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## Multiracial Identity, Monoracial Authenticity & Racial Privacy: Towards an Adequate Theory of Multiracial Resistance

Maurice R. Dyson

*Southern Methodist University Dedman School of Law*

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# MULTIRACIAL IDENTITY, MONORACIAL AUTHENTICITY & RACIAL PRIVACY: TOWARDS AN ADEQUATE THEORY OF MULTIRACIAL RESISTANCE†

Maurice R. Dyson\*

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## INTRODUCTION

In constitutionally endorsing the affirmative action program at the University of Michigan Law School, the Court once and for all legitimated the *Regents of the University of California v. Bakke's*<sup>1</sup> diversity rationale as a permissible compelling state interest to justify race-based affirmative action.<sup>2</sup> This compelling interest is significant in that it permits race to be used narrowly as one among many factors to determine

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\* Assistant Professor of Law, Southern Methodist University Dedman School of Law; A.B. 1995, Columbia College; J.D. 1999, Columbia University School of Law. The author thanks Dean Attanasio and the faculty of law at Southern Methodist University. Special thanks to Professors Darren Hutchinson and Pamela Bridgewater for their valuable guidance and support as well as Jane Dolkart for her helpful comments with this work. Thanks is extended to Roy Anderson, Gregory Crespi, Ndiva Kofele-Kale, Mila Davis-Dyson, Gant Grimes and to my mother, MaryAnne Lee, who endured much and taught me more. I dedicate this Article to my brother William Dyson, who I regret life never gave me the opportunity to know.

1. 438 U.S. 265, 314 (1978) (noting the diversity rationale is grounded in the First Amendment's protection of a level of academic freedom, including a school's "right to select those students who will contribute the most to" the school's goal of providing a "robust exchange of ideas").

2. See *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003). The law school program was upheld by a vote of 5–4, with Justice Sandra Day O'Connor providing the swing vote by siding with more liberal jurists. However, in *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003), the University of Michigan's undergraduate program was overturned by a vote of 6–3. Taken as a collective whole, the impact of the two rulings will force universities and schools to abandon rigid systems as they sort through applications of prospective students.

student admission eligibility.<sup>3</sup> But with the pronouncement of this holding, six justices made clear that the Court expects that twenty-five years from now (fifty years since *Bakke* was decided), the consideration of race in admissions will no longer be necessary to further the interest of diversity.<sup>4</sup>

Shortly after the Court's decision, California voters similarly contemplated the fate of race in the Racial Privacy Initiative ("RPI"). The initiative represented the most far-reaching bid by anti-affirmative action critic Ward Connerly to once and for all remove the consideration of race from all corners of state government.<sup>5</sup> However, despite considerable funds and effort expended by proponents, the RPI was roundly defeated by a fairly large margin of voters. Approximately 5,483,343 or 63.9% voted against the initiative and 3,104,721 or 36.1% voted in favor of it.<sup>6</sup> What do these decisions by the high Court and the largest state electorate portend for the future of racial classification and racial justice? At the heart of this inquiry are the questions of how we should define the role of

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3. *Grutter*, 123 S. Ct. 2325.

4. *Id.* at 2346. The Court noted that it:

take[s] the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable. . . . [and that it] expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

*Id.*

For the majority, the necessity for some finality to all race conscious admissions programs "assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Id.* (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (plurality opinion)); see also Nathaniel L. Nathanson & Casimir J. Bartnik, *The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools*, 58 CHI. B. REC. 282, 293 (1977). Nathanson and Bartnik observe that:

It would be a sad day indeed, were America to become a quota-ridden society, with each identifiable minority assigned proportional representation in every desirable walk of life. But that is not the rationale for programs of preferential treatment; the acid test of their justification will be their efficacy in eliminating the need for any racial or ethnic preferences at all.

*Id.*

5. See generally Edwin Garcia, *Initiative Splits GOP Leaders Looking at Effort To Ban Data on Race*, SAN JOSE MERCURY NEWS, Feb. 22, 2003, at A1. Ward Connerly is the author of Proposition 209, which prohibits state entities from discriminating against or giving preferential treatment to any individual or group in public employment, public education, or public contracting on the basis of race, sex, color, ethnicity, or national origin. California Civil Rights Initiative (Proposition 209), CAL. CONST. art. I, § 31 (1996).

6. California Secretary of State Official Website, Statewide Returns, at <http://vote2003.ss.ca.gov/Returns/prop/00.htm> (last visited Nov. 2, 2003).

race in our society and whether the current racial classification system and nomenclature are the best vehicles for advocating racial justice.

In an attempt to address these important issues, I argue that neither ignoring the saliency of race, nor encompassing poor Whites in a multiracial coalition, will necessarily lead to progress for racial minorities. "Essentialized" race consciousness and racial solidarity are not entirely satisfying solutions either, because they too often lead to problems of racial authenticity. By defining what legitimately qualifies as "Blackness," racial authenticity often manifests itself through an over reliance on pigmentation as a proxy for race in ways which are sure to marginalize racial minorities. Therefore, I conclude that we remain bereft of an adequate theory of social resistance that can both recognize and address the epistemological and ontological difficulties of racial identity in general and multiracial identity in particular. Below, I propose a workable framework to address racial identity within the context of racial resistance.

This Article is divided into five parts. Part I briefly places the significance of the Supreme Court's affirmative action ruling in *Grutter v. Bollinger* in context,<sup>7</sup> particularly the implications of its recommended twenty-five year timeframe in recognizing racial diversity. Part II examines the dangerous consequences of implicit assumptions underlying the RPI. More specifically, I investigate the potential ramifications the RPI would have had upon multiple sectors of our society, including healthcare, education, and law enforcement. In the process, I attempt to demonstrate that the concept of racial privacy is a strategic misnomer intended not to protect one's privacy, but rather to privatize race away from the accountability of governmental institutions. Part III discusses multiracial identity and the hierarchy of racial classifications. I examine why multiracial classification advocates conceptually support the RPI but nonetheless remain skeptical of its ability to render racial distinctions meaningless.

In Part IV I attempt to illustrate through personal narrative why multiracial identity is not necessarily inconsistent with a regime of self-identified monoracial classification. In addition, I discuss precisely why we should continue to repudiate colorblind initiatives such as Connerly's RPI. Part V addresses the more general difficulties posed by racial classifications, including objections raised by progressive colorblind theorists. In this regard, I attempt to unpack the relationship between racial identity and movements for racial justice, giving some attention to the notion of political race recently articulated by Lani Guinier and Gerald Torres. Ultimately, I hope to offer critical considerations for an effective stratagem, and perhaps, a better fate for positive race conscious remedies in the twenty-five years to come.

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7. 123 S. Ct. 2325 (2003).

## I. TWENTY-FIVE YEARS LEFT OF RACE CONSCIOUSNESS?

In *Grutter v. Bollinger*<sup>8</sup> and *Gratz v. Bollinger*,<sup>9</sup> the U.S. Supreme Court found that diversity is a compelling state interest, and that race may be narrowly used as one among many factors to determine student admission eligibility in a non-mechanical and individualized fashion.<sup>10</sup> The Court's position on this newly endorsed interest did not come without strong reservation from the individual members of the Court. In fact, six justices made clear that the Court expects that twenty-five years from now, the consideration of race in admissions will no longer be necessary to further the interest of diversity.<sup>11</sup> Justices Ginsburg and Breyer took issue with O'Connor's suggestion of a termination point by observing that:

[f]or at least part of that time, however, the law could not fairly be described as "settled," and in some regions of the Nation, overtly race-conscious admissions policies have been proscribed. . . . Moreover, it was only 25 years before *Bakke* that this Court declared public school segregation unconstitutional, a declaration that, after prolonged resistance, yielded an end to a law-enforced racial caste system, itself the legacy of centuries of slavery.<sup>12</sup>

It is debatable whether the twenty-five year timeframe is a forecast or, as Justice Ginsburg contends, a hope that racial considerations will not be necessary, or neither, as Justice Thomas contends. Justice Thomas definitively characterized "the imposition of a twenty-five year time limit only as a holding that the deference the Court pays to the Law School's educational judgments and refusal to change its admissions policies will itself expire."<sup>13</sup> Indeed one might say that the deference the Court exercised in reviewing the use of race in Michigan's admissions programs will eventually be non-existent, given the credible assumption that an extensive imposition upon non-beneficiaries beyond twenty-five years will no longer be politically tolerated. Thus, whether the Court's timeframe is a hope or a forecast, strict scrutiny analysis may eventually become "fatal in fact" after the passage of an additional twenty-five years of impatience by

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8. *Id.*

9. 123 S. Ct. 2411 (2003).

10. *Grutter*, 123 S. Ct. 2325 (2003).

11. *Id.* at 2346.

12. *Id.* at 2347 (internal citation omitted).

13. *Id.* at 2365 (Thomas, J., concurring in part and dissenting in part); see also *id.* at 2364 n.13 ("I agree with Justice Ginsburg that the Court's holding that racial discrimination in admissions will be illegal in 25 years is not based upon a 'forecast'. . . . I do not agree with Justice Ginsburg's characterization of the Court's holding as an expression of 'hope.'").

affirmative action opponents and colorblind advocates.<sup>14</sup> Regardless of whether such efforts prove fruitful, one might say that the Court, in effect, put the nation on notice that the political will of Americans will no longer tolerate the use of race as the rumbling of dissent becomes louder.

## II. THE RACIAL PRIVACY INITIATIVE

That rumbling noise of dissent has begun in California. In fact, the day when race would begin to vanish as a consideration already occurred with the passage of Proposition 209, the state-wide ban on affirmative action in California's university system.<sup>15</sup> But in a promising development, California voters recently decided to vote against the passage of the RPI.<sup>16</sup> The RPI proposal, officially known as "Classification By Race, Ethnicity, Color or National Origin," or "Proposition 54," was designed to prevent California's public agencies from classifying "any individual by race, ethnicity, color or national origin in the operation of public education, public contracting or public employment."<sup>17</sup> Further, the initiative defines "classification" as any "act of separating, sorting or organizing by race, ethnicity, color or national origin including, but not limited to, inquiring, profiling, or collecting such data on government forms."<sup>18</sup> Attempting to remove all consideration of race from governmental accountability is not unusual for the conservative Connerly, who successfully passed prohibitions on racial preferences in California and Washington,<sup>19</sup> and set his sights on doing the same in Michigan just one day after *Grutter* and *Gratz* were decided.<sup>20</sup> Although defeated, the initiative would have significantly curtailed the ability to hold state institutions accountable by rendering

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14. Justice Brennan argued that the Court's review under the Fourteenth Amendment should be "strict, but not 'strict' in theory and fatal in fact." *Bakke*, 438 U.S. at 361-62.

