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Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect

Sylvia R. Lazos Vargas*

This Article examines why the assumption of sameness is so pervasive in our society, and why the very idea of diversity is so resisted. The assumption and the corollary mandate to be the same are embedded in American cultural ideology, in how Americans think of themselves, in the stories that we tell regarding who we are and where we come from, in how we construct our values and norms, and in how Americans make sense of our chaotic social world. The assumption and mandate of sameness not only influence American culture, they also guide judges' thinking and decisionmaking in key equal protection decisions. When the United States Supreme Court asserts that equal protection is an individual right, that we are all one people—American, and that to recognize different distinct cultural groups per se undermines constitutional values and American tradition, the Court is not interpreting constitutional law. Rather, the Court is asserting American ideology. However, this ideology is not inclusive of all Americans. It is one that constructs hegemony in favor of White Americans and those who can fall within the White ethnic narrative of assimilation.

This Article shows that the myth of sameness is an ideological construction that is vigorously contested by the canon battles taking place in the social sciences and among political theorists. The Article also explains how social sciences, such as psychology and sociology, capture the depth of our differences and reveal that the promise of assimilation is a promise that has only been available to White ethnics, and even then, not uniformly. Thus, the

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transdisciplinary critique of the homogeneity assumption and mandate offers constitutional interpretation two things—(1) a lens that can create the distance necessary to question the premises of the assumption and mandate of sameness and (2) guidelines of how to better conceptualize and understand intergroup difference. If we are to live up to our liberal ideals, we must understand American culture, how ideology constructs it, and how social science debunks it. Only then can we finally begin to establish the groundwork for an inclusive and unified society. The homogeneity assumption and mandate is unjust and fails to unify a complex and diverse society under a conception of justice that is just for all, and not just those who benefit from the dominant story we currently tell about ourselves, the White ethnic narrative.

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[T]he Toltec god of night, Tezcatlipoca, . . . visits the god of peace and creativity, Quetzalcoatl, the Plumed Serpent, to offer him the gift of the mirror. On seeing himself reflected, Quetzalcoatl identifies himself with humanity, and falls, terrified.

Aztec legend¹

I. INTRODUCTION

This Article explains and then deconstructs the cultural ideology that has made homogeneity an unexpressed assumption and mandate in law. When courts incorporate such ideology, those who do not fit the construct of the assumption of sameness are excluded. This tension caused by the universalizing of, and the resulting exclusionary tendencies of assuming, homogeneity has been duplicated outside of law in key disciplines, such as history, sociology, psychology, and political theory. Understanding how transdisciplinary discourse seamlessly constructs assumptions of sameness can instruct courts how to distance themselves from ideological assumptions of sameness and build interpretive analytical methods that permit more complex and complete understandings of difference.

At one time in our history, constitutional discourse excluded from the polity distinct groups that did not fit the homogeneity assumption. By selectively defining who merited being considered an equal, constitutional doctrines maintained the semblance of a unified

1. CARLOS FUENTES, *THE BURIED MIRROR: REFLECTIONS ON SPAIN AND THE NEW WORLD* 11 (1992).

constitutional discourse and a unified society.² At the founding of the nation, only White male property owners were deemed worthy of the right to vote.³ The Supreme Court then expanded upon this notion. In *Johnson v. McIntosh*⁴ the Court excluded Native Americans from the polity, reasoning that they were "savages" who could not be recognized as holding civilized notions of property.⁵ In *Dred Scott v. Sandford*,⁶ constitutional discourse legitimized the objectification of African-Americans, as "beings of inferior order."⁷ The Court denied African-Americans their full humanity when it declared that, even when African-Americans were free from the bonds of slavery, they were undeserving of the rights of citizenship.⁸ Following the bloody Civil War and the enactment of the Thirteenth and Fourteenth Amendments, in *Plessy v. Ferguson*,⁹ the Supreme Court legitimized segregation as a social norm, reasoning that the law could not disturb such traditions and the natural social order.¹⁰ In *Bradwell v. Illinois*¹¹

2. This tradition of stratifying a society between those who are worthy of being considered equals and those who are not can be traced to Greek philosophy. See PLATO, *THE REPUBLIC* (G.M.A. Grube trans., 1974); *THE POLITICS OF ARISTOTLE* 117 (Steven Ernest Baker ed. & trans., 1977) ("[I]n democracies . . . justice is considered to mean equality . . . but equality for those who are equal, and not for all.").

3. See JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 37-53 (1991) (discussing that at the founding of the Nation the vote was limited to White male property owners).

4. 21 U.S. (8 Wheat.) 543 (1823). For a discussion of this case and a general treatment of Native Americans and indigenous peoples under the law, see generally ROBERT A. WILLIAMS, JR., *AMERICAN INDIANS IN WESTERN LEGAL THOUGHT: THE DISCOURSE OF CONQUEST* (1992).

5. See *Johnson*, 21 U.S. at 590-91. Story's legal commentary forms the basis for this reasoning:

The title of the Indians was not treated as the right of propriety and dominion, but as a mere right of occupancy. As infidels, heathens, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign, and independent nations. The territory over which they wandered . . . was . . . deemed as if it were inhabited only by brute animals.

JOSEPH STORY, *COMMENTARIES* § 152, reprinted in M. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKGROUND TERRITORY IN INTERNATIONAL LAW* 29 (1926).

6. 60 U.S. (19 How.) 393 (1857). For instructive discussions of this case, see generally DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978).

7. *Dred Scott*, 60 U.S. at 407.

8. See *id.* at 406.

9. 163 U.S. 537 (1896). For discussions of how White ideology influenced the judges deciding this case, see generally T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325 (1992).

10. See *Plessy*, 163 U.S. at 552.

11. 83 U.S. (16 Wall.) 130 (1873). Justice O'Connor views this case as the paradigmatic example of gender discrimination. See Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1550 (1991).

and *Muller v. Oregon*,¹² women's "physical structure" and wifely and maternal "functions"¹³ permitted the Court to rationalize state legislation that barred women from access to professional occupations and to legitimize the social belief that it was "repugnant" to permit a woman's distinctness from her family and her husband.¹⁴ In *Chae Chan Ping v. United States*,¹⁵ the Court's construction of Chinese as a "menace to civilization" and as aliens that were incapable of assimilation led the Court to exclude Chinese-Americans from any constitutional protections under the Fourteenth Amendment.¹⁶

The exclusion paradigm¹⁷ is no longer credible or workable. First, from a moral perspective, the civil rights movement and the

12. 208 U.S. 412 (1908).

13. *Id.* at 420 ("Woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil."); *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring) (The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.").

14. See *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring) ("The harmony . . . of interests . . . to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband."); see also *Muller*, 208 U.S. at 421-22 ("[H]istory discloses the fact that woman has always been dependent upon man. . . . As minors, though not to the same extent . . . [woman was thought to be] needing especial care that her rights may be preserved."). For a discussion of these cases, see Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 117-39 (David Kairys ed., 1982).

15. 130 U.S. 581 (1889). In *Chae Chan Ping*, the Court stated:

[T]he presence of Chinese laborers had a baneful effect upon the material interests of the State, and upon public morals; that their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization; . . . that they retained the habits and customs of their own country, and in fact constituted a Chinese settlement within the state, without any interest in our country or its institutions.

Id. at 595-96. In *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), the Court expressed a similar belief that the Chinese were an unassimilable race:

[The Chinese,] of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests. . . .

Id. at 717. For a discussion of the Chinese exclusion cases, see generally Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987); RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* (1989) [hereinafter TAKAKI, *STRANGERS*].

16. See *Chae Chan Ping*, 130 U.S. at 595. The Court concluded that the U.S. Constitution permitted targeted exclusion of Chinese laborers. See *id.* The Court separately concluded that immediate deportation of Chinese lacking residency documentation was also authorized. See *Fong Yue Ting*, 149 U.S. at 724.

17. A paradigm is an enclosed system of knowledge, discourse, and constructed truth that is self-sustaining and self-affirming. Paradigms affect how we interpret what we perceive. They function as an epistemological framework that makes it difficult for

Supreme Court's pronouncements in *Brown v. Board of Education*¹⁸ and *Loving v. Virginia*¹⁹ succeeded in focusing the national will on the need to revise social norms that permitted and required segregation.²⁰ The nation witnessed something of a revolution: Congress enacted civil rights statutes protecting and furthering rights of minorities; courts mandated the integration of public schools; and states, local governments, and state courts took additional steps to protect and further the rights of minorities.²¹ This marked a turning point in Americans' willingness to permit the state to intervene and regulate social, economic, and occupational group relations, areas once relegated to the sacrosanct "private sphere." In the years since *Brown*, the majority of Americans has come to believe that discrimination against racial minorities is morally wrong.²² The moral cultural landscape has changed so that no credible politician or intellectual could seriously argue, "Let's go back to the days when only Whites and men counted."²³

participants to acknowledge or comprehend other epistemologies. Paradigms serve a legitimizing function:

[T]he study of paradigms . . . prepares the student for membership in the particular scientific community with which he will later practice. Because he there joins men who learned the bases of their field from the same concrete models, his subsequent practice will seldom evoke overt disagreement over fundamentals.

THOMAS S. KUHN, *STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10-11, 187-210 (3d ed. 1996).

18. 345 U.S. 972 (1953). For two key accounts of this case and the ensuing desegregation litigation, see generally RICHARD KLUGER, *SIMPLE JUSTICE* (1976) and Alexander M. Bickel, *The Original Understanding and the Segregation Decisions*, 69 HARV. L. REV. 1 (1955).

19. 388 U.S. 1 (1967).

20. Sociologists Omi and Winant believe that the race paradigm shifted during the civil rights revolution, as the racial dominance along the Southern White segregationist model became more difficult to justify. See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM 1960 TO 1990* 89-108, 90 n.2 (2d ed. 1994) (calling the period one of "great transformation").

21. The Civil Rights Act of 1964 prohibited discrimination, for example, as to public accommodation, education, and private employment. See Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1971, 1975a-1, 2000a-2000h-6 (1997)).

22. See Daniel Yankelovich, *How Changes in the Economy are Reshaping American Values*, in *VALUES AND PUBLIC POLICY* 29-33 (Henry J. Aaron et al. eds., 1994).

23. However, the struggle for establishing social hierarchy based on status takes different forms. Omi and Winant interpret the current neoconservative movement as an attempt to redefine race and reassert hegemony in favor of Whites. See OMI & WINANT, *supra* note 20, at 128-36; see also HOWARD WINANT, *RACIAL CONDITIONS: POLITICS, THEORY, COMPARISONS* (1994). For example, race and racial hegemony underlie the issues of merit and just desserts in the affirmative action controversy (minorities are advantaged illegitimately) and the social welfare debate (neoconservatives have linked race and gender to undeserving needy mothers). See NANCY FRASER, *UNRULY PRACTICES: POWER, DISCOURSE AND GENDER IN CONTEMPORARY SOCIAL THEORY* 161-81 (1989) (describing current form of liberal state as an unequal discourse over hierarchy of needs); April L. Cherry, *Social*

Second, social dynamics have changed. Because of the civil rights "revolution," African-Americans and other historically disenfranchised groups have come to believe that they are "empowered"²⁴ and that they deserve to be full members of the polity.²⁵ Although many believe that rights discourse is just that, only talk,²⁶ others opine that rights discourse has changed the social order and is an independent force that continues to transform our society, with repercussions that few would have anticipated.²⁷ At the very

Contract Theory, Welfare Reform, Race and the Male Sex-Right, 75 ORE. L. REV. 1037 (1996) (criticizing welfare reform because it targets African-American women); *see also infra* Part II.B.

24. Elizabeth Schneider argues:

Rights discourse can express human and communal values; it can be a way for individuals to develop a sense of self and for a group to develop a collective identity. Rights discourse can also have a dimension that emphasizes the interdependence of autonomy and community. It can play an important role in giving individuals a sense of self-definition, in connecting the individual to a larger group and community, and in defining the goals of a political struggle, particularly during the early development of a social movement.

Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 611-12 (1986); *see also* Barbara Christian, *The Race for Theory*, in MAKING FACE, MAKING SOUL, HACIENDO CARAS: CREATIVE AND CRITICAL PERSPECTIVES BY WOMEN OF COLOR 335, 343 (Gloria Anzaldúa ed., 1990); Cornel West, *Nihilism in Black America*, in BLACK POPULAR CULTURE (Gina Dent ed., 1992).

25. *See, e.g.*, KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989).

26. *See, e.g.*, DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987) (arguing that rights of minorities are tenuous and when the white majority is under pressure these rights will give way).

27. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1357-58 (1988). This "rights" revolution has led some minority commentators to defend liberal thought against critical legal theorists. Crenshaw has offered the following critique of critical legal theory:

Critics also disregard the transformative potential that liberalism offers. Although liberal legal ideology may indeed function to mystify, it remains receptive to some aspirations that are central to Black demands, and may also perform an important function in combating the experience of being excluded and oppressed. This receptivity to Black aspirations is crucial given the hostile social world that racism creates. The most troubling aspect of the Critical program, therefore, is that "trashing" rights consciousness may have the unintended consequence of disempowering the racially oppressed while leaving white supremacy basically untouched.

Id.; *see also* PATRICIA J. WILLIAMS, *ALCHEMY OF RACE AND RIGHTS* (1991) (arguing that law should reconstruct rights to capture individuals in full social context); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 306-07 (1987) (describing rights for minorities as "cloaks of safety that unite us in a common bond"); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (arguing for rights for minorities); John Powell, *Racial Realism or Racial Despair?*, 24 CONN. L. REV. 533 (1992) (critiquing Derrick Bell for undervaluing the political power of African-Americans and

least, the civil rights revolution has given groups that historically have been excluded from the polity the hope that social justice can be achieved. Sporadically, but consistently, such aspirations spur rationally apathetic individuals into collective acts and other kinds of attempts to exercise political power.²⁸

Third, from a demographic perspective, we are increasingly becoming a heterogeneous society in which groups, other than White²⁹ Euro-ethnics, numerically dominate. The United States Census Bureau predicts that in fifty years African-Americans, Asian-Americans, and Latinos will outnumber the White majority in the

underestimating humans' need to assert their equal worth as people). *But cf.* 2 FRIEDRICH VON HAYEK, *LAW, LEGISLATION AND LIBERTY, THE MIRAGE OF SOCIAL JUSTICE* 65 (1978). There it is stated:

It also can scarcely be denied that the demand for 'social justice' has already in great measure transformed the social order and is continuing to transform it in a direction which those who called for it never foresaw. Though the phrase has undoubtedly helped occasionally to make the law more equal for all, whether the demand for justice in distribution has in any sense made society just or reduced discontent must remain doubtful.

Id.

28. Voting data on Asian-Americans and Latinos show that, in the recent national elections, voter participation among these groups increased significantly. Analysts credit this increased interest in national politics to the changing political terrain in issues that directly impact these communities. See William E. Gibson, *Hispanic Backlash at Polls, Sends Message to GOP: The Strong Turnout in November Means Republicans May Stall Immigration Reform*, ORLANDO SENTINEL, Jan. 5, 1997, at A17 (reporting strong voter turnout motivated by immigration reform); see also Patrick J. McDonnell, *Latinos Make Strong Showing at Polls*, L.A. TIMES, Nov. 8, 1996, at 1; Imbert Mathee, *Asian Americans' Political Impact, Interest Growing*, SEATTLE POST-INTELLIGENCE, July 15, 1996, at A2.

29. I capitalize the term White, as well as Latino, African-American, and Asian-American, to emphasize that each is an American cultural subgroup that also forms a distinct political and socioeconomic community. By the use of these terms, I do not intend to ignore the cultural distinctness of groups such as Jews and Arab-Americans. Those categorizations serve the purpose of structuring the discussion of this Article, to link the construction of sameness and difference to the White ethnic narrative. I refer to various Latino subgroups, including Cuban-Americans, Mexican-Americans, Puerto Ricans, and Central Americans, as "Latinos." Latino scholars have not uniformly agreed on terminology to describe themselves. See, e.g., Bertha Hernandez-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric, and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994) (noting that the term "Latino" excludes concerns of Latinas in the context of discussing the heterogeneity among Latinas); Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"? Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259 (1997) (using "Latino" for the sake of simplicity in the context of discussing Latinos vis-à-vis the majority) [hereinafter Johnson, *Melting Pot*]; Guadalupe T. Luna, *"Agricultural Underdogs" and International Agreements: The Legal Context of Agricultural Workers within the Rural Economy*, 26 N. MEX. L. REV. 9 (1996) (using the term "Mexican" to include Mexican nationals and U.S.-born citizens of Mexican heritage and "Latinos/Latinas" to denote Puerto Ricans, Cubans, and those from Central and South America in the context of discussing the fairness of U.S. agricultural policy and doctrinal land tenancy issues vis-à-vis Mexican agricultural labor in the Southwest).

country as a whole.³⁰ If women, gays and lesbians, and people with disabilities are added to the mix of racial and ethnic minorities, then cultural heterogeneity is the status quo.³¹

In short, we are shifting to a heterogeneous social reality. Perhaps we are already there. Moreover, the idea that difference or diversity is a positive to be embraced is increasingly taking hold of the intellectual agenda in academia,³² business,³³ and political rhetoric.³⁴

30. Assuming that current demographic trends continue, the U.S. Census Bureau projects that by 2050 traditional "minority" groups will constitute slightly over half of the population. The breakdown would be as follows: Latinos 25%, African-Americans 14%, and Asian-Americans 11%. See generally U.S. BUREAU OF THE CENSUS, POPULATION PROJECTIONS OF THE UNITED STATES BY AGES, SEX, RACE AND HISPANIC ORIGIN: 1995 TO 2050 (1996).

31. The work of Carol Gilligan supports the view of cultural feminists that women are a distinct cultural subgroup in society. See generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1993). Radical feminists believe that women are a historically subordinated group, and accordingly, a distinct group marked by power domination in society. See, e.g., CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987). The branch of feminism concerned with "formal equality" argues that the effort to make legal claims of equality based on the premise that women are different undermines efforts to obtain equality of status. See, e.g., O'Connor, *supra* note 11, at 1553 (finding the premise of women's distinctness "troubling").

Gays and lesbians can also be considered a distinct societal group. John D'Emilio believes that gay and lesbian identities were created as a result of capitalist development. See John D'Emilio, *Capitalism and Gay Identity*, in MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS AND THE UNIVERSITY 3 (1992). However, gays and lesbians face barriers in defining themselves as a group. Urvashi Vaid observes that it may never be possible to get a fix on the number of gays and lesbians: "[H]omosexuality involves choice—indeed, it involves a series of four major choices: admitting, acting, telling, and living." URVASHI VAID, VIRTUAL EQUALITY 30, 31-33 (1996). Many will not make these choices because of the societal opprobrium and physical danger, and will elect to stay "in the closet." See *id.* Eve Kosofsky notes the costs and implications of choosing to identify as gay or lesbian, and argues that such a choice should be respected when counting who is gay. See EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 54-63 (1990); see also Marc Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992) (describing gay culture as involving more than a sexual choice).

32. In a survey of university professors nationwide, 50% expressed that creating a multicultural environment in the university is a priority. The author of the survey interpreted this data to support the conclusion that commitment to multiculturalism and diversity has increased among faculty and academic institutions. See Denise E. Magner, *Fewer Professors Believe Western Culture Should Be the Cornerstone of the College Curriculum: A Survey Finds a Growing Commitment to Diversity and Multiculturalism*, CHRON. OF HIGHER EDUC., Sept. 13, 1996, at A12.

33. See, e.g., David A. Thomas & Robin J. Ely, *Making Difference Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV., Sept./Oct. 1996, at 79 (describing how a company can successfully integrate diversity efforts to become more competitive).

34. Democratic House Minority Leader Richard Gephardt is reported to have said, "When you get beyond . . . legalese, there is a very basic principle . . . we want a U.S. Congress that looks like the people of America." Bill Cotterell, *Lawyer Warns of Efforts to End Minority Districts in a Visit to Tallahassee*, TALLAHASSEE DEMOCRAT, Feb. 19, 1996, at 4B. Following the 1992 election, President Clinton stated that he wanted "an administration

We even perceive ourselves to live in a culturally heterogenous America, even though such a perception of demographic heterogeneity is exaggerated.³⁵

This Article explores why judges continue to assume homogeneity and eschew the heterogeneity that has become a permanent feature in the social, political, and intellectual landscape. Part II.A describes what this Article calls the “homogeneity assumption.” The homogeneity assumption is embedded cultural ideology that indicates that we are all one people. To be an American means to have inherited a set of traditions and values that are Anglo-American-based. Our common traditions account for the special American genius, which imbues us with exceptionality. All Americans, no matter their origin, must eventually assimilate into this dominant norm. To proclaim difference is negative, because somehow it is un-American and threatens our belief in a strongly unified American whole (like Samson, we must not permit anyone to snip at the myth, lest we weaken). We fear that to talk about difference may fan separationist fires simmering below the surface into Madisonian ugly factionalism or raw balkanization.

Part II.B explores how the homogeneity assumption is hegemonic. In its modern context, the homogeneity assumption has become intertwined with White ethnic immigrant narrative. The dominant social group in America is now the White ethnics, who hail from the immigrant influx of the early 1900s. The White ethnic immigrant myth—that hard work, assimilation, and virtue can overcome any adversity, including racism—has become the dominant American cultural narrative. The White ethnic immigrant myth is hegemonic because it mandates assimilation, dismisses the power and subordination dynamics of racism, demands conformity with “American values,” and ultimately constructs a racial/cultural binary that pits the virtuous White assimilated ethnics against the nonvirtuous “raced” and the culturally different.

In Part III, this Article takes the position that, to break the epistemological hold of the homogeneity assumption in public law, we must deconstruct it. Transdisciplinary analyses bring in other

that looks like America in racial, gender, and regional terms.” See John Hanchette, *Clinton Wants a Cabinet that Reflects America*, GANNET NEWS SERV., Aug. 12, 1992.

35. See Priscilla Labovitz, *Just the Facts*, N.Y. TIMES, Mar. 25, 1996, at A2. White America believes that 50% of Americans are from racial and ethnic groups. White perception is that 15% of the current population is Hispanic, compared to the 10% actual figure; 11% are Asian-American, compared to the 3% actual figure; and 24% are African-American, compared to the 12% actual figure. See *id.*

disciplinary realities that illuminate the extent to which the homogeneity assumption is based on questionable premises. If constitutional jurisprudence is to break free of the homogeneity assumption and the exclusion paradigm that results from it, then the Supreme Court should incorporate this work into its analysis. The Court must replace the homogeneity assumption with a construct that assumes difference. It must abandon attempts at unified stable assumptions of who we are, and instead opt for more complex understandings.

In Part III.A, this Article examines the “multiculturalism” debate within history. History is the discipline that constructs who we are by linking us to where we came from. Multiculturalists retell history from a perspective that includes in the American identity both winners and losers. Multiculturalism debunks the myth that Americans are one unified monolith. Instead, multiculturalists seek to tell a more complex story of interrelatedness but separateness. Heterogeneity has been the rule in American history. Moreover, the conflict between the dominant group, which claims for itself the mantle of normality and universality, and those that lie outside the homogeneity assumption has been an important constant in our history.

Part III.B looks at an important element of the homogeneity assumption—the mandate to assimilate—and deconstructs it from an anthropological, sociological, and race theory³⁶ perspective. Recent work within sociology contests the position that assimilation is the inevitable end point of entry groups into our society. Moreover,

36. I use the term “race theory” to include legal scholars whose work can be categorized under Critical Race Theory (CRT) as well as work in other fields, such as sociology and psychology. CRT is diverse and varied, and it is difficult to describe uniformly. However, CRT’s principal concern has been with critiquing legal rules that appear to be neutral and rational, and demonstrating how these rules support ideological, epistemic, political, and wealth-creation systems that embody beliefs and assumptions that promote and maintain racism in our society. Angela Harris’ *Foreword* to the 1994 Critical Race Theory Symposium sponsored by the California Law Review contains a thoughtful and lucid summary of current CRT scholarship and the multiplicity of issues, methodologies, and central ideas that such scholarship is currently addressing. See Angela P. Harris, *Foreword to The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1994). Professor Crenshaw’s introduction to her coedited critical race theory reader offers a more personal view of the critical race theory project. See Kimberle Crenshaw, *Introduction to RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xiii-xxxii (Kimberle Crenshaw et al. eds., 1995). I also include developing LatCrit scholarship under the term race theory. Like CRT, the central concern of this scholarship is to critique legal rules and doctrines from the perspective of ethnic minorities, more specifically, Latinos/as, and to offer critiques and alternative jurisprudential approaches that do not overlook the interests and particularities of Latino and other ethnic communities. See generally Francisco Váldes, *Latino/a Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1 (1996).

sociological data indicates that, in spite of the mandate to assimilate, Americans retain a significant degree of cultural and ethnic distinctness. Race theory provides the more powerful indictment of the assimilation mandate. Assimilation assumes that entry groups will be accepted and incorporated as equals. Raced groups³⁷ have not had that opportunity to assimilate, due to the very differentiation that racing processes effect.

In Part III.C, this Article examines the psychological literature and how this literature supports the view that intergroup differences will persist. Psychology and sociology debunk the myth that, by clinging to the homogeneity assumption, we can maintain a unified society. Rather, perceived intergroup differences appear to be innate to the human condition, and, by failing to acknowledge and recognize the dynamics of group differences, courts commit a major error in understanding the nature of, and what is required for the resolution of, intergroup conflicts.

Part III.D argues that a process view of race can help us to understand the complexity of difference. The homogeneity assumption universalizes differences into a Black-White binary, which minimizes the extent of and pervasiveness of racing. In constitutional law, the effect of the status-based, binary construct is to recognize only that difference which fits into the African-American racial experience. Thus, those characteristics of excluded groups of difference that do not fit into the Black racial paradigm are not recognized. Understanding race as a complex, multilayered process can help break the hold of the simplicity of the Black-White construct and help the Court reconstruct racial problems in more focused ways.

In Part III.E, this Article challenges the assertion that liberalism and multiculturalism are inapposite. The traditional view of liberalism on which this assertion is based is but one construction of liberalism, specifically, a construction that incorporates the homogeneity assumption. This traditional universalistic construct has been under attack because it privileges the dominant perspective and excludes other perspectives that are equally valid. An alternative liberal construct, which this Article calls multicultural liberalism, conceives

37. Recent work by race theorists emphasizes the dynamic and changing nature of race. By using the term "raced," I wish to emphasize the process by which a social group becomes a socially constructed race and de-emphasize the status conceptualization of race. For example, Stephen Small uses the term "racialized group" to "emphasiz[e] the social (and thus changing) nature of racialized boundaries . . . [their] contingent nature and the historical . . . boundaries." STEPHEN SMALL, RACIALIZED BARRIERS: THE BLACK EXPERIENCE IN THE UNITED STATES AND ENGLAND IN THE 1980s 36 (1994); *see also infra* Part II.D.

the individual more broadly and recognizes the primacy of cultural identity. Under multicultural liberalism, a liberal state should strive to respect individuals' *noncoerced choices* about their cultural identity. Multicultural liberalism's lesson is that, to fulfill the promise of equal dignity and equal individual autonomy to all members of society, public law must recognize the right of each of us to be something other than what the homogeneity assumption dictates.

This Article concludes that differences, whether cultural, gender, or racial, are not inherently disunifying. Rather, in a multicultural society we, and particularly courts, must strive to understand the full complexity of difference. Only by valuing our differences can we finally begin to establish the groundwork for a unified society.

II. THE HOMOGENEITY ASSUMPTION: THE WHITE ETHNIC NARRATIVE AS CULTURAL IDEOLOGY

A. *The Bases for the Homogeneity Assumption: Americanization as Monistic Ideology*

The promise of America was born in the eighteenth century out of the bold conviction that we are all created equal. It was extended and preserved in the nineteenth century, when our nation spread across the continent, saved the union and abolished the scourge of slavery. Then, in turmoil and triumph, that promise exploded onto the world stage to make this the American century.

What a century it has been. America became the world's mightiest industrial power, saved the world from tyranny in two world wars and a long cold war, and time and again, reached across the globe to millions who longed for the blessings of liberty.

Along the way, Americans produced the great middle class and security in old age; built unrivaled centers of learning and opened public schools to all; split the atom and explored the heavens; invented the computer and the microchip; and deepened the wellspring of justice by making a revolution in civil rights for African-Americans and all minorities, and extending the circle of citizenship, opportunity, and dignity to women.³⁸

The homogeneity assumption is best described as a cultural ideology of "Americanization," a monistic view that Anglo-Saxon culture is the core American culture and that Anglo-Saxon culture is superior to all others. This Part II identifies the main components of

38. President William Jefferson Clinton, *Let Us Set Our Sights Upon a Land of New Promise*, 143 CONG. REC. S 119-03, S 121 (1997) (President Clinton's 1997 Inaugural Address) [hereinafter Clinton Inaugural].

"Americanization" as a cultural ideology that forms part of an embedded sense of self. Part II.A below describes how in our cultural dialogue Americanization is commonly expressed as (1) utilitarian arguments made with respect to immigration and assimilation and (2) the view that the dominant Anglo-American culture represents the one "true" American culture. This dialogue, not always overtly stated, regarding why immigrants should assimilate and what it is that makes up the core American identity, deeply influences how we think about ourselves and those who the majority perceives as falling outside the assumption of sameness, which becomes also the assumption of who should be included in the monolithic whole. Part II.B describes how these ingrained cultural understandings have become intertwined in the White ethnic immigrant myth, a narrative that captures the core American values that reflect our sense of self. It is also a myth that constructs and reinforces hegemony by constructing those who are the same, from a dominant perspective, as virtuous Americans, and those who fall outside the homogenous core as nonvirtuous outsiders.

Sociologist Jeffrey Praeger defines cultural ideology as an organized set of assumptions concerning social reality that orient perception, thought, and action in society that is capable of articulation and rational defense.³⁹ Because cultural ideology is a social construction of the world, the reality that cultural ideology captures has social meaning that may not correspond with reality. Praeger explains that racial ideology, in particular, "can be mistaken for reality."⁴⁰ He continues:

Only the passage of time and the emergence of new understandings reveal how previous efforts to comprehend differences . . . serve to justify and, in a limited sense, legitimate inequity. . . . Any racial ideology is inadequate so far as it cannot comprehend the individual in the groups. What stands for explanation at the ideological levels easily dissolves when confronted with social reality.⁴¹

39. See Jeffrey Praeger, *American Ideology as Collective Representation*, 5 ETHNIC RACIAL STUD. 98, 101 (1984); see also Clifford Geertz, *Ideology as a Cultural System*, in THE INTERPRETATION OF CULTURES: SELECTED ESSAYS BY CLIFFORD GEERTZ 218, 193-233 (1973) [hereinafter Geertz, *Ideology*] (arguing that the function of ideology is to provide authoritative concepts that render culture meaningful, the images by which it can be sensibly grasped).

40. Praeger, *supra* note 39, at 100-101; see also Geertz, *Ideology*, *supra* note 39, at 204-07; Harris, *supra* note 36, at 749 (suggesting that CLS questions "real reality" and instead posits that "ideology is all there is"); J.M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133 (1991).

41. Praeger, *supra* note 39, at 101.

Ideology serves to rationalize what we perceive.⁴² It operates unconsciously, seamlessly constructing and supporting assumptions that cannot stand up on closer examination.⁴³ "Americanization" functions as a cultural ideology because it seamlessly constructs and reinforces an attitude that sameness is normal and the universal status quo, and that difference, its opposite, is outside the norm and not desirable.

1. The Utilitarian Arguments

The utilitarian justification of homogeneity masks important value choices and the underlying tensions between the monistic view of American culture and other alternatives. Yet much of our discussion about tolerance for ways that lie outside the homogeneity assumption is conducted in the framework of utilitarian arguments, which, in turn, mask fundamental ideological assumptions.

From the dominant community's perspective, "Americanization" is expressed as a preference in immigration policy for immigrants from cultures like the Anglo-Saxon culture, on the grounds that such cultures assimilate faster into the American dominant culture. The utilitarian justification is that the process of assimilating such groups would be less stressful on the host group and would result in less noticeable social conflict. From the minority perspective, the utilitarian argument is often combined with ethnocentrism, which sometimes spills over as intolerance.⁴⁴

An early example of the utilitarian argument, combined with ethnocentrism and intergroup prejudice, is Benjamin Franklin's essay written before the American Revolution, in which Franklin contemplated what kind of "virtuous people" should become

42. See *id.* at 101-103 ("Ideology . . . represents the dominant, more or less culturally universal scheme by which social order is understood and explained.").

43. Professor Young-Bruehl emphasizes the unconscious level at which ideology functions. It (1) operates against self-consciousness and thereby avoids rigorous reasoned examination, and (2) protects against revealing internal contradictions because they are pervasive and self-reinforcing. See ELISABETH YOUNG-BRUEHL, *THE ANATOMY OF PREJUDICES* 97 (1996); see also Geertz, *Ideology*, *supra* note 39, at 230 (stating that cultural ideology is symbolic structure); Praeger, *supra* note 39, at 101 (stating that "ideology has served not to illuminate reality but to obscure it").

44. Young-Bruehl would be more specific and tie ethnocentrism with the psychoanalytical concept of "ideologies of desire," which are the bases of prejudices. See YOUNG-BRUEHL, *supra* note 43, at 28-35. Prejudices need not coincide with ethnocentrism. See *id.* at 28-39.

