The Content of Our Characterizations

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"Ever'thing there is but lovin' leaves a rust on yo' soul."
Langston Hughes

INTRODUCTION

In his book *Stacked Deck: A Story of Selfishness in America*,[1] law professor and philosopher Lawrence Mitchell attends to the structural features

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1. LAWRENCE E. MITCHELL (1998).

of inequality[2] by inverting the self-referential perspective of John Rawls' concept of original position[3] to an other-directed focus. He challenges what he considers to be liberalism's fatal flaw: the denial that privilege and disadvantage determine individual power and position, rather than hard work and ability. According to Mitchell, the law also shares this limitation by creating an individual subject that is self-reliant and independent. Only through rejecting this myth and moving from an ethic of formal equality to an ethic of caring can we achieve a fair and equitable social order.

Professor Mitchell does not ask us to envision a just society behind a veil of ignorance, not knowing where we will be positioned. Rather, he asks us to envision a structure which would be fair to our children, who are intrinsically vulnerable and the natural objects of our love and care. In creating such a structure, in dialogue with others who have children, we would not likely develop, either intentionally or unintentionally, a winner-take-all society.

Like Professor Mitchell, progressive race theorists seek to develop theories of justice that avoid the strictures of classical liberal theory without necessarily rejecting liberalism itself.[4] Among the many contributions of *Critical Race Praxis: Race Theory and Political Lawyering in Post-Civil Rights America*,[5] is Professor Eric Yamamoto's recommendation of an even more radical change in perspective on the problem of persistent structural inequality.[6] He does not limit his focus to children—

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2. According to Professor Mitchell, individuals are vulnerable because of racism, sexism, poverty, ignorance, downsizing and layoffs, unsafe products, and stock market manipulation. *See id.* at 41–43.

3. For a description of John Rawls' concept of original position, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 150–59 (1978).

4. *See* Dorothy E. Roberts, *Sources of Commitment to Social Justice*, 4 ROGER WILLIAMS U. L. REV. 175 (1998); *see also* Derrick Bell, *Racial Realism—After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 ST. LOUIS U. L.J. 393 (1990); Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Mari Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613 (1986).

5. 95 MICH. L. REV. 821 (1997) [hereinafter Yamamoto, *Critical Race Praxis*]; *see also* Eric Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 UCLA ASIAN PAC. AM. L.J. 33 (1995). Professor Yamamoto has expanded his ideas in his recently published book, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA (1999). The comments in this essay are addressed to the ideas in his article, *Critical Race Praxis*.

6. Professor Yamamoto's critique extends beyond Professor Mitchell's in addressing not only the structural features of inequality but the representational aspects as well. *See* Yamamoto, *Critical Race Praxis*, *supra* note 5, at 840–44.

the most tragic victims of our nation's crisis of race and class[7]—but takes as his polestar the increasingly tense, uneasy interaction of groups disadvantaged by racial and ethnic subjugation,[8] and he questions the near mythological concept "people of color," a characterization which promotes a vision of unity among groups which share a similar condition, but which often conceals overlapping and conflicting theoretical and practical issues.[9] Professor Yamamoto calls for progressives to abandon the obsession with the injustice of particularized circumstances and personal or group-specific notions of freedom. He calls for a decreased emphasis on justice, as it is conceived through law, and an expanded idea of racial justice and the tools necessary for its attainment.[10]

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7.   *See* MANNING MARABLE, BEYOND BLACK AND WHITE 208 (1995):

> In the area of health care, six out of ten pre-school children in New York City are not immunized. There are currently only ninety-six nurses for the six hundred elementary schools throughout the city. Every day in New York, 70,500 children use drugs. Thirty-five babies are born daily with low birth weights. More than 160,000 children, mostly African American and Latino, have no health insurance. And today, AIDS is the leading cause of death in New York City for children under the age of five. In the area of housing and homelessness, New York currently has about 90,000 homeless people, 90 per cent of whom are black and His-panic. Every night, some 24,000 people, including nearly 10,000 children, will sleep in city-run homeless shelters. During the next five years, one out of every twelve black children in New York City will sleep in a homeless shelter.

8.   This tension is exemplified by contemporary civil rights litigation in the state of California where antidiscrimination laws designed to end the subordination of non-White groups (and women) are used by non-Whites themselves to claim subordination by other non-Whites. *See* Yamamoto, *Critical Race Praxis, supra* note 5, at 821–24.

9.   The term "people of color" often refers not only to the possibility of progressive coalition among subordinated racial groups but also to the changing demographics of the population of the United States. These demographic changes, in turn, challenge the con-tinued characterization of non-Whites as "minorities," and the propriety of a bi-polar notion of racial conflict. Other issues are also implicated, such as the impact of the ree-mergence of an ethnicity paradigm in place of or along side a focus on race, and most importantly, the question whether, and if so how, these demographic and theoretical shifts will be used either to further domination or liberation for all groups. *See* discussion *infra* Part I.

10.   Professor Yamamoto draws a distinction between law, as it conceives of justice, and racial justice as it is experienced by racialized groups. He explores three aspects of law's dissociation from racial justice: the historic connection of law to racial oppression; the limited reach of antidiscrimination law, in particular its failure to redress claims of cultural discrimination and institutional racism; and the inadequacy of the White-on-Black racial paradigm for resolving increasingly complex conflicts among communities of color. *See* Yamamoto, *Critical Race Praxis, supra* note 5, at 839–66.

Professor Yamamoto describes two civil rights litigations in the state
of California, *Ho v. San Francisco United School District*[11] and *United Minori-
ties v. San Francisco*,[12] which exemplify a growing phenomenon in
contemporary civil rights litigation: antidiscrimination laws designed to
end the subordination of non-Whites (and women) are used by non-
Whites themselves to claim subordination by other non-Whites. Several
factors characterize these suits, and they signal important disconnections
between progressive race theory and practice. First, through a myriad of
factors, the rhetoric of individualism and aspects of neoconservative race
theory are deployed by one subordinated racial group against one or
more other similarly subordinated groups.[13] Second, these suits are
marked by the absence of progressive race theory and its practitioners
either behind the scenes or in the litigations themselves.[14] Third, there is
no evidence of critical inquiry into the interminority dynamics at the
heart of each litigation.[15]

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11.   No. C-94-2418 (N.D. Cal. 1994). In *Ho*, Chinese American plaintiffs in San
Francisco seek to invalidate a 1983 consent decree desegregating San Francisco's public
schools. The consent decree, which was approved initially in a class action brought by the
NAACP charging discrimination by Whites, mandates racial and ethnic diversity in stu-
dent bodies and establishes a 40% cap for students from any one racial or ethnic group in
each "magnet" school. Chinese Americans benefited initially from the decree's diversity
mandate, substantially increasing their enrollments. However, the Chinese American
plaintiffs who now seek to exceed the forty-percent cap claim that the effect of the cap is
to grant unconstitutional racial preferences to those who are less qualified, particularly
African Americans and Latinos.

12.   No. C-91-2350 (N.D. Cal. Nov. 9, 1994). In *United Minorities*, African Ameri-
cans and Latinos bring an employment discrimination action charging preferential
treatment of Chinese Americans.

13.   Among the factors deployed in these litigations, Professor Yamamoto cites the
statements of supporters of one or both of the parties in the litigation, legal filings, and
media portrayals employing racialized rhetoric, demeaning stereotypes and neoconserva-
tive race theory. He characterizes neoconservative race theory as a strategy focused on
merit, individual rights, colorblindness, and cultural and intellectual inferiority of one
group in relation to one or more others. *See* Yamamoto, *Critical Race Praxis*, *supra* note 5,
at 822–23.

14.   *See id.* at 825–26.

15.   Through a series of questions, Professor Yamamoto identifies three unstated as-
pects of the interminority dynamics present in each litigation: (1) intergroup power ("Is
affirmative action, as neoconservatives argue, 'discrimination against Asians in order to
protect blacks'—making Asian Americans the 'new victims' of racism and African Ameri-
cans, and to a lesser extent Latinos, the 'new perpetrators?' Or is this construction of
interracial conflict a mask for continued white supremacy?"); (2) the fit of civil rights law
("Is the traditional antidiscrimination-law scheme workable for multiracial conflicts in
post-civil rights America? Or is it necessary to remake the white on black jurisprudential
paradigm?"); and (3) context ("How do the volatile mid-1980s Asian American admis-
sions controversy and the mid-1990s California Civil Rights Initiative and the University
of California affirmative action repeal contextualize the intergroup issues in *Ho*? And why

How might progressive theorists, lawyers, and activists "working in post-civil rights America bridge both the gap 'of chasmic proportions' between progressive race theory and political lawyering practice and the growing divide between law and racial justice," as defined by the experiences of racialized groups?[16] Professor Yamamoto responds by offering "the beginnings of a critical race praxis."[17] In lieu of a fully-developed description of this praxis, Yamamoto puts forth four starting points or guidelines.[18] These guidelines are specifically designed to aid in the conduct of civil rights litigation and the resolution of other conflicts in which the interests of two or more subordinated racial groups are pitted against each other in a zero-sum competition over what may be viewed as the limited benefits of legal justice.[19] Drawn from the intuitions of "critical

do intergroup issues of apparent legal and political import, scrutinized by race scholars, appear to evaporate in *Ho* amid lawyerly formulation of legal argument and strategy?"). *Id.* at 826. (footnotes omitted) (citing Ho v. San Francisco Unified Sch. Dist., 965 F. Supp. 1316 (N.D. Cal. 1997)).

16.   *Id.* at 828–29 (footnote omitted).

17.   *Id.*

18.   Yamamoto's four guideposts are "the conceptual, the performative, the material, and the reflexive." *Id.* at 830. The conceptual guideline suggests a contextualization of the controversy to examine how racialization occurs and to focus on intersections with heterosexism, patriarchy, and class. The performative guideline, focused on action, has two dimensions: (i) identifying practical steps that respond not only to the particular controversy but also to the history of grievances among the groups involved, and (ii) choosing who (ideally, progressive race theorists) should take action. The material guideline addresses changes in the material conditions of racial oppression at two levels: (i) the socio-structural level, which involves redistribution of societal goods, and (ii) the representational level which deals with changes in the assessment of cultural traits and racial identities. The reflexive guideline requires scholars and lawyers to re-integrate experience into praxis so that theory is developed in light of the actual experiences of groups. *See id.* at 876–80 (footnote omitted).

19.   Yamamoto acknowledges the continuing significance of legal justice under the traditional civil rights paradigm but argues that it "increasingly is experienced by racialized communities as racial injustice. Indeed, 'embittered' and 'frustrated and misunderstood' is how a professor and civil rights attorney describes her racial minority clients after 'encounters with civil rights enforcement.' These experiences are symptomatic of the law's intensifying dissociation from racial justice, or what one sociologist calls America's 'retreat from racial justice.'" *Id.* at 828.

Professor Yamamoto argues further that the specter of zero-sum competition among racial groups results from the Supreme Court's transformation of anti-discrimination jurisprudence from a tool to remedy long-standing racial injustice to one further securing White majoritarian interests:

> Over the last twenty years, the Supreme Court has used America's multiracial demographics and the existence of interminority competition and conflict to transform whites from the centuries-long historical oppressor of people of color into "just another group competing with many others." Based on the Court's rulings, whites now can be considered a

race theory, pragmatism, prophetic theology, feminist legal theory, and environmental justice scholarship,"[20] these guidelines are not intended to "prescribe what racial justice is, or should be, in any particular situation. Rather, they offer guideposts toward collective, reflective antisubordination practice."[21]

In part to explain the troubling dynamics of contemporary civil rights litigation such as *Ho* and *United Minorities*, Yamamoto posits a growing disjuncture between progressive race theory and political and legal practice. He offers critical race praxis in response to two distinct, yet related, phenomena: the "coalescence of conservative race theory and political practice into a neoconservative praxis;"[22] and the practical turn in critical race scholarship emanating from legal theorists on the left,[23] a turn which also reflects others' concern over a theory-practice split. With respect to the latter, Yamamoto argues that this practical turn is needlessly centered on courts and legal doctrine. He recommends, therefore, that scholars on the left view litigation as a site of cultural performance[24] to be guided by progressive race theory and its theorist-practitioners. Specific litigations should become occasions for the resolution of deeper conflicts that prevent the occurrence of interracial justice.

Despite the interminority conflict in civil rights litigation that Yamamoto and other legal scholars describe,[25] in my view, Professor Yamamoto's claim of disjuncture is overstated. In addition to scholars,

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"victim group with the same moral and legal claims" as other groups .... In its most recent rulings, the Court has attributed interminority competition and conflict to "racial factionalism," "separatism," and "balkanization," which in turn it has attributed to consciousness of racial differences .... [T]he evil of racism in intensely conflictual multiracial America is no longer individual and institutional acts of white supremacy, but rather the recognition of racial differences in the form of racial classifications. Race consciousness leads to factionalization and separatism, which leads to conflict. ... The very existence of governmental racial classifications, race factions, and interminority conflict are circumstantial proof of the causal links.

Id. at 861–62 (footnotes omitted).

20. *Id.* at 830.
21. *Id.*
22. *Id.* at 829.
23. *See id.* at 829, 870–73.
24. *See id.* at 884–89.
25. *See, e.g.*, Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 957 (1995) (arguing that remedying racial discrimination by relying on racial classifications pits Black and non-Black minority groups against one another in a struggle to receive limited benefits).

many activists support his claim,[26] but their assertions do not necessarily prove the point. Several causes contribute to the picture of apparent dissociation. I would single out from among them the difficult problem of readily translating theoretical formulations into practical solutions,[27] a factor Professor Yamamoto acknowledges but does not accord the weight I think it bears.[28] I would factor in the additional problem of time lag between theoretical articulation and prescription, on the one hand, and hard evidence of their outworking in the practical arena, on the other.

I do agree that the fit between progressive race theory and contemporary praxis is often. imprecise for reasons other than translation and related causes. Progressive race theorists criticize other progressive and liberal legal theorists for failing to address issues of race either directly or adequately and for failing to advance beyond description and opaque theoretical formulations to material prescriptions.[29] Many find much of progressive race theory similarly wanting.[30]

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26.   *See* Yamamoto, *Critical Race Praxis, supra* note 5, at 832 n.41, 834–35 (describing interviews with political lawyers, scholars, and community activists, and reporting their opinions on the reasons for the seemingly tenuous connection between progressive race theory and lawyering practice).

27.   Professor Yamamoto does not give credit to the tastes of individual scholars or to the contributions of their work even if they do not participate in front-line political and legal struggle. Also, within legal academic circles, the attention of critical scholars has been diverted to some extent by the battle for legitimacy within the academy and by battles among various groups of color within progressive race scholarship. More importantly, however, many scholars are engaged in both scholarly and political pursuits, often melding the two, without concerning themselves about precise articulations of the relationship between the two or the need to respond to criticism about the value of their work. *See* Yamamoto, *Critical Race Praxis, supra* note 5.

28.   *See id.* at 834. Professor Yamamoto acknowledges the difficult problem of translating many of the ideas progressive theorists have about race, law, and social power but does not address the issue of time lag. *See id.* at 834.

29.   For critiques of the critical legal studies movement, see Cornel West, *CLS and a Liberal Critic,* 97 YALE L.J. 757 (1988); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?,* 22 HARV. C.R.-C.L. L. REV. 301 (1987) [hereinafter Delgado, *The Ethereal Scholar*]; Robert Williams, *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for People of Color,* 5 LAW & INEQ. J. 103 (1987). For critiques of mainstream feminism, see Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender,* 1991 DUKE L.J. 365 (1991); Trina Grillo and Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons between Racism and Sexism (or Other -Isms),* 1991 DUKE L.J. 397 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory,* 42 STAN. L. REV. 581 (1990).

30.   *See* Daniel A. Farber and Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives,* 45 STAN. L. REV. 807 (1993); Mark Tushnet, *The Degradation of Constitutional Discourse,* 81 GEO. L.J. 251 (1992); Randall L. Kennedy, *Racial Critiques of Legal Academia,* 102 HARV. L. REV. 1745 (1989); Eleanor Brown, Note, *The Tower of Babel; Bridging the Divide Between Critical Race Theory and "Mainstream" Civil Rights Scholarship,* 105 YALE L.J. 513 (1995).

The claim of disjuncture made by Professor Yamamoto and other critical race theorists appears to rest in part on the view that theory and practice are (or should be) seamless. Accepting this formulation, to the extent a separation exists, the fault lies as much with the inadequacies of theory as with its implementation. Professor Yamamoto's singular focus on praxis is, therefore, counterintuitive; his claim of disjuncture cannot be assessed without a critique of the assumption that, in its current state of development, progressive race theory has something of critical, practical significance to impart to claimants and practitioners in the pursuit of racial justice.

Professor Yamamoto cites two among other possible causes for the dissociation he observes between progressive theory and practice: (i) the "White on Black" (typically referred to as the "Black-White") paradigm of race[31] and (ii) the civil rights model of legal justice. Understandably, Yamamoto does not point out specific prescriptions practitioners may use to resolve the inter-color group conflicts that increasingly characterize modern civil rights litigation.[32] Within progressive race scholarship, the reconstruction of the Black-White paradigm of race is largely undertheorized,[33] and Yamamoto admits that the best intuitions of

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31.   Professor Yamamoto's reformulation is a more accurate portrayal of the position of groups under the paradigm than the more typical characterization. *See* Yamamoto, *Critical Race Praxis, supra* note 5, at 826.

