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Book Review Essay

Locating Latinos in the Field of Civil Rights: Assessing the Neoliberal Case for Radical Exclusion

WHO IS WHITE?: LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE. By George Yancey.[†] Boulder: Lynne Rienner Publishers, 2003. Pp. x, 230. \$49.95.

Reviewed by Richard Delgado*

I. Introduction: A New Kind of Racism

Poor Latinos! Nobody loves them. Think-tank conservatives like Peter Brimelow, joined by a few liberals and a host of white supremacist websites, have been warning against the Latino threat: Because our dark-haired friends from south of the border insist on preserving their peculiar language and ways, they endanger the integrity of our Anglocentric culture. In order to guard against Balkanization and associated disorders, we should limit immigration from Latin America and police the southern border even more vigilantly than we do now.¹

Recently this group of scholars has been joined by a second group. Composed for the most part of moderate liberals, these writers argue that Latinos pose a different kind of threat. Classified as minorities by many university and public administrators, members of this group nevertheless consume social services and affirmative action slots intended for the country's historic minorities—blacks and Native Americans. Precisely because Latinos assimilate, according to these commentators, they have little claim on our civil rights sympathies.² Latinos, then, come under fire from

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1. *E.g.*, PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* 257–68 (1995); *see also infra* notes 30–36 and accompanying text. For a discussion of hate in cyberspace, see RICHARD DELGADO & JEAN STEFANCIC, *UNDERSTANDING WORDS THAT WOUND* 123–38 (2004) [hereinafter DELGADO & STEFANCIC, *WORDS THAT WOUND*].

2. *Cf.*, *e.g.*, John D. Skrentny, *Inventing Race*, 146 *PUB. INT.* 97, 98–99, 109–18 (Winter 2002) [hereinafter Skrentny, *Inventing Race*] (noting that the high immigration rates of Latinos brings the national character closer to that of Latinos thereby making their need of affirmative action programs less compelling and that treating Latinos as minorities strays from the program's original goal and threatens to swamp it with overwhelming members). *See also* JOHN D. SKRENTNY, *IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* 15 (1996) (arguing that women and ethnic groups other than African Americans are conspicuously absent from the

the right for not assimilating and from the left for doing the exact opposite. The right uses unassimilability as a rationale for keeping Latinos out; the left, their success in fitting in as a reason for denying public benefits and places in colleges and universities to ones who are already here. Individualistic, non-nonsense Americans have a limited stock of empathy, this group writes. Why risk compassion fatigue by extending our civil rights sympathies to groups who do not really need them?³

The former group includes Brimelow, Patrick Buchanan, Samuel Huntington, liberal Arthur Schlesinger, the anti-immigrant organization FAIR, and a legion of white supremacist websites that inveigh against the evils of “mud people.”⁴ The second, somewhat softer-edged school includes scholars such as Paul Brest, John Skrentny, Orlando Patterson, Mari Matsuda, and columnist Charles Krauthammer, who warn of the danger of dilution when well-meaning activists and administrators extend civil rights programs to groups beyond their original beneficiaries.⁵

affirmative action debate because affirmative action developed as a model of justice for African Americans, in response to a struggle for racial equality and a racial crisis); *infra* notes 38–68 and accompanying text (explaining that several authors assert that Latinos have less of a moral claim than do others for civil rights solicitude and remedies).

3. Cf. *World News Tonight* (ABC television broadcast, Aug. 7, 2004) (employing the term “compassion fatigue” in reference to the “unending” stream of casualties from Iraq).

4. See JUAN PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 478–88 (2000) [hereinafter PEREA ET AL., RACE AND RACES] (collecting sources describing white supremacist attitudes and rhetoric); DELGADO & STEFANCIC, WORDS THAT WOUND, *supra* note 1, at 123–24 (describing various websites); see also, e.g., Imperial Klans of America Realm of Virginia, *IKA Virginia*, at <http://www.k-k-k.com/virginia> (last visited Oct. 23, 2004) (“Wake up White America Our borders are being flooded every day by thousands of these mud races!”); ENotes.com, *White Supremacy Groups*, at <http://www.enotes.com/white-supremacy/662> (last visited Oct. 23, 2004) (“It is the philosophy of the World Church of the Creator to hate one’s enemies—Jews and the “mud races”—and love one’s own kind, the white race.”).

5. See Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 899–900 (1995) (suggesting that black inclusion within affirmative action programs may have a higher priority than the Latino kind because it is comparatively less clear that Latino socioeconomic status is linked to discrimination and because blacks’ unique historical oppression constrains their social mobility); Charles Krauthammer, *Diversity is a Blow to African-Americans*, BUFF. NEWS, Aug. 20, 1997, at B3 (“From the African-American perspective, diversity has diluted the impact of affirmative action without securing its political viability.”); Orlando Patterson, *Race by the Numbers*, N.Y. TIMES, May 8, 2001, at A27 [hereinafter Patterson, *Race by the Numbers*] (“Latino coalition strategies, by vastly increasing the number of people entitled to affirmative action, have been a major factor in the loss of public support for it.”); Skrentny, *Inventing Race*, *supra* note 2, at 113 (“The continuing confusion over the scope of affirmative action weakens a policy that may still be very important for black Americans.”); cf. Mari Matsuda, *Beyond, and Not Beyond Black and White: Deconstruction Has a Politics*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 393, 393–94 (Francisco Valdes et al. eds., 2002) [hereinafter Matsuda, *Not Beyond Black and White*] (urging that the black-white binary retains much of its original moral force and that the problems of African Americans deserve the prime attention of the civil rights community and stating “we cannot understand American racism unless we understand African American History”); *id.* at 396–97 (arguing that the effects of deconstructing the black-white binary bear watching because they may have adverse impacts on the search for racial justice); Mari Matsuda, Keynote Address to the National People of Color in the Law Conference in Washington, D.C. (Oct. 7, 2004)

A recent book by George Yancey typifies this new movement. Published in 2003 by Lynne Rienner Publishers, *Who Is White?: Latinos, Asians, and the New Black/Nonblack Divide* offers an extended argument, complete with footnotes, charts, graphs, and survey material, for limiting civil rights remedies to blacks alone.⁶ This Review Essay first surveys the recurring admonitions of nativist writers that Latinos are incompatible with America. It then turns to the recent school of liberal critics who reason that Latinos assimilate—intermarry, move into white neighborhoods, learn English—so successfully that they can safely be ignored. The first group’s arguments are weak normatively—their vision of America as a sanitized, Anglicized nation with little diversity of thought, culture, or ethnicity is simply out of keeping with contemporary ideals.

The second group’s are not. Normatively strong, they rise or fall on the strength of their factual predicate and what follows from it. Are Latinos, in fact, assimilating, and if so, in what ways? Are they following the same path as that of earlier European groups, such as Irish, Italians, and Jews, who were first considered nonwhite, culturally inferior, and incapable of higher intellectual functioning, but soon secured social acceptance and admission to the white race?⁷ And, if Latinos are coming to terms with America in some respects, what does that mean for social justice? Should we quietly but firmly write them out of the civil rights equation in favor of those more needy?⁸ After considering these questions, this Review Essay closes by offering a few observations for the benefit of the second-largest minority group about the fate that may befall them if they make common cause with moderate liberals who urge just that, and some directions critical scholarship should take in light of America’s multiracial future.

11. Precursors—Anti-Latino Nativism over the Years

Throughout most of our history, the prevailing view of Latinos, especially Mexican Americans, was that they were slow, or unfit, to assimilate into American society.⁹ This Part examines attitudes and actions

[hereinafter Matsuda, Keynote Address] (same; advocating an abolitionist model for a wide range of civil rights scholarship and activism).

6. GEORGE YANCEY, *WHO IS WHITE? LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE* 159–63 (2003).

7. See, e.g., NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* 1 (1995) (examining how the “Catholic Irish, an oppressed race in Ireland, became part of an oppressing race in America”); Karen Brodtkin Sacks, *How Did Jews Become White Folks?*, in *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* 395 (Richard Delgado & Jean Stefancic eds., 1997) (asserting that although “America did not always regard its immigrant European workers as white,” by the 1950s it was clear that “Jews were simply one kind of white folks”); *infra* notes 59–60 and accompanying text (discussing how Asians and Latinos have already begun moving up the ladder of whiteness).

8. Most of the writers in this school are particularly concerned over Latinos’ receipt of affirmative action in college and university admissions. See *infra* notes 38–53.

9. For an excellent overview, see the essays in *IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN AMERICA* (Juan Perea ed., 1997).

toward this group at certain key periods—the decades following initial contact, the period just before and after *Brown v. Board of Education*, and the last twenty years or so. As will be seen, American society has often treated Latinos as undesirable, unwholesome, and foreign.

A. *Settlement and Conquest through the Mexican War*

When the early Anglo explorers first encountered Mexican settlers in the thinly populated Southwest, they met a collection of hardy farmers with advanced agriculture, property, and irrigation systems¹⁰ and close, intact families. Their brown skin and indigenous appearance invited racism, however, while their occupation of coveted lands made displacing them highly desirable.¹¹ As historians such as David Weber and Reginald Horsman have shown, this combination proved unfortunate for the peaceful Mexicans.¹²

Whipped up by political leaders like James Buchanan, Sam Houston, and President James K. Polk, Anglo settlers readily adopted demeaning views of the Mexicans and inflated notions of their own superiority and fitness to rule.¹³ (Indeed, the term “Anglo-Saxon” seems to have been coined during this period in large part to justify the seizure of Mexican lands.)¹⁴ Writer Rufus Sage, for example, wrote that “[t]here are no people on the continent of America, whether civilized or uncivilized, with one or two exceptions, more miserable in condition or despicable in morals than the mongrel race inhabiting New Mexico.”¹⁵ Lansford Hastings, author of a popular emigrants’ guide, described the Mexicans as “wild, shirtless, earless

10. See, e.g., DAVID J. WEBER, *Introduction to FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS* 20 (David J. Weber ed., 1973) (discussing the Mexican settler’s practice of irrigated farming and communal property-holdings).

11. See, e.g., REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM* 210 (1981) (discussing the justification that Americans forcibly took over the northern provinces of Mexico because Mexicans were unable to make proper use of the land); WILLIAM SHALER, *A JOURNAL OF A VOYAGE BETWEEN CHINA AND THE NORTH-WESTERN COAST OF AMERICA MADE IN 1804* (1935), *reprinted in* FOREIGNERS IN THEIR NATIVE LAND, *supra* note 10, at 65–68 (proposing an Anglo conquest of the resource-rich California, which was inhabited by the Mexicans at the time); Gilbert Paul Carrasco, *Latinos in the United States, in IMMIGRANTS OUT!*, *supra* note 9, at 190–93 (highlighting the hostilities toward Mexicans in lucrative mining areas).

12. See *also* HORSMAN, *supra* note 11, at 210; DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS 1836–1986*, at 29 (1987) (recounting the departure of Mexicans from San Antonio due to the arrival of American and German settlers); SHALER, *supra* note 11, at 65–68; see *also* FRANK D. BEAN & MARTA TIENDA, *THE HISPANIC POPULATION OF THE UNITED STATES* 18 (1987) (recounting the influx of thousands of Anglos into the Southwest).

13. See HORSMAN, *supra* note 11, at 208–13 (discussing Buchanan’s and Houston’s views); PEREA ET AL., *RACE AND RACES*, *supra* note 4, at 258–60 (discussing Polk’s views).

14. See HORSMAN, *supra* note 11, at 208–13; TOMÁS ALMAGUER, *RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA* 23–25 (1994).

15. Rufus Sage, *Degenerate Inhabitants of New Mexico* (1846), in 2 RUFUS B. SAGE: HIS LETTERS AND PAPERS, 1836–1847, at 82–87 (LeRoy R. Hafen & Ann W. Hafen eds., 1956), *reprinted in* FOREIGNERS IN THEIR NATIVE LAND, *supra* note 10, at 72.

and heartless creatures,” whom nature had unaccountably allowed,” to occupy this delightful land.¹⁶ A U.S. government minister, while deploring the outright plunder of Mexican lands, still wrote that the Mexican population was “lazy, ignorant, . . . vicious . . . , dishonest,” and doomed to cultural defeat at the hands of the more enterprising Anglos.¹⁷

The presumed racial character of the Mexicans justified not only displacement by the superior Anglo settlers, but also a pretextual and brutally aggressive war with Mexico, in which the United States marched all the way to Mexico City and dictated surrender terms under which it seized almost one-half of the nation’s land.¹⁸ After the war, those attitudes justified shady lawyers, land surveyors, and greedy developers in stealing vast farms and ranches guaranteed to the Mexicans in the Treaty of Guadalupe Hidalgo.¹⁹

B. *Operation Wetback and the Black Civil Rights Era*

With Anglo supremacy well established, many Mexicans, both natives and immigrants, found farm labor working for Anglos their main occupation.²⁰ But the U.S. economy during this period was unstable, with periodic depressions.²¹ No longer needed, the Mexicans were then so unpopular that many states attempted to drive them from the country. The Colorado governor, for example, ordered the state militia to deport Mexicans, who were believed to be a welfare drain, and to close the state’s southern border.²² In Oklahoma, Latinos were threatened with being burned out of their houses, while signs in Texas told Mexicans to get out of town.²³

The pseudoscience of this period, which previously had focused on African American genetic inferiority, now veered to consider Latino defects. Their “dark stream” of “peon blood,” according to prominent eugenicist Madison Grant, rendered them inferior even to the southern European Jews

16. HORSMAN, *supra* note 11, at 211.

17. *Id.* at 212.

