

"Multiracial" Discourse: Racial Classifications in an Era of Color-blind Jurisprudence

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**“MULTIRACIAL” DISCOURSE: RACIAL CLASSIFICATIONS IN
AN ERA OF COLOR-BLIND JURISPRUDENCE**

TANYA KATERÍ HERNÁNDEZ*

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INTRODUCTION

The debate, in short, is really not so much about a multiracial box as it is about what race means—and what it will come to mean as the society approaches the millennium.¹

For the past several years,² there has been a Multiracial Category Movement (MCM) promoted by some biracial persons³ and their parents for the addition of a “multiracial” race category on the decennial census.⁴ The stated aim of such a new category is to obtain a more

1. ELLIS COSE, *COLOR-BLIND* 23-24 (1997).

2. See Linda Jones, *Mixed Race and Proud of It*, GANNETT NEWS SERVICE, Nov. 20, 1990, available in 1990 WL 4984634 (reporting that mixed-race proponents lobbied unsuccessfully for a separate racial category in the 1990 census). Although the Multiracial Category Movement (MCM) was unsuccessful in its effort to add a multiracial category to the 1990 census, it did persuade the congressional subcommittee on Census, Statistics and Postal Personnel to hold a series of hearings in 1993 to explore the sufficiency of current racial classifications and the possible need for a multiracial category. See *Review of Federal Measurements of Race and Ethnicity: Hearings Before the Subcomm. on Census, Statistics and Postal Personnel of the House Comm. on Post Office and Civil Service*, 103d Cong. (1993) [hereinafter *Multiracial Hearings*]. The U.S. Office of Management and Budget (OMB) held hearings of its own one year later. Office of Management and Budget, Hearing on Directive No. 15: Public Hearing on Standards for Classification of Federal Data on Race and Ethnicity (July 18, 1994). Thereafter, Congressman Thomas Petri (Wis.-R.) sponsored a bill to mandate the inclusion of a “multiracial” and a “multiethnic” category in all federal data collection forms. The bill was referred to the House Government Reform and Oversight Committee on Feb. 25, 1997. See H.R. 830, 105th Cong. (1997).

3. “Biracial” is used in this Article to refer to those individuals who claim a social identity based on their status as mixed-race persons. In contrast, the term “mixed-race” refers to the entire population of persons with parents of different races irrespective of biracial identity.

4. Bijan Gilanshah, *Multiracial Minorities: Erasing the Color Line*, 12 LAW & INEQ. J. 183, 184 (1993). The MCM has targeted the census racial classifications in order to obtain “official recognition [of mixed-race Americans] as a distinct, powerful social unit.” *Id.* at 184.

On the state level, the MCM has lobbied successfully for implementation of a multiracial category on local data-collection forms in Florida, Georgia, Illinois, Indiana, Michigan, and Ohio. See GA. CODE ANN. § 50-18-135 (1994) (requiring a multiracial category on state forms used for reporting racial data to federal agencies); 105 ILL. COMP. STAT. ANN. 5/2-3.111 (West Supp. 1997) (requiring multiracial category on all forms used by the State Board of Education to collect and report on data that contain racial categories); IND. CODE ANN. § 5-15-5.1-6.5 (Michie Supp. 1997) (requiring a multiracial category in certain forms, questionnaires, and other documents used by public agencies); MICH. COMP. LAWS ANN. § 37.2202a (West Supp. 1997) (requiring public agency forms and questionnaires that request racial information or classifications to include a multiracial category); OHIO REV. CODE ANN. § 3313.941 (Anderson 1997) (requiring a multiracial category on school district forms that collect racial data); see also Doug Stanley, *Census Bureau to Test Revised Race Categories*, TAMPA TRIB., June 4, 1996, at 1, available in 1996 WL 10230771 (observing the administrative addition of a multiracial category to Florida’s school enrollment forms and computers during a routine Department of Education update in 1995). Similar legislation is also pending in Maryland, Massachusetts, New Hampshire, and Texas. See MD. ANN. CODE art. 41, § 18-310 (1997) (authorizing a temporary task force to study the possible

specific count of the number of mixed-race persons in the United States⁵ and to have that tallying of mixed-race persons act as a barometer and promoter of racial harmony.⁶ As proposed, a respondent could choose the "multiracial" box⁷ in lieu of the presently listed racial classifications of American Indian or Alaskan Native, Asian or Pacific Islander, Black,⁸ White, or Other.⁹ The census schedule also

addition of a multiracial category on state forms); S. 252, 181st Gen. Ct., Reg. Sess. (Mass. 1997) (proposing the addition of a "multiracial" category on forms used by local school systems); H. 259, 1997 Reg. Sess. (N.H. 1997) (proposing mandatory inclusion of biracial and multiracial options on state forms that collect racial data); S. 1069, 74th Leg., Reg. Sess. (Tex. 1995) (proposing mandatory inclusion of a multiracial category on state forms that collect racial data). In addition, Harvard University applications for admission included a multiracial category for the 1992-93 academic year. Elizabeth Atkins, *When Life Isn't Simply Black or White*, N.Y. TIMES, June 15, 1991, at C1, available in LEXIS, News Library, Nyt File.

5. Gilanshah, *supra* note 4, at 186 (stating that an accurate determination of the size of the multiracial population is difficult to make because the Census Bureau does not officially recognize a multiracial category).

6. *See id.* at 197-98 (asserting that government recognition of a multiracial category may lead to more interracial group cooperation because multiracial individuals will be better able to serve as "negotiators" in interracial conflicts).

7. MCM proposals vary from simply adding a multiracial box to the present classification list, to the more complex proposal of having the multiracial box followed by the additional question of the respondent's "component" information—the identification of each parent's race. *See Multiracial Hearings, supra* note 2, at 265 (statement of Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education). The OMB considered and recently adopted an alternative proposal of checking more than one racial category. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,788-90 (1997) [hereinafter Revisions to Directive No. 15]; Recommendations from the Interagency Committee for the Review of the Racial and Ethnic Standards to the Office of Management and Budget Concerning Changes to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 36,874, 36,885 (1997) [hereinafter Recommendations to OMB]; *see also* Steven A. Holmes, *People Can Claim One or More Races on Federal Forms*, N.Y. TIMES, Oct. 30, 1997, at A1, available in LEXIS, News Library, Nyt File. Other proposals have been made to reform census racial classifications, but those proposals are beyond the scope of this Article. *See Multiracial Hearings, supra* note 2, at 266 (statement of Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education) (commenting on proposals for the addition of a Middle Easterner category, the transfer of Native Hawaiians from the Pacific Islander category to the Native American category, and the counting of Hispanics as a racial, rather than an ethnic, group).

8. In this Article, the words Black and White appear capitalized when they refer to persons whose race is Black or White to denote the political meaning of race and the social significance of being White or Black as something more than just skin color. *Accord* Victor F. Caldwell, Book Note, 96 COLUM. L. REV. 1363, 1369 (1996) (reviewing CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Williams Crenshaw et al. eds., 1995)) (contrasting the Critical Race Theory historical view of race, which acknowledges past and continuing racial subordination, with the formal view of race, which treats race as "neutral, apolitical descriptions, reflecting merely "skin color" or region of ancestral origin" (quoting CRITICAL RACE THEORY, *supra*, at 257)).

9. Except for the "Other" category, the aforementioned racial and ethnic classifications were instituted in 1978 by the OMB in cooperation with the Minority Advisory Committees of the U.S. Census Bureau for standardized collection of racial data by the U.S.

includes a separate Hispanic Origin ethnicity question.¹⁰ On October 29, 1997, the U.S. Office of Management and Budget (OMB) adopted a federal Interagency Committee recommendation to reject the multi-racial category in favor of allowing individuals to check more than one racial category.¹¹ Some MCM proponents are not satisfied with the OMB's decision, because multiple box checking does not directly promote a distinct multiracial identity.¹² These MCM proponents are committed to continue lobbying for a multiracial category on the

Bureau of Census and all other federal government agencies. See Transfer of Responsibility for Certain Statistical Standards from OMB to Commerce, Dep't of Commerce, Directives for the Conduct of Federal Statistical Activities, Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19,260, 19,269 (1978) [hereinafter Directive No. 15]. The OMB director is authorized to dictate the methodology of all federal data collection forms. 44 U.S.C. § 3504 (1994). The intent of the instituted classification system was to meet the data collection obligations required by federal civil rights laws. See Directive No. 15, *supra*, at 19,269 (directing federal agencies to use specified racial categories for civil rights compliance reporting). See *infra* notes 312-318 and accompanying text for a discussion of civil rights laws. The Census Bureau has received special permission from the OMB to use an "Other" race category not listed in Directive 15. See Recommendations to OMB, *supra* note 7, at 36,877.

10. There has been some discussion regarding the transformation of "Hispanic" into a racial category because of the sense that certain Latinas or Latinos whose ancestors are from Central and South America view their Latino-ness as a race rather than as an ethnicity. See Luis Angel Toro, "A People Distinct from Others": Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15, 26 TEX. TECH L. REV. 1219, 1223 (1995) (asserting that the census treatment of a Hispanic category as ethnic, rather than racial, overlooks the racial nature of the subordination imposed on Mexican-Americans along with the Mexican-American people's own conception of their identity). Although there is some truth in the notion that hostility against Latinas and Latinos takes the form of entrenched racism rather than discrimination based upon ethnicity, the use of the comprehensive category of Hispanic as a racial category would inappropriately conflate the separate racial and ethnic identities that are a reality for Latinas and Latinos of African ancestry who are primarily, but not exclusively, from the Caribbean. See Tanya K. Hernández, *Over the Rainbow? Puerto Ricans and the "Multiracial" Category in the Year 2000 Census*, CRÍTICA J. P.R. POL'Y & POL., Aug. 1996, at 1, 6 (concluding that Afro-Latinos "experience racism based upon their African-linked phenotype," which gives race, as distinct from ethnicity, a political meaning for them); cf. Rosemary C. Salomone, *The Ties That Bind: An Interdisciplinary Analysis of Gender, Ethnicity, and the Practice of Law*, 3 VA. J. SOC. POL'Y & L. 177, 179 (1995) (positing that ethnicity apart from race also shapes consciousness in society). But see Adolph Reed Jr., *Skin Deep: The Fiction of Race*, VILLAGE VOICE, Sept. 24, 1996, at 22, available in 1996 WL 11170163 (viewing race and ethnicity as part of the same continuum of social hierarchy, where groups that are most debased are considered races, and groups that are accorded greater social acceptance are deemed ethnicities).

11. Revisions to Directive No. 15, *supra* note 7, at 58,786; Recommendations to OMB, *supra* note 7, at 36,937. The Interagency Committee recommendation, which the OMB adopted, is as misplaced as the multiracial census category proposal itself. See *infra* Part II.D (arguing that multiple box checking and the multiracial category misperceive the social significance of race).

12. Barbara Vobejda, *Census Expands Options for Multiracial Families*, WASH. POST, Oct. 30, 1997, at A11, available in LEXIS, News Library, Wpost File (quoting Project RACE President Susan Graham as stating, "OMB is trying to erase 'multiracial' from the vocabulary").

2010 census.¹³ Further, an OMB official has indicated that the issue of a multiracial category might be reconsidered with an increase in mixed-race persons.¹⁴ Yet, the significance of the MCM extends beyond the actual decision of whether and how mixed-race persons should be counted.

The discourse surrounding the advocacy for a census count of mixed-race persons has social and legal ramifications apart from the limited context of revising a census form.¹⁵ The principle underlying this Article is that the law should be understood in terms of its social consequences. From a legal-realist perspective, it is important to scrutinize the neutral discourse characteristic among those proposing a legally mandated mixed-race census count. Such analysis exposes its moral and political significance and ramifications.¹⁶ "[L]anguage . . . can powerfully evoke and enforce hidden signs of racial superiority, cultural hegemony, and dismissive 'othering' of people."¹⁷ The power of discourse arises from its ability to construct a public narrative and then obstruct counter-explanations for social reality.¹⁸

Multiracial discourse contends that a mixed-race census count is necessary because race has become too fluid to monitor.¹⁹ The theory

13. *All Things Considered: OMB and Race* (National Public Radio broadcast, Oct. 29, 1997), available in 1997 WL 12834140.

14. *All Things Considered: No to Multiracial* (National Public Radio broadcast, July 8, 1997), available in LEXIS, News Library, Tnpr File.

15. See Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 79 (1994) ("A method of discourse [itself] can subordinate.")

16. See Note, *Legal Realism and the Race Question: Some Realism About Realism on Race Relations*, 108 HARV. L. REV. 1607, 1607-08 (1995) ("[T]he Realist project [is] an attempt to expose 'moral and political discourse' within supposedly neutral legal discourse" (footnote omitted)).

17. TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* x (1992); see also Reginald Leamon Robinson, *"The Other Against Itself": Deconstructing the Violent Discourse Between Korean and African Americans*, 67 S. CAL. L. REV. 15, 25 (1993) (explaining that "a status quo legal narrative" is a social mythology that assumes the validity of a racial pre-narrative of presumed inferiority, which, if unquestioned, becomes a foundational notion and transforms itself into a social truth).

18. See Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles,"* 66 S. CAL. L. REV. 1581, 1585 (1993) (stating that narratives both filter and construct a reality).

19. Cf. *Racially Mixed Americans: The Facts Challenge Traditional Categorizations*, MINORITY MARKETS ALERT, Mar. 1, 1993, available in 1993 WL 2918051 ("Current Census Bureau tracking of racial categories is becoming less meaningful as the nation develops a more multicultural/multiracial character."). The increase in children from interracial marriages and the increase in non-White immigration to the United States are the principal reasons extolled for why distinctions in race have become more nebulous. See *id.* The 1990 census reported 1.5 million interracial married couples. Eunice Moscoso, *Mixed-Race Americans Want New Census Category*, ATLANTA CONST., July 21, 1996, at A12, available in 1996 WL 8220406. In addition, the census reported 2 million children under the age of 18 who

posits that the inability to identify psychologically with just one racial category is inherent to mixed-race persons alone and that the growing number of mixed-race persons demonstrates the futility of racial categorization as a practice.²⁰ For instance, MCM proponents often refer to the growing numbers of persons who choose the "Other Race" category to support the premise that the racial categories are inadequate for mixed-race persons.²¹ The multiracial narrative of modern race being more fluid than in the past corresponds with and reinforces the color-blind jurisprudence presentation of race as devoid of meaning.²² Thus, "multiracial discourse" has an immediate meaning as the rhetoric deployed in the campaign for a specific count of mixed-race persons,²³ and a more expansive meaning as the approach to race that views the increasing diversity of society as deconstructing and transcending race.²⁴ Multiracial discourse misconstrues the meaning of

were mixed-race (i.e., of a different race than one or both parents). See Haya El Nasser, Panel: "Multiracial" Census Label Unneeded; Suggests Allowing Multiple Checks in Race Categories, USA TODAY, July 9, 1997, at 3A, available in 1997 WL 7007256. In 1994, 63.6% of legal immigrants were from Africa, Asia, and Latin America. U.S. IMMIGRATION & NATURALIZATION SERV., DEP'T OF JUSTICE, 1994 STATISTICAL YEARBOOK 21, 27-28 tbl.C & tbl.2 (1996).

20. See Angela Ards, *The Multiracial Movement Raises Questions About Political Black Identity*, VILLAGE VOICE, Feb. 11, 1997, at 36, available in 1997 WL 7917408 (asserting that racial categories are becoming "increasingly inadequate" to reflect the nation's diversity).

21. Cf. Jones, *supra* note 2 (noting that multiracial-category proponents were "[w]eary of marking the box that says 'other'"). Yet, Latinos and Latinas are the persons who overwhelmingly choose the "Other Race" category. *Id.* at 172 (statement of Sonia Pérez, Senior Policy Analyst, National Council of La Raza). Studies of why 40% of Latinos and Latinas choose the "Other Race" category reveal that for some, "race and culture are fused" so that their cultural differences from White and Black Americans inform their view of themselves as a distinct cultural race "within which they may be white or black or various categories in between." Clara E. Rodriguez, *Race, Culture, and Latino "Otherness" in the 1980 Census*, 73 SOC. SCI. Q. 930, 931 (1992). It is interesting to note that upon the Census Bureau's follow-up of 1980 census "Other Race" respondents, census enumerators classified 90% of the respondents as White. *Id.* at 933.

22. Color-blind jurisprudence refers to the recent body of Supreme Court precedents that promote the ahistorical view that racial classifications have been the cause of racism. See Conference, *Race, Law and Justice: The Rehnquist Court and the American Dilemma*, 45 AM. U. L. REV. 567, 586 (1996) (discussing the so-called color-blind ideology of the Supreme Court). This Article employs Ian F. Haney López's general definition of race "as a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry." Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994).

23. The immediate definition of multiracial discourse encompasses the proposal for a multiracial category and alternate proposals for the counting of mixed-race persons, such as the multiple-box-checking recommendation recently adopted by OMB. See *supra* note 7.

24. Multiracial discourse promotes the equating of increasing numbers of mixed-race persons with an escape from racial difference and thus the problems of race. See, e.g., Jerelyn Eddings, *Counting a "New" Type of American: The Dickey Politics of Creating a "Multiracial" Category in the Census*, U.S. NEWS & WORLD REP., July 14, 1997, at 22, 22-23 (stating that

race used in the group measurement of racial disparity, with an individual-focused assessment of fluid cultural identity.²⁵ Such a view of race negates its sociopolitical meaning²⁶ and thereby undermines effective legal mechanisms to ameliorate racial discrimination.²⁷ In fact, the MCM can be viewed as a metonym for the more general color-blind approach to race evident in recent Supreme Court cases.²⁸

Both the immediate and expansive meanings of "multiracial discourse" are interrelated and involve a highly politicized discourse. Accordingly, this Article shall question the assumptions that underlie both levels of meaning in order to assess the continuing significance of the racial classifications that multiracial discourse challenges.²⁹ This analysis reveals that although multiracial discourse may seem benign and appealing on a humanitarian level,³⁰ its implementation will produce counter-egalitarian results in the struggle for racial equality.³¹ The MCM's campaign for color-blind treatment of racial hierar-

"the government might, in effect, create a group that is quintessentially American—emphasizing the melting pot quality of the population rather than the distinctions" because "the concept of multiracialism fits [President Clinton's] goal of creating a country that transcends racial division").

25. See *infra* notes 67-74 and accompanying text.

26. The sociopolitical meaning of race can be defined as the substantive view of "historical-race" which "embodies past and continuing racial subordination" combined with "status-race," which acknowledges race "as an indicator of social status." Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 4 (1991).

27. See Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 662 (1996) ("To identify fluidity, change, border-crossing, and unstable categories is not to deny the real force and power that some people have accorded group labels and categories, to the clear detriment of others.").

28. See Conference, *supra* note 22, at 568 (discussing a "new jurisprudence" in which the Supreme Court shows a movement toward color-blindness and away from racial preferences).

29. In general, references to the rhetoric surrounding the advocacy for a multiracial category shall be denoted herein as MCM assertions, and the term "multiracial discourse" shall refer to the more expansive definition of the concept that views the increasing diversity of society as deconstructing and transcending race.

30. Upon being questioned about the request for a multiracial census category, President Clinton responded, "I wouldn't be opposed to that. That's the first time I ever heard it, but it makes sense. . . . I can't see any reason not to do it." President's Remarks and a Question-and-Answer Session with the American Society of Newspaper Editors in Dallas, Texas, 1 PUB. PAPERS 474, 483 (Apr. 7, 1995). This Article attempts to provide the President and the public with the legal reasons why a multiracial category and other mixed-race census count proposals will have adverse consequences.

31. See Ards, *supra* note 20 (stating that some national civil rights organizations, such as the NAACP, fear that a multiracial category will dilute black political representation and influence, because the use of such a category would result in "massive black flight from the race"); Carl M. Cannon, *Census Faces Racial Issue*, BALTIMORE SUN, June 29, 1997, at 1A, available in 1997 WL 5518631 (observing that civil rights organizations are "worried that new ways of counting race will dilute the political strength of minorities—and contribute to the erosions of recent economic gains made by blacks and Latinos"). Yet, the counter-

chy cloaks the racial significance of ostensibly race-neutral laws, as the Supreme Court's recent movement toward color-blind antidiscrimination jurisprudence has done.³²

Because of the manner in which the census context highlights the dangers of multiracial discourse to racial justice efforts, this Article will focus upon the census as a well-known paradigm for the way racial classifications function. In particular, to demonstrate the folly of color-blind approaches to race issues, the author enlists the debate centered on the demand for a census count of mixed-race persons. Because the census is the cornerstone of the federal statistical system,³³ the battle over the reform of the census racial classifications is significant and far-reaching.³⁴ The census reflects in large measure

egalitarian results of multiracial discourse extend beyond the confined question whether the census count of racial minorities will be diminished. This is because the discourse promotes a distorted vision of the meaning of race that can only misinform efforts to address racial privilege and hierarchy.

32. See *supra* note 22.

33. See U.S. CONST. art. I, § 2, cl. 3 ("The actual Enumeration shall be made . . . within every subsequent Term of ten Years, in such Manner as [Congress] shall by Law direct."); 13 U.S.C. § 141 (1994) ("The Secretary [of Commerce] shall . . . every 10 years . . . take a decennial census of population . . . in such form and content as he may determine . . ."); *Multiracial Hearings*, *supra* note 2, at 247 (statement of Thomas C. Sawyer, Chairman, House Subcomm. on Census, Statistics and Postal Personnel) ("[I]t is from [the census data that] wide-ranging public and private information systems are built on every level.").

34. There is a growing body of literature regarding the different aspects of the MCM. See RUTH COLKER, *HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW* 8-9 (1996) (comparing perceived race categorization problems to categorization problems faced by individuals of varying genders, sexual orientations, and disabilities); Gilanshah, *supra* note 4, at 204 (advocating a multiracial category for the 2000 census to legitimize the existence of multiracial Americans); Carol R. Goforth, "What Is She?" *How Race Matters and Why It Shouldn't*, 46 DEPAUL L. REV. 1, 107-08 (1996) (concluding, upon analysis of the MCM, that racial classifications should be abolished); Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1169-70 (1997) (opposing a multiracial category because of its ability to undermine cohesion of the Black community, which was achieved by the reappropriation of the One Drop Rule as a move of empowerment); Alex M. Johnson Jr., *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887, 893-94 (1996) (proposing that the Black community be treated as an ethnicity in order to avoid the negative consequences of a racial label); Kenneth Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 289 (1995) (arguing that self-identification as part of a racial group may legitimize "the very racial category that has served as the instrument of group subordination"); Kenneth E. Payson, *Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People*, 84 CAL. L. REV. 1233, 1290 (1996) (promoting a multiracial category to dismantle the "dividing lines of race"); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 987 (1995) (asserting that a multiracial category helps avoid balkanization by race); cf. Toro, *supra* note 10, at 1223 (concluding that the Hispanic ethnicity classification should be recast as a racial category). See generally Luther Wright, Jr., Note, *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513 (1995) (proposing to mandate the use of racial classifi-

the nation's struggle over how human beings will be known politically in a racially stratified society.³⁵ "The debate over a multiracial category reveals an intriguing aspect about how we conceptualize race."³⁶ An examination of multiracial discourse reveals that multiracial-category proponents misperceive the meaning of race relevant to the census inquiry by conflating a cultural approach to race with a sociopolitical approach to race.³⁷ Therefore, this Article analyzes the widespread legal ramifications of the MCM and assesses whether the MCM's proposal effectively advances its stated goal of promoting racial equality.³⁸ After analyzing the legal import of multiracial discourse, the Article determines that the MCM misperception of race and its fluidity inadvertently furthers the progression of color-blind jurisprudence in direct contravention of the MCM goal of promoting racial equality. Part I provides background and identifies the motivating forces behind the MCM as a color-blind movement. Part II critiques the MCM for its adverse effects upon racial justice efforts in furthering the manner in which color-blind jurisprudence disregards actual experiences of racial discrimination in the promotion of White supremacy.³⁹ Part III proposes a race-conscious classification system, which reflects the sociopolitical nature of race, to monitor racial discrimination more effectively and to dislodge the force of multiracial discourse.

ation on birth certificates and include a biracial category to dissuade individuals from later attempting to change their racial designation). Other legal commentators have discussed multiracial identity in other contexts. See, e.g., Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 959 (1994) (reasoning that the needs of biracial children call for child placement determinations to be based on their mixed heritage); Julie C. Lythcott-Haims, *Where Do Mixed Babies Belong? Racial Classification in America and Its Implications for Transracial Adoption*, 29 HARV. C.R.-C.L. L. REV. 531, 531 (1994) (arguing that the existence of multiracial children undermines the validity of race-matching in adoption placement). In contrast to the existing literature, this Article explores the color-blind nature of the MCM's discourse and its consequent advancement of White privilege.

35. Cf. VIRGINIA R. DOMÍNGUEZ, *WHITE BY DEFINITION: SOCIAL CLASSIFICATION IN CREOLE LOUISIANA* 3, 162 (1986) (asserting that the racial stratification in present-day society is evident in the widespread understanding that Whites automatically receive a higher social status).

36. Michael Omi, *Racial Identification and the State: The Dilemmas of Classification*, 15 LAW & INEQ. J. 7, 19 (1997).

37. See *infra* notes 66-76 and accompanying text.

38. See Jon Michael Spencer, *Just What We Don't Need: Another Racial Classification*, WASH. POST, Jan. 22, 1997, at A23, available in 1997 WL 2247441 ("[T]he acknowledged ideal of the multiracial advocates themselves is the attainment of a nonracial society.").

39. For an explanation of the term "White supremacy," see *infra* note 122 and accompanying text.

I. THE BACKGROUND AND MOTIVATION OF THE MULTIRACIAL CATEGORY MOVEMENT

It seems to me that the popular assumption that a child is owed a specific identity reveals as much or more about the needs and privileges of adults than about the needs, rights or ontological reality of human young. In particular, this assumption reflects adults' own socially created needs for contexts that do not deeply threaten their own wishes for communities of like-minded persons who can share and appreciate their identities.⁴⁰

The MCM has been described as "a movement that is not entirely based upon the question of racial mixture *per se*" in that its focus is upon the presumed classification needs of Black biracial persons.⁴¹ In fact, the principal proponents of the multiracial category are "monoracial"⁴² Black and White parents of biracial children.⁴³

40. Anita L. Allen, *Does a Child Have a Right to a Certain Identity?*, reprinted in ROSALIND EKMAN LADD, *CHILDREN'S RIGHTS RE-VISIONED: PHILOSOPHICAL READINGS* 98, 100 (1996).

41. Lewis R. Gordon, *Specificities: Cultures of American Identity—Critical 'Mixed Race'?*, 1 SOC. IDENTITIES 381, 382 (1995). Accordingly, this Article will deploy a Black-White historical focus in its analysis of the legal consequences of multiracial discourse. The Black-White historical focus of this Article is not an unconscious failure to look beyond the African-American context when analyzing race relations, although this is a particular danger within academic discussions of race. See Berta Esperanza Hernández Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369, 432-33 (1994) (criticizing legal analyses that inadvertently overlook the diversity of ethnicities and races while purporting to discuss entire communities of people of color). Nor is the Black-White focus of this Article based upon the presumed unique application of the United States "One Drop Rule" to persons of African ancestry. The One Drop Rule categorizes a person as Black by virtue of any generational connection to African ancestry. See F. JAMES DAVIS, *WHO IS BLACK?: ONE NATION'S DEFINITION* 4-6 (1991) (explaining the interchangeable terms of the "one-drop rule," the "one black ancestor rule," the "traceable amount rule," and the "hypo-descent rule"). This Article views all hostility towards non-White persons as a manifestation of the One Drop Rule. See, e.g., Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race" in Twentieth-Century America*, 83 J. AM. HIST. 44, 49 (1996) (noting that miscegenation laws targeted not just persons of African ancestry, but also American Indians and Asian Americans, including Chinese, Japanese, Koreans, East Indians, and Filipinos).