Americans.⁴⁵ The “virtuous” were the “lovely White,” who were “Superior Beings,” already in short supply worldwide.⁴⁶ The English were preferable stock, in contrast to ethnic groups such as Germans, who were unassimilable “swarms” and “boors,” who would cling to their very different language and customs.⁴⁷ Franklin’s spirit can be traced to today. Pat Buchanan’s 1992 and 1996 presidential nomination bids attracted support when he charged that there were already too many immigrants in the United States, and that they were not the right kind.⁴⁸ A recent best-seller charges that increased immigration from Third World countries will “overwhelm” the United States’ Anglo-American traditions and criticizes these immigrants for their failure to assimilate.⁴⁹

45. See Benjamin Franklin, *Observations Concerning the Increase of Mankind* (1751), reprinted in 4 THE PAPERS OF BENJAMIN FRANKLIN 227-34 (Leonard W. Labaree et al. eds., 1961).

46. See *id.* Franklin observed:

That the Number of purely white People in the World is proportionably very small. All Africa is black or tawny. Asia chiefly tawny. America (exclusive of the new Comers) wholly so. And in Europe, the Spaniards, Italians, French, Russians and Swedes, are generally of what we call a swarthy Complexion; as are the Germans also, the Saxons only excepted, who with the English, make the principal Body of White People on the Face of the Earth. I could wish their Numbers were increased. And while we are, as I may call it, *Scouring* our Planet, by clearing America of Woods, and so making this Side of our Globe reflect a brighter Light to the Eyes of Inhabitants in Mars or Venus, why should we in the Sight of Superior Beings, darken its People? Why 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? But perhaps I am partial to the Complexion of my Country, for such Kind of Partiality is natural to Mankind.

Id. at 234.

47. See *id.* Franklin stated:

[W]hy should the Palatine Boors be suffered to swarm into our Settlements, and by herding together establish their Language and Manners to the Exclusion of ours? Why should Pennsylvania, founded by the English, become a Colony of *Aliens*, who will shortly be so numerous as to Germanize us instead of our Anglifying them, and will never adopt our Language or Customs, any more than they can acquire our Complexion.

Id.

48. See Joanne Kenen, *Buchanan Rhetoric Flamboyant and Controversial*, REUTERS WORLD SERVICE, Feb. 22, 1996 (quoting Buchanan as stating on national television, “I think God made all people good, but if we were to take a million immigrants in, say Zulus, next year, or Englishmen and put them in Virginia, what group would be easier to assimilate and would cause less problems for the people of Virginia?”). I acknowledge that James Buchanan for many Americans is an extremist. However, I argue that his expressions, albeit somewhat crude, reflect a nativistic conceit that infects all of our thinking. His arguments hold sway because they are innately appealing and persuasive, as they are anchored in the cultural ideology of Americanization.

49. See generally PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER* (1995).

Minority neoconservatives also champion the monistic Americanization view, without adopting the racial hostility taint of Franklin's argument. They focus on the utilitarian advantages for the minority of swift behavioral acculturation and assimilation into the Anglo-American majority. Some, like Linda Chávez, a Mexican-American lawyer and now popular commentator, attack the resistance of minority groups to acculturation as dangerous and misguided.⁵⁰ In *Out of the Barrio*⁵¹ she argues that bilingual education should be abolished.⁵² She urges Latino groups to learn English, adopt the norms and other modes of communication of the dominant group, so that their speech, clothing, mannerisms, mode of socializing, and other cultural markers no longer differentiate them as belonging to a distinct ethnic group.⁵³ In this way, Latinos can better compete with Anglo-Americans. Similarly, in the African-American community a long list of conservative social scientists, among them Thomas Sowell⁵⁴ and Shelby Steele,⁵⁵ like Franklin Frazier⁵⁶ before them, advocate a change in African-American cultural norms and traits. Terry Eastland,⁵⁷ also makes this argument in his recent best seller. They contend that

50. White assimilationist liberals also make this same argument. See, e.g., ARTHUR M. SCHLESINGER, JR., DISUNITING OF AMERICA 104-125 (1992); Nathan Glazer, *The Problems of Ethnic Studies*, in ETHNIC DILEMMAS 1964-82 97, 101-03 (1983).

51. See LINDA CHÁVEZ, *OUT OF THE BARRIO: TOWARD A NEW POLITICS OF HISPANIC ASSIMILATION* (1991).

52. See *id.* at 9-38. This position is particularly controversial. See, e.g., Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CAL. L. REV. 321 (1987) (discussing bilingual education as a status issue).

53. See CHÁVEZ, *supra* note 51, at 161-71.

54. Sowell, an economist, approaches culture as a commodity. Using a utilitarian lens, he asks, given today's market structures, what cultures enjoy a comparative advantage. He extolls those cultures that have cultural, structural, and behavioral advantages in succeeding in a market economy; for example, he praises Jews' informal commercial networking, the Protestant work ethic, and Italians' cohesive family ties. He urges African-Americans to also adopt cultural values that would make them more competitive. See generally THOMAS SOWELL, *ETHNIC AMERICA: A HISTORY* (1981).

55. See generally SHELBY STEELE, *THE CONTENT OF OUR CHARACTERS: A NEW VISION OF RACE IN AMERICA* (1991) (critiquing certain aspects of Black culture). Steele attacks the idea that one should retain Black English in order to truly be Black, see *id.* at 70-71, or that racism should be blamed for individual failures, see *id.* at 66-70.

56. Frazier argued that slavery disrupted, if not eliminated, African-American family formation, necessary for cultural groups to survive and prosper. Instead, the destruction of the African-American family fostered dysfunctional cultural behaviors. Frazier advocated that African-Americans transform family structures and values about family units to conform with the dominant norm in American society. See generally E. FRANKLIN FRAZIER, *THE FREE NEGRO FAMILY* (1932).

57. Eastland argues that African-Americans have not taken advantage of the opportunities afforded by affirmative action, and that this is one of the reasons that there continues to be inequality between Whites and African-Americans. See generally TERRY EASTLAND, *ENDING AFFIRMATIVE ACTION: THE CASE FOR COLOR-BLIND JUSTICE* (1995).

African-American culture should become more aligned with the Anglo-American norm, in order for African-Americans to better compete in today's national and global economy.⁵⁸

Both of these arguments, Chávez's praise of behavioral acculturation and neoconservative African-Americans' assimilation,⁵⁹ are Darwinist and utilitarian assertions that the survival, and indeed the economic progress, of the individual members of minority groups depends on their ability to fully integrate into American society. The arguments are also Anglo-centric because they take as a given that Anglo-American culture is, in essence, the American culture. Although not often articulated as a political argument, the minority utilitarian argument also contains a hope that, by fully assimilating into the majority core culture, minorities would not only become economic successes but also would be subject to less prejudice and discrimination.⁶⁰

What remains unquestioned and unanswered by the utilitarian arguments is: (1) whether and why Anglo-American culture is indeed superior; (2) whether utilitarian concerns are all that matter; and (3) why immigrant parents are willing to urge, without reserve, practical complete assimilation, even at the cost of survival of their own culture. These latent questions reveal that utilitarian arguments fail to consider another fundamental point of view, that different cultures should coexist with the dominant American culture, even if the participants in the minority culture are foregoing utilitarian

58. But see Derrick Bell, Jr., *The Racism is Permanent Thesis: Courageous Revelation or Unconscious Denial of Racial Genocide*, 22 CAP. U. L. REV. 571, 573 (1993). Derrick Bell critiques White conservatives' acclamation of the African-American neoconservative writings:

For white people who both deny racism and see a heavy dose of the Horatio Alger myth as the answer to blacks' problems, how sweet it must be when a black person stands in a public place and condemns as slothful and unambitious those blacks who are not making it. Whites eagerly embrace black conservatives' homilies to self-help, however grossly such messages are unrealistic in an economy where millions . . . are unemployed and, more important, in one where racial discrimination in the workplace is . . . vicious.

Id. at 573.

59. By assimilation, I mean what sociologist Milton Gordon calls behavioral acculturation, the process of adopting and taking on as your own the cultural values and behaviors (language, dress, speech) of the dominant group. See MILTON GORDON, *ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION AND NATIONAL ORIGIN* 60-72 (1964). I do not include structural assimilation that occurs when the entry group is granted large-scale access to social and economic institutions of the host society. See *id.* at 72. The entry into dominant social and economic institutions controls the ability of the entry group to advance occupationally and socially. See *id.*

60. Nathan Glazer describes this as one of the motivations of White liberals for making the assimilation argument. See Glazer, *supra* note 50, at 101.

advantages. Utilitarian arguments mask the choices that these unanswered questions raise, because the choices are made by cultural ideology. Cultural ideology lends strength to the utilitarian arguments and makes the choices for acculturation and assimilation seem a natural and essential part of the American tradition.

2. The Teleological Argument: Bracketing Cultural Ideology

Americanization is also a teleological argument: it is a monistic view that Anglo-Saxon heritage represents the true and only heritage of Americans. Psychologist Young-Bruehl⁶¹ believes, like Benjamin Franklin,⁶² that ethnocentrism, love of one's own culture and the inability to see the merit of others, is a universal condition of humankind. De Tocqueville captured this as Americans' "insatiable vanity."⁶³

The hold of ethnocentrism is directly related to the important role that culture plays in how societies think about themselves. Cultural character endures over time, forms the psychological and sociological anchor of a society, and becomes the traditions and norms that capture the essence of what a people are and understand themselves to be.⁶⁴ According to neoclassical economist Frederick von Hayek, cultural norms, developed over time, account for the success of a people and their ability to survive and defy alteration and manipulation by rational man.⁶⁵

Cultural character can be defined, but for those of us living within the culture it is difficult to extract what it is.⁶⁶ We take our own

61. Professor Young-Bruehl defines ethnocentrism as a form of prejudice that protects group identity in economic, social, and political terms, which "is . . . universal—where groups are, ethnocentrism is Ethnocentrism takes distinct historical forms. They vary with social circumstances and types of social and political organization, and they are influenced by technological developments." YOUNG-BRUEHL, *supra* note 43, at 27-28.

62. See Franklin, *supra* note 45.

63. De Tocqueville wrote that Americans were vain about being Americans: "Their vanity is not only greedy, but restless and jealous. It makes endless demands and gives nothing. It is both mediant and querulous." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 252-53 (J.P. Mayer & Max Lerner eds., 1966) (1835).

64. Five sociologists who undertook a case study of American middle-class concepts of individualism and civic traditions offer this definition of culture: The cultural tradition of a people—its symbols, ideals, and ways of feeling—is always an argument about the meaning of the destiny that its members share. Cultures are dramatic conversations about things that matter to their participants, and American culture is no exception. See ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 27 (1985). For a critique of *HABITS OF THE HEART*, see generally CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989) [hereinafter TAYLOR, *SOURCES*].

65. See 2 VON HAYEK, *supra* note 27, at 65.

66. Fernand Braudel expressed this idea: "Live in England for a year and you will not learn much about the English. But when you return to France you will see, in the light of

"local knowledge" to be the "metaphysics of humankind."⁶⁷ The inability to be conscious of our own view implies that we are what anthropologist Renato Rosaldo calls a positioned subject, an analyst who comes to the subject with her own cultural perspective, through which she filters what she observes and evaluates.⁶⁸ Clifford Geertz, an influential anthropologist, urges that we take a "thick" approach and that we study culture in layers, as an analysis of the symbolic dimensions of social action.⁶⁹ He believes that to study a culture we

your surprise, that which had remained hidden to you because it was so familiar." FERNAND BRAUDEL, *HISTOIRE ET SCIENCES SOCIALES: LA LONGUE DUREE*, ANNALES: ECONOMIES, SOCIETES, CIVILIZATIONS 725, 737 (1958); see also RAYMONDE CARROLL, *CULTURAL MISUNDERSTANDINGS: THE FRENCH-AMERICAN EXPERIENCE* (Carol Vol trans., 1988) (exploring differences in French and American culture as a French outsider). Outsiders seem to be better able to discern what is America's cultural character. See, e.g., DE TOCQUEVILLE, *supra* note 63. De Tocqueville's work is still the standard that sociologists and political philosophers use as a starting marker to measure America's cultural values. See BELLAH ET AL., *supra* note 64, at 50 (taking the title of their sociological survey on community and individualism from de Tocqueville's observation on Americans' civic spiritedness); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 1 (1991) ("Our own ways of thinking and speaking seem so natural to us that very often it is only an empathetic outsider who can enter into our view of the world and spot a peculiarity in it.").

67. See RENALDO ROSALDO, *CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS* 202 (2d ed. 1993) ("The temptation to dress one's own 'local knowledge' of either the folk or professional variety in garb at once 'universal' and 'culturally invisible' to itself seems to be overwhelming.").

68. See *id.* at 168-214. A debate exists within sociology and anthropology as to how a culture should be described and defined to avoid cultural positionality. See *id.* at 207 (admonishing that the analyst considers the perceptions of those being analyzed as much as the analyst considers her own perceptions); BELLAH ET AL., *supra* note 64, at 303 ("The analyst . . . is still within the traditions of his own society . . . he is studying. . ."); VICTOR TURNER, *THE CRAFT OF SOCIAL ANTHROPOLOGY* (1967) (advocating case method to uncover the "social drama"); Joan Vincent, *Systems and Process 1974-1985*, 15 ANN. REV. ANTH. 99 (1981) ("[A]nalysts must study culture from a variety of perspectives to construct a 'processual analysis,' which makes no monistic claims to truth."). Rosaldo explains that social positionality is "laced with power":

Cultures and their "positioned subjects" are laced with power, and power in turn is shaped by cultural forms. Like form and feeling, culture and power are inextricably intertwined. In discussing forms of social knowledge, both of analysts and of human actors, one must consider their social positions. What are the complexities of the speakers's social identity? Does the person speak from a position of relative dominance or relative subordination?

ROSALDO, *supra* note 67, at 168; see also CARROLL, *supra* note 66, at 125-26. Carroll urges us to accept that "my truth is precisely that, 'my' truth." She continues, "I must become able to conceive that the 'aberrant' behavior that wounds me . . . may be informed . . . by the truth of the . . . other. . . ." *Id.*

69. This is what Clifford Geertz calls "thick description":

Such a view of how theory functions in an interpretive science suggests that the distinction, relative in any case, that appears in the experimental or observational sciences between "description" and "explanation" appears here as one, even more relative, between "inscription" ("thick description") and "specification" ("diagnosis")—between setting down the meaning particular social actions have

should examine shared realities, myths, social identity, ethnicity, status, and “attempts by particular people to place these things in some sort of comprehensible meaningful frame.”⁷⁰

To answer the question of what are the cultural values that guide how we think about ourselves, we would set about discerning the set of values and norms that guide the conduct and goals and strivings of our society—the conversation about who we are and our ideals and destiny as a people.⁷¹ We can construct a “thick” framework drawing on what Americans say they believe,⁷² sociological studies,⁷³ and our own narratives and myths.⁷⁴

for the actors whose actions they are, and stating, as explicitly as we can manage, what the knowledge thus attained demonstrates about the society in which it is found and, beyond that, about social life as such.

Geertz, *Ideology*, *supra* note 39, at 27; *see also* ROSALDO, *supra* note 67, at 168-214 (describing culture as a collection of “loosely tied bundles of informal practices”).

70. Geertz, *Ideology*, *supra* note 39, at 30. Geertz describes cultural analysis as stratigraphic . . . one peels off layer after layer, each such layer being complete and irreducible in itself, revealing another, quite different sort of layer underneath . . . [and can cover views] about nationalism, about violence, about ethnicity, about urbanization, about status, about death, about time [The analyst must] guard the answers that others . . . have given

Id. at 30.

71. Culture has many meanings. Geertz, for example, offers two definitions of culture:

[1] Culture is best seen not as complexes of concrete behavior patterns—customs usages, gradations, habit clusters—as has by and large been the case up to now, but

[2] as a set of control mechanisms—plans, recipes, rules instructions (what computer engineers call programs)—for the governing of behavior [M]an is precisely the animal most desperately dependent upon such extra-genetic, outside-the-skin control mechanism, such cultural programs, for ordering his behavior.

Clifford Geertz, *The Impact of the Concept of Culture on the Concept of Man*, in *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS BY CLIFFORD GEERTZ* 33, 44 (1973) [hereinafter *Geertz, Impact*]. In this particular section, culture means embodiment of cultural values and norms that guide the conduct of a people, Geertz’s second meaning above.

72. In a recent study, Daniel Yankelovich summarized what Americans believe to be their core culture into the following themes:

[1] Freedom. Valuing political liberty, free speech, freedom of movement, freedom of religious worship, and other freedoms from constraints to the pursuit of private happiness.

[2] Equality before the law. Placing a high value on having the same rules of justice apply to one and all, rich and poor, [B]lack and [W]hite.

[3] Equality of opportunity. The practical expression of freedom and individualism in the marketplace, which helps to resolve the tensions between the values of freedom and equality.

[4] Fairness. Placing a high value on people getting what they deserve as the consequence of their own individual actions and efforts.

[5] Achievement. A belief in the efficacy of individual effort: the view that education and hard work pay off.

The beliefs of (a) individualism, (b) merit, (c) fairness, and (d) exceptionality form the core basis of the cultural ideology that supports the homogeneity assumption:

a. Individualism

First is individualism, the idea that the individual is the agent of moral decisionmaking, the focus of legal rights in our society.⁷⁵ In our myths, individual heroes accomplish incredible feats, like the brave detective and the lone cowboy.⁷⁶ A sociological study, *Habits of the Heart*, declares that it is "individualism, not equality, as de Tocqueville thought, that has marched inexorably throughout our history."⁷⁷ The

[6] Patriotism. Loyalty to the United States and dedication of the way of life it represents.

[7] Democracy. A belief that the judgment of the majority should form the basis of governance.

[8] American exceptionalism. A belief in the special moral status and mission of America.

[9] Caring beyond the self. Placing a high value on a concern for others such as family or ethnic group; neighborliness; caring for the community.

[10] Religion. A reverence for some transcendental meaning extending beyond the realm of the secular and practical.

[11] Luck. A belief that one's fortunes and circumstances are not permanent and that good fortune can happen to anyone at any time.

Yankelovich, *supra* note 22, at 23-24.

73. See, e.g., BELLAH ET AL., *supra* note 64; JENNIFER L. HOCHSCHILD, *FACING UP TO THE AMERICAN DREAM: RACE, CLASS AND THE SOUL OF THE NATION* (1995) (collection of attitudinal data by race on the "American Dream").

74. Consider Rollo May's description of the importance of myth:

There are . . . two ways human beings have communicated through their long and fitful history. One is rationalistic language A second way is myth. The myth is a drama which begins as a historical event and takes on its special character as a way of orienting people to reality. The myth, or story, carries the values of the society: by the myth the individual finds his sense of identity By their myths, we could say, we shall know them. The myth unites the antinomies of life: conscious and unconscious, historical and present, individual and social [M]yth refers to the quintessence of human experience, the meaning and significance of human life.

ROLLO MAY, *THE CRY FOR MYTH* 26 (1991).

75. Mary Ann Glendon uses the term "lone rights-bearer." She critiques the law's narrow construction of what is an individual, most often viewed as an acquisitive agent, without responsibilities to the communities that she inhabits and to her fellow human beings. See GLENDON, *supra* note 66, at 47-76 ("The American dialect of rights talk implicitly encodes an image of the possessor of rights. His qualities, or lack of them, help to explain why our rights claims are so stark and our responsibility concepts so inconspicuous.").

76. See BELLAH ET AL., *supra* note 64, at 145 ("America is . . . the inventor of that most mythic individual hero, the cowboy, . . . he can shoot straighter and faster . . . and [has] a special sense of justice. . . . The connection of moral courage and lonely individualism is even tighter for that other, more modern American hero, the hard boiled detective[,] . . . [f]rom Sam Spade to Serpico . . .").

77. *Id.* at viii.

picture of the individual that captures the American imagination is the individual with freedom to be left alone, to be her own person, to speak out, to participate freely in the community, and free to have her rights respected.⁷⁸ In law, individual rights “trump” all else.⁷⁹ Property rights protect the individual from government intrusion, and, in the current battle over government regulatory “overreaching,” property rights have taken on rhetorical and cultural force.⁸⁰

Whenever equal protection analysis sets up a dichotomy between individual and group rights, individual rights have the upper hand. For example, in the recent line of affirmative action cases, *Wygant v. Jackson Board of Education*,⁸¹ *City of Richmond v. J.A. Croson Co.*,⁸² and *Adarand Constructors, Inc. v. Peña*,⁸³ the Court has adopted a more skeptical stance toward affirmative action programs, shifting to a strict scrutiny review of governmental programs aimed at remedying past and current racial discrimination.⁸⁴ This development is anchored in the Court’s claim that equal protection is fundamentally an individual right.⁸⁵ As stated in *Croson*, “the ‘rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.’”⁸⁶ In these cases, the Court applies the principle of individualism to require reliance on a “color blind doctrine” that all individuals, regardless of

78. See *id.* at 23-25.

79. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) [hereinafter DWORKIN, *RIGHTS*]; see also GLENDON, *supra* note 66, at 9 (“In its simple American form, the language of rights is the language of no compromise. The winner takes all and the loser has to get out of town.”).

80. See GLENDON, *supra* note 66, at 18-46. Professor Glendon links the Founders’ Lockean conceptualization of property to the principle that governmental authority must be limited. The result is that “from the beginning, the absoluteness of American property rhetoric rooted illusions and clear thinking about property rights and rights in general.” *Id.*; see also JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMIT OF AMERICAN CONSTITUTIONALISM: A VIEW FROM THE FORMATION* (1990) (concluding that property rights rhetoric masks cultural aspects of property); Sylvia R. Lazos Vargas, *Florida Property Rights Act: A Political Quick Fix or a Political Mixed Bag of Tricks*, 23 FL. ST. U. L. REV. 315 (1995) (discussing property rights rhetoric in Florida’s recent enactment of a “property rights” bill).

81. 476 U.S. 267 (1986).

82. 488 U.S. 469 (1989).

83. 515 U.S. 200 (1995).

84. The Court announced and justified the shift to a strict scrutiny standard for race-based actions by state and federal governments. See *id.* at 213-38.

85. See *Croson*, 488 U.S. at 493; see also *Adarand*, 515 U.S. at 223 (“[T]he individual . . . is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights.”).

86. *Id.* (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)).

race, ethnicity, or gender be treated the same under the law.⁸⁷ Second, under *Adarand*, the Court has held that race or other general, class-based characteristics for distribution of government benefits cannot be used as a proxy.⁸⁸ Third, the Court has determined that employing a governmental remedial program without adequate rationales “stigmatizes” minority individuals because the program “inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race.”⁸⁹ The opinions rely on individualist ideology to justify a simple result in cases that involve complex race relations. By referencing such a powerful ideological cultural value, these decisions are self-legitimizing and succeed in masking that these decisions decontextualize African-American and White social identity.⁹⁰

b. Merit

The second core belief is merit, that the American system metes out just rewards for those who work hard. Narratives about our mythical heroes, such as Benjamin Franklin,⁹¹ Abraham Lincoln,⁹² and

87. See *id.* at 485 (“The guarantee of Equal Protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.” (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-90 (1978))); *Adarand*, 515 U.S. at 223-25 (arguing that, under principle of consistency, equal protection should be equally concerned with the position of those who lose out in the affirmative action bargain as with those who are the victims of racial discrimination). For an early discussion of why a formalist approach to race is a logical error, see generally Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

88. See *Adarand*, 515 U.S. at 227-28 (requiring a fit between race as a proxy and the purposes to be attained by the legislation to distinguish between legitimate and illegitimate uses of classifications); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting) (“Such policies may embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens . . .”).

89. *Adarand*, 515 U.S. at 229; see also *Croson*, 488 U.S. at 493 (“Classifications based on race carry a danger of stigmatic harm . . . [and] may in fact promote notions of racial inferiority.”).

90. Both critical race theorists and constitutional commentators have elaborated this thesis. See generally Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1 (1991); John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric of Affirmative Action*, 79 IOWA L. REV. 313, 333 (1994); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758; T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991). I discuss these opinions in greater detail in the second article of this project. See Sylvia R. Lazos Vargas, *Democracy and Inclusion: The Role of the Judge in Reconciling Majority-Minority Conflict in a Pluralist Polity*, 58 MD. L. REV. (forthcoming 1999).

91. See BENJAMIN FRANKLIN, AUTOBIOGRAPHY, reprinted in BENJAMIN FRANKLIN 3-180 (Ormond Seavy ed., 1993) (describing penurious habits and how hard work and self-discipline paid off).

Horatio Alger,⁹³ provide us with proof that hard work leads to success. The sociologists in *Habits of the Heart* observe that “[t]he demand to ‘make something of yourself’ through work is one that Americans coming of age hear as often from themselves as from others.”⁹⁴ Sociologist Jennifer Hochschild reports that both African-Americans and Whites believe that the key to success lies in their own ability and willingness to work hard. Even though African-Americans recognize increasingly that they are the victims of discrimination, which may thwart their ability to succeed, they continue to believe in the American Dream.⁹⁵ This dissonance, Hochschild concludes, leads to African-Americans being more likely to blame themselves for their failures, rather than luck or societal and economic circumstances.⁹⁶ From a utilitarian perspective, the pursuit of the American Dream often becomes translated as the pursuit of material success.⁹⁷ De Tocqueville reported that Americans “pursue prosperity” with “feverish ardor.”⁹⁸ From a moral perspective, hard work and success are linked to personal virtue.⁹⁹ From a political perspective, the

92. See, e.g., WILLIAM HANCHETT, *OUT OF THE WILDERNESS: THE LIFE OF ABRAHAM LINCOLN* 3-20 (1994) (describing Lincoln’s rise from poverty to prominent political figure).

93. See, e.g., EDWIN P. HOYT, *HORATIO’S BOYS: THE LIFE AND WORKS OF HORATIO ALGER, JR.* (1974) (describing Horatio Alger’s rags-to-riches story).

94. BELLAH ET AL., *supra* note 64, at 65.

95. In the 1960s, the majority of Whites and African-American believed that success lay in their own hands; however, by 1980, the majority of African-Americans were not as optimistic. Only half, as compared to two-thirds of Whites, believed that life outcomes reflected their own individual abilities. See HOCHSCHILD, *supra* note 73, at 57-61.

96. See *id.* at 65.

97. See BELLAH ET AL., *supra* note 64, at 149. The authors of *HABITS OF THE HEART* make a distinction between the individualistic strain in American society, which finds success and meaning in materialistic success, and the pursuit of self-realization and self-fulfillment in a series of disciplines, practices, and trainings. See *id.* at 290. Thus, materialistic “success” becomes the mark of the “best” . . . “[T]he only clearly defined cultural standards against which status can be measured are the gross standards of income, consumption, and conformity to rational procedure for attaining ends.” Middle-class individuals are thus motivated to enter a highly autonomous and demanding quest for achievement . . .” *Id.* at 148-49. The authors conclude that the individualism that Americans so treasure and so emphasize leads to a “disembodied” self. See *id.* Sociologist Jennifer Hochschild echoes the conclusion of *HABITS OF THE HEART*. See HOCHSCHILD, *supra* note 73, at 255 (“The [American D]ream is ambiguous not only on how much achievement counts as success but also on what kind of achievement ought to be pursued.”); see also TAYLOR, *SOURCES*, *supra* note 64 (arguing that the postmodern condition leads to a disembodied self that seeks self-realization through materialistic pursuits).

98. DE TOCQUEVILLE, *supra* note 63, at 536 (“Among democratic peoples where there is no hereditary wealth, every man works for his living, or has worked, or comes from parents who have worked. Everything therefore prompts the assumption that to work is the necessary, natural, and honest condition of all men.”).

99. See *id.* at 522. According to Hochschild, both African-Americans and Whites believe that virtue is connected to realization of the American Dream. See HOCHSCHILD, *supra* note 73, at 59.

current attack on affirmative action is based on the argument that group rights violate the principle of merit,¹⁰⁰ that individuals should be judged, according to Martin Luther King, Jr.'s aphorism, on the "content of character and not the color of skin."¹⁰¹ In *Wygant*,¹⁰² *Croson*,¹⁰³ and *Adarand*,¹⁰⁴ the Court makes the claim that a "color-blind" doctrine is necessary because only in that way can all individuals, both White and minority, be judged on their own

100. Recent poll data show a lack of support for affirmative action programs and that the key cause of the racial split revolves around differing views of how the merit-reward equation functions in our society. Close to 80% of Whites do not believe that "qualified minorities should receive preference over equally qualified whites." Cathleen Decker, *The Times Poll: Most Back Anti-Bias Policy But Spurn Racial Preferences*, L.A. TIMES, Mar. 30, 1995, at A1. Popular commentary cites the violation of meritocratic values as the reason for erosion of popular support. See, e.g., Yankelovich, *supra* note 22; DINESH SOUZA, *THE END OF RACISM* (1995); EASTLAND, *supra* note 57. Psychological studies indicate that views of merit cause Whites to disfavor affirmative action. See James Kluegel, *If There Isn't a Problem, You Don't Need a Solution: The Bases of Contemporary Affirmative-Action Attitudes*, 28 AM. BEHAVIOR. SCI. 761-84 (1985) (suggesting that the ideology of individualism and meritocracy prevents Whites from empathizing with minorities in the area of affirmative action). A recent political analysis based on more recent surveys confirms the thesis that the racial gap on the merits of affirmative action is a product of differing racial perspectives on core ideological values of fairness, equality and merit. See generally DONALD R. KINDER & LYNN M. SANDERS, *DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS* (1996).

101. Shelby Steele took this phrase from Martin Luther King, Jr.'s speech for the title of his book. Steele's book attacks affirmative action because he believes that affirmative action plays into White and African-American dynamics of "racial innocence." See generally STEELE, *supra* note 55.

102. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). In *Wygant*, the challenge involved a collective bargaining agreement provision that modified the layoff seniority provision by requiring the school district to maintain certain levels of minority teachers, even if these "last-hired" minorities did not have sufficient seniority. See *id.* at 269-73. The Court phrased the issue of seniority in "merit" language, while examining the propriety "of laying off nonminority teachers with greater seniority in order to retain minority teachers with less seniority." *Id.* at 282. Justice Powell noted that affirmative action remedies aimed at remedying general harms "work against innocent people." *Id.* at 276.

103. In *Croson*, the challenge involved the City of Richmond's preferential race-based program for construction contracting. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). The Court described the challenged program as one that "entitles a black, Hispanic, or Oriental entrepreneur from anywhere in the country to an absolute preference over other citizens based solely on their race . . . [and requiring] a rigid 30% quota." *Id.* at 471. Justice O'Connor's opinion implied that, had it not been for the preferential, race-based program, the White contractor would have obtained the contract on the merits. *Id.* at 469-72.

104. In *Adarand*, the challenge involved a preferential race-based federal government contracting program. See *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200 (1995). The Court set the problem as this: Mountain Gravel, the contractor owned by a nonminority business, would have won the guardrail contract had it not been for the program's mandate to hire certified small businesses controlled by "socially and economically disadvantaged individuals." *Id.* at 204. Justice O'Connor appealed to meritocracy when she attacked affirmative action programs because they are "inevitably perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect." *Id.* at 229.

individual merit.¹⁰⁵ This constitutional narrative recalls the meritocracy myth.¹⁰⁶

c. Fairness

Third, we believe in fairness, that the American political and market systems function fairly, and also that we are fair people. In popular vernacular, "we believe in the system."¹⁰⁷ Both Whites and African-Americans are committed to pursuing the American Dream.¹⁰⁸ Over the last five decades, through the apogee of segregation and antimiscegenation laws, civil rights demonstrations, and the continued gap between Whites' and African-Americans' economic welfare, two-thirds of Whites have *consistently* believed that African-Americans are treated fairly.¹⁰⁹ In the law, the presumption of fairness plays out in antidiscrimination law's insistence on an intent requirement.¹¹⁰ The

105. See *Adarand*, 515 U.S. at 270-71 (Souter, J., dissenting); *Croson*, 488 U.S. at 521 (Scalia, J., concurring in judgment); *Wygant*, 476 U.S. 314-15 (Stevens, J., dissenting).

106. Again, this argument has been capably made by a variety of critical race and constitutional scholars. See generally Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357, 1364 (1992) ("Merit sounds like white people's affirmative action."); Morrison, *supra* note 90, at 331 (arguing that White Americans' narrative of "neutral standards" serves to distance them from advantages received); David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 948-60 (1996) (arguing that affirmative action is required to counteract the deeply ingrained stereotypes that Whites hold which blame, culturally and ability-wise, African Americans for their inferior social and economic position); Susan Sturm & Lani Guanier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996) (attacking current definitions of merit and fairness in the context of law school admissions); Robin West, *Constitutional Fictions and Meritocratic Success Stories*, 53 WASH. & LEE L. REV. 995, 1013 (1996) (arguing that *Bakke*, *Croson*, and *Adarand* represent "historical fictions of thwarted meritocratic success"); Orlando Patterson, *Affirmative Action, on the Merit System*, N.Y. TIMES, Aug. 7, 1995, at A2 (arguing that the critique of affirmative action as a counter to the principle of merit is not born out by the data: of the 90 percent of White Americans who claim to oppose affirmative action because it undeservedly hurts a White only 7 percent can cite a specific instance based on personal knowledge).

107. See generally Yankelovich, *supra* note 22 (indicating that fairness is American core belief).

108. See HOCHSCHILD, *supra* note 73, at 60-88.

109. The survey conducted by National Opinion Research Corporation has tracked African-American and White attitudinal data since the 1940s. Consistently, through the most recent observations, the total number of White Americans that believed race relations are getting better was about two-thirds. In 1944, when White southerners were asked if they believed that African-Americans were being treated fairly, 77% responded in the affirmative; twelve years later, the percentage had *increased* to 79%. See YOUNG-BRUEHL, *supra* note 43, at 97; HOCHSCHILD, *supra* note 73, at 61 (citing survey by National Opinion Research Corporation). By contrast, *consistently*, the majority of African-Americans do not see a fair system, but one that is riddled by entrenched racism. More well-off African-Americans see racial discrimination than do poor African-Americans. See *id.* at 72-75.