18. See PEREA ET AL., RACE AND RACES, *supra* note 4, at 248 (reporting that the lands seized, encompassing California, Texas, New Mexico, Arizona, Nevada, and parts of Colorado, Utah, and Kansas, amount to about one-third of the continental United States); RODOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS 12–21 (3d ed. 1988) (chronicling the “violent and brutal” invasion of Mexico, the justificatory role played by Manifest Destiny and the Monroe Doctrine in the U.S. decision to invade, and the specifics of the Treaty of Guadalupe Hidalgo).

19. PEREA ET AL., RACE AND RACES, *supra* note 4, at 259–99. For an overview of Chicano history, including this period, see generally ACUÑA, *supra* note 18.

20. Carrasco, *supra* note 11, at 190–92.

21. *Id.* at 190.

22. See Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado’s Historic Embrace—and Denial—of Equal Opportunity in Higher Education*, 70 U. COLO. L. REV. 703, 737–39 (1999) [hereinafter Delgado & Stefancic, *Home-Grown Racism*] (recounting the governor’s actions after Mexicans sought welfare relief during the Great Depression: “[He] . . . ordered alien beet workers out of the state and blockaded the southern border to make sure no new ones entered”).

23. Carrasco, *supra* note 11, at 193 (providing examples of discrimination against Mexican workers in Oklahoma and Texas during the Great Depression).

and Slavs.²⁴ Glenn Hoover, in a 1929 article, urged that the U.S. end immigration from Mexico because the Immigration Act of 1924 denied admission to all aliens ineligible for citizenship.²⁵ Naturalization law then limited citizenship to “free white persons,” which, to him, the mixed-blood Mexicans plainly were not.²⁶ He also called for bars against marriage between Anglos and Mexicans.²⁷ Inspired, perhaps, by writings like these, the United States launched two large programs under each of which more than one million Mexicans and Mexican Americans, many of them legal U.S. citizens of long standing, were deported to Mexico. One program, backed by the U.S. Congress in 1954 (the same year that *Brown v. Board of Education* was decided), was named “Operation Wetback.”²⁸ A slightly earlier program was the subject of a recently filed class action brought by the survivors.²⁹

C. *The New Nativism—1980 through Today*

Today’s nativism against Latinos draws on many of the same currents—biological inferiority, racial impurity, laziness, and inability to assimilate—that marked earlier versions, but adds a new element: formal laws aimed at restricting Latinos’ civil rights and ability to earn a livelihood. Writers such as Samuel P. Huntington,³⁰ Victor Davis Hanson,³¹ Arthur Schlesinger, Jr.³²

24. MADISON GRANT, *THE PASSING OF THE GREAT RACE, OR THE RACIAL BASIS OF EUROPEAN HISTORY* 69, 81 (1916); see Neil Foley, *Becoming Hispanic: Mexican Americans and the Faustian Pact with Whiteness*, in *REFLEXIONES* 1997, at 57–58 (1998) (describing the prevailing U.S. view in the 1930s that Mexicans of mixed Spanish, Indian, and African ethnicity were racially inferior, in contrast to the Mexican view that such racial mixing “produced racial strength”).

25. Foley, *supra* note 24, at 58–59.

26. *Id.* at 58.

27. *Id.*

28. This was its official governmental name. See Carrasco, *supra* note 11, at 197–98 (discussing “Operation Wetback”).

29. Gregg Jones, *Reparations Sought for ‘30s Expulsion Program; Campaign Begins on Behalf of 1-Million-Plus People Forced to Leave the U.S. for Mexico*, *L.A. TIMES*, July 16, 2003, at B8 (reviewing a program in the 1930s by which Americans in California who were of Mexican descent were deported to Mexico and reporting on the current legislative and legal campaign to compensate the victims of the program).

30. See SAMUEL P. HUNTINGTON, *WHO ARE WE?* 221–56, 316–24 (2004) (discussing how Mexican immigration differs from past immigration because it is not leading to assimilation, but instead has led many Hispanic advocates to form a goal of transforming “America as a whole into a bilingual, bicultural society”); Samuel P. Huntington, *The Hispanic Challenge*, *FOREIGN POLICY*, Mar.–Apr. 2004, at 30 (arguing that “the persistent influx of Hispanic immigrants threatens to develop the United States into two people, two cultures, and two languages” because Hispanic immigrants refuse to assimilate).

31. See generally VICTOR DAVIS HANSON, *MEXIFORNIA: A STATE OF BECOMING* (2003) (warning that the U.S. Southwest is fast turning into a region that is dirty and Balkanized, with an overtaxed social service network and schools that teach ethnic pulp and political correctness rather than the classics).

32. See ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* 107–10 (1992) (lamenting a separatist push for bilingualism that “retards rather than expedites the movement of Hispanic children into the English-speaking world and . . . promotes segregation more than it does integration”).

Peter Brimelow,³³ and Michael Lind³⁴ warn against the dangers of Balkanization, descent into Babel, and the loss of national unity³⁵ that could result from letting too many immigrants into the country, while organizations such as U.S. English, the backers of California's anti-immigrant Proposition 187, and FAIR (Federation for American Immigration Reform) endorse legislation aimed at curtailing Latino culture and language, long after the Supreme Court ended statutory discrimination against African Americans.³⁶

* * *

As we have seen, Anglo society has not readily accepted, much less welcomed, brown-skinned newcomers from Mexico or most other parts of Latin America. Except for the agricultural sector, which periodically needed their labor, U.S. society deemed Latinos dull, unclean, and slow to acquire American ways. Despite their poor reception, however, Latinos have continued to migrate to the United States and, once here, to have children so that their numbers have grown rapidly.³⁷ That growth has sparked a new attitude toward Latinos on the part of a certain sector of the population. Concerned that this large and growing group is poised to exert real influence on American society, this sector, which includes a number of academics, liberals, and concerned African Americans, wishes simply to write them out of the civil rights equation. In this view, Latinos would enjoy the right to remain here, work, attend school, and intermarry with whites, but they would

33. See BRIMELOW, *supra* note 1 (arguing that the American immigration system is broken, that politicians are defying the will of the American people by allowing massive immigration, and that the country is at risk of becoming a nation without a unifying core).

34. See MICHAEL LIND, *THE NEXT AMERICAN NATION* 116, 131 (1995) (discussing the negative implications of simultaneously maintaining racial preferences, multiculturalism, and massive immigration); see also PATRICK J. BUCHANAN, *THE DEATH OF THE WEST* 125–26 (2002) (claiming that Mexican immigrants have trouble assimilating because many are of a nonwhite race, a large number do not want to learn English and wish to create separate ethnic enclaves in the United States, and they have a “belief in racial rights and ethnic entitlements” that is supported by “cultural elites”). *But see* Michael Lind, *The Beige and the Black*, N.Y. TIMES, Aug. 16, 1998 § 6 (Magazine), at 38 [hereinafter Lind, *The Beige*] (proposing that “shifting patterns of racial intermarriage suggest that the next century may see the replacement of the historic white-black dichotomy in America with a troubling new division, one between beige and black”).

35. See JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA* 9–32 (1996) [hereinafter STEFANCIC & DELGADO, *NO MERCY*] (discussing these movements).

36. Examples of these types of effort include Official English laws, which are on the books in nearly half of all states, anti-immigrant measures like California's Proposition 187 (which would have denied state benefits, including public education, to resident aliens), and measures forbidding bilingual education. See Juan Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 340–71 (1992) (analyzing the history, legality, and implications of the “Official English Movement”); see generally PEREA ET AL., *RACE AND RACES*, *supra* note 4 (discussing these and other measures).

37. See *infra* notes 74–90 and accompanying text.

have little claim on our civil rights sympathies. The next Part examines examples of this position, including a new book by George Yancey that makes the argument explicitly and takes it to a new level.

III. Too Successful for Their Own Good?: Neoliberal Racism and the Emerging Argument Against Latino Recognition

A. *Preservation of Affirmative Action*

The new argument for excluding Latinos from civil rights consideration holds that they are little different from former immigrant groups. This “immigrant analogy”³⁸ suggests that, just as earlier groups of European immigrants from Greece, Italy, Ireland, and Poland found their places in American society, so too, in time, will Latinos. Society need make few special provisions for their accommodation. In particular, it should exclude them from affirmative action programs designed for real minorities—blacks and Native Americans.

For example, in a syndicated column, Charles Krauthammer argues in favor of cutting affirmative action back to its core—blacks—in order to preserve it from attack and to conserve scarce social resources and sympathy.³⁹ Without addressing how Latinos will fare if left alone, Krauthammer urges that this is justified because they lack the moral standing of blacks, and including them in affirmative action would dilute that program and raise its costs beyond what America is prepared to pay.⁴⁰

Political scientist John Skrentny echoes many of these sentiments in a 2002 article.⁴¹ Observing that affirmative action was originally designed to benefit only blacks, he questions the wisdom of its recent expansion to new groups, particularly the children of immigrants from Latin America and Asia.⁴² This approach makes “permanent victims” of these groups, while

38. The term occurred to me on reading Sylvia R. Lazos Vargas, *Deconstructing Homo(geneous) Americanus: The White Ethnic Immigrant Narrative and its Exclusionary Effect*, 72 TUL. L. REV. 1493 (1998). On the overlapping ways in which racial and ethnic groups form group consciousness, see generally MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (2d ed. 1994).

39. Krauthammer states:

Affirmative action was born in the '60s as a way to give historically discriminated-against blacks an edge. But since then, more and more groups have demanded the same edge. . . . But this search for allies has not quite worked. . . . [D]iversity has diluted the impact of affirmative action. . . . [T]he whole structure of preferences . . . [should be] replaced with a simple single preference for the black underclass.

See Krauthammer, *supra* note 5, at B3

40. *Id.*

41. See Skrentny, *Inventing Race*, *supra* note 2, at 98–99, 109–12 (arguing that the lack of a coherent rationale for including certain ethnic groups in affirmative action, while excluding others, harms the program).

42. See *id.* at 98 (explaining that recent immigrants from Latin America and Asia benefit from current formulations of affirmative action).

threatening affirmative action for others.⁴³ If the public ultimately rejects affirmative action, he warns, its “over- or underinclusiveness will likely be the reason.”⁴⁴

B. Cost of Distraction from More Pressing Matters

Critical race theorist Mari Matsuda and former Stanford Law School dean and sometime critical legal studies fellow traveler Paul Brest argue along similar lines. Matsuda warns that the black/white binary paradigm of American racial thought retains much of its original descriptive force despite the country’s rapidly diversifying population. While the issues facing nonblack groups such as Latinos and Asians are worthy of consideration, policymakers should focus first on the larger problems of African Americans, the alleviation of which can give other racial minority groups resolve to combat their own social injustices.⁴⁵ Brest and his coauthor argue that Latinos lack the unique history of oppression that blacks endured; the lesser version they suffer may be addressed in other ways.⁴⁶ In a similar vein, Orlando Patterson argues that “race by the numbers,” in which college administrators aim for a student body composed of all the country’s minority groups in proportion to their representation in the population at large, will lead to administrative chaos and the program’s ultimate downfall.⁴⁷

C. Not Deserving

A final group of writers, including University of Michigan Professor J.B. White,⁴⁸ Peter Skerry,⁴⁹ and, at least by implication Brest and Oshige,⁵⁰

43. *Id.* at 97–99, 109–12; see also Luther Wright, Jr., Note, *Who’s White, Who’s Black, and Who Cares?*, 48 VAND. L. REV. 513, 563–64 (1995) (advocating replacing the category of Hispanic with Biracial-American, in part for this reason).

44. Skrentny, *Inventing Race*, *supra* note 2, at 112.

45. See Matsuda, *Not Beyond Black and White*, *supra* note 5, at 393–94, 396–97; Matsuda, Keynote Address, *supra* note 5; see also John O. Calmore, *Race-Conscious Voting Rights and the New Demography in a Multiracing America*, 79 N.C. L. REV. 1253, 1258 (2001) (warning against dilution of civil rights emphasis on blacks and blackness); cf. Leonard Baynes, *If It’s Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow Than Lightness?: An Investigation and Analysis of the Color Hierarchy*, 75 DENV. U. L. REV. 131, 132–34, 184–85 (1997) (arguing that the darker the individual’s skin the more likely that the individual will experience discrimination and prejudice).

46. Brest & Oshige, *supra* note 5, at 873–74 (arguing that the Latino predicament is not “intractable”); *id.* at 875 (citing an example of a Latino with light skin as a poor candidate for affirmative action); *id.* at 883–90, 900 (explaining that the Latino identity captures many national origin groups with varying needs of affirmative action protection); see also Lisette E. Simon, *Hispanics: Not a Cognizable Ethnic Group*, 63 U. CIN. L. REV. 497, 516–18 (1994) (arguing that the term “Hispanic” is “too varied and amorphous” to be given effective application by courts).

47. Patterson, *Race by the Numbers*, *supra* note 5, at 27 (stating that Latino coalition strategies, which press for a “separate, unified Latino classification” even though “nearly half of Hispanics consider themselves white,” have “been a major factor in the loss of political support” for affirmative action because they have resulted in an increase in affirmative action beneficiaries).

