



## Alabama Law Scholarly Commons

---

Articles

Faculty Scholarship

---

2005

### The Current Landscape of Race: Old Targets, New Opportunities 2006 Survey of Books Relating to the Law - Part II: Critical Race Theory & Constitutional Law

Richard Delgado

*University of Alabama - School of Law*, rdelgado@law.ua.edu

Follow this and additional works at: [https://scholarship.law.ua.edu/fac\\_articles](https://scholarship.law.ua.edu/fac_articles)

---

#### Recommended Citation

Richard Delgado, *The Current Landscape of Race: Old Targets, New Opportunities 2006 Survey of Books Relating to the Law - Part II: Critical Race Theory & Constitutional Law*, 104 Mich. L. Rev. 1269 (2005).  
Available at: [https://scholarship.law.ua.edu/fac\\_articles/443](https://scholarship.law.ua.edu/fac_articles/443)

This Article is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Alabama Law Scholarly Commons.

# THE CURRENT LANDSCAPE OF RACE: OLD TARGETS, NEW OPPORTUNITIES

Richard Delgado\*

WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY. By *Michael K. Brown, Martin Carnoy, Elliott Currie, Troy Duster, David B. Oppenheimer, Marjorie M. Shultz, and David Wellman*. Berkeley, Los Angeles, and London: University of California Press. 2003. Pp. vii, 338. Cloth, \$40; paper, \$17.95.

ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF *BROWN v. BOARD OF EDUCATION*. By *Charles J. Ogletree, Jr.* New York and London: W.W. Norton & Company. 2004. Pp. xi, 365. Cloth, \$25.95; paper, \$15.95.

THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY. By *Alexander Tsesis*. New York and London: New York University Press. 2004. Pp. ix, 228. \$45.

## TABLE OF CONTENTS

INTRODUCTION: THE DOG THAT DIDN'T BARK.....	1270
I. THREE RECENT BOOKS ON RACE .....	1273
A. <i>Charles J. Ogletree, Jr., All Deliberate Speed: Reflections on the First Half Century of <i>Brown v. Board of Education</i></i> .....	1273
B. <i>Michael K. Brown, Martin Carnoy, Elliott Currie, Troy Duster, David B. Oppenheimer, Marjorie M. Shultz and David Wellman, Whitewashing Race: The Myth of a Color-Blind Society</i> .....	1274
C. <i>Alexander Tsesis, The Thirteenth Amendment and American Freedom</i> .....	1276
II. ANALYSIS AND COMPARISON .....	1277
III. THE DOG THAT DIDN'T BARK .....	1279
A. <i>Incorporating White Privilege into Racial Analysis</i> .....	1279
B. <i>Beyond the Black-White Paradigm of Race</i> .....	1281
IV. LOOKING FOR SIGNS OF THE NEW PARADIGM IN BROWN, OGLETREE, AND TESIS .....	1283
CONCLUSION: ONCE THE DOG BARKS, THEN WHAT? .....	1286

---

\* University Distinguished Professor of Law & Derrick Bell Fellow, University of Pittsburgh School of Law. A.B., University of Washington; J.D., University of California at Berkeley (Boalt Hall). —Ed.

## INTRODUCTION: THE DOG THAT DIDN'T BARK

It is difficult enough identifying areas within a current field of scholarship that are underdeveloped and in need of further attention. In science, one thinks of missing elements in the periodic table or planets in a solar system that our calculations tell us must be there but that our telescopes have not yet spotted.<sup>1</sup> In civil-rights law, one thinks of such areas as women's sports<sup>2</sup> or the problems of intersectional groups, such as women of color or gay black men.<sup>3</sup> One also thinks of issues that current events are constantly thrusting forward, such as discrimination against Arabs<sup>4</sup> or execution of children<sup>5</sup> or the mentally retarded.<sup>6</sup>

What of challenges that do not come readily to mind because they lie outside the current paradigm—problems that we do not readily think of as civil-rights issues at all, or that are so radically unlike those we do recognize that they require a leap of the imagination to see them as such?<sup>7</sup> Here, we lack a template—a periodic table. We cannot easily make the link between the familiar and the unknown. The new issue does not lie on the same plane as those we know, so that mental extrapolation and interpolation do not readily lead us to it.

Issues of this kind require us to expand our conceptual repertory and learn to think in different ways. They require us to listen for “the dog that doesn't bark”<sup>8</sup>—to flip a structure such as conventional civil-rights law and look at it sideways. They require us to look at that structure as a whole and consider what might be missing.

This is a good time to step back and survey recent writings about race. The fiftieth anniversary of *Brown v. Board of Education*<sup>9</sup> has brought forth a

1. See, e.g., Mary Carmichael, *Astronomy: Third From Gliese*, NEWSWEEK, June 27, 2005, at 12.

2. E.g., Deborah Brake, *Revisiting Title IX's Feminist Legacy: Moving Beyond the Three-Part Test*, 12 AM. U. J. GENDER SOC. POL'Y & L. 453 (2004).

3. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (discussing problems of intersectional groups, such as black women).

4. See, e.g., Charles Pope, *Fear Grows that War on Terror is Trampling Rights*, SEATTLE POST-INTELLIGENCER, Sept. 10, 2002, at A1 (discussing concern that antiterror measures might endanger privacy and civil liberties).

5. See *Roper v. Simmons*, 543 U.S. 551 (2005).

6. See *Atkins v. Virginia*, 536 U.S. 304 (2002).

7. See, e.g., THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS*, 2 INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE (2d ed. 1970) (discussing process by which scientific paradigms succeed and replace each other).

8. See the Sherlock Holmes detective story, ARTHUR CONAN DOYLE, *THE HOUND OF THE BASKERVILLES* (John Murray, 26th impression 1965) (1902), in which the fictional detective solves a mystery by noticing that neighborhood dogs did not bark at a time when everyone had thought the crime took place.