42. The term "monoracial" is employed by multiracial-category proponents to describe persons who are not of mixed-race backgrounds. See, e.g., *Multiracial Hearings*, *supra* note 2, at 125-26 (statement of Carlos Fernández, President, Association of MultiEthnic Americans) (proposing reforms to include multiracial categories for persons who belong to more than one race so that those persons will not have to select a "monoracial" category). The term is a misnomer in the sense that few residents of the United States can claim a "pure" ancestral background. See Linda Mathews, *More Than Identity Rides on a New Racial Category*, N.Y. TIMES, July 6, 1996, at A7, available in LEXIS, News Library, Nyt File (positing that between 75% and 90% of Blacks can be considered "mixed-race" insofar as their ancestral backgrounds often include persons who have been socially acknowledged as White or some race other than Black). In addition, the MCM's use of the term "monoracial" inad-

The initial impetus for the MCM was the discomfort many White-Black interracial couples felt when choosing racial classifications for their mixed-race children on educational data collection forms.⁴⁴ Yet,

vertently furthers the notion that the census racial classifications represent scientifically determinable categories, rather than sociopolitical descriptions that reflect our nation's racial caste system. See *infra* notes 81-83 and accompanying text.

43. See *Multiracial Hearings*, *supra* note 2, at 262 (testimony of Norma Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education) ("I think that adding a [multiracial] category would be a positive response to the biggest customer that our office serves, and that is the parents of children."); Payson, *supra* note 34, at 1235-36 ("Those advocating [a multiracial category] are largely multiracial persons, parents in interracial unions who advocate on behalf of their mixed-race children . . ."); Mathews, *supra* note 42 ("It's the parents of many multiracial children who have the identity problem, not the children themselves." (quoting a former MCM proponent)). In fact, of the persons testifying before the congressional committee in favor of the multiracial category, at least three were self-identified monoracial parents of mixed-race children. *Multiracial Hearings*, *supra* note 2, at 105, 158, 159.

44. *Multiracial Hearings*, *supra* note 2, at 126 (testimony of Carlos Fernández, President, Association of MultiEthnic Americans) (discussing parental concern with choosing a racial category for multiracial children in public schools). Thus, even though the multiracial category is presented as a mechanism for ostensibly ensuring the self-esteem of biracial children, it appears to be more of an attempt to bolster the self-esteem of the parents of biracial children. See JON MICHAEL SPENCER, *THE NEW COLORED PEOPLE: THE MIXED-RACE MOVEMENT IN AMERICA* 87 (1997) (explaining that the multiracial identity movement "has to do with the self-esteem of these interracially married white parents"); Mathews, *supra* note 42 (asserting that parents have "complex motives" for supporting a multiracial category, including a desire to "minimize" a child's Black heritage). In addition, the MCM believes that biracial children need a multiracial category to bolster their self-esteem in a racially divisive society. See Jones, *supra* note 2 (discussing a study that found that biracial children who identified with the race of only one parent were uncomfortable with that self-identification and felt "more 'whole'" when they came to identify themselves as biracial). This belief rests upon the fallacy that non-White "monoracial" children do not struggle with their racial identity after confronting society's pejorative views of non-whiteness. Indeed, Dr. Kenneth and Mamie Clark's renowned study of Black children revealed that, at a young age, Black children express preferences to be White and to have white dolls in reaction to their observations of societal racial preferencing. See Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children*, in *READINGS IN SOCIAL PSYCHOLOGY* 169, 169-78 (Theodore M. Newcomb & Eugene L. Hartley eds., 1947). To posit that only biracial children struggle to come to terms with the social meaning of race enshrines the image of mixed-race children as "tragic . . . mulatto[es]" who are incapable of understanding the political nature of race. NAOMI ZACK, *RACE AND MIXED-RACE* 129 (1993). Turning to the census in particular, Ellis Cose noted:

Whether the census should be used as an occasion for such statements [of personal identity] (or, for that matter, should be seen as a solution to feelings of low self-esteem or racial estrangement) is another subject altogether. Suffice it to say that those who go to the U.S. Bureau of the Census searching for psychological deliverance are looking in the wrong place and are bound to be greatly disappointed.

COSE, *supra* note 1, at 24; accord Ards, *supra* note 20, at 36 ("It's not the role of the government to make people feel good." (quoting Professor Kwame Anthony Appiah, who opposes the multiracial category because he believes mixed-race persons are not discriminated against as multiracial)).

the MCM demand for a multiracial category is usually presented in terms of its disapproval of all forms of racial classification. For example, Susan Graham—a White mother of two Black-White biracial children, the Executive Director of Project RACE (a national organization advocating on behalf of multiracial children), and one of the principal advocates for the availability of a multiracial category—states that true progress would be the eradication of all racial classifications.⁴⁵ Similarly, Carlos Fernández, former President of the Association of MultiEthnic Americans, has also argued that his preference is that “racial and ethnic classifications should be done away with entirely.”⁴⁶ These statements reflect the general view among multiracial-category proponents that the use of current or any racial classifications is a form of discrimination in that the focus it places upon race diminishes the humanity of the individuals it purports to represent.⁴⁷ The MCM advocates describe their movement as an instrumental step toward the “dream of racial harmony,” as opposed to the creation of “one more divisive category.”⁴⁸ The MCM frequently posits that multiracial persons are a “unifying force”⁴⁹ on the theory that multiracial persons “as a group may be the embodiment of America’s best chance to clean up race relations.”⁵⁰ Thus, proponents value a multiracial category for its

45. *Multiracial Hearings*, *supra* note 2, at 120 (written testimony of Susan Graham, Executive Director of Project RACE). The MCM also views the “Other” racial category on the census as unacceptable: Use of “an ‘Other’ category . . . would be the worst possible alternative” as it negates claims to any part of the racial or ethnic categories listed before it. *Id.* at 166 (testimony of Carlos Fernández, President, Association of MultiEthnic Americans).

46. *Id.* at 127 (testimony of Carlos Fernández, President, Association of MultiEthnic Americans); accord Mathews, *supra* note 42 (expressing the belief of multiracial-category proponents that racial distinctions themselves would disappear in a color-blind society); Marilyn Reinhardt, *Multiracial People Must No Longer Be Invisible; Diminishing Us All*, N.Y. TIMES, July 12, 1996, at A26, available in LEXIS, News Library, Nyt File (“[T]he logical extension of challenging our existing systematic racial categorization is to press for its elimination . . .”).

47. See *Multiracial Hearings*, *supra* note 2, at 168 (testimony of Maj. Marvin Arnold, Ph.D.) (opining that America should arrive at a point where race no longer matters).

48. *Id.* at 169; accord Payson, *supra* note 34, at 1290 (asserting that mixed-race persons may be able to “build bridges” between divided racial communities and should thus be accorded a separate racial classification).

49. See *Multiracial Hearings*, *supra* note 2, at 171 (testimony of Carlos Fernández, President, Association of MultiEthnic Americans).

50. Ramona E. Douglass, *Multiracial People Must No Longer Be Invisible*, N.Y. TIMES, July 12, 1996, at A26, available in LEXIS, News Library, Nyt File. This understanding presents biracial persons as natural ambassadors of racial harmony because of their innate “biconceptualism.” See Gilanshah, *supra* note 4, at 198 (stating that “multiracials possess unique credentials for mediating racial conflict”). However, such an understanding negates the extent to which all other non-Whites also maintain biconceptual realities in their roles as daily border-crossers and negotiators in the White world. See Melissa Harrison & Margaret E. Montoya, *Voices/Voces in the Borderlands: A Colloquy on Re/Constructing Identities in Re/*

perceived shift away from the rigidity of racial classifications,⁵¹ which some perceive as a cause of racial hostility.⁵² The hope is that the multiracial category will act as an acknowledgement of the fluid and nebulous character of race and hence its meaninglessness as a grouping of persons.⁵³ In effect, MCM proponents implicitly wish to use the multiracial category as a mechanism for moving toward a color-blind society that will effectuate racial equality.⁵⁴ Thus, the demand for a multiracial category is less a race-conscious recognition of all the races with which a particular person identifies, than it is a mechanism for questioning the use of any system of racial classification.⁵⁵

The implicit color-blind vision⁵⁶ of the MCM is also reflected in what I term the "symmetrical identity demands" of the White parents

Constructed Legal Spaces, 6 COLUM. J. GENDER & L. 387, 398-99 (1997) (describing the manner in which an individual who interacts with a person of another race experiences a "biconceptual reality"); Hickman, *supra* note 34, at 1258 (arguing that the presentation of mixed-race persons as born racial ambassadors negates the capacity of "monoracial" persons who have been and who continue to be directly engaged in the work of racial justice).

51. See Ards, *supra* note 20 (discussing the views of parents who believe that absence of a multiracial category denies mixed-race children an opportunity to be counted).

52. See Goforth, *supra* note 34, at 11 (opining that racial classifications "increase the perception of differences among the races, which aggravates the racial tensions plaguing this country").

53. *But see* John Powell, *Who Thought of Dropping Racial Categories, and Why?*, POVERTY & RACE, Jan.-Feb. 1995, at 12, 12 (noting "the fact that race is [acknowledged as] socially constructed does not establish that race lacks meaning or force," or that redistributive remedies ought not be based on race).

54. Cf. Gilanshah, *supra* note 4, at 199 (advocating government recognition of multiracials for the benefit of blurring color lines and thus reducing racial animus). But, given the great significance accorded to race in our society, such color-blind goals are misguided. See *infra* Part II.A.

55. Consider one MCM proponent's assertion:

I contend that society should embrace, as a transitory vehicle, multiple racial categories that expressly recognize and acknowledge products of mixed-race unions as distinct from both blacks and whites. I assert that this will have the effect of creating a type of "shade confusion" which will eventually destroy the black/white dichotomy that currently exists, ultimately reducing race to a meaningless category, as it should be.

Johnson, *supra* note 34, at 891; accord Goforth, *supra* note 34, at 10 (relating a personal experience where the author, a White mother of an adopted White-Black biracial child, reported her support for the multiracial category as well as her preference for abolition of all racial classifications).

56. One scholar explains "the colorblind approach" as follows:

All racial classifications are deemed suspect because racial categories are viewed as inherently racist. . . . Supporters of this response would have us believe that cultural meanings 400 years in the making will disappear if we prohibit reference to those meanings in public law and policy. Although the colorblind approach makes explicit racial categories unlawful, this does not mean they no longer exist, nor does it change their meaning.

Charles R. Lawrence III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, *Forward to Symposium, Race and Remedy in a Multicultural Society*, 47 STAN. L. REV. 819, 836

who predominate among the MCM's spokespersons.⁵⁷ The "symmetrical identity demand" is the appeal for all racial aspects of a child to be acknowledged in that child's public assertion of racial identity: "I'm part of this kid, too, no matter who he looks like."⁵⁸ As one parent of multiracial children testified in a recent congressional hearing, without a multiracial category, biracial children are forced to "choose one parent over the other."⁵⁹ One can empathize with the parental impulse to have their familial connection to their children publicly reflected in the collection of racial data.⁶⁰ However, claims to different racial ancestries are not socially symmetrical in effect.⁶¹ That is to say, what the parents of biracial children may fail to perceive is that while the political acknowledgement of White racial ancestry can be beneficial to the individual child, it also unfortunately reinforces societal White supremacy when society places greater value on White ancestral connections than on non-White connections.⁶² "Whiteness is an aspect of racial identity surely, but it is much more; it remains a concept based on relations of power, a social construct predicated on

(1995) (footnote omitted). Another scholar critiques the color-blind theory along the same lines:

The claim made by the proponents of colorblindness ultimately becomes an argument about the worth of race relative to other categories of oppression. Those who believe that colorblind policies will be effective are contending that these other categories (class, income, age, status, etc.) are better measures of disadvantage than race. I would argue that this contention is generally not true. If we eliminate poverty, we will not eliminate racism for the precise reason that racism was not the focus of the attack. Indeed, we will not even eliminate the intersections between race and class in such situations, because they are likely to be resistant to purely class-based attacks.

Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 180 (1994).

57. Cf. SPENCER, *supra* note 44, at 88 (stating that interracial married Whites are probably the persons behind the multiracial movement).

58. Mathews, *supra* note 42; accord LISE FUNDERBURG, *BLACK, WHITE, OTHER: BIRACIAL AMERICANS TALK ABOUT RACE AND IDENTITY* 331 (1994) (commenting that a White mother desired her biracial child to self-identify as White); Michael K. Frisby, *Black, White, or Other*, EMERGE, Jan. 1996, at 48, available in 1996 WL 15657617 (explaining the views of a multiracial category proponent, Susan Graham, who is the White mother of a biracial child).

59. *Multiracial Hearings*, *supra* note 2, at 160 (testimony of Maj. Marvin Arnold, Ph.D.).

60. See Allen, *supra* note 40, at 100 ("I want to suggest that typical parents—and indeed all adults who take responsibility for children in typical western societies—want their children either (1) to share much of their identities or, failing that, (2) to have an insider's appreciation for their identities.").

61. See Gotanda, *supra* note 26, at 6 ("The socially constructed racial categories white and Black are not equal in status.").

62. Cf. *id.* ("[T]he classification white signifies 'uncontaminated' European ancestry and corresponding racial purity.").

white dominance and Black subordination."⁶³ Thus, the symmetrical identity demand can also function as a claim to having biracial children inherit all of the privileges of White status, which White parents logically would like to extend to their children as protection from racism against non-Whites.⁶⁴ In short, the insistence on symmetry in racial categorization is color-blind in its refusal to acknowledge the sociopolitical nature of race.⁶⁵

In demanding a separate mixed-race category, the MCM misconstrues race as solely a cultural identification.⁶⁶ Specifically, such a demand presupposes that there are "pure-Black" experiences, which make a person authentically Black, and inversely, that the lack of such authenticating cultural experiences makes a person "less Black."⁶⁷ Part of what drives the push for a separate racial category is the desire to reflect more accurately the cultural experiences of biracial Blacks living in an interracial context.⁶⁸ Although there may be a cultural component to the identification of persons who have been socially segregated into insular communities and who have a history of varied cultural ties to different African countries and tribes, such cultural manifestations are not uniform across the African diaspora.⁶⁹ For in-

63. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1761 (1993). "With whiteness, as with American Express, membership has its privileges." K. Anthony Appiah, *The Multiculturalist Misunderstanding*, N.Y. REV. BOOKS, Oct. 9, 1997, at 30, 30.

64. See Haney López, *supra* note 22, at 41 n.155 (avoiding condemnation of those who "strive to envelop themselves and their loved ones in the protective mantle of Whiteness" in this "violently racist society").

65. See *infra* notes 325-344.

66. A cultural approach to race refers to race as a community with "broadly shared beliefs and social practices." Gotanda, *supra* note 26, at 4.

67. See Leonard M. Baynes, *Who Is Black Enough For You? The Stories of One Black Man and His Family's Pursuit of the American Dream*, 11 GEO. IMMIGR. L.J. 97, 128 (1996) (explaining how the cultural experiences of Caribbean Blacks differ from other African Americans' cultural experiences). The paradox of concerns with racial authenticity can best be highlighted with the following example: Jessye Norman is a Black opera singer who devotes her creativity to a European art form and, as a consequence, may socialize primarily within White communities; however, Ms. Norman's association with European culture cannot diminish her status as a Black woman.

68. The MCM concern is focused upon biracial persons living in bicultural, interracial households rather than the larger community of mixed-race persons. Cf. Ards, *supra* note 20 (referring to a study that indicates that 75% to 90% percent of African Americans are biracial).

69. W.E.B. Du Bois's personal experiences reflect this lack of uniformity:

Living with my mother's people I absorbed their culture patterns and these were not African so much as Dutch and New England. The speech was an idiomatic New England tongue with no African dialect; the family customs were New England, and the sex mores. My African racial feeling was then purely a matter of my own later learning and reaction; my recoil from the assumptions of the whites; my experience in the South at Fisk. But it was none the less real and a large determinant of my life and character. I felt myself African by "race" and by that

stance, the cultural attributes of the insular Black community in New York are not equivalent to the cultural attributes of insular Black communities in Oaxaca, Mexico or in Loíza, Puerto Rico. The uniformity of Black social identification throughout the Black diaspora is by virtue of the fact that a Black person is viewed as distinct because of appearance, ancestry, or both,⁷⁰ and not because of any commonality in culture.⁷¹ The OMB's recent decision allowing mixed-race persons to be counted with a "check-all-that-apply" system of racial classification⁷² also mistakenly construes race as cultural identification. If race were primarily a form of cultural identification, then an option to check more than one box would be appropriate for those persons reared within a mixed-cultural context. But race is a group-based experience of social differentiation that is not diminished by a diverse ancestral heritage. Further, the OMB decision may result in the division of a multiple-race response into shares;⁷³ therefore, it is ill-suited to a collection of race data for measuring social differentiation.⁷⁴

token was African and an integral member of the group of dark Americans who were called Negroes.

W.E. BURGHARDT DU BOIS, *DUSK OF DAWN* 115 (Transaction Pub. 1992) (1940).

70. *Cf. id.* at 153 ("But what is this group; and how do you differentiate it; and how can you call it 'black' when you admit it is not black? . . . I recognize it quite easily and with full legal sanction; the black man is a person who must ride 'Jim Crow' in Georgia."). This is the sociopolitical meaning of race that Du Bois describes. See *supra* note 26 for a formal definition of sociopolitical race.

71. The distinction between race-as-culture and race-as-politics minimizes the salience of the observation that some multiracial families are thought to be living culturally within "multiracial communities." Gotanda, *supra* note 26, at 4 (describing differences between race-as-culture and status-race considerations of political hierarchy). Historically, most mixed-race Blacks were commonly raised solely within the community of the Black parent and in the absence of contact with White familial connections. Arguably, this phenomenon occurred because family members were "disowned" by their White familial connections, while they were welcomed by Black family members. See FUNDERBURG, *supra* note 58, at 25, 29, 60, 65-66 (comparing the experiences of mixed-race Blacks who were raised in multiracial communities and those who were raised in Black neighborhoods with limited exposure to their White heritage). Furthermore, locality-based social research can inquire into the hypothesis that multiracial communities are developing. Given the important role of the census in racial-data collection, see Part II.D, such an inquiry can be conducted outside the framework of the decennial census. See Recommendations to OMB, *supra* note 7, at 36,940 (stating that when a population is concentrated in certain states, it may be more advisable to collect data at a local level). *But see* Payson, *supra* note 34, at 1289 (advocating the census as a forum for building a community of mixed-race persons).

72. Revisions to Directive No. 15, *supra* note 7, at 58,786.

73. See Vobejda, *supra* note 12 (noting that the OMB has yet to decide how race data will be tabulated under the new "check-all-that-apply" system, but that OMB officials have stated "that the numbers would be published in such a way that people are not double counted").

74. See Recommendations to OMB, *supra* note 7, at 36,874 (acknowledging that racial categories were needed to monitor access to social and economic opportunities "for popu-

The federal Interagency Committee and MCM concern with racial-cultural authenticity⁷⁵ is not necessarily shared by all mixed-race persons.⁷⁶ Contrary to the MCM posture, the community of biracial persons is not a monolith. There are a great number of biracial persons whose racial identity is rooted in blackness because of the political meaning of race in this society. The perspective of biracial persons with respect to issues of racial identification in general, and the presumed need for a multiracial category in particular, can vary greatly from the perspective of monoracial parents.⁷⁷ For example, when interviewed, one biracial person noted, "It took until I was twenty for my mother to understand that I identified black. That was

lation groups that historically had experienced discrimination and differential treatment because of their race or ethnicity"). One commentator noted:

My own suggestion would permit individuals to check as many boxes relevant to race and ethnicity as seem relevant. Total or regional responses can be divided by the actual number of people counted by the census. The resulting fractions will help remind anyone using census information of its sources in self-identification and of the roughness of its truths.

Minow, *supra* note 27, at 687. However, viewing the resulting fractions as deconstructing the stigma of race overlooks the failure of similar classification schemes in other countries. See *infra* notes 114-141 and accompanying text (analyzing the Latin American approach to race and racial subordination).

75. See, e.g., *Multiracial Hearings*, *supra* note 2, at 134 (statement of Carlos Fernández, President, Association of MultiEthnic Americans) (asserting that current classifications do not truthfully identify mixed-race persons).

76. See, e.g., LISA JONES, BULLETPROOF DIVA: TALES OF RACE, SEX, AND HAIR 28, 53-66 (1994) (mixed-race author who identifies herself as Black expressing concern about the desirability of a multiracial category); Deborah Waire Post, *Reflections on Identity, Diversity, and Morality*, in CRITICAL RACE THEORY: THE CUTTING EDGE 419, 419-20 (Richard Delgado ed., 1995) (mixed-race author affirms that "[m]y decision to identify myself as a black person is not exclusively a matter of descent I prefer to believe that I am who I am, a black woman, because I made an ethically and morally correct choice with respect to my identity"); Janita Poe, *Multiracial Category on Census Interests "Others,"* CHI. TRIB., July 11, 1997, at 1, available in 1997 WL 3566909 ("[I]t's not going to solve the race issue. I think it's much deeper than that." (quoting a mixed-race resident of Chicago who does not agree that requiring a person to choose more than one racial category will assist people in altering their racist preconceptions)). In fact, very few self-identified biracial persons attended the first demonstration in Washington, D.C., scheduled by and for biracial persons who aimed to call attention to the need for a multiracial census category. See Moscoso, *supra* note 19 (reporting that thousands of biracial persons were expected to attend a July 20, 1996 demonstration but that only 200 mixed-race persons ended up attending).

77. See FUNDERBURG, *supra* note 58, at 27, 48, 320 (asserting that the experiences of parents in defying racial conventions—e.g., by entering into interracial relationships—are not parallel to those of biracial children navigating their identity in a racially stratified society); see also Tanya Katerí Hernández, *The Interests and Rights of the Interracial Family in a "Multiracial" Racial Classification*, 36 U. LOUISVILLE J. FAM. L. (forthcoming 1997) (manuscript at 5-7) (arguing that biracial persons have less of an interest in the proposed multiracial category than do their monoracial parents). Although there are college organizations that focus upon the concerns of biracial persons, they were curiously absent from the Multiracial Hearings.

very hard for her. She looked at it as these were her *kids*, and so we were Jewish and we were black It was very hard for her to understand that."⁷⁸ Although their number is overstated by the MCM, there are biracial persons who favor a multiracial category to alleviate the psychological pressure of living in a racially stratified society.⁷⁹ Notwithstanding the well-meaning desire to mitigate the pain of racial bias, it should be noted that "monoracial" non-Whites share the same desire to escape the burdens of being socially differentiated by virtue of their race. The anguish experienced by targets of racial bias is not a dynamic peculiar to the "culture" of mixed-race persons.⁸⁰ The view of race as culturally based, like the MCM's inadvertent reification of race as a biological construct,⁸¹ mistakenly essentializes the concept of race,⁸² thereby precluding honest assessments of the social and polit-

78. See FUNDERBURG, *supra* note 58, at 112 (interviewing René-Marlene Rambo); *accord supra* note 59.

79. Cf. Payson, *supra* note 34, at 1288-90 (arguing that a multiracial category would enable mixed-race persons to have an official racial identity in a society that places heavy emphasis on racial categorizations).

80. See *supra* note 50.

81. The MCM proponents' demand for "accuracy" in racial classification systems reifies the biological notion of race by presuming that the "mixture" of two pure races produces a "mixed-race" person. Hickman, *supra* note 34, at 141-42. This Article does not subscribe to the view that races are scientifically determined and thus contained in pure forms from which mixtures then arise. A complete analysis of the sociological versus scientific views of race can be found in K. ANTHONY APPIAH & AMY GUTMANN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* (1996) and in Haney López, *supra* note 22. Yet, the acknowledgement that race is a social construct, rather than a biologically determined object, has been viewed by some as a mandate to disregard the social meaning of race. See, e.g., Howard Winant, *Postmodern Racial Politics in the United States: Difference and Inequality*, in *THE POLITICS OF RACE* 55, 62-65 (Theodore Rueter ed., 1995) (explaining that neoconservatives believe that the finding that race is not scientific means that there is no rationale for discussing race anymore). Others vehemently reject this line of reasoning:

Race, then, is a kind of social fiction; popular misconceptions about genetics assert a fictive biological basis for genetically arbitrary social groupings. And yet these groupings do indeed have the status of fact: "race" may not be a meaningful biological or genetic concept, but it certainly is a powerful political and social construct. The Los Angeles cops who stopped Rodney King probably didn't muse about scientific designations or social mythology before beating him bloody, nor do such thoughts even fleetingly cross the minds of the legions of white women who clutch their purses tighter when black men stand near them at crosswalks.

MAUREEN T. REDDY, *CROSSING THE COLOR LINE: RACE, PARENTING, AND CULTURE* 9 (1994). Interestingly, the MCM approach to race mixture parallels that used by eugenicists in the past to subordinate persons of color. See *infra* note 160.

82. The tendency to essentialize involves reducing a complex concept or set of traits to one categorized experience. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 585 (1990).

ical meanings of race that are significant in shaping racial identity.⁸³ This nation's history of racial oppression has particular salience in an analysis of the MCM, especially given its dominance by Black-White, mixed-race persons and their parents.⁸⁴ As Part II discusses below, our nation's history of racial subordination has accorded whiteness a property value in which the parents of biracial children often are unconsciously deeply invested.⁸⁵

II. THE ADVERSE CONSEQUENCES OF MULTIRACIAL DISCOURSE

People are not, for example, terribly anxious to be equal (equal, after all, to what and to whom?) but they love the idea of being superior. And this human truth has an especially grinding force here, where identity is almost impossible to achieve and people are perpetually attempting to find their feet on the shifting sands of status.⁸⁶

A. *The Reaffirmation of the Value of Whiteness in Racial Hierarchy*

In order to understand fully the ramifications of multiracial discourse upon the use of racial classifications in law, it is critical first to examine the MCM proposal in the context of the existing racial hierarchy. When societal benefits are distributed differentially within a racial caste system, race takes on the quality of property rights.⁸⁷ Whiteness and approximations of whiteness will always be valued in a society structured on a White/non-White racial continuum.⁸⁸ Legal commentators have noted that the White racial classification in the United States in effect became a form of property right contingent

83. See Paul E. Peterson, *A Politically Correct Solution to Racial Classification*, in CLASSIFYING BY RACE 3, 3 (Paul E. Peterson ed., 1995) ("Whether or not to classify by race is a political, not a moral or ethical, question.").

84. See *supra* note 57.

85. JANE LAZARRE, *BEYOND THE WHITENESS OF WHITENESS: MEMOIR OF A WHITE MOTHER OF BLACK SONS* 67, 79 (1996) (recognizing the desire of White parents to protect their Black children from the effects that the children's appearance have upon racist persons in society).

86. JAMES BALDWIN, *THE FIRE NEXT TIME* 88 (Vintage Int'l 1993) (1963).

87. See, e.g., Derrick Bell, *Property Rights in Whiteness: Their Legal Legacy, Their Economic Costs*, in CRITICAL RACE THEORY: THE CUTTING EDGE 75, 81 (Richard Delgado ed., 1995) (discussing the historical argument for a property right in whiteness); Harris, *supra* note 63, at 1734-35 (discussing how privileged rights in property were based on race and afforded only to Whites, thereby making "whiteness" a thing of value).

