journey for the First Amendment and Trademark Law*, 36 CARDOZO ARTS & ENT. L. J. 83, 96–97 (2018) ("Written as a 'macro' analysis of the relationship between the First Amendment and trademark law, this opinion [in *In re Tam*] urges a re-examination of the justification for the disparagement clause and urges that *McGinley*, the leading precedent, be reexamined in light of the passage of time." *Id.* at 99.).

[32] Iancu v. Brunetti, 139 S. Ct. 2294, 2296 (2019).

judges in those cases were able to strategically weaponize time and procedure to reinforce racism and colonialism. I demonstrate that, by using settler colonial logics similar to those in cases such as *Johnson v. M'Intosh* (1823), *Harjo* invoked Euro-American equitable conceptions of time to uphold white supremacy.[33] Meanwhile, following cases like *Citizens United v. FEC* (2010), *Tam* invoked implicitly Euro-American "colorblind"[34] conceptions of what Charlotte Garden terms the deregulatory First Amendment to uphold white supremacy and neoliberal capitalism.[35]

Part II examines two mechanisms through which courts manage time, i.e. the equitable defense of laches and the judicial power to create issues sua sponte, and their

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[33] *See generally* Johnson v. M'Intosh, 21 U.S. 543 (1823). For a critique of the racist and temporal overreach of the Supreme Court in *Johnson v. M'Intosh* (1823), see generally Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958–1045 (2011). For a critique of how courts impose "fictive temporalities" on Indigenous Peoples in the service of denigrating their personhood and rights, see generally Kevin Noble Maillard, *The Pocahontas Exception: The Exemption of American Indian Ancestry from Racial Purity Law*, 12 MICH. J. RACE & L. 351 (2006) (noting the tendency of Federal Indian Law to "relegate Indians to existence only in a distant past, creating a temporal disjuncture to free Indians from a contemporary discourse of racial politics." *Id.* at 357. Such representations "assess Indians as abstractions rather than practicalities, or as fictive temporalities characterized by romantic ideals…either essentializing a pre-modern and ahistorical culture, or trivializing this ancestry as inconsequential ethnicity." *Id.*).

[34] I put the term "colorblind" in scare quotes because of its underlying ableism and practicality, as well as its cooption by those in the radical right.

[35] Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323–62 (2016) (commenting on those cases that (1) "expand the scope of activity to which the First Amendment applies" (2) "embrace a more absolutist approach to the First Amendment," and (3) signal the Supreme Court's willingness to "entertain new or aggressive forms of deregulatory challenges" to the First Amendment).

significance as settler colonial formations of power that operate from Euro-American racial time maps. Part III offers an overview of the intersections between racial chronopolitics and law, by drawing on interdisciplinary discussions of race and temporality.[36] Finally, the Article concludes by encouraging lawyers and judges invested in progressive intellectual property law to consider how their tendencies to accept Euro-American racial time maps as epistemological truth hinder the decolonization of trademark law and how they might address such tendencies by making intentional choices about race and temporality. Achieving social justice goals in trademark law requires embracing a multiplicity of visions of racial time and respecting its attendant consequences for U.S. law.

I. SITUATING RACE IN TRADEMARK LAW

Three recent trademark cases – *Harjo, Blackhorse*, and *Tam* – illustrate the inescapable intersections between race and intellectual property rights. The litigation in the first two cases, initiated by Suzan Shown Harjo, Amanda Blackhorse, and a group of Indigenous activists, contested the protectability of a famous NFL football team's trademark on the basis that it is disparaging to Native Americans.[37] The lawsuits that Harjo and Blackhorse filed spanned decades

[36] While contemporary speed theory is often traced to the work of Paul Virilio, this Article engages a variety of sources on time, speed, and temporality, in order to examine how they are socially and culturally stratified categories that operate differently depending on the race, gender, and class of the individuals experiencing them. SARAH SHARMA, IN THE MEANTIME: TEMPORALITY AND CULTURAL POLITICS 4, 5 (2014).

[37] For an extended history of the battle over the mascot, see generally Lex Pryor, *"We Just Brought the King of the Mountain of Sports Slurs to Its Knees*," THE RINGER (Aug. 12, 2020, 6:20 AM), https://www.theringer.com/nfl/2020/8/12/21361914/washington-football-team-name-change-native-activists-perspective [https://perma.cc/B8QJ-6SJH].

and raised important questions about the protection of racist mascots in the instant cases and more generally.[38] While Blackhorse was ultimately victorious in securing the cancellation of the Washington R******* trademarks, her legal triumph was short lived. The outcome in *Tam* raised fundamental questions about the constitutionality of Section 2(a) of the Lanham Act and, accordingly, the recently announced outcome in *Blackhorse*.[39] While these three cases raise rather obvious issues around race and representation, I am interested in how the reasoning upon which their holdings turn implicate questions of racial chronopolitics. I approach the analysis of temporality through CRTIP, a constantly evolving critical framework for applying Critical Race Theory to intellectual property cases.

CRTIP is, as Keller and I define it, "the interdisciplinary movement of scholars connected by their focus on the racial and colonial non-neutrality of the laws of copyright, patent, trademark, right of publicity, trade secret, and unfair competition using principles informed by CRT."[40] CRTIP identifies "a body of scholarship with shared tenets about the racialized hierarchies inherent in IP law and its attendant ordering of knowledge."[41] Theorizing at the intersections of Critical Race Theory and intellectual property is not intended to force scholars into CRTIP as an analytic framework. Rather, it is to introduce one way of

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[38] Suzan Shown Harjo, *Statement of Suzan Shown Harjo on the Retirement of the Washington Football Team's Racist Name in* PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY, AMERICAN UNIVERSITY: WASHINGTON COLLEGE OF LAW (July 13, 2020), https://www.wcl.american.edu/impact/initiatives-programs/pijip/news/statement-of-suzan-shown-harjo-on-the-retirement-of-the-washington-football-teams-racist-name/ [https://perma.cc/FA97-MEZE].

[39] In re Tam, 808 F.3d 1321, 1334 (Fed. Cir. 2015), *as corrected* (Feb. 11, 2016), *aff'd sub nom.* Matal v. Tam, 137 S. Ct. 1744 (2017).

[40] Vats & Keller, *supra* note 28, at 740.

[41] *Id.*

reading intellectual property scholarship that takes up questions of race and (neo)coloniality together, in a larger, always emergent conversation about racial justice.

"Intellectual property's economic structure is 'always already' raced,"[42] because capitalism's orientation to knowledge is always already raced. Betsy Rosenblatt, for instance, demonstrates about copyright law that "[i]t rewards appropriation of materials perceived as primitive, raw, or 'folk' by purveyors of dominant culture, while punishing appropriation of materials that it associates with higher culture or views as already completed."[43] As such, copyright law operates as "the language of the colonizer."[44] Kara Swanson similarly shows about patent law that its "ideology of slavery reached into the technical bureaucracy of the patent office, an arena of law and of the administrative state frequently considered outside politics."[45] As such, patent law implicates "an ultimate claim of whiteness as intellectual property."[46] Knowledge, in both instances, is ordered in a manner that centers whiteness and its attendant estimations of the value of creation and knowledge.

Trademark law too produces and entrenches visual economies of whiteness. Rosemary Coombe writes that

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[42] *Id.* at 745.

[43] Elizabeth L. Rosenblatt, *Copyright's One-Way Racial Appropriation Ratchet*, 53 U.C. DAVIS L. REV. 591, 598 (2019). Rosenblatt follows in a line of scholars critiquing copyright law for its ethnocentricism, see, e.g., MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 3–4, 24 (2012) (arguing that Eurocentric approaches to intellectual property law, including copyright, prevent equitable access to "the good life").

[44] Rosenblatt, *supra* note 43, at 598.

[45] Kara W. Swanson, *Race and Selective Memory: Reflections on Invention of a Slave*, 120 COLUMBIA L. REV. 1077, 1080 (2020); Swanson adds to the historical weight of evidence showing that patent law is raced, *see e.g.* RAYVON FOUCHÉ, BLACK INVENTORS IN THE AGE OF SEGREGATION: GRANVILLE T. WOODS, LEWIS H. LATIMER & SHELBY J. DAVIDSON (2003).

[46] Swanson, *supra* note 45, at 1080.

trademarks "denied or downplayed the cultural and ethnic differences of some 'Americans'" through "the medium of the consuming body and embodiment…of others whose claims to an American subjectivity were complicated by contemporary relations of subjugation."[47] Put differently, America's visual culture, as constituted through trademark law, constituted whiteness as valuable by objectifying people of color. One way that the "scopic regime"[48] of trademark law operated was through the articulation of people of color as primitive, i.e. from a time past. As Coombe puts it, in the late nineteenth and early twentieth centuries "we see preoccupation with the frontiers of civilization and the containment of the primitive."[49] In the sections that follow, I explore how *Harjo* and *Blackhorse* not only reinforce temporally based race discrimination by portraying Native Americans as primitive but also illustrate how the manipulation of time through legal procedure can advantage certain litigants over others, with considerable racial and colonial consequences.[50]

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[47] Coombe, *supra* note 9.

[48] *See* Judith Butler, *Endangered/Endangering: Schematic Racism and White Paranoia*, in READING RODNEY KING/READING URBAN UPRISING (Robert Gooding-Williams ed., 1993).

[49] Coombe, *supra* note 9, at 108.

[50] National Congress of American Indians, *Ending the Era of Harmful "Indian" Mascots*, NCAI.ORG (2021), https://www.ncai.org/proudtobe [https://perma.cc/3F7E-S7V7]. For a comprehensive discussion of why R******* reinforces violent settler colonialism, see, e.g., C. RICHARD KING, REDSKINS: INSULT AND BRAND (2019) (King begins by unequivocally stating: "*R*dskin* is a problem. It is an outdated reference to an American Indian. It is best regarded as a racial slur on par with other denigrating terms…The word has deep connections to the history of anti-Indian violence, marked by ethnic cleansing, dispossession, and displacement." *Id.* at 1.). For the reasons that King identifies and following the practices of numerous news outlets, I have placed R******* under erasure. Gene Demby, *Which Outlets Aren't Calling The Redskins 'The Redskins?' A Short History*, CODE SW!TCH (Aug. 25, 2014, 5:29 PM), https://www.npr.org/sections/codeswitch/2014/08/25/

A. That Washington Football Team

The National Congress of American Indians, which has consistently spoken out against racist mascots such as Washington R******s, writes that "rather than honoring Native [P]eoples, these caricatures and stereotypes are harmful, perpetuate negative stereotypes of America's first [P]eoples, and contribute to a disregard for the personhood of Native [P]eoples."[51] The purportedly complimentary mascots that linger in American culture produce immense psychological harm, especially for Native youth, and encourage hate crimes.[52] Racist mascots have long been a way of maintaining offensive and damaging stereotypes under the guise of homage, tradition, and competition.[53] Because settler colonialism has historically operated through

343202344/which-outlets-arent-calling-the-redskins-the-redskins-a-short-history [https://perma.cc/CPY9-BXP6].

[51] National Congress of American Indians, *supra* note 50.

[52] Daniel Snyder, owner of The Washington Football Team, has previously asserted that R******* honors Native Americans. Daniel Snyder, *Letter from Washington Redskins Owner Dan Snyder to Fans*, WASHINGTON POST (Oct. 9, 2013), https://www.washingtonpost.com/local/letter-from-washington-redskins-owner-dan-snyder-to-fans/2013/10/09/e7670ba0-30fe-11e3-8627-c5d7de0a046b_story.html [https://perma.cc/NV8Q-XK3E]. For a meta-analysis of studies on the harm produced by Native mascots, see, e.g., Laurel R. Davis-Delano et al., *The Psychosocial Effects of Native American Mascots: A Comprehensive Review of Empirical Research Findings*, 23 RACE ETHNICITY & EDUC. 613, 613–33 (2020).