48. See James Boyd White, *What’s Wrong With Our Talk About Race?: On History, Particularity, and Affirmative Action*, 100 MICH. L. REV. 1927, 1935 n.16, 1936 (2002) (urging that

make arguments casting doubt on Latinos' entitlement to civil rights solicitude, including affirmative action, because they are not deserving. As nonblack minorities with light skin, middle class aspirations, and no history of slavery or intense discrimination, they are more likely to pursue the same upward course that earlier waves of European immigrants did.⁵¹ Brest and Oshige concede that Latinos might warrant consideration in regions of the country where their numbers are high, but only by showing economic disadvantage.⁵² Blacks would qualify for affirmative action without that showing.⁵³

D. George Yancey and the Coming Black/Nonblack Divide

Recently, George Yancey, one of the editors of *The Cornel West Reader*, has offered an extensive argument against including Latinos and Asian Americans in the civil rights equation, except, perhaps, as cheerleaders and supporters of black causes.⁵⁴ In *Who Is White?: Latinos, Asians, and the*

African Americans' status as "involuntary minorities" warrants special consideration, and accordingly, as compared with other minority groups, "there is an additional and deeper justification, rooted both in the nature and intensity of white racism against blacks"). White does not rule out affirmative action for Latinos and other groups: "All this does not mean that the Fourteenth Amendment does or should speak only to the relations between whites and blacks, or that affirmative action is proper only with respect to that group. . . . My point is not to put these practices into question . . ." *Id.* at 1936-37.

49. See PETER SKERRY, *MEXICAN AMERICANS: THE AMBIVALENT MINORITY* 297-99 (1993) (arguing that "Mexican Americans have had more social and psychic space in which to anchor themselves" because "they have never experienced the extremes of intimacy and humiliation with dominant whites that blacks experienced under slavery and Jim Crow").

50. Brest & Oshige, *supra* note 5, at 890, 899-900 (concluding that "the decision concerning which, if any, Latino groups to include in an affirmative action program may depend on a law school's rationales for the program and on regional demography" and pointing out that while Latinos are "the objects of prejudice and discrimination" and suffer low socioeconomic status in high enough percentages to cause concern, it is difficult to pinpoint the causes of their low socioeconomic status, that status may not be intractable, and "since there is little pan-Latino identity, the scope of the multiplier effect from affirmative action is uncertain").

51. See LINDA CHAVEZ, *OUT OF THE BARRIO* 101-38 (1991) (arguing that "[t]he success of middle-class Hispanics is an untold—and misunderstood—story perhaps least appreciated by Hispanic advocates whose interest is in promoting the view that Latinos cannot make it in this society"); see also Lind, *The Beige*, *supra* note 34, at 38-39 (positing that given the high number of Hispanics and Asians who marry Caucasians, blacks are seen as increasingly deviant in a "white-Asian-Hispanic melting-pot majority—a hard-to-differentiate group of beige Americans"). See also White, *supra* note 48, at 1934 ("I do not mean to say that members of other racial groups do not have horrible experiences But I myself do not see the . . . intensity of feeling, on the part of white people with respect to the 'race' of other groups.").

52. Brest & Oshige, *supra* note 5, at 890, 899-900; see also Peter H. Schuck, *Alien Ruminations*, 105 *YALE L.J.* 1963, 2000-04 (1996) (discussing this and related suggestions). Brimelow is more straightforward: He does not want Latino and Asian immigrant children competing with his son for a college slot. See BRIMELOW, *supra* note 1, at 11.

53. Brest & Oshige, *supra* note 5, at 878-80.

54. *E.g.*, YANCEY, *supra* note 6, at 156 ("Of course, this is not to say that all Latinos and Asian Americans will stop supporting issues that blacks care about. Just as there are progressive European Americans . . . there will always be Hispanic and Asian Americans who support blacks.").

New Black/Nonblack Divide, Yancey builds on the scholarship of all the above authors, but goes on to pose the issue of nonblack minorities in an especially provocative way. Because Yancey's book constitutes the most detailed exposition of the emerging argument against Latinos, Asians, and other nonblack groups, it deserves special scrutiny.

Yancey begins by reminding his readers of the familiar prediction that by the year 2050, minorities of color will for the first time outnumber whites.⁵⁵ In an astonishing twist, Yancey takes issue with this piece of conventional wisdom. Whites will not remain passive in the face of the impending shift. Instead, they will enlist Asians and Latinos as members of the white race, leaving blacks at the bottom of the social ladder.⁵⁶ Members of these two other groups will not join whites merely in a strategic sense, making common cause with them on particular issues. Rather, they will literally become white, just as the Irish, Greeks, Italians, and Jews did in the decades following the advent of heavy immigration in the early years of the twentieth century.⁵⁷ At first marginalized, despised, and excluded from the best neighborhoods, schools, and jobs, these groups were treated much like blacks and actually seen that way; only by a process that included acquiring wealth (sometimes through organized crime), swearing loyalty to the Democratic Party, and agreeing to join in the suppression of blacks were they permitted to join the white race.⁵⁸ Just as their social construction changed when white self-interest dictated it, that of Asians and Latinos will as well.

By 2050, Yancey writes, the number of what today are regarded as whites will indeed slip below that of what we now consider people of color. But by then, Latinos and Asians will have achieved admission to the white race, so that the number of whites will continue to exceed that of the nation's historic and truest minority. The demographers' predictions then, while literally correct, ignore that race is malleable, that a group's contours are subject to change, and that immigrant groups have always moved into and out of the white race when it suited whites' purposes.⁵⁹

But will Asians and Latinos succumb to the siren song of whiteness, rather than, for example, pursuing civil rights in coalition with blacks and

55. *Id.* at 1; see also Lind, *The Beige*, *supra* note 34, at 38.

56. *Id.* at 2-4.

57. *Id.*

58. *Id.* at 2-4, 32-35; James R. Barrett and David Roediger, *How White People Become White* (1996), reprinted in PEREA ET AL., *RACE AND RACES*, *supra* note 4, at 445-50; David Roediger, *Early Twentieth Century European Immigration and the First Word in Whiteness* (1996), reprinted in PEREA ET AL., *RACE AND RACES*, *supra* note 4, at 450-53; Gregory Williams, *Life on the Color Line* (1995), reprinted in PEREA ET AL., *RACE AND RACES*, *supra* note 4, at 453.

59. See YANCEY, *supra* note 6, at 2-4; see also NATHAN GLAZER, *WE ARE ALL MULTICULTURALISTS NOW* 149 (1997) (proposing that while Hispanics and Asians are becoming less different from whites, African Americans are still far from becoming fully incorporated, thereby forming two nations—"the black and the others").

Native Americans? Yes; in fact, they have already begun doing so, according to Yancey, just as whites have begun seeing them as racial allies.⁶⁰ The same will not happen with blacks, Yancey writes, for they suffer a degree of alienation unlike that of other minorities. Even as Latinos and Asians move smoothly up the ladder of whiteness, blacks will continue to occupy the bottom rung. Uniquely stigmatized, alienated, and marginalized, they will remain specially in need of assistance from white sympathizers and the government.⁶¹

Chapter One, entitled *Alienation and Race in the United States*, sets out the above-mentioned thesis,⁶² while Chapter Two documents the historical assimilation of immigrant groups and the underpinnings of black alienation.⁶³ Chapter Three, on residential and marital segregation, shows that whites welcome Asians and Latinos into their families and neighborhoods, but not blacks.⁶⁴ Chapter Four describes the results of a telephone survey that showed that Asians and Latinos are taking on white attitudes at the same time whites are starting to think of them as white.⁶⁵ Black attitudes, by contrast, remain oppositional and progressive, year after year. Chapter Five shows that Asians and Latinos, generation by generation, take on white behavior and traits through assimilation and intermarriage,⁶⁶ and even gives a timetable for their respective whitenings,⁶⁷ while a final chapter spells out the implications of all this for social policy and civil rights.⁶⁸

60. YANCEY, *supra* note 6, at 115–18.

61. *See, e.g., id.* at 4–7, 44–59, 89–123, 125–64 (tracing sociopolitical developments in the history of black Americans and arguing they have had the greatest difficulty in assimilating into the dominant culture). Yancey situates African Americans as the group most facing contemporary alienation and urges that, for this reason, additional efforts and resources should be directed toward blacks. *Id.* at 159.

62. *Id.* at 1–25.

63. *Id.* at 27–62 (arguing that Hispanic Americans and Asian Americans, in particular, have had an easier time assimilating into the dominant European American culture, while African Americans have remained alienated, the outliers in a very “white” culture).

64. *Id.* at 63–87 (documenting how, though European Americans do not mind close social proximity with nonblack minority group members, on issues such as marriage or residential living their social interaction with blacks appears unwelcoming); *see also* RACHEL MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 175 (2001) (predicting that Asians and Latinos will continue to intermarry with whites, leaving blacks maritally isolated from other groups).

65. YANCEY, *supra* note 6, at 89–123 (“The End of the Rainbow Coalition”).

66. *Id.* at 125–47 (“The Changing Significance of ‘Latino’ and ‘Asian’”); *see also id.* at 20 (“We are heading into a society where nonblack racial groups will eventually become incorporated into the dominant culture and, for all practical purposes, become white.”).

67. *Id.* at 129–31 (giving the figure fifty years for Latinos and 100 for Asians).

68. *Id.* at 149–66 (“The Black/Nonblack Society”). One of these implications is that more resources must be devoted to blacks, *id.* at 154, over a long period of time. *Id.* at 160. Other groups will need only short-term assistance of a limited sort. *Id.*

IV. Examining the Neoliberal Argument against Latino Recognition

Each of the authors mentioned above—White, Krauthammer, Yancey, Skrentny, Matsuda, Skerry, and Patterson—argues for some version of two propositions: (1) blacks are different from Asians and Latinos⁶⁹—more victimized by discrimination and cruel stereotypes, they are exceptional,⁷⁰ and (2) because of this exceptionality, blacks are more deserving of civil rights solicitude and affirmative action.⁷¹ Some of these writers also subscribe, either implicitly or explicitly, to the immigrant analogy according to which Asians and Latinos will follow the path of earlier groups like the Irish and Italians, who made their peace with America, learned American ways, and today are virtually indistinguishable from the descendants of Anglo Saxon immigrants who came to this country in its early years.⁷² Each of these propositions is open to question. In what follows, I concentrate on Latinos; other scholars, many of whom have analyzed the “model minority myth” of the successful, upward-climbing Asian,⁷³ will no doubt address that aspect of the Yancey thesis in due course.

A. *Who are Latinos?*

Over the past few decades, immigration reform has brought millions of new immigrants from Latin America to the United States.⁷⁴ In the period just prior to that, structured labor contracting (*Bracero*) programs brought farmworkers to work for prearranged periods in the nation’s farms and ranches.⁷⁵ By the end of the 1980s, the presence of a large Latino population

69. See *supra* notes 39, 41, 45, 48, 49 & 61 (citing Krauthammer, Skrentny, Matsuda, White, Skerry, and Yancey, respectively).

70. *Id.*

71. *Id.*

72. See, e.g., *supra* notes 48–49.

73. E.g., FRANK WU, *YELLOW* (2002) (examining the problems of racial diversity and demanding the death of the “model minority myth” since it only “obscures realities”); Robert S. Chang, *Toward an Asian American Legal Scholarship*, 81 CAL. L. REV. 1241, 1259–65 (1993) (discussing the “model minority myth” and the way that “the portrayal of Asian Americans as successful permits the general public, government officials, and the judiciary to ignore or marginalize the contemporary needs of Asian Americans”).

74. See, e.g., DEP’T OF HEALTH & HUMAN SERVS., *A DEMOGRAPHIC AND HEALTH SNAPSHOT OF THE U.S. HISPANIC/LATINO POPULATION 11–19* (2002), available at <http://www.cdc.gov/nchs/data/hpdata2010/chcsummit.pdf>; PEREA ET AL., *RACE AND RACES*, *supra* note 4, at 246–48 (describing the contours of this group); Berta Esperanza Hernández-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369, 383–93 (1994), reprinted in PEREA ET AL., *RACE AND RACES*, *supra* note 4, 248–52 (describing modern Latino population trends in the United States and the migration history of various Latino groups). On Mexican Americans, the largest subgroup of Latinos, see Joe R. Feagin, *White Supremacy and Mexican Americans: Rethinking the “Black-White Paradigm”*, 54 RUTGERS L. REV. 959, 969–73 (2002).

75. See, e.g., Carrasco, *supra* note 11, at 190–200 (describing how Latinos have historically, and opportunistically, been welcomed into the United States during times of labor shortages).

had become vexing to many. With the demise of the Soviet Union, America's consciousness shifted to domestic irritants, and images and treatment of Latinos changed for the worse.⁷⁶ English-Only movements sprang up,⁷⁷ while bilingual education and aid to farmworkers and immigrants came under fire.⁷⁸ Movements to close and police the border more vigilantly gained momentum.⁷⁹

Since the U.S. Census in 1980 attempted for the first time to count the number of Latinos—persons of Spanish-Hispanic origin—the group's size has more than doubled, from slightly over 14 million to over 38.8 million today, making Latinos the largest ethnic group of color, slightly ahead of blacks.⁸⁰ Fueled by immigration and a high birth rate, their number is expected to grow rapidly well into the future; by the year 2050 (the year of such interest to George Yancey), some predict that Latinos will again double their percentage of the U.S. population, which will likely then be over 25 percent Latino.⁸¹ It is possible that even this growth rate may be an underestimate: A recent report showed that the number of Latinos grew nearly 13 percent between April 2000 and July 2003 alone.⁸²

76. *E.g.*, THE LATINO/A CONDITION: A CRITICAL READER, at back cover page (Richard Delgado & Jean Stefancic eds., 1998) [hereinafter THE LATINO/A CONDITION].

77. *See, e.g.*, STEFANCIC & DELGADO, NO MERCY, *supra* note 35, at 9–19; James Crawford, *Hold Your Tongue*, in THE LATINO/A CONDITION, *supra* note 76, at 559–61.

78. *See, e.g.*, STEFANCIC & DELGADO, NO MERCY, *supra* note 35, at 20–32; Crawford, *supra* note 77, at 559–61; Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, in THE LATINO/A CONDITION, *supra* note 76, at 610–20.