15. See California Civil Rights Initiative (Proposition 209), CAL. CONST. art. I, § 31 (1996).

16. See generally Garcia, *supra* note 5, at A1.

17. CAL. CONST. art. I, § 32(a) (proposed amendment), available at <http://voterguide.ss.ca.gov/propositions/2-3-4-text.html> (last visited Nov. 3, 2003).

18. CAL. CONST. art. I, § 32(c) (proposed amendment), available at <http://voterguide.ss.ca.gov/propositions/2-3-4-text.html> (last visited Nov. 3, 2003).

19. For more on Connerly's successes in California and Washington and his plans for Michigan, see Joel Kurth, *Voters May Decide Affirmative Action*, DETROIT NEWS, July 3, 2003; see also Washington Secretary of State Official Website, Text of Initiative 200, at <http://www.secstate.wa.gov/elections/initiatives/text/i200.htm> (last visited Mar. 10, 2004); By All Means Necessary Official Website, *Who Is Ward Connerly?*, at <http://www.bamn.com/doc/2003/do.asp?0309-who-is-ward-connerly.asp> (last visited Mar. 10, 2004).

20. See *The Tavis Smiley Show: Interview with Ward Connerly* (NPR radio broadcast) (July 9, 2003) (discussing Connerly's stated belief that the *Grutter* decision represents a defeat for America and announcing his efforts to bring an initiative, similar to Proposition 209, to Michigan voters).

potential proof in the form of statistical data unavailable to the public. It was, in the words of Patricia Williams, a "kind of 'don't ask, don't tell' stance of racial revelation."<sup>21</sup>

Approximately 983,761 Californians joined the effort to eliminate racial classification by signing a petition to place the RPI on the ballot.<sup>22</sup> It represented Connerly's second attempt to get the RPI on the ballot; he previously failed to procure a vote sufficient to qualify the RPI for placement on the March 2002 ballot. By employing the services of signature-gathering companies that can charge up to \$3.50 per signature, Connerly was finally able to raise significant funds to gather more than enough signatures. However, only 670,518 were required for state-wide ballot qualification in California.<sup>23</sup>

It should concern even conservative minded voters that if the RPI passed, there would not exist a source of independent statistical information available to challenge claims of racial disparity made by both the right and the left. In fact, this is the very reason that some conservatives have not entirely welcomed Connerly's initiative.<sup>24</sup> Perhaps their concern stems from the realization that a vacuum of data may leave moral, political, and legal claims even more susceptible to public manipulation by pundits or advocacy groups. For example, Thomas Wood, co-author of Proposition 209, opposed the initiative for the very reason that one cannot enforce Proposition 209 without statistics that would otherwise be prohibited by the RPI.<sup>25</sup> Further, at least one

21. Patricia Williams, *Diary of A Mad Law Professor*, NATION, available at <http://www.thenation.com/doc.mhtml?i=20020617&s=williams> (June 17, 2002).

22. See Press Release of Kevin Nguyen, *Racial Privacy Initiative Proponents Mark Passing of November 2002 Ballot Deadline*, at [http://www.racialprivacy.org/content/press/june27\\_2002.php](http://www.racialprivacy.org/content/press/june27_2002.php) (June 27, 2002).

23. See William Brand, *Racial Privacy Initiative Heading for State Ballot*, OAKLAND TRIB., Apr. 17, 2002, at A1 ("[T]he institute has spent well more than \$1 million on the petition drive. 'Donations have ranged from \$2 to a \$100,000 contribution from Joseph W. Coors,' Connerly said.").

24. Nearly all of the major California gubernatorial candidates openly opposed the initiative, including current Republican governor Arnold Schwarzenegger. Suzy Khimm, *Avalanche Against Prop 54*, at <http://www.alternet.org/story.html?StoryID=16972> (Oct. 17, 2003). Likewise, in 1999, when Connerly tried to get a similar measure passed in Florida, Governor Jeb Bush, a fellow conservative, warned that the fight over the proposed ballot initiative would cause even greater racial divisions in his state. Instead, Bush adopted his own state program to curb affirmative action in college admissions, and Connerly's efforts failed. Governor Jeb Bush replaced Connerly's Florida Civil Rights Initiative with One Florida. See DeWayne Wickham, *Bush's Good (Not Perfect) Affirmative Action*, at [http://www.oneflorida.org/myflorida/government/governorinitiatives/one\\_florida/articles/bush\\_27s\\_good\\_not\\_perfect\\_aff\\_action.html](http://www.oneflorida.org/myflorida/government/governorinitiatives/one_florida/articles/bush_27s_good_not_perfect_aff_action.html) (last visited Mar. 10, 2004).

25. See Emil Guillermo, Jayson Blair, *the RPI and APA Heritage Month*, at <http://www.sfgate.com/cgi-bin/article.cgi?file=/gate/archive/2003/05/20/eguillermo.DTL> (May 20, 2003) (noting an "ecstatic" Thomas Wood over observing only a 48% Field Poll in support of the RPI, which incidentally was the same as a year ago). According to

prominent state Republican voiced concerns that the initiative would unduly hurt the racial image of the party during a critical time of rebuilding.<sup>26</sup>

The potential impact of the RPI proposal should not be underestimated. According to Williams:

In such a world, there can be no easy way to know whether Native American women are being sterilized at higher rates in public hospitals than other groups. One would not be able to determine whether public schools were tracking [B]lack students into remedial classes and [W]hite students into advanced placement. Documentation of ghettoization and other patterns of residential segregation would be magically wiped from census data.<sup>27</sup>

According to Williams, the proposal's purported colorblind approach is anything but colorblind.<sup>28</sup> For instance, the RPI would not allow racial profiling data to be assembled in order to assess police misconduct.<sup>29</sup>

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Guillermo Wood indicated that "such a low figure with a year to go assured the RPI was as good as dead." *Id.* But in opposition to Proposition 54, Wood unequivocally stated:

[T]he RPI would gut the enforcement of anti-discrimination laws, including Prop. 209 itself. I pointed out to them that the state GOP had endorsed CCRI/209, and that California Republicans had supported it overwhelmingly on election day, 5 Nov 1996. It was a foregone conclusion, I said, that the RPI would be opposed on election day by a large majority of liberals, Democrats, and racial and ethnic minorities in the state. I explained to the committee that this alone would be bad enough for the GOP, but that it would be even worse if (as I confidently predicted) a majority of Republican voters, including most [W]hite, conservative voters, also voted against the measure, once these voters realized that it would make it virtually impossible to enforce Prop. 209, which they had overwhelmingly supported.

Thomas E. Wood, *The Ideology of the Racial Privacy Initiative*, at [http://www.aadap.org/ideology.htm#\\_Toc37479769](http://www.aadap.org/ideology.htm#_Toc37479769) (Mar. 23, 2003).

26. Shannon Reeves, acting on behalf of the California Republican Party as its secretary, became so alarmed by the initiative and potential voter backlash that he sent an email to the party's twenty board members prompting the party to not endorse the initiative in the March 2002 ballot bid. See Michelle Alexander, *The Racial Privacy Initiative: Ward Connerly's Latest Assault on Civil Rights*, at <http://www.aclunc.org/opinion/010626-assaultcivilrights.html> (Apr. 1, 2001) (ACLU Op-Ed).

27. Williams, *supra* note 21, at 1-2.

28. *Id.*

29. The proposition provides that:

Neither the governor, the legislature nor any statewide agency shall require law enforcement officers to maintain records that track individuals on the basis of said classifications, nor shall the governor, the legislature or any statewide agency withhold funding to law enforcement agencies on the basis of the failure to maintain such records. Subsection (h) provides that the otherwise lawful



Conceivably, under this exemption, “penitentiary wardens could still segregate prisoners by race to halt race riots and police lieutenants wouldn’t have to be colorblind in assigning undercover cops to infiltrate racially-based gangs.”<sup>30</sup> It is quite curious how racial classification is permissible in criminal repression of people of color by law enforcement but impermissible when it legitimately questions law enforcement conduct. As Roger Clegg, a proponent of the RPI, testified before the U.S. Commission on Civil Rights: “a good example [of racial classification]” is when “a prison includes a physical description of an inmate in his file; this information would obviously be useful if, say, the prisoner escaped and the police needed to identify him.”<sup>31</sup> It is reprehensible that under the RPI it is innocuous to use race to advance racial suppression and control, yet, after Proposition 209, the use of race to allocate equal educational opportunity is prohibited.

The RPI proposal is not the first to embrace this tenuous paradox. In fact, several courts have relied on the “operational need” of law enforcement and correctional agencies as a justification to uphold hiring or assignment practices that favor minorities, even in the absence of past discrimination.<sup>32</sup> In fact, disciplinary segregation in prison has been cited as a model example of the kind of race consciousness that the Fourteenth

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assignment of prisoners and undercover law enforcement officers shall be exempt from this section.

CAL. CONST. art. I, § 32(g) (proposed amendment), available at <http://www.racialprivacy.org/content/language.php> (last visited Mar. 10, 2004); see also John Woolfolk, *MERCURY NEWS, Prop. 54 Effect On Police Debated*, at <http://www.mercurynews.com/mld/mercurynews/news/local/6789227.htm> (Sep. 16, 2003). Woolfolk notes:

Some profiling studies may be unaffected. Most notably, the California Highway Patrol, which agreed to track the race of drivers who are stopped to settle a profiling lawsuit by a San Jose motorist, may be allowed under an exemption for consent decrees. The initiative also exempts programs that collect racial information to comply with federal law or maintain eligibility for federal programs, or where it would otherwise result in loss of federal funding.

*Id.*

30. Steve Sailer, *Pondering Patterson [IV]: Why We Can't Get Beyond Race*, at [http://www.vdare.com/sailer/pondering\\_patterson\\_4.htm](http://www.vdare.com/sailer/pondering_patterson_4.htm) (June 8, 2001).

31. *Racial and Ethnic Data Collection by Government Agencies: Statement by Roger Clegg to the U.S. Commission on Civil Rights*, at [http://www.adversity.net/RPI/RPI\\_pages/3\\_new.htm](http://www.adversity.net/RPI/RPI_pages/3_new.htm) (May 17, 2002). Roger Clegg has also unsuccessfully sought to end affirmative action admissions programs. See Nathan Collins, *Suit Weighs in on Admissions Policy*, at [http://www-tech.mit.edu/V123/Nfour/4mites\\_gruder.fourn.html](http://www-tech.mit.edu/V123/Nfour/4mites_gruder.fourn.html). (last visited Mar. 16, 2003).