[53] Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 866 (2016) (coining the term "Indian appropriation," Riley and Carpenter observe that "the U.S. legal system has historically facilitated and normalized the taking of *all* things Indian for others' use, from lands to sacred objects, and from bodies to identities. Indian appropriation, according to Native [P]eoples, has deep and long-lasting impacts, with injuries ranging from humiliation and embarrassment to violence and discrimination." (emphasis in original)); *see also* MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 2–3 (2003).

the dispossession of Native Peoples, ameliorating the racial and colonial violence done by Native mascots specifically – and racially objectifying trademarks generally – requires consideration of who has control over cultural production and how these practices affect structurally marginalized groups.[54] As Angela R. Riley and Kristen A. Carpenter write, "when it comes to minority groups, cultural appropriation often occurs in a societal context of power imbalance, racism, and inequality, rather than an atmosphere of fair, open, and multilateral exchange."[55]

In 2020, after decades of legal struggle, Daniel Snyder retired the name of his Washington Football Team, which was one of the nation's most visible and egregious remaining examples of a trademark representing Native Americans.[56] This turn of events occurred after multiple lawsuits, years of protest, and the reversal of multiple victories. In 1992, acting on the opposition to the Washington R******* trademarks that had existed for many years, Suzan Shown Harjo, Raymond D. Apodaca, Vine Deloria, Jr., Norbert S. Hill, Jr., Mateo Romero, William A. Means, and Manley A. Begay, Jr. petitioned the Trademark

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[54] Angela Riley et al., *The Jeep Cherokee is Not a Tribute to Indians. Change the Name.* WASHINGTON POST (Mar. 7, 2021, 7:00 AM), https://www.washingtonpost.com/opinions/2021/03/07/jeep-cherokee-name-change-native-americans/ [https://perma.cc/P9HY-2FMQ].

[55] Riley & Carpenter, *supra* note 53, at 864.

[56] Brakkton Booker, *After Mounting Pressure, Washington's NFL Franchise Drops Its Team Name*, NPR (July 13, 2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/13/890359987/after-mounting-pressure-washingtons-nfl-franchise-drops-its-team-name [https://perma.cc/T3N5-3HPD]; Scott Allen, *A Timeline of the Redskins Name Change Debate*, WASHINGTON POST (July 13, 2020), https://www.washingtonpost.com/graphics/sports/dc-sports-bog/2020/07/13/amp-stories/timeline-redskins-name-change-debate/ [https://perma.cc/BD89-389R] (showing that Native American organizations formally pushed back against the 7 team trademarks as early as 1972).

Trial and Appeal Board ("TTAB") for the cancellation of seven trademarks owned by Pro-Football, Inc. on the grounds that they were disparaging.[57] In 1999, the United States Patent and Trademark Office ("USPTO") canceled the trademarks for the Washington R*******. Pro-Football, Inc. appealed.[58] In 2003, the district court reversed on the grounds that the trademarks were not disparaging.[59] In 2005, the D.C. Circuit remanded the case to the district court, asking the court to clarify its findings related to the equitable defense of laches.[60] In a statement that affirms property rights over racial equity, it held that "during the period of delay, Pro-Football and NFL Properties invested in the trademarks and had increasing revenues during this time frame."[61] In 2008, the district court dismissed the case on laches grounds; the next year, the DC Circuit affirmed the dismissal and the Supreme Court granted cert.[62] The complicated procedural history of the case and the many appeals are a testament to the difficulty of invalidating a trademark as valuable as this one. It also reveals the racially fraught nature of temporally imbricated procedure, which I turn to in detail below.

As a result of the complicated dynamics of the case and the successful invocation of laches, Amanda Blackhorse, Marcus Briggs-Cloud, Phillip Cover, Jillian Pappan, and Courtney Tostigh filed another petition with the TTAB in 2006 to cancel the offending trademarks.[63] The TTAB suspended that case until the final disposition in

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[57] *See generally* Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439 (E.D. Va. 2015).
[58] *Id.* at 450.
[59] *Id.*
[60] Pro-Football, Inc. v. Harjo, 415 F.3d 44 (D.C. Cir. 2005).
[61] Pro-Football, Inc. v. Harjo, 284 F. Supp. 2d. 96, 112 (D.D.C. 2003).
[62] *Pro-Football Inc.*, 112 F. Supp. 3d at 450. *See* Pro-Football, Inc. v. Harjo, 567 F. Supp. 2d 46, 62 (D.D.C. 2008).
[63] *Pro-Football, Inc.*, 112 F. Supp. 3d at 450–51.

Harjo.[64] The case that became *Blackhorse* resumed after *Harjo* concluded in 2009.[65] After a series of substantive and procedural concerns were addressed, the TTAB cancelled the trademarks in 2014, pursuant to Section 2(a) of the Lanham Act, on the theory that they may be disparaging to Native Americans.[66] Both parties filed cross-motions for summary judgment in the District for the Eastern District of Virginia;[67] the court ultimately denied Pro-Football, Inc.'s motion for summary judgment.[68] Specifically, Pro-Football Inc. sought summary judgment on the grounds that 15 U.S.C. §1052(a) violates the First Amendment by "restricting protected speech, imposing burdens on trademark holders, and conditioning access to federal benefits on restrictions of trademark owners' speech.[69] The district court concluded with respect to this claim:

> First, Section 2(a) of the Lanham Act does not implicate the First Amendment. Second, under the Supreme Court's decision in *Walker v. Tex. Div., Songs of Confederate Veterans, Inc.*, the Fourth Circuit's mixed/hybrid speech test, and *Rust v. Sullivan* (1991), the federal trademark registration program is government speech and is therefore exempt from First Amendment scrutiny.[70]

The district court also cited the long-followed precedent in *In re McGinley*.[71] In 2018, the Fourth Circuit reviewed *Blackhorse* on appeal in light of new developments.[72] It

[64] *Id.* at 451.
[65] *Id.*
[66] *Id.*
[67] *Id.* at 447.
[68] *Id.* at 489.
[69] *Id.* at 447–48.
[70] *Id.* at 454 (internal citations omitted).
[71] *Id.* at 455.
[72] *See generally* Pro-Football, Inc. v. Blackhorse, 709 Fed. Appx. 182 (4th Cir. 2018).

remanded the case to the district court for a decision consistent with the Supreme Court's holding in *Tam*.[73]

Pro-Football, Inc. raised a laches defense on multiple occasions during *Harjo*. In the first instance, the D.C. Circuit remanded to the district court on the basis that the court had wrongly applied the laches defense to one of the plaintiffs, Romero.[74] It held that the lower court had mistakenly run the time on the laches defense from 1967, the time of registration of the Washington R******* trademarks, instead of the age of majority of the plaintiffs.[75] The D.C. Circuit makes an important point here in the service of racial justice: "[w]hy should laches bar all Native Americans from challenging Pro-Football's 'Redskins' trademark registrations because some Native Americans may have slept on their rights?"[76] Yet upon second review, the district court held that laches *did* apply, this time because the youngest of the defendants, Romero, "waited almost eight years—seven years, nine months to be precise—after reaching the age of majority before petitioning to cancel the six trademarks in question. That delay is 'unusually long by any standard.'"[77] Central to the showing of economic prejudice was evidence of Pro-Football Inc.'s investment in the trademarks and related advertising and promotion materials.[78] Pro-Football, Inc. raised the laches defense again in *Blackhorse*, in a motion for summary judgment.[79] The district court held that the Blackhorse defendants did *not*

[73] *Id.*
[74] Pro-Football, Inc. v. Harjo, 415 F.3d 44, 49–50 (D.C. Cir. 2005).
[75] *Id.* at 48–49. The TTAB had previously held that laches was "inapplicable due to the 'broader interest . . . in preventing a party from receiving the benefits of registration where a trial might show that respondent's marks hold a substantial segment of the population up to public ridicule.'" *Id.* at 47 (internal citation omitted).
[76] *Id*. at 49.
[77] Pro-Football, Inc. v. Harjo, 567 F. Supp. 2d 46, 53–54 (D.D.C. 2008).
[78] Pro-Football, Inc. v. Harjo, 284 F. Supp. 2d. 96, 112 (D.D.C. 2003).
[79] Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439, 488–89 (2015).

unreasonably or unjustifiably delay in petitioning the TTAB in waiting for a decision in *Harjo*.[80] Indeed, the court agreed that filing sooner may have resulted in the "filing of unnecessary petitions."[81] Further, it noted that in trademark cases, as with copyright and patent cases, laches was a remedy to be used sparingly; public policy militated in favor of canceling disparaging trademarks.[82] While I will discuss the problematic aspects of these laches findings in Part II, I want to highlight here that 1) the TTAB and the courts were aware of the public policy issues around race and disparagement and 2) they embraced a broad vision of laches. Both of these facts suggest that the outcomes in the cases discussed here were far from foregone conclusions.

B. The Band With No Name

Tam was as much a continuation of a dialogue between the TTAB and the D.C. Circuit as it was a battle for Simon Tam to protect the name of his band, the Slants. Though Tam did not set out to change the history of trademark law and free speech jurisprudence in the United States, he did so through the curious, though perhaps unsurprising, connections between *Harjo* and *Blackhorse* with *Tam.* Like *Harjo* and *Blackhorse*, *Tam* has a long and rather convoluted procedural history, that spans nearly a decade.[83] In 2010, Tam sought to register the trademark for

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[80] *Id.*

[81] *Id.* at 489.

[82] *Id.*

[83] For a brief overview of the timeline of the case, see generally Diana Michele Yap, *He Named His Band the Slants to Reclaim a Slur. Not Everyone Approved*, WASHINGTON POST (May 16, 2019, 9:00 AM), https://www.washingtonpost.com/entertainment/books/he-named-his-band-the-slants-to-reclaim-a-slur-not-everyone-approved/2019/05/15/b939275a-700d-11e9-8be0-ca575670e91c_story.html [https://perma.cc/C8J6-8AJS]. For a more detailed version of Tam's story, see generally SIMON TAM, SLANTED:

"Slants" for the first time.[84] The USPTO rejected his application, relying on *Urban Dictionary* to define the term as "derogatory or offensive" to Asian Americans.[85] Tam appealed the decision before the TTAB.[86] The TTAB again denied the application for the trademark.[87] Tam appealed to the Federal Circuit, who sua sponte raised the issue of whether Section 2(a) of the Lanham Act violated the First Amendment to the U.S. Constitution.[88] Ultimately, the court determined that the disparaging trademark language of Section 2(a) violated the First Amendment's guarantee of free speech because it allowed the USPTO to engage in indefensible content-based discrimination.[89] A critique of *In re McGinley*, a longstanding established precedent, featured prominently in the Federal Circuit's decision.[90]

In 2017, in an opinion that reads almost as a continuation of *Blackhorse*, the Supreme Court affirmed the Federal Circuit's decision, on free speech grounds.[91]

HOW AN ASIAN AMERICAN TROUBLEMAKER TOOK ON THE SUPREME COURT (2019).