32.   *See id.* at 853–55 (describing the intuitions of progressive race theory as at best heuristic and descriptive).

33.   For examples of scholarship discussing the Black-White paradigm of race, see John O. Calmore, *Exploring Michael Omi's Messy Real World of Race: An Essay for "Naked People Longing to Swim Free,* 15 LAW AND INEQ. J. 25 (1997); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space,* 1 ASIAN L.J. 1 (1994); Adrienne D. Davis, *Identity Notes Part One: Playing in the Light,* 45 AM. U. L. REV. 695 (1996); Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary,* 75 TEX. L. REV. 1181 (1997) [hereinafter Delgado, *Rodrigo's Fifteenth Chronicle*]; Angela Harris, *Foreword: The Jurisprudence of Reconstruction,* 82 CAL. L. REV. 741 (1994); Chris K. Iijima, *The Era of We Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections in the Critique of the Black/White Paradigm* 29 COLUM. HUM. RTS. L. REV. 47, 60 (1997); Elizabeth Martinez, *Beyond Black/White: The Racisms of Our Time,* 20 SOC. JUST. 22 (1994); Rachel F. Moran, *Neither Black Nor White,* 2 HARV. LATINO L. REV. 61 (1997) [hereinafter Moran, *Neither Black Nor White*]; Rachel F. Moran, *Unrepresented,* 55 REPRESENTATIONS 139 (1996) [hereinafter Moran, *Unrepresented*]; Rachel F. Moran, *What if Latinos Really Mattered in the Public Policy Debate?,* 85 CAL. L. REV. 1315 (1997) [hereinafter Moran, *What If Latinos*]; Juan F. Perea, *The Black/White Binary Paradigm and The "Normal Science" of American Racial Thought,* 85 CAL. L. REV. 1213 (1997) [hereinafter Perea, *Normal Science*]; Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution,* 36 WM. & MARY L. REV. 571 (1995) [hereinafter Perea, *Ethnicity and the Constitution*]; Ramirez, *supra* note 25, at 958; William R. Tamayo, *When the "Coloreds" Are Neither Black Nor Citizens: The United States Civil Rights Movement and*

theorists are at this point no more than descriptive and heuristic.[34] In addition, many purported reconstructions of American racial paradigms proceed from a false equation of the civil rights model of legal justice and the Black experience of race.[35] Much of this scholarship tends to equate the civil rights model of legal justice with the aspirations of the African American civil rights movement itself. These faulty premises lead scholars to misstate the premises of the civil rights struggle, to underestimate the movement's benefits to Whites and other non-Whites, and to prematurely signal the demise of the movement's vision and the disutility of its legislative product.

Yamamoto does not purport to resolve the debate over the existing racial paradigm or the contributions of the civil rights model of legal justice, and the views expressed here will not accomplish that result either. This essay suggests both further amplification of Yamamoto's guidelines for critical race praxis and, more importantly, recommends their application to the analysis and development of progressive race theory itself. In Part I, I critique the various models recommended by scholars to replace the Black-White paradigm and examine aspects of the debate over race versus ethnic designations. In Part II, I consider various claims that distort the history and import of the civil rights movement of the 1950s and 60s and the significance of the civil rights model of legal justice for groups other than African Americans. In Part III, I apply one of Professor Yamamoto's guidelines for critical race praxis to the treatment of whiteness in progressive race theory. Finally, I conclude by returning to the view that scholars have focused too much attention on problems of disjuncture and insufficiently on the core problem of structural inequality: the separation of civic and political rights from economic and social ones.

Global Migration, 2 ASIAN L.J. 1 (1995); Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225 (1995).

34. Yamamoto, *Critical Race Praxis*, supra note 5, at 853–55.

35. *See, e.g.*, Moran, *Unrepresented*, supra note 33, at 142 ("The civil rights model in the United States is clearly based on the African American experience."); Perea, *Normal Science*, supra note 33, at 1239 ("Within the [Black-White] paradigm, the only facts and histories that matter are those regarding Whites and Blacks. Therefore, virtually the only stories we ever learn about civil rights are stories about Blacks and Whites struggling over civil rights for Blacks.").

I. RECONSTRUCTING THE DOMINANT PARADIGM OF RACE

A. *Inside Black and White*

In *Beyond Black and White*,[36] political and social theorist Manning Marable comments on the "collapsing myth" of unity among various groups of color. The goal of multicultural democracy is easy to state, but the challenge of transcending the theoretical and practical limits and contradictions of a politics of race is far more difficult than progressive activists and theorists are willing to acknowledge. Obvious differences of history, culture, and language mediated through the prisms of race, class, gender, and sexuality, under a dominating ideology of White supremacy create seemingly insurmountable barriers to a unified attack on institutionalized racism. To this mix must be added radical actual and projected increases in the non-White percentage of the U.S. population occurring in tandem with even more radically increasing racialized expressions of violence, social destruction and degradation, poverty, and class inequality. Moreover, conflicting politics of racial identity and empowerment strategy, exacerbated by intergenerational clashes based on differences in values and experience, persist within and across groups of color.[37] Compounding these impediments are a radical transformation in our conception of racial categories[38] coupled with a debate about their continued theoretical and practical utility.[39] In a period of radical social transformation, scant solid ground exists on which to construct a new social ideal. Common condition does not lead readily to common consciousness.

To a large extent, the struggles among non-Whites seem only to amplify a long tradition of struggle under a binary construction of racial

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36.   *See* MARABLE, *supra* note 7, at 185.

37.   For discussions of intergenerational conflict within racialized groups, see Iijima, *supra* note 33, at 61–68; CORNEL WEST, RACE MATTERS 14–18 (1993); Paulette Caldwell, *Dread Heads: Roles, Models, and the Black Voice in Mainstream News*, 18 PARAGRAPH 13 (1995).

38.   *See generally* Sharon M. Lee, *Racial Classifications in the U.S. Census: 1890–1990*, 16 ETHNIC AND RACIAL STUD. 75 (1993) (analyzing changes in the meaning of race in U.S. society from 1890 to 1990); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES FROM THE 1960's TO THE 1980's 3–4, 145–46 (1991) (discussing the impact of census classifications on the politics of racial identity).

39.   *See* Ian F. Haney-Lopez, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143, 1179–88 (1997) (summarizing the debate among scholars regarding the salience of race as a category and calling for the rejection of racial language).

conflict represented in terms of Black and White.[40] Yamamoto's focus on the racial politics employed in contemporary civil rights litigation also points to a central weakness in a competitive model of group empowerment, a weakness which does not disappear and which may be exacerbated in the competition among non-White groups. Racism is about race: more races can lead both to changes in the way racism is presented, and ultimately to more, rather than less, racism. A competitive model leads inevitably to a zero-sum framework which overshadows commonalities and emphasizes and reinscribes differences, hostilities, and, ultimately, continued subordination.[41] To the point, this model does nothing to decenter "whiteness" and other notions of racial hierarchy and supremacy or to promote the goal which Yamamoto argues progressive theorists share: "the elimination or diminution of the material, real-world conditions of racial oppression," an essential component of a progressive definition of racial justice.[42]

A competitive model of individual and group empowerment is not inherent in the struggle for justice, but progressive theorists do not necessarily abandon it when proposing reconstructions of the existing racial binary. Most agree that a Black-White model of racial conflict plays an important role in blinding racial and ethnic subordinates to the particulars of their shared condition.[43] Yet much of what passes for critique of the Black-White construction of race does little more than substitute alternative binary or other constructions for the existing dominant paradigm without attending to the consequences of these reconstructions for the ultimate goal of ending racial subordination. Much of the emerging scholarship challenging the prevailing paradigm does so only by articulating the claims of other subordinates in comparison with African

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40.   *See* Yamamoto, *Critical Race Praxis, supra* note 5, at 821–28 (describing cases and controversies involving conflicts among subordinated racial groups which employ ideas refined by neoconservative race scholars).

41.   *See id.* at 861–62. Professor Derrick Bell suggests that this competition is exacerbated in times of conservative retrenchment. *See* DERRICK BELL, AND WE ARE NOT SAVED 5 (1987). A number of scholars have addressed this aspect of interminority group justice claims. *See, e.g.,* Lisa Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed Los Angeles,* 66 S. CAL. L. REV. 901 (1995); Reginald Leamon Robinson, *The Other Against Itself: Deconstructing the Violent Discourse Between Korean and African Americans,* 67 S. CAL. L. REV. 15 (1993); Charles R. Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation,* 47 STAN. L. REV. 819 (1995).

42.   Yamamoto, *Critical Race Praxis, supra* note 5, at 831.

43.   For descriptions of the limits of the Black-White paradigm, see Calmore, *supra* note 33, at 58–60; Iijima, *supra* note 33, at 68–74.

Americans, on the one hand, and dominant Whites on the other.[44] Such
articulations, nevertheless, play a crucial role in racial justice projects: they
provide a much-needed and more complete understanding of the opera-
tion of White supremacy in the subordination of each individual as well
as all racialized groups. Yet a singular focus on the deconstruction of the
most common representation of the existing racial paradigm, unhinged
from an express commitment to a broadly transformative antisubordina-
tion vision that benefits all—including Whites[45]—easily intensifies the
focus on particularized circumstances which Yamamoto decries. The de-
construction of a paradigm of race, which standing alone contributes to
interracial disharmony, may actually become an engine of racial discord.
The dynamics within much of progressive race scholarship mirror the
dynamics Professor Yamamoto criticizes in contemporary civil rights liti-
gation involving multiple racial groups.[46]

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44.   *See* Delgado, *Rodrigo's Fifteenth Chronicle, supra* note 33, at 1189–1200 (describing
the impact of the Black-White paradigm on Latinos); *see also* Pat K. Chew, *Asian Ameri-
cans: The "Reticent" Minority and their Paradoxes*, 36 WM & MARY L. REV. 1, 47–54 (1994)
(describing the employment conditions of Asian Americans in professional occupations).
Professor Chew does compare Asian Americans to groups other than African Americans
and Whites, such as Latinos. However, using population/workforce statistics (arguably the
most general and, therefore, least reliable comparison), she does note in particular the
relative positions of Asian and African Americans in certain professions: "In some cases,
such as with public administrators and officials, psychologists, counselors and teachers, and
directors and actors, the under-representation of Asian Americans is more extreme than
the under-representation of African Americans." *Id.* at 48–49 (footnote omitted).
45.   *See* Calmore, *supra* note 33, at 80 (commenting on the goal of empowering the
whole of American humanity). Calmore further argues:

> Whites must do more than merely take a counter-stance to white su-
> premacy. They must also engage in renegotiating the dominant culture in
> a way that "whiteness" becomes enough of a color so that a multicultural
> nation would include them *as people of color*, as another "border identity"
> that would "constitute a bold infringement on normalcy" and help to
> create a new consciousness of the borderlands—a *mestiza* consciousness
> . . . . [T]hese new colored whites would join with colored non-whites to
> make one glorious mess of race and ethnicity. It may be the only way to
> move us out of the mess we are in now.

Id. (quoting Peter McLaren, *White Terror and Oppositional Agency: Towards a Critical Mul-
ticulturalism, in* MULTICULTURALISM 45 (David Theo Goldberg ed., 1994)).
46.   *See supra* text accompanying notes 11–15.

1. Separate-but-Equal Binaries

Anthropologist Roger Sanjek offers six alternative scenarios to capture the possibilities of racial orderings for the twenty-first century.[47] These scenarios do not exhaust the possibilities for the future, but they provide a useful backdrop for analyzing emerging reconstructions of the dominant Black-White frame of social and legal analysis. Legal and other scholars often reconstruct the Black-White paradigm implicitly by creating multiple, competing, separate-but-equal binary constructions of race with a different subordinated group on the bottom and Whites on the top—for example, an Asian-White or a Latino-White binary.[48] A variation of this model focuses on language, citizenship status, immigration politics, and "perpetual foreignness," and it combines African Americans and dominant Whites into one dominator group sometimes referred to as "Anglos."[49] (This variation reflects some aspects of the traditional

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47. Professor Sanjek notes that the following scenarios are not mutually exclusive and "each may portend a glimpse of one aspect of our future. There are good reasons to expect that each of these alternatives simultaneously will find advocates and supporters as the nation passes into the twenty-first century." Roger Sanjek, *Intermarriage and the Future of Races in the United States*, *in* RACE 103, 116 (Gregory and Sanjek eds., 1994).

    Scenario one—a social order in which racial groups compete and contend for relative political advantage; Scenario two—people-of-color unity among black, Hispanic, and Asian groups; Scenario three—transition from a White-Black racial order to a light-dark order in which Asians and some Hispanics align with Whites; Scenario four—increasing use of a racially mixed identification, even to the point of a "mixed" U.S. census racial category, as some already urge; Scenario five—Latin American-styled views of race as appearance, not ancestry, may gain ascendance; and Scenario six—a people-of-all-colors ideology promoting unity among working- and lower-middle-class persons, and identifying their class enemies. *See id.* at 116–21.

48. *See, e.g.,* Delgado, *Rodrigo's Fifteenth Chronicle, supra* note 33, at 1199 (arguing that cultural stereotypes about Latinos are more devastating than those about Blacks); Chew, *supra* note 44, at 1 (describing social and economic indicators where Whites and Blacks exceed Asian Americans).

49. *See* Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595, 599 (1999) (defining English-speaking Americans as "Anglos"); Tamayo, *supra* note 33, at 1–3 (praising Latino and Asian American civil rights organizations for their advocacy on behalf of immigrants and criticizing the National Association for the Advancement of Colored People (NAACP) and the Leadership Conference on Civil Rights for their equivocation and failure in this regard, and describing specifically a Black-immigrant conflict within a broader anti-immigrant national sentiment). Professor Moran notes:

> Despite the racial overtones in the immigration debate, civil rights organizations have sometimes been reluctant to ally themselves with immigrant rights organizations. For example, when Congress was considering employer sanctions for hiring undocumented workers, immigrant advocates argued that the penalties would lead to discrimination against Latino and Asian workers legally present in the United States. According

Black–White binary: Asian and Latino/a Americans are collapsed into the White category such that African Americans appear to be the only or the principal victims of racism.) In other binaries, another group is added to each side of the equation, creating, for example, a binary consisting of African Americans and Latino/as as dominated, and Whites and Asian Americans as dominators. [50] This construction may reflect an attempt to capture the class implications of racial subordination but does so imperfectly by leaving out poor Asian Americans and poor Whites. Still others, apparently focused on color—standing alone or in combination with class—imply a Black/non-Black or light/dark reconstruction in which Asian Americans and some Latinos combine with Whites to form an expanded White majority. This latter construction merges with some interpretations of the existing paradigm which effectively treat everyone who is not Black, however "Black" is defined, as White.[51]

> to this view, employers would play it safe by refusing to hire people of Latino or Asian ancestry, even when they were citizens or permanent resident aliens. Rejecting these concerns, the National Association for the Advancement of Colored People (NAACP) testified in support of the sanctions . . . .

Moran, *Neither Black Nor White, supra* note 33, at 83. Professor Moran does recognize that the NAACP later joined Latino advocates in calling unsuccessfully for repeal of the sanctions. *See id.*

50.   Descriptions of the racial violence in Los Angeles in 1992 following the verdict in the first Rodney King police brutality trial suggest the emergence of a Latino-Black/Asian-White binary. *See, e.g.,* MARABLE, *supra* note 7, at 184; Tamayo, *supra* note 33; Robinson, *supra* note 41; Ikemoto, *supra* note 41.

51.   *See* 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 (1997) (describing a dark-light binary that cuts across racial and ethnic classifications); *see also* Roger Sanjek, *supra* note 47, at 117 (suggesting among six alternative scenarios for future racial orderings a "transition from a white-black racial order to a light-dark order in which Asians and some Hispanics align with whites."). Sanjek also describes a scenario in which Latin American-styled views of race as appearance may emerge. Commenting on the European, African, and American Indian mixed ancestry of many Latinos, Sanjek notes that:

> Racial terms translatable as "white," "black," or "Indian," refer to appearance, not beliefs about absence or presence of African or American Indian ancestry. In addition, other terms exist to identify persons of intermediate combinations of skin color, hair form, and facial features, much as white Americans distinguish blonds, brunets, or redheads, and pale to olive-skinned complexions.

Id. at 120 (citations omitted). He notes further, however, that "[c]enturies of white racial dominance are reflected in continuing notions that light skin, straight hair, and European facial features are prestigious, but families and kinship networks include persons who vary widely in racial physiognomy." *Id.*

Progressive scholars, in the course of deconstructing the dominant racial paradigm, often reorganize it but do not necessarily reject its underlying bipolarity. The result of all such reconstructions is that we are left with multiple, competing, binary constructions of race. Few capture with any reasonable accuracy the actual experience of racism for all groups or provide any credible analysis of existing and projected demographic changes in the U.S. population.[52] They also typically fail to engage many of the effects of racism either standing alone or intersecting with other bases of subordination.[53]

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52. Most scholars note the current and projected demographic changes in the U. S. population, and, without more, proceed to offer alternatives to the Black-White framing of race relations. But Sanjek argues:

> Political readings of various projections of future racial composition—the percentages of whites, blacks, Hispanics, and Asians in given cities, states, or the nation—do not take into account the trends of intermarriage, the nature of racial identification of mixed persons, or the significance of intermarriage within kinship networks.