32. See, e.g., *Reynolds v. City of Chicago*, 296 F.3d 524, 530–31 (7th Cir. 2002); *Wittmer v. Peters*, 87 F.3d 916, 921 (7th Cir. 1996); *Talbert v. City of Richmond*, 648 F.2d 925, 931–32 (4th Cir. 1981); *Minnick v. Cal. Dep't of Corr.*, 157 Cal. Rptr. 260, 268–69 (1st App. Dist. 1979).

Amendment allows.<sup>33</sup> For example, in *Wittmer v. Peters*,<sup>34</sup> Chief Judge Posner upheld the use of preferential treatment to hire a Black correctional officer at an Illinois boot camp for young offenders in order to promote discipline and order.<sup>35</sup> Even more significant is that Supreme Court jurisprudence has not foreclosed or prohibited Posner's approach. Indeed, a majority of the Court has validated that order, control, and security constitute a "pressing public necessity," or to use modern parlance, a "compelling state interest," which can justify racial discrimination by state actors.<sup>36</sup> Even as recently as the *Grutter* decision, Justice Thomas affirmed that: "[w]here the Court has accepted only national security, and rejected even the best interests of a child, as a justification for racial discrimination, I conclude that only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a 'pressing public necessity.'"<sup>37</sup>

Another exception to the initiative's prohibition, which permitted racial and ethnic classification of medical research subjects and patients, also appeared to have an especially harsh result for people of color. Data on race and ethnicity extracted from public health and other records, such as population-based surveys that are the cornerstone of our current knowledge, would be outlawed. Collecting racial data concerning the impact of Black infant mortality, breast cancer, heart disease, osteoporosis, AIDS, tuberculosis, prostate cancer, sickle cell anemia, lead poisoning, and teen smoking would all be impermissible under the initiative. What is troubling is that much of the aforementioned demographic data is not obtained through "medical research" of any kind. Consequently, this exemption, which would have possibly expired after ten years in accordance with the RPI, makes little sense except perhaps as a clever public relations guise of objectivity that utterly fails to recognize the reality of how our public health administrations operate.<sup>38</sup> Perhaps the

33. See, e.g., *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (per curiam); *Lee v. Washington*, 390 U.S. 333, 334 (1968) (per curiam); *Stewart v. Rhodes*, 473 F. Supp. 1185, 1189 (S.D. Ohio 1979).

34. 87 F.3d. 916 (7th Cir. 1996).

35. *Id.* at 920–21.

36. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("Pressing public necessity may sometimes justify the existence of racial discrimination; racial antagonism never can.").

37. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2352 (2003) (Thomas, J., concurring in part and dissenting in part); see also *Palmore v. Sidoti*, 466 U.S. 429 (1984) (holding that even the best interests of a child do not constitute a compelling state interest that would allow a state court to award custody to a father because the mother was in a mixed-race marriage). In *Palmore*, the Court found that the governmental interest in granting custody based on the best interests of the child "substantial," but ultimately held that the custody decision could not be based on the race of the mother's new husband. *Id.* at 433; cf. *Lee v. Washington*, 390 U.S. 333, 334 (1968) (per curiam) (Black, J., concurring) (indicating that protecting prisoners from violence might justify narrowly tailored racial discrimination).

38. See Williams, *supra* note 21.

case against the RPI is best stated by the Santa Clara Public Health Department, a state agency directly impacted by it:

[F]rom a Public Health surveillance perspective, we do not support the [RPI]. We know that in this day and age racial and ethnic disparity still exist [sic] in our country. Inequalities exist not only in health but also in education, professional, and financial opportunities . . . . Being colorblind will not eliminate the racism and prejudice that exists within our society. In our work, race information is an essential tool. If we produced reports for the overall county population without race information, we would never be able to identify the health disparities that exist within various race/ethnicities. With this type of critical information we can help to eliminate the inequalities that exist and make the most effective use of limited resources. Many diseases and conditions have both biological and behavioral risk factors. For our purposes, race serves as a proxy for culture. Cultural beliefs and practices profoundly impact the personal choices that a person makes about his/her health. As health protectors and promoters, race as well as culture and language are critical pieces of information that improve the quality of services provided to clients.<sup>39</sup>

Although an exemption is made for federal compliance requirements mandating the collection of race data, an approach such as the RPI, if taken to its extreme, may one day cripple monitoring efforts. For example, it would be extremely difficult to monitor access of minorities to home mortgage loans under the Home Mortgage Disclosure Act;<sup>40</sup> to enforce the Equal Credit Opportunity Act<sup>41</sup> and the Fair Housing Act;<sup>42</sup> to monitor and enforce desegregation plans in public schools; or to assist minority businesses under minority business development programs. In the area of child welfare, the elimination of race data would undermine enforcement of the Indian Child Welfare Act,<sup>43</sup> which actually requires placement of Indian children with foster or adoptive families of similar ethnic backgrounds.<sup>44</sup> While these federal acts would presumably preempt the initiative to the extent that they are inconsistent, it remains a distinct possibility that "the state interpretation and practice is broader in scope

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39. Meeting of the Board Of Supervisors, Santa Clara County, *Agenda Item A: Oppose Racial Privacy Initiative*, at <http://www.sccgov.org/scc/assets/docs/224376KeyboardAttachment-200457695.pdf>. (Mar. 11, 2003) [hereinafter *Agenda Item A*].

40. Home Mortgage Disclosure Act, 12 U.S.C.A. §§ 2801–2810 (2003).

41. Equal Credit Opportunity Act, 15 U.S.C.A. §§ 1691(a)–(f) (2003).

42. Fair Housing Act, 42 U.S.C.A. §§ 3604–3619 (2003).

43. Indian Child Welfare Act, 25 U.S.C. § 1915 (1978).

44. *Id.*

and would have been negatively proscribed by the RPI as to hamper data collection and effective enforcement."<sup>45</sup> Likewise, mandates in the No Child Left Behind Act<sup>46</sup> to employ racial classifications for purposes of testing and accountability, while still feasible under preemption, may have been hampered by a broader interpretation that would have precluded data collection necessary for effective assessment, development, mentoring, and other remedial measures necessary to achieve adequate yearly educational progress.<sup>47</sup> These anti-discrimination laws are crucial to remedying discriminatory effects not easily corrected by, for example, intrinsic market forces as some have suggested.<sup>48</sup>

Technically however, under the RPI as proposed, race could have been used in some circumstances beyond the exemptions described above. Although the probability of this remained highly unlikely, because a two-thirds majority of both houses of the state legislature would have been required.<sup>49</sup> Notwithstanding the defeat of the RPI, the current systematic assault on legal regimes which are designed to achieve racial equity<sup>50</sup> may bring us closer to the day when race will be judicially declared irrelevant.

The term racial privacy is a conceptual misnomer that has very little to do with protecting the privacy of one's racial identity as Connerly

45. *Agenda Item A, supra* note 39, at 3. This could have been achieved by the RPI unless the legislature and governor were to act otherwise.

46. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1111 (b)(2)(H)(i)-(iii), 115 Stat. 1425, 1444-48 (2002).

47. *See id.*

48. *See generally* RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992) (arguing that regulation is unnecessary given the market nature of the workforce); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 108-15 (1962) (advocating a free market approach for remedying discrimination).

49. The probability is unlikely because Section 32(b) of the initiative provides:

The state shall not classify any individual by race, ethnicity, color or national origin in the operation of any other state operations, unless the legislature specifically determines that said classification serves a compelling state interest and approves said classification by a 2/3 majority in both houses of the legislature, and said classification is subsequently approved by the governor.

CAL. CONST. art. I, § 32(b) (proposed amendment), available at <http://voterguide.ss.ca.gov/propositions/2-3-4-text.html> (last visited Nov. 3, 2003).

50. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 281 (2001). Indeed, whatever little remains of civil rights enforcement after the crippling decision in *Alexander v. Sandoval* that barred private suits under Title VI alleging a racially disparate impact, would have been nearly obliterated by the proposed RPI ban on statistical data gathering, a critical tool to show disparity. Of course, similar to the proposed RPI, the implications of the decision are far reaching for civil rights groups since the rights and remedies under the implementing regulations of Title II of the Americans With Disabilities Act of 1990 (ADA) and section 504 of the Rehabilitation Act of 1973, as well as Title IX of the Higher Education Amendments of 1972, are the same as those prohibited from private enforcement under Title VI. *See* ADA, 42 U.S.C.A. § 12101 (2004); Rehabilitation Act of 1973 § 504, 45 C.F.R. § 84 (2003); Higher Education Amendments of 1972, 34 C.F.R. § 106 (2003).

asserts, and more to do with the privatization of race away from governmental accountability in healthcare, education, and law enforcement. Nonetheless, the initiative's rhetoric is postured to appeal to the popular notion of preserving privacy in much the same fashion as one preserves medical history, credit information, or religious affiliation from prying eyes. It is also conceived as a measure designed to curb state power. The RPI proposal "carves out a sphere of autonomy within which the state may not intrude. Thus, beyond individuals not being obligated to check boxes indicating race, the state can no longer check the boxes for them."<sup>51</sup> However, this rationale is not only unpersuasive, but logically inconsistent as it elides the fact that race is a social construct from which we base our interpersonal interactions and often implicitly ascribe world views and social status. Thus, that which the world knows is not suddenly made private simply because it is no longer checked off in a box. So long as material inequality and personal attributes are commonly attributed to one's racial identity, it will not cease to exist in the minds and hearts of the American populace. The fact that no governmental classification is available does not inflect this longstanding reality. Accordingly, Connerly's RPI appears to be predicated upon the unsupported proposition that categorical distinctions based upon race did not come into existence well before the government's classification.<sup>52</sup> Race, while not a bona-fide scientific category as some have despairingly attempted to prove,<sup>53</sup> is very real nonetheless in our society.<sup>54</sup> Because of this reality, government will

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51. R. Richard Banks, *Introduction to Border People and Antidiscrimination Law*, 17 HARV. BLACK LETTER L.J. 25 (2001).

52. Long before the Office of Management and Budget (OMB) issued the Race and Ethnic Standards for Federal Statistics and Administrative Reporting in 1978, racial distinctions could be witnessed—even as early as the European slave trade which began in 1444. See LERONE BENNETT JR., *BEFORE THE MAYFLOWER: A HISTORY OF BLACK AMERICA* 29 (1969) (noting that "[a] year before the arrival of the celebrated Mayflower, 113 years before the birth of George Washington, 244 years before the signing of the Emancipation Proclamation, a ship sailed" to Jamestown, Virginia carrying a cargo of African slaves).

53. See RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994) (arguing that there are differences between races in measured intelligence and positing that such differences are genetic in origin). See generally STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* (1981) (recounting scientific studies that measured skulls to prove Africans are intellectually inferior).