[84] Tam filed his initial application in March 2010 but abandoned it. U.S. Ser. No. 77/952,263 (now abandoned). He filed a second application in 2011, six years before the decision in *Tam.* Eugene Volokh, *The Volokh Conspiracy: The Slants Trademark Registered Today, Six Years After the Application Was First Filed*, WASHINGTON POST (Nov. 14, 2017, 3:04 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/14/the-slants-trademark-registered-today-six-years-after-the-application-was-first-filed/ [https://perma.cc/7QKD-LXAA].

[85] Matal v. Tam, 137 S. Ct. 1744, 1754 (2017).

[86] *Id.*

[87] Denial of Request for Reconsideration, U.S. Trademark Application Serial No. 85472044 (TTAB Dec. 20, 2012), available at https://ttabvue.uspto.gov/ttabvue/v?pno=85472044&pty=EXA&eno=5 .

[88] In re Tam, 808 F.3d 1321, 1334 (Fed. Cir. 2015) ("[W]e sua sponte ordered rehearing en banc. We asked the parties to file briefs on the following issue: Does the bar on registration of disparaging marks in 15 U.S.C. § 1052(a) violate the First Amendment?" *Id.*)

[89] *Id.* at 1360.

[90] *Id.*

[91] *Tam*, 137 S. Ct. at 1754.

Though the judgment in *Tam* was a unanimous one, Justice Kennedy, Justice Ginsberg, Justice Sotomayor, and Justice Kagan wrote in concurrence. They concluded:

> As the Court is correct to hold, §1052(a) constitutes viewpoint discrimination—a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny. The Government's action and the statute on which it is based cannot survive this scrutiny. …This separate writing explains in greater detail why the First Amendment's protections against viewpoint discrimination apply to the trademark here…the viewpoint discrimination rationale renders unnecessary any extended treatment of other questions raised by the parties.[92]

All justices concurred that Section 2(a), which permits the USPTO to refuse to register a trademark which "[c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols or bring them into contempt, or disrepute,"[93] "offends a bedrock First Amendment principle: speech may not be banned on the ground that it expresses ideas that offend."[94] More specifically, banning racist trademarks under Section 2(a), the Court unanimously agreed, is an overbroad act of viewpoint discrimination that is not justified by the state's interests of preventing the use of discriminatory speech or protecting the free flow of

[92] *Id.* at 1765 (Kennedy, J., Ginsberg, J., Sotomayor, J., and Kagan, J. concurring in part and concurring the judgment).
[93] 15 U.S.C. § 1052(a) (2006).
[94] *Tam*, 137 S. Ct. at 1751.

commerce.[95] In this, the Supreme Court reversed the precedent established by *In re McGinley* and its progeny.[96]

C. Free Speech as Racial Triangulation

As I have previously argued, the relevant question in *Harjo*, *Blackhorse*, and *Tam* is not "why?" but "why now?" Indeed, the dissent by Judge Laurie in the Federal Circuit asks this question, pointing to the long history of precedent that justified *not* making a decision based on free speech.[97] More specifically, though Section 2(a) of the Lanham Act was enacted in 1905 and renewed in 1946,[98] it was not struck down as unconstitutional until 2017, with the decisions in *Tam* and *Brunetti*.[99] Bringing CRTIP to bear on the outcomes in these cases is helpful in untangling the racially and colonially violent processes at work in the decisions, with respect to "racial triangulation,"[100] "racial

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[95] Eugene Volokh, *The Slants (and the Redskins) Win: The Government Can't Deny Full Trademark Protection to Allegedly Racially Offensive Marks*, WASHINGTON POST (June 19, 2017, 10:50 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/19/the-slants-and-the-redskins-win-the-government-cant-deny-full-trademark-protection-to-allegedly-racially-offensive-marks/?utm_term=.ebaf7c7ef4aa [https://perma.cc/R5M4-P7M5].

[96] *In re McGinley*, 660 F.2d 481 (C.C.P.A. 1981) (finding that "[w]ith respect to appellant's First Amendment rights, it is clear that the PTO's refusal to register appellant's mark does not affect his right to use it." *Id.* at 484).

[97] *In re Tam*, 808 F.3d 1321, 1374 (Fed. Cir. 2015) (Lourie, J., dissenting) (writing that: "one wonders why a statute that dates back nearly seventy years—one that has been continuously applied—is suddenly unconstitutional as violating the First Amendment. Is there no such thing as settled law, normally referred to as *stare decisis*?").

[98] 15 U.S.C. § 1052(a).

[99] *See generally* Iancu v. Brunetti¸ 139 S. Ct. 2294 (2019).

[100] *See generally* Robert S. Chang & Neil Gotanda, *Afterward: The Race Question in LatCrit Theory and Asian American Jurisprudence*, 7 NEV. L. J. 1012 (2007).

libertarianism,"[101] and "racial chronopolitics."[102] More specifically, the Federal Circuit's decision to raise a First Amendment question sua sponte pitted the emancipatory struggles of Native Americans and Asian Americans against one another using divide and conquer tactics, deregulatory free speech practices, and manipulations of time that critical race studies scholars across disciplines have critiqued as destructive.[103] I explore the racial triangulation and racial libertarianism components of the case here before turning to the racial chronopolitics issue in the rest of the Article.

The three cases that anchor this section, *Harjo*, *Blackhorse*, and *Tam*, showcase how seemingly "colorblind" or "postracial"[104] legislation and precedent can collide in ways that reveal underlying processes of "racial formation."[105] That is to say that racial identities and racism evolves over time, through discourse and policy, as a response to progressive change.[106] "Racial projects"[107] manifest as structural elements that prevent people of color from attaining equality. As critical race theorist Derrick Bell observes, the formal equality under law that people of color, particularly Black people, won during the civil rights movement did not change the nation's underlying racial

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[101] ANJALI VATS, THE COLOR OF CREATORSHIP: INTELLECTUAL PROPERTY, RACE, AND THE MAKING OF AMERICANS 120 (2020).
[102] *See, e.g.,* CORRIGAN, *supra* note 24, at 34–35.
[103] VATS, *supra* note 101, at 120–26.
[104] *See, e.g.*, Catherine Squires et al., *What Is This "Post-" in Postracial, Postfeminist ... (Fill in the Blank)?*, 34 J. OF COMMC'N INQUIRY 210, 212–53 (2010).
[105] *See generally* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (2nd ed. 1994) (defining and developing the terms "racial formation" and "racial projects" and elaborating on their theory in a historical context).
[106] *See generally id.*
[107] *See generally id.*

commitments, it only created an illusion of racial progress that has been eroded considerably.[108]

In this instance, deregulating the First Amendment cloaked racial capitalism in the language of colorblind economics and calls for free speech rendered structural racism and settler colonialism invisible.[109] Put differently, *Tam* eviscerated *Blackhorse* as a victory by embracing racial libertarianism, a deregulatory approach to racism that made people of color responsible for their own liberation – and therefore oppression.[110] They attempt to move the United States and its people of color into a legal framework that fails to recognize that time does not operate equally for all. Robert S. Chang and Neil Gotanda use the term "racial triangulation" to describe how cases such as this one pit people of color against each other.[111] Drawing upon the work of political scientist Claire Jean Kim, they write:

> Depending on the issue, a different group is placed on a horizontal plane of formal equivalence with Whites. The triangle is a useful device to emphasize the issues at stake in the coalition and helps to avoid collapsing the politics into a false binary. The triangulation diagram demonstrates the issue-specific way that the invitation to Whiteness (actual, honorary, or formal) or Americanness is issued, and it highlights the inconsistencies and hypocrisies. The cynical deployment of the language of equality, 'You are like us and not them,' can be seen to be issue-specific. It masks attempts to co-opt without any real granting of

[108] DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 3 (1992).
[109] VATS, *supra* note 101, 120–26.
[110] *Id. See also* Margaret Chon & Robert S. Chang, *The Indians Who Were Not Heard and the Band That Must Not Be Named: Racial Formation and Social Justice* in *Intellectual Property Law*, Race + IP 2021, FAMU College of Law (Online) (Apr. 9–10, 2021) (exploring how the Supreme Court's First Amendment approach to *Tam* frustrates social justice goals through its romantic notion of the marketplace of ideas).
[111] *See generally* Chang & Gotanda, *supra* note 100.

> equality with Whites. It is a way to maintain white dominance.[112]

In this case, the attempts of Harjo, Blackhorse, and others to address violent settler colonialism were thwarted by seemingly progressive First Amendment jurisprudence proclaiming to protect Asian Americans.[113] As a methodological matter, cases such as this one, involving people of color on both sides, can serve as helpful illustrative examples of how and why racial capitalism and "colorblind" lawmaking operate to reinforce casual racism and settler colonialism.[114] They also demonstrate how postracial language of formal equality and market deregulation can obfuscate destructive divide and conquer politics.

II. CRITICAL RACE INTELLECTUAL PROPERTY AND THE POLITICS OF TIME

"Temporality," Liaquat Ali Khan argues, "is an integral part of law."[115] This is a far-reaching claim that scholars across disciplines have explored, in various legal contexts. For instance, in his book on law and time, Rakoff argues for legal approaches to temporal management that encourage civil engagement and social activity, both of which he contends are vital to the success of a democratic nation.[116] Rakoff seeks to attend to legal time in order to

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[112] *Id.* at 1024–25.

[113] For a discussion of the divisiveness of reclaiming the term "slants," see generally Simon Tam, *The Slants to NAPABA: Stop Undermining the Work of Activists*, ANGRY ASIAN MAN (July 29, 2015), http://blog.angryasianman.com/2015/07/the-slants-to-napaba-stop-undermining.html [https://perma.cc/8K2J-ZSTQ].

[114] Chang & Gotanda, *supra* note 100, at 1024–25.

[115] Liaquat Ali Khan, *Temporality of Law*, 40 MCGEORGE L. REV. 55, 56 (2008).

[116] RAKOFF, *supra* note 16, at 1–9.

address what he identifies as temporal misallocation.[117] In a review essay of the book, Lobel notes that Rakoff's work only begins to scratch the surface of the cultural implications of the intersections of law and time.[118] She seeks to "illuminate several ways in which framing the struggles over the legal construction of time as a universal human project of social engineering rather as an ongoing struggle among unequal actors in society may naturalize certain assumptions and inequalities."[119] Lobel's response to Rakoff echoes the work of critical race studies scholars, who insist on interrogating the racial structures through which cultural practices of temporal management are produced. Sarah Sharma, for instance, whose book focuses on race, class, time, and labor, notes that for all the talk of time among those she calls the "speed theorists,"[120] there is virtually no talk of what she defines as "differential lived time."[121]

Speed theory as Sharma describes it refers to the postmodernist turn epitomized by the work of Paul Virilio,[122] a French scholar who descried the rise of the hypermediated culture of speed in which we live.[123] Sharma writes: "[t]The culture of speed, as it appears in such various conversations, goes by many terms: 24/7 capitalism (Jonathan Crary), the chronoscopic society (Robert Hassan), fast capital (Ben Agger), the new temporalities of biopolitical production (Michael Hardt and Antonio Negri), the culture of acceleration (John Tomlinson), chronodystopia (John Armitage and Joanne Roberts),

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[117] *Id.*
[118] Lobel, *supra* note 18, at 359.
[119] *Id.* at 371.
[120] SHARMA, *supra* note 36, at 5.
[121] *Id.* at 6.
[122] The postmodernist turn signified a move from investment in the grand narratives of the Enlightenment and Modernism, often through critique and deconstruction. *See, e.g.*, JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION (1979).
[123] PAUL VIRILIO, SPEED AND POLITICS (1986).