Sanjek, *supra* note 47, at 116. He argues further:

> The white population increasingly may divide into two groups. The first will be those "Americans" who admit to no ethnicity, continue to practice racial exclusion, and define fewer and fewer U.S. residents as white. The second will consist of those whites who, along with persons of other and mixed racial identities, maintain social ties and practice politics that increasingly discount race, and that accord ethnicity across today's racial boundaries. This second grouping will have its conservative and progressive elements, dividing on issues we may now not easily predict.

Id. at 121.

Sanjek provides an example of how this new ethnicity may operate. He describes the comments of Peter Chema, a White city council member in the City of Yonkers who fought the 1985 order issued by Federal District Court Judge Leonard Sand that the City of Yonkers erect new low-income housing in White neighborhoods to remedy historic housing segregation aimed at Blacks.

> [Chema] objected to being called a racist, protesting, "I live in an integrated building in an integrated neighborhood. My wife is a minority. My brother-in-law is a minority." His wife is Filipino, and his brother-in-law is Peruvian. Chema also teaches martial arts at the Yonkers Chinese Community Center and has appeared in a Kung-fu movie. He exemplifies racism with a multicultural face.

Id. at 122.

In the end, then, the critical racial issue will continue to be the place that persons of African descent occupy within the U.S. social order.

53. Many progressive scholars have addressed the phenomenon of racism intersecting with other bases of discrimination. For race-gender discussions, see Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539 (1989); Caldwell, *A Hairpiece, supra* note 29; Barbara Christian, *Camouflaging Race and Gender*, 55 REPRESENTATIONS 120 (1996); Kimberlé

2. The Rise of Exceptionalist Claims

Scholars describing the distinct history and effects of racism on particular racialized groups generally disclaim any intention to create an oppression sweepstakes or race to the bottom, but often the framework of their narratives negates this contention.[54] By focusing selectively on the social and economic indicators which make one such group as bad or worse off than another and by developing general claims of exceptionalism,[55] a competitive model of group empowerment is reinforced. More often than not, the selected indicators do not demonstrate in toto the positions of racialized groups relative to each other so much as they demonstrate the differential operation of White supremacy in an overarching system of subordination. Many scholars fail either to recognize or acknowledge an underlying feature of racialization processes: the creation of a series of surface distinctions that alternately demonize one group and idealize another in much the same way that the dominant racial paradigm pits Blacks and Whites against each other. The result is a one-up-one-down game where each stigmatized group at some point gets to be on the bottom under all others in society. As Professor Yamamoto recognizes, all bipolar racial constructions fail to account either for this process or for the interminority group conflicts that are masked by a simplistic framework of a single dominator group over a dominated one.[56]

Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHIC. LEGAL F. 139 (1989); Harris, *supra* note 29, at 581; Laura Padilla, *Intersectionality and Positionality: Situating Women of Color in the Affirmative Action Dialogue*, 66 FORD. L. REV. 843 (1997). For race-class discussions, see Roy L. Brooks, *Racial Subordination Through Formal Equal Opportunity*, 25 SAN DIEGO L. REV. 81 (1988); Richard Walker, *California's Collision of Race and Class*, 55 REPRESENTATIONS 163 (1996). For race-sexual orientation discussion, see Robert Chang and Jerome Culp, Jr., *Nothing and Everything: Race, Romer, and (Gay/Lesbian/Bisexual) Rights*, 6 WM. & MARY BILL OF RIGHTS J. 229 (1997). For a discussion of the intersection of multiple factors, see Ruth Colker, *Bi: Race, Sexual Orientation, Gender and Disability*, 56 OHIO ST. L.J. 1 (1995).

54.   *See* Delgado, *The Ethereal Scholar, supra* note 29, at 1199 (arguing that cultural stereotypes about Latinos are worse than those about Blacks); Chew, *supra* note 44, at 54 (describing social and economic indicators where Blacks exceed Asians but leaving out areas where Asians exceed Blacks); Perea, *Ethnicity and the Constitution, supra* note 33, at 571–72 (limiting his arguments about the Constitution's limited protection of ethnicity to "other" Americans, namely, Latinos and Asian Americans).

55.   For a discussion of the rise of exceptionalist claims, see Leslie Espinoza and Angela P. Harris, *Embracing the Tar-Baby: LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585, 1594–1604 (1997).

56.   *See* Yamamoto, *Critical Race Praxis, supra* note 5, at 851–65 (describing the inadequacy of the Black-White paradigm in dealing with interminority group conflicts).

Two examples of competing exceptionalist claims illustrate these competitive dynamics: "perpetual foreignness" and slavery. Treating racialized individuals as perpetual foreigners is one example of a central feature of racialization processes. Curiously, many scholars seize upon this idea to distinguish the effects of racialization on certain groups, such as Asian and Latino Americans, in comparison not only with dominant White ethnics but also with African Americans.[57] Similarly, others focus on the percentage of other non-Whites in the United States who are noncitizens.[58] With respect to both of these indicators—perpetual foreignness and citizenship status—African Americans, as much as Whites, become principal dominators of other racialized groups.

Such comparisons overlook the historic treatment of African Americans as fundamentally unassimilable into the American social, economic, and political polity.[59] African American immigrants are also

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57.   *See* Neil Gotanda, *"Other Non-Whites" in American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1188 (1985) (reviewing PETER IRONS, JUSTICE AT WAR (1983)). Gotanda states:

> While in legal history the discussion of race has usually meant analysis of the legal condition of Blacks, I suggest an examination of non-Black racial minorities—"Other non-Whites"—as a distinct mode of analysis. One of the critical features of legal treatment of Other non-Whites has been the inclusion of a notion of "foreignness" in considering their racial identity and legal status.

Id.

58.   *See* Moran, *Neither Black Nor White*, *supra* note 33, at 79 (describing the extent of Mexican immigration into the United States between 1940 and 1992 and noting that only a little over 10% entered as permanent resident aliens); Moran, *Unrepresented*, *supra* note 33 (noting the insignificant numbers of immigrants of African descent).

59.   *See* DERRICK BELL, GOSPEL CHOIRS: PSALMS OF SURVIVAL IN AN ALIEN LAND CALLED HOME (1996)·(essays describing the historic and continuing alienation of African Americans in American society). Professor Juan Perea comments on Toni Morrison's description of Blacks as America's "real aliens:"

> Morrison describes the hatred of Blacks as the defining, final, necessary step in the Americanization of immigrants. "It is the act of racial contempt [banishing a competing black shoe-shiner] that transforms this charming Greek into an entitled white." Morrison sees Blacks as persistently victimized by Americanizing processes, always forced to "the lowest level of the racial hierarchy." The struggles of immigrants, according to Morrison, 'are persistently framed as struggles between recent arrivals and blacks. In race talk the move into mainstream America always means buying into the notion of American blacks as the real aliens. Whatever the ethnicity or nationality of the immigrant, his nemesis is understood to be African American.'

Perea, *Normal Science*, *supra* note 33, at 1230 (interpreting Toni Morrison, *On the Backs of Blacks*, *reprinted in* ARGUING IMMIGRATION 97 (Nicholaus Mills ed., 1994)).

treated differently than White immigrants, notwithstanding their relatively small numbers in relation to current numbers of Asian and Latino immigrants.[60] Few would dispute that African American citizens

> Morrison is right that American "Whiteness" is often achieved through distancing from Blacks. Latinos/as participate in the paradigm by engaging in racism against Blacks or darker-skinned members of Latino/a communities. Current events belie, however, Morrison's notion of American Blacks as "the real aliens." Mexican and other Latino/a and Asian aliens have become targets of state and federal legislation denying them medical and educational resources."

Id. at 1230. Without privileging either Morrison's or Perea's account—indeed there is truth in both—Professor Perea makes my point. There is enough "perpetual foreignness" and alienage talk to stigmatize each and every racialized group.

60.   Professor Moran argues that Latinos are trapped between a civil rights model and an immigration model of empowerment, neither of which accurately reflects Latino history and experience of racism. She notes further:

> Even today, the African American community is defined primarily in racial terms; a small influx of African and Caribbean immigrants has not altered the perception that Blacks are mainly the descendants of slaves. America's fascination with the charismatic General Colin Powell exemplifies this monolithic racial understanding of Blacks. When the media labeled General Powell as the first Black with the potential to become President, he politely pointed out that he was the descendant of Jamaican immigrants and thought of himself as such. Nevertheless, the press continued to refer to him as a Black who had broken through the race barrier to become a Presidential frontrunner.

Moran, *Neither Black Nor White, supra* note 33, at 69.

However, Professor Moran does not examine the extent to which Blacks, too, are trapped between a civil rights model and an immigration model, neither of which reflects their experiences. The experiences of Amadou Diallo and Abner Louima with police brutality in the City of New York illustrates their treatment as Blacks, not as immigrants, and confirms Professor Moran's point. But the treatment of Haitian immigrants seeking political asylum in comparison with others seeking similar refuge in the United States and of the Cuban "boat people," most of whom were clearly of African descent, in comparison with earlier White Cuban immigrants, demonstrates the differential treatment of Black immigrants.

Professor Lolita Buckner Inniss describes the Black American experience, before and during slavery to the present, as an immigrant experience. *See* Lolita Buckner Inniss, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness*, 49 DePAUL L. REV. 301, 301 (1999). Commenting also on the media's treatment of General Colin Powell, Inniss perceives the transmission of a different symbol than Moran's Black racial monolith. Inniss describes how the apparent success of some Caribbean Black immigrants, of which General Powell is the paradigmatic example, has been used by American Whites to prove that native Blacks lack the drive and commitment to hard work that an immigration model presupposes. *See id.* at 340. Moreover, she defines how, for many Black immigrants, the "immigrant dream," exemplified by General Powell, leads them to expect a continuation of the economic success and middle and upper middle-class lifestyles they enjoyed in their home countries. However, often their experience quickly becomes "an immigrant

are subjected to continuing denial of the benefits of first-class citizenship,[61] but few appreciate the extent to which the experiences and protest movements of African Americans have defined the meaning of citizenship itself.[62]

Exceptionalist claims based on foreignness appear to collide with Black exceptionalism, in particular the African American experience with slavery and its aftermath, but the two claims are joined in critical respects. Scholars acknowledge the importance of slavery to the African American experience. But by limiting its effects to African Americans and no others and centering it in the United States, they prove too much and too little. Just as all racialized groups are treated in some respect as perpetually foreign, the experience of slavery and its aftermath affect and belong to all

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nightmare," exemplified by the story of Colin Ferguson, an upper middle-class Jamaican immigrant who experienced the same racism in the United States as any other Black person. Ferguson killed and wounded several commuters on the Long Island Railroad. Ferguson represented himself in a trial which, more so than the O.J. Simpson murder trial, was truly "the trial of the century."

61.   *See* BELL, *supra* note 59, at 5–11 (describing the worsening economic and social conditions for Blacks).

62.   *See* Arthur Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUT. L. REV. 387, 389 (1967) (arguing that African American struggles have defined American citizenship):

> That the achievement of this objective [the constitutional objective of Black freedom] required the construction of a surrounding and protecting fabric of further constitutional guarantees, including the new prohibitions against the denial by a state of any citizen's right to due process of law or the equal protection of the laws of that state, was the first manifestation of an extraordinary phenomenon in American constitutional history—the catalyzing role of efforts to achieve the constitutional goal of Negro freedom upon the creation of new concepts and doctrines affecting the interests of all citizens.

Id.

Professor Kinoy continues to define the "catalyzing effect of the myriad forms of struggle for Negro freedom and equality upon the development of constitutional rights and liberties applicable to all citizens," including the rise of distinct rights such as the extension of the doctrine of First Amendment vagueness, freedom of association, and the right to counsel:

> It is the opinion of this author that this is no coincidence—that the peculiar and special conditions underlying the growth of American society explain why the struggles to eliminate the remaining pervasive influences of the institution of human slavery are inextricably linked to the efforts to broaden the base of constitutional liberties for all citizens, and to defend those already achieved.

Id. at n.6; *see also* ORLANDO PATTERSON, FREEDOM IN THE MEANING OF WESTERN CULTURE (1991) (arguing that slavery in Western societies gave rise to the centrality of the ideal of freedom).

who enter the United States, by birth or otherwise, citizen and nonciti-
zen alike. At the same time, a singular focus on slavery limits the Black
experience to slavery and places it primarily within the borders of the
United States. [63] Like the experiences of other non-Whites, the Black
experience is global in dimension. Scholars arguing on behalf of other
non-Whites have demonstrated the powerful connections between race
relations in the United States and international relations.[64] They add an
important dimension to recent articulations of progressive race theory,
but the intellectual power and reach of their arguments is not unique and
not new.[65]

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63.   *See* Martinez, *supra* note 33, at 27–28. Martinez argues that the Black/White
framework grows out of a White political culture dominated by a U.S. self-centeredness
that "lacks any global vision other than relations of domination. In particular, the U.S. has
consistently demonstrated contempt for Latin America . . . . The U.S. refuses to see itself
as one nation sitting on a continent with 20 others . . . . That myopia has surely nurtured
the Black/white framework for racism." *Id.*

64.   *See* Espinoza & Harris, *supra* note 55, at 1630 ("A LatCrit focus on Latin Amer-
ica, South America, Central America, Mexico, and the Caribbean, and the relationship of
these countries with the United States makes possible an analysis that joins together do-
mestic 'race relations' with international relations.").

65.   *See* DAVID L. LEWIS, W.E.B. DUBOIS: BIOGRAPHY OF A RACE, 1868–1919 251
(1993). Lewis describes the rise of Pan-Africanism, beginning in 1899, and quoting
DuBois' closing address, "To the Nations of the World," delivered at the first meeting of
the Pan African Congress in London in 1900: "In the metropolis of the modern world, in
this closing year of the nineteenth century, there has been assembled a congress of men
and women of African blood, to deliberate solemnly upon the present situation and out-
look of the darker races of mankind." DuBois' better known speech, defining color as the
critical issue for the twentieth century, delivered twenty-five years after the first meeting
of the Pan African Congress, is presumed to be addressed to racism in the United States.
A more complete rendition of the text reveals, however, that not only did DuBois refer
to international dimensions of racism, but he also utilized a paradigm not limited solely to
Black and White:

> [T]he problem of the twentieth century is the problem of the colour
> line, the question as to how far differences of race . . . are going to be
> made, hereafter, the basis of denying to over half the world the right of
> sharing to their utmost ability the opportunities and privileges of modern
> civilization. To be sure, the darker races are today the least advanced in
> culture according to European standards. This has not, however, always
> been the case in the past, and certainly the world's history, both ancient
> and modern, has given many instances of no despicable ability and capac-
> ity among the blackest races of men. In any case, the modern world must
> need remember that in this age . . . millions of black men in Africa,
> America, and the Islands of the Sea, not to speak of the brown and yel-
> low myriads else where, are bound to have great influence upon the
> world in the future, by reason of sheer numbers and physical contact . . .
> If, by reason of carelessness, prejudice, greed and injustice, the black
> world is to be exploited and ravished and degraded, the results must be
> deplorable, if not fatal, not simply to them, but to the high ideals of jus-

Without making such a claim, Professor Angela Harris lays out the contours of the claim for Black exceptionalism in response to particular attacks on the Black-White paradigm.[66] In a colloquy with Professor

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tice, freedom, and culture which a thousand years of Christian civiliza-
tion have been held before Europe.

Id. at 251.

Manning Marable describes the international dimensions of racism during the
Reagan administration:

> An explicitly racist aspect of the Reagan agenda manifested itself domes-
> tically and internationally. Black workers suffered disproportionately from
> both unemployment and social-service reductions . . . . In its foreign af-
> fairs, the Reagan administration authorized a policy of 'constructive
> engagement' with apartheid South Africa. In 1981, Reagan asked Con-
> gress to repeal the Clark amendment prohibiting covert military aid to
> Angolan terrorists; authorized the U.S. training of South Africa's Coast
> Guard; and vetoed a UN Security Council resolution condemning South
> Africa's illegal invasion of Angola. In 1982 the Reagan administration
> rescinded controls on "non-lethal" exports to apartheid's military and
> police; voted for a $1.1 billion loan from the International Monetary
> Fund to South Africa; sent 2,500 electric-shock batons to the South Afri-
> can police; and appointed a pro-apartheid U.S. executive, Herman
> Nickel, ambassador to Pretoria. The next year, the administration estab-
> lished offices in downtown Johannesburg to promote accelerated U.S.
> investment in the regime, and granted a license for U.S. firms to service
> South Africa's Koeberg nuclear power plant. By 1984 about 6,350 U.S.
> corporations held direct subsidiaries or did some form of business inside
> the racist regime. U.S. firms supplied 15 per cent of the state's imports,
> and absorbed 8 per cent of its exports, amounting to $4 billion.