110. See, e.g., *Croson*, 488 U.S. at 496 (holding that remedial action must be focused on specific instances of racial discrimination); *Adarand*, 515 U.S. at 219-20 (stating that past

Court has outlined a very narrow doctrinal construction requiring a showing of deliberate discrimination to establish a violation of the Equal Protection Clause.¹¹¹ In employment antidiscrimination law, the Court has also downplayed the relevance of unconscious discrimination.¹¹² More generally, the Court has required a focus on “perpetrators” rather than on “victims.”¹¹³ This presumption of fairness also supports the Court’s current decontextualization of race under its “color-blind” approach.¹¹⁴

d. Exceptionality

Fourth, Americans believe in their exceptionality, that triumph is possible over any adversity. The sociologists who wrote *Habits of the Heart* observed that “[w]e have imagined ourselves a special creation, set apart from other humans.”¹¹⁵ Carlos Fuentes, a Mexican novelist, takes a comparative turn and calls this Americans’ lack of fatalism.¹¹⁶ He contrasts it with Mexican imagination, influenced by Mexican

discrimination is “too amorphous” to support remedial affirmative action); *Wygant*, 476 U.S. at 276 (holding that remedial action must be focused on specific instances of racial discrimination).

111. See *Washington v. Davis*, 426 U.S. 229 (1976) (screening employment tests); *Keyes v. School Dist. No. 1*, 473 U.S. 189 (1973) (school desegregation); *Metropolitan Housing Devel. Corp. v. Village of Arlington Heights*, 429 U.S. 252 (1977) (residential housing).

112. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Opportunity*, 47 STAN. L. REV. 1161 (1995) (critiquing Court’s approach to intent requirement in context of employment discrimination); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993).

113. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

114. The Court’s color-blind reasoning relies on the presumption that individuals, African-American and White, can compete on equal footing, absent any state intervention, and that the awarding of contracts occurs entirely on meritocratic factors. This position denies the existence of structural disadvantages, unconscious racism, and systemic racism. See Michael Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1732 (1989) (arguing that the strict scrutiny test is inappropriate in cases like *Croson* because it “appears as an abstract, detached, and purely formal procedure rather than as a substantially fair and practically oriented means to resolve conflicting claims.”); Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing that unconscious discrimination is so pervasive that it requires a more far-reaching contextual analysis of discrimination cases); Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinctions Between Color-Blind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003 (1997) (critiquing the Court’s approach in affirmative action cases because it permits and encourages transactional discrimination); see also sources cited *supra* note 90.

115. BELLAH ET AL., *supra* note 64, at 296.

116. See FUENTES, *supra* note 1, at 11.

Catholicism's and Aztec nativism's belief that destiny cannot be brought to heed to the will of humankind.¹¹⁷ An opinion poll translates the American view into a belief in the special moral status and mission of America.¹¹⁸ As expressed by historians and American presidents, it is the faith that Americans are deserving of blessings¹¹⁹ and a "manifest destiny."¹²⁰ President Clinton's inaugural speech reflects this faith in American exceptionalism: Our history is an inevitable straight line progression towards a special destiny; America is a special place where exceptional triumphs took place; the mistakes that happened along the way, like slavery and the marginalization of women, have been cured by American genius.¹²¹

These core beliefs comprise the ideological basis of the homogeneity assumption: we are one people, united, equal, involved in the pursuit of merit and achievement. They form a myth about Americans,¹²² a common narrative that explains who we are and why

117. See *id.* at 346-55.

118. See Yankelovich, *supra* note 22, at 21-33.

119. Thomas Jefferson's second inaugural address calls upon this spirit of exceptionalism:

Kindly separated by nature and a wide ocean . . . , too high minded to endure the degradations of others, possessing a *chosen* country, . . . entertaining a due sense of our equal right to the use of our own faculties, to the acquisitions of our industry, to honor and confidence from our fellow citizens, resulting not from birth, but from our actions and their sense of them; enlightened by a benign religion, professed, indeed and practiced in various forms, yet all of them including honesty, truth, temperance, gratitude and the love of man; acknowledging and adoring an overruling providence, which by all its dispensations proves that it delights in the happiness of man here and his greater happiness hereafter; with all these blessings, what more is necessary to make us a happy and prosperous people?

Thomas Jefferson, *First Inaugural Address* (Mar. 4, 1801), in *SELECTIONS FROM THE PERSONAL, POLITICAL AND PHILOSOPHICAL WRITINGS OF THOMAS JEFFERSON* 271 (Saul K. Padover ed., 1967).

120. It was an Irish immigrant, John L. O'Sullivan, who coined the term "manifest destiny" and argued that it was Providence that made irresistible Americans' spread across the continent. See John L. O'Sullivan, *Annexation*, 17 U.S. MAG. & DEMOCRATIC REV., July 1845, at 4, 5-8.

121. See Clinton Inaugural, *supra* note 38, at S121 ("[W]hat a century it has been. America became the world's mightiest industrial power, saved the world from tyranny Along the way, Americans produced the great middle class . . . deepened the wellspring of justice by making a revolution in civil rights for African Americans and all minorities, and extending the circle of citizenship, opportunity, and dignity for women. . . . America stands alone as the world's indispensable nation.").

122. See MAY, *supra* note 74, at 45. May states:

To be a member of one's community is to share in its myths, to feel the same pride that glows within us when we recall the Pilgrims at Plymouth Rock . . . and Kit Carson riding into the West. The outsider, the foreigner, the stranger is the one who does not share our myths.

Id.

we are here,¹²³ and construct a basis for understanding who belong and who does not in the cultural community.

The American myth is capacious in content, which makes it possible for there to be competing versions of the American myth. Some individuals and some groups, because of their race experience or culture, shape the American myth to reflect their own sense of identity and their own different social experience. Both Whites and African Americans believe in the American Dream, yet there are subtle and important differences.¹²⁴ American mythology accommodates these various versions and yet remains sufficiently familiar and unified as to a set of core common beliefs that inform our understanding of the social world around us.

B. The White Ethnic Narrative as Hegemonic Ideology

This section argues that the homogeneity assumption is firmly entrenched because it incorporates and gives meaning to the cultural values described in Part II.A as American cultural ideology. The modern vehicle for its articulation is the White ethnic immigrant narrative. This is the most recent narrative of success, one that connects the majority of Whites to their immediate past. Socioeconomically and attitudinally, the Euro-White ethnic identity now dominates White sociological identity. Sociologist Richard Alba has documented that the old ethnic groupings, such as Irish-Americans and Italian-Americans, have converged into a new "European-American identity."¹²⁵ The White ethnic immigrant myth connects White ethnics to a heroic story of the immigrant, who arrived poor and

123. See BELLAH ET AL., *supra* note 64, at 303.

124. See Hochschild, *supra* note 73, at 250-60. Hochschild comments that the American Dream is an ideology that "performs brilliantly" and provides a "unifying vision but allows infinite variations within that vision." *Id.* at 250. Hochschild seeks to answer why, in the face of discrimination and disparate economic circumstances, African-Americans believe in the American Dream as strongly as do Whites. Data showed that both races believe in the American Dream, but that key differences existed, by race and socio economic status. Some subgroups do not believe in the American Dream at all. For example, Black nationalism can be interpreted as standing for the proposition that African-Americans should not believe in the American Dream because racism will prevent them for ever achieving it. See, e.g., MANNING MARABLE, HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA 11-19 (1983) (arguing that the U.S. is not just a capitalist state, but a "racist/capitalist state" and that the Black movement must chart a "realistic program to abolish racist/capitalist underdevelopment"). But these subgroups form a minority.

125. See RICHARD D. ALBA, ETHNIC IDENTITY: THE TRANSFORMATION OF WHITE AMERICA 1-26, 310-19, 323-26 (1990) (analyzing survey data in which individuals were personally interviewed about ethnicity, taken between 1984 and 1985 from 524 noninstitutionalized, English-speaking adult residents of the counties of Albany, Rensselaer, Saratoga, and Schenectady, New York.).

was discriminated against, but worked hard and eventually made it. This myth embodies, reaffirms, and legitimizes America's cultural ideological values of individualism, merit, fairness, and exceptionality. The White ethnic narrative has come to dominate the American imagination because it vividly communicates what we currently understand to be American values.¹²⁶

However, the White ethnic myth also constructs hegemony:¹²⁷ 1) the immigrants' success "proves" that race and racism can be overcome—therefore, race and racism exist in the past; 2) to be part of America requires that distinct groups accept and follow the mandate to assimilate; 3) immigrants' partial or complete attainment of the American Dream demonstrates that failure to advance is due to lack of willingness to work hard and therefore lack of virtue. By capturing the narrative of American ideological values, the White ethnic narrative has constructed for itself a heroic, superior status in contrast to the racial antinomy.

1. Race and Racism Exist Only in Our Past

The White ethnic immigrant narrative has helped to construct and reinforce a version of racism under which, subtly and unassailably, Whites claim racial innocence.¹²⁸ Americans know that our history

126. See *id.* (describing a new pan-European ethnic identity and observing that "this definition amounts to a redefinition of what is quintessentially American, and perhaps in this impacts on national identity"); HOCHSCHILD, *supra* note 73, at 225-49 (discussing White ethnic immigrant narrative as dominant ideology supporting the American Dream).

127. Antonio Gramsci's concept of hegemony involves both coercion and consent. See generally ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (Q. Hoare & G. Smith trans., 1971) (Gramsci's concept of hegemony has two prongs: consent by the great masses, and the coercive apparatus of state power.). Gramsci's concept of hegemony went beyond law. He believed that hegemony was embedded in the popular system of ideas and practices, what he termed "common sense." See generally SUE GOLDING, GRAMSCI'S DEMOCRATIC THEORY: CONTRIBUTION TO POST-LIBERAL DEMOCRACY (1992) (explaining that it is through the production of and adherence to common sense that a society consents to the way in which it is ruled).

The main thrust of the Critical Legal Studies project is to investigate the various ways in which law functions as hegemony. Robert Gordon explains, "The most effective kind of domination takes place when both the dominant and dominated classes believe that the existing order, with perhaps some marginal changes, is satisfactory, or at least represents the most that anyone could expect, because things pretty much have to be the way they are." Robert Gordon, *Developments in Legal Theory*, in THE POLITICS OF LAW, *supra* note 14, at 281-93. Kimberlé Williams Crenshaw explains further that "[l]aw . . . embodies and reinforces ideological assumptions about human relations that people accept as natural or even immutable." Crenshaw, *supra* note 27, at 1351-52. Within these assumption are concepts of domination and superiority of one social group over another. See *id.*

128. But cf. generally STEELE, *supra* note 55 (accusing Whites as well as African-Americans of using racial innocence as a shield for addressing the difficult problems underlying racism); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297

contains ugly episodes of prejudice and discrimination towards newly arrived immigrants, when signs like "Irish need not apply" were posted outside storefronts¹²⁹ and immigrants were considered akin to "nuisances."¹³⁰ Perhaps, we may not know about some of the most distasteful incidents: lynchings that targeted Italians, other dark-skinned Southern Europeans, and Jews;¹³¹ and burnings that razed synagogues.¹³² This is the kind of prejudice that we know and can recognize. I will call such prejudice "Bull Connor" racism. The image that I wish to draw upon is the TV picture that we have all seen of the Alabama police commissioner, Bull Connor, and the Alabama police, clubbing and hosing down the freedom riders. It is a black and white TV picture—young men in Blues Brothers' outfits and women in nicely coiffed hairdos and Jackie Kennedy pearls—an image that is remote and removed from our present day reality, like TV pictures of *Father Knows Best* and white-hooded Ku Klux Klan characters riding in the night. Such blatant racism was remote from us. It was said to be conduct engaged in only by other (uneducated, mostly Southern,¹³³ and morally reprehensible) Whites.

Our parents, grandparents, and great-grandparents may have experienced some form of Bull Connor racism. However, they

(1990) [hereinafter Ross, *Innocence*] (explaining that the affirmative action debate is framed in the rhetoric of "white innocence" and that this avoids dealing with problems of unconscious racism).

129. See ANDREW M. GREELEY, *THAT MOST DISTRESSFUL NATION: THE TAMING OF THE AMERICAN IRISH* 122 (1972) [hereinafter GREELEY, *AMERICAN IRISH*]; see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528 (1989) (Scalia, J., concurring) (justifying strict scrutiny review of race-based remedial programs, based on the fact that not only African-Americans but also Jews and Irish experienced racism in the past).

130. See *Ambler Realty Co. v. Village of Euclid*, 297 F. 307 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926). The lower court judge in *Ambler* invalidated a zoning ordinance based on case law that had earlier invalidated racial ordinances. See *id.* at 317. He reasoned that, because "colored people" and immigrants were nuisances, no zoning ordinance could withstand constitution attack: "The blighting of property values and the congesting of population, whenever the colored or certain foreign races invade a residential section, are . . . well known. . . ." *Id.* at 313.

131. See generally JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* (1988); Joe R. Feagin, *Old Poison in New Bottles: The Deep Roots of Modern Nativism*, in *IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 13 (Juan F. Perea ed., 1997).

132. See generally BARRIERS: *PATTERNS OF DISCRIMINATION AGAINST JEWS* (N.C. Belth ed., 1958).

133. See Peter Applebome, *It's Poverty of Imagination to Find Only the South Guilty*, N.Y. TIMES, Mar. 16, 1997, at 27 (arguing that "[t]here is something comforting about this notion of the South as the repository for all the nation's racial sins and morality plays, but it was never really true, and it's certainly not true now.") The author quotes Jack Temple Kirby as exhorting us to find new tropes: "I think what we're doing is making Northern white folks feel good about themselves by telling the same story over and over again about the South. There have got to be other stories about race we could tell." *Id.*

advanced, and their children and their children's children have also advanced socioeconomically.¹³⁴ We may be aware that not every ethnic group has been able to access socioeconomic success.¹³⁵ For example, the upper echelons of wealth and power still remain largely the reserve of Protestant Anglo-American men.¹³⁶ But enough progress has been made to validate our belief in the fairness of the system and to reinforce the myth of American exceptionality.¹³⁷

The "my parents overcame racism" story reinforces the myth that racism metamorphosizes and eventually melts away into the White ethnic identity; that it is not a serious injury or harm that can persist through history; and that racism and racist attitudes are not entrenched in current economic structures and social norms. This mythology also supports the view that the law must proscribe only intentional, culpable, and episodic racism,¹³⁸ because it is an individual fault that can be overcome. However, such a construction of racism permits its decontextualization, unlinks race from its historical roots, and limits conceptually its current social and economic forms.¹³⁹ This construction supports and reaffirms "White innocence," reaffirming racism as something in which initially only *others* engage.¹⁴⁰

On the other hand, minorities experience racism very differently, as an endemic, permanent, and continuous phenomena. Some African-Americans' belief in conspiracies, that Whites conspire to do

134. This conception of "progress" is inextricably tied to the standard straight-line assimilation model where each successive generation becomes more assimilated and also more materially successful. See GORDON, *supra* note 59, at 61-89.

135. The socioeconomic data show that every White immigrant group has made socioeconomic advances. Not every group has advanced equally. Andrew Greeley's comprehensive regression analysis concluded that from 1950 to 1970 Jews have done better than any other group, followed by Catholic Irish and Italians. Lagging on the socioeconomic scale were Poles. See ANDREW M. GREELEY, *ETHNICITY IN THE UNITED STATES: A PRELIMINARY RECONNAISSANCE* 64-87 (1974) [hereinafter GREELEY, *ETHNICITY*].

136. In a 1970s study, sociologist Thomas Dye reported that Protestant Anglo-American men by far controlled the 4,000 top positions in government, business, and the public sector of the United States. See THOMAS R. DYE, *WHO'S RUNNING AMERICA* 3-8, 150-53 (1976).

137. See HOCHSCHILD, *supra* note 73, at 244-49 (connecting the White ethnic immigrant myth to White cultural identity).

138. See *supra* notes 107-110 and accompanying text.

139. See *supra* notes 88, 103.

140. See RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* 14-15 (1993) (noting that evasion of color and power is dominant White racial discursive practice in the United States); Ross, *Innocence*, *supra* note 128, at 302 (indicating that affirmative action threatens White racial innocence, which accounts for its programmatic unpopularity among Whites); see generally STEPHANIE M. WILDMAN ET AL., *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996) (stating that ability to avoid consequences of racial power is a form of White privilege).

harm to the African-American community and "set up" African-Americans for failure, appears farfetched to many Whites. However, it reflects not only distrust based on past racial harms perpetrated by large organizations, like the U.S. government, but also frustration with a political system that has failed to do anything about African-Americans' structural economic inequality.¹⁴¹ For minorities the most important life coping skill may be learning to handle the implications of the racial social identity.¹⁴²

The gap in conceptions of racism goes beyond systemic discrimination and structural inequality. It is also rooted in what each group "knows" because of their own experience with discrimination. Twenty-five percent of all African-Americans report acts of discrimination "almost every day,"¹⁴³ as a variety of daily racial "microaggressions" that effectively, even if subtly, communicate negative stereotypes.¹⁴⁴ By contrast, only four percent of Whites report experiencing some form of discrimination, generally as a remark based on ethnic stereotypes.¹⁴⁵

141. See THOMAS B. EDSALL & MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS AND TAXES ON AMERICAN POLITICS* 237 (1991) (describing African-American belief in White conspiracy to encourage flow of crack cocaine to Black community); Regina Austin, *Beyond Black Demons and White Devils: Antiblack Conspiracy Theorizing and the Black Public Sphere*, 22 FLA. ST. U. L. REV. 1021, 1025, 1030 (1995) (asserting that conspiracy theories are prevalent among African-Americans today). One theory concerns genocide, suggesting that AIDS either was intentionally developed to decimate Black populations in Africa or was the result of uncontrolled biological experiments of the U.S. government. See *id.* at 1025. Conspiracy theories have been reinforced in African-American communities by U.S. government studies like the Tuskegee Bad Blood Experiments, where nearly 400 African-Americans were denied treatment for syphilis in order to determine its long-term effects. See *id.* at 1030. I am indebted to my student, S. Malaika Jartu, for the insight that sometimes what African-Americans call "conspiracy" is related to political failure to address economic segregation and structural problems of race and class. In many areas of the South, where racial residential segregation persists, White students enjoy computers and access to the latest books, while African-Americans may not have books to take home. Ms. Jartu cited this type of inequity, which she had experienced in the Palm Beach school system, as an example of "White conspiracy." She said, "Without books, how can you make it in a system that demands education for success? Isn't that a conspiracy?"

142. See Patterson, *supra* note 106, at A2.

143. See HOCHSCHILD, *supra* note 73, at 57, 65.

144. See Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989). Recent work reports that even middle-class African-Americans who have attained the American Dream continue to experience racism and discrimination. See generally ELLIS COSE, *RAGE OF A PRIVILEGED CLASS* (1993) (tracking studies about how individual successful African-Americans have coped with the daily insults that are motivated by racism); WILLIAM H. GRIER & PRICE M. COBBS, *BLACK RAGE* (1992) (characterizing African-Americans' resentment of racial discrimination as psychological clinical phenomena that middle-class African-Americans and their therapists must address).

145. See HOCHSCHILD, *supra* note 73, at 149. But the experience varies among Christian White ethnics. Thirteen percent of Poles experience discrimination. Between 10 and 15% of Italians reported hearing about acts of discrimination against members of their

Whiteness is a privilege that sociologist Ruth Frankenberg describes as a series of cultural practices that permit Whites to not be aware of the privileges and dominance into which they are born.¹⁴⁶ Whites do not notice that their daily environments are generally made up almost entirely of other Whites; even in homogeneous environments, Whites believe themselves to be diverse.¹⁴⁷ Whites' own ability to perceive the privileges attached to being White, and the consequent unprivileging of being non-White, is limited. White privilege means having entry to structures and institutions that mete out important economic opportunities;¹⁴⁸ having access to neighborhoods, jobs, credit, and tax benefits that by and large are off limits or available in limited fashion to minorities;¹⁴⁹ it means being presumed competent, intelligent, and hardworking;¹⁵⁰ it means not being discriminated against daily by anyone ranging from a restaurant attendant to a car salesperson. Finally, it is the advantage of not having to think of yourself as different, not having to acknowledge the perquisites that you have gained because of your social racial identity. Being White means that the standards and norms peculiar to Whites

ethnic group. Nearly 40% of Jews report experiencing discrimination. *See id.* at 141, 148-49.

146. *See* FRANKENBERG, *supra* note 140, at 14-23.

147. Journalist Frances Fitzgerald studied the upper middle-class suburbs of Sun City, Arizona, in which residents sought to establish a special place where civic values and diversity would be valued. Fitzgerald found the community "remarkably homogeneous." *See* FRANCES FITZGERALD, *CITIES ON A HILL: A JOURNEY THROUGH CONTEMPORARY CULTURES* 203-45 (1986). The subjects, however, found themselves to be diverse, and they never reported discomfort or noticed that their environment excluded any minority groups. *See id.* In another study, a sociologist reports the same phenomenon of Whites failing to perceive racial homogeneity. *See* M.P. BAUMGARTNER, *THE MORAL ORDER OF A SUBURB* 10, 117 (1991).

148. *See generally* JOE R. FEAGIN ET AL., *DISCRIMINATION AMERICAN STYLE: INSTITUTIONAL RACISM AND SEXISM* (1991).

149. *See* Marglynne Armstrong, *Privilege in Residential Housing*, in *PRIVILEGE REVEALED*, *supra* note 140, at 43-66 (discussing residential segregation and effect as racial privilege). *See generally* DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993) (exploring the significance of the increasing class and residential isolation between blacks and whites). Evidence suggests that, in the area of credit, the practice of redlining minority and racially integrated neighborhoods is widespread. *See* CONSUMERS UNION OF U.S., INC., WEST COAST REGIONAL OFFICE, MICHAEL A. TERHORST, *THE AMERICAN DREAM: OPENING THE DOOR TO CREDIT AND ENDING MORTGAGE DISCRIMINATION* (1993) (discussing discrimination in mortgage lending). Occupational mobility has also been a part of the story of racial formation. David Roediger discusses how from the beginning of our history certain occupations remained off-limits to racial minorities, particularly African-Americans. *See generally* DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991).

150. *See* WILDMAN ET AL., *supra* note 140, at 103-37; WILLIAMS, *supra* note 27, at 98-130.

and White Euro-ethnicity become the implicit standard by which all other members of our society are measured. Whites need not confront the dissonance between their egalitarian beliefs and what psychological studies have measured, unconscious harsh discriminatory treatment of minorities, because their rationalizations are not contested.¹⁵¹ This leaves a large racial reality gulf, which Whites become aware of only with the occasional socially impacting event.¹⁵²

Justice Scalia's affirmative action narrative in his *Croson* concurrence illustrates how the White ethnic immigrant narrative dismisses African-Americans' experience and supports Whites' highly attenuated relationship to race and racism.¹⁵³ Prior to becoming a

151. See Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION AND RACISM 61-86 (John F. Dovidio & Samuel L. Gaertner eds., 1986). Gaertner and Dovidio detailed a study of ingroup and outgroup dynamics in which Whites were selected because of their ideologically egalitarian beliefs. The study found that when norms are clear Whites do not exhibit bias, but that bias will play in when rules are ambiguous or conflicting; thus, Whites are discriminating but doing so in a way that does not conflict with egalitarian self-image. Perceived errors made by African-Americans were characterized harshly (e.g., lazy, not motivated) while the same error made by a White subject was not ascribed to a negative personal characteristic. See *id.* The study characterizes Whites' attitudes towards African-Americans as a "particular type of ambivalence in which conflict is between feelings and beliefs associated with an egalitarian value system and unacknowledged negative feeling and beliefs concerning blacks." *Id.*; see also HOCHSCHILD, *supra* note 73, at 215 (indicating that Whites ascribe failure of African-Americans to move up the socioeconomic ladder to character flaws (69%), God's will (55%), and dysfunctional black culture (52%)); James Kluegel, *supra* note 100, at 784 (suggesting that the ideology of individualism and meritocracy prevents Whites from empathizing with minorities in the area of affirmative action). Frankenberg also notes that avoidance is the dominant dynamic governing Black-White relations, but she notes that Whites experience moments of recognition of the impact of racism on others' lives. See FRANKENBERG, *supra* note 140.

152. For example, the O.J. Simpson verdict shocked White Americans, because it was palpable testament of the wide gulf between African-Americans' and White Americans' faith in the fairness of the criminal justice system and their views on the shape and contours of racism. African-Americans were far more likely than Whites to believe the defendant's claim that the Los Angeles Police Department had conspired to "frame" Mr. Simpson. Whites also became distrustful of African-Americans' views of justice when the criminal trial, in which jurors were predominantly African-American, resulted in a verdict of not guilty. See Maria Puente, *Poll: Blacks' Confidence in Police Plummets*, U.S.A. TODAY, Mar. 21, 1995, at 3A; Frank Rich, *State of Denial*, N.Y. TIMES, Feb. 9, 1997, at A6 (asserting that, because of a wide racial gap, African-Americans and Whites can view the same event in directly opposing ways); David K. Shipler, *Living under Suspicion*, N.Y. TIMES, Feb. 7, 1997, at A2 (citing polls that show three-quarters of African-Americans agree with the "not guilty" criminal verdict, compared with only one-third of whites, while three-quarters of Whites agree with the liability found in the civil trial, compared with less than one-third of blacks); Jack E. White, *Simpson Verdict Exposes Racial Gulf and Paranoia*, DALLAS MORNING NEWS, Oct. 8, 1995, at 1J..

153. For a discussion of Scalia's narrative in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520-28 (1989) (Scalia, J., concurring in judgment), see generally Rosenfeld, *supra*

member of the Supreme Court, Scalia, in a law review symposium, attacked the remedial rationale of affirmative action programs by citing the story of his immigrant father.¹⁵⁴ He related that his father probably “had [n]ever seen a [B]lack man.”¹⁵⁵ With this rhetorical distancing, his father, the White Italian immigrant, cannot help but be seen as innocent from past acts of racism. By the logic of “I am not responsible for [White Southerners’] past acts,” race and racism become distanced from the present circumstances of the descendant of the White ethnic immigrant. Thus, to connect past acts of racism to present acts violates the principle of individualism.¹⁵⁶ For full symmetry, past discrimination becomes the individual’s act; as Justice Scalia stated in his *Croson* concurrence, “[t]he relevant proposition is not that it was [B]lacks, or Jews, or Irish who were discriminated against, but that it was individual men and women.”¹⁵⁷ Scalia rhetorically paints remedial efforts that attempt to connect past discrimination to the present as a kind of racism that is as violent and dehumanizing. He quoted Professor Bickel, saying that “‘a racial quota derogates the human dignity and individuality . . . [it] is a divider of society, a creator of castes.’”¹⁵⁸ Finally, Scalia rhetorically equated the “racism” of the *Croson* minority contractor set-aside program with the “Bull Connor” racism of Ku Klux Klan cross-burnings. “When we depart from this American principle [of racial neutrality] *we play with fire*, and much more than an occasional . . . *Croson burns*.”¹⁵⁹

note 114, and Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 38 (1989) [hereinafter Ross, *Richmond*].

154. See Antonin Scalia, *The Disease as Cure*, 1979 WASH. U. L.Q. 147, 152.

155. *Id.* Is this really true, that a White immigrant could live his life in the United States and never see a Black man? If what Scalia means is that his father had never seen a black man prior to arriving in the United States, what is the relevance of this? Or is this part of Justice Scalia’s narrative, a rhetorical distancing of the White ethnic success story from the legacy of racism against African-Americans?

156. See *Croson*, 488 U.S. at 496 (stating that remedial action must be focused on specific instances of racial discrimination); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 219-21 (1995) (indicating that past discrimination is “too amorphous” to support remedial affirmative action); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (same); see also *supra* note 85.

157. *Croson*, 488 U.S. at 528 (Scalia, J., concurring in judgment).

158. *Id.* at 527 (Scalia, J., concurring in judgment) (quoting ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 133 (1975)).

159. *Id.* (Scalia, J., concurring in judgment) (emphasis added). See generally Rosenfeld, *supra* note 114 (discussing how Scalia builds in *Croson* a narrative of White innocence); Ross, *Richmond*, *supra* note 153 (same). Ironically, three terms after writing this concurrence, Scalia, writing for the majority in *RAV v. City of St. Paul, Minn.*, 505 U.S. 377, 392 (1992), defended the First Amendment right of the Ku Klux Klan to “expres[s] group hatred.”

Scalia's *Croson* opinion is patently a White ethnic immigrant narrative or race. For the African-American reader, Scalia's rhetorical race-based burnings recall a very different experience and a very different suffering from the suffering of the White contractor who loses a contract bid. For African-Americans, affirmative action programs are not Bull Connor racist acts, but rather represent a positive intervention that counterbalances both individual discrimination based on stereotypes and structural inequality. The sole source of support for Scalia's turning a set-aside contract program into Bull Connor racism is White racial ideology of individualism and racial distancing as embodied in the White ethnic immigrant narrative. Scalia's arguments gain persuasive force because they are anchored in the shared ideological values of the White ethnic narrative.

2. Assimilation as a Mandate

Most White ethnic immigrants followed the mandate of assimilation and acculturation willingly. In America, the immigrant from the old country acquired a new identity as an American.¹⁶⁰ The vision of America was a land of new beginnings, where a wide variety of peoples came and found an opportunity to become something they could never be in the old country, participants in the American Dream, Americans who through hard work and ingenuity could succeed and enter the middle class.¹⁶¹ Once they came, they became transformed, shedding their old identities and merging into the exceptional

160. Consider this early description of an American:

What then is the American, this new man? . . . I could point out to you a family whose grandfather was an Englishman, whose wife was Dutch, whose son married a French woman, and whose present four sons have now four wives of different nations . . . Here individuals of all nations are melted into a new race of men.

J. HECTOR ST. JOHN DE CRÉVECOEUR, *LETTERS FROM AN AMERICAN FARMER* (1782). An English/Jewish dramatist coined the term and captured the ideology in a play, "The Melting Pot." The protagonist proclaims:

America is God's crucible, the great Melting Pot where all the races of Europe are melting and reforming. Here you stand, good folk, think I, when I see them at Ellis Island, here you stand in your fifty groups, with your fifty languages and histories, and your fifty blood hatreds and rivalries. But you won't be long like that, brothers, for these are the fires of God you've come to—these are the fires of God. A fig for your feuds and vendettas! Germans and Frenchmen, Irishmen and Englishmen, Jews and Russians—into the Crucible with you all! God is making the American.

ISRAEL ZANGWILL, *THE MELTING POT: DRAMA IN FOUR ACTS* 37, 199 (1909).

161. See HOCHSCHILD, *supra* note 73, at 228-42; KARST, *supra* note 25, at 82-84.

American persona.¹⁶² Analysts and immigrants describe the immigrants' transformation experience in powerful terms: "intense and extensive rebirth,"¹⁶³ "momentous personal and irreversible decision,"¹⁶⁴ "reformation,"¹⁶⁵ and "transcendence."¹⁶⁶ Whether "transformation" represents a rationalization of the immigrant's traumatic experience, a communal norm reinforced among disfavored transplants, putting the best light on a set of hard choices, or simply another iteration of the American Dream, the effect is the same: an enduring ideology central to White ethnic immigrants' belief system that mandates assimilation.¹⁶⁷

For decades, the assimilation model dominated sociology as well.¹⁶⁸ First Milton Gordon¹⁶⁹ and then Nathan Glazer and Patrick Moynihan¹⁷⁰ reworked the "melting pot" myth into sociological theories that described different processes but nonetheless ended up at the same end point. Assimilation is inevitable. Critics like Howard

162. John Quincy Adams is reported to have said of immigrants, "They must cast off the European skin, never to resume it. They must look forward to their posterity rather than backward to their ancestors." WERNER SOLLORS, *BEYOND ETHNICITY* 4 (1986).

163. HOCHSCHILD, *supra* note 73, at 239.

164. ANDREW R. HEINZE, *ADAPTING TO ABUNDANCE: JEWISH IMMIGRANTS, MASS CONSUMPTION AND THE SEARCH FOR AN AMERICAN IDENTITY* 220-23 (1990).

165. ELIZABETH EWEN, *IMMIGRANT WOMEN IN THE LAND OF DOLLARS: LIFE AND CULTURE ON THE LOWER EAST SIDE 1890-1925* 186-205 (1985).

166. HOCHSCHILD, *supra* note 73, at 239.

167. *Accord id.* at 239-40.

168. See JOE R. FEAGIN & CLARICE BOOTHE FEAGIN, *RACIAL AND ETHNIC RELATIONS* 30-33 (5th ed. 1996) (describing assimilation as dominant model); GORDON, *supra* note 59, at 89 ("Anglo-conformity has been the most prevalent ideology of assimilation."); GREELEY, *supra* note 135, at 15-34 (discussing reasons why ethnic pluralism has been distrusted and how sociology followed the assimilation paradigm in American thought).

169. In the 1960s, sociologist Milton Gordon published his influential *Assimilation in American Life*. See GORDON, *supra* note 59. Based on field observations and rigorous critiques of the existing assimilation/acculturation models, Milton Gordon described an assimilation/acculturation model as having dimensions of time, as well as "depth." He described eight stages or aspects of the assimilation/acculturation process: (1) the entry group changes its cultural patterns to those of the host group (acculturation); (2) the entry group gains access into social institutions and forms of social organization of the dominant culture (structural assimilation); (3) the entry group conforms with cultural conduct patterns of dominant culture (behavioral assimilation); (4) intermarriage (marital assimilation); (5) the entry group self-identifies with the values and norms of the dominant community (identification assimilation); (6) absence of prejudice by the host group (attitude-receptional assimilation); (7) absence of discrimination by the host group (behavior receptional assimilation); (8) the entry group participates in the civic life of the dominant group as equals (civic assimilation). See *id.* at 68-76. Gordon, however, viewed assimilation and acculturation as the end-point of this process. See *id.* at 115-23.