hypermodern times (Giles Lipovetsky), and liquid time (Zygmunt Bauman)."[124] Each of these terms describes different but overlapping characteristics of contemporary time, informed by theorists of political economy, international relations, neoliberal capitalism, and so on.[125] Yet for Sharma, speed theorists fail to understand the nuances of time, specifically that speeding up is only one aspect of temporal alienation and oppression.[126]

One example that she provides to illustrate this argument is that of yoga. While yoga is valorized as being "outside" the corporate system, the quality of being exterior to organizational structures does not indicate resistance to them. In the case of yoga, the practice renders the corporate laborer more efficient, and thus more valuable, under capitalism.[127] Southern plantation systems operated through similar raced logics of time: plantation owners experienced *leisure* time, marked by long, slow days, while Black field workers simultaneously experienced *labor* time, marked by short, fast days.[128] Sharma's work bridges conversations between law and time and race and time by providing frameworks for being "temporally attuned."[129] This section draws on interdisciplinary scholarship to racially and temporally attune to the implications of procedural practices, specifically the equitable defense of laches and the judicial power to create issues sua sponte as they arise in the context of trademark law. My aim is to demonstrate how attending

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[124] SHARMA, *supra* note 36, at 5 (emphasis omitted).
[125] *Id.*
[126] *Id.* at 15–16.
[127] *Id.* at 91–96; *see generally* RAKA SHOME, DIANA AND BEYOND: WHITE FEMININITY, NATIONAL IDENTITY, AND CONTEMPORARY MEDIA CULTURE (2014).
[128] Carol M. Megehee & Deborah F. Spake, *Decoding Southern Culture and Hospitality*, 2 INT'L J. OF CULTURE, TOURISM & HOSP. RES. 97–101 (2008).
[129] SHARMA, *supra* note 36, at 12.

to time is vital to attending to race, particularly within the context of intellectual property litigation.

A. Temporal Attunement in Intellectual Property Law

Time is built into the very structures of American intellectual property law. Copyright and patent law are intended "[t]o promote the [p]rogress of [s]cience and the useful [a]rts, by securing *for limited [t]imes* to [a]uthors and [i]nventors the exclusive [r]ight to their respective [w]ritings and [d]iscoveries."[130] "Limited times" has been the subject of much litigation, including in the now infamous *Eldred v. Ashcroft*, in which the United States Supreme Court considered "the authority the Constitution assigns to Congress to prescribe the duration of copyrights."[131] In that case, the Court ultimately granted broad authority to Congress in determining and extending the "limited times" for which copyright protection exists.[132] Central to the reasoning in *Eldred* was the history of patent cases raising questions of duration. Justice Ginsberg wrote: "We count it significant that early Congresses extended the duration of numerous individual patents as well as copyrights" and "…the Court has found no constitutional barrier to the legislative expansion of existing patents."[133] The "pathsetting precedent"[134] on this issue for the majority was *McClurg v. Kingsland*, which upheld the retroactive application of a new patent law.[135]

Broadly speaking, copyright law and patent law are intended to create limited monopolies, with the narrow

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[130] U.S. CONST., art. I, § 8, cl. 8 (emphasis added).
[131] Eldred v. Ashcroft, 537 U.S. 186, 192 (2003).
[132] *Id.*
[133] *Id.* at 201–02.
[134] *Id.* at 203.
[135] *See generally* McClurg v. Kingsland, 42 U.S. 202 (1843).

purpose of encouraging innovation.[136] Both cases alter the intellectual property bargain, by changing its temporal rules. Khan provides one framework for understanding the temporal issues presented by intellectual property law.[137] He does so by focusing on the mechanics of legal time. Specifically, Khan's proposed method for engaging with law and time is to create a language for talking about temporality, one that ascribes theoretical significance to points in time (t) and temporal durations (Δt) in order to pinpoint how law acts upon time and how time functions in law.[138] In Khan's grammar of time, *Eldred* raises a temporal duration issue, (Δt), while *McClurg* raises a point in time (t) issue. More specifically, the Court noted in *Eldred* that the phrase "limited [t]imes," i.e. limited term, raises an issue of temporal confinement and constriction over which Congress has absolute control.[139] Therefore, *Eldred* effectively announces itself as a case that hinges on temporal containment. The Court also noted in *McClurg* that a retroactively applied patent law could protect an invention that was not previously protected.[140] Accordingly, *McClurg* effectively announces itself as a case that hinges on starting points. The Court noted that a patent "depend[s] on the law as it stood at emanation of the patent, together with such changes as have been since made[,] for though they may be retrospective in their operation, that is not a sound objection to their validity."[141] The temporal issues that I have identified here are not exhaustive; they are examples that demonstrate intellectual property's temporal elements.

Another area in which intellectual property scholars have theorized time is in the context of fair use. Joseph Liu,

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[136] *Eldred*, 537 U.S. at 214–16.
[137] *See generally* Khan, *supra* note 115.
[138] *Id.* at 62–64.
[139] *Eldred*, 537 U.S. at 199.
[140] *McClurg*, 42 U.S. at 209–10.
[141] *Id.* at 206.

for instance, contends that time ought to be a factor in the fair use test.[142] He offers the following maxim: "the older a copyrighted work is, the greater the scope of fair use should be – that is, the greater the ability of others to re-use, critique, transform, and adapt the copyrighted work without permission of the copyright owner. Conversely, the newer the work, the narrower the scope of fair use."[143] Liu's proposal explicitly recognizes that value of copyrighted work changes over the duration of its existence, particularly given public interest in using the work.[144] Justin Hughes makes a similar argument based on the market for the copyrighted work.[145] Time, one might contend, is of the essence when considering fair use.

The remainder of this section turns to two procedural mechanisms that operate to control time in intellectual property law: the equitable defense of laches and the judicial authority to create issues sua sponte. Both mechanisms, which are invoked across areas of law, have been long critiqued for their propensities for abuse, particularly insofar as they interfere with procedural due process.[146] Though not all cases involving laches and sua sponte raise content-based social justice concerns, in or beyond trademark law, they frequently highlight ethical questions about how courts think about time and evoke questions about how courts might rethink practices of judicial timekeeping.

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[142] Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 464–65 (2002).
[143] *Id.* at 410.
[144] *Id.* at 411.
[145] *See generally* Justin Hughes, *Fair Use Across Time*, 43 UCLA L. REV. 775 (2003).
[146] *See, e.g.*, Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 248–51 (2002). Milani and Smith contend that courts overuse *sua sponte* decision-making in ways that restrict the parties' due process rights.

B. Laches, Racial Time & Equity

The Fourth Circuit, outlining the definition and purpose of the equitable defense of laches, observed that "equity aids the vigilant, not those who sleep on their rights. Laches may be applied by a court to bar a suit at equity that has been brought so long after the cause of action accrued that the court finds that bringing the action is unreasonable and unjust."[147] Those claiming laches at equity must prove that 1) the plaintiff delayed in exercising their rights and 2) the delay was unreasonable.[148] They must also show that the unreasonable delay resulted in prejudice to the plaintiff, via evidence and/or expectations.[149] Significantly, laches is "a judicially created doctrine, whereas statutes of limitations are legislative enactments."[150] Courts are accordingly reluctant to overrule statutes of limitations because they represent congressional intent.[151] These elements of laches highlight the materiality of time in pursuing claims as well as determining appropriate relief under the circumstances. "Sleeping on rights" suggests a slowness to action, as well as a sense of incompetence. "Vigilance" suggests attentiveness to those who might infringe on rights or commit another harm.

Moreover, implicit in the conception of laches as a defense at equity – indeed in equitable relief generally – is a

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[147] Lyons P'ship, LP v. Morris Costumes, Inc., 243 F.3d 789, 797–98 (4th Cir. 2001) (citing Ivani Contracting Corp. v. City of N.Y., 103 F.3d 257, 259 (2d Cir. 1997)).

[148] *See* Vikas K. Didwania, *The Defense of Laches in Copyright Infringement Claims*, 75 U. CHI. L. REV. 1227, 1230–31 (2008).

[149] *Id.* at 1231.

[150] *Lyons*, 243 F.3d at 798. *Lyons*, which is a copyright case, is at the center of the Circuit split that I discuss below. In it, the Fourth Circuit noted that equitable remedies such as laches only apply to equitable actions, not statutory ones as in the Copyright Act. *Id.* at 797.

[151] *Id.*

constantly evolving notion of justice.[152] Yet justice is a relative concept, that when understood from the "perpetrator perspective,"[153] in Alan Freeman's terms, can quickly become one-sided. As the Supreme Court observed in *City of Sherrill v. Oneida Indian Nation* (2005), "courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands…."[154] Even independent of the racial issues that arise in *Harjo, Blackhorse,* and *Tam*, terms like "antiquated" necessarily evoke questions of racial justice because they require inquiries into how such outdated claims came to be and why they came to be. *Sherrill* is one example of how perpetrator perspectives on time are normalized, here through the categorization of one reading of the temporal as "antiquated." In the same way that rhetorics of postraciality perpetuate the fiction that race is an irrelevant relic of the past,[155] competing narratives about the antiquated and the relevant shape understandings of justice and equity.[156]

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[152] For a discussion of the racial justice issues at stake at equity generally, see, e.g., Kent Roach, *The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies*, 33 ARIZ. L. REV. 859 (1991) (noting that "[t]he potential of equity lies in its ability to legitimize relief that does not necessarily address the harms caused by the wrongdoer and goes beyond restoring the notional status quo ante." *Id.* at 860.).

[153] *See generally* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1987) (noting that "the concept of 'racial discrimination' may be approached from the perspective of either its victim or its perpetrator." *Id.* at 1052).

[154] City of Sherril v. Oneida Indian Nation, 544 U.S. 197, 217 (2005) (citing Badger v. Badger, 69 U.S. 87, 94 (1864)).

[155] For a discussion of how postraciality operates to delegitimate claims of race discrimination, see generally Ralina L. Joseph, *"Tyra Banks Is Fat": Reading (Post-)Racism and (Post-) Feminism in the New Millennium*, 26 CRITICAL STUD. IN MEDIA COMMC'N 237 (2009).

[156] *See, e.g.*, Yara Sa'di-Ibraheem, *Jaffa's Times: Temporalities of Dispossession and the Advent of Natives' Reclaimed Time*, 29 TIME & SOC'Y 340 (2020).

In the context of copyright law, laches has a long and litigated history.[157] In a well-known passage among copyright lawyers, Judge Learned Hand wrote:

> It must be obvious to every one familiar with equitable principles that it is inequitable for the owner of a copyright, with full notice of an intended infringement, to stand inactive while the proposed infringer spends large sums of money in its exploitation, and to intervene only when his speculation has proved a success.[158]

Judge Hand's argument highlights the economic costs of waiting to file suit in a copyright case until the allegedly infringing party has invested a great deal of time and money into the copyrighted work and the perverse incentives that even a purportedly equitable remedy can create. Analogous reasoning applies to patent law, as I discuss below. In *Haas v. Feist* (1916), the case Judge Hand was deciding, the relationship between time and justice is legible in the commentary on the exploitativeness and deceptiveness of waiting to file the copyright infringement claim in question.[159] For nearly 100 years, judges tended to read Judge Hand's opinion as a justification for recognizing laches defenses to copyright infringement.[160] Despite a Circuit split in application of laches to copyright law, the prevailing view through the 2000s was that the defense could succeed in at least some cases.[161] This changed when the Supreme Court stepped in to resolve the Circuit split.