9. 347 U.S. 483 (1954).

wealth of scholarship—retrospective, critical, and celebratory.<sup>10</sup> The three books that I take as illustrative are each, in their way, excellent. Reflective, even ruminative, *All Deliberate Speed* interweaves the story of author Charles Ogletree's<sup>11</sup> life with national events that took place during the same period, such as the *Brown* decision, the Anita Hill–Clarence Thomas hearings, and the lawsuit for black reparations growing out of the 1921 Tulsa riots. Ogletree's book brings these events to life, while reinforcing how much remains to be done to effectuate *Brown*'s mandate. In *Whitewashing Race*, Michael K. Brown<sup>12</sup> and his coauthors<sup>13</sup> put forward a scorching critique of an emerging neoconservative approach to race and show how it has produced a new type of tough-minded, "realist" racism exemplified by Stephen and Abigail Thernstrom's *America in Black and White: One Nation, Indivisible*.<sup>14</sup> Alexander Tsesis's<sup>15</sup> book audaciously seeks to reorient racial jurisprudence so that it avoids the cultural inertia and doctrinal baggage that recent books—including the other two reviewed here—document. He seeks to place such jurisprudence on sounder footing.

Although these otherwise strong books contribute greatly to current knowledge, they—like much recent writing about race—nevertheless devote scant attention to two issues that ought to be on the agenda of every serious treatment of race: white privilege and the place of nonblack groups such as Latinos and Asian Americans in the civil-rights equation. Not only for African Americans, but also for other groups, two forces—oppression and favoritism—maintain white supremacy, so that ending one without attention to the other would do little to improve matters.<sup>16</sup> If the demise of formal, state-sponsored racism has left in place a system of informal favors, exchanges, informational networks, old-boy references, and college-entrance criteria by which whites see to their own, the system of white-over-black power relations will hardly budge.<sup>17</sup> White privilege thus demands the serious attention of every race scholar.

10. See, e.g., DERRICK BELL, *SILENT COVENANTS* (2004) (questioning whether *Brown*'s contribution to blacks' advancement was as great as its supporters say and positing that equal school funding might have been a worthier goal).

11. Jesse Climenko Professor and Vice Dean of Clinical Programs, Harvard Law School.

12. Professor and Chair of the Department of Politics, University of California at Santa Cruz.

13. Martin Carnoy, Professor of Education and Economics, Stanford University; Elliott Currie, Lecturer in Legal Studies, University of California at Berkeley; Troy Duster, Professor of Sociology, New York University, and Chancellor's Professor, University of California at Berkeley; David B. Oppenheimer, Professor of Law and Associate Dean for Faculty Development, Golden Gate University School of Law; Marjorie M. Shultz, Professor of Law, University of California at Berkeley (Boalt Hall); David Wellman, Professor of Community Studies, University of California at Santa Cruz.

14. STEPHEN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* (1997) [hereinafter THERNSTROM & THERNSTROM, *AMERICA IN BLACK AND WHITE*] (providing a stinging critique of race-conscious remedies).

15. Visiting Assistant Professor of Law, Chicago-Kent College of Law.

16. See *infra* Section III.B.

17. See *infra* Section III.B.

By the same token, a simplistic approach that takes two groups, the white and the black, as constitutive can do little to counter the types of discrimination that nonblack groups, such as Latinos, Asians, and Native Americans, suffer.<sup>18</sup> Such a treatment will only be able to redress discrimination targeting these other groups to the extent that they succeed in analogizing their discrimination to a type that blacks encounter. A Filipino, for example, who suffers accent discrimination on the job,<sup>19</sup> or a Latina unable to perform jury duty because she understands Spanish and cannot be counted on to pay attention to the fumbling court interpreter,<sup>20</sup> may easily find herself without a remedy. Blacks do not suffer discrimination based on a foreign-sounding accent, national origin, immigration status, or inability to speak English proficiently.<sup>21</sup> Hence a Filipino, Asian, or Latino complaining of one of these forms of treatment is apt to find little case or statutory law in his or her favor. The black–white binary paradigm of race thus requires expansion to deal with our increasingly multicultural, multiracial society—and even, sometimes, to do justice to the black cause.<sup>22</sup>

These two issues—white privilege and the black–white binary of race—are the dogs that don't bark. Strikingly absent from much recent writing about race, they tell us a great deal about mindset,<sup>23</sup> presupposition, and, in some cases, intellectual laziness,<sup>24</sup> racial favoritism,<sup>25</sup> and denial. Their absence mars the imagination, reach, and analytical power of many otherwise very good books.

This Review proceeds in four parts. Part I describes the three books. Part II highlights what is valuable in each and points out a few minor respects in which they fall short. Parts III and IV identify a deeper shortcoming: the failure to come to terms with white privilege and the black–white binary paradigm of race, issues that lie outside the conventional paradigm of race scholarship but that are becoming more salient with each passing day.

18. See *infra* Section III.A.

19. See, e.g., Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1333–40 (1991) (discussing the case of a Filipino job applicant with a heavy accent who was denied a job as a Department of Motor Vehicles clerk).

20. *Hernandez v. New York*, 500 U.S. 352 (1991).

21. See, e.g., Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997) (book review); Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 (1997).

22. See *infra* notes 50–63 and accompanying text (explaining how single-focus treatment denies one group of allies as well as a broader perspective on how the checkerboard of racial progress operates, with groups periodically advancing while others regress and with all of them sometimes pitted against each other for crumbs).

23. For example, "To me, civil rights means (a) rights of all minorities, (b) rights of African Americans, or (c) rights of minorities, but not the privileges of whiteness."

24. For example, "I've been studying and writing about (a), (b), or (c) above for all these years; why do I have to change now?"

25. For example, "All my friends are (a), (b), or (c); their experience is really central to racial discourse, so I'll forget all those other issues, for now."

## I. THREE RECENT BOOKS ON RACE

A. *Charles J. Ogletree, Jr., All Deliberate Speed: Reflections on the First Half Century of Brown v. Board of Education*

Part memoir, part legal history, and part legal critique, *All Deliberate Speed* is well-paced and a very good read. Beginning with the author's early school years as a "*Brown* baby" (Ogletree, pp. 15–42), the book takes the reader through the legal strategy that led up to *Brown v. Board of Education* (Ogletree, pp. 3–13, 111–27), juxtaposes the late Supreme Court Justice Thurgood Marshall with current Supreme Court Justice Clarence Thomas (Ogletree, pp. 135–37, 170–79, 183–236), and gives a behind-the-scenes look at the author's representation of Anita Hill during the Clarence Thomas confirmation hearings (Ogletree, pp. 181, 202–17). It discusses the campaigns for affirmative action (Ogletree, pp. 81–82, 147–66, 242–56) and black reparations (Ogletree, pp. 274–93), the defense of Angela Davis (Ogletree, p. 45), and many other national events in which the author played a leading part. The reader learns of Ogletree's early years living with struggling black parents on the wrong side of the tracks in Merced, California (Ogletree, pp. 15–40), his undergraduate years at Stanford University (Ogletree, pp. 41–56), and his life-changing three years at Harvard Law School (Ogletree, pp. 57–78). It follows him through his term with the nationally prominent District of Columbia Public Defender Service (Ogletree, pp. 82–88) and his entry into teaching law. Photographs of Ogletree in his third-grade class, as his high school's student body president, as an undergraduate activist at Stanford, and as a young lawyer arguing key cases enliven an already engaging book.