79. On these twin movements, *see*, for example, STEFANCIC & DELGADO, NO MERCY, *supra* note 35, at 20–32; Kevin R. Johnson, *Immigration Politics, Popular Democracy, and California's Proposition 187*, in THE LATINO/A CONDITION, *supra* note 76, at 110–23; Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations*, 73 IND. L.J. 1111, 1136–40 (1998).

80. For more on the history of the decision to add Hispanic as a designation of race for the U.S. Census, *see* CAMPBELL GIBSON & KAY JUNG, HISTORICAL CENSUS STATISTICS ON POPULATION TOTALS BY RACE, 1790 TO 1990, AND BY HISPANIC ORIGIN, 1970 TO 1990, FOR THE UNITED STATES, REGIONS, DIVISIONS, AND STATES (2002), available at <http://www.census.gov/population/www/documentation/twps0056.html> (last visited Oct. 23, 2004). On the composition of this group, *see* U.S. CENSUS BUREAU, UNITED STATES, RACE AND HISPANIC ORIGIN: 1790 TO 1990, at <http://www.census.gov/population/documentation/twps0056/tab01.pdf> (Sept. 13, 2002); Richard Delgado & Jean Stefancic, *Introduction to THE LATINO/A CONDITION: A CRITICAL READER*, *supra* note 76, at xvii; DEP'T OF HEALTH & HUMAN SERVICES, *supra* note 74. During most of its history, the U.S. Census Bureau did not count Latinos, or included them in the white category. CLARA RODRIGUEZ, CHANGING RACE: LATINOS, THE CENSUS, AND THE HISTORY OF ETHNICITY IN THE UNITED STATES 129 (2000). Most Latinos, if asked, identify themselves as "Latino," "Hispanic," or a national-origin or descent group such as "Mexican" or "Puerto Rican." When pushed, as in the current census, to identify themselves as black, white, Asian, or other, 46% listed themselves as Latino or Hispanic. Another 20% responded "other." *See* Lynnette Clemetson, *Hispanic Population is Rising Swiftly, Census Bureau Says*, N.Y. TIMES, June 19, 2003, at A22.

81. Delgado & Stefancic, *supra* note 80, at xvii; U.S. CENSUS BUREAU, PROJECTED POPULATION OF THE UNITED STATES, BY RACE AND HISPANIC ORIGIN 1 (Mar. 18, 2004) (estimating 24.4%), available at <http://www.census.gov/ipc/www/usinterimproj/natprojtab01a.pdf> (last visited Oct. 27, 2004).

82. *See* U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION BY SEX, RACE, AND HISPANIC OR LATINO ORIGIN FOR THE UNITED STATES: APRIL 1, 2000 TO JULY 1, 2003, at 2 (June

Nearly two-thirds of Latinos are Mexican Americans, making it the largest subgroup.⁸³ Central and South Americans come next, making up about 13 percent, then Puerto Ricans with about 11 and Cubans with about 5 percent.⁸⁴ The Latino population residing in the United States is larger than the population of Canada and possesses an annual purchasing power of over \$300 billion.⁸⁵ The largest populations of Latinos are found in the Southwest and California.⁸⁶ Large settlements of Cubans live in Florida, while most Puerto Ricans reside in New York and other large East Coast cities.⁸⁷

A relatively young group (which accounts for their high birth rate),⁸⁸ the group also suffers disproportionately from poverty and school drop-out.⁸⁹ A U.N. study showed that if all Latinos residing in the United States were considered as a separate country, that country would rank thirty-fifth in the world in a combined index of social well-being that included income, education, and access to health care; an all black America would rank thirty-first.⁹⁰ Although it is possible to load the “oppression sweepstakes”

14, 2004) (giving raw population figures), available at <http://www.census.gov/popest/national/asrh/NC-EST2003/NC-EST2003-03.pdf> (last visited Oct. 27, 2004).

83. Delgado & Stefancic, *supra* note 80, at xvii; DEP'T OF HEALTH & HUMAN SERVICES, *supra* note 74.

84. Delgado & Stefancic, *supra* note 80, at xvii.

85. *Id.*

86. Richard Delgado & Jean Stefancic, *The Shape of the Latino Group: Who Are We and What Are We Talking about Anyway?*, in *THE LATINO/A CONDITION*, *supra* note 76, at 1.

87. *Id.*

88. See Anthony M. Stevens-Arroyo, *Americans and Religions in the Twenty-First Century: The Latino Religious Resurgence*, 558 ANNALS AM. ACAD. POL. & SOC. SCI. 163, 171 (1998) (“Moreover, the high birthrates and lower median age for the Latino population . . . constitute the principal factors for demographic growth.”); see generally Ilan Stavans, *Latino Studies and Black Studies: Bonds and Divergent Paths*, CHRON. HIGHER EDUC., Aug. 8, 2003, at B7 (stating that Latinos have the highest rate of teenage pregnancy of any racial group in the United States).

89. See Stevens-Arroyo, *supra* note 88, at 171 (stating that Latinos occupy a comparatively low economic position in the U.S. population, and that school dropout rates for Latinos are “dismal”).

90. UNITED NATIONS, HUMAN DEVELOPMENT REPORT 1993, at 18 (1993), available at http://hdr.undp.org/reports/global/1993/en/pdf/hdr_1993_ch1.pdf (last visited Oct. 23, 2004); see also Cass R. Sunstein, *Well-Being and the State*, 107 HARV. L. REV. 1303, 1320–21 (1994) (discussing and analyzing the U.N. report). Since 1993, the racial disparity noted in the 1993 report has widened and deepened. See UNITED NATIONS, UNITED NATIONS HUMAN DEVELOPMENT REPORT 2001, at 15, 141–42 (2001) (providing human development indexes for African Americans and Hispanic Americans that would place them 46th in the world and 68th in the world, respectively), available at <http://hdr.undp.org/reports/global/2001/en/pdf/completenew.pdf> (last visited Oct. 23, 2004); *infra* note 97 and accompanying text (noting that Latinos exhibit downward assimilation—the second generation worse off than the first); *infra* note 141 and accompanying text (noting that Latinos, on average, attend schools with higher percentages of minority students than any other racial group); *infra* note 142 and accompanying text (reporting that Latinos, not blacks, exhibit the highest school dropout ratio). One study found that 80% of Latinos live in the country's most polluted counties, a rate higher than either blacks (65%) or whites (57%). SIERRA CLUB, *LATINO COMMUNITIES AT RISK: HOW BUSH ADMINISTRATION POLICIES HARM OUR COMMUNITIES* 4 (June 2004), available at <http://www.sierraclub.org/comunidades/comunidades.pdf> (last visited Oct. 23, 2004). See also Adrianna Quintero-Somainsi & Mayra Quirindongo, *Hidden Danger: Environmental Health Threats in the Latino Community* (Natural Res. Def. Council, New

differently by choosing a different set of variables, or by declaring a particular history (slavery as opposed to conquest, for example) dispositive, it would appear that in many ways Latinos are at least as disadvantaged as blacks.⁹¹

B. Yancey and the Neoliberal Argument against Latino Recognition—Are Latinos Whitening over Time?

Despite these statistics, George Yancey argues that society may, more or less, leave Latinos alone. The group is assimilating, each generation a

York, N.Y.), Oct. 2004, at 4 (noting that heavily “Hispanic neighborhoods are often located in industrial areas where pollutants are constantly poured into the air by factories and heavy traffic”), available at http://www.nrdc.org/health/effects/latino/english/latino_en.pdf (last visited Oct. 27, 2004).

91. For example, the group exhibits a higher school dropout rate than blacks, a higher degree of school segregation, and lives and works in the most polluted environments. See *supra* note 90. Those Latinos who attend the average high school fail to graduate from nonselective colleges at a higher rate than any other group in part because of poverty and poor high school preparation. Richard Fry, Pew Hispanic Center, *Latino Youth Finishing College: The Role of Selective Pathways* 20 (June 23, 2004) (reporting study results showing that “Hispanic or Latino” students who graduated from a high school in the second to fourth quintile of academic intensity were the least likely—only 42.7%—to earn a bachelor’s degree from a “non-selective” college; the next highest group was blacks, with 45% earning a bachelor’s degree), available at <http://www.pewhispanic.org>; see also PEW HISPANIC CENTER, FACT SHEET: EDUCATIONAL ATTAINMENT: BETTER THAN MEETS THE EYE, BUT LARGE CHALLENGES REMAIN 2 (Jan. 2002) (suggesting that poverty and poor high school preparation lead to poor college performance: “Some of the problems that become apparent among Latinos in high school and college stem from early academic difficulties. . . . Latino youth are . . . most likely to attend schools that are overcrowded and underfunded”), available at http://www.pewhispanic.org/site/docs/pdf/education_pdf_version.pdf (last visited Oct. 23, 2004). But see Fry, *supra*, at 17–18 (concluding from his study that poor high school preparation has little to do with Latinos’ college graduation rates: “Colleges and universities are simply not succeeding with Hispanic students to the extent that they are with white students, and inadequate secondary school preparation is not to blame”). Latinos’ access to health services and enrollment in health insurance plans is lower than blacks. U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2003, at 16 (2004), available at <http://www.census.gov/prod/2004pubs/p60-226.pdf> (last visited Oct. 23, 2004). And Latinos’ rates of occupational injuries are among the highest in the nation. BUREAU OF LABOR STATISTICS, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2003, at 5 (Sept. 22, 2004), available at <http://www.bls.gov/news.release/pdf/cfoi.pdf> (last visited Oct. 23, 2004). See also MAURICE JOURDANE, THE STRUGGLE FOR THE HEALTH AND LEGAL PROTECTION OF FARM WORKERS: EL CORTITO 1–8 (2004) (describing the severe pain and debilitation that resulted from the use of the cortito, a short-handled hoe, in farm labor).

However, mortality rates and rates of chronic disease are lower for Hispanics in the United States than for non-Hispanic whites. See Paul D. Sorlie et al., *Mortality by Hispanic Status in the United States*, 270 J. AM. MED. ASS’N 2464, 2467–68 (1993).

Only 1.2% of second-generation Mexican Americans living in the United States considered themselves American, indicating a high degree of social alienation. See ALEJANDRO PORTES & RUBÉN G. RUMBAUT, LEGACIES: THE STORY OF THE IMMIGRANT SECOND GENERATION 162 tbl.7.2 (2001) [hereinafter PORTES & RUMBAUT, LEGACIES] (reporting the 1.2% statistic). Latinos are seriously underrepresented in the media, with 6.5% of primetime TV roles, compared to 16% for blacks. See CHILDREN NOW, FALL COLORS 2003–04, at 4 (2004) (examining the primetime series offered on the six major broadcast networks for the 2003–2004 season), available at <http://www.childrennow.org/assets/pdf/fc03/fall-colors-03-v5.pdf> (last visited Oct. 23, 2004).

little better off than the last. Like earlier waves of European immigrants, Latinos learn English, send their children to school, and buy houses in respectable neighborhoods. Moreover, surveys of social attitudes show that Latinos are adopting positions characteristic of whites, while whites are starting to think of Latinos as white or nearwhite.

Yancey's statistics are selective, however, while others do not support his conclusions. These weaknesses are explored below, in subparts IV(D) and IV(E).⁹²

C. *The Immigrant Analogy*

Some of the core weaknesses of the latter-day argument against Latinos stem from the immigrant analogy, which holds that, like earlier waves of European immigrants, Latinos will blend into American society in a generation or two, whether or not this country makes special efforts on their behalf.⁹³ Beyond ordinary decency, society owes them very little—certainly not the full protection of our civil rights laws or affirmative action programs designed for other purposes. “If my ancestors made it,” some of these writers seem to reason, “they (Latinos and Asians) can, too.”⁹⁴

And of course they can, after a fashion. But most Latinos are not immigrants.⁹⁵ With U.S. roots extending back for several generations, indeed in some cases since before the Anglo settlers arrived,⁹⁶ their poverty and stigmatization cannot be explained as the product of a temporary unfamiliarity with mainstream culture. And with those who are immigrants, the path for many is not linear. In particular, immigrants from Mexico, and perhaps other Latin American countries as well, are assimilating downwards—the second and third generations worse off than the first.⁹⁷ To hope that Latin poverty

92. See *infra* notes 128–155.

93. See *supra* notes 41–43, 49–51, 56–58, and accompanying text; see also YANCEY, *supra* note 6, at 42 (arguing that “if Asian Americans overcome the perceptions that they are biologically different from majority group members . . . then, [they] will eventually assimilate into the dominant group society in the same way southern/eastern European ethnic groups have become ‘white’”).

94. See *supra* notes 38–44, 48–51, and accompanying text.

95. The 2002 U.S. Census Bureau update indicates that three in five Hispanics were born in the United States. See D’Vera Cohn, *Hispanics Declared Largest Minority; Blacks Overtaken in Census Update*, WASH. POST, June 19, 2003, at A1.

96. See Feagin, *supra* note 74, at 970–71 (stating that “the first Mexican residents of the United States did not immigrate, but were brought into the new nation by violent conquest during the Texas rebellion and the Mexican-American War of the 1830’s and 1840’s”).