88. Although this Article deploys the legal history of Black-White race relations to analyze the White privilege aspects of the MCM, its assessment of racial subordination is more expansive. See Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571, 573 (1995) (emphasizing the importance of racially diverse perspectives in legal analysis).

upon the White racial label.⁸⁹ This is reflected in the fact that being regarded as White is an object of significant value. Indeed, whiteness continues to be so significantly valued that individuals have in recent years expended great sums of money by litigating their individual claims to whiteness,⁹⁰ by trying to keep non-White corpses out of White cemeteries,⁹¹ and by seeking compensation for the perceived harm of having Black babies.⁹² For much of our nation's history, White status was a necessary condition for citizenship and naturaliza-

89. One commentator outlines how this property right developed:

Following the period of slavery and conquest, white identity became the basis of racialized privilege that was ratified and legitimated in law as a type of status property. After legalized segregation was overturned, whiteness as property evolved into a more modern form through the law's ratification of the settled expectations of relative white privilege as a legitimate and natural baseline.

Harris, *supra* note 63, at 1714; accord Derrick Bell, *Xerxes and the Affirmative Action Myth*, 57 GEO. WASH. L. REV. 1595, 1602, 1608 (1989) (observing that affirmative action policies are seen as a threat to the "property interests of identifiable whites").

90. An example of the significance that individuals place upon official racial classifications is that of a family who always lived as and considered themselves to be White. Six family members attempted to reclassify themselves as White when they discovered that the Louisiana State Office of Vital Statistics had classified their parents as Black. *Doe v. State*, 479 So. 2d 369, 371 (La. Ct. App. 1985); Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255, 256 (1983) (explaining that *Doe* demonstrates how racial caste informs the definitions of Black and White); cf. Derrick Bell, *Racial Libel as American Ritual*, 36 WASHBURN L.J. 1, 1 (1996) (stating that "[t]oday, racial defamation continues its oppressive role" by publicly depicting Blacks as subordinate); Harris, *supra* note 63, at 1735 ("The direct manifestation of the law's legitimation of whiteness as reputation is revealed in the well-established doctrine that to call a white person 'Black' is to defame her."). *Plessy v. Ferguson* can also be viewed as a lawsuit concerning a claim to whiteness. In *Plessy*, Homer Adolph Plessy asserted that the refusal to seat him in a White passenger car interfered with his reputation as a White individual. *Plessy v. Ferguson*, 163 U.S. 537, 538 (1896), overruled by *Brown v. Board of Educ.*, 347 U.S. 483 (1954); cf. CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 152-73* (1987) (analyzing the *Plessy* case in the context of restrictive and affirmative rights arguments); Bell, *supra* note 87, at 81 (pointing to Plessy's argument that whiteness is a property right).

91. See DOMÍNGUEZ, *supra* note 35, at 155-57 ("The idea that polluted blood contaminates matter is, however, nowhere more evident than in burial practices. . . . In this sense, burial is the ultimate expression of the boundaries of social categories and of the special importance accorded to the purity or impurity of one's blood."); Rick Bragg, *Just a Grave for a Baby, But Anguish for a Town*, N.Y. TIMES, Mar. 31, 1996, at A14, available in LEXIS, News Library, Nyt File (reporting that upon learning that a buried infant had a Black father, Georgia Baptist deacons attempted to have the baby's body exhumed from the church's exclusively White graveyard).

92. See Ronald Sullivan, *Sperm Mix-up Lawsuit Is Settled*, N.Y. TIMES, Aug. 1, 1991, at B4, available in LEXIS, News Library, Nyt File (reporting that a White mother was awarded approximately \$400,000 in an out-of-court settlement for harm suffered as a result of insemination with the sperm of a Black man instead of the sperm from her White husband).

tion.⁹³ In addition, White, female U.S. citizens were automatically divested of their citizenship upon marriage to a racially barred applicant.⁹⁴

Social standing continues to be a significant benefit of whiteness, regardless of one's socioeconomic level.⁹⁵ Whites have been "given public deference and titles of courtesy because they . . . [are] white."⁹⁶ After controlling for differences in education and job training, Whites continue to earn higher wages than Blacks.⁹⁷ From an institutional perspective, the supremacy accorded White status in a racial hierarchy also benefits industry by defusing class tensions amongst Whites.⁹⁸ W.E.B. Du Bois observed seventy years ago that "the white group of laborers, while they received a low wage, were compensated in part by a sort of public and psychological wage."⁹⁹ Movements for formal ra-

93. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 452 (1856) (holding that free Blacks whose ancestors were enslaved could not be considered citizens for federal constitutional protection purposes).

94. Haney López, *supra* note 22, at 15.

95. See Harris, *supra* note 63, at 1758-59 ("The wages of whiteness are available to all whites regardless of class position, even to those whites who are without power, money, or influence.").

96. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 700 (1935). Adrian Piper, a self-identified Black woman whose phenotype appears White, notes:

A benefit and a disadvantage of looking white is that most people treat you as though you were white. And so, because of how you've been treated, you come to expect this sort of treatment, not perhaps, realizing that you're being treated this way because people think you're white, but rather falsely supposing that you're being treated this way because people think you are a valuable person. So, for example, you come to expect a certain level of respect, a certain degree of attention to your voice and opinions, certain liberties of action and self-expression to which you falsely suppose yourself to be entitled because your voice, your opinion, and your conduct are valuable in themselves.

Adrian Piper, *Passing for White, Passing for Black*, 58 *TRANSITION* 4, 25 (1992).

97. See Derek A. Neal & William R. Johnson, *The Role of Premarket Factors in Black-White Wage Differences*, 104 *J. POL. ECON.* 869, 891 (1996) ("After decades of narrowing, the unadjusted black-white wage gap has either widened or failed to shrink further since 1980."); see also MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 85 & tbl.4.4 (1995) (stating that Blacks lag behind Whites in both income and wealth).

98. See Harris, *supra* note 63, at 1760 (noting that members of the White working class will overlook their own oppression by privileged Whites, because members of the White working class are nevertheless afforded "a host of public, private, and psychological benefits" solely because they are White).

99. DU BOIS, *supra* note 96, at 700; accord DAVID R. ROEDIGER, *THE WAGES OF WHITENESS* 13 (1991) (discussing how the racial privileges conferred by whiteness can motivate subordinated and exploited Whites to overlook the reality that they are exploited by other Whites); Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 *NOTRE DAME LAW.* 5, 18 (1976) ("[T]he creation of a black subclass enabled poor whites to identify with and support the policies of the [white] upper class.").

cial equality have done little to diminish this hierarchy.¹⁰⁰ In fact, even as standards of legal equality have been erected, the intangible object of whiteness has continued to be valued.¹⁰¹ Thus, the ability of Whites not to think of themselves in racial terms at all is another benefit of whiteness, in that whiteness is cognitively viewed as the norm and hence not a race.¹⁰² This is, in effect, another benefit that multiracial-category proponents logically want to pass on to their children—the leisure of not having to think about race at all.¹⁰³

Given this ongoing privilege of White racial status, it is important to examine the role that a mixed-race census count would have in reinforcing the estimation of whiteness. To be sure, the value placed on whiteness is not one which exists in a vacuum. Rather, it is an intrinsic part of an institutional racial hierarchy in which the closer one can approximate whiteness, the better off one is economically and socially.¹⁰⁴ This racial hierarchy, which denigrates all connections to blackness in order to maintain the White ideal,¹⁰⁵ evidences

100. Although *Brown v. Board of Education*, 347 U.S. 483 (1954), reversed the doctrine of “separate but equal,” *id.* at 488, it did not address the ways in which systems of White privilege could be undone. “In accepting substantial inequality as a neutral base line, a new form of whiteness as property was condoned. Material inequities between Blacks and whites—the product of systematic past and current, formal and informal, mechanisms of racial subordination—became the norm.” Harris, *supra* note 63, at 1753.

101. In a study that asked White students how much money would adequately compensate them if they were changed from White to Black, most respondents indicated that \$50 million over a person’s lifetime or \$1 million per year might be adequate compensation. See ANDREW HACKER, *TWO NATIONS* 32 (1992). Furthermore, the ongoing value of whiteness has encouraged persons who could assume a White identity to do so in order to advance in their professional careers. See Henry Louis Gates, Jr., *White Like Me*, *NEW YORKER*, June 17, 1996, at 66, 66 (attributing to professional “pragmatism” the esteemed Black *New York Times* book reviewer Anatole Broyard’s assumption of a White identity throughout his life).

102. See Barbara J. Flagg, “Was Blind, But Now I See”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993) (“I call this the transparency phenomenon: the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific. Transparency often is the mechanism through which white decisionmakers who disavow white supremacy impose white norms on blacks.” (emphasis omitted)); cf. H. HOETINK, *CARIBBEAN RACE RELATIONS: A STUDY OF TWO VARIANTS* 120-26 (Eva M. Hooykaas trans., Oxford Univ. Press 1967) (1962) (discussing society’s “somatic norm image”—those White physical characteristics accepted as the society’s norm and ideal).

103. See Spencer, *supra* note 38 (discussing “multiracial advocates’ stated goal of American nonracialism”).

104. Harris, *supra* note 63, at 1713.

105. *Id.* at 1710-12 (describing the life of a Black woman who tried to hide all indications of her true identity). Even the term “denigrate” stems from the Latin root “denigrare,” which means to blacken. MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 308 (10th ed. 1996).

itself perhaps most starkly in the selection of adoptive children.¹⁰⁶ In the adoptions market, White babies are highly prized, followed by mixed-race babies, with Black babies the least preferred.¹⁰⁷ History demonstrates that, in such a racial hierarchy, those who are mixed-race will logically assert their White ancestry, while downplaying their African ancestry, in order to further themselves in the social structure and flee repression.¹⁰⁸ Similarly, White parents will seize opportunities to extend their privilege of whiteness to non-White persons they care about.¹⁰⁹

This complicates the MCM assertion that the unique life experiences of mixed-race persons alone justify a separate racial classification.¹¹⁰ For instance, one White mother of mixed-race children has

106. See Jan Breslaauer, *Hues and Cries*, L.A. TIMES, July 7, 1991, at 3, available in 1991 WL 2261294 (discussing color as an important issue in the world of adoption).

107. See *id.* (setting forth the order of preference for adopted children as evidence that the issue of race is salient). The order of preference in adoption is not a simple reflection of the preference adoptive parents have for children who look like them, because the same racial order of preference also exists in the transracial adoption context. Perry, *supra* note 15, at 102-04.

108. See FRANTZ FANON, *BLACK SKIN, WHITE MASKS* 18, 54, 81-82 (Charles Lam Markmann trans., Grove Press 1967) (1952) (discussing the efforts of persons of African ancestry to elevate themselves to the level of Whites); cf. CARL N. DEGLER, *NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES* 103 (1971) (discussing the gradations of color and the higher ranking of value attached to those closest to White).

109. See FUNDERBURG, *supra* note 58, at 326 (interviewing a person who concedes: "I know a lot of my privilege has come from my white father. A lot of my privilege. . . . I can't ignore it because I have had so many benefits from that. And I'm talking institutionally."). James W. Gordon has theorized that Justice Harlan had a Black half-brother who inspired his dissent in *Plessy v. Ferguson*. James W. Gordon, *Did the First Justice Harlan Have a Black Brother?*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 122, 122-23, 137 (Richard Delgado ed., 1995). Thus, one could view Justice Harlan's concern for color-blindness as stemming from his desire to assist a family member to access privileges which he would have otherwise been allocated but for his mixed-race status. Consistent with this hypothesis of White families having a concern for the civil rights of mixed-race family members specifically, rather than an interest in the general proposition of social equality, is the observation that Justice Harlan's concern with the legal equality of Blacks did not extend to other similarly situated non-Whites such as the Chinese. See Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 156 (1996).

110. See *supra* note 68 and accompanying text. Although there may be instances in which the way Black-White mixed-race persons experience racism varies from that experienced by "pure" Blacks, it should be noted that the racism mixed-race persons experience flows from their connection to blackness, as opposed to their mixed-race status. See, e.g., FUNDERBURG, *supra* note 58, at 44 (interviewing a biracial person who noted: "maybe I'm half-white, but people look at me and don't think that. . . . We're discriminated against—whether people think I'm Spanish or mixed or black—we're both discriminated against because of what we look like."); Post, *supra* note 76, at 420 (reporting that a White mother encouraged her Black-White biracial child to embrace both White and Black ancestries and that the child learned the meaning behind asserting Black sociopolitical identity when called a racially derogatory epithet for the first time). Accordingly, the choice of many

related the desire to impart to her son the privilege of walking about the world without being concerned that others will find him racially threatening and thereby presume him criminal.¹¹¹ Some White parents are quite forthright about the impulse to preserve this access for their children:

biracial persons to identify as Black is connected to their direct experiences with racism as Blacks, as opposed to a blind adherence to the rule of hypo-descent—also known as the One Drop Rule—in which persons with any Black ancestry are deemed Black. See DAVIS, *supra* note 41, at 5. Even those biracial persons who wish to eschew racial categories altogether are also exposed to racism based on their connections to blackness rather than their mixed-race heritage. See Richard Sandomir, *Zoeller Learns Race Remarks Carry a Price*, N.Y. TIMES, Apr. 24, 1997, at B9, available in LEXIS, News Library, Nyt File (reporting that when the Black-Asian mixed-race golfer Tiger Woods won the Masters in 1997, a fellow golfer, Fuzzy Zoeller, urged Woods not to request collard greens and fried chicken at the next year's Champions Dinner).

Similarly, the experiences of racism that middle-class minorities and light-skinned minorities undergo may vary from those of racial minorities who are indigent or dark-skinned, but the diversity of their experiences does not negate the central source of racism: animosity against connections to blackness, which are viewed as inferior. See ELLIS COSE, *THE RAGE OF THE PRIVILEGED CLASS 4* (HarperPerennial 1995) (1993). A comparison to the lack of hostility against persons with mixed ethnic backgrounds, such as WASP-Irish or WASP-Jewish individuals, bears out the hostility targeted against Black-White mixed-race persons, because Black-White mixed-race persons are connected with blackness as opposed to simply being mixed-race:

But there are also crucial distinctions between a Jewish woman becoming part of an Italian family, an Irish man marrying into a Jewish one, even a white American of any ethnicity marrying a Nigerian or Jamaican, and a white American marrying an African American. It is a function of racism, the special white American fear and suspicion of American Blacks . . .

LAZARRE, *supra* note 85, at 45.

Furthermore, the MCM observation that sometimes mixed-race persons are given an aloof reception by monoracial persons does not justify having mixed-race persons specially counted. MCM's reliance upon this observation as a rationale conflates the dynamic of prejudice (i.e., prejudgments that are based upon arbitrary factors) with that of discrimination (i.e., denials by an empowered elite, to which Blacks do not belong, of tangible rights or opportunities). In fact, the prejudgments that Blacks have been said to make about biracial persons are often reactions to the perceived biracial assertion of an "honorary White" privilege in a racial caste system, rather than a mixed-race-based prejudice against biracial persons:

Black[s] reject [] . . . "mixed race" students, but this happens . . . when they insist on being "mixed"—the white part seemingly offered as a sign of *superiority*. "If you consider yourself Black, whatever else you might be ethnically, . . . it doesn't matter to anyone what other mixtures you have inside of you."

Id. at 63 (quoting a biracial son) (emphasis added).

111. See REDDY, *supra* note 81, at ix (suggesting that a black child must "keep his hands out of his pockets when he is in stores . . . lest he be seen as a shoplifter" and "learn how to talk to the police who will surely stop him when he is out riding his bike"). Black parents are also concerned about their children being presumed criminal based upon their race. See, e.g., Deborah Waire Post, *Race, Riots and the Rule of Law*, 70 DENV. U. L. REV. 237, 238-39 (1993) (expressing concern that her son will be presumed criminal).

I came to understand, for example, that I had better make myself highly visible to their mostly white teachers hoping to mitigate their opinions about Black children being uncared for and unruly. When the teachers saw a white, middle-class mother, I incurred the privileges of caste and class many whites regularly and unconsciously enjoy.¹¹²

Color-blind platforms for such protective efforts permit concerned White parents to extend the supremacist system privilege to those who are viewed as "practically-all-White" without actually dismantling the racial hierarchy itself.

Accordingly, the demand for statistical recognition of mixed-race persons—and acknowledgement of all aspects of an individual's racial identity—is occurring within a sociopolitical context that values White ancestry and denigrates non-White ancestry. In such a racial caste system, it is impossible to acknowledge mixed-race persons officially without actually elevating the status of those who can claim to be other than "pure" Black, no matter how egalitarian the intent of the MCM.¹¹³ This same elevation of mixed-race classes is evident in various Latin American countries and in apartheid South Africa in ways that powerfully illuminate the implications of furthering multiracial discourse in the United States.¹¹⁴

B. The Dissociation of a Racially Subordinated Buffer Class from Equality Efforts

In those Latin American countries such as Brazil, Cuba, Colombia, Panama, Venezuela, and Nicaragua, where sizable communities of Blacks reside,¹¹⁵ and where Whites are a numerical minority, a favored

112. LAZARRE, *supra* note 85, at 47.

113. See *supra* note 38 and accompanying text.

114. Although South Africa and Latin America are used in this Article as illustrations, this phenomenon is not particular to those societies. For reasons which shall be explored in Part II.B of this Article, mixed-race categories have been recognized by law in other countries at different points in history. See, e.g., DEGLER, *supra* note 108, at 239-40 (noting that early eighteenth-century Jamaican law allocated a special place for Mulattoes); Timothy M. Phelps, *Shades of Black: Haiti's Class Rank is Skin Deep*, NEWSDAY, Oct. 3, 1994, at A17, available in LEXIS, News Library, Newsdy File ("[H]ere [in Haiti], as in South Africa until recently, the degree of a person's blackness often determines a person's status.").

115. This is in contrast to those Latin American countries, such as Mexico, Peru, and Ecuador, where indigenous persons are a majority of the population of color, and persons of African ancestry are fewer in number. Yet, it should also be noted that the Black minorities in such countries are also denigrated. See LESLIE B. ROUT, JR., *THE AFRICAN EXPERIENCE IN SPANISH AMERICA: 1502 TO THE PRESENT DAY* 185-226 (1977) (examining the Black experience in Argentina, Uruguay, Paraguay, Chile, Bolivia, Peru, and Ecuador); Calvin Sims, *For Blacks in Peru, There's No Room at the Top*, N.Y. TIMES, Aug. 17, 1996, at A1, available in

"Mulatto"¹¹⁶ class has long been recognized as distinct from the subordinate Black population.¹¹⁷ Historian Carl Degler has termed this phenomenon as the "mulatto escape hatch," which he defines as the "recognition of a special place for mixed bloods."¹¹⁸ Mulattoes are accorded greater favors than Blacks, but fewer privileges than the numerical minority of empowered Whites: "The top jobs in business, politics and academia are held by those with light skin. . . . Studies show that blacks are poorer, less educated and less respected than whites and mulattoes."¹¹⁹ In turn, the greater opportunities available to Mulattoes encourage them to dissociate themselves from their African ancestry.¹²⁰ Similar to lower class Whites in the United States, Mulattoes in much of Latin America act as a buffer class between elite Whites and economically exploited Blacks.¹²¹ This buffer effectively maintains a system of White supremacy.¹²² It is this temptation to dis-

LEXIS, News Library, Nyt File (describing Peruvian Blacks' discontent with their menial jobs).

116. Although the use of the word "Mulatto" to describe mixed-race persons has a derogative etymology, it is used in this Article to reflect accurately the terminology used for mixed-race persons in Latin America and in the United States during certain historical periods to be discussed herein. See JACK D. FORBES, *BLACK AFRICANS AND NATIVE-AMERICANS* 131-50 (1988) (explaining that the word "Mulatto" became equivalent to the word "hybrid" in the sixteenth century and that "Mulatto" historically implied such traits as immorality, inferior physical status, and subservience commonly associated with mules as laboring animals).

117. Although the Mulatto racial class is distinct in much of Latin America, most scholarship has concentrated on the case example of Brazil, which has the largest Black population outside of the African continent. Sabrina Gledhill, *The Latin Model of Race Relations*, in CARLOS MOORE, CASTRO, *THE BLACKS, AND AFRICA* app. 1, at 355 (1988) (explaining that the Latin American model of race relations is structured upon recognition of a Mulatto class and the premise that miscegenation will solve racial problems); cf. Peggy A. Lovell, *Race, Gender, and Development in Brazil*, 3 *LATIN AM. RES. REV.* 7, 7 (1994) ("Brazil is home to the world's largest population of African descent except for Nigeria."); David L. Marcus, *Melting Pot Coming to a Boil: Brazilians Blur Color Lines, but Racism Stands out Clearly*, *DALLAS MORNING NEWS*, Jan. 16, 1994, at 1A, available in 1994 WL 6103958 (reporting that about half of Brazil's population is comprised of people with African blood).

118. DEGLER, *supra* note 108, at 245.

119. Marcus, *supra* note 117.

120. See *id.* ("[D]ark-skinned Brazilians are reluctant to call themselves black. To many blacks the goal is to be 'promoted' out of being black, to join the mainstream."); cf. Anthony W. Marx, *Contested Citizenship: The Dynamics of Racial Identity and Social Movements*, reprinted in Supp. 3 *INTERNATIONAL REVIEW OF SOC. HISTORY, CITIZENSHIP, IDENTITY, AND SOCIAL HISTORY* 159, 177-79 (Charles Tilly ed., 1996) (maintaining that the Brazilian state's propagation of an image of racially inclusive citizenship hinders racial identity formation for social mobilization despite the existence of inequality).

121. See *infra* notes 162-172 and accompanying text.

122. White supremacy is literally the view that Whites and whiteness are supreme to all else within legal and social structures. See generally Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331 (1988) (discussing the hegemony of White supremacy). More expansively,

sociate from racial subordination that concerns many about a mixed-race census count.¹²³

Although mixed-race persons in these societies have been afforded greater opportunities, it should be noted that the construction of a middle-tier racial group is distinct from the phenomenon of "passing." Passing refers to an individual's "decision" to rely upon his or her light skin and European features in order to assume the life and privilege of a White person secretly.¹²⁴ In contrast, the institutionalization of middle-tier racial categories publicly sanctions entire groups of persons to access greater opportunities over a subordinate class of Blacks, while the full panoply of privileges available to Whites is held out of reach.¹²⁵ In racial structures such as those traditionally existing in the United States,¹²⁶ passing will be one of the only mechanisms for a qualifying individual to gain full entrance into the world of

the term refers to the system of beliefs that creates and reinforces the existing economic, political, and social structures' ranking of whiteness as supreme "and [that] convinces the dominated classes that the existing order is inevitable." *Id.* at 1351.

123. Arthur A. Fletcher, Chairperson of the U.S. Commission on Civil Rights, observed: I can see a whole host of light-skinned Black Americans running for the door the minute they have another choice. And it won't necessarily be because their immediate parents are Black, White, or whatever, but all of a sudden they have a way of saying—in this discriminatory culture of ours, they have another way of saying, "I am something other than Black."

Multiracial Hearings, *supra* note 2, at 273 (testimony of Arthur A. Fletcher, Chairperson, U.S. Commission on Civil Rights).

124. See Harris, *supra* note 63, at 1710 (describing a Black Chicago woman's presentation of herself as a White woman); cf. HOETINK, *supra* note 102, at 116, 120 (arguing that phenotypes closer to whiteness—"the somatic norm image"—increase the number of available economic and social opportunities). Passing can sometimes be viewed as an involuntary decision, in that systems of racial oppression and economic exploitation have often given passing an "economic logic." Harris, *supra* note 63, at 1713; accord Melissa Nobles, "Responding with Good Sense": The Politics of Race and Censuses in Contemporary Brazil 54, 118-19, 192-93 (1995) (unpublished Ph.D. dissertation, Yale University) ("Brazilians don't identify as 'blacks' [not] because there is no racism or because they don't know that they are 'black.' To the contrary, Brazilians do not identify as 'black' mostly because it defies reason to do so.").

Although this working definition of passing is grounded in the context of Black-White racial hierarchies, it should be noted that passing has also been a concern for communities of Jews, as well as gay and lesbian persons, in their attempts to mobilize "assimilated" members of their communities. John O. Calmore, *Random Notes of an Integration Warrior*, 81 MINN. L. REV. 1441, 1467-68 (1997) (noting that the passing of Jews for White comes at "substantial psychic costs and loss of identity"); Sharon Elizabeth Rush, *Equal Protection Analogies: Identity and "Passing": Race and Sexual Orientation*, 13 HARV. BLACK LETTER L.J. 65, 67 (1997) (stating that passing is prevalent in gay, lesbian, and bisexual communities); cf. 3 ENCYCLOPAEDIA JUDAICA 770-83 (1996) (detailing the Jewish community's historical concern with assimilation).

125. See *infra* notes 143-146 and accompanying text.

126. See DOMÍNGUEZ, *supra* note 35, at 121-22 (delineating regions within the contiguous United States that used alternate racial structures).

White privilege.¹²⁷ In racial structures with middle-tier categories, however, even those who are not light enough to pass for White have a second option for accessing enhanced economic mobility as a member of a buffer class.¹²⁸

The censuses in countries with middle-tier racial categories reflects the distinct racial structure¹²⁹ and demographic pattern of small White populations with large Black populations.¹³⁰ In Brazil, for example, in the last four census schedules that included questions regarding color, race, or both, the color terms used ranged from White, Yellow, Brown, and Black.¹³¹ Although the Brazilian census schedules used the term "color" categories, the color categories utilized corresponded directly with racial categories.¹³² The Yellow category represented the inclusion of citizens of Asian descent in Brazil's population,¹³³ while "Black" represented persons with African ancestry, and "Brown" represented persons with mixed Black and White ancestry.¹³⁴ The Brown category is somewhat akin to the current

127. See Harris, *supra* note 63, at 1765 ("Under the operative racial hierarchy, passing is the ultimate assimilationist move—the submergence of a subordinate cultural identity in favor of dominant identity, assumed to achieve better societal fit within prevailing norms."); Gates, *supra* note 101, at 66 (providing a modern example of passing by high-ranking Black *New York Times* book reviewer Anatole Broyard, who felt compelled to maintain his assumed White identity until death).

128. See Tanya Katerí Hernández, *The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws*, 76 OR. L. REV. (forthcoming 1997) (manuscript at 4-5) (describing the middle-tier communities' "greater access to economic opportunity than the masses of the lower class").

129. In Brazil, the fluctuating omission of color and racial census categories has been viewed as "another instrument of social control . . . [because] [t]he reality of race relations is masked, and any information that Blacks could use in their struggle for social justice is withheld." ABDIAS DO NASCIMENTO, BRAZIL: MIXTURE OR MASSACRE? ESSAYS IN THE GENOCIDE OF A BLACK PEOPLE 80 (Elisa Larkin Nascimento trans., 2d ed. 1989) (1979). The first Black Senator in Colombia's entire history has noted that because few racially categorized statistics were aggregated, "[f]or a long time, no one wanted to admit there was racial discrimination in Colombia, [or] that there were even any blacks to discriminate against." Karen De Witt, *Black Unity Finds Voice in Colombia*, N.Y. TIMES, Apr. 18, 1995, at A5, available in LEXIS, News Library, Nyt File (internal quotation marks omitted). The census schedules in Venezuela, Colombia, and the Dominican Republic have omitted race, color, or ethnic origin questions. DOREEN S. GOYER & ELIANE DOMSCHKE, THE HANDBOOK OF NATIONAL POPULATION CENSUSES: LATIN AMERICA AND THE CARIBBEAN, NORTH AMERICA, AND OCEANIA 132, 158, 350 (1983).

130. See MARVIN HARRIS, PATTERNS OF RACE IN THE AMERICAS 128-31 (1964) (providing maps of Black and White demographic patterns in North and South America).

131. Marvin Harris et al., *Who Are the Whites?: Imposed Census Categories and the Racial Demography of Brazil*, 72 SOC. FORCES 451, 453 (1993).

132. The only explicit "racial" category on the 1991 Brazilian census was the "Indigenous" category for Brazil's native populations. Nobles, *supra* note 124, at 88-89 tbl.3.1.

133. *Id.* at 101.