MARABLE, *supra* note 7, at 26.

66.   *See* MARABLE, *supra* note 7, at 26–27; Espinoza & Harris, *supra* note 55, at 1596–
1605. Professor Harris states:

> The argument for black exceptionalism is usually not articulated in mixed
> company in the interests of interracial solidarity. I have set out the argu-
> ment, not because I believe it to be right, but because I believe that
> Perea's direct challenge to the black-white paradigm and the power and
> promise of LatCrit theory more generally forces it into the open. The
> claim of black exceptionalism presents both an intellectual and a political
> challenge to LatCrit theory. As an intellectual claim, black exceptionalism
> answers Perea's criticism of the black-white paradigm by responding that
> the paradigm, though wrongly making "other nonwhites" invisible,
> rightly places black people at the center of any analysis of American cul-
> ture or American white supremacy. In its strongest form, black
> exceptionalism argues that what "white" people have done to "black"
> people is at the heart of the story of America: indeed, the story of "race"
> itself is the story of the construction of blackness and whiteness. In this
> story, Indians, Asian Americans, and Latino/as do exist. But their roles
> are subsidiary to, rather than undermining, the fundamental binary na-
> tional drama. As a political claim, black exceptionalism exposes the deep

Leslie Espinoza, Harris does not root her description of the Black experience in slavery; perhaps by design, she rarely mentions it directly. Harris argues that a claim for Black exceptionalism is based on two supports: ". . . the historic and continuing centrality of African American ethnicity to American political and social life; and . . . the centrality of anti-black racism to the patterns of domination we call white supremacy."[67]

A direct reference to slavery and its equivalence to Black exceptionalism appears in Professor Espinoza's account of the critical role of narrative scholarship, and she refers to slavery in order to place it in opposition to claims of other non-Whites to perpetual foreignness.[68] Like Professor Espinoza, Professor Harris also places the Black experience of slavery in opposition to the "foreignness" of others, and she does so in support of an argument regarding the centrality of the Black experience to American political and social identity:

> Native Americans are thought to have vanished long ago, leaving behind only their noble spirituality for non-Indians to admire and appropriate at will. Asian Americans and Latinos are imagined as eternal "strangers," people who carry the border of American territorial power and cultural integrity within them. But African Americans, for all our talk about Mother Africa, are profoundly and unmistakably Americans. More to the point, Americans are distinctively African.[69]

Yet other parts of Professor Harris' narrative make clear that African Americans have experienced an exclusion in terms of a certain kind of

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mistrust and tension among American ethnic groups racialized as "nonwhite."

Id. at 1603.

   67.   Espinoza & Harris, *supra* note 55, at 1596.

   68.   *See id.* at 1635. Professor Espinoza states:

The "immigrant" aspect of racial oppression is not equivalized in the traditional black/white racial paradigm. African Americans know which side of the border they are on. African American exceptionalism—and I agree with Angela [Harris] that there is an exceptionalism—is more tied to slavery. There is, however Chicano/a exceptionalism. Like Native Americans, we are colonized. Unlike Native Americans, we have not had the symbolic recognition of our original sovereignty. I worry that this identity will be forgotten.

Id.

   69.   *Id.* at 1596–97 (citations omitted).

foreignness akin to that of other non-Whites.[70] African American claims to the "borderlands" do not rest on geography; rather, they "embody the nigger in the American imagination: a creature at the border of the human and the bestial, a being whose human form only calls attention to its subhuman nature."[71]

My point is not to trivialize the claims of either African Americans or other non-Whites to differential racialization, or to privilege one account over another, or even to establish false equivalencies where none exist. Difference among racialized groups are real, but so are commonalities, such as the dominant paradigm's influence on the racial construction of groups and their relationships to each other.[72] Rather, I want to point to the purpose and effect of differential racialization itself in perpetuating competition among racialized others.[73] I also want to suggest that a commonality underlies the various exceptionalist claims and all forms of racism, one which the scholarship on reordering the existing racial paradigm understates in its attempt to distinguish historic expressions of

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70.   Some argue that the alienation of Blacks is greater than the foreignness of others. *See* Martinez, *supra* note 33, at 28. Martinez describes the culture of color in the United States:

> The relatively light skin and "Caucasian" features of many Latinos mean they are less threatening in the eyes of white racism and can even "pass"—unnoticed, invisible—much more often than African Americans. Obviously this carries certain advantages in a racist society. Many Latinos would like to pass, work hard to assimilate, and succeed.

Id.

Describing the psychological implications of the Black-White paradigm, Martinez quotes Robert Blauner:

> We buy black writers, not only because they can write and have something to say, but because the white racial mind is obsessed with blackness . . . Mexican-Americans, on the other hand, have been unseen as individuals and as a group . . . James Baldwin has pointed to the deep mutual involvement of black and white in America. The profound ambivalence, the love-hate relationship, which Baldwin's own work expresses and dissects, does not exist in the racism that comes down on LaRaza . . . Even the racial stereotypes that plague Mexican-Americans tend to lack those positive attributes that mark antiblack fantasies—supersexuality, inborn athletic and musical power, natural rhythm. Mexicans are dirty, lazy, treacherous, thieving bandits—and revolutionaries.

Id. (quoting ROBERT BLAUNER, RACIAL OPPRESSION IN AMERICA 163–64 (1972)).

71.   Espinoza & Harris, *supra* note 55, at 1601.

72.   *See id.* (arguing both in favor of "strategic essentialism" and against exaggerated commonality among people of color).

73.   Professor Espinoza notes that liberation need not be a zero-sum game, and others need to heed her observation. *See id.* at 1643.

racism from its contemporary mutations.[74] Finally, the emergence of any exceptionalist claim brings into play other exceptionalisms and calls up a competition among them. Professor Espinoza's questions are telling:

> [w]ho is more 'exceptional'? When we ask that question, we are buying into the hierarchical system that oppresses us. Latino/as are seen as immigrant interlopers; blacks are seen as intractable criminals. Does it really matter if resistance is met with deportation or with imprisonment? The important questions are: "What is the nature of our oppression? Who benefits by it? And, how can we resist?[75]

3. Restorying the Black-White Paradigm

I would be satisfied with Professor Espinoza's questions were it not for another important dimension of our struggles to articulate a more complete statement of American racism. Again, I will use slavery, not for

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74.   *See* DAVID GOLDBERG, ANATOMY OF RACISM (1990). Goldberg argues that racism lacks any single, permanent or fixed characteristics and that new forms are born out of global events, in particular the new international division of labor:

> [A]ll forms of racism may be linked in terms of their exclusionary or in-clusionary undertakings. A major historical shift has been from past racist forms defining and fueling expansionist colonial aims and pursuits to contemporary expressions in nationalist terms. Insistence on racial inferi-ority in the past fed colonial appetites and imperialist self-definition. Racism is taken now to be expressed increasingly in terms of isolationist nationalist self-image; of cultural differentiation tied to custom, tradition, and heritage; and of exclusionary immigration policies, anti-immigrant practices and criminality.

Id. at xiv.

    Professor Harris, on the other hand, appears to suggest a differential racism in the form of nativism which affects non-Whites other than Blacks. "From a global perspective, the perpetuation of nativist racism puts American whites and blacks into collusion against foreign, nonwhite Others." Espinoza & Harris, *supra* note 55, at 1639. At the same time she suggests African American interest in a reordered racial paradigm:

> African Americans also have an interest in recognizing a larger geopoliti-cal context for white supremacy. For instance, to the extent that African Americans are concerned about Africa and its relations with the West, it is necessary to understand that white supremacy is not solely a domestic phenomenon, but is inextricable from the colonial practices that gave it birth.

Id. (citation omitted). I agree that all subordinated groups have an interest in the world-wide dimensions of White supremacy, but I differ from Professor Harris by recognizing the effects of nativist racism on African Americans in the first instance. *See infra* n.102.

75.   Espinoza & Harris, *supra* note 55, at 1635–36.

its exceptional quality, but as an example of the risks of an insufficiently nuanced account of the Black-White paradigm and its reconstructions and the potential of the paradigm critique to coalesce with neoconservative theory and praxis.

Professor Espinoza powerfully employs the term "restorying" to refer to the use and importance of narrative to deconstruct and reorder the dominant racial paradigm.[76] This retelling in large part defines the project of the progressive scholarship discussed in this essay; it is essential to the process of uncovering many of the negative consequences of the operation of the Black-White paradigm, consequences which are harmful to Blacks and Whites and to other non-Whites inadequately represented by it. Professor Espinoza also describes a dynamic process:[77] each retelling of our stories allows us not only to reimagine the future; with "each telling and retelling, both listener and speaker are better able to construct a meaning for their own individual life and to sort through false visions of our individual stories and of the cultural stories that constrain us."[78]

Professor Espinoza's reference to "our stories" may not convey the complications involved in telling stories across the boundaries of non-White experience. We need not tell the same stories. Our stories about White supremacy will be different from White accounts of whiteness and different from each other's. However, unless we take great care in the stories we tell, we stand to undermine the legitimacy of this important element of progressive race methodology to a far greater extent than any of our detractors have done heretofore.[79] To the extent the ideology of White supremacy has caused us to be under- , mis- , and mal-educated about ourselves, we have been similarly educated about each other and our relationships one to another. While uncovering our specific group

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76. *See id.* at 1631.

77. Professor Harris' response to Professor Espinoza further explains this dynamism:

> . . . [A]s Leslie [Espinoza] suggests, the ultimate goal is not telling the same story over and over again, unchanged. Rather, stories should change as one tells them, for narratives serve not just as explanations of the past but as road maps for where we wish to go. And the subject of the story, as well, should change in the telling. It is important, then, to acknowledge that the story of black oppression changes in light of the story of Latino/a oppression, and that the subject of each story—"black identity" or "Latino/a identity"—itself is constantly changing even in the process of telling its story.

Id. at 1643.

78. *Id.* at 1633.

79. *See generally* DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1998) (attacking use of storytelling in legal scholarship by feminists and progressive race theorists).

histories, we need to take account of the history of White supremacy to avoid undermining the history of others.

Progressive scholars in the legal academy are well aware of Professor Charles Lawrence's pathbreaking ideas regarding unconscious racism.[80] Other scholars have reinforced the significance of Lawrence's work: since "so much discrimination is motivated by unconscious beliefs and stereotypes, minority group members and women will be significantly harmed by unintended, non-malicious discrimination."[81] The progressive scholarship described in this Essay is not motivated by conscious bias. But the notion of unconscious racism, typically employed to describe relationships among groups in a White-on-Black or dominator-on-dominated framework, applies with equal force to the relationships among racialized groups.

Progressive scholarship analyzing the Black-White paradigm of race often reflects an angry, retributive attitude or tone toward Blacks and Black scholars:[82] it is now common to hear references to a so-called "African American franchise on race"[83]—as if the Black-White paradigm was created by Blacks—despite the fact that attempts by Blacks to expand the paradigm have been thwarted by neoconservative forces.[84] Ostensibly in jest, Blacks are described as "*the* model minority."[85] This tone may be the inevitable by-product of the business of uncovering and retelling the

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80.   *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

81.   David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 946 (1996).

82.   *See* Espinoza & Harris, *supra* note 55, at 1615.

> Professor Perea's article, for example, could be read as a criticism of African American scholars—a set piece for Black/brown conflict. Arguably, Latino/as are asking why Black scholars continually ignore the suffering of other racial groups. African Americans seem to have bought the franchise on race victimhood and do not want to share the territory of suffering—and righteous indignation—with other outsider groups.

Id. (responding to Perea, *Normal Science, supra* note 33).

83.   *Id.* at 1615.

84.   *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). In *Croson*, the Supreme Court used an attempt by the City of Richmond to expand the Black-White framework of race by including within its minority set aside program other non-Whites along with Blacks as a reason for striking down that program and, for the first time, extended strict scrutiny analysis to affirmative action programs.

85.   For the most part, comments of this sort seldom find their way into written expressions of progressive race theory. Professors Espinoza and Harris, *supra* note 55, provide a rare insight into the dynamics that increasingly characterize conferences and other gatherings of progressive scholars.

story of American racism. Honest reflection will not always be pleasant.[86]
But what may suffice for an initial stage of a movement must not over-
take or become the movement itself.

Professor Yamamoto's call to critical race praxis assumes that theo-
rists have intuitions of theory to impart to practitioners and activists
seeking to resolve interminority group tensions. Theorists cannot answer
this call without also attending to similar tensions among themselves. In
the coalescence of neoconservative theory and praxis, the story of Ameri-
can slavery and its aftermath and similar engines of oppression of other
racialized groups are rapidly being trashed, diminished, and restructured
in the service of contemporary race politics.[87] Our restorying must take
place at the same time but need not cooperate unwittingly with the neo-
conservative project.[88]

Sociologist Steven Steinberg addresses the difficulty of ridding social
science of crude, popular ideas about race and ethnicity. He notes that
"opposing these ideological currents is like swimming upstream—one starts
out with a burst of energy, makes some headway, but eventually succumbs
to the unrelenting downstream force."[89] The ideological force of the Black-
White paradigm of race is multidimensional, and it is more entrenched and
more powerful than most scholars are willing to acknowledge. Deconstruc-
tion, detached from an inclusive antisubordination commitment, can be a
dangerous tool.

Against the weight of history, the commitment to a fair and com-
plete restorying of race cannot be taken for granted. Not only must it be
stated unambiguously, but all aspects of our work must clearly reflect it:
from our descriptions and analyses of differential racialization, demo-
graphic representations, and projections for the population of the future,
to the construction of categories of identity and exceptionalist claims.

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86.   *See* Christian, *supra* note 53, at 125.
87.   *See* DINESH D'SOUZA, THE END OF RACISM (1995) (reconstructing the meaning
and import of American slavery for Blacks); ORLANDO PATTERSON, RITUALS IN BLOOD:
CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES (1999) (denouncing the res-
urrection of the idea of stable slave families and adopting and extending a Moynihanesque
description of contemporary Black families); PETER BRIMELOW, ALIEN NATION: COMMON
SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995) (arguing that current immigra-
tion patterns, consisting of a large percentage of non-Whites, must be curtailed because
their eligibility for affirmative action will displace Whites in education and employment).
88.   *See, e.g.*, discussion *infra*, Part II, regarding the tendency of progressive scholars to
"restory" the civil rights movement in a way which distorts its aims and accomplishments.
89.   STEPHEN STEINBERG, THE ETHNIC MYTH ix (2d ed. 1989).

B. *Of Race and Ethnicity*

Professor Yamamoto argues that progressive scholars must abandon conservative theories of ethnicity, but he does not point to any who do not. The problem with the debate among progressives over the salience of race and ethnicity as organizing principles for various groups is more nuanced than Professor Yamamoto's admonition suggests. Most progressives reject conservative ethnicity theory, but some employ the language of race and ethnicity in a manner which fails to adequately counter critical underpinnings of conservatism. It is possible, therefore, to reject conservative theory on the one hand but unwittingly reinscribe its tenets on the other. Arguments pitting race against ethnicity in either conservative or progressive form have the potential to perpetuate a competitive model of group empowerment, reinforce biological notions of race, and define American racism as a bipolar dilemma. Many progressives miss the essential focus of antisubordination theory and practice by focusing on differences in racial or ethnic essentialism that do not address directly the relationship between material conditions of subordination and the ideological premises on which they rest. For the most part, their failure to adequately interrogate all elements of conservative ethnicity theory flows from attributing a power to the Black-White paradigm of race that it cannot support and from confusing the paradigm with the limits of formal equality.

1. Race Versus Ethnicity

Professor Perea argues that the focus on race, especially under law, leaves out significant factors, such as culture, language, and religion, that are features of ethnic identification.[90] He argues further that race is in-

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90.　In Perea's words:

> [A]pplying a narrow concept of race to Latinos makes no sense. Latinos constitute a heterogeneous group composed of people of many races and nationalities but with a high degree of commonality in culture, language, history and tradition. For this group, equal protection defined narrowly by race really constitutes little or no protection because much discrimination suffered by Latinos does not depend on racial difference.

Perea, *Ethnicity and the Constitution, supra* note 33, at 600; *see also* Moran, *Unrepresented, supra* note 33, at 142 (arguing that Latinos are not adequately represented under a civil rights model based on the Black experience of race: "First, Latinos are not a monolithic racial group: their ancestors may be white, black, or indigenous peoples."). Professor Moran describes, without adopting, an ethnic attribution for Latinos. *But see* Haney-Lopez, *supra* note 39 (discussing the limits of ethnicity and arguing for an increased reliance on the language of race to define Latino identity).

cluded in but not constitutive of ethnicity; as a result, issues of discrimi-
nation unique to ethnic groups escape legal scrutiny and popular
attention.[91] This result he attributes directly to the law's focus on race
which has caused the courts to neglect ethnicity and, in addition, has
"encouraged an underinclusive, binary discourse about race in which the
primary views expressed are the white and the African American."[92] Pro-
fessor Perea limits the force of his arguments principally to groups such as
Asian Americans and Latinos to the exclusion of Blacks and Whites.[93]

These arguments focus needlessly on biological notions of race and
attribute them almost exclusively to the Black-White racial paradigm. But
nothing compels this relationship,[94] and by continuing to insist on its ex-
istence and by limiting the thrust of his arguments to Latinos and Asian
Americans, Professor Perea reinforces these biological understandings.[95]

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91. *See* Perea, *Ethnicity and the Constitution, supra* note 33, at 603:

By focusing exclusively on race, the Court will not recognize, either by
design or through error, many equally pernicious forms of discrimination
because of ethnic traits. The Court's exclusive focus on race, either
broadly or narrowly conceived, reinforces the tendency to consider all
issues of discrimination and racism in the binary terms of only two com-
munities, the African American and the white.

