

## POSTRACIALISM: RACE AFTER EXCLUSION

by  
*Janine Young Kim\**

*This Article examines a profound shift in the concept of race. Although race is widely viewed as socially constructed through continuous struggles over meaning, its content has remained remarkably stable over time. Race, since the nation's founding, has been defined mainly by three social conditions: difference, denigration, and exclusion. Among these, exclusion has been central, driving the effort to differentiate and denigrate in order to justify exclusion. Especially after the ascendancy of multiculturalism in the 1990s, however, race has come to be defined by another set of social conditions. They are (in corresponding order) identity, equality, and inclusion. Under this new conception of race, identity is primary; it is the logic of identity that demands and necessitates both equality and inclusion in society. The first aim of this Article is to explain this turn in the meaning of race—a turn that has taken so long and is so significant that it may well be appropriate to describe it as “post-racial.” The second aim of this Article is to consider the implications of the new conception of race to progressive politics, which may be obstructed by the fluidity of identity and the indeterminacy of equality. Inclusion, on the other hand, is a more concrete condition that can also serve as a political goal. Inclusion remains undertheorized, however, and this Article concludes with an initial effort towards addressing this deficit by identifying five types of racially problematic inclusion: conditional inclusion, limited inclusion, imperfect inclusion, revolving door inclusion, and overinclusion.*

I.	INTRODUCTION.....	1064
II.	RACE-AS-DIFFERENCE, -DENIGRATION, AND -EXCLUSION.....	1068
	A. <i>Race-as-Difference</i> .....	1069
	B. <i>Race-as-Denigration</i> .....	1075
	C. <i>Race-as-Exclusion</i> .....	1079
	D. <i>The Centrality of Exclusion</i> .....	1082
	E. <i>Defining Whiteness Through Exclusion</i> .....	1086

---

\* Associate Professor of Law, Marquette University Law School; B.A., M.A. Stanford University, J.D. Yale Law School. Many thanks to Sumi Cho, Paul Finkelman, Danni Hart, Bill Hing, David Papke, and the faculty at Villanova Law School and participants at a 2013 CAPALF works-in-progress session for their comments on earlier drafts of this article. I am also grateful for the support of Marquette University Law School and the dedicated research assistance of Emily Constantine and Elana Olson.

III.	REDEFINING RACE: IDENTITY, EQUALITY, AND INCLUSION.....	1093
	A. <i>Race-as-Identity</i> .....	1096
	B. <i>Race-as-Equality</i> .....	1112
	C. <i>Race-as-Inclusion</i> .....	1120
IV.	THEORIZING INCLUSION.....	1126
	A. <i>Conditional Inclusion</i> .....	1128
	B. <i>Limited Inclusion</i> .....	1131
	C. <i>Imperfect Inclusion</i> .....	1133
	D. <i>Revolving Door Inclusion</i> .....	1135
	E. <i>Overinclusion</i> .....	1137
V.	CONCLUSION .....	1139

## I. INTRODUCTION

We are living in an age of proliferating “posts”: post-modern, post-colonial, post-structural, and in the United States of late, post-racial.<sup>1</sup> Alt-

---

<sup>1</sup> See, e.g., Starita Smith, *A Postracial World? We're Not Quite There Yet*, FORT WORTH STAR TELEGRAM, Jan. 13, 2008, at D4. It is worth noting that the idea of a postracial society is not new. The term “postracial” can be traced back to at least the 1970s, primarily in the writings of race progressives. See ADIA HARVEY WINGFIELD & JOE R. FEAGIN, *YES WE CAN?: WHITE RACIAL FRAMING AND THE 2008 PRESIDENTIAL CAMPAIGN* 217 (2010); see also THOMAS H. NAYLOR & JAMES CLOTFELTER, *STRATEGIES FOR CHANGE IN THE SOUTH* 136 (1975). Some scholars trace the *idea* of the postracial back to the end of the Civil War and characterize it as part of a decidedly conservative strategy. See Mario L. Barnes et al., *A Post-race Equal Protection?*, 98 GEO. L.J. 967, 972–73 (2010). But see Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 503 (2003) (tracing the idea of postracialism to the abolitionist movement). References to postracialism between the 1970s and 2008 appear to be infrequent and made in passing, but some do include a more sustained discussion or vision of postracialism. Several such discussions can be found in the field of philosophy: for example, British philosopher Paul Gilroy’s 2000 book, *Against Race*, and the late American philosopher Emmanuel Chukwudi Eze’s 2001 book, *Achieving Our Humanity: The Idea of the Postracial Future*. EMMANUEL CHUKWUDI EZE, *ACHIEVING OUR HUMANITY: THE IDEA OF THE POSTRACIAL FUTURE* (2001); PAUL GILROY, *AGAINST RACE: IMAGINING POLITICAL CULTURE BEYOND THE COLOR LINE* (2000). Within law, Derrick Bell’s 1990 article, *After We’re Gone*, engages in an imaginative exercise in which Black Americans are sold for wealth offered by extraterrestrial “Space Traders” and taken away in chains, ushering in a postracial future that is likely to be plagued by economic, social, and cultural instability. Derrick Bell, *After We’re Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 ST. LOUIS U. L.J. 393, 400 (1990). Argument in support of the postracial in the context of law can be found in several of Rhonda V. Magee Andrews’ works, including Magee Andrews, *supra*, at 503 (calling for a jurisprudence based on postracial human dignity). Finally, some writings juxtapose postracialism with multiculturalism, which arguably emphasizes culture over race as the locus of difference. See, e.g., Donald E. Lively, *The Provisional Approval Experience: Lessons for Legal Education in Darwinian Times*, 52 J. LEGAL EDUC. 397, 406 (2002) (describing Florida Coastal School of Law’s “embrac[e] of multiculturalism as a postracial concept”); Renisa Mawani, “*Cleansing the Conscience of the People*”: *Reading Head Tax Redress in Multicultural Canada*, 19 CAN. J. L. & SOC’Y, no. 2, 2004, at 127, 127–28, 138–39 (positing postracialism as a problematic consequence of multiculturalism).

though much has been written about postracialism, a settled definition remains elusive. Some interpret postracialism as a claim that society is now free of racism.<sup>2</sup> Others say it is a claim that society is now free of race and racialization.<sup>3</sup> Still others argue that postracialism is an ideology designed to prolong and even worsen the subordination of racial minorities.<sup>4</sup>

A term popularized by the media, coverage of postracial America appears to be, at best, ambivalent. News stories and commentaries probably spend less ink proposing that we are beyond race than recounting all the ways we are not. As linguist John McWhorter has observed, “the question . . . ‘Is America post-racial in the age of Obama,’ is actually a summons for us to ritualistically affirm that we are aware that race still matters in America. The stray person who claims that it doesn’t is to be corrected (and probably ridiculed).”<sup>5</sup> It would seem, then, that the idea of a postracial America was never a truth but a debate.

Accordingly, postracialism may not herald the death of race but rather its revitalization in public discourse.<sup>6</sup> In particular, it has raised important questions about the ways in which our views about race may have changed over time. There is little disagreement that much has changed since the beginning of our nation. Debate instead tends to revolve around how much progress these changes signal, and whether it is appropriate to celebrate that progress (and end race-based remedies like affirmative action) or to lament how far we still have to go (and renew our efforts toward social justice).<sup>7</sup> In other words, the harder and more

<sup>2</sup> See Barnes et al., *supra* note 1, at 975.

<sup>3</sup> See TOURÉ, WHO’S AFRAID OF POST-BLACKNESS?: WHAT IT MEANS TO BE BLACK NOW 12 (2011). Comedian Stephen Colbert lampoons this idea on *The Colbert Report* by asking guests, like the actor Samuel L. Jackson, if they are Black because he (Colbert) does not see race. THE COLBERT REPORT (Comedy Central, Dec. 12, 2011).

<sup>4</sup> According to Sumi Cho, ideological postracialism has four major features: (1) it is premised on the descriptive claim that significant racial progress has been achieved; (2) it promotes the ideal of race-neutral universalism; (3) it asserts a moral equivalence between race-consciousness before and after the Civil Rights Era; and (4) it requires a “pragmatic” distancing from certain race progressives, such as critical race theorists. See Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1600–04 (2009).

<sup>5</sup> John McWhorter, *It’s Official: America Is ‘Post-Racial’ in the Age of Obama*, GRIO (Jan. 14, 2010), <http://thegrio.com/2010/01/14/its-official-america-is-postracial-in-the-age-of-obama/>. Although I do not agree with his definition or assessment of America’s postracial status, I think McWhorter’s observation is correct that the question at issue—posed by the media—is a loaded one designed to provoke a largely predictable response.

<sup>6</sup> See IMANI PERRY, MORE BEAUTIFUL AND MORE TERRIBLE: THE EMBRACE AND TRANSCENDENCE OF RACIAL INEQUALITY IN THE UNITED STATES 1–2 (2011); cf. ROOPALI MUKHERJEE, THE RACIAL ORDER OF THINGS: CULTURAL IMAGINARIES OF THE POST-SOUL ERA 37–38 (2006) (observing that the pursuit of colorblindness paradoxically highlights the centrality of race in our state structures).

<sup>7</sup> See Sheryll Cashin, *Shall We Overcome? “Post-Racialism” and Inclusion in the 21st Century*, 1 ALA. C.R. & C.L. L. REV. 31, 40 (2011). Of course, scholars like Sumi Cho see postracialism as an engine of regression, not to be celebrated or lamented but vigorously opposed. See Cho, *supra* note 4, at 1592–93; see also Barnes et al., *supra* note

interesting part of this debate is not about whether race still matters but what to do with the fact that it does.

This Article focuses, however, on another aspect of change that seems to be largely overlooked in the debate about postracialism: the shifting conception of race itself. Since the mid-twentieth century, Americans have come to accept the explanation that race is a social construction. Under the constructivist view, race is not fixed and stable but under constant transformation through political struggles over how “human bodies and social structures are represented and organized.”<sup>8</sup> This understanding of race suggests that as cultural representation and social organization change, race—as a concept—also changes.

Any such conceptual change would and should have a significant impact on the debate over what to do about race, for surely what we do about race must be informed by an understanding of *how* race matters. Thus, the question, “Is America postracial?” may be usefully rephrased in the following way: Has racial progress so altered the way we think, live, and order ourselves that race means something significantly different today than it did in the past? Perhaps by addressing this conceptual question, we can begin to make sense of a so-called postracial era that remains deeply preoccupied with race.

In this Article, I offer a cautious “yes” to this question. My answer is cautious because there are many qualifications and explanations that need to be made in order to arrive at this conclusion. At the same time, my answer is surely a yes—such qualifications and explanations do not ultimately suggest that nothing has fundamentally changed. I believe that we can coherently describe what I call the “traditional conception” of race and contrast it with a “new conception” of race that constitutes a significant recent departure—one that could justify the term “*post-race*.” Although the term is admittedly controversial, the prefix “post” is helpful for thinking about how the seemingly intractable meanings that have coalesced around the concept of race can be displaced by a new set of meanings that signal a major shift in context.

I begin my analysis of this shift by describing the traditional conception of race. In keeping with the constructivist approach, I look to dominant structures and representations—what I refer to here in shorthand as “social conditions”—to demonstrate that traditional race is founded upon structures and representations of difference, denigration, and exclusion.<sup>9</sup> I explain how these three social conditions defined the concept of

---

1, at 976–77 (observing that the contemporary embrace of postracialism is part of a historical pattern of reaction to periods of race awareness or conflict).

<sup>8</sup> MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* 55–56 (2d ed. 1994).

<sup>9</sup> My approach also aligns with David Theo Goldberg’s observation that “[r]ace . . . is a set of conditions, shifting over time.” DAVID THEO GOLDBERG, *THE THREAT OF RACE: REFLECTIONS ON RACIAL NEOLIBERALISM* 156 (2009). This is an approach that accounts for both constructedness and the reality of experience that renders race salient in our society.

race by describing the history—especially legal history—that produced and sustained them. I end this discussion by highlighting the primacy of exclusion as the driving force behind the move to differentiate and denigrate. I also offer a brief explanation of how these defining social conditions of race were, consciously and unconsciously, part of an effort to establish and maintain the borders of whiteness.

In Part III, I turn to three new social conditions that have emerged to challenge and displace the traditional understanding of race. In corresponding order, they are: identity, equality, and inclusion. Although all three notions have existed within race discourse for much of our history, it is not until recently that they can be described as conditions rather than mere ideals. This is not to say that these conditions have been perfected;<sup>10</sup> probably most people of color experience both inclusion and exclusion depending on context, and there remain some groups for whom exclusion is nearly total.<sup>11</sup> Nonetheless, I explain how identity, equality, and inclusion can describe the American racial condition today. Of particular importance for this new conception of race is identity, which undergirds equality and inclusion. This Part also highlights some problems of political action that arise from the emphasis on identity, and suggests that a greater focus on inclusion may help to counteract them.

Part IV takes a closer look at inclusion. Inclusion, especially as compared to identity and equality, is an underdeveloped idea in race scholarship. This is surprising, given that it is probably the increase and visibility of racial inclusion—exemplified by Barack Obama's election—that best supports claims of a postracial America. In this Part, I argue that we should attend more to inclusion, in part because a growing number of people of color are experiencing it, and also because inclusion, as currently practiced, is often problematic. A singular focus on exclusion ignores these developments and inappropriately narrows the constituency that can benefit from, and participate in, a robust and relevant race discourse.<sup>12</sup> Moreover, it risks overlooking the insidious ways in which extant forms of inclusion can further the subordination of those who are included and excluded. I end by identifying five types of problematic inclu-

---

<sup>10</sup> It should be noted that race-as-difference, -denigration, and -exclusion were also not perfected conditions. There have long been exceptions and counter-discourses that sought to undermine these alignments. See *infra* text accompanying notes 169–71, 257–59.

<sup>11</sup> I think here of those who have been caught up in the criminal justice system. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 1–2 (rev. ed. 2012).

<sup>12</sup> See DEXTER B. GORDON, *BLACK IDENTITY: RHETORIC, IDEOLOGY, AND NINETEENTH-CENTURY BLACK NATIONALISM* 163 (2003) (describing how race rhetoric not only addresses an audience but creates it); cf. Stuart Hall, *Subjects in History: Making Diasporic Identities*, in *THE HOUSE THAT RACE BUILT: BLACK AMERICANS, U.S. TERRAIN* 289, 291 (Wahneema Lubiano ed., 1997) (“It isn’t that the subjects are there and we just can’t get to them. It is that they don’t know yet that they are subjects of a possible discourse.”).

sion that require further study: (1) conditional inclusion; (2) limited inclusion; (3) imperfect inclusion; (4) revolving door inclusion; and (5) overinclusion. Using specific examples to illustrate each type, I explain how their problematic nature cannot be understood without recognizing the new conception of race that lies at the heart of postracialism.

## II. RACE-AS-DIFFERENCE, -DENIGRATION, AND -EXCLUSION

Since at least the end of World War II, race in the United States has been analyzed as a social construct rather than a biological fact.<sup>13</sup> This major shift in our understanding created enormous space to examine the processes by which such social construction occurs, as well as the agents (i.e., individuals, groups, institutions, the state) and forces that contribute to them. At the same time, the notion of race as socially constructed introduced instability to racial meaning, conjuring a concept that is potentially in constant flux and (insidiously) flexible.<sup>14</sup>

Many scholars have grappled with the implications of this social definition of race, bringing much needed light and insight to an aspect of American life that has proved to be so consequential and yet so deeply submerged.<sup>15</sup> Their research has been invaluable in unearthing the assumptions, associations, and psychological mechanisms that work to preserve racial inequality even as the traditional ideas of race and inequality have been discredited. My goal in this Article is not to rehearse or critique this literature but to build upon it by spotlighting an aspect of race's social construction that has been curiously overlooked: the resulting architecture of race.<sup>16</sup>

Although the process-oriented focus in this field, and indeed the very idea of social constructedness, suggest that the concept of race is ever changing, in fact it has remained surprisingly stable. In this Part, I describe how race has long been associated with three primary social conditions: difference, denigration, and exclusion. This is not to say that there have been no challenges to these defining conditions of race; principles

<sup>13</sup> Osagie K. Obasogie, *The Return of Biological Race? Regulating Innovations in Race and Genetics Through Administrative Agency Race Impact Assessments*, 22 S. CAL. INTERDISC. L.J. 1, 20–21 (2012).

<sup>14</sup> See *supra* text accompanying note 8.

<sup>15</sup> Alongside the work of Omi & Winant, *supra* note 8, are other key writings that have shaped contemporary racial discourse. See, e.g., IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 10 (1996) (discussing the law's contribution to the construction of whiteness); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713–14 (1993) (analyzing the foundations of white privilege); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318–20 (1987) (introducing the idea of unconscious racism).

<sup>16</sup> Many scholars have noted the apparent hollowness of the constructivist view of race. See, e.g., ANTONIA DARDER & RODOLFO D. TORRES, *AFTER RACE: RACISM AFTER MULTICULTURALISM* 12 (2004) (noting that there is “little substantive theorizing about the construct itself”); Hall, *supra* note 12, at 290 (calling this definition a “mantra” “we mouth”).

of sameness, equality, and inclusion surely developed along the way and have gathered force over time.<sup>17</sup> Nor would it be correct to say that race's association with each of these conditions has been unvarying; the strength of its attachment to these conditions has waxed and waned. But despite powerful discursive opposition and changes in the political, economic, and socio-cultural landscape of the United States, the idea of race since the founding of the nation has continued to revolve around the conditions of difference, denigration, and exclusion vis-à-vis the racialized other.

Below I explore these conditions by analyzing the history of their influence and (re)articulation. My purpose here is not to offer a complete historical account of race but rather to provide snapshots that demonstrate the durability of these defining conditions of race in the United States. Toward that end, I rely on the historical research of others and offer footnotes and citations that will enable readers to discover the fuller history for themselves.

### A. *Race-as-Difference*

Many observers have proclaimed that the United States is a nation built upon race.<sup>18</sup> This is a compelling insight that begs for further explanation, although even a cursory inspection of the laws, policies, and norms of the United States since its founding demonstrates quite clearly that the statement is disturbingly true. Race defined such basic issues as whether one is free or enslaved,<sup>19</sup> citizen or alien,<sup>20</sup> able to hold property rights,<sup>21</sup> or able to enter the nation at all.<sup>22</sup> Race has also determined

---

<sup>17</sup> See *infra* Part III.

<sup>18</sup> See, e.g., Barnes et al., *supra* note 1, at 975 (“Long ago, Alexis de Tocqueville identified race as the tragic flaw upon which American society was built.”); cf. GOLDBERG, *supra* note 9, at 329–30 (“Race is a foundational pillar of modernizing globalization, both shaping and coloring the structures of modern being and belonging, development and dislocation, state dynamism and social stasis.”); Walter Johnson, *King Cotton’s Long Shadow*, N.Y. TIMES, Mar. 31, 2013, § SR (N.Y. ed.), at 12 (“The United States, as W.E.B. Du Bois wrote, was ‘built upon a groan.’”).

<sup>19</sup> See, e.g., *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 134, 140 (1806) (declaring plaintiffs free after determining that they are descended from an American Indian woman).

<sup>20</sup> See, e.g., *United States v. Thind*, 261 U.S. 204, 213 (1923) (rejecting the naturalization petition of a South Asian immigrant); *Ozawa v. United States*, 260 U.S. 178, 198 (1922) (rejecting the naturalization petition of a Japanese immigrant); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1856) (rejecting the claim that Blacks can be American citizens).

<sup>21</sup> See, e.g., *Terrace v. Thompson*, 263 U.S. 197, 199–200 (1923) (upholding a law intended to restrict the property rights of Japanese immigrants); see also *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 604–05 (1823) (restricting property sale by tribes to individuals); Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN’S L. REV. 153, 155 (noting that individual Indians were similarly restricted from property sales).

more mundane—and for that perhaps more important<sup>23</sup>—aspects of life such as where one lives,<sup>24</sup> which train car one can ride,<sup>25</sup> whom one can marry,<sup>26</sup> and where one’s children go to school.<sup>27</sup>

How has race accomplished all of this? What is it about race that determines so much? Race is first and foremost associated with the idea of difference—namely, that race denotes difference that is legible in the bodies (e.g., hair texture, skin color, eye and nose shape) of various human beings. From the eighteenth century writings of the founding fathers to our modern confidence that we can tell a person’s race by just looking at her, Americans have linked race with difference and that difference is seemingly both natural and obvious, at least most of the time.<sup>28</sup>

---

<sup>22</sup> See Immigration Act of 1924 (National Origins Act), Pub. L. No. 139, ch. 190, 43 Stat. 153, *repealed by* Immigration and Nationality Act, Pub. L. No. 414, ch. 477, tit. IV, § 403(a)(23), 66 Stat. 163, 279 (1952); Geary Act, ch. 60, 27 Stat. 25 (1892), *repealed by* Chinese Exclusion Repeal Act of 1943, Pub. L. No. 199, ch. 344, 57 Stat. 600; Scott Act, ch. 1064, 25 Stat. 504 (1888), *repealed by* Chinese Exclusion Repeal Act of 1943; Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882), *repealed by* Chinese Exclusion Repeal Act of 1943. It should be noted that the early exclusionary laws against Asians also included criteria other than race; for example, the Page Law, 18 Stat. 477 (1875), was aimed at women from Asia who were considered prostitutes, and the 1882 Chinese Exclusion Act and 1888 Scott Act barred Chinese laborers specifically. See Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 467–69 (2005). Thus, although these early laws were not an absolute racial bar, they served to make certain immigrants suspect on the basis of race. See *id.* at 469 (describing how Chinese men had to “look like merchants” and their wives had to possess certain status markers, such as bound feet, in order to gain entry).

<sup>23</sup> Cf. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 370 (“Yet it is the little things, the small everyday realities of life, that reveal the deepest meanings and values of a culture, give legal theory its grounding, and test its legitimacy.”).

<sup>24</sup> See *Shelley v. Kraemer*, 334 U.S. 1, 4 (1948); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1848 (1994).

<sup>25</sup> See *Plessy v. Ferguson*, 163 U.S. 537, 540–42 (1896).

<sup>26</sup> See *Loving v. Virginia*, 388 U.S. 1, 2–3 (1967).

<sup>27</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 487 (1954).

<sup>28</sup> See LINDA MARTÍN ALCOFF, *VISIBLE IDENTITIES: RACE, GENDER, AND THE SELF* 7 (2006); JOHN P. JACKSON, JR. & NADINE M. WEIDMAN, *RACE, RACISM, AND SCIENCE: SOCIAL IMPACT AND INTERACTION* xi (2004). Recent research suggests that children as young as nine months visually differentiate along racial lines. See David Ferguson, *9-Month-Old Babies Demonstrate Racial Bias in Face Recognition*, RAW STORY (May 4, 2012), <http://www.rawstory.com/rs/2012/05/04/9-month-old-babies-demonstrate-racial-bias-in-face-recognition/>; see also MARTHA MENCHACA, *RECOVERING HISTORY, CONSTRUCTING RACE: THE INDIAN, BLACK, AND WHITE ROOTS OF MEXICAN AMERICANS* 4 (2001) (revealing that her interest in writing about the racialization of Mexican Americans originated from her personal inquiries about the “faintly Black facial characteristics” of her fair-skinned father). When a person’s racial identity is not visually obvious, some suggest that such ambiguity causes anxiety. See ALCOFF, *supra*, at 191; see also Adrian Piper, *Passing for White, Passing for Black*, 58 TRANSITION 4, 4, 9 (2009) (describing how the author’s colleagues felt the need not only to categorize her race but also to obtain verbal confirmation from her).

Thomas Jefferson, for example, devoted a significant amount of attention to the differences among races, with a special emphasis on the Black and White races. In his *Notes on the State of Virginia*, he writes of American slaves: “The first difference which strikes us is that of colour. . . . [It] is fixed in nature, and is as real as if its seat and cause were better known to us.”<sup>29</sup> From this point of departure in the differences of physical bodies, Jefferson evaluates the relative beauty of the two races, their distinctive personalities and moral traits, as well as their comparative intellectual capacities.<sup>30</sup> Benjamin Franklin, on the other hand, emphasized distinctions not only in skin color, but also in language and habits to differentiate between Whites and non-Whites, the latter of which included Germans who were then settling in large numbers in Pennsylvania.<sup>31</sup>

Remarkably, race has never completely moved away from its reliance on the notion of difference, although there have been, as I discuss below, changes in how we define difference. Nonetheless, the essential link between race and difference remained constant over the roughly 250 years of the nation’s existence, despite several major historical events that presented the possibility of radical change.

A significant shift in race relations occurred with the abolition of slavery in the nineteenth century, but race continued to be defined by difference even as Blacks were guaranteed equal status under the law.<sup>32</sup> American law has endorsed this race-as-difference view repeatedly, most notably in *Plessy v. Ferguson* where the Supreme Court of the United States characterized Louisiana’s railway segregation statute as merely acknowledging “a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color.”<sup>33</sup> For the *Plessy* Court, racial difference was a self-evident fact and the law was free to rely on it as an organizing principle.

While the “other race” in the United States often referred to Blacks, other minority races were also defined by difference.<sup>34</sup> In the 1854 case of

---

<sup>29</sup> THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 138 (William Peden ed., Univ. N.C. Press 1955) (1785).

<sup>30</sup> See *id.* at 138–43.

<sup>31</sup> See BENJAMIN FRANKLIN, OBSERVATIONS CONCERNING THE INCREASE OF MANKIND, PEOPLING OF COUNTRIES, &c. 224 (William Abbatt ed., 1918) (1755). In a well-known passage, Franklin considered only Anglo-Saxons to be White. Other Europeans such as the Germans, the French, and the Swedes were too “swarthy” to be included in this group. See *id.*

<sup>32</sup> See Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 1928 (2000).

<sup>33</sup> *Plessy v. Ferguson*, 163 U.S. 537, 543 (1896); see also Harris, *supra* note 32, at 2003 (observing that during this period of time, there was widespread belief that “race made humans incontestably, inalterably different from one another”).

<sup>34</sup> In this Article, I mainly describe the application of race-thinking on Whites, Blacks, Asians, and Latina/os. The notable omission of American Indians is intentional because racial perceptions about and by this group are mediated by their political status. So although American Indians have also been affected by difference, denigration, and exclusion, each of these must be considered in light of the Indian

*People v. Hall*, the Supreme Court of California held that a Chinese man could not testify in the murder trial of a White defendant in part because the Chinese are “a distinct people . . . differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference.”<sup>35</sup> Difference in color also determined whether Mexican Americans would be eligible to vote under state laws and where they would go to school.<sup>36</sup>

By the second half of the nineteenth century, differentiation became as much a matter of modern science as of intuitive observations that, as Thomas Jefferson put it, happen to “strike us.” Race scientists developed varied classifications, some identifying four major races and others as many as 34.<sup>37</sup> These anthropologists, ethnologists, physicians, psychologists, and other learned men saw differences in more subtle features of the human body, such as skull shape and size, as well as their connection to non-physical traits like intelligence, promiscuity, and criminality.<sup>38</sup> Even the widespread acceptance of evolutionary theory, which posits that all living organisms share a common origin, could not displace the belief in biological race difference. Evolutionists like Alfred Russel Wallace eventually abandoned the theory under pressure/desire to explain racial difference in humans.<sup>39</sup> Charles Darwin continued to espouse evolution,

---

struggle for sovereignty and self-determination, a complex subject that is beyond the scope of my project here.

<sup>35</sup> *People v. Hall*, 4 Cal. 2d 399, 405 (1854); see also Harris, *supra* note 32, at 1945 (noting that immigration laws aimed against the Chinese were premised on the ideas of difference and unassimilability).

<sup>36</sup> See *Mendez v. Westminster Sch. Dist.*, 64 F. Supp. 544, 546 (S.D. Cal. 1946); Harris, *supra* note 32, at 1934. In *Mendez*, the ostensible reason for segregation was lack of proficiency in English. The court noted, however, that no credible effort was made to determine language proficiency. *Mendez*, 64 F. Supp. at 549.

<sup>37</sup> See Mildred K. Cho, *Racial and Ethnic Categories in Biomedical Research: There Is No Baby in the Bathwater*, 34 J.L. MED. & ETHICS 497, 498 (2006). Classification of races occurred prior to this time, but upon very different foundations. For example, eighteenth century naturalists like Johann Blumenbach and Georges-Louis Leclerc de Buffon explained their classifications by reference to the effects of external factors—e.g., climate, food, disease—on human bodies. See JACKSON & WEIDMAN, *supra* note 28, at 35. It was not until the mid-nineteenth century that race became a hardened scientific category reflecting innate, biological differences through the theory of polygenism. See *id.* at 29–30.