54. See Chris K. Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47, 53 (1997) ("Although race is socially constructed and not an immutable biological characteristic, the effect of the phenomenon of race is nonetheless real."); Charles R. Lawrence III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 835 n.71 (1995) ("To recognize that race is socially constructed does not make it any less real."); John A. Powell, *The Colorblind Multiracial Dilemma: Racial Categories Reconsidered*, 31 U.S.F. L. REV. 789, 791 (1997) ("While the claim that race is an illusion draws on the work of late- and post-modernists . . . which purports that race is socially constructed—the conclusion that race is not real does not comport with the deeper implication of this insight.").

never be wholly blind to race in all respects nor is it the case, as others have suggested, that America will cease to think about race once there is no required self-reporting of racial classification.<sup>55</sup> Therefore, when deconstructed down to its most basic terms, racial privacy appears to be nothing more than perhaps a strategic label which resonates with sectors of the electorate that find appeal in its superficial promise of a multiracial, yet colorblind, society.

### III. MULTIRACIAL CLASSIFICATION AND RACIAL HIERARCHY

The Black community is the mother of this multiracial community, she (Black community) has carried this "child" and is now giving birth. The birth pains are GREAT! The White community is the father. He's responsible for siring this child but he's not interested. Finally, the child is born. Now the child wants it's own space and a different name from it's mother. She doesn't want to let go . . . . There's some distance between the father and child and even some reluctance to recognize that there's even a relationship. The mother's feeling are hurt because she doesn't understand why this child wants to be different from her after she's nurtured and given recognition to her child. Her hurt feelings give way to resentment as her child leaves her to find his niche in the world.<sup>56</sup>

As the foregoing quote may suggest, the movement in support of the RPI appeals to some multiracial advocates who have worked relentlessly to carve their own niche in the world essentially by challenging the current monoracial paradigm and with some success.<sup>57</sup> Indeed, Connerly himself

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55. See Reginald Leamon Robinson, *The Shifting Race-Consciousness Matrix and the Multiracial Category Movement: A Critical Reply to Professor Hernández*, 20 B.C. THIRD WORLD L.J. 231, 238 (2000). According to Robinson:

With this MCM [Multiracial Category Movement], we can weaken our narrow fixation on a singular racial identity, and by broadening our racial lenses, we can achieve at least five goals. First, we can shift our race consciousness. Second, we can destabilize racial categories completely. Third, we can think, talk, and use "race" categories toward a higher, Spiritual end. Fourth, we can eradicate all racial categories. Fifth, we can begin to relate to each other as Spirit beings, despite the different "color" garb we may choose in a given lifetime.

*Id.*

56. Tracy Cope, *Developing A Multiracial Perspective*, at <http://www.webcom.com/invoice/point12.html> (Feb. 5, 1997).

57. In addition to successfully lobbying for changes in the 2000 census calling for a multiracial category, the Multiracial Category Movement has also been successful with data-collection forms in Georgia, Illinois, Indiana, Michigan, Ohio, and Florida. See GA. CODE ANN. § 50-18-135 (1994) (requiring a multiracial category on state forms used for

is multiracial, having 25% Black lineage, with the rest of his ancestors White or American Indian. Further, organizations such as the Association of MultiEthnic Americans have expressed support for the Connerly initiative even though they view it as unlikely to lead to the elimination of racial classifications in the immediate future.<sup>58</sup> Connerly's contempt for the government's current racial categorization in an increasingly diverse nation is undoubtedly a major part of why multiracial persons support his initiative.<sup>59</sup>

Indeed, it is sure to be frustrating to many in the Multiracial Category Movement (MCM) that the prevailing census race classification paradigm, long before recent changes to the 2000 census, has been monoracial.<sup>60</sup> Both Connerly and sectors within the multiracial camps justify their position by the fact that the current monoracial conception, or the Black/White paradigm,<sup>61</sup> is far more simplistic than the true reality

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reporting racial data to federal agencies); 105 ILL. COMP. STAT. ANN. 5/2-3.111 (West 1998) (mandating multiracial category on all forms used by the State Board of Education to collect and report on data that contain racial categories); IND. CODE ANN. § 5-15-5.1-6.5 (Michie Supp. 1997) (mandating multiracial category in certain forms used by public agencies); MICH. COMP. LAWS ANN. § 37.2202a (West 2001) (mandating public agency forms and questionnaires to include a multiracial category); OHIO REV. CODE ANN. § 3313.941 (Anderson 1997) (requiring a multiracial category on school district forms that collect racial data); see also Doug Stanley, *Census Bureau to Test Revised Race Categories*, TAMPA TRIB., June 4, 1996, at 1, available at 1996 WL 10230771 (noting a multiracial category was added to Florida's school enrollment forms and computers).

58. See generally Ramona Douglass, *Ramona's Census Subcommittee Testimony*, at <http://www.h-net.msu.edu/gateways/migration/threads/political/OMB15AMEA.html/> (May/June 1994) (testimony on a "multiracial" OMB category). Ramona Douglass is an officer in the Association of MultiEthnic Americans.

59. See, e.g., Kenneth E. Payson, *Check One Box: Reconsidering No. 15 and the Classification of Mixed-Race People*, 84 CAL. L. REV. 1233, 1236-37 (1996) (noting the monoracial categorical approach is ill-advised in light of the "increasing mixed-race population" of America).

60. Monoracial and ethnic classifications were instituted in 1978 by the United States Office of Management and Budget in cooperation with the Minority Advisory Committees of the U.S. Census Bureau for standardized collection of racial data by the U.S. Bureau of Census and all other government agencies. The instituted classification system intended to meet the obligations for data in federal civil rights laws. The OMB classification system also includes a separate Hispanic-Origin ethnicity question to reflect the fact that Latinos and Latinas can be of White racial ancestry, Black racial ancestry, or Native American ancestry. Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 FED. REG. 19,260, 19,269 (May 4, 1978); see also Bijan Gilanshah, *Multiracial Minorities: Erasing the Color Line*, 12 LAW & INEQ. J. 183, 184 (1993) (noting that the Multiracial Category Movement has focused on the census racial classifications to establish "official recognition [of mixed-race Americans] as a distinct, powerful social unit.").

61. See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243, 1267 (1993) ("To focus on the [B]lack-[W]hite racial paradigm is to misunderstand the complicated racial situation in the United States."); see also ANNE SUTHERLAND, *GYPSIES: THE HIDDEN*

of a "technicolor nation." In fact, racial intermingling, through the birth of interracial children, interracial dating, sex, and marriage, is on the rise.<sup>62</sup> Population geneticist Mark Shriver found that the average self-identified African American is 17%–18% White in contrast to the average American White who is 0.7% Black.<sup>63</sup> In addition, approximately 10% of adults who call themselves Black are more than 50% White.<sup>64</sup> The "browning" and "beiging" of America has thus solidly taken root.

Some multiracial persons, however, may take issue with colorblind activists such as Connerly and their insistence on eliminating racial categories rather than defining more accurate ones that acknowledge their special existence. As Ramona Douglass of the Association of MultiEthnic Americans testified before the House Subcommittee on the census:

What we don't have, which is no longer acceptable to the ever growing millions we represent, is an official acknowledgment of our very existence. I can't be "[W]hite" in the state of Illinois because it deems the race of the mother as the only reliable criteria for determining the "race" of the child, and at the same time be "[B]lack" or Native American in another state which only acknowledges the race of the father, or minority-designated parent. It's not logical, it's not real and, more importantly, it's not me. The term "other" is also

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AMERICANS (1986); Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375 (1999); Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965 (1995); See generally Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695, 696 (1996); Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997); Angela Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 775 n.169 (1994); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 957–59 (1995); William R. Tamayo, *When the "Coloreds" Are Neither Black nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1 (1995); Frank Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 248 (1995).

62. Randall Kennedy, *How Are We Doing With Loving?: Race, Law and Intermarriage*, 77 B.U.L. REV. 815, 818 (1997). Kennedy notes that:

[A]ccording to the calculations of Douglas Besharov and Timothy Sullivan, in 1960, about 1.7% of married [B]lacks had a [W]hite spouse. In 1990, the percentage had risen to about 5.9%. Moreover, the pace of increase in marriage across the [B]lack-[W]hite racial frontier is quickening, especially in terms of [W]hite men and [B]lack women.

*Id.*

63. See Steve Sailer, *Racial Privacy Initiative: A Trump Card* at <http://www.vdare.com/sailer/rpi.htm> (June 20, 2002) (discussing Shriver's studies).

64. *Id.*



unacceptable, for it negates our claims to any part of the racial or ethnic categories listed before it.<sup>65</sup>

For far too long multiracial classification has been plagued with inaccuracy. This inaccuracy dates at least as far back as the seventeenth and early eighteenth centuries in the upper South. In an effort to discourage interracial mating and with the increasing need to link free mulattoes with enslaved mulattoes and Blacks, laws were designed to preserve "White privilege,"<sup>66</sup> and thus the one-drop rule was born.<sup>67</sup> The lower south, however, opted to treat mulattoes as a distinct third racial class, above Blacks.<sup>68</sup> Perhaps in an attempt to address this historical inaccuracy, the 2000 Census now permits the identification of one or more races as an indication of racial identity.<sup>69</sup> For example, the three categories for the American Indian and Alaska Native populations (American Indian, Eskimo, or Aleut) were previously combined into one category where one would indicate their enrolled principal tribe as an American Indian or Alaska Native.<sup>70</sup> Likewise, six Asian categories and three Pacific Islander categories now appear on the Census 2000 questionnaires, in addition to "Other Asian" and "Other Pacific Islander" categories which have write-in sections.<sup>71</sup> The category known as "Some Other Race," which is intended to capture responses such as Mulatto, Creole, and Mestizo, also contains a write-in section.

65. Douglass, *supra* note 58, at 2.

66. For a discussion on White privilege, see Martha R. Mahoney, *Residential Segregation and White Privilege*, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 273-75 (Richard Delgado & Jean Stefancic eds., 1997); Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences through Work in Women's Studies*, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 291-99 (Richard Delgado & Jean Stefancic eds., 1997); Stephanie M. Wildman & Adrienne D. Davis, *Making Systems of Privilege Visible*, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 314-18 (Richard Delgado & Jean Stefancic eds., 1997); see also DISPLACING WHITENESS: ESSAYS IN SOCIAL AND CULTURAL CRITICISM (Ruth Frankenberg ed., 1997); DAVID ROEDIGER, *WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (rev. ed. 1999); STEPHANIE WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996); Davis, *supra* note 44, at 710 ("This shifting construction of both [B]lackness and [W]hiteness illuminates both the fluidity of racial classifying practices, and the inexorable nature of securing the [W]hite rights."); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1777-81 (1993).