170. See NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, *BEYOND THE MELTING POT: THE NEGROES, PUERTO RICANS, JEWS, ITALIANS, AND IRISH OF NEW YORK CITY* viii-xxxiii (2d ed. 1970); see also *infra* notes 311 & 312 and accompanying text.

Kallen¹⁷¹ and Andrew Greeley¹⁷² assailed the ethnic assimilation model as more ideology than sociology. Nonetheless, the ethnic assimilationist model has remained firmly ensconced in the American imagination.¹⁷³

Sociological data support the view that assimilation has been the dominant dynamic. For some ethnic groups, like German-Americans, no measurable ethnic identification remains.¹⁷⁴ However, assimilation is only part of the story. The process of entry into and formation of American identity is more complex and varied than can be explained by any single concept. Richard Alba's recent work on ethnic identity among Whites shows that eighty percent experience a weak form of ethnic identity, which is primarily symbolic, such as participating in church rituals, going to festivals, eating ethnic foods, or tracing genealogy to immigrant parentage (a form of "ethnic honor").¹⁷⁵ Andrew Greeley views ethnicity, even if not experienced consciously, as highly correlated to socioeconomic accomplishment and social

171. Around the 1940s, Howard Kallen, a social philosopher, developed cultural pluralism as a philosophical juxtaposition to the melting pot model. It is primarily a normative argument (and hence not sociology) that has been influential as an ideology. It rests on the following: Because American society is founded on principles of equality, no ethnicity or cultural identity is privileged over another. See HOWARD M. KALLEN, *CULTURAL PLURALISM AND THE AMERICAN IDEA: AN ESSAY IN SOCIAL PHILOSOPHY* 51 (1956). Instead, what Kallen called the "American Idea" stands for the proposition that all individuals should be recognized in their entire sense, including recognizing their cultural affinities. See *id.* at 64. Drawing on psychological and anthropological insights, Kallen argued that cultural affinity is an essential part of a person's identity. See *id.* The individual's interaction with her group is constitutive of the individual, of who she is and will become. See *id.* at 44, 63, 71. Therefore, a society based on the America Idea would not support conditions that would force individuals to assimilate or otherwise abandon their cultural identity. See *id.* at 49. Kallen believed that cultural pluralism allowed persons to become better persons, better realized in terms of their potential, as well as better global citizens; and that a multicultural society provided conditions for a better society than a monistic one. See *id.* at 98.

172. Andrew Greeley, for example, lists five separate models of systems of intergroup adaptation: Anglo-conformity, melting pot, cultural pluralism, acculturation but not assimilation, ethnogenesis. See GREELEY, *ETHNICITY*, *supra* note 135, at 291-309.

173. This model remains conceptually influential, in spite of the critiques. Particularly problematic has been Gordon's conclusion that all entry groups would eventually assimilate. Modern understanding of assimilation/acculturation and ethnic identity is that these phenomena are more complex, subtle, and variable in form, not explainable by a single model, but better represented by a series of models that describe different perspectives and dynamics. See FEAGIN & FEAGIN, *supra* note 168, at 39-41 (critiquing Gordon's assumption that structural assimilation would not be a key issue of resistance by the dominant group); GREELEY, *ETHNICITY*, *supra* note 135, at 305-07.

174. See GREELEY, *ETHNICITY*, *supra* note 135, at 112.

175. See ALBA, *supra* note 125, at 47-60, 312-15 (citing Max Weber's description of symbolic identity as a narrative about the history with both factual and moral dimensions).

behavior.¹⁷⁶ Joe and Clarice Feagin critique the assimilation model by emphasizing that minority groups have not structurally assimilated, because they are denied access to important social and economic institutions that act as gatekeepers to greater economic opportunity.¹⁷⁷

The assimilation mandate, which is a core component of the White ethnic narrative, is highly relevant as ideology.¹⁷⁸ It supports the construction of a subordinated social identity for those who have not become part of the White monolith and the rationalization needed to support White innocence. If White ethnics succeeded through assimilating, and willingly participated in stripping away their own culture, then for others to retain culture, for whatever reason, becomes a sign of unwillingness to participate in the American Dream. Such willingness is an undesirable trait, a purposeful "rebellion" and a refusal to play by the rules of the game. To be different and to remain different, even if the groups' experience of coming to and living in America is very different from the White ethnics', becomes colored with the taint of disloyalty to the American ideal. These groups "threaten" the unitary American identity because they are "unassimilable."¹⁷⁹ The stereotypes that proliferate in American popular culture and political rhetoric of onrushing "yellow" and "brown" hordes¹⁸⁰ evince anxiety caused by the mere presence and

176. See GREELEY, *ETHNICITY*, *supra* note 135, at 64-87 (applying regression analysis to socioeconomic indicators, Greeley concluded that Jews, Irish Catholics, and Italians have attained the most upward mobility, while Poles lagged significantly behind).

177. See FEAGIN & FEAGIN, *supra* note 168, at 39-45.

178. See HOCHSCHILD, *supra* note 73, at 244-46. Hochschild stated that the American Dream requires double transformation, first the stripping away of culture, and next the transformation into the middle class. See *id.* Racial minorities were denied the chance of the second transformation. Instead, such a transformative moment was "diminished, and even curdled." See *id.*; see also ROSALDO, *supra* note 67, at 209-12 ("[M]embers of racial minority groups receive a peculiar message: either join the mainstream or stay in your ghettos, barrios and reservations, but don't try to be both mobile and cultural.").

179. *Hirabayashi v. United States*, 320 U.S. 81, 101 (1943) (finding that state action applying curfew restrictions to Japanese-Americans was reasonable because Japanese-Americans had remained isolated and unassimilable); *Fong Yue Ting v. United States*, 149 U.S. 698, 717 (1893) ("[Chinese are] apparently incapable of assimilating with our people . . ."); *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (indicating that Chinese threaten domestic stability because they will not assimilate into United States culture; therefore, the Constitution allows for this group to be targeted for exclusion from the U.S.). Benjamin Franklin's dislike of the German "Boors" and "Tawnies" was rooted in his fear that the "Tawnies" would multiply quickly and overwhelm the Anglo-American ethnicities, and that Germans' and Tawnies' inability to assimilate would destabilize American culture. See Franklin, *supra* note 45, at 227.

180. The current anti-immigration sentiment reflects racial hostility. See generally BRIMELOW, *supra* note 49 (arguing that California will soon experience "white flight" due mainly to "Third World" flooding of California, mostly by Mexicans); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy and California's Proposition 187: The*

visibility of culturally distinct groups. George Washington is reported to have said, "[T]he more homogeneous our citizens can be made . . . the greater will be our prospect of permanent union."¹⁸¹ As Ishmael Reed observes, the visibility of cultural difference challenges the myth of a unitary American identity.¹⁸²

The resulting hegemonic practice is what Maria Lugones and Elizabeth Spelman call "cultural imperialism."¹⁸³ Iris Marion Young describes it as follows:

Cultural imperialism involves the universalization of a dominant group's experience and culture, and its establishment as the norm The culturally dominated undergo a paradoxical oppression, in that they are both marked out by stereotypes and at the same time rendered invisible. As remarkable, deviant beings, the culturally imperialist are stamped with an essence. The stereotypes confine them to a nature which is often attached in some way to their bodies and thus cannot easily be denied. These stereotypes so permeate the society that they are not noticed as contestable. Just as everyone knows that the earth goes around the sun, so everyone knows that gay people are promiscuous, that Indians are alcoholics, and that women are good with children. White males, on the other hand, insofar as they escape group marking, can be individuals. Those living under cultural imperialism find themselves defined from the outside, positioned, placed, in a network of dominant meaning they experience as arising from elsewhere, from those with whom they may not identify and who do not identify with them.¹⁸⁴

In law, the assimilation mandate delegitimizes the claims of the racially and culturally different. It has the following effects: (a) reluctance to recognize culturally distinctive groups, (b) to recognize race becomes viewed as threatening social stability, and (c) to recognize minority groups becomes contrary to constitutional principles.

Political Relevance and Legal Irrelevance of Race, 70 WASH. L. REV. 629, 650-61 (1995) (describing Proposition 187 as having anti-Mexican tilt). See also *infra* note 405.

181. MICHAEL KANNEN, *PEOPLE OF PARADOX* 74 (1972).

182. See Ishmael Reed, *America's "Blacks Only" Ethnicity*, in *THE INVENTION OF ETHNICITY* 228 (Werner Sollors ed., 1989) ("Ethnicity is treated like a kind of disease We remind people who are 'passing' for Anglo of their immigrant grandfathers. . . . [Blacks] remind people—we're like walking examples, or emblems of ethnicity. That makes people uncomfortable.").

183. See Maria C. Lugones & Elizabeth V. Spelman, *Have We Got a Theory for You! Feminist Theory, Cultural Imperialism and the Demand for "The Woman's Voice,"* 6 WOMEN'S STUD. INT'L F. 573-581 (1983).

184. IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 59 (1990).

a. Courts Are Reluctant to Recognize Culturally Distinctive Groups that Fall Outside the Black-White Construct

When diversity groups seek recognition of their cultural distinctiveness to stake a claim as equal participants in the polity, these groups come into direct conflict with the myth that Americans are one distinctive identity. The most notable challengers to this myth have been African-Americans. They are the paradigmatic example of a racial minority, having suffered both individual discrimination and prejudice, as well as a "caste" status as a historically, socially, and economically dominated group.¹⁸⁵ The civil rights revolutions in both the 1870s and the 1960s engendered laws and doctrinal approaches designed to address such individual and group harm. The Court developed the antidiscrimination principle,¹⁸⁶ under which racial classifications are inherently suspect and require judicial "strict scrutiny" to determine if such classifications are properly motivated.¹⁸⁷ In *Brown v. Board of Education*,¹⁸⁸ the Court articulated the outlines of an anti-caste principle¹⁸⁹ when the Court held that African-American children should not be forced to bear the detrimental effects of segregationist practices.¹⁹⁰

185. See *infra* notes 309-310 and accompanying text.

186. See generally Paul Brest, *The Supreme Court 1975 Term-Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976) (calling the "antidiscrimination principle" . . . the general principle disfavoring classifications and other decisions and practices that depend on race (or ethnic origin) of the parties affected").

187. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (strict scrutiny for racial classifications is not always "fatal," but a close fit is required between classification and purpose); *Fullilove v. Klutznick*, 448 U.S. 448, 533 (1980) (Stevens, J., dissenting) ("[R]acial characteristics so seldom provide a relevant basis . . . and because classifications based on race are potentially so harmful . . . [courts must require] any such classification to be clearly identified and unquestionably legitimate."); *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (requiring strict scrutiny of racial classifications but finding that national security threat overrides racial discrimination concerns); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (treating as suspect administrative discrimination against Asians in the granting of permits for laundries).

188. 347 U.S. 483 (1954).

189. See generally Ruth Colker, *Anti-subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (interpreting Equal Protection Clause to redress social conditions that produce social disparities between social groups); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960) (arguing that basis of *Brown* lies in an anti-caste interpretation); Paul R. Dimond, *The Anti-Caste Principle Toward a Constitutional Standard for Review of Race Cases*, 30 WAYNE L. REV. 1 (1983) (outlining anti-caste principle and arguing that it is grounded in legislative history of 14th Amendment); Cass R. Sunstein, *The Anti-Caste Principle*, 92 MICH. L. REV. 2410 (1994) (advocating an interpretation not merely directed at "caste legislation" but any historical and past practice that creates second-class status).

190. See *Brown*, 347 U.S. at 495 ("A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children . . .").

However, outside the Black-White binary construct, equal protection has been limited. Courts have been reluctant to recognize how cultural distinctiveness can become subject to the dynamics of social domination and deprivileging, as Professor Young describes. For example, under Title VII cases as well as equal protection law, the Court finds problematic cases in which racial traits take the form of cultural difference. Individuals from minority ethnic groups find limited protection for speaking accented English¹⁹¹ or speaking a language other than English on the job.¹⁹² In *Hernandez v. New York*,¹⁹³ the Court declined to extend *Batson v. Kentucky*¹⁹⁴ to prohibit peremptory challenges to Latinos who spoke and understood Spanish.¹⁹⁵ In a recent controversial child custody case in Texas, a judge forbade a Latino mother from teaching her cultural language to her child.¹⁹⁶

191. See, e.g., *Fragante v. City & County of Honolulu*, 888 F.2d 591, 593 (9th Cir. 1989) (concluding that while Title VII proscribed discrimination because of linguistic characteristics, *Fragante's* Filipino accent affected his ability to communicate, thereby precluding a finding of accent and ethnicity discrimination). Professor Matsuda recounts that one student, an Asian-American born and raised in Hawaii, helped her understand the depth and importance of the cultural identity component of language, and how courts' refusal to recognize language discrimination causes harm. See Mari Matsuda, *Voices of America: Antidiscrimination Law and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1394 (1991). The student simply stated: "I don't see how they can come to our place and tell us we can't talk the way we talk." *Id.* Professor Matsuda writes that she realized the effect of accent cases was not only to deny choice to retain one's culture identity, but also to denigrate one's own sense of personhood by stigmatizing one's cultural identity. The student stated, "[P]eople like me, people I grew up with, my parents, my aunts and uncles, are somehow unworthy because of the way we talk." *Id.* A clear stigmatizing message is sent that members of diverse groups don't belong. Or if we do belong, we do so at a lower social profile. This distinction is not only tolerated but also reinforced by legal structure. See *id.*

192. See, e.g., *Long v. First Union Corp. of Va.*, 894 F. Supp. 933 (E.D. Va. 1995), *aff'd*, 86 F.3d 1151 (4th Cir. 1996) (holding that Title VII does not protect an individual's ability to express her cultural heritage by speaking her native tongue); *García v. Spun Steak Co.*, 998 F.2d 1480, 1488-89 (9th Cir. 1993) (holding that hostile environment theory applies with equal force to racially discriminatory environments and English-only language restriction is relevant factor within that determination; however, employer has right to define parameter as to when and where employees may converse in foreign language while on the job); *Gutiérrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1988) (holding that a rule restricting employee's use of Spanish while on the job did not violate Title VII), *vacated*, 490 U.S. 1010 (1989).

193. 500 U.S. 352 (1991). See discussion of case *infra* Part III.D.

194. 476 U.S. 79 (1986).

195. See *Hernandez*, 500 U.S. at 353.

196. See Sam Howe Verhovek, *Mother Scolded by Judge for Speaking in Spanish*, N.Y. TIMES, Aug. 30, 1995, at A1. A White (Anglo) judge is quoted as saying to the bilingual Mexican national mother:

"If the child starts first grade with the other children and cannot even speak the language that the teachers and the other children speak and she's a full-blood American citizen, you're abusing that child and you're relegating her to the position of housemaid. Now, get this straight. You start speaking English to this

b. Race is Reconstructed as Irrational and Threatening of Social Stability

Manifestations of such cultural distinctiveness or cultural bonds are perceived as irrational, dangerous, and threatening of racial strife.¹⁹⁷ In *Adarand* and *Croson*, Justice O'Connor warned that government programs that favor racial groups may lead to a "politics of racial hostility."¹⁹⁸ Scalia made the point with more rhetorical bluntness. In his *Adarand* and *Croson* concurrences, Scalia used the threat of factionalism and social disorder to rhetorically reconstruct consciousness of the racial dimension of minorities' social identity as a threat to American wholeness.¹⁹⁹ In *Croson*, he painted the Richmond city council's minority set-aside program as a manifestation of the most dangerous kind of factionalism, black-on-white factionalism, and warns of the "danger of oppression from factions."²⁰⁰

c. Recognizing Racial Groups Becomes Contrary to Important Constitutional Principles

To recognize multiple cultural groups lays bare the frailty of the White cultural dominance and a monolithic White ethnic identity. In *Regents of the University of California v. Bakke*, Justice Powell candidly acknowledged the fundamental threat to White identity that would be caused if the Court recognized multiple ethnic and racial groups:

child because if she doesn't do good in school, then I can remove her because it's not in her best interest to be ignorant. The child will only hear English. Now listen to me Ms. Laureano [the mother]. Listen to me good. That child must speak English."

Out of the hearing of this judge, the mother's reaction was: "When I was there and he was saying those things to me, I felt humiliated. I could not believe it was happening. I felt like I was being denied my rights, one of which is to speak my native language." *Id.*

197. See generally GREELEY, *ETHNICITY*, *supra* note 135, at 17-26.

198. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236-37 (1995) (stating that racial classifications may lead to racial strife).

199. See *Adarand*, 515 U.S. at 248-50 (Scalia, J., concurring in the judgment); *Croson*, 488 U.S. at 523 (Scalia, J., concurring in the judgment).

200. *Croson*, 488 U.S. at 523-24 (Scalia, J., concurring in the judgment). Scalia went on:

The prophesy of [Madison's factionalism in Federalist No. 10] came to fruition in Richmond in the enactment of a set-aside clearly and directly beneficial to the dominant political group, which happens also to be the dominant racial [African-American] group. The same thing has no doubt happened before Where injustice is the game, however, turnabout is not fair play.

Id. at 524 (Scalia, J., concurring in the judgment).

[T]he white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment . . . for then the only 'majority' left would be a new minority of [W]hite Anglo-Saxon Protestants.²⁰¹

In the voting rights cases,²⁰² the Court has developed an application of the color-blind doctrine that is based on the premise that there is inherent harm in recognizing a racial group.²⁰³ The Court situates race consciousness as being inapposite to the constitutional principle that individuals should be treated as individuals, regardless of their race, ethnicity, or gender.²⁰⁴ The Court concludes that strict scrutiny is required for districting plans that "are predominantly motivated by race."²⁰⁵ Courts now must determine whether a political body "recognized race" in drawing voting districts, or if other factors, such as "shared interests" or political motivations, dominated the state legislature's reasoning in drawing district lines.²⁰⁶ This is a daunting task.²⁰⁷ The Court's underlying rationale that race consciousness is a

201. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 295-96 (1978). Arguably, in *Croson*, Justice O'Connor voiced the same concern when she described the minority set-aside program as overinclusive because the program included other ethnic minority groups such as Oriental, Spanish-speaking, Indian, Eskimos, and Aleuts. See *Croson*, 488 U.S. at 505.

202. See, e.g., *Reno v. Bossier Parish Sch. Bd.*, 117 S. Ct. 1491 (1997); *United States v. Hays*, 115 S. Ct. 2431 (1995); *Miller v. Johnson*, 115 S. Ct. 2475 (1995); *Bush v. Vera*, 116 S. Ct. 1941 (1996); *Shaw v. Hunt (Shaw II)*, 116 S. Ct. 1894 (1996); *Shaw v. Reno*, 509 U.S. 630, 656-57 (1994) (*Shaw I*).

203. See *id.* at 648-49.

204. See *Miller v. Johnson*, 515 U.S. 900, 911 (1995) ("The Government must treat citizens 'as individuals, not 'as simply components of a racial, religious, sexual or national class.'") (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (O'Connor, J., dissenting)) (quoting *Arizona Governing Comm'n for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1083 (1983)); see also *Adarand*, 515 U.S. at 223 (stating that race cannot be used as proxy for purpose that governmental program seeks to remedy); *Metro Broad.*, 497 U.S. at 547 (O'Connor, J., dissenting) ("Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think.").

205. *Miller*, 515 U.S. at 915 (holding that race is predominant motivation when plaintiff proves that "the legislature subordinated race neutral principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities . . . [of] interest"); *Shaw*, 509 U.S. at 649 (holding that bizarreness of the shape of an electoral district is circumstantial evidence that race was the dominant and controlling rationale).

206. *Shaw v. Hunt*, 116 S. Ct. 1894 (1996), clarified that "a legislature may be conscious of the voters' races without using race as a basis for assigning voters to districts." *Id.* at 1900.

207. See *id.* at 1917 (Stevens, J., dissenting). Stevens stated:

[L]egislative decisions are often the product of compromise and mixed motives I have always been skeptical about the value of motivational analysis as a basis for constitutional adjudication . . . particularly . . . in a case of this type, as

prohibited way of reasoning, and its skepticism in recent prominent cases contesting voting districts, leads to the conclusion that the Court presumes that the recognition of racial groups is suspect and should be avoided. One could interpret this case law as a doctrinal attempt by a predominantly White Court to remove race from the immediate concern of legislatures.²⁰⁸ Yet, we notice and act on race all the time.²⁰⁹

The Court mandates a false American unity by not recognizing the distinct cultural identities of millions of Americans. The sociological text that the Court inserts in these cases has no grounding in the lives experienced by groups that are not White. Rather, it is the sociological text of the White ethnic narrative.

3. The Construction of Innocent White Identity

White ethnicity is a constructed social racial identity, much in the same way that African-Americans, Latinos, Asian-Americans, and Native-Americans possess a constructed racial identity.²¹⁰ Construction of social identities is relational.²¹¹ If ethnicity and race are socially constructed, so also must their relational opposite, White ethnic identity, be socially constructed.

The White immigrant success story constructs White ethnic identity as virtuous. First, this reconstruction of the White ethnic identity legitimizes the privileges that attach to White ethnicity. White ethnics individually succeeded through transformation, hard work, perseverance in the face of ethnic racism, and loyalty to a fair

mixed motivations would seem to be endemic to the endeavor of political districting.

Id. (Stevens, J., dissenting).

208. See Gotanda, *supra* note 90, at 23 (“[T]he attempt to deny racial consideration is, at its root, an attempt to hide the underlying racial oppression, a reality no amount of wand-waving and obfuscation can eliminate.”).

209. See OMI & WINANT, *supra* note 20, at 59-60 (claiming that one of the first things we notice about persons is race, along with gender); WILDMAN ET AL., *supra* note 140, at 9 (same).

210. See CRITICAL WHITE STUDIES: LOOKING BEYOND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997) (addressing what is whiteness); IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1995) (examining what legal discourse constructs as whiteness under immigration law); FRANKENBERG, *supra* note 140, at 1-2 (arguing that “any system of differentiation shapes those on whom it bestows privilege as well as those it oppresses[;] White people are ‘raced’ just as men are ‘gendered’”); bell hooks, *Representing Whiteness: Seeing Wings of Desire*, ZETA 2, Mar. 1989 (arguing that to ignore White ethnicity is a mistake).

211. See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 50-78 (1990); Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 31-38 (1987).

system.²¹² Second, by constructing a virtuous White ethnic identity, the White immigrant model reconstructs raced identities as nonvirtuous. Other groups who do not succeed fail because they are unwilling to work hard. This rationalization maintains the illusion of White innocence and the transparency of White privilege. This is a rationalization firmly anchored in the White ethnic narrative's construction of core American ideological values of individuality, merit, fairness, and exceptionality.

The construction of Whiteness has not been uniform.²¹³ For example, for some White immigrant groups, the appropriation of the White relational construct was not immediately within grasp. The Irish, upon arrival, became the "Celtic race."²¹⁴ They were stereotyped as "lazy, shiftless, dirty, savage"²¹⁵ drunks, who were "the most pushy and obnoxious of the immigrant groups."²¹⁶ According to a contemporaneous account, "[t]o be called an 'Irishman' [was] almost as great an insult as to be stigmatized as a 'nigger feller.'"²¹⁷ Because of the perception that the Irish were "fundamentally inferior," many, primarily Protestant Americans, found it "small wonder that churches were burned and that Catholics were occasionally murdered in riots."²¹⁸

There were also gradations of status and work.²¹⁹ Some ethnic immigrant groups had better opportunities for upward mobility than others. While the Irish were relegated to the most difficult types of labor, Scandinavians and English were more likely to arrive at America with the capital required for farming.²²⁰ The exclusion of the Irish from more lucrative employment opportunities was effectuated in part by the proliferation of such tools as the "No Irish Need Apply" sign²²¹ and an anti-Catholic educational system.²²²

212. Cf. ALBA, *supra* note 125, at 317 (stating that White ethnic identity defends individualistic ideology, "because it portrays the system as open to those who are willing to work hard and pull themselves over barriers of poverty and discrimination").

213. See FRANKENBERG, *supra* note 140, at 11.

214. See GREELEY, AMERICAN IRISH, *supra* note 129, at 10-25.

215. *Id.* at 225.

216. *Id.* at 6.

217. ROEDIGER, *supra* note 149, at 25.

218. GREELEY, AMERICAN IRISH, *supra* note 129, at 118.

219. See ROEDIGER, *supra* note 149, at 23-25 ("The many gradations of unfreedom among whites made it difficult to draw fast lines between any idealized free white worker and a pitied or scorned servile Black worker . . . [but] of course that continuum did not extend to the extreme of chattel slavery as was inflicted on people of color.").

220. See *id.* at 145.

221. See GREELEY, AMERICAN IRISH, *supra* note 129, at 122.

222. See *id.* at 118.

Nonetheless, at a general level, White ethnic groups have followed some form of socioeconomic and political assimilation. Socioeconomically, White ethnics have achieved middle-class acceptability; each generation has better educational and occupational opportunities than the last.²²³ Richard Alba's depiction of convergence of distinct European ethnic groups into a White ethnic identity captures White ethnics' assimilation into a distinct and identifiable social and cultural group, even as many in each ethnic subgroup retain weak symbolic ethnic identities.²²⁴

One of the functions of the White ethnic immigrant "success story" is to enable all White ethnics, regardless of relative socioeconomic success, to participate in the construction of Whiteness and enjoy the benefits of Whiteness. Sociologists and race theorists posit that White immigrants, in great part, attained the American Dream by becoming part of a superior racial social identity—White.²²⁵ Even if the White ethnic immigrants' circumstances were dire and even if they themselves have not gained full access to the American Dream, they succeed in part because they are not at the "bottom of the well."²²⁶ The "raced" become emblematic of those social qualities that Whites do not want to have attached to them.²²⁷ To be African-

223. See GREELEY, *ETHNICITY*, *supra* note 135, at 64-87. For example, Catholic Irish do better socioeconomically than any other ethnic group except Jews. See *id.*

224. See ALBA, *supra* note 125, at 310-19.

225. See HOCHSCHILD, *supra* note 73, at 246-47 ("The American Dream is one that grants whiteness to those who wouldn't be considered white in Europe."); see also W.E.B. DUBOIS, *BLACK RECONSTRUCTION IN THE UNITED STATES* 700-01 (1935) (stating that Whites are reluctant to acknowledge same disadvantages as Blacks, and presence of Blacks allows Whites to bond across a vast socioeconomic divide); ROEDIGER, *supra* note 150, at 21-27 (indicating that the "White worker" category is a self-consciously developed social category that probably began in the 17th century before Jamestown, and to "work like a nigger" was considered a worse fate than having to "work like an Indian"); Reed, *supra* note 182, at 228 ("So we permit millions of people to acquire what passes in the United States as prestige without their having to earn it. All one has to be is '[W]hite' For there to be '[W]hite' there has to be '[B]lackness.'").

226. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 147-57 (1992); DUBOIS, *supra* note 225, at 700-01 (describing how White workers received a low wage but were compensated in part by a public and psychological benefit because they were White).

227. See Praeger, *supra* note 39, at 111. Praeger opines:

The [B]lack experience in America is distinguished by the fact that the qualities attributed to [B]lackness are in opposition to the qualities rewarded in society . . . those qualities which the dominant society has attempted to deny in itself, and it is the difference between [B]lackness and [W]hiteness that defines, in many respects, American cultural self-understanding.

Id.; see also Crenshaw, *supra* note 27, at 1373 ("Racist ideology replicates this pattern of arranging oppositional categories in a hierarchical order; historically, [W]hites represented the dominant antimony while Blacks came to be seen as separate and subordinate.").

American is to be intellectually deficient, sexually hyperactive, and aggressive, as well as lazy, lacking a work ethic, and prone to criminal behavior.²²⁸ To be Mexican-American is to be from an inferior culture; more interested in leisure than hard work; endowed with romantic skills; for the most part a drug trafficker or laborer, but not an intellectual; part of an onrushing brown horde.²²⁹

Ishmael Reed calls the racial privilege from which White immigrants benefit "unearned."²³⁰ Instead, the White ethnic immigrant story portrays America as a classless and raceless society, and it hides that individuals from a lower class and with subordinated racial social identities have very different life chances from those who can claim Whiteness.²³¹ As Ishmael Reed states, this story "becomes a narcotic which permits 'White America' from dealing with its problems."²³² Racial minorities become the targets for all of America's ills.²³³ Not surprisingly, Whites have very little empathy for

228. Elisabeth Young-Bruehl argues that prejudice, discrimination, and ultimately intergroup relations cannot be understood independently of the personal psychological motivations and attitudes that are culturally transmitted and maintained. *See generally* YOUNG-BRUEHL, *supra* note 43.

229. *See* ROSALDO, *supra* note 67, at 212-14 (citing the television series *Miami Vice*'s use of stereotypical Latino figures, popular stereotypes about Colombian cocaine dealers, and Ronald Reagan's veiled reference to Nicaragua's proximity to South Texas). *See infra* notes 403-405 and accompanying text.

230. Reed, *supra* note 182, at 229. To make this point of the social distance between White immigrants and racial minorities, Jennifer Hochschild uses the following anecdote:

In a meeting, Attorney General Robert Kennedy once tried to temper the insistent anger of [B]lack participants' demands by proclaiming his and his brother's sympathy and understanding. But he reminded his interlocuters [sic] that "other Americans also had to endure periods of oppression." In support of this fact he noted that his grandfather was an Irish immigrant. Jim Baldwin responded . . . "You do not understand at all. Your grandfather came as an immigrant from Ireland and your brother is President of the United States. Generations before your family came as immigrants my ancestors came to this country in chains, as slaves. We are still required to supplicate and beg you for justice and decency."

HOCHSCHILD, *supra* note 73, at 337-38 n.69 (citing KENNETH CLARK, KING, MALCOLM, BALDWIN: THREE INTERVIEWS 15 (1985)).

231. *See* HOCHSCHILD, *supra* note 73, at 251-60 (White America uses the myth of meritocracy to hide problems of race and class); *see also supra* notes 148-149 and accompanying text.

232. Reed, *supra* note 182, at 229.

233. *See id.* Reed continues:

As long as racial constructions are maintained, race will never become obsolete. By blaming all of its problems on [minorities], the political and cultural leadership are able to present the United States as a veritable utopia for those who aren't afraid of 'hard work' . . . [Minorities] should be viewed as a blessing. Without [minorities] where would our great republic be?

Id.; *see generally* Cherry, *supra* note 23 (arguing that women on welfare have become targets of a public/private dichotomy that feminizes U.S. social welfare system).

racial minorities and the poor which allows them to distance themselves from the problems of race and poverty.²³⁴

To summarize, this Part II has explored the significance of cultural ideology in how we make sense of and construct the social world around us. The White ethnic narrative dominates the American imagination because it so effectively embodies the values in which we believe as a culture. This narrative not only analytically assumes sameness, but finds heterogeneity to be threatening, disloyal, and contrary to goals and ideologies that are distinctly American. In key Supreme Court decisions that deal with racial and social group conflict, it is this narrative that informs the Court's vision of social text. Because these opinions are based on assumptions that we are all the same, they either mandate sameness or decontextualize the social significance of difference. Cultural ideology, as embodied in the White ethnic narrative, is what in the main supports these very controversial opinions.

III. A TRANSDISCIPLINARY CRITIQUE OF THE HOMOGENEITY ASSUMPTION

In the "red bead game," [Edward Deming, management expert, demonstrates his "quality control" ideas. He] asks for ten volunteers Six of the students become workers, two become inspectors of the worker's production, one becomes the inspector of the inspectors' work, and one becomes the recorder. Dr. Deming mixes together 3,000 white beads and 750 red beads in a large box. He instructs the workers to scoop out beads from the box with a beveled paddle that has indentations for fifty beads at a time. Each scoop of the paddle is treated as a day's production. Only white beads are acceptable. Red beads are defects . . . invariably, each worker's scoop contains some red beads. Deming plays the role of the manager by exhorting the workers to produce no defects. When a worker scoops few red beads [he or she] may be praised. Scooping many red beads brings criticism and an exhortation to do better, otherwise "we will go out of business." The manager reacts to each scoop of beads as if it had meaning in itself rather than as part of a pattern The actual number of red beads scooped by each member is out of that worker's control. The worker, as Dr. Deming says, "is only delivering the defects."²³⁵

234. See *supra* note 155.

235. CHRISTOPHER STORY, AMERICAN SOCIETY FOR TRAINING & DEVELOPMENT, EXCELLENCE: IT'S IN THE CARDS (1994). The author's description of the "red bead game" continues: "After the manager records the scores, the game leader puts on his or her CEO hat and exhorts the manager to counsel the workers with the most defects and to praise the ones with just one or zero defects." The CEO can rave on: "Tell those workers to care about the

Because the homogeneity assumption is cultural ideology, it is rarely articulated in judicial opinions, even though, as Part II has explored, court opinions are informed by the assumption. The Court stands inside its own culture, and, just as we do as individuals, courts lack consciousness of their cultural positionality. The legal method allows for decontextualization and abstraction of social facts that permit the ready insertion of sociological text based on cultural ideology. The homogeneity assumption "performs" as representative of social reality, because the disciplinary paradigms that the Court uses to legitimate such a reality are themselves influenced and constrained by cultural ideology.²³⁶ Thus, cultural ideology is self-legitimizing.²³⁷

To break the hold of the homogeneity assumption, courts must focus on how they receive, interpret, and articulate knowledge and how knowledge is self-legitimated. In this way, the contours of ideology can be discerned and understood. Like Deming's red beads, only when we understand why knowledge systems are producing the red beads can we explain the pervasiveness of these "errors."²³⁸ Without understanding how our construction and interpretation of knowledge produces the red balls, we would only succeed in "tampering," that is attempting doctrinal "patches" or "fixes" doomed

welfare of the company." *Id.* The manager, who by now is warming to the role, pleads with the workers to do a better job. *See id.*

236. Cf. JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* 47-53 (Geoff Bennington & Brian Massumi trans., 1984) (stating that technology is self-legitimizing); KUHN, *supra* note 17, at 1887-210 (postulating that scientific paradigms are self-legitimizing); Praeger, *supra* note 39, at 101-03; David Couzens Hoy, *Introduction to FOUCAULT: A CRITICAL READER* (1986) (explaining that, for Foucault, "analyzing systems of thought borrows from sociological functionalism, which sees social life as systematically interconnected, such that change in any part affects other aspects of life").