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[157] For a discussion of the contemporary state of copyright laches, see, e.g., Daniel Brainard, *The Remains of Laches in Copyright Infringement Cases: Implications of Petrella v. Metro-Goldwyn-Mayer*, 14 J. MARSHALL REV. INTELL. PROP. L. 432 (2015).

[158] Haas v. Feist, 234 F. 105, 108 (S.D.N.Y. 1916).

[159] *Id.*

[160] *See, e.g.*, Petrella v. Metro-Goldwyn-Mayer, Inc., 695 F.3d 946, (9th Cir. 2012), *aff'd* 572 U.S. 663 (2014).

[161] Didwania, *supra* note 148, at 1228.

In 2014, the Supreme Court decided *Petrella v. MGM,* which resolved the split between the Circuits on the existence and scope of copyright laches.[162] *Petrella* involved an infringement claim against MGM for the film *Raging Bull*.[163] After a series of long delays, Paula Petrella, the daughter of Jake LaMotta's close friend Frank Petrella, filed suit in 2009, alleging that *Raging Bull* infringed on a screenplay that her father had written in 1963.[164] MGM repeatedly denied having infringed on Petrella's copyright.[165] The case centered on the question of whether MGM could defeat the infringement claim via a laches defense because Petrella had waited 18 years after renewing the copyright in her father's screenplay to file suit.[166]

The Ninth Circuit and the district court found for MGM on the laches defense.[167] In concurrence, despite finding for MGM, Judge Fletcher observed that "[l]aches in copyright cases is…entirely a judicial creation. And it is a creation that is in tension with Congress' intent."[168] He also observed that Judge Hand's opinion is inapposite, despite its invocation by courts who recognize copyright laches.[169] Judge Fletcher maintains that Judge Hand was making an observation about estoppel and not laches.[170] The Supreme Court agreed in part, deciding that "[w]hile laches cannot be invoked to preclude adjudication of a claim for damages brought within the Act's three-year window, in extraordinary circumstances, laches may, at the very outset

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[162] Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 673–74 (2014).
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.* at 677.
[167] *Id.*
[168] *Petrella*, 695 F.3d at 958 (Fletcher, J., concurring).
[169] *Id.*
[170] *Id.* at 959.

of the litigation, curtail the relief equitably awarded."[171] Petrella's suit, filed long after *Raging Bull* was released and copyright in her father's screenplay was renewed, was nonetheless viable as to copyright infringement that occurred after its filing date in 2009.[172] The Court noted MGM's claim, i.e. the equity issue presented by Petrella's failure to make a copyright infringement claim prior to the studio's investment in the film.[173] As *Petrella* highlights, not only does copyright laches raise questions of time, it raises questions of *what* time and *whose* time.

Similar issues arise in the context of patent law.[174] The Supreme Court recently took up the question of patent laches in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC, et al.*, analogizing itself to copyright laches contexts.[175] "[L]aches," the Court reiterated, based on its decision in *Petrella*, 572 U.S. 663, "cannot be invoked to bar legal relief in the face of a statute of limitations enacted by Congress. The question … is whether *Petrella*'s reasoning applies to a similar provision of the Patent Act, 35 U.S.C. §286, which includes a 6-year statute of limitations. We hold that it does."[176] This most recent ruling on laches in patent law built on *Petrella* to assert similar statutory and equitable boundaries.[177] In both cases, concerns about

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[171] *Petrella*, 572 U.S. at 665.

[172] *Id.* at 677.

[173] *Id.* at 676.

[174] *See, e.g.*, In re Bogese II, 303 F.3d 1362, 1367 (Fed. Cir. 2002); Reiffin v. Microsoft Corp., 270 F. Supp. 2d 1132, 1154 (N.D. Cal. 2003). The defense of patent laches was first established in Kendall v. Winsor, 62 U.S. 322 (1858). The statute of limitations in the Patent Act of 1952 limited the use of patent laches as a defense.

[175] SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prod., LLC, 137 S. Ct. 954 (2017).

[176] *Id.* at 959 (internal quotations and citation omitted).

[177] Note that some argue that although the Supreme Court has declined to recognize laches defenses in patent cases that equitable estoppel still applies. *See generally* R. David Donoghue et al., *Patent Laches is Dead, Long Live Equitable Estoppel,* FINANCIER WORLDWIDE (Aug., 2017),

separation of powers, raised by Congress' legislative pronouncements about statutes of limitations, heavily influenced the Supreme Court's decisions.[178] Prior to the decision in *SCA Hygiene Products* the Federal Circuit used a "totality of the circumstances"[179] approach to evaluate assertions of laches defenses that is notable because of its flexibility in allowing consideration for the context of the decision. Race could be included in such an approach.

Instead of diving into the many threads of laches in copyright law and patent law in greater detail, I want to flag both as evidence of the importance of time in the laches defense, i.e. in the form of unreasonable delay, and its close relationship to the notion of justice, i.e. in the form of undue prejudice. *Petrella* raises the question of whether it is equitable to file a copyright infringement claim *after* the purportedly infringing party has invested in the copyrighted work; the temporal elements of justice in that context are clear.[180] The Ninth Circuit noted this issue in *Danjaq LLC v. Sony Corp.*, wherein the copyright holder appeared to have waited until the alleged infringer had invested approximately one billion dollars in the copyrighted work, i.e. the James Bond franchise, producing economic prejudice.[181] The Supreme Court's blanket ruling on laches in the context of statutory limitations only considers some equitable considerations around time while erasing others. I would

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https://www.financierworldwide.com/patent-laches-is-dead-long-live-equitable-estoppel#.YEWQVJ1KhQA [https://perma.cc/PB7P-L6UD]**.** Judge Hand's opinion, as well as Judge Fletcher's commentary, suggests this is true in the context of copyright laches as well. Estoppel is not, however, a 1:1 substitute for laches because of its distinct requirements.

[178] For a discussion of separation of powers, see Didwania, *supra* note 148.

[179] Symbol Tech. Inc. v. Lemelson Med., Educ. & Rsch. Found., LP., 422 F.3d 1378, 1385–86 (Fed. Cir. 2005).

[180] *See, e.g.*, Jacobsen v. Deseret Book Co., 287 F.3d 936, 949 (10th Cir. 2002).

[181] Danjaq LLC v. Sony Corp., 236 F.3d 942, 956 (9th Cir. 2001).

contend, for instance, that adherence to statutory guidelines above equitable concerns invests in Euro-American understandings of time, specifically those that value economic investments in intellectual property rights more than the integrity of creators. Such investments in even race neutral decision-making can reify whiteness and the property rights associated with it.[182] Equitable remedies, though they comport with congressional intent leave space for understanding social justice remedies. Yet, as I demonstrate through *Harjo*, that distinction can cut both ways. Equitable remedies can also become tools for disenfranchising people who lack structural power.

C. Sua sponte, Racial Time & Judicial Decision-making

More than one legal theorist has referred to the power to create issues sua sponte as the "Gorilla Rule" that applies as the exception to the General Rule.[183] Many lawyers and scholars agree that this rule marks a considerable deviation from the adversarial party system, which is directed by the choice and agency of the parties, that usually governs in U.S. courts. However, they also seem to differ tremendously in their sense about when and how sua sponte decision-making is reasonable and acceptable. Some have described sua sponte decision-making as "playing God," in that it can obstruct procedural due process.[184] These themes once again

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[182] *See, e.g.*, Bell, *supra* note 108.

[183] *See* Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1023 (1987) ("A well known riddle asks: 'Where does an eight-hundred pound gorilla sleep? ' The response is: 'Anywhere it wants.' The judicial application of this rule would be: 'When will an appellate court consider a new issue?' The response is: 'Any time it wants.'").

[184] *See, e.g.*, Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245 (2001).

support the notion that procedural matters can be manipulative, even operating as a form of procedural gaslighting.[185] Yet despite these criticisms, courts create issues sua sponte with great frequency, especially in appellate courts, including the Supreme Court:

> Supreme Court Rule 14.1(a) unequivocally states that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." The Supreme Court only ignores this rule "in the most exceptional cases, where reasons of urgency or economy suggest the need to address the unpresented question in the case under consideration." When the Supreme Court deems it necessary to disregard this rule, it acts "sua sponte"—or "on its own motion."[186]

Evident in this discussion of sua sponte decision-making is a temporal argument: sua sponte questions are pressing ones, raised in the interest of efficiency. Sua sponte decision-making is intended to be an extreme measure, not one used in the daily course of affairs. Yet, courts appear to use this power far more frequently than such a standard

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[185] For a recent discussion of procedural fetishism in the context of administrative law, see, e.g., Nicholas Bagley, *The Procedure Fetish*, 18 MICH. L. REV. 345 (2019) (seeking to "call into question the administrative lawyer's instinctive faith in procedure, to reorient discussion to the trade-offs at the heart of any system designed to structure government action, and to soften resistance to the relaxation of unduly burdensome procedural rules." *Id.* at 349.).

[186] Clayton P. Jackson, *Sua Sponte Conversions of Constitutional Challenges – Understanding Citizen's United's Enigmatic Procedural Quirk* (July 16, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3653316 [https://perma.cc/48A4-R436]. For similar arguments, see also Ronald J. Offenkrantz & Aaron S. Lichter, *Sua Sponte Actions in the Appellate Courts: The* "*Gorilla Rule*" *Revisited*, 17 J. APP. PRAC. & PROCESS 113, 116 (2016); Greenlaw v. United States, 554 U.S. 237, 243 (2008) (standing for the proposition that courts should generally occupy "the role of neutral arbiter.").

would suggest, without concern for the creation of new issues that the parties did not raise.[187] The decision by courts to use their sua sponte authority is often deeply problematic, in no small part because it originates from the racial vantage points of individual judges and interferes with due process.[188] Broad use of sua sponte authority veers into the realm of judicial overreach; examples of egregious exercises of judicial power are abundant. While the definition of sua sponte as the practice of raising issues on the court's motion is straightforward, I want to explore the origins and implications of this judicial practice.

Like the equitable defense of laches, the power to create issues sua sponte originates in equity.[189] In the English legal system, the appellate court at equity had the authority to review any issue, while appellate courts at common law only had the authority to review issues decided at the trial court level and reflected in the record.[190] The latter was a result of the adversary process that dominates in U.S. law.[191] Because appellate courts at common law were not permitted to raise issues sua sponte, some have argued "sua sponte actions . . . are incongruous with current principles of appellate review."[192]

Like the equitable defense of laches, the power to create issues sua sponte has considerable social justice consequences. One case in which sua sponte decision-making had a tremendous impact was *Citizens United v. FEC* (2010).[193] The issues that were raised sua sponte in that

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[187] Greenlaw, 554 U.S. at 243 (standing for the proposition that courts should generally occupy "the role of neutral arbiter"); *see generally* Offenkrantz & Lichter, *supra* note 185.
[188] Milani & Smith, *supra* note 146, at 252.
[189] Offenkrantz & Lichter, *supra* note 186, at 117–18.
[190] *Id.*
[191] *Id.*
[192] *Id.* at 118.
[193] Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

case changed its entire scope, allowing for extremely broad, pro-corporation readings of free speech and political contributions.[194] I want to highlight this case because it is one that American Studies scholar Manu Karuka shows is deeply intertwined with histories of white supremacy in the United States.[195] *Citizens United* was made possible by a long history of building and reinforcing corporate power, ending in the conclusions that corporations are people for the purposes of political speech. Karuka argues in a chapter on "shareholder whiteness" that the corporate form operated as a mechanism through which to mobilize financial capital.[196] He further demonstrates that finance capital was a status property afforded only to those who enjoyed the privileges of whiteness.[197] Karuka goes on to build a genealogy of legal cases, from *Fletcher v. Peck* (1810) to *Citizens United*, that incentivize "citizen colonialism"[198] through corporate personhood. In this reading, *Citizens United* was the result of hundreds of years of investment in transforming settler colonists into agents of white supremacy, through the embrace of finance-based capitalism.