67. Payson, *supra* note 59, at 1244-45.

68. *Id.* at 1246-47.

69. See U.S. Census Bureau, *Racial and Ethnic Classification Used in Census 2000 and Beyond*, at <http://www.census.gov/population/www/socdemo/race/racefactcb.html> (last modified Apr. 12, 2000) (stating that the 2000 census contains fifteen check box optional categories and three write-in sections whereas the 1990 census contained sixteen check box response categories and two write-in areas).

70. *Id.*

71. *Id.* (discussing other write-in categories on the 2000 census).

However, the history of the one-drop rule in America has created doubts about the political consequences of these new multiracial categories. One fear is that the new census approach may yield lowered numbers in the Black and Native American categories that in turn will have harmful results for racial minorities overall. Tanya Hernández, for example, raises concerns about the way the MCM may harm the enforcement of federal civil rights law because Whites may manipulate these categories and become persuaded to do further violence to egalitarian principles of racial justice that protect racial minorities.<sup>72</sup> This may explain why civil rights organizations have also risen in opposition to the MCM.<sup>73</sup> The concrete advantage Hernández sees in preserving race-conscious classification is its constant reminder to society not to abandon progress toward racial equality.<sup>74</sup> Naturally, she also remains weary of people who self identify as multiracial given the likelihood they will be favored as Caucasian in our society and courts.<sup>75</sup> This approach, she believes, promotes pigmentocracy,<sup>76</sup> and ignores “the political meaning of race.”<sup>77</sup> Others have also similarly suggested that this favored mixed status, in turn, may create a new racial hierarchy rather than dismantling the current one.<sup>78</sup> For instance, Rachel Moran observes that groups are differently situated with respect to the possible ramifications of mixed-race categorization, in part due to the dramatically different rates and consequences of intermarriage.<sup>79</sup> Moran asserts that Asian-American intermarriage sustains racial assimilation as Asian Americans tend to intermarry more frequently with Whites.<sup>80</sup> What results then is an altered elevated standing in the racial

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72. See Tanya Katerí Hernández, “Multiracial” Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97 (1998).

73. See Carl M. Cannon, *Census Faces Racial Issue*, BALT. SUN, June 29, 1997, at 1A (noting that civil rights organizations are “worried that new ways of counting race will dilute the political strength of minorities—and contribute to the erosions of recent economic gains made by [B]lacks and Latinos”).

74. Hernández, *supra* note 72.

75. *Id.* at 111.

76. Pigmentocracy refers to the tendency of those with White or light skin to be considered towards the top of the social strata, while those with darker skin are relegated to the bottom. See Peter M. Sanchez, *Ethnicity, Race and Democratic Consolidation: The Dominican Republic, Guatemala and Peru*, at <http://136.142.158.105/LASA97/sanchez.pdf> (Apr. 17, 1997) (draft paper) (citing Alejandro Lipschutz, *El indoeamericanismo y el problema racial en las americas* (2d ed., 1944)).

77. Hernández, *supra* note 72, at 113.

78. See Banks, *supra* note 51, at 26 (noting that Rachel Moran suspects that the census’s mixed-race option, while contributing to the assimilation of Asian Americans, may for [B]lacks “create yet another opportunity . . . to further stratify themselves internally based on degree of [W]hite ancestry.”). Race consciousness is therefore increasingly seen as threatened by the Multiracial Category Movement.

79. Rachel F. Moran, *The Mixed Promise of Multiracialism*, 17 HARV. BLACKLETTER L.J. 47, 50–55 (2001).

80. *Id.* at 51.

hierarchy.<sup>81</sup> Interracial marriage removes the otherwise prevalent presumption of disloyalty to the United States by challenging the image of foreignness entrapped in their image within the broader American populace.<sup>82</sup> The same "de-ethnicization" by interracial marriage, as she puts it, is not true for Blacks since their racial identity is not removed in the same way it is removed for Asian Americans.<sup>83</sup> Moreover, Blacks are less inclined to intermarry.<sup>84</sup> In addition, racial tracking of Latinas/os is already full with complexity due to the fact that multiple races are included in the Latino community.<sup>85</sup>

The fact that a significant proportion of Hispanics, Blacks, Native Americans, and others who may also have multiracial ancestry are more likely to self-identify, and be identified by others, monracially compounds this concern. As such, they may not present the same data collection problems as mixed-race persons. Some have speculated that the long-standing phenomenon of multiracial persons "passing" for another race might also contribute to the monoracial approach.<sup>86</sup> Another likely factor that will tend to stabilize the monoracial nature of identity is the possibility that census data may be interpreted in such a way that reincarnates the

81. *Id.*

82. See Banks, *supra* note 51, at 25–26 (discussing Moran's *The Mixed Promise of Multiracialism*). Rachel Moran also extensively discusses the MCM thesis, *supra* note 79, at 167.

83. Banks, *supra* note 51, at 25–26.

84. *Id.* Banks notes:

Even as it softens racial boundaries, it may undermine group identity and cohesion. The census's recognition of multiple origins acknowledges both the assimilation that intermarriage produces for Asian Americans and the distinct ethnic identity that they may wish to maintain . . . African Americans are substantially less likely than other groups to intermarry, a phenomenon explained by a number of factors. Residential and educational segregation leaves [B]lacks with less opportunity to intermarry. Blacks may be less inclined toward intermarriage, perhaps in part because, as Moran hypothesizes, cross racial intimacy harkens back to the forced sexual liaisons of the slavery era. Finally, [B]lacks confront resistance to intermarriage. According to Moran, "Americans are more likely to oppose intermarriage between [B]lacks and [W]hites than other forms of intermarriage."

*Id.*

85. See, e.g., Payson, *supra* note 59, at 1241 (noting that many Latinos self-identify as of mixed indigenous and European heritage and that the failure of Directive No. 15 to account for Mestizo identity requires the abandonment of its obsolete racial categories); see also Luis Angel Toro, "A People Distinct from Others": Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15, 26 TEX. TECH. L. REV. 1219, 1248 (1995).

86. See generally F. JAMES DAVIS, WHO IS BLACK? ONE NATION'S DEFINITION 125 (1991); JOEL WILLIAMSON, NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES 2 (1980).

one-drop rule.<sup>87</sup> Indeed, census officials have already indicated that self-identified Whites who are also members of a racial minority group will be "assigned" to the minority group.<sup>88</sup> On the other hand, some commentators welcome the MCM advocacy as a positive means to break down racial hierarchies and blur racial distinctions.<sup>89</sup> For example, Professor Alex Johnson argues in favor of multiracial classification because he essentially believes it will engender a form of "shade confusion" that will consequently render race meaningless as the Black/White paradigm fades from existence.<sup>90</sup> But while this approach may give Tanya Hernández and others in the anti-MCM camp pause, it does raise the legitimate question of whether multiracial identity can ever be consistent with the monoracial paradigm of self-classification that she sees as so instrumental to promoting racial justice. In the search for an answer to this question, we must first address a threshold inquiry: How is racial identity formed?

#### IV. RACIAL IDENTITY FORMATION AND THE MIXED-RACED PARADIGM

This part offers a claim of the process in which racial identity formation occurs and explores whether this process is compatible with monoracial paradigms of classification. In the process, I hope to illustrate through personal narrative precisely why, despite an increasingly multiracial nation, we should continue to repudiate colorblind initiatives such as Connerly's RPI and promote racial justice.

Born to a Black father and a White mother, I distinctly came to learn that I would occupy multiple spaces—one White, one Black. Yet in New York City, I cannot convince many that I am not Puerto Rican and in New Orleans, I am suddenly mistaken as a Creole. Mine is a diverse lineage with African American and Blackfoot Indian on one side and Sicilian, Neapolitan, and Irish on the other. With the exception of my brother, all of my siblings are fair-skinned. William was the only one of my brothers who was dark-skinned, the same as my father. In fact, William happened to be the only dark-skinned child among my two other olive-skinned siblings. I never had the joy to know William, who died as an infant in the arms of a nurse in a hospital somewhere in Utah.

It happened when my mother was ensconced to the emergency care wing of the hospital after she and my father crashed their car into a ditch. Upon admittance, my worried father learned that he could not accompany her, could not visit her, could not even see her through a window.

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87. Banks, *supra* note 51, at 26.

88. *Id.*

89. See Robinson, *supra* note 55.

90. Alex M. Johnson Jr., *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887, 891 (1996).

In the agony of physical trauma and the possible loss of his wife and son, he was forced to a wing of the hospital which he was informed was reserved for Blacks. My father was jeered and threatened. He was told that the KKK would see to it that he would never leave town if he did not take the opportunity to leave while he still could. Forced to decide to abandon his wife in her time of need or risk his own possible lynching, he bravely chose to remain. My brother, who was injured in the crash, was attended to by a nurse who, in the words of my mother, was "so visibly disgusted that she had to hold this Black child in her arms." The nurse grew so flustered and impatient with the negro infant that she rapidly forced the milk from the bottle as she fed him. In fact, she squirted the milk down his throat until the bottle was nearly empty. The autopsy revealed that little William was drowned to death, his lungs filled with milk. My brother died not from the injury that he sustained from the crash, but from bigotry. My mother mourned her loss in the all-White wing and for the first time ever, my father was seen crying in the all-Black waiting room.

That was my first lesson in racialized space—my mother weeping in one place, my father in another. To the external world, they appeared worlds apart. But in the home where my parents were together, I would later wonder whether that space was Black? Or White? Or was it devoid of color? Life was blurry around the edges, only I did not know it in the bliss of childhood ignorance and the happy medium my parents maintained from the outside. It was true, or so it seemed that "when people intermarry and produce children of mixed race, racial identifications, racial loyalties, and racial kinships blur."<sup>91</sup> Which was I? Langston Hughes's poem *Cross* makes clear both the separate racialized space of mother and father, as well as the lingering limbo of the bewildered mixed offspring. Was I like the narrator in that poem penned by Langston Hughes? He wrote:

*My old man died in a fine big house.  
My ma died in a shack.  
I wonder where I'm gonna die,  
Being neither [W]hite nor Black?*<sup>92</sup>

Was that the case? That I was neither White nor Black? "Inter"-racial, caught "between" races? Or bi-racial, having "both" Black and White in me? And furthermore, would I be defined by my experience of racial hostility or by pride for my heritage? Clearly it was both; but often I have occasion to wonder if I were present in the hospital when my infant brother died, where would I have waited? In the all-White wing with my

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91. Kennedy, *supra* note 62, at 819.

92. Langston Hughes, *Cross*, in *SELECTED POEMS OF LANGSTON HUGHES* 158 (1926).

mom, or in the colored waiting room with my dad? Undoubtedly, it would have been the latter.