237. Lyotard describes the process of legitimation in the context of scientific knowledge:

[S]ince "reality" is what provides the evidence used as proof in scientific argumentation, and also provides prescriptions and promises of a juridical, ethical, and political nature with results, one can master all of these games by mastering "reality." That is precisely what technology can do. By reinforcing technology, one "reinforces" reality, and one's chances of being just and right increase accordingly. Reciprocally, technology is reinforced all the more effectively if one has access to scientific knowledge and decision-making authority.

This is how legitimation by power takes shape. Power is not only good performativity, but also effective verification and good verdicts It is self-legitimizing.

LYOTARD, *supra* note 236, at 47.

238. Similarly, Professor Unger argues that liberal views of politics are paralleled by liberal views of knowledge and that the two bodies of thought must be critiqued from a global perspective. *See generally* ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* (1984).

to fail.²³⁹ This requires that judges acquire consciousness about their own cultural positionality and about how cultural ideology informs the decisions that they make.²⁴⁰ Renato Rosaldo and Clifford Geertz are anthropologists who have struggled with the question of how a culturally positioned analyst can discern social reality without being influenced by her own cultural positionality. They advocate acquiring distance from one's own culture and understanding the myriads of ways that culture performs and influences what we know and accept as "truth" and common sense.²⁴¹

This Part deconstructs the homogeneity assumption by using the insights of other disciplines. The attack on the homogeneity assumption is a transdisciplinary project. In history, discussed in Part III.A, the "multicultural" historians have challenged versions of history that view America as one unified people, inexorably progressing to unification and overcoming the negative social dynamics that result from constructed difference. Part III.B deconstructs the mandate to assimilate using sociology, anthropology, and race theory. The conventional wisdom that assimilation was an inevitable end point in the integration of ethnic entrant groups dominated sociology up until the 70s. This wisdom became part of our cultural common knowledge. However, current work in this area rejects this old wisdom.

Part III.C discusses how sociology and psychology indicate the intractability of difference and the potential dangers to social fabric that come from not adequately recognizing and understanding the dynamics of socially constructed difference. Part III.D argues that the Black/White racial dichotomy plays into the homogeneity assumption by narrowing the ways in which racialized difference is conceptualized. The emerging view in race theory of race as a process, not as a status, allows us to see race more broadly but with more focus and permits us to break free of the oversimplification of difference wrought by the Black-White paradigm. Finally, Part III.E

239. Dr. Deming used this colorful language to teach quality control. *See supra* note 235 and accompanying text.

240. *See* RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 446-66 (1990) (arguing that judges must adopt awareness of "translations" between cultures); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* 376-77 (1990) (judges struggle in good faith against partiality); Martha Minow, *The Supreme Court, 1986 Term Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 32 (1987) (courts adopt an unstated point of reference when assessing others). In the second part of this project, I propose a "relational" approach to judging disputes involving majority-minority conflict which requires that the judge acknowledge her own cultural positionality. *See* Lazos Vargas, *supra* note 90, at Part III.

241. *See supra* notes 40-42 and accompanying text.

discusses the challenge within political philosophy to liberal theories that assume cultural sameness. This challenge posits that justice requires that public law recognize the full depth and complexity of difference.

A. *The Homogeneity Assumption as History: Should Only "Winners" Get to Tell Their Story?*

History is told by the winners.

Anonymous²⁴²

John Sayles' 1996 movie, *Lone Star*, contains a scene at the beginning in which an Anglo parent objects when Pilar, the heroine, includes Mexican history when she teaches fourth graders about the Texans' and Tejanos' struggle for independence from Mexico.²⁴³ Why should Mexican internal politics be part of the history of Texas independence? the Anglo parent asks.²⁴⁴ He asserts that what Pilar is teaching "confuses" the issues.²⁴⁵ He cuts off her attempts to defend herself with what he believes to be the ultimate argument, "But we won."²⁴⁶ Pilar responds patiently but with a sigh, "It's more complicated than that."²⁴⁷

This Part III.A examines the homogeneity assumption through a historical lens by delving into the debate between traditional and "multicultural" historians.²⁴⁸ A fierce battle among historians has been

242. From a mural in Belfast, Northern Ireland.

243. See *LONE STAR* (Columbia Pictures 1996).

244. See *id.*

245. See *id.*

246. *Id.*

247. See *id.* For a LatCrit scholar's critique of this movie, see Margaret E. Montoya, *Lines of Demarcation in a Town Called Frontera: A Review of John Sayles's Movie, Lone Star*, 27 N. MEX. L. REV. 223 (1997).

248. I will use the term "multicultural," even though this term has become overused and value-laden. These historians that I cite do not use this term to refer to themselves. The primary emphasis of these historians has been to understand history from multiple perspectives. One strand of thought views colonialism as a dialogic process between the colonized and the colonizers, the process resulting in "resistance" culture, or a mixed, "mestizo" culture. See, e.g., EDWARD SAID, *CULTURE AND IMPERIALISM* 209-20 (1993) (describing stages of colonial culture). Other strands apply the insights of postmodernism and examine how law and other discourses have been used to legitimize colonial conquests. See, e.g., WILLIAMS, *supra* note 4 (examining how law legitimized the conquest of indigenous peoples by Spain, England, and the United States). Yet for others, the principle purpose of multicultural history is to focus on intergroup relations and diversity. See, e.g., PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* (1987) (recounting what other historians have left out and refocusing on a history that has at its center full recognition of diversity); RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA* 16 (1993) [hereinafter TAKAKI, *MIRROR*] (retelling history with the aid of minority narratives so that minorities can reclaim the power

brewing, pitting multicultural historians against traditional historians.²⁴⁹ The multiculturalists seek to rewrite and expand our retelling of history, focusing on the contributions and suffering of nonmajority group members. The critiques of this approach parallel the defenses of the homogeneity assumption that were discussed in Part I. Traditionalists claim that multiculturalists underappreciate and underemphasize the Anglo-American traditions that form the core of the American philosophical traditions and overexalt the contributions made to intellectual and social heritage by minorities, in particular African-Americans.²⁵⁰ By creating a "cult of ethnicity," emphasizing what separates us, rather than what unites us, multiculturalists are said to fuel the separatist fires that rage in and disserve minority communities.²⁵¹ Such ethnocentricity, it is charged, will delay the inevitable assimilation and integration of minorities.²⁵² Ultimately, multiculturalism is said to be dangerous because it distorts the intellectual canons that are essential to a liberal education and form the basis of what we understand to make up intellectual culture.²⁵³

to define who they are). It is contested whether Whites and Anglo-American culture ever dominated American culture. Multicultural historians retell American history as a history of a heterogeneous people.

249. See, e.g., ROBERT HUGHES, *THE CULTURE OF COMPLAINT: THE FRAYING OF AMERICA* (1993); SCHLESINGER, *supra* note 50; Thomas Sowell, *Promoting Alienation*, *FORBES*, Nov. 25, 1991, at 112.

250. See SCHLESINGER, *supra* note 50, at 61-65 (debunking the emergence of "there's-always-a-Black-man-at-the-bottom-doing-the-real-work" approach to American history); Glazer, *supra* note 50, at 123 ("I think a black literature of resentment and anger has played a larger role in teaching in recent years than can be justified by any large view of American and English literature.").

251. See, e.g., Glazer, *supra* note 50, at 118 (stating that emphasis of separatist history will be "unrealistic" and teach minorities about the "basically corrupt Anglo-American dominated society"); SCHLESINGER, *supra* note 50, at 43, 112. Schlesinger claims:

[T]he ethnic upsurge . . . began as a gesture of protest against the Anglo-centric culture. It became a cult, and today it threatens to become a counterrevolution against the original theory of America as 'one people,' a common culture, a single nation The cult of ethnicity has . . . produc[ed] a nation of minorities—or at least of minority spokesmen—less interested in joining with the majority in common endeavor than in declaring their alienation from an oppressive, white, patriarchal, racist, sexist, classist society.

Id.

252. But see Nathan Glazer, *Multiculturalism and Public Policy*, in *VALUES AND PUBLIC POLICY*, *supra* note 22, at 141 (stating that, even if school curriculum promotes multiculturalism, "American culture overwhelmingly leads to assimilation and homogenization").

253. See SCHLESINGER, *supra* note 50, at 126-38; see also ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 56 (1987) (stating that multiculturalism "weaken[s] our convictions of the truth or superiority of American principles and our heroes"); Charles Taylor, *Multiculturalism*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 36 (Amy Guttmann ed., 1994) [hereinafter Taylor, *Multiculturalism*] (arguing that other

The traditionalist versus multiculturalist struggle is overstated. The rhetorical force of the debate obfuscates that these two camps have different purposes. Multicultural historians have the goal of exploring different retellings and traditionalists seek a unified retelling. Multiculturalists address their work to those who have historically been excluded from the historical narrative, while traditionalists seek a unified coherent narrative that supports and explains American cultural ideology. However, traditionalists fail to recognize that insistence on a unified retelling of American history is ultimately hegemonic because the only history that gets retold clearly and heroically is that of the winners, while those of the losers gets forgotten.

1. Different Mirrors²⁵⁴

At one level, this is a modernist-postmodernist²⁵⁵ struggle, with the traditionalists fighting for the stability of a single version of American history, a unified truth about who we are. The unified story fits neatly into the homogeneity assumption's central ideological tenets and satisfies the need to retell and validate American ideology: the inherent value of individualistic philosophy, proof of American exceptionalism, and the anchor for our belief in the basic goodness of the American character. The modernist/unitary version of history is a steady progression of feats in which American exceptionality triumphed over physical, geographical, and ideological adversity.²⁵⁶ Distasteful interludes, like slavery, the Civil War, Jim Crow, and the near Native American annihilation become located somewhere in a

cultures be approached with a "presumption of value," but contending that "it can't make sense that we come up with a final concluding judgment that their value is great or equal to others").

254. Takaki describes the purpose of multicultural history metaphorically: "Who I am is also the process of looking in the mirror. What do you see when you look in, a darkened image provided by a society? . . . By viewing ourselves in a mirror which reflects reality, we can see our past as undistorted and no longer have to peer in our future as through a glass darkly." TAKAKI, *MIRROR*, *supra* note 248, at 426.

255. Postmodernists critique the historians' compulsion to ascribe to individual events transcendental accomplishments. Michel Foucault's work can be interpreted in this way, and more specifically, as an analysis of discourse and power through time: "[W]e should try to discover how it is that subjects are gradually, progressively, really and materially constituted through a multiplicity of organisms, forces, energies, materials, desires, thoughts etc. We should try to grasp subjection in its material instance as a constitution of subjects." Michel Foucault, *Language, Counter-Memory, Practice*, in *SELECTED ESSAYS AND INTERVIEWS* 221 (Donald F. Bouchard ed., 1977); *see also* Ian Hacking, *The Archaeology of Foucault*, in *FOUCAULT: A CRITICAL READER*, *supra* note 238, at 27-41.

256. *See supra* notes 117-119 and accompanying text.

distant past, sad episodes that Americans have overcome.²⁵⁷ Consequently, there is no dissonance between America's political rhetoric of equality and its social reality. Such historical retelling maintains White innocence, removes race from the immediate present, reaffirms the important cultural ideologies of individualism and meritocracy, and provides support for the inherent fairness and exceptionalism of American traditions.

On the other hand, multiculturalism challenges the homogeneity assumption's ideology that Americans are and have always been one unified people. The multiculturalists do not view history as a simple win-loss accounting, as part of an inevitable march toward a "manifest destiny" of a unified people. This approach depicts a more complete, but more ambiguous, version of the American character.²⁵⁸ Instead of unity and ideological verification, this project seeks to show the complexity and interrelatedness of the many national and immigrant groups, all of whom, in some way, contributed to America's development.

Edward Countryman writes that America was a place where peoples with widely divergent histories, cultures, social statuses, and races converged in "a collision of histories."²⁵⁹ Countryman shows that, at different stages of our development, even at the very founding of the nation, intergroup conflict existed in different forms.²⁶⁰ He

257. See generally *supra* Part II.B.1.

258. Professor Rosaldo explains that multiculturalists' attempts to include the "losers" weaves a richer tapestry of the whole:

When one moves beyond . . . [a] notion of our history and their history and sees instead interconnected histories that interact and mutually shape one another, subordinated histories and dissident traditions become a pathway, not to separatism and fundamentalism, but to a renewed vision of national histories. The inclusion of excluded and marginalized histories offers a vision of the social whole.

Renato Rosaldo, *Foreword: Symposium Surveying Law and Borders*, 48 STAN. L. REV. 1037, 1041 (1997); see also Patricia Nelson Limerick, *The Canon Debate from a Historian's Perspective*, 43 J. LEGAL EDUC. 4, 10 (1993) ("[T]he new history, with its revised canon and its commitment to inclusiveness, is actually putting us together, at last constructing a version of national history that . . . puts everybody into the same story, and makes their relatedness, their interdependence, into the glue of both the nation and its history.").

259. EDWARD COUNTRYMAN, *AMERICANS: A COLLISION OF HISTORIES* 4 (1996).

260. Countryman stresses the incongruity between the ideological aspirations as to how Americans defined themselves, a political body committed to freedom and equality, and the political and legal reality in which America was never "one" people. See *id.* Even at the time of the American Revolution, it was clear that "we the people" meant being White and male. See *id.* at 72. Countryman traces the same tension of partial and complete exclusion to 100 years following the founding of the Nation. Native Americans, freed African-Americans, Californios, newly arrived immigrants, and women struggled to be included as citizens. Countryman concludes that "status and the concept of belonging to the polity remained hopelessly intertwined." *Id.* at 160-69.

demonstrates that America has struggled, as it continues to struggle, with the issue of inclusion of people of color and women.²⁶¹ America has remained stratified; our legacy, he concludes, has been a continuing "vexation" with race.²⁶² Thus, Countryman's retelling challenges the ideology that homogeneity, unity, and transformation into part of a dominant monolith is an inevitable American destiny.

Ronald Takaki writes about the struggle of various ethnic and racial groups to survive prejudice, economic exploitation, and legal legitimization of subordinate social status.²⁶³ Takaki helps us to understand that prejudice and subordination of minorities and women has a long history.²⁶⁴ The origins of that "peculiar institution," slavery, can be traced to 1619.²⁶⁵ Jefferson and Franklin²⁶⁶ feared what slavery and its remnants might mean to Americans. At the same time, each believed resolutely in the supremacy of the "Lovely White."²⁶⁷ The Chinese also arrived with the founding of the Nation. Yet, early on, law, as well as social custom, "foreignized" the Chinese, labeling them

261. See *id.* Countryman believes that ideology of exclusion accounts for these events: (1) the decision in *Cherokee Nation v. State of Georgia*, 30 U.S. (5 Pet.) 1 (1831), where Chief Justice Marshall wrote that "the Supreme Court 'was not the tribunal in which those rights [of the Cherokee] are to be asserted;'" (2) the decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), in which Justice Taney wrote that as a matter of "historical fact" . . . [African-Americans] 'were not intended to be embraced, in this new political family which the constitution brought into existence;" and (3) following the 1848 U.S.-Mexico war and the signing of the Treaty of Guadalupe Hidalgo, the systemic stripping of Californios' and Tejanos' rights to own property in Anglo-American courts. See COUNTRYMAN, *supra* note 259, at 149-50, 161-62.

262. Countryman concludes his book with the following:

The late nineteenth century's resolution of the issues of [R]ed-[W]hite, [W]hite-[B]lack, and [R]ed-[B]lack on the premise that America is a [W]hite person's country did prove strong . . . But what seemed resolved . . . came unstuck . . . [R]ed and [B]lack Americans proved not only too strong to disappear but also strong enough to recover from degradation and historic defeat. Whatever the reason, the questions of identity and distinctiveness that were first raised when black and white people from the Old World and red people from the New World met remain open, even now.

Id. at 241.

263. See generally TAKAKI, MIRROR, *supra* note 248.

264. See generally *id.*

265. Ronald Takaki estimates that African slaves arrived on American shores as early as 1619, probably as indentured servants. See *id.* at 7.

266. Jefferson urged that eventual emancipation of the slave must be followed by repatriation outside the United States. See THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 132 (Tom Abernathy ed., 1964). Franklin resolutely believed in Anglo-American superiority. See *supra* notes 45-47 and accompanying text.

267. See JEFFERSON, *supra* note 266, at 132.

as “alien,” “yellow hordes,” and “unassimilable.”²⁶⁸ Today, Asian-Americans remain racialized as “foreigners.”²⁶⁹

Takaki’s retelling challenges the myth that race is a distant problem that has solved itself. Rather, Takaki’s retelling signals to the reader that the problem of racial prejudice is complex with a beginning that starts with our collective memory, and suggests that there may be no “manifest destiny” to resolution of racial conflict, other than our struggling to understand the full complexity of our differences and heritage.²⁷⁰

2. Defining Communities

At the core, historians are fighting about defining who we are.²⁷¹ Traditionalists seek to tell a story about one America. The unified American identity is White (male) and Anglo-Saxon, fitting neatly within the parameters of the homogeneity assumption.²⁷² This is an assimilationist vision, in which no conflict with “others” can exist because they have been absorbed into the homogeneous whole. However, if we only tell one story, there is no recognition of the various distinct groups who “lost” out in the hegemonic struggle, but nonetheless contributed to American history in ways that our collective memory may no longer be able to recall.²⁷³ A unitary vision is hegemonic because those omitted by default had nothing worthy of collective recollection and admiration. Instead, their stories become an alternative, delegitimized “revision” of the “true” American history. Even if their accomplishments were to be retold, they might very well

268. See TAKAKI, MIRROR, *supra* note 248, at 7; see also *supra* note 179.

269. See *id.*; see also *infra* note 405.

270. See TAKAKI, MIRROR, *supra* note 248, at 427-28 (“America’s dilemma has been our resistance to ourselves—our denial of our immensely varied selves. . . . [W]e originally came from many different shores and our diversity has been at the center of the making of America.”).

271. See SCHLESINGER, *supra* note 50, at 48 (“The invocation of history is indispensable to nations and groups in the process of making themselves. How else can a people establish the legitimacy of its personality, the continuity of its tradition, the correctness of its course?”); TAKAKI, MIRROR, *supra* note 248, at 15 (indicating that what is needed in the retelling of history is not so much a “distant” mirror, as one that is “different”).

272. See, e.g., R.M. DEVENS, OUR FIRST CENTURY (1851) (depicting the accomplishments of Americans as those of White men); see also SCHLESINGER, *supra* note 50, at 53, 55 (“American history was long written in the interests of white Anglo-Saxon Protestant males. Counter ethnic histories developed as compensatory . . . very often succumb[ing] to . . . temptation of noble lies.”).

273. See COUNTRYMAN, *supra* note 259, at 238 (“What is actually destroyed may be gone. But what is repressed has a way of coming back, in history . . .”).

be attributed to the Anglo-American monolithic whole.²⁷⁴ Because of societal privileging, we assume that the agent who accomplished all the great feats of American exceptionalism is a White (male) Anglo-Saxon identity.²⁷⁵

Multiculturalists seek to include the stories of all peoples, the "losers" as well as the "winners."²⁷⁶ Multiculturalism permits minorities to retell their own histories, compose their own narratives, reconstruct their own social identity and reconstitute their social culture.²⁷⁷ Ronald Takaki asks, "What happens when historians leave out many of America's peoples?"²⁷⁸ He answers, drawing on the words of Adrienne Rich, an African-American poet: "'When someone with the authority of a teacher' describes our society, and 'you are not in it' . . . [the] experience can be disorienting—'a moment of psychic disequilibrium, as if you looked into a mirror and saw nothing.'"²⁷⁹ Thus, minorities reclaim the power to retell their own stories in a way that recognizes their own losing and suffering, but also

274. Countryman explains that African-American slaves contributed to the development of the South, solving with white plantation owners problems that they jointly faced. For example, he ascribes the cultivation of rice in the Mississippi delta to the African slaves who knew how to grow the crop in Africa. The cotton gin was another joint enterprise. The development of the Mississippi delta, which was riddled with disease, was mainly a slave enterprise, which cost a great many African slave lives. *See id.* at 100-08.

275. This can be understood as the kind of privileging that Barbara Flagg, Stephanie Wildman, and Ruth Frankenberg describe, *see supra* notes 146-154 and accompanying text, or as a discourse constructing the subject that Foucault describes, *see supra* note 255.

276. *See Limerick, supra* note 258, at 9 ("These histories retold from various perspectives are very different from the standard traditional version, simply because the standard version left out a great deal."); *see also* TAKAKI, *MIRROR, supra* note 248, at 14-15 (quoting a Mexican writing in 1874: "'It is very natural that the history written by the victim does not altogether chime with the story of the victor.'").

277. This is a vision of transformation and reclamation that has been articulated by bell hooks and Paulo Freire. Hooks stated:

I cross boundaries to take another look, to contest, to interrogate, and in some cases to recover and redeem [T]he disruption of the colonized/colonizer mind-set is necessary for border crossings to not simply reinscribe old patterns, we need strategies for decolonization that aim to change the minds and habits of everyone.

BELL HOOKS, *OUTLAW CULTURE: RESISTING REPRESENTATIONS* 5 (1994). Freire's opinion is:

The popular classes, despite the ideological efforts of the dominant classes, despite the power of their ideology, do not recognize themselves in many of the cultural elements deemed "national" by the dominant classes. On the contrary, they know perfectly well that basically what is said to be "national" is in many cases, the expression of class power which minimizes and downgrades them. One of the critical tasks . . . is a critical rediscovery of culture and of language.

PAULO FREIRE & ANTONIO FAUNDEZ, *LEARNING TO QUESTION: A PEDAGOGY OF LIBERATION* 80-81 (Tony Coates trans., 1992).

278. TAKAKI, *MIRROR, supra* note 248, at 16.

279. *Id.* (quoting ADRIENNE RICH, *BLOOD, BREAD, AND POETRY: SELECTED PROSE* 1979-85, 199 (1986)).

their striving and courage. José Antonio Navarro, a Tejano hero of the Alamo, founding father of Texas,²⁸⁰ and all-but-forgotten personality in the standard version of Texan history,²⁸¹ expresses the value of revisionist history simply. In his introduction to *Apuntes Históricos*, written in 1853, he explains to San Antonio's Tejanos why he finds the effort necessary: "[This is] an imperfect but truthful history . . . not for the small souls, nor for the egotists, who do not care about the glories or sorrows of men of another origin or language, but for the humanitarian and cultured who understand how to respect and sympathize with the suffering of a valiant people."²⁸²

Multiculturalism, then, is at one level a discourse within minority communities, a continuing struggle to "empower" and redefine who and what are minority communities. In a society in which privilege is transparent, "deprivileging" of social identity constantly affects the sense of worth and belonging of members of minority groups.²⁸³ Social identity must constantly be recovered and transformed. The dynamics of social processes that subordinate group social identities

280. José Antonio Navarro was a Tejano who fought alongside Anglo-American Texans for the emancipation of Texas from Mexico. After Texan independence, he fought for the defense and recognition of Tejanos' interests in a legal system that was controlled by the Anglo-Americans, many of whom believed that Mexicans were an inferior "race." See David R. McDonald & Timothy M. Matovina, *José Antonio Navarro: Tejano Advocate and Historical Chronicler*, in *DEFENDING MEXICAN VALOR IN TEXAS: JOSÉ ANTONIO NAVARRO'S HISTORICAL WRITINGS, 1853-57* 15-32 (David R. McDonald & Timothy M. Matovina eds., 1995). Navarro also played a key role in defending Tejano citizenship, fighting off a proposal by Francis Moore to grant suffrage only to the "free white population," a move designed to exclude the "hordes of Mexican Indians," that is, the existing Tejano population which was predominantly mestizo. See *id.* at 20.

281. In a recent visit to the Alamo, I observed that the only memorialization of Navarro's contributions to the state of Texas is a small four-feet-by-six-feet display in one of the side rooms, very modest indeed for one of the founding fathers of Texas and especially modest when compared to the honorification of Anglo-American Texan leaders. A trip to the Alamo, a Texas shrine, is *de rigueur* for every child enrolled in a San Antonio elementary school. However, elementary school field trips, even for Mexican-American children from San Antonio's predominantly Mexican-American *barrios*, do not include an exploration of Navarro's house, even though it is within walking distance from the Alamo. See Interview with Rachel Y. Lazos, first-grade teacher with fifteen years' experience in the predominantly Mexican-American Northside Independent School District. Navarro's house is attended to by volunteers. When I visited, the attendant was an older Mexican-American retired city worker, somewhat Kahloesque in appearance. She waited for the few visitors in the winter in an unheated museum. Her response as to why she volunteered was, "It's something important I do."

282. José Antonio Navarro, *Apuntes Históricos Interesantes*, reprinted in *DEFENDING MEXICAN VALOR IN TEXAS: JOSÉ ANTONIO NAVARRO'S HISTORICAL WRITINGS*, *supra* note 280, App. 5 (author's unofficial translation). In 1853, Navarro, as an "eyewitness" and participant in the Texas war, wrote *Apuntes Históricos Interesantes* in order to correct the "small" and "great" inaccuracies of the historical account of the Alamo recorded by Anglo-American Colonel Yoakum. See *id.*

283. See *supra* notes 13, 277.

that have "lost" in the hegemonic struggle is ongoing.²⁸⁴ Poet Mitsue Yamada states that "to finally recognize our own invisibility is to finally be on the path toward visibility."²⁸⁵

Multicultural retelling of history represents a frontal assault on the homogeneity assumption. If we are one people, why is it necessary to have more than one history? If the American system is inherently fair, why do these retellings focus on how the past constructed subordinated social identities for disenfranchised groups? This discourse challenges the hegemonic construct of the homogeneity assumption: White innocence is jeopardized by making race visible; multicultural retellings evoke White guilt as the historical privileging of the White community becomes visible;²⁸⁶ and the myths of merit, individualism, and White virtue can no longer be self-legitimizing because the unearned benefits of Whiteness become visible.²⁸⁷ In sum, multicultural retellings put pressure on hegemonic cultural ideology and its hidden assumptions.

B. *The Sociology of Groups: The Myth of Assimilation*

As I told ye I come a little late. Th' Rosenfelts an' the' Lodges bate me
be at least a boat lenth, an' be th' time I got hee they were stern an' rock
bound thimsilves. So I got a glorious raycaption as soon as I was
towed off th' rocks. Th' stars an' sthripes whispered a welcome in the'
breeze an' a shovel was thrust into me hand an' I was pushed into a
sthreet excyvatin' as though I'd been born here.

Mr. Dooley²⁸⁸

284. See STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 520 (1989) ("[T]here is always a gun at your head . . . *The gun at your head is your head*; the interests that seek to compel you are appealing and therefore pressuring only to the extent they already live within you, and indeed *are* you."); Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* 180 (Ann Snitow et al. eds., 1983) ("Woman hatred is so embedded in culture, so 'normal' does it seem, so profoundly is it neglected as a social phenomenon, that many women, even feminists and lesbians, fail to identify it until it takes, in their own lives, some permanently unmistakable and shattering form.").

285. TAKAKI, *MIRROR*, *supra* note 248, at 426 (quoting Mitsue Yamada). Ronald Takaki calls this process "unlearning the past and substituting a more inclusive revisioning." *Id.*

286. Multicultural history may tap into "White guilt." Shelby Steele describes this as the "guilt" that, as members of a historical privileged race and class, Whites have attained privileges that they have not earned. They also have been spared the constant pain and suffering associated with being a member of a subordinated class. See STEELE, *supra* note 55, at 77-109; see also *supra* notes 149-54 and accompanying text.

287. See *supra* Part II.B.2.

288. GREELEY, *AMERICAN IRISH*, *supra* note 129, at xxvi (quoting an Irish toast).

American culture is a covert conspiracy to lead groups of ethnic origin to believe in a phantom melting pot; however, denying them access to fully assimilate to the high status of the pure European American.

Sherrie Barnes²⁸⁹

Part II.B discussed the assimilation mandate as cultural ideology. This mandate posits that ethnic groups will integrate into American society by “melting in,” thereby losing any distinctiveness. What emerges is a unified American monolith. Assimilation, it was hoped, would eventually do away with the problems of intergroup hostility and prejudice. Failure to assimilate intimates failure to want to succeed under the American Dream and disloyalty to a system that offers exceptionalism and rich rewards to those who earn them.

The assimilation mandate is a very strong component of the White ethnic narrative and forms the “common sense” sociological reality that most Americans carry in their heads. The assimilation mandate makes assumptions about social and psychological reality: (1) we can all meld into one group, such that distinct social and cultural groups will not persist, and (2) the social and psychological dynamics will permit groups that are distinct and different to regard each other as equals sufficiently to “melt into” one another. The assimilationist view dominated American sociology for decades, as exemplified by Nathan Glazer’s and Patrick Moynihan’s *Beyond The Melting Pot*,²⁹⁰ and Milton Gordon’s *Assimilation in American Life*.²⁹¹ However, there has been a strong countermovement in sociology and anthropology questioning whether assimilation indeed is the dominant dynamic. Race theory offers the more powerful critique. Race, for better or worse, remains the most powerful social status divider in America. Racial groups cannot assimilate into the American “melting pot” because of how social dynamics construct race.

1. How Culture Binds

Part II.A.2 discussed culture in the context of American cultural norms and values. The introduction to Part II discussed the importance of culture in the formation of epistemology.²⁹² Culture also has an important associative component. To associate with members of one’s cultural or ethnic group and to identify with them is largely a matter of individual choice. What sociologists observe are

289. Sherrie Barnes, *Ebonics* (1997) (unpublished student manuscript on file with the author).

290. See *supra* note 170.

291. See *supra* note 59.

292. See *supra* notes 38-41 and accompanying text.

individual choices that follow a general pattern²⁹³ which demonstrates the associative strength of cultural ties.

Anthropologists believe that cultural bonds are “primal.”²⁹⁴ Culture forms a kind of kinship, an extension of the tribal unit, and attachments that come from a natural sense of affinity.²⁹⁵ These anthropologists describe culture as an attachment that is fundamental and basic to the human condition. We are born into a particular cultural community, and in that cultural community we are socialized. From cultural bonds flow our “sense of belonging” and identity, which make sense of who we are.²⁹⁶

Sociologists report that ethnic groups have either a “high” or “low” group identity.²⁹⁷ Cultural factors will affect the strengths of the

293. Choice is not a group process but a set of ongoing individual choices, from which sociologists observe and discern patterns. See GLAZER & MOYNIHAN, *supra* note 170, at xxiv (“Assimilation and acculturation proceed at a rate determined in large measure by individuals . . .”); MAX WEBER, 1 *ECONOMY AND SOCIETY* 26 (1968). Weber believes that social relationship is the behavior of a plurality of actors that has meaningful content because the action of each takes account of that of others and is oriented in these terms. The social relationship thus consists entirely and exclusively in the existence of a probability that there will be a meaningful course of action. See *id.* What is established for the group would not necessarily hold true for any individual, because individual dynamics and influences play out differently. See GLAZER & MOYNIHAN, *supra* note 170, at xiv (“Human groups do not exist in nature. . . . They are chosen, and whether one chooses to see oneself as Third World, Black, Negro, is not determined by either biology or sociology. It is a free act, even if constrained by social influences.”).

294. Clifford Geertz and Edward Shils describe culture in this context as “primordial,” “communal,” “primal ties,” and “tribalism.” The most basic way of conceptualizing culture is as a social group, a community that has developed over time from family ties to kinship then tribes, and sometimes evolving into a nation state. See Geertz, *The Integrative Revolution: Primordial Sentiments and Civil Politics in the New States*, in *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS BY CLIFFORD GEERTZ*, *supra* note 39, at 255-70. Such communalism may develop around different tenets, such as language, race, religion, political strife, or social custom. See *id.* For example, Geertz describes the central organizing principle for Indonesians as geography. See *id.*; see also Edward Shils, *Primordial, Personal, Sacred and Civil Ties*, *BRIT. J. SOC.*, June 1957, at 130-45.

295. Cultural communities feel loyalty and bind together not on the basis of rational reasons or persuasive discussion, but instead based on a bond of kinship and because of membership in the group. The group itself may have norms that discipline the loyalty of the group. But loyalty will be affective and connected to kinship. Loyalty may be accentuated by a hostile environment; for example, persecution of Jews in Nazi Germany saw a rise in Judaic religious observance among German Jews. Geertz describes the

primordial attachment as a set of givens, in language, social patterns, religion that result in loyalty to one’s kinsman, neighbor, believer, ipso facto as a result not merely of one’s personal affection, practical necessity, common interest, or incurred obligation, but at least in great part by virtue of some unaccountable absolute import attributed to the tie itself.

Geertz, *Ideology*, *supra* note 39, at 265.