The book's principal leitmotif is integration—the *Brown* ideal—and the author's ambivalence about whether the ideal is still worth striving for in the face of society's increasing indifference (Ogletree, pp. xiv–xvii, 259–73). Integration provided Ogletree with a first-rate education, yet it failed many other black students of his generation. In his graduating class of several hundred, only a handful of the dozens of black students wanted to attend a four-year college (Ogletree, p. 40). Some cities, such as Boston, resisted integration bitterly, casting abuse on defenseless black schoolchildren bused in from the other side of town (Ogletree, pp. 57–71). Others placed black and brown children in lower academic tracks or in classrooms led by teachers who believed them incapable of higher intellectual achievement (Ogletree, pp. 33, 40). Because society seems content to pursue integration at "all deliberate speed," Ogletree wonders whether the black community would not be better off pursuing equal funding (Ogletree, pp. 234–35, 309–10), neighborhood schools, or one of the newer alternatives such as charter schools (Ogletree, pp. 261, 267–70) or voucher programs that enable parents to send their children to any school they believe better than their current one (Ogletree, pp. 235–36, 261).

Ogletree ends on a somber note, uncertain how far U.S. society has come in the fifty years since the Supreme Court decided *Brown* (Ogletree, pp. 295–311). He laments the loss of great voices, such as Justice Marshall's and Martin Luther King, Jr.'s, and the way segregation has begun to creep back into most of our big cities (Ogletree, p. 297). He concludes by noting that we stand today on the edge of a precipice and must remain vigilant to prevent further decline in the realization of the great principles embodied in this landmark case (Ogletree, pp. 298–303).

B. *Michael K. Brown, Martin Carnoy, Elliott Currie,  
Troy Duster, David B. Oppenheimer,  
Marjorie M. Shultz, and David Wellman, Whitewashing  
Race: The Myth of a Color-Blind Society*

Since the heyday of the civil-rights movement of the 1960s—the heady times that Charles Ogletree writes about—the United States has entered a new phase of race relations, one that emphasizes a color-blind society (Brown et al., pp. vii–viii, 2–5). This movement has found particular favor with a series of conservative and neoconservative commentators and writers including Dinesh D'Souza,<sup>26</sup> Jim Sleeper,<sup>27</sup> and especially Abigail and Stephen Thernstrom,<sup>28</sup> who argue that the civil-rights movement has succeeded and that any lingering distress in the black community must be due to cultural factors inherent in that community.<sup>29</sup>

These “racial realists,”<sup>30</sup> according to Brown et al., subscribe to three tenets (Brown et al., pp. 1–2). First, the civil-rights revolution succeeded when new laws banished legal segregation and outlawed discrimination in housing, employment, voting, and most other spheres. Second, if racial inequality persists, it is due to black failure, behavioral and cultural. Third, because the United States has become a color-blind society with only rare, isolated cases of outright discrimination, race-conscious policies such as affirmative action are unjustified.

*Whitewashing Race* confronts these contentions with a scathing refutation, composed of equal parts of terse argument crackling with indignation and page after page of social-science evidence. If racism lodges within the

26. E.g., *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* (1995); *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991).

27. E.g., *LIBERAL RACISM: HOW FIXATING ON RACE SUBVERTS THE AMERICAN DREAM* (1997).

28. E.g., *AMERICA IN BLACK AND WHITE*, *supra* note 14; *The Real Story of Black Progress*, WALL ST. J., Sept. 3, 1997, at A20 [hereinafter Thernstrom & Thernstrom, *Real Story*].

29. See, e.g., Brown, et al., pp. 2–17 (describing this neo-conservative view); Thernstrom & Thernstrom, *Real Story*, *supra* note 28; see also THERNSTROM & THERNSTROM, *AMERICA IN BLACK AND WHITE*, *supra* note 14 (book-length treatment of black deficits and white innocence).

30. The term is Brown's. It introduces an unfortunate confusion; Derrick Bell used the term much earlier in a quite different sense. See Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 364 (1992) (urging a “racial realist” approach to African American civil rights that recognizes inherent limitations of civil rights remedies).

very structures of society, permeates every significant encounter, and pervades every period in our history, pretending to be color-blind will merely make matters worse (Brown et al., pp. 35–36). Racial realists deny the existence of structural racism by filtering their evidence and basing their data on a narrow and outmoded understanding of racism as obvious, intentional, evil-willed, and individual (Brown et al., p. 35).

Public opinion polls show that smaller and smaller numbers of white people hate blacks, believe them stupid and inferior, and wish not to associate with them (Brown et al., p. 36). From this, racial realists conclude that racism is dead. Brown et al. critique these polls and present studies that show that American attitudes are not nearly as benevolent as the realists like to imagine (Brown et al., pp. 40–43). Furthermore, much racism today is unintentional, unstated, quite polite, and even normal (Brown et al., p. 43). Embedded in a host of behaviors, attitudes, expectations, rules of the game, and norms is a system of advantage and exclusion that constantly places whites on top at the expense of others—all without anyone grinding anyone else under his or her heel (Brown et al., p. 43).

Making use of the concepts of accumulation and disaccumulation (Brown et al., pp. 22–25, 231–32), Brown and his coauthors show, in separate chapters about markets (Brown et al., Chapter Two), education (Brown et al., Chapter Three), crime (Brown et al., Chapter Four), employment and affirmative action (Brown et al., Chapter Five), and voting (Brown et al., pp. Chapter Six), how whites have gained opportunities while minorities have lost them. Needless to say, the studies these authors highlight and the key moments in history—such as the G.I. Bill and the Federal Housing Act (Brown et al., pp. 27, 75)—they cite to show how the haves arranged to come out ahead differ radically from those the conservatives choose to trumpet.