Today I check only the Black/African American box out of pride, pride from the image I have of my father and of my own history—the magnificent pyramids of what was once known as Kemet and the ancestors who sacrificed in the name of freedom. I remain as I did in my college and law school years, an advocate for Black empowerment and social justice. I was not like the few mixed-race persons I knew that vigorously asserted their dual racial identity at every opportunity. Although the pain of having to choose between races is a phenomenon well documented in the lives of biracial children and adults,<sup>93</sup> for me, the initial difficulty as a child was instead feeling very much in limbo. The Black side of my family shunned my siblings and me because of our White mother. Likewise, our White Italian family disowned us the moment parental affiliation began. Consequently, as a child and a teenager, I never knew extended family of any kind that would help solidify and ground my cultural and racial identity beyond my immediate one. I soon came to understand that race is not hereditary or an inheritance that is passed down.<sup>94</sup> How could it be? Both of my brothers identify themselves quite differently, with one asserting his White identity and the other claiming both aspects of his racial identity, even though they grew up in the same household as I. In contrast to an essentialist outlook, which “assumes that the experience of being a member of the group . . . is a stable one, one with a clear meaning, a meaning constant through time, space, and different historical, social, political, and personal contexts,”<sup>95</sup> my context was fluid and evolving. As the historian Barbara Fields once wrote, “if race lives on today, it does not live on because we have inherited it from our forbears of the seventeenth century or eighteenth or nineteenth, but because we continue to create it today.”<sup>96</sup>

Physically looking neither White nor Black, I did appear for a long time to be somewhere ambiguously in between.<sup>97</sup> I soon learned that

93. See generally Philip M. Brown, *Biracial Identity and Social Marginality*, 7 CHILD & ADOLESCENT SOC. WORK J. 319 (1990); James H. Jacobs, *Identity Development in Biracial Children*, in RACIALLY MIXED PEOPLE IN AMERICA 190, 190–206 (Maria P.P. Root ed., 1992); Deborah J. Johnson, *Racial Preference and Biculturality in Biracial Preschoolers*, 38 MERRILL-PALMER Q. 233 (1992); Kathy Overmier, *Biracial Adolescents: Areas of Conflict in Identity Formation*, 14 J. APPLIED SOC. SCI. 157 (1990).

94. See generally Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 HARV. C.R.–C.L. L. REV. 1 (1994).

95. Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 19 (1995).

96. Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, 181 NEW LEFT REV. 95, 117 (1990).

97. See generally HALF AND HALF: WRITERS ON GROWING UP BIRACIAL AND BICULTURAL (Claudine Chiawei O'Hearn ed., 1998); WHAT ARE YOU?: VOICES OF MIXED-RACE YOUNG PEOPLE (Pearl Fuyo Gaskins ed., 1999).

phenotype goes a long way in facilitating racial identity because it is the foundation for the social interaction with others by which one largely comes to identify one's self.<sup>98</sup> In this sense, racial identity formation can largely be derived from predominately phenotypic community characteristics. According to Ian Haney López:

[C]ommunities can serve as mediums linking race to identity and back again only if communities are somehow racially identifiable. The morphological similarities of people who have long lived in geographic or social proximity seem to offer an easy explanation for the overlap of communities and races: that communities came first and were racialized as a function of the race-obsessed social ideology of this country.<sup>99</sup>

López also observes:

[R]ace must be understood as a *sui generis* social phenomenon in which contested systems of meaning serve as the connections between physical features, races, and personal characteristics. In other words, social meanings connect our faces to our souls. Race is neither an essence nor an illusion, but rather an ongoing, contradictory, self-reinforcing process subject to the macro forces of social and political struggle and the micro effects of daily decisions.<sup>100</sup>

If the significance ascribed to phenotype and racial sorting used to demark people are not biologically inherent, but rather socially constructed,

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98. Phenotype describes an individual's observable physical attributes, such as height, eye, hair, and skin color, facial features, and hair texture. As defined by a medical dictionary, phenotype is "the entire physical, biochemical, and physiological makeup of an individual as determined both genetically and environmentally, as opposed to genotype." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1277 (28th ed. 1994).

99. López, *supra* note 94, at 54. According to López:

Under this view, for example, the myriad disparate Native American cultures were collapsed into a single monotonous racial "Indian" by the Anglo emphasis on morphological difference as a trope for social and power inequalities. In this way, Native American peoples, like the Mexicans of the Southwest and the Chinese in California described earlier, presumably existed as communities before elements of their morphology became racially meaningful; they were members of communities before they were members of a race.

*Id.* at 54–55.

100. *Id.* at 7; see also T. Alexander Aleinikoff, *A Case for Race Consciousness*, 91 COLUM. L. REV. 1060, 1067 (1991) ("While not every decision we make necessarily has a racial component, when race is present it almost invariably influences our judgments. We are intensely—even if subconsciously—race-conscious.").

how was it that I came to psychologically, spiritually, and emotionally evolve into my current state of Black race consciousness?<sup>101</sup>

In so evolving I did not, however, reject my White Italian heritage or that of my Native-American ancestors. They are sophistically interwoven in multiple layers that, for the most part, only reinforce my experience as a racial minority. But in claiming my Black identity in the company of inquiring Whites and other Blacks, I rejected the vast number of multiracial persons who time and time again would identify with the non-minority part of themselves. Indeed, this occurred far more than one could reasonably attribute to mere coincidence. A former chairman of the U.S. Commission on Civil Rights has speculated that “a whole host of [B]lacks [will run] for the door the minute they have another choice [as a] way of saying, ‘I am something other than [B]lack.’”<sup>102</sup> Isn’t that similar to what happened to the Black flight which occurred the moment Jim Crow was declared illegal? But when I would acknowledge my Black identity, Whites were made uncomfortable while many Blacks were penchant, even combative, but more often so sure of what they saw that they did not even begin to question whether I was anything other than Latino. Some thought they figured me out, others were uncomfortably unsure. Others suspected I was a mixture of “some kind” just gleaned from the fact that my surname does not sound Hispanic. In fact, a former law firm colleague of mine remained silently curious until the proper moment in conversation came when he could eagerly ask about my racial and ethnic mix without seeming as if he were prying. “Why do you want to know?” I inquired, as if I could momentarily guard my racial privacy from the fact that I was undeniably a person of color. “So I know what jokes I can make without offending you,” he replied. Naturally, the realization that he could not tell Black, Irish, Native American, or Italian jokes left him even more perplexed. At each encounter I am often reminded of sociologists Michael Omi and Howard Winant who observe that:

[O]ne of the first things we notice about people when we meet them (along with their sex) is their race. We utilize race to provide clues about who a person is. The fact is made painfully obvious when we encounter someone whom we cannot conveniently racially categorize—someone who is, for example, racially “mixed” or of an ethnic/racial group with which we are not familiar. Such an encounter becomes a

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101. See, e.g., López, *supra* note 94, at 7 (noting that race is located within the cartography of other social constructions).

102. Banks, *supra* note 51, at 27 (quoting Rachel Moran, former chairman of the U.S. Commission on Civil Rights).



source of discomfort and momentarily a crisis of racial meaning.<sup>103</sup>

My racial orientation was undoubtedly shaped not only by my eventual racial acceptance within my group of Black peers, but also through pride in my heritage, the latter of which could gradually withstand any given rise or fall in my racial acceptance within my group of Black peers. Of course, my orientation was also a result of the experiences of alienation, which among other things included being misdiagnosed with a learning disability and tracked into academic dead-end courses with a majority of fellow students of color, being subjected to police traffic pullovers, and being subjected to hostility when engaging in activism for common equality. Unaware of these experiences, some Blacks I met would often quietly, or very truculently, challenge me when I asserted my Black identity as a light-skinned person. Over time, I realized that I stood in a unique position to witness how Blacks and Whites viewed one another and I came to vehemently resent the latter's anti-dark bias toward the former, which I fully acknowledged to be global in dimension.<sup>104</sup> I understood this bias had also created an internalized defense mechanism among Blacks against those favored with lighter skin.<sup>105</sup> Indeed, White favoritism toward light-skinned persons has become so internalized and entrenched within the Black community, in the form of resentment against other Blacks of light complexion. But while I understood this resentment and its source whenever I encountered it among friends and associates, I nonetheless refused to engage in the house Negro/field Negro dichotomy that often accompanied such resentment. Nonetheless it was clear that when it came to other Blacks, I was even one step further removed from racial acceptance, for I was not simply a light-skinned Black, but of mixed lineage.

*As you look upon my mocha skin with disdain  
One ever feels one cognitive dichotomy,  
One's invisibility—an ideological lopsidedness  
With both "struggle" and "hegemony"  
Coursing through his veins.  
Far from intellectual curiosity is my pride and pain*

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103. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1980s 62 (1986).

104. See, e.g., CARL DEGLER, NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES 98–112, 226 (1971) (noting a color caste hierarchy in Brazil with dark-skinned Blacks at the bottom).

105. Cf. Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705 (2000); Leonard M. Baynes, *If It's Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 DENV. U. L. REV. 131, 146–53 (1997) (discussing "colorism" in the Latino community).

*But I have fun with your social experiment,  
 Your "really who's Black game."  
 Yet no need to wonder, no cause for alarm  
 My color, culture and content  
 remain proudly intact and unharmed.  
 But on every occasion you are always the gracious host  
 Who ostracizes to quell your demons  
 and appease your own ghosts.<sup>106</sup>*

But just as often, my phenotypical reality opened up another world, or some small part of it. Even being mistaken, and often treated as Latino only confirmed that race matters. Because of my appearance, I also experienced racial and ethnic discrimination from yet another vantage point. Growing up, the words "spic" and "dumb El Salvadorian" were epithets I quickly came to know. More than several times, before I took it upon myself to learn Spanish, I was even regarded by Dominicans as a "stuck up Puerto Rican who did not want to speak the language." I was caught in the vortex of intergroup ethnic and racial animosity among Latinos as well as from both Whites and Blacks.

So why would I, a person who has experienced hostility from Whites and non-Whites, and who is himself both White and non-White, ever advocate and embrace race consciousness? The point I make in recounting my mixed-race lineage and the complexity of identity and complexion is this: despite its difficulty and inexactness, despite the multidimensionality<sup>107</sup> and intersectionality,<sup>108</sup> a multiracial background does not always eviscerate the need for monoracial classification schemes, but rather, reinforces its continuing relevancy in the lives of multiracial persons who are viewed in strictly monoracial terms. If that seems like a contradiction infused with internal tension, then it is no less contradictory than living daily in the "double consciousness" that both bi-racial and Black persons experience.<sup>109</sup> Added to this complexity remains the open question of how one is to mesh multiraciality and race consciousness with engagement in racial resistance. I address this question below.