296. GREELEY, *ETHNICITY*, *supra* note 135, at 12-15.

297. Sociologist Harry Kitano views ethnic identity dimension as “essentially a pluralistic adaptation, focusing on the retention of ethnic ways.” HARRY H.L. KITANO &

associational bond, the group's central ideology, history, religion, institutional mechanisms, and social organizations. Social norms guard and protect retention of cultural bonds and ethnic association.²⁹⁸ Milton Gordon describes ethnic group association as guiding our social associations, occupational choices, marriage, and recreational activities through the life cycle.²⁹⁹ He further specifies that subgroup ethnic stratification by social class and religious affiliation, which he calls "ethgroups," provides powerful associational guideposts that guide patterns of behavior, group identification, and social participation.³⁰⁰

Commentators from various perspectives stress the crucial importance of culture in the formation of identity. Howard Kallen, a cultural pluralist, argues that cultural affinity is an essential part of a person's identity. The individual's interaction with her group is constitutive of the individual,³⁰¹ of who she is and will become.³⁰²

ROGER DANIELS, *ASIAN AMERICANS: EMERGING MINORITIES* 199 (2d ed. 1995). Glazer and Moynihan believe that "conscious awareness" of a distinctive subgroup identity develops due to a variety of factors:

[c]onscious awareness of foreign origin based on the reality of a foreign culture is only one element in the establishment of a strong set of social organization, and by no means absolutely essential. The creation of the Mormons out of completely American origins—a group that now shows the American ethnic pattern of a group, largely formed through descent, with distinctive values and social organization—demonstrates that foreign language and culture is no requirement for very strong social organization.

GLAZER & MOYNIHAN, *supra* note 170, at xxiv.

298. "High" identity ethnic groups can fashion cultural norms that promote strong cultural ties (endogamy, socializing primarily within the structure of the cultural group) and create structural forms of support (building and maintaining cultural institutions, such as churches, associations, businesses). In extreme cases, like the Hassidim and Amish, separatism ensures that they are able to maintain cultural identity even when surrounded by a "hostile" majoritarian culture. On the other hand, "low" identity ethnic groups will tend to retain very little of their culture and quickly undergo assimilation and acculturation. See GEERST HOFSTED, *CULTURE'S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES* 25-28 (1989); see also GORDON, *supra* note 59, at 75-83; KITANO & DANIELS, *supra* note 301, at 200-01.

299. See GORDON, *supra* note 59, at 34-51. Gordon states that with "ethnic grouping there develops a network of organization and informal social relationships which permits and encourages the members of the ethnic group to remain within its confines for all of their primary relationships and some of their secondary relationships through all stages of the life cycle." *Id.* at 34.

300. See *id.* at 51-55.

301. See KALLEN, *supra* note 171, at 44. Kallen stated:

[A] group's culture embraces the total economy of their life together. It includes in a configuration striving ever to preserve an ongoing stability, all diversities of scenes and stuffs, of raw materials and the knowledge and workmanship that process them, all the generations of men and women and children as they grow up in concords and discords, all their collective and personal remembrances, embodied in rites and rites, myths, legends and prophecies.

Charles Taylor, a communitarian, argues that social identity and community enable an individual to answer the question "Who am I?," situate her commitments and identifications, and provide needed context within the larger framework of society.³⁰³

Economists and sociologists have also explained the choice to associate with members of one's culture as rational, self-interested choice.³⁰⁴ They describe as "social capital" the mutual trust that ethnic bonds engender and the social norms that members of cultural groups understand exist for the communal best interest.³⁰⁵ Social capital enables individuals to pursue more efficiently activities as varied as commerce or the entry into a new country by immigration.³⁰⁶

Extrinsic factors, such as social norms, may discourage the formation of distinctive cultural groups and behaviors. Part II.B.2 described the mandate to assimilate as integral to American ideology. Up until the early 1970s, the assimilation model dominated the American sociological disciplinary episteme. The accepted wisdom was that assimilation would happen eventually to every entrant immigrant group. In *Beyond The Melting Pot*, Glazer and Moynihan believed that cultural and ethnic groups changed in the United States,

Id.

302. *See id.* at 49.

303. *See* TAYLOR, SOURCES, *supra* note 64, at 27 ("My identity is defined by the commitments and identifications which prove the frame or horizon within which I can try to determine from case to case what is good, or valuable, or what ought to be done In other words, it is the horizon within which I am capable of taking a stand."). Charles Taylor believes that community is essential to the formation of identity and community interacts in a "dialogical process depending on an individual's relation to others." Taylor, *Multiculturalism*, *supra* note 253, at 34.

304. *See, e.g.*, JOHN REX, RACE AND ETHNICITY 1-17 (1986) (applying rational choice theory to individual choice to identify racially or ethnically). Individual choice is constrained by social factors. Each individual must make a "bargain" to what degree she will continue to be part of a group, given costs (e.g., prejudice) and gains (e.g., greater access to socioeconomic mobility). *See id.*

305. *See* James S. Coleman, *A Rational Choice Perspective on Economic Sociology*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY 166-76 (Neil J. Smelser & Richard Swedberg eds., 1994) (stating that social capital is derived from ordinarily informal relationships established for noneconomic purposes but with economic consequences); FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 325 (1995) (arguing that society's endowment of social capital is critical to understanding its competitive advantage and social and political stability, in that "social capital is necessary to permit the proper functioning of rational modern economic and political institutions").

306. Economists have studied the advantage of ethnic relations in the context of commerce. Sociologists have concluded that maintenance of social capital is advantageous to immigrant communities. *See, e.g.*, JANET TAI LANDA, TRUST, ETHNICITY AND IDENTITY: BEYOND THE NEW INSTITUTIONAL ECONOMICS OF ETHNIC TRADING NETWORKS, CONTRACT LAW, AND GIFT EXCHANGE (1994); Min Zhou & Carl L. Bankston, III, *Social Capital and the Adaptation of the Second Generation: The Case of Vietnamese Youth in New Orleans*, 28 INT'L MIGRATION REV. 821 (1994).

becoming something new, sometimes becoming political coalitions and cultural groups that provided strong support systems.³⁰⁷ But these were processes through which ethnic groups achieved eventual assimilation and socioeconomic success. For Milton Gordon, cultural distinctness retained by immigrant groups was a temporal stepping stone to eventual assimilation.³⁰⁸ Robert Park, influenced by Marxist class conflict theory, posited that even racialized groups, which in his "race relations cycle" engaged in class and economic conflict, would eventually follow a dynamic of mutual acceptance and assimilation.³⁰⁹

However, as Part II.B.2 initially explored, recent sociological work does not confirm that assimilation is the eventual end point of entrant groups, although assimilation may well be the dominant dynamic.³¹⁰ Nathan Glazer has always acknowledged the continuing relevance of ethnic and cultural bonds, and more recently has proclaimed that multiculturalism seems to be the new American dynamic, primarily because race creates a social dynamic that prevents the assimilation of these groups.³¹¹ Andrew Greeley's work in the 1970s demonstrated that ethnicity and cultural affiliation are enduring even if we may not be conscious as to how subgroup cultural identity guides our behavior.³¹² Richard Alba's 1990s survey shows that eighty percent of Americans do not simply identify themselves as Americans, but specify some form of Euro-ethnic symbolic identity.³¹³ Alba's data also show that youths and the more educated are more likely to articulate an ethnic identity and are more interested in investigating cultural and ethnic bonds.³¹⁴

Thus, a variety of viewpoints and data support the observation that assimilation has not been a uniform, absolute phenomenon, and

307. See GLAZER & MOYNIHAN, *supra* note 170, at xvii-xxii.

308. See GORDON, *supra* note 59, at 121.

309. Robert E. Park posited a "race relations" cycle: immigrant inflows (invasion) precipitate inter-ethnic competition followed by conflict; ethnic conflict can subside as the immigrant group adapts and changes to take into account the new environment; adaptation can lead to assimilation/equilibrium in which conflict and competition subside. See ROBERT E. PARK, RACE AND CULTURE 227-32 (1950); see also ROBERT E. PARK & ERNEST W. BURGESS, INTRODUCTION TO THE SCIENCE OF SOCIETY (1924).

310. Sociologists conclude that there are many dynamics, always evolving. See *supra* note 173-176 and accompanying text.

311. See GLAZER & MOYNIHAN, *supra* note 170, at xvii-xxii (arguing that ethnic bonds from natural alliances that helped entry immigrant groups to assimilate). See generally NATHAN GLAZER, WE ARE ALL MULTICULTURALISTS NOW (1997) (acknowledging multiculturalism as the emerging paradigm dominating cultural thinking about distinct social groups).

312. GREELEY, ETHNICITY, *supra* note 135, at 31; see *supra* note 176.

313. See ALBA, *supra* note 125, at 47-60, 312-15.

314. See *id.* at 307-08.

that cultural identity remains influential in how Americans view themselves and behave. In a postmodernist, anchorless world, cultural affiliation may emerge as an even stronger "tie that binds" as individuals seek meaning in their social existence through their cultural connections.

2. Racial Group Formation

A key extrinsic factor that affects intergroup relations is race. Sociologists describe race and ethnicity as a boundary, separating social groups and stratifying society into classes.³¹⁵ In explaining how these boundaries are so resistant, sociologists sometimes use the concept of "caste," as social systems where the boundaries between racial groups are inflexible and practically impermeable.³¹⁶ The dominant group socially constructs difference. Such difference has social meaning; the dominant group imparts for itself higher social status by constructing for itself positive qualities in opposition to the negative qualities of raced groups. Social norms create social and psychological separation between the social groups. In formalized caste systems, such as Jim Crow and South Africa's system of apartheid, the dominant group may use the legal and political system to legitimize racial and ethnic hierarchy and to monopolize for itself entry into social structures and institutions that provide opportunities for socioeconomic upward mobility.³¹⁷

In the 1960s, sociologists and psychologists were optimistic that the ethnic model of assimilation and acculturation would extend to race as well. They believed that African-Americans and other

315. See FEAGIN & FEAGIN, *supra* note 168, at 30-33; TAMOTSU SHIBUTANI & KIAN M. KWAN, *ETHNIC STRATIFICATION* 28-33 (1965); Fredrik Barth, *Introduction to ETHNIC GROUPS AND BOUNDARIES* 15 (Fredrik Barth ed., 1969).

316. See Marvin E. Olsen, *Power Perspective on Stratification and Race Relations*, in *POWER IN SOCIETIES* (Marvin E. Olsen ed., 1970); H. EDWARD RANSFORD, *RACE AND CLASS IN AMERICAN SOCIETY: BLACK, LATINO, ANGLO* 3-46 (2d ed. 1994) (stating that caste systems result in a rigid, closed form of stratification, based on color and resulting in a "huge gap in power, wealth, health, status, and life-chances between the castes"); Lloyd Warner, *Introduction to DEEP SOUTH* (Allison Davis et al. eds., 1941) (determining, via this study of a small city in the Old South, that socioeconomic stratification according to caste group membership is the main reason African-Americans and Whites never mixed socially or intermarried).

317. See KARST, *supra* note 25, at 43-61 (describing how case law legitimized Jim Crow); Arnold M. Rose, *Race and Ethnic Relations*, in *CONTEMPORARY SOCIAL PROBLEMS* (Robert K. Merton & Robert A. Bisbet eds., 1961) (concluding that the Black-White caste system became legitimized by *Plessy v. Ferguson*, 163 U.S. 537 (1896), and remained unchallenged until the 1940s); C. VAN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d ed. 1974) (describing Jim Crow).

minorities could assimilate into the mainstream³¹⁸ and the problem of social inequality and psychological prejudice would cease to be significant.³¹⁹ Such hopes were disproved as the general socioeconomic situation of African-Americans did not improve and prejudice and discrimination proved to be resilient.³²⁰

Race theorists do not believe that race can ever behave like ethnicity. Race theory views the formation and definition of race as a site for political struggle and intergroup conflict.³²¹ The form of racing may change over time, but race does not vanish as a salient social process that divides and stratifies. Under this view, distinct racial groups are permanent.³²²

The dynamic view of race posits that forms of racing will change over time. The experience of ethnic groups, like Jews³²³ and the

318. Nathan Glazer and Daniel Patrick Moynihan acknowledged that their prediction in the 1963 edition of *The Melting Pot* that African-Americans would be able to follow the "ethnic model" and assimilate into the mainstream "didn't happen." See GLAZER & MOYNIHAN, *supra* note 170, at xiii. Prejudice, they acknowledged, was one factor. But they also stated that lack of progress was explained because African-Americans had developed separatist ideology, rejected dominant cultural norms, failed to take advantage of political opportunities, and failed to build social institutions that would support the development of the African-American community. See *id.* at xiii-xxiii. Glazer's most recent work, *We Are All Multiculturalists Now*, see *supra* note 311, acknowledges that assimilation "has simply been discredited" because of White Americans' failure to "incorporate" African-Americans. See *id.* at 97. He now places responsibility for African-Americans' non-assimilation on the continuing social and physical racial segregation in the United States. See *id.* at 95-137.

319. Compare GORDON ALLPORT, *THE NATURE OF PREJUDICE* (1954) (indicating that prejudice is a rigid or inflexible attitude that the American society can overcome; and situating prejudice as a problem of the "prejudiced personality"), with JOHN DUCKITT, *THE SOCIAL PSYCHOLOGY OF PREJUDICE* 58 (1992) (surveying the ebb and flow of socio-psychological literature and concluding that "racism and discrimination [are] rooted in the American social structure and basic conflicts of group interests").

320. See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *supra* note 149. See also *supra* notes 146-152 and accompanying text.

321. For Michael Omi and Howard Winant, the authors of a leading sociological "racial formation" text, race has "intense" social meaning and race is the primary social organizing principle. See OMI & WINANT, *supra* note 20, at 90 ("Race is pre-eminently a social phenomenon, something which suffuses each individual identity, each family and community, yet equally penetrates state institutions and market relationships.").

322. See BELL, *supra* note 226, at 13. Derrick Bell believes that "[t]he goal of racial equality is, while comforting to many Whites, more illusory than real." *Id.*

323. In the 1990s, sociologists view Jews as having largely assimilated into American life. See, e.g., GREELEY, *ETHNICITY*, *supra* note 135, at 28-32; HOCHSCHILD, *supra* note 73, at 32. Arguably, for Jews, racial intolerance has not disappeared, but has changed form. Michael Lerner argues that Jews, as Whites, are invited to assimilate, but at the cost of abandoning Judaism:

By and large the way to get into this system is to take off your *kippah*, cut off your beard, hide your fringes; in other words, to reject your entire cultural and religious humanity. In that sense, Jews could have given up their Judaism in the Roman world and then we would have had Roman privilege. Or we could have fallen in with European Christendom and developed exactly the same genetic makeup, and

Irish,³²⁴ and religious groups such as Catholics,³²⁵ which were at one time viewed as a race or targeted for discrimination and prejudice but have now become more accepted, give hope that race will eventually cease to be a harsh social divider. Sociologists confirm that racial boundaries have demonstrated flexibility. Socioeconomic data indicate that among middle-class Latinos and Asian-Americans, racial boundaries have become more permeable.³²⁶ Within the African-American community, the intersection of class and race has created stratifications. Middle-class and upper-class African-Americans have made significant progress, with some achieving socioeconomic positions superior to Whites,³²⁷ while the underclass remains isolated.³²⁸

Nonetheless, in spite of such socioeconomic progress, those who have progressed continue to experience prejudice and discrimination.³²⁹ Stephen Small concludes that the African-American middle

we would have been doing better. Conversely, you get an interesting experience when you try resuming all the external markings of Jewishness. I remember an incident in Berkeley in 1982 when I decided to start wearing my *kippah*. I wanted to see what it would be like to be "out" as a Jew. About three days after this decision I was walking down the street and somebody ten feet ahead of me says, "Take the cap off, kike!" in a really hostile, angry voice.

CORNEL WEST & MICHAEL LERNER, *JEWS AND BLACKS: A DIALOGUE ON RACE, RELIGION AND CULTURE IN AMERICA* 67 (1995).

324. Andrew Greeley concludes that the once-hated Irish have now become respectable. Greeley also observes that their sense of ethnic identity and connection to cultural roots has diminished. The Irish behave like another historically raced group, Jews, in political outlook, education, and attitudes toward prejudice and discrimination. See GREELEY, *AMERICAN IRISH*, *supra* note 129, at 255-70; GREELEY, *ETHNICITY*, *supra* note 135, at 32.

325. Most Americans no longer think that being Catholic is a mark of significant social differentiation. See GREELEY, *ETHNICITY*, *supra* note 135, at 111-20.

326. Ransford observes that "middle-class Mexican Americans face fewer barriers and have more assimilation options than do middle class blacks." RANSFORD, *supra* note 316, at 118-28. He points to better opportunities for spatial assimilation, as well as data on exogamy, a significant indicator of acculturation and host group social acceptance. In California, one in two Mexican-American women intermarry with Whites. However, lower-class Mexican-American farm workers remain desperately poor, "kept in virtual serfdom on remote ranches all over the Southwest, financially and physically unable to leave." *Id.* Asian-Americans marry outside of their ethnicity at the same rate. See KITANO & DANIELS, *supra* note 297, at 187-88. The rate for Koreans, 34.1%, is markedly lower. See *id.*

327. See RANSFORD, *supra* note 316, at 71-93 (surveying socioeconomic data and concluding that African-Americans have made progress in occupational mobility, education, and income levels within the last three decades).

328. See generally WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987).

329. Middle-class and upper-class African-Americans continue to experience racism and discrimination and believe that racial hostility has worsened. See HOCHSCHILD, *supra* note 73, at 216 (concluding that the social significance of race is declining among poor but increasing among well-off African-Americans); see also sources cited *supra* note 142.

class is more tenuous than their White counterparts, because they still face problems of discrimination and low earnings, given educational attainment and occupational status.³³⁰ Sociologist Harry Kitano believes that physicality will continue to racialize ethnic and racial groups, in spite of class progress.³³¹ Physicality will distinguish individual members of the raced group and act as a marker of a subordinated racial identity that attaches to members, whether they choose it or not.³³²

In sum, because of the social relevance of race, the mandate to assimilate is a command that racialized minorities cannot possibly follow. In the foreseeable future, race, in some form, will continue to play an important role in creating separate and distinct racial communities. Data support the inference that racial group boundaries have become more permeable. Nevertheless, data also show that racial prejudice has not disappeared. As long as racializing processes continue, race, whatever its form, will continue to be a key factor in creating salient, if not totally impermeable, boundaries that divide Americans into racial groups and thwart the ability of racialized minorities to assimilate.

3. Cultural Borderlands

Postmodernists reject the premise that cultural identity is fixed and unchanging and can be distilled into an essential identity.³³³ Cultural commentators take from this insight that individuals can belong to multiple cultural groups.³³⁴ Renato Rosaldo describes

330. See SMALL, *supra* note 37, at 120-25.

331. Sociologist Harry Kitano calls this "ethnic visibility . . . inescapable . . . reactions from the outside world force the retention of an ethnic identity, no matter how slight." KITANO & DANIELS, *supra* note 297, at 200. Canadians categorize minorities that are distinguishable by skin color and physical features as "visible" minorities. See *id.*

332. See, e.g., Johnson, *Melting Pot*, *supra* note 29 (discussing how physicality marks some members of a Mexican-American family as "raced," while light-skinned, blue-eyed members can elect to pass as White).

333. Some argue that identity is inherently an unstable subject that cannot be defined. See, e.g., JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990) (contesting the construction of "woman").

334. See Allan C. Hutchinson, *Identity Crisis: The Politics of Interpretation*, 26 NEW ENG. L. REV. 1173, 1192 (1992) ("Identity is relative, not intrinsic; fluid, not fixed; perspectival, not neutral; and protean, not perfected. The subject is a cultural creation, not a biological given. . . . Always shifting and often self-contradictory . . ."); Joan Chalmers Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 307 ("[P]ost-modern approach starts from the notion of a fragmented and shifting self . . . constantly reconfigured self, shaped but not determined by membership in sets of social categories that crystalize power relations. . . ."). Chandran Kukathas stated:

cultural identity as consisting of "multiple border zones," rather than homogeneous communities, which individuals "negotiate," move back and forth from, or "transform."³³⁵

While an individual's cultural community may not be fixed, we are all distinctively marked by cultural context.³³⁶ Our "identity is in the etched details of mediated lives and struggle."³³⁷ The social identity that attaches to being a member of a minority group marks the individual in a special way. Social identity is a mirror back of our worthiness. As Charles Taylor states:

Our identity is partly shaped by recognition or its absence, often by the misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Non-recognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.³³⁸

Minorities, particularly the educated elite, can be members of communities that are both privileged and unprivileged.³³⁹ They may shift back and forth, but they are always captured by a social identity that imparts to them because of their visible racial difference an inferior social identity. This dual membership involves what W.E.B.

[E]ven if individuals are constituted by the communities to which they belong, they are invariably members of different communities which contribute to the shaping of their lives in different ways and to different degrees. To say this is not to suggest that individuals are completely free to choose . . . but to recognize that the nature of those allegiances and the nature of individual identity is not fixed or stable but variable.

Chandran Kukathas, *Liberalism, Communitarianism, and Political Community*, 13 SOC. PHIL. & POL. 80, 91 (1996).

335. ROSALDO, *supra* note 67, at 169 (describing the experience of reading Sandra Cisneros' *House on Mango Street* as providing him with the insight that members of distinct cultural minorities inhabit cultural borderlands and must constantly negotiate what the cultural borderlands will mean for themselves).

336. See Hutchinson, *supra* note 334, at 1192.

337. Nancie E. Caraway, *The Challenge and Theory of Feminist Identity Politics: Working on Racism*, 12 FRONTIERS 109, 111 (1991).

338. Taylor, *Multiculturalism*, *supra* note 253, at 26.

339. See WILDMAN ET AL., *supra* note 140, at 7-24, 161-176 (describing the multiple identities we inhabit as strands in a Koosh ball, and her own multiple memberships as a Professor, White woman, Jew, and pioneer for justice); Audre Lorde, *Age, Race, Class, and Sex: Women Redefining Difference*, in SISTER OUTSIDER 114 (1984) ("As a forty-nine-year-old Black lesbian feminist socialist mother of two, including one boy, and a member of an interracial couple, I usually find myself a part of some group defined as other, deviant, inferior, or just plain wrong."); WILLIAMS, *supra* note 27, at 306 (describing the multiple cultural memberships, both privileged and unprivileged, of her African-American male colleague).

Dubois called “double consciousness.”³⁴⁰ The first part of this “double consciousness” is the perspective of looking at the world “through the eyes of others in contempt and pity,”³⁴¹ as a member of a subordinated social group. The second is one’s conscious striving, which, as described by Professor Matsuda, seeks to transcend a subordinated social identity.³⁴² The result can be “vertigo” and “flashes of brilliance,”³⁴³ or the pain of negotiating an identity that is shaped by subordinated external representations.

Anthropologist Renaldo Rosaldo takes W.E.B. Dubois’ double consciousness insight and applies it at the social group level, suggesting that ethnic groups and racial groups that are both raced and have been afforded partial membership into privileged spheres negotiate a “borderland identity.”³⁴⁴ Such groups “neither remain what they once were nor become fully absorbed into the culturally transparent Anglo-American middle-class.”³⁴⁵ Instead of assimilating or remaining separated and isolated, these groups negotiate “borderland” cultural group identities—complex, contradictory, and plural.³⁴⁶ They retain distinctness, even as they negotiate back and

340. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 16-17 (1903) (“The Negro . . . is . . . born with a veil and gifted with second-sight [In] this double-consciousness . . . one ever feels his two-ness,—American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals.”).

341. *Id.*; see also Praeger, *supra* note 39, at 110. Praeger’s opinion is:

Blacks experience the world both as individuals and as members of the collectivity: their individuality is mediated through their understanding of the collective representations of blacks. Individuality is constrained both externally by a society which holds certain expectations of how blacks ought to be and internally by black individuals forced to consider themselves in relations to these images.

Id.

342. Professor Matsuda values this double consciousness:

What does a consciousness of the experience of life under patriarchy and racial hierarchy bring to jurisprudence? . . . Outsider scholars have recognized that their specific experiences and histories are relevant to jurisprudential inquiry. They reject narrow evidentiary concepts of relevance and credibility. They reject artificial bifurcation of thought and feeling. Their anger, their pain, their daily lives, and the histories of their people are relevant to the definition of justice.

Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7 (1989).

343. *Id.* at 8.

344. See ROSALDO, *supra* note 67, at 196-217; see also ILAN STAVANS, *THE HISPANIC CONDITION: REFLECTIONS OF CULTURE AND IDENTITY IN AMERICA* 18-19 (1995).

345. ROSALDO, *supra* note 67, at 211.

346. See *id.* at 204-17 (“In the postcolonial world an autonomous internally cogent view of culture and the universe is no longer possible. Rather we should study the ‘complex sites of cultural production.’”). Gloria Anzaldúa states of the “new mestiza”:

The new mestiza copes by developing a tolerance for contradictions, a tolerance for ambiguity. She learns to be an Indian in Mexican culture, to be Mexican from

forth between privileged cultural identities and the subordinate racial status.

In conclusion, this Part III.B has explored how the work of sociologists, anthropologists, and race theorists deconstructs and undermines the mandate to assimilate. The story of assimilation has become mythologized in the American imagination and continues to be invoked and form part of our collective "common sense." However, from a sociological perspective, assimilation has not been a uniform or absolute process. Sociological data suggest that White ethnics remain bound and influenced by their cultural identities. What unifies and constructs the White assimilated whole is Whiteness. The White ethnic narrative rationalizes substantive opportunity advantages of Whiteness and subsumes the unjustness of racializing certain groups, by constructing Whiteness as virtuous, based on merit and loyalty to buy into the American Dream. However, to sustain this rationalization Whites must be able to believe that all groups are able to assimilate, if only they wanted to. This is perhaps why the mythology of assimilation has been so difficult to defeat.

Minorities cannot assimilate. Even if minorities were willing and able to abandon their cultural identity (which White ethnics have not uniformly done) minorities cannot abandon race. Race is socially constructed by the outside. Minorities remain distinct and will remain differentiated because race is visible, and as a society we continue to make race a salient social group divider. Assimilation requires that the dominant group accept the minority group eventually as equals, as those who belong with the larger group. Yet racial boundaries create psychological and social differences that thwart this kind of full social acceptance. Even if we consider the ways in which we now understand cultural identity and race to have become destabilized, we

an Anglo point of view. She learns to juggle cultures. She has a plural personality, she operates in a pluralistic mode—nothing is thrust out Not only does she sustain contractions, she turns the ambivalence into something else.

GLORIA ANZALDÚA, *BORDERLANDS! LA FRONTERA: THE NEW MESTIZA* 21 (1987); *see also* Praeger, *supra* note 39, at 110-11 ("For blacks . . . the effort to reconcile into one personality images which are diametrically opposed poses [what Dubois called double-consciousness] . . . understanding double consciousness [thus] is central to understanding the racial problem in American culture."). For a literary description of the push and pulls of negotiated borderland identities, *see generally* JULIA ALVAREZ, *HOW THE GARCÍA GIRLS LOST THEIR ACCENTS* (1989); SANDRA CISNEROS, *THE HOUSE ON MANGO STREET* (1984); LUIS J. RODRIGUEZ, *ALWAYS RUNNING LA VIDA LOCA: GANG DAYS IN L.A.* (1993). For Latino scholars' own narratives of their negotiating borderland cultural identities, *see generally* Johnson, *Melting Pot*, *supra* note 29; Leslie C. Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, 103 HARV. L. REV. 1878 (1990); Margaret E. Montoya, *Mascaras, Trenzas, y Greñas: Unmasking the Self While Unbraiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185 (1995).

can again conclude that the process of racial and ethnic group subordination creates permanent, indelible stratifications that thwart full assimilation and integration of minorities.

C. *The Socio-Psychology of Groups: Can We Be One Big Happy Family?*

The Court has mistaken a Kulturkampf for a fit of spite.

Justice Antonin Scalia³⁴⁷

The homogeneity assumption not only assumes away the importance of social and racial status as constructing barriers to assimilation and a unified version of the American identity, it also assumes away human psychology. Four distinct theories, ingroup and outgroup dynamics, competition theory, social dominance theory, and cognitive theory, suggest that the formation of distinct groups is a permanent feature in how human beings live and organize themselves, and that the line between sociability and intergroup hostility and prejudice is very thin.

1. Ingroup and Outgroup Preference

Beginning in the 1960s, psychologist Henri Tajfel, in association with other colleagues, researched what he termed the “minimal intergroup paradigm.”³⁴⁸ The researchers introduced “groupness” by creating completely arbitrary groups that had no interaction with each other.³⁴⁹ Tajfel observed that the dynamics of group behavior manifested themselves even in these “minimal” groups.³⁵⁰ He concluded that “the mere perception of belonging to two distinct groups—that is, social categorization per se—trigger[s] intergroup discrimination favoring the ingroup.”³⁵¹

Extensive group dynamics research has established that, when group identification becomes salient, members of the “ingroup” will behave unconsciously in a variety of ways that favor other members of the “ingroup.”³⁵² As observed by Tajfel, the “minimal intergroup

347. *Romer v. Evans*, 116 S. Ct. 1620, 1629 (1996) (Scalia, J., dissenting).

348. Henri Tajfel & J. Turner, *An Integrative Theory of Intergroup Conflict*, in *THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS* 38 (W. Austin & S. Worchel eds., 1979).

349. *See id.*

350. *See id.*

351. *Id.*

352. In 1963, Tajfel and Wilkes performed studies requiring subjects to subjectively estimate the relative length of lines. Once they introduced the concept of ingroups and outgroups, subjects' observations began to vary markedly. Subjects consistently overestimated the length of lines corresponding to outgroups and underestimated the lines

paradigm" functions in arbitrarily created small groups, absent any relationship or contact between the subjects, and absent any self-interested gains.³⁵³ Even if an ingroup member is subject to losses by favoring the ingroup, researchers observed discrimination in favor of other ingroup members.³⁵⁴

Early theoretical work posited that the mere existence of cultural group affiliation would feed into ingroup and outgroup dynamics and result in prejudice and hostility towards nonmembers of the cultural groups.³⁵⁵ This theory has not been borne out by group dynamics research. Tajfel's work concluded that, while with ingroup/outgroup formation there was an unconscious preference for ingroup members, it was not necessarily linked to intergroup prejudice.³⁵⁶ However, he and others confirmed that intergroup prejudice can be easily elicited under social circumstances in which there is intergroup competition,³⁵⁷ and when differences become salient given social context.³⁵⁸

Hence, the boundary between ingroup-preferring behavior, on the one hand, and hostility and prejudice on the other, is thin, and only a slightly relevant social condition may be sufficient to precipitate outgroup bias and prejudice. Subordinated social identity may provide a ready form of salient social difference, particularly if the dominant group perceives the subordinated groups to be competing for limited resources and opportunities, to be challenging established belief systems, or to be disrupting the value system of the majority.

corresponding to ingroups. See Henri Tajfel & A.L. Wilkes, *Classification and Qualitative Judgments*, 54 BRIT. J. PSYCHOL. 101, 1103-104 (1963).

353. See M.B. Brewer, *Ethnocentrism and its Role in Interpersonal Trust*, in SCIENTIFIC INQUIRY IN THE SOCIAL SCIENCES 345-60 (M.B. Brewer & B. Collins eds., 1981).

354. See Henri Tajfel, *Cognitive Aspects of Prejudice*, 25 J. SOC. ISSUES 79, 83-86 (1969). In another experiment, subjects were asked to allocate rewards fairly. Subjects nonetheless rewarded members of ingroups at a higher rate than outgroups, even when absolute benefits would increase for both ingroup and outgroup members if the subjects had allocated rewards and punishments more proportionately. See generally HENRI TAJFEL, HUMAN GROUPS AND SOCIAL CATEGORIES (1981).

355. In 1906, Sumner theorized that ethnic group identification would lead to outgroup hostility. To Sumner, this was an inevitable consequence of human formation into social groups: "Loyalty to the group . . . [and] hatred and contempt for outsiders . . . all grow together." W. G. SUMNER, FOLKWAYS 13 (1906).

356. S. Hinkle & J. Schopler, *Ethnocentrism in the Evaluation of Group Products*, in INTERGROUP RELATIONS 160-73 (W. Austin & S. Worchel eds., 1979).

357. In a series of studies, middle-class boys from the same kinds of backgrounds were studied. When researchers created competitive circumstances, such as sports tournaments, researchers observed intense intergroup hostility and animosity. See R.R. Blake & J.S. Mouton, *Intergroup Problem Solving in Organizations: From Theory to Practice*, in THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS, *supra* note 348, at 19-32. See generally M. SHERIF, GROUP CONFLICT AND COOPERATION (1967).

358. See *infra* note 361 and accompanying text.

2. Competition Theories

Competition theory, a Darwinist view influential in both psychology³⁵⁹ and sociology,³⁶⁰ is based mainly on a broad ecological perspective and a historical framework. The theory posits that, in certain social and market circumstances, competition exists, or groups perceive that competition exists, for limited resources.³⁶¹ For example, African-Americans and Whites may compete for low-wage, low-skill jobs in rural locations where there is only one factory; or immigrant groups and African-Americans may compete for a limited number of unskilled jobs in inner city areas. In these cases, each group constitutes a real threat to the other, because they are directly competing in a zero-sum game. One group's gains will result in the other group's losses.

Sherif, a group dynamics psychologist, concluded from the results of a series of small scale experiments in which he created competitive conditions for arbitrarily formed ingroups and outgroups, that

[w]hen groups engaged in reciprocally competitive and frustrating activities, such that the gain or desired goal by one results in loss for the other, unfavorable stereotypes of the out-group and its members come into use. In time these unfavorable attitudes are standardized in a group, and the out-group is placed at a prejudicial distance, even to the point that group members want nothing whatever to do with members of the other group.³⁶²

359. See generally DUCKITT, *supra* note 319, at 96-109 (stating that the term "competition theory" is rarely used but specific theories are consistent with "realistic conflict theory"); Sherif & Sherif, *Research on Intergroup Relations*, in THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS, *supra* note 348, at 7-18.

360. According to Park's "race relations" cycle, during the period of a new group's entry, Park posits that there will be intergroup competition that sparks racial prejudice. See PARK, *supra* note 309.