<sup>38</sup> See JACKSON & WEIDMAN, *supra* note 28, at 47, 72; Richard Conniff, *God and White Men at Yale*, YALE ALUMNI MAG., May & June 2012, available at <http://www.yalealumnimagazine.com/articles/3456>; see also JOE L. KINCHELOE & SHIRLEY R. STEINBERG, CHANGING MULTICULTURALISM 17 (1997) (stating that schools’ and universities’ “historical role” is “as rationalizers for the behaviour of the privileged and the concealers of the ways hegemony operates to shape how the social order evolves”). While most eugenicists appear to have been men, Angela Harris notes that some women used the logic of eugenics to argue for greater freedom from (biologically problematic) marriage for women. See Harris, *supra* note 32, at 1979.

<sup>39</sup> See JACKSON & WEIDMAN, *supra* note 28, at 67–68.

but incorporated the belief in racial difference by positing that non-Whites occupied an earlier stage of development.<sup>40</sup>

While the law did not fully embrace race science, legal opinions during this time clearly revealed judges' familiarity with and reliance on so-called scientific classifications.<sup>41</sup> Eventually, however, the U.S. Supreme Court rejected science in favor of popular beliefs about race when it denied naturalization to an Asian Indian who was anthropologically classified as "Caucasian." The Court justified its decision by declaring that the applicant's racial difference is "of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation."<sup>42</sup> Thus, regardless of whether it was supported by science or popular prejudice, the belief in difference was dominant. Indeed, when the two sources of knowledge came into conflict, difference prevailed.

One might be tempted to argue that the foregoing description of race-as-difference is an artifact of a bygone time when racial difference was seen as biological, natural, and eternal. But the shift from a biological to a social conception of race in the middle part of the twentieth century has not altered the focus on difference.<sup>43</sup> To be sure, part of the rea-

---

<sup>40</sup> See *id.* at 69–70. Commentators have observed that the blatant manipulation of science to affirm White superiority suggests that scientists were not involved in a collective effort to deceive but instead were under a collective delusion about racial hierarchy. See Claudia Roth Pierpont, *The Measure of America*, NEW YORKER, Mar. 8, 2004, at 48, 50; LARA TROUT, *THE POLITICS OF SURVIVAL* 148 (2010).

<sup>41</sup> The racial prerequisite cases on naturalization exemplify this phenomenon. Judges in those cases speak, at a level of baroque detail that is almost uncomfortable to us today, about people of varied "blood," "descent," and "stock." In *Ex parte Shahid*, 205 F. 812, 814–16 (E.D.S.C. 1913), Judge Henry Smith defines Whites eligible for naturalization as including: "[A]ll European Jews who are of Semitic descent, more or less intermixed with the peoples of European habitation, viz., with peoples of Celtic, Scandinavian, Teutonic, Iberian, Latin, Greek, and Slavic descent. It includes Magyars, Lapps, and Finns, who are of Ugric stock, and the Basques and Albanians. It includes the mixed Latin, Celtic-Iberian, and Moorish inhabitants of Spain and Portugal, the mixed Greek, Latin, Phoenician, and North African inhabitants of Sicily, and the mixed Slav and Tartar inhabitants of South Russia." This list was meant to demonstrate that a man born in Syria cannot be naturalized because he lacks what all those on the list had in common: a fair complexion and European ancestry. Finally in *United States v. Thind*, 261 U.S. 204, 213 (1923), the U.S. Supreme Court rejected race science and held that the statutory term "white persons" should be defined pursuant to the common understanding of 1790. Noting that immigration at that time "was almost exclusively from the British Isles and Northwestern Europe," the Court described the linkage among White persons with the phrase, "bone of their bone and flesh of their flesh." *Id.*

<sup>42</sup> *Thind*, 261 U.S. at 215.

<sup>43</sup> It is worth noting that although the biological view of race is widely discredited, it has not disappeared altogether. Recent resurgences of this view include Charles Murray and Richard J. Herrnstein's 1994 book *The Bell Curve*, in which the authors posit a link between IQ tests and genetic differences, and biologist Armand Marie Leroi's 2005 *New York Times* Op-Ed, where he argues that racial differences can be genetically identified. See RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 105 (1994); Armand Marie Leroi, Op-Ed., *A Family Tree in Every Gene*, N.Y. TIMES, Mar. 14, 2005, at A21. A

son for this is that the shift remains imperfect; racial identity is still tied to physical appearance in the popular imagination and our laws continue to regard race as an “immutable” feature of our selves.<sup>44</sup> Moreover, while public discourse on race often condemns race-as-difference, it does not necessarily follow that the idea has not survived in more private quarters of society.<sup>45</sup>

But perhaps a more interesting reason for the continued association between race and difference is that even as the case for biological race has been falsified by science, the idea of *social* difference flourished in the latter half of the twentieth century. This view argues that although race, as a marker of human difference, does not exist in nature, race remains real because it produces different experiences, perspectives, and frameworks for knowledge that affect one’s identity and status.<sup>46</sup> Thus racial minorities are different from the White majority, not because they are biologically different, but because they are socially different. This is a radically changed construction of racial difference in both a spatial and a temporal sense. It shifts the source of difference from the biological to the social, from the internal to the external. This will have a significant impact on the development of identity and authenticity, discussed below. Moreover, social difference is not a priori, but the result of being born into and living in a particular, racialized milieu. All this suggests that difference is, in theory, mutable: just as difference is generated by the American racial milieu, so too can sameness be created by a change in the social structures that currently dominate society. Under the social view, then, race is not inherent, natural, and immutable, yet it remains a salient marker of difference.

The adoption of the social view of race coincided with the Civil Rights Movement that also took place in the mid-twentieth century. Also known as the “Second Reconstruction,” the movement sought to enforce the promise of equality that was made (and broken) after the Civil War.<sup>47</sup> The breakthrough toward greater equality came with the NAACP’s success in *Brown v. Board of Education*, which overturned *Plessy*. According to Angela Harris, who has dubbed the period before the Second Reconstruction “the age of difference,” the second half of the twentieth century

---

limited resurgence of biological race in the area of health care may be occurring today. See Obasogie, *supra* note 13, at 23.

<sup>44</sup> See, e.g., *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (upholding employer’s ban on employees wearing cornrows while observing that a ban on a natural “Afro/bush” style would constitute racial discrimination); see also Cristina M. Rodríguez, *Language Diversity in the Workplace*, 100 Nw. U. L. REV. 1689, 1739–41 (2006) (discussing the inadequacy of the immutability analysis in the context of workplace English-only rules).

<sup>45</sup> See Harris, *supra* note 32, at 2009. Research into implicit bias has demonstrated that we recognize racial difference in ways that are even private from ourselves. See Cashin, *supra* note 7, at 34–35.

<sup>46</sup> See *infra* Part III.A.

<sup>47</sup> See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 8–10 (3d ed. 2002).

ushered in a new political discourse that marginalized the notion of racial difference.<sup>48</sup> But this change, as Harris demonstrates, proved to be problematic in light of the new understanding of racial difference. Although American racial norms now valorized equality and commonality of all human beings (biological sameness), social difference remained a defining feature of race. Thus, the Supreme Court's blanket refusal to acknowledge social difference ironically had the effect of reinforcing the belief that race is only defined by difference in biology.<sup>49</sup>

### B. *Race-as-Denigration*

There is nothing inherently wrong about noticing or even emphasizing difference. In fact, it appears that in most other areas of human life—in our enjoyment of the natural beauty of the earth, or in our choices regarding the food we eat, the clothes we wear, the cars we drive—we like difference and appreciate variety. This, of course, has not been the way that *racial* difference has been approached. What makes race such an important, and thorny, issue in modern American life is precisely the fact that racial difference has been expressed in a way that denigrates people of color.

Denigration, like difference, traces its history back to the founding of the nation. Thomas Jefferson did not simply ruminate on the racial differences between Blacks and Whites, but demeaned the former while elevating the latter. He believed that Whites were more physically attractive than Blacks:

Are not the fine mixtures of red and white, the expressions of every passion by greater or less suffusions of colour in the one, preferable to that eternal monotony, which reigns in the countenances, that immoveable veil of black which covers all the emotions of the other race? Add to these, flowing hair, a more elegant symmetry of form, their own judgment in favour of the whites, declared by their preference of them . . . .<sup>50</sup>

Jefferson also asserted the moral and intellectual superiority of the White race, characterizing Blacks as lacking forethought and imagination, ruled more by “sensation than reflection.”<sup>51</sup> Thus, he concluded that Blacks, “whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of

---

<sup>48</sup> Harris, *supra* note 32, at 1982.

<sup>49</sup> See *id.* at 2004–09; *cf.* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (“In the eyes of government, we are just one race here. It is American.”). More recently, however, the Court has come to accept social difference as a basis for recognizing the salience of race. See *infra* text accompanying notes 223–24.

<sup>50</sup> JEFFERSON, *supra* note 29, at 138.

<sup>51</sup> *Id.* at 139.

body and mind.”<sup>52</sup> These comments suggest that difference does not stand alone; its connection with denigration—of a *relation* of superiority and inferiority—is immediate in Jefferson’s understanding of race.<sup>53</sup>

Although the idea of Black inferiority was likely augmented by the institution of slavery and the abjection it entailed,<sup>54</sup> Blackness in and of itself was often seen as the sole basis for denigration. Put another way, it was not slavery that was understood to be the source of Black inferiority, but rather that Black inferiority was the cause and justification of slavery. This belief, as historian Howard Zinn describes, involved “that special racial feeling—whether hatred, or contempt, or pity, or patronization—that accompanied the inferior position of blacks in America for the next 350 years.”<sup>55</sup>

Law, for its part, perpetuated the notion of Black inferiority. The most infamous example of the law’s role in racial denigration is the Supreme Court’s *Dred Scott* decision, in which Chief Justice Taney denied citizenship to Blacks because they belong to “a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority.”<sup>56</sup> Indeed, this decision declared that slavery was established for the benefit of slaves, and that the framers not only believed in Black degradation but enshrined it within the Constitution.<sup>57</sup>

Race-as-denigration endured beyond the early years of the nation. Although more sophisticated individuals framed their beliefs about race in terms of difference rather than denigration, especially after abolition and the introduction of the principle of universal equality in America’s understanding of itself, this was the thinnest of veils. In *Plessy*, for example, Justice Brown insisted that segregation merely recognized difference and disclaimed that segregation “stamps the colored race with a badge of

<sup>52</sup> *Id.* at 143. Benjamin Franklin, too, does not stop at recognition of difference among races. He observes difference but also relies on that difference to explain his preference for Whites over others. FRANKLIN, *supra* note 31, at 224.

<sup>53</sup> Cf. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 22 (1990) (discussing how discourses of difference mask relationships of hierarchy and power).

<sup>54</sup> That complete subordination was necessary to maintain the institution of slavery is explained with chilling candor in *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829), where Judge Thomas Ruffin declared: “The end [of slavery] is the profit of the master, his security and the public safety; the subject, one doomed in his own person and his posterity, to live without knowledge and without the capacity to make anything his own, and to toil that another may reap the fruits. . . . The power of the master must be absolute to render the submission of the slave perfect.”

<sup>55</sup> HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES: 1492–PRESENT 24 (20th anniversary ed. 1999); see also *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856) (explaining how the inferiority of the Black race led to the European belief that “the negro might justly and lawfully be reduced to slavery for his benefit”).

<sup>56</sup> *Dred Scott*, 60 U.S. (19 How.) at 404–05.

<sup>57</sup> *Id.* at 404–05, 407.

inferiority.”<sup>58</sup> As one commentator has observed, this was an argument that might as well have been made by a Martian for its extreme decontextualization of the practice.<sup>59</sup> Justice Brown was unpersuasive even then; Justice Harlan’s dissent characterized Louisiana’s segregation statute as founded upon the belief that “colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens.”<sup>60</sup> However, even Justice Harlan in that case proclaimed the White race to be not only dominant at that time but dominant for all time.<sup>61</sup>

Race-as-denigration applied to other non-White races as well. The Asian population was, like Blacks, considered to be inferior as well as different. Initially welcomed as a source of cheap labor, the Chinese were quickly relegated to the same class as Blacks in the American race hierarchy.<sup>62</sup> In the *People v. Hall* decision, for example, the court described the Chinese as “black” or “Indian” for purposes of excluding testimony by Chinese witnesses against a White defendant.<sup>63</sup> Finding that the intent of the legislature in adopting this evidentiary statute was to shield Whites from the “corrupting influences of degraded castes,” the court observed that not only were the Chinese “a distinct people,” but they were also “a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point.”<sup>64</sup> At other times, however, White Americans regarded Asians as superior to Blacks and even close in rank to Whites.<sup>65</sup> Such beliefs, far from expressing any true idea of racial equality, tended to accentuate the fact of racial hierarchy in the United States and the shifting positions that various racial groups occupied. As many scholars have demonstrated, the relative

---

<sup>58</sup> *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

<sup>59</sup> See Chris Edelson, *Judging in a Vacuum, or, Once More, Without Feeling: How Justice Scalia’s Jurisprudential Approach Repeats Errors Made in Plessy v. Ferguson*, 45 AKRON L. REV. 513, 522 (2012).

<sup>60</sup> *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting).

<sup>61</sup> *Id.* at 559. The apparent contradiction in Justice Harlan’s condemnation of the segregation statute and his faith in “white domination” is resolved when one recognizes that his understanding of equality was limited to formal, or legal, equality. Indeed, his famous exhortation that the Constitution is “color-blind” suggests that the law forces us to use an artificial frame to ignore or obscure what is actually there: race, understood to signify difference and denigration. See *id.*

<sup>62</sup> See Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 230–31 (1995).

<sup>63</sup> See *People v. Hall*, 4 Cal. 2d 399, 403–05 (1854). The statute at issue stated that “No Black or Mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man.” *Id.* at 399.

<sup>64</sup> *Id.* at 403, 405.

<sup>65</sup> See, e.g., *Ex parte Shahid*, 205 F. 812, 815 (E.D.S.C. 1913) (evaluating the desirability of a “highly educated and cultivated Japanese or Chinese or Malay or Siamese”). Of course, such openness toward the merits of Asians was made easier by the fact that Asians posed no danger of becoming Americans—they were already clearly excluded from naturalization. See *supra* note 22 and accompanying text.

racial “superiority” of Asians was often strategically deployed to explain and justify the further denigration of other groups.<sup>66</sup>

Like Asians, Latina/os also have been subjected to racial denigration. Negative racial opinions about Mexicans, for example, were rampant during congressional debates about the potential annexation of Mexican territory in the southwestern United States in the mid-nineteenth century. Not only were Mexicans seen as a “mongrel” race, but such racial mixture—of Black, Indian, and Spanish ancestry—was itself viewed as the source of weakness and corruption.<sup>67</sup> Although eager to expand westward and take Mexican territory, politicians like Senator John C. Calhoun objected to the possibility of “incorporating” Mexicans into the American polity, asking, “Are we to associate with ourselves as equal, companions and fellow citizens, the Indians and mixed race of Mexico?”<sup>68</sup> The answer was clear to Calhoun, who deemed such association “fatal to our institutions.”<sup>69</sup>

The era of race science did little to change the assumption that racial difference is linked to the racial inferiority of non-Whites. Indeed, race science sought to “prove” racial inferiority through the development of standardized tests for the measurement of intelligence and aptitude that were used to denigrate non-Whites.<sup>70</sup> Interestingly, the tests were aimed more directly at the population that was viewed, in the late nineteenth and early twentieth centuries, as “lesser” Whites rather than the non-Whites that had hitherto been the targets of widespread racial denigration.<sup>71</sup> Perhaps because the belief in non-Whites’ inferiority was already so dominant, no scientific testing was necessary to buttress such claims. In any case, when the United States experienced high levels of immigration from southern and eastern Europe, intelligence tests were administered on the new European immigrants to demonstrate their inferiority relative to “native Americans.”<sup>72</sup> Aptitude tests, along with other newly developed criteria such as photos and personal interviews, were al-

<sup>66</sup> See Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 *POL. & SOC’Y* 105, 107 (1999); Wu, *supra* note 62, at 229, 231.

<sup>67</sup> See REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLI-SAXONISM* 210 (1981) (“The Mexicans had failed [to make proper use of the northern provinces of Mexico] because they were a mixed, inferior race with considerable Indian and some black blood.”).

<sup>68</sup> JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 295 (2d ed. 2007).

<sup>69</sup> *Id.*

<sup>70</sup> JACKSON & WEIDMAN, *supra* note 28, at 116.

<sup>71</sup> Scientific differentiation within the White race appears to have originated with mid-nineteenth century physical anthropology. As John Jackson and Nadine Weidman observe, distinguishing between Blacks and Whites did not require precise measurements of human bodies that defined the discipline of physical anthropology. See *id.* at 74.

<sup>72</sup> See *id.* at 116–17.

so used to deem Jewish immigrants unqualified to be admitted to elite American universities.<sup>73</sup>

Although the mid-twentieth century ushered in a more robust understanding of equality, denigration of racial minorities has continued to our day. To be sure, there still exist those “unreconstructed” racists who consciously believe in White racial superiority. Perhaps more disturbing, however, is the growing evidence of widespread implicit bias—unconsciously-held negative beliefs about non-Whites—that may infect the perceptions, decisions, and behaviors of even those who sincerely think of themselves as egalitarian.<sup>74</sup> It is not unreasonable to suspect that such bias stems from centuries of overt and covert racial denigration that has naturalized the idea of non-White inferiority in American culture.<sup>75</sup> Implicit bias research suggests, then, that denigrating assumptions, meanings, and associations that represent themselves as reasonable and commonsensical constantly undermine our professed commitment to racial equality.<sup>76</sup>

### C. *Race-as-Exclusion*

The third major condition of traditional race is exclusion. Like difference and denigration, the idea of exclusion has been central to our understanding of race since the nation’s founding. This was certainly true for Blacks, whose early exclusion from American society was effectuated through slavery. As many historians have argued, the need for labor in the American colonies was acute, and African slaves were the logical answer—not because they were inherently inferior, but because they were rendered more helpless to enslavement by geographical and cultural dislocation.<sup>77</sup> As slaves, Blacks were not only excluded from American society as citizen-participant, but were essentially excluded from humanity itself and relegated to the status of chattel property.<sup>78</sup> As non- or sub-

---

<sup>73</sup> See KAREN BRODKIN, *HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA* 31–32 (1998).

<sup>74</sup> See Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action”*, 94 CALIF. L. REV. 1063, 1064 (2006). Although this Article focuses on race-as-denigration in the United States, research has shown that implicit bias against non-Whites is a global phenomenon. *Id.*

<sup>75</sup> Sheryll Cashin suggests another possible source of implicit bias: residential segregation and the valorization of “thug life” that promote cultural stereotypes. See Cashin, *supra* note 7, at 36.

<sup>76</sup> See, e.g., Jacquelyn Bridgeman, *The Thrill of Victory and the Agony of Defeat: What Sports Tell Us About Achieving Equality in America*, 7 VA. SPORTS & ENT. L.J. 248, 257 (2008) (describing how implicit bias research suggests that difference and denigration are “often a part of efficient cognitive functioning”).

<sup>77</sup> See JACKSON & WEIDMAN, *supra* note 28, at 21; KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 22–26 (1956); ZINN, *supra* note 55, at 26.

<sup>78</sup> See CHARLES W. MILLS, *BLACKNESS VISIBLE: ESSAYS ON PHILOSOPHY AND RACE* 6 (1998) (discussing the condition of “subpersonhood”); Harris, *supra* note 15, at 1718–21.

persons, Blacks under slavery were excluded from exercising such basic human rights as owning property, getting educated, marrying, and enjoying the full protections of the criminal law.<sup>79</sup>

For free Blacks, both before and after abolition, exclusion took on the form of official and unofficial segregation that created insurmountable barriers to participation in American society.<sup>80</sup> In addition, hard-fought political rights such as the right to vote became meaningless as Whites, especially in the South, used both legal and extra-legal methods to keep Blacks from gaining and using political power.<sup>81</sup> The trope of “second-class citizenship” became a powerful way during the Civil Rights Movement of the 1950s and 60s to express the exclusion that Blacks continued to experience despite the formal recognition of equality a century before.<sup>82</sup>

While the exclusion of Blacks from American society is fairly well known, the exclusion of other non-White races is less notorious, with the exception of Japanese internment during World War II.<sup>83</sup> This is rather remarkable in light of the fact that exclusion of Asians from American society, for example, took such explicit forms as a complete bar on immigration into the United States.<sup>84</sup> Indeed, many of the nation’s earliest restrictive immigration laws, regulating both entry into and deportation out of the United States, developed as a result of racial animus toward the Chinese.<sup>85</sup> Asians were also denied naturalization,<sup>86</sup> and state and local governments—especially on the West Coast where the Asian population was

---

<sup>79</sup> Not all Blacks in the early years of the United States were slaves and free Blacks had more rights—some owning plantations and slaves themselves. See ERIC FONER, *FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION* 10 (2005). Even so, by 1860 only five percent of the Black population was free, *id.* at 5, and most “enjoyed few rights other than not being considered a form of property.” *Id.* at 10.

<sup>80</sup> Segregation was implemented not only through separate accommodations and services for Blacks and Whites, but also through wholesale prohibitions against Blacks entering some northern states. See ERIC FONER, *WHO OWNS HISTORY?: RETHINKING THE PAST IN A CHANGING WORLD* 176 (2002). Similar laws were also implemented against Asian immigrants in the West. See Kerry Abrams, *The Hidden Dimension of Nineteenth-Century Immigration Law*, 62 *VAND. L. REV.* 1353, 1387–88 (2009).

<sup>81</sup> See Gilda R. Daniels, *Voter Deception*, 43 *IND. L. REV.* 343, 346–47 (2010).

<sup>82</sup> See FONER, *supra* note 80, at 151.

<sup>83</sup> The Supreme Court validated the exclusion of the Japanese from the West Coast in *Korematsu v. United States*, 323 U.S. 214, 215–16, 223–24 (1944). In 1982, a federal commission attributed the internment to racism against Japanese Americans residing on the West Coast that predated the Pearl Harbor attack, the fear of Japan’s military strength, false rumors (spread in part by prominent government officials) about Japanese Americans’ disloyalty and espionage, and political pandering. *COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED* 4–6 (1982).

<sup>84</sup> See *supra* note 22.

<sup>85</sup> See Abrams, *supra* note 80, at 1354.

<sup>86</sup> See *supra* text accompanying note 42. The restriction on naturalization to only Whites and Blacks meant that not only Asians but also people of Middle Eastern descent were denied citizenship. See John Tehranian, *Compulsory Whiteness: Towards a Middle Eastern Legal Scholarship*, 82 *IND. L.J.* 1, 11 (2007).

largest—sought to impose other exclusionary restrictions such as barring corporations from employing Asians and restricting some Asians from owning or leasing land.<sup>87</sup> Moreover, like Blacks, Asians were subject to both residential and school segregation, as well as anti-miscegenation laws.<sup>88</sup>

Latina/os suffered from exclusionary laws and policies as well. For example, although Mexicans living in the annexed territory gained American citizenship through the Treaty of Guadalupe Hidalgo, many were unable to exercise basic citizenship rights—such as the vote—because state laws restricted such rights on the basis of race.<sup>89</sup> The people of Puerto Rico, annexed in 1898, were also politically excluded with no representation in the federal government. This was a status that derived from reluctance on the part of Congress to grant equal status to Puerto Ricans who were of “mixed blood.”<sup>90</sup> Latina/os in the United States were also segregated in schools<sup>91</sup> and excluded from other public places and institutions.<sup>92</sup> Immigration policies toward Latina/os were also largely exclusionary, subjecting migrant workers to exploitation and mass deportations.<sup>93</sup>

While formal exclusion, such as segregation and anti-miscegenation laws, ended during the Civil Rights Era, informal exclusionary practices against racial minorities have proved resistant to change. Residential and, by extension, school segregation remains a serious problem across the United States.<sup>94</sup> Voting rights of minorities continue to be threatened, and a tolerable level of employment equity remains elusive.<sup>95</sup> Moreover, new means of exclusion have surfaced over the last several decades. For example, the mass incarceration of Blacks and Latina/os (mostly men but also women) via the war against drugs has led to severe economic,

<sup>87</sup> See Marie A. Failing, *Yick Wo at 125: Four Simple Lessons for the Contemporary Supreme Court*, 17 MICH. J. RACE & L. 217, 225 (2012); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 274–75 (1997).

<sup>88</sup> See *Gong Lum v. Rice*, 275 U.S. 78, 87 (1927) (upholding school segregation); *Perez v. Lippold*, 198 P.2d 17, 27, 29 (Cal. 1948) (striking down anti-miscegenation law that restricted marriages between Whites and “Negroes, Mongolians, members of the Malay race or Mulattoes”).

<sup>89</sup> See PEREA ET AL., *supra* note 68, at 296–301.

<sup>90</sup> See *id.* at 356, 370–71. Whether Puerto Ricans desire statehood today remains uncertain. *Puerto Rico Statehood Protests to be Staged Before Congress and White House, Rep. Jose Aponte Says*, HUFFINGTON POST (Jan. 28, 2013), [http://www.huffingtonpost.com/2013/01/28/puerto-rico-statehood-pro\\_n\\_2566683.html](http://www.huffingtonpost.com/2013/01/28/puerto-rico-statehood-pro_n_2566683.html).

<sup>91</sup> See *Mendez v. Westminster Sch. Dist.*, 64 F. Supp. 544, 545–46 (S.D. Cal. 1946).

<sup>92</sup> See *Hernandez v. Texas*, 347 U.S. 475, 481–82 (1954).

<sup>93</sup> See Kevin R. Johnson, “*Aliens*” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM. L. REV. 263, 274 (1996–1997).

<sup>94</sup> See Don Corbett, *Stunted Growth: Assessing the Stagnant Enrollment of African-American Students at the Nation’s Law Schools*, 18 TEMP. POL. & CIV. RTS. L. REV. 177, 189–91 (2008).

<sup>95</sup> See Caren E. Short, Comment, “*Phantom Constituents*”: A Voting Rights Act Challenge to Prison-Based Gerrymandering, 53 HOW. L.J. 899, 901–03 (2010) (on voting); Donna E. Young, *Post Race Posthaste: Towards an Analytical Convergence of Critical Race Theory and Marxism*, 1 COLUM. J. RACE & L. 499, 504–05 (2012) (on economic disparity).

political, and social marginalization of these groups.<sup>96</sup> Indeed, this exclusion-by-criminalization is so pervasive that many commentators are calling it “the New Jim Crow.”<sup>97</sup> Thus, despite the development of a strong national norm of racial equality, certain forms of exclusion endure.

Although I have provided only a brief summary of the historical and legal events that have directly turned on race, I trust that it suffices to support my claim that the concept of race in the United States has been traditionally defined by the social conditions of difference, denigration, and exclusion. In the remainder of this Part, then, I focus on two aspects of race-as-difference, -denigration, and -exclusion that further our understanding of race in the United States: first, how these three conditions relate to one another, and second, how they were part of the struggle to define whiteness in particular.

#### D. *The Centrality of Exclusion*

In thinking about difference, denigration, and exclusion, one may be inclined to give equal weight to each of these conditions and even to consider them as independent from one another. Put another way, it is conceptually possible that in one context, race may merely signify difference, while in another, race triggers exclusion without reference to denigration. Viewing the development of these conditions in historical context, however, the three have always gone hand-in-hand.<sup>98</sup> More than that, it appears that racial exclusion is the driving force behind the move to differentiate and denigrate.<sup>99</sup>

---

<sup>96</sup> See Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 18, 31 (Marc Mauer & Meda Chesney-Lind eds., 2002). As sociologist Loïc Wacquant has noted, a sudden rise in the incarceration of racial minorities occurred at least once before: during Reconstruction when freed Blacks sought to claim their equality and exercise their newly granted rights. See Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the “Race Question” in the U.S.*, 13 *NEW LEFT REV.*, Jan.–Feb., 2002, at 41, 53; see also DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME* 39 (2008) (describing the virtual re-enslavement of Blacks in the post-Reconstruction South through convict-leasing programs).

<sup>97</sup> See, e.g., ALEXANDER, *supra* note 11; Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 *ALBANY L. REV.* 703 (2000). The use of this term has stirred some controversy. See, e.g., James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 *N.Y.U. L. REV.* 21, 23 (2012) (observing that the Jim Crow analogy may distort the current mass incarceration problem).

<sup>98</sup> See DARDER & TORRES, *supra* note 16, at 12; cf. MINOW, *supra* note 53, at 3 (“When we identify one thing as unlike the others, we are dividing the world; we use our language to exclude, to distinguish—to discriminate.”).