97. PORTES & RUMBAUT, *LEGACIES*, *supra* note 91, at 276–83 (stating that the downward assimilation and the relative social position of the second and third generation is worse for second and third generation Latinos than their immigrant counterparts). *Contra* JEFFREY GROGGER & STEPHEN J. TREJO, *FALLING BEHIND OR MOVING UP?: THE INTERGENERATIONAL PROGRESS OF MEXICAN AMERICANS* viii (2002) (concluding that “[i]ntergenerational progress for Mexican Americans appears to stall after the second generation” after “experienc[ing] dramatic gains in education and earnings between the first and second generations”). Strangely, and without examining the empirical evidence, Yancey reasons that Mexican Americans, precisely because they

and misery will abate, by itself, in a short time, flies in the face of current knowledge.⁹⁸

Latino immigration is different from the European kind, for a number of reasons. As mentioned earlier, the group's history is inextricably linked with conquest and American imperialism.⁹⁹ From the first encounters, Anglo society demonized the Mexicans they found living in the Southwest, coining stereotypes that they would soon use to rationalize military aggression and the plunder of Mexican lands.¹⁰⁰ Latinos were treated as inferior and deserving of subservient roles from the beginning.¹⁰¹ Italians, Greeks, and Irish, although scarcely welcomed with open arms, met no precisely comparable fate. Their "story of origin" includes hardship and struggle, but they were not conquered people nor despised as such.

Further, the Mexican border (and that with Guatemala) is near, making passage from one side to the other easy. Many Mexican Americans and others take advantage of the border's proximity and porosity to make frequent repeat visits to their villages.¹⁰² Many send some of their precious savings home, employing one of dozens of telegraph and money delivery services that have sprung up in large U.S. cities.¹⁰³ Others arrange to have favorite foods cooked by mothers-in-law in their native villages 2,200 miles

have been in the United States for a longer period than some other groups, "should . . . have a better chance to thin their racial identities . . ." YANCEY, *supra* note 6, at 43 n.6.

98. RUBÉN G. RUMBAUT & ALEJANDRO PORTES, *ETHNICITIES: CHILDREN OF IMMIGRANTS IN AMERICA* 35–40 (2002).

99. See ACUÑA, *supra* note 18, at 1–4 (describing how Spanish colonialism and violent U.S. expansion have created a "legacy of hate" among the Mexican peoples); HORSMAN, *supra* note 11, at 210 ("By the time of the Mexican War, America had placed the Mexicans firmly within the rapidly emerging hierarchy of superior and inferior races."); *supra* notes 9–19 and accompanying text.

100. See generally ARNOLDO DE LEÓN, *THEY CALLED THEM GREASERS: ANGLO ATTITUDES TOWARD MEXICANS IN TEXAS, 1821–1900* (1983) (chronicling some of the major stereotypes harbored by white Americans about Mexican Americans throughout the nineteenth century); HORSMAN, *supra* note 11, at 210 ("[I]nnate weaknesses were found in the Mexicans."); Ian E. Haney López, *Race, Ethnicity, Erasure: The Saliency of Race to Lit Crit Theory*, 85 CAL. L. REV. 1143, 1175–76 (1998) ("Historians locate the racialization of Mexican Americans in terms of Anglo expansion westward across North America . . .").

101. See SHALER, *supra* note 11, at 59–60; *supra* note 96.

102. See Néstor P. Rodríguez, *The Social Construction of the U.S.-Mexico Border, in IMMIGRANTS OUT!*, *supra* note 9, at 237–39 (describing the ease of travel between the United States and Mexico for Mexican immigrants in the past half century).

103. E.g., Elizabeth Becker, *Latin Migrants to U.S. Send Billions Home*, N.Y. TIMES, May 18, 2004, at C4; Daisy Hernandez, *With Fewer Dollars to Go Around, More Are Going Around World*, N.Y. TIMES, July 14, 2003, at A16; *Our Kinda Ciudad*, ECONOMIST, Jan. 11, 2003; Chuck Oxley, *Immigrants Squandering Pay on Check Fees, Wiring Charges*, at http://www.responsiblelending.org/news_headlines/ap80903.cfm (Aug. 9, 2003); Ginger Thompson, *A Surge in Money Sent Home by Mexicans*, N.Y. TIMES, Oct. 28, 2003, at A14 (all reporting on the trend of Latinos sending money from the United States to their hometowns using various money delivery sources).

away sent to them in New York or Hartford.¹⁰⁴ Most immigrants retain a place in their heart for their homeland, intending to return there someday to retire, build a home, or buy a small farm.¹⁰⁵ This makes forming unconditional attachment to the United States difficult, something that was not true of the early wave of immigrants.¹⁰⁶

Even in death, many Mexicans seek reunion with their home country. A recent *New York Times* article described a booming business among mortuaries in certain large cities that prepare and send the bodies of Mexicans who die in the United States back to their village graveyards in Mexico.¹⁰⁷ And when Mexico recently decided to permit its émigrés to hold dual citizenship, large numbers of Mexicans living in the United States flocked to their consulates to fill out an application, even ones who had lost their Mexican citizenship and gained the U.S. variety.¹⁰⁸

Other grounds differentiate Latinos from the earlier wave of immigrants from eastern and southern Europe. Many Latinos are very dark or indigenous looking, with broad cheekbones, slightly slanted eyes, black hair, and short, stout bodies—as far from the idealized image of Eurocentric beauty as one could be and as much so as many blacks.¹⁰⁹ Many of the early European immigrants, although uprooted and poor, looked white. They also arrived without the devastating social stigma many Latinos, particularly Mexicans, bore, dating back to the time of conquest when the early settlers disparaged them as a lazy, stupid, and mongrelized race.¹¹⁰ Latinos were stigmatized in the prevailing Anglo “story of origin.”¹¹¹ European immigrants were not. Anglos were prepared to find Latinos unattractive, even ones who were clean, presentable, and fit.

Still other features differentiate the experiences of the early European immigrants from those of today’s Latinos. The early Europeans received help from settlement houses, social workers, and a small cottage industry of

104. Andrea Elliott, *For Mom's Cooking, 2,200 Miles Isn't Too Far*, N.Y. TIMES, Aug. 11, 2003, at A1.

105. This impression is drawn from numerous personal communications with recent immigrants.

106. *Id.* In fact, a fair number of immigrants did change their minds and return to their homelands after finding that America was not what it was cracked up to be. MILTON M. GORDON, *ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION, AND NATURAL ORIGINS* 107–08 (1964).

107. Tripti Lahiri, *In Death, Homeward Bound*, N.Y. TIMES, June 26, 2003, at C15.

108. On the new provision for Mexican-U.S. dual citizenship and the huge response it met, see Associated Press, *U.S. Mexicans Gain Dual Citizenship*, N.Y. TIMES, Mar. 20, 2003, at A31.

109. See *supra* note 11 and accompanying text.

110. See Feagin, *supra* note 74, at 961–71; *supra* notes 11–19, 74–76 and accompanying text.

111. A “story of origin” is a founding myth or agreed tale. See generally Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280 (1989) (describing the American story of origin and how it legitimates the Constitution and gives it meaning while simultaneously justifying the denial of benefits under the Constitution to minority groups who do not fit into the story).

“Americanization” agents, self-appointed and otherwise, who taught them American standards of cleanliness, recipes, dress, and social behavior.¹¹² Today’s Latinos benefit from nothing comparable.¹¹³ Indeed, a militarized border with searchlights, motorized vehicles, barbed wire, police dogs, helicopters, and sensors places unauthorized entrants in mortal danger.¹¹⁴ In some areas of the Southwest, murderous, Mexican-hating vigilantes, some of whom move to the region expressly because they enjoy the prospect of engaging in human target practice, step in where they believe the border patrol is not doing its job.¹¹⁵ U.S. immigration law favored the early Europeans; today, it is stacked against Latinos seeking entry.¹¹⁶ Once inside the country, the Europeans found U.S. law either neutral or on their side.¹¹⁷ Domestic laws today formally disadvantage Latinos, ranging from California’s Proposition 187, which would have cut off schooling and other state benefits to immigrants, to English-only laws in many states and workplaces, and school policies that prohibit bilingual education beyond a very brief period.¹¹⁸

112. See, e.g., JANE ADDAMS, *TWENTY YEARS AT HULL-HOUSE* 196–212 (1981); *HANDBOOK OF SETTLEMENTS* (Robert A. Woods & Albert J. Kennedy eds., 1970); HOWARD J. KARGER, *THE SENTINELS OF ORDER: A STUDY OF SOCIAL CONTROL AND THE MINNEAPOLIS SETTLEMENT HOUSE MOVEMENT, 1915–1950* (1987) (all three sources describing the role of settlement houses in assimilating European immigrants into American society); see also PEARL I. ELLIS, *AMERICANIZATION THROUGH HOMEMAKING* (1929) (outlining home economics lessons designed to promote social assimilation).

113. See Delgado & Stefancic, *Home-Grown Racism*, *supra* note 22, at 743–72 (describing how in Colorado, the “Americanization” industry that sprang up on behalf of European immigrants essentially shut down around 1920—when most of the immigrants to the state were then Mexican).

114. See Claudia Smith, *Border Enforcement: Deadlier Than Ever and Ineffective As Always*, 2 *LATINO STUD.* 111, 111–13 (2004) (detailing recent trends in border-crossing related fatalities); cf. CENTER FOR LATIN AMERICAN STUDIES, *MEXICALI GROUP TAKES ISSUE OF UNSAFE DEPORTATION OF THE MINORS TO THE C.A.S.* (2003) (challenging the U.S. practice of deporting Mexican children and pregnant women in unsafe areas and in the middle of the night) (on file with the author); Rachel L. Swarns, *Immigrants Feel the Pinch of Post-9/11 Laws*, *N.Y. TIMES*, June 25, 2003, at A14 (discussing the enactment of state laws in response to terrorism that inadvertently restrict the ability of Mexican immigrants to obtain driver’s licenses).

115. See Feagin, *supra* note 74, at 959–60 (describing the prosecution of a San Diego man who satisfied his desire to “shoot some aliens”); Mark Lisher, *Vigilante Chief Longs to Lead U.S. Border War*, *AUSTIN AMERICAN-STATESMAN*, Nov. 2, 2003, at A1 (describing an armed vigilante group that patrols the U.S.-Mexico border in Texas and Arizona).

116. E.g., Leo R. Chavez, *Immigration Reform and Nativism: The Nationalist Response to the Transnationalist Challenge*, in *IMMIGRANTS OUT!*, *supra* note 9, at 61, 61–66 (discussing California’s Proposition 187); *id.* at 171–81 (describing the changing twentieth-century American immigration policies). On Arizona’s lookalike measure, see Sheryl Kornman, *Prop. 200 Splits Arizona on Proof of Citizenship for Benefits*, *TUCSON CITIZEN*, Oct. 28, 2004, at 1A (discussing a state proposition that would bar noncitizens from receiving public services not mandated by the federal government).

117. See Johnson, *supra* note 79, at 1129 (arguing that American law has historically favored white European immigrants).

118. See *supra* note 36. The campaign for California’s Proposition 187 featured explicit anti-Latino and anti-immigrant material. See Chavez, *supra* note 116, at 61–66; Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 *CAL. L. REV.* 1395,

Unlike the early twentieth century European immigrants or blacks today, Latinos lack role models or a large middle class.¹¹⁹ The Europeans left countries that might have been suffering famine, war, or revolution, but that were otherwise culturally intact. Many boasted proud histories of artistic and cultural achievement.¹²⁰ Many of today's Latino immigrants come from sending nations that are in economic turmoil due to histories of U.S. meddling and imperialism.¹²¹ Blacks count role models in the form of entertainment and sports stars and the occasional media celebrity, as well as a large and growing middle class.¹²² Latinos have little of either.¹²³ Blacks benefited from the Civil Rights movement and still enjoy support from white sympathizers, including a legion of teachers and school counselors on the lookout for black talent. Latinos have far fewer allies of this sort.¹²⁴ Popular culture disparages Latinos through explicitly and consciously demeaning roles in movies, jokes, putdowns, and mocking of the Spanish language through expressions such as "hasta la vista, baby," "no problemo," "numero uno," and "no way, Jose"¹²⁵—features that others do not have to endure, at least as frequently and unapologetically.

1409, 1414 (1997); Feagin, *supra* note 74, at 977; see also Kevin Johnson, Driver's Licenses and Undocumented Aliens: The Future of Civil Rights Law (2003) (unpublished manuscript, on file with the author) (contending that driver's license eligibility constitutes an important civil rights concern for Latinos).

119. See *supra* notes 89–91 and accompanying text (citing statistics comparing poverty and high school dropout rates for this group with those statistics of other groups).

120. Italy, Greece, and Ireland, for example, boast histories of great achievement in literature, painting, sculpture, and music.

121. E.g., Feagin, *supra* note 74, at 960–61. Mexico, for example, has suffered an imperialist war and U.S. land grab amounting to nearly half its territory as well as economic meddling after the war. See ACUÑA, *supra* note 18, at 1–135 (detailing the U.S. conquests of Mexico's Northwest: Texas, New Mexico, Arizona, and California).

122. See CHILDREN NOW, *supra* note 91, at 2–4 (surveying racial representation in primetime television to find that while African Americans comprise 16% of primetime characters, Latinos comprise only 6% of the same group); Mary McNamara, In "Post" Culture, the Prefix is In, L.A. TIMES, Aug. 31, 2003, at E4 (quoting Andrew Hacker's statement that "there may be a growing black middle class").

123. See Mark A. Perigard, *Alien Nation*, BOSTON HERALD, Nov. 5, 1995, at TV1 (finding Latinos starkly underrepresented in TV, accounting for only 2% of primetime roles, while blacks accounted for 18%); Alison R. Hoffman & Chon A. Noriega, *Looking for Latino Regulars on Prime-Time Television: The Fall 2003 Season*, UCLA Chicano Studies Research Center Research Report (April 2004) (setting out the report's conclusion that only 4% of television characters in the fall of 2003 were Latino and that Latinos appear in only 15% of television series and only 5 out of 12 genres), available at <http://www.chicano.ucla.edu/reports/tr3.pdf> (last visited Nov. 4, 2004). The early 2000s' spate of Latino and Latina pop music stars has only slightly improved this picture. *Id.*

124. This conviction is drawn from numerous personal communications with Latino undergraduates, college admissions officers, and high school students.