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[194] *See, e.g.*, Jackson, *supra* note 186.

[195] *See* MANU KARUKA, EMPIRE'S TRACKS: INDIGENOUS NATIONS, CHINESE WORKERS, AND THE TRANSCONTINENTAL RAILROAD 18 (2019). Through his nuanced critical race studies approach to examining the cultural and legal histories of Westward railroad expansion, Karuka shows that the U.S. has embraced overly simplistic narratives of sovereignty and capitalism that presume the inevitability of settler colonialism. Myths about the U.S. sovereignty and the inexorability of Manifest Destiny flatten time by ignoring the fits and starts of Westward Expansion, as well as the actors that caused them. The West was won not through the divine right of American Protestant culture but the piecemeal construction of a system of corporate shareholder capitalism, invested in whiteness, and hard earned victories in a long war against the communal intimacies of Native Nations and Chinese Americans. *Id.*

[196] *Id.* at 150.

[197] *Id.*

[198] *See id.* at 151.

As a result of shareholder whiteness and citizen colonialism, whiteness and shareholding came to be intertwined, with both operating as vehicles for racist labor exploitation and resource hoarding. The free speech element of this process, as later sections will show, was another step toward a deregulated First Amendment, through which people of color were made responsible for addressing the racism directed against them. Like the equitable defense of laches then, the judicial practice of raising issues sua sponte implicates time and social justice, including issues of race and coloniality. The next section turns to CRTIP to interrogate how both procedural practices operate in trademark law as vehicles for normalizing racism and colonialism, particularly in these cases highlighted here.

III. THE RACIAL CHRONOPOLITICS OF (TRADEMARK) LAW

Dr. Martin Luther King Jr.'s dismissal of "well timed"[199] social protest in his 1963 "Letter from a Birmingham Jail" implicitly critiques the Supreme Court's 1955 directive to states to carry out integration of schools with "all deliberate speed."[200] As Lisa Corrigan observes, King's language is a chronopolitical response to *Brown II* (1955) that demonstrates how time seems to go hand-in-hand with racial justice, for individuals and institutions.[201] Matthew Houdek and Kendall Phillips make a similar point, writing: "[T]his sense of *now* seems particularly common as a means of motivating action, as the current moment is

[199] Martin Luther King Jr., *Letter from a Birmingham Jail* (Apr. 16, 1963), https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html [https://perma.cc/6P5S-85X9].
[200] Brown v. Bd. of Educ. of Topeka II, 349 U.S. 294, 301 (1955).
[201] CORRIGAN, *supra* note 24, at 23–45.

depicted as being *the* moment of action."[202] When oppression is consistently unbearable, the time to act is now but also *always*. The temporality of "patience," then, often unfolds differently for those who are white and those who are not, as a result of differing racial time maps.[203] That which is *fast* for white people, is *slow* for Black People.

"Letter from a Birmingham Jail" is, in this respect, an attempt by King to reconcile what Mills might describe as clashing racial time maps in order to produce racial justice. Over the past four years, a subset of Americans watched in horror as the "whitelash"[204] that followed the postracial era that purportedly emerged *after* the election of President Barack Obama unfolded as the familiar authoritarian undoing of democracy. Comparisons to the past seemed ubiquitous as historians noted the similarities between 1968 and 2018.[205] Events repeated themselves, as the United States demonstrated itself to be far less post-racial than most had imagined and far less – or perhaps just as – democratic than its forefathers intended. Yet for some, the realities of Trump's America affirmed the knowledge that racial violence is embedded within U.S. democracy while for others it produced a need to proclaim "this is not my America,"[206] as though it could be otherwise. In other

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[202] Matthew Houdek & Kendall R. Phillips, *Rhetoric and the Temporal Turn: Race, Gender, Temporalities*, 43 WOMEN'S STUD. IN COMMC'N 369, 370 (2020) (emphasis added).

[203] Mills, *supra* note 19, at 304.

[204] *See, e.g.*, CAMERON D. LIPPARD, J. SCOTT CARTER & DAVID G. EMBRICK, PROTECTING WHITENESS: WHITELASH AND THE REJECTION OF RACIAL EQUALITY (2020).

[205] Kevin K. Gaines, *The End of the Second Reconstruction*, MOD. AM. HIST. 113, 118 (2018). Gaines argues that the Obama Era marked the need for a Second Reconstruction era. However, he also notes that the promise of civil rights was never realized due to intense racial backlash.

[206] For an Afrofuturist take on this sentiment, see DERRICK BELL, *The Space Traders*, *in* FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 158, 159–160 (1992). In Bell's now classic science fiction tale, Ronald Reaganeque aliens offer to solve America's

words, some racial time maps suggested that there was a period of time in which America was an ideal nation, free from racism, while other racial time maps asserted the opposite.[207]

King's story is a familiar one in America, taught in every school in the country. Yet, it is only one example of how time and dispossession are linked, with opposing groups recognizing that to control the temporal narratives of the moment is often to control the property relations of the moment. Renisa Mawani tells a similar tale of legal temporality with respect to the ship the *Komagata Maru.*[208] Building on the work of Lisa Lowe,[209] she contends that the dominant historical narrative in which British colonialism temporally *followed* Indigenous inhabitance oversimplifies the dialectic relationship between Indigenous Peoples, British Indians, and settler colonists.[210] Their relationships were mutually constitutive, not mutually exclusive. The racial time maps that Mawani reveals problematize the purportedly clear and decisive lines between the time of indigeneity and the time of colonialism. By showing that British colonists articulated their identities via complex dialectic with the Indigenous Peoples they encountered, Mawani demonstrates that legal sovereignty was constituted

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environment and economic problems in exchange for its Black people. Bell's point throughout the story and the book is that racism in the U.S. is permanent.

[207] *See* Mills, *supra* note 19.

[208] RENISA MAWANI, ACROSS OCEANS OF LAW: THE KOMAGATA MARU AND JURISDICTION IN THE TIME OF EMPIRE (2018).

[209] Lisa Lowe's book *The Intimacies of Four Continents* explores the interconnections of colonial trade and settler colonialism across multiple continents. This exploration of the *linkages* of coloniality fundamentally pushes back against Euro-American racial time maps in which coloniality is a complete and inevitable process. For Lowe, Karuka, and Mawani, quite the opposite is the case. *See generally* LISA LOWE, THE INTIMACIES OF FOUR CONTINENTS (2015).

[210] Renisa Mawani, *Specters of Indigeneity in British-Indian Migration, 1914*, 46 L. & SOC'Y REV. 369, 371–72 (2012).

through Indigenous Peoples, not *before* them.[211] As in Karuka's example, the duration of Indigenous sovereignty is longer than British colonists wish to admit, casting doubt on the swiftness and completeness of British sovereignty.[212] In this respect, "temporally before"[213] is a fiction of time's duration, through which law naturalizes and legitimizes its own function. The marking of the beginning of a period of colonial time is a claim to sovereignty, a centering of Empire's law through fictive temporality.

The schema for studying time that I want to develop here is that of racial chronopolitics, in the context of intellectual property law, through the equitable defense of laches and the judicial power to create issues sua sponte. Chronopolitics as a concept speaks generally to the relationships among culture, politics, and time, across multiple identities and axes.[214] This broad schema for understanding time highlights temporality's many manifestations within law, while attending to how and where time emerges as a mediator of race in legal contexts. Cheryl I. Harris's canonical "*Whiteness as Property*" lays out a framework for understanding how white supremacy continues to exist within law, even as the nation professes "colorblindness."[215] She lays out a structural and temporal

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[211] *Id.*

[212] *Id.* (explaining: "My objective is to question and unsettle the presumed linearity of colonial time implicit in the configuration of indigenous and nonindigenous subjectivities and in colonial legal historiographies that depict encounters among [I]ndigenous [P]eoples, Europeans, and non-European migrants in successive spatiotemporal terms." *Id.* at 373.).

[213] Elizabeth A. Povinelli, *The Governance of the Prior*, 13 INTERVENTIONS 13, 19 (2011).

[214] CORRIGAN, *supra* note 24, at xiv.

[215] *See generally* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (Harris writes that: "Whiteness as property has taken on more subtle forms, but retains its core characteristic – the legal legitimation of expectations of power and control that enshrine the status

argument, contending that property rights "are contingent on, intertwined with, and conflated with race."[216] She notes that one of the goals of her essay is to "examine the emergence of whiteness as property and trace the evolution of whiteness from color to race to status to property as a progression historically rooted in white supremacy and economic hegemony over Black and Native American [P]eoples."[217] Judicial interventions into temporality, like judicial interventions into structures of property, have frequently reinforced the power of whiteness, through the affirmation of Euro-American racial time maps. The remainder of this section explores racial chronopolitics as a tool for understanding temporality in law, first generally then specifically, in trademark law.

A. Racial Time Maps in Legal Practice

Ian Haney López's groundbreaking *White by Law: The Legal Construction of Race*. López, explores the role of what he names the Prerequisite Cases, i.e. the judicial decisions in which courts determined the racial scope of the citizenship rights afforded by the Reconstruction amendments.[218] López also uses the example of the Mashpee Indians, who filed suit in 1976 to recover tribal lands from the U.S., in order to show how racial time maps articulated from Euro-American positionalities necessarily exclude and disenfranchise Indigenous Peoples.[219] In *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (1978), the district court decided against the Mashpee

quo as a neutral baseline, while masking the maintenance of white privilege and domination." *Id.* at 1715.).

[216] *Id.* at 1714.

[217] *Id.*

[218] *See generally* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1997).

[219] *Id.* at 127–28. López does not use the phrase "racial time maps" but the sentiments about time are the same. *Id.*

Indians, finding that they did not constitute a "tribe" under the Indian Non-Intercourse Acts.[220] López writes of the case's temporalities explicitly, speaking of moments and durations around which colonialism operates:

> Designed to prevent private transactions with Native American tribes, this statute, like the naturalization laws, was originally enacted in 1790. The district court ruled that in order to proceed, the Mashpee first had to prove they were a "tribe" within the meaning of the word as defined by the Supreme Court in 1901, to wit "a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." The Mashpee, seeking in 1976 to use a 1790 law, were required to prove they existed in terms of a 1901 definition of a Native American tribe. This definition, and indeed the Non-Intercourse Act itself, contained antiquated, racist, and restrictive notions of tribal identity, not least in the establishment of racial purity as a requisite element of tribal existence and in the spirit of paternalism and domination animating the statute.[221]

The district court uses a temporal sleight of hand to project whiteness onto the Mashpee Indians in an attempt to legally bind them to a vision of citizenship—and citizen colonialist, to call back to Karuka—that will certainly dispossess them of their land. Settler colonial legislation and "precedent" become tools of extending the duration of a past long passed

[220] Congress passed the Indian Non-Intercourse Acts from 1790–1834 in order to define and manage land conveyances to tribes. *See* 25 U.S.C. § 177 (1834). For a critique of blood quantums and other colonial measures of "Indianness," see generally Desi Rodriguez-Lonebear, *The Blood Line: Racialized Boundary Making and Citizenship among Native Nations*, SOCIO. OF RACE & ETHNICITY (2021).
[221] LÓPEZ, *supra* note 218, at 89.

into the present, in a manner that Harris might critique as proof of the shifting bounds of whiteness as temporality.[222]

López's example demonstrates how racial time maps function, through construction and deconstruction of significant points in time and durations of time. In the case of the Mashpee Indians, duration of precedent, specifically the reach of the 1901 definition of "tribe," becomes a vital element in the deprivation of the very right to the identity required to claim Indigenous lands.[223] López's method is important because it alerts us to 1) legal temporalities related to precedent but also 2) human temporalities related to people. *Stare decisis*, which is ultimately controlled by judges, serves as a release valve for issues of race and coloniality. Put differently, when individual judges choose to intervene in issues of time, they have the power to structurally endorse particular visions of race. Their decisions may also be informed by problematic and antiquated representational politics that are then translated into structural realities.[224] These two propositions become relevant in the two trademark cases that I examine in detail, because they highlight the personal judicial agency involved in rooting out racism and colonialism.