134. Harris et al., *supra* note 131, at 453.

United States proposal for a multiracial category in that it is viewed as an umbrella for counting the many different shades of mixed persons within the Brazilian population. In fact, the number of shades included within the Brown category is extensive.¹³⁵ In the 1976 Brazilian census, a supplementary household survey included an open-ended color question. Respondents described themselves with 136 different colors.¹³⁶

Ironically enough, after decades of utilizing mixed-race categories, the 1991 Brazilian census was subject to a campaign for the elimination of the Brown mixed-race color category in favor of a specific African-ancestry race question.¹³⁷ Although the request to eliminate the mixed-race category did not prevail, the organizers also mounted a publicity campaign to encourage respondents to move away from the mixed-race category by checking the Black category instead.¹³⁸ This campaign was entitled "Don't Let Your Color Pass into White: Respond with Good Sense."¹³⁹ The campaign was motivated by the concern that Brazilians often lie about their color by selecting a lighter color because they are embarrassed to have African origins.¹⁴⁰ The campaign for greater numbers of persons to accurately check the Black category was mounted to produce more reliable socioeconomic data on Blacks and thereby assist in mobilizing a racial justice movement.¹⁴¹ This is the insidious aspect of middle-tier categories—the

135. Nobles, *supra* note 124, at 118-19.

136. *Id.* at 54, 118-19.

137. *Id.* at 16, 152-53.

138. *See id.* at 1 (describing a campaign that "urged Brazilians to self-select a 'darker' color on their census schedules").

139. *Id.*

140. Harris et al., *supra* note 131, at 452-53 (stating that Brazilians identified as "*pretos*" or "*negros*" are subject to strong negative stereotypes, and that some dark Brazilians consequently "identify themselves . . . by terms that connote less resemblance to *preto* types").

141. Nobles, *supra* note 124, at 150-51. In addition, the campaign also hoped to address the decreasing numbers of Blacks being counted in the population despite the significant physical presence of Black majorities. *Id.* at 179-80. The 1991 census results reflect a slight increase in the number of Brazilians using the Brown category in comparison to the 1980 census numbers, and a slight decrease in the numbers using the White category. The Black category maintained roughly the same numbers. Informações Estatísticas e Geocientíficas, *Censo Demográfico de 1991* (visited Nov. 17, 1997) <<http://www.ibge.org/informacoes/censodem/censo.htm>>. Although the quantitative measures of the campaign's success were negligible, the campaign proponents have claimed a victory in having the Brazilian census officials publicly state that they will rethink the color categories for the 2000 census to reflect more accurately the numbers of persons of African ancestry. Telephone Interview with Melissa Nobles, Professor of Political Science, Massachusetts Institute of Technology (Nov. 6, 1997); cf. Matt Moffett, *Seeking Equality: A Racial "Democracy" Begins Painful Debate on Affirmative Action*, WALL ST. J., Aug. 6, 1996, at A1, available in 1996 WL-WSJ 3113407 (reporting on the Black-student-led Committee in Favor of Quotas for fed-

detachment of subordinated persons from concern with racial justice out of a psychological sense of superiority, notwithstanding their own consistent experiences of discrimination and prejudice. Middle-tier census categories in racially stratified societies thus present an inherent threat to racial justice efforts. Merely checking the box has a political effect, despite the fact that an individual's phenotype will continue to determine her daily experiences of racism. This problem is further exacerbated when Whites feel pressure to accord tangible benefits to those occupying the middle tier, as occurred in apartheid South Africa.

Similar to the Brazilian White minority's use of the mixed-race Brown color category, apartheid South Africa's White minority utilized a middle-tier category for mixed-race persons known as "Coloured." The four South African census classifications have traditionally been White, Bantu (Black Africans), Coloured, and Asiatic (East Indians).¹⁴² The South African government historically accorded Coloureds greater material advantages than Bantus, such as higher wages,¹⁴³ access to employment positions of higher status,¹⁴⁴ and admission to White universities.¹⁴⁵ However, Coloureds received fewer material benefits than Whites.¹⁴⁶ Accordingly, a stratified value system accompanied the racial hierarchy.¹⁴⁷ The Coloureds internalized notions of the racial hierarchy, i.e., that lighter-skinned Coloureds were presumed to be smarter than darker-skinned Coloureds.¹⁴⁸ Similar to the Brazilian and United States experience of racial hierarchy, lighter-skinned South African Coloureds often passed into the White community with greater access to employment

eral university admissions and the 1996 federal government commission to draft a plan for Afro-Brazilian compensatory policies).

142. See Sheila T.L. Van der Horst, *The Effects of Industrialisation on Race Relations in South Africa*, in *INDUSTRIALISATION AND RACE RELATIONS: A SYMPOSIUM 97*, 99-100 (Guy Hunter ed., 1965).

143. *Id.* at 122-23.

144. *Id.* at 131-32.

145. See JIM HOAGLAND, *SOUTH AFRICA: CIVILIZATIONS IN CONFLICT* 105 (1972) (discussing Coloureds' admission to the White, English-speaking University of Cape Town).

146. See GAIL GERHART, *BLACK POWER IN SOUTH AFRICA: THE EVOLUTION OF AN IDEOLOGY* 75 (1978) (describing the allocation of different places in social and economic structures for every racial group); HOAGLAND, *supra* note 145, at 111 (finding that Coloureds are resentful about the social and political restrictions they face); Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1277 (1994) (finding that South African benefit-allocation was strongly tied to racial classification).

147. See Van der Horst, *supra* note 142, at 123 (finding that the Coloured person in South African society was considered "a socially and intellectually inferior being" as compared to Whites, and that Bantus were the most inferior of all).

148. HOAGLAND, *supra* note 145, at 109.

and educational opportunities.¹⁴⁹ As long as the Coloureds were receiving these material gains, there generally prevailed among them an acquiescence to apartheid.¹⁵⁰ It was not until the apartheid system began to deny Coloureds their intermediary-status privileges that they became interested, as a group, in aligning themselves with the Bantus and the East Indians. This helped to successfully undermine the foundation of the apartheid system.¹⁵¹

The South African departure from the privileging of middle-tier Coloureds was directly connected to the purposeful increase in the size of the White population.¹⁵² The 1970 census showed that the increase in the Coloured population was almost double that of the increase in the White population, and demographic projections indicated that by the end of the century, there would be as many Coloureds as Whites in South Africa.¹⁵³ Following the release of these demographic projections, there was a relaxation of immigration controls for White European workers, which, in turn, allowed South Africa to increase its White population.¹⁵⁴ The transformation of Whites into a numerical majority, and the use of White working-class immigrants as a new middle-tier community, diminished the need to favor

149. See Van der Horst, *supra* note 142, at 126 ("The increase in the range of jobs in the industrial economy, together with colour bars in employment and the improvement in the educational standard of the Coloured people have increased both the incentive and the capacity of people of mixed racial origin to 'pass' as whites . . ."); see also Ford, *supra* note 146, at 1277 ("In such a system it was not uncommon for many individuals to wish to challenge the classification they had been assigned. For example, a 'coloured person' could enjoy greater benefits if he could be reclassified as a 'white person.'").

150. See GERHART, *supra* note 146, at 277-84 (reporting that Coloureds did not mobilize against apartheid as long as they were enjoying greater incomes and legal rights as an intermediate group separate from Bantus); HOAGLAND, *supra* note 145, at 110 (finding that Coloureds were in a "firm alliance with the white man").

151. See ROBERT FATTON JR., BLACK CONSCIOUSNESS IN SOUTH AFRICA: THE DIALECTICS OF IDEOLOGICAL RESISTANCE TO WHITE SUPREMACY 67, 158 & n.12 (1986) (maintaining that the inclusion of Coloureds within the Black identity was instrumental to the success of the Black Consciousness movement); LEO KUPER, AN AFRICAN BOURGEOISIE: RACE, CLASS, AND POLITICS IN SOUTH AFRICA 49 (1965) (noting that persons traditionally classified as Coloureds identified themselves with Whites, because Whites were "at the apex of the system of stratification," but that the Coloureds changed their position when they began to face new discrimination that lead to their alignment with Black Africans); Lawrence, *supra* note 56, at 827 (noting that persons classified as Coloureds began to identify themselves as Black, thereby solidifying the opposition to White supremacy).

152. See HOAGLAND, *supra* note 145, at 110.

153. *Id.* at 118.

154. See *id.* at 110.

mixed-race persons as a buffer class between the White elite and the economically exploited Bantus.¹⁵⁵

In contrast, Whites in the United States never needed to create a biracial middle tier, because Whites always far outnumbered persons of color relegated to the bottom of the racial hierarchy.¹⁵⁶ The U.S. use of the "multiracial-type" categories of octoroon,¹⁵⁷ quadroon,¹⁵⁸ and Mulatto¹⁵⁹ in the censuses of 1850-1920 has been described more as a reflection of the growth of the eugenics movement's ranking of genetic intelligence¹⁶⁰ than as a serious attempt to institutionalize a

155. *Id.* ("[A]partheid's relentless destruction of [Coloureds'] bridges into the white world may, in time to come, drastically alter their firm alliance with the white man, if it has not already begun to do so."); see also *infra* note 302 and accompanying text.

156. See HACKER, *supra* note 101, at 227 (estimating that the White population of the United States from 1790 through 1990 was always a minimum of 80% of the entire population); see also HARRIS, *supra* note 130, at 128-31 (comparing the United States demographics to Latin America's small populations of Whites and large populations of Blacks). It should be noted that within the contiguous United States there has been regional variance in the recognition of mixed-race persons, such as in the case of "Creoles" in Louisiana. See DOMÍNGUEZ, *supra* note 35, at 121-22 (describing the Louisiana legislature's formation of a militia corps comprised solely of Creoles). Significantly, this variance follows the model discussed herein of utilizing mixed-race persons as a buffer class in communities where Whites fear the possibility of becoming a numerical minority. See DAVIS, *supra* note 41, at 35 (noting that South Carolina accorded mixed-race persons special status distinct from "pure" Blacks who outnumbered Whites).

157. An octoroon was defined as one-eighth Black. KATHY RUSSELL ET AL., *THE COLOR COMPLEX: THE POLITICS OF SKIN COLOR AMONG AFRICAN AMERICANS* 18 (1992).

158. A quadroon was defined as one-quarter Black. *Id.*; see also DAVIS, *supra* note 41, at 36-37 (reporting the wide use of the term "quadroon" to describe individuals who were considered one-fourth African).

159. The term "Mulatto" denotes a person of mixed Black and White heritage. DAVIS, *supra* note 41, at 6. Written instructions for the census enumerators of the 1870 and 1880 censuses specifically stated, "[The color] column is always to be filled. Be particularly careful in reporting the class Mulatto. The word is here generic, and includes quadroons, octoroons, and all other persons having any perceptible trace of African blood. Important scientific results depend upon the correct determination of this class." HYMAN ALTERMAN, *COUNTING PEOPLE: THE CENSUS IN HISTORY* 275 (1969) (internal quotation marks omitted).

160. The eugenics movement developed in the United States by 1895 and continued decades later. EDWARD J. LARSON, *SEX, RACE AND SCIENCE: EUGENICS IN THE DEEP SOUTH* 22 (1995). The years 1910 through 1920 saw the publication of a number of articles that attributed the successes of certain people of color to their possession of White blood. See, e.g., E.B. Reuter, *The Superiority of the Mulatto*, 23 *AM. J. SOC.* 83, 87 (1917) ("The most simple and obvious means of accounting for the observed superiority of the mulattoes is to deny the equality of the parent races and to attribute the superiority of the mixed-blood individuals to the fact of a superior racial heredity."). The Census Bureau's stated reason for discontinuing the use of the Mulatto-type categories after the 1920 census was that by the 1920s, three-quarters of all Blacks in the United States were racially mixed, and thus, there was no longer a need to count out Mulattoes separately (despite the fact that those counted as "pure" Blacks in past census years were also mixed). Gary L. Flowers, *New Racial Classifications in 2000 Census: A Setback for Civil Rights Enforcement?*, COMMITTEE REP.—LAW. COMMITTEE FOR CIV. RTS. UNDER L., Winter 1994-1995, at 1, 4.

mixed-race, middle-tier buffer class.¹⁶¹ Rather, the United States has periodically imported White immigrants who effectively served as a working-class buffer between its own White elite and the non-White underclass.¹⁶² For instance, when national concern grew about the increasing number of Mulattoes, appeals for immigrants from Europe were quickly made.¹⁶³ Once here, these White immigrants were en-

Interestingly, the retrenchment of civil rights accorded to Blacks during Reconstruction and the use of genetic arguments to distance Mulattoes from their African ancestry parallels the current demand for recognition of mixed-race persons as distinct in the climate of eroding civil rights and resurging eugenic theories of racial superiority. See RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 295-96 (1994) (detailing the propagation of scientifically unsubstantiated theories for racial genetic superiority); MICHAEL LIND, *UP FROM CONSERVATISM: WHY THE RIGHT IS WRONG FOR AMERICA* 196-97 (1996) (asserting that current scholarship is based on the eugenic policies of Nazi Germany); *THE BELL CURVE WARS: RACE, INTELLIGENCE, AND THE FUTURE OF AMERICA* 3 (Steven Fraser ed., 1995) ("Not since the eugenics craze of the 1920s has this line of thought occupied a serious place on the national agenda.").

161. It should be noted, however, that the failure to institutionalize a separate mixed-race intermediary class did not stop Whites from making micro-level distinctions between Mulattoes and darker-skinned Blacks based on a greater sense of comfort with those persons of color who more closely approximated whiteness in the midst of the rule of hypodescent. RUSSELL ET AL., *supra* note 157, at 18 (noting that plantation owners initiated the legacy of recognizing distinctions between Mulattoes and Blacks with the rigid White-supremacist social order that accorded light-skinned Blacks "[c]oveted indoor assignments, including artisan, driver, valet, seamstress, cook, and housekeeper," while dark-skinned Blacks were relegated to field work).

162. See IRA BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH* 231 (1974) ("The influx of Irish and German workers into Southern cities speeded the exclusion of Negro freemen from many occupations. . . . With white workers available in growing numbers, white employers exercised their racial preference in many trades traditionally dominated by blacks."); KITTY CALAVITA, *U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR: 1820-1924*, at 3 (1984) ("None of these [European] migrations was truly spontaneous but was triggered and shaped by state policies."); JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925*, at 17-18 (2d ed. 1988) (finding that, after the Civil War, federal and state governments encouraged European immigration); JAMES OLIVER HORTON, *FREE PEOPLE OF COLOR: INSIDE THE AFRICAN AMERICAN COMMUNITY* 134 (1993) (reporting that, before and after the Civil War, free Blacks in most northern cities "faced stiff competition from immigrant workers who generally refused to tolerate blacks as skilled co-workers"); Hernández, *supra* note 128, at 5 (suggesting that immigration was used "to fill status gaps").

163. One commentator has noted:

The result was a growing mass of "mungrels and mulattoes," with the inevitable consequence that "in the course of a few years . . . half the inhabitants of the city will be people of Colour." Along with the revulsion at such matings came appeals on behalf of immigrants from Europe:

The hardy Irish, and industrious Germans, flying from European bondage and settling among us is vastly advantageous, and should be greatly encouraged.

NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* 55 (1995) (omission in original) (citation omitted) (quoting THOMAS BRANAGAN, *SERIOUS REMONSTRANCES ADDRESSED TO THE CITIZENS OF THE NORTHERN STATES, AND THEIR REPRESENTATIVES* 79, 80 (1805)).

couraged to support the maintenance of slavery and the racial caste system it enforced.¹⁶⁴ From 1820 to 1920, exactly 29,656,589 Europeans legally immigrated to the United States, constituting anywhere from 70% to 96% of all legal immigrants admitted.¹⁶⁵

Between 1911 and 1950, the systemic desire for greater numbers of White immigrants informed immigration legislation.¹⁶⁶ The Immigration Act of 1924¹⁶⁷ institutionalized quotas that favored immigrants from northern and western European nations and barred Blacks.¹⁶⁸ Blacks were barred as immigrants despite the fact that the 1924 quota system was established with the rationale that preference should be given to persons whose origins matched this nation's "native born" population for easier assimilation.¹⁶⁹ In 1929, eighty-two percent of the immigrants allowed into the United States were from northern and western Europe.¹⁷⁰ The use of European immigrants as a middle tier in the United States relegated non-White immigrants such as the

164. *Cf. id.* at 97 ("[T]he poorer class of Irish immigrants in America, are greater enemies to the negro population, and greater advocates for the continuance of negro slavery, than any portion of the population in the free States." (quoting John Finch, *Notes of Travel in the United States*, reprinted in 7 JOHN R. COMMONS & ASSOCS., A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 60 (1958))). Later, immigrant labor unions excluded Blacks from virtually all trades. See Crenshaw, *supra* note 122, at 1375 ("[I]t was for the precise purpose of assimilating into the American mainstream that immigrant laborers adopted these exclusionary policies.").

165. SILVIA PEDRAZA & RUBÉN G. RUMBAULT, ORIGINS AND DESTINIES: IMMIGRATION, RACE, AND ETHNICITY IN AMERICA 4 (1996).

166. *See id.* at 7 ("With the passage of . . . the 1924 Immigration and Nationality Act, immigration was restricted on the basis of national origins, and quotas were set that favored the immigrants from northern and western European nations . . .").

167. 43 Stat. 153 (1924) (previously codified in scattered sections of 8 U.S.C.) (repealed 1952).

168. Subdivisions (b) and (c) of section 11 of the Act specifically excluded "descendants of slave immigrants" from consideration as inhabitants in the continental United States in 1920, which was the basis in subdivision (a) for admitting foreign-born individuals of the same "nationality." § 11(a)-(c), 43 Stat. at 159 (previously codified at 8 U.S.C. § 211) (repealed 1952) (emphasis added). The Act has been considered "[t]he most sweeping example of national nativistic policy." Berta Esperanza Hernández-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century*, 23 FORDHAM URB. L.J. 1075, 1093 (1996). At the same time, section 3 of an Act of February 5, 1917 banned all immigration from Asia. Immigration Act of 1917 § 3, 39 Stat. 874, 875-78 (1917) (codified at 8 U.S.C. § 136) (repealed 1952).

169. *See* A. Warner Parker, *The Quota Provisions of the Immigration Act of 1924*, 18 AM. J. INT'L L. 737, 740 (1924) (describing Senator Reed's testimony that "we can easily assimilate [immigrants] if their origins resemble the origins of the people they find when they get here" (internal quotation marks omitted)).

170. *See* PEDRAZA & RUMBAULT, *supra* note 165, at 8. The national origins quota system was in place until 1965. The 1965 amendments to the Immigration and Nationality Act of 1952 abolished the national origins quota system. 1965 Amendments to the Immigration and Nationality Acts of 1952, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended at 8 U.S.C. § 1101-1106 (1994)).

Chinese—who themselves were completely excluded by the Immigration Act of 1917¹⁷¹—to the lower status of Blacks.¹⁷²

In contrast, the persistent recognition of mixed-race classes in countries such as Brazil¹⁷³ paralleled the continued demographic pattern of poor Blacks generally outnumbering Whites.¹⁷⁴ Consequently, there has been an enduring need in Brazil for mixed-race persons to act as a buffer between these two classes in order to maintain the supremacy of a White minority.¹⁷⁵ It is this same fear of demographic suffusion in the United States that partially drives the burgeoning White interest in the multiracial category.¹⁷⁶

In the 1980s, when discussion of the multiracial category first arose in the United States,¹⁷⁷ the public began to draw its attention to the concern that White men would soon be "the new minority."¹⁷⁸ By the 1990s, the media frequently informed the public that the decline

171. 39 Stat. 874 (1917) (previously codified at 8 U.S.C. § 136) (repealed 1952).

172. See *supra* note 169; cf. *Gong Lum v. Rice*, 275 U.S. 78, 81, 87 (1927) (rejecting the claim of a Mississippi-resident businessman of Chinese citizenship, that his daughter, who was a U.S. citizen, should be accorded the same rights of White children and transferred from a Black to a White school district).

173. See *supra* notes 131-136 and accompanying text. As stated earlier, this was not a phenomenon peculiar to Latin America. See *supra* note 114. In eighteenth century Jamaica, for instance, when the population was 90% Black, a special place was carved out into law for an intermediary Mulatto class. This 1733 law stated that after the third generation, Mulattoes "shall have all the Privileges and Immunities of his Majesty's Subjects of this Island, provided they are brought up in the Christian Religion." DEGLER, *supra* note 108, at 239-40 (internal quotation marks omitted).

174. See FLORESTAN FERNANDES, *THE NEGRO IN BRAZILIAN SOCIETY* 67 (Phyllis B. Eveleth ed. & Jacqueline D. Skiles et al. trans., Colum. Univ. Press 1969) (1965).

175. See *supra* note 122 and accompanying text.

176. See *Multiracial Hearings*, *supra* note 2, at 295 (testimony of Anthony M. Messina, Associate Professor of Political Science, Tufts University) (asserting that the press periodically alerts the nation of projected increases in the growth of "minority" populations and the potential for having the nation "swamped" with people of color).

177. See, e.g., KATHLYN GAY, *THE RAINBOW EFFECT: INTERRACIAL FAMILIES* 24-25 (1987) (asserting that a mixed-race category will give biracial children the best of both worlds); *No Place for Mankind*, *TIME*, Sept. 4, 1989, at 17, 17 (expressing the difficulty in counting children of interracial marriages who do not want to choose just one box on high-school data forms). The Association of MultiEthnic Americans, a California-based confederation of interracial groups located nationwide, was founded in 1988 to assist parents of multiracial children in challenging existing public-school racial classifications. *Multiracial Hearings*, *supra* note 2, at 128 (statement of Carlos Fernández, President, Association of MultiEthnic Americans).

178. *A New Minority: Male Whites*, *REC. N. N.J.*, Aug. 1, 1984, at C17, available in 1984 WL 2433000 (providing government statistics that demonstrate that "[f]or the first time in American history, White men are a minority in the nation's work force"); *Report: Number of Non-Hispanic Whites in Dade County Declined*, *ST. PETERSBURG TIMES*, Mar. 26, 1987, at 2B, available in 1987 WL 5748117 (reporting that in the first five years of the 1980s, the number of non-Hispanic Whites in Dade County dropped by 115,000); *The Biggest Secret of Race Relations: The New White Minority*, *EBONY*, Apr. 1989, at 84 (estimating that, by the year

in the White population had reached “dramatic” proportions.¹⁷⁹ In 1990, *Time* magazine reported that, “[s]omeday soon, surely much sooner than most people who filled out their Census forms last week realize, white Americans will become a minority group.”¹⁸⁰ Whites’ alarm about becoming a minority has also expressed itself in polling data indicating skewed perceptions of the nation’s current demographics and job opportunities.¹⁸¹

The concern with the “browning of America”¹⁸² has accompanied increasing consternation with the continued existence of racial repatriation programs¹⁸³ and fears of race wars akin to White-minority ante-

2000, Blacks and Hispanics will constitute a majority in nearly one-third of the fifty largest U.S. cities).

179. See *A New Minority: Male Whites*, *supra* note 178.

180. William A. Henry III, *Beyond the Melting Pot*, TIME, Apr. 9, 1990, at 28, 28; accord Lawrence Auster, *Immigration Gives Birth to Unfree America*, ATLANTA J. & CONST., May 15, 1991, at A13, available in 1991 WL 7791633 (setting forth a concern that Whites of European ancestry will be a minority in the United States by 2050 and specifically asserting that the nation’s “ability to preserve and transmit . . . common heritage [will] depend [] on the continued existence of a majority population that believes in it”); Henry, *supra*, at 28 (“By 2020, a date no further into the future than John F. Kennedy’s election is in the past, the number of U.S. residents who are Hispanic or nonwhite will have more than doubled, to nearly 115 million, while the white population will not be increasing at all.”); Mathews, *supra* note 42 (acknowledging a fear of a White minority by the year 2040).

181. *Immigration Facts*, PORTLAND OREGONIAN, Mar. 26, 1996, at A6, available in 1996 WL 4123093 (reporting a survey showing that White Americans believe that 49.9% of the nation’s population is White when in actuality the percentage is 74%, that 23.8% is Black when in actuality the percentage is 11.8%, that 10.8% is Asian when in actuality the percentage is 3.1%, and that 14.7% is Hispanic when in actuality the percentage is 9.5%); PATRICIA J. WILLIAMS, THE ROOSTER’S EGG 97-98 (1995) (noting the concern of a White commercial lawyer, voiced at a professional meeting attended mostly by Whites, that “[n]obody’s hiring white guys anymore”). The push to make English the “official language” of the nation is an extension of the race-based fear of an impending White minority; Mark Falcoff, *Our Language Needs No Law*, N.Y. TIMES, Aug. 5, 1996, at A17, available in LEXIS, News Library, *Nyt File* (suggesting that English-only proponents are “kept awake at night by imaginary perils” of being subsumed by Spanish-language speakers but that these English-only proponents are not worried about any of the other 150 languages spoken in United States).

182. See Itabari Njeri, *Beyond the Melting Pot: In America, Blending in Was Once the Ideal*, L.A. TIMES, Jan. 13, 1991, at E1, available in 1991 WL 2336718 (labeling demographic shifts in the United States as the “browning of America”); see also Henry, *supra* note 180, at 28 (describing how “[t]he ‘browning of America’ will alter everything in society, from politics and education to industry, values and culture”).

183. See Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream That Is America*, 23 HASTINGS CONST. L.Q. 1115, 1120 (1996) (postulating that many who oppose affirmative action are concerned with “[c]hanges in demographics [that] have created the specter of a coming majority of color that threatens to eclipse the numerical white majority”); Bill Johnson, “Mixed Race” Category Shows Folly of Preferences, DETROIT NEWS, Mar. 22, 1996, at A10, available in 1996 WL 2913337 (estimating that because Whites are soon to be a numerical minority, society should eradicate racial classifications and end “all group entitlements”).

bellum fears of slave revolts.¹⁸⁴ Thus, the desire of some mixed-race persons to be recognized as members of a distinct racial group coalesces with the systemic motivation to defuse demands for racial justice and maintain a structure of White supremacy.¹⁸⁵ Such a posture resonates with the Latin American use of mixed-race persons to buffer the numerical minority of Whites from the equality concerns of the majority of non-Whites.¹⁸⁶

Yet, Latin American race relations are a poor model to emulate. The recognition of a separate class of mixed-race persons in Brazil has not led to a genuinely color-blind society, because the desire to avoid being categorized with a denigrated Black populace has resulted in a hyper-consciousness of color gradations and phenotypical traces of African ancestry.¹⁸⁷ In fact, some Brazilians describe their race relations

184. See CARL T. ROWAN, *THE COMING RACE WAR IN AMERICA: A WAKE-UP CALL* 282 (1996) (maintaining that the arming of White hatemongers who want "to take back America for the white race" by "bloody racial strife" is inevitable); Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 402-03 (1989) (suggesting that Justice Scalia has drawn upon the unconscious fear of past slave rebellions in his condemnation of affirmative action).

