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## DERRICK BELL'S TOOLKIT— FIT TO DISMANTLE THAT FAMOUS HOUSE?

RICHARD DELGADO\*

*Does United States antidiscrimination law embrace a black/white binary paradigm of race, in which other, nonblack minority groups must compare their treatment to that of African Americans in order to gain redress? In this Derrick Bell Lecture, Professor Richard Delgado argues that it does, and that other minorities also fall from time to time into the trap of exceptionalism, placing their own experiences at the center of discussion. Taking as his text a recent chronicle by Derrick Bell, Bluebeard's Castle, Professor Delgado argues that narrow binary thinking—regardless of the group that engages in it—weakens solidarity, reduces opportunities for coalition, deprives one group of the benefits of the others' experiences, makes one overly dependent on the approval of the white establishment, and sets one up for ultimate disappointment. The black/white binary, in short, is bad for blacks, just as her foolish fixation on the gloomy noble of operatic fame finally doomed Judith, the heroine of Bluebeard's Castle.*

Looking back, I see that, while I have bumbled through life pretty much without a mentor of any sort, I have had three coyotes. For readers unfamiliar with Southwest culture, a coyote is someone who conducts you to the North for pay, but also at some risk to himself. Chicano society is conflicted about coyotes: They charge a lot, sometimes they betray you, and sometimes the land to which they conduct you turns out to disappoint.

My first coyote was a nameless homeroom teacher in ninth grade who did me what I am sure he thought was a great favor. During my early school years my family moved around a lot, for reasons having to do with my father's status under U.S. law. So, I attended a lot of

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different schools. Every September my mother would take me, hand in hand, to the new school, where she would patiently explain to the assistant principal how Dicky was really a very good little reader and great with numbers. Each time the official would look at me dubiously and send me to the Bluebird room, where I would spend my days in the company of lanky children, too old for their grades, with crossed eyes, who would pass most of the time drawing idly or looking out the window.

Then one day the anonymous homeroom teacher, picking up on something, I don't know what, told me that space had opened up in Mrs. Sheridan's college prep English class and asked if I would like to be transferred to it. I didn't, but my mom sure did, so the next day I found myself in a room full of bright-eyed young teenagers who were listening intently—not throwing anything or looking out the window—while the teacher was reading aloud from *The Rime of the Ancient Mariner*. It was a revelation: They were doing publicly what I had been doing privately, with borrowed books, in my room back home.

The second coyote entered my life some fifteen years later, when a certain Mexican American law professor suggested I consider going into law teaching. Until then, we had only spoken on the phone, I as a junior law review editor, he as an untenured professor and author of a submitted article. He subsequently went down in flames, but not before sending my c.v. to a number of law schools, including the one where I got my first teaching job.

My third coyote is—you guessed it—Derrick Bell, who, although he may not know it, conducted me to intellectual realms hitherto unknown and unimagined, opening up vistas I never knew existed. And, unlike coyotes in real life, he never charged me a nickel, and left me secure, as a reader and now a friend, that I was always in good hands.

Derrick, thank you. You have been the best coyote of all.

\* \* \*

What a treasure trove of ideas Derrick Bell has showered on an entire generation of his readers! Interest convergence.<sup>1</sup> Law schools tying themselves in knots over what to do about seven superb teaching candidates.<sup>2</sup> Structural conflict of interest between civil rights liti-

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<sup>1</sup> See Derrick A. Bell, Jr., *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518 (1980) [hereinafter Interest-Convergence Dilemma].

<sup>2</sup> See Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* 140-43 (1987) [hereinafter *And We Are Not Saved*] (The Chronicle of the DeVine Gift).

gators and their clients.<sup>3</sup> Space traders who demand that America deliver up all its blacks in return for three gifts of inestimable value.<sup>4</sup> And lately, racial realism, the notion that despite periodic ebbs and flows, the fortunes of blacks in American society remain roughly constant, as though obeying a melancholy law of racial thermodynamics.<sup>5</sup> Racial reformers must labor with little guarantee that their work will ever bear fruit, gleaned whatever reward they can from the struggle itself.<sup>6</sup>

A recent chronicle from the master storyteller builds on this legal realist theme. *Bluebeard's Castle*, the final chapter in Bell's latest book, *Afrolantica Legacies*,<sup>7</sup> offers up a tale of power, unrequited love, and the dangers of ignoring history. In this Lecture, I intend to explore the realist dilemma Bell depicts in *Bluebeard's Castle*, showing that in some respects that predicament is even deeper than its eminent author may realize. But then I show how the chronicle conceals a flip side that promises transformation and progress—if we are prepared to shift how we think about race and each other, and to entertain a degree of radical trust.

I first discuss the allegory of Bluebeard's Castle and the interpretation Professor Bell places on it.<sup>8</sup> I then propose another reading, exposing a latent dimension to the story that is even more worrisome than the one Bell highlights.<sup>9</sup> I show how this other dimension plays out in U.S. history,<sup>10</sup> then outline how marginalized groups may sometimes, jiu-jitsu fashion, turn the master's tools into a device for dismantling that famous house.<sup>11</sup>

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<sup>3</sup> See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *Yale L.J.* 470, 471, 512-15 (1976).

<sup>4</sup> See Derrick Bell, *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 *St. Louis U. L.J.* 393, 398 (1990) [hereinafter *After We're Gone*].

<sup>5</sup> See Derrick Bell, *Racial Realism*, 24 *Conn. L. Rev.* 363, 373-74 (1992) [hereinafter *Racial Realism*].

<sup>6</sup> See *id.*

<sup>7</sup> Derrick Bell, *Afrolantica Legacies* 155-68 (1998) [hereinafter *Afrolantica Legacies*].

<sup>8</sup> See *infra* Part I.

<sup>9</sup> See *infra* Part II.

<sup>10</sup> See *infra* Part III.

<sup>11</sup> See *infra* Conclusion. Attributed to Audre Lorde, an old civil rights adage holds that one cannot use the master's tools (i.e., civil rights categories) to dismantle his house. See Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in *Sister Outsider: Essays and Speeches* 110, 112 (1984). This Lecture agrees that one cannot do so, at least without major modification of those tools. See *infra* Conclusion. It also argues that the black/white binary of race is one of those tools. See *infra* notes 39-40 and accompanying text.

I  
BLUEBEARD'S CASTLE

In the world of literature and music, *Bluebeard's Castle* is both a French fairy tale and an opera by Béla Bartók.<sup>12</sup> Both tell the story of a nobleman who marries a series of women and spirits them away to his castle, where they remain hidden for the rest of their lives.<sup>13</sup> In Bartók's version, the principal character, Judith, Bluebeard's fourth wife, is attracted to the "strange and awe-inspiring" noble whose heart she hopes to touch with the humanizing power of her love.<sup>14</sup> Despite her family's warnings and the evidence of her senses, she allows herself to become entranced with Bluebeard and takes increasing risks as their relationship develops. When Judith visits Bluebeard's castle, she finds a forbidding, windowless fortress, so damp and sunless that, in a signature aria, she sings that the very stones must be weeping.<sup>15</sup>

Walking along a central hallway, Judith spies a series of seven locked doors. Hoping to find a ray of light to relieve the castle's gloom, Judith asks Bluebeard to throw them open. He refuses, asking her to accept him on faith. But she persists, certain that the rooms will contain what her hopes tell her must be there—some sign that life with Bluebeard will contain more than the all-pervading dreariness that envelops his castle. When she finally persuades Bluebeard to open the doors and peers inside, she discovers a series of vistas each more horrifying than the last—instruments of torture and hoards of wealth, all stained by blood. Undaunted, Judith insists on admission to the final room. Over Bluebeard's objections she enters, fearing the worst—that she will find the murdered corpses of Bluebeard's three previous wives. Instead, the door opens to reveal that Bluebeard has not murdered them. They are quite alive, pale and bedecked in jewels, crowns, and splendid dresses. As they advance, Bluebeard seizes the wide-eyed Judith, who pleads for mercy. But to no avail: Bluebeard drapes her with shining raiment, crown, and jewels, and she slowly, inevitably, takes her place with the others behind the closed doors.<sup>16</sup>

For Bell, Judith's fate is an allegory for blacks' hopes and fears and a metaphor for American racial progress.<sup>17</sup> The six locked rooms of the castle correspond to major developments in civil rights history,

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<sup>12</sup> See *Afrolantica Legacies*, supra note 7, at 155 (citing Béla Bartók, *Duke Bluebeard's Castle* (Columbia Records 1963)).

<sup>13</sup> See *id.* at 155-57.

