

Why “Race Matters:” LatCrit Theory and Latina/o Racial Identity

Enid Trucios-Haynes[†]

INTRODUCTION

Latinas/os are a force to be reckoned with, and we now require our own room in the “Master’s House.”¹ Yet, we must not forget it is the “Master’s House,” and we are constrained by the basic home rule that is White supremacy. Latinas/os are not exempt from the oppression of White supremacy, yet, as a group or individually, we often are seduced into thinking we are White.² Latinas/os must be vigilant to avoid the seduction of Whiteness. And we, Latinas/os, more than other groups of color, are vulnerable to the seduction of whiteness. We carry the desire for Whiteness, inscribed on our souls, from Latin America and transported across the border or from our neighborhoods where our parents and generations before have lived. Latinas/os, more than others, are seduced by Whiteness because we are not called Black,³ we are not even identified as a race—at least not officially. We are seduced by whiteness because we do not see that the foundation of the Master’s House, the Black-White paradigm, includes the racialization of our language, our culture, our history. We must see – *Tenemos que ver.*

[†] Professor of Law, Brandeis School of Law of the University of Louisville; J.D., Stanford Law School (1986).

1. Leslie Espinoza, *A Vision Towards Liberation*, 19 CHICANO-LATINO L. REV. 193, 193 (1998) (citing Audre Lorde, *The Masters Tools Will Never Dismantle the Master’s House*, in THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR 98, 99-100 (Cherrie Moraga & Gloria Anzaldua eds., 1981)).

2. I use the term “White” to describe the socially constructed identity of persons who receive the most benefit from the U.S. system of White privilege, which has been described as a “package of unearned assets . . . an invisible weightless knapsack of special provisions, assurance, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear and blank checks.” BARBARA J. FLAGG, WAS BLIND BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW 144(1998). White identity also includes the benefit of not having to notice one’s privilege. *Id.* This use of the term “White” also recognizes the history of White racial identity that has at times been expansive as a form of assimilation for White ethnic groups. See Paulette M. Caldwell, *The Content of Our Characterizations*, 5 MICH. J. RACE & L. 53, 90 (1999).

3. I use the term “Black” to describe the broader group of individuals who are socially constructed as well, yet principally identified in biological terms as individuals of African descent. *Cf.* Leonard M. Baynes, *Who is Black Enough For You? The Stories of One Black Man and His Family’s Pursuit of the American Dream*, 11 GEO. IMMIGR. L.J. 97, 103 (1996) (noting that “[i]n the Black American community, being Black is often associated not only with issues of appearance, but also with ideological and political considerations and national identity”). See generally Dorothy E. Roberts, *BlackCrit Theory and the Problem of Essentialism*, 53 U. MIAMI L. REV. 855 (1999) (noting the multidimensionality of Black identity including those who are viewed as Latina in some circumstances); *infra* Section I (C), for a discussion of the social construction of race in the United States; e.g., Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695 (1996).

In 1944, Gunnar Myrdal described the “American Dilemma:”⁴ the ideal of all persons being created equal and the “basic characteristic of race prejudice—a hierarchicalized sense of group position.”⁵ This contradiction continues today. Latinas/os⁶ occupy a position within the entrenched racial hierarchy that Myrdal described, and this is an issue that must be addressed by scholars developing LatCrit Theory. This hierarchical order applies to all groups perceived in racial terms, including Latinas/os, and reflects more than a simple Black-White divide.⁷ Racial hierarchy today incorporates what Neil Gotanda has described as “racial stratification,”⁸ which accepts the model of a “hierarchical structure *between* minorities,” instead of a model that “emphasizes the subordinate position of *all* racial and ethnic minorities.”⁹ The Latina/o community has reached a critical mass in the U.S., and we can no longer afford to be silent regarding race-related issues. Latinas/os have been on the sidelines in the racial discourse within the U. S. for numerous reasons, stemming both from within the community and from external influences. However, Latinas/os must not only directly address how race has defined our group in U.S. socio-political discourse, but also become active participants in disassembling racial hierarchy in all its forms throughout the United States.

The racial hierarchy in the United States is part of the system of White supremacy that organizes racial discourse using a strict Black-White racial divide.¹⁰ White supremacy embodies a White-over-Non-White/Black construct or a racial hierarchy, which has been defined differently by various critical race scholars.¹¹

4. GUNNAR MYRDAL, AN AMERICAN DILEMMA 5 (1944).

5. Herbert Blumer, *Race Prejudice as a Sense of Group Position*, PAC. SOC. REV., Spring 1958, at 3-7, construed in STANFORD M. LYMAN, COLOR, CULTURE, CIVILIZATION, RACE AND MINORITY ISSUES IN AMERICAN SOCIETY 9 (1994).