185. In fact, one can often view the MCM as a partisan issue, "with conservative Republicans in Congress lining up behind a multiracial category and liberal Democrats defending the status quo" because of their commitment to race-conscious equality measures. Carl M. Cannon, *Census Faces Racial Issue*, BALTIMORE SUN, June 29, 1997, at 1A, available in 1997 WL 5518631; see also Scott Shepard, *Tensions Mount: OMB Nears Decision on Multiracial Category for Census*, COX NEWS SERVICE, July 7, 1997, available in LEXIS, News Library, Wires File (reporting that Republican House Speaker Newt Gingrich has written the OMB directly to lobby for a mixed-race census count and that Republican Wisconsin Congressman Thomas Petri sponsored a bill to institute a multiracial category). The U.S. systemic interest in the MCM also coalesces with the Census Bureau's recent concern over the expense of continuing to collect racial data and confront ongoing claims that racial minorities are persistently undercounted. See *Multiracial Hearings*, supra note 2, at 68 (testimony of Reynolds Farley, Research Scientist, Population Studies Center, University of Michigan) ("It would be nice if we had a color-blind society and if we could save money by eliminating the race question from the census . . ."); see also *Wisconsin v. City of New York*, 116 S. Ct. 1091, 1094-95 (1996) (citing Census Bureau estimates that racial minorities are consistently undercounted in the decennial censuses); Steven A. Holmes, *Tentative Pact Will Allow Census to Test the Sampling Method*, N.Y. TIMES, Nov. 1, 1997, at A2, available in LEXIS, News Library, Nyt File (noting that Republicans have opposed all but limited testing of Census Bureau use of statistical sampling because of concerns that formerly undercounted racial minorities would harm them politically).

186. Cf. Nobles, supra note 124, at 213 (pointing out that the lack of claims of racial discrimination in Brazil occurs because race is viewed as irrelevant in Brazil's color-blind society).

187. See DEGLER, supra note 108, at 102, 207-08 (describing the color consciousness of Brazilians and their classifications of mixed-race people as Mulattoes, Morenos, or Pardos); Marcus, supra note 117 (reporting that a White British woman who initially thought Brazil had an easy mixing of all colors was disabused of that notion when she married a Black Brazilian and found that "'people nudge each other when we pass'"); cf. ADRIENNE RICH, *Disloyal to Civilization: Feminism, Racism, Cynophobia*, in ON LIES, SECRETS, AND SILENCE 275,

as “veiled apartheid.”¹⁸⁸ Brazilian commentators have noted that the country’s Mulatto buffer class is a “‘much more intelligent [mechanism] for subjugating a race than South Africa, which used guns.’”¹⁸⁹ This description is particularly apt when one considers that the promotion of a mixed-race class was motivated by the desire to “whiten” the country by having Blacks *disappear* through a mixing of the races,¹⁹⁰ and that the census colors are ranked hierarchically from the most positively valued color of White to the pejoratively viewed color of Black.¹⁹¹ The whitening ideal “remains encoded and enmeshed in the language of ‘a mixed people’ which is generally taken to mean, a ‘lighter’ if not ‘whiter’ people.”¹⁹² Thus, color-blindness has not led to a transcendence of race but instead to a reinforcement of a racial caste system in the one region long touted as a racial democracy.¹⁹³

Given the Latin American experience with multiracial categories, with Brazil as the primary example, the MCM should note the risk that its demands for recognition will be co-opted by Whites concerned with self-imposed fears of demographic challenges to the hierarchy of White supremacy.¹⁹⁴ Long-disputed Latin American attitudes toward

300 (1979) (“I no longer believe that ‘colorblindness’—if it even exists—is the opposition of racism; I think it is, in this world, a form of naiveté and moral stupidity.”).

188. See Marcus, *supra* note 117 (reporting that the mother of an assault victim believes that “Brazil has a system of ‘veiled apartheid’”). Afro-Brazilian politician Abdias do Nascimento suggests that “‘the apartheid of Brazil is much worse than that of South Africa.’” Nobles, *supra* note 124, at 166 (quoting *Apartheid no Brasil e pior que na Africa, diz secretario*, FOLHA DE SAO PAULO, Aug. 2, 1991).

189. Marcus, *supra* note 117 (quoting Black Brazilian lawyer Carlos Alberto Medeiros).

190. See GILBERTO FREYRE, *THE MANSIONS AND THE SHANTIES: THE MAKING OF MODERN BRAZIL* 418 (1963) (reporting that “it is almost impossible to find anthropologically pure Africans or Negroes” in Brazil today). When President Theodore Roosevelt toured South America in 1913, a Brazilian government official assured him that there would be no “‘Negro problem,’” because through mixing “‘there would be no Negroes’” in the future. Marcus, *supra* note 117; accord Gledhill, *supra* note 117, app. 1, at 355 (noting the “whitening” ideal of the Latin American race-relations model).

191. George Reid Andrews, *Racial Inequality in Brazil and the United States: A Statistical Comparison*, 22 ESTUDOS AFRO-ASIÁTICOS 47 (1992).

192. Nobles, *supra* note 124, at 112.

193. Cf. GILBERTO FREYRE, *THE MASTERS AND THE SLAVES* 83 (Samuel Putnam trans., 2d rev. ed. 1986) (premising a theory of “racial democracy” upon the claim that racial mixing results in a racially harmonious society); *id.* at 182 (“The friction here [in Brazil] was smoothed by the lubricating oil of a deep-going miscegenation . . .”); Anani Dzidzienyo, *Brazilian Race Relations at the End of the 20th Century*, in RACE, ETHNICITY & GENDER: A GLOBAL PERSPECTIVE 197, 202 (Samuel P. Oliner & Phillip T. Gay eds., 1997) (“Long held up as the perfect model of a racially egalitarian society absent of deeply entrenched patterns of racial prejudice and discrimination, Brazil enters the 21st century having to face up to the fact that it has never been the egalitarian society it has been widely perceived to be.”).

194. One commentator has noted that “a dominant culture can be relatively unconcerned with a subordinated group’s definition of itself . . .” T. Alexander Aleinikoff, A

race are disconcertingly echoed in U.S. multiracial discourse. For instance, the belief that racial mixture will destroy racism has been featured prominently in the promotion of a mixed-race census count.¹⁹⁵ The multiracial discourse narrative is that mixing away racism will absolve the nation from having to address entrenched racial disparities in socioeconomic opportunity.¹⁹⁶ But when racial mixture as a solution to racial conflict has been promoted in the past, the burden has been consistently placed upon Blacks to mix.¹⁹⁷ In effect, assimilation of Blacks into whiteness, not so much mixture itself, has been an underlying goal of miscegenation racial-democracy campaigns in Latin America.¹⁹⁸ And the result has always been the maintenance of White supremacy.¹⁹⁹

Appropriation of the MCM by disaffected Whites is also a concern, because, as is widely known, subordinated group members will eventually flee from such classifications when given the choice.²⁰⁰

Case for Race-Consciousness, 91 COLUM. L. REV. 1060, 1083 (1991). Accordingly, when Whites do take an interest in identity politics, one must question the motivation of the interest.

195. The following assertion is indicative of this discourse: "Since our father was black and our mother was Jewish, we called ourselves Jewbros. Me and my brothers, the race of the future. Everybody's going to be brown in the future. The pure blacks and the pure whites are going to be bred out of the race." STUDES TERKEL, *RACE: HOW BLACKS AND WHITES THINK AND FEEL ABOUT THE AMERICAN OBSESSION* 398 (1992) (interviewing Leo King). Compare a similar assertion: "She [interviewee's mixed-race daughter] carries a strength that neither of her parents has, because she's the product of our daring to reach over, because we loved each other. She's the future." *Id.* at 392 (interviewing Hank De Zutter); accord Tom Morganthau, *What Color Is Black?*, NEWSWEEK, Feb. 13, 1995, at 63, 65 ("If your object is the eventual integration of the races, a mixed-race or middle group is something you'd want to see developing . . . The middle group grows larger and larger, and the races eventually blend.") (quoting Harvard sociologist Orlando Patterson)).

196. Cf. Jim Chen, *Unloving*, 80 IOWA L. REV. 145 *passim* (1994) (arguing in favor of interracial marriage and the disregard of race).

197. See FANON, *supra* note 108, at 51 (describing the reasons for Blacks' assimilation into White society).

198. See FREYRE, *supra* note 193, at xvi (noting that Brazilian Black and White cultures, once separate and distinct groups, "had their [antagonism] broken by the interpenetration of cultures and miscegenation"); Thomas E. Skidmore, *Racial Ideas and Social Policy of Brazil, 1870-1940*, in *THE IDEA OF RACE IN LATIN AMERICA, 1870-1940*, at 7, 9 (Richard Graham ed., 1990) (describing the whitening ideal of Brazil's promotion of racial mixture).

199. See *supra* notes 187-193 and accompanying text.

200. The Chairperson of the U.S. Commission on Civil Rights noted:

I know in the Black community, a large number of people who feel that if they had another choice they would sure exercise it, because they think the economic opportunities that would flow from being identified as "other," whatever "other" is, in this culture is an advantage and not a liability.

Multiracial Hearings, *supra* note 2, at 273 (testimony of Arthur A. Fletcher, Chairperson, U.S. Commission on Civil Rights). Thus far, experiments with the multiracial category have demonstrated that Native American and Asian-Pacific Islander numbers tend to decrease when a multiracial category is offered. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, STATISTICAL NOTE NO. 40, TESTING METHODS OF COLLECTING RACIAL AND ETHNIC

While the United States has generally taken a binary White/non-White approach to racial stratification,²⁰¹ given its current concern with the decreasing number of Whites and the consistent White preference for persons of color who more closely approximate a White appearance, the United States is still susceptible to acknowledging a Latin-American-type, mixed-race buffer class.²⁰² In addition, the long-

INFORMATION: RESULTS OF THE CURRENT POPULATION SURVEY SUPPLEMENT ON RACE AND ETHNICITY 74 tbl.7 (1996) (showing those choosing the American Indian category as decreasing from 1.06% of all respondents to 0.79% when a multiracial category was offered); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, POPULATION DIVISION WORKING PAPER NO. 16, FINDINGS ON QUESTIONS ON RACE AND HISPANIC ORIGIN TESTED IN THE 1996 NATIONAL CONTENT SURVEY 16 tbl.A (1996) (showing those choosing the American Indian category as decreasing from 0.6% of all respondents to 0.4% when a multiracial category was offered, and the Asian and Pacific Islander respondents decreasing from 4.0% to 2.7%). Although the aforementioned limited surveys regarding the multiracial category have not noted much of a decrease in those choosing the Black category, one could predict a similar decrease in Black numbers if a multiracial category becomes socially acceptable as a middle-tier category. See BUREAU OF LABOR STATISTICS, *supra*, at 74 tbl.7 (illustrating that those choosing the Black category maintained roughly 10% of all respondents regardless of the availability of a multiracial category); BUREAU OF THE CENSUS, *supra*, at 16 tbl.A (illustrating that Black respondents decreased from 10.4% to 9.4% when a multiracial category was offered and a Hispanic-origin ethnicity question preceded the race categories). Such a prediction is rooted in the historical attraction that middle-tier categories have for oppressed communities. See BENJAMIN BRAWLEY, A SOCIAL HISTORY OF THE AMERICAN NEGRO 330-31 (reprinted 1971) (1921) (noting that in the antebellum United States, light-skinned persons of African ancestry, given their ability to obtain freedom, had been known to separate themselves from those persons identified as "pure" Black); E. Ophelia Settle, *Social Attitudes During the Slave Regime: Household Servants Versus Field Hands*, in 1 THE MAKING OF BLACK AMERICA: ESSAYS IN NEGRO LIFE AND HISTORY 148, 150-51 (August Meier & Elliott Rudwick eds., 1969) (finding that the middle-tier group of Mulattoes, who were often accorded the elevated status of house slaves, were more likely to turn in fugitive slaves than were the "pure" Black slaves, who were relegated to the position of field hands).

201. See Ramirez, *supra* note 34, at 958 ("When courts and legislatures first created race-conscious remedies in the 1960s, the United States was seen as a black and white society.")

202. See BRAWLEY, *supra* note 200, at 331 (contending that as a predominantly White country, the United States has frequently given mixed-race persons some advantage over those perceived as "pure" Blacks); FUNDERBURG, *supra* note 58, at 197, 337 (detailing responses of biracial interviewees who admit that biracial persons can be extended better opportunities and can socialize more freely with White persons); HACKER, *supra* note 101, at 12 (describing lighter skin color as an advantage in U.S. society); RUSSELL ET AL., *supra* note 157, at 125 (noting the likelihood in contemporary U.S. society that lighter-skinned Blacks will be more often hired and promoted by White employers than equally qualified darker-skinned Blacks); Leonard M. Baynes, *If It's Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow Than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 DENV. U. L. REV. (forthcoming 1997) (manuscript at 3, on file with author) (stating that darker-skinned persons are subjected to more discrimination than lighter-skinned persons of color); Robyn Meredith, *Power Deal*, USA TODAY, June 21, 1995, at 1B, available in LEXIS, News Library, Usatdy File (reporting that a Ford Foundation and Russell Sage Foundation report—the Multi-City Study of Urban Inequality—found that race and skin tone make a difference in job placement rates in the United States and that men who are Black and dark-skinned have their odds for employment reduced by 52%

standing U.S. habit of utilizing a system of exceptionalism, whereby an individual Black person may be deemed socially acceptable "because you are not like the rest of them,"²⁰³ demonstrates the ability of White North Americans to make distinctions among subordinated group members even within a bipolar, hypo-descent framework.²⁰⁴ Societal willingness to make distinctions within a subordinated class is integral to the construction of privileged middle-tier communities.²⁰⁵ There is also some MCM willingness for social distinction of biracial persons, as revealed by some proponents' opposition to a mixed-race census count that omits an actual multiracial category: "We need the terminology of "multiracial" in there As it is, my children cannot be multiracial children. My children can be "check-all-that-apply" children, and I do not consider that fair."²⁰⁶

Yet, as previously noted, even without a susceptibility to recognizing a mixed-race community as an intermediate group above "pure" Blacks, a mixed-race census count inherently undermines the MCM's

after accounting for other factors); Erica D. Shelton, *Beauty 'Ideal' Is All Mixed Up*, CHI. SUN-TIMES, June 11, 1996, at 30, available in 1996 WL 6749749 ("Like color discrimination of the past, films, television and music videos have contributed to putting a well-intended, inclusive notion like multiculturalism to poor use. Black models and actresses have grown in prominence, but a disproportionate number of biracial women have taken center stage in the entertainment industry."). This is a related but separate dynamic from the color distinctions that Blacks make within the Black community itself. See *Walker v. IRS*, 713 F. Supp. 403, 407-08 (N.D. Ga. 1989) (order) (extending Title VII protection to acts of intraracial discrimination); RUSSELL ET AL., *supra* note 157, at 107-23 (documenting the colorism phenomenon within the Black community, wherein lighter-skinned Blacks are often accorded social favoritism).

203. See Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 278-79 (1994). Kastely explains:

One dangerous effect of this contemporary form of white racism occurs when white people treat a few black people as special and worthy of inclusion in dominant cultural and political life, while treating all other black people as Other, as those who do not conform to the norm of human life, and as unworthy of respect or concern.

Id.; accord ROWAN, *supra* note 184, at 247-48 (noting that American journalists view General Colin Powell as an exception—a Black man who "transcended" race and was thus palatable as a potential presidential candidate).

204. See Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673, 684-86 (1985) (discussing the social stratification within the Black community); see also *supra* note 110 (defining hypo-descent).

205. Pettigrew, *supra* note 204, at 685.

206. Elizabeth Shogren, *Panel Rejects "Mixed-Race" Census Category*, L.A. TIMES, July 9, 1997, at A1, available in 1997 WL 2227486 (quoting Susan Graham, national MCM leader and President of Project RACE); see also El Nasser, *supra* note 19 (quoting a multiracial resident of New Orleans as stating: "I still think they should have a multiracial category I guess now I would check off Asian/Pacific Islander, I would have to check off white and black. I would just feel more comfortable with multiracial.").

stated goal of racial equality by hindering victims of oppression from psychologically identifying with the plight of other subordinated community members.²⁰⁷ Thus, the proposal to add a multiracial category, which includes an inquiry into the race of each parent of a mixed-race respondent, would not be a costless “compromise.”²⁰⁸ Furthermore, the inclusion of parental racial-component information, or an ability to check more than one racial category, could very well replicate the antebellum fractional approach to race, which is epitomized by the categories of octoroon, quadroon, and Mulatto—social groups systematically encouraged to dissociate from subordinated Blacks.²⁰⁹

Apart from the concern with the advisability of recognizing a mixed-race buffer community throughout the United States, the MCM must be wary of advancing its proposal under the banner of color-blindness, which has served as a veil for the maintenance of race-based privilege in recent United States case law, as Part II.C discusses below.

In fact, the simultaneous growth of multiracial discourse and civil rights retrenchment should alert the MCM to the appropriation of its identity movement by others more concerned with dismantling social-justice programs.²¹⁰ This phenomenon is particularly well highlighted in the development of color-blind jurisprudence. When Justice Scalia declares that “[i]n the eyes of government, we are just one

207. See *supra* note 120 and accompanying text; see also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1191-94 (1995) (discussing how cognitive psychological studies suggest that once a group identity is formed, polarization of outgroup members by ingroup members could be explained by “[the] subjects’ motivations and attempts to balance two competing needs: a desire to enhance their relative social standing by disparaging outgroup members . . . and a need to preserve a belief in their own unbiased evaluative fairness”).

208. But see Hickman, *supra* note 34, at 1262-64 (proposing to count multiracial persons on a line separate from race in order to “celebrate” mixed-race persons in the population). Although Hickman opposes the inclusion of a multiracial category as a racial classification, her “separate-line” proposal may inadvertently support the MCM position that mixed-race persons are symbols of racial harmony that should be celebrated.

209. See, e.g., Payson, *supra* note 34, at 1282 (favoring the inclusion of parental racial-component information in the census to “mitigate any incidents of ‘defection’ from monoracial categories”); see also *supra* notes 157-158, 200-205 and accompanying text (discussing census categories for Mulattoes prior to 1920 and the dissociation of mixed-race Blacks from other Blacks).

210. Cf. Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467, 1471 (1996) (arguing that the backlash against efforts to address racial subordination is advanced by denying the salience of race); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 828 (1997) (noting “the law’s intensifying dissociation from racial justice, or what one sociologist calls America’s ‘retreat from racial justice’” (quoting STEPHEN STEINBERG, TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY 213 (1995))).

race here[; i]t is American,"²¹¹ it is in the context of a case that hinders the federal government's ability to institute affirmative action programs.²¹²

C. *The Continuation of the Color-Blind Jurisprudence Trajectory*

In *constitutionalizing its wishful thinking*, the majority today does a grave disservice . . . to those victims of past and present racial discrimination in this Nation whom government has sought to assist²¹³

Color-blindness is the insistence in law that the government should never take race into account, regardless of the context in which race is used.²¹⁴ The MCM's idealization of color-blindness and its disdainful view of "divisive" racial classifications parallel the Supreme Court's current trend of viewing racial classifications as a morally and politically objectionable part of the body of antidiscrimination law.²¹⁵ In fact, multiracial-category proponents and the Supreme Court both view the eradication of racial classifications as an

211. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment). *Adarand* held that federal affirmative action programs instituted to assist subordinated groups are subject to the same strict scrutiny standard as acts of discrimination against subordinated group members. *Adarand*, 515 U.S. at 227.

212. *See id.* at 275 (Ginsburg, J., dissenting) ("For a classification made to hasten the day when 'we are just one race,' however, the lead opinion has dispelled the notion that 'strict scrutiny' is 'fatal in fact.'" (citations omitted)).

213. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 552-53 (1989) (Marshall, J., dissenting) (emphasis added).

214. Aleinikoff, *supra* note 194, at 1063. Yet, "the color-blind theory of the Constitution is precisely that—a 'theory,' one of any number of competing theories that seek to interpret the fourteenth amendment's delphic proscription of state action that denies any person 'the equal protection of the laws.'" Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1335 (1986).

215. *See* David Kairys, *Unexplainable on Grounds Other Than Race*, 45 AM. U. L. REV. 729, 735 (1996) (attributing to racism the Supreme Court's recent approach to civil rights cases in which Blacks have attempted to achieve racial justice through race-conscious measures). A number of commentators view the retrenchment in antidiscrimination law as the result of the 1980s Reagan-led White backlash against institutions perceived as sympathetic to Black interests. *See* Crenshaw, *supra* note 122, at 1362 n.119 (1988) (noting that the failed 1984 Democratic Party presidential election bid "reflects a perception among whites that the party is too sympathetic to Black interests"); Jonathan Feldman, *Race-Consciousness Versus Colorblindness in the Selection of Civil Rights Leaders: Reflections upon Jack Greenburg's Crusaders in the Courts*, 84 CAL. L. REV. 151, 154 & n.19 (1996) (book review) (detailing the current backlash against civil rights within the court system). It is interesting to note that the entrenchment in civil rights and the systemic attention to the MCM both date back to the 1980s.

end in and of itself, rather than a means for achieving racial justice.²¹⁶ "The truth, however, is that racial justice and colorblindness are not the same thing."²¹⁷

Recent cases demonstrate the jurisprudential shift toward presumed color-blindness,²¹⁸ which thoroughly denies the historical context of White supremacy and Black subordination, both of which reinforce race-based privilege and thereby hinder a realistic appraisal of racial disparity.²¹⁹ As Part II.D will discuss, the attainment of true color-blindness is impossible in a society that has historically imbued race with political meaning. The Supreme Court's stated reliance upon color-blindness may thus be viewed as a guise for maintaining the status quo of race-based privilege.²²⁰ This Article discusses four cases exemplifying the salient jurisprudential move towards a color-blind approach to educational admissions,²²¹ voting rights,²²² government business contracting,²²³ and the capital sentencing process.²²⁴ These cases demonstrate a progression in color-blind jurisprudence from a desire to narrow the examination of the political meaning of race to a complete disavowal of the social significance of race.²²⁵ An

216. Aleinikoff, *supra* note 194, at 1115 (maintaining that color-blind theory has been transformed into serving the ultimate goal of color-blindness as a formality rather than a means of ending material inequality).

217. Culp, *supra* note 56, at 162.

218. Neal Devins, *Adarand Constructors, Inc. v. Pena and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions*, 37 WM. & MARY L. REV. 673, 674 (1996) ("Like a phoenix rising from the ashes, calls for a 'color-blind society' are again sweeping the nation."); Karen B. Dietrich, Note, *Federal Affirmative Action After Adarand Constructors, Inc. v. Pena*, 74 N.C. L. REV. 1259, 1292 (1995-1996) ("*Adarand* further conveyed the increasing interest of the Court in finally achieving a colorblind society . . ."). Although one commentator traces color-blind rhetoric back to the 1850s, the current judicial reverence for color-blindness only dates back to the 1980s. See generally ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992) (discussing the evolution of color-blind jurisprudence in the United States).

219. See David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 119 ("[T]he Court has shown no interest in investigating the accuracy of racial classifications.").

220. See *id.* at 114 (asserting that there can be no "choice between color blindness and race-consciousness" and that the only choice is "between different forms of race-consciousness").

221. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *reh'g en banc denied*, 84 F.3d 720 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

222. *Shaw v. Reno*, 509 U.S. 630 (1993), *remanded sub nom. Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994), *rev'd*, 116 S. Ct. 1894 (1996).

223. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

224. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

225. Yet, it should be noted that the color-blind jurisprudential movement extends beyond the equal protection context. See, e.g., Tanya E. Coke, Note, *Lady Justice May Be Blind, but Is She a Soul Sister? Race Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327, 348 (1994) (observing that the Supreme Court, in *Georgia v. McCollum*, 505 U.S. 42 (1992), has manifested "sweeping rhetoric about irrelevance of race to jury selection").

analysis of the aforementioned contexts indicates that the color-blind approach, which the MCM propagates, is counterproductive to its goal of eradicating racism. Four key dynamics distinguish the development of color-blind jurisprudence: (1) the removal of the historical meaning of race from the analysis of racial discrimination; (2) the removal of societal discrimination from the analysis of racial discrimination; (3) the judicial view of race-conscious, racial justice efforts as harmful stereotyping; and (4) the judicial excision of race from racial discrimination discourse.

1. *The Historical Meaning of Race Expelled from Analysis of Racial Discrimination.*—

[W]e remain imprisoned by the past as long as we deny its influence in the present.²²⁶

*McCleskey v. Kemp*²²⁷ was one of the early Supreme Court cases to champion the color-blind ideal as more significant than the reality of racial discrimination in the constitutional analysis of equal protection claims.²²⁸ With *McCleskey*, the Court reinforced the equal protection standard that a petitioner must prove that the individual decisionmakers in her case acted with discriminatory intent, regardless of

226. *McCleskey*, 481 U.S. at 344 (Brennan, J., dissenting).

227. 481 U.S. 279 (1987).

228. This is distinct from the interpretation of the dissent in *Plessy v. Ferguson*, as the first judicial pronouncement of the color-blind ideal. Given that Justice Harlan's opposition to the legal segregation of railway cars was rooted in the reality of racial discrimination, the author agrees with commentator Neil Gotanda, who asserts that Justice Harlan did not truly espouse a color-blind approach in his dissent in *Plessy v. Ferguson*. "Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons." *Plessy v. Ferguson*, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *see also* Gotanda, *supra* note 26, at 39 (interpreting Justice Harlan's dissent as "a peculiar mix of historical-race and formal-race" as opposed to the generally accepted view that Justice Harlan espoused a color-blind constitution); Laurence H. Tribe, "In What Vision of the Constitution Must the Law Be Color-Blind?," 20 J. MARSHALL L. REV. 201, 203 (1986) (suggesting that Justice Harlan's "color-blind ideal, it turns out, was only shorthand for the concept that the Fourteenth Amendment prevents our law from enshrining and perpetuating white supremacy"). Furthermore, Justice Harlan's discussion regarding color-blindness was connected to his conviction that Whites held and would continue to hold the dominant position in the United States. *See Plessy*, 163 U.S. at 559 (Harlan, J., dissenting) ("The white race deems itself to be the dominant race in this country. . . . So, I doubt not, it will continue to be for all time . . ."); *accord* Jamin B. Raskin, *From "Colorblind" White Supremacy to American Multiculturalism*, 19 HARV. J.L. & PUB. POL'Y 743, 744 (1996) ("Thus, at its very inception, the doctrine of juridical color-blindness was deemed to be perfectly compatible with the perpetuation of white supremacy . . .").

the existence of statistically discriminatory patterns.²²⁹ Although *McCleskey* is an equal protection case distinct from the race remedy cases that follow in this section, it highlights the ways in which color-blind jurisprudence extends beyond the mainstream discontent with affirmative action programs for people of color.

The *McCleskey* Court reviewed a petition for habeas corpus that asserted that the Georgia capital sentencing process was administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments.²³⁰ In support of this claim, the petitioner submitted a statistical study ("the Baldus Study") of over two thousand Georgia murder cases from the 1970s.²³¹ The study demonstrated an overwhelming connection between the imposition of the death sentence in Georgia and the races of the victim and the defendant.²³² Despite the comprehensiveness of the Baldus Study, the Supreme Court held that the study did not establish that the administration of the Georgia capital punishment system violated the Fourteenth Amendment's Equal Protection Clause or the Eighth Amendment's prohibition against cruel and unusual punishment.²³³

In the face of consistent data—which showed that on the basis of race, Black defendants were more likely to receive the death penalty than were Whites²³⁴ and that the lives of White victims were more highly valued than those of Blacks²³⁵—the Court insisted that the

229. Although *Washington v. Davis*, 426 U.S. 229, 239 (1976), established the individualistic discriminatory intent requirement for equal protection claims, *McCleskey v. Kemp*, 481 U.S. 279, 312-13 (1987), worsened the myopia of the Court's approach to the reality of racial discrimination by refusing to acknowledge the racist effect of extensive race-based statistical disparity in sentencing.

230. *McCleskey*, 481 U.S. at 286.

231. *Id.* at 286-87.

232. *Id.* The Baldus Study indicated that Black defendants who killed White victims have the greatest likelihood of receiving the death penalty. After taking into account 230 other variables, the Baldus Study found that prosecutors sought the death penalty in 70% of cases involving Black defendants and White victims and in only 32% of cases involving White defendants and White victims. The death penalty was imposed almost three times as often in cases involving Black defendants and White victims (22%) as those involving White defendants and White victims (8%). The death penalty was imposed least often in the case of Black victims and Black defendants. *Id.*

233. *McCleskey*, 481 U.S. at 312-13. Commentators have been highly critical of the *McCleskey* decision. See, e.g., Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 441 (1988) ("The Court's response to the detailed evidence . . . was a labored 'So what?'); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1413 (1988) ("The Court's suggestion that the legacy of Georgia's history shines no light on the Baldus statistics offends common sense; it makes one laugh—and cry.").