<sup>14</sup> See *id.* at 155.

<sup>15</sup> See *id.* at 155-57.

<sup>16</sup> See *id.* at 156-57 (recounting story).

<sup>17</sup> See *id.* at 158-64.

such as *Brown v. Board of Education*<sup>18</sup> and 1960s-era civil rights laws.<sup>19</sup> Judith's hope as she opens each door mirrors the black community's celebrations following each milestone; her disappointment, that of African Americans as each advance inevitably is cut back by narrow judicial interpretation, foot dragging, and delay.<sup>20</sup> Bell takes issue with his illustrious predecessor, Martin Luther King, Jr., who wrote that "the line of progress [may] never [be] straight," but that a traveler who perseveres will nevertheless "see the city again, closer by."<sup>21</sup> Instead, just as Bluebeard shuts Judith away when she opens the final door, so America will always shrink from the light so that "[d]isappointed, resigned to our fate, we will watch as the betrayal of our dreams is retired to some somber chamber while the stage grows dark and the curtain falls."<sup>22</sup>

## II

### JUDITH'S PREDICAMENT AS METAPHOR FOR AFRICAN AMERICAN HOPES

Why did Bell choose a French fairy tale to illustrate a point about African American history and experience? Perhaps to illustrate a universal truth about empowered groups' cynical use of hope to keep the peasantry in line. Perhaps, too, Bell was drawn to the story of Bluebeard because he saw himself in Judith, whose transformation from besotted idealist to disillusioned bride mirrors, in some respects, Bell's own path.<sup>23</sup> As the opera opens, Judith entertains a vision of an ideal life with Bluebeard and, despite warnings, takes risks to achieve it.<sup>24</sup> When finally allowed access to the castle, she recognizes it for what it is—just as Bell, despite his early hopes, now recognizes the reality of a

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<sup>18</sup> 347 U.S. 483 (1954).

<sup>19</sup> See *Afrolantica Legacies*, supra note 7, at 158-64.

<sup>20</sup> See *id.* at 159-60 ("As Bluebeard's wives were doomed to suffer imprisonment, blacks seem foreordained to endure one racial disaster after another. The tableau changes with the times, but its structure and . . . outcome remain constant.").

<sup>21</sup> *Id.* at 166 (internal quotation marks omitted) (quoting Martin Luther King, Jr., *Where Do We Go from Here: Chaos or Community?* 12 (1967)).

<sup>22</sup> *Id.* at 168.

<sup>23</sup> See *Racial Realism*, supra note 5, at 377-78. Derrick A. Bell, Jr., began his career as a civil rights litigator, see *Association of Am. Law Schs., The AALS Directory of Law Teachers 1997-98*, at 255, but over time developed profound skepticism over the possibility of racial progress, especially through litigation. See, e.g., *And We Are Not Saved*, supra note 2, at 26-74, 140-77 (describing racial progress as intermittent, with periods of regression); *Racial Realism*, supra note 5, at 363 (doubting that racial equality for blacks will ever be achieved).

<sup>24</sup> See *Afrolantica Legacies*, supra note 7, at 155-57.

persistently racist country.<sup>25</sup> The castle may also represent, on one level or another, Harvard Law School, whose hallways resisted, to the end, Bell's efforts to bring humanism and light.<sup>26</sup> Despite her growing horrific realization, Judith clings to the faith that her marriage will succeed, just as civil rights activists once clung to the hope of a better world.<sup>27</sup>

As Bell recounts it, the force of Bluebeard's story lies in its use of repetition, the seven doors standing in for milestones in black history,<sup>28</sup> but also serving to highlight the maddening similarity of each step, with its repeat cycle of curiosity, hope, revelation, and disappointment. Similarly, the eerie image of the imprisoned brides, coma-like in their consciousness, is driven home through repetition. Three, now four, seemingly identical, pale, imprisoned women forcefully remind us of the fate of a people who fail to grasp their situation or who listen to dreamers who tell them that salvation lies just around the corner.

### III

#### BLUEBEARD'S CASTLE AND THE ARCHITECTURE OF RACE

In Bell's allegory, Judith could have avoided her predicament by staying home and tending her garden, just as Bell, the sometime cultural nationalist, has encouraged his fellow African Americans to foreswear integration and settle instead for building strong black communities.<sup>29</sup> As I will argue later, she need not abjure love entirely

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<sup>25</sup> Compare *id.* (describing Bluebeard's Castle allegory as one of dashed hopes) with *And We Are Not Saved*, *supra* note 2 (positing that quest for racial justice is always likely to be elusive).

<sup>26</sup> On Bell's courageous efforts to persuade Harvard Law School to hire black women, humanize its teaching, and adopt fair hiring and promotion standards for professors, see Derrick Bell, *Confronting Authority: Reflections of an Ardent Protester* 3-8 (1994).

<sup>27</sup> Compare *Afrolantica Legacies*, *supra* note 7, at 156 ("Despite the ominous signs, she wants to believe her marriage will succeed."), with King, *supra* note 21, at 12 (arguing that racial reformers who persist will reap rewards of eventual success).

<sup>28</sup> See *Afrolantica Legacies*, *supra* note 7, at 160-64 (analogizing first six locked doors to Emancipation Proclamation, Reconstruction Amendments, *Brown v. Board of Education*, and other civil rights breakthroughs).

<sup>29</sup> See Derrick A. Bell, Jr., *A School Desegregation Post-Mortem*, 62 *Tex. L. Rev.* 175, 177-78 (1983) (writing that desegregation data are unpromising and that better strategy would be to fortify black schools). Bell reminds us, here and elsewhere, that favorable judicial decisions like *Brown v. Board of Education* are invariably followed by great celebrations, singing, and dancing in the streets—after which subtle resistance and judicial retrenchment quietly rob them of efficacy. See *And We Are Not Saved*, *supra* note 2, at 45-48; *Interest-Convergence Dilemma*, *supra* note 1, at 518-19. He might have added that in some respects they leave us even worse off than before. Conservatives, believing that the legal system has given away the store to undeserving minorities, redouble their resistance, while our friends, the liberals, believing the problem has been solved, go off to do battle with another one, such as saving the whales. Psychologists know, too, that a variable rein-

but should instead seek it with a different, more steadfast suitor.<sup>30</sup>

We might begin by taking a closer look at the architecture of that castle, its arrangement of rooms, and the relationships they set up among Bluebeard's four wives. Like an Eastern potentate with a harem, Bluebeard may be playing them off against each other, maintaining everything nicely under his control.<sup>31</sup> Recall how at the very time *Brown v. Board of Education*<sup>32</sup> announced a ringing breakthrough for black schoolchildren, U.S. Attorney General Herbert Brownell was ordering Operation Wetback, a massive roundup of Mexicans, many of them United States citizens, for deportation to Mexico,<sup>33</sup> and how just a few years earlier, a presidential decree had ordered all Japanese Americans living on the West Coast to wartime detention centers, many losing farms and businesses in the process.<sup>34</sup>

By the same token, during Reconstruction southern planters refused to hire the newly freed blacks, instead bringing in Mexicans and Asians to carry out the work the slaves previously performed.<sup>35</sup> In similar fashion, Texas school authorities in the wake of *Brown* certified certain schools desegregated after cynically arranging pupil assignment so that the schools were fifty percent black, fifty percent Mexican American.<sup>36</sup>

Ignoring how society racializes one group at the expense of another, then, is risky business. To understand when one is being manipulated or used to suppress someone else, each minority group

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forcement schedule is the surest way to hook someone, so that the law's intermittent bestowal of breakthroughs followed by repressive decisions is exactly what is needed to keep a marginalized people coming back for more. See *Elements of Psychology* 64 (Audrey Haber & Richard P. Runyon eds., 2d ed. 1978) (noting that response rates to stimuli are generally greater when reinforcement is variable rather than fixed). Similarly, Judith's abiding hope leads her to open more doors despite repeated disappointments.

<sup>30</sup> See *infra* Conclusion.

<sup>31</sup> In this Lecture, I use the four wives as a metaphor for America's major racial minority groups (African Americans, Latinos, Asians, and Native Americans).

<sup>32</sup> 347 U.S. 483 (1954).

<sup>33</sup> See Juan Ramon García, *Operation Wetback: The Mass Deportation of Undocumented Workers in 1954*, at 169-232 (1980) (describing planning and implementation of Operation Wetback by Attorney General Brownell); see also Richard Delgado, *Making Pets: Social Workers, "Problem Groups," and the Role of the SPCA—Getting a Little More Precise About Racialized Narratives*, 77 *Tex. L. Rev.* 1571, 1576 (1999) (describing Operation Wetback).