<sup>99</sup> See Charles Lawrence III, *Commentary, Listening for Stories in All the Right Places: Narrative and Racial Formation Theory*, 46 *LAW & SOC’Y REV.* 247 (2012); see also Richard T. Ford, *Race as Culture? Why Not?*, 47 *UCLA L. REV.* 1803, 1805 (2000) (arguing that “antiracism . . . is best understood as a response to a specific history of subordination whose primary modus operandi was to create its targets.” (emphasis added)). Martha Minow has written about exclusion as the engine of difference and denigration more generally. See MINOW, *supra* note 53, at 86. However, Minow’s description of this

Consider once more the writings of Thomas Jefferson and Benjamin Franklin. The racial difference that Jefferson described, and the racial inferiority that he detected in Blacks especially, were not simply a good faith scientific attempt to observe, compare, describe, and sort human beings. His objective, made clear in his writings, was to justify slavery, oppose abolition, and avert miscegenation.<sup>100</sup> After cataloguing the flaws and weaknesses of Blacks, Jefferson concludes:

This unfortunate difference of colour, and perhaps of faculty, is a powerful obstacle to the emancipation of these people. . . . Among the Romans emancipation required but one effort. The slave, when made free, might mix with, without staining the blood of his master. But with us a second is necessary, unknown to history. When freed, he is to be removed beyond the reach of mixture.<sup>101</sup>

Franklin makes his own “observations” about non-Whites to rationalize his vision for a Whites-only nation: “[W]hy increase the sons of *Africa*, by planting them in *America*, where we have so fair an opportunity, by excluding all blacks and tawneys, of increasing the lovely white and red?”<sup>102</sup> Both Jefferson and Franklin write as if innate differences and inferiority logically and inevitably lend themselves to literal, physical exclusion of non-Whites from American society. But modern readers recognize that such differences and inferiority were both imagined and imposed in order to justify exclusion; it was the ideal of exclusion that generated racial difference and denigration, not the other way around.<sup>103</sup>

---

dynamic is perhaps less purposeful toward subjugation than the account I present here about race. For example, in her description of the exclusion created by buildings that have narrow doorways that cannot accommodate wheelchairs, she does not suggest that designing narrow doorways was a means of dominating or exploiting the disabled. Instead, subjugation happens simply because the builder did not have the disabled in mind. *See id.* at 12. In the context of race, however, exclusion is not so innocent. *See infra* Part II.E.

<sup>100</sup> Paul Finkelman writes that as a Southern Republican, the idea of a “mob” of free, lower-class Blacks was anathema to Jefferson’s conception of American democracy. “Jefferson could assert the equality of mankind only by excluding blacks.” PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS* 132–33 (2d ed. 2001); *cf.* GOLDBERG, *supra* note 9, at 341–42 (arguing that unlike European racism, which is aimed at repressing those who resist becoming Europeanized, American racism sets up “limits and blocks on those who *would* ‘be us’”).

<sup>101</sup> *See* JEFFERSON, *supra* note 29, at 143.

<sup>102</sup> FRANKLIN, *supra* note 31, at 224. Although “red” is used today to refer to American Indians, Franklin used the word “tawney” to describe them. Similar to Jefferson’s use of “red,” *see supra* text accompanying note 50, Franklin probably meant to describe Whites with pink or ruddy coloring.

<sup>103</sup> *See* Audrey Smedley, *The History of the Idea of Race . . . and Why it Matters* 6–7 (2007) (unpublished manuscript), available at <http://www.understandingrace.org/resources/pdf/disease/smedley.pdf>. Paul Finkelman describes how despite being a scientist and a naturalist, Jefferson made absurdly irrational claims about Blacks, including his belief that dark skin comes from the different color of a Black person’s blood, and the suggestion that Black women might breed with “the Oran-ootan.” *See* FINKELMAN, *supra* note 100, at 134. It is unclear whether Finkelman views difference and denigration as causes or as justifications of Jefferson’s desire to exclude. It is clear

While the enslavement of American Blacks was the ultimate manifestation of the exclusionary motive, this dynamic can be discerned in myriad laws and policies that marginalized racial minorities. Segregation, as explained in *Plessy*, was a legal distinction that “must always exist so long as white men are distinguished from the other race by color.”<sup>104</sup> This statement would be nonsensical and hopelessly circular—a difference that depends on continued differentiation?—but for the fact that it accurately depicts the act of differentiation as *creating* (not just noticing) racial difference.<sup>105</sup> In *Plessy*, such differentiation is undertaken in service of racial segregation; segregation is justified by difference and, as Justice Harlan in dissent points out, thinly veiled denigration.<sup>106</sup>

Naturalization laws that subordinated Asians in the United States also reveal the exclusion-first dynamic. The most telling example of this is the Supreme Court’s apparent about-face in *United States v. Thind*, decided a few months after *Ozawa v. United States*. In *Ozawa*, the Court declared a Japanese applicant for naturalization to be ineligible because he was not Caucasian and therefore not “[W]hite” within the meaning of the naturalization statute.<sup>107</sup> Just a few months later when Bhagat Singh Thind, an Asian Indian, argued before the Court that he is eligible because he is scientifically considered to be Caucasian, the Court rejected his application on the grounds that White is not synonymous with Caucasian after all.<sup>108</sup> The Court’s hasty reversal on the definition of whiteness can only be explained by the desire to deny Thind the rights and privileges of whiteness and citizenship.<sup>109</sup> Thind’s race, which was reclassified from White to non-White by this decision, was determined by the imperative of exclusion.<sup>110</sup>

---

from his account, however, that Jefferson had significant economic investment in slavery, not just in keeping slaves but also in selling them to sustain “his extravagant lifestyle.” *See id.* at 131–32.

<sup>104</sup> *Plessy v. Ferguson*, 163 U.S. 537, 543 (1896).

<sup>105</sup> To be sure, Justice Brown was more specifically arguing that legal distinction is premised on social distinction and no more. In trying to mask the legal act of differentiation, however, he lays bare the social act of differentiation that underwrites segregation.

<sup>106</sup> *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting).

<sup>107</sup> *Ozawa v. United States*, 260 U.S. 178, 198 (1922).

<sup>108</sup> *United States v. Thind*, 261 U.S. 204, 208–11 (1923).

<sup>109</sup> *See HANEY LÓPEZ, supra* note 15, at 92–94.

<sup>110</sup> It is also telling that the challenge against Thind’s naturalization application grew out of the exclusionary immigration law passed in 1917 that prohibited entry by Asian Indians at the time. The new immigration restriction lent Asian Indians “dual status” as ineligible for immigration but potentially eligible for naturalization. *See* Deenesh Sohoni, *Unsuitable Suitors: Anti-Miscegenation Laws, Naturalization Laws, and the Construction of Asian Identities*, 41 *LAW & SOC’Y REV.* 587, 606–07 (2007). As Sohoni notes, this “conflict” was resolved in favor of Thind by the Oregon District Court, but reversed by the U.S. Supreme Court. In the majority opinion, Justice Sutherland explicitly referred to the immigration law to deny naturalization. *See id.* at 607; *see also Thind*, 261 U.S. at 215.

These examples of exclusion demonstrate that the practice was accomplished through significant legal intervention in society. From slave codes that criminalized fraternization between Blacks and Whites and anti-miscegenation laws that forbade interracial marriage, to segregation laws that divided public space and life along racial lines, to economic policies that encouraged residential segregation and the maintenance of racially identifiable schools, exclusion of racial minorities occurred not through the aggregation of freely-made choices of individuals but rather through the constraints placed upon them.<sup>111</sup> This is not to suggest that but for the law there would have been no exclusion; however, such exclusion might not have been so total and so devastating without the role of official laws and policies that endorsed and then enforced it.<sup>112</sup> As numerous historians have pointed out, the fact that such laws existed at all suggests that the ideas of racial difference and racial denigration were not universal givens for all Whites.<sup>113</sup> Rather, Whites became invested in racial difference, denigration, and exclusion as whiteness itself came to acquire value as a marker of inclusion.<sup>114</sup> And precisely because so much exclusion was effectuated by *law*, it could not be arbitrary but instead required a rationale—the twin rationale of difference and denigration.

Exclusion is an engine of difference and denigration in another sense. It is the fact of historical exclusion that has ended up generating real differences in non-White racial groups. Denied such basic needs as freedom, property, political power, education, and employment, racial minorities as a group have fared poorly vis-à-vis Whites across almost all measures of social and economic well-being.<sup>115</sup> Today there is indeed a

---

<sup>111</sup> This thesis also suggests that difference, denigration, and exclusion were not, as perhaps commonly thought, the result of early Americans' ignorance and lack of worldliness. See Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 774.

<sup>112</sup> Indeed, this history of exclusion suggests a significant degree of artificiality to the current structure and demography of the United States. For example, the nation might have become majority-minority long ago had immigration laws been administered without regard to race. Freedom with respect to interracial marriage might have led to a much more multiracial population than we have today. And, of course, had there been no segregation racial minorities might have become more economically and politically powerful.

<sup>113</sup> See EDMUND S. MORGAN, *AMERICAN SLAVERY AMERICAN FREEDOM* 327 (1975); Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2079–80 (1993); see also STAMPP, *supra* note 77, at 21–22 (describing how Black and White servants in the seventeenth century were “remarkably unconcerned about their visible physical differences”); Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1172 (1997) (noting that evidence of race mixing appears as early as 1632).

<sup>114</sup> See MORGAN, *supra* note 113, at 328; Harris, *supra* note 15, at 1714.

<sup>115</sup> See EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* 1–2 (2003). Asian Americans are often cited as the exception to this rule, since Asian Americans are said to be more highly educated than Whites and their median household income is also higher than that of Whites. But as Robert Chang has pointed out, these statistics are misleading. Robert S. Chang, *Toward an Asian American Legal Scholarship:*

difference between Whites and non-Whites in terms of achievements and opportunities, and this inequality has ravaged the non-White population—especially Blacks and Latina/os.<sup>116</sup> Race has become a self-fulfilling prophecy, and as such is now, perversely, more effective at justifying exclusion and masking it as the product, rather than the source, of difference and denigration.<sup>117</sup> One can see this in the affirmative action context, where Blacks and Latina/os are deemed to be either under- or unqualified to matriculate in elite colleges or to be hired for a sought-after job without “special preferences.” Poor minorities—e.g., Black single mothers who have been described as “welfare queens”—are deemed to be unworthy of state assistance to maintain a place within the mainstream.<sup>118</sup> Those who have a criminal record—disproportionately Black and Brown—are stripped of their right to vote, sometimes on a permanent basis, leading to the loss of voice not only for the individuals who are disenfranchised, but their communities as well.<sup>119</sup> Race, in this sense, has been astonishingly successful not only at excluding racial minorities but also at justifying itself as a meaningful and valid mechanism of social ordering.

### *E. Defining Whiteness Through Exclusion*

Although “race” is a term that potentially can be applied to describe and classify every person on the globe, historically race in the United States has been deployed to define Whites and whiteness in particular. As Whiteness Studies has demonstrated over the past two decades of insightful and compelling scholarship, the definition of whiteness has taken on generic rather than specific form: whiteness has been defined through the negation of race rather than through the assertion of it.<sup>120</sup> Put another

*Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1262–63 (1993).

<sup>116</sup> See Short, *supra* note 95, at 905–09.

<sup>117</sup> Jon Cruz aptly describes this historical arc as the development of race from “farce” to “tragedy.” Jon Cruz, *From Farce to Tragedy: Reflections on the Reification of Race at Century’s End*, in MAPPING MULTICULTURALISM 19, 35 (Avery F. Gordon & Christopher Newfield eds., 1996).

<sup>118</sup> Indeed, readers familiar with family law know that minorities are often viewed as outsiders to the very notion of a family, which is defined in accordance with White, middle-class conventions. Hence, families are broken up by the state through varied mechanisms and too many children of color grow up estranged from the love and support of their mothers and fathers. See generally Dorothy E. Roberts, *Child Welfare’s Paradox*, 49 WM. & MARY L. REV. 881, 894–901 (2007) (describing the dualism of child protection services). With respect to Black families especially, such devaluation of familial connections obviously evokes the “family” structure imposed by slavery. See Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 179.

<sup>119</sup> See Travis, *supra* note 96.

<sup>120</sup> Seminal works in Whiteness Studies include: DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991); Barbara J. Flagg, “Was Blind, but Now I See”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); see also David R. Roediger, *Introduction to BLACK ON WHITE: BLACK WRITERS ON WHAT IT MEANS TO BE WHITE* 3

er way, whiteness “locates difference” (i.e., race) in the other, while simultaneously obscuring its own racial perspective.<sup>121</sup> As whiteness as a descriptively *racial* category dissolves, whiteness as an *American* norm emerges, and race—possessed by those who are different, degraded, and excluded—comes to stand for the abnormal, the deviant.<sup>122</sup> And although the forced exclusion of the racialized other played a crucial part in the development of white normativity, the nature of American whiteness downplays and erases Whites’ struggle for exclusion that helped to define it. In this subsection, I wish to highlight three aspects of race (or rather, its negation) as the means of defining whiteness: (1) the unnaturalness of the exclusionary project that has been the preoccupation of American institutions and social discourse; (2) the phenomenon of hyper-exclusion according to race; and (3) the importance of White agency in effecting exclusion and defining race.

The first thing to note about race-as-exclusion in the context of whiteness is to see that our racial order is a made, rather than a grown, social order.<sup>123</sup> By this I mean that race (i.e., its structure, its meaning, its effect, in short, its significance) is not natural, spontaneous, and organic, but artificial: an artifact. This proposition goes beyond the idea of race as merely non-biological; the notion of artifice and artifact is intended to suggest that race is also strategic and instrumental.<sup>124</sup> As such, race-as-difference, denigration, and especially exclusion was in fact very difficult to impose, and it took a great deal of both ingenuity and effort, and in many cases physical coercion, to establish these associations that seem so obvious today.<sup>125</sup>

---

(David R. Roediger ed., 1998) (observing that whiteness studies were conducted by Black intellectuals as early as the mid-nineteenth century and speculating that it may have even begun on the auction block as slaves studied potential masters).

<sup>121</sup> See MINOW, *supra* note 53, at 4, 25; see also bell hooks, *Representations of Whiteness in the Black Imagination*, in BLACK ON WHITE, *supra* note 120, at 38, 41 (noting how even liberal, antiracist Whites “invest in the sense of whiteness as mystery”).

<sup>122</sup> Cf. MINOW, *supra* note 53, at 111 (describing all aspects of this dynamic under what she calls the “social-relations approach” to difference); JEAN-PAUL SARTRE, ANTI-SEMITES AND JEWS 22 (1948) (explaining how a French anti-semitite “considers himself an average man, modestly average, basically mediocre. . . . But you must not think that he is ashamed of his mediocrity; he takes pleasure in it . . .”).

<sup>123</sup> See Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN’S L. REV. 1149, 1194–97 (1998) (explaining Friederich Hayek’s theory of made versus grown, or spontaneous, orders).

<sup>124</sup> See STAMPP, *supra* note 77, at 22–23; see also MARI J. MATSUDA, WHERE IS YOUR BODY?: AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW 23 (1996) (describing how the “variety of devices” used to maintain hierarchy “reveal the deep contradictions and instability inherent in any racist organization of social life”); Allen & Rosenberg, *supra* note 123, at 1197 (“Made orders usually possess a limited number of variables, and thus those variables may be manipulated in order to produce predictable outcomes.”).

<sup>125</sup> See GOLDBERG, *supra* note 9, at 3–4 (referring to the “labor of race”).

For example, as much as Southern Whites sought to portray Blacks as simple-minded sub-humans for whom slavery was a boon rather than bane, this pastoral depiction of slavery was obviously false. As Kenneth Stampp has observed, “A wise master did not take seriously the belief that Negroes were natural-born slaves. He knew better. He knew that Negroes freshly imported from Africa had to be *broken* in to bondage; that each succeeding generation had to be *carefully trained*.”<sup>126</sup> To be sure, slavery was not singularly brutal in every way; scholars have described instances of genuine affection and even love developing between masters and slaves.<sup>127</sup> Nonetheless, preserving the *institution* required a self-conscious and hypocritical suspension of compassion, morality, and political principles among people who championed Enlightenment views about human sensibilities, freedom, and equality.<sup>128</sup> When one considers the forced separation of races through slave codes, segregation and anti-miscegenation laws, and immigration and naturalization restrictions that continued well into the mid-twentieth century, as well as the participation of the arts, sciences, and letters in explaining, justifying, and extending all these mechanisms of exclusion, it becomes clear that excluding mass-

---

<sup>126</sup> STAMPP, *supra* note 77, at 144 (emphasis added); see also FINKELMAN, *supra* note 100, at 4. (describing the theory of Northern secession among Garrisonian abolitionists as “based on the notion that slavery was inherently unstable, needing force to be viable”).

<sup>127</sup> See, e.g., Jason A. Gillmer, *Telling Stories of Love, Sex, and Race, in LOVING v. VIRGINIA IN A POST-RACIAL WORLD: RETHINKING RACE, SEX, AND MARRIAGE* 29 (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012) (describing two exemplary stories of interracial romantic relationships in pre- and post-abolition Texas); MICHAEL J. KLARMAN, *UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY* 13 (2007) (noting the often intimate relationship that grew between female house slaves and their White mistresses). Besides the story of Mildred Jeter and Richard Loving that eventually led to the *Loving v. Virginia* decision, probably the most famous interracial relationship is that between Thomas Jefferson and Sally Hemings, his slave. See Stephanie L. Phillips, *Claiming Our Foremothers: The Legend of Sally Hemings and the Tasks of Black Feminist Theory*, 8 HASTINGS WOMEN’S L.J. 401, 404 (1997) (describing how the possibility of a “long-term, amorous relationship” between Jefferson and Hemings complicates the meanings of race and slavery).

<sup>128</sup> The hypocrisy was not lost on the framers. See FINKELMAN, *supra* note 100, at 6; KLARMAN, *supra* note 127, at 20; PEREA ET AL., *supra* note 68, at 111 (quoting Luther Martin, Maryland delegate to the Constitutional Convention). Some 40 years later, Judge Ruffin also acknowledged the moral contradiction between democracy and slavery in *State v. Mann*: “The power of the master must be absolute to render the submission of the slave perfect. I most freely confess my sense of the harshness of this proposition; I feel it as deeply as any man can; and as a principle of moral right every person in his retirement must repudiate it. But in the actual condition of things it must be so. There is no remedy. This discipline belongs to the state of slavery.” 13 N.C. (2 Dev.) 263, 266 (1829). As others have noted, Judge Ruffin’s professions of guilt must be taken with a grain of salt. From the beginning of his opinion, it is clear that the primary difficulty he attempts to overcome is not his moral compunction about rendering slaves defenseless against masters, but rather the admittedly enormous task of trying to convince those outside of the slaveholding states that his decision is correct. See Eric L. Muller, *Judging Thomas Ruffin and the Hindsight Defense*, 87 N.C. L. REV. 757, 768–69 (2009).

es of people from whiteness—from privilege, belonging, and becoming American—was, unsurprisingly, an immense, elaborate, and arduous undertaking that infringed on the freedoms of Whites and non-Whites alike.<sup>129</sup> Exclusion still remains a difficult task, but perhaps less so, once race-as-difference, denigration, and exclusion became institutionalized and internalized within American society.<sup>130</sup>

A second noteworthy aspect of developing whiteness is what I call hyper-exclusion; that is, the tendency of whiteness to be ever more exclusive rather than inclusive. This is not to suggest that membership in whiteness has not expanded at various points in American history. The idea of race itself arose out of an instance of inclusion—granting “equal” racial status to poor Whites in order to thwart cross-racial class solidarity.<sup>131</sup> Many historians have also explored the racial inclusion that occurred for the Irish, Jews, Italians, and other Europeans who were newly

---

<sup>129</sup> The harms visited upon non-Whites by these laws and ideas are relatively well-known; less attention has been paid to the harms imposed on Whites. Whites who wished to have sexual relations with or marry non-Whites were equally prohibited from engaging in such activities, sometimes under threat of criminal punishment. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 3–5 (1967); Finkelman, *supra* note 113, at 2082–87. Slave codes prohibited Whites from interacting with Blacks and sometimes made it more difficult for masters who wished to emancipate slaves to do so. See KLARMAN, *supra* note 127, at 11; Finkelman *supra* note 113, at 2080 (on fraternization), 2092–93 (on manumission). They also criminalized Whites who educated Blacks. See Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229, 276 (1994). But see KLARMAN, *supra* note 127, at 13 (noting that this law was often ignored). White women who married immigrants ineligible for naturalization lost American citizenship, if they were citizens already, or became ineligible to naturalize themselves despite meeting racial qualifications. See Kevin R. Johnson, *Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 BERKELEY WOMEN'S L.J. 142, 160–61 (1996) (reviewing IAN FIDENCIO HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996)). These examples reveal that the privileged norms were not those of Whites generally, but rather of a subset of Whites who sought racial exclusion. See MINOW, *supra* note 53, at 71. This helps explain why Justice Brown in *Plessy* viewed desegregation as equivalent to “a commingling of the two races upon terms unsatisfactory to either,” *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896), rather than the granting of individual choice in determining how and with whom one lives her life.

<sup>130</sup> One telling example of this process is the adoption of both slavery and anti-miscegenation laws among some Native American nations as a means of achieving, ironically, both assimilation and sovereignty. See Carla D. Pratt, *Loving in Indian Territory: Tribal Miscegenation Law in Historical Perspective*, in *LOVING v. VIRGINIA IN A POST-RACIAL WORLD*, *supra* note 127, at 46, 46–47, 53.

<sup>131</sup> See STAMPP, *supra* note 77, at 32–33; ZINN, *supra* note 55, at 37; see also BLACKMON, *supra* note 96, at 41 (describing how “the moral rationalization of slavery—and the view of slaves as the essential proof of white men’s royal status—became as fundamental to whites’ perception of America as the concept of liberty itself”); FINKELMAN, *supra* note 100, at 126 (stating that equality among Whites depended on slavery); Gillmer, *supra* note 127, at 32 (quoting a local newspaper article stating that “[t]he very existence of slavery keeps alive in the breast of every white citizen a jealous passion for liberty” (internal quotation marks omitted)).

immigrating in large numbers to the United States in the nineteenth century.<sup>132</sup> These instances of inclusion were, however, few and far between, motivated by efforts to exclude others like the Asians, and in some cases took extraordinary events (like the Nazi Holocaust) to occur. Moreover, they are better described as cases of “assimilation” rather than “inclusion”: it was only through the adoption of Anglo-Saxon norms that these groups came to be accepted as real Americans.<sup>133</sup> Thus, these examples are better thought of as exceptions that prove the rule: the circle of whiteness entailed the construction of impervious and ever-tightening barriers to entry that ensured maximum privilege to as few as possible.<sup>134</sup> So it was that when Takao Ozawa argued that the 1790 naturalization law should be read inclusively to deny citizenship to only those non-Whites who were clearly contemplated as such at the time, i.e., Blacks and Native Americans, the Supreme Court answered that congressional intent was in fact to exclude all but White persons.<sup>135</sup>

Perhaps the clearest example of hyper-exclusion as a means to define whiteness is the rule of hypodescent, also sometimes known as the “one drop” rule.<sup>136</sup> Although the term sounds vaguely scientific, the rule is in

<sup>132</sup> See, e.g., BRODKIN, *supra* note 73; NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995); ROEDIGER, *supra* note 120.

<sup>133</sup> See, e.g., Jonathan Weinberg, *The End of Citizenship?*, 107 MICH. L. REV. 931, 945 (2009) (reviewing PETER J. SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* (2008)) (describing the Americanization programs of the 1920s as “harsh”). As the Native American experience reveals, assimilation is better understood as destruction rather than inclusion, i.e., inclusion becomes possible only if one is supposed to have shed all markers of difference. The metaphor of the “melting pot,” popularized in the early 1900s, is particularly apt to describe this process of self-destruction and remaking. See also DAVID L. ENG, *THE FEELING OF KINSHIP: QUEER LIBERALISM AND THE RACIALIZATION OF INTIMACY* 182 (2010) (describing how Japanese internment was represented as an “Americanizing Project”); MINOW, *supra* note 53, at 28 (quoting an Italian American growing up at the turn of the last century as saying, “We were becoming Americans by learning how to be ashamed of our parents.”); Lisa Sandoval, *Race and Immigration Law: A Troubling Marriage*, 7 MOD. AM. 42, 52 (2011) (noting, however, that the metaphor never applied to people of color); Austin Sarat & Thomas R. Kearns, *Responding to the Demands of Difference: An Introduction*, in *CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW* 1, 14 (Austin Sarat & Thomas R. Kearns eds., 1999) (observing that the law has demanded sameness as a condition of inclusion).

<sup>134</sup> See ZINN, *supra* note 55, at 629, 646–47; see also ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 7 (2010) (describing Max Weber’s theory that “categorical inequality arises from social closure”); Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1614 (2011) (“[H]istorically, racism has been bi-directional: It gives to whites (e.g., citizenship) what it takes away from or denies to people of color.”). The idea of the privileged few to the exclusion of many is also at the heart of the recent Occupy movements in the United States. Ironically, the Occupy movement has itself been accused of being racially exclusionary. See Nick J. Scullo, *Social Justice in Turbulent Times: Critical Race Theory & Occupy Wall Street*, 69 NAT’L LAW. GUILD REV. 225, 226–29 (2012).

<sup>135</sup> See *Ozawa v. United States*, 260 U.S. 178, 195 (1922).

<sup>136</sup> Hypodescent is not necessarily the same as the “one drop” rule, as it refers more generally to the social practice of classifying a person’s race according to the

fact an entirely social practice with no precedent or basis in science. Hypodescent not only categorized and excluded countless people with White ancestry as the different and denigrated other, but it did so with the purpose of narrowing whiteness and its privileges to those who were of “pure” European descent.<sup>137</sup> Under slavery, the rule allowed White slaveowners to increase their holdings in human beings by classifying their children by slave women as slaves.<sup>138</sup> After abolition, the rule was largely concerned with defining the limits of whiteness for purposes of enforcing exclusionary laws and racial norms. Thus, a person who appeared phenotypically White, like Homer Plessy, who was seven-eighths White, was able to challenge the segregation laws of Louisiana as a Black person. Moreover, when Plessy charged that segregation laws created inequality by stripping him of social standing and enhancing that of Whites, the Supreme Court dismissed the issue casually by observing that as a Black man, he would not have such standing in the first place to lose.<sup>139</sup> Similarly, in an education case from 1914, three schoolchildren who were known to be mixed-race, but legally defined as White under a more relaxed variant of hypodescent, were nonetheless subject to segregation because the school trustees were willing to establish separate facilities for them and their continued matriculation in the White school would cause White parents to withdraw their children.<sup>140</sup> Both of these cases, along with naturalization cases like *Thind*, which withdrew White status from certain Caucasians,<sup>141</sup> demonstrate that preserving the privi-

---

race of the less privileged parent. Thus, the “one drop” rule is the most extreme variant of the rule of hypodescent. Race in the United States, especially for Blacks, has been determined both formally and informally by the “one drop” rule, especially after the *Plessy* decision. See Patrick Wolfe, *Land, Labor, and Difference: Elementary Structures of Race*, 106 AM. HIST. REV. 866, 882 (2001). In 1920, the U.S. Census Bureau adopted the rule in its 14th census. See Hickman, *supra* note 113, at 1187.

<sup>137</sup> See Hickman, *supra* note 113, at 1163 & n.3, 1189–90.

<sup>138</sup> Of course, the rule of hypodescent also allowed such slave masters to deny their own children and the biological link (and whatever sameness that may be presumed in such link) between them. As Abraham Lincoln pointed out during one of his debates with Stephen Douglas, “slavery [was] the greatest source of amalgamation.” See Renée M. Landers, *What’s Loving Got to Do with It? Law Shaping Experience and Experience Shaping Law, in LOVING v. VIRGINIA IN A POST-RACIAL WORLD*, *supra* note 127, at 128, 132 (internal quotation marks omitted).

<sup>139</sup> *Plessy v. Ferguson*, 163 U.S. 537, 549 (1896).

<sup>140</sup> See *Tucker v. Blease*, 81 S.E. 668 (S.C. 1914). In that case, the court determined that the children were legally White under South Carolina law because they were less than one-eighth Black, the cut-off point under the state’s anti-miscegenation laws. Even while acknowledging that such children were “entitled to exercise all the legal rights of a white person,” the court held that “proper classification” will depend on the availability of equal accommodation. *Id.* at 673. Such classification, the court went on, would take into account not only the racial ancestry of the children, but also their social standing as well as the needs and desires of the White community. *Id.* at 673–74. In this case, of course, the social outweighed the biological, and the court cited its concern for the proper education of White children as an additional utilitarian justification for segregation. See *Id.* at 673.

<sup>141</sup> See *supra* note 110 and accompanying text.

leges of whiteness was a central concern, and racial classification and meaning were made according to that objective.