234. *McCleskey*, 481 U.S. at 287.

235. *Id.* at 336 (Brennan, J., dissenting).

Baldus Study "[a]t most indicate[d] a discrepancy that appears to correlate with race. . . . [But this] discrepancy . . . is 'a far cry from [a] major systemic defect.'"²³⁶ The Court drew this conclusion despite the fact that the Baldus analysis of 230 other variables²³⁷ demonstrated that "few details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white."²³⁸

The Court's imposition of a narrow "intent to discriminate" standard²³⁹ was, in effect, a refusal to acknowledge how the historic application of the death penalty was infected by racism.²⁴⁰ The removal of historical context from the existence of racism belies the actual nature of racism and, hence, the political meaning of race.²⁴¹ Therefore, the *McCleskey* bar to the use of historical racial data in the presentation of equal protection claims compromises an accurate depiction of race

236. *McCleskey*, 481 U.S. at 312-13 (quoting *Pulley v. Harris*, 465 U.S. 37, 54 (1984)).

237. *Id.* at 287.

238. *Id.* at 321 (Brennan, J., dissenting). The Court stated that "unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value. Although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent." *McCleskey*, 481 U.S. at 298 n.20 (citation omitted). The Court thus dismissed the continuing effect of historical bias. *Id.* at 298-99. Justice Brennan noted his dissatisfaction with the Court's finding:

Georgia's legacy of a race-conscious criminal justice system, as well as this Court's own recognition of the persistent danger that racial attitudes may affect criminal proceedings, indicates that McCleskey's claim is not a fanciful product of mere statistical artifice.

. . . .

By the time of the Civil War, a dual system of crime and punishment was well established in Georgia.

Id. at 328-29 (Brennan, J., dissenting). The dismissal of historical data occurred despite Justice Brennan's earlier acknowledgement in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), that Georgia's then extant death penalty statutes were "pregnant with discrimination." *Id.* at 257 (Brennan, J., concurring).

239. *McCleskey*, 481 U.S. at 293.

240. One commentator noted:

Sometimes the exposure of the pervasiveness of racialism, and of the racist policy it entails, can cost too much. Better to pretend that the jury behavior reflected by the Baldus study is simply "unexplained," to preserve the image of the dispassionate jury, together with the implicit conclusion that the disproportionate sentences are a coincidence.

Carter, *supra* note 233, at 446-47.

241. See Peter Charles Hoffer, "Blind to History," *The Use of History in Affirmative Action Suits: Another Look at City of Richmond v. J.A. Croson Co.*, 23 RUTGERS L.J. 271, 278-79 (1992) (arguing that the Court improperly utilized historical data by not following the mode of historical analysis that requires a broad examination of social reality when discussing a particular movement in history).

and discrimination.²⁴² To the extent that our nation's history of racial hostility continues to inform the perception and attitudes of persons empowered to act upon their prejudiced notions, historical background is relevant. Moreover, history is crucial to an acknowledgement of the social systems that have been established within a biased framework. Ahistorical analyses of equal protection claims conceal the existence of racially flawed social systems and the harms which result from silent acceptance of the status quo and thereby strip political significance from race altogether.²⁴³ Yet, the Court disengages history from claims of racial discrimination for the purpose of pursuing a color-blind aim.

The ideal of reaching for a color-blind society was held to be more relevant to the constitutional analysis at issue in *McCleskey*, than were the realities of racial discrimination in the application of the death penalty.²⁴⁴ The Court's color-blind ideal is revealed by its desire to ignore the clear systemic indications of racial bias and its preference for searching for an individual with particularized discriminatory intent.²⁴⁵ In turn, the great esteem that the Court places on color-blindness obscures the harms stemming from the status quo existence of race-based privilege in the life-and-death context of the death penalty application.²⁴⁶

Similarly, the MCM's advocacy for official recognition of a distinct mixed-race cultural identity is divorced from the historical positioning of such groups as middle-tier buffers vis-à-vis racial justice efforts. *McCleskey* demonstrates that such ahistorical approaches hinder the progress of racial justice rather than aid it. By viewing racism as an isolated phenomenon resulting from the bias of a sole culpable actor, rather than as a dynamic constructed and influenced by history,

242. See Carter, *supra* note 233, at 441 (“[T]he problem is not an inability to remember the past, but an incapacity to integrate the present.”).

243. See Alan Davis Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054 (1978) (terming the failure of antidiscrimination laws to consider historical data as a “perpetrator perspective [that] presupposes a world composed of atomistic individuals whose actions are outside of and apart from the social fabric and without historical continuity. From this perspective, the law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors.” (footnotes omitted)).

244. See *McCleskey*, 481 U.S. at 314-19.

245. *Id.* at 292 (“Thus, to prevail under the Equal Protection Clause, *McCleskey* must prove that the decisionmakers in *his* case acted with discriminatory purpose.”).

246. For example, in its analysis of *McCleskey*'s Eighth Amendment claim, the Court was unperturbed by the fact that the Baldus Study indicated that Whites were more willing to allocate mercy for White defendants than Black defendants, because, as the Court noted, such a dynamic expressed the conscience of the community. See *id.* at 312 (“Apparent disparities in sentencing are an inevitable part of our criminal justice system.”).

the *McCleskey* Court began to separate the sociopolitical meaning of race from the discourse surrounding the analysis of racial problems.²⁴⁷ By overlooking the historical content of what race means, the Court reduced race to a concept too nebulous for legal analysis.²⁴⁸ The MCM's promotion of race itself as a nebulous concept will only further the Court's seeming inability to grasp the meaning of race.

2. *Societal Discrimination Expelled from Analysis of Racial Discrimination*.—Affirmative action questions the settled expectations Whites have because they are White; therefore, the affirmative action context particularly highlights the link between the jurisprudential preference for color-blindness and its consequent reinforcement of race-based privilege.²⁴⁹ In *City of Richmond v. J.A. Croson Co.*,²⁵⁰ the Supreme Court held that the City of Richmond failed to demonstrate a compelling governmental interest to justify an affirmative action plan designed to benefit persons of color by awarding thirty percent of city construction contracts to "Minority Business Enterprises."²⁵¹ The Court deemed the plan insufficiently tailored to remedy the effects of prior discrimination, because the City only proffered evidence of "societal discrimination"—an inadequate basis for the use of this race-conscious classification system.²⁵² The Court concluded that in order to justify the use of a race-conscious allocation system, the plan's proponents had to provide evidence of particularized discrimination.²⁵³ The Court's dismissal of the notion of societal discrimination—a systemic phenomenon for which no one person can be singled out as the perpetrator—disables government from effectively examining and re-

247. See Gotanda, *supra* note 26, at 44-45 (noting that the Supreme Court treats "particular manifestations of racial subordination—substandard housing, education, employment, and income [disparities] . . . as isolated phenomena . . ." and thus veils the continuing oppression of institutional racism).

248. See *McCleskey*, 481 U.S. at 316 n.39 ("Finally, in our heterogeneous society the lower courts have found the boundaries of race and ethnicity increasingly difficult to determine.").

249. Harris, *supra* note 63, at 1779 ("[A]ffirmative action de-privileges whiteness and seeks to remove the legal protections of the existing hierarchy spawned by race oppression.").

250. 488 U.S. 469 (1989).

251. *Id.* at 498-506.

252. *Id.* at 505.

253. *Id.* at 496-97 (O'Connor, J.). Yet, "blindness to contemporary *social* realities helped spawn the monstrous lie, propagated by the Supreme Court in *Plessy v. Ferguson*, that the segregation of the Negro had nothing to do with racial oppression." Kennedy, *supra* note 214, at 1341 (emphasis added) (footnote omitted).

dressing the actual harms of racial discrimination.²⁵⁴ As a result, data showing that Blacks constituted approximately fifty percent of the residents in Richmond, but received less than one percent of public contracting funds,²⁵⁵ became legally insignificant and thus an acceptable societal condition.²⁵⁶ Furthermore, “the City could not prove that the parties who benefitted from the set-off were those who had been harmed by prior discrimination *precisely* because there had been so few African-American construction businesses.”²⁵⁷

Similarly, the MCM overlooks societal discrimination and is thus unable to appreciate the political implications of demanding a mixed-race census count within a preexisting racial caste system. This jurisprudential parallel with the MCM is best exemplified by Justice Scalia’s myopic statement that “[r]acial preferences appear to ‘even the score’ . . . only if one embraces the proposition that our society is

254. The Court’s inability to recognize the harms of status quo societal discrimination is further aggravated by *Croson*’s insistence upon symmetry in the application of strict scrutiny analysis rather than the more flexible standard of intermediate scrutiny, which was utilized in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). *Metro Broadcasting* held that the intermediate standard was acceptable for evaluating benign race-conscious measures mandated by Congress. *Id.* at 563; accord Bryan K. Fair, *Rethinking the Colorblindness Model*, 13 NAT’L BLACK L.J. 1, 81 (1993) (deeming the intermediate scrutiny standard, which the Court utilized in *Metro Broadcasting*, to be a sensible approach comparable to that utilized in gender discrimination cases and stating that “if our Constitution is not required to be gender-blind, I see no reason that it should be required to be color-blind”).

Croson demands that race-conscious efforts for racial justice must be narrowly tailored to further a compelling governmental interest—just as actual instances of racial discrimination must be narrowly tailored to further a compelling governmental interest: “We thus reaffirm the view expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.” *Croson*, 488 U.S. at 494 (O’Connor, J.). Similarly, in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995), the Supreme Court overturned *Metro Broadcasting* and held that federal affirmative action programs must be subject to the strict scrutiny standard.

Yet, the race-neutral application of the strict scrutiny standard, which treats efforts to redress racial discrimination in the same manner as acts of discrimination itself, completely overlooks the significance of race in our society and thereby hampers the viability of remedial plans by preferring race-neutral methods that have been proven ineffective. See CORNELL WEST, *RACE MATTERS* 64 (1993) (noting that “without affirmative action, black access to America’s prosperity would be even more difficult to obtain and racism in the workplace would persist anyway”); see also *infra* Part II.C.3.

255. *Croson*, 488 U.S. at 479-80.

256. One commentator suggests that the acceptance of societal discrimination as the norm is explained by the manner in which lower socioeconomic status rationalizes the disparity in treatment. See RICHARD DELGADO, *THE COMING RACE WAR?* 17 (1996) (observing that social psychology norm theory holds that an individual’s “reaction to another person in distress varies according to the [perceived] normalcy or abnormalcy of his or her plight”).

257. Hoffer, *supra* note 241, at 274.

appropriately viewed as divided into races"²⁵⁸ Regardless of whether the MCM is uniformly motivated by a desire to enhance the social status of mixed-race children, the Latin American race-relations model demonstrates that the existence of a racial hierarchy makes it impossible to implement a decennial tally of mixed-race persons without having the tally systemically utilized as a mechanism for preserving White status. *Croson* demonstrates that the MCM's disregard for the hierarchy of general societal discrimination will hinder the MCM's ability to achieve the goal of racial harmony.

3. *The Judicial View of Race-Conscious Equality Measures as Harmful Stereotyping.*—

Racial classifications of any sort pose the risk of lasting harm to our society.²⁵⁹

Four years after *Croson*, in the case of *Shaw v. Reno*,²⁶⁰ the Court's color-blind trajectory adopted the premise that forthright considerations of racial difference are a form of stereotyping that is just as harmful as acts of discrimination.²⁶¹ *Shaw* entailed a challenge to a North Carolina congressional reapportionment plan that created two districts to strengthen the effect of minority votes.²⁶² A group of five White individuals (of whom three did not reside in the relevant voting districts and thus admittedly suffered no vote dilution)²⁶³ challenged the reapportionment plan as unconstitutional.²⁶⁴ After noting the districts' irregular cartographical shapes, the Supreme Court articulated

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

259. *Shaw v. Reno*, 509 U.S. 630, 657 (1993), *remanded sub nom. Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994), *rev'd*, 116 S. Ct. 1894 (1996). *But see* Aleinikoff, *supra* note 194, at 1091 (maintaining that the color-blind theory is mistaken when it objects to race-conscious remedies on the ground that such remedies may "increase racial stereotyping and intolerance").

260. 509 U.S. 630 (1993), *remanded sub nom. Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994), *rev'd*, 116 S. Ct. 1894 (1996).

261. *Id.* at 657; *accord* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that all racial classifications imposed by government are subject to strict scrutiny); *id.* at 241 (Thomas, J., concurring) (stating that racial justice programs that utilize race-conscious remedies "stamp minorities with a badge of inferiority").

262. *Shaw*, 509 U.S. at 633-34.

263. *Id.* at 637, 641. "Instead, the decision states that these plaintiffs have a right to live in a colorblind world, where redistricting does not upset their racial expectations." Culp, *supra* note 56, at 185. When *Shaw* reached the Supreme Court again after remand, the Court held that the plaintiffs who lived outside the districts lacked standing. *Shaw v. Hunt*, 116 S. Ct. 1894, 1900 (1996).

264. *Shaw*, 509 U.S. at 633-34.

an unprecedented constitutional claim²⁶⁵ that without sufficient justification, reapportionment plans creating oddly shaped districts could not rationally be "understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race."²⁶⁶ Absent proof of intentional discrimination, this new constitutional claim characterizes racial reapportionment made solely for the purpose of strengthening minority voting, as a race-based stigma and a threat of inciting racial hostility.²⁶⁷

Shaw thereby undermined the efficacy of section 5 of the Voting Rights Act²⁶⁸ and its 1982 amendments,²⁶⁹ which, contrary to the Court's decision, established race-consciousness.²⁷⁰ By utilizing race-neutral principles, the Supreme Court equated the severity of racist gerrymandering for the purposes of instituting racially biased election practices, with race-conscious affirmative attempts to address patterns of race discrimination in voting.²⁷¹ In effect, the Supreme Court appeared to demand that racist practices resolve themselves without any affirmative acknowledgement that racial bias is at work.²⁷² "Color-

265. See *id.* at 667 (White, J., dissenting) (criticizing the majority's distinction of *Shaw* from *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977)).

266. *Shaw*, 509 U.S. at 652.

267. *Id.* at 642-43.

268. Voting Rights Act of 1965 § 5, 42 U.S.C. § 1971 (1994).

269. Voting Rights Act Amendments of 1982 § 3, 42 U.S.C. § 1973(b).

270. See Aleinikoff, *supra* note 194, at 1111 ("The 1982 amendments to the Voting Rights Act provide the most dramatic example of federal race-consciousness."). In order to ensure that electoral changes would not have the effect of abridging minority voting rights, section 5 of the Voting Rights Act of 1965 required Southern states to obtain preclearance from the Attorney General of any proposed changes to voting rules. Voting Rights Act of 1965 § 5, 42 U.S.C. § 1971. The 1982 amendments to the Act expanded its coverage to any voting measure that resulted in a lessened opportunity for equal voting rights on the part of minorities, whether or not the state legislature explicitly intended such a result. Voting Rights Act Amendments of 1982 § 3, 42 U.S.C. § 1973(b).

271. *Shaw*, 509 U.S. at 641.

272. In its insistence upon color-blind principles, the *Shaw* Court was willing to ignore the facts that there had not been a single Black member of Congress from North Carolina since Reconstruction and that White residents persisted in their refusal to vote for Black candidates. *Id.* at 659 (White, J., dissenting). Indeed, North Carolina's history of exclusionary voting and political participation accounted for the fact that forty of North Carolina's one hundred counties were still under the mandated federal supervision of section 5 of the Voting Rights Act. See *Thornburg v. Gingles*, 478 U.S. 30, 38 (1986) ("North Carolina has officially discriminated against its black citizens with respect to their exercise of the voting franchise from approximately 1900 to 1970 by employing at different times a poll tax [and] a literacy test . . ."); Lani Guinier, *What Color Is Your Gerrymander? The Constitution and White Minority Districts*, in *THE POLITICS OF RACE: AFRICAN AMERICANS AND THE POLITICAL SYSTEM* 226, 227 (Theodore Rueter ed., 1995) (noting North Carolina's history of voter discrimination).

blindness is a simple and apparently costless way to forget the racism in American society."²⁷³

Before the Voting Rights Act, redistricting lines had historically been drawn to create all White-majority districts.²⁷⁴ Interestingly, the Court never viewed such race-based redistricting as a debasement of advantaged Whites; yet, the Court found debasement when two Black-majority districts were drawn in the name of remediation.²⁷⁵ To state the case in concrete terms, in the electoral context, the color-blind approach maintains bloc voting by Whites.²⁷⁶ Aside from doing for Whites what the Court says cannot be done for Blacks,²⁷⁷ this is especially troubling in light of the empirical fact that Whites who form an electoral majority only vote for White candidates.²⁷⁸ It also preserves unchallenged, old-fashioned political gerrymandering, under which redistricting for facially neutral political purposes ensures that Whites

273. John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 358 (1994); see also Fair, *supra* note 254, at 69 ("[T]he colorblindness model allows us to continue our avoidance of one of this Nation's most enduring problems—the ideology of racial supremacy."). But forgetting racism is not costless to subordinated non-Whites:

Faith in the colorblind cure contains an implicit acceptance of a significant cost. The admitted injury imposed by the still-virulent and demeaning social construction of race continues while we wait for the "just-don't-say-it" approach to work. But this cost includes more than what can be measured by a reckoning of those cases where racial discrimination is real in fact but not in law.

Lawrence, *supra* note 56, at 837.

274. Kairys, *supra* note 215, at 743.

275. See *id.* at 744 (asserting that the Supreme Court's "conservative majority is creating what appears to be a white constitutional right not to be represented by an African American as a result of redistricting under the Voting Rights Act, and thereby essentially invalidating the Act"); Raskin, *supra* note 228, at 750 ("What could be wrong with such a district, unless you assume that white people have a presumptive constitutional right to be in the majority?").

276. Cf. Theodore Reuter, *The Politics of Race*, in THE POLITICS OF RACE: AFRICAN AMERICANS AND THE POLITICAL SYSTEM 5, 6 (Theodore Reuter ed., 1995) (noting that students of race and politics often assume race to be "a central variable in American politics").

277. Commentators have aptly described this discrepancy:

The comparisons of *Shaw* with *McCleskey* . . . suggest that the Court's own equal protection analysis may on occasion have an arbitrary component as well. The comparison suggests that the Court has a tendency to undervalue serious systemic discrimination experienced by blacks, and a tendency to be more sensitive to marginal unintended discrimination experienced by whites.

Julian A. Cook, Jr. & Mark S. Kende, *Color-Blindness in the Rehnquist Court: Comparing the Court's Treatment of Discrimination Claims by a Black Death Row Inmate and White Voting Rights Plaintiffs*, 13 T.M. COOLEY L. REV. 815, 850 (1996).

278. See Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1428 (1991) (noting that 55% of White voters would vote for a White candidate over a Black candidate, regardless of qualifications).

retain electoral power.²⁷⁹ *Shaw* preserves White privilege in the name of symmetrical, neutral color-blindness in that it ignores the asymmetrical historical influences and political meaning of race²⁸⁰—an effect contrary to the MCM's stated goal of racial justice.²⁸¹

The Court's preoccupation with the harm of racial stereotyping and the MCM's parallel concern with the racial stereotyping of biracial children as Black, "stems from [the belief of some Justices] . . . that 'white' and 'Black' are devoid of political content."²⁸² Thus, the use of racial classifications is rarely justified, because the categories are dangerous in and of themselves.²⁸³ Yet, where racism pervades a political system, disadvantaged groups will tend to form coalitions for the purpose of group empowerment.²⁸⁴ "If black and white voters had identical preferences, no one would have an incentive to engage in race-conscious districting, since the same candidates would win, and the same laws would be enacted, regardless of the racial composition of the electorate."²⁸⁵ Yet, the *Shaw* majority treats the empower-

279. See Feldman, *supra* note 215, at 161 (arguing that a color-blind approach cannot overcome political gerrymandering).

280. The Court's defense of race-based privilege in the voting rights context was further entrenched with its holding in *Miller v. Johnson*, 515 U.S. 900, 901 (1995), where the Court concluded that an allegation that race was "a legislature's dominant and controlling rationale in drawing district lines" was sufficient to state a *Shaw* equal-protection claim. Such a conclusion was contrary to *Shaw*, where a specific allegation bore out a reapportionment scheme so irrational on its face that, without justification, it could be understood only as an effort to segregate voters racially. *Shaw v. Reno*, 509 U.S. 630, 658 (1993), *remanded sub nom. Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994), *rev'd*, 116 S. Ct. 1894 (1996). *Miller's* extension of the Court's seeming unwillingness ever to acknowledge race raises the principle of color-blindness to such a venerable position that any attempt to redress racial discrimination effectively will be thwarted. *Bush v. Vera*, 116 S. Ct. 1941 (1996), is an example of the thwarting effect of *Miller's* extension. In *Bush*, the Court held that Texas's long history of discrimination against minorities in the electoral process could not justify the challenged racially drawn district lines, because the contorted shape of the district "defeat[ed] any claim that the districts are narrowly tailored to serve the State's interest in avoiding liability" for vote dilution under the Voting Rights Act. *Id.* at 1961.

281. See *Multiracial Hearings*, *supra* note 2, at 109 (statement of Susan Graham, Executive Director, Project RACE).

282. Gotanda, *supra* note 26, at 41 (arguing that Chief Justice Rehnquist and Justice Stewart have refused to ascribe any significance to the interplay between voters' decisions and race).

283. See *Shaw*, 509 U.S. at 657 ("Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin.").

284. Howard M. Shapiro, Note, *Geometry and Geography: Racial Gerrymandering and the Voting Rights Act*, 94 YALE L.J. 189, 199 (1984) ("Where race is a salient political factor, group members will act substantially in concert, racial groupings will have an independent political existence, and a theory of racial group disadvantaging can make sense.").

285. Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of the Century*, 50 VAND. L. REV. 291, 300 (1997). Yet, "virtually no black representatives from the South are elected except from majority-black districts." *Id.* at 297. Race has also mattered in the

ment of racial-coalition formation as equivalent to balkanization.²⁸⁶ The Court's position conflates the solidarity effects of racial oppression with actual racial bias and obfuscates the actual manifestations of racial discrimination. The MCM also confuses the solidarity effects of racial discrimination with racial stereotyping when it disregards a sociopolitical view of race in favor of a cultural view of race.²⁸⁷

4. *The Judicial Excision of Race from Racial Discrimination Discourse.*—The progression in the Supreme Court's development of color-blind jurisprudence discussed above laid the groundwork for the radical Fifth Circuit "race-blind"²⁸⁸ decision of *Hopwood v. Texas*.²⁸⁹ *Hopwood* reviewed the University of Texas School of Law's preferential admissions policy for Black and Mexican-American applicants.²⁹⁰ The Fifth Circuit held, in contravention to the Supreme

context of increased legislative commitment to the interests of racial minorities on the part of Black and Hispanic members of Congress. See Vincent Di Lorenzo, *Legislative Heart and Phase Transitions: An Exploratory Study of Congress and Minority Interests*, 38 WM. & MARY L. REV. 1729, 1812 (1997) (arguing that Black and Hispanic members of Congress are more responsive to minority interests than are White members of Congress).

286. *Shaw*, 509 U.S. at 657 ("Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions.")

287. See *supra* notes 65-84 and accompanying text (arguing that the MCM cultural view of race misperceives race's social meaning).

288. "Race-blindness"—i.e., the argument that "all talk of race should end"—is set forth as a natural outgrowth of color-blindness. IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 176 (1996).

289. 78 F.3d 932 (5th Cir.), *reh'g en banc denied*, 84 F.3d 720 (5th Cir.) *cert. denied*, 116 S. Ct. 2581 (1996). *Hopwood* is radical because it is a departure from Supreme Court precedent, and because the case is based upon the Fifth Circuit's own interpretation of the direction of the Supreme Court color-blind jurisprudence. See *id.* at 944 ("Justice Powell's view in *Bakke* is not binding precedent on this issue. . . . Indeed, recent Supreme Court precedent shows that the diversity interest will not satisfy strict scrutiny. Foremost, the Court appears to have decided that there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs."); see also Kennedy, *supra* note 233, at 1440 ("[I]n our political system, decisions rendered by the Justices of the Supreme Court have a very special moral meaning. The decisions of the other branches chart the lines of power but, in the eyes of many, the decisions of the Court chart the lines of legitimacy.")

The Third Circuit took a similar maverick, color-blind approach in *Taxman v. Board of Education*, 91 F.3d 1547 (3d Cir. 1996) (in banc), *cert. granted*, 117 S. Ct. 2506 (1997), and *cert. dismissed*, No. 96-679, 1997 WL 745523 (U.S. Dec. 2, 1997), which held that in the absence of direct Supreme Court precedent, nonremedial affirmative action plans are prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994). *Id.* at 1550. Legislative bodies have also acted upon and extended the Court's color-blind theory with enactments and repeals. See, e.g., Small Business Jobs Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755 (1996) (codified as amended in scattered sections of 19, 26, and 42 U.S.C.); Multiethnic Placement Act of 1994, 42 U.S.C. § 5115(a) (1994) (repealed 1996); California Civil Rights Initiative, Proposition 209 (Nov. 5, 1996), CAL. CONST. art. I, § 31 (outlawing all racial preferences in state employment, public contracting, and public university admissions).

290. *Hopwood*, 78 F.3d at 936.

Court precedent of *Regents of the University of California v. Bakke*,²⁹¹ that race could not be used as even one of a multiplicity of factors in law school admissions, because it was inappropriate to continue elevating some races over others to the "detriment" of Whites, even to correct a perceived racial imbalance in the student body.²⁹² Even though the Fifth Circuit essentially circumvented the authority of the established precedent of *Bakke*, the Supreme Court refused to grant certiorari in the *Hopwood* case.²⁹³

Just as the Supreme Court has discredited the historical and political meaning of race in its recent color-blind jurisprudence,²⁹⁴ the Fifth Circuit deduced that "one cannot conclude that [the University of Texas's] *past* discrimination has created any *current* hostile environment for minorities,"²⁹⁵ despite the law school's forceful legacy of discrimination.²⁹⁶ Furthermore, the Fifth Circuit, in no uncertain terms,

291. 438 U.S. 265 (1978); see also *Hopwood*, 84 F.3d at 722 (Politz, C.J., dissenting) ("[T]he opinion goes out of its way to break ground that the Supreme Court itself has been careful to avoid and purports to overrule a Supreme Court decision."); Aleinikoff, *supra* note 194, at 1089 ("Justice Powell's famous 'diversity' argument in *Bakke* implicitly acknowledges the reasonableness of some manner of color-conscious decision making in a world in which race has mattered and continues to matter." (footnote omitted)).

292. The *Hopwood* court stated:

In summary, we hold that the University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school.

Hopwood, 78 F.3d at 962.

293. *Hopwood*, 116 S. Ct. at 2581.

294. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), with regard to the intermediate level of scrutiny applied to congressionally mandated "benign" racial classifications); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (O'Connor, J.) ("[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (plurality opinion) ("[T]he level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination.").

295. *Hopwood*, 78 F.3d at 953.

296. See *Sweatt v. Painter*, 339 U.S. 629, 639 (1950) (finding that the University of Texas Law School's denial of admission to an applicant based upon his race violated the Equal Protection Clause of the Fourteenth Amendment). Judge Stewart, who dissented in the denial of rehearing en banc in *Hopwood*, noted the law school's legacy of discrimination: To divorce the time in which it was legally possible for Sweatt to attend the Law School from the reality he experienced there is to ignore the very insidiousness of racial discrimination. It was the vestiges of that discrimination which, far from being destroyed, thrived and drove Sweatt out of the Law School.