<sup>34</sup> See *Korematsu v. United States*, 323 U.S. 214, 216-17 (1944) (describing executive orders that directed Japanese to be placed in detention centers); see also Delgado, *supra* note 33, at 1577 (same).

<sup>35</sup> See Delgado, *supra* note 33, at 1577.

<sup>36</sup> See *id.*; see also George A. Martinez, *Mexican Americans and Whiteness*, in *The Latino/a Condition: A Critical Reader* 175, 176 (Richard Delgado & Jean Stefancic eds., 1998) (describing desegregation case where court treated Mexican Americans as white).



must attend to the broader scale. Castle doors may be opening and shutting in a more complex sequence than we will realize if we focus only on the fortunes of one occupant.

When Bell carries out this larger exploration, the desperate urgency that he illustrated through the Bluebeard metaphor will gain even more force. He will be able to show that what minorities saw as social and legal advances actually moved us closer to the forfeiture of our dreams, and how the dominant society arranged it so. Like Judith, then, we will learn to be skeptical because “neither love nor life can be sustained on unearned trust.”<sup>37</sup> This is even more so because the tyrannical Bluebeard, like some of today’s conservatives, rationalizes that he did his bedecked, bejeweled, but still imprisoned wives a favor.<sup>38</sup>

#### A. *Knocking on the Castle Door: The Black/White Binary of Race*

Judith’s entrancement with Bluebeard may stand as a metaphor for the dichotomous quality that afflicts much racial thought today.<sup>39</sup> As scholars such as Juan Perea have pointed out, traditional civil rights thinking deems a single group paradigmatic,<sup>40</sup> with the experiences and concerns of other groups receiving attention only insofar as they may be analogized to those of this group.<sup>41</sup> Binary thinking often accompanies what is called “exceptionalism,” the belief that one’s

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<sup>37</sup> Afrolantica Legacies, *supra* note 7, at 156.

<sup>38</sup> See Dinesh D’Souza, *The End of Racism: Principles for a Multiracial Society* 88-90 (1995) (implying that institution of slavery may have benefited blacks by bringing them to America, where conditions were better than those faced by workers in much of world).

<sup>39</sup> Bell’s impressive body of writing to date has been largely Afrocentric—that is, concerned with the fortunes of just that one social group. In light of changes in demographics and the social composition and dynamics of a rapidly evolving society, will that focus need to broaden? The thesis of this Lecture is that it will, and that blacks and all other racial minority groups will benefit from this broadening. On the binary, or dichotomous, nature of much of today’s civil rights thought, see, e.g., Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 Cal. L. Rev. 1213 (1997) (using Kuhnian notion of paradigm to show how contemporary scholarship deems certain issues central to civil rights analyses—mainly those that deal with African-American experience and problems—while rendering others unimportant, beyond scope of consideration, or important only insofar as they can be analogized to ones facing blacks); see also Richard Delgado, *Rodrigo’s Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 Tex. L. Rev. 1181 (1997) (voicing Latino-Critical scholarship view of black/white binary).

<sup>40</sup> See Perea, *supra* note 39, at 1214-15; see also Juan F. Perea, Richard Delgado, Angela P. Harris, & Stephanie M. Wildman, *Race and Races: Cases and Resources for a Diverse America* (2000) (providing extended analysis of inadequacy of monoracial approaches).

<sup>41</sup> See Delgado, *supra* note 39, at 1183-86, 1191-99 (describing Latino experience of being analyzed within black/white paradigm).

group is, in fact, so unusual as to justify special treatment,<sup>42</sup> as well as nationalism, the belief that the primary business of a minority group should be to look after its own interests.<sup>43</sup>

Consider now, the many ways that binary thinking—like Judith's initial refusal to consider the fates of Bluebeard's three previous wives—can end up harming even the group whose fortunes one is inclined to place at the center.

*1. Shifting Tides: How Society Arranges Progress for One Group to Coincide with Repression of Another*

The history of minority groups in America reveals that while one group is gaining ground, another is often losing it. From 1846 to 1848, the United States waged a bloodthirsty and imperialist war against Mexico in which it seized roughly one-third of Mexico's territory (and later colluded with crafty lawyers and land-hungry Anglos to cheat the Mexicans who chose to remain in the United States of their lands guaranteed under the Treaty of Guadalupe Hidalgo).<sup>44</sup> Yet only a few years later, the North fought an equally bloody war against the South, ostensibly to free the slaves.<sup>45</sup> During Reconstruction (1865 to 1877), slavery was disbanded, the Equal Protection Clause was ratified, and black suffrage was written into law.<sup>46</sup> Yet, this generosity did not extend to Native Americans: In 1871, Congress passed the Indian Appropriations Act, providing that no Indian nation would be recognized as independent and capable of entering into a treaty with the United States.<sup>47</sup> A few years later, the Dawes Act broke up land held jointly

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<sup>42</sup> See Leslie Espinoza & Angela P. Harris, *LatCrit: Latinas/os and the Law—Afterword: Embracing the Tar-Baby: LatCrit Theory and the Sticky Mess of Race*, 85 Cal. L. Rev. 1585, 1596-1604 (1997) (making case for black exceptionalism).

<sup>43</sup> See *Critical Race Theory: The Cutting Edge* 345-87 (Richard Delgado ed., 1995) (exploring cultural and legal nationalism as themes in modern civil rights thought).

<sup>44</sup> 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, 721 (1999) (describing this sorry chapter in Southwest history). On this and other chapters in Mexican subjugation, see generally Rodolfo Acuña, *Occupied America: A History of Chicanos* (3d ed. 1988).

<sup>45</sup> See John Hope Franklin & Alfred A. Moss, Jr., *From Slavery to Freedom: A History of African Americans* 205-08 (7th ed. 1994) (recording political history of emancipation of slaves during and because of Civil War).

<sup>46</sup> See U.S. Const. amends. XIII, XIV, XV.

<sup>47</sup> See Indian Appropriations Act of March 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (1994)); see also Perea et al., *supra* note 40, at 203 (describing part of Act that provided that "hereafter no Indian nation or tribe . . . shall be acknowledged or recognized as an independent . . . power with whom the United States may contract by treaty").

by tribes, resulting in the loss of nearly two-thirds of Indian lands.<sup>48</sup> In 1879, Article XIX of the California constitution<sup>49</sup> made it a crime for any corporation to employ Chinese workers.<sup>50</sup> And in 1882 Congress passed the Chinese Exclusion Laws<sup>51</sup> that were soon upheld in *Chae Chan Ping v. United States*.<sup>52</sup> Goodwill toward one group, then, does not necessarily translate into the same for others.

In 1913, California's Alien Land Law<sup>53</sup> made it illegal for aliens ineligible for naturalization to lease land for more than three years, a measure that proved devastating for the Japanese population, many of whom derived their livelihood from agriculture.<sup>54</sup> A few years later, Congress eased immigration quotas for Mexicans because they were needed by large farm owners.<sup>55</sup> Go figure.

During the first half of this century, Indian boarding schools sought to erase Indian history and culture,<sup>56</sup> while California segregated black and Chinese schoolchildren to preserve the purity of young Anglo girls.<sup>57</sup> Yet, in 1944, *Lopez v. Seccombe*<sup>58</sup> found segregation of Mexicans from public parks to violate the Equal Protection Clause,<sup>59</sup> and a short time later a federal court declared California's practice of requiring Mexican American children to attend separate

<sup>48</sup> See Indian General Allotment (Dawes) Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 354, 381 (1994)); see also Perea et al., supra note 40, at 215 (describing how Act broke up Indian reservations, reallocating segments to individual tribal members).

<sup>49</sup> See Cal. Const. art. XIX, § 2 (repealed 1951).

<sup>50</sup> See Perea et al., supra note 40, at 376-77 (citing California constitutional provision that prohibited employment of Chinese by California corporations as "the most vexing part" of Article XIX).

<sup>51</sup> Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943) (suspending immigration of Chinese laborers for 10 years and forbidding state and federal courts from admitting Chinese to citizenship); see also Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504 (repealed 1943) (expanding Chinese Exclusion Act by barring return of Chinese laborers who left United States).

<sup>52</sup> 130 U.S. 581 (1889); see Perea et al., supra note 40, at 382-88 (describing events that surrounded enactment, and judicial affirmation, of Chinese Exclusion Act).

<sup>53</sup> Act of May 19, 1913, ch. 113, § 2, 1913 Cal. Stat. 206, 207 (repealed 1955).