The third and final aspect of whiteness I want to note is the fact of White agency in the development of race in general and whiteness in particular. Recognition that race is socially constructed raises a question about the identity of the architects and the builders of race.<sup>142</sup> Race in America was constructed by Americans, who imagined themselves to be, exclusively, White persons of pure European descent. Moreover, the decisionmakers in society—the masters, the voters, the judges, the employers—have historically been predominantly White. Although Michael Omi and Howard Winant have described the process of social construction as hegemonic, requiring the participation of both the superordinated and the subordinated, hegemony is first and foremost a top-down assertion of power and control by elites.<sup>143</sup> The process of “othering” through difference, denigration, and exclusion was a mode (one of many possible modes) of racial domination.<sup>144</sup> Racial domination is enhanced by the transparency of whiteness itself, the carefully crafted transformation of whiteness into generalized norms about intelligence, morality, speech, and manners, all of which are in fact derived from the privileges enjoyed through exclusion.<sup>145</sup> Exclusion is therefore not only a determined effort to establish and maintain White superiority, it is also an effort to define whiteness as synonymous with superiority.<sup>146</sup>

My aim in highlighting White agency in the construction of race and whiteness is not to attribute racial guilt on Whites. Racial guilt is at best a double-edged sword. While it may motivate some Whites toward corrective action, racial guilt has a tendency to become personalized and has led to the belief that remedies for inequality are a form of punishment that requires discriminatory intent to be morally appropriate.<sup>147</sup> Nonethe-

<sup>142</sup> Cf. GOLDBERG, *supra* note 9, at 4 (referring to the “day-laborers, the bricklayers, of racial foundations”); MINOW, *supra* note 53, at 119 (explaining that difference must be understood as “a comparison drawn—by somebody”) (emphasis added).

<sup>143</sup> See OMI & WINANT, *supra* note 8, at 56.

<sup>144</sup> Accordingly, many writers refer to the notion of “hegemonic whiteness” to describe how racial domination is accomplished through an ideal white racial identity that is coded as normal and neutral. See MATTHEW W. HUGHEY, *WHITE BOUND: NATIONALISTS, ANTIRACISTS, AND THE SHARED MEANINGS OF RACE* 193 (2012); *supra* text accompanying note 122. Another obvious mode of domination is violence and terror. Below, I describe how inclusion, despite its positive connotation, can also reproduce domination. See *infra* Part IV.

<sup>145</sup> See MINOW, *supra* note 53, at 51 & n.6.

<sup>146</sup> See Dorothy E. Roberts, *Why Culture Matters to Law: The Difference Politics Makes*, in *CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW*, *supra* note 133, at 85, 90 (observing that Whites view themselves as culture-less and their way of life “as the way things are just supposed to be”).

<sup>147</sup> See *Washington v. Davis*, 426 U.S. 229, 239 (1976); cf. MINOW, *supra* note 53, at 72 (observing that the requirement of intent is based on the presumption that the

less, agency is important to acknowledge for the following reasons. First, it helps to reinforce the fact that difference, denigration, and exclusion are all constructed conditions rather than natural ones. Second, although these conditions of race are now largely viewed as institutionalized rather than interpersonal, there remains a human element in the perpetuation of racial injustice that should not be neglected.<sup>148</sup> Finally, this observation, like the others in this Part, is intended to build the foundation for my discussion in Part III, which explores the ways in which each of these important aspects of race have changed, prompting us to consider the possibility of redefining race. As I explain below, those who have been historically differentiated, denigrated, and excluded are spearheading the reconstruction of race in the United States; that is, non-Whites have claimed agency over race for the future.

### III. REDEFINING RACE: IDENTITY, EQUALITY, AND INCLUSION

Although American race has been long associated with the destructive conditions of difference, denigration, and exclusion, there is little desire on the part of the racially oppressed to reject race altogether. This was evident in the era of colorblindness, when racial conservatives sought to neutralize race-conscious remedies like affirmative action by denying the relevance of race to fair decision-making.<sup>149</sup> The progressive response against colorblindness was swift and furious, especially from the academy, which emphasized justice over fairness and at the same time exposed the shallowness of fairness in the context of institutionalized or systemic rac-

---

status quo is neutral); PERRY, *supra* note 6, at 21 (arguing for a “post-intentional[]” understanding of racism).

<sup>148</sup> See MINOW, *supra* note 53, at 79–80 (noting that “we build the institutions, squeezing each other’s ideas into a common shape so that we can prove rightness by sheer numbers of independent assent”) (emphasis added) (quoting MARY DOUGLAS, *HOW INSTITUTIONS THINK* 91 (1986)).

<sup>149</sup> The notion of colorblindness, like postracialism, has roots in progressive thought. In the legal realm, it is traced back to Justice Harlan’s dissenting opinion in *Plessy v. Ferguson*, where he asserted: “Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.” 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). In the popular imagination, however, colorblindness seems to be more closely associated with Martin Luther King, Jr.’s famous “I Have a Dream” speech, where he expressed his hope in 1963 that his children will “one day live in a nation where they will not be judged by the color of their skin but by the content of their character.” Martin Luther King, Jr., *I Have a Dream*, March on Washington (Aug. 28, 1963), available at <http://www.archives.gov/press/exhibits/dream-speech.pdf>; see, e.g., David O. Sears et al., *Race in American Politics: Framing the Debates*, in *RACIALIZED POLITICS: THE DEBATE ABOUT RACISM IN AMERICA* 1, 6 (David O. Sears & Jim Sidanius eds., 2000) (quoting King’s speech as supporting the establishment of a “race-blind standard”). The invocation of colorblindness beginning in the 1960s to scale back on the gains of the Civil Rights Movement has broken the association between that concept and racial progress. See BONILLA-SILVA, *supra* note 115, at 2; cf. Peller, *supra* note 111, at 760 (locating an integrationist compromise to reject race consciousness in the 1960s and 70s).

ism. The message then was that race mattered.<sup>150</sup> Even on its own terms, however, the ideal of colorblindness was limited in scope; although the rhetorical focus on individual merit and character, rather than race, was broad enough to pervade all aspects of American life, its normative force seems not to have reached much beyond the realm of *public life*.<sup>151</sup> The debate between racial conservatives and progressives largely remained on the level of issues such as access to higher education, employment, and redistricting, i.e., the spaces where exclusion seemed to have the greatest material impact on the life chances of the racial majority and minorities alike.<sup>152</sup>

On the other hand, the popular notion of a postracial America makes a claim not only on the public but also on the private arenas of American life. Linked to the candidacy and election of the first biracial Black–White president of the United States, postracial America is supposed to be a place in which race does not matter—not only for purposes of deciding admissions and jobs, but also in the hearts and minds of the voting public. It is less about *trying* to be colorblind, and more about *being*, deep down, postracial. Indeed, in addition to the presidency of Barack Obama, many point to the rise in interracial marriages<sup>153</sup> and of the multiracial population<sup>154</sup> as indicators that postracialism has arrived.

<sup>150</sup> This message served as the title of Cornel West's influential 1993 book, which discusses issues and challenges of race in America. See CORNEL WEST, *RACE MATTERS* (1993).

<sup>151</sup> See Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 5 (1991) (referring to Justice Stewart's statement that the requirement of colorblindness does not apply in the private sphere). Kimberlé Williams Crenshaw also observes that colorblindness appealed mainly to conservatives and never seemed to fully reach moderates and liberals. See Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back To Move Forward*, 43 CONN. L. REV. 1253, 1326 (2011).

<sup>152</sup> In contrast, race-consciousness seems to have remained acceptable in the private sphere—e.g., in specifying the desired race of one's romantic partner. See ENG, *supra* note 133, at 6–7; Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1309–10 (2009).

<sup>153</sup> See WENDY WANG, PEW RESEARCH CTR., *THE RISE OF INTERMARRIAGE: RATES, CHARACTERISTICS VARY BY RACE AND GENDER 1* (2012), available at <http://www.pewsocialtrends.org/files/2012/02/SDT-Intermarriage-II.pdf>. The data on interracial marriages tell only part of the tale of interracial intimacy in the United States today. These figures do not consider long-term interracial same-sex relationships that are currently ineligible for marriage, nor do they consider long-term interracial different-sex relationships that, for one reason or another, have not been formalized through marriage. *Id.* at 41. So, too, there has been much written on shorter-term interracial relationships that are left out of the picture. See PEREA ET AL., *supra* note 68, at 965–72.

<sup>154</sup> With respect to the multiracial population in the United States, the issue is less about an increase in its numbers and more about its developing political consciousness as well as the growing awareness of this group by the general public. As many scholars have observed, interracial sexual relationships always existed—despite anti-miscegenation laws and norms—and resulted in children whose mixed-race status was denied. See, e.g., Kevin Noble Maillard, *The Multiracial Epiphany, or How to Erase an Interracial Past*, in *LOVING V. VIRGINIA IN A POST-RACIAL WORLD*, *supra* note 127, at 91, 93 (condemning the focus on the 1967 *Loving v. Virginia* decision as the beginning of multiracial existence). Thus, some have criticized the new multiracial

As such, the nation's transcendence of race is believed to be more complete and more organic for having a seemingly individualist and decidedly emotional and intimate core: in 2008, Americans did not just vote for Barack Obama, Americans (and the world) loved Barack Obama.<sup>155</sup>

If anything, the reluctance to abandon race is even more evident in the debate over postracialism. To be sure, part of this debate replicates the older argument that race still matters in the distribution of material goods and services, and the United States is hardly "beyond" race in that important and meaningful sense. In addition, however, the idea of being or becoming post-race has brought into sharper relief a shift in the traditional definition of race that has been slowly but surely occurring since the middle of the last century.<sup>156</sup> While many Whites may be ready and

---

identity movement for embracing biological race and failing to recognize that the supposedly monoracial parents that produced these children probably were themselves biologically multiracial. See Rainier Spencer, *Militant Multiraciality: Rejecting Race and Rejecting the Conveniences of Complicity*, in *COLOR STRUCK: ESSAYS ON RACE AND ETHNICITY IN GLOBAL PERSPECTIVE* 155, 156, 164 (Julius O. Adekunle & Hettie V. Williams eds., 2010). Others, however, predict that multiracial consciousness will, or at least *could*, transform the extant racial order. See KIMBERLY McCLAIN DaCOSTA, *MAKING MULTIRACIALS: STATE, FAMILY, AND MARKET IN THE REDRAWING OF THE COLOR LINE* 187–90 (2007); Nancy Leong, *Half/Full*, 3 U.C. IRVINE L. REV. (forthcoming 2013).

<sup>155</sup> Obama is himself the product of an interracial marriage and referred to his varied racial and international background in his famous March 2008 speech about race. One voter's reaction was to note that "Obama made it right to be white and still love your black relatives, and to be black and still love your white relatives." See GWEN IFILL, *THE BREAKTHROUGH: POLITICS AND RACE IN THE AGE OF OBAMA* 175 (2009) (quoting Mireya NAVARRO, "Who Are We? New Dialogue on Mixed Race", N.Y. TIMES, March 31, 2008) (internal quotation marks omitted); Ryan Lizza, *The Final Push*, NEW YORKER, Oct. 29 & Nov. 5, 2012, at 62, 63 (discussing the importance of the "ground game" and the Obama campaign's focus on "the role of storytelling—and emotion—in motivating participation") (quoting Harvard Divinity School Professor Marshall Ganz) (internal quotation marks omitted). The voter's reaction to Obama resonates with Randall Kennedy's argument that we ought to aim for a condition where "love and loyalty are unbounded by race." Randall Kennedy, *My Race Problem—and Ours*, ATLANTIC MONTHLY, May 1997, at 55, 66. Cornel West has also observed the link between the idea of postracialism and emotion. He has critiqued postracialism in the following way: "It's the difference between being color-blind and love-struck. You see, if I love you, I don't need to eliminate your whiteness. If you love me, you don't need to eliminate my blackness." See IFILL, *supra* at 167 (internal quotation marks omitted) (quoting Mark J. Bonamo, *Booker Honors History as He Makes It*, HACKENSACK CHRON. (Feb. 20, 2008)). One could also characterize the Nobel Prize committee's patently premature conferral of the Peace Prize on Obama as fools rushing in. See Matt Moore & Karl Ritter, *Obama Wins Nobel Peace Prize*, HUFFINGTON POST (Oct. 9, 2009), [http://www.huffingtonpost.com/2009/10/09/obama-wins-nobel-peace-pr\\_n\\_314907.html](http://www.huffingtonpost.com/2009/10/09/obama-wins-nobel-peace-pr_n_314907.html) (describing various reactions to the award).

<sup>156</sup> There was, of course, resistance against difference, denigration, and exclusion prior to the 1950s. Kenneth Stampp, for example, discusses how work stoppages and slow-downs, as well as lying, theft, and running away, made slaves "troublesome property." See STAMPP, *supra* note 77, at 86–140. Asians in the United States sought to assert equal status in many court cases during the nineteenth century that Hyung-Chan Kim has characterized as precursors to the Civil Rights Movement. See Hyung-

willing to jettison race, which so starkly evokes the reprehensible means by which Whites dominated non-Whites, racial minorities have imbued race with alternative meaning. The racial struggles of the past century not only involved access and opportunity in American life, but also reconfigured the way that race is understood within minority communities. Moreover, with the rise of the multiculturalist movement in the 1990s, this reconfiguration entered the mainstream of American thinking about race.<sup>157</sup>

This new understanding of race is far more wholesome than the older, more traditional definition of race that turned on difference, denigration, and exclusion. The corresponding conditions of this new racial conception are identity, equality, and inclusion. I do not claim that this new conception of race has supplanted the old; they are not, in reality at least, mutually exclusive.<sup>158</sup> Rather, I believe that race-as-identity, -equality, and -inclusion supplements and enhances our understanding of the complexities of race in the United States today. As I explain below, recognizing these two coexisting constructions can help us to understand the different roles that race plays in varied contexts and for varied groups and individuals.

#### A. *Race-as-Identity*

Because it affects so many facets of American life, race informs one's sense of self and one's perspectives about, and approaches to, the world around her. It also mediates a person's experiences and reception by others in society.<sup>159</sup> As a descriptive matter, there is no question that race is intimately linked to identity.<sup>160</sup> For my purposes, what is interesting about this link is not so much its descriptive dimension but its normative

---

Chan Kim, *An Overview, in ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY* 1, 27–29 (Hyung-Chan Kim ed., 1992). Another example of resistance is the various armed conflicts that occurred between Mexican-Americans and Anglo-Americans in the mid-nineteenth and early-twentieth centuries over land expropriation and race subjugation. See PEREA ET AL., *supra* note 68, at 323–39. I locate the beginning of this definitional shift in the 1950s, however, because that is when the protest against the racial mechanisms that differentiated, denigrated, and excluded took on the form of a national social movement, and when the ideas that would potentially displace difference, denigration, and exclusion were becoming more completely articulated. See MINOW, *supra* note 53, at 131–32.

<sup>157</sup> See Avery F. Gordon & Christopher Newfield, *Introduction to MAPPING MULTICULTURALISM* 1, 1 (Avery F. Gordon & Christopher Newfield eds., 1996).

<sup>158</sup> It is true, however, that the two conceptions of race may be *theoretically* opposed.

<sup>159</sup> See Charles Taylor, *The Politics of Recognition, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 32–33 (Amy Gutmann ed., 1994); see also HUGHEY, *supra* note 144, at 146 (quoting CHARLES H. COOLEY, *HUMAN NATURE AND THE SOCIAL ORDER* 184 (Transaction Publishers 1964) (1902)) (defining identity as a “reflected or looking glass self” in which we see ourselves based on the images others have of us”).

<sup>160</sup> See DARDER & TORRES, *supra* note 16, at 5 (“The majority of people in this country continue to believe that they belong to a specific race, and this has an impact on the way they conceive of their social identity.”).

one. That is, not only does race affect one's identity or sense of self, but it is also believed to render that identity meaningful and, therefore, valuable—especially among the racially oppressed.<sup>161</sup> Accordingly, the reactions against the claim that the United States is beyond race have been not only political but also passionate and moving personal responses that speak to the deeply-held connection between race and the self.

Many commentators, such as sociologist Michael Eric Dyson and anthropologist Signithia Fordham, object to the possibility of deracialization in the context of discussing Black identity. Dyson, for example, argues that while Obama's election may signal the possibility of a post-racist future, "[a] post-racial outlook seeks to delete crucial strands of our identity."<sup>162</sup> Fordham echoes a similar concern when she asks, "Why are we acceptable only if we are willing to erase our social and cultural history?"<sup>163</sup> Dyson and Fordham's anxiety about racelessness speaks to the critical role that race plays in forging identity.<sup>164</sup> Moreover, their metaphorical evocation of biology—for Dyson, DNA, and for Fordham, "bone memory"—suggests that they locate their identities not in an unencumbered self but in an encumbered and *embodied* one.<sup>165</sup> It seems we have come full circle.

<sup>161</sup> In contrast, a White person's attachment to her race seems decidedly unhealthy and is usually associated with hate groups and old-fashioned White supremacy. See Peller, *supra* note 111, at 761. But see HUGHEY, *supra* note 144, at 146–47 (analyzing how members of a White anti-racist group construct White identity). Thus, embrace of whiteness for most Whites occurs, if it occurs at all, in a covert, ironic, or humorous way, exemplified by the website, *Stuff White People Like*, and the comedy of Stephen Colbert and Louis C.K.

<sup>162</sup> Michael Eric Dyson, *Race, Post Race: Barack Obama's Historic Victory Represents a Quantum Leap in the Racial Progress of the United States*, L.A. TIMES, Nov. 5, 2008, at A31; see also MICHAEL ERIC DYSON, APRIL 4, 1968: MARTIN LUTHER KING, JR.'S DEATH AND HOW IT CHANGED AMERICA 231 (2008) ("We should not be post-racial: seeking to get beyond the uplifting meanings and edifying registers of blackness.").

<sup>163</sup> Signithia Fordham, *Passin' for Black: Race, Identity, and Bone Memory in Postracial America*, 80 HARV. EDUC. REV. 4, 6 (2010); see also Gotanda, *supra* note 151, at 59–60 (arguing that the development of a colorblind society would constitute "cultural genocide" against the Black community).

<sup>164</sup> This view is obviously not universal. Dissenters, including members of minority groups, view race as an artificial and meaningless concept around which people rally—often with bad results. See, e.g., DARDER & TORRES, *supra* note 16, at 12, 17 (arguing that the empty idea of race distracts from a more effective class-based analysis of inequality); GILROY, *supra* note 1, at 11 (denouncing "raciology").

<sup>165</sup> Cf. ALCOFF, *supra* note 28, at 86 (noting the "intimate" relationship between racial identity and the body); Elizabeth Grosz, *Feminism, Materialism, and Freedom*, in NEW MATERIALISMS: ONTOLOGY, AGENCY, AND POLITICS 139, 152–53 (Diana Coole & Samantha Frost eds., 2010) (linking freedom, the body, and "the individual's inner cohesion and historical continuity"). The notion of the "unencumbered self" is a classically liberal perspective on individuals as free from any associations except those of their choosing. The communitarian critique challenges this notion of the self as incomplete, arguing that liberalism fails to account for the responsibilities, obligations, and loyalties that are often "inseparable from understanding ourselves as the particular persons we are." See L. Scott Smith, *Religious Toleration and the First*

Needless to say, this is quite striking. Although race-consciousness can be traced back to at least the nineteenth century<sup>166</sup> and engendered full-fledged society-wide movements in the 1960s,<sup>167</sup> the idea that race may be intrinsically valuable is relatively new.<sup>168</sup> The race-consciousness of abolitionism tended toward emphasis on the common humanity of the races, using sameness as a means of appealing to the empathy of White liberals in order to overturn the foundational assumptions of slavery.<sup>169</sup> Although part of the resistance to racial oppression included efforts at self-representation and the construction of a shared, positive Black identity,<sup>170</sup> it appears that the prevailing view of race was more akin to a condition to be overcome or overlooked, not something to be explicitly recognized, valued, and accommodated.<sup>171</sup>

Race-consciousness, in the forms of both integrationism and nationalism, reached its highest point of popularity and political success in the

*Amendment*, 22 KAN. J.L. & PUB. POL'Y 109, 127 (2012) (quoting MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 13, 14 (1996)) (internal quotation marks omitted).

<sup>166</sup> See GORDON, *supra* note 12, at 69–70; Henry Louis Gates, Jr., “*The Lives Grown Out of His Life*”: Frederick Douglass, Multiculturalism, and Diversity, in *MULTICULTURALISM: ROOTS AND REALITIES* 1, 4, 10–11 (C. James Trotman ed., 2002).

<sup>167</sup> See Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 25 (1994); Peller, *supra* note 111, at 761.

<sup>168</sup> See *infra* text accompanying notes 188–97; RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* 148 (2005); Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2155 (2013) (suggesting that racial identity is “a personal characteristic intrinsically deserving of respect”); Taylor, *supra* note 159, at 25 (analyzing the claim that nonrecognition or misrecognition of identity constitutes a form of oppression); Camille Gear Rich, *Racial Commodification in the Era of Elective Race: Affirmative Action and the Lesson of Elizabeth Warren* 7 (USC Gould Sch. of Law, Legal Studies Research Paper Series No. 12–19, 2012), available at <http://ssrn.com/abstract=2132685> (noting that “Americans have come to invest more and more significance in their racial self-identification decisions”).

<sup>169</sup> See Elizabeth B. Clark, *Breaking the Mold of Citizenship: The “Natural” Person as Citizen in Nineteenth-Century America (A Fragment)*, in *CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW* 27, 29–30 (Austin Sarat & Thomas R. Kearns eds., 1999) at 42; Julie Husband, *Frederick Douglass’s American “We”*, in *MULTICULTURALISM: ROOTS AND REALITIES* 17, 18 (C. James Trotman ed., 2002); cf. GORDON, *supra* note 12, at 83 (describing Black nationalists’ appeal to common humanity as a means of establishing Black subjectivity and worth).

<sup>170</sup> See GORDON, *supra* note 12, at 78–79.

<sup>171</sup> To be sure, such a view of race—at least when endorsed by *Black* abolitionists—may have been strategically necessary. See, e.g., Husband, *supra* note 169, at 27–28 (“Imagining a multicultural America may not have been beyond [Frederick] Douglass’s powers, but it was beyond the limits of a useful nineteenth-century racial politics.”); GORDON, *supra* note 12, at 84 (explaining that recognition and respect for difference “had to be the rhetorical assignment of a later generation”). It is easy to see why an integrationist approach to race would have been more palatable to White society than the incipient Black nationalism of that time. See *id.* at 81–84; cf. Husband, *supra* note 169, at 18 (suggesting that Martin Delany’s militancy helped popularize integrationism among abolitionists).

1960s. Twentieth century nationalist movements, especially, sought to create value in race through the notion of culture. In his narrative of American racial “fabrication,” Ian Haney López describes how nationalism transformed “[a]spects of quotidian life,” such as language, dress, and dance “into elements of cultural authenticity and weapons of cultural renewal.”<sup>172</sup> Cultural awareness became salient not only for Black Americans but for other racial groups such as Mexican Americans who began to self-identify as “Chicanos.”<sup>173</sup> Although the turn toward culture suggests more strongly that value inheres in race, the concept still remained largely instrumental—it constituted a “weapon,” a means of generating group solidarity for the specific purpose of political mobilization.<sup>174</sup> Thus, while there was certainly political investment in the idea of race in earlier modes of race-consciousness, the kind of profoundly personal and emotional attachment to race that is expressed by writers like Dyson and Fordham seems absent.

The link that Dyson, Fordham, and Haney López make between culture, race, and identity is one that appeals to, and is made sensible by, the social and intellectual context of multiculturalism. Multiculturalism is an umbrella term that expresses many different and sometimes conflicting theories.<sup>175</sup> Although these conflicts present serious difficulties in any descriptive account of multiculturalism, I attempt here to narrow the field by focusing on multiculturalist identity discourse and by relying on the well-regarded explication of multiculturalism offered by the philosopher Charles Taylor. Moreover, I do not mean to suggest that multiculturalism is the cause of social changes in the United States but rather a prominent

---

<sup>172</sup> López, *supra* note 167, at 25. According to Dexter Gordon, the 1960s saw two variants of Black nationalism: cultural nationalism led by Maulana Karenga, and political nationalism led by the Black Panthers. See GORDON, *supra* note 12, at 165.

<sup>173</sup> See MENCHACA, *supra* note 28, at 19–20.

<sup>174</sup> See GORDON, *supra* note 12, at 175 (describing Black nationalism’s use of racial identity as “strategic”); MENCHACA, *supra* note 28, at 20 (suggesting that racial organization among Mexican Americans was primarily focused on “mobilizing for ethnic politics”); cf. Hall, *supra* note 12, at 291 (explaining that culture, race, and identity are interconnected as the first two constitute the systems of meaning that situate social subjects as potentially political “identities”). The question of whether there is a unified entity that can be called a “Black race” remains a potent issue. See Regina Austin, “*The Black Community, Its Lawbreakers, and a Politics of Identification, in AFTER IDENTITY: A READER IN LAW AND CULTURE* 143, 143 (Dan Danielsen & Karen Engle eds., 1995); Leland Ware & Theodore J. Davis, *Ordinary People in an Extraordinary Time: The Black Middle-Class in the Age of Obama*, 55 *HOW. L.J.* 533, 536–37 (2012).

<sup>175</sup> See MICHAEL MURPHY, *MULTICULTURALISM: A CRITICAL INTRODUCTION* 5 (2012); see also KINCHELOE & STEINBERG, *supra* note 38, at 1 (“Used as a goal, a concept, an attitude, a strategy and a value, multiculturalism has emerged as the eye of a social storm swirling around the demographic changes that are occurring in Western societies.”); Leti Volpp, *Talking “Culture”: Gender, Race, Nation, and the Politics of Multiculturalism*, 96 *COLUM. L. REV.* 1573, 1608 (1996) (observing that the definition of “multiculturalism” is deeply contested).

vehicle through which such changes occurred.<sup>176</sup> Accordingly, multiculturalism is loosely defined here as “an approach that shows us another way of using knowledge to understand ideas and events.”<sup>177</sup>

The multiculturalist approach toward knowledge became especially salient in the 1990s as the United States began anticipating a twenty-first century demographic shift that would render Whites a racial minority in the nation.<sup>178</sup> Unsettling the assumption that “White” stands as a synonym for “American” opened up possibilities for a broader exploration of American identity. To be sure, identity explorations were occurring prior to this time, especially among racially marginalized Americans.<sup>179</sup> Moreover, the United States had been, in fact, multicultural since its founding. What changed in the 1990s was a growing awareness of this historical condition within mainstream society and the attendant legitimization and endorsement of this course of inquiry.<sup>180</sup> Thus, multiculturalism, with its emphasis on identity and diversity, became a new form of “common sense.”<sup>181</sup>

Like its forebear, nationalism, race-oriented multiculturalism emphasized respect for identity, especially as a member of a historically excluded

<sup>176</sup> The actual causes of change are impossible to identify completely, but included among them would be the Civil Rights Movement of the 1960s, nationalist movements of the 1970s, several wars, especially the Vietnam War, post-structuralism, and developments in technology. See ALCOFF, *supra* note 28, at 206–07; KENNETH J. GERGEN, *THE SATURATED SELF: DILEMMAS OF IDENTITY IN CONTEMPORARY LIFE* xi (1991).

<sup>177</sup> C. James Trotman, *Introduction to MULTICULTURALISM: ROOTS AND REALITIES*, *supra* note 169, at ix. Despite its name, multiculturalism engaged not only with culture—traditionally understood to refer mainly to ethnic or national differences—but broadly encompassed recognition of other forms of diversity, including race. Many writers have criticized the conflation of culture and race within multiculturalist discourse. See FORD, *supra* note 168, at 7; DARDER & TORRES, *supra* note 16, at 12.

<sup>178</sup> See RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA* 2 (1993); see also MUKHERJEE, *supra* note 6, at 13 (noting that “hyphenated Americans’ proliferated” in the 1980s with increased immigration and popularity of multiculturalist discourse).

<sup>179</sup> See CELESTE MICHELLE CONDIT & JOHN LOUIS LUCAITES, *CRAFTING EQUALITY: AMERICA’S ANGLO-AFRICAN WORLD* 72–73 (1993). Perhaps the most famous articulation of this exploration is W.E.B. Du Bois’s poignant description of the “double-consciousness” of Black identity. See W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 3 (Brent Hayes Edwards ed., Oxford Univ. Press 2007) (1903).

<sup>180</sup> One of the most obvious signs of legitimization was the change in the required curriculum that occurred in higher education across the United States. See TAKAKI, *supra* note 178, at 3–4; see also Kyle Huwa, *West Missing from Curriculum*, *STANFORD REV.*, Dec. 4, 2009, available at <http://stanfordreview.org/article/west-missing-from-curriculum/> (describing the now famous 1988 student protest that led to the restructuring of Stanford University’s “Western Civilization” requirement). Another is the federal government’s recent data-collection directive that “respondent self-identification should be facilitated to the greatest extent possible.” See Rich, *supra* note 168, at 8 n.33.