361. Fredrik Barth's competition theory, which he calls the "ecological perspective," hinges on the proposition that competition will exist when two or more distinguishable groups (racial or ethnic) overlap and attempt to exploit the same market niche. Barth explains:

[S]table inter-ethnic relations presuppose such a structuring of interaction: a set of prescriptions governing situations of contact ... [but] when two or more interspersed groups are in fact in at least partial competition within the same niche ... one would expect one such group to displace the other, or an accommodation involving an increasing complementary and interdependence to develop.

Barth, *supra* note 315, at 20.

362. Sherif & Sherif, *supra* note 359, at 10.

Historical empirical work by sociologist Susan Olzak supports the link between intergroup competition and intergroup hostility.³⁶³ Using economic and demographic data and newspaper accounts of instances of racial and ethnic violence during the period from 1882 through 1914, Olzak applied regression analysis to test the hypothesis that racial and ethnic conflict would intensify with increased competition among distinct racial and ethnic groups.³⁶⁴ Olzak found a significant correlation between lynchings of African-Americans and increased immigrant inflows.³⁶⁵ Olzak concludes that these data support the competition theory hypothesis.³⁶⁶

3. Social Dominance Theories

Social dominance theory provides an explanation for intergroup inequality and hostility that has psychological, sociological, and political science foundations. Social dominance psychological studies include a remarkable small-scale experiment that supports the proposition that, when ingroups and outgroups are placed in social positions of dominance and subordination, prejudice and hostility result. Two social psychologists conducted a two-week experiment at Stanford on middle-class students with no history of prejudiced attitudes or behaviors. The students were randomly assigned as "prisoners" and "guards." In a very short time, the "guards" stereotyped and attached derogatory labels to the "prisoners." As the experiment went on, the "guards'" behavior towards the "prisoners" became more brutal, sadistic, and dehumanizing. The student "prisoners" suffered nervous breakdowns, and the researchers were

363. See SUSAN OLZAK, *THE DYNAMICS OF ETHNIC COMPETITION AND CONFLICT* 109-33 (1992). Olzak's project specifically involves verifying the ecological perspectives theories of Barth and others. See *id.* at 15-31, 162-64.

364. See *id.* at 32-47.

365. See *id.* at 126 (finding that "rate of violence against African Americans in urban settings was over three times higher when immigration surged"). A separate regression testing for depressed economic conditions also found a significant relationship between economic downturns in the South and lynchings of African Americans. See *id.* at 133-34. Olzak cautions that the increase in racial violence also appears to have been influenced by political competition, because Populism's political challenges to the one-party system coincided with economic downturns in the South during this period. *Id.* at 134.

366. See *id.* Olzak concludes: "[E]conomic slumps, particularly those that affected the least skilled workers, increased rates of both forms of racial violence [lynching and urban violence], as did rising competition from immigration Even when indicators of [political and economic] upheavals are included in analysis, competition processes remain strong." *Id.* at 133.

forced to call off the experiment.³⁶⁷ From this well-noted experiment and other historical observations,³⁶⁸ John Duckitt conjectures that psychological pressure to rationalize social power situations causes a dominant group to ascribe to the subordinate group negative stereotypes and malicious motivations.³⁶⁹

The phenomenon of scapegoating, observed historically, also supports the proposition that, in conditions where one group exercises social domination and holds a privileged status over another, intergroup hostility will result. In scapegoating, a higher-status group invents an ideology and portrays a lower-status group in ways that can be used to blame the low-status for problems affecting the higher-status group. For example, scapegoating ideology, in vogue even prior to the advent of Nazi Germany, ascribed to Jews immense powers, both in terms of their ability to control global capital and wealth and with respect to personal powers. Michael Blain considers the centuries of German group defamation against Jews and their racial objectification as "an absolute precondition" to the Holocaust.³⁷⁰

Small-scale psychological experiments may explain why scapegoating is a historically recurring phenomenon. When higher-status groups "scapegoat" lower-status groups to account for a general problem, or blame them for intragroup problems and conflicts, scapegoating draws attention from intragroup conflicts and tends to lessen tension within the ingroup.³⁷¹

367. See Charles Haney & Paul Zimbardo, *Social Roles and Role Playing: Observations from the Stanford Prison Study*, in CURRENT PERSPECTIVES IN SOCIAL PSYCHOLOGY 266-74 (E.P. Hollander & R.C. Hunt eds., 1976).

368. For example, John Hope Franklin documents White America's extensive rationalization of its treatment of African-Americans during slavery and the Jim Crow era. See generally JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* (1967) (tracing the historical struggle for racial equality).

369. See DUCKITT, *supra* note 319, at 102 (interpreting the experiment as "involv[ing] the process of psychological rationalization, which functions to justify oppression and exploitation").

370. See generally Michael Blain, *Group Defamation and the Holocaust*, in GROUP DEFAMATION AND FREEDOM OF SPEECH: THE RELATIONSHIP BETWEEN LANGUAGE AND VIOLENCE (Monroe H. Freedman & Eric M. Freedman eds., 1995) (describing how Nazi propaganda machinery portrayed Jews as child killers, Christ killers, racial monsters, manipulative, and greedy). See also DUCKITT, *supra* note 319, at 102-04, 150.

371. See BABAD ET AL., *THE SOCIAL SELF: GROUP INFLUENCES ON PERSONAL IDENTITY* 103 (1983) (observing ironically that group cohesion can be maintained "[w]hen there is tension and social problems seem insurmountable, [by finding] an innocent, weak, and distinctive group to blame and victimize!").

4. Cognition Theory

Finally, cognition theory offers another link between intergroup preferences and socio-psychological inequality. Cognitive psychologists posit that, in order to process information, individuals create categories and formulate simple paradigms. Cognitive categories simplify and make the complex world more manageable for human cognition.³⁷² Social cognition theorists studying prejudice posit that stereotypes are embedded in cognitive categories that we use to organize and represent information. Categorization, in turn, affects how we perceive and process information. Cognitive psychologist David Hamilton uses the concept of schemas to explain how, at the very primary level of perceiving, intergroup social stereotypes enter our knowing: "[A]ctivation of a schema, such as a stereotype, can influence what aspects of the available information are attended to by individuals, how that information is interpreted as it is encoded, and hence what information will be available for later retrieval."³⁷³ According to the cognitive paradigm, stereotypes are a form of cognitive categorization that are embedded into how we perceive, recall, and make decisions.³⁷⁴

Thus, cognitive psychologists find in cognitive categories the basis for prejudice and discrimination. People perceive³⁷⁵ and remember in a way that fits into their stereotypes about ingroups and outgroups.³⁷⁶ We create stereotypes that favor ingroups.³⁷⁷ Subjects have better memory of negative results of outgroup members and tend to forget negative results for ingroup members.³⁷⁸

Henri Tajfel's intergroup dynamics work connects social identity to cognition. People seek positive self-esteem, and this motivation

372. See David L. Hamilton & Tina K. Trolier, *Stereotypes and Stereotyping: An Overview of the Cognitive Approach*, in PREJUDICE, DISCRIMINATION AND RACISM, *supra* note 151, at 133.

373. *Id.* at 143.

374. From a cognition standpoint, a stereotype is "a cognitive structure that contains the perceiver's knowledge, beliefs and expectancies about some human group." *Id.* at 133. For application of the insights of cognitive psychologists to the analysis of legal doctrine addressing discrimination, see sources cited *supra* notes 112-14.

375. See David L. Hamilton, *Illusory Correlation as a Basis for Stereotyping*, in COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR 115-45 (David L. Hamilton ed., 1981) [hereinafter COGNITIVE PROCESSES] (noting that subject perceptions will "fit" racial stereotypes).

376. See Myron Rothhart, *Memory Processes and Social Beliefs*, in COGNITIVE PROCESSES, *supra* note 375, at 145-82.

377. See David A. Wilder, *Perceiving Persons as a Group: Categorization and Ingroup Relations*, in COGNITIVE PROCESSES, *supra* note 375, at 213-58.

378. See generally David F. Frey & Samuel Gartner, *Helping and the Avoidance of Inappropriate Interracial Behavior: A Strategy that Perpetuates a Non-Prejudiced Self-Image*, 50 J. PERSONALITY & SOC. PSYCHOL. 1083 (1986).

will cause individuals to embed social cognition categories with properties that favor members of ingroups and disfavor members of outgroups. Turner notes that

to explain discrimination of ingroup outgroup division in terms of cognitive processes, motivational factors need to be superimposed. . . . The categorization process produces the perceptual accentuation of intragroup similarities and intergroup differences and thus makes salient or perceptually prominent criteria or relevant aspects of ingroup or outgroup membership. In this way it selects the specific dimensions for self-evaluation and social comparison in the given setting. It also ensures that intergroup comparisons focus on perceptual discontinuities between ingroup and outgroup members so that positive differences (distinctiveness) and not similarities contribute to self-esteem.³⁷⁹

Cognition theory explains why well-meaning Whites unconsciously discriminate and are able to rationalize their prejudiced behavior. They either perceive in racially biased ways or organize information to accommodate negative stereotypes. When confronted with information that demonstrates racial bias they are able to rationalize this evidence by recurring to the same negative stereotypes that occasioned the racial bias.³⁸⁰ These studies can lead to fatalism about law's ability to discourage racially prejudiced behavior because it is so ingrained, pervasive, and self-legitimizing. John Duckitt's summary of recent work on social prejudice suggests that a liberal education can reduce intergroup prejudice by disrupting the social transmission of stereotypes and cultural norms that promote intolerance and scapegoating of other groups.³⁸¹ Dovidio's and Gaertner's studies indicate that clear standards and guidelines can help avoid the insertion of racial stereotypes into the process of perception and evaluation.³⁸²

Applying intergroup preference, competition, social dominance, and cognition theories, we can observe that the homogeneity assumption not only assumes sameness, but it minimizes and assumes away the negative dynamics of intergroup prejudice, competitive

379. Henri Tajfel, *Social Psychology of Intergroup Relations*, 33 ANN. REV. PSYCH. 1 (1982); J.C. Turner, *The Experimental Social Psychology of Intergroup Behavior*, in THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS, *supra* note 348, at 66-101.

380. *See supra* note 151 and accompanying text.

381. *See* DUCKITT, *supra* note 319, at 255-56. Duckitt suggests that social psychologists' studies indicate that the transmission of social prejudice and social stereotypes can be counteracted by educational processes, such as curriculum and methods of teaching that are designed to introduce a multicultural perspective. *See id.* at 255-56. Duckitt also points to the research on cooperative education that demonstrates that cooperative enterprises in mixed ethnic groups can reduce intergroup hostility. *See id.* at 256.

382. *See supra* note 151 and accompanying text.

hostility, dominant group scapegoating, and cognitive stereotypes. The socio-psychological evidence demonstrates how easily societal dynamics can become negative, generating hostility and prejudice. If courts were to dispose of the homogeneity assumption, they would take a step forward in understanding intergroup difference and recognizing the negative dynamics of intergroup conflicts.

The recently decided *Romer v. Evans*³⁸³ is a case that illustrates the potential for applying the insights of socio-psychological dynamics to intergroup conflict cases. In *Evans*, the Court entertained the constitutionality of Colorado's Amendment 2 which not only repealed or rescinded existing provisions geared to protect homosexual citizens from discrimination but also prohibited all legislative, executive, or judicial action at any level of state or local government designed to protect homosexuals.³⁸⁴ Justice Kennedy's majority opinion rightly characterized this referendum as a popular action targeting a disfavored group, stating that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."³⁸⁵ The Court relied, in part, on this characterization in striking down the referendum under rational basis review.³⁸⁶

Justice Scalia's dissent, on the other hand, rejected the Court's finding of intergroup hostility and recharacterized the debate as a mere dispute over values, beginning his dissent with the sentence quoted at the beginning of this section.³⁸⁷ Yet, ironically, Justice Scalia's own diatribe about the importance of permitting the polity to determine social values without court intervention exemplifies the way in which

383. 116 S. Ct. 1620 (1996).

384. *See id.*

385. *Id.* at 1628.

386. *Id.* at 1627 ("[W]e will uphold the legislative classification so long as it bears a rational basis to some legitimate end . . . Amendment 2 fails, indeed defies, even this conventional inquiry."). Commentators have provided various explanations as to whether the standard of review applied in *Romer v. Evans* was actually the minimal scrutiny that the Court claims to have applied. *See, e.g.,* Cass R. Sunstein, *The Supreme Court 1995 Term Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 76-79 (1996) (connecting *Evans* with *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985)); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 329-34 (1997) (arguing that illegitimate purpose scrutiny is dependent on the constitutional provision at issue and that in *Evans* what was illegitimate was the motivation behind Amendment 2 was to "create classes of citizens"); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 Const. Comment. 257, 264 (1996) (explaining that the Court's invocation of minimal scrutiny was an accurate description of the level of review, and that what was unique was that in *Evans* the majority "single[d] out a group for pariah status").

387. *See id.* at 1629 (Scalia, J., dissenting). Justice Scalia was joined in his dissent by Chief Justice Rehnquist and by Justice Thomas.

negative stereotypes can be used to threaten a group's right to exist. Analogizing homosexuals to criminals, polygamists, and persons who are cruel to animals,³⁸⁸ Justice Scalia further asserts that homosexuals have disproportionately great political power and disposable income.³⁸⁹ Thus, Justice Scalia's own rhetoric effectively demonstrates how disputes over cultural values may become the vehicle for reaffirming and legitimizing negative social identity of a disfavored group.

The strongest justification for the Court's intervention was that this kind of referendum poses a particular kind of danger for intergroup relations. By enacting Amendment 2, it could be argued that the dominant group, heterosexuals who view coexistence with gays and lesbians as unacceptable, exercised their political power of greater number and greater cultural acceptance to exclude gays and lesbians from membership in the polity. Such a political act also has moral and social implications. Gays and lesbians do not deserve political membership because this "threatens" the morals of the polity. By implication, the outgroup is inherently immoral. From a socio-psychological perspective, this is a form of racialized objectification that could lead to scapegoating. Accordingly, under this analysis Evans' constitutional theoretical link is to cases that require a higher scrutiny of democratic processes when acts of the majority appear to be motivated by prejudice,³⁹⁰ rather than what the Court applied,

388. *See id.* at 1635.

389. *See id.* at 1634-37.

390. John Hart Ely's process theory begins from a social and political text that posits that the democratic process does not always produce reasoned results. *See* John Hart Ely, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). Democratic politics can be subject to capture by majoritarian interest groups whose motivations may not be aligned with the values of the polity as a whole. Professor Ely observes that representatives do not always represent minorities' interests, because majorities lack empathetic understanding (or the willingness to be empathetic) or are hostile or prejudiced. *See id.* at 77-88. Professor Ely argues that judicial review is appropriate wherever the Court might deem that there is "prejudice against discrete and insular minorities." Professor Ely simply concludes that "we came to recognize that the existing constitutional devices for protecting minorities were simply not sufficient. No finite list of entitlements can possibly cover all the ways majorities can tyrannize minorities, and the informal and more formal mechanisms of pluralism cannot always be counted on either." *Id.* at 105. As Ely explains, such dynamics "provid[e] the majority of the whole with the common motive to invade the rights of other citizens that Madison believed improbable in pluralistic society." *Id.* at 153. Ely's doctrinal basis for this argument is *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.8 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

rational basis review.³⁹¹ In *Evans*, the Court had the opportunity to take the unequivocal position that official government acts, such as a state constitutional amendment, cannot sanction or enforce outgroup targeting and scapegoating.³⁹²

D. Race Theory: Towards an Understanding of the Complexity of Difference

Recent work in race theory reconceptualizes race as a social construct that is dynamic and complex.³⁹³ In this section, I will capture this idea by describing race as a process. This conceptualization is both more inclusive and exclusive than the conventional status concept. Under the concept of race as a status, the questions of "What is race?" and "Who is raced?" are easier to answer. The rules emphasize physicality and genealogy,³⁹⁴ and, although the rules may be arbitrary, the solutions are less complex and require less social and historical understanding. Under the view of race as a process, race is unstable and has multiple meanings and functions: (1) which ethnic

391. See *Romer*, 116 S. Ct. at 1628. It could also be argued that rational basis review is evolving into a more ratcheted analysis in cases dealing with gay and lesbian citizenship rights.

392. It could be argued that the Court implicitly takes this position. The Court describes Amendment 2 as imposing an absolute legal disability on gay men and lesbians as a "solitary class." *Id.* at 1626. The Amendment 2 majority "withdr[ew] from homosexuals, but not others, specific legal protection from the injuries caused by discrimination." *Id.*; see also *id.* at 1627 (Amendment 2 does not permit gays and lesbians "safeguards that others enjoy or may seek without constraint."). I elaborate this argument in the second work of this project. See Lazos Vargas, *supra* note 90, at Part V(B).

393. See, e.g., John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160 (1992) ("[R]ace' is not a fixed term. Instead, 'race' is a fluctuating, decentered complex of social meanings that are formed and transformed under the constant pressures of political struggle."); Jennifer M. Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 HASTINGS L.J. 1353 (1995) (exploring the various processes through which African-Americans have been racialized as people falling outside the ideology of (good) "Americanness").

Michael Omi's recent work argues that a 1990s race perspective requires that we adopt an understanding of race that is "attentive to a complex understanding of racial location and interest, one that does not essentialize race but interrogates policies . . . and grapples with the increased visibility of Asian-Americans and [Latinos] and how they are implicated in a range of racial issues." Michael Omi & Dana Y. Takagi, *Situating Asian Americans in the Political Discourse on Affirmative Action*, 55 REPRESENTATIONS, Summer 1996, at 155; see also Symposium, *Our Public Obsession, Our Private Sin*, 15 LAW & INEQUALITY J. 1 (1997) (containing works by Omi, Calmore, and others discussing the complexity of race).

394. Cf. HANEY LOPEZ, *supra* note 210 (discussing cases in which immigration court attempted to trace genealogy to determine if petitioner for entry into the United States is "White"); Gotanda, *supra* note 90 (discussing "one drop" of African-American blood rule and how it was applied through history).

and racial groups are considered to be “raced” changes over time;³⁹⁵ (2) because race is a social process, understanding the scope and intensity of “racing” requires economic, historical, and wealth creation/class analysis;³⁹⁶ (3) race involves a physicality aspect;³⁹⁷ (4) the construction of race is a political struggle sited in the state, and the state participates in the process of construction of race through legal discourses that legitimize racial subordination;³⁹⁸ and (5) the process of “racing” is complicated by the interaction with other categories that might further influence the construction of a subordinate status, such as gender, sexual orientation, and class.³⁹⁹

395. See OMI & WINANT, *supra* note 20, at 57-61 (observing that the cultural ideology that supports the social construction of race changes over time); see also *supra* Part I.B.3 (discussing how the racing of Irish-Americans changed over time).

396. See generally TOMÁS ALMÁGUER, *RACIAL FAULTLINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA* (1994) (discussing the historical, sociological, and economic forces that contributed to the racing of Mexican-Americans in California); TAKAKI, *STRANGERS*, *supra* note 15 (exploring the historical, sociological, and economic forces that racialized Asians); WILLIAMS, *supra* note 4 (exploring how Native Americans were racialized through the discourse of conquest and how law legitimized this phenomenon).

397. See *supra* notes 327-329 and accompanying text. Because of this emphasis on phenotype, some members of a racialized group can escape a racialized social identity by “passing.” See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1709-12 (1993) (describing her light-skinned African-American grandmother’s “great daring and self-denial” and the psychological cost of “reentering her self” when she “passed” to access better jobs during Jim Crow); Johnson, *Melting Pot*, *supra* note 29 (describing the wide variability of physicality and phenotype within his own family and the Latino community at large).

398. The state and the politics of the state become the situs where racial groups struggle to construct racial meaning. See, e.g., FRASER, *supra* note 23, at 144-83 (as applied to oppressed groups); OMI & WINANT, *supra* note 20, at 2 (as applied in the Black-White racial construct); Margaret A. Baldwin, *Public Women and the Feminist State*, 20 HARV. WOMEN’S L.J. 47 (1997) (as applied to women); see also KARST, *supra* note 25, at 43-61 (discussing Jim Crow laws as legitimizing racial labeling and caste creation); HANEY LOPEZ, *supra* note 210, at 27-33 (examining immigration law and concluding that the legal construction of who is raced by the virtue of not being considered “white” is primarily a power dynamics struggle); WILLIAMS, *supra* note 4 (exploring how legal discourse legitimated the dispossession of Native American lands).

399. Subordinated identities, such as gender, sexual orientation, and immigrant status are intersectionalities where race theorists have explored variability in the racializing process. See, e.g., Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (developing the concept of intersectionality); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California’s Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995) [hereinafter Johnson, *Proposition 187*] (discussing the intersection between race and immigrant status in the politics of California’s Proposition 187); Cherry, *supra* note 23 (exploring the targeting of African-American “welfare mothers”); Anzaldúa, *supra* note 346, at 19-20 (describing the complexity of homophobia within the Mexican-American culture).

This conceptualization of race is far more complex than the White-Black binary construct that dominates American thinking about race. The simplicity of the White-Black status construct fits into our sense that African-Americans are the paradigmatic "raced" group in American society. It also plays into the exclusionary aspects of the homogeneity assumption, because difference is so oversimplified that only racial distinctness that looks like and acts like the Black paradigm becomes recognized by courts.

This binary construct has long masked the complexities and subtleties of race. For example, Andrew Hacker, in his recent *Two Nations: Black and White, Separate, Hostile, Unequal*,⁴⁰⁰ dismisses Latinos and Asian-Americans from the race construct, describing them as ethnic groups that are now almost totally assimilated and who refuse to recognize themselves as being "raced."⁴⁰¹ Thus, Hacker constructs a neat and tidy dual race paradigm, Black versus White, in which African-Americans live in a "separate nation" as "aliens" in America, and Asian-Americans and Latinos are part of the White privileged monolith. Hacker's dismissive treatment of ethnic minorities may well be motivated by his wish to make a strong, essentialist indictment of American racial politics. While this may be politically effective,⁴⁰² it is inauthentic.

Similarly, the Supreme Court's thinking about race has been captured by the Black-White binary construct.⁴⁰³ Although the Court has called ethnicity and national origin a "first cousin of race,"⁴⁰⁴ it has not adopted a racial construct broad enough to address the concerns of racialized ethnic groups under the Equal Protection Clause. In applying the antidiscrimination principle, it has not considered what attributes of ethnicity are targeted for discrimination. Nor, in applying the antisubordination principle, has it examined how a practice that appears neutral on its face, when connected with a history of

400. See ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 9-11 (1992).

401. See *id.*

402. See Judith Butler, *Contingent Foundations: Feminism and the Question of "Postmodernism,"* in *FEMINISTS THEORIZE THE POLITICAL* 15 (Judith Butler & Joan W. Scott eds., 1992) (arguing that within feminism there is political necessity to speak as a group, and that representational politics is linked to identity politics).

403. See Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571 (1995) [hereinafter Perea, *Binary Constitution*]; see also Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42, 69-70 (1995) [hereinafter Johnson, *Civil Rights*] (discussing why Black-White construct does not "fit" problems of discrimination aimed at Latinos).

404. *Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting).

discrimination and subordination, may continue stereotypes that are harmful and reinforce a subordinate social identity. For racial ethnic communities the racializing process is more complex than under a Black-White construct. Under the latter, physicality and racial history play a prominent role. Under the former, foreignization and cultural subordination take prominence.⁴⁰⁵ Racial prejudice based on ethnicity is different from the prejudice encountered by African-Americans and cannot fit into the Black-White construct.⁴⁰⁶

The Supreme Court's decision in *Hernández v. New York*⁴⁰⁷ helps to illustrate how a more complex analysis is needed to determine if and how ethnic communities are racialized. In *Hernández*, the Supreme Court held that bilingual jurors could be subject to peremptory challenges.⁴⁰⁸ First, examining the actions of the prosecutor, the Court found that the prosecutor's motivations were "race-neutral" because there was no evidence of discriminatory intent or conscious stereotyping that affected the prosecutor's decisionmaking.⁴⁰⁹ Second, the Court held that, under the facts of *Hernández*, Spanish-speaking ability was not a proxy for race.⁴¹⁰ The Court acknowledged that

405. Professor Moran argues that Latinos and Asian-Americans are neither Black nor White in political or social terms; rather, their experience shares aspects of the African-American race experience as well as of White ethnic models. For these groups, race may be better understood as having aspects of religion, language, culture, and "foreignization." See Rachel F. Moran, *Unrepresented*, 55 REPRESENTATIONS, Summer 1996, at 139, 150. Similarly, Neil Gotanda argues that for Asian-Americans a key aspect of racialization is their foreignization. See Neil Gotanda, "Other Non-Whites" in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1188 (1985). The current tension between Asian-Americans and the Democratic National Committee is illustrative. Asian-Americans are questioning why only Asian-Americans who contributed more than \$5,000 are being investigated, and not other Americans. See WILDMAN ET AL., *supra* note 140, at 12-13 (relating incident where Asian-American potential juror was asked whether he spoke English, but no other juror was asked this same question); Daphne Kwok & Robert Sakinawa, *How's This for Gratitude*, N.Y. TIMES, Mar. 21, 1997, at A2 (questioning whether Congress or the press can distinguish between Asians who are citizens of other countries and Americans of Asian descent); see also *supra* notes 183-84, 195-200 and accompanying text.

406. Cf. YOUNG-BRUEHL, *supra* note 43 (discussing generally that prejudice should be viewed as distinct processes, each based on different ideology and externalized psychologies).

407. 500 U.S. 352 (1991).

408. See *id.* at 369-70 (involving two bilingual jurors who were subject to peremptory challenges by the defense where the case involved testimony in Spanish).

409. See *id.* at 363. In *Hernández*, the prosecutor did not justify his use of peremptory challenges on the basis of not wanting Spanish-speaking jurors. See *id.* at 371. However, the prosecutor reportedly only questioned potential jurors with a Spanish surname about Spanish-speaking language ability. See Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 53 (1993).

410. See *Hernández*, 500 U.S. at 371. For a general critique of this assertion, and a general argument that language can serve as a proxy for unpopular national origin, see Juan

Spanish-speaking ability was correlated with belonging to a Latino community,⁴¹¹ and moreover, that the *Hernández* holding might decrease the number of Latino jurors.⁴¹² The Court declined to connect Spanish-speaking ability to ethnicity and thus found that the facts and circumstances before it did not warrant a finding that the prosecutor had intended to discriminate on the basis of ethnicity.⁴¹³

Discrimination on the basis of Spanish-speaking ability can be a manifestation of racialized processes as applied to Latinos. First, the labeling of Latinos and Asian-Americans as "foreign," "unassimilable," and "horde-like," historically has served as a racial marker.⁴¹⁴ This labeling has been used to exclude these groups from the political community⁴¹⁵ and has also served as a vehicle for targeting nativist fears against these groups.⁴¹⁶ Thus, speaking a different language

F. Perea, *Democracy and Distrust: An Essay on American Language, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992) [hereinafter Perea, *Language*].

411. See *id.* at 370 ("Language [is an] ... express[ion] ... [of] membership in a community.").

412. See *id.* at 363.

413. See *id.* at 371-72. The Court found that the facts of *Hernández* did not warrant overturning the lower court's judgment that there had been no evidence of discriminatory intent, and left open the question of whether the ability to speak Spanish can be an attribute of race. See *id.* See generally Juan F. Perea, *Hernández v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1 (1992) (criticizing equal protection doctrine's inability to address language difference); Deborah Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761 (1993) (arguing that *Hernández* was wrongly decided and effectively permits prosecutors to exclude Latino jurors).

414. See *Korematsu v. United States*, 323 U.S. 214, 239 (1944) (Murphy, J., dissenting) (discussing the problem in the context of Japanese-Americans). Distrust and foreignization marked Asian-Americans through the 1940s, culminating in the World War II internment of Japanese-Americans, two-thirds of whom were native-born Americans, on the grounds that they posed a security risk. See *id.* at 233-34; see also *Fong Yue Ting v. United States*, 149 U.S. 698, 698 (1893) ("[Chinese are] of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, ... and apparently incapable of assimilating with our people ..."); *Chae Chan Ping v. United States*, 130 U.S. 581, 595-96 (1889) ("[Chinese] immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization, ... and they retain the habits and customs of their own country."); see also *supra* note 183.

415. See generally Moran, *supra* note 405, at 149-50 (arguing that, because Latinos are asked to fit into African-Americans' experience under civil rights model and a White ethnic experience under immigration laws, their claims for constitutional protection never have gained legitimacy); Perea, *Binary Constitution*, *supra* note 407 (arguing that the Court takes assimilation into White community as proxy for standing in the political community).

416. Some theorists argue that the current political movement targeting Mexican-American immigrants is a reflection of the majority's discomfort with Mexican-Americans as a distinctive cultural group. See Linda Bosniak, *Nativism the Concept: Some Reflections*, in IMMIGRANTS OUT!, *supra* note 131, at 286-87; Kevin R. Johnson, *Proposition 187*, *supra* note 403. In California, immigrant hostility has spilled over to native-born and resident Latinos. A recent report from the Los Angeles County Commission of Human Relations

becomes a marker of someone who does not belong to the community and can be excluded as a foreigner and alien. Like an accent and physicality, language can function as racial marking.⁴¹⁷ In *Hernández*, the Court recognized that speaking a language other than English can elicit "distance and alienation . . . ridicule and scorn."⁴¹⁸ In *Hernández*, the jurors could understand Spanish, and this ability marked their foreignness, as did their Spanish surnames.

Second, language, culture, and nationality are highly linked. Culture is transmitted through the parents' language, language is the carrier of cultural ideology and cultural symbols, and language is a powerful symbol of culture.⁴¹⁹ Historically, Anglo-Americans have viewed Latino and Asian heritages as culturally inferior. This view of superiority goes beyond ethnocentrism and is instead manifested as racialized attitudes toward Asians and Asian-Americans, Mexicans and Mexican-Americans. Historians John Higham and David Weber describe Anglo-Americans' attitude of cultural and national superiority as complex, combining anti-Spanish, anti-indigenous, and anti-Catholic prejudices: the Spanish were viewed as culturally backwards, hierarchical, incompetent, cruel, with indolent work habits; Catholics were seen as inherently morally thwarted; and the racially mixed Mexican population were tainted with indigenous blood and were considered the racial equivalents of slaves.⁴²⁰ Our current political

(CHIRLA) documented an increase of 23.5% in hate crimes against Latinos since the enactment of Proposition 187. An analysis examining complaints filed with the CHIRLA in the Los Angeles Mexican-American community post-Proposition 187 concludes that

[Proposition] 187 has transformed everyday life for Latinos of every status, including those born here and those whose ancestors have lived in the U.S. for generations. The climate of hostility [engendered by Proposition 187] resulted in discrimination in business establishments, increased police abuse, heightened conflict among neighbors and an increase in hate crimes and hate speech against Latinos. There is abundant evidence of anti-Asian hate activity. . . .

Nancy Cervantes et al., *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 CHICANO-LATINO L. REV. 1, 9 (1995).

417. See Matsuda, *supra* note 191, at 1349; Perea, *Language*, *supra* note 414, at 340-71.

418. *Hernández*, 500 U.S. at 370.

419. See generally RALPH FASOLD, THE SOCIOLINGUISTICS OF SOCIETY, 147-79 (1984); JOSHUA FISHMAN, LANGUAGE AND ETHNICITY (1986); JOSHUA FISHMAN, BILINGUALISM IN THE BARRIO (1971); EDWARD T. HALL, THE SILENT LANGUAGE 45-50 (1990).

420. Professor Weber attributes the animosity felt towards Mexicans as derivative of English antipathy towards the Spanish and Catholicism. He reports that Bartolomé de las Casas' (a Dominican bishop historian) treatise indicting the Spanish colonizers for their cruelty to the indigenous peoples in the Americas was widely read in England. See generally BARTOLOMÉ DE LAS CASAS, HISTORIA DE LAS INDIAS, 3 vols. (1951). The Spanish Inquisition added to the image of extreme Spanish cruelty. Mixed in was an ingrained English antipathy toward Catholicism. As a result, Anglo-Americans' prevailing attitude towards Mexicans was that they were "indolent, ignorant, bigoted, cheating, dirty, blood-thirsty, cowardly half-

rhetoric continues to reflect the attitude that Anglo-American countries and nations are superior to Latin America and other countries formerly colonized by the Spanish.

Third, repression of language can be a vehicle for constructing and enforcing racial/cultural subordination.⁴²¹ Many among the current generation of Mexican-American professionals can remember as schoolchildren being forbidden from and being punished for speaking Spanish in school.⁴²² In the 1950s and 1960s, public schools in California and the Southwest segregated Mexican-Americans under the pretext that Mexican-American children did not speak or were not sufficiently proficient in English.⁴²³ The epithet "Spic" is said to be derived by the inability of the Spanish-trained tongue to pronounce the long "e" vowel in "speak."⁴²⁴ Thus, a cultural attribute, speaking Spanish, has been racialized, reconstructed as a badge of racial inferiority.

breeds." DAVID J. WEBER, *Introduction* to FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS 59-60 (David J. Weber ed., 1973) (citing contemporaneous accounts). Historian John Higham links Americans' attitudes towards Mexico with the ideology of Anglo-Saxon superiority. See HIGHAM, *supra* note 131, at 35-67.

421. See Perea, *Language*, *supra* note 414, at 395-303 (describing early struggle of German Americans to resist imposition of a monolingual standard); Montoya, *supra* note 346, at 193 ("Latina/o history is replete with stories about those [Latinos] who changed their names, lost the Spanish language and . . . culture.").