<sup>54</sup> See Perea et al., supra note 40, at 2, 398-405 (describing impact of Alien Land Law on Japanese farmers and community).

<sup>55</sup> See Act of Feb. 5, 1917, ch. 29, 39 Stat. 874 (repealed 1952); see also Perea et al., supra note 40, at 312-14 (describing early "guest" or temporary worker program, which was forerunner of later Bracero Program).

<sup>56</sup> See Perea et al., supra note 40, at 862 (describing Indian boarding schools, one of which had as its motto "[t]radition is the enemy of progress").

<sup>57</sup> See Charles M. Wollenberg, *All Deliberate Speed: Segregation and Exclusion in California Schools, 1855-1975*, at 9-13, 28-47 (1976) (describing California's pre-*Brown* practice of social segregation in schools).

<sup>58</sup> 71 F. Supp. 769 (S.D. Cal. 1944).

<sup>59</sup> See *id.* at 771.

schools unconstitutional.<sup>60</sup> And, in a horrific twist, in the 1940s, the United States softened its stance toward domestic minorities, who were needed in the war industries and as cannon fodder on the front, but turned its back on Jews fleeing the Holocaust.<sup>61</sup>

Shortly after the war, at a time when vistas were beginning to open up for returning black servicemen, Congress reversed its policy of giving United States citizenship to Filipino World War II veterans.<sup>62</sup> Even today, the patchwork of progress for one group coming with re-trenchment for another continues. For example, at a time when Indian litigators are winning striking breakthroughs for tribes,<sup>63</sup> California has been passing a series of anti-Latino measures, including English-Only,<sup>64</sup> Proposition 187,<sup>65</sup> and restrictions on bilingual education.<sup>66</sup>

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<sup>60</sup> See *infra* notes 141-64 and accompanying text (discussing *Mendez v. Westminster Sch. Dist.*, 64 F. Supp. 544 (S.D. Cal. 1946)).

<sup>61</sup> See Delgado, *supra* note 33, at 1577 (discussing Bracero Program, under which thousands of Mexican workers were admitted into country); Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 *Hastings Women's L.J.* 79, 89, 94 (1998) (same); see also Philip A. Klinkner & Rogers M. Smith, *The Unsteady March: The Rise and Decline of Racial Equality in America 161-201* (1999) (describing ease of racism and restrictions on minority labor during wartime).

<sup>62</sup> See Act of June 27, 1952, Pub. L. No. 82-414, § 403(a)(42), 66 Stat. 163, 280 (repealing Act of Oct. 14, 1940, ch. 876, 54 Stat. 1137, which had provided for naturalization of Filipinos who served honorably in Army, Navy, Marine Corps, or Coast Guard); see also Perea et al., *supra* note 40, at 412 (describing plight of Filipino World War II veterans living in United States).

<sup>63</sup> These include casino gambling and fishing rights. See *Minnesota v. Mille Lacs Band of Chippewa*, 119 S. Ct. 1187 (1999) (holding that Indian tribe retained hunting, fishing, and gathering rights guaranteed to it by 1837 Treaty); David H. Getches et al., *Cases and Materials on Federal Indian Law 882-94* (4th ed. 1998) (describing expansion of Indian fishing and hunting rights); see also Jennifer Warren, *21 Initiatives Await Voters on State's March Ballot*, *L.A. Times*, Oct. 31, 1999, at A18 (describing advances in state legislation permitting casino gambling on Indian land). Of course, Indians have not always fared well in the courts. For a treatment of the vicissitudes of Indian sovereignty doctrine, see David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 *Cal. L. Rev.* 1573 (1996).

<sup>64</sup> *Cal. Const.* art. III, § 6 (establishing English as official state language); see also Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 *Minn. L. Rev.* 269 (1992) (discussing California's, and other states', official English policies).

<sup>65</sup> 1994 *Cal. Legis. Serv. Prop. 187* (West) (codified in scattered sections of *Cal. Educ., Gov't, Health & Safety, Penal, Welf. & Inst. Codes*) (restricting public services for undocumented aliens); see also Patrick J. McDonnell, *Prop. 187 Talks Offered Davis Few Choices*, *L.A. Times*, July 30, 1999, at A3 (describing mediation between California Governor and opponents of Proposition 187 pursuant to which Governor agreed not to appeal court ruling declaring Proposition 187's core provisions unconstitutional).

<sup>66</sup> See 1998 *Cal. Legis. Serv. Prop. 227* (West) (codified at *Cal. Educ. Code §§ 300-340* (West Supp. 1999)) (prohibiting bilingual education in public schools); see also Anna Gorman, *Frustrations Abound in First Year of Prop. 227*, *L.A. Times* (Ventura County

## 2. *Affirmative Pitting of One Disadvantaged Group Against the Other*

Not only does binary thinking conceal the checkerboard of racial progress and retrenchment, it can hide the way dominant society often casts minority groups against one another, to the detriment of both. For example, in colonial America, white servants had been treated poorly.<sup>67</sup> In 1705, however, when the slave population was growing, Virginia gave white servants more rights than they had enjoyed before, to keep them from joining forces with slaves.<sup>68</sup> In the same era, plantation owners treated house slaves (frequently lighter skinned than their outdoor counterparts) slightly better than those in the fields, recruited some of them to spy on their brothers and sisters in the field, and rewarded them for turning in dissidents.<sup>69</sup>

In the years immediately following the Civil War, southern plantation owners urged replacing their former slaves, whom they were loath to hire for wages, with Chinese labor.<sup>70</sup> They succeeded: In 1868, Congress approved the Burlingame Treaty with China, under which larger numbers of Chinese were permitted to travel to the United States.<sup>71</sup> Immediately following the Civil War, the Army recruited newly freed slaves to serve as Buffalo Soldiers putting down Indian rebellions in the West.<sup>72</sup>

In *People v. Hall*,<sup>73</sup> the California Supreme Court used legal restrictions on blacks and Native Americans to justify banning Chinese from testifying against whites in criminal trials. The court wrote:

It can hardly be supposed that any Legislature would attempt . . . excluding domestic negroes and Indians, who not unfrequently have correct notions of their obligations to society, and turning loose upon the community the more degraded tribes of the same species, who have nothing in common with us, in language, country or laws.<sup>74</sup>

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Ed.), June 21, 1999, at B1, available in Lexis, News Library, LAT file (describing problems associated with implementation of Proposition 227).

<sup>67</sup> See Perea et al., *supra* note 40, at 96.

<sup>68</sup> See *id.* at 97 (describing change in Virginia laws).

<sup>69</sup> See *id.* at 96.

<sup>70</sup> See Milton R. Konvitz, *The Alien and the Asiatic in American Law 11-12* (1946) (noting South's interest in substituting Chinese "coolie" labor for Negro slave labor).

<sup>71</sup> See Treaty of Tientsin, July 28, 1868, U.S.-China, 16 Stat. 739; see also Perea et al., *supra* note 40, at 374, 382 (describing treaty).

<sup>72</sup> See Monroe Lee Billington, *New Mexico's Buffalo Soldiers, 1866-1900* (1991) (describing Buffalo Soldiers and their role in putting down Indian insurrection).

<sup>73</sup> 4 Cal. 399 (1854).

<sup>74</sup> *Id.* at 403.

Similarly, Justice Harlan's dissent in *Plessy v. Ferguson* staunchly rebuked segregation for blacks, but supported his point by disparaging the Chinese, who had the right to ride with whites.<sup>75</sup> And, in 1912, when the House of Representatives debated the question of American citizenship for Puerto Ricans, politicians used the supposed failure of other minority groups to justify withholding rights from the newly colonized.<sup>76</sup>

During California's Proposition 187 campaign, proponents curried black votes by portraying Mexican immigrants as competitors for black jobs.<sup>77</sup> Earlier, even the sainted George Sánchez exhorted his fellow Mexican Americans to oppose further emigration from Mexico, on the ground that it would hurt Mexican Americans already here.<sup>78</sup>

### 3. *Over-Identification with Whites*

Sometimes the pitting of one minority group against another, inherent in binary approaches to race, takes the form of exaggerated identification with whites at the expense of other groups. For example, early in Mississippi's history, Asians sought to be declared white so that they could attend schools for whites.<sup>79</sup> Early litigators followed a similar "other white" policy on behalf of Mexican Americans,

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<sup>75</sup> 163 U.S. 537, 561 (1896) (Harlan, J., dissenting). In this century, conservatives have used the supposed success of Asians to justify denying government services or affirmative action for other minorities and poor whites. See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 Cal. L. Rev. 1241, 1258-65 (1993) (discussing model-minority myth); see also Perea et al., *supra* note 40, at 412-19 (same). By limiting Asian immigration to this country, Anglos greatly reduced Asian representation today. See *supra* notes 51-52 and accompanying text. With relatively small numbers, Asians are less of a threat than larger groups such as blacks and Latinos, hence safer to hold up as the emblem of success. Social scientists know that when two minority groups coexist in one region, the majority group will often make pets of the smaller group, designating them the favorites and appointing them to positions and jobs. See Delgado, *supra* note 33, at 1579 (describing majority group's tendency to befriend smaller of two minority groups in given region). The majority group can then rebut any inference that it is racist by pointing to the highly visible successful members of the smaller group.