<sup>181</sup> KINCHELOE & STEINBERG, *supra* note 38, at 19; see also FORD, *supra* note 168, at 42–43; PERRY, *supra* note 6, at 130. But see BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* 6 (2001) (arguing that apparent consensus around multiculturalism is false).

group.<sup>182</sup> Accordingly, the racial identities that were being reconfigured during this period were deeply embedded in history and socio-racial relations. This history (which needed to be recovered because it had been neglected and excluded) was crucial to identity, which Taylor defines as denoting not only “who we are,” but also “where we’re coming from.”<sup>183</sup> Thus, one can see why one of the most potent expressions of this concern was in the debate over multicultural education and the battle over the “Western canon” in American universities.<sup>184</sup> According to Taylor, exclusion needed to be corrected because it impoverished our understanding and experience of national history and culture.<sup>185</sup> But more importantly, exclusion demeaned the identities—the “worth”—of the excluded and thereby constrained their full development.<sup>186</sup> The project of recovering and imparting neglected histories and cultures within institutions of learning was, therefore, a key component of (re)constructing race in late twentieth century United States.

As the foregoing indicates, the multiculturalist agenda was probably less focused on establishing a culturally plural society and more concerned with the remediation of identity harms that were being inflicted on excluded minorities.<sup>187</sup> In other words, multiculturalism was not a declaration of “culture wars” but rather a demand for justice. Multiculturalist identity politics involved more than intragroup cultivation of racial identity and cultural pride; people of color were not asking for the right to be left alone to develop their own ways of life. Instead, they demanded *recognition* of identity, which is to say that minorities sought respect *by others*, especially by the culturally hegemonic group.<sup>188</sup> Identity work within a

<sup>182</sup> See Taylor, *supra* note 159, at 25, 64. *But see* Jeanne Maddox Toungara, *Multiculturalism and the Demise of the African-American in the Body Politic*, 8 *HOW. SCROLL* 56, 64–65 (2006) (characterizing multiculturalism as part of “an insidious plan to divert attention from historical tensions in policymaking”). In his essay, Taylor also sees important commonalities with the feminist movement. *See* Taylor, *supra* note 159, at 25, 65. *But see* Susan Wolf, Comment, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION*, *supra* note 159, at 75, 75–76 (noting divergences).

<sup>183</sup> Taylor, *supra* note 159, at 33 (internal quotation marks omitted); *see also* Lisa Nakamura & Peter A. Chow-White, *Introduction—Race and Digital Technology*, in *RACE AFTER THE INTERNET* 1, 3 (Lisa Nakamura & Peter A. Chow-White eds., 2012) (observing that erasure of history is a key mechanism of racial oppression).

<sup>184</sup> *See* Amy Gutmann, *Introduction to MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION*, *supra* note 159, at 3, 12–24; *see also* K. Anthony Appiah, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION*, *supra* note 159, at 149, 158–59 (observing that public education is a primary instrument of social reproduction).

<sup>185</sup> Taylor, *supra* note 159, at 64–66.

<sup>186</sup> *See id.* Along these lines, one can conclude that the Supreme Court’s embrace of the multiculturalist diversity rationale was truly *halfhearted*—it embraced the first but not the second component of the multiculturalist agenda. *See infra* text accompanying note 285.

<sup>187</sup> *See* Wolf, *supra* note 182, at 75–76.

<sup>188</sup> *See* Taylor, *supra* note 159, at 65–66.

racial group surely fostered a sense of belonging, beauty, and empowerment for its members as it had always done; but according to Taylor, what was new and distinct about multiculturalism from nationalism was this externally-focused emphasis on gaining recognition and respect, which necessarily required engagement with, rather than separation from, mainstream white culture.<sup>189</sup> Similarly, multiculturalism is distinguishable from integration, which typically has been defined as entry by minorities into White-designated spaces.<sup>190</sup> Instead, the goal was the transformation of such designations to create multicultural public spaces that would minimize further harm to identity.<sup>191</sup> Perhaps the best evidence for the traction that these identity-based arguments were gaining during the 1990s is the furious backlash that they unleashed, starting with the publication of works such as Arthur Schlesinger's *The Disuniting of America* (1991), Peter Brimelow's *Alien Nation* (1995), and Samuel Huntington's *Who Are We?: The Challenges to America's National Identity* (2004).<sup>192</sup> These texts were far less concerned with the existence and accommodation of

---

<sup>189</sup> Although Taylor distinguishes multiculturalism from nationalism, one wonders if he does not go far enough. In his discussion of Quebec, for example, Taylor still speaks in terms of a liberal political entity comprised of separate cultural spheres that are loosely connected through state enforcement of fundamental rights (e.g., right to vote). See *id.* at 58–60. As Susan Wolf points out in her response to Taylor, multiculturalists may have been demanding a much more radically *integrated* form of recognition; that is, recognition that minorities also comprise the larger “we” of the national community, and that minority cultures are an integral part of the national culture. See Wolf, *supra* note 182, at 81–85; see also CONDIT & LUCAITES, *supra* note 179, at 14 (observing that mainstream America mistakenly conflated Black separatism with multiculturalism). Thus, the multiculturalists’ demand in American universities was not that there be greater opportunities or even requirements to study minority cultures through ethnic studies departments (these had already been established in the 1970s), but rather that the very notions of “American history” and “the Canon” be revised to reflect the multicultural origins and development of our society. See Wolf, *supra* note 182, at 85.

<sup>190</sup> See, e.g., Cashin, *supra* note 7, at 43.

<sup>191</sup> Charles Lawrence suggests the importance of this transformation in a story he tells about a dinner party where he was the only person of color. As the guests were each sharing childhood stories about school, he noted that their stories described school as a place of rational expectations and freedom. For Lawrence and his sisters, however, going to their predominantly White school was like entering a battlefield and home was the place “for healing, for dressing each other’s wounds.” See Charles R. Lawrence III, Foreword, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 840 (1995). As this story reveals, the private space of the home was where these children could repair the kinds of identity harms that Taylor describes in his analysis of multiculturalism. Lawrence continues: “It was a time for . . . restoring our dignity and the sense of our own beauty that was denied us in the public world.” *Id.* The trope of the “home” is a significant one in race scholarship. Later in his article, Lawrence describes his effort to create a multicultural space for his seminar at Stanford Law School as building a “homeplace.” *Id.* at 841–42; see also Austin, *supra* note 174, at 158 (referring to the Black community as “Home”); MENCHACA, *supra* note 28, at 19–26 (discussing the importance of Aztlán to the Chicano/a movement).

<sup>192</sup> See ALCOFF, *supra* note 28, at 16–18.

insular ethno-racial enclaves within the United States and much more with how identity politics through the prism of multiculturalism was finally threatening to transform *American* (read White European) culture.<sup>193</sup>

Under multiculturalism, racial minorities became the acknowledged subjects rather than mere objects of racial projects. The capacity to exercise agency over one's own identity (individual and cultural), according to Taylor, is a fundamental aspect of human dignity that dates back to the late eighteenth century.<sup>194</sup> But this was a capacity that had been historically denied to racial minorities whose social identity was ascribed and whose ability to generate culture and knowledge was denigrated. Despite the social and political victories achieved through the Civil Rights Movement of the 1960s, the extension of human dignity to racial minorities did not entail recognition of agency to remake identity and culture. Instead, it merely conferred a limited kind of dignity, allowing the universalized norms of whiteness to become more (or at least ideally) attainable by non-Whites.<sup>195</sup> Multiculturalism challenged this dynamic of dignity-via-assimilation as a distortion of non-White identity and the rejection of true human dignity.<sup>196</sup> As K. Anthony Appiah observes, an effective multiculturalist "politics of recognition" had to assert that a Black person be respected "*as a Black*."<sup>197</sup>

Multiculturalism also spurred recognition of multiple racial identities in at least two respects. The first was the recognition of racial groups that located themselves outside of the Black/White categories that framed race discourse in the past.<sup>198</sup> A subject position was not only within the province of Blacks and Whites but also other groups, such as Asian Americans and Latina/os, whose assertions of distinct histories, concerns, and experiences within the racial hierarchy of the United States began to be heard.<sup>199</sup> Accordingly, racial identity was considered to be more nuanced than previously recognized under the so-called Black/White paradigm.<sup>200</sup> Moreover, these groups not only sought to redefine themselves

<sup>193</sup> See *id.* at 17–18.

<sup>194</sup> See Taylor, *supra* note 159, at 30.

<sup>195</sup> See *id.* at 43; see also Peller, *supra* note 111, at 760–62 (arguing that the post-civil rights era is marked by the imperatives of colorblindness and assimilation).

<sup>196</sup> See Taylor, *supra* note 159, at 43–44.

<sup>197</sup> Appiah, *supra* note 184, at 161–63.

<sup>198</sup> See Gordon & Newfield, *supra* note 157, at 3.

<sup>199</sup> Perhaps unsurprisingly, mainstream media reported on these additional voices as making conflicting demands. See NEIL FOLEY, *QUEST FOR EQUALITY: THE FAILED PROMISE OF BLACK-BROWN SOLIDARITY* 147 (2010) (discussing coverage of the purported conflict between John Hope Franklin and Angela Oh while serving on President Clinton's 1997 Initiative on Race).

<sup>200</sup> Within legal scholarship, the inadequacy of the Black/White paradigm was analyzed by Robert Chang, an Asian American, and Juan Perea, a Latino scholar, among others. See Chang, *supra* note 115, at 1265–68; Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213 (1997). I have previously argued that the Black/White paradigm remains a useful framework for thinking about race, even in a multicultural society. See Janine Young

but also openly directed a counter-gaze on whiteness.<sup>201</sup> In this way, the new approach to race ascribed racial identity to Whites and attempted to render their privileges more visible.<sup>202</sup> “White males,” in particular, came under close scrutiny as the identity group that historically dominated racial struggles and placed themselves at the top of the race hierarchy.<sup>203</sup> Demonstrating the discursive nature of socially-constructed race, the attack on White males and the resentment that it triggered—especially as the latter was expressed in opposition to affirmative action in the 1990s—helped to both reveal and shape White self-consciousness.<sup>204</sup>

Multiculturalism in the 1990s also contributed to the rise of multiracial identity in the United States. Although “mixed-race” people existed in the United States since before its founding, the rule of hypodescent denied social recognition of such people in any meaningful way.<sup>205</sup> Even as the Association of Multiethnic Americans in 1993 requested a “multiracial” category on the U.S. Census, sociologist Kimberly McClain DaCosta observes that the notion of such an identity at that time was novel to many multiracial individuals themselves.<sup>206</sup> This is perhaps due to the fact that multiracial identity has been constructed quite differently from the “monoracial” identities that were forged through shared history and culture. In contrast, multiracials comprised a group of individuals with varied cultural backgrounds and experiences and no shared history of oppression and resistance.<sup>207</sup> This has rendered the multiracial identity movement suspect; it is often viewed as an attempt to opt out of a less desirable identification per hypodescent.<sup>208</sup> Yet recognition of multiracial identity became both urgent and logical, if somewhat ahistorical, within the ascendant multiculturalist approach that celebrated dignity, authenticity, and diversity.<sup>209</sup> In this sense, the multiculturalist ethos of the late

Kim, Note, *Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 YALE L.J. 2385, 2386–87 (1999).

<sup>201</sup> See hooks, *supra* note 121, at 41; Kenneth L. Karst, *Does Integration Have a Future?*, in CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW, *supra* note 133, at 139.

<sup>202</sup> See generally CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997).

<sup>203</sup> See John R. Graham, *The End of the Great White Male*, in CRITICAL WHITE STUDIES, *supra* note 202, at 3, 3–5.

<sup>204</sup> See MUKHERJEE, *supra* note 6, at 42–43.

<sup>205</sup> See *supra* text accompanying notes 136–39.

<sup>206</sup> DACOSTA, *supra* note 154, at 1–2.

<sup>207</sup> *Id.* at 7. As DaCosta later observes, multiracial identity “is as much about family as race,” that is, the recognition of interracial relationships within the family (i.e., parent and child) that are either ignored or misrecognized by others. *Id.* at 16.

<sup>208</sup> See *id.* at 35. On the other hand, DaCosta’s analysis indicates that multiracial identity developed in reaction to the belief that mixed-race individuals are always already suspect due to divided racial allegiances and an inability to conform adequately to the behaviors and appearances that are commonly taken to signal “monoracial” identity. See *id.* at 127–28.

<sup>209</sup> For example, the multiracial movement emphasizes *self*-identification as a matter of dignity and rejects both an identification system based on eyeballing by

twentieth century not only facilitated the recognition of a multiracial community, it broadly motivated the *creation* of that community.<sup>210</sup>

It should be clear from this discussion that racial identity under the multiculturalist influence did not reject racial difference for a blandly humanistic and classically liberal view of racial relations based on sameness. On the contrary, multiculturalists embraced difference but sought to redefine it on their own terms. The old race-as-difference view was false and could not morally justify social hierarchy and exclusion. Instead, race-as-identity sought recognition and respect of social and cultural differences. It historicized race and argued that race played a key role in producing differences in status, experience, and knowledge, i.e., the “who we are” and the “where we’re coming from.” At the same time, multiculturalist identity never abandoned the humanist view of sameness—the fundamental identity we all share with one another as human beings and unique individuals. Just as the word “identity” itself denotes both sameness and difference, race-as-identity played within the new and arguably liberating space created by this duality of meaning.<sup>211</sup> Thus, race-as-identity is not “post” in the sense of disruption and disconnection; it takes older ideas of difference, representation, worth, and self-determination and “rework[s]” them into an identity that is “both located in a tradition and yet not constrained by it.”<sup>212</sup>

Multiculturalism is today largely regarded as a failed ideology, although it is not entirely clear why. Some critics have charged that multiculturalism never achieved the structural changes it sought. That is basically true; structural racial inequality persists today.<sup>213</sup> But this is hardly a searing or even unique critique of multiculturalism given the fact that all other liberation ideologies have similarly failed to reach that grand objective. Consequently, while the critique is undoubtedly correct, it is also sufficiently trivial that it seems to say less about the merits and demerits of multiculturalism and more about the assumptions and agendas of the critics themselves. Others argue that multiculturalism’s failure lies in its overemphasis on issues like dignity and agency, which allowed its adher-

---

others as well as one that limits individuals to a “monoracial” identity. See Nancy G. Brown & Ramona E. Douglass, *Making the Invisible Visible: The Growth of Community Network Organizations*, in *THE MULTIRACIAL EXPERIENCE: RACIAL BORDERS AS THE NEW FRONTIER* 323, 325–26 (Maria P. P. Root ed., 1996).

<sup>210</sup> See DaCOSTA, *supra* note 154, at 179. As DaCosta notes, it was not only the affirmative logic of identity discourse that legitimated the search for a multiracial identity. It was also a response to the sense of alienation that multiracial individuals felt because they did not fit within the “conventional definitions of racial membership.” *Id.* at 44.

<sup>211</sup> As Linda Martín Alcoff explains: “When I refuse to listen to how you are different from me, I am refusing to know who you are. But without understanding fully who you are, I will never be able to appreciate precisely how we are more alike than I might have originally supposed.” ALCOFF, *supra* note 28, at 6.

<sup>212</sup> See Hall, *supra* note 12, at 294.

<sup>213</sup> See DARDER & TORRES, *supra* note 16, at 23; but see *infra* text accompanying notes 214–21.

ents to settle for psychological and symbolic affirmations (e.g., special menu options on Cinco de Mayo,<sup>214</sup> elevator “world music”) far short of substantive, material gains.<sup>215</sup> Again, I think this critique is largely correct, but misleading, for it also suggests that multiculturalism was at least partially successful, but domesticated by its own success in penetrating the mainstream.<sup>216</sup> Moreover, these critiques take insufficient account of the fact that many elements of multiculturalism survived in related antiracist movements—such as Critical Race Theory—that continued to challenge racial injustice under the rubric of race-as-identity.

There is much more that can be said about multiculturalism’s rise and subsequent decline, and the critiques and backlash that occurred both within and against the movement. For my purposes, however, a detailed intellectual history is not necessary; the point I wish to make is simply that the broad constellation of ideas and practices that we call multiculturalism was crucial in transforming the notion of race-as-identity into what can be called a *condition*—that is, reaching a stage of widespread acceptance in society as a way of thinking about and living race. According to Austin Sarat and Thomas Kearns, “[w]e have had, until the most recent emergence of cultural pluralism and identity politics, few ways to see and speak of difference, except to mark its threats to order or

---

<sup>214</sup> But see Ben Highmore, *Bitter After Taste*, in *THE AFFECT THEORY READER* 135-36 (Seigworth & Gregg eds., 2003) (considering the possibility of “a pedagogy of multicultural food” that is a form of “everyday politics . . . of the gut as much as the mind”).

<sup>215</sup> See KINCHELOE & STEINBERG, *supra* note 38, at 16. The authors argue that multiculturalism may confuse “psychological affirmation with political empowerment” and therefore “promises an emancipation that it can’t deliver.” *Id.*; see also Kennedy, *supra* note 155, at 56 (observing that since one’s race is a matter of chance, there should be neither pride nor shame). Dorothy Roberts describes a similar dynamic when she observes: “Culture is usually recognized in inverse proportion to power. The more subordinated a community, the more culture it is seen to have.” Roberts, *supra* note 146, at 90 (footnote omitted). Kincheloe and Steinberg, along with others like Darder and Torres, also note that multiculturalism’s neglect of class-consciousness has led to its failure to redistribute wealth. See DARDER & TORRES, *supra* note 16, at 19; KINCHELOE & STEINBERG, *supra* note 38, at 17; see also Cruz, *supra* note 117, at 37 (arguing that identity should be seen as a means and not an end). Others have suggested that the fault lies in part with constructivism, which tends to neglect materialist concerns in favor of a focus on “reconstructing subjectivities, discourses, ethics, and identities.” See Diana Coole & Samantha Frost, *Introducing the New Materialisms*, in *NEW MATERIALISMS: ONTOLOGY, AGENCY, AND POLITICS* 1, 25 (Diana Coole & Samantha Frost eds., 2010).

<sup>216</sup> For example, Arun Kundnani says multiculturalism in England took “black culture off the streets . . . and [put] it in the council chamber, in the classroom and on the television, where it could be institutionalised, managed and reified.” Arun Kundnani, *The Death of Multiculturalism*, *INST. OF RACE RELATIONS* (Apr. 1, 2002), <http://www.irr.org.uk/news/the-death-of-multiculturalism/>; cf. Peller, *supra* note 111, at 766 (observing a similar dynamic of domestication of the once-radical integrationism by the Civil Rights mainstream).

to wish for its end.”<sup>217</sup> While such a shift falls short of restructuring society, I think it is hard to dispute that multiculturalism had a significant impact on public race discourse. This achievement is all the more notable when we remember that the constructivist view posits race as, first and foremost, discursive.

Finally, it is worth mentioning that multiculturalism did succeed in accomplishing some important institutional changes in the United States, many of which helped to further cement the discursive shift analyzed above. This is particularly true within higher education, as universities across the country—from diversely populated areas like California to much less diverse places like Minnesota—altered the required curriculum beyond the study of “Western civilization.”<sup>218</sup> Multiculturalism also led to changes in lower education—from libraries stocking non-European children’s books<sup>219</sup> to the proliferation of theories and guides on multicultural education.<sup>220</sup> In addition, governments and corporations today train their personnel in “cultural literacy,” and profess their commitment to fostering diversity through voluntary adoption of various types of affirmative action programs.<sup>221</sup> Even the Supreme Court has recently endorsed race-as-identity in its *Grutter* opinion, acknowledging that race is not solely an exclusionary classification but can operate as a proxy for differences in interests, backgrounds, and perspectives, especially among members of groups that have historically experienced discrimination.<sup>222</sup> This new understanding of race, as identity rather than traditional

<sup>217</sup> Sarat & Kearns, *supra* note 133, at 9; see also KARST, *supra* note 201, at 160 (noting that multiculturalism “re-acculturated” Whites as well).

<sup>218</sup> See TAKAKI, *supra* note 178, at 3–4.

<sup>219</sup> See Wolf, *supra* note 182, at 82–83.

<sup>220</sup> See, e.g., Gordon L. Berry, *Introduction: The Interface of Child Development, Multiculturalism, and Media Within a Worldview Framework*, in THE SAGE HANDBOOK OF CHILD DEVELOPMENT, MULTICULTURALISM, AND MEDIA xvii, xviii (Joy Keiko Asamen et al. eds., 2008). These changes are thought to not only improve the educational outcomes of racial minorities through the development of more positive identities, but also to create new generations of Americans that are more tolerant and sophisticated in matters of race and culture. See Sabrina Zirkel, *The Influence of Multicultural Educational Practices on Student Outcomes and Intergroup Relations*, 110 TCHRS. C. REC. 1147, 1151–52, 1168 (2008); see also Wolf, *supra* note 182, at 82 (“When one child with this exposure [to multicultural education] encounters another, she neither expects him to be the same as she nor sees him as alien or foreign.”).

<sup>221</sup> See Leong, *supra* note 168, at 2155, 2182; Stacy L. Hawkins, *A Deliberative Defense of Diversity: Moving Beyond the Affirmative Action Debate to Embrace a 21st Century View of Equality*, 2 COLUM. J. RACE & L. 75, 84–85 (2012).

<sup>222</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003). In contrast, the race-as-difference view is assumed in *Adarand Constructors, Inc. v. Peña*, where the majority decides to apply strict scrutiny to an affirmative action program in part because “[r]acial classifications are simply too pernicious” to society to bear a more lenient form of review. 515 U.S. 200, 229 (1995) (internal quotation marks omitted) (quoting Justice Stevens’s dissent in *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980), where he also indicated that race is rarely relevant to decisionmaking, *id.* at 547). The fact that the majority opinions in both *Adarand* and *Grutter* were penned by Justice

difference, enabled the Court to affirm the continued use of affirmative action in public universities.<sup>223</sup>

Before moving on to an exploration of race-as-equality, two important points must be clarified. First, nothing in this Article is intended to suggest that race-as-difference has disappeared altogether. There is no gainsaying that there are individuals who continue to believe in natural differences among races, and there are institutions—such as our welfare and criminal justice systems—that operate under basically the same assumption. Although the nomenclature may have changed to refer to “cultural” rather than biological differences, the destructive notion of an inherited deficit remains stable within these regimes. The new discourse around culture speaks to the enduring power of race-as-difference. The continued belief in deep-seated and essential differences among racialized populations demonstrates strong resistance to radical change. At the same time, however, the focus on culture—e.g., the “Black culture” or their so-called “culture of poverty”—confirms the substantial, though far from unproblematic, impact that multiculturalism has had on public discourse.<sup>224</sup> In sum, it can be said that race-as-difference and race-as-identity coexist today, not in separate spheres or belief systems (e.g., among white supremacists v. racial egalitarians, conservatives v. liberals) but in a complex and uneasy interrelation that reveals the historical contingency of the race concept.

Second, and more importantly, the shift to race-as-identity is not without its difficulties as a racially progressive project. One difficulty is the concern that race-as-identity and its emphasis on authenticity and affirmation not only encourages political settlement, but also ultimately veers toward individualism and away from community. After all, as K. Anthony Appiah has noted, it seems rather odd that the Romantic, individualist idea of authenticity has been transplanted into a multiculturalist discourse that is ostensibly engaged with collective identity.<sup>225</sup> Some slippage, therefore, seems inevitable. Today, the fear of individualist fragmentation is both real and urgent, engendered by increasingly subjectivist approaches to race such as that of cultural critic Touré, who argues that the point of collective civil rights organizing is to allow Blacks to be individuals,<sup>226</sup> and law professor Nancy Leong, who claims that racial

---

O'Connor may also be suggestive of the shift from race-as-difference to race-as-identity. In *Grutter*, Justice O'Connor found persuasive the arguments of “major American businesses” and the United States military that there are real benefits to pursuing diversity. *Grutter*, 539 U.S. at 330–31.

<sup>223</sup> *Grutter*, 539 U.S. at 343.

<sup>224</sup> See BARRY, *supra* note 181, at 11–12.

<sup>225</sup> See Appiah, *supra* note 184, at 149–50. It seems to me that identity's focus on “experience” is also prone toward individualism. See ALCOFF, *supra* note 28, at 183.

<sup>226</sup> TOURÉ, *supra* note 3, at 8–9. Touré's continued use of the word “we,” however, may suggest that there remains a sense of group-ness—perhaps one that is back-grounded.

identity is too personal to be commoditized.<sup>227</sup> To be sure, racial identity has always had both collective and individual dimensions, but the relationship between the two is becoming more problematic—especially among people of color who experience social inclusion and, with it, greater options for identity formation and performance.<sup>228</sup> Neither Touré nor Leong press for the depoliticization of race, but it seems to me that they are struggling to find the terms under which their more personalized or customized variant of identity can participate in an effective politics of racial justice.<sup>229</sup>

Relatedly, the concern that essentialism is either inherent or dominant in the identity formation process has led to the dissolution, or at least attenuation, of the bonds that might otherwise spur collective mobilization. Recognition of group identity seems to have coincided with the interrogation of “internal difference.”<sup>230</sup> There is today a broad understanding that the relationship between race and identity, though integral, is also imperfect: every individual has multiple social identities and, thus, according to Kenneth Karst, it follows that “every community—including the nation—has only a partial claim on the individual’s attachments.”<sup>231</sup> It appears, then, that although identity may constitute the epicenter of how we have come to conceptualize race, the reverse is, increasingly, not true. One can detect the decentering of race in Barack Obama’s autobiography when he writes, “My identity might begin with the fact of my race, but it didn’t, couldn’t, end there.”<sup>232</sup> More than this, there is a sense that we have not yet captured the full scope of identity even in speaking of multiple and overlapping identities; the very act of recognition can also

<sup>227</sup> See Leong, *supra* note 168, at 2156.

<sup>228</sup> See TOURÉ, *supra* note 3, at 12–13. Touré, for example, offers not only his own perspective as a well-educated and successful celebrity who lives and works in racially integrated spaces, but also reports the views of other highly successful Black artists, intellectuals, and media figures. *Id.*; see also Leong, *supra* note 168, at 2204, 2210 (discussing the impact of diversity programs on their actual beneficiaries, i.e., those who are attending universities and working in companies).

<sup>229</sup> See generally Leong, *supra* note 154.

<sup>230</sup> See, e.g., DANIEL COOPER ALARCÓN, *THE AZTEC PALIMPSEST: MEXICO IN THE MODERN IMAGINATION* 6–9 (1997) (discussing the need for a more complex understanding of Chicano identity).

<sup>231</sup> Karst, *supra* note 201, at 159; see also Dan Danielsen & Karen Engle, *Introduction to AFTER IDENTITY: A READER IN LAW AND CULTURE* xiii (Dan Danielsen & Karen Engle eds., 1995); Michelle Adams, *Radical Integration*, 94 CALIF. L. REV. 261, 295 (2006). This seems to be an appropriate corrective action against race-as-difference, which had a totalizing effect. See, e.g., *Sweatt v. Painter*, 339 U.S. 629, 631 (1950); Brief of the Family of Heman Sweatt as Amicus Curiae in Support of Respondents at 8, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2012) (No. 11-345), 2012 WL 3578589 (describing the University of Texas President Theophilus Painter’s note indicating that Sweatt is “duly qualified” to matriculate in every way except his race).

<sup>232</sup> BARACK OBAMA, *DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE* 111 (rev. ed. 2004).

be an act of classification and constraint.<sup>233</sup> Claims of *creative* identity construction—that originate from within rather than outside of the self—seem to be increasingly gaining purchase in more recent identity discourses.<sup>234</sup>

Thus, what has become clear in the wake of multiculturalism is that racial identity has become a tenuous basis for political action, at least in any *a priori* sense.<sup>235</sup> Unlike in the age of difference, denigration, and exclusion, where the assertion of a non-White racial identity constituted an inherently political and progressive act, racial self-identification no longer carries such meaning.<sup>236</sup> Race and racism have become conceptually disentangled with the advent of race-as-identity. With it has come the more individualistic notion that one's identity is "rooted in, but not restricted by" race.<sup>237</sup> This has ushered in what Camille Gear Rich calls "the Era of Elective Race," where there are myriad reasons for racial self-identification and myriad bases for any specific racial self-designation.<sup>238</sup>

I do not wish to leave the impression that the contemporary condition of race-as-identity is unbearably fragmented, atomistic, and unmoored.<sup>239</sup> The idea of racial identity has never been stable, but is always evolving. While there are other valid interpretations, one way to read the more personal, individualistic orientation of identity discourse today is to see it as an attempt to preserve rather than renounce race; that is, to construct a racial identity that is more than a reactive, instrumental social status (*a la* the old biological and social difference framework) that will eventually fall away if and when racism ends. It may be, in other words, an effort to find race from deep within—as something like "bone memory" or DNA that constitutes a fundamental, shared, and generative part of our selves.