106. Maurice Dyson, *Mixed*, in *TRUTH AND TRIBULATION, SELECTED POEMS* 10 (Maurice R. Dyson & Terrence B. Page eds., 1999).

107. See generally Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285 (2001) [hereinafter *Identity Crisis*].

108. See, e.g., Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antisubordination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. LEGAL F. 139, 142-43 (1989).

109. See generally W.E.B. Du Bois, *THE SOULS OF BLACK FOLK* (1903); FRANTZ FANON, *BLACK SKIN, WHITE MASKS* (1967).

# VI. MULTIRACIAL IDENTITY: THE DILEMMA OF CLASSIFICATION AND RACIAL RESISTANCE

Some commentators have suggested that racial identity is a prerequisite for racial resistance.<sup>110</sup> Darren Hutchinson, for example, suggests that there exists “a symbiotic relationship between racial resistance and identity formation, . . . two processes [that] are mutually reinforcing.”<sup>111</sup> More specifically, he asserts that racial identity and consciousness “serves as a prerequisites or catalyst for racial resistance.”<sup>112</sup> Although I agree these spheres are mutually reinforcing, indeed symbiotic, I am less prepared to say that racial identity, at least in all cases, serves as a prerequisite to racial resistance. While Hutchinson recognizes that the Black Power Movement was “the clearest example of how resistance to oppression fashions identity” it is clear in his successive passages for example that he, along with other scholars, regards identity as shaped by “experiential knowledge” which in turn becomes the basis for racial resistance to racial injustice.<sup>113</sup>

Indeed, I came to adopt my Black identity through struggle, a struggle against being separated at times from my father and my mother, simply because societal discrimination worked against their interracial union. I also engaged in battles to dismantle academic tracking in my high school—because I was a direct victim of it, the double standards in financial aid and need blind admissions in college, and cab drivers that did not pick up college students such as myself. I also waged battle with other forms of racial subordination without knowing that it was merely because I had neither been accepted as Black, nor had I come to identify the cause I was fighting for as a Black one. But soon thereafter I embraced my racial identity, in large measure because others engaged in these battles finally embraced me as one of their own. The social meaning of the struggle we fought connected our faces to a collective soul.

Thus, if we acknowledge that race is socially constructed, we must also come to accept that it can be formed by engagement that can and has been socially regarded, at its essence, as racial resistance. The synergy of multiple environmental factors can work in reverse to form the very identity of the person who suddenly, or even gradually, finds himself in the midst of its perfect storm. To be sure, this is not likely to be the case

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110. See, e.g., Darren Lenard Hutchinson, *Critical Race Studies: Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455, 1469 (2002) [hereinafter *Critical Race Studies*] (“The progressive race blindness scholarship also blurs the reality that racial consciousness or identity serves as a prerequisite or catalyst for racial resistance. Persons of color have written extensively on how their racial identity—shaped by experiences with subordination—gives them valuable ‘experiential knowledge’ for challenging racial injustice.”).

111. *Id.* at 1468.

112. *Id.* at 1469.

113. *Id.*

all the time, or nearly all the time, since one can view the vicissitude of life through a non-rationally contextualized filter. But in some cases, these experiences may wake the soul to embrace the reality of one's racial space and identity within the world. As such, racial identity formation in limited circumstances can be both externally reinforced and internally developed. Essentially, although racial identity formation is typically a predicate to racial resistance, this should not mean that it can never be the inverse.

As one of the multiracial persons on whose behalf Connerly supposedly waged his RPI initiative, I must ultimately reject it. Whatever his intent, the result would be clear for people of color. Thus, unlike progressive colorblind theorists,<sup>114</sup> I embrace racial classification as the cornerstone for accountability. However we come to identify ourselves, I believe that in some, but certainly not all cases, challenging the material effects of discrimination requires that we remain focused on race which in turn may also facilitate racial identity formation. Indeed, a focus on the material effects of inequality will only reinforce the relevance of racial classifications and the need for race conscious remedies.<sup>115</sup>

When all is said and done, the simple ironic truth is also all too clear: Connerly was pushing for the elimination of racial data and calling for the end of racial consideration just as the conservative U.S. Supreme Court today now acknowledges the saliency of race.

#### A. The Dilemma of Classification and Racial Authenticity

Calling for a contextual review of the Michigan plan, the majority of the Court noted that: "[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."<sup>116</sup> Connerly's initiative entirely missed this point in that, in its vehement insistence to eliminate race, it represented a position not of colorblindness,

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114. See, e.g., PAUL GILROY, *AGAINST RACE: IMAGINING POLITICAL CULTURE BEYOND THE COLOR LINE* 29 (2000); C. Christi Cunningham, *The "Racing" Cause of Action and the Identity Formally Known as Race: The Road to Tanazunchale*, 30 RUTGERS L. REV. 709 (1999); Richard T. Ford, *Race As Culture? Why Not?*, 47 UCLA L. REV. 1803, 1806 (2000); Hutchinson, *Critical Race Studies*, *supra* note 110 (discussing progressive colorblindness scholarship and citing Reginald Leamon Robinson, *The Shifting Race-Consciousness Matrix and the Multiracial Category Movement: A Critical Reply to Professor Hernández*, 20 B.C. THIRD WORLD L.J. 231, 232-33 (2000)); Reginald Leamon Robinson, *A Means of Preventing Escape from the Control of Her White Masters*, 15 TOURO L. REV., 401, 432-33 (1999).

115. See generally Richard Delgado, *Two Ways to Think About Race: Reflections on the ID, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279 (2001).

116. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2341 (2003) (noting that racial preferences must be viewed in context).

but of hostility to race consciousness.<sup>117</sup> Implicit in the belief that race consciousness vis-à-vis racial classifications will have a negative impact is that the racial categories which Connerly opposes will essentialize individual groups by "falsely implying that they experience life at a unitary location."<sup>118</sup> Colorblind theorists, such as Christi Cunningham, also view race as a "malignant proxy" for community while Reginald Robinson, for example, believes such classifications raise the unsavory question of what is genuine or "authentic" Blackness.<sup>119</sup> Beyond these concerns, there is also the longstanding skepticism of the historical emphasis of race consciousness which produced the negative regime of Jim Crow. However, this skepticism is overly broad in that it fails to take adequate notice of the fact that race consciousness can and has served the beneficial purpose of addressing racial inequity in many fields such as education.<sup>120</sup> In this regard, colorblind theorists' obfuscation of the distinction of racial classification as a remedial measure from more distinct historically invidious classifications is reminiscent of the Supreme Court's blurred articulation of a so-called colorblind jurisprudence.<sup>121</sup>

But for now, the Supreme Court has acknowledged the legitimate role of race as embodied in the diversity rationale for affirmative action. The Court's endorsement of the use of race, by extension, has also meant the endorsement of racial classifications for all intents and purposes. But query why the Court would pave the way for the further use of racial classifications. No doubt, a number of theories will be espoused about O'Connor's pivotal swing vote. My own belief is that at the very heart of her opinion in *Grutter* is the notion of national legitimacy and security, as well as the special role of education. This, I believe, can explain the Court's affirmation of the ultimate role of race and the use of racial classi-

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117. Cf. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1378-79 (1988) ("Racial hierarchy cannot be cured by the move to facial race-neutrality . . . White race consciousness, in a new form but still virulent, plays an important, perhaps crucial, role in the new regime that has legitimated the deteriorating day-to-day material conditions of the majority of Blacks.").

118. Hutchinson, *Critical Race Studies*, *supra* note 110, at 1461-62.

119. E. Christi Cunningham, *The "Racing" Cause of Action and the Identity Formerly Known As Race: The Road To Tamazunchale*, 30 RUTGERS L.J. 707, 728 (1999); Reginald Leamon Robinson, "Expert" Knowledge: Introductory Comments on Race Consciousness, 20 B.C. THIRD WORLD L.J. 145, 160-63 (2000).

120. See *Lau v. Nichols*, 414 U.S. 563 (1974); *Keyes v. Denver Sch. Dist. No. 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); see also Sylvia Hurtado, *Linking Diversity and Educational Purpose: How Diversity Affects the Classroom Environment and Student Development*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 187 (Gary Orfield & Michal Kurlaender eds., 2001); ROBERT M. HUTCHINS, *THE HIGHER LEARNING IN AMERICA* 15, 19 (1936).

121. See Neil Gotanda, *A Critique of "Our Constitution is Color Blind,"* 44 STAN. L. REV. 1, 53-55 (1991).

fications in university admissions. Below I attempt to briefly elaborate on this important point.

*B. A New Purpose for Race and Racial Classification?*

Justice O'Connor writes:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.<sup>122</sup>

Education is key to national legitimacy because, for O'Connor, it provides the training ground for a diverse national leadership to develop. This diverse leadership in turn fosters a sense of legitimacy of a democratic nation that reflects all of its citizens.<sup>123</sup> In addition to the legitimacy afforded by inclusiveness, O'Connor has a new argument for why the University of Michigan should be permitted to maintain its admissions policy, to wit: Race-based affirmative action is necessary to win the war on terror. This idea is related to the first, since it is legitimacy that in turn engenders security. The idea is that because racial diversity will ensure broad legitimacy in a racially and ethnically diverse world, the face of America will resemble its officer core (and other nations that have long seen their interests diametrically opposed to our own). In this regard, the most effective amicus brief of all, particularly in view of the war in Iraq, was filed by a group of twenty-nine retired military and civilian leaders, including General H. Norman Schwarzkopf, director of the allied forces in the 1991 Gulf War, Robert McFarlane, President Reagan's national security adviser, Admiral William T. Crowe, former chairman of the Joint Chiefs of Staff, and General Wesley Clark, former Supreme Allied Commander in Europe.<sup>124</sup> These military officers also took note of the nexus between security and racial diversity:

In the interest of national security, the military must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting. It

122. Grutter v. Bollinger, 123 S. Ct. 2325, 2341 (2003).

123. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312-13 (1978) (Powell, J., concurring) (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)) ("[T]he 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples.").

124. Brief of Amici Curiae Lt. Gen. Julius W. Becton, Jr., et al. at 29-30, Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (No. 02-241).

requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective. Like our military security, our economic security and international competitiveness depend upon it. An alternative that does not preserve both diversity and selectivity is no alternative at all.<sup>125</sup>

If racial diversity vis-à-vis inclusive considerations of racial classifications matter for the Supreme Court and our nation's legitimacy and security, how do progressive colorblind theorists attempt to reconcile their attempts to destabilize racial classifications? Other colorblind theorists go a step further in their contradiction by discounting racial classifications on the one hand, while simultaneously relying upon race as a vehicle for social resistance or social control on the other. For example, as Hutchinson observes, C. Christi Cunningham's writing indicates that she "wishes to discard the identity quotient—but maintain race as a concept of shaping political and equality movements."<sup>126</sup> The fact that colorblind activists such as Connerly make a specific allowance for racial classification for purposes of police authority and racial oppression in the RPI calls into the question the integrity and genuine intent of their professed colorblind agenda.