92. *Id.* at 573; *see also* Moran, *Unrepresented, supra* note 33, at 141–42 ("The mixed
message of the civil rights paradigm, which is rooted in the black experience, is that Lati-
nos have been treated similarly to blacks, but in reality they are more like white ethnic
immigrants.").

93. *See* Perea, *Ethnicity and the Constitution, supra* note 33, at 571–72:

Are there just two Americas, defined by blackness and whiteness, strug-
gling to define some mutual accommodation in society? . . . For too
long, the real ethnic complexity of American society has been sub-
merged, hidden by a discussion that counts only race as important and
only black or white as race. What of the rest of us, neither black nor
white, not fitting neatly into either category? . . . This essay discusses
"other" Americans, Latinos and Asian Americans among them, and their
treatment under the Constitution.

94. For an argument suggesting that the Supreme Court's notion of race is not bio-
logically based, contrary to what much of progressive race theory asserts, see Donald
Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375, 1378–79 (1999).

95. Roger Sanjek comments on two effects of placing ethnicity theory at the center
of analysis of the Black-White paradigm. This formulation "regularly leads to treating
African Americans as merely an exception to processes that affect everyone else, and to
underplaying the historic legal and popular denial of equality accorded to Native, Asian,
and Hispanic Americans." Sanjek, *supra* note 47, at 109. Professor Rachel Moran ad-
dresses the latter effect of ethnicity theory by pointing out how the Latino experience
differs from the experience of dominant ethnics. However, she notes in passing the ex-
clusion of African Americans from ethnic formulations but does not analyze further the
impact of this exclusion. This failure unwittingly reinforces a Black-White paradigm

Progressive scholars have long argued under a social constructionist view of race that racism manifests itself in ways that affect cultural and other factors typically claimed to be exclusive constituents of ethnicity.[96] This is so even when cultural and related factors are used to discriminate against groups traditionally identified by biological notions of race. Such discrimination manifests itself as much by associating sociocultural factors with biology as by denying the protection of antidiscrimination law because such factors are not biologically based.

Within traditional legal theory, race and ethnicity are joined in a framework that denies antidiscrimination protection for any deviation from dominant norms. To the extent that traditional legal theory fails to recognize racism that takes the form of discrimination against characteristics attributed to ethnicity under a racial paradigm, nothing suggests that moving to an ethnic formulation will change this result. Progressive scholars must acknowledge that ethnicity exists within race as much as race exists within ethnicity, and the insistence on any coherence or analytical utility in the distinction between such terms and their unique effects on subordination is questionable.

Professor Perea admirably critiques the flaws in the Supreme Court's reasoning in *Hernandez v. New York*,[97] and he demonstrates that the Court's failure to accord constitutional significance to discrimination against jurors on the basis of bilingualism is wrong. But by attributing the Court's failure to a distinction between race and ethnicity, Professor Perea elevates the formal equality granted in constitutional law under a racial paradigm to an undeserved place of honor, and he fails to acknowl-

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which acknowledges White (and some "other") but denies Black ethnicity. *See* Moran, *Neither Black Nor White, supra* note 33, at 69–77.

96.   *See, e.g.,* Caldwell, *A Hairpiece, supra* note 29 (critiquing the limitation of antidiscrimination law to immutable characteristics to the exclusion of historical, sociocultural associations with racial difference); *see also* WERNER SOLLORS, THEORIES OF ETHNICITY: A CLASSICAL READER (1996) (analyzing the scholarly debate regarding the differentiation between race and ethnicity):

> In practice, the distinction between a racial and an ethnic group is sometimes blurred by several facts. Cultural traits are often regarded as genetic and inherited (e.g., body odor, which is a function of diet, cosmetics, and other cultural items); physical appearance can be culturally changed (by scarification, surgery, and cosmetics); and the sensory perception of physical differences is affected by cultural perceptions of race.

Id. at xxxii (quoting PIERRE L. VAN DEN BERGHE, RACE AND RACISM: A COMPARATIVE PERSPECTIVE 10 (1967)); *see also* Espinoza & Harris *supra* note 55, at 1624–29 (describing the "circle" of biology and culture in American racial understandings); Yamamoto, *Critical Race Praxis, supra* note 5, at 846–48 (discussing without distinguishing between race and ethnicity, the law's exclusion of discrimination on the basis of culture).

97.   500 U.S. 352 (1991).

edge the shortfalls of formal equality which are demonstrated by the material conditions of subordination. These are shortfalls are of a dimension sufficient to disembowel any professed legal protection of Blacks under a narrow, Black-White understanding of race.[98] Justice Thurgood Marshall's warnings about the power and propensity of governmental actors to hide discrimination behind constructs of neutrality, to which Professor Perea refers,[99] presage the continuing use of peremptory challenges to strike members of any and all subordinated groups from juries. This continuing exclusion, sanctioned by law, does not result from a binary racial paradigm or constitutional jurisprudence focused on race to the detriment, if not exclusion, of ethnicity. It results from a limited conception of legal justice based not on African American and White experiences, as Professor Perea claims, but solely on the experiences of dominant Whites.

Professor Perea would readily acknowledge that race is socially constructed,[100] but he appears to lose this insight in his arguments about ethnicity. Rather, he appears to treat the nonbiological features of ethnicity as somehow more concrete or "real" than race; they are a given, a natural formulation that fits some groups but not others. He might well argue for an expansion of the Supreme Court's notion of race in lieu of a switch to the language of ethnicity.[101] Limiting ethnic discrimination to Latinos and Asian Americans—Americans other than Blacks and

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98.   *See* Michael J. Raphael and Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under* Batson v. Kentucky, 27 U. MICH. J.L. REFORM 229, 236 (1993) (arguing that the norm of neutrality renders *Batson* claims ineffective and harms the integrity of the judicial system by blatantly condoning discriminatory preemptory challenges based on facially neutral explanations that are pretexts for discrimination); *see also* Bryan A. Stevenson and Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509 (1994) (arguing that the courts are willing to tolerate rampant discrimination and exclusion of minorities from juries by accepting pretextual justifications).

99.   Perea, *Ethnicity and the Constitution, supra* note 33, at 600. "'Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons.'" (quoting Justice Marshall's concurrence in *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring)).

100.   *See* Perea, *Normal Science, supra* note 33, at 1219 n.27.

> The idea that knowledge is socially constructed, and therefore both contingent upon the values of a society and highly formative of those values in subsequent generations, is by now well established as a premise of critical theory. Writers on the subject of race have established forcefully that any concept of "race" itself is a highly contingent and mutable social construction. The understanding of race as a social construction does not mean that race is not real. It is both real and profoundly determinative of how we experience our lives and identities.

Id. (citations omitted).

101.   *See* Moran, *Unrepresented, supra* note 33, at 151 (making just such an argument).

Whites—reinforces artificial distinctions among subordinated groups to
no avail. It is one thing for Professor Perea to argue that Latinos and
Asian Americans are disproportionately affected by excluding bilingualism
from constitutional protection in the context of jury selection; it is quite
another to imply, in the face of a constitutional jurisprudence bent on
narrow constructions of both race and ethnicity, that language or other
cultural differences among White ethnics and Blacks might receive differ-
ent consideration under a constitution which he claims reflects Black and
White experiences, or that such differences account for an insignificant
part in Black-White racialization.[102]

Perhaps the most interesting among the issues inadequately addressed
by Professor Perea is his failure to consider the effect his emphasis on eth-
nicity might have on the very groups he seeks to protect. His arguments
allow for the reassertion of ethnicity-based claims by dominant White
ethnics, regardless of previous conditions of subordination. Such White
ethnicity-based claims, like White race-based claims, trump the mean-
ingful assertion of rights and the receipt of remedies by subordinated
groups. I agree that the Black-White framing of race should and will be
reconfigured, but Professor Perea's reformulation through ethnicity
promises more than it can deliver.

2. Conservative Ethnicity Theory

Migrants to the United States, voluntary and involuntary alike, are
either racialized or ethnicized, sometimes on initial arrival, other times
over the passage of time.[103] This process is neither accidental nor prede-

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102.   Professor Perea does acknowledge the "Ebonics" debate, an argument over the
ability of Black public school children to learn in classes where standard English is spoken,
and he suggests that a departure from the Black-White racial paradigm could assist Blacks
in asserting language-based discrimination claims. *See* Perea, *Normal Science, supra* note 33,
at 1238 n.115. Yet his very mention of this debate belies his point about the centrality of
Black experiences in antidiscrimination law and social policy. Moreover, incorporating
the experiences of others, purportedly outside the Black-White framework, will not assist
Blacks, as he argues, since, unlike Spanish and certain languages spoken by Asian Ameri-
cans, a central tenet of the debate regarding Blacks and language is that Ebonics is not a
language.

103.   Professors Omi and Winant describe this process:

> Particularly during the nineteenth century, the category of "white" was
> subject to challenges brought about by the influx of diverse groups who
> were not of the same Anglo-Saxon stock as the founding immigrants. In
> the nineteenth century, political and ideological struggles emerged over
> the classification of Southern Europeans, the Irish and Jews, among other
> "non-white" categories. Nativism was only effectively curbed by the in-

termined. Conservative ethnicity theory, which Professor Yamamoto asks progressives to reject, has at least two essential components, only one of which is adequately critiqued by many progressive scholars. First, conservative ethnicity theory presupposes that over time all migrants will assimilate—they will lose their preexisting national and cultural connections and assume an undifferentiated American ethnicity.[104] Conservative theorists make race a component of ethnicity. Therefore, racial groups, like ethnic groups, are assumed to assimilate. Progressives depart from conservatives on this assumption at least in that some groups are subjected to historic and continuing subordination.

Professor Moran engages this first component of conservative ethnicity theory by describing its connection to the subordination of Latinos. In her view, the civil rights model of justice is based on the experiences of Blacks and Whites. She argues that Latinos are not adequately protected by the civil rights model of justice because Latinos are not a monolithic race: their ancestors are Black, White, and/or indigenous. She argues further that Latinos are not represented under an immigration model, which is based on the history and experience of ethnic Whites.[105]

> stitutionalization of a racial order that drew the color line around, rather than within, Europe . . . .

> . . . .

> . . . By stopping short of racializing immigrants from Europe after the Civil War, and by subsequently allowing their assimilation, the American racial order was reconsolidated in the wake of the tremendous challenge placed before it by the abolition of racial slavery.

OMI & WINANT, *supra* note 38, at 64–65.

104.   Roger Sanjek attributes this transformation in the first instance to intermarriage and contrasts his views with those of other scholars:

> My interpretation of the historical significance of intermarriage in relation to ethnicity differs totally from that of Gordon, who sees intermarriage as *the final step* in a series of cultural and structural assimilations . . . . [I]ntermarriages *began immediately upon* each new wave of European immigration. I suggest that these marriages became the social vehicle through which cultural contrasts with "people we marry" were constructed as ethnic on the part of the existing white American population. Over time, as intermarriage rates increased with each generation, there was less and less cultural stuff requiring any assimilation. Gordon's intermarriage caboose is my engine of cultural change among white Americans.

Sanjek, *supra* note 47, at 107 (citing MILTON MYRON GORDON, ASSIMILATION IN AMERI-
• CAN LIFE: THE ROLE OF RACE, RELIGION, AND NATIONAL ORIGINS (1964)).

105.   *See* Moran, *Unrepresented, supra* note 33, at 141–42.

However, like many progressives, Professor Moran does not adequately engage the second component of conservative ethnicity theory. This component masks the underlying purpose of initial ethnicization or racialization of migrants to (and indigenous groups within) the United States. Conservative ethnicity theory is superimposed on an understanding of America as constituted initially, if not irrevocably, on a normative Anglo-Saxon ethnicity. Other White ethnics—principally the Irish, Jews, and Southern and Eastern Europeans—while initially ethnicized, in effect were operatively racialized. They were considered to be less than normative, dominant Whites.[106] Through a variety of factors of assimilation, including intermarriage and upward mobility (money "whitens"), these nondominant Whites were eventually absorbed into an overriding American, dominant-White ethnicity.[107]

While in their nondominant state, these "other" White ethnics were thought to be descended from cultural, religious, national, and linguistic groups inferior to normative American Whites. However, they were considered to have culture, to originate from nation states capable of self-governance, to possess the power of language. Blacks, dominated initially and continually by racial characterizations, have been presumed to lack culture, language, and the intellectual power on which self-governance and nationhood depend.[108] This characterization continues to dominate

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106.   *See* OMI & WINANT, *supra* note 38, at 64–65.

107.   *See* Sanjek, *supra* note 47, at 106. He argues:

> [Intermarriage] accorded ambiguously defined European "others" an unambiguous white racial status in the United States. The boundaries of "white" in the nation's history have expanded continuously with this "naturalization" of non-British Europeans. In 1751, Benjamin Franklin railed against German "aliens" whose presence interfered with the dominance of "purely White People". Later nativist and white supremacist groups would choose other targets, like Italians, Greeks, Slavs, and Jews, all today safely considered white and marriageable by the majority of white Americans.

Id. (citations omitted).

108.   Roger Sanjek describes this relationship of culture to the Black-White racial divide by examining patterns of intermarriage which, except in the case of Blacks, transform race into ethnicity. Defining race according to the five-race framework of U.S. census categories, he challenges the practice of assigning defining features to race and ethnicity:

> In the 1980 census, 1.4 million persons identified themselves as American Indian by race, yet 5.3 million whites (by race) claimed some American Indian ancestry on the separate ethnic-origin question. There is· probably some puffery in this second figure, yet evidently 5.3 million persons attest to a nonwhite American Indian ancestor alongside European forbears but simultaneously consider themselves white. For many of these persons the Indian ancestry is remote, but for. others it is not. More than half of

Blacks despite growing internal class distinctions (money does not always "whiten").[109] The superstition of ethnicity theory on a foundation of

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> American Indians today are married to non-Indian spouses, most of whom are white . . . .
>
> Race, where the possibility of intermarriage ended or was shunned by whites, stood for biologically defined *difference*, and for the denial of any conceivable or discussible cultural contrast within a white kinship network. Offspring of any white-black marriages were considered black. They did not inherit the ethnic identity of their white parent in any socially recognized manner and were not incorporated into their white parent's kinship network. Today's substantial white-Asian and white-Hispanic intermarriage rates, however, raise the questions of whether, and why, a contemporary round of race-to-ethnicity conversion may be in motion. Will some white Americans, at least, accord ethnicity through intermarriage across what have been racial lines and admit to Polish-Mexican, or Jewish-Chinese, or French-German-Puerto Rican, or WASP-Korean kinspersons?
>
> The grounds for parallel conversion of race to ethnicity barely exist across the white-black line, however, where the intermarriage rate is not high but very low . . . .

Sanjek, *supra* note 47, at 105–08 (citations omitted).

Toni Morrison also alludes to the presumption of the absence of culture among Blacks in her account of the initial encounter between Daniel Defoe's Crusoe and Friday—a "'savage cannibal'—black, barbarous, stupid, servile, adoring . . ."

> For longer than necessary, the first words he [Friday] is taught, first "master," then "yes" or "no," remain all he is permitted to say. During the time in which he knows no other English, one has to assume he thinks in his own language, cogitates in it, explains stimuli and phenomena in the language he was born to. But Crusoe's account suggests otherwise, suggests that before his rescue Friday had no language, and even if he did, there was nothing to say in it.

Toni Morrison, *Introduction: Friday on the Potomac, in* RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY xxiii–xxiv (Toni Morrison ed. 1994).

See also BIRTH OF A NATION (Epoch Producing Corp. 1915), D.W. Griffith's turn of the century film portraying Black elected officials after Reconstruction as buffoons incapable of the reason required for participation in representative democracy.

109. *See* MARABLE, *supra* note 7, at 21–23 (describing the dimensions of the class divisions among Blacks sufficient to put into question the very term "black community"). However, he continues to describe the effects of White privilege that threaten the lives of Blacks of every social class. *See generally* ELLIS COSE, THE RAGE OF THE PRIVILEGED CLASS (1993) (detailing racism against the Black middle class); ROBIN KELLEY, YO' MAMA's DISFUNKTIONAL! (1997) (criticizing social science research which sees urban Black expressive culture as nothing but pathology, nihilism, and compensatory behavior); ORLANDO PATTERSON, RITUALS OF BLOOD (1998) (arguing that similar behavior leads to a perpetuation of dysfunctional family patterns among Blacks, a pattern that can be traced back to slavery).

normative White American identity, initially formulated to circumvent biological notions of race, merely builds on and reinscribes this faulty foundation.