Evaluating whether this somewhat philosophical project is a worthy one is beyond the scope of this Article; in any case, the answer surely will vary according to context. What I do want to point out is that it does not

<sup>233</sup> Cf. FORD, *supra* note 168, at 37–39 (applying Michel Foucault's hypothesis on the history of sexuality to race in the post-civil rights era).

<sup>234</sup> See Maria P. P. Root, *The Multiracial Experience: Racial Borders as a Significant Frontier in Race Relations*, in *THE MULTIRACIAL EXPERIENCE*, *supra* note 209, at xiii, xxiii; cf. FORD, *supra* note 168, at 158–62 (expressing a preference for "cultural syncretism"); CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 62 (1991) (describing the modern understanding of self-discovery as an aesthetic process that parallels the shift from *mimēsis* to *poiēsis*).

<sup>235</sup> See ALCOFF, *supra* note 28, at 85; Cruz, *supra* note 117, at 37; Grosz, *supra* note 165, at 148–49.

<sup>236</sup> See DARDER & TORRES, *supra* note 16, at 57 (noting that racial self-identification such as "Asian American" and "Chicano," as well as "people of color," are political acts of empowerment and solidarity).

<sup>237</sup> Michael Eric Dyson, *Tour(é)ing Blackness*, in *TOURÉ*, *supra* note 3, at xi, xi.

<sup>238</sup> See Rich, *supra* note 168, at 7, 9.

<sup>239</sup> See Gutmann, *supra* note 184, at 7 (rejecting the dichotomy between social and "atomistic" views of the self and positing that individual identities are "partly constituted by collective dialogues").

have to mean the end of a politics around identity, although it probably does require a different mode of politics. Surely, if what is being demanded is choice and agency regarding racial identity, there remains the possibility of choosing group (identification) and choosing change (mobilization).<sup>240</sup> Moreover, the experience of racial subordination, as always, will tend to engender both solidarity and resistance.<sup>241</sup> An example of this may be found, perhaps surprisingly, in the multiracial identity movement. Despite the criticism that multiracials are seeking to carve out an intermediate, near-White status within the U.S. racial hierarchy,<sup>242</sup> studies of this group have shown that many of them in fact self-identify as persons of color even as they wish to gain recognition of their mixed-race status.<sup>243</sup> For at least some within this movement, the end goal is not a state of fragmentation but an “integrative-pluralistic” racial identity that affirms and mobilizes new dimensions of difference for an expanded egalitarian and inclusive politics.<sup>244</sup>

Another potential avenue of politicization is the continued practice by historically racialized individuals to express their sense of group-ness through the language of family and kinship.<sup>245</sup> As interracial marriage, transracial adoption, and the multiracial population increase, one can expect such intimate expressions of solidarity to gain significance.<sup>246</sup> This can have profound implications for both the composition of resistance groups, as well as their methods of resistance. Growing intimacy among people with different racial identities may mean that the feeling of racial solidarity will extend beyond those who personally experience racial sub-

---

<sup>240</sup> Charles Taylor points out, for example, that self-definition “*in opposition* to the demands of society, or nature, which *shut out* history and the bonds of solidarity” constitutes the negation of a meaningful identity. This is because choice only matters when it is made within “a horizon of important questions.” TAYLOR, *supra* note 234, at 40.

<sup>241</sup> See ALCOFF, *supra* note 28, at 43 (observing that group identity reflects both shared experiences and a shared position from which to see the world); López, *supra* note 167, at 38 (explaining how the history and experience of subordination *creates* groups that did not exist before).

<sup>242</sup> It appears that at least some of this criticism is aimed at the motives of the parents of multiracial children—especially White mothers—who may be seeking to pass on their racial privilege to their offspring. See, e.g., Spencer, *supra* note 154, at 162–63.

<sup>243</sup> See Angelique Davis, *Political Blackness: A Sociopolitical Construction*, in *LOVING V. VIRGINIA IN A POST-RACIAL WORLD*, *supra* note 127, at 169, 176; Root, *supra* note 234, at xix–xx; Rich, *supra* note 168, at 10; cf. DACOSTA, *supra* note 154, at 11 (noting that “[r]ather than blending into whiteness, [multiracials] are asserting a racialized identity”).

<sup>244</sup> See G. Reginald Daniel, *Black and White Identity in the New Millennium: Unsevering the Ties that Bind*, in *THE MULTIRACIAL EXPERIENCE*, *supra* note 209, at 121, 123.

<sup>245</sup> See Yalonda Howze & David Weberman, *On Racial Kinship*, 27 *SOC. THEORY & PRAC.* 419, 419 (2001); *but see* Kennedy, *supra* note 155, at 65 (rejecting the idea of racial kinship in favor of a commitment to distributive justice).

<sup>246</sup> See, e.g., DACOSTA, *supra* note 154, at 187–90 (discussing the potential for radical change via interracial kinship); ENG, *supra* note 133, at 2 (asking whether White adoptive parents of an Asian American child could be considered Asian American).

ordination to include those who love them.<sup>247</sup> In addition, such closeness may make it more difficult for people of color to engage in traditional forms of confrontational politics, signaling a change in the form of political activity that we are likely to see in the future.

### B. *Race-as-Equality*

My proposition here—that race-as-equality is a *condition* and not merely an ideal in the United States—may be viewed by many, especially race progressives, as tenuous and even dangerous. It is, indeed, difficult to explain this condition, although perhaps not for the reasons that skeptics may expect. The explanatory problem lies not in demonstrating that the association between race and equality is in fact broadly accepted, but rather in defining what that association entails.

I begin with the easier task. I think it can hardly be disputed that today the dominant American view is that people of all races are, and should be regarded as, equals. Race-as-denigration was roundly rejected during the Civil Rights Era, and the prevailing public discourse on race was irrevocably transformed to demand equality and deny hierarchy.<sup>248</sup> It is important to note that it is not just race progressives who link race to equality; racial conservatives also depend on the language and idea of equality to legitimate their claims. Indeed, from the Tea Party to White nationalist groups, a direct appeal to the principle of equality is deemed to be crucial in maintaining these entities' credibility with the American public.<sup>249</sup> This is not to suggest moral equivalence between the two deployments of race-as-equality; my point is simply that the connection between race and equality is viewed as fundamental across the political spectrum and across racial groups.

I also do not suggest that equality is an achieved *material* condition for all racial groups. Not only would such an assertion be baseless but it

---

<sup>247</sup> Cf. Taylor, *supra* note 159, at 32 (explaining how identity is created dialogically “through interaction with others who matter to us,” i.e., “significant others”). Something like this seems to be happening within the LGBT rights movement. See, e.g., Bobbi Bernstein, Note, *Power, Prejudice, and the Right to Speak: Litigating “Outness” Under the Equal Protection Clause*, 47 STAN. L. REV. 269, 274–76 (1995) (describing the political effect that coming out has on friends and family); Mollie Reilly, *Rob Portman Reverses Gay Marriage Stance After Son Comes Out*, HUFFINGTON POST (Mar. 15, 2013), [http://www.huffingtonpost.com/2013/03/15/rob-portman-gay-marriage\\_n\\_2881805.html](http://www.huffingtonpost.com/2013/03/15/rob-portman-gay-marriage_n_2881805.html) (reporting on a GOP senator’s changed perspective two years after his son came out); see also Emens, *supra* note 152, at 1372 (noting that bipartisan support for the Americans with Disabilities Act has been attributed to the many members of Congress with disabled relatives).

<sup>248</sup> I write “irrevocably” with intention. I do not think it is overly optimistic to say that we will never go back to a public discourse of racial denigration. But as I explain in this subsection, the contest over what we want to achieve under the banner of equality is an open question.

<sup>249</sup> See ELLIS COSE, *THE END OF ANGER: A NEW GENERATION’S TAKE ON RACE AND RAGE* 44 (2011); HUGHEY, *supra* note 144, at 24.

would also be far beyond the scope of this subsection, which deals mainly with shifts in the *rhetorical* condition of race. There are two reasons for my emphasis on the rhetorical over the material. The first is a matter of internal consistency. As I previously noted, race-as-equality corresponds with race-as-denigration discussed in Part II. I argued there that race-as-denigration was elemental to the definition of race because of the then-prevailing belief in the inherent inferiority of non-Whites that helped to shape the meaning and operation of race in society. My argument, however, did not seek to (nor could it) prove that inherent inferiority was an actual lived condition of non-Whites. Under the traditional conception, non-Whites were not *in fact* inferior to Whites but merely described to be so. Similarly, one can say that the prevailing view today is that race has no effect on the inherent equality of all persons.

The second, more substantive reason for my emphasis on the rhetorical is the indeterminate nature of equality. In order to assess whether we have achieved lived equality, we would initially need to know what that state of affairs would be. But this is difficult to envision not least because racial equality appears to be such an all-encompassing or all-or-nothing notion such that talking about the actualization of equality is nearly impossible.<sup>250</sup> Moreover, as Peter Westen has shown, equality has multiple meanings, more than one of which may be considered “bona fide.”<sup>251</sup> If, as one of my law professors years ago suggested, equality requires us to place everyone on some imaginary horizontal line labeled “equality,” what does the line stand for? “[P]aychecks and power[?]”<sup>252</sup> Happiness and well-being? Whiteness? Is it best expressed through a horizontal line, or can it be a curve, or maybe a Venn diagram? We seem to have a much better grasp on describing *inequality* using these and other measures whereas equality, even conceptually speaking, remains elusive. For this reason, I postpone the discussion about the material condition of race to race-as-inclusion below. I believe that the concept of inclusion offers more flexibility and content for analyzing the material aspects of race.

Setting aside the issue of material equality, however, does not advance my claim that the meaning of race has turned toward equality. After all, what I am describing may be merely a rhetorical shift that falls short of the kind of change needed to rise to the level of a social condition. At the outset, it is worth noting that even a “mere” rhetorical shift toward equality in race discourse is a significant, albeit insufficient, event. Many scholars have demonstrated the powerful, even creative, force of

<sup>250</sup> This trap of perfectionism was a concern for nineteenth century Black leaders who, according to Celeste Condit and John Lucaites, developed the notion of “equal rights” to make equality claims more plausible and concrete. See CONDIT & LUCAITES, *supra* note 179, at 89.

<sup>251</sup> PETER WESTEN, SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF ‘EQUALITY’ IN MORAL AND LEGAL DISCOURSE xvi (1990). Many others have also discussed the ambiguity of equality. See, e.g., CONDIT & LUCAITES, *supra* note 179, at 89; MATT CAVANAGH, AGAINST EQUALITY OF OPPORTUNITY (2002).

<sup>252</sup> FOLEY, *supra* note 199 (epigraph of book quoting Linda Chavez-Thompson).

rhetoric and discourse on the formation of individuals, groups, and society itself.<sup>253</sup> Such identity-constitutive rhetoric, as Celeste Condit and John Lucaites argue, also enables a group “to articulate in public the pressing survival needs of its constituents.”<sup>254</sup> Our history confirms the truth of these insights. The public declarations and endorsements of the natural inferiority of non-Whites by courts, political figures, academics, and others had a disastrous effect in the United States by normalizing systematic exclusion from social, political, and economic participation. Similarly, the adoption of the rhetoric of equality by those same sources of public knowledge was widely influential in dismantling many of the exclusionary mechanisms that were in place. Thus, rhetorical shifts, in and of themselves, matter.

Of course, one hopes that there is more to the rhetoric of equality than the mouthing of the word; we want speakers to mean what they say (and furthermore to act consistently with such meaning). Even so, our normative desire for integrity will depend in large part on the substantive meaning behind the word. Whether one endorses, say, Ward Connerly’s pursuit of “equality” depends on what he means by it.<sup>255</sup> The fact is that the rhetoric of equality has been around for a long time and its definition would have been, at times, unintelligible to us today. Recall the views of Thomas Jefferson, who penned the original draft of the Declaration of Independence, asserting that “all men are created equal” but in fact excluding all Blacks from his meaning.<sup>256</sup> As many scholars have observed, the idea of racial equality that is recognizable to us today derives not from our founding fathers and documents, but from America’s first dissidents: the abolitionists.<sup>257</sup> It is they who argued for the extension of equality to all men (“universal equality”) and transformed the Constitution into a document that could be read to ensure equal liberty regardless of race.<sup>258</sup>

---

<sup>253</sup> See CONDIT & LUCAITES, *supra* note 179, at x; GORDON, *supra* note 12, at 163; cf. WESTEN, *supra* note 251, at xiii–xiv (describing how authors of the Equal Rights Amendment used the term “equality” to link their cause to an “ancient and powerful rhetorical tradition”).

<sup>254</sup> See CONDIT & LUCAITES, *supra* note 179, at 76–77.

<sup>255</sup> See WARD CONNERLY, *CREATING EQUAL: MY FIGHT AGAINST RACE PREFERENCES* (2000).

<sup>256</sup> See *supra* text accompanying note 50–53.

<sup>257</sup> See CONDIT & LUCAITES, *supra* note 179, at 79; FONER, *supra* note 80, at 157. Early feminists also fought for the universal equality idea that is dominant today. To be sure, not all abolitionists embraced a robust definition of equality. Indeed, there is evidence that it was White abolitionists, who contemplated the presence of “equal” non-Whites in society, who felt more acutely the need to develop a racial theory reflecting hierarchy. See JACKSON & WEIDMAN, *supra* note 28, at 56; see also CONDIT & LUCAITES, *supra* note 179, at 71–72 (discussing the differences between Black and White abolitionists).

<sup>258</sup> See CONDIT & LUCAITES, *supra* note 179, at 79; Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 334–35

Rather than resolving the meaning of equality, emancipation appears to have multiplied it. As the opinions in *Plessy v. Ferguson* reveal, even the notion of universal equality could be subdivided into political, civil, and social equality.<sup>259</sup> Justice Brown's majority opinion in *Plessy* asserted that while the Constitution guaranteed political equality for all races, it said nothing about universal civil and social equality.<sup>260</sup> Even Justice Harlan's much-lauded dissent, while extending civil equality to Blacks, did not contemplate social equality among the races.<sup>261</sup> It was not until the Civil Rights Era of the 1950s and 1960s that an undivided notion of universal equality would begin to take hold.

What is also clear about the notion of equality in nineteenth and early-twentieth century United States is that equality seemed to have little to do with the equality of *people*. In *Plessy*, the idea that Blacks could be equal to Whites seemed to be beyond the ken of the Justices, all of whom presupposed the superiority of the White race.<sup>262</sup> For each of these men, equality was an artificial veneer: we must act *as if* Blacks are equal,<sup>263</sup> law must blind itself to extant distinctions of race.<sup>264</sup> With equality of people being impossible (that is, inconceivable), *Plessy* held that there remains only the equality of things, like accommodations and rights.<sup>265</sup> In this way, "separate but equal" was rationalized.

This idea was dramatically rejected in *Brown v. Board of Education*, and its predecessor, *Mendez v. Westminster School District*, where the courts concentrated on the equality of people over things.<sup>266</sup> Comparable facilities were not enough to meet the demands of equality; nor, presumably, would equivalent "intangible" reputational values satisfy.<sup>267</sup> Instead, the unanimous *Brown* opinion focused on the schoolchildren themselves and the psychological and social effects of segregated education on them.<sup>268</sup> Using social science evidence, the Court discussed in detail the "feeling of inferiority" generated by racially separate education to describe the in-

---

(1987) (analyzing Frederick Douglass's interpretation). Equal was not "universal"—women remained excepted from its definition.

<sup>259</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>260</sup> *Id.* at 544.

<sup>261</sup> *Id.* at 559 (Harlan, J., dissenting).

<sup>262</sup> *Id.* at 549; *id.* at 559 (Harlan, J., dissenting).

<sup>263</sup> Such dispensation was limited to Blacks. Justice Harlan, who expressed the view of equality before the law, excluded the Chinese from the possibility of equal citizenship. *See id.* at 561 (Harlan, J., dissenting).

<sup>264</sup> After giving assurances that the White race will likely remain superior for all time, Justice Harlan writes: "In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful." *Id.* at 559 (Harlan, J., dissenting).

<sup>265</sup> *Id.* at 548.

<sup>266</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); *Mendez v. Westminster Sch. Dist.*, 64 F. Supp. 544, 549 (S.D. Cal. 1946).

<sup>267</sup> *See Sweatt v. Painter*, 339 U.S. 629, 633–34 (1950).

<sup>268</sup> *Brown*, 347 U.S. at 494.

equality of segregation.<sup>269</sup> The idea of equality inhering in people is perhaps even more forcefully articulated in *Mendez*, where District Judge Paul J. McCormick declared that “[a] paramount requisite in the American system of public education is *social* equality.”<sup>270</sup>

The *Brown* decision signaled the acceptance of an understanding of equality that would look to people as its definition and measure.<sup>271</sup> Because *people* of all races are equal, inherent racial inequality could no longer serve as a justification for race-based exclusion. But this meaning of equality is hopelessly abstract, and any consensus that might have been reached inevitably dissolved—if not in concept then surely in the follow-through.<sup>272</sup> Although the toppling of legal segregation among races was the immediate, logical outcome, what might be needed next was controversial. As early as 1964, Martin Luther King, Jr. observed that granting equality, with “nothing more . . . appears reasonable, but it is not realistic.”<sup>273</sup> The contradiction between the inherent equality of all races and the actual subordinated position of non-Whites did not lead to the abandonment of equality nor an energetic effort to actualize it, but instead set equality on a trajectory toward further modification and proliferation of its meaning.

In the post-*Brown* era, as Reva Siegel points out, the concept of race-as-equality has splintered into three distinct principles of equal protection: the conservative anticlassification principle, the progressive anti-subordination principle, and the newly emergent, moderate antibalkanization principle.<sup>274</sup> Briefly, the anticlassification principle proceeds from the position that because all people are inherently equal, it follows that all people should be treated the same.<sup>275</sup> The antisubordination princi-

<sup>269</sup> *Id.* at 489 n.4, 493–94.

<sup>270</sup> *Mendez*, 64 F. Supp. at 549 (emphasis added).

<sup>271</sup> The pendulum may have swung too far in the public education context. In *San Antonio Independent School District v. Rodriguez*, the Supreme Court rejected the plaintiff’s contention that the dramatic disparity in funding among the state’s public schools violates equal protection. 411 U.S. 1 (1973).

<sup>272</sup> See Cruz, *supra* note 117, at 27 (describing the weak commitment to actuating material equality).

<sup>273</sup> MARTIN LUTHER KING, JR., *WHY WE CAN’T WAIT* 147 (1964). A more visceral description of the hollowness of nominal equality is provided by the Black abolitionist Hosea Easton: “Merely to cease beating the colored people, and leave them in their gore, and call it emancipation, is nonsense.” See CONDIT & LUCAITES, *supra* note 179, at 92 (quoting HOSEA EASTON, *A TREATISE ON THE INTELLECTUAL CHARACTER AND CIVIL AND POLITICAL CONDITION OF THE COLORED PEOPLE OF THE U. STATES AND THE PREJUDICE EXERCISED TOWARDS THEM* 52 (1837)).

<sup>274</sup> Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *YALE L.J.* 1278, 1281–82 (2011). Siegel explains that this fragmentation did not occur until the 1970s. *Id.* at 1291.

<sup>275</sup> This is because the harm of race, under this view, is seen as the classification of individuals into distinct groups. See *id.* at 1287–88. Thus, a race-conscious remedy is only allowable in situations where classification has been intentionally applied and can be described as arguing for neutrality rather than equality. See *id.* at 1298.

ple, on the other hand, does not take equality as the starting point but the end; thus, disparate treatment is appropriate in cases where it promotes the goal of racial equality.<sup>276</sup> Antisubordination endorses the inherent equality of all people, but also assumes that this premise cannot capture the full meaning or promise of equality in a society that has always been racially stratified.<sup>277</sup> Finally, antibalkanization argues that disparate treatment aimed at correcting social inequality is permissible unless it threatens social cohesion.<sup>278</sup> Antibalkanization seems to accept that all humans are inherently equal and that the concept of equality requires more than the recognition of this fact, while at the same time imposing a side constraint on the pursuit of equality.

There are two things to note about this most recent iteration of equality in legal discourse. First, it tends to demonstrate that the rhetoric of race-as-equality is not merely cosmetic. Under all three views of equality, the inherent equality of persons, regardless of race, is the common starting point of analysis. Indeed, none of the views would make sense without this underlying premise. Under the anticlassification principle, which in popular parlance is called the colorblindness principle, it makes no sense to argue—as a matter of justice—that all persons should be treated the same if in fact persons are not equal to begin with.<sup>279</sup> Under the antisubordination principle, too, it makes no sense to argue that justice requires differential treatment of subordinated persons who are inherently inferior. Both of these objections would apply to the antibalkanization principle as well. To be sure, the outcomes of policies and cases may differ based on which principle is applied, but that does not negate the common assumption of equality that underpins each approach to what equality demands in operation. In my view, this weakens the claim a skeptic might make that evidence of continuing material inequality is also evidence that the old assumptions about racial inferiority persist.<sup>280</sup> It

---

<sup>276</sup> Under the antisubordination principle, the harm of race is identified as existing and future social inequality. *See id.* at 1288–89.

<sup>277</sup> *See id.*

<sup>278</sup> The antibalkanization perspective identifies the harm of race as its potential to generate social conflict in cases of both extreme stratification and extreme remediation. *See id.* at 1300.

<sup>279</sup> *See* ANDERSON, *supra* note 134, at 25.

<sup>280</sup> Some caution on this point is in order. Implicit bias research has shown that most people make unconscious associations between non-Whites and negative characteristics. Thus, one might say that race-as-denigration persists in some form. As I have indicated, the shift I am describing does not necessarily displace the old conception of race so much as it challenges and coexists with it in the American mainstream. In addition, the fact that this research demonstrates race-as-denigration persists at the *unconscious* level is significant; race-as-equality perhaps has not penetrated “all the way down,” but it is also not merely cosmetic either (i.e., implicit bias research is not exposing covert bias). *See, e.g.,* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1514 (2005) (explaining that implicit bias contradicts “sincere self-reports”).

turns out that poor outcomes for racial minorities can occur even under the condition of race-as-equality.

Second, it appears that in the contemporary context, the antibalkanization view of equality may have the greatest salience. This is in part because several of the most recent Supreme Court decisions addressing race equality have been decided by “swing” Justices who have relied on this principle.<sup>281</sup> In addition, antibalkanization came into being in response to latter-day equal protection cases where the Court has been called upon to review challenges to civil rights initiatives such as affirmative action and racial redistricting.<sup>282</sup> Antibalkanization is also closely aligned with race-as-identity in that it emphasizes history, identity, and diversity. Finally, it is “postracial” in the sense that the Justices who embrace this principle have expressed the hope that some day, race will not matter.<sup>283</sup>

If I am right, then the condition of race-as-equality may very well mean more than just the premise of inherent equality. Antibalkanization, as that principle played out in *Grutter*, for example, suggests that race is valuable not only to the people of color who assert it to cultivate their own sense of identity and belonging, but also to Whites who can benefit from the knowledge and perspectives of non-Whites.<sup>284</sup> Thus, race-as-equality under antibalkanization also gestures toward equal *worth* as a justification for diversity, albeit one that appears to be stubbornly assessed from a White point of view.<sup>285</sup> Indeed, the proliferation of diversity pro-

<sup>281</sup> Reva Siegel names Justices O’Connor, Kennedy, and Powell, as moderate judges who have adhered to the antibalkanization principle. These Justices’ views were critical in the higher education affirmative action cases *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), the racial integration case *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), and the racial redistricting case *Shaw v. Reno*, 509 U.S. 630 (1993). See Siegel, *supra* note 274, at 1293–99, 1305–15.

<sup>282</sup> See Siegel, *supra* note 274, at 1302. In contrast, anticlassification and antisubordination principles both derive from *Brown* and the Court’s work in dismantling the separate-but-equal doctrine. See *id.*

<sup>283</sup> See *id.* at 1295, 1306 (quoting Justices O’Connor and Kennedy, respectively in *Shaw*, 509 U.S. at 657, and *Parents Involved*, 551 U.S. at 787, expressing this view). That this position should not be confused with the anticlassificationist colorblind ideology is clear from Siegel’s thesis as well as from Justice Kennedy’s own overt rejection of colorblindness as a viable constitutional principle in *Parents Involved*. See *Parents Involved*, 551 U.S. at 787–88 (Kennedy, J., concurring). But see Helen Norton, *The Supreme Court’s Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 212–13 (2010) (linking postracialism with anticlassification).

<sup>284</sup> See *Grutter*, 539 U.S. at 333.

<sup>285</sup> Condit and Lucaites observe that equality has been associated with the notion of worth since the nineteenth century. CONDIT & LUCAITES, *supra* note 179, at 80; see also *supra* text accompanying notes 210–12 (identifying worth as a central concern of race-as-identity). With respect to the critique that *Grutter* is based on a White perspective of affirmative action, see Kenneth B. Nunn, *Diversity as a Dead-End*, 35 PEPP. L. REV. 705, 723–25 (2008). While I sympathize with this critique, I think it tends to overlook the Court’s stated concerns that broad access to education is a paramount goal, see *Grutter*,

grams in American institutions suggests that there is widespread recognition of the value of non-White racial identity, for a variety of reasons.<sup>286</sup> Interestingly, at least one critic of *Grutter* has argued that the Court was wrong to rely on historical subordination to defend the University of Michigan Law School's program because today's diversity programs are based on institutional objectives distinct from remedial concerns.<sup>287</sup> But another way to read the *Grutter* decision is to recognize that the Court acceded to the importance of history and experience in the multiculturalist framework for race-as-identity.

Ironically, this recognition of worth appears to have come at the cost of displacing the concept of equality as the overriding concern of race-conscious policies. Antibalkanization is an equal protection principle that does not seem to privilege equality so much as inclusion: equality is neither a state of being (per anticlassification) nor a goal to be pursued (per antisubordination).<sup>288</sup> Antibalkanization emphasizes the need for an inclusive and thereby cohesive society, a concern that not only reflects consideration of the divisions of the past—such as Jim Crow segregation—but also those of the present that arise from identity politics.<sup>289</sup> Thus, racial inequality—which is acknowledged to exist—should be remedied not for its own sake but because it endangers this cohesive vision of the nation that promises “[e]ffective participation by members of all racial and ethnic groups.”<sup>290</sup> At the same time, too much remedy could also lead to divisiveness because those who are disadvantaged, even under a benign race-conscious policy, may come to feel excluded and resentful.<sup>291</sup> Thus

---

539 U.S. at 331–32, and that lack of diversity delegitimizes institutions—an argument that seems to be based on the perspective of excluded people of color. *See id.* at 332–33.

<sup>286</sup> *See* Hawkins, *supra* note 221, at 84–90; Leong, *supra* note 168, at 2166–67.

<sup>287</sup> *See* Hawkins, *supra* note 221, at 77–78, 107. This article brings much-needed insight into the difference between the diversity and remedial rationales that animate various institutional initiatives related to employment and admissions. However, the two cannot be completely divorced from one another—at least not in the realm of race, where it is the history and experience of oppression that fundamentally constitutes the difference necessary for diversity and that calls for the remedy of affirmative action. While there may be pragmatic reasons for race progressives to support diversity programs (I, too, support them), they are distasteful and incomplete precisely because of the displacement of this history and experience by objectives such as “improved business competence” and “increased operational performance.” Even the otherwise welcome rationale of “good corporate citizenship” sidesteps the justice-based claims advanced by people of color in their demand for inclusion. I hasten to add that the critique against the diversity rationale stems from more than the desire for psychic affirmation; a shallow and purely instrumental understanding of difference is also likely to negatively affect the experiences of included racial minorities. *See infra* Part IV.

<sup>288</sup> Siegel, *supra* note 274, at 1283, 1288–89.

<sup>289</sup> *Id.* at 1300.

<sup>290</sup> *Grutter*, 539 U.S. at 332.

<sup>291</sup> *See* Siegel, *supra* note 274, at 1308; *see also* MUKHERJEE, *supra* note 6, at 19 (observing that affirmative action discourse freezes out a smaller and smaller percentage of the population).

the *Grutter* decision, along with its companion case *Gratz*, suggests that the Court is less concerned with whether affirmative action could be pursued and more with how it is implemented.<sup>292</sup> In this way, race-as-equality under the antibalkanization principle equalizes Whites and non-Whites in terms of their vulnerability to wrongheaded or poorly-administered race-conscious policies, while at the same time acknowledging the historical antecedents that make benign race-conscious policies necessary to restore and maintain the polity.<sup>293</sup> Thus, while the race-as-equality condition might be more robust than ever, it has also been relegated to, at best, a secondary role.

### C. *Race-as-Inclusion*

The final condition of the new conception of race is inclusion. Unlike race-as-equality, where I focused mainly on discursive practices, inclusion has both discursive and material dimensions. My claim is that not only does the concept of race today demand inclusion, but also that inclusion is occurring on a significant scale. Indeed, it is the fact of actual inclusion—epitomized by Barack Obama’s election as U.S. President—that has triggered the widespread claim of a postracial America. Accordingly, this discursive and experiential shift is helping to reshape our conception of race.