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[222] *See generally* Harris, *supra* note 215.

[223] LÓPEZ, *supra* note 218, at 127–28.

[224] One such problematic representational politic might be the Myth of the Vanishing Indian, i.e. the belief that Indigenous Peoples were completely eliminated by settler colonialism. *See generally* Brewton Berry, *The Myth of the Vanishing Indian*, 21 PHYLON 51–57 (1960). Maillard speaks of the Indian Grandmother Complex as a means of both claiming Indigenous ancestry and distancing from the purported savagery of Indianness. Maillard, *supra* note 33, at 380–-81. Both of these tropes have a temporal quality to them, that manages and constricts the agency of Indigenous Peoples. As individuals steeped in racist and colonialist cultures, judges are as prone as anyone to make errors of judgment about people of color, perhaps even more so given their relationships to whiteness; see also Philip J. Deloria's canonical work on Native representation and "playing Indian" in the U.S. in PHILIP JOSEPH DELORIA, PLAYING INDIAN (2007).

Further, López's argument is another example of how reading law from a Critical Race Theory perspective can reveal different racial time maps, with distinct and articulable social justice concerns. Without a doubt the Mashpee Indians, operating within their own racial time maps, considered themselves to be a tribe. But the United States Federal Government, who imposed a Euro-American racial time map onto them, did not. Whether through constancy or interruption, white supremacy functions via the presentation of Euro-American race time-maps as normal and natural, and all other time maps as, in Kathryn McNeilly's terms, illegibly "untimely."[225] Natalia Molina, a historian of citizenship, argues that reading race across time is an important exercise because it demonstrates how fragments of racist discourse can be invoked and redeployed in different historical moments and across racial groups.[226] McNeilly contends that "[u]ntimeliness thought in this way requires abandoning commitment to linearity, progression and predictability."[227] The next section takes López's reading as a model for reading the temporal politics of the subjects of this Article, *Harjo, Blackhorse,* and *Tam.*

B. Mapping Racial Time in Harjo, Blackhorse, and Tam

I want to return to the question that I posed early in this Article with respect to the decisions by the Federal Circuit and Supreme Court in *Tam*: "why now?" That question, of course, focuses attention on why the courts in

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[225] *See generally* Kathryn McNeilly, *Are Rights Out of Time? International Human Rights Law, Temporality, and Radical Social Change*, 28 SOC. & LEGAL STUD. 817, 818 (2018).

[226] *See generally* NATALIA MOLINA, HOW RACE IS MADE IN AMERICA: IMMIGRATION, CITIZENSHIP, AND THE HISTORICAL POWER OF RACIAL SCRIPTS (1st ed. 2014).

[227] McNeilly, *supra* note 225, at 818.

question chose this moment to overturn *In re McGinley* in the service of finding Section 2(a) of the Lanham Act to be unconstitutional. The query is, at root, a chronopolitical one, that also implicates race. As Rakoff notes, temporal questions are unavoidable.[228] This section asks where they exist and what to do with them, specifically in the contexts of *Harjo*, *Blackhorse*, and *Tam.* Mills' concept of racial time maps is one entrée into reading temporality in these cases.[229] I contend that the D.C. Circuit in *Harjo* defaulted to Euro-American settler colonial racial time maps in making their decisions which, in turn, produced an incomplete assessment of the issues at stake in evaluating the laches defense as well as an imposition of judicial authority on trademark law. *Harjo* hinged on the age of the plaintiffs seeking to invalidate the R******* trademarks.[230]

Yet, the *materiality* of the age of majority was an equitable question that the judges in *Harjo* had the ability to set in the context of histories of settler colonialism. To put this differently, the lawyers and judges involved in *Harjo* could have explored alternate approaches to understanding and interpreting the age of majority as a justification for the equitable defense of laches, situated in racial justice and colonial dispossession.[231] Addie C. Rolnick notes that the tendency of courts to treat Indian law is "political rather than racial in nature."[232] The decision in *Harjo* continued that practice by treating the failure of the plaintiffs to file in a

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[228] RAKOFF, *supra* note 16, at 3.

[229] Mills, *supra* note 19, at 299–300.

[230] *See* Pro-Football, Inc. v. Harjo, 284 F. Supp. 2d. 96, 112, 143–44 (D.D.C. 2003).

[231] I do not want to collapse racial justice and decolonial praxis here, as both are relevant to the discussion in this Article.

[232] Rolnick, *supra* note 33, at 963 (citing Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974)). For a discussion of "legitimized racism" against Native Americans, including use of the term r*******, see Dwanna L. Robertson, *Invisibility in the Color-Blind Era: Examining Legitimized Racism against Indigenous Peoples*, 39 AM. INDIAN Q. 113, 114 (2015).

matter that was "timely" as an economic calculation instead of a racial calculation, underpinned by centuries of settler colonial disenfranchisement. Investment in and increasing revenues from the R******* trademarks took center stage in the appellate review of the case.[233] Yet, the trademarks themselves were built on the foundation of settler colonial land theft set forth in *Johnson v. M'Intosh* (1823) and were maintained, in no small part, through the circulation of racist images.

In *Johnson*, the Supreme Court began with a narrative of British and American sovereignty through which property law was articulated.[234] Justice Marshall used this narrative, with its temporal components, as a colonial logic through which to find that the Piankashaw Indians possessed only a right of occupancy in their land, not a right of conveyance.[235] Through its definition of occupancy, *Johnson* rhetorically and materially imposed a Euro-American racial time map on the U.S. in the service of settler colonialism. *Harjo* replicated that Euro-American racial time map by taking procedural questions about the age of majority as unrelated to race and (de)colonization and, relatedly, taking the racial underpinnings of equitable defenses as "colorblind."

Accepting writ large that property and trademarks ought to be governed by the "fictive temporalities"[236] of colonial practice results in a wholly Euro-American racial time map, through which the lived experiences of Indigenous Peoples are invalidated and erased. This is, to recall Chon's term, the procedural gaslighting that occurs through the equitable defense of laches.[237] Consider, in

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[233] *See Harjo*, 284 F. Supp. 2d. at 112.
[234] Johnson v. M'Intosh, 21 U.S. 543, 573–74 (1823).
[235] *Id.* at 587–89 (holding that "discovery gave an exclusive right to extinguish the Indian title of occupancy").
[236] Maillard, *supra* note 33, at 357.
[237] Chon, *supra* note 21.

contrast to the D.C. Circuit's finding in *Harjo*, an exegesis in which the judges acknowledged the embeddedness of trademark law in larger histories of settler colonialism. An opinion written by aforementioned judges might have acknowledged the false characterization of Native mascots as respectful, even as they are rooted in settler colonial temporal narratives of nation,[238] the application of the age of majority as unjust based on intersectional Indigenous disempowerment,[239] or the immense power and whiteness of professional sports teams, particularly when pitted against Native Americans, as a means of accepting the *Harjo* plaintiff's argument.[240] The racial time map upon which the D.C. Circuit relied took all of the above for granted, in a move that reinforced settler colonialism. As Walter Mignolo writes: "[t]he problem with coloniality of knowledge, and of existing within its realm (knowing, sensing and believing), is that it makes us believe in the ontology of what the North Atlantic's 'universal fictions' have convinced us to believe."[241] The "universal fictions" in *Harjo* are temporal

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[238] Victoria F. Phillips, *Beyond Trademark: The Washington Redskins Case and the Search for Dignity*, 92 CHI.-KENT L. REV. 1061, 1067 (2017) (writing that: "Most of the appropriated Native imagery was based on a false historical narrative and highly exaggerated caricatures. Many of the portrayals included fictitious, savage, and violent imagery.").

[239] *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 UNIV. OF CHI. LEGAL F. 139, 166 (1989), available at http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8 [https://perma.cc/6683-CKCT] (describing how multiple interlocking forms of oppression can result in unique forms of oppression; here, the fact that Native Americans are deracialized, dispossessed, and erased may form the basis of a persuasive intersectional claim).

[240] Riley et al., *supra* note 54.

[241] Walter D. Mignolo, *Coloniality Is Far from Over, and So Must Be Decoloniality*, 43 AFTERALL: A J. OF ART, CONTEXT & ENQUIRY 38, 39 (2017).

and positional. They sanitize and weaponize time, through judgments about harm to each side, and precedent, by overturning *McGinley*, in a manner that, intentionally or inadvertently, reinforced whiteness as (intellectual) property and broke with stare decisis.

The Federal Circuit and the Supreme Court engage in similar temporal bait and switches in *Tam.* I would be remiss not to parse the harms here: while Tam identified a valid harm that required redress, the Court's decision to approach it through deregulating free speech was deeply problematic. The most compelling evidence that they defaulted to a Euro-American racial time map in making their decisions is the timing of the reversal. Judge Laurie, dissenting in the Federal Circuit, expressed his skepticism at the refusal of the Court to follow precedent, even after nearly seven decades.[242] While stare decisis can certainly operate as a tool of injustice, in this case it does not. It is a mechanism through which addressing racism and colonialism is assigned to neoliberal markets.[243] The break with precedent, made all the more notable by the amount of time that had passed since *McGinley*, signaled alignment with racial capitalism. Breaking with precedent is often a mark of progress, even judicial activism. But here, I contend, it is a signifier of judicial commitment to an underlying history of trademark law mired in the circulation of derogatory and violent images, through which people of color were rendered inferior to white people.

Important here is the observation that markets do not only produce goods, they produce social relations, i.e. the understandings of economy and relationality through which

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[242] In re Tam, 808 F.3d 1321, 1374 (Fed. Cir. 2015) (Lourie, J., dissenting).

[243] For Simon Tam's vision of the litigation in *Tam* and its implications, see generally TAM, SLANTED, *supra* note 83 ; for a discussion of the divisiveness of reclaiming the term "slants," see generally Tam, *The Slants to NAPABA*, *supra* note 113.

domination is justified.[244] Angela P. Harris writes that "[W.E.B.] Du Bois saw white supremacy not only as a way to sustain economic exploitation, but also as a psychological and cultural technology that discredits the image of *homo economicus* as motivated purely by rational self-interest."[245] Karuka, of course, provides additional evidence for this point by demonstrating how citizen colonialism was enacted through the expansion of shareholder whiteness, a particularity of the capitalist corporation.[246] The temporal break in *Tam* is thus a conservative one, through which settler colonial time is functionally reset, in a move that frustrates the discursive and material project of decolonization.[247] Again, by differently orienting to temporality, the lawyers and judges involved in *Tam*, which set the stage for *Blackhorse* to be overturned, could have centered anti-racism and anti-coloniality.