For example, racial realists argue that since blacks have lower graduation rates at elite colleges than whites, they would be better off attending less selective schools where the competition is less keen (Brown et al., p. 115). Brown et al. show that minority students are more likely to graduate from elite schools than their counterparts with similar test scores who attend less selective schools (Brown et al., p. 116). Brown et al. posit that this is so because elite colleges tend to have more financial and social resources and make a point of nurturing and supporting all students (Brown et al., p. 116). They also point out that the University of Mississippi, a school the realists tout as a model of equal opportunity because it has a color-blind admissions policy, graduated only forty-eight percent of its black students, while the University of Virginia, an elite school that practices affirmative action, graduated over eighty percent (Brown et al., pp. 124–26). By subjecting common conservative arguments and assumptions to withering scrutiny, introducing new social-science evidence, and reanalyzing old data, Brown et al. forcefully challenge the central tenets of the new conservative racial realism. Racism, although subtle, still pervades our institutions and our very thoughts and will not yield unless we move beyond reassuring bromides about color-blindness and equal opportunity.



C. *Alexander Tsesis, The Thirteenth Amendment  
and American Freedom*

Most readers think of the Fourteenth Amendment<sup>31</sup> when they think of civil rights and antidiscrimination remedies. Alexander Tsesis believes that the Thirteenth Amendment,<sup>32</sup> which prohibited slavery and provided that Congress may effectuate that prohibition through appropriate legislation, is an underused avenue of civil-rights protection (Tsesis, pp. 6–7). He documents his argument by examining not only the legislative intent behind the amendment, but also the historical, political, and legal events that were taking place before, during, and after it came into being (Tsesis, pp. 6–7, 34–43). His overall thesis is that the Thirteenth Amendment, with its abolitionist association, can provide civil-rights protections from current practices that subordinate minorities in a fashion similar to that of slavery without the doctrinal limitations—such as state action, intent, and an interstate economic impact—that courts have imposed on Fourteenth Amendment and Commerce Clause jurisprudence (Tsesis, pp. 3–4, 6–7, 44–46, 112–17, 130–36).

Drawing from Justice Harlan's dissent in *Hodges v. United States*,<sup>33</sup> Tsesis argues that the Thirteenth Amendment not only abolishes slavery but aims to protect fundamental liberties. The amendment recognizes that slavery was not an innate condition, but one that society and the law imposed. Therefore, the "eradication of slavery . . . should have a social and legal component for achieving equal liberty" (Tsesis, p. 96). The amendment authorizes judges to decide whether laws or actions resemble incidents or badges of slavery that impede every person's right to lead a fulfilling life free from indiscriminate uses of official or private power.

For Tsesis, the Thirteenth Amendment allows Congress to advance the ideals of the Declaration of Independence and Preamble to the Constitution—a free and equal citizenry. Furthermore, it is expansive enough to counter new and coercive practices in each generation. All repressive conduct rationally related to impediments of freedom comparable to those that characterized slavery could be forbidden. If Congress employs Section 2 of the Amendment in abusive ways that stray from its intended purpose, judicial review will check that grant of power (Tsesis, pp. 22–23).

Under current case law, rooted in the Fourteenth Amendment, Congress can only enact remedial measures, not preemptive, substantive laws aimed at advancing national policies and human flourishing (Tsesis, pp. 46–47). The Thirteenth Amendment, by contrast, grants Congress the power to pass substantive guarantees. The case that signified this expansive reading is *Jones v. Alfred H. Mayer Co.*,<sup>34</sup> in which Justice Stewart explicitly relied on the legislative intent, plain meaning, and judicial history of both the Thir-

---

31. U.S. CONST. amend XIV.

32. U.S. CONST. amend. XIII.

33. 203 U.S. 1, 20 (1906) (Harlan, J., dissenting), *overruled by* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

34. 392 U.S. 409 (1968).

teenth Amendment and various civil-rights statutes to reach the type of discriminatory practices that a builder had employed. From this opinion, Tsesis infers that "Congress has the power . . . rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation" (Tsesis, p. 86).

The amendment can only reach infringements that are analogous to involuntary servitude (Tsesis, pp. 97, 117), but Tsesis uses landmark decisions such as *Roe v. Wade*,<sup>35</sup> *Griswold v. Connecticut*,<sup>36</sup> and *Loving v. Virginia*<sup>37</sup> to show how courts could combat latter-day infringements more directly and effectively under this landmark piece of legislation than under contorted theories of equal protection or due process (Tsesis, pp. 104–36).

Tsesis concludes with an imaginative analysis of recent problems that have confounded courts and the national imagination, including Confederate symbols (Tsesis, pp. 97, 137–49) and hate crime (Tsesis, pp. 97, 116, 139, 149–54), in Thirteenth Amendment terms. By guaranteeing personal safety and stability while banishing symbolic invocations of the horror of slavery, the Thirteenth Amendment can provide the flexible instrument modern society needs to forge a future in which all may lead fulfilling and socially useful lives.

## II. ANALYSIS AND COMPARISON

All three books richly reward the serious reader and, with the few exceptions noted later,<sup>38</sup> are devoid of serious deficiencies. All three are well written and engaging; one turns the page eager to see what comes next. All three incorporate history, social policy, and legal doctrine in intriguing ways. Each posits a clear, unitary thesis and develops it without unnecessary elaboration or digression. The reader is never in doubt about where the authors are going.

Tsesis's book is perhaps the most audacious and original. Brown and his coauthors are merciless, almost overwhelming, in their attack on a comfortable, inbred, conservative orthodoxy that has had its own way without much serious opposition. They rate high marks for sheer rhetorical and argumentative skill. Ogletree is the best pure storyteller; he knows how to invite the reader into his world and show what makes it go around. He holds the reader's attention while recounting events, large and small, over a fifty-year span—no small feat.

Tsesis's is perhaps the most optimistic of the three books, arguing that the Thirteenth Amendment can release antidiscrimination law from its current stranglehold. He offers a blueprint as to how desperately needed reforms, of the kinds Brown et al. and Ogletree highlight, can come about. Both Ogletree and Brown et al. are soberly realistic about the failure of

---

35. 410 U.S. 113 (1973).

36. 381 U.S. 479 (1965).

37. 388 U.S. 1 (1967).