125. See Feagin, *supra* note 74, at 964–65 & nn.37–41 (citing a study by anthropologist Jane Hill regarding "mock Spanish" and the 1997 movie *Men in Black* to conclude that popular culture subtly mocks and degrades Latinos); Patrisia Gonzales & Roberto Rodriguez, *Anything but Brown*, Universal Press Syndicate, at <http://www.hispanicvista.com/html3/112803coa.htm> (Nov. 28, 2003)

D. Social Attitudes and Whiteness—What Does It Mean to Think White?

Some years ago, I published a law review article entitled *Minority Law Professors' Lives: The Bell-Delgado Survey*,¹²⁶ which examined how law professors of color were faring. With questions dealing with career satisfaction, burn-out, relations with colleagues and students, and material support at their law schools, the questionnaire provided a snapshot of the fortunes and well-being of blacks, Latinos, and Asians teaching at the nation's law schools.

Some years later, a young African American woman obtained my permission to replicate the survey.¹²⁷ It turned out that she did not use the same questions I had asked, so the results of her survey would shed little light on changes in the legal academy during the interim. When I received my own questionnaire, I was struck by how little relevance some of the questions bore to Latinos. One question, in particular, asked whether, when growing up, my parents had suffered because of the legacy of Jim Crow laws. I wrote the author, explaining that, while they had not suffered under that particular regime, the country's formal legal structure had disadvantaged them—and me—in countless ways, including many of the ones discussed above. I pointed out that most Latinos would probably have the same reaction and suggested a few questions to add if she were interested in eliciting information for that group. Whether she took me up on my suggestion, I do not know; her article still awaits publication.

This incident suggests that scholars need to take care when assessing the civil rights experiences of Latinos. Yancey, for example, supports his argument against including Latinos in the civil rights agenda by citing survey data professing to show that Latinos are beginning to think like whites. But consider how he came to that conclusion. One of his questions asked respondents whether they thought there was too much talk about race.¹²⁸ According to Yancey, very few blacks think this is true, although most whites do. When many of his Latino and Asian respondents agreed with the proposition, Yancey concluded that Latinos and Asians are beginning to think like whites.¹²⁹

(arguing that today's television shows rarely depict dignified Latinos, but rather a parade of subservient, buffoon, and criminal types); Perigard, *supra* note 123 (charging that television reinforces negative images of Latinos).

126. Richard Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349 (1989).

127. See Pamela Smith, *The Tyrannies of Silence of the Untenured Professors of Color*, 33 U.C. DAVIS L. REV. 1105, 1108 n.5 (2000) (discussing her survey).

128. YANCEY, *supra* note 6, at 100-04, 182-86 & tbl.A.4 (reproducing and discussing survey data).

129. *Id.*

But might it not be that Latinos and Asians, realizing that the country implicitly subscribes to a black/white binary paradigm of race,¹³⁰ interpret the question, not unreasonably, as asking whether they believe the United States has too much conversation about *blacks*? Answering yes to that question would not, then, be an indication of political conservatism, much less of identification with the white race. It might mean, instead, that the respondent believes discussion of racial minority groups ought to be broader than it is now and include groups other than African Americans. Similarly, Yancey asked his respondents how they felt about increasing welfare spending and integration of the nation's churches.¹³¹ Evidently, many blacks believe in both, while large numbers of whites do not.¹³² Because Yancey's Latino and Asian respondents gave answers more like those given by whites than by blacks, he concludes that they are beginning to adopt white attitudes.¹³³ But bear in mind that Latinos, as a group, prize families and cultural solidarity. Asked whether they favor integrating churches or spending on social welfare programs, they may reply tepidly, not because they identify with whites but rather because they identify with their own culture and believe that families and churches should be the first resort of those who suffer misfortune.

One could imagine a different test of cultural attitudes that asked African Americans how they feel about immigration, bilingual education, accent discrimination, or workers speaking languages other than English on the job. On learning that many respond to these measures in much the same way whites do, one could conclude that blacks were taking on white attitudes, were on their way to assimilation, and that society's first order of business ought to be to take care of those nonblack minority groups that represent the real bottom of the social ladder. Of course, this would be preposterous,¹³⁴ but the point is that one's choice of questions, as well as how one interprets the answers, must be approached with care. If one's object is to see whether Asians and Latinos are "beginning to approach *racial issues* from a majority group perspective,"¹³⁵ one must avoid using racial issues as synonymous with black ones, for then one would come perilously close to using the black/white binary of race to justify itself.¹³⁶

130. See generally Juan Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 (1997) [hereinafter Perea, *Binary Paradigm*] (analyzing "the role of books and texts on race in structuring our racial discourse").

131. See YANCEY, *supra* note 6, at 100–04, 182–86 & 184 tbl.A.4 (discussing survey methodology and responses).

132. *Id.*

133. *Id.*

134. But see STEVEN W. BENDER, *GREASERS AND GRINGOS: LATINOS, LAW AND THE AMERICAN IMAGINATION* 165 (2003) (reporting that a 1992 survey of blacks in Los Angeles found that they felt closer to whites than to Latinos).

135. YANCEY, *supra* note 6, at 9–10 (emphasis added).

136. See, e.g., *id.* at 156 (expressing the conclusion that blacks are more progressive than Asians and Latinos). But a sample of the questions that Yancey used to elicit information supporting this question shows many that are black-themed. Since every group is progressive

Yancey committed exactly this error in his selection of questions. He first examined questions to see if they generated a large black/white gap in the responses he received.¹³⁷ When he found such a question, he proceeded to ask it of a population of Asians and Latinos to see if their responses were more like those of whites than blacks.¹³⁸ The fallacy of such an approach should be obvious: It ends up measuring a group's attitudinal similarity to whites by imagining that they were blacks answering the same questions. But a group like Latinos may be attitudinally vastly different from whites in a host of respects that the researcher did not ask about—precisely because the researcher designed questions merely to show that Latinos differ from blacks. That, of course, does not exhaust all the possibilities. Because Latinos do not respond as blacks do to *certain* questions, it does not follow that they are like whites.¹³⁹ To make such an assertion simply recapitulates the black/white binary paradigm of race.

Yancey, like other liberals who oppose including Latinos in the civil rights agenda, finds it highly significant that blacks are still the most segregated group when it comes to housing.¹⁴⁰ But Latinos hold that dubious distinction with respect to schooling—more Latino children attend dominantly minority schools than do any other group.¹⁴¹ They also suffer the highest high school dropout rate by far.¹⁴² Who is to say which group is most

toward itself, Yancey's discovery verges on tautology. A recent national survey of Latinos shows that the group is distinctly progressive, favoring dealing with the causes of crime through job training, counseling, and neighborhood centers for young people, rather than tough punishment; 80% believing that discrimination is a problem, and supporting a generous immigration policy, universal health insurance, and aid to education. Press Release, Nat. Council of LaRaza, Latinos Optimistic About Future, Feel Candidates Ignore Their Issues, and Have a Shared Policy Agenda, Poll Finds, at <http://www.nclr.org/content/news/detail/25333> (June 27, 2004).

137. YANCEY, *supra* note 6, at 100–04.

138. *Id.*

139. For example, “Do you like soul food?” or “Do you like country western music?” would likely produce distinct black/white gaps. Suppose that Latinos answered these two questions in a way more characteristic of whites than of blacks. Would it follow that Latinos were taking on food and music preferences of whites and were therefore “whitening?” Not at all. Those same respondents, if asked, might reveal that they liked Mexican food and music best of all. Moreover, a sample of blacks asked about tamales and mariachi music might reveal tastes much like whites.

140. *Id.* at 63–68, 72–84.

141. GARY ORFIELD, SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 2, 33–34 (2001) (concluding that the average Latino attends a school that is 29.1% white and 70.9% black and brown and that the average black attends a school that is 31.7% white and 68.3% black and brown), available at http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf (last visited Oct. 23, 2004); Orlando Patterson, *What To Do When Busing Becomes Irrelevant*, N.Y. TIMES, July 18, 1999, § 4 (Week in Review), at 17. This hypersegregation is particularly pronounced in certain states. See Will Potter, *Many Hispanic Students Live in States That Already Ban Affirmative Action*, CHRON. HIGHER EDUC., June 6, 2003, at A21.

142. NICOLE STOOPS, U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2003, at 3 tbl.A (2004) (reporting that, of persons age 25 years and over, 57% of Hispanics have graduated from high school whereas 80% of the next highest group, blacks, have completed

marginalized and separated from the mainstream?¹⁴³ Or, again, consider the marginally lower opposition to intermarriage rates that Yancey cites for Asians and Latinos vis-à-vis blacks as indications of their assimilation.¹⁴⁴ Yet, might those rates not reflect, in some cases, white males pursuing a “Suzy Wong” stereotype of the obedient, non-feminist Asian woman,¹⁴⁵ or Anglo women acting on unconscious stereotypes, for example, of the Latin lover?¹⁴⁶

E. *The Differential Racialization Hypothesis*

Yancey and other writers who urge confining the civil rights agenda to one group would do well to recall a recent teaching of social science, namely the differential racialization hypothesis.¹⁴⁷ Their neglect of it is surprising, since Yancey, at least, relies heavily on the racial-construction thesis which is often taught along with it.¹⁴⁸ The differential racialization hypothesis holds that society constructs races differently at different times in light of society’s needs.¹⁴⁹ For example, in one era society needs a model minority to rebut the accusation that it is racist and unjust. It selects Asians and racializes them in a convenient fashion, such as hard-working automatons and coldly intelligent high-achieving drones.¹⁵⁰ In another era, it needs menial laborers; Mexicans and other Latinos now appear in popular culture as servants and happy, courteous workers. In some periods, such as that

high school), available at <http://www.census.gov/prod/2004pubs/p20-550.pdf> (last visited Oct. 23, 2004).

143. Or which direction *whites* may be moving in? Might it be that white society, by absorbing black music, styles, and embracing black entertainers is moving closer to black culture, but not closer to Latino and Asian cultures? See *supra* notes 122–125 and accompanying text.

144. See YANCEY, *supra* note 6, at 40, 68 (presenting survey statistics showing that majority racial groups are more reluctant to have their child marry a black person than to marry someone from another racial group).

145. John M. Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283, 349–53 (1997) (discussing the perception of Asian women as symbolizing the ideal of femininity, by virtue of their small physical stature, which, in turn, has been traditionally associated with submissiveness, passivity, and vulnerability); see generally Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1271–73 (1992) [hereinafter Delgado & Stefancic, *Images of the Outsider*] (generally discussing Asian stereotypes, including how white male actors emerged as having legitimate access to Asian women).

146. See Delgado & Stefancic, *Images of the Outsider*, *supra* note 145, at 1273 (stating that one stereotype of Mexican Americans is the “tragic, silent, ‘Spanish’ tall, dark and handsome” figure of romantic fiction).

147. See OMI & WINANT, *supra* note 38, at 61 (articulating the classic statement of this hypothesis).

148. See *supra* notes 55–60 and accompanying text.

149. See generally OMI & WINANT, *supra* note 38; see also Delgado & Stefancic, *Images of the Outsider*, *supra* note 145, at 1261–75 (providing historical examples of how depictions of minorities have changed over time in response to the changing needs of society).

150. See Delgado & Stefancic, *Images of the Outsider*, *supra* note 145, at 1270–73 (describing the general perceptions of Asians in American popular culture).

defined by slavery, society needed to rationalize black subjugation. Images then circulated of the happy slave or wise elder.¹⁵¹ Later, after slavery ended, the newly freed blacks posed a potential threat to white interests. Thus, media imagery changed to that of sullen brutes with designs on white women and white prerogatives—images that justified brutal oppression.¹⁵²

When society needs to marginalize a group, it chooses from material at hand. Latinos are often racialized by reason of their immigrant condition, their status as a conquered people, and their attachment to a foreign language, accent, or, sometimes, religion. Blacks are rarely, if ever racialized on these grounds, but on different ones such as skin color. Asians are racialized as cold, driven competitors out to deprive more easygoing Americans of jobs or slots in top universities, or remorseless foreigners bent on destroying the American automobile industry.¹⁵³

If society racializes the various groups differently, this calls into question the validity of tests and surveys, like Yancey's, that are framed in terms of only one group's experience. Like the questionnaire that asked me if I had suffered by growing up under Jim Crow laws—but neglected to ask about common experiences of racism that Latinos endure—the questions one chooses and how one couches them can easily predetermine the answers.¹⁵⁴ Ultimately, structural features of the social environment may suppress a particular group at least as much as racial attitudes toward them. Moreover, survey instruments are notoriously unreliable; everyone knows what a “good” (nonracist) and a “bad” (racist) answer is and answers accordingly.¹⁵⁵

151. *Id.* at 1263–64.

152. *Id.* at 1264–65.

153. See Delgado & Stefancic, *Images of the Outsider*, *supra* note 145, at 1273 (discussing how stereotypes of Asians in the post-World War II era have improved only marginally and economic rivalry is now fueling a further wave of anti-Asian sentiment).

154. For example, one survey shows that blacks consider themselves closer to whites than to Latinos. See BENDER, *supra* note 134, at 165. Another shows that 61% of Hispanics agree that colleges and universities should admit minorities even though they have SAT scores and GPAs lower than whites, while only 56% of blacks agree. See Potter, *supra* note 141. And another finds that 57% of blacks support school vouchers. See DAVID A. BOSITIS, 2002 NATIONAL OPINION POLL: EDUCATION 2 (2002). Which group, then, is more politically radical and which is nearer in position to whites?