Hopwood, 84 F.3d at 725 (Stewart, J., dissenting). Judge Stewart also noted that one year after being admitted to law school, Sweatt left "without graduating after being subjected

declared war upon any race-conscious affirmative action, so that "if the law school continues to operate a disguised or overt racial classification system in the future, its actors could be subject to actual and punitive damages."²⁹⁷ *Hopwood's* race-blind frustration of racial equality lends a negative cast to the MCM's desire ultimately to abolish all systems of racial classification because of their seeming divisiveness.

The four cases discussed above demonstrate that one of the most problematic implications of the Court's color-blind theories is its ahistorical demand for racial symmetry in the implementation of remedial measures to promote equality.²⁹⁸ The cases show that symmetrical preclusion of race-based factors in legal analysis results in hierarchical allocation of privilege across race. Similarly, the MCM advocates racial symmetry when it demands that biracial cultural identities be superimposed upon the political meaning of race to reflect White ancestry as well as non-White ancestry.²⁹⁹ What MCM proponents fail to acknowledge, however, is that their multiracial-symmetry demand is made within a society in which non-Whites are considered inferior; therefore, the MCM proposal would elevate those individuals who can successfully claim some portion of privileged whiteness. The appropriation of the MCM by a mainstream interest concerned about the possible decline in White demographic predominance augments the potential elevation of biracial persons as a middle-tier buffer against challenges to White privilege.

The imposition of a theory of racial symmetry upon an already existing racial caste system renders imbalanced treatment of Whites and Blacks.³⁰⁰ This is because color-blind theory can make no distinction between race-based harm to subordinated populations and di-

to racial slurs from students and professors, cross burnings, and tire slashings." *Id.* (quoting *Hopwood v. Texas*, 861 F. Supp. 551, 555 (1994), *rev'd*, 78 F.3d 932 (5th Cir.), *reh'g en banc denied*, 84 F.3d 720 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996)).

297. *Hopwood*, 78 F.3d at 959.

298. See Aleinikoff, *supra* note 194, at 1105 (stating that the color-blindness theory applies abstract symmetry); see also *supra* note 292.

299. Such an argument is implicit in the statements of some members of the MCM. See ZACK, *supra* note 44, at 95-96 (lamenting the fact that successful Black leaders of the Harlem Renaissance did not claim a mixed-race identity to reflect their White ancestry in addition to their Black ancestry).

300. One commentator has noted:

Colorblindness puts the burden on blacks to change; to receive "equal" treatment, they must be seen by whites as "white." Hence, the "compliment" that some whites pay to blacks: "I don't think of you as black." Colorblindness is, in essence, not the absence of color, but rather monochromatism: whites can be colorblind when there is only one race—when blacks become white.

Aleinikoff, *supra* note 194, at 1081 (footnotes omitted).

rected race-based approaches to address such subordination.³⁰¹ In fact, some view the insistence on the color-blind approach as a purposeful method for privileging Whites and disadvantaging Blacks in order to create an apartheid-like system in the United States.³⁰² Implementation of a mixed-race census count would be a regulatory extension of color-blind jurisprudence because of its implicit focus upon race as solely cultural and devoid of political content. Therefore, the MCM should be wary of becoming the next step in the progression of a color-blind agenda, which has proven to work against the MCM's equality goal.

301. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 264 (1995) (Stevens, J., dissenting) ("The majority's concept of 'consistency' ignores a difference, fundamental to the idea of equal protection, between oppression and assistance."); WEST, *supra* note 254, at 64-65 (stating that given this nation's "historically weak will toward racial justice and substantive redistributive measures . . . an attack on affirmative action is an attack on redistributive efforts by progressives"); Aleinikoff, *supra* note 194, at 1106 (questioning equal treatment of race-based reparation measures and discrimination in light of the history of racial oppression and continued inequality); Harris, *supra* note 63, at 1770 (asserting that the presumption of White innocence with respect to affirmative action programs masks settled expectations of continued White privilege).

302. See Kairys, *supra* note 215, at 737, 748 (positing that the Supreme Court's conservative majority has no legitimate claim to neutrality in race discrimination cases when, for the purposes of racial equality, it exercises judicial restraint where Blacks are disadvantaged, and judicial activism where Whites are inconvenienced); Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 499-512 (1995) (reviewing DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993), which examines the effects of residual racial segregation in the United States as comparable to those of South African apartheid). It should be noted that, given the government's concomitant commitment to race-conscious, social justice efforts, post-apartheid South Africa's stated goal for a nonracial society is not a color-blind goal. See SPENCER, *supra* note 44, at 154 (describing the South African government's abandonment of official racial designations but noting its confirmed use of racially connected factors such as geographical locations, languages, and last names for purposes of affirmative action).

Many commentators view the Court's current development of color-blind jurisprudence as a recurrence of the post-Civil War Restoration/Redemption rejection of the substantive equality efforts that followed the Reconstruction. See, e.g., Jamie B. Raskin, *Affirmative Action and Racial Reaction*, 38 HOW. L.J. 521, 522 (1995) ("If the modern civil rights movement is indeed America's 'second Reconstruction,' the current period is our second Redemption—a partial but systematic unraveling of the social progress made by the civil rights movement." (footnote omitted)); Sondra Hemeryck et al., Comment, *Reconstruction, Deconstruction and Legislative Response: The 1988 Supreme Court Term and the Civil Rights Act of 1990*, 25 HARV. C.R.-C.L. L. REV. 475, 476 (1990) (noting many parallels between the late nineteenth-century Supreme Court's retreat from congressional protection of racial minorities and the recent Court's narrowing of laws and rules enacted to benefit the same); Derrick Bell, *Et Tu, A.C.L.U.?*, N.Y. TIMES, July 18, 1996, at A23, available in LEXIS, News Library, Nyt File (observing that the Supreme Court's recent color-blind approach echoes the post-Reconstruction period, when the Court used color-blindness to invalidate legislation intended to protect former slaves).

Moreover, a mixed-race census count would further eviscerate racial justice efforts by presenting the presumed classification difficulties of biracial persons as support for the proposition that race is too biologically indeterminate to classify.³⁰³ Specifically, the idealization of a color-blind society without racial classifications is facilitated by the multiracial discourse view of race as a dynamic too fluid to be defined precisely, which, in turn, makes "societal" discrimination too nebulous to identify or monitor through statistical data collection.³⁰⁴ Yet, race can only be viewed as indeterminate when approached as a scientific concept where "pure" races are difficult to identify because of cultural and historical racial mixtures. In contrast, racial distinctions are not perplexing when race is instead recognized as a social construct with political meanings derived from our nation's historical subordinate positioning of non-Whites.

The danger of the Court's color-blind approach, and of the MCM's appeal for the same approach in their goal of eradicating racism, is that it maintains systems of White privilege.³⁰⁵ This is what makes a color-blind approach such an inappropriate tool for combating racial subordination.³⁰⁶ One commentator notes:

303. Cf. Johnson, *supra* note 34, at 891 (stating that the goal of multiracial categories is to create "shade confusion," which will eventually destroy the Black-White dichotomy and reduce race to a "meaningless category").

304. See *Adarand*, 515 U.S. at 220 (viewing societal discrimination as too amorphous to justify the use of a race-conscious racial justice plan); *McCleskey v. Kemp*, 481 U.S. 279, 316 n.39 (1987) ("Finally, in our heterogeneous society the lower courts have found the boundaries of race and ethnicity increasingly difficult to determine.").

305. One commentator has observed:

At the same time that Whites wanted to become color-blind, Blacks were demanding separate admission standards to schools and jobs. Thus the ideology of universalism must be viewed in the proper context. It is mostly an attempt by Whites to maintain institutional arrangements which embody the residual results of past overt racism.

ROBERT STAPLES, INTRODUCTION TO BLACK SOCIOLOGY 261 (1976); accord *Feldman, supra* note 220, at 154 (asserting that color-blindness institutionalizes the status quo of White privilege over Black disadvantage); *Gotanda, supra* note 26, at 2-3 ("A color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans."); *Harris, supra* note 63, at 1768 ("[P]rotection of the property interest in whiteness is achieved by embracing the norm of colorblindness.").

A separate danger that Neil Gotanda perceives from the widespread acceptance of the color-blind norm is that "[t]he successful abolition of 'Black' as a meaningful concept would require abolishing the distinctiveness that we attribute to Black community, culture, and consciousness." *Gotanda, supra* note 26, at 59.

306. See *Aleinikoff, supra* note 194, at 1162 (arguing that color-blind theoretical approaches to legal analysis of equality claims are "an impediment in the struggle to end racial inequality"); *Gotanda, supra* note 26, at 18 ("[T]he nonrecognition [of race] is a means of avoiding or repressing consideration of the social relations and social context that are associated with race."); *id.* at 37 (asserting that a color-blind approach "denies the

[H]ere is the perversity of color-blindness—to banish race-words redoubles the hegemony of race by targeting efforts to combat racism while leaving race and its effects unchallenged and embedded in society, seemingly natural rather than the product of social choices. If all mention of race, whether White or Black, remedial or discriminatory, is equally suspect, the reality of racial subordination is obscured and immunized from intervention.³⁰⁷

In short, the multiracial discourse engaged in the support for a mixed-race census count creates the danger of inadvertently supporting the maintenance of status quo racial inequality.³⁰⁸ This danger can be located in the multiracial discourse conceptualization of race as too fluid to monitor.³⁰⁹ The legacy of multiracial discourse will be its ability seemingly to validate and reinforce the color-blindness that limits racial equality.³¹⁰

D. *Measurement of Racial Progress Hindered*

[T]he veneer is very thin. Scratch colorblindness, and white supremacy comes to the surface pretty quickly.³¹¹

In analyzing the advisability of a mixed-race census count, it is particularly important to examine the uses of census racial data. Census racial data is principally used to enforce the civil rights mandates against discrimination in employment,³¹² in the selling and renting of homes,³¹³ and in the allocation of mortgages.³¹⁴ The U.S. Department of Housing and Urban Development also uses racial data to determine where to locate low-income and public housing.³¹⁵ More importantly, census racial data has also been used in voting-rights re-

experience of oppression and limits the range of remedies available for redress"); *id.* at 59 (positing that the color-blind ideal's implicit social goal of assimilation degrades positive aspects of blackness, because it seeks homogeneity in society rather than diversity).

307. HANEY LÓPEZ, *supra* note 288, at 177; *accord* Crenshaw, *supra* note 122, at 1346-47 (noting that color-blindness cannot correct racial subordination it does not recognize).

308. *See* Powell, *supra* note 53, at 13 ("Without racial statistics, . . . racism, which is still very much a part of our society, will be that much harder to identify, that much more difficult to eradicate, and that much more likely to remain a societal norm.").

309. *See supra* note 53.

310. *See* Aleinikoff, *supra* note 194, at 1122 ("Race-neutral strategies simply postpone our society's inevitable rendezvous with its history of racism.").

311. Raskin, *supra* note 228, at 745.

312. 42 U.S.C. § 2000e (1994).

313. *Id.* § 3604.

314. *Id.* § 3605.

315. *Multiracial Hearings*, *supra* note 2, at 267 (testimony of Paul Williams, General Deputy Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development).

districting to improve the political participation of people of color.³¹⁶ Indeed, the OMB racial and ethnic classifications were devised for the specific purpose of facilitating the enforcement of civil rights laws and not for promoting particular cultural identifications for groups of people.³¹⁷ As one commentator noted during the congressional hearings on the multiracial-category proposal: "In terms of our nation's civil rights laws and programs, the number of self-identified Swedes may be interesting, but not salient."³¹⁸ Accordingly, the census is an inappropriate forum for the expression of a color-blind ideal.

The important political implications of racial classifications make the OMB's recent "check-all-that-apply" option³¹⁹ as hazardous as the multiracial category itself. Like the MCM, the OMB overlooks how government inquiry into race matters. When a person of color experiences discrimination, that experience of racism is not cut in half because the person is only "one-half Black" or "one-half Asian." Because the census's race question is a mechanism for monitoring the extent to which socioeconomic opportunities are stratified by race, it is nonsensical to divvy up the racial classification response into shares (like the long-since-repudiated categories of octoroon, quadroon, and Mulatto),³²⁰ when the social experience of race is not perceived in shares. Furthermore, the comprehensive scope of the OMB "check-all-that-apply" decision inflates the race-as-culture fractioning of race's political meaning. The OMB decision is comprehensive in that any individual can check as many boxes as reflect her racial heritage, without viewing herself as a mixed-race person because both parents are of the same race.³²¹ This fractured mechanism for monitoring patterns of racial difference will underappreciate the extent to which socioeconomic opportunities are structured by race³²² and therefore function as a color-blind racial classification system.

316. 42 U.S.C. § 1973 (1994).

317. See Directive No. 15, *supra* note 9, at 19,629 (noting that, among other things, racial classifications were established to monitor civil rights compliance and maintain comparable data across federal agencies).

318. *Multiracial Hearings*, *supra* note 2, at 96 (testimony of Henry Der, National Coalition for an Accurate Count of Asians and Pacific Islanders).

319. See Revisions to Directive No. 15, *supra* note 7, at 58,789.

320. See JOEL WILLIAMSON, *NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES* 112 (1980) (explaining that pure Blacks, Mulattoes, quadroons, and octoroons were counted separately in the 1890 census, that the results were unreliable, and that the census never again attempted to make such distinctions); see also *supra* notes 157-159 and accompanying text (discussing the 1850-1920 censuses, which included a separate Mulatto category).

321. See Revisions to Directive No. 15, *supra* note 7, at 58,789.

322. See Stephen Barr & Michael A. Fletcher, *U.S. Proposes Multiple Racial Identification for 2000 Census*, WASH. POST, July 9, 1997, at A1, available in 1997 WL 11972903 (identifying

The fallacy of the color-blind theory is its premise that non-recognition of race is equivalent to the non-perception of race.³²³ Yet, “[s]uppressing the recognition of a racial classification in order to act as if a person were not of some cognizable racial class is inherently racially premised”;³²⁴ “[i]n pretending to ignore race, this society denies itself the self-knowledge that is demanded for eradicating racism and achieving racial justice.”³²⁵ Color-blindness, in effect, is a denial that race matters.³²⁶ “There is very little difference between black Americans and white Americans when you go to the bottom of it. But what little there is, is very important.”³²⁷

Color-blind discourse not only masks racial hierarchies that exist in society and history,³²⁸ it entrenches those hierarchies, while contending that racism no longer exists.³²⁹ Yet, nothing could be further from the truth.³³⁰ The ongoing discrimination against Blacks in the

that the significant challenge to civil rights enforcement will depend on how the “overlap” in races is tabulated by the census).

323. See Krieger, *supra* note 207, at 1198, 1202 (asserting that natural human cognitive organization predisposes people to categorize and stereotype by race); David Berreby, *Primary Colors*, SCIENCES, Mar.-Apr. 1997, at 38, 40 (theorizing that, absent teachings by others, racial thinking arises in children by age three).

324. Gotanda, *supra* note 26, at 19.

325. Aleinikoff, *supra* note 194, at 1125. Another commentator explains:

The eradication of barriers has created a new dilemma for those victims of racial oppression who are not in a position to benefit from the move to formal equality.

The race neutrality of the legal system creates the illusion that racism is no longer the primary factor responsible for the condition of the Black underclass

Crenshaw, *supra* note 122, at 1383.

326. See generally WEST, *supra* note 254. Another dangerous outcome of the color-blind approach is that it denies that race matters and at the same time insists that the laws of equality can address any discrimination that “truly” occurs. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 101, 104 (1992) (“The worship of equality rules as having absolute power benefits whites by preserving a benevolent but fictional self-image, and such worship benefits blacks by preserving hope.”).

327. Gerald Early, *Introduction to LURE AND LOATHING: ESSAYS ON RACE, IDENTITY, AND THE AMBIVALENCE OF ASSIMILATION* xi, xvii (Gerald Early ed., 1993) (paraphrasing the unlettered workman in William James’s “The Gospel of Relaxation”) (internal quotation marks omitted).

328. See Peggy C. Davis, *Law as Microaggression, in CRITICAL RACE THEORY: THE CUTTING EDGE* 169, 171-72 (Richard Delgado ed., 1995) (arguing that the cultural heritage of slavery and segregation informs the race-consciousness of present-day individuals and leads to a perpetuation of the racial hierarchy that characterized those races).

329. See *id.* at 172 (“Anti-black attitudes persist in a climate of denial.”); Charles R. Lawrence, III, *The Epidemiology of Color-Blindness: Learning to Think and Talk About Race, Again*, 15 B.C. THIRD WORLD L.J. 1, 9 (1995) (“This kind of massive denial is not possible unless there is also a strictly enforced taboo against speaking publicly about that which we do not wish to see.”).

330. See BELL, *supra* note 326, at 92, 97 (maintaining that, given the racial reality of the last three centuries, racism is a seemingly permanent fixture in the United States); Davis, *supra* note 328, at 170 (positing that U.S. society commonly regards Blacks as incompetent

United States economy is well documented.³³¹ In addition, social reliance upon racially biased premises persists, as borne out by the well-noted and continuing refusal of taxi-cab drivers to accommodate Black male passengers,³³² and the continuing police practice of viewing all Black people as criminals.³³³

The experience of being presumed a criminal until proved otherwise is one that African-American men, rich and poor, know too well. Taxis that fail to stop, nighttime pedestrians who scuttle away in fear and random roustings by police and security guards are common events in the lives of black men—but often viewed as paranoid fantasies by white Americans, who are generally exempt from the presumption of criminality.³³⁴

While Black men are documented as presumptive criminals, Black women are derogatorily presumed to be undeserving welfare recipients.³³⁵ Thus, given its correlation with economic and social in-

and reflects "traditional stereotype[s] of blacks [as possessing an] inferior mentality, primitive morality, emotional instability, laziness, boisterousness, closeness to anthropoid ancestors, occupational instability, superstition, care-free attitude, and ignorance".

331. See HACKER, *supra* note 101, at 230-36 (providing empirical data that demonstrates racial disparities across numerous economic indicators); WEST, *supra* note 254, at 63 ("[B]lack poverty is primarily due to the distribution of wealth, power, and income—a distribution influenced by the racial caste system . . ."); WILLIAMS, *supra* note 181, at 59 ("The power of de facto segregation in all areas of American life is still so strong that very few African-Americans are not directly affected by poverty, crime, and discrimination."); Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819 (1991) (demonstrating by empirical research that retail car dealerships systematically offer substantially better prices on identical cars to White men than they do to Blacks or women); Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other-isms)*, in CRITICAL RACE THEORY: THE CUTTING EDGE 564, 569 (Richard Delgado ed., 1995) ("The privileging of some groups in society over others is a fact of contemporary American life. . . . This societal ordering is clear to children as early as kindergarten." (footnote omitted)); Robert E. Suggs, *Bringing Small Business Development to Urban Neighborhoods*, 30 HARV. C.R.-C.L. L. REV. 487, 488 (1995) (noting that racial barriers stifle Black business activity in Black communities).

332. See Hamil R. Harris, *For Blacks, Cabs Can Be Hard to Get; Discrimination Is Elusive Problem Regulators Say*, WASH. POST, July 21, 1994, at J1, available in 1994 WL 2430870 (reporting that despite a lawsuit and 778 complaints in 1993-1994, cab drivers continue to refuse to pick up Black passengers because they are generally "afraid" of them).

333. *The 6:42 from Chappaqua*, N.Y. TIMES, May 11, 1995, at A28, available in LEXIS, News Library, Nyt File (reporting an incident in which professionally attired Earl G. Graves, Jr., a Yale- and Harvard-educated senior vice-president of Black Enterprise Magazine, was seized and publicly searched in Grand Central Station on his way to work because of an anonymous letter claiming a much smaller Black man was carrying a gun).

334. *Id.*

335. See Marlene Cemons, *Myths Color Views on Who Receives Aid*, CHI. SUN-TIMES, Jan. 29, 1995, at 24, available in 1995 WL 6632029 (asserting that the average American believes

dicators, race is not, as Justice Scalia and other proponents of color-blindness insist, an irrelevant characteristic like eye color or hair shade.³³⁶

It is important to note that the racial categories themselves do not confer stigma upon non-White classifications, but rather racism informs and stigmatizes the categories.³³⁷ Accordingly, eliminating the categories would not eliminate racism itself. The differentiation individuals and institutions make for purposes of self-interest would still occur. By way of comparison, within the context of gender discrimination, it is not the label "woman" which relegates women to less pay than men. Similarly, the needed transformation from paternalistically referring to all women as "girls" did not effect a concrete change in their economic status with respect to men.³³⁸ Labels themselves cannot "other" a group of people.³³⁹ Therefore, simply discontinuing

that the typical welfare recipient is an unmarried Black woman with "lots of children and no desire to get a job," despite the fact that for the past two decades, the typical welfare recipient has actually been a rural White person, and the actual number of Black women on public assistance has decreased significantly); cf. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 44-45 (1991) (noting that Black women have been presumed to be shoplifting at retail stores where they have been denied admission by the use of buzzer systems); Taunya Lovell Banks, *Two Life Stories: Reflections of One Black Woman Law Professor*, 6 *BERKELEY WOMEN'S L.J.* 46, 50 (1990-91) (noting that Black women are not insulated by gender from the fear Whites have of Blacks).

336. See Strauss, *supra* note 219, at 114 (maintaining that centuries of explicitly race-based discrimination have imbued a political meaning to race, which correlates poverty with blackness and thus makes true color-blindness unattainable).

337. See Powell, *supra* note 53, at 12 ("Dropping racial categories from the Census will not alleviate the racial hierarchy that supports the systems of resource distribution in American society."). But see John Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 *Nw. U. L. Rev.* 363, 379 (1966) ("[A]ny legal classification by race weakens the government as an educative force."); William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 *U. CHI. L. REV.* 775, 809 (1979) ("[O]ne gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment never to tolerate in one's own life—or in the life or practices of one's government—the differential treatment of other human beings by race.").

338. See Judy Mann, *Taking Another Crack at the Wage Gap*, *WASH. POST*, July 2, 1997, at D10, available in 1997 WL 11971805 (reporting that, according to the U.S. Census Bureau, women on average earn \$9000 less per year than men).

339. See Piper, *supra* note 96, at 30 ("[I]t doesn't really matter what term we use to designate those who have inferior and disadvantaged status, because whatever term is used will eventually turn into a term of derision and disparagement by virtue of its reference to those who are derided and disparaged . . ."). One commentator has observed:

Slaves, when "freed," often referred to themselves by a new name. Similarly, the Black Muslims, in an effort to change their identities as subordinate in the political and social world, changed their names. But renaming cannot be accomplished at the surface level of surnames, nor even at the deeper level of social and political discourse. This is true because the problematic of race is accessible only at a deeper level—a level that mediates between the social and political, and between sign and meaning.

the use of labels or renaming them will fail to suspend racism; indeed, as this Article has argued, it can actually hamper society's ability to do so.³⁴⁰ To work effectively toward the eradication of racism, it is essential to acknowledge the existence and social significance of racial distinctions.³⁴¹ In a nation such as ours, where race unquestionably matters, it is imperative to ground the evaluation of the proposal for a mixed-race census count within a race-conscious theoretical structure and with the understanding that recognizing racial hierarchy does not cause racism.³⁴² It is only by asserting a race-conscious narrative of what race means politically that the negative aspects of multiracial discourse can be countered.

III. A RACE-CONSCIOUS RACIAL CLASSIFICATION PROPOSAL

Race-consciousness, as advanced by Critical Race theorists, advocates the explicit recognition of race and its meaning in our society.³⁴³ It is the idea that race matters to one's perception and experience of (and *in*) the world, and thus it acknowledges that racial meanings are not symmetrical.³⁴⁴ This Article seeks to clarify the way in which race-consciousness should emphasize the political aspects of race in legal analysis as opposed to more diffusive appeals for respect of cultural diversity. Although cultural diversity is a laudable societal goal, it is an imprecise mechanism for legally assessing discrimination. Its lack of precision for the antidiscrimination context arises from the manner in which cultural approaches to race focus upon personal identity as a

D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 506 (1993) (footnotes omitted).

340. See generally Winant, *supra* note 81 (maintaining that decontextualizing race obscures tangible racial difference).

341. See generally WEST, *supra* note 254 (examining the ways in which the experience of African Americans in the United States is framed by their race).

342. See Aleinikoff, *supra* note 194, at 1087 (arguing that while "White racism has made 'blackness' a relevant category in our society," this is not the case for "colorblindness [which] seeks to deny the continued social significance of the category, to tell blacks that they are no different from whites, even though blacks as blacks are persistently made to feel that difference"); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 835 (asserting that Whites have linked identification of race-consciousness with the evils of racism).

343. See Kennedy, *supra* note 233, at 1424 ("A better way to formulate the meaning of equal protection in the race-relations context is to . . . look [] beyond the process producing inequality in the social relations of racially identifiable groups, to the objective indicia of inequality itself."). See generally CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995) (compiling writings that focus on the ways in which race informs an individual's experience); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995) (anthologizing essays from Critical Race theorists). This notion predates the Critical Race Theory movement. See BALDWIN, *supra* note 86, at 104 ("Color is not a human or a personal reality; it is a political reality.").

344. See Peller, *supra* note 342, at 790.

central feature of racial difference. But it is not the manner in which an individual may feel kinship with fellow group members and thereby assert a group identity that causes racial bias. In contrast, it is the way in which groups are “othered,” and thereby racialized that is manifested in racial discrimination and is thus most salient to methods for evaluating and monitoring instances of discrimination.³⁴⁵ In order to have the law successfully work toward the goal of racial equality, legal analysis should shift from the discourse of color-blindness to that of race-consciousness (as more narrowly focused herein).³⁴⁶ The proposal that this Part sets forth is rooted in the premise that, in order to document and hopefully assist in eradicating such subordination, categories should be reflective of the existing racial and ethnic hierarchy rather than constructed from individual cultural identities.³⁴⁷

In an era in which the persistence of racism is increasingly called into question,³⁴⁸ there is a vital need for accurate data demonstrating the correlation between racially subordinated categories and intentionally withheld economic and educational opportunities.³⁴⁹ As borne out by the Latin American experience with mixed-race catego-

345. One scholar notes:

The social constructedness of race in America means that no one person controls it. The category I check on my Census form is not determinative. Whether I see myself as black, Negro, African American, multiracial, or Other is only part of the equation. When I visit the suburbs to shop for a house, my race is important—to my realtor and potential neighbors, as well as to me. The taxi driver who passes me on the street is not concerned with what was put on my Census form. Race is not simply a noun; race is a verb. It is what we do in ordering our society.

powell, *supra* note 53, at 13.

346. See Aleinikoff, *supra* note 194, at 1062 (“[I]n order to make progress in ending racial oppression and racism, our political and moral discourse must move from color-blindness to color-consciousness, from antidiscrimination to racial justice.”); Crenshaw, *supra* note 122, at 1369 (“Exposing the centrality of race consciousness is crucial to identifying and delegitimizing beliefs that present hierarchy as inevitable and fair.”).

347. Cf. powell, *supra* note 53, at 12 (“Modifying statistical categories to dilute or refract racial data is ineffectual, unless the desired effect is obscuring the reality of racial disparity.”). But see Payson, *supra* note 34, at 1286 (contending that the use of a racial classification system to reflect racial hierarchy acts to reinforce its existence rather than assist in efforts to identify and redress discrimination).

348. See BELL, *supra* note 326, at 92 (“The real problem is that my view—that racism is permanent—conflicts with and seems inimical to [most others’] world view.”); WILLIAMS, *supra* note 181, at 40 (arguing that, in light of the silence surrounding racism, activists must “relegitimate” discussions of racial tensions).