38. See *infra* Part III.

integration over the past half century, noting that society has seemed conversely willing to pay a heavy price for integrating at “all deliberate speed.” White Americans uncomplainingly underwrite “the prisons, police, mopping-up health care services, and other reactive measures predictably required by the maintenance of drastically unequal social conditions” (Brown et al., p. 249). They also pay in terms of lost competitiveness and depressed performance of the U.S. economy (Brown et al., p. 249; Tsesis, p. 110).

Ogletree and Brown et al. highlight more clearly than does Tsesis the need for extralegal forces and social activism in advancing a broad civil-rights agenda. Like Ogletree, Brown and his colleagues show how white America must share power and resources with those whom it has grown accustomed to excluding from these goods. It must also make sacrifices in standards of living to achieve a fair and stable society (Brown et al., p. 228; Ogletree, p. 299). Brown et al. make plain that policies designed to combat racial inequality must also proceed with awareness of the complex relationships between race and class. Intelligently chosen policies—such as a higher minimum wage—will benefit people of all races and stave off accusations and resentment (Brown et al., p. 230).

The books suffer minor flaws. Tsesis should have addressed objections to his position. For example, could not a conservative Supreme Court impose limitations on Thirteenth Amendment analysis just as it has on the other bases for civil-rights protection? Ogletree never addresses what could rekindle lost enthusiasm for black causes in a way comparable to the role international appearances and the threat of domestic disruption played in bringing about *Brown v. Board of Education*.<sup>39</sup> Brown and his coauthors focus their indignation almost exclusively on Stephen and Abigail Thernstrom and a few other neoconservative opponents of race-conscious remedies, overlooking other critics of affirmative action who warrant attention as well.<sup>40</sup>

When Ogletree discusses affirmative action, he points out that the diversity argument<sup>41</sup> currently in favor masks the real, substantive reasons why it is still needed (Ogletree, p. 165). After all, if diversity is the real goal in higher education, why limit it to the two or three groups that have suffered historical oppression? He correctly points out that “[t]his is a particularly difficult question in a time [of] disconnect between the past injustices and oppression faced by blacks and the experience of current generations of whites, whose only exposure to racial classifications is their use in providing

---

39. Derrick A. Bell, Jr., Commentary, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524–26 (1980).

40. E.g., GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971); RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992); GLENN C. LOURY, *ONE BY ONE FROM THE INSIDE OUT: ESSAYS AND REVIEWS ON RACE AND RESPONSIBILITY IN AMERICA* (1995); CHARLES MURRAY, *LOSING GROUND* (1984); THOMAS SOWELL, *AFFIRMATIVE ACTION AROUND THE WORLD: AN EMPIRICAL STUDY* (2004); THOMAS SOWELL, *ETHNIC AMERICA: A HISTORY* (1981).

41. That is, that affirmative action is needed to diversify universities and workplaces that otherwise might be practically all white.

benefits to minority groups" (Ogletree, pp. 164–65). The other authors offer nothing nearly so astute in their discussions of affirmative action. Tsesis comes closest when he observes that "[t]he nation rises or falls as a whole," so that helping promising minority students gain admission to top schools, where they will receive a first-rate education, not only helps heal old wounds, but also benefits the nation as a whole (Tsesis, p. 110).

On the whole, these are strong, original books that should be on the bookshelf of every American interested in finding solutions to one of the United States' most intractable problems.

### III. THE DOG THAT DIDN'T BARK

#### A. *Incorporating White Privilege into Racial Analysis*

Most civil-rights scholarship focuses on discrimination visited on people of color, women, and other outgroups. What of actions that do not discriminate against such groups but instead entrench white privilege? In a typical civil-rights violation, an empowered person, usually a white, commits an act of discrimination—such as hate speech, denial of a job, or rejection of a housing loan—against a black or Latino of lesser power and social standing. This may happen with or without conscious intent, and the act may be individual, institutional, or a matter of social custom. The common thread is that they all render a member of a historically disenfranchised group worse off.

Suppose, however, that the member of the dominant group acts not to disfavor such an individual, but to benefit another member of his or her own group? This ubiquitous practice raises the issue of white privilege: a series of interlocking favors, courtesies, benefits, and customs by which the dominant group confers gains on one of its own.<sup>42</sup> It includes the artfully crafted letter of recommendation that a teacher writes for a favorite white student, but does not write for the black student in the rear row who shows flashes of real talent.<sup>43</sup>

White privilege includes suburban families who hire each other's children, one to tend the yard while the family is away, the other to babysit its children; or, when they are older, provide them with summer internships in each other's companies to pad their resumes for college.<sup>44</sup> It includes

---

42. See STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED* (1996) (analyzing the many varieties of white privilege); Barbara J. Flagg, "Was Blind, but Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies* (Wellesley Coll. Ctr. for Research on Women, Working Paper No. 189, 1988); see also MAURICE BERGER, *WHITE LIES* (1999) (discussing how white supremacy and institutional racism limit the life chances of people of color); GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS* (1998) (same).

43. Richard Delgado, 1998 *Hugo L. Black Lecture: Ten Arguments Against Affirmative Action—How Valid?*, 50 ALA. L. REV. 135, 150 (1998).

44. *Id.*

conversational gambits,<sup>45</sup> workplace expectations and norms that reward familiarity with white culture,<sup>46</sup> and police officers who let neatly dressed white motorists off with a warning.<sup>47</sup> It includes companies that hire through the grapevine, so that African-American or Latino candidates have fewer chances of coming to their attention than do well-connected whites.<sup>48</sup> It includes a host of other arrangements, large and small, by which comfortably placed people help, reward, and validate their own.

Is this a civil-rights issue? Yes. White privilege acts, like discrimination, as a socially stratifying force, but from the opposite direction. By concentrating wealth, comfort, and well-being, it polarizes society and widens the gap between the haves and the have-nots. Imagine a society that consists of two groups, the As and the Bs. More powerful and numerous than the Bs, the As tacitly agree to oppress them for fun and profit. They circulate stories and myths that the Bs are stupid and lazy. They exclude them from the best jobs, schools, and neighborhoods.