<sup>76</sup> See Perea et al., *supra* note 40, at 342-43 (describing debate in House of Representatives).

<sup>77</sup> See Manning Marable, *Beyond Racial Identity Politics: Towards a Liberation Theory for Multicultural Democracy*, in *Critical Race Theory: The Cutting Edge* 448, 449-50 (Richard Delgado & Jean Stefancic eds., 2d ed. 1999) (noting that some conservative leaders take position that undocumented Latino workers take jobs from African American workers). In other circumstances, however, Asians and Latinos benefit by being treated as nonblack. For example, in housing segregation, Asians and Latinos are often treated as more acceptable than blacks in the decision of who gets to live in white neighborhoods.

<sup>78</sup> See David G. Gutiérrez, *Walls and Mirrors: Mexican Americans, Mexican Immigrants, and the Politics of Ethnicity* 131-33 (1995) (discussing George Sánchez's role).

<sup>79</sup> See Perea et al., *supra* note 40, at 662-63 (discussing *Gong Lum v. Rice*, 275 U.S. 78 (1927), in which Court upheld Mississippi state constitutional provision establishing sepa-

arguing that segregation of Mexican Americans was illegal because only the variety directed against blacks or Asians was expressly countenanced by law.<sup>80</sup>

Chinese on the West Coast responded indignantly to *People v. Hall*,<sup>81</sup> the Chinese testimony case, on the grounds that it treated them the same as supposedly inferior Negroes and Indians.<sup>82</sup> Later, Asian immigrants sought to acquire United States citizenship but learned that a naturalization statute that had stood on the books for 150 years, beginning in 1790, denied citizenship to anyone other than whites.<sup>83</sup> In a series of cases, some of which reached the United States Supreme Court, Asians from China, Japan, and India sought to prove that they were white.<sup>84</sup>

Anglocentric norms of beauty divide the Latino and black communities, enabling those who most closely conform to white standards to gain jobs and social acceptance, and sometimes to look down on their darker-skinned brothers and sisters.<sup>85</sup> Box-checking also enables those of white or near-white appearance to benefit from affirmative action without suffering the worst forms of social stigma and exclusion.<sup>86</sup>

#### 4. *Interference with Moral Insight and Generalization*

Binary thinking can also impair moral insight and reasoning for whites. Justice John Harlan, author of the famous dissent in *Plessy v. Ferguson*,<sup>87</sup> wrote a shockingly disparaging opinion on the Chinese

rate schools for nonwhite children after parents of Chinese American child had insisted on her being classified as white).

<sup>80</sup> See Delgado, *supra* note 39, at 1188 (discussing "other white" strategy).

<sup>81</sup> 4 Cal. 399 (1854).

<sup>82</sup> See *supra* notes 73-74 and accompanying text; see also Perea et al., *supra* note 40, at 373 ("The Chinese responded to *People v. Hall* with outrage.").

<sup>83</sup> See Naturalization Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (relevant provisions repealed by Nationality Act of 1940, Pub. L. No. 76-853, § 303, 54 Stat. 1137, 1140); see also Ian F. Haney Lopez, *White By Law: The Legal Construction of Race* 37-47 (1996) (describing history of this statute and cases brought under it). During Reconstruction the prohibition was softened to allow acquisition of citizenship by persons of African nativity or descent. See *id.* at 43-44.

<sup>84</sup> See Lopez, *supra* note 83, at 79-109, 203-12 (discussing various cases deciding which groups comprise white race, including *Kharaitai Ram Samras v. United States*, 125 F.2d 879 (9th Cir. 1942) (holding that Asian Indians are not white); *In re Saito*, 62 F. 126 (C.C.D. Mass. 1894) (holding that Japanese are not white); *In re Ah Yup*, 1 F. Cas. 223 (C.C.D. Cal. 1878) (No. 104) (holding that Chinese are not white)).

<sup>85</sup> See Perea et al., *supra* note 40, at 470-71, 999 (discussing social standards of beauty and color).

<sup>86</sup> See John Martinez, *Trivializing Diversity: The Problem of Overinclusion in Affirmative Action Programs*, 12 *Harv. BlackLetter J.* 49 (1995) (discussing role of box-checking in affirmative action programs).

<sup>87</sup> 163 U.S. 537, 563 (1896) (Harlan, J., dissenting).

just a few years earlier in the Chinese Exclusion case, *Chae Chan Ping*.<sup>88</sup> Recently, Asian American scholars have pointed out how the great Justice turns out to have suffered a blind spot that besmirches his reputation.<sup>89</sup> Similarly, others have pointed out how Earl Warren, who enjoys towering fame as a liberal justice who supported civil rights for blacks and, as governor of California, put an end to school segregation for Asian and Mexican American schoolchildren, was a prime mover in the effort to remove Japanese Americans to concentration camps in the beginning months of World War II.<sup>90</sup> Until recently, most historians and biographers embraced the official version in which Warren played at most a minor role.<sup>91</sup> It seems quite likely that binary, monocultural thinking made possible the selective empathy that enabled these two famous figures to misstep as they did.<sup>92</sup>

Binary thinking can easily allow one to believe that America made only one historical mistake—for example, slavery.<sup>93</sup> If so, the prime order of business is to redress that mistake by making its victims whole; the concerns of other groups would come into play only insofar as they resemble, in kind and seriousness, that one great mistake. But simplifications of that form are always debatable, never necessary, and rarely wise. As a leading Native American scholar put it: “To the Indian people it has seemed quite unfair that churches and government agencies concentrated their efforts primarily on the blacks. By defining the problem as one of race and making race refer solely to black, Indians were systematically excluded from consideration.”<sup>94</sup> The truth is that all the groups are exceptional; each has been racialized in different ways; none is the paradigm or template for the others.<sup>95</sup>

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<sup>88</sup> 130 U.S. 581 (1889); see *supra* note 52 and accompanying text.

<sup>89</sup> See Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 Iowa L. Rev. 151 (1996) (describing Justice Harlan's casual stereotyping of Asians).

<sup>90</sup> See Sumi K. Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 19 B.C. Third World L.J. 73 (1998) (unearthing little known history of Warren's role in backing internment of Japanese Americans).

<sup>91</sup> See *id.* at 83-86 (describing majority view among historians that Warren played, at most, secondary role in internment of Japanese Americans).

<sup>92</sup> To be sure, moral insight sometimes does generalize. Justice Thurgood Marshall, for example, dissented in *Harris v. Rosario*, 446 U.S. 651, 652 (1980) (Marshall, J., dissenting), a welfare-benefits case in which the Court approved lower level of welfare payments for people in Puerto Rico.

<sup>93</sup> Or if one is a Mexican nationalist, Conquest, or immigration restriction for a Chinese person.

<sup>94</sup> Vine Deloria, Jr., *Custer Died for Your Sins* 168 (1969). Deloria charges civil rights activists with being caught up in a black/white binary, but by insisting that Indian affairs be placed at the center, he comes perilously close to embracing a red-white version of his own.

<sup>95</sup> See *infra* notes 96-105 and accompanying text; see also Tomás Almaguer, *Racial Fault Lines: The Historical Origins of White Supremacy in California* (1994) (discussing



Blacks were enslaved.<sup>96</sup> Indians were massacred and then removed to the West.<sup>97</sup> Japanese Americans were relocated in the other direction.<sup>98</sup> African Americans are stereotyped as bestial or happy-go-lucky, depending on society's shifting needs;<sup>99</sup> Asians, as crafty, derivative copycats or soulless drones;<sup>100</sup> Mexicans as hot-tempered, romantic, or close to the earth.<sup>101</sup> Blacks are racialized by reason of their color; Latinos, Indians, and Asians on that basis but also by reason of their accent, national origin, and, sometimes, religion as well. All these groups were sought as sources of labor; Indians and Mexicans, as sources of land.<sup>102</sup> Puerto Ricans, Indians, and Mexicans are racialized by reason of conquest.<sup>103</sup> Latinos, Indians, and Asians are pressured to assimilate; blacks to do the opposite.<sup>104</sup> The matrix of race and racialization thus is constantly shifting, sometimes overlapping, for the four main groups.<sup>105</sup>

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racialization of three major groups—Mexican Americans, Native Americans, and Asian Americans—in California during nineteenth century, and showing how black/white framework gave way to more complex forms of racialization and white supremacy). Atomistic thinking of the sort facilitated by the various binaries and nationalist enthusiasms lies, plausibly, at the heart of the patchwork of reparations measures that the United States has enacted or backed for various groups: Native Hawaiians, Japanese internees, and victims of the Holocaust have received such reparations (although reparations for Holocaust victims were extracted from another country, Germany), while African American descendants of the slaves and Mexicans whose land was stolen during the Mexican American war of aggression have not received reparations.