Professor Moran argues that the civil rights model is clearly based on the experiences of Blacks and the immigration model on the experiences of White ethnics. She applies this analytical framework to the problem of affirmative action and the underrepresentation of Latinos in the affirmative action debate. I do not quarrel with her basic arguments about the inclusion of Latinos. But by creating a bimodal analysis of equality that purportedly traps Latinos between Black and White models of empowerment, she accords the formal equality guaranteed under a civil rights model unwarranted sanguinity and gives too little weight to the core of the attack on race-specific remedies for all groups.

First, the civil rights model, like the immigration model, is founded on the experiences of White ethnics, not on the experiences of Blacks. Formal equality presupposes that the legal needs of the subordinated are no different from the legal needs of the dominant. Second, the supposition of formal equality leads to limited interpretations of antidiscrimination protection, limits which Professor Moran readily acknowledges, and these limits lead in turn to the need for race-specific remedies. Yet the same suppositions of formal equality inform attempts to dismantle affirmative action and other race-specific remedies for any and all groups: group-based remedies depart from the guarantee of individual freedom which has allowed today's dominant White ethnics to secure a place of belonging in American social, political, and economic life. Racialization processes create superficial distinctions among groups in order to mask their substratal premises and their elemental effects on the subordination of all dominated groups. The focus of progressives should be on the racialization process itself, not on a Black-White paradigm which cannot carry the weight many progressives would place upon it.

Professor Moran recommends an expansion of the notion of race itself to include social factors attributed to ethnicity; a deeper engagement by Latino scholars of both the civil rights and immigration models for the purpose of Latino empowerment; the abandonment of a monolithic notion of race in the face of long-standing American practices of racial mixture; and the deployment of Latino public intellectuals to transform popular thinking regarding the limits of the civil rights and immigration models. She argues further that as Latinos gain prominence in American society, their experiences with race may catalyze the development of a true multicultural democracy.[110]

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110. Moran explains this dynamic:

As Latinos gain prominence, their experience may facilitate a thorough reexamination of America's outmoded conceptualization of race . . .

Professor Moran's vision is admirable in its attempt to include all groups, though her primary focus is on Latinos. But to consider empowerment primarily, if not exclusively, through the lens of the Latino experience may further distort our vision unless our focus is dead-centered on the issue of whiteness, rather than blurred by a limited view of the ideological underpinnings of the Black–White paradigm. With respect to racial identity and racial mixture, she appears to argue on one hand that Latinos are not a monolithic racial group—i.e., that their ancestors are Black, White, or indigenous, suggesting that Latinos are actually three distinct races—and on the other that they are a single racially mixed group.[111] What she does not address is the propensity of Latino identity to divide along lines of Black and White.[112] This aspect of

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Ultimately, though, the greatest contribution that Latinos may make is to alert Americans to the ways in which [the civil rights and immigration] paradigm[s] [have] become obsolete. Latinos may not fit the models because the models just don't fit the complications of a multiracial, multiethnic, multicultural, multilingual America.

Moran, *Unrepresented, supra* note 33, at 150–51.

111.   If Latinos are not monolithically raced, what then are the races of Blacks? Professor Moran acknowledges the ethnic tensions between native-born Blacks and recent African American immigrants, but she does not clearly account for the ethnic diversity among as many as 75% of native-born Blacks which includes a racial heritage that is "also American Indian, European, Asian and/or Hispanic." *See* MARABLE, *supra* note 7, at 222. Moreover, what is the meaning of the term "Black?" *See* Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161 (1997) (describing the role of the law in the monolithic, racial construction of African Americans). On the varied political uses of the term "Black," see ROBERT FATTON JR., BLACK CONSCIOUSNESS IN SOUTH AFRICA (1986); Charles R. Lawrence III, *Race and Remedy in a Multicultural Society: Forward: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819 (1995).

Professor Moran does not demonstrate that Latino pan-ethnic or racial identity can withstand the power of color and blood-based racialization that immediately subsumes all non-Latino Blacks in the United States (and, presumably, some Black Latinos) into an all-encompassing Black racial identity. National origin, religion, language, and culture have not been demonstrated to possess similar transformative power either to create a separate identity for Latinos outside of Blackness and Whiteness or to resist the power of whiteness as an unstated modifier of American identity. It is difficult to accept the exceptionalist frame of Professor Moran's description of Latinos or her hope that the Latino experience will provide America an intimacy with racial mixture it has not always known.

112.   Professor Baynes would modify this Black–White characterization by acknowledging a dark-light racial dichotomy that cuts across racial and ethnic lines to represent color-based racism between Blacks and Latinos on the one hand and Whites on the other and among and between Blacks and Latinos themselves. *See* Baynes, *supra* note 51. Professor Sanjek argues that Latino-styled racial patterns transform biological notions of race into those based on appearance. Hence, Latinos often reject the identity choices of Black or White in answering the U.S. census question on race, but do so because they understand the designations Black or White in cultural terms: they do not consider themselves

Latino identity may further entrench the Black-White racial paradigm, if not formally in law and social policies, then in the actual material and social conditions of racism. The mere existence of a multiracial democracy does not spell the end of racism or important dimensions of its Black-White frame.

Latino scholars acknowledge that the overwhelming majority of Latinos—upwards of 95%—identify as White even though their sense of the term may differ in some respects from its traditional connotation in the United States.[113] This difference leads to the observation that Latinos, large numbers of whom are products of racial mixture, are not White in the sense that this term has in the United States.[114] In this respect, Latinos mirror previous non-British White ethnic groups composed of both native-born and immigrant populations, citizens and noncitizens, which were "raced" on cultural grounds and therefore originally not considered White in the U.S. sense of the term. Whether or not Latinos will ultimately mirror the pattern of White ethnic transformation from ethnicity into dominant whiteness is not known. However, it is clear that the Latino sense of race, based to some extent on the experience of race outside of the United States, does not completely reject the notion of whiteness itself. For example, ascribing racial identity according to European appearance in lieu of ancestry tracks critical aspects of the American experience of Black-White race-based differentiation.[115] Nor can it be said with certainty that a Latino sense of identity can or will withstand the upward pull toward whiteness that defines American preferred racial identity.

In addition to the incipient notions of whiteness intertwined with Latino racial mixture, Professor Moran's vision does not take account of the continued existence of significantly different rates of intermarriage between Whites and Blacks (or Blacks with Latinos and Asian Americans)

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culturally to be either Black or White. *See* Sanjek, *supra* note 47, at 120. Professor Moran also refers to Latino rejection of Black-White identity choices for purposes of the U.S. census but she describes these choices in racial terms. *See* Moran, *Unrepresented, supra* note 33, at 142. Sanjek argues further that notwithstanding the Latino understanding of race as appearance, not ancestry, the biological underpinnings of centuries of White racial dominance persist in continuing idealization of and preference for light skin, straight hair, and European facial features. *See* Sanjek, *supra* note 47, at 120.

113.   *See* Berta Esperanza Hernandez-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369, 384 n.54 (citing GERARDO MARÍN AND BARBARA VAN OSS MARÍN, RESEARCH WITH HISPANIC POPULATIONS 2 (1991)).

114.   *See id.*

115.   *See id.; see also* Caldwell, *A Hairpiece, supra* note 29, at 383–85 (arguing that discrimination on the basis of sex and race intersect along lines of White standards of appearance against Black women).

on the one hand, and between (and among) Whites and Latinos and Asian Americans on the other. The ideology of whiteness has created a hierarchy of races, represented by a concomitant Black-White paradigm, with Blacks at one pole, dominant Whites at the other, and all other racial and ethnic groups represented in its middle continuum. It is precisely the tow of whiteness that has transformed the racialized identity of previous White ethnics in the United States from nondominant or "other" Whites to dominant Whites: intermarriage between nondominant and dominant Whites created for the former a dominant White racial identity.[116]

Whether or not the prominence of Latinos will create a new sense of multiracial identity in America, as Professor Moran suggests, or track the historic patterns of transformation of racial identity to White ethnic identity that have held for every group other than Blacks, is not known. Much depends on the political scenarios which public intellectuals choose to advocate. One possibility is a racially mixed identity that does not privilege White over Black and resists the power of private and governmental entities to force identification, even along Black-White-Latino-Asian lines. Private and governmental entities may cause a split in individuals' choices of racial identity: multiracial identity for private purposes, reflecting fully the fact of racially mixed parentage, and public identification for purposes of political and economic empowerment along traditional polarized lines of Black-White-Latino-Asian designation. At a minimum, progressive scholars need to acknowledge the possibility of both enhanced recognition of racism against groups other than African Americans and the persistence of a binary racial order with all groups, except Blacks, above the line of acceptability.

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116.   Professor Haney-Lopez advocates the language of race as a paradigm for Latino identity in addition, if not in contrast, to ethnicity. *See* Haney-Lopez, *supra* note 39, at 1158. He analyzes the way in which a claim to Mexican American whiteness complicated the Supreme Court's ultimate decision to accord constitutional significance to the exclusion of Mexican Americans from jury pools in its 1954 decision in *Hernandez v. Texas. See id.* at 1158–72. His narrative alternates between a sense of predestined, state-imposed racial identification for Mexican Americans based on biological notions and the pragmatism of Mexican Americans themselves to avoid the subjugation ordained for Blacks. He notes that Mexican Americans advocated a third sense of identity which was neither Black nor White, in the sense the frequent use of this phrase by current progressives suggests. But, that third sense of identity was not simply neither Black nor White: it was both White and "other." *See id.* at 1165–66. Professor Haney-Lopez does not critically engage the current choice of Latinos to identify, predominantly, as White—whatever their sense of the term—or the ideological dimensions of White identity either in the 1950's or today, nor does he account for the effect of voluntary or imposed identification on the demographics he projects for the next century. *See id.* at 1208–11.

Like the power of the Black-White paradigm, the force of conservative theories of ethnicity is sufficiently strong that simple assertions of surface distinctions between socially constructed methods of group formation and identification will not suffice. To end group-based subordination, progressives must turn away from distinctions without difference, to confront difference itself and the material conditions it engenders. With the advent of globalization and transnational citizenship, pan- and multi-ethnic identity (both American and other) for all groups may in the end be an appropriate goal for all Americans. But to attain this goal on the basis of hierarchy—whether racial or ethnic or both—is antithetical to the ideals which Professor Yamamoto and I believe progressive race theorists share.

· II. MOVEMENTS, MODELS AND THE JURISPRUDENCE OF COLOR-ON-COLOR CONFLICT

Though the full story of the African American civil rights movement of the 1950s and 60s remains to be told, its history, like that of slavery, is rapidly being lost and misrepresented.[117] Unlike some accounts of the civil rights movement, which appear to be motivated by an intention to denigrate the moral and intellectual force of African American interests and leadership, accounts from progressive scholars are not so designed.[118] However, progressive scholars often attribute the limits of civil rights law to the civil rights movement itself, and they sometimes imply that African

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117. *See* D'SOUZA, *supra* note 87 (arguing that slavery was not racist or ultimately harmful for African Americans who escaped worse conditions in Africa through slavery, and that the civil rights movement grew out of a commitment to theories of cultural relativism which in turn led the movement to misconstrue the purpose and effects of segregation). For critiques of D'Souza's thesis, see Richard Rorty, *Color-Blind in the Marketplace*, N.Y. TIMES, Sept. 24, 1995, § G, at 9 (characterizing D'Souza's work as "bloated with quotations and anecdotes, but [having] virtually no argumentative structure . . . The only analytic tool Mr. D'Souza uses is his idee fixe, cultural relativism . . . [H]e barely tries to defend his startling claim that the civil rights movement developed as a direct outgrowth of cultural relativism."); Dennis Cauchon, *"End of Racism" Not Justified by D'Souza's Means*, USA TODAY, Sept. 28, 1995, at 4D ("What's most remarkable about The End of Racism is not its controversial assertions about race; it's the nearly total lack of argument provided to support these unusual views."); Charles Johnson, *Widening the Racial Divide*, L.A. TIMES, Nov. 26, 1995, at 4 ("He has read an entire library of literature devoted to race. But knowing what one has read and knowing America's racial history are two very different things. That D'Souza still has much to learn about this country explains his bizarre attempt to reintroduce racial stereotyping into our discourse when these are noxious ideas that Americans of goodwill have no choice but to reject, regardless of how pervasive such thinking may be.").

118. *See* D'SOUZA, *supra* note 87.

American social justice movements addressed narrow concepts of race and were waged by and for African Americans exclusively.[119]

Conflating the civil rights model of legal justice with the African American civil rights movement[120] falsely suggests that the movement took a monolithic approach to empowerment.[121] The civil rights model of legal justice, and the strategies advocated by some civil rights leaders, did reflect an attachment to an ethnicity paradigm based on formal equality, but other leaders clearly rejected such an approach. Even the leaders who advanced a strategy of formal equality could not have anticipated that the civil rights model would result in a narrow conception of legal justice as interpreted by the courts.[122] Hence the limited conception of legal justice which has emerged as the dominant interpretation of antidiscrimination law cannot be laid at the feet of African American leaders, nor can it be attributed to the intellectual limits of the civil rights movement.

Not only were the political strategies of the civil rights movement intellectually richer than narrow concepts of legal justice, the struggle was not waged solely around issues of race nor on behalf of African Americans alone.[123] Racism has always played a significant role in African American subordination. Critics of African American leaders have always assumed that they advocate only race-based empowerment strategies in the interests of African Americans. This portrayal persists despite considerable contrary evidence.

Claims suggesting a myopic, self-centered focus of African American empowerment strategies serve only to exacerbate interminority group as well as Black-White tensions. They often lead to a "Black stigma" and

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119. *See generally* DONA COOPER HAMILTON & CHARLES V. HAMILTON, DUAL AGENDA: RACE AND SOCIAL WELFARE POLICIES OF CIVIL RIGHTS ORGANIZATIONS 2–3 (1997) (observing that efforts of civil rights organizations aimed at benefiting Blacks have never overshadowed efforts aimed at helping all poor people).

120. *See* OMI & WINANT, *supra* note 38, at 128 (citing Lewis Killian, *Black Power and White Reactions: The Revitalization of Race-Thinking in the United States*, 454 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI., 42 (Mar. 1981) and failing to distinguish between the civil rights movement and the civil rights model of legal justice). Killian's comments more accurately characterize a legal model of justice than the civil rights movement.

121. *See* Calmore, *supra* note 33, at 35 (noting that "[b]y 1965, Black Nationalists challenged the viability of the ethnicity paradigm and its assimilationist conceptualization of integration. Meanwhile Watts burned and blacks demanded group rights, including something more than legal equality"); *see also* STOKELY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 53–57 (arguing against integration as a strategy for people who suffer as members of a group).

122. *See* OMI & WINANT, *supra* note 38, at 185 n.61 (describing the emergence of neoconservative strategies as "an attempt to confine racially based demands to an ethnicity-oriented model of politics").

123. *See* HAMILTON & HAMILTON, *supra* note 119, at 2.

cause other groups to define their interests in contrast to those of Blacks. They also greatly understate the benefits of Black struggles and the civil rights model of legal justice to groups other than Blacks.

Precisely because of the explosive nature of race and racism, African Americans have had the difficult task of confronting racism while at the same time advocating improvements in general social welfare, both for the benefit of all who need it.[124] Black leadership often finds itself caught in a proverbial catch-22: conservatives tend to scapegoat African Americans for persistent economic and social inequality; progressives tend to expect too much from African Americans.[125] If progressive theory is

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124.   Hamilton and Hamilton observe this dilemma for African American leaders:

> Precisely for this reason [the persistence of racism], they have had to chart a course that has required them to confront the explosive issue of race in American politics. Perhaps more than anyone, they have understood that race per se has been, and remains, a dangerously divisive aspect of American life. They knew that pointing out instances of discrimination would likely stir up deep-seated animosities. And yet they recognized that the struggle to achieve racial justice and economic development had to be pursued on both fronts.

Id. at 259.

125.   Interestingly enough, Marable attributes the failure of progressives to supplant the civil rights model with new models of empowerment to the rise of the far right in the 1990s and to the failure of African American leadership since the 1960s. He observes further:

> The great gift of black folk to American politics and society has been that we have consistently fought for a more inclusive and humanistic definition of democracy, the relationship between people and the state. From slavery through Reconstruction, and from the nadir of racial segregation through the desegregation movement in the South, we have consistently challenged the limited definitions of what democracy should be about. As we have struggled, others within the society have been influenced by our vision and sacrifices, and have joined the fight to expand the boundaries of democracy. The inability of the black movement to develop new theories and models of political intervention during the era of Reaganism and the conservative domination of Congress under Gingrich has meant that the entire spectrum of social forces left of center has fallen into disarray. White liberals, labor, feminists, and others, have not produced a coherent statement to halt the movement to the right, because in the end that alternative must be articulated by the most oppressed sectors of our society for it to have a fundamental impact upon the social order. In short, the struggles of black people, in conjunction with other racial minorities and the poor, will prove decisive in the continuing battle to redefine the nature and character of democracy . . . This is why an analysis of black political and civil society, its leadership and competing ideologies, is linked to the development of a broader understanding of what the future of American democracy may be.