Then one day the As undergo a change of heart. They realize that discrimination is wrong and stop visiting it on the Bs. But the As still like each other best, and so continue favoring each other in a multitude of ways while excluding the Bs from their bounty. After active discrimination in the grinding-someone-under-your-heel sense ended, would the Bs begin enjoying upward mobility, move into nice neighborhoods, get into good schools, win places in the Senate, and become CEOs of major corporations? If their old *bête noir*, the A group, deploys selective privilege to aid each other but not the Bs, the latter's progress will be slow indeed.

Privilege and discrimination, then, are like two sides of a coin. They replicate social relations in similar ways. One operates to submerge and eliminate the competition; the other to elevate and favor one's own kind. It is easy to deny that one is a racist. It is harder to deny that one is the beneficiary of privilege or that one has on occasion doled it out to a favorite friend or relative.<sup>49</sup>

45. Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms)*, 1991 DUKE L.J. 397.

46. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

47. McIntosh, *supra* note 42.

48. Daniel Gross, *In the Loop: A Lucrative Place to Be: The More Contacts You Have, The More You'll Be Paid*, *Study Says*, INT'L HERALD TRIB., Aug. 24, 2004, at Fin./Bus. 13 (interview with Kenneth Arrow).

49. A rare example of judicial recognition of the need to consider white privilege and supremacy occurred in *Loving v. Virginia*, 388 U.S. 1 (1967), a Supreme Court decision striking down a Virginia antimiscegenation statute. In *Loving*, an interracial couple challenged their state's Racial Integrity Act, which prohibited marriages between whites and nonwhites, on equal protection and due process grounds. *Id.* at 2, 6. The trial judge had suspended their sentences on condition that they leave the state and not return together for twenty-five years. *Id.* at 3. He rationalized his order by reasoning:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

### B. *Beyond the Black–White Paradigm of Race*

An emerging racial paradigm takes into account the fortunes of all the major ethnic groups of color, as well as whites.<sup>50</sup> It treats race and racism not as a series of localized flaws in an otherwise functional system, but as a broad feature affecting much of social life.<sup>51</sup> Race cannot be understood piecemeal, by examining its function in just one area alone. It requires attention to a host of factors cutting across several fields of knowledge and

---

*Id.* At the time, Virginia was one of sixteen states that prohibited intermarriages, many of them through laws dating back to slavery. *Id.* at 6 n.5.

On appeal, Virginia argued that its statute complied with equal protection because whites and nonwhites were similarly disadvantaged—neither could marry each other. *Id.* at 7–8. Brushing aside this argument, the Court found “no legitimate overriding purpose independent of invidious racial discrimination” to justify the statute. *Id.* at 11. “[T]hat Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.” *Id.* It also went on to hold that the statute denied the Lovings liberty without due process of law. *Id.* at 12. Since marriage is one of the “basic civil rights of man,” to deny its exercise as Virginia did violated a fundamental right without adequate justification. *Id.*

The Court’s reasoning goes far beyond merely noticing that Virginia’s criminal statute classified on the basis of race and thus violated the color-blind norm. Noting that Virginia’s law left minorities free to marry members of their own group or of other minority groups, the Court concluded that it could be aimed only at protecting the purity of the white race. *Id.* at 11–12. If purity of the other races were important, the statute would have prohibited blacks, Asians, Indians, and Latinos from marrying each other. *Id.* at 11 n.11. Instead, it only prevented them from marrying, as Richard Loving did, a member of the white race.

The statute, then, looked beyond the usual evils that summon up equal protection: lack of color-blindness, racial classification, and unequal treatment of persons and groups that are similarly situated. It aimed to set whites on a marital—and perhaps eugenic—pedestal: pure, undefiled, and superior. The Court spent little time addressing the reasonableness of the classification—whether Virginia could demonstrate a compelling interest, and whether the statute was calculated to advance that interest in narrowly tailored fashion. Redolent of white supremacy, it could not stand regardless of whether the mandates of conventional equal protection doctrine were satisfied. It stood, justifiably, on a higher plane of constitutional suspicion.

The only Supreme Court decision to confront white supremacy and privilege, *Loving v. Virginia* would seem to offer a promising starting point for a jurisprudence trained on those concepts. Such a jurisprudence would explore such issues as:

Which practices and laws advance white privilege and well-being at the expense of other groups?

Which practices and laws entrench privilege and superior status so deeply and irreversibly that a society committed to equal opportunity should not tolerate them?

What tests and criteria of cultural meaning can we use to aid ourselves in recognizing practices of white privilege?

Future scholarship might well examine these and related questions, including the line-drawing challenges that are certain to arise: How blatantly must the measure benefit whites? Suppose the benefit concerns not marriage or another fundamental right, but an ordinary economic benefit, such as tax breaks for the rich—most of whom just happen to be white? Suppose the conduct is largely private, such as marital choices, or partly private and partly public, such as a standardized test in use by private and public schools that rewards familiarity with white culture? Might a white-supremacist measure ever be justified by a compelling state interest, such as wartime security? See *Korematsu v. United States*, 323 U.S. 214 (1944).

50. See sources cited *supra* note 21.

51. JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (2000) (offering broad coverage of civil rights and featuring each group of color, plus whites); Perea, *supra* note 21.

affecting the fortunes of whites, blacks, Latinos, Arabs, Asian Americans, and Native Americans in complex ways.<sup>52</sup>

The new paradigm made its first appearance in fields other than law, such as labor history,<sup>53</sup> whiteness studies,<sup>54</sup> immigration studies,<sup>55</sup> and ethnic histories.<sup>56</sup> A few legal scholars now incorporate this approach into their work.<sup>57</sup> A few, such as Juan Perea, have actively contributed to its development.<sup>58</sup> One recent treatment by a legal scholar demonstrated in detail exactly how ignoring the history of nonblack minority groups has backfired to the detriment of blacks on many occasions and how treating other groups as mere ancillaries to the black cause deprives blacks of much-needed allies.<sup>59</sup>

A racial paradigm that places one group—usually African Americans—in the center and takes cognizance of the other groups only insofar as they succeed in analogizing themselves to the central group suffers a second drawback: it is apt to provide a poor quality of justice to the groups it locates on the margin.<sup>60</sup> These other groups will receive redress for racial wrongs only to the extent to which they prove that what happened to them would have been actionable had it happened to an African American.<sup>61</sup> Recall the example of the Filipino who could not recover for accent discrimination because our system of antidiscrimination remedies contained nothing that squarely addressed his predicament.<sup>62</sup> Latinos complaining of discrimination on account of suspected illegal status, Asian Americans who receive diffident treatment because of the model-minority myth, or Native

52. See, e.g., PEREA ET AL., *supra* note 51; Richard Delgado, *Derrick Bell's Toolkit—Fit to Dismantle that Famous House?*, 75 N.Y.U. L. REV. 283 (2000).