349. See *Multiracial Hearings*, *supra* note 2, at 96 (testimony of Henry Der, National Coalition for an Accurate Count of Asians and Pacific Islanders):

Until there is adequate testing or sufficient evidence is provided about the experiences of biracial or multiracial persons that are unique to their being biracial or multiracial, the national coalition asks the Census Bureau not to create a biracial or multiracial category at this time. It is not clear at this time what is the salience

ries,³⁵⁰ a mixed-race census count would interfere with the ability to draw these correlations by clouding the inquiry into discrimination.³⁵¹ Furthermore, the absence of a mixed-race census count may allow more effective monitoring of the discrimination perpetrated against mixed-race persons. That is because the racial hierarchy tends to view biracial persons as inferior, not because they are mixed-race, but because they are non-White.³⁵² And it is this facet of the discrimination against biracials as persons of color that must be measured and addressed in the struggle for racial equality.³⁵³ Accordingly, the current racial categories and single-box-checking system should remain intact to the extent they reflect the ways in which society ranks its members.³⁵⁴

Any system of racial classification will be imperfect in its ability to reflect completely the individuality of each person counted.³⁵⁵ Yet, it is not the specific identity of individuals that is at stake in the census inquiry into race, but the collection of data to assess group-based

of knowing how many biracial and multiracial person there are . . . [i]n terms of our nation's civil rights laws and programs

The one factor that multiracial-category proponents set forth as salient and unique to the identity of mixed-race persons is their need for mixed-race bone marrow donors. See Douglass, *supra* note 50 (announcing a bone marrow drive planned for the July 20, 1996 Multiracial Solidarity March on Washington). Yet, the medical literature does not directly address the special donor needs of biracial donees. Cf. Alan H. Goodman, *Bred in the Bone?*, THE SCIENCES, Mar.-Apr. 1997, at 20, 21 (noting that genetic variations "are greatest within so-called races rather than among them").

350. See *supra* notes 115-123 and accompanying text.

351. See *Multiracial Hearings*, *supra* note 2, at 193 (testimony of Steven Carbo, Staff Attorney, Mexican American Legal Defense and Educational Fund) ("[M]ultiracial categories do lend themselves a lack of clarity [sic] regarding the motivations of persons who discriminate.").

352. See FUNDERBURG, *supra* note 58, at 44 (interviewing a biracial person who noted that "maybe I'm half-white, but people look at me and don't think that").

353. But see Goforth, *supra* note 34, at 9-10 ("Moreover, the idea that social reality requires us to recognize the concept of 'race' seems to me an example of circular reasoning."). However, Goforth's indictment falters in the face of the actual Latin American difficulty in addressing racism in a social context that refuses to use consistent racial categories—that is, when they are utilized at all. See *supra* note 129. Although light-skinned "monoracial" Blacks are provided with access to greater opportunities than their darker-skinned group members, that colorism dynamic could not be measured with a multiracial category, because mixed-race persons are of all shades and phenotypes.

354. A compulsory single-box-checking system reflects the way in which mixed-race individuals are treated based on their non-White status. See *supra* notes 87-103 and accompanying text.

355. See Revisions to Directive No. 15, *supra* note 7, at 58,788-90 (adopting a census data-collection system that allows individuals to choose as many racial categories as they feel apply). However, even this system cannot completely reflect each person's individuality, as the instrument by its construct will still force individuals to check predefined boxes.

harms.³⁵⁶ As such, the focus of a census racial classification system should be upon the distinctions in race which form the basis of group-based harms. This needed focus on the politics of difference is not compatible with the MCM culture-focused identity politics approach.³⁵⁷ A race-conscious classification system intentionally emphasizes the politics of difference by organizing itself around the ways in which groups are racially subordinated.

A race-conscious racial classification system is an instrumental mechanism for monitoring racial discrimination.³⁵⁸ There is a value in vigilance in and of itself, separate from the existence of race-based remedies, in that racism is allowed to run rampant when its effects are concealed from public view. The compilation of statistical data can act as a social-systems monitor when individuals utilize the data to call society to account for the entrenched benefits of race-based privilege. Even if the current scheme of civil rights laws were dismantled, it would still be important to measure the extent of race discrimination consistently over time, thereby developing other mechanisms for addressing such racism.³⁵⁹ For example, even though the *McCleskey*

356. See Nancy A. Denton, *Racial Identity and Census Categories: Can Incorrect Categories Yield Correct Information?*, 15 LAW & INEQ. J. 83, 89 (1997) (arguing that the crucial difference between individual identity and social identity comes to light in understanding that the "discrimination and prejudice that the use of the categories is intended to help remedy are triggered by how society views a person, regardless of how that person defines himself or herself").

357. Iris Marion Young, *Deferring Group Representation*, in ETHNICITY AND GROUP RIGHTS 349, 354-68 (Ian Shapiro & Will Kymlicka eds., 1997) (delineating the important distinction between identity politics and the politics of "difference" that enhances society's ability to address group-based harms through group representation). Identity politics emphasizes the centrality of personal identities in forming world views. CRAIG CALHOUN, *CRITICAL SOCIAL THEORY CULTURE, HISTORY, AND THE CHALLENGE OF DIFFERENCE* 198, 204 (1995) (contending that identity politics refers to the invocation of race, nation, gender, class, and a host of other identities as an organizing principle for group politics). It should also be noted that MCM advocates are not the only persons who conflate race-as-culture with the sociopolitical meaning of race. Stephen L. Carter, *The Black Table, the Empty Seat, and the Tie*, in LURE AND LOATHING: ESSAYS ON RACE, IDENTITY, AND THE AMBIVALENCE OF ASSIMILATION 55, 66 (Gerald Early ed., 1993) (identifying that the substance of the author's Black identity is his love of Black people); see also *supra* note 21 (noting the ways in which some Latinos and Latinas fuse culture with race when responding to the census race question). Accordingly, this Article's clarification of the sociopolitical meaning of race in the government's use of racial classifications may be useful outside of the multiracial identity context. Haney López, *supra* note 22, at 5 (noting that critical race theorists "argue for race consciousness, yet do so without explicitly suggesting what race might be").

358. See 42 U.S.C. § 2000e-2 (1994) (outlining the use of census racial data to enforce the civil rights mandates against discrimination in employment); *id.* § 3604 (discrimination in the sale and renting of homes); *id.* § 3605 (discrimination in the allocation of mortgages).

359. *But see* Judy Scales-Trent, *Add 'Multiracial' to the Next Census*, L.A. TIMES, July 3, 1996, at B9 ("Statistical data can help improve the lot of black Americans—but only when white

equal protection claim was not based upon a remedial statute,³⁶⁰ the recognition of race's political meaning in the compilation of statistical data was crucial for explaining the lack of equity for Blacks in the criminal justice system.³⁶¹

Given the significant uses of the census racial data and the persistence of racial discrimination, it is important to utilize a classification scheme built around the political meaning of race³⁶² and make that focus a prominent feature of the census form's instructions.³⁶³

This Article proposes an openly race-conscious, single-box-checking census classification system. Such a system is needed because of the manner in which the hypo-descent rule³⁶⁴ seemingly pertains to all non-Whites in varying degrees, due to the fact that all forms of non-whiteness are deemed inferior to whiteness.³⁶⁵ In fact, acknowl-

Americans want this to happen; the numbers themselves have no independent power." Yet, society's refusal to acknowledge statistical demonstrations of racism would only be compounded by the failure to collect the data at all. See *supra* note 308.

360. See *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987) (noting that *McCleskey's* claim that the Georgia capital sentencing process violated the Eighth and Fourteenth Amendments was based on a statistical study that purportedly showed disparate treatment of defendants based primarily on the race of their victims).

361. *McCleskey's* failure to succeed with his equal protection claim has been attributed to the Court's disinterest in reforming the entire criminal justice system, rather than any failings in the power of statistical data to demonstrate bias. Carter, *supra* note 233, at 446-47.

362. See Haney López, *supra* note 22, at 38 ("Race is not hereditary; our parents do not impart to us our race. Instead, society attaches specific significance to our ancestry . . ."). One commentator explains this idea even further:

What joins me to other blacks, then, and other blacks to another, is not a set of shared physical characteristics, for there is none that all blacks share. Rather, it is the shared experience of being visually or cognitively *identified* as black by a white racist society, and the punitive and damaging effects of the identification.

Piper, *supra* note 96, at 30-31.

363. See *Multiracial Hearings*, *supra* note 2, at 274 (testimony of Norma V. Cantú, Assistant Secretary for Civil Rights, U.S. Department of Education) (demonstrating that data are lost because people are not given adequate instructions on how to fill out the census forms and for what the information is used).

364. See *supra* note 41.

365. See *supra* Part II.A. My proposal is premised upon the centrality of racism against all persons considered non-White. This premise is distinct from the notion that counting persons as simply White or non-White would be sufficient for monitoring the existence of racism. Cf. Nathan Glazer, *The Hard Questions: Race for the Cure*, NEW REPUBLIC, Oct. 7, 1996, at 29, available in 1996 WL 9233603 (proposing that the census should only inquire whether the respondent is Black, because "[r]ace in America means blacks," and explaining that the numbers from the census are used to measure programs combatting racism against Blacks). A simplification to only White and non-White racial categories would hinder the nation's ability to monitor and inform itself about the distinct ways in which various communities experience racism. For instance, the racism against racial minorities who do not speak English or speak what is deemed to be heavily-accented English is distinct from that against persons who do speak English. It is still racism, but the ways in which the

edging the political meaning of race is crucial in working toward the MCM's goal of racial equality, which has thus far been missing from the discourse of the movement itself.³⁶⁶

Because a race-conscious classification system can be more effectively tailored to monitor racial discrimination, the current census classification system needs definitional modification to be more effective.³⁶⁷ For example, the system's ambiguous definitions create confusion in respondents. The current census scheme defines "Black" as being a person who has "origins in any of the black racial groups of Africa" and "White" as being a person who has "origins in any of the original peoples of Europe, North America, or the Middle East."³⁶⁸ The doctrinal problem with such definitions is that their inadvertent approach to race as a biological concept makes them perplexing to implement:

linguistic subordination is implemented may need to be addressed in a different manner than other racial equality issues. See Mark L. Adams, *Fear of Foreigners: Nativism and Workplace Language Restrictions*, 74 OR. L. REV. 849, 864 (1995) (noting that many proponents of English-only ordinances argue that such laws are necessary to protect the United States' national unity). In order to develop an effective mechanism for combatting all types of racism, we, as a society, need to collect information about the various communities that are viewed as non-White. A variation upon this proposal could be the counting of persons as simply "socially advantaged" and "socially disadvantaged," which, in its expansiveness, would have the benefit of including gays and lesbians in the calculus of how our country benefits and disadvantages its residents. Yet, the benefits of collecting such information could be obtained by adding a question regarding the respondent's sexual orientation, without sacrificing the usefulness of racial data.

366. Evidence of the MCM representatives' failure to consider the political meaning of race is their claim that they have not yet considered whether the multiracial category should be accorded the same congressional protection as the other racial categories and the Hispanic origin ethnicity classification. See *Multiracial Hearings*, *supra* note 2, at 169 (testimony of Carlos Fernández, President, Association of MultiEthnic Americans) ("Let's get the information that reflects reality. What we to do with that later should be, ought to be a distinct question . . .").

367. OMB's recent decision to permit multiple box checking should also be reversed for a more accurate reflection of the pervasiveness of racial bias.

368. Standards for the Classification of Federal Data on Race and Ethnicity, 59 Fed. Reg. 29,831, 29,834 (1994). These classification standards are not without controversy:

Some have suggested that the geographic orientation of the definitions for the various racial and ethnic categories is not sufficiently definitive. They believe that there is no readily apparent organizing principle for making such distinctions and that definitions for the categories should be eliminated.

Id. at 29,833. The "origins" approach to defining race also furthers the societal view of Whites as U.S. natives and non-Whites as trespassers, by limiting to Whites (and Native Americans) the ability to have "origins in the original peoples of North America." Cf. Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome,"* in *ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY* 1087, 1095 (Hyung-chan Kim ed., 1992) (noting the persistent judicial view of Asians in the United States as presumptively foreign).

Who among us knows their "origins"? For if you count back in your own family, doubling the number each generation (two parents, four grandparents, eight great-grandparents, etc.) you will find 32,000 possible ancestors during the previous 15 generations alone. Do you know their "origins"?³⁶⁹

I propose a Race-Conscious Racial Classification System that modifies government data collection forms by dispensing with such vacuous pseudoscientific racial definitions and, instead, employs an approach rooted in the sociopolitical meanings of race.³⁷⁰ This proposal is asserted not as the definitive classification scheme, but merely as an invitation for developing a classification system organized around the political meaning of race for more effective use of racial data. By focusing upon the political meaning of race, a race-conscious classification system can avoid the distortions of a race-as-culture focus. The race-as-culture focus invites responses about personal identity rather than monitoring social differentiation based on racial ancestry. The following proposal is set forth primarily as a vehicle for initiating the discussion of the importance of race-conscious racial classifications, rather than being a concrete model for statistical data collection. The current list of racial classifications should be accompanied by the following explanation (exclusive of footnotes):

*Recognizing that there are no such things as scientifically pure races or ethnicities, and that a person's individual identity can never be reduced to a single box, this form requests that you indicate*³⁷¹

369. Scales-Trent, *supra* note 359.

370. This would be akin to Charles Lawrence's "Cultural Meaning" test. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355-58 (1987) (proposing overt judicial examination of context to assist in recognizing racial meanings and motivations). Thus, the instant proposal acknowledges that race is a social construct. Accord Jeffrey H. Rutherford, *Reexamining Race and Racial Identity in the United States*, 15 LAW & INEQ. J. 1, 1 (1997) ("The argument that race is a social construct means that race derives its effective existence primarily from political, social and cultural underpinnings."). But it would be erroneous to presume, as color-blind theory does, "that if something is socially constructed it can simply be willed away." John A. Powell, *The "Racing" of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. J. 99, 118 (1997).

371. This proposal maintains that the Census Bureau should continue its use of self-identification as the method for determining racial categories, because only individual respondents can assess the sociopolitical meaning of race in their lives. If a method other than self-identification were used (e.g., a third-party "eye-ball" test), a census taker would not appreciate the racial bias that persons who appear White may experience upon revealing their African ancestry. See Piper, *supra* note 96, at 30 ("[M]y public avowal of my racial identity [as Black although appearing White] almost invariably elicits all the stereotypically racist behavior that visibly black people always confront . . ."). Yet, it should be noted that for purposes of measuring social disadvantage, the self-identification method has been critiqued as susceptible to fraudulent responses. See Ford, *supra* note 146, at 1281

which single race and/or ethnicity you find most politically and socially meaningful. Because the collection of racial and ethnic data is utilized and compiled for the specific purpose of monitoring discrimination in society (see attached list of civil rights statutes which rely upon the Census Bureau collection of racial data),³⁷² this classification system focuses upon the ways in which your appearance and assertion of race affect your treatment by others in society.³⁷³

In order to assess the political role of your racial background you may reflect upon the following questions. When first interacting with others, in what ways does your appearance affect the interaction? For instance, an individual who in his or her daily interactions in society finds that others consistently react to him or her as White or Black,³⁷⁴ and modify their behavior based upon that physi-

(asserting that self-identification methods allow White persons who wish to participate in race-based preference programs to identify themselves as Black, and Black persons who wish to escape the social derision of blackness to identify as White). Thus, the instant political-race proposal is no more susceptible to the "reduction" in the number of persons choosing pejoratively viewed racial classifications because of "false consciousness," than a biological-race approach lodged in a self-identification system of classification. Cf. Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism* in *Bostick v. Florida*, 67 TUL. L. REV. 1979, 2039 (1993) ("In contemporary America, a man's color still puts him at risk when dealing with the police. If Justice Thomas ever goes to Los Angeles, he had better bring a phalanx of white Secret Service agents to protect him from the hard-core racist groups within the Los Angeles Police Department.").

372. For a list of pertinent civil rights statutes, see *supra* notes 312-317 and accompanying text.

373. See *supra* notes 331-336 and accompanying text (discussing discrimination against Blacks in the U.S. economy).

374. The manner in which an individual whose racial background is rooted in more than one non-White category is racialized also relates to the ways in which blackness is always viewed as the most pejorative of all racial attributes. See Gordon, *supra* note 41, at 382 ("[A]lthough there are people who function as 'the blacks' of particular contexts, there is a group of people who function as the blacks everywhere . . . the blackest blacks." (citations omitted)). Thus, even though all non-White persons are viewed as subordinate, individuals' Black ancestries often can be more determinative of the social roles of their race. This is borne out by the experiences of Afro-Latinos in the United States who are discriminated against based upon their ethnicity but are constantly under siege because of their African phenotype. Cf. Juan A. Giusti Cordero, *AfroPuerto Rican Cultural Studies: Beyond cultura negroide and antillanismo*, 8 J. EL CENTRO DE ESTUDIOS PUERTORRIQUEÑOS 57, 57 (1996) ("Approaches to the historical experience of Puerto Ricans of color have been overwhelmed by the urgency of confronting racism . . .").

Interestingly, the MCM focuses on the dilemma of Black mixed-race persons as opposed to the mixture of other racial ancestries, such as Native American and Asian ancestries, which are viewed as subordinate. See *supra* note 41 and accompanying text. The MCM's lack of emphasis on the classification needs of mixed-race individuals who are rooted in pejoratively viewed communities other than Black may indicate that there is a small number of such individuals. Accordingly, such individuals could continue to utilize an "Other Race" classification until the community of Asian/Native-American mixed-race persons has increased to the point where it can be determined what significance such racial mixture has within the racial political hierarchy. Although the use of the "Other

*cal assessment, can conclude that his or her White or Black phenotype determines the sociopolitical role of his or her racial background, regardless of how diverse that particular individual's ancestry actually is. Alternatively, when you share the details of your racial ancestry, how does that revelation affect your treatment by others? For instance, where an individual may phenotypically appear White, but when sharing his or her background with others discloses that his or her ancestry also includes Blacks and then finds that the listener is fixated only on the person's Black ancestry, then it would be appropriate for such an individual who personally identifies as White and Black to conclude that the "Black" racial classification reflects the sociopolitical role of his or her diverse racial background.*³⁷⁵

The goal of the proposed race-conscious classification system is to cultivate a more precise understanding of the ways in which race is socially and politically significant, apart from its role as one of many factors in personal identity formation. By designing a classification system that interrogates the political content of race, the collection of

Race" category to list out the specific ancestries of a mixed-race person's identity may facially appear similar to the proposed multiracial category, its use is not accompanied by the same middle-tier-buffer dangers to racial equality efforts as is the case with an officially instituted multiracial category. Furthermore, the retention of the "Other Race" category would facilitate the analysis of the ways in which new arrivals to the United States are racialized. It is accordingly inappropriate for the federal Interagency Committee to recommend the abolition of the "Other" category. See Recommendations to OMB, *supra* note 7, at 36,939. For instance, upon arrival in the United States, the Irish were not considered White; they were considered a race unto themselves. They were racialized by a "blackening" of their image. See IGNATIEV, *supra* note 163, at 76 ("Strong tendencies existed in antebellum America to consign the Irish, if not to the black race, then to an intermediate race located socially between black and white."). The Census Bureau has received special permission from OMB to utilize an "Other" category not delineated by OMB Directive No. 15. See Recommendations to OMB, *supra* note 7, at 36,880.

375. For example, when interpersonal relationships are altered by the revelation of Black ancestry in persons whose phenotype does not announce it, the sociopolitical role of that biracial person's diverse ancestry can be said to be Black. See FUNDERBURG, *supra* note 58, at 219 (interviewing a biracial person who explained the discrimination he experienced even though his phenotype did not reveal his African ancestry: "In my own experience, I've seen dating relationships turn off as a result of prejudice once someone realized I was black."). Therefore, the choice of the Black racial category for such an individual would reflect his personal experience with racism and understanding of the sociopolitical nature of racial classifications, rather than an automatic choice to indicate the race of the parent who is most marginalized in society, or a political preoccupation with maintaining the "numbers" of the Black community. Nor will this system of identification be ascribed by others through the rule of hypo-descent, because a respondent's exploration of the political meaning of race can be divorced from a personal identity of diverse ancestral connections. This proposal is also distinct from OMB Directive No. 15, which advises a mixed-race person to check the "category which most closely reflects the individual's recognition in his community." Directive No. 15, *supra* note 9, at 19,269. Unlike OMB Directive No. 15, this proposal does not overlook the ways in which mixed-race persons are discriminated against upon revealing their non-White ancestry.

racial data can more closely correspond with the social dynamic such data seek to measure. Furthermore, the proposal's disjunction of the political meaning of race from the cultural approach to race also preserves an individual's ability to assert a varied personal identity. Specifically, the frank explanation of the reasons for a public inquiry into political race may assure the respondent that the complex and varied ways individuals construct and restructure their personal identities are not being called into question or challenged by the Census Bureau.

In addition to having the current racial classifications accurately reflect the sociopolitical meaning of racial hierarchy, this proposal also effectuates the erosion of the White transparency that fosters White privilege,³⁷⁶ because Whites will have to confront their whiteness as a race under this Article's proposal.³⁷⁷ Because the proposal takes a sociopolitical approach to race, persons who identify as White cannot check a box without acknowledging the social benefits that accompany White status.³⁷⁸ When whiteness must be confronted as a race like any other, it undermines its presumed superiority as the norm.³⁷⁹

Although the proposal would be administratively simple to implement,³⁸⁰ there are those who might be concerned with the ability of respondents to comprehend and utilize the stated explanations. Yet, its complexity stems not from presenting respondents with detailed census instructions, but from the difficulty of confronting the reality of the meaning of race and the benefits or hardships such political

376. See Flagg, *supra* note 102, at 957 (determining that White transparency is an obstacle that must be addressed in racial justice efforts).

377. ACCORD STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 180 (1996):

[O]ne small way to give up white privilege is to stop pretending that race does not matter, even though our aspiration continues to be that it should not matter. If we stop pretending that race does not permeate our daily life, our classrooms, and the affairs of government, perhaps we will start to see the operation of white privilege, and other privileges, more clearly.

378. This would be a productive "direct engagement with white supremacy" by Whites, which otherwise rarely occurs. Lawrence, *supra* note 56, at 838.

379. See Gordon, *supra* note 41, at 389 ("[W]hen white is spoken of as a race, many whites experience discomfort for good reason; it violates their place in the social order."); cf. DELGADO, *supra* note 256, at 32 (positing that White supremacy could be more effectively undermined if Whites became "race traitors" by consistently challenging race-based allocation of privilege).

380. Implementation of the proposal would only entail the following: (1) the inclusion of an explanation of the purpose of collecting racial data, and (2) the definition of sociopolitical race. Inasmuch as the categories and the single-box-checking system are retained, the Census Bureau would not incur any additional administrative costs in the tabulation of the census data. In addition, the proposal's retention of the single-race-category system permits the collection of comparative data to measure racial disparity across time.

meaning can impose.³⁸¹ For instance, "[n]ot all black people know what races are, but they know what hatred of black people is."³⁸² This is the sociopolitical significance of blackness known to many people irrespective of educational background.³⁸³ The instant proposal is forthright about the reality of this complexity and encourages society as a whole to take on the important task of grappling with the discomfort of acknowledging racial prejudice and disadvantage.

CONCLUSION

No form of a mixed-race census count will be an effective mechanism for achieving the MCM's stated goal of overcoming racism. The multiracial discourse that supports the MCM promotes color-blindness by asserting a cultural approach to race, which negates its sociopolitical import. Furthermore, the MCM employs a color-blind assessment of the effects of a mixed-race census count when it overlooks the historical uses of mixed-race, middle-tier buffers for purposes of subordination in Latin America and apartheid South Africa. The MCM's promulgation of color-blind theory reinforces the current jurisprudential shift of negating the experiences of racial discrimination against persons of color, and in the process, maintains systems of race-based privilege.³⁸⁴ The danger that the MCM will be co-opted by the larger society as a mechanism for constructing a buffer class to maintain White privilege, in the midst of a growing concern with the demographic decline of White U.S. residents,³⁸⁵ further calls into question the soundness of implementing a mixed-race census count. Even without such a calculated appropriation of the MCM, a mixed-race census count is not advisable, because it would not accurately reflect the racial caste system as it exists in the United States.³⁸⁶ Maintaining caste-conscious racial classifications permits us, as a nation, to acknowledge openly the existence of our racial hierarchy in order to

381. See HARLON L. DALTON, *RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS AND WHITES* 31 (1995) ("[I]t is small wonder that true engagement is so rare. Usually, no one wants to take the initiative. Talking honestly about race feels risky. We aren't quite sure how to do it or where it will lead."); Vincent Di Lorenzo, *Complexity and Legislative Signatures: Lending Discrimination Laws as a Test Case*, 12 J.L. & POL. 637, 639 (1996) (advocating a recognition of complexity by legislatures).

382. Gordon, *supra* note 41, at 388.

383. See *id.* ("Similarly, children learn about groups to hate, although they have no clue of what races are.")

384. See Harris, *supra* note 63, at 1734-35 (acknowledging that whiteness is valued for, among other things, its granting of property rights).

385. See *supra* notes 176-185 and accompanying text.

386. See *supra* notes 87-103 and accompanying text.

work toward substantively eradicating it and countermanding the negative implications of multiracial discourse.³⁸⁷

The most critical aspect of multiracial discourse, which this Article's race-conscious classification proposal addresses, is its characterization of race as too fluid to be adequately reflected by "monoracial" categories, as if the birth of mixed-race persons alone would undermine the existence of race-based privilege.³⁸⁸ The perception of mixed-race persons as ambassadors of racial harmony, indicative of multiracial discourse, resonates with the failed Brazilian race-mixture-as-"racial-democracy" approach to race relations.³⁸⁹ The confluence of multiracial discourse with discredited Latin American perspectives on race is especially alarming given its potential for furthering the course of color-blind jurisprudence. Civil rights efforts to rectify the color-blind jurisprudence premise that race should never be taken into account may be severely hampered by the use of multiracial discourse to assert that race is "too nebulous" to be utilized in governmental efforts to eradicate racism.³⁹⁰ This is the enduring legacy of the MCM—the facility for multiracial discourse to further a color-blind jurisprudential dismantling of civil rights, irrespective of administrative decisions about whether and how to conduct a mixed-race census count. At the same time, the MCM has also provided an invaluable opportunity to have a public discussion about the meaning of race and the need for a more concrete understanding of race in legal efforts aimed at addressing racial disparity. It is only with such a frank discussion of the continuing sociopolitical meaning of race that we as a society can develop a mechanism for effectively abolishing racial inequality—the ultimate goal of the MCM.

Not until . . . we have faced the full human and personal consequences of self-serving, historically entrenched social and legal conventions that in fact undermine the privileged interests they were designed to protect, will we be in a posi-

387. See Angela P. Harris, *The Jurisprudence of Reconstruction, Forward to Symposium, Critical Race Theory*, 82 CAL. L. REV. 741, 743 (1994) ("[C]rafting the correct theory of race and racism can help lead to enlightenment, empowerment, and finally to emancipation . . .").

388. Rochelle L. Stanfield, *Blending of America*, 29 NAT'L J. 1780, 1781 (1997) ("Others anticipate that the bedroom will accomplish what other catalysts could not. Douglas J. Besharov, an [American Enterprise Institute for Public Policy Research] resident scholar, for example, said in a 1996 article in *The New Democrat* that the growing numbers of mixed-race youth represent 'the best hope for the future of American race relations.'").

389. Moffett, *supra* note 141 ("To those who say racial mixing makes it impossible to apply quotas in Brazil, [one Afro-Brazilian activist] has a retort, 'Brazilian police have never had any difficulty distinguishing between black and white.'").

390. See *supra* note 304 and accompanying text.

tion to decide whether the very idea of racial classification is a viable one in the first place.³⁹¹

391. Piper, *supra* note 96, at 31.