MARABLE, *supra* note 7, at xiv–xv.

to inform praxis, it is important that theory be based in the first instance on an accurate factual foundation.

A. *African American Social Movements and Black Stigma*

Scholars properly attribute the existence of modern civil rights legislation to the protest movements of the mid-20th century.[126] But the aspirations of the African American social movements of that time extended far beyond racial justice through law. Scholars who place undue emphasis on legal strategies of the civil rights movement or who conflate criticisms of the civil rights model of legal justice and the civil rights movement miss this essential point. To limit African American social justice movements in this way, however unintentionally, trivializes their reach and power.

Professor Yamamoto notes that the African American civil rights movement centered politically and morally on legal strategies.[127] His views on legal justice suggest that advocacy for nonlegal solutions necessary to achieve actual social justice played at best a secondary role in the movement's strategy. Professors Charles and Dona Hamilton present a different account. They posit an African American social justice movement of two dimensions, one focused on legal justice and the other on social and economic empowerment not only for African Americans but also for other subjugated groups. [128]

The American civil rights movement and African American aspirations for legal, social, and economic justice overlap, but are not coterminous. The American civil rights movement, which culminated in

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126.   *See* Moran, *Unrepresented, supra* note 33, at 142:

   The civil rights model in the United States is clearly based on the African American experience. Modern civil rights protections arose primarily as a response to the persistence of a caste system rooted in slavery. The civil rights movement aimed to dismantle official segregative practices and to promote equal opportunity without regard to race.

Yamamoto, *Critical Race Praxis, supra* note 5, at 845 (footnote omitted):

   [T]he African American civil rights movement of the 1950s and 1960s placed antidiscrimination law at the center of its political and moral strategies, and in some important respects those strategies succeeded. Over time, antidiscrimination laws compelled the state and federal governments to bring their considerable powers to bear in prohibiting intentional race discrimination in the public realm.

127.   *See* Yamamoto, *Critical Race Praxis, supra* note 5, at 845–51.

128.   *See* generally, HAMILTON & HAMILTON, *supra* note 119.

the passage of comprehensive civil rights legislation[129] and is reflected in the civil rights model of legal justice, has led to a near total separation between legal rights and social and economic justice.[130] This separation has led to the undermining of the apparent and potential success of legal justice. By contrast, African American social justice movements have never backed away from the need for a revolution in both arenas. To the extent the civil rights model inherent in contemporary interpretations of law lacks an analysis of class-based differences, a focus on economic justice and structural inequality, or fails to address aspects of cultural discrimination, the fault does not lie at the feet of African Americans.

Professors Hamilton and Hamilton demonstrate through extensive analysis and detail the "dual agenda" of African American civil rights organizations from the 1930s through the mid-1990s.[131] These organizations consistently worked to promote economic and social welfare policies that would not only overcome race-specific problems, but which would benefit African Americans generally along with all other economically-disadvantaged people. This aspect of African American civil rights and social movements is hidden from view[132] in contrast to the well-documented struggle for legal justice.

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129. This legislative product includes the comprehensive Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968. *See* 42 U.S.C.A. §§ 2000a–2000e-16 (West 1994); 42 U.S.C.A. §§ 1971, 1973 (West 1994); 42 U.S.C.A. §§ 3601-19 (West 1994). The movement also led to a resuscitation of provisions of The Civil Rights Act of 1866, later codified as 42 U.S.C. §§ 1981, 1982. In its 1883 decision in the *Civil Rights Cases*, the Court struck down other civil rights legislation involving discrimination in public accommodations. *See* The Civil Rights Cases, 109 U.S. 3 (1893). Although the Civil Rights Act of 1866 was not involved in Supreme Court's decision, the Court indicated that the 1866 statute should also be limited to situations involving governmental action. *See id.* at 23; *see also* Jones v. Mayer Co., 392 U.S. 409 (1968) (holding that the Civil Rights Act of 1866 applied to purely private discrimination).

130. *See* Delgado, *Rodrigo's Fifteenth Chronicle, supra* note 33, at 188 (arguing that the civil rights model lacks a class component).

131. *See* HAMILTON & HAMILTON, *supra* note 119, at 3–4.

132. As Hamilton and Hamilton explain:

> There have long been two agendas working as the driving force behind the actions and concerns of the civil rights organizations. These groups have always focused not only on racial discrimination but also on issues of general socioeconomic concern. The latter approach has probably been obscured because racial discrimination had played such a prominent role in American history. People have automatically assumed that when civil rights organizations spoke and acted, they were doing so only in an effort to combat the perfidious nature of racism in American society. To be sure, this has been a constant concern precisely because racism has been, in various forms, a continuing presence in American society. Thus it has been presumed that civil rights organizations, as interest groups, have been steadfastly acting from that single motive . . . . Civil rights organi-

African American civil rights organizations have long been admonished to broaden their focus, to become "more attentive to social welfare issues, to rise above a narrow focus on race and concentrate on helping all people, especially the poor."[133] Hamilton and Hamilton point out that this criticism and demand were advanced notwithstanding "clear evidence that this was exactly what civil rights groups were doing and would continue to do."[134]

Claims about the limited moral, intellectual, and practical reach of African American social movements continue today.[135] These claims operate in tandem with historic refusals of many other stigmatized groups to coalesce with African Americans even when their interests converge.[136]

> zations have thoroughly understood the necessity of keeping a delicate balance between their concern to end racial discrimination (both de jure and de facto) and their equally important concern to bring about viable social welfare policies for *all* Americans.

Id. at 258–59.

133.   *Id.* at 2.

134.   *Id.* The authors continue:

> They always pursued a "dual agenda". . . . Frequently, when they advocated policies, they were presumed to speak only for African Americans. They were "civil rights" groups and consequently not expected to concern themselves with issues other than racial segregation and discrimination, and certainly not with economic issues that would benefit *all* poor people regardless of race and ethnicity.

Id. at 2–3.

135.   *See, e.g., id.* at 3 (Professor Theda Skocpol wrote in 1991 that "[c]ivil rights groups tend to be preoccupied with defending affirmative action or pushing for measures targeted on the nonwhite poor.").

136.   Professors Hamilton and Hamilton describe the interaction among Blacks, Jews, and Catholics during World War II and the post-war period regarding the fight for full and fair employment and the establishment of a permanent Fair Employment Practice Committee ("FEPC"):

> According to historian Merl E. Reed, Catholics and Jews began to distance themselves from the movement as the Senate debates dragged on. Though both groups had experienced employment discrimination, Catholics resented "being lumped with colored people in America's thinking' and Jews pulled back 'in the belief that their minority troubles were social, rather than economic, in origin." Neither group wanted statistics to be published "that indicated that they had been helped by the FEPC." This suggests that a "Black stigma" was attached to the FEPC . . . Other groups, such as Jews and Catholics, may have felt uncomfortable as part of the coalition supporting the [effort] and about being seen as having been helped by the FEPC because Negroes were very visible leaders in efforts to abolish employment discrimination.

Id. at 65.

Both often reflect a Black stigma: the inability to associate African Americans with anything outside of narrow, race- and group-specific particularism, and an aversion to being associated with African Americans and their interests.[137]

B. *The Civil Rights Model for Other Non-Whites*

I have already discussed the way scholars conflate the civil rights model of justice with the Black experience of race by failing to see the influence of ethnicity theories (and therefore the White experience of race) on interpretations of the civil rights model. I have also argued that scholars who claim that the Black-White framing of civil rights law leads courts to neglect ethnicity erroneously attribute to the Black-White racial paradigm the effects that principles like neutrality have on equality for all groups. Here I want to address a different though related claim: the implication that Blacks have benefited more under a civil rights model than other groups.[138] Not only is this implication wrong, it also supports the

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137.   Evidence of a "Black stigma" in relation to interests associated with African Americans persists. For example, some of the underpinnings of the designation of Asian Americans as a "reticent minority," including notions accepted by some Asian Americans, reflect a similar need for dissociation from stereotypical notions about Blacks and Black leadership. In the film *Slaying the Dragon*, a documentary analyzing the stereotypical representation of Asian Americans in film and other visual media, California State University sociologist Dr. Eugene Wong notes the connection between the image of an humble, quiet, Asian-Pacific American community interested in preserving the status quo and the intensification of Black protest in the early 1960's. Advancing the notion of Asian Americans as a reticent, law-abiding minority was a deliberate attempt to embarrass civilly disobedient Blacks. Thus Asian Americans are not constructed as generally reticent but reticent in relation to Black militancy. *See* SLAYING THE DRAGON (National Asian American Telecommunications Association 1987).

The idea of reticence in relation to Black interests and the stigma associated therewith has also been a part of the identity of some Asian Americans. Professor Pat Chew, in an admirably honest account, reveals her reluctance to be identified as the subject of a dispute regarding a faculty refusal to hire a Chinese woman professor. This dispute ultimately led to the resignation of Professor Derrick Bell as dean of the University of Oregon Law School.

> I was not sure that as an Asian American I should be a beneficiary of affirmative action polices. Besides, I thought, I did not want or need that labeling . . . Even now, I am ambivalent about revealing that I was the candidate.

Chew, *supra* note 44, at 4.

138.   *Compare* Chew, *supra* note 44, at 49 (arguing that the underrepresentation of Asian Americans in certain managerial and other upper-level occupations is greater than the underrepresentation of African Americans), *and* Moran, *Unrepresented, supra* note 33 (arguing that Latinos are left out of an affirmative action debate focused on Blacks and

equally erroneous view that Blacks waged the civil rights movement for narrow, selfish reasons, and it exacerbates intergroup conflict.

Some scholars do not distinguish the effects of limited interpretations of civil rights laws, which retard the progress of Blacks as well as other racialized groups, from the operational and ideological effects of the Black-White paradigm. Racialized groups other than African Americans have not been denied the benefits of civil rights legislation. Like African Americans, their experience has not been uniform,[139] but the guarantees of civil rights legislation have benefited all and have led to general social reforms.[140] Moreover, Professor Derrick Bell has demonstrated that the civil rights model has benefited Whites as much as, if not more than, Blacks.[141] To the extent the Black-White paradigm reflects a continuum of race, other groups have benefited not only on their own account but also by being treated as "other" or nondominant Whites. Failure to acknowledge these benefits perpetuates power evasion.

Progressives need to acknowledge that the likelihood of new legislation in the foreseeable future is remote, and that the attack on corrective legal justice qua affirmative action is for some a more basic attack on the

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Whites), *with* Rochelle Sharpe, *Losing Ground*, WALL ST. J., Sept. 14, 1993, at A1 (noting that during the 1990–91 recession, African Americans were the only group to experience a net job loss while Whites, Latinos and Asians all gained thousands of jobs, and reporting that under affirmative action, efforts broadly conceived to include all minority groups companies can show increased workforce diversity while masking African American reversals).

Professor Yamamoto cites the Supreme Court's decision in *Hernandez* in support of his claim that the Black-White framing of racial discrimination marginalizes issues of other groups by overlooking White relations with other non-Whites. *See* Yamamoto, *Critical Race Praxis*, *supra* note 5, at 852 n.150 (citing Hernadez v. New York, 500 U.S. 352 (1991)). However, the fact that he describes the case without further analysis—noting only that a White attorney used preemptory challenges to eliminate Hispanic jurors—suggests that he reads the case in much the same way as Professor Perea. I have indicated earlier that Professor Perea misperceives the holding in *Hernandez* by attributing it to the Court's inadequate ethnicity jurisprudence rather than to the dominance of principles of neutrality. *See supra* text accompanying notes 98–99.

139.   *See* George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 1 (1997); George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930–1980*, 27 U.C. DAVIS L. REV. 555 (1994).

140.   *See* DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW 659 (3d ed. 1992) (citing FREUND, THE CIVIL RIGHTS MOVEMENT AND THE FRONTIERS OF LAW, *in* T. PARSONS & K. CLARK, THE NEGRO AMERICAN 363 (1966)).

141.   *See id.* at 659–60 (describing the benefits to Whites of racial remedies). Professor Bell also argues that the rights of Blacks are only advanced when they coincide with the perceived needs of Whites. *See id.* at 660.

fundamental guarantees of civil rights law.[142] I do not suggest that scholars back away from criticizing the civil rights model because it is being attacked by neoconservative activists. However, I do suggest that they not contribute to the success of neoconservative projects through faulty representations of the effects of civil rights law.

For most scholars, the deconstruction of the Black-White paradigm presupposes continued reliance on benefits derived from civil rights legislation.[143] All groups stand to benefit from working within the civil rights model as well as continuing to challenge its limits. Groups (including Blacks) disadvantaged by the Black-White racial paradigm will not be better off in the absence of civil rights guarantees. Rather, the additional claims that all groups choose to assert build on a civil rights foundation. The conflation of the Black-White paradigm and the civil rights model focuses erroneously on blackness and insufficiently on constricted interpretations of the role of law in the attainment of racial justice.

C. *Law and Color-on-Color Conflict*

Professor Yamamoto adds another dimension to the criticism of the civil rights model. He argues that the interracial conflicts which often characterize contemporary civil rights litigation may demonstrate the ill-fit of traditional antidiscrimination law for multiracial conflicts in "post-civil rights America."[144] He acknowledges that legal justice is still possible for racial minorities, but criticizes the current conception and practice of antidiscrimination law for its limited reach in the pursuit of racial justice

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142. *See* D'SOUZA, *supra* note 87, at 544 (calling for a repeal of the Civil Rights Act of 1964); *see also* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) (arguing that Title VII of the Civil Rights Act of 1964 is no longer necessary).

143. This reliance is clearly the point of Professor Haney-Lopez's argument regarding the salience of race for Latino identity:

> Unfortunately, the construction of Latino/a identity in non-racial terms continues as a basis for arguing that the remedies fashioned to redress racial discrimination should not be available to Latino/a communities . . . . Using nonracial language to assess Latino/a racial identities risks obscuring important aspects of experience and threatens to hide from view racially determined conditions. It also facilitates a dangerous denial of the legitimate need for as well as access to antidiscrimination institutions and practices.

Haney-Lopez, *supra* note 39, at 1207–08.

Professor Moran also would expand, rather than supplant, the civil rights model to account for Latino experience. *See* Moran, *Unrepresented*, *supra* note 33, at 150–51.

144. Yamamoto, *Critical Race Praxis*, *supra* note 5, at 826.

and for its failure to provide a jurisprudential framework for color-on-color conflict.[145] He also links the foundation of civil rights law to the Black-White paradigm of race and argues that this framing of race blocks the creation of a color-on-color jurisprudence.

Professor Yamamoto's call for a jurisprudence for color-on-color conflict is odd given his critiques of both antidiscrimination law and the ill-fit between progressive race theory and political and legal practice. The courts have explicitly acknowledged color-on-color conflict in the context of discrimination by one member of a racial group against another member of the same group.[146] Arguably, the Supreme Court has alluded to the likely contours of a color-on-color jurisprudence (perhaps including Whites as a color group) in cases such as *University of California Regents v. Bakke* and *City of Richmond v. Croson*, decisions which Professor Yamamoto would likely find inconsistent with his notions of legal or racial justice.[147] Courts are likely to create a jurisprudence that centers on the interests of Whites, based on colorblind, neutral principles, even in controversies involving color-on-color conflict. Moreover, the scholarly literature addressing color-on-color conflict, to which Professor Yamamoto refers,[148] does so in the context of broad socio-political disputes not easily reducible to or resolvable in the contours of specific litigation. For these reasons, it may well be that color-on-color conflict is best resolved outside of the judicial system.[149]

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145.   *See id.* at 852.

146.   *See, e.g.*, Walker v. Secretary of Treasury, 713 F. Supp. 403, 408 (N.D. Ga. 1989) (allowing an employment discrimination claim to be brought by a light-skinned African American alleging discrimination by her dark-skinned African American supervisor).

147.   Justice Powell's reference to "a nation of minorities" in *Bakke* could arguably be made within a Black-White framework that could easily be applied in disputes involving color-on-color conflict to restrict the rights of non-Whites generally in order to protect the rights of dominant Whites. *See* Regents of the Univ. of California v. Bakke, 438 U.S. 265, 292 (1978). One could argue that this is precisely the result of the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989), where among other reasons for striking down the City's minority set aside program, the Court was careful to express disdain for the City's inclusion of minorities other than Blacks, using language suggesting—if not sure to foment—inter-minority conflict (stating "[t]here is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry. . . . [O]ne may legimately ask why [Blacks] are forced to share this 'remedial relief' with an Aleut citizen who moves to Richmond tomorrow?"). *Id.*

148.   *See* Yamamoto, *Critical Race Praxis, supra* note 5, at 853 n.156.

149.   Professor Yamamoto appears to call for the development of a color-on-color jurisprudence that can be used by courts. *See id.* at 853–55. However, in other instances, he appears to recommend a more limited role for courts and legal justice. *See id.* If he means to suggest, for the reasons I have identified or others, that color-on-color conflicts are best resolved outside of courts, he should say so unequivocally.