53. See DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (rev. ed. 1999) (discussing the role of work and unions in assimilating early immigrant groups); see also DAVID R. ROEDIGER, *TOWARDS THE ABOLITION OF WHITENESS: ESSAYS ON RACE, POLITICS, AND WORKING CLASS HISTORY* (1994) (showing how several racial forces interacted in the construction of white identity).

54. See *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* (Richard Delgado & Jean Stefancic eds., 1997); PEREA ET AL., *supra* note 51, at 429–99.

55. See RICHARD D. ALBA, *ETHNIC IDENTITY: THE TRANSFORMATION OF WHITE AMERICA* (1990) (reporting a classic study of ethnic white immigrants).

56. See Elizabeth Martínez, *Beyond Black/White: The Racisms of Our Time*, SOC. JUST., Spring-Summer 1993, at 22 (urging that contemporary racism is not merely a matter of black and white interactions).

57. See sources cited *supra* note 21; PEREA ET AL., *supra* note 51.

58. See Perea, *supra* note 21.

59. See Richard Delgado, *Derrick Bell's Toolkit: Fit to Dismantle That Famous House?*, 75 N.Y.U. L. REV. 283 (2000).

60. See *id.*

61. See *id.* Recall, for example, how some African Americans were disappointed when *Grutter v. Bollinger*, 539 U.S. 306 (2003), protected affirmative action as an aspect of advancing whites' interest in an effective economy and military. See David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548 (2004). The *Grutter* opinion, in short, protected black interest as an aspect of whites'. *Id.*

62. See *supra* note 19 and accompanying text.

Americans thought to be favored children of federal largess also will be unable to recover.<sup>63</sup>

#### IV. LOOKING FOR SIGNS OF THE NEW PARADIGM IN BROWN, OGLETREE, AND TESIS

Few legal writers consider white privilege when writing about racial discrimination, and fewer still consider the complex dynamics that the demise of the black–white binary of race brings to light. As a result, many strong books lose analytical force as well as real-world applicability.

How do the authors under review fare in these respects? Brown et al. are best at addressing white privilege. Employing the notions of social accumulation and disaccumulation, they examine the means by which whites have assured themselves a dominant position generation after generation so that although blacks advance, the gap between them and whites remains constant (Brown et al., pp. 17–25, 231–32). Discussions of this kind are rarer in Tesis or Ogletree, and even more so in other recent books about race.<sup>64</sup> Ogletree does note how well-off whites have established selective colleges and universities for their youth, like the ones he managed to attend, and have sent their sons and daughters there year after year (Ogletree, pp. 41–56). Other than this, white privilege is largely missing from his book. Tesis is mainly concerned with old-fashioned discrimination and the many ways society deprives blacks of a full and enjoyable life. He devotes little attention to what is occurring on the other side of the equation and the dozens of ways by which whites help each other advance to the exclusion of others. Both authors could have incorporated white privilege to good advantage. Ogletree might, for example, have discussed how he felt as an undergraduate at Stanford, surrounded by products of the nation's best prep schools, or how his colleagues in legal services defended their hiring policies, which largely excluded blacks, by falling back on the idea of merit. For his part, Tesis might have shown how slave labor laid the foundation for white wealth, which continued long after abolition.

Turning to the black–white binary of race, Ogletree, who grew up in California, cannot help but mention Latinos at various points—although his book is primarily about blacks (Ogletree, pp. 32–34, 44, 54–55, 82, 143, 151, 162, 260–63, 265–66). He mentions that the composition of his elementary school was heavily black and Latino, and the photographs reproduced in his book confirm this. In the chapter on his Stanford days, Latino students make their appearance as fellow demonstrators (Ogletree, p. 55). Later, when he discusses recent trends in school segregation, he again mentions the fortunes of Latino children (Ogletree, pp. 260–63). Ogletree

---

63. See Delgado, *supra* note 59.

64. E.g., DERRICK BELL, *SILENT COVENANTS: Brown v. Board of Education AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004) (dwelling mainly on the fortunes of African Americans and devoting little attention to white privilege and nest-feathering); F. MICHAEL HIGGINBOTHAM, *RACE LAW: CASES, COMMENTARY, AND QUESTIONS* (2d ed. 2005) (same).



thus seems relatively ecumenical in his concerns; although Latinos make only infrequent appearances in his book, they are not entirely absent, nor does he make any conscious effort to exclude them.

Tsesis's book is a different story. Wedded to an abolitionist theory of racial remediation, Tsesis seems determined to make that single model work for all minorities, even those who have no history of enslavement.<sup>65</sup> This makes little sense. Whites did not want labor from the Indians, but their land. Fearless, and with intimate knowledge of the local terrain, Indians would fight to the death rather than suffer enslavement. Whites wanted something different from the Mexicans: first, their land, and later, low-paid migrant agricultural labor in work crews and camps. From Asians, U.S. society wanted yet another set of commodities: at first, labor in building the nation's railroads and mines, and later, technical services as the "model minority" keeping the nation's computers and office machines humming efficiently.<sup>66</sup>

This simplified summary points up something that Tsesis and some other writers ignore: namely, how a theory of black civil rights can do justice to only some of the types of mistreatment society visits on nonblack groups. The Japanese did not need reparations for slavery; they needed reparations for wartime internment. Latinos do not need freedom from the badges and incidents of slavery but from the badges and incidents of conquest, including cultural destruction, loss of ancestral lands, and a school system seemingly bent on steadily suppressing their history and language.<sup>67</sup> A model of redress needs to suit the history and culture of the group for which it is applied. True, society every now and then will treat Asians or Latinos as it did the slaves; for example, forcing them into coolie labor or onto farm-worker crews with few freedoms or opportunities to leave and pursue other options.<sup>68</sup> In these circumstances, nothing is wrong with applying an abolitionist model or a statute derived from that tradition. But, as explained earlier, other groups experience many indignities that African Americans ordinarily do not.<sup>69</sup> Trying to force these into a paradigm not designed for them guarantees poor results.