If, according to these military officers, legitimacy and security are furthered by demonstrative racial inclusiveness, how is it then that legitimacy and security are best ensured in Connerly's RPI? It would appear that there is not only a conspicuous difference between these camps in what role race should play, but also a marked difference of opinion in the inherent value of race in achieving legitimacy and security for our democratic republic. In the former, race is used to harness legitimacy and security for the better good while in the latter, race is viewed as something so inimical to security that it must be controlled. In this sense it is rather ironic that Connerly's call for the elimination of racial boxes actually leads to less freedom for people of color, not more.

In the final analysis, traditional critical race theorists, civil rights advocates, and other allies would do well to finally recognize the importance of working together over the next twenty-five years to close the race gap in education, health care, criminal law, employment, and other important arenas of our social and political lives. Such cooperation will be critical to make race less salient and less determinative of educational, economic, and political resources and opportunities. Likewise, whatever differences remain between people of color, be they monoracial, multiracial, critical race, or progressive, one might concede that Tanya Hernández's call for race consciousness within the monoracial Black/White paradigm is in its most fundamental terms, a call for racial

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125. *Id.*

126. Hutchinson, *Critical Race Studies*, *supra* note 110, at 1463.

solidarity among Blacks and multiracials. Cornel West once described this approach to racial solidarity as "racial reasoning."<sup>127</sup> For West, racial reasoning is the notion that Black people, in order to lend strength to the struggle of equality, must close ranks and speak with one voice.<sup>128</sup> However, for West, racial reasoning is unsatisfying primarily because it produces Black leaders that focus solely on pigmentation instead of qualification and reasoning.<sup>129</sup>

I also find difficulties with the racial reasoning concept, given that my racial identity was inextricably tied to a limited societal construction of race solely based upon my own pigmentation. Indeed, such a narrow conception of race vis-à-vis pigmentation obviously contradicts the multidimensionality of people of color; it has undoubtedly played a role in my own marginalization within both the Black and White communities. To be sure, racial reasoning has other negative consequences. It is, after all, this type of reasoning, according to West, that led to the confirmation and ascendancy of Justice Clarence Thomas and his radically anti-progressive colorblind agenda. As West states:

Thomas's claim to racial authenticity [is] his birth in Jim Crow Georgia, his childhood spent as the grandson of a [B]lack sharecropper, his undeniably [B]lack phenotype degraded by racist ideals of beauty, and his gallant [B]lack struggle for achievement in racist America. Second, the complex relation of this claim to racial authenticity to the increasing closing-ranks mentality in [B]lack America. Escalating [B]lack-nationalist sentiments—the notion that America's will to racial justice is weak and therefore [B]lack people must close ranks for survival in the hostile [W]hite country—rests principally upon claims to racial authenticity . . . . Most [B]lack leaders got lost in this thicket of reasoning and thus got caught in a vulgar form of racial reasoning: [B]lack authenticity—[B]lack

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127. Cornel West, *Black Leadership and the Pitfalls of Racial Reasoning*, in *RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY* 390 (Toni Morrison ed., 1992).

128. *Id.*

129. *Id.* West suggests:

The fundamental aim of this undermining and dismantling is to replace racial reasoning with moral reasoning, to understand the [B]lack-freedom struggle not as an affair of skin pigmentation and racial phenotype but rather as a matter of ethical principles and wise politics, and to combat [B]lack-nationalist views of subordinating the issues and interests of [B]lack women by linking mature [B]lack self-love and self-respect to egalitarian relations within and outside [B]lack communities. The failure of nerve of [B]lack leadership is to refuse to undermine and dismantle the framework of racial reasoning.

*Id.* at 393.



closing-ranks mentality—[B]lack male subordination of [B]lack women in the interests of the [B]lack community in a hostile [W]hite-racist country.<sup>130</sup>

Thus, while Hernández calls for the abolition of the MCM because she believes it will promote pigmentocracy, she fails to see that her proposal for such an abolition only succumbs to another invidious form of racial reasoning. Moreover, she fails to show how such an abolition would radically alter the status quo in this respect. Theoretically, the end of the MCM will hardly mean that the current pigmentocracy will no longer exist, nor does it necessarily mean that racial justice will be served. In the end, I therefore must respectfully disagree with this portion of Hernández's important thesis because as the foregoing discussion illustrates, over-reliance on pigmentation will always cheat the cause of racial justice.

However, on the other end of the spectrum, there are those who suggest that in order to lend strength to the struggle of equality, we not close ranks, but instead expand them. For example, Lani Guinier and Gerald Torres, recently expressed optimism for successful multiracial coalition building by constructing collective identity and cause under the banner of "political race."<sup>131</sup> "Political race" begins by using the societal construction of racial identity as a method by which to organize non-minorities. This is achieved by demonstrating how the needs of the racial minorities overlap with non-minorities as to implicate threats to the common good.<sup>132</sup> In short, Guinier and Torres are concerned with the very issues inherent in multiracial coalition building that Derrick Bell confronted in his oft-cited interest convergence dilemma.<sup>133</sup> But as Cheryl Harris queries, we must wonder whether "political race intervention . . . moved us through race to class, or is it an intervention that leaves crucial aspects of racial

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130. *Id.* at 391–92.

131. See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 11–12 (2002).

132. Andrew E. Taslitz, *The New Data: Over-Representation of Minorities in The Criminal Justice System: Racial Auditors and the Fourth Amendment: Data With the Power To Inspire Political Action*, 66 *LAW & CONTEMP. PROBS.* 221, 282 (2003). According to Taslitz:

The key point is that the political race idea, if correct, optimistically asserts that the circle of the sympathetic can be widened based on a strategy of portraying a threat to the common good. The anxiety raised by novel information given to otherwise uninformed [W]hites may therefore help to foster [W]hite willingness to embrace a new view of America as, in part, a racial polity.

*Id.*

133. See generally Derrick A. Bell, Jr., *Brown v. Board of Education and The Interest-Convergence Dilemma*, 93 *HARV. L. REV.* 518 (1980).

disadvantages still to be addressed?"<sup>134</sup> According to Harris, the answer appears to lie in the latter concern, since class itself is organized in racial terms that may lead to neglect of specific disadvantages affecting racial minorities.<sup>135</sup>

Consequently, we remain without an adequate theory of social resistance that can both recognize racial identity in general and multiracial identity in particular, while at the same time working for racial justice without either resorting to superficial reliance on pigmentation or marginalizing the interests of racial minorities.

## CONCLUSION

It is ostensibly clear that race will not lose its significance for quite some time. Even Justice Thomas remains skeptical of the ability of universities to eliminate any racial inequity, noting that in twenty-five years, affirmative action "policies will clearly have failed to 'eliminate the [perceived] need for any racial or ethnic' discrimination because the academic credentials gap will still be there."<sup>136</sup> Consequently, Connerly's initiative highlights not only that data analysis is critical for the enforcement of substantive rights, but that race conscious intervention is necessary to eradicate the enduring legacy of race conscious oppression that gives rise to this inequity. However, colorblind theorists and political race theorists alike should take caution that racial equality is not undermined by either a restrictive or narrow deference to race, as in the case of the former, or through an expansive definition of racial identity vis-à-vis political race identity, as in the case of the latter.

Neither ignoring the saliency of race, as Connerly does, nor encompassing poor Whites in a multiracial coalition, as Guinier and Torres envision, will necessarily lead to progress for racial minorities or the reclaiming of race-based scholarships, race-based financial aid, or race-based enrichment programs such as those recently abandoned at MIT<sup>137</sup> and

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134. Cheryl I. Harris, *Mining in Hard Ground the Miner's Canary*, 116 HARV. L. REV. 2487, 2529 (2002) (book review).

135. *Id.*

136. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2365 (2003) (Thomas, J., concurring in part and dissenting in part) (quoting Nathanson & Bartnika, *The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools*, 58 CHI. B. REC. 282, 293 (1977)).

137. The Department of Education's Office of Civil Rights initiated an investigation after two anti-affirmative action advocacy groups, the Center for Equal Opportunity and the American Civil Rights Institute, sent a letter to MIT alleging that its two summer programs were illegal because they limited enrollment to underrepresented minorities. Marcella Bombardieri, *MIT Drops a Policy For Minorities*, at <http://www.aad.english.ucsb.edu/docs/mit11.html> (Feb. 11, 2003); cf. Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States'*

elsewhere for fear of being sued by White constituents. For the reasons articulated above, racial reasoning is not an entirely satisfactory solution to building racial solidarity either. Whatever theories of solidarity and racial identity we adopt, in order to be truly effective, it is incumbent upon any movement to:

1. recognize the continuing need for racial classification for purposes of governmental accountability;
2. incorporate consideration of the increasing presence of multiracial identity and the specific role it will undoubtedly play in the future;
3. leverage broader influence upon constituents other than racial minorities by drawing upon the guiding principle of mutual self interest while adequately addressing the real materialist consequences of under-represented racial minorities.

These three elements are essential to any new theory of resistance that is centered around racial identity and classification, but are often not adequately addressed.

Regardless of whether the consideration of race legally ceases to be a factor to promote diversity by June 23, 2028, as the Supreme Court recommended, the growing hostility to racial categorization may mean that racial categorization will eventually cease to survive, legally or politically, except in marginal contexts. When this happens, so-called colorblind jurisprudence may very well be the default rule of law. By then, all the wrangling and debate over what role race should now play will ultimately become constitutionally obsolete.<sup>138</sup> Because that fateful day draws near we must finally recognize the time is now to act, and to act decisively.

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*Experiences* 55, 59 (2003), at <http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf>.

138. It is questionable whether the Court's language in *Grutter* prohibiting the use of race for purposes of diversity in twenty-five years is binding or merely dicta, albeit persuasive dicta by six members of the Supreme Court. See, e.g., Michael C. Dorf, *The Supreme Court's Divided Rulings in the University of Michigan Affirmative Action Cases: What Does it All Mean?*, at <http://writ.news.findlaw.com/dorf/20030625.html> (June 25, 2003). Conceivably, one can argue that the Court's language does not speak directly to the case at hand, although it is an important factor in O'Connor's narrow tailoring analysis. It is true, however, that the Court's recommended deadline on racial considerations will have important implications nonetheless.