<sup>96</sup> See Franklin & Moss, *supra* note 45, at 27-55 (describing origins, development, and economics of slave trade).

<sup>97</sup> See, e.g., Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* 312-17 (1990) (tracing justificatory concepts in Western discourse for these and other incidents).

<sup>98</sup> See *Justice Delayed: The Record of the Japanese American Internment Cases* (Peter Irons ed., 1989) (containing essays discussing Japanese internment).

<sup>99</sup> See 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, 1262-67 (1992) (articulating functional view of American racial imagery of African Americans).

<sup>100</sup> See *id.* at 1270-73 (describing American racial imagery of Asians).

<sup>101</sup> See *id.* at 1273-75 (describing American racial imagery of Mexicans).

<sup>102</sup> See, e.g., Perea et al., *supra* note 40, at 103-31 (addressing black slavery), 174-79 (addressing conquest of Indians and taking of their land), 317-25 (describing use of Mexican agricultural labor); Delgado, *supra* note 33, at 1576 (describing ways that Latinos and Asians are racialized).

<sup>103</sup> See Perea et al., *supra* note 40, at 246-48 (describing role of conquest in histories of Puerto Ricans, Indians, and Mexicans).

<sup>104</sup> See *id.* at 366, 587, 663-69 (describing forces pressing toward, or away from, assimilation); see also *Plessy v. Ferguson*, 163 U.S. 537 (1896) (evidencing forces against black assimilation).

<sup>105</sup> Even membership in the white race changes over time. Groups such as the Italians and Irish, which early in our history were considered nonwhite, were permitted to join the white race by reason of unionization, loyalty to the Democratic Party, and in some cases acquisition of wealth through organized crime. See *Critical White Studies: Looking Be-*

This differential racialization renders binary thinking deeply problematic. Consider the recent trial of Ronald Ebens for the murder of Vincent Chin, whom he beat to death for being a "Jap" supposedly responsible for the loss of jobs in the automobile industry.<sup>106</sup> After Ebens's first trial in Detroit, which resulted in a twenty-five year jail sentence, was overturned for technical reasons, his attorney moved for a change of venue on the ground that Ebens could not be tried fairly in that city.<sup>107</sup> The motion was successful, and the second trial was held in Cincinnati, where Ebens was acquitted.<sup>108</sup> A United States Commission on Civil Rights report speculated that the acquittal resulted from the limitations of the black/white paradigm of race, which may have misled the Cincinnati jury, sitting in a city where Asian Americans are few, into disbelieving that racism against Asians played a part in the crime:

The ultimate failure of the American justice system to convict Ebens of civil rights charges, perhaps partly because of the Cincinnati jury's difficulty in believing in the existence of anti-Asian hatred, also implies that many Americans view racial hatred purely as a black-white problem and are unaware that Asian Americans are also frequently targets of hate crimes.<sup>109</sup>

##### 5. *"You're Special"—When Minorities Succumb to the Siren Song of Uniqueness*

Black/white or any other kind of binary thinking can also warp minorities' views of themselves and their relation to whites. As social scientists know, Caucasians occasionally select a particular minority group as a favorite, usually a small, non-threatening one, and make that group overseers of the others or tokens to rebut any inference that the dominant group is racist.<sup>110</sup> Minorities may also identify with whites in hopes of gaining status or benefits under specific statutes, such as the naturalization statute, that limit benefits to whites.<sup>111</sup> The siren song of specialness may also predispose a minority group to be-

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hind the Mirror 339-421 (Richard Delgado & Jean Stefancic eds., 1997) (containing essays on how various near-white groups were permitted to join white race).

<sup>106</sup> See U.S. Comm'n on Civil Rights, *Civil Rights Issues Facing Asian Americans in the 1990s*, at 25 (1992).

<sup>107</sup> See *id.* at 25-26.

<sup>108</sup> See *id.* at 26.

<sup>109</sup> *Id.* at 28. Today, Japanese experience prejudicial treatment that other minorities do not because of their association with World War II and the auto industry; Koreans and Vietnamese experience such treatment because of their association with the more recent wars. See *id.* at 24 (describing sources of racist attitudes against Asian Americans).

<sup>110</sup> See *supra* note 75.

<sup>111</sup> See *supra* note 83 and accompanying text (describing statute that limited naturalization to whites).

lieve that it is uniquely victimized and entitled to special consideration from iniquitous whites. Latino exceptionalists, for example, sometimes point out (if only privately) that Latinos have the worst rates of poverty and school dropout;<sup>112</sup> are soon to be the largest group of color in the United States;<sup>113</sup> fought bravely in many foreign wars and earned numerous medals and commendations;<sup>114</sup> and are racialized in perhaps the greatest variety of ways of any group, including language, accent, immigration status, perceived foreignness, conquered status, and certain particularly virulent stereotypes.<sup>115</sup> Needless to say, specialness lies entirely in the eye of the beholder and can be maintained only by presenting a particular interpretation of history as the only true one.

#### 6. *Impairment of the Ability to Generalize and Learn from History: Reinventing the Wheel*

Binary thinking and exceptionalism also impair the ability to learn from history; they doom one to reinvent the wheel. For example, when recent scholars put forward the theory of interest convergence to account for the ebb and flow of black fortunes,<sup>116</sup> the theory came as a genuine breakthrough, enabling readers to understand a vital facet of blacks' experience. Yet, the long train of Indian treaty violations,<sup>117</sup> as well as Mexicans' treatment in the wake of the Treaty of Guadalupe Hidalgo,<sup>118</sup> might have led commentators to arrive at that insight earlier and to mold it into a broader, more powerful form. By the same token, the treatment of Asians, with one group first fa-

<sup>112</sup> See *The Latino/a Condition: A Critical Reader* xix (Richard Delgado & Jean Stefancic eds., 1998) (describing Latino poverty, school dropout, and other statistics).

<sup>113</sup> See *id.* at xvii (noting growth and relative size of American Latino population).

<sup>114</sup> See Richard Estrada, *Military Success for Hispanics Is Tied to Education*, *Chi. Trib.*, Feb. 25, 1997, § 1, at 19 (describing Latino experience in military).

<sup>115</sup> See Perea et al., *supra* note 40, at 246-366 (setting out history of Latinos' encounters with, and treatment by, whites).

<sup>116</sup> See *Interest-Convergence Dilemma*, *supra* note 1 (arguing that blacks' racial fortunes respond not so much to altruism or evolving notions of racial justice as to majority group's self-interest at given moment in history); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 *Stan. L. Rev.* 61 (1988) (same).

<sup>117</sup> See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (upholding congressional legislation that allotted Indian land as constitutional despite fact that allotment violated existing treaties and that tribes refused to consent); *Western Shoshone Nat'l Council v. Molini*, 951 F.2d 200 (9th Cir. 1991) (upholding Indian Claims Commission's finding that Shoshone tribe's treaty-reserved rights to hunt and fish were extinguished by acts of federal government); Perea et al., *supra* note 40, at 173-246 (summarizing treatment of Indians at hands of U.S. legal system).