In a society where both racial identity and racial equality are highly valued, the logic of inclusion seems obvious. Identity and equality are both attributes that qualify persons to participate in various public and private activities. Whether one is talking about a patently political act like voting or an intimate act like getting married, who you are and the social status you enjoy will play an important, sometimes even dispositive, role on the possibility of participation. It was the lack of personhood and respect, and the unequal status that such deficit implied, that justified the racial exclusion described in Part II of this Article. Conversely, the dismantling of exclusionary institutions such as slavery, Jim Crow, and racialized marriage and naturalization laws, as well as the establishment of inclusionary policies such as affirmative action and antidiscrimination legislation, were premised on the recognition of both identity and equality as fundamental attributes of persons of all races.<sup>294</sup>

In the twenty-first century United States, the idea of race-as-exclusion is anathema. Other than extremists, no one—progressives, moderates, or

---

<sup>292</sup> *Grutter*, 539 U.S. at 328; *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003).

<sup>293</sup> Barack Obama, in his pivotal 2008 speech on race, echoed this understanding of race-as-equality by analogizing anger in the Black community with anger in the White community. Barack Obama, President, United States, Race Speech at the Constitution Center (Mar. 18, 2008), available at <http://constitutioncenter.org/amoreperfection>. Although Reva Siegel argues that then-nominee Obama managed to relate “[w]ithout equating,” see Siegel, *supra* note 274, at 1350, others have been critical. See, e.g., Crenshaw, *supra* note 151, at 1323–24.

<sup>294</sup> See *supra* Parts III.A & B.

conservatives—advocates publicly for exclusion solely on the basis of race. Quite the contrary, “diversity” is the watchword of the day: from universities to Fortune 500 companies to the United States military, inclusion of racial minorities is identified as both a value and a goal.<sup>295</sup> There are, to be sure, varying approaches to diversity. For example, conservatives may argue that a policy of race neutrality will succeed in achieving inclusion, albeit more gradually than some may like. More progressive thinkers, on the other hand, may believe that affirmative action must be taken in order to achieve inclusion more quickly or at all. Moreover, such diversity-oriented policies may be founded on differing rationales: they may be justified as a remedy for centuries of exclusionary practices, a corrective for present-day biases, or a politically legitimating mechanism in a racially plural democracy. Whichever variant is at work, it is extremely difficult to find mainstream discourses that explicitly seek to (re)create Whites-only preserves.

Of course, inclusive rhetoric is one thing and inclusive institutions are another. Progressives are understandably skeptical about race neutrality as demonstrating, at best, an inadequate commitment to inclusion. (At worst, race neutrality may betray a secret desire for continued White supremacy.<sup>296</sup>) But the fact is that inclusion is occurring all around us and has been so over the past several decades.<sup>297</sup> Walk through a college campus, a shopping mall, or a government building and you will see racial minorities studying, working, teaching, visiting, and offering and demanding services at each of these places. Increasingly, people of color are attaining positions of wealth and power that would have been almost unthinkable just 50 years ago (or even five years in the case of the U.S. Presidency).<sup>298</sup> The Black middle class has been steadily growing.<sup>299</sup> Inter-

---

<sup>295</sup> See EXXONMOBIL, GLOBAL DIVERSITY 1, available at [http://www.exxonmobil.com/Corporate/Files/news\\_pub\\_diversity.pdf](http://www.exxonmobil.com/Corporate/Files/news_pub_diversity.pdf); HEADQUARTERS, DEP'T OF THE ARMY, UNITED STATES ARMY DIVERSITY ROADMAP 1 (2010), available at [http://www.armydiversity.army.mil/document/Diversity\\_Roadmap.pdf](http://www.armydiversity.army.mil/document/Diversity_Roadmap.pdf); UNIV. OF OR., DIVERSITY STRATEGIC ACTION PLAN PROGRESS REPORT (2010–11), available at [http://oei.uoregon.edu/sites/oei.uoregon.edu/files/Final\\_Report\\_2010-2011-sm.pdf](http://oei.uoregon.edu/sites/oei.uoregon.edu/files/Final_Report_2010-2011-sm.pdf); WALMART, DIVERSITY AND INCLUSION IMPACT REPORT 2 (2013), available at <http://corporate.walmart.com/global-responsibility/diversity-inclusion>.

<sup>296</sup> See, e.g., HUGHEY, *supra* note 144, at 32–34 (describing the colorblind rhetoric of White nationalists).

<sup>297</sup> See, e.g., MUKHERJEE, *supra* note 6, at 13 (noting that Blacks began attaining highly-visible, elite positions in the 1980s); TOURÉ, *supra* note 3, at 9 (observing that in the 1980s and 1990s, Blacks became more diverse in terms of education and income).

<sup>298</sup> Ellis Cose offers the following list of successful Blacks in the corporate world: “Richard Parsons as CEO of Time Warner, Kenneth Chenault as head of American Express, Ann Fudge as chairman and CEO of Young & Rubicam Brands, and . . . Kenneth Frazier as CEO of Merck.” COSE, *supra* note 249, at 8. Cose also notes that while in 1970 there were 1,100 elected Black officials, by 1990 there were about 10,000. *Id.* at 10–11 (citing historian Manning Marable).

<sup>299</sup> See Forman, *supra* note 97, at 55–56. Sociologist Kris Marsh has also noted that the composition of the Black middle class has shifted from a family structure to a single-and-living-alone “Love Jones” model. Kris Marsh, *Opinion: Where is the Black*

racial marriages are slowly increasing.<sup>300</sup> The multiracial population—whether through birth or immigration—is burgeoning.<sup>301</sup> All of these signs suggest that the United States is more inclusive than ever before.

There is also reason to believe that the United States will continue on its trajectory toward greater inclusion. Antidiscrimination laws and diversity-oriented policies of various stripes can be expected to continue to affect the attainment by racial minorities of important social resources like education, housing, voting, and employment. Attitudes about racial minorities—for example, in the interracial marriage context—continually become more open and tolerant.<sup>302</sup> Some legal scholars, like Jerry Kang, have expressed cautious optimism that technology can also lessen the exclusionary impact of race.<sup>303</sup> Others have suggested that generational turnover will render American society more racially inclusive.<sup>304</sup> The changes have been slow in coming; as Kenneth Karst observed, “[w]hat the Court and the Congress mainly achieved through law during [the 1960s] was not racial integration but the elimination of barriers to integration.”<sup>305</sup> But Karst also suggests that inclusion begets more inclusion, as greater social interaction and knowledge-sharing not only affects the non-Whites who are gaining access but also Whites who are at the same time becoming “re-acculturated.”<sup>306</sup> Even if some Whites do not undergo such internal transformation, the demographic reality of enlarged

*Middle Class? You Don't Have to Look Far*, CNN (Jan. 4, 2012), <http://inamerica.blogs.cnn.com/2012/01/04/where-is-the-black-middle-class-you-dont-have-to-look-far/>.

<sup>300</sup> See WANG, *supra* note 153, at 1, 5. To be sure, rates of interracial marriages differ across racial groups and across gender. For example, Asian American women tend to out-marry at rates that are significantly higher than Asian American men and African American women. However, given the history of interracial sex and marriage in the United States, together with the particular racialization patterns for Asian Americans and Latina/os, interracial marriage constitutes “a particularly salient terrain on which incorporation occurs.” See PERRY, *supra* note 6, at 139.

<sup>301</sup> See Spencer, *supra* note 154, at 161.

<sup>302</sup> See WANG, *supra* note 153, at 7.

<sup>303</sup> See Kang, *supra* note 280, at 1592–93; Kang & Banaji, *supra* note 74, at 1092–93.

<sup>304</sup> See RICHARD J. PAYNE, *GETTING BEYOND RACE: THE CHANGING AMERICAN CULTURE* 77–78 (1998); see also COSE, *supra* note 249, at 49 (observing that White rage over recent social changes is “too rooted in old ideas and in old people to survive much beyond this generation”); DON TAPSCOTT, *GROWN UP DIGITAL: HOW THE NET GENERATION IS CHANGING YOUR WORLD* 2, 6 (2009) (calling the millennial generation “smarter, quicker, and more tolerant of diversity,” and “a force for social transformation”).

<sup>305</sup> KARST, *supra* note 201, at 155.

<sup>306</sup> See *id.* at 160; see also Melody Finnemore, *The Good, the Bad and the Ugly: Minority Attorneys Face It All*, *Longtime Advocate Says*, 73 OR. ST. B. BULL. 30, 30 (2013) (describing how a White lawyer’s participation in the state bar’s diversity programs has opened his eyes to subtle forms of racial discrimination that he did not see before); cf. COSE, *supra* note 249, at 1 (“Black hope and white growth . . . are closely related.”); Deborah Waire Post, *Reflections on Identity, Diversity and Morality*, 6 BERKELEY WOMEN’S L.J. 136, 154 (1990–1991) (describing how White liberals who participated in the Civil Rights Movement were also engaged in the invention of their own culture).

and empowered minority groups is likely to force further inclusion in the future.<sup>307</sup>

This is truly an amazing story of social progress, and whether one believes such progress occurred with the help of Whites or in spite of them, the fact of inclusion cannot be denied.<sup>308</sup> Indeed, it is so amazing that very few seem to have believed it occurred. The event that precipitated the calls for a postracial society, Barack Obama's history-making ascent to the U.S. Presidency, seemed so unlikely that many were still expecting his campaign to fail, even on election night.<sup>309</sup> In part because they did not believe that the people of the United States would choose a Black president, many people of color, including Blacks, did not initially support Obama's run. As Gwen Ifill has written, it was Obama's victory in the predominately White Midwestern state of Iowa that turned the tide and allowed people to think there might be genuine "hope" and "change" in the United States.<sup>310</sup> In thinking about the new conception of race-as-inclusion, then, the election of Barack Obama is an important event, but the fact that it came as such a surprise to so many—myself included—may be even more important. It suggested that perhaps many of us who think about and study race in the United States missed something crucial in our analyses.<sup>311</sup>

---

<sup>307</sup> A stark example of this dynamic was seen within days of Obama's 2012 victory when many Republicans reversed their positions on immigration policies in an effort to court the "Latino vote." See Ezra Klein, *Two Numbers Show Why Republicans Support Immigration Reform*, WASH. POST WONKBLOG (Jan. 28, 2013, 10:34 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/28/two-numbers-show-why-republicans-support-immigration-reform/>. On the other hand, revealing a dynamic of limited inclusion, see *infra*, the high voter turnout among Blacks in 2008 spurred Republicans to enact voter-ID laws in response. See Jane Mayer, *The Voter-Fraud Myth*, NEW YORKER, Oct. 29 & Nov. 5, 2012, at 44, 49.

<sup>308</sup> See, e.g., Adam Hanft, *In Panic Mode, Hillary Clinton Joins the LBJ Wing of the Democratic Party*, HUFFINGTON POST (Jan. 8, 2008), [http://www.huffingtonpost.com/adam-hanft/in-panic-mode-hillary-cli\\_1\\_b\\_80504.html](http://www.huffingtonpost.com/adam-hanft/in-panic-mode-hillary-cli_1_b_80504.html) (describing Clinton's controversial statement that Martin Luther King, Jr.'s "dream became real" through Lyndon Johnson's policies).

<sup>309</sup> Doubts may have been fueled by the "Bradley Effect," which suggests that pre-election polls of voters are significantly inaccurate when it comes to Black political candidates. While Obama's victory in 2008 argued against the "Bradley Effect," some commentators during the 2012 election resurrected the concern. See Rich Karlgaard, *Does the Bradley Effect Overtake Obama in the Polls?*, FORBES (Sep. 16, 2012), <http://www.forbes.com/sites/richkarlgaard/2012/09/16/does-the-bradley-effect-overtake-obama-in-the-polls/>.

<sup>310</sup> See IFILL, *supra* note 155, at 163.

<sup>311</sup> See, e.g., COSE, *supra* note 249, at 6–9 (describing how Obama's election defied expectations within the Black community); IFILL, *supra* note 155, at 1 (admitting that 30 years in journalism covering race failed to prepare the author for Obama's rise); Crenshaw, *supra* note 151, at 1311 (observing that for those Critical Race Theorists that struggled for survival in the 1980s and 1990s, Obama's election may seem like "one of Derrick Bell's fantastical chronicles" or "a mirage"). Had such disbelief continued, it is possible that we might have failed to elect the first Black president and would have had no one to blame but ourselves. Cf. IFILL, *supra* note 155, at 67

This picture of racial progress is not as rosy as it sounds. Racial inclusion is visible, but whether there is enough of it is a radically different question.<sup>312</sup> Nothing here is intended to suggest that we now live in a fully inclusive society. That claim would be simply counterfactual. The dramatic racial disparities in such social indicators as wealth, income, education, and health suggest that inclusion has been deficient.<sup>313</sup> Whether inclusion is evenly distributed across racial groups is another question. For example, Asian Americans tend to fare better than other non-White groups in terms of access to opportunities such as education and income. Multiracial individuals may also fall into this category.<sup>314</sup> Finally, non-Whites often experience both inclusion and exclusion in varying contexts. For example, with respect to access to higher education, Blacks and Latina/os may be favored for admission under affirmative action policies, but in the criminal justice context, those same groups may be targeted for regulation under the racial profiling practices of the police.<sup>315</sup>

Accordingly, the condition of inclusion, though real and palpable, feels both insecure and incomplete. This probably has something to do with the economic downturn, which has hit minority populations harder than Whites.<sup>316</sup> But even without this sense of personal vulnerability, one cannot miss the apparent racial contradictions that mark our times. For example, we have seen decades of persistent and aggressive attacks against affirmative action but, as discussed above, the idea of diversity is flourishing today. There is mass incarceration of Black men in our country, but we also elected a Black man to the U.S. Presidency, twice. We have been anticipating becoming a majority–minority nation by the mid-twenty-first century, but we are also seeing the rise of multiracial identities that threatens to blur the color lines underlying this projection. There is no one-to-one opposition in these examples: Obama does not negate mass incarceration and mass incarceration does not negate Obama. Nor can we continue to insist that Obama is merely an exception

---

(quoting Michelle Obama saying “[t]hat gnawing sense of self-doubt that is so common in all of us, is a lie . . . . We are more prepared than we could ever know.” (internal quotation marks omitted)); Ralph Richard Banks, *Beyond Colorblindness: Neo-Racialism and the Future of Race and Law Scholarship*, 25 HARV. BLACKLETTER L.J. 41, 43 (2009) (observing that an “initially unyielding sense of skepticism” threatened the viability of Obama’s victory).

<sup>312</sup> See MUKHERJEE, *supra* note 6, at 17.

<sup>313</sup> See *supra* note 115.

<sup>314</sup> See Ware & Davis, *supra* note 174, at 534; cf. DACOSTA, *supra* note 154, at 155 (citing a study indicating that the buying power of multiracials falls below Blacks but above Native Americans, and is expected to rise faster than that of both Blacks and Whites in the future).

<sup>315</sup> See HOWARD MCGARY, *THE POST-RACIAL IDEAL* 30 (2012). The Hispanic population also suffers from a similarly high rate of poverty. See *id.* See generally Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1008 (2001) (discussing, in both comparative and absolute terms, the impact of mass incarceration on the Black community).

<sup>316</sup> See Crenshaw, *supra* note 151, at 1338 n.256.

that proves the rule. Yes, Barack Obama is an extraordinary man who is the first and only (self-identified) Black man to become President, but there are countless other gifted men and women of color who have achieved power, influence, and wealth. What I have been trying to show in this Article is that these contrasting phenomena may not actually be contradictions but juxtapositions, symptomatic of two competing conceptions of race that play out *as* mainstream, hegemonic race discourse.

It is no wonder, then, that we find ourselves in a period of proliferating “posts,” for the possibility of radical transformation and disruption of the status quo is constrained when we operate within, instead of against, widely-accepted frameworks.<sup>317</sup> Many are thus looking toward the future-as-present, articulating as yet inchoate approaches to race and racism that are described as “post-Black,”<sup>318</sup> “post-soul,”<sup>319</sup> “post-intent,”<sup>320</sup> “post-human,”<sup>321</sup> and, of course, “post-race.” As this list demonstrates, it is not just thought, but also language that is struggling to find new ways of naming and critiquing varying forms of racial subordination, where all of these “posts” stand as placeholders for a new discourse that will help us “converse and connect”<sup>322</sup> with each other and with the lived realities of race.<sup>323</sup> This search for a new radical theory of race is a positive development, but my focus here remains on the mainstream. And although what I have called the new conception of race is playing out in that arena, I do not believe it is *played out*. In particular, there has been too little attention paid to the idea of inclusion, which can be an important tool in advancing the goals of the Civil Rights Movement and in preparing the ground for the next generation of race theories. In the next Part of this Article, I

<sup>317</sup> Cf. Lois McNay, *Feminism and Post-Identity Politics: The Problem of Agency*, 17 CONSTELLATIONS 512, 522 (2010) (arguing that “a certain degree of routinization and entrenchment is crucial to ensure that the radical thrust of counter-hegemonic practices endures”).

<sup>318</sup> See TOURÉ, *supra* note 3, at 12.

<sup>319</sup> See MUKHERJEE, *supra* note 6, at 6 (attributing the term also to Eduardo Bonilla-Silva, Nelson George, and others).

<sup>320</sup> See PERRY, *supra* note 6, at 21.

<sup>321</sup> See Judith Halberstam & Ira Livingston, *Introduction to POSTHUMAN BODIES* 1, 9 (Judith Halberstam & Ira Livingston eds., 1995).

<sup>322</sup> See Lamont Lilly, *New Blackness and the Post-Soul Aesthetic: An Interview with Mark Anthony Neal*, RACIALICIOUS (Mar. 13, 2013), <http://www.racialicious.com/2013/03/13/new-blackness-the-post-soul-aesthetic-an-interview-with-mark-anthony-neal/> (quoting Neal talking about the use of the “n-word”).

<sup>323</sup> See, e.g., PERRY, *supra* note 6, at 42 (referring to “racism” as “practices of inequality” in order to move away from the focus on intent); Kang & Banaji, *supra* note 74, at 1067 (suggesting that we use the phrase “fair measures” instead of “affirmative action” to reflect new information on the effect of implicit bias). See also David A. Hollinger, *Obama, The Instability of Color Lines, and the Promise of a Postethnic Future*, 31 CALLALOO 1033, 1033 (2008) (explaining how postracialism is marked by uncertainty and instability). Several commentators have sought new terminology to discuss evolving concepts. Cf. W. J. T. MITCHELL, SEEING THROUGH RACE 2–3 (2012) (suggesting that the frequent use of “post” expresses a historical turn in perception that remains unnamed).

make the case for why theorizing inclusion is worth the effort and take some initial steps toward developing such a theory.

#### IV. THEORIZING INCLUSION

Compared to identity and equality, inclusion is undertheorized. One reason for this may be that the basic idea of inclusion travels under various aliases, including “integration” and “diversity.” These latter terms are, in fact, often analyzed; and among racial progressives, they are also often criticized. Integration has been defined and experienced as entry into White-designated spaces<sup>324</sup>—hardly an ideal situation for non-Whites who are essentially constructed as interlopers. More positive interpretations of integration might suggest a seamless blending of races but, under identity-driven race discourse, the seams are pretty important. Thus, the integration ideal is largely thought to be dead and buried.<sup>325</sup> Diversity, on the other hand, is quite alive and well, but many progressive scholars seem to view it as a “dead-end.”<sup>326</sup> The diversity concept, which often emphasizes institutional benefits (e.g., the “business case” for diversity), seems too thin and too attenuated from the historical, justice-based claims of racial minorities to effect lasting and meaningful changes.

Rather than trying to revitalize either “integration” or “diversity,” I use the word “inclusion” because it is less politically loaded. Therefore, I think it will be more descriptively useful since it comes with less normative baggage. “Inclusion” also seems to be a word that is often used to suggest a thicker version of diversity, as in institutions describing themselves as *both* diverse and inclusive. I see this rather loose circulation of the word as a strength—it appears to be aspirational and yet largely undefined. My aim in this Part is to define this term and then deploy it to describe and evaluate the forms of inclusion that are being practiced today. I do not undertake to propose an ideal of inclusion, although I think that this is important for us to develop going forward. For now, however, I hope mainly to identify some ways of thinking about inclusion that can help us along this road.

“Inclusion,” as used in this Article, is a spare term. It means a minimum level of access to a resource such as a job, or a place in a college class. On the one hand, this is more than the availability of an *opportunity* to have a job or to attend a school. Rather, I refer to inclusion only when a person actually gets hired or accepted. On the other hand, inclusion in this context means less than some more robust uses of the word. It does not denote any significant level of respect, appreciation, or incorporation within a particular milieu. Inclusion is capacious enough to take on such

---

<sup>324</sup> Cashin, *supra* note 7, at 43; *see also* Adams, *supra* note 231, at 264 (noting that integration has become synonymous with assimilation).

<sup>325</sup> Elizabeth Anderson, however, argues that an attempt at resurrection of integration is taking place among American intellectuals. ANDERSON, *supra* note 134, at 2.

<sup>326</sup> Nunn, *supra* note 285, at 723–24; *see also* Leong, *supra* note 168, at 2156.

meaning, perhaps with a modifier like “full” or “ideal,” but it does not require it.<sup>327</sup> Thus, I think of inclusion here as a flexible, sliding-scale condition of human beings in American social and economic life.

In addition, inclusion is categorically differentiated from exclusion. One may be tempted to define anything less than full inclusion as de facto exclusion. But this kind of definitional stop stymies rather than advances race discourse because a perfectionist stance on inclusion makes identifying the variety of racial conditions and positions that exist very difficult. For one thing, it tends to be descriptively inaccurate. There is a significant difference in the experience of, say, being hired under non-ideal conditions and not being hired at all. As explained in greater detail below, the employee faces racial harms that differ from those of the unemployed that may be either overlooked or underestimated. When race is conceptualized solely in terms of exclusion, it can be alienating to those who struggle with race discrimination in non-paradigmatic ways. Moreover, calling everything “exclusion” tends to shift the discourse back to the traditional conception of race, which may not be in operation or under limited operation in the actual employment context.

Focusing only on exclusion not only fails to account for different experiences, but it also makes it difficult to speak about them. I say this with my own personal experiences in mind. As an Asian American law professor who immigrated to the United States as a young child, I would describe the course of my life and my general condition as one largely defined by varying forms of inclusion. I would not presume that a Latina or Black law professor would say something similar, although I would also observe that being a law professor suggests a significant degree of inclusion in and of itself. At the same time, I also sense that the inclusion I experienced is likely to have been more constrained than that of a similarly situated White woman.<sup>328</sup> Framing all of my race-related experiences pursuant to the language of exclusion fails to help me distinguish among such experiences and talk about the inclusions (and exclusions) of my life. The subtle ways in which I have been overlooked or underestimated generate much different impressions and social strategies than the time that a White cab driver kicked me out of his cab for “making [him] feel sick” or when a Black man called me a “Jap” as he passed me on the

---

<sup>327</sup> The reader might object that “diversity” may serve my purposes just as well. But diversity seems to have a numerical connotation, or at best, suggests lots of variety. I think inclusion, in contrast, implies something about the substantive conditions of a given social environment. See, e.g., Tim Eigo, *Inclusion's Progress: Catching Up with the Bar's Diversity Director*, ARIZ. ATT'Y, Jun. 2010, at 14 (quoting attorney I. Godwin Otu as saying, “Diversity is the mix—we bring people from different backgrounds. Inclusion is getting that mix to work well together.”).

<sup>328</sup> For example, I doubt that a White woman would have been referred to as an “exotic minority” as I have been by a colleague. A White woman is also more likely to experience not only inclusion but also racial privilege, which is not available to non-Whites.

street.<sup>329</sup> Thus, inclusion and exclusion coexist, not only in our social structures but also in the life experiences of a single person.

By focusing on inclusion, I do not mean to argue that it is more important than exclusion. Surely both are important. Exclusion can lead to the denial of urgent human needs such as housing, food, health, education, and work. This fact has historically and presently warranted the emphasis on exclusion. But the importance of understanding inclusion is growing, partly because it appears that more people of color are experiencing it and also because this cohort is more likely to have the resources to address racial injustice. I prioritize inclusion in this Article in order to make the point that the phenomenon is largely underappreciated and potentially progressive.

My general view, as I have already indicated, is that inclusion and exclusion are coexisting conditions of American society that must be reckoned with. Moreover, they are related to one another. Inclusion can be used to deny exclusion and therefore ignore it where it exists. It can also justify exclusion by demonstrating that exclusion, where it does exist, is appropriate and deserved. The response to such regressive arguments is not to deny inclusion or treat it as a negligible exception to the overarching imperative of exclusion. Instead, we must explain how our conceptions of race contribute to extant forms of both exclusion and inclusion that are deeply problematic.

Toward that end, I briefly sketch below five types of problematic inclusion: conditional inclusion, limited inclusion, imperfect inclusion, revolving door inclusion, and overinclusion. The situational examples I use are ones that others have already identified as racially subordinating. My hope is to bring more clarity and urgency to their discussions by using the framework of inclusion. By demonstrating that these forms of inclusion are the product of two dominant and competing conceptions of race, I hope to move these issues out from the margins. By focusing on inclusion, I also attempt to illuminate some common ground among differentially included and excluded people.

#### A. *Conditional Inclusion*

Conditional inclusion refers to inclusive practices that entail racial performance for their maintenance. Studies of conditional inclusion are already well underway, especially in the work of Devon Carbado and Mitu Gulati, who analyze the ways in which racial minorities must “work” iden-

---

<sup>329</sup> Experiences of exclusion are sometimes more difficult to identify as the proving of negatives often tends to be. It is interesting that when the cultural critic Touré asked over a hundred Black celebrities, artists, academics, and others to recount the most racist thing that had ever happened to them, the most common response he received was that “the answer is unknowable.” See TOURÉ, *supra* note 3, at 120–21; see also ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* 49 (1993) (quoting a Black law firm partner saying “Had I been given a fair shot, who knows where I would be?”).

tity in the employment context in order to be and stay included.<sup>330</sup> They argue that the modern colorblind norms of the workplace actually require racial minorities to “disidentify” with their communities in order to make their White counterparts “racially comfortable.”<sup>331</sup> This is problematic not only because such performances can be self-alienating in an age of race-as-identity, but also because meeting such performance demands to “act White” imposes risks and costs on minority workers that go unrecognized and uncompensated.<sup>332</sup> Helpfully, Carbado and Gulati, along with Catherine Fisk, refer to such racial injustices as arising “after inclusion” to distinguish from the racial discrimination that prevents minorities from obtaining employment in the first place.<sup>333</sup>

Even Barack Obama, who might be supposed to have achieved a fully realized form of inclusion, can be described as actually experiencing conditional inclusion. Setting aside the question of whether he feels self-alienated, progressive critics of Obama’s presidency have argued that he has not done enough for racial minorities, especially Blacks, precisely because he is himself Black.<sup>334</sup> These critics have noted that while Obama is able to champion the concerns of the Latino and LGBT communities, he has been constrained in his ability to pursue policies that explicitly address the interests of the Black community.<sup>335</sup> Interestingly, the debate over Obama’s policies strike at his very identity, suggesting that his failure

<sup>330</sup> Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262 (2000).

<sup>331</sup> *See id.* at 1290, 1294; Roberts, *supra* note 146, at 90 (arguing that the *American Airlines* decision announced to Black women that “their right to work was conditioned on their renunciation of black culture”); *cf.* TOURÉ, *supra* note 3, at 10 (describing how a Black employee might have to be willing to talk about the previous night’s episode of *Modern Family* in order to get ahead).

<sup>332</sup> *See* Carbado & Gulati, *supra* note 330, at 1294.

<sup>333</sup> *See* Devon Carbado et al., *After Inclusion*, 4 ANN. REV. L. & SOC. SCI. 83 (2008).

<sup>334</sup> Political scientist Fredrick Harris has argued that Obama’s presidency has led to a decline in race-conscious politics because “the imperatives of reelection take over.” Fredrick Harris, *Still Waiting for Our First Black President*, WASH. POST, Jun. 1, 2012, at B01. Similarly, political activist Eva Paterson has observed that a non-Black president might have done more for the Black community than Obama because of the racial conditions that are implicitly attached to the latter’s presidency. Eva Paterson, *Mr. President, Three Wishes of a Black American*, S.F. BAYVIEW (Nov. 7, 2012), <http://www.sfbayview.com/2012/mr-president-three-wishes-of-a-black-american/>.