Tsesis's book fares poorly on this score although it fares well in other respects. What about Brown et al.? *Whitewashing Race* is gratifyingly broad in its treatment of white privilege and racial hoarding (Brown et al., pp. 22–25, 231–32), and is properly scathing in its criticism of administrators and

---

65. In a faculty workshop, I asked the author if his Thirteenth Amendment approach would work for all minorities. He insisted it would. Alexander Tsesis, Address at the University of Pittsburgh Law School (Nov. 2004) (notes on file with author).

66. On the model-minority myth, see PEREA ET AL., *supra* note 51, at 412, 413–16, 419, 980.

67. On the role of conquest in Latino history, see Richard Delgado, *Rodrigo and Revisionism: Relearning the Lessons of History*, 99 Nw. U. L. REV. 805, 824–32 (2005) (book review); Juan F. Perea, *A Brief History of Race and the U.S.-Mexican Border: Tracing the Trajectories of Conquest*, 51 UCLA L. REV. 283 (2003).

68. See *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd.*, 535 U.S. 137 (2002); PEREA ET AL., *supra* note 51, at 312–16, 320, 369–70, 395–97, 416–21.

69. See *supra* notes 17–20 and 46–48 and accompanying text.

policy planners who enacted legislation that enabled whites to get ahead at the expense of minorities (Brown et al., pp. 75–79, 92–93). Despite this, its treatment of nonblack minorities is confounding. In the introduction, these California authors explain that they “focus largely on black and white . . . because the conservative consensus on race is mostly constructed around the relationship between black and white” (Brown et al., p. x). True to their promise, Latinos, Asians, and Indians are virtually absent from their pages; their discussion proceeds almost entirely in black–white binary terms.

This, of course, is merely to explain racism with more racism. Furthermore, it is simply untrue. Conservatives such as Samuel Huntington<sup>70</sup> and Peter Brimelow<sup>71</sup> have written forceful and ugly books about Latino cultural inferiority; the cable news pundits editorialize against this group regularly;<sup>72</sup> and fearful voters in the authors’ own state enacted three referenda—English Only,<sup>73</sup> Proposition 187<sup>74</sup> (which denied immigrants public services, including education), and the California Civil Rights Initiative, Proposition 209<sup>75</sup> (the anti-affirmative action measure)—aimed at the Latino population. When Brown and his coauthors blithely declare Latinos irrelevant to racial analysis, one wonders whether they read their own newspapers or realized that their state is nearly one-third Latino but only 6.7 percent black.

Brown et al. explain that discrimination against African Americans is older than that against the other groups (Brown et al., pp. ix–x), shapes individual housing choices in a way that antipathies toward the other groups do not (p. xi), and is a foundational part of U.S. culture and history (Brown et al., p. x) (in short, black exceptionalism). These rationalizations are unworthy of serious social scientists. All the groups are exceptional—blacks suffered slavery; Indians suffered removal and extermination (what could be more foundational than that?); Mexican Americans suffered conquest and the loss of one-half of their country in a pretextual war, followed by colonial occupation and suppression of culture, language, and land tenure. Puerto Rico is a United States colony, pure and simple. Japanese Americans were interned during World War II, losing businesses, homes, and farms on the strength of fabricated evidence, merely because they looked like the wartime

70. SAMUEL P. HUNTINGTON, *WHO ARE WE?: THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY* 243 (2004) (warning that America’s core values could suffer dilution if too many Latino immigrants gain admission).

71. PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER* (1995) (warning against disastrous consequences of excessive immigration).

72. For instance, Lou Dobbs in his “Broken Borders” series and in other segments on *Lou Dobbs Tonight* exhibits thinly veiled hostility toward Mexican immigrants. See, e.g., *Lou Dobbs Tonight* (CNN television broadcast Oct. 12, 2005), available at <http://transcripts.cnn.com/TRANSCRIPTS/ldt.html>; *Lou Dobbs Tonight* (CNN television broadcast Aug. 23, 2005), available at <http://transcripts.cnn.com/TRANSCRIPTS/ldt.html>.

73. CAL. CONST. art. III § 6(b) (providing that English is the official language in a state with a heavy Latino population).

74. See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

75. CAL. CONST. art. I § 31 (providing that the state shall not discriminate or grant preferential treatment on the basis of race and a number of other factors).

enemy.<sup>76</sup> While blacks may be slightly more segregated than Latinos in housing, the latter are the most segregated group in public schools and suffer by far the highest dropout rate.<sup>77</sup>

One wonders whether Brown et al., would have done better not to explain or attempt to justify their decision to omit nonblack groups at all. After all, nothing is wrong with writing about one minority group, as Ogletree did, but it should be done without insulting the others or trivializing their experience. The reader does miss out on the big picture, but for some purposes it may be perfectly sensible to limit one's coverage in that respect. It is not necessary to demean the other groups or their suffering at the same time. Moreover, to imply, as Brown and his coauthors do, that Latinos and Asians are irrelevant to racial analysis, especially in today's climate, simply beggars belief.

#### CONCLUSION: ONCE THE DOG BARKS, THEN WHAT?

These three books, excellent in many ways, exhibit some of the best features of recent writing about race. One—Tsesis's—deploys legal history and doctrinal innovation in the search for a way to avoid the many hurdles that the Supreme Court has placed in the way of civil-rights remedies. Ogletree expertly uses legal storytelling in his account of a half-century of civil-rights history so as to rekindle conscience and engage the sympathies of readers with sympathy to share. Brown and his coauthors marshal an impressive array of social-science evidence to refute the central teachings of a new school of tough-love neoconservative critics of race-conscious remedies.

Inadequate coverage of white privilege mars two of the books, and neglect of issues affecting nonblack minorities, such as Asian Americans, Arabs, Native Americans, and Latinos, blights all three. Writers attempting to make sense of the United States' racial predicament must expand their analysis to take account of these two issues. They must pay attention to white privilege—to what is taking place on the other side of the racial divide—just as they must consider the fortunes of nonblack groups—certainly when these intersect with those of blacks, but especially when they do not.

---

76. Other U.S. citizens looked like wartime enemies—the Germans and Italians—yet were not interned.

77. See Richard Delgado, *Locating Latinos in the Field of Civil Rights: Assessing the Neoliberal Case for Radical Exclusion*, 83 TEX. L. REV. 489, 503–04 & nn.90–91 (2004) (book review).