422. See, e.g., Margaret E. Montoya, *Law and Language(s): Image, Integration and Innovation*, 7 LA RAZA L.J. 147, 148 (1994) (recounting colleague's personal experience of being punished in elementary school for speaking Spanish); see also Hon. Cruz Reynoso, *Ethnic Diversity: Its Historical and Constitutional Roots*, 37 VILL. L. REV. 821, 825 (1992) (retelling personal experience in segregated California public schools).

423. See *Westminster School Dist. v. Mendez*, 161 F.2d 774, 784 (9th Cir. 1947) (holding that school district's segregation of Mexican-American children was unconstitutional under 14th Amendment; the court found that English language deficiencies of some Mexican-American children could justify tracking differentiation, but did not justify blanket segregation); *United States v. Texas*, 342 F. Supp. 24 (E.D. Tex. 1971) (finding court mandated integration of South Texas school district on equal protection, rejecting justification of English-speaking deficiency), *aff'd*, 446 F.2d 518 (5th Cir. 1972); *Gonzalez v. Sheely*, 96 F. Supp. 1004 (D. Ariz. 1951) (finding language-based segregation unconstitutional); *Independent School Dist. v. Salvatierra*, 33 S.W.2d 790 (Tex. Civ. App. 1930) (South Texas school district justified segregation of Mexican-American children because of alleged problems with the English language). See generally George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience, 1930-80*, 27 U.C. DAVIS L. REV. 555, 579 (1994) (describing the Mexican-American school desegregation cases and situating their importance relative to *Brown*); Reynoso, *supra* note 422, at 829-30 (retelling his own experience of going to segregated schools even though he and his brothers spoke fluent English).

424. The New Dictionary of American Slang states that "spic" comes from the "presumed protestation 'no spick English.'" NEW DICTIONARY OF AMERICAN SLANG 408 (Robert L. Chapman ed., 1986).

At this general level, a process-based conception of race supports the view that language should be viewed as an attribute of ethnicity that may be racialized. However, a process-based race analysis acknowledges that racing practices change over time and can be geographically localized. The argument thus far has focused on past practices of social subordination that are particularized to Asian-Americans and Mexican-Americans and localized in the Southwest and California. Yet, *Hernández* is a modern case. *Hernández* is localized in New York, a city traditionally harboring a wide variety of immigrants that have managed to coexist, and some would argue, thrive together. Should the Court apply historical and sociological knowledge of racialized practices in California and the Southwest to the Latino community in New York?

To answer this question requires that we reexamine the process of how the *Hernández* Latino community is raced. Sociologists and race theorists have offered an analysis of racing that concludes that historical social dynamics continue to be relevant to modern racial dynamics. Rodolfo Alvarés argues that if a social system and economic structure have been racialized because of historical, social, economic, and class dynamics, the new immigrants who come into this system will become “incorporated into an already thoroughly structured, thoroughly defined, social situation.”⁴²⁵ Sociologists Tomás Almaguer and Martha Menchaca also conclude from their studies that preexisting racial patterns of colonization and wealth accumulation bear directly on current racialization processes.⁴²⁶

Moreover, recent or current immigrant status, such as that which might have been present among the *Hernández* Spanish-speaking jurors, when intersecting with ethnicity could carve out a status that is subject to a more severe form of racializing processes. David Gutiérrez links the current anti-immigrant nativist hostility to past and current anti-immigrant sentiment and exploitative labor practices.⁴²⁷

425. Rodolfo Alvarés, *The Unique Psycho-Historical Experience of the Mexican-American People*, 52 SOC. SCI. Q. 15, 20-21 (1971).

426. See MARTHA MENCHACA, *THE MEXICAN OUTSIDERS: A COMMUNITY HISTORY OF MARGINALIZATION AND DISCRIMINATION IN CALIFORNIA* (1995) (detailing a sociological study of Mexican-Americans in a rural community in Santa Paula, California linking the Southwest's history of Anglo-American colonization, and the agricultural labor exploitative system of peonage labor, to current social conditions of physical segregation and inferior school systems for the Mexican-American community); ALMÁGUER, *supra* note 396 (exploring generally the social caste-like system that racialized social attitudes towards Mexican-Americans and Asian-Americans and linking these to occupational segregation).

427. See DAVID G. GUTIÉRREZ, *WALLS AND MIRRORS: MEXICAN-AMERICANS, MEXICAN IMMIGRANTS AND THE POLITICS OF ETHNICITY* 217 (1995) (describing stratified labor system in which unskilled and agricultural jobs were largely the domain of Asian-

Rachel Moran believes that anti-immigrant sentiment reinforces negative stereotypes of Latinos as foreign and less trustworthy in their patriotic loyalty.⁴²⁸ Kevin Johnson and other theorists argue that the current political movement targeting immigrants is a reflection of the majority's discomfort with Latinos as a distinctive cultural group.⁴²⁹

This Part III.D does not attempt to resolve the *Hernández* puzzle. Rather, this discussion illustrates the complexity of the inquiry, how much broader the approach of race as a process is than the status-based approach. Yet, concurrently, the focus is more narrow and particularized. In *Hernández*, the Court acknowledged that the process of exploring what attributes of ethnicity can be racialized is complex.⁴³⁰ However, the Court declined to undertake this challenge. Instead, the Court fell back on intent analysis, thus failing to acknowledge the full social context and racializing processes in which the prosecutor's actions took place. In *Adarand* and *Croson*, the Court seemed to chafe at governmental units' simplistic analysis of race in structuring remedial minority set-aside programs.⁴³¹ The Court's demand in *Adarand* was that lawmaking agencies abandon the simplistic use of race status as a proxy for solving complex racial

Americans and Mexican-Americans, and professional and skilled jobs were the domain of Whites and recent White ethnic immigrants); see also ALMÁGUER, *supra* note 396, at 71-73. Almaguer retells how a preexisting stratified class/race system, already in existence under Mejicano and Californio rancheros, combined with Anglo racial attitudes, contributed to create hostile racial attitudes towards Mexican-Americans. Almaguer develops this theme to early 1900s, in which racial attitudes combined with developing agricultural economy, laid the foundation for a system of occupational and residential segregation in California. See *id.* See generally Michael Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425 (1990) (concluding that the Anglo-American dominant majority denied Mexicans, Mexican-Americans, and Asian-Americans participation in society they built with their labor, unlike the opportunities that White ethnic immigrants were afforded).

428. See Moran, *supra* note 405, at 149.

429. See generally Johnson, *Civil Rights*, *supra* note 403; see also sources cited *supra* note 410 & 420.

430. See *Hernández v. New York*, 500 U.S. 352, 371 (1991). The Court stated:

[W]e do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.

Id.

431. In *Croson*, Justice O'Connor critiqued the overbreadth of the minority set-aside program, which included Eskimos, Aleuts, and Native Americans in addition to African-Americans. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 472 (1989). She expressed skepticism whether the program was aimed at remedying past discrimination. See *id.* In *Adarand*, Justice O'Connor speaking for the Court critiqued the use of race as a proxy for a remedial action program, and again expressed her skepticism at such overbroad use of racial classifications. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 219-22 (1995).

issues.⁴³² Yet, in *Hernández*, the Court failed to take up its own challenge to move beyond the Black-White binary construct and build a more complex construct of racial difference.

In sum, the Black-White binary construct has the obvious advantages of simplicity and connection to a traumatic episode of American racial history, slavery and its aftermath. However, the Black-White construct plays into the homogeneity assumption. The racial variant goes something like this. We assume sameness; the exception is when difference is something that cannot be denied and must be recognized, the Black-White race divide. Thus, public law overlooks other kinds of racially constructed difference and how such difference can be part of a discriminatory practice. What this part III.D has offered is an example of how thinking about race as a process not only breaks this very powerful construct, but allows the Court to perform the task it appeared to set in *Adarand*—use more tailored analyses in understanding and resolving the conflicts that arise from racial difference.

E. Public Law as Normative: Liberalism and Heterogeneity

BE

Within my recesses, I yearn to be
so much more than what they'll see.
I am not willing to give in and be
that man they need—he isn't Me.
Yet, as myself they won't let me be,
If not he, you will not be!
I wish they would just let me be—
let me be . . . be simply Me.

Klay Fennell⁴³³

If I am not for myself, who will be for me. But if I am only for myself
alone, what am I? And if not now, when?

Rabbi Hillel⁴³⁴

This Part III's transdisciplinary deconstruction of the homogeneity assumption concludes with a review of how the homogeneity assumption has become part of a canon debate within liberal theory, a discipline that forms the normative foundation of

432. See *Adarand*, 515 U.S. at 224-28.

433. This poem was written by an "out" gay law student.

434. RABBI HILLEL, SAYINGS OF THE JEWISH FATHERS 15, reprinted in OXFORD DICTIONARY OF QUOTATIONS 251 (3d ed. 1979).

American constitutional law.⁴³⁵ The leading proponents of liberal theory during the 1970s and 1980s, including Rawls,⁴³⁶ Dworkin,⁴³⁷ and Nozick,⁴³⁸ constructed liberal theory in universalist terms and were generally influenced by Kant's work. The immediate question that engaged their project was the debate over whether the egalitarian and redistributive efforts of the 1970s and 1980s welfare state could be located within modern reinterpretations of liberalism. The manner in which these philosophers constructed liberalism was primarily individualist and universalist. Their arguments made key assumptions about how individuals function in society, how they come to make moral decisions, and what primary values the rational moral agent might have. The assumptions and beginning points reveal a view of society in which the polity is overwhelmingly homogeneous, or there is remarkable agreement as to what should be the dominant cultural values.⁴³⁹ This Part III.E explores how the construction of liberalism that we have come to accept as the dominant interpretation of liberalism embodies the homogeneity assumption by reviewing the critiques of liberalism from (1) feminists and communitarians and (2) Will Kymlicka's multicultural construction of liberal theory.

435. See JEFFRIE G. MURPHY & JULIUS L. COLEMAN, *THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 7, 106 (1991) (acknowledging the importance of liberalism in the interpretation of constitutional law); Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 *STAN. L. REV.* 855, 861 (1995) ("[We] believe that the dominant American constitutional tradition is one of liberal individualism."); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 *N.C. L. REV.* 303, 375 (1989) ("American Constitutional law . . . is predominantly an outgrowth of British-American traditions of liberalism.").

436. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter RAWLS, *THEORY*] (using the figure of the reasonable pater familias as the actor situated behind the "veil of ignorance"); JOHN RAWLS, *POLITICAL LIBERALISM* 220-24 (1996) (accounting for diversity in the individual characteristics of members of the community and in their affinity for culture; however Rawls does not envision multicultural communities).

437. See generally RONALD DWORKIN, *A MATTER OF PRINCIPLE* 228-32 (1985) [hereinafter DWORKIN, *PRINCIPLE*] (discussing cultural structure but not envisioning cultural differences); DWORKIN, *RIGHTS*, *supra* note 79 (addressing the importance of rights for minorities, among other subjects, but assuming cultural uniformity); RONALD DWORKIN, *LAW'S EMPIRE* (1986).

438. See generally ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974) (countering Rawls' redistribution arguments using Rawls' theoretical framework).

439. Accord WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 86-88 (1995) [hereinafter KYMLICKA, *MULTICULTURAL*] (opining that most liberals, and specifically Dworkin and Rawls, assume cultural homogeneity, although both acknowledge the importance of culture in formulating their respective distinct approaches to justice).

1. Liberal Theory

Liberal theory is not unitary and can be formulated in a variety of ways.⁴⁴⁰ It is, however, concerned with three key elements: (i) the relationship between the individual and the state, (ii) the autonomous moral agent, and (iii) the construction of individual basic rights in the liberal state.

(i) In a liberal state, each individual is free from state interference to pursue her idea of the good life. The state must remain neutral with respect to formulations of the good life, because in a pluralist society there will be a variety of views and consensus on any particular view of the good life will be impossible to achieve without having to coerce a portion of society.⁴⁴¹ (ii) Liberalism is premised on the autonomous, rational decisionmaker.⁴⁴² This figure, the moral agent, has the right to moral choice, is imbued with the capacity to struggle with moral decisions, and is detached from social and psychological inclinations.⁴⁴³ Autonomy and the capacity for rational choice make the human subject morally relevant.⁴⁴⁴ (iii) Liberalism is deontological in that principles of justice are prior to our conception of what is good.⁴⁴⁵ For example, liberal theorists, like Rawls, use the framework of "social contract" to construct principles that rational moral agents would agree are necessary for a just society, independent of personal

440. See *id.* at 1-10 (explaining that liberalism is a moral argument of justice and that there are various versions of the argument); DWORKIN, PRINCIPLE, *supra* note 437, at 186-87 ("[T]he constitutive morality of liberalism . . . is sufficiently distinct and influential to give sense to the idea, shared by liberals and their critics, that liberalism exists, and to give sense to the popular practice of arguing about what it is."); UNGER, *supra* note 238, at 8 ("[T]he 'deep structure' [of liberalism] allows room for a variety of philosophical positions, depending on which part of the underlying experience is illuminated and which chain of problems pursued.").

441. See Immanuel Kant, *On the Common Saying: "This May Be True in Theory, But It Does Not Apply in Practice,"* in KANT'S POLITICAL WRITINGS 73-74 (1973) (1793).

442. See generally IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (1975 ed.) (1788).

443. See *id.* at 105 ("A subject of ends . . . must be made the ground for all maxims of action.").

444. See *id.* at 120-21 ("It is nothing else then. It is the precedence of the subject and the dignity in her freedom of choice that lays a [powerful foundation] for the autonomous individual."); see also MURPHY & COLEMAN, *supra* note 435, at 73-75.

445. See IMMANUEL KANT, CRITIQUE OF PURE REASON 89 (Norman Kemp Smith trans., Humanities Press 1929) (1781) ("It is the capacity of a being which is subject to special laws."). Michael Sandel thinks broadly of liberalism as deontological because individual liberalism does not presuppose any political purposes or ends. Instead, the deontological approach emphasizes the capacity of human beings to choose the right ends through reason. See generally MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1983).

beliefs and tastes.⁴⁴⁶ Liberal principles protect private autonomous choices and can be formulated as a set of rights that a citizen possesses vis-à-vis the state. Ronald Dworkin, in *Taking Rights Seriously*, explains that “individual rights are trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have, or to do, or not a sufficient justification for imposing some loss or injury upon them.”⁴⁴⁷ For John Rawls, such rights are “inviolable [because they are] founded on justice that even the welfare of society as a whole cannot deride.”⁴⁴⁸

2. Feminist and Communitarian Critiques of Liberalism

Communitarians and feminist theorists, among others, argue that traditional liberalism errs, first, in exalting rationalism to the detriment of other values and perspectives; and second, in contending that the self can be viewed “atomistically,” independently and divorced from community and social context.

The first critique attacks the premise that it is the *rational* decisionmaking of individuals that imbues human activity with special dignity and deference. Rational decisionmaking stands in opposition to other kinds of human thinking, such as that involving faith, community, ecological thinking, and cultural schemas. Because individual liberalism sets up a rational-nonrational duality, it is argued that these alternative values have become subordinated, and even suspect. Further, because rationality is combined with the concept of neutrality, we are not conscious that what we construct as rationality works transparently to fashion a hierarchy of values. What is rational is “truth,” what is “truth” is neutral, and what is “neutral” becomes the norm against which all are compared. Modernism, rationalism, and the rhetoric of “neutrality” have resulted in a universalizing tendency

446. This is the function that the social contract plays for John Rawls’ veil of ignorance. Rawls uses the device of the social contract to formulate a conception of what principles would govern a just society. The hypothesis is that society would choose Rawls’ formulation of principles of justice if, behind the veil of ignorance, persons did not know where they would fit into society. In *A Theory of Justice*, Rawls develops ideas in order to support his conception of the social contract. First, Rawls argues that principles of justice underlie the moral and political values of the current liberal state. See RAWLS, THEORY, *supra* note 436, at 3-11. Second, Rawls attempts to demonstrate that the moral and political values inherent in classic liberalism are the result of a selection process that all people can agree is fair. This is referred to as the “justice as fairness” principle. See *id.* at 17. Last, Rawls seeks to establish that the principles of liberalism support a desirable and functional civil society. See *id.* at 51.

447. DWORKIN, RIGHTS, *supra* note 79, at xi.

448. RAWLS, THEORY, *supra* note 436, at 3-4.

in liberal thought, or stated more strongly, a type of absolutism that does not recognize either the merits of other perspectives, or liberalism's own epistemological positionality. Thus, feminists argue that liberalism is distinctly male-gendered;⁴⁴⁹ cultural relativists argue that liberalism is Western-centric;⁴⁵⁰ and ecologists and environmentalists argue that liberalism is an individualistic construction that legitimizes capitalism and encourages exploitative activities that set humanity against the natural world.⁴⁵¹

Rationalism is linked with modernism, a belief that there is one "truth" that can be deduced through logic and pure reason. Rationality takes us in a straight-line advance, which we call progress. Progress becomes good for its own sake; nothing else is needed to justify it.⁴⁵² Many have argued that modernism falsely labels as "progress" outcomes that divorce men and women from their community, and that "progress" unduly connects us to acquisitive goals.⁴⁵³

449. For example, Carol Gilligan has shown that a woman's concept of justice, which prioritizes the needs of people over abstract principles of justice, was devalued by child development psychologist Lawrence Kohlberg, who in turn, was heavily influenced by Kant in developing his moral maturity framework. See generally GILLIGAN, *supra* note 31; see also MACKINNON, *supra* note 31 (arguing that liberalism, when applied to women, treats them as an abstract, another interest group within pluralism; the social construction of gender is a social system of power that itself is a political system); Baldwin, *supra* note 398 (exploring the contours of what the state would look like from a feminist theoretical perspective); Cherry, *supra* note 23 (discussing homogeneity assumption in liberal social contract theory and how this assumption disadvantages and continues subordination of women).

450. Ursula K. Le Guin describes this process as follows:

We human beings long to get the world under our control and to make other people act just like us. In the last few centuries, some of us—variously described as the White Man, the West, the Colonial Powers, Industrial Civilization, the March of Progress—found out how to do it. The result is that now many of us all over the world are eating hamburgers at McDonald's. Since other results include forests destroyed for pasture for the cattle to make the hamburgers, and oceans suffocated by the waste products of making plastic boxes for the hamburgers, the success of the White Man's control of the world is debatable; but his success in making other people act just like him is not. No culture that has come in contact with Western industrial culture has been unchanged by it, and most have been assimilated or annihilated, surviving only as vestigial variations in dress, cooking or ethics.

Ursula K. Le Guin, *Feeling the Hot Breath of Civilization*, N.Y. TIMES BOOK REV., Oct. 29, 1989, at 11 (reviewing MARIO VARGAS LLOSA, *THE STORYTELLER* (1989)).

451. For example, Joseph Sax has proposed thinking about property as part of an ecological system and not as a legalistic "bundle of rights" with clearly defined boundaries. See generally Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993).

452. See generally 2 VON HAYEK, *supra* note 27, at 65; B.S. Markesinis, *Progress, in THE GRADUAL CONVERGENCE: FOREIGN IDEAS, FOREIGN INFLUENCES AND ENGLISH LAW ON THE EVE OF THE 21ST CENTURY* (B.S. Markesinis ed., 1994).

453. As discussed *supra* note 97, Charles Taylor and the sociologists of *Habits of the Heart* come to this conclusion. Charles Taylor, though, is harsher, and concludes that the

In critiquing the individualistic assumptions of liberalism, communitarians have maintained that individuals do not exist independently of society, but instead are formed by their societal context. Individuals' sense of self is formed in a community.⁴⁵⁴ For Charles Taylor, individuals' sense of self-identity and self-worth is a reflection of the identity provided them by their social context.⁴⁵⁵ Societal practices that deny equal recognition to all members of society, and that fail to recognize their cultural difference, are themselves a form of oppression, because the state fails to value and respect all human beings equally.⁴⁵⁶ For Professors Sandel and Glendon,⁴⁵⁷ liberalism's insistence on a socially disembodied individual means that important moral precepts, such as loyalty to family or community, are taken out of the rights equation and civic discourse of values.⁴⁵⁸ For Sandel, civic responsibilities, as well as a sense of justice, are developed within the community. Justice can have no meaning without social context.⁴⁵⁹

3. A Multicultural Construction of Liberalism

Professor Will Kymlicka, in *Liberalism, Community and Culture*⁴⁶⁰ and more recently in *Multicultural Citizenship*,⁴⁶¹ does not quarrel with the central elements of liberalism, but would reconcile liberalism with heterogeneity. Applying the Rawlsian scheme of the "original position" in which rational actors, behind the "veil of ignorance," agree on a "social contract" of just principles, Kymlicka argues that liberalism requires that we can identify, protect, and

postmodern self is one that is unanchored and alienated from community. See generally TAYLOR, SOURCES, *supra* note 64.

454. Charles Taylor criticizes the inability of modern liberal philosophy to incorporate sources of self. Professor Taylor views the relationship between individual and community to be central to any construction of philosophy. See generally TAYLOR, SOURCES, *supra* note 64; Taylor, *Multiculturalism*, *supra* note 253. Similarly, Michael Sandel views liberalism's individualistic account of human selfhood as unrealistic and overly confining. See MICHAEL SANDEL, DEMOCRACY'S DISCONTENT 14-16 (1996) ("[T]he liberal conception of the person is too thin to account for the full range of moral and political obligations we commonly recognize, such as obligation. This counts against its plausibility generally.").

455. See Taylor, *Multiculturalism*, *supra* note 253, at 36.

456. See *id.* In his essay on multiculturalism, Charles Taylor expresses this thought as "the politics of recognition." See *supra* note 338 and accompanying text.

457. See generally GLENDON, *supra* note 66 (arguing that "rights talk" and cultural ideology have led Americans to a highly individualistic vision of liberalism).

458. See *id.*; SANDEL, *supra* note 454, at 14-16.

459. See SANDEL, *supra* note 454, at 62.

460. WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE (1989) [hereinafter KYMLICKA, LIBERALISM].

461. KYMLICKA, MULTICULTURAL, *supra* note 439.

promote culture membership as a “primary good.”⁴⁶² Thus, a “neutral” state would not create conditions that would coerce an individual to abandon her cultural identity or disadvantage individuals who have a cultural identity other than the majority culture, but would instead honor an individual’s reasonable expectations that she be able to retain her cultural identity in conditions of equality.⁴⁶³

Kymlicka’s multicultural construction of liberalism is a conception of justice that would treat access to one’s culture as something that people can be expected to (1) want, regardless of their particular conception of the good life, because culture is tied to identity and self-respect;⁴⁶⁴ (2) require, in order to be able to function as autonomous individuals making meaningful choices;⁴⁶⁵ and (3) need, because culture provides us with a sense of what we are capable of accomplishing.⁴⁶⁶

Like all arguments about justice based on social contract arguments, the construction of multicultural liberalism presupposes what rational actors would want for themselves prior to any conception of the good. In a multicultural construct, culture is important because it provides the context in which individuals make choices about what it is that they want to pursue as the good life. Only if each individual’s cultural identity is recognized and given as much respect as the culture of the dominant group can all individuals in a society make meaningful, *noncoercive choices*.⁴⁶⁷ In a liberal society, all individuals should have the *noncoercive freedom to choose* their

462. See KYMLICKA, LIBERALISM, *supra* note 460, at 169; KYMLICKA, MULTICULTURAL, *supra* note 439, at 85 (asserting that the right to culture should be on the same footing as the right to religious freedom).

463. See KYMLICKA, MULTICULTURAL, *supra* note 439, at 86. For Kymlicka, culture represents the ties, bonds, and attachments that persons would legitimately expect to be able to preserve. See *id.* at 76. He quotes Dworkin, who interprets culture as “shared vocabulary of tradition and convention.” *Id.* at 83. Culture is also language and shared history, shared myths and visions as to what makes us relevant and special. Culture is national or ethnic traditions and conventions, which can be transmitted socially and through institutions, without fixed centers or precise boundaries and capable of changing from within through dialogue. See *id.* at 86-87. Culture is relevant in a liberal construct because culture defines the parameters of individual’s capacity to be “free.” See KYMLICKA, LIBERALISM, *supra* note 460, at 167; see also *supra* notes 298-300 and accompanying text.

464. Kymlicka states that culture shapes self-identity (by affecting how others perceive us) and provides an “anchor” for self-identification. See KYMLICKA, LIBERALISM, *supra* note 460, at 89.

465. See KYMLICKA, MULTICULTURAL, *supra* note 439, at 83 (noting that access to societal culture is a precondition for making intelligent judgments about how to lead our lives); KYMLICKA, LIBERALISM, *supra* note 460, at 165 (“[W]e decide how to lead our lives by situating ourselves in these cultural narratives”).

466. See KYMLICKA, LIBERALISM, *supra* note 460, at 176.

467. See *id.* at 145.

cultural identity—to retain bonds with their culture or to become assimilated into the new culture.⁴⁶⁸ Although we would ordinarily expect individuals to want to retain their cultural bonds, in a liberal society each of us would have the opportunity to make choices about our culture. We could follow handed-down traditions or instead question the values, history, and customs that we have inherited. The liberal environment should provide plentiful choices, because the interplay of diverse ideas and cultures would stimulate members to question their basic assumptions.⁴⁶⁹

Kymlicka's multicultural construct also would apply if we envision culture, as postmodernists do, as stratified or as cultural borderlands. Each individual should have the choice to modify her cultural identity to a new hyphenated construct, or to mediate cultural identity(ies) in cultural borderlands, negotiating back and forth. Each should be free to exercise important self-definitional choices, without state or societal coercion.

Choices can only be meaningful if society equally recognizes all cultures, both majority and minority.⁴⁷⁰ To recognize the equal worth of each individual requires recognizing the equal worth of each cultural group. It also requires that each group have an equal voice in the polity and equal opportunity to participate in decisions that affect all in the community.⁴⁷¹

Under multicultural liberalism, a just society would allow marginalized groups to define their own "truths," identities, and practices.⁴⁷² The law would not make interpretive choices about cultural identity and cultural choice that would be imposed on those within the community who are different.⁴⁷³ Accordingly, in a just society, courts would ensure that cultural choices were not imposed,

468. Kymlicka believes that "people do not genuinely move between cultures" and that "successful integration is a costly process." See KYMLICKA, *MULTICULTURAL*, *supra* note 439, at 85. But see *supra* Part III.B.3. Rawls believes that leaving one's society, culture, language, and speech "would be a grave step" and that generally persons would be reluctant to do so. See RAWLS, *THEORY*, *supra* note 436, at 222.

469. See KYMLICKA, *MULTICULTURAL*, *supra* note 439, at 87 (stating that liberal culture allows members to question and reject traditional ways of life; the resulting cultural identity should become "both thinner and less distinctive").

470. Kymlicka believes, as do communitarians, that cultural identity and social recognition are intertwined. Kymlicka emphasizes that culture is constitutive of personal identity. See *id.* at 92-93. To honor all individual autonomy, the State must actively ensure the equal standing of all cultural groups. It is not enough to let the market sort out what societal cultures are worth saving. See *id.* at 107-16.

471. See *id.* at 121-23.

472. See KYMLICKA, *LIBERALISM*, *supra* note 460, at 90.

473. See *id.* at 197.

but were made as part of an exercise in public reason that would include all.

Under a multicultural construct, public law would proscribe acts that would maintain, reinforce, or further societal subordination of a cultural group vis-à-vis another social group. As discussed in Part III.C, with respect to *Romer v. Evans*, one way to apply this principle is by limiting state-sanctioned acts that target a group for disfavored treatment.⁴⁷⁴ This is a minimalist application of multicultural liberalism. Kymlicka's group equalization concept goes further and would impose obligations on the State to undertake affirmative steps to "even the playing field" among groups, in effect remedying the stigma that is attached to certain racial and cultural group affiliations.⁴⁷⁵ Race theorists would be skeptical that the State or any other power would ever be able to remove the implication of subordination of race and culture, counter the negative social processes connected with race and cultural subordination. Kymlicka suggests process solutions: greater recognition of group rights, and better ways of ensuring that subordinated groups' views can be given equal representation and due weight in the polity.⁴⁷⁶

Kymlicka addresses one of the issues underlying the multicultural history debate addressed in Part III.A. What happens if we assume difference and permit difference to prosper? Won't we fall apart as a society? Kymlicka believes that what can hold us together is a belief in a shared identity.⁴⁷⁷ But this must be a shared identity that is just, an identity that accommodates, rather than subordinates, those who are culturally different.⁴⁷⁸ This multicultural vision is an "organic" vision of pluralism. Individuals within a community can hold on to their cultural identity and still be part of a civic whole if we can share a common heritage and common ideals that are just for all.

Some have argued that public law cannot support multiculturalism because multiculturalism runs counter to fundamental principles of

474. See KYMLICKA, MULTICULTURAL, *supra* note 439, at 92.

475. See *id.* at 108 ("[R]esponding to cultural differences with benign neglect makes no sense. The state unavoidably promotes certain cultural identities, and thereby disadvantages others.").

476. See KYMLICKA, MULTICULTURAL, *supra* note 443, at 130-51; see also LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994).

477. See KYMLICKA, MULTICULTURAL, *supra* note 439, at 188 ("People decide who they want to share a country with by asking who they identify with, who they feel solidarity with.").

478. See *id.* at 189.

liberal theory.⁴⁷⁹ However, this assertion when more carefully examined reveals that its conception of liberalism is based on the traditional construction of liberal theory that emphasizes individual rights, universalizes what it calls rational and neutral, and assumes away or distorts cultural heterogeneity. Liberal theory is far from a uniform construct. There are many legitimate alternative constructions that effectively counter the universalistic homogenizing tendencies of the traditional version. These alternative visions do not abandon the central values of liberalism—autonomy, free will, and individual dignity. Rather, these versions argue that liberal theory must account for social, cultural, political, and normative pluralism, as well as differences in race and gender.

The critiques of liberalism illustrate that a construction of liberalism that fails to challenge the homogeneity assumption distorts the identity of individuals that fall outside of its confines.⁴⁸⁰ By failing to account for difference, rules based on a universalist version of liberalism become coercive. Such constructs are unjust. They have robbed those of us who are not part of, or do not assume the norms of, the imaginary (nonexistent) Anglo-American monolith, the dignity that we are due under the law. Justice requires that the Court respect the most intimate choices that each of us makes: decisions of who we are in the modern multicultural environment. If liberalism means anything, it must stand for this most elementary principle, to “let me be . . . be simply Me.”⁴⁸¹

IV. CONCLUSION

When Whiteness is examined under the lens of the ongoing canon battles that are taking place in the disciplines of history, sociology, and liberal theory, we can begin to see that Whiteness is a fragile construction that depends a great deal on interweaving ideology

479. See, e.g., Brest & Oshige, *supra* note 439, at 861 (casually questioning whether diversity theories and liberalism can be reconciled).

480. This construction of multicultural liberalism parallels arguments made by legal scholars. Mari Matsuda simply concludes that public law should recognize the right of “people . . . to be what they are.” Matsuda, *supra* note 191, at 1391 (noting that certain aspects of cultural identity, such as accent and language, should be subject to protection under antidiscrimination and equal protection law). Kenneth Karst argues that the Constitution mandates protecting “freedom of individuals’ beliefs and behavior associated with cultural identity, the individualistic expectations generated by civic culture.” See KARST, *supra* note 25, at 374. Charles Lawrence has argued for a “substantive societal condition . . . [that recognizes] the individual right to be treated without reference to one’s race as primary.” Charles R. Lawrence, III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 824 (1995).

481. See *supra* note 433 and accompanying text.

of what it means to be an American. In modern context, American cultural ideology draws narrative strength from the White ethnic immigrant story of success, hard work, and transformation into an exceptional American identity. This myth captures the imagination of the White majority, and to some extent also minorities, because it vividly embodies the values that in current American culture we cherish the most—individuality, hard work, faith in a system that metes out just rewards to the virtuous, and trust in the exceptionality of American ideals and the American Dream.

When the Supreme Court asserts that equal protection is an individual right; that we are all one people, American; that to recognize different distinct cultural group per se undermines constitutional values and American tradition, the Court is not interpreting constitutional law. Rather, the Court is asserting American ideology. However, this is not an ideology that is inclusive of all Americans. It is one that constructs hegemony in favor of White Americans and those who can fall within the strictures of the homogeneity assumption and mandate. Those who fall outside the construction of sameness are cast as disloyal, disunifying, nonvirtuous, unwilling to play by the rules of the American enterprise.

The myth of oneness and sameness is an ideological construction that the canon battles taking place in the social sciences and political philosophy have shown us are subject to vigorous contestation. The empirical work of social scientists, particularly psychologists and sociologists, captures how deep our differences are and how the promise of assimilation is a promise that has only been available to White ethnics, and even then not uniformly. Race theory shows us that the construction of sameness is a construction that reinforces social, economic, and political power. For those who are visibly different, or wish to wear kippahs, the consequence of a cultural ideology that mandates sameness is a message that may not be intended but nonetheless is communicated in a myriad of ways: “You are outside of the American canon; you are disloyal, disunifying, unworthy, and rebellious because you do not follow the rules of what it means to be an American.”

If we are to live up to the liberal ideals that American constitutional law espouses, we must understand American culture, how ideology constructs it, and how social science debunks it. However, does this process of deconstruction lead us to a deconstruction of the American identity and a nihilistic world in which we become a valueless people without traditions, history, and sense of ourselves? This need not be the end result of deconstruction, and it is

not the aim advocated in this project. Rather, exploring how knowledge is formed is the necessary prerequisite to building a better system of analysis, as Dr. Deming's "red ball" demonstration illustrates. Only by knowing how it is that cultural ideology buttresses weak constitutional interpretations that produce rules that exclude and reify the dominance of the majority can we begin to construct other interpretations and analyses that better live up to our shared liberal values of individual dignity and the right "to be . . . be only Me." This is an ongoing project on which the upcoming article *Democracy and Inclusion*, the second half of this work, and other authors have and will continue to elaborate.