6. I use the term “Latina/o” to refer to individuals tracing their ancestry to the countries of the Western Hemisphere that are Spanish or Portuguese speaking. Mexican, Puerto Rican and Cuban American leaders have denounced the term “Hispanic” as a label crafted by the U.S. government that is based on stereotypes and forced unification of diverse peoples. See BILL PIATT, BLACK AND BROWN IN AMERICA, THE CASE FOR COOPERATION 30-31 (1997). Others have criticized the term because it refers to this group as being “of Spain,” which inappropriately devalues the cultural contributions of Non-Whites in Latin American. *Id.* at 31. I also use the term Black rather than African-American, which I see as a broader group of people with an African heritage. See, e.g., Leonard M. Baynes, *The Diversity Among Us*, 19 W. NEW ENG. L. REV. 25 (1997) (examining the intersection of race and national origin within the Black community).

7. See *infra* Section II (A), for a discussion of the Black-White paradigm and how this structures race relations discourse in the United States.

8. See Neil Gotanda, *Multiculturalism and Racial Stratification*, in MAPPING MULTICULTURALISM 239-250 (Avery F. Gordon & Christopher Newfield, eds., 1996).

9. *Id.* at 240.

10. See Clara E. Rodriguez, *Challenging Racial Hegemony: Puerto Ricans in the United States*, in RACE 131, 132 (Steven Gregory & Roger Sanjek eds. 1994).

11. For example, Sumi Cho uses a working definition of White supremacy that views it as “a set of reinforcing and synergistic beliefs and institutional practices and policies reflecting hierarchical group power relations consistent with superiorization of white racial identity or inferiorization of non-white racial identity.” Sumi K. Cho, *Affirmative Action: Diversity of Opinions: Multiple Consciousness and the Diversity Dilemma*,

However, it is commonly agreed that white supremacy creates and reinforces the existing economic, political and social structures, and convinces the dominated classes that the existing order is inevitable.¹² We, as Latinas/os, must acknowledge and investigate the ways in which the dominant culture defines our group as a Non-White, White or non-racial group that is outside of the race discourse, in order to suit its convenience, depending upon the interest that exists at a particular time.¹³

Many Latinas/os experience their daily lives as Non-White people in terms of their race, color, national origin, language, culture, and/or citizenship status,¹⁴ which some have referred to as “foreignness”.¹⁵ I submit that while Latinas/os have in part chosen and partly have been forced to accept an indeterminate racial group identity,¹⁶ political unity may require Latinas/os to affirmatively adopt a Non-White group identity.¹⁷ At a minimum, it is critical that LatCrit scholars confront our community’s ambivalence about its group racial identity.¹⁸

The legal construction of Latinas/os as an indeterminate racial group is problematic.¹⁹ An indeterminate racial identity permits discrimination to remain

68 U. COLO. L. REV. 1035, 1063 n.6 (1997). Margaret Montoya has outlined a view of White supremacy which includes the White majority’s treatment of many groups of Non-White peoples from pre-colonial times to present that begins before slavery and emphasizes a historical link between English and Spanish colonists in the Americas. See Margaret E. Montoya, *Of “Subtle Prejudices”, White Supremacy, and Affirmative Action: A Reply to Paul Butler*, 68 U. COLO. L. REV. 891, 906 (1997). A more narrow view of White supremacy would focus on the treatment of African-Americans in the United States dating since the days of slavery. See Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841 (1997).

12. See Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1351 (1988).

13. See George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321, 326-328 (1997); *infra*, pp. 19-21.

14. See Kevin R. Johnson, *Melting Pot’ or “Ring of Fire?: Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1261, 1268, 1280 (1997), 10 LA RAZA L.J. 175, 182, 194 (1998).

15. See *id.* See also Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997). See generally, e.g., Neil Gotanda, *Asian American Rights and the “Miss Saigon Syndrome,”* in ASIAN AMERICANS AND THE SUPREME COURT, A DOCUMENTARY HISTORY 1087, 1096 (Hyung-Chan Kim ed., 1992) (referring to the dualism of non-White national origin groups of color who are identified as racial minorities in certain instances and as non-citizens in other instances which will alter legal treatment).

16. See *infra* Part II (B).

17. See George A. Martinez, *African-Americans, Latinos, and the Construction of race: Toward an Epistemic Coalition*, 19 CHICANO-LATINO L. REV. 213 (1998). See also Athena D. Mutua, *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, 53 U. Miami L. Rev. 117, 1186 (1999) (arguing that the rivalry between blacks and Latinas/os is caused in part by the perceived racial mobility of Latinas/os, which may be exacerbated by the broader Latina/o community’s ambivalence about racial identity).

18. See Caldwell, *supra* note 2, at 90 (noting the possibility that this ambivalence will cause Latinas/os to become assimilated like White ethnic groups in the United States, thereby reinforce White supremacy).