<sup>335</sup> Indeed, the major civil rights achievements under the Obama presidency appear to be the elimination of the “Don’t Ask Don’t Tell” policy in the military and the issuance of an executive order that mimics aspects of the DREAM Act intended to protect the children of undocumented immigrants from deportation. Obama has also declared that he supports same-sex marriage, a position that he was reluctant to take during his first campaign. On the other hand, Jonathan Capenhart has argued, in response to Fredrick Harris, that Obama has in fact done much for the Black community, but these achievements remain somewhat under the radar. *See* Jonathan Capenhart, *Stop Waiting for and Start Paying Attention to Our First Black President*, POSTPARTISAN, WASH. POST (Jun. 3, 2012, 8:00 PM), [http://www.washingtonpost.com/blogs/post-partisan/post/stop-waiting-for-and-start-paying-attention-to-our-first-black-president/2012/06/03/gJQAxQGCCV\\_blog.html](http://www.washingtonpost.com/blogs/post-partisan/post/stop-waiting-for-and-start-paying-attention-to-our-first-black-president/2012/06/03/gJQAxQGCCV_blog.html).

can be attributed to the fact that he may not really be Black after all, in some fundamental sense.<sup>336</sup> Thus, conditional inclusion is a phenomenon that is closely tied to race-as-identity, dealing with restrictions on freedom and choice that have become central to defining one's identity on both personal and group levels.

Conditional inclusion occurs in other, perhaps more trivialized, settings as well. Stephen Carter, for example, writes about the necessity of "dressing to shop" in order to obtain decent help from sales clerks, which he describes as "a tax that racism imposes on success: Yes, we will treat you differently from the way that we treat your brethren and sistren, but only if you first mark yourself as different."<sup>337</sup> Carter, who is a Yale Law School professor, a best-selling author, and a self-acknowledged beneficiary of affirmative action, is perhaps the apotheosis of racial inclusion (at least until Barack Obama was elected President). He has the option of being able to "dress to shop" at Brooks Brothers, a store that many people of color would not consider entering for a variety of reasons, not least of which is the high cost of the clothing sold there. But Carter's account of his inclusion into the highest echelon of American society is no less a story of racial subordination than the traditional narratives of racial exclusion—including Patricia Williams' narrative—that are familiar to many of us already.<sup>338</sup>

These examples of conditional inclusion—from the seat of the U.S. Presidency to the aisles of American shopping malls—demonstrate the continued significance of race across all aspects of social life, even for those who are widely acknowledged to be included. A conceptual leap does exist between the racist premises of mass incarceration that locks up so many Black men and the Brooks Brothers security guard that follows Carter around because he is not wearing a suit and tie. But it is perhaps not as big as it seems at first—especially for someone like Carter who writes ardently about the kinship he feels for his "brethren and sistren" and the significance of his Blackness to his sense of chosen and unchosen

---

<sup>336</sup> See Harris, *supra* note 334; cf. Debra J. Dickerson, *Colorblind: Barack Obama Would Be the Great Black Hope in the Next Presidential Race—If He Were Actually Black*, SALON (Jan. 22, 2007), [http://www.salon.com/2007/01/22/obama\\_161/](http://www.salon.com/2007/01/22/obama_161/) (arguing that Obama, as the son of an African immigrant, is not "politically and culturally black" because his ancestors were not slaves).

<sup>337</sup> Stephen L. Carter, *The Black Table, the Empty Seat, and the Tie*, in LURE AND LOATHING: ESSAYS ON RACE, IDENTITY, AND THE AMBIVALENCE OF ASSIMILATION 55, 60 (Gerald Early ed., 1993).

<sup>338</sup> Patricia Williams tells of the time when she was excluded from a clothing store after seeking entry by using a buzzer. See Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 128 (1987). This story is sometimes described as the most famous of the narratives that Critical Race Theory has deployed. See, e.g., David A. Skeel, Jr., *Lawrence Joseph and Law and Literature*, 77 U. CIN. L. REV. 921, 928 (2009).

identity.<sup>339</sup> As the possibility and significance of choices about racial identity and identification grow, it becomes increasingly important to study their ramifications for a progressive agenda. Our understanding of race must be expansive enough to speak to this development.

### B. *Limited Inclusion*

American society also practices limited inclusion, which occurs when only certain non-White populations are included. Unlike conditional inclusion, which tends to differentiate among members *within* a racial group, the phenomenon of limited inclusion refers to distinctions made *between* racial groups. Studies of race and racism have revealed that, generally, some identifiable groups are favored for inclusion over others. For example, Asian Americans and some Latina/os tend to be more included—as evidenced by relatively better economic and social indicators like income and housing.<sup>340</sup> Light-skinned or multiracial persons may be more accepted for inclusion than darker-skinned Blacks.<sup>341</sup> Theorizing limited inclusion can provide a lens with which to see more clearly the problem of “diversity” where, say, all the employees of a company are Whites and Latina/os,<sup>342</sup> or Whites and “mixed-Asians.”<sup>343</sup>

Most explorations of limited inclusion have emphasized the exclusion inherent to this dynamic.<sup>344</sup> For example, the fact that Asian American women out-marry at rates significantly above African American women has been used to show that the latter group remains largely excluded.<sup>345</sup> Moreover, generalized statistics on interracial marriage obscure such exclusion, which, by virtue of limited inclusion, becomes more pronounced for particular groups. Indeed, these differential rates of intermarriage may do more than obscure; they may justify exclusion by suggesting that Black women’s “failure” to out-marry demonstrates some

<sup>339</sup> See Carter, *supra* note 337, at 64 (claiming that his preference for the companionship of other Blacks is “partly cultural, partly social, and partly political, but it is mostly affectional”).

<sup>340</sup> See Chang, *supra* note 115, at 1261. Although Asian Americans are often described as the most successful group, this fails to take into account diversity within the group. For example, Vietnamese-, Laotian-, and Hmong-Americans experience high rates of poverty, sometimes exceeding the rates of Blacks. See *id.*

<sup>341</sup> See, e.g., The Talk of the Town: *Black Is Back*, THE NEW YORKER, Oct. 30, 1995, at 33. See Jennifer L. Hochschild, *Looking Ahead: Racial Trends in the United States*, 134 DAEDALUS, Winter 2005, at 70, 79 (2005).

<sup>342</sup> See Deborah A. Ramirez, *Multiracial Identity in a Color-Conscious World*, in THE MULTIRACIAL EXPERIENCE, *supra* note 209, at 49, 58.

<sup>343</sup> See Leong, *supra* note 154.

<sup>344</sup> See, e.g., Hochschild, *supra* note 341, at 79.

<sup>345</sup> Marriage relates to exclusion on at least two levels. The first is the more obvious one that suggests that Black women are excluded from interracial family formations, as evidenced by the small numbers of intermarriage that occurs within this population. The second is the less obvious one that suggests that marriage follows inclusion—that is, social science evidence suggests that inclusion is more often than not the precondition to intermarriage, not its result. See DACOSTA, *supra* note 154, at 185.

form of natural or chosen racial incompatibility with others, especially Whites.<sup>346</sup> These are significant concerns that are, and should remain, central to our understanding about the problematic relationship between inclusion and exclusion.

But framing limited inclusion solely as a species of exclusion presents its own set of difficulties. For example, scholars sometimes use the idea of racial “triangulation” in order to describe limited inclusion as a process of “co-opting the center to divide opposition and inhibit attack.”<sup>347</sup> Under this view, inclusion is thought to entail, variously, defecation, assimilation, pandering, or some other form of false-consciousness among affected groups, who become complicit in racial exclusion.

This is surely disheartening and problematic. But no less disheartening and problematic is the implication that these groups in the “center” are passive and content to be used in the service of continued racial injustice. To be sure, focusing on exclusion helps us to recognize that we are being used by the dominant class. This is a step toward resistance but it can be a disempowering one—an explanation that emphasizes what is being done *to* minority populations. Triangulation keeps us entrenched in the framework of traditional race and suggests that we should reject inclusion because it comes with non-ideal terms.

In contrast, understanding that the dynamic of inclusion is itself problematic reminds us of the conditions of identity and equality that underwrite inclusion. These conditions suggest that there is more agency and empowerment than ever within minority groups. As Deborah Waire Post has observed, one’s racial identity is a matter of multiple factors but it is ultimately a matter of moral and ethical choice.<sup>348</sup> So, too, I would say, is one’s choice to *identify* with a subordinated group over a privileged one even in the absence of a common identity or closely-shared experience. The new conception of race highlights what may be accomplished *by* people of color to improve their own and others’ inclusion.

This is especially important because the included are likely to have greater resources to devote to that end. The unprecedented level of inclusion we now have means that racial minorities have a chance to “wield

---

<sup>346</sup> Cf. RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE 129 (2011) (discussing how social and cultural factors contribute to Black women’s reluctance to out-marry with Whites). For Banks, however, it appears that the central concern lies more with the economic impact that low marriage rates generally have on the Black community and not with the rate of out-marrriage specifically. See *id.* at 112–13.

<sup>347</sup> See TERRY SMITH, BARACK OBAMA, POST-RACIALISM, AND THE NEW POLITICS OF TRIANGULATION 2 (2012) (quoting Robert S. Becker, *Triangulation or Strangulation? Obama + Clinton = Bush III?*, OPEN SALON (July 19, 2010), [http://open.salon.com/blog/robert\\_s\\_becker/2010/07/19/triangulation\\_or\\_strangulation\\_obama\\_clinton\\_bush\\_iii](http://open.salon.com/blog/robert_s_becker/2010/07/19/triangulation_or_strangulation_obama_clinton_bush_iii)); see also Kim, *supra* note 66, at 119 (explaining how triangulation depoliticizes Asian Americans by giving them something to lose) (internal quotation marks omitted).

<sup>348</sup> Post, *supra* note 306, at 137.

power [rather] than to fight it.”<sup>349</sup> People of color should not have to give up that power in order to avoid cooptation; nor should they feel ashamed about being included. Instead, the included must not only understand the dynamics of limited inclusion but must also work to transform it. To make this possible, we must widen the frame of race to take account of the foundational premises of inclusion as well as exclusion.

### C. *Imperfect Inclusion*

Another aspect of inclusion that is racially problematic is what I call imperfect inclusion. This type of inclusion is akin to the “glass ceiling” that feminists originally identified as an invisible barrier to attaining elite status in women’s careers. For my purposes, imperfect inclusion refers to the limits placed on attaining elite social status more broadly and not just in one’s profession.

Racial minorities no longer occupy the most menial positions in the American workforce.<sup>350</sup> With inclusive laws and policies in place, people of color make up a significant percentage of the ranks of doctors,<sup>351</sup> lawyers,<sup>352</sup> and even government officials.<sup>353</sup> Many people of color have attained managerial positions with the hope of continued promotion.<sup>354</sup> They have also paved the way for others to follow in their footsteps. Angela Davis once wrote that “[w]alls turned sideways are bridges.”<sup>355</sup> But they can also be turned into ceilings. Indeed, numerous studies have demon-

<sup>349</sup> RICHARD THOMPSON FORD, *RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY* 30 (2011).

<sup>350</sup> See MUKHERJEE, *supra* note 6, at 15.

<sup>351</sup> According to the American Medical Association, a little over 22% of physicians were identified as non-White in 2008 (including Hispanics, who constituted 4.9%). The actual percentage of non-White doctors may be higher given that 23.4% were categorized as “Unknown.” See AM. MED. ASS’N, *PHYSICIAN CHARACTERISTICS AND DISTRIBUTION IN THE U.S.* (2010), available at <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/minority-affairs-section/physician-statistics/total-physicians-raceethnicity.page>.

<sup>352</sup> According to the American Bar Association, about 12% of practicing lawyers were identified as non-White (including Hispanic) in 2010. The number of minority law students is higher, at about 22%. *Lawyer Demographics*, ABA (2011), [http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer\\_demographics\\_2011.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2011.authcheckdam.pdf).

<sup>353</sup> Several sources report that minorities make up over 30% of the federal government workforce. The percentages drop, however, as the positions become more senior. See, e.g., Amanda Palleschi, *Number of Minorities in Senior-Level Federal Positions Increasing*, GOV’T EXEC. (Mar. 21, 2012), <http://www.govexec.com/management/2012/03/number-minorities-senior-level-federal-positions-increasing/41533/>.

<sup>354</sup> Note that this may have been achieved under conditions of racial performance demands (conditional inclusion) and membership in a favored racial group (limited inclusion).

<sup>355</sup> See Matsuda, *supra* note 258, at 333 (internal quotation marks omitted) (quoting ANGELA DAVIS, *WITH MY MIND ON FREEDOM: AN AUTOBIOGRAPHY* 347 (1975)).

strated that minorities, like women, eventually hit a glass ceiling in their careers and earlier than one might suppose.<sup>356</sup>

Imperfect inclusion can contribute to obscuring various forms of racial injustice. Successful individuals like Barack Obama, Condoleeza Rice, Sonia Sotomayor, and others are cited as proof of a perfectly inclusive society—one in which racial minorities can reach the highest level of recognition and achievement in spite of their race. By ignoring the fact that these individuals are exceptional (indeed, they are often the “firsts” and “only” in their respective positions), both exclusion and the glass ceiling are masked. Exclusion is masked because such prominent examples of inclusion are used to deny the existence of race-based exclusion—any exclusion that exists is transformed into a natural result of healthy competition. The imperfection of inclusion is also cloaked by exceptional examples of success; the glass ceiling thereby becomes naturalized in a similar way.<sup>357</sup>

Imperfect inclusion may occur as the result of a clash between the two conceptions of race. This was very visible during Justice Sotomayor’s controversial confirmation process when it was revealed that she considered her Latina heritage to enhance her ability to judge.<sup>358</sup> Conservatives attacked her for this statement, threatening to derail her appointment to the Supreme Court. Their objection was not based on Justice Sotomayor’s abilities or wisdom, but rather on her embrace of race-as-identity. For her critics, her race was an obstacle to be overcome, not an asset.<sup>359</sup> Justice Sotomayor’s brush with the glass ceiling illustrates how imperfect inclusion serves a double duty: not only does it naturalize the barriers that subordinate racial minorities, but it also has a disciplinary function that endorses assimilation and abjection under the old dynamic of race-as-difference, -denigration, and -exclusion.

Research has shown that even those minorities who experience significant economic success still lack the social status that Whites enjoy; indeed, in some cases, successful minorities face greater levels of discrimination. For example, wealthy people of color who wish to move into upscale suburban communities may face resistance that they would not face if they

<sup>356</sup> See, e.g., Evan Roberts, Comment, *Corporate Leadership and the Unfinished Diversity Movement*, 14 DUQ. BUS. L.J. 277, 296 (2012) (citing various studies).

<sup>357</sup> See PERRY, *supra* note 6, at 130–31; Crenshaw, *supra* note 151, at 1333.

<sup>358</sup> In a speech at Berkeley Law School, Justice Sotomayor stated: “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.” Hon. Sonia Sotomayor, *A Latina Judge’s Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002); see also Peter Baker, *Court Choice Pushes Issue of ‘Identity Politics’ Back to Forefront*, N.Y. TIMES, May 31, 2009, at 20 (quoting Abigail Thernstrom denouncing Obama’s nomination of Sotomayor, saying “[Obama] didn’t pick a post-racial candidate. . . . She’s a quintessential spokesman for racial spoils.”).

<sup>359</sup> See L. Darnell Weeden, *Race-Conscious Equality Confronts America, President Obama, Justice Sotomayor, Professor Gates, and Sergeant Crowley*, 35 T. MARSHALL L. REV. 113 (2009).

were looking for a home in a less wealthy, minority-dominated area.<sup>360</sup> Wealthy Black or Latino persons driving expensive cars may be subject to more frequent traffic stops.<sup>361</sup> Indeed, as the arrest of Henry Louis Gates, Jr. revealed, simply being a Black man trying to get into his own home in a predominantly White neighborhood can raise suspicion, regardless of one's economic class and credentials.<sup>362</sup>

To be sure, focus on the commonality of racial experience should not obscure the differences that create fissures within the group. For example, as James Forman, Jr. has pointed out, while all Black and Brown people may be subject to increased police harassment, those with greater economic resources are insulated in ways that marginalized people are not.<sup>363</sup> Indeed, the class tension within the Black community has led to questions about the viability of a cohesive Black identity.<sup>364</sup> Moreover, inclusion may work differently for men and women. Studies indicate that single Black women without children are increasingly represented in the middle-class<sup>365</sup> but also must confront a lower glass ceiling than Black men.<sup>366</sup> Rather than ignoring or conflating these different experiences, we should examine them through a more flexible and expansive understanding of race.

#### D. *Revolving Door Inclusion*<sup>367</sup>

Sometimes inclusion ends with exclusion. An example of this dynamic is the hiring of a racial minority under an affirmative action policy that ends with that employee being fired for what can be described as race-based reasons. In legal academia, for example, there is concern that even if the ranks of junior faculty include many racial minorities, many of them

<sup>360</sup> See PEREA ET AL., *supra* note 68, at 172–74.

<sup>361</sup> See Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 155–56 (2008).

<sup>362</sup> See Crenshaw, *supra* note 151, at 1334–35. As comedian Chris Rock observed in *Bigger and Blacker*, “None of you would change places with me. And I’m rich! I’m rich! That’s how good it is to be White.” CHRIS ROCK: BIGGER & BLACKER (HBO Home Video 1999).

<sup>363</sup> See Forman, *supra* note 97, at 56–57; see also COSE, *THE RAGE OF A PRIVILEGED CLASS*, *supra* note 329, at 185 (acknowledging that middle-class Blacks are unlikely to be involved in violent confrontations with the police).

<sup>364</sup> See Adams, *supra* note 231, at 262–63 n.1 (observing that there are many Black communities defined by class, geography, religion, etc.).

<sup>365</sup> See Marsh, *supra* note 299.

<sup>366</sup> Kate L. Didech, Note, *The Extension of Disparate Impact Theory to White Men: What the Civil Rights Act of 1991 Plainly Does Not Mean*, 10 TEX. J. C.L. & C.R. 55, 67 n.106 (2004). Single Black women with children, on the other hand, are more likely to be excluded, living in poverty, and saddled with the pejorative label of “welfare queen.” Geneva Brown, *Ain’t I a Victim?: The Intersectionality of Race, Class, and Gender in Domestic Violence and the Courtroom*, 19 CARDOZO J. L. & GENDER 147, 162–63 (2012); see also DYSON, *supra* note 163, at 85 (noting the glass ceiling for Black women).

<sup>367</sup> I have adapted this term from Pearl Stewart’s article on this issue. See Pearl Stewart, *After Decades, Revolving Door Remains for Black, Latino Scholars in the Academy*, DIVERSE (July 19, 2012), <http://diverseeducation.com/article/17227/#>.

fail to achieve tenure and end up leaving the institution.<sup>368</sup> The reasons for this failure may vary. The junior faculty member's writing may be considered subpar—perhaps because of the subject matter of her scholarly interest or because of her unconventional approaches to traditional topics. Or her teaching evaluations may be low because students do not respond to her positively. Or her service may be devalued because she seems not to work as collaboratively and collegially as the tenured faculty would like or expect. All of these reasons may or may not be related to her race, and thus the issues become quite subtle.

Although the junior faculty member is ultimately excluded, I think this situation is better analyzed as a problematic species of inclusion that I call revolving door inclusion. This is because being fired involves personal and institutional implications far different from not being hired in the first place. On the personal level, not being hired for racial reasons and being fired for racial reasons sends different signals. In the first instance, the institution may be said to subscribe to the traditional view of race as difference, denigration, and exclusion. In the second instance, however, the institutional racism that the employee experiences is much more nuanced, and cannot be so easily explained under the old definition of race. Especially where the institution has hired the employee under an affirmative action policy, the loss of employment can appear to be a personal rather than an institutional failure.

To be sure, it may be that the institution is insufficiently committed to affirmative action and its underlying mandate for promoting identity, equality, and inclusion.<sup>369</sup> Indeed, as Nancy Leong has pointed out, affirmative action has been used to extract a value from minority hiring that is quite distinct from the reasons that initially animated the policy.<sup>370</sup> In addition to this unearned revenue, the revolving door scenario, unlike the exclusion scenario, allows the institution to better defend itself by either blaming the junior professor or even by shifting the blame to the students/consumers who refuse to relate to her. Although reprehensible, the institutional explanation to fire is quite different from the institutional explanation not to hire.

---

<sup>368</sup> See, e.g., Beverly Horsburgh, *Decent and Indecent Proposals in the Law: Reflections on Opening the Contracts Discourse to Include Outsiders*, 1 WM. & MARY J. WOMEN & L. 57, 62 n.8 (1994) ("Outsider professors, moreover, continue to experience difficulty in being hired, often resign their positions, and are frequently denied tenure."); Pamela J. Smith, *The Tyrannies of Silence of the Untenured Professors of Color*, 33 U.C. DAVIS L. REV. 1105, 1120–21 (2000) (referring to the hostility that was driving talented professors of color out of the legal academy); COMM. ON RECRUITMENT AND RETENTION OF MINORITY LAW TEACHERS, AM. ASS'N OF LAW SCH., *THE RACIAL GAP IN THE PROMOTION TO TENURE OF LAW PROFESSORS* (2005), available at <http://www.aals.org/documents/racialgap.pdf> (reporting that there is a statistically significant difference between minority and non-minority tenure rates for the years studied); see also COSE, *END OF ANGER*, *supra* note 250, at 69 (describing the revolving door phenomenon in the world of finance).

<sup>369</sup> See Post, *supra* note 306, at 148–49.

<sup>370</sup> See Leong, *supra* note 168, at 2155.

Moreover, revolving door inclusion helps to reinforce the harms of all of the other problematic forms of inclusion identified above. It tells the employee (and others) to satisfy racial performance demands or else; it may exacerbate limited inclusion by permitting only certain favored minority individuals or groups to remain employed; and it creates a situation of imperfect inclusion for the disfavored minority individuals or groups who reach the ceiling and are let go.

### E. *Overinclusion*

The last form of inclusion I want to highlight is the problem of overinclusion. I speak of overinclusion in two senses, both of which have to do with the notion of racial fraud. The first is the concern expressed by some Whites that the fluidity and choice that marks race-as-identity will lead individuals to adopt whatever racial classification is most advantageous at the moment.<sup>371</sup> This relates, in particular, to affirmative action and the question of who should fall within its ambit. The motivation for this concern is ambiguous. One possibility is the worry that Whites will be disadvantaged under affirmative action by individuals who are “barely” a racial minority (e.g., an applicant whose parentage is less than one-eighth Black) and who would or could otherwise “pass” as White (e.g., an applicant who appears White regardless of ancestry). Another possibility is the worry that minority individuals will be disadvantaged under the same scenario—that the “real” minorities who are the intended beneficiaries of affirmative action will be displaced. Especially in light of the increased visibility and recognition of multiracial persons, these concerns have been heightened.<sup>372</sup>

The other problem of overinclusion deals with claims of inauthenticity that have troubled racial group cohesion. As Richard T. Ford observes,

---

<sup>371</sup> See, e.g., Luke Johnson, *Elizabeth Warren Acknowledges Listing Herself as Native American to Harvard, Penn.*, HUFFINGTON POST (May 31, 2012), [http://www.huffingtonpost.com/2012/05/31/elizabeth-warren-native-american-heritage\\_n\\_1558838.html](http://www.huffingtonpost.com/2012/05/31/elizabeth-warren-native-american-heritage_n_1558838.html). I heard this concern increasingly expressed by my White students in Race and the Law as they are working through the interaction between recognition of multiracial identity and the administration of affirmative action policies. However, it may be extended to more social scenarios as well, where race can be viewed as a lever of manipulation. See, e.g., TOURÉ, *supra* note 3, at 10 (describing how a Black person can talk to a White person about the latest Jay-Z album to make the latter temporarily “feel cool” and thereby “build the relationship” needed in the situation). It should be noted that Touré appears to view this less as manipulation and more as virtuosity in racial identity performance. See *id.* at 11; see also DYSON, *supra* note 163, at 232 (describing how various strategies of identity performance “permit black folk to operate in the world with a bit of sanity and grace”).

<sup>372</sup> Suspicions of racial fraud by multiracial people are not confined to contemporary times. Itabari Njeri describes how Marcus Garvey attempted to paint W.E.B. Du Bois as a disloyal “mulatto” who would sometimes “claim[] he’s a Frenchman, on another day Dutch, and only ‘when it is convenient is he a Negro.’” See Itabari Njeri, *Sushi and Grits: Ethnic Identity and Conflict in a Newly Multicultural America*, in LURE AND LOATHING, *supra* note 337, at 13, 26–27.

labels such as “oreo” and “banana” accuse individuals of being disloyal to their race by assimilating too much whiteness into their sense of identity or identity performance.<sup>373</sup> Although such accusations appear to exclude the so-called oreos and bananas from the group, many have pointed out that they are in fact methods of mandating inclusion.<sup>374</sup> I categorize this as overinclusion because the claim of inauthenticity seeks to include (and discipline) those who may not actually wish to be included,<sup>375</sup> and ultimately reflects the overdetermined nature of racial identity.

The problem of overinclusion is clearly situated in the new conception of race-as-identity and the various tensions within that condition, including between choice (more or less constrained) and essentialism, as well as between fluidity and stability. To the extent that identity choices can be harmful, the enunciation of coherent principles that inform them will be prudent. One possibility is to further develop the idea that choices over identity, like any other important choice in one’s life, has ethical dimensions that need to be considered. While thinking about identity as an ethical choice may or may not require group loyalty, at the very least it ought to account for harms to others. Such an approach may be particularly salient in the affirmative action/race selection context. Another possibility is to consider identity choice also as a function of emotion, particularly affection and empathy, relying on the broad and important idea of kinship.<sup>376</sup> This approach might be used to foster group cohesion without resorting to harsh disciplinary mechanisms.

While the suggestions above focus on internal norms for identity selection, Camille Gear Rich has recently offered guidance for external judgments, particularly relating to employer discretion in the affirmative action context.<sup>377</sup> Recognizing that race today is often elective and valuable not only to people of color but also to employers that promote diversity in the workplace, Rich argues for a functionalist view of affirmative action that articulates the aim of workplace diversity as the assemblage of people with varied experiences of racialization and subordination.<sup>378</sup> Such an approach would promote a thicker view of diversity that can advance antistatutory goals and at the same time ameliorate concerns related to essentialism and strategic identity choices.<sup>379</sup> Rich’s engagement with this issue reflects, as this Article does, the need to account for the shift in the meaning of race and the need to theorize inclusion.

<sup>373</sup> FORD, *supra* note 168, at 39–40; *cf.* Post, *supra* note 306, at 140 (positing that racial identity is an ethical choice that presupposes “a set of loyalty norms”).

<sup>374</sup> See FORD, *supra* note 168, at 116; TOURÉ, *supra* note 3, at 158.

<sup>375</sup> See TOURÉ, *supra* note 3, at 160–63 (discussing the idea of the “race traitor”); *cf.* Howze & Weberman, *supra* note 245, at 434 (arguing that while racial solidarity is legitimate and prudent, it is also not morally obligatory).

<sup>376</sup> See *supra* text accompanying notes 244–46.

<sup>377</sup> Rich, *supra* note 168, at 13.

<sup>378</sup> *Id.* at 17.

<sup>379</sup> See *id.* at 24.

## V. CONCLUSION

This Article has sought to offer an explanation of the postracial phenomenon by framing the issue around two different conceptions of race that coexist in American society today: (1) race-as-difference, -denigration, and -exclusion, and (2) race-as-identity, -equality, and -inclusion. On a discursive level, the shift from the first to the second is nothing short of revolutionary; on a material level, however, we have seen only gradual and tentative changes. Nonetheless, I believe that these changes are significant enough to support the notion that race means something very different today than it did even 25 years ago. It is only in this narrow sense that I think we can consider ourselves “postracial.” Our society is not one in which there is no such thing as race or racism; instead, it is a society in which race means different things to different people in different contexts. Far from death, race has become prolific.

We have achieved much racial progress to get to this point. This, I realize, can be a dangerous statement in an environment where racial conservatives seize on any small sign, however inappropriate, to call for the end of racial remedies.<sup>380</sup> Indeed, postracialism itself can be read as a triumphalist, conservative assertion. I have tried to redefine postracialism to serve a racially progressive cause, not as a pragmatic concession to fashionable race-speak but as a theoretical framework for recognizing new social conditions that I hope will be useful toward achieving greater racial justice. In this way, I consider the postracial dilemma to be one that is situated *within* the progressive movement, born from the struggle to redefine race as a foundation for identity, equality, and inclusion. Accordingly, postracialism is not something to be proved or refuted; rather, it is something to be studied. Ideally, such postracial studies would interrogate the profound shifts in the meaning of race that have been occurring, and also begin the work of imagining those yet to come.

---

<sup>380</sup> See Crenshaw, *supra* note 151, at 1316. As David Eng and others have noted, “ever since the Enlightenment race has always appeared as disappearing.” ENG, *supra* note 133, at 10 (paraphrasing Jodi Melamed, *The Spirit of Neoliberalism: From Racial Liberalism to Neoliberal Multiculturalism*, 24 SOC. TEXT, Winter 2006, at 1, 3).