155. It is worth noting that the Lilly survey that Yancey relied on was aimed primarily at ascertaining attitudes about church-going and not about racial identification directly. When asked directly if they consider themselves white, black, or other, 42% of Latinos chose other. Mireya Navarro, *Going Beyond Black and White, Hispanics in Census Pick 'Other'*, N.Y. TIMES, Nov. 9, 2003, at A1. A “large portion of . . . respondents [to the U.S. Census] wanted Hispanic to be considered their race.” *Id.* As one commentator put it: “That’s the big change over time. There’s a Latino identity, that’s neither black nor white, and it’s a positive identity.” *Id.* Many Latinos reject whitening as a mark of success and consider it, instead, a sign of undesired assimilation. *Id.*

V. A Civil Rights Agenda for an Emerging Multiracial America: How to Think About a Complex Reality

America is destined to enter an increasingly multiracial future. Latinos are unlikely to whiten any more than some blacks or Native Americans are, while Asians are likely to retain their cultural distinctness well into the future. All of these groups are apt to remain marginalized, although the means of their racialization will remain distinct and some of the groups will be permitted to advance from time to time as the interest of the majority group dictates. Poorly theorized rationalizations that one group is prototypical, exceptional, or unusually deserving of consideration should be recognized for what they are—simple interest group politics. Future scholarship needs to focus more than it has on Latinos and Asian Americans—not less. Too little is known about these groups; more laws expressly disadvantage them than target blacks, and fewer remedial measures are in place to ease their predicament. If, as this Review Essay suggests, the neoliberal argument is an evasion—Latinos and Asians are unlikely simply to blend into the woodwork—then any adequate theory of race must take account of groups other than blacks and whites. Where, specifically, do Latinos and Asian Americans figure in? And, what lessons does all of this have for blacks? Consider some of the following areas that would seem to warrant treatment in a new, expanded critical race jurisprudence.

A. *Seeing the Broad Checkerboard of Race and Avoiding Manipulation*

If one examines racial histories on a broad scale, one sees that progress for one racial minority group often accompanies reversals for another. For example, from 1846–1848, the United States fought a bloody, imperialist war against Mexico at the end of which it seized nearly one-half of that nation's territory.¹⁵⁶ Yet, only a few years later, the North fought a gallant, courageous, and bloody war against the South, ostensibly to free the slaves.¹⁵⁷

During Reconstruction, blacks registered great gains. Yet, in 1871, Congress passed the Indian Appropriations Act and, a few years later, the Dawes Act, greatly curtailing Indian sovereignty and land tenure.¹⁵⁸ And, in 1879, the new California Constitution made it a crime for a corporation to employ Chinese workers,¹⁵⁹ while three years later Congress enacted the

156. See *supra* notes 18–19 and accompanying text.

157. JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM* 198–219 (7th ed. 1994) (describing the Civil War and its causes).

158. See PEREA ET AL., *RACE AND RACES*, *supra* note 4, at 208, 215, 665 (detailing the steps taken by Congress to end treaty-making with Indian nations and make possible the division of reservation lands).

159. *Id.* at 376 (citing the 1879 California Constitution as requiring that “no corporation . . . shall . . . employ, directly or indirectly, in any capacity, any Chinese or Mongolian”).

Chinese Exclusion Laws that the Supreme Court upheld in *Chae Chan Ping v. United States*.¹⁶⁰

In the early years of this century, boarding schools for Indian children ruthlessly suppressed Indian culture,¹⁶¹ while California schools segregated black and Chinese schoolchildren to avoid tainting white schoolchildren by exposure to them.¹⁶² Yet, by the 1940s California courts were beginning to find segregation of Mexican American schoolchildren unconstitutional.¹⁶³ By mid-century, the Supreme Court in *Brown v. Board of Education*¹⁶⁴ struck down separate-but-equal accommodations for blacks at exactly the same time that Congress was ordering deportations of Mexican Americans during Operation Wetback.¹⁶⁵

Binary thinking not only makes it difficult to see the full panoply of race, it can conceal the way that the dominant group often affirmatively pits groups against each other, to the disadvantage of both. For example, in the antebellum South, Virginia gave white indentured servants more privileges than blacks to keep them from joining forces with the black slaves.¹⁶⁶ Later, plantation owners selected light-skinned slaves for duty in the masters' houses and recruited them to spy on their darker-skinned brothers and sisters in the fields and to inform the master of any impending rebellion.¹⁶⁷ In *People v. Hall*,¹⁶⁸ the California Supreme Court upheld a prohibition of Chinese testimony against whites in criminal trials by pointing out that blacks and Native Americans could not testify either. During California's Proposition 187 campaign, backers curried black votes by insinuating that Mexican immigrants aspired to take black jobs.¹⁶⁹ And recent mayoral elections in Los Angeles and San Francisco featured appeals to black voters

160. 130 U.S. 581 (1889).

161. See WILCOMB E. WASHBURN, *RED MAN'S LAND, WHITE MAN'S LAW* 218 (2d ed. 1995) (describing the author's experience in an Indian boarding school, "a world marked by punctuality, discipline, competition, study and punishment; a cold friendless passage to the culture that counted").

162. See CHARLES WOLLENBERG, *ALL DELIBERATE SPEED* 9–13, 39–47 (1976) (recounting California's history of segregating white schoolchildren from both black and Chinese schoolchildren).

163. See *Mendez v. Westminster School Dist.*, 64 F. Supp. 544 (S.D. Cal. 1946); *Lopez v. Seccombe*, 71 F. Supp. 769 (S.D. Cal. 1944).

164. 347 U.S. 483 (1954).

165. See *supra* note 28 and accompanying text.

166. HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* 37 (1980).

167. See *id.* at 35 (describing the division of slaves as a psychological control tool of the Southern elite to create "disunity among slaves by separating them into field slaves and more privileged house slaves").

168. 4 Cal. 399 (1854).

169. See Manning Marable, *Beyond Racial Identity Politics: Towards a Liberation Theory for Multicultural Democracy*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 448, 449 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) (commenting that immigration issues have been central to recent Latino-black disunity).

to vote against Latino candidates and instead for the familiar white-dominated machine.¹⁷⁰

Binary thinking also hides the way that Caucasians often select a particular minority group—often a small, nonthreatening one—for favored treatment, thus rebutting any presumption that the majority are unjust.¹⁷¹ For, if the human-relations officer who fired you was a fellow minority group member, say an Asian or light-skinned Latino, how can you complain of racist treatment? The designated pet group can easily come to believe that its favored treatment is justified, ignoring that in another time or place it will find itself replaced and at the mercy of a different group.

B. Breakthrough Cases, Triumphalism, and the Black/White Binary Paradigm of Race

Current legal scholarship celebrates *Brown v. Board of Education*¹⁷² as the crown jewel of American legal thought.¹⁷³ Yet, recent scholarship shows that this landmark decision benefited the white majority much more than it did blacks. Scholars such as Derrick Bell¹⁷⁴ and Mary Dudziak¹⁷⁵ have shown that *Brown* may not have come about so much because of a moral breakthrough on the part of white society or the judiciary. Rather *Brown* came about when it did because of the country's need to bolster international appearances during a time of intense Cold War competition with the Soviet Union for the loyalties of the uncommitted Third World, much of which was brown, black, or Asian.¹⁷⁶ According to this view, *Brown* was never intended to benefit blacks. Rather, its aim was to improve the image of U.S. elites in the eyes of the world.¹⁷⁷ Blacks ended up deriving relatively little

170. E.g., Ellis Cose, *A Brownout in Los Angeles*, NEWSWEEK, June 18, 2001, at 32; Mireya Navarro, *Blacks and Latinos Try to Find Balance In Touchy New Math*, N.Y. TIMES, Jan. 17, 2004, at A1; Patrick Reddy, *Political Lessons from L.A.*, UPI, June 19, 2001, LEXIS, News Library, UPI File; William J. Stern, *Blacks vs. Latinos*, CITY J., Summer 2001, at 7; John Wildermuth & Rachel Gordon, *Mayor Brown Tells Ministers Gonzalez Opposes Blacks*, S.F. CHRON., Nov. 26, 2003, at A1. On the troubled relations between the two groups, see generally Stavans, *supra* note 88.

171. See Richard Delgado, *Making Pets: Social Workers, "Problem Groups," and the Role of the SPCA—Getting a Little More Precise About Racialized Narratives*, 77 TEXAS L. REV. 1571, 1579 (1999) (noting that when two racial minority groups coexist in the same area, "white folks often 'make pets' of one . . . at the expense of the other").

172. 347 U.S. 483 (1954).

173. See Richard Delgado & Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547, 547 (1995) [hereinafter Delgado & Stefancic, *Social Construction*].

174. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) [hereinafter Bell, *Interest-Convergence*] (contending that the *Brown* decision came about to further the political and economic interests of white policymakers).

175. MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

176. *Id.* at 107–13.

177. See *id.* at 105–07 (describing the recognition by some Supreme Court Justices of the need to improve the overseas perception of American race relations and positing that this recognition

benefit from *Brown*.¹⁷⁸ Indeed, the announcement of a great breakthrough may have worsened their plight: Liberals, believing that the messy problem of discrimination had been solved,¹⁷⁹ went on to new issues, such as the environment. Blacks' enemies, the conservatives and the deep South, redoubled their resistance, believing that the Supreme Court had done something unprincipled.¹⁸⁰ Fifty years after *Brown*, more black schoolchildren attend segregated schools than before the case was decided.¹⁸¹

So *Brown* did little for blacks and much for whites. What did it do for Latinos? Arguably, it made their situation considerably worse, although this may not have been appreciated at the time. Consider how *Brown*, based as it was on equal protection,¹⁸² inevitably—if unintentionally—contributed to a growing black/white binary paradigm of race. Equal protection analysis by its nature requires two groups, similarly situated, that receive differential treatment with respect to some public benefit or program, such as education.¹⁸³ In our country, because of its history, those groups are apt to be white and black. When the Supreme Court chose equal protection over other

influenced the *Brown* decision). It was also designed to ease the threat of disruption from the returning black servicemen and women who had fought and risked their lives for democracy and freedom. Bell, *Interest-Convergence*, *supra* note 174, at 524–25.

178. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 155–56 (1991) (“[T]here is little evidence that *Brown* helped produce positive change By stiffening resistance and raising fears before the activist phase of the civil rights movement was in place, *Brown* may actually have delayed the achievement of civil rights.”); Michael Klarman, *Are Landmark Court Decisions All That Important?*, *CHRON. HIGHER EDUC.*, Aug. 8, 2003, at B10 (positing that Supreme Court decisions rarely lead public opinion and consequently that the results of the Court’s decision in *Grutter v. Bollinger* are unlikely to have much effect on society, as would have been true if the opinion would have come down the opposite way).

179. See, e.g., Juan F. Perea, *Buscando America: Why Integration and Equal Protection Fail to Protect Latinos*, 117 *HARV. L. REV.* 1420, 1454 (2004) (arguing that for liberals concerned with fundamental justice, “*Brown* provides important evidence that struggles for justice can bear fruit even in the face of determined resistance. *Brown* thus fits neatly into the liberal ideology of gradual but inevitable progress toward universal justice and fairness.”).

180. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 490 (2000) (noting that white southern leaders described *Brown* as a decision by “a lawless Court, abandoning the Constitution . . . for the personal and political values of unelected judges”); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 *VA. L. REV.* 7, 85–116 (arguing that *Brown* “catalyz[ed] southern resistance to racial change”).

181. See Orfield, *supra* note 141, at 33–34; Vincent Brydon, *Panel: Segregation Still Exists in U.S. Schools*, *TOPEKA CAP. J. (Kan.)*, Oct. 26, 2002 (citing various speakers at a National Bar Association annual symposium) available at http://www.cjonline.com/stories/102602/kan_segpanel.shtml (last visited Nov. 4, 2004); cf. Erwin Chemerinsky, *Access to Justice: The Rehnquist Court and Justice: An Oxymoron?*, 1 *WASH. U. J.L. & POL’Y* 37, 48 (1999) (stating that a federal district court’s decision that ended busing in Oklahoma City “effectively meant the re-segregation of schools”); Delgado & Stefancic, *Social Construction*, *supra* note 173, at 549 (observing that “except in the Deep South, . . . black children are as likely today [1995] as they were forty years ago to attend predominantly black schools”).

182. *Brown*, 347 U.S. at 493 (holding that segregation deprived black children of equal educational opportunity).

183. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-1 (2d ed. 1988).

avenues to strike down separate-but-equal pupil assignments for black and white children, it contributed to a mode of analysis in which two groups, and two only—the black and the white—constituted racial discourse. Other groups might gain consideration, but only insofar as they were able to analogize their treatment to a form visited on blacks.¹⁸⁴ Yet Latinos, like Asian Americans, are on the receiving end of much mistreatment that is not precisely analogous to any that blacks suffer.¹⁸⁵ The black/white binary paradigm renders much of this mistreatment legally invisible.

The black/white binary paradigm of race left Latinos and other nonblack minority groups with essentially two choices: They could be whites, or they could be blacks. Neither approach proved particularly successful. In the early years of Latino activism, Latino litigators and social service agencies pursued an “other white” strategy, in which they argued that the law permitted only segregation against blacks, and since Latinos were white, school and other authorities had no business treating them in that fashion.¹⁸⁶

Needless to say, such a strategy was not exactly empowering, nor did it do much to endear Latinos to blacks. During the 1960s, Brown Power exploded on the national scene, with Chicano youth staging school walkouts, farmworkers striking for better conditions, and university students marching for Latino and ethnic studies programs, classes, and professors.¹⁸⁷ Patterned after tactics developed by the Student Nonviolent Coordinating Committee (SNCC), the Congress of Racial Equality (CORE), and other black activist organizations, this wave of activism relegated the tame “other white” strategy to the scrap heap.¹⁸⁸ But it still bore overtones of me-tooism; in veering in

184. See Perea, *Binary Paradigm*, *supra* note 130, at 1220 (noting that “the paradigm dictates that all other racial identities and groups in the United States are best understood through the Black/White binary paradigm”).