<sup>118</sup> See generally Symposium, *Understanding the Treaty of Guadalupe Hidalgo on its 150th Anniversary*, 5 *Sw. J.L. & Trade Am.* 5 (1998) (including articles on legal interpretation of this landmark—and much violated—treaty); see also Perea et al., *supra* note 40, at 260-91 (detailing treaty's history and circumvention by land-hungry Anglo settlers).

vored, then disfavored when conditions change,<sup>119</sup> might have inspired a similar, more nuanced theory.<sup>120</sup> And in Mexican American jurisprudence, *Westminster School District v. Mendez*,<sup>121</sup> decided seven years before *Brown v. Board of Education*, marked the first time a major court expressly departed from the rule of *Plessy v. Ferguson* in a challenge to de jure segregation.<sup>122</sup> Had it not been for a single alert litigator on the staff of the NAACP Legal Defense Fund who recognized the case's importance and insisted that the organization participate in *Mendez* as amicus,<sup>123</sup> *Mendez* would have been lost to African Americans and the road to *Brown* would have been harder and longer.<sup>124</sup> Finally, when Mexican Americans were demanding their rights, George Sánchez, anticipating one of the arguments that the NAACP used to great effect in *Brown*—namely, that continued discrimination against blacks endangered the United States's moral leadership in the uncommitted world—argued that mistreatment of Latinos in the United States could end up injuring the country's relations with Latin America.<sup>125</sup> Earlier, the Japanese in California had effectively deployed a similar argument when San Francisco enacted a host of demeaning rules.<sup>126</sup>

Writings by Derrick Bell<sup>127</sup> and Gerald Rosenberg<sup>128</sup> pointing out the limitations of legal reform for minorities are foreshadowed in

<sup>119</sup> See Perea et al., *supra* note 40, at 367-428 (setting out history of Asian groups in United States, including ebbs and flows of favoritism and nativist treatment).

<sup>120</sup> Consider as well the fate of *Yick Wo v. Hopkins*, 118 U.S. 356, 356 (1886) (declaring unconstitutional facially race neutral city ordinance that was applied in discriminatory fashion), a great breakthrough in equality jurisprudence that was essentially ignored for one hundred years.

<sup>121</sup> 161 F.2d 774, 781 (9th Cir. 1947) (ordering end of school segregation of Mexican American children because California law did not explicitly provide for "separate but equal" treatment).

<sup>122</sup> See Christopher Arriola, *Knocking on the Schoolhouse Door: Mendez v. Westminster, Equal Protection, Public Education, and Mexican Americans in the 1940's*, 8 *La Raza* L.J. 166 (1995) (describing California's history of Mexican school segregation); Charles Wollenberg, *Mendez v. Westminster: Race, Nationality and Segregation in California Schools*, 53 *Cal. Hist. Q.* 317 (1974) (describing California's history of school segregation).

<sup>123</sup> See *infra* notes 159-60 and accompanying text (describing role of NAACP attorney William Hastie).

<sup>124</sup> See *infra* notes 141-64 and accompanying text (describing progression from *Mendez* to *Brown*).

<sup>125</sup> See Gutiérrez, *supra* note 78, at 132 (quoting Sánchez as saying that "the biggest single drawback to good relations with Latin America, particularly Mexico, is to be found in the mistreatment of our Spanish-speaking citizens and of the nationals of those countries"); Arriola, *supra* note 121 (describing history and dynamics leading up to *Mendez*).

<sup>126</sup> See Wollenberg, *supra* note 57, at 55-72 (describing complaints by Japanese in San Francisco, through diplomatic channels, of mistreatment by United States).

<sup>127</sup> See *Interest-Convergence Dilemma*, *supra* note 1; *Racial Realism*, *supra* note 5.

<sup>128</sup> See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991).

the experience of American Indians when the state of Georgia refused to abide by the Supreme Court's ruling in *Worcester v. Georgia*<sup>129</sup> and President Andrew Jackson did nothing to enforce it.<sup>130</sup> After Bell wrote his signature Chronicle of the Space Traders,<sup>131</sup> Michael Olivas observed that Latino and Cherokee populations had experienced literal removal several times in history.<sup>132</sup>

### 7. *Impairment of Coalitions*

Finally, dichotomous thought impairs groups' ability to forge useful coalitions. For example, neither the NAACP nor any other predominantly African American organization filed an amicus brief challenging Japanese internment in *Korematsu v. United States*,<sup>133</sup> or in any of the other cases contesting that practice.<sup>134</sup> Earlier, the League of United Latin American Citizens (LULAC), a politically moderate litigation organization for Latinos, distanced itself from

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<sup>129</sup> 31 U.S. (6 Pet.) 515, 561 (1832) (holding that "[t]he Cherokee nation . . . is a distinct community . . . in which the laws of Georgia can have no force," and that Georgia was not free to criminalize residence by white persons on Indian land without license).

<sup>130</sup> See Perea et al., *supra* note 40, at 207-08 (describing constitutional crisis this episode precipitated).

<sup>131</sup> See *After We're Gone*, *supra* note 4, at 397-400.

<sup>132</sup> See Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 St. Louis U. L.J. 425, 428-29 (1990). A final aspect of impairment of the ability to generalize and learn from experience is the way binary thinking can lead whites to see minorities as essentially the same—templates for mistreatment of a later group. See *supra* notes 73-74 and accompanying text (describing California Supreme Court's use of legal restrictions on blacks and Native Americans to justify banning Chinese from testifying against whites in criminal trials). For example, when the United States took over Northern Mexico, issues arose under the Treaty of Guadalupe Hidalgo over how to treat Mexican mestizos living in the conquered region. True to form, Anglo leaders decided to grant lighter-skinned Mexicans a relatively full panoply of protections, while analogizing darker-skinned ones to American Indians and treating them accordingly. See Perea et al., *supra* note 40, at 266 (discussing California's early contortions over whether Mexicans could be white, and if so, which ones). Indeed, the California State Constitution of 1849 granted the right to vote only to whites, thus disenfranchising the majority of Mexican mestizos who looked dark. See *id.* at 266-67. And when the United States Congress, in the wake of the war with Spain in which this country seized the island of Puerto Rico, debated the extent of citizenship rights to confer upon the conquered islanders, "Representative James L. Slayden of Texas . . . took exception to the view that the hybrid, a cross between the blacks and whites or between the brown and whites, was 'less well fitted for self-government than the full-blooded African Negro.'" *Id.* at 342. According to the Congressman, the Negro had shown little success in government—surely the Puerto Ricans would prove no more able. See *id.* This unnecessary template strategy, then, causes dominant groups to repeat the same mistakes they made before.

<sup>133</sup> 323 U.S. 214, 215 (1944).

<sup>134</sup> See Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 Harv. L. Rev. 1745, 1780 (1989) (pointing out African American legal community's failure to rally to this cause).

other minority groups and even from darker-skinned Latinos by pursuing the "other white" strategy.<sup>135</sup> And in Northern California, Asians, Mexican Americans, and blacks recently have been at loggerheads over admission to Lowell High School and UC-Berkeley.<sup>136</sup>

Sometimes, minority groups do put aside differences and work together successfully. For example, Chinese- and Spanish-speaking parents successfully challenged monolingual instruction in San Francisco in *Lau v. Nichols*.<sup>137</sup> Jews and blacks marched hand in hand in the sixties.<sup>138</sup> A coalition of California Latinos and Asians collaborated in litigation striking down Proposition 187, which denied social services and public education to undocumented immigrants.<sup>139</sup> And another coalition of minority groups has been working to change the nearly all-white lineup on current television programs.<sup>140</sup>

The school desegregation case *Mendez v. Westminster School District*,<sup>141</sup> which (as I described earlier<sup>142</sup>) was a rare exception to the inability of minority groups to generalize from other groups' experiences, is worth recounting in some detail as an example of minority groups working together successfully. By the 1920s, Mexican immigration had made Mexican Americans the largest minority group in California.<sup>143</sup> Although state law did not require school districts to segregate Mexican American schoolchildren, pressure from parents led most school boards to do so on the pretext that the Mexican children's language difficulties made this in their best educational interest.<sup>144</sup> On March 2, 1945, a small group of Mexican American parents filed suit in federal district court to enjoin that practice.<sup>145</sup> The court

<sup>135</sup> See supra note 80 and accompanying text.

<sup>136</sup> See Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 Mich. L. Rev. 821, 826-30 (1997) (describing recent litigation in which Asian American students sought to be allowed to exceed 40% cap on students of any ethnic group at magnet state high schools like Lowell High).

<sup>137</sup> 414 U.S. 563 (1974); see also *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973) (deciding in favor of coalition of Mexican American and black parents that Denver schools must desegregate if school district fails to rebut prima facie case on remand).

<sup>138</sup> See, e.g., Taylor Branch, *Parting the Waters: America in the King Years, 1954-63*, at 881 (1988) (noting participation of Rabbi Joachim Prinz of American Jewish Congress in March on Washington).

<sup>139</sup> On the demise of Proposition 187, see supra note 65 and accompanying text.

<sup>140</sup> See, e.g., Gail Pennington, *Predominant Color in the Fall Television Lineup is White*, St. Louis Post-Dispatch, Aug. 29, 1999, at F9 (reporting efforts by NAACP and national coalition of Latino groups to increase minority representation in television programs).