19. The variety of judicial interpretations of the Latina/o identity as sometimes a racial group and

unremedied under current antidiscrimination law,²⁰ and permits the manipulation of the Latina/o image to exploit racial fears.²¹ Furthermore, Latina/o political organizations should acknowledge the constructed Non-White racial identity that has been imposed broadly on the group in socio-political discourse.²² Latinas/os united by a sophisticated understanding of this constructed Non-White identity can be a force for developing a broader view of racial group identity—one that better accounts for Latina/o experience.²³ Latinas/os must also recognize that an indeterminate racial identity does not reflect the lived experience of many, if not most of us within the United States.²⁴ LatCrit theory must assess the multidimensionality of the Latino/a identity to understand how White supremacy impacts the Latina/o community, and the ways in which Latinas/os may reinforce White supremacy.²⁵ In so doing, LatCrit theory can help develop a new foundation for building coalitions with other communities of color.²⁶

at other times as an ethnic group has been criticized as “lax and almost sloppy.” Yxta Maya Murray, *The Latino-American Crisis of Citizenship*, 31 U.C. DAVIS L. REV. 503, 514 (1998).

20. Under the Equal Protection Clause of the Fourteenth Amendment, only classifications based on race, ancestry and national origin are suspect. This means that Latinas/os must identify discrimination in terms of place of birth (national origin) because Latinas/os have yet to be recognized as a distinct racial group by the U.S. Supreme Court. See *Hernandez v. Texas*, 347 U.S. 475, 480-481 (1954). Under Title VII of the Civil Rights Act of 1964, protection for Latinas/os against employment discrimination is only available if there is discrimination based on national origin discrimination. 42 U.S.C. § 2000e-2(a)(1)-(2) (1994). See Christopher David Ruiz Cameron, *How the Garcia Girls Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347 (1997), 10 LA RAZA L.J. 261 (1998); Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 984-986 (1995). Title VIII also prohibits national origin discrimination in public housing, with similar limitations to Title VII. 42 U.S.C. § 3604(a)-(b) (1994).

21. See *infra* Part II (D).

22. See *infra* Part II (C).

23. See *infra* pp. 55-55 and Part IV (A-C).

24. See *infra* Part II (C).

25. Much of LatCrit Theory has focused on the multidimensionality of the Latina/o identity, and the fact that the Latina/o experience of discrimination is not addressed within the traditional civil rights discourse. See Berta Esperanza Hernandez-Truyol, *Borders (En)Gendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882, 883 (1997) (rejecting the dominant legal paradigm focus on a single attribute of identity such as race or gender as inappropriate for Latinas/os because of Latina/o multidimensionality). More recently, some LatCrit scholars have explicitly recognized that the multidimensionality of the Latina/o identity, in particular the racial identity, means that Latinas/os often confront the choice of whether to reinforce oppression or align themselves with oppressed groups. See generally Elizabeth M. Iglesias, *Symposium: The Long Shadow of Korematsu; Out of the Shadow: Marking the Intersections in and between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Legal Theory*, 40 B.C. L. REV. 349 (1998); *infra* Part III.

26. LatCrit scholars have begun to address the difficult enterprise of constructing coalitions with other communities of color. See Martinez, *supra* note 17, at 214-15 (assessing a Black-Chicano conflict over the direction of the Dallas, Texas school district); Mutua, *supra* note 17, at 1186 (referring to the Black-Latino rivalry reflected in “contests over jobs, access to education and housing,” which is played out in urban centers throughout this country in which “Blacks often see Latinas/os as a racially mobile group capable of leapfrogging over them with access to whiteness”); e.g., Rachel F. Moran, *Demography and Distrust: The Latino Challenge*

Self-identification for many Latinas/os includes experiences not recognized within the dominant Black-White paradigm for racial discourse in the United States.²⁷ For example, some Latinas/os possess a racial identity intertwined with their cultural identity.²⁸ Some segments of the Latina/o community already understand their racial position within the U.S. Black-White paradigm, despite their multidimensionality in terms of color, race, language, culture, national origin, citizenship status and other factors.²⁹ Those who perceive their racial identity as intertwined with their cultural identity, may recognize a broader concept of racial identity than the seemingly narrow racial categories in the United States under the Black-White paradigm.³⁰ A broader, more contextualized understanding of racial identity may lead to more inclusive racial discrimination remedies and a broad-based effort to combat subordination in U.S. society.³¹

An affirmative Non-White Latina/o racial identity may bring about equality under the law for Latinas/os. If we accept that Latinas/os largely are perceived as a Non-White racial group in this country, we must also push for a definition of “race” that includes color, race, language, culture, national origin, citizenship status and other factors that reflect the Latina/o experience.³² A broader conception of racial identity — one that includes the critical aspects of Latina/o identity — is a step toward recognizing the histories of all communities of color in the United States and their interrelatedness.³³

A Non-White identity for Latinas/os need not ignore the tremendous diversity of our peoples.³⁴

I further argue that critical race theory should include a Latina/o perspective of racial identity.³⁵ Much of critical race theory has focused on the racial oppression of

to *Civil Rights and Immigration Policy in the 1990s and Beyond*, 8 LA RAZA L.J. 1, 12 (1995).

27. See *infra* Part III.

28. See Rodriguez, *supra* note 10.

29. See generally Robert Suro, *Recasting the Melting Pot: Later-Generation Latinos are Writing a New Immigration Story*, AM. DEMOGRAPHICS, Mar. 1999, at 30