Like the precedent that López focuses on as disenfranchising Native Americans, *Harjo*, *Blackhorse*, and *Tam* default to Euro-American racial time maps while

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[244] Angela P. Harris, *Where is Race in Law and Political Economy?* LPE PROJECT (Nov. 30 2017), https://lpeproject.org/blog/where-is-race-in-law-and-political-economy/ [https://perma.cc/P9WE-7J5X]. When I speak of racial capitalism, I am referring to the radical Black tradition of that term that originates with Cedric Robinson. For an accessible discussion of racial capitalism and its meaning, see, e.g., Robin D.G. Kelley, *What Did Cedric Robinson Mean by Racial Capitalism?* BOSTON REV. (Jan. 12, 2017), http://bostonreview.net/race/robin-d-g-kelley-what-did-cedric-robinson-mean-racial-capitalism [https://perma.cc/238Q-FXY2].

[245] Harris, *supra* note 244.

[246] *See generally* KARUKA, *supra* note 195.

[247] For a discussion of decolonization and its practices, see, e.g., Eve Tuck & K. Wayne Yang, *Decolonization is not a Metaphor*, 1 DECOLONIZATION: INDIGENEITY, EDUC., & SOC'Y 1 (2012). I am mindful here of the many genealogies and strands of decoloniality, even among Indigenous Peoples. Decolonization is a local, as well as global, practice that must center and support the views of actual Indigenous Peoples, not direct saviorism at them.

invoking facially neutral legal arguments. The equitable defense of laches cannot produce justice if it cannot respect the equity interests of all litigants. Similarly, the judicial practice of raising issues sua sponte requires good racial judgment on the part of judges, as well as the lawyers responding to them. These procedures not only frustrate the social justice goals of groups that have been historically disenfranchised, but they also do real and grievous harm to those parties who do cannot seek redress for harm. A just approach to racial chronopolitics, then, is an accountability issue, through which settler colonialism can be addressed or ignored. In the final subsection of the Article, I consider how a decolonial approach to time might look in the context of law, with particular attention to embracing the "untimely."

C. Decolonizing Trademark Law's Temporalities

Crafting emancipatory racial chronopolitics is a far from straightforward task. Indeed, Mills ends his meditation on racial time with a pointed but inchoate call for "an oppositional racial chronopolitics."[248] Just action in the face of this call requires "a recognition of the racial structuring of the modern world and the concomitant need for racial justice."[249] Mills' referent in making this call is Euro-American political discourse, which centers a linear progress narrative that stretches from political philosophers including Immanuel Kant, John Locke, David Hume, and Thomas Jefferson to the present day, in which their conceptions of the world seem normal and natural.[250] Yet, as I suggested in the previous section, looking critically at the racialized effects of particular conceptions of "equity" creates opportunities for discussing racial equity. So too does

[248] Mills, *supra* note 19, at 312.
[249] *Id.*
[250] *See generally* CHARLES W. MILLS, THE RACIAL CONTRACT (2011).

learning to identify and undo Euro-American racial time maps, through legal argument and judicial practice. Defaulting to Euro-American racial time maps that, definitionally speaking, delegitimize the lived experiences and legal claims of Native Americans and Asian Americans will necessarily frustrate social justice goals.

López's understanding of *Town of Mashpee* underscores this, by showing how the collision of settler colonial property law and Euro-American racial time maps coalesce to produce an exclusionary definition of tribe that disenfranchises Indigenous Peoples.[251] His implicit response to this problem, of course, is to center self-determination as a principle of identity and property. Changing both understandings of time and understandings of identity is necessary to build Federal Indian Law that is capable of honoring the histories and rights of Indigenous Peoples, as well as Asian Americans. Angela R. Riley and Kristen A. Carpenter discuss the process through which settler colonial time unfolded and Indigenous Peoples came to be "owned" by whites, in a way that hastened dispossession and genocide:

> By the time of U.S. independence, the Native population had been reduced by as much as 95% since the point of contact due to war, genocide, disease, and various other factors. With such devastating reductions in the number of Native people, settlers continued to remove remaining Indians from desired territories and began to see them as symbolic of a free, pagan, and disappearing race whose land, material culture, and identity could be taken and then consumed and assumed by whites. As Deloria has documented, by the late 1700s fraternal societies had formed in which members dressed up as Indians—including face paint and buckskin—while carrying bows, arrows, and pipes. Entranced by the "unknowable knowledge" possessed by the "enigmatic Indian,"

[251] LÓPEZ, *supra* note 218, at 127–28.

> inductees of organizations like the "Society of Red Men" and the "Improved Order of Red Men" underwent initiation ceremonies and were given Indian names to mark "the passage from paleface to Red Man." These organizations used Indian hierarchies—sachems, chiefs, councils, squaw sachems, and warriors—all modeled on their perception of secret "Indian mysteries." According to Deloria, these organizations served to instantiate the Americanness of elite individuals in the new Republic, linked together through secret, fraternal organizations promoting multilayered identities of patriotism, political engagement, and service.[252]

Implicit in the story they tell is a racial time map that is vastly different than that imposed upon Indigenous Peoples in *Harjo* and *Blackhorse*. Deloria's grandfather, a plaintiff in *Harjo*, highlights the close relationships between representations of Indians that entrench the Myth of the Vanishing Indian, performance of Indian customs and rituals, and settler colonial genocide. Time is marked by moments of exploitation, not of financial gain. The notions of time that Euro-American corporations, such as the Washington R******* and its owners, adopt are intertwined with histories of colonial expansion.[253] They perpetuate understandings of financial loss that begin by devaluing the lives of people of color, particularly Native Americans.

McNeilly, of course, treats the entrée of other than the Euro-American into legal racial time maps as a break with the timely.[254] The untimely, in this sense, marks a point of temporal rupture, through which new understandings of time can be centered and produced. McNeilly discusses the "untimely" in the context of international human rights law.[255] Building on the work of critical human rights

[252] Riley & Carpenter, *supra* note 53, at 873–74.
[253] Pryor, *supra* note 37.
[254] McNeilly, *supra* note 225, at 818.
[255] *Id*.

scholars such as Upendra Baxi and Makau Mutua, McNeilly suggests a new direction – and temporality – for the corpus:

> By this I do not mean that the time of these rights has come to an end, or that their utility has necessarily faltered . . . what I argue is that a productive future . . . may be envisaged by considering more closely its relationship to temporality and by actively thinking through a conception of rights that is *untimely*.[256]

Untimely rights are those that are "out-of-step or out-of-time, which goes beyond a linear and progressive relation between past, present and future and, additionally, involves a[] 'leap into the future without adequate preparation in the present . . . the creation of the new, to an unknown future, what is no longer recognizable in terms of the present.'"[257]

Exactly *what* constitutes the untimely in the context of trademark law is up for debate. In one reading, the interjection of the free speech argument into the case is untimely, because it lacks a temporal justification. However, in another reading, the untimely describes the move away from a linear progress-oriented narrative of rights. That is to say, for instance, encouraging courts to critically examine arguments about the benefits Indigenous Peoples might derive from Pro-Football investing in their trademark in order to evaluate a claim of laches might support untimeliness. Put differently – and building on the above – it is far more likely that Romero and the other plaintiffs slept on their rights for practical reasons, related to structural oppression than desired to freeride on the labor of the defendant. Indeed, per Riley and Carpenter, it is the Washington Football Team that was freeriding on the

[256] *Id.*
[257] *Id.* (citing Elizabeth Grosz).

identities of Native Americans.[258] Using the untimely as a lens for rethinking where equitable remedies do and should lie with respect to anti-racism and anti-coloniality is a powerful way of centering social justice, especially within exploitative systems of racial capitalism.

Read in this light, *Harjo*, *Blackhorse*, and *Tam* offer three primary lessons: 1) legal actors, including lawyers and judges, have a *choice* in the matter of how they wish to handle procedural questions that implicate the timely and the untimely, 2) legal actors frequently lack the *skills and schemas* to identify and parse racial issues that arise in the context of trademark and other intellectual property cases, including through the lenses of temporality, and 3) *racial justice training* for law students who will become lawyers, professors, and judges to think about issues such as how time operates in the context of intellectual property law specifically and judicial decision-making more generally is integral to dismantling the structures of white supremacy. These three lessons do not hinge on the outcome of the intellectual property cases that I have discussed. Rather, they point us in the direction of decolonial methodologies for considering and confronting structural calcifications of race within law. Understanding how time works in intellectual property law, can create possibilities for making novel arguments about racial justice.

IV. CONCLUSION

Trademark law has long been intertwined with race and colonialism, through the perpetuation and monetization of images that degrade and humiliate people of color. From Aunt Jemima, the Quaker Oats Pancake Mammy to Mia, the Land O' Lakes Butter Maiden, the racialization of Black,

[258] Nancy Leong's new book on "identity capitalism" gets at this very issue. NANCY LEONG, IDENTITY CAPITALISTS: THE POWERFUL INSIDERS WHO EXPLOIT DIVERSITY TO MAINTAIN INEQUALITY (2021).

Indigenous, and Brown people has been commonplace in American culture. The circulation of trademarks that normalize racial hierarchies functionally reconstructs "better days," even as the nation professes its desire to move toward a "colorblind" and "postracial" world. Even now, in 2021, battles over the cancellation of these trademarks persists. One representational and structural undercurrent in trademark battles involving people of color is that of racial time. Not only are the representations that people of color are struggling against often regressive ones that point to times that have purportedly passed, but the procedural mechanisms through which courts manage them also reveal a strong judicial monopoly on racial time maps. Affirmative defenses like laches and judicial powers like sua sponte highlight how race, time, and law intersect.

I have argued here that developing intentional modes of racial chronopolitics can help to address some of the dispossession that occurs through lawyerly and judicial default to Euro-American racial time maps. In the cases I examined here, i.e. *Harjo, Blackhorse,* and *Tam,* the courts' analyses of laches and judicial practice of raising issues sua sponte project Euro-American narratives about time onto Indigenous Peoples and Asian Americans. They also facilitate the convenient invocation of free speech issues in cases in which such issues have been treated otherwise for decades. Despite Tam's own protestations to the contrary, I read *Tam* as a pyrrhic victory, that enables the Slants to protect their name at the expense of deregulation and entrenches racial capitalism as well as settler colonialism. The racial libertarian logics of the case rely on free market and free speech (de)regulation to cure the ills of racism. Such logics largely revert to a status quo invested in protecting white supremacy, not the rights of Black and Brown Peoples. Defaulting to Euro-American racial time maps, as the courts in *Harjo, Blackhorse,* and *Tam* do, allows corporations to control narratives of oppression in ways that are contrary to

the realities of the lives of people of color. Decolonizing racial chronopolitics and legal procedure is accordingly necessary and pressing, in and out of trademark law.

I want to conclude by gesturing toward the ways that lawyers and law professors can engage critically with questions such as the ones presented in *Harjo, Blackhorse*, and *Tam.* The first step in attending to racial chronopolitics is to recognize that lawyers and judges have a choice in how they engage with matters of time. After making this recognition, they can turn to crafting theories of time that they can leverage to make powerful arguments about racial justice and settler colonialism in the courtroom. Expounding upon these theories is an important next step, particularly insofar as it ensures that the default Euro-American racial time maps that facilitate racial and colonial exploitation can be carefully decolonized.