<sup>141</sup> 64 F. Supp. 544 (S.D. Cal. 1946).

<sup>142</sup> See supra notes 121-24 and accompanying text.

<sup>143</sup> See John P. Jackson, *Transforming Social Science into Modern Authority in Brown*, 1945-55 (forthcoming 2000) (manuscript at 129-30, on file with author).

<sup>144</sup> See id. at 130.

<sup>145</sup> See id.

ruled, nearly a year later, that because California lacked a segregation statute, the doctrine of "separate but equal" did not apply.<sup>146</sup> Moreover, it found that sound educational reasons did not support separation of the Mexican children, that separation stigmatized them, and ruled the practice unconstitutional.<sup>147</sup>

The school districts appealed to the Ninth Circuit Court of Appeals, at which point the case came to the attention of the American Jewish Congress and the NAACP Legal Defense Fund.<sup>148</sup> The NAACP's amicus brief, prepared by Robert Carter, advanced many of the same arguments the attorneys for the Mexican plaintiffs had put forward in the trial court, but added a new one based not on legal doctrine or precedent, but on social science.<sup>149</sup> Relying heavily on data collected by Ambrose Caliver, an African American researcher employed by the U.S. Department of Education, Carter argued that racial segregation would inevitably lead to inferior schools for minorities because few school districts could afford the cost of a dual system and would inevitably cut corners with the schools for Mexicans and blacks.<sup>150</sup> Citing the work of Gunnar Myrdal and others, Carter also argued that racial segregation demoralized and produced poor citizenship among minority individuals and thus contravened public policy.<sup>151</sup>

The NAACP's brief was cautious and incremental in arguing that segregation invariably led to spending differentials. At the same time, its social science was rudimentary, relying as it did on studies of the adverse effects of segregation in general, rather than on studies showing that segregated education harmed minority schoolchildren.<sup>152</sup> A second brief authored by a group of social scientists and submitted by lawyer and historian Carey McWilliams supplied many of the links missing from the NAACP's brief.<sup>153</sup> The social scientists marshalled studies showing that young children were especially vulnerable to the crippling effects of forced racial separation and were quick to absorb the lesson of their own inferiority.<sup>154</sup> Segregation became a psychologically damaging "badge of inferiority" that could not be squared

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<sup>146</sup> See *id.* (discussing holding in *Mendez*).

<sup>147</sup> See *id.* at 130-31.

<sup>148</sup> See *id.* at 131.

<sup>149</sup> See *id.* at 131-34.

<sup>150</sup> See *id.* at 133-34 (reporting that Caliver's data from seventeen segregated states and District of Columbia showed that this, in fact, had happened).

<sup>151</sup> See *id.* at 135-36.

<sup>152</sup> See *id.* at 133-34.

<sup>153</sup> See *id.* at 138.

<sup>154</sup> See *id.* at 140-44.

with the Fourteenth Amendment.<sup>155</sup> This more narrowly targeted argument was the very one the NAACP would adopt, years later, in *Brown v. Board of Education*.<sup>156</sup>

Although the Ninth Circuit affirmed the trial court opinion, it did so on the narrow ground that California law lacked any provision for the segregation of the Mexican schoolchildren.<sup>157</sup> Two months later, Governor Earl Warren eliminated that loophole by signing a bill repealing all of California's statutes requiring racial segregation.<sup>158</sup> Thus, official segregation in California came to an end.

While the appeal was pending, the NAACP sent their brief to William Hastie, one of the principal figures in the campaign against segregated schooling.<sup>159</sup> Appreciating its significance, Hastie wrote to Thurgood Marshall, encouraging him to develop the argument contained in the social scientists' brief, "with as little delay as possible."<sup>160</sup> Marshall agreed, and assigned Annette H. Peyser, a young staff member with a background in social science, to do so.<sup>161</sup> She did, and other social scientists, learning of the NAACP's interest, pursued their own studies of the intrinsic harm of forced racial separation,<sup>162</sup> many of which found their way into the graduate school litigation cases,<sup>163</sup> and ultimately into *Brown* itself.<sup>164</sup>

The *Mendez* case demonstrates that narrow nationalism not only deprives one of the opportunity to join with other groups,<sup>165</sup> it also closes one off from the experiences and lessons of others. It can conceal how the American caste system, in a complex dance, disadvantages one group at one time and advantages it at another.<sup>166</sup> It can

<sup>155</sup> See *id.*

<sup>156</sup> See *id.* at 151-52.

<sup>157</sup> See *id.* at 145 (discussing Ninth Circuit's affirmance, *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947)).

<sup>158</sup> See *id.*

<sup>159</sup> See *id.* at 146.

<sup>160</sup> *Id.*

<sup>161</sup> See *id.* at 146-47.

<sup>162</sup> See *id.* at 148-52.

<sup>163</sup> See, e.g., *Sweatt v. Painter*, 339 U.S. 629, 633-34 (1950).

<sup>164</sup> See *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 & n.11 (1954) (citing sociological studies as supporting claim that segregation has detrimental effect on African American children).

<sup>165</sup> See George A. Martínez, *African-Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition*, 19 *Chicano-Latino L. Rev.* 213, 215-20 (1998) (criticizing binary thinking as likely to lead to nonrecognition, or shallow recognition, of different status of other groups, which in turn implies disrespect); Charles Taylor, *The Politics of Recognition*, in *Multiculturalism: Examining the Politics of Recognition* (Amy Gutmann ed., 1994) (discussing view that equal treatment of others will promote unity of purpose and reciprocal recognition).

<sup>166</sup> See *supra* Part III.A.1-2.



disguise the way American society often affirmatively pits groups against one another, using them as agents of each other's subordination,<sup>167</sup> or uses mistreatment of one group as a template for discrimination against another.<sup>168</sup> Because almost all racial binaries consist of a nonwhite group paired with whites, they predispose outgroups to focus excessively on whites, patterning themselves after and trying to gain concessions from them, or aiming to assimilate into white society.<sup>169</sup>

#### CONCLUSION: WHAT CAN WE DO?

Minority groups in the United States should consider abandoning all binaries, narrow nationalisms, and strategies that focus on cutting the most favorable possible deal with whites, and instead set up a secondary market in which they negotiate selectively with each other. For example, instead of approaching the establishment supplicatingly, in hopes of a more favorable admission formula at an elite school or university system, Asians might approach African Americans with the offer of a bargain. That bargain might be an agreement on the part of the latter group to support Asians with respect to an issue important to them—for example, easing immigration restrictions or supporting bilingual education in public schools—in return for their own promise not to pursue quite so intently rollbacks in affirmative action or set-asides for black contractors. The idea would be for minority groups to assess their own preferences and make tradeoffs that will, optimistically, bring gains for all concerned. Some controversies may turn out to be polycentric, presenting win-win possibilities so that negotiation can advance goals important to both sides without compromising anything either group deems vital. Like a small community that sets up an informal system of barter, exchanging jobs and services moneylessly, thus reducing sales and income taxes, this approach would reduce the number of times minorities approach whites hat in hand. Some gains may be achievable by means of collective action alone. When it is necessary to approach whites for something, a nonbinary framework allows that approach to be made in full force. It also deprives vested interests of the opportunity to profit from flattery, false compliments, and mock sympathy (“Oh, your terrible history. Your group is so special. Why don’t we . . .”).

Ignoring the siren song of binaries opens up new possibilities for coalitions based on level-headed assessment of the chances for mutual

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<sup>167</sup> See *supra* Part III.A.3.

<sup>168</sup> See *supra* note 132 and accompanying text.

<sup>169</sup> See *supra* Part III.A.3.

gain. It liberates one from dependence on a system that has advanced minority interests at best sporadically and unpredictably. It takes interest convergence to a new dimension.

*Bluebeard's Castle* could just as easily have served as an allegory about gender imbalance and the social construction of marriage between unequals. Although Bell does not draw this lesson from it, it is certainly as implicit in the French fairy tale as the lesson Bell extracts about black progress. Seen through this other lens, a straightforward solution, one that Judith apparently never contemplated, would have been to engage in collaborative action with Bluebeard's three previous wives against their common oppressor, the gloomy noble bent on subjugating them all—in short, an injection of feminist solidarity. Persisting in an unsuccessful strategy, waging it with more and more energy, can prove a counsel of despair. Sometimes, as with the black/white binary, one needs to turn a thought structure on its side, look at it from a different angle, and gain some needed distance from it, before the path to liberation becomes clear.