185. Examples include discrimination based on alienage, accent, culture, or the speaking of a language other than English. For an example of a court struggling with one aspect of this difference, see *Hernandez v. Texas*, 347 U.S. 475 (1954).

186. See George A. Martinez, *Mexican Americans and Whiteness*, in CRITICAL RACE THEORY, *supra* note 169, at 379 (observing that after the Texas legislature passed, in 1943, “a resolution that established as a matter of Texas public policy that all Caucasians were entitled to equal accommodations[. . . Mexican Americans attempted to rely on the resolution and sought to claim one of the traditional benefits of whiteness—freedom from exclusion from public places”); Steven D. Wilson, *Brown over “Other White”: Mexican Americans’ Legal Arguments and Litigation Strategy in School Desegregation Lawsuits*, 21 LAW & HIST. REV. 145, 145 (2003) (noting that Mexican American lawyers distanced themselves from *Brown* and its potential application to their civil rights claims and instead continued to rely on federal and state court precedent that established Latinos as the “other white” race under Jim Crow laws).

187. See ACUÑA, *supra* note 18, at 307–56; OSCAR “ZETA” ACOSTA: THE UNCOLLECTED WORKS (Ilan Stavans ed., 1996); Oscar “Zeta” Acosta, *Life in the Trenches*, in THE LATINO/A CONDITION, *supra* note 76, at 333–34.

188. SNCC and CORE were organizations founded by interracial groups of students in 1960 and 1942, respectively. Both groups sought to combat white supremacy in the United States by means of nonviolent resistance strategies such as sit-ins, jail-ins, voter registration drives, and freedom rides. See CLAYBORNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF

the opposite direction, Latinos tried, essentially, to be black, as the prevailing paradigm of race required.¹⁸⁹ The movement soon lost force—white America found the Latinos' claim to the same legacy of racism as the black civil rights movement unpersuasive, if not ridiculous, and the opportunity to forge an authentic Latino voice and politics, centered on issues of concern to that community, was lost.¹⁹⁰

Brown v. Board of Education, which relegated Latinos to the periphery and demanded that they choose between being black and white, functioned much as *Plessy v. Ferguson*¹⁹¹ did for blacks. Although *Brown* was greeted by African Americans with joy and celebration (and even more so by elite whites),¹⁹² it set back Latino fortunes just as surely as it advanced black and white ones. *Plessy* was an unmitigated disaster for blacks, ushering in a regime in which they were marginalized and ignored, yet told that the law required nothing more. *Brown* may have performed much the same function for Latinos.¹⁹³ Critical race scholars need to look more carefully at how Supreme Court cases like *Brown* shifted the fortunes of groups other than the one immediately before the Court.

C. *Interest Convergence when the Number of Players is Three*

In one of the more impressive breakthroughs of the early Critical Race Theory movement, Derrick Bell posited that advances for African Americans came about, not so much from altruism or evolving notions of morality, but because of the dictates of white self-interest.¹⁹⁴ Selecting as his target *Brown v. Board of Education*, Bell showed how this landmark of American race jurisprudence occurred when it did because of the need to present a favorable image of U.S. race relations to the international community and to deprive our Cold War competitors of political capital, as well as to postpone the

THE 1960S 19–43 (1981); TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63, at 171, 390 (1988).

189. ACUÑA, *supra* note 18, at 354–56 (“The Black-white confrontation produced a whirlwind of events that caused Mexican Americans . . . to escalate demands for similar human rights and political gains.”).

190. *Id.* at 309 (“Mexican Americans and other minorities had a difficult time convincing people that they belonged to the civil rights movement.”).

191. 163 U.S. 537 (1896) (upholding separate-but-equal doctrine against challenge that it violated blacks' constitutional rights).

192. See Bell, *Interest-Convergence*, *supra* note 174, at 524–25 (noting that the *Brown* decision had “value to whites . . . in policy-making positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation”); Delgado & Stefancic, *Social Construction*, *supra* note 173, at 548 (“Did *Brown* benefit white elites more than it benefited blacks?”).

193. Namely, it relegated them to the margins and rendered their complaints nonredressable and unsympathetic.

194. Bell, *Interest-Convergence*, *supra* note 174, at 524–25.

threat of domestic disruption.¹⁹⁵ Bell later extended his analysis to the full sweep of African American civil rights history, showing at each critical point how advances and retreats corresponded to the needs of the dominant group, rather than those of blacks.¹⁹⁶ Subsequent scholarship, including work by Mary Dudziak¹⁹⁷ and this author,¹⁹⁸ confirmed Bell's hypothesis. As a result, interest convergence has entered the lexicon of all critical scholars as a powerful explanatory tool.

Few, however, have extended interest convergence to groups other than African Americans, or sought to apply it to relations among minority groups. The tool would seem to promise just as much insight in these settings as in the one in which Bell coined it. For example, when Latinos deployed the "other white" strategy,¹⁹⁹ they sought to capitalize on a convergence of interests with whites in suppressing blacks and relieving their own community from the ravages of discrimination. On other occasions, blacks have made common cause with whites in an effort to frustrate the political aspirations of upstart Latino candidates for certain big-city mayoral positions.²⁰⁰ In California, many African Americans supported Proposition 187, an anti-immigrant measure that would have put high hurdles in the way of Latino and Asian immigrants seeking social services and upward mobility.²⁰¹ Some commentators treat these instances as simple errors,

195. *Id.* at 524–25; see also DUDZIAK, *supra* note 175, at 104 (stating that "Brown [was an] effective Cold War tool by suggesting that racial equality was simply an American constitutional principle"); *id.* at 107 ("When *Brown v. Board of Education* was decided, the opinion gave the U.S. government the counter to Soviet propaganda it had been looking for, and the State Department . . . wasted no time in making use of it."); *supra* note 177 and accompanying text.

196. DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* (3d ed. 1992) (tracing the entire trajectory of blacks' civil rights struggles).

197. See generally DUDZIAK, *supra* note 175 (discussing the civil rights movement in the context of America's need to narrate a rosy story of democracy and human rights to counter Soviet propaganda and negative foreign press coverage of Jim Crow).

198. Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369 (2002).

199. See *supra* note 186 and accompanying text.

200. See Richard Delgado, *Linking Arms: Recent Books on Interracial Coalition as an Avenue of Social Reform*, 88 CORNELL L. REV. 855, 876, 883 (2003) [hereinafter Delgado, *Linking Arms*]; *supra* note 170 and accompanying text. On the difficulties of coalition politics generally, see Richard Delgado, *Derrick Bell's Toolkit—Fit to Dismantle that Famous House?*, 75 N.Y.U. L. REV. 283, 302 (2000) [hereinafter Delgado, *Toolkit*] ("[D]ichotomous thought impairs groups' ability to forge useful coalitions."); Harold Meyerson, *In New York as in L.A., Racial Politics Thwarts A Rebirth of Urban Liberalism*, AM. PROSPECT, Dec. 3, 2001, at 18, 20 (arguing that in the 2001 New York and Los Angeles mayoral elections, "the politics of race derailed the prospects for a new urban liberalism").

201. Delgado, *Linking Arms*, *supra* note 200, at 871; see Feagin, *supra* note 74, at 977 (asserting that "English-only" laws such as Proposition 187 reflect the "great antagonism toward Spanish language and bilingual programs" shared by both whites and blacks); Patrisia Gonzales & Roberto Rodriguez, *The Unintended Census Race*, at http://www.uexpress.com/columnoftheamericas/?uc_full_date=20030725 (July 25, 2003) (arguing that "fear-merchants have begun to peddle the notion that African Americans and Hispanics have the most to fear from" the

lamentable occasions when minority groups failed to perceive their common interests.²⁰² In fact, they might be better seen as efforts, conscious or not, to advance the interest of one group at the expense of another, even if that entailed making common cause with whites.²⁰³

D. *The Pitfalls of Coalition Politics: Fighting White Privilege*

Recent scholarship has called into question the romantic notion of a heady coalition of the oppressed uniting to challenge their common oppression. Scholars have pointed out that coalitions are apt to be short-lived and beset by internal antagonisms, tacit reservations, and halfhearted commitments.²⁰⁴ They have warned that any outsider coalition is vulnerable to ship-jumping when whites offer one of the parties a better deal than that which they might have hoped to receive from remaining with the group.²⁰⁵

One type of outsider coalition that might seem immune from all these dangers is one aimed at countering a practice that disadvantages them all, namely, white privilege—that collection of invisible favors, practices, and tacit understandings whereby whites secure courtesies and benefits for each other at the expense of minorities and others shorn of privilege.²⁰⁶

growing Hispanic population); see also *California Recall Survey*, S.F. CHRON., Sept. 26, 2003, at A18 (reporting that 57% of Latinos favored Cruz Bustamante—the only serious minority candidate—for governor while only 17% of blacks did); Felicia R. Lee, *New Topic in Black Studies Debate: Latinos*, N.Y. TIMES, Feb. 1, 2003, at A1 (discussing the wide range of views among Black Studies scholars as to the effect of Latino population growth on Black Studies scholarship).

202. See generally Delgado, *Linking Arms*, *supra* note 200, at 859–60, 865, 868–84 (explaining and taking issue with this “error” view of coalition failures); Julie Su & Eric K. Yamamoto, *Critical Coalitions: Theory and Praxis*, in CROSSROADS, *supra* note 5, at 384–85 (blaming failure of many progressive coalitions on distrust, internal conflicts, and failure to appreciate common interests); ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA 175–90* (1999) (explaining certain failures as stemming from lack of imagination, empathy, or deep analysis).

203. See, e.g., Delgado, *Linking Arms*, *supra* note 200, at 876 (explaining that a minority group may seek to form a coalition with whites, even at the expense of other minorities, because “such a coalition will be larger, more powerful, and potentially more durable than one with another minority group”).

204. For example, some blacks have combined forces with conservative whites to support the limiting of affirmative action programs to blacks, at the exclusion of Hispanics and other minorities. *Id.* at 875–76; see generally Delgado, *Toolkit*, *supra* note 200, at 302–03 (discussing the “other white” strategy, in which moderate Latinos distanced themselves from other minority groups and even other, darker-skinned Latinos); Tamar Jacoby, *Voting Bloc Without a Party*, N.Y. TIMES, Oct. 28, 2002, at A25 (calling attention to the gulf between black and Latino issues, especially in city and state elections).

205. See Delgado, *Linking Arms*, *supra* note 200, at 875–76.

206. See STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCES UNDERMINE AMERICA* (1996) (discussing the problem of the invisibility of white privilege and stating that “the invisible cannot be combated, and as a result privilege is allowed to perpetuate, regenerate, and re-create itself”); see also Cohn, *supra* note 95 (stating that blacks and Latinos exhibit a history of tense relations but also wary agreement on some issues such as the need to fight discrimination and increase jobs).

But even a coalition aimed at combating white privilege is subject to many of the pitfalls that scholars have identified in coalition politics in general. It turns out that privilege, whether of the white kind or any other variety, is not a stable, unitary essence that people own, by reason of who they are, to the exclusion of others. In some settings (such as certain sectors of the entertainment industry) blacks may be privileged, or at least able to win easy entry, while in others, Asians and Latinos may bear privileges that carry more than a whiff of whiteness. Latinos may wish that there were less talk about race; as Yancey points out, not wanting to hear unpleasant talk about a loaded subject may be something they have in common with whites.²⁰⁷ Similarly, when blacks oppose immigration or support anti-Latino measures, such as English-only rules or Proposition 187, that, too, could be considered an aspect of white privilege and entrenchment in America.²⁰⁸

Privilege, in short, is relational and a matter of one's situation. For this reason, a coalition to end white privilege can easily find itself beset by internal antagonisms and sudden defections. Only by heeding the dynamics of a broad field of minority groups, all vying for position, can such issues come into view.

E. New Variations of Colorblind Racism

Many writers have critiqued the notion that the Constitution is colorblind as a conceptual impossibility or a poor tool for redressing oppression.²⁰⁹ Most of this scholarship focuses on the variety of colorblindness practiced by conservatives. But what of the variety that takes the form of insisting, as George Yancey or Charles Krauthammer do, that society recognizes only two colors, the white and the black, and ignores all the others? The multiracial critical theory that this Review Essay urges would further the critique of colorblindness by showing its full complexity, demonstrate that liberals are just as prone to selective colorblindness as their conservative counterparts when they ignore and marginalize Latinos, and devise tools to unmask and counter it whenever it appears.

VI. Conclusion

A more nuanced form of race scholarship will not develop, however, if society follows the lead of neoliberals like Yancey, Patterson, Matsuda, White, Krauthammer, and Skrentny and limits the spectrum of civil rights

207. See *supra* notes 128–130 and accompanying text.

208. See *supra* note 134.

209. See, e.g., Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 2–3 (1991) (arguing that "[a] color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans").

discourse to blacks and whites. Not only is this a poor idea conceptually, it suffers from practical difficulties that should give every reader, including blacks, pause: It discourages coalition even while it concedes the historic fickleness of the white majority in tolerating civil rights breakthrough victories followed by silent retrenchment and deployment of pet-group and divide-and-conquer strategies.

Progressives should invest their effort in expanding, not narrowing, civil rights discourse. The future lies with multiracialism rather than one-party politics, with complexity rather than artificial simplicity, with a candid embrace of a booming, seething, polyglot world rather than a dismissively simplified one that will be increasingly out of touch with the world we inhabit.