Professor Yamamoto's description of the complex dynamics involved in interracial conflicts, applied to the dynamics possibly underlying the conflict in *United Minorities*, amounts to the strongest brief possible against expecting courts to resolve more than a very narrowly-defined aspect of the conflict. According to Professor Yamamoto, Chinese Americans in San Francisco have long been discriminated against in business, housing, and education, and discrimination continues: recent immigrants are mostly poor and affected negatively by Proposition 187; young Asian males are subject to police harassment; Asians are victims of hate crimes; middle-class Chinese Americans feel discriminated against by Whites and, through affirmative action, by Blacks and Latinos. On the other hand, Chinese Americans in San Francisco are financially successful, are rising in political strength, occupy significant state and local government positions, exceed their proportionate share of the population at state colleges and universities, and are considered by Blacks and Latinos to be middle minorities receiving the benefits of White privilege in exchange for their help in subordinating Blacks and Latinos.[150] Yet nothing in Professor Yamamoto's description suggests that the narrow issue before the court is illuminated in any meaningful way or should necessarily be expanded by the interminority dynamics he describes: whether or not the institutional actors intentionally restricted the employment opportunities of Blacks and Latinos because of race.

Professor Yamamoto argues that the dynamics of interminority conflict are different from conflicts between color groups and Whites, yet many of the dynamics he suggests are at play in *United Minorities* appear in traditional White-on-color conflicts, often mediated through the intersection of race and class. If scholars choose to advocate the development of a jurisprudence for color-on-color conflict, they must abandon the mere description of differences and specify why the differences they describe matter in the legal arena. If Chinese Americans—or Blacks or Latinos for that matter—are agents of employment discrimination against other color groups, then the institutional actors need to be found liable even though Chinese Americans or others also suffer discrimination in other institutions or other aspects of economic and social life.

Professor Yamamoto's descriptive and heuristic account of the inter-racial dynamics in *United Minorities* also seems to be the very kind of progressive race theory writing that practitioners find frustrating, baffling, and not particularly helpful, and which contributes to the apparent disjuncture between theory and practice that Yamamoto finds disturbing. He speculates about the reasons for silence regarding the interminority

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150.   *See id.* at 857–59.

dynamics by judges, lawyers, and parties in *United Minorities*, then describes the features of antidiscrimination law that promote these silences. He then describes the extension by courts of a colorblind jurisprudence developed in Black-White conflict to color-on-color conflict with much the same consequences as I have already suggested. Finally, Professor Yamamoto questions why legal scholars have not developed a jurisprudence for inter-group conflict. He concludes, as I have tried to illustrate by examining scholarly treatment of the Black-White racial paradigm and the civil rights model of legal justice, that progressive theory lacks a coherent theoretical core on interracial conflict.

In short, Professor Yamamoto tells theoreticians and practitioners what they already know without providing insights on solving the problem he identifies. Professor Yamamoto's guidelines for critical race praxis are also marked by this abstract quality. In the next section I identify aspects of one of his guidelines needing further explication and attempt to apply that guideline to the development of progressive race theory.

III. APPLYING THE GUIDELINES OF CRITICAL RACE PRAXIS TO PROGRESSIVE RACE THEORY

The thesis of this essay is that Professor Yamamoto's assumption that progressive race theory in its present state has much to offer practitioners involved in interracial conflict is counterintuitive. Progressive theory actually reflects many of the dynamics that Professor Yamamoto describes as characteristic of civil rights litigation involving two or more sub-ordinated racial groups. I have focused on the description and reconstruction of the Black-White paradigm of race, and the importance of the civil rights movement of the 1950s and 1960s and the civil rights model of legal justice for groups other than African Americans. I argue, therefore, that Professor Yamamoto's guidelines for critical race praxis be applied to progressive race theory. In this section, I apply one of his guidelines to the ideology of whiteness, a central problem in racialization processes to which progressive race theory pays inadequate attention when theorizing interracial conflict.

A. *Racial Group Agency and Responsibility*

Professor Yamamoto recommends four guidelines for critical race praxis, only one of which he develops in any detail: racial group agency and responsibility. The guideline of agency and responsibility grows out of the recognition of situated group power. Yamamoto argues that a theory of situated group power "acknowledges the capacity of racial groups,

amid changing racial demographics and socio-economic structures, to be simultaneously oppressed and oppressive, liberating and subordinating."[151] He further amplifies the idea of situated group power through four understandings. First, simultaneity suggests that groups can be at once oppressed and oppressing; that is, simultaneity "is characterized by racial groups that have resisted domination from above and have obtained some degree of socio-economic power, and that situationally redeploy structures oppressive to them to oppress others." Second, positionality deepens the idea of simultaneity by acknowledging that "[e]ach social actor is engaged in multiple relationships . . . defined at least in part by race, class, gender, culture, sexual orientation, age, disability or locale." Positionality provides insight into the idea of responsibility "by focusing on the position and comparative power of an actor within each relationship, within each context."[152] Third, differential racialization recognizes that "racial groups are racialized differently—that varying historical experiences and current socio-economic conditions create different racial images, status and power among racial groups, and that those differences contribute to intergroup conflict." Differential racialization in turn accounts for "differential racial group agency in the construction and maintenance of racial hierarchies and differential racial group responsibility for dismantling those hierarchies . . . Racial groups, even while themselves struggling against domination by others, sometimes, and in complex ways, exercise power over others and . . . this exercise of power occasionally generates or exacerbates interracial conflict."[153] Finally, the idea of dominance-transformation forces the question: "Under what circumstances does the exercise of one racial group's power over another disable the other in terms of self-definition or self-determination and thus entail responsibility for interracial healing?"[154]

Carrying out just this one of the four guidelines for critical race praxis is obviously a tall order. Professor Yamamoto applies it to the conflicts in *Ho* and *United Minorities* and to the racialized debate about immigration. Unfortunately, his application is largely descriptive, replaying his account of the differential power relationships involved in each conflict. More importantly, his application assumes a neutral, disinterested assessor of situational power—one without a stake in the outcome of the assessment. Who can say that when one group, or segment thereof, presses a perspective on its own subordination that its reasons for doing so are not legitimate, that it does so to oppress others, or that its refusal to

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151.   Yamamoto, *Critical Race Praxis, supra* note 5, at 890–91.
152.   *Id.* at 892.
153.   *Id.* at 893–93.
154.   *Id.* at 893.

acknowledge any subordinating effect on other groups amounts to power evasion or irresponsibility? Groups may or may not agree with his judgment that Asian Americans, or important segments of that community, aligned themselves with conservative Whites to cast themselves as victims of Blacks and Latinos in the affirmative action debate.[155] Blacks and Latinos may not agree with this assessment since they, like conservatives and liberals, may not agree about the propriety of affirmative action for some or all Latinos.[156] Others may reject the possibility that genuine debate over racial group empowerment can occur at the same time as debate among conservatives without embracing or lending support to conservative political projects.[157]

Notwithstanding these observations, I believe that Professor Yamamoto's agency guideline contributes importantly to critical race praxis. The attempt to apply the guideline in concrete situations may generate new opportunities for intergroup healing. It may also be an important tool for restorying racism, which is essential to understanding racism's differential manifestations.[158] I also believe it can usefully be applied to the development of progressive race theory. Rather than apply the notion of agency and responsibility to theory development around a particular conflict, however, I think it may be more useful to apply it to the notion of whiteness and the many locations of that idea within progressive theory.

155.	*See id.* at 893–94.

156.	*See* Moran, *Unrepresented, supra* note 33, at 143–46 (characterizing the views of Brest and Oshige regarding the appropriateness of affirmative action for Latinos).

157.	Yamamoto acknowledges this possibility in discussing interracial conflict but decides nevertheless to take the risk of providing support for those who would abandon the idea that races are differently situated or that the law should acknowledge in any way the fact that they actually are. *See* Yamamoto, *Critical Race Praxis, supra* note 5, at n.150 (citing Yamamoto, *Rethinking Alliances, supra* note 5, at 70–71). *See also* Yamamoto, *supra* note 5, at 864 (describing reasons for absence of a color-on-color jurisprudence).

158.	For example, Professor Yamamoto presents a different account of the immigration debate than is presented by Tamayo and Moran. The latter scholars characterize African Americans as the subordinated racial group which exercised its situational power to coalesce with Whites against Latinos and Asians in the immigration debate. *See* Moran, *Neither Black Nor White, supra* note 33; Tamayo, *supra* note 33 (describing the role of African Americans in anti-immigration politics). Yamamoto describes the players as Whites, African Americans, and Asian Americans combined against recent Latino and Asian immigrants. *See* Yamamoto, *Critical Race Praxis, supra* note 5, at 836. None of these accounts places Latinos among the anti-immigrant group, but the interplay of race and class, which Yamamoto suggests placed some middle-class Asian Americans among the dominant group, suggests the presence of some middle-class Latinos as well.

B. *The Wages of Whiteness*

The interrogation of whiteness among progressive race scholars is not new. However, that scholarship is more often directed toward analyzing the ideology of whiteness among Whites than among non-White groups. Still, in considering the reconstruction of the Black-White paradigm, progressive race scholars are paying more attention to the role of whiteness in the differential racialization of traditionally subordinated groups.[159] Rather than repeat any of that discussion here, I want to focus on aspects of the debate around the Black-White paradigm of race that need further study from the perspective of their potential for reinforcing whiteness.

1. Distrusting Demography

Most discussions of the Black-White paradigm of race proceed from the assumption that current and projected demographic changes demand its reconstruction. I do not disagree with accounts of the limitations of the existing paradigm or with the view that rapid demographic changes will reconfigure it. However, periods of high immigration are not new in the history of the United States. In the past, the ideology of whiteness has not decentered the Black-White paradigm, but has actually intensified it. Whiteness has been expanded to include new groups. Thus current demographic changes impel, but do not compel, a move away from the Black-White framing of race.

I do not argue that the same pattern of absorption into dominant whiteness will be followed with respect to the groups now making up the lion's share of U.S. immigration, nor do I mean to exclude the possibility that many Blacks can be reconfigured as Whites. However, it is at least possible that whiteness will be redefined to include either groups or individuals now considered less than dominant White. In addition, blackness may also be reconfigured to include more than African Americans. The problem with the Black-White paradigm is not simply that a particular group—typically, African Americans—is represented on the bottom. The problem is that there needs to be a bottom group and that the bottom group needs to be racially defined. The definition of the bottom can center on biology; it can also be ordered around appearance rather than ancestry, with a preference for standards related to biological notions of Whiteness. These appearance standards are not just aesthetic but have

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159.   *See* discussion *supra*, Part I.A.

real, material and psychological consequences.[160] Blackness may come to
be centered around class, class intersecting with but not supplanting race
as a signifier. The term "poor White" may come to be seen for what it
really is and has always been—another racial classification akin to "other"
White.

When applying the concept of racial group agency to the role of
demographic projections in the reconstruction of racial paradigms, schol-
ars need to be more attentive to the consequences of the reconstructions
they advocate and to potential redefinitions of whiteness and blackness.
They should also consider that demography can be used deliberately,
rather than inadvertently, in the service of particular reconstructions. The
principal ideological effect of the Black-White paradigm has been to cre-
ate a hierarchy of races with Whites and whiteness at the top, Blacks and
blackness at the bottom, and other colors and color groups along a con-
tinuum between the two. Economic and other social indicators, including
salient changes in demography, both capture and complicate but do not
completely reflect or supplant the essence of this historic relationship or
its ideological underpinnings.[161] Selected social and economic indicators
can amount to no more than snapshots in rapidly changing social and
economic patterns. Gross statistical comparisons often do not support the
stories they are intended to enliven. Finally, nothing suggests that trade

160.   *See* Baynes, *supra* note 51 (arguing that the light-dark paradigm of race reveals
significant advantages for light skinned people over dark-skinned ones and that this para-
digm cuts across traditional racial and ethnic lines).

161.   Professor Yamamoto captures this aspect of the Black-White paradigm in his
description of the sociopolitical underpinnings of the United Minorities litigation:

> Despite past and recent history, many Chinese Americans in San
> Francisco are financially successful, Chinese American political visibility is
> rising in the Bay Area, and Asian Americans generally exceed their
> proportionate numbers at University of California Campuses. The newly
> appointed city chief of police and state Supreme Court justice are
> Chinese American, as was the recent Chancellor of the University of
> California at Berkeley. Indeed, some African Americans perceive Asian
> Americans as a buffer between whites and blacks, as the "racial
> bourgeoisie" or "middleman minority" who, by their partially elevated
> position in the racial hierarchy, undermine black charges of white
> supremacy while nevertheless preserving white privilege and slowing
> black advancement. Some mid-level Asian American managers confirm
> that charge, at lease in part, through their complaint that they are used by
> white superiors as the "pacifiers" and "shock absorbers." They perceive
> that the are directed to fire or make unrealistic demands of lower-level
> African Americans and Latinos while absorbing the flack and insulating
> their employers from discrimination claims by virtue of their own
> minority status.

Yamamoto, *Critical Race Praxis, supra* note 5, at 858–59 (footnotes omitted).

and other relations with foreign nations will not radically alter both the White and non-White composition of current immigration patterns. Through our own characterizations, we could find ourselves wedded to new racial paradigms that do not represent racial reality any more accurately than the existing one.

2. Racial Essentialisms

The idea of racial group agency and responsibility can also be usefully applied to the development of racial essentialisms. An analysis of differential racialization is necessary to understand the varied operations of White supremacy and to assist in determining the extent of a particular group's situational power in a given context. However, differential racialization can also lead to power evasion. The analysis of difference need not lead to false equivalencies among groups. At the same time, scholars need to focus on the myriad ways a particular aspect of racialization, such as foreignness or susceptibility to color-based racism, can be used to create insignificant differences among groups. Blacks are treated as perpetually foreign; Latinos and Asians are denied the benefits of racial understandings when they are treated as White or its equivalent; any group can be effectively racialized as much by being characterized as an ethnic group as by being denied that characterization. Accurate descriptions of differential racialization depend on keeping a simultaneous focus on difference as well as sameness and applying both perspectives to the analysis of specific interracial conflicts.

3. The Value of Whiteness in Assessing Racial Group Agency

A focus on whiteness will not avoid all the difficulties of assessing racial group agency. The problem of the perspective of the assessor will remain. However, developing color-on-color group perspectives on the issue of whiteness may produce salient benefits. First, attention to whiteness may help subordinated groups remain focused on hierarchy, the central problem in racial subordination. Second, the inquiry into whiteness can take place outside of the context of specific conflicts. This is not to suggest that whiteness need not be considered in relation to specific controversies; rather, we should also take the opportunity to assess whiteness in somewhat less passion-inflamed circumstances. Finally, the interest in decentering whiteness may provide meaningful common ground.

CONCLUSION: RESOLVING DISJUNCTURE

I argue at the beginning of this Essay that Professor Yamamoto's claim that there exists a divide of chasmic proportions between progressive race theory and legal and political practice asserts too much. Nevertheless, my view of the relationship between theory and practice leads me to suggest that the guidelines he proposes for critical race praxis should be applied to progressive race theory. The tensions he describes in contemporary civil rights litigation exist in, though they do not derive from, progressive race theory.

At bottom, the problem of disjuncture has precious little to do with the Black-White racial paradigm or the civil rights model of legal justice (though both need to be restructured), the other causes Professor Yamamoto cites, or to the problems of translation and time lag which I credit more than he. These factors merely provide a means of viewing our society's crippling blindness to the inevitable results of separating civic and political rights from social and economic ones.

Professor Miller's observations on the problem of persistent structural inequality, which I cite at the beginning of this Essay, lead us to turn our attention away from ourselves to our children. In *The Persistence of Economic Discrimination*, Elias Toma argues that discrimination persists because it benefits the powerful. He argues further that discrimination cannot be eliminated, but that it may be possible to tame it. Like Professor Miller, Toma asks us to direct our attention to our children:

> Probably the most fundamental and effective way of dealing with discrimination is to promote equal opportunity of endowment prior to or at birth so that no racial, ethnic, or gender group will be subjected to 'acquired' (in contrast to genetic) underendowment. No group would see its children undernourished, undereducated, or left homeless because of prejudice and discrimination, or because the parents cannot afford the expense of caring for them. . . . This approach dictates that the equalization of opportunities should start at the beginning of life, not at the time one enters school, the labor market, or the world of business.[162]

Professor Yamamoto directs our attention to the growing problem of conflict among subordinated racial groups. I choose to combine his focus with that of Miller and Toma by suggesting that progressive race scholars direct their attention to our children, the most direct and immediate

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162. ELIAS TOMA, THE PERSISTENCE OF ECONOMIC DISCRIMINATION 182 (1994).

victims of our national crisis of race and class. All racism is not economic, but the fact that we participate in the development of progressive race theory and practice means that, unlike growing numbers of America's children, we have been able to escape the worst effects of the economics of racial discrimination.

Racism is about race. More races and racial advocacy can lead either to more or less racism. Our relative powerlessness in the face of racism can fuel competition and attacks on each other or lead us to find ways to advance the goal of a multiracial, multicultural democracy that is also nonracist. Discrimination will not be eliminated through our scholarship but through a change in social conditions. We may be able to create the climate that must precede positive social change by attending to the consequences of the positions we advocate. The most important contribution we make may be the change we bring about in ourselves and the improved conditions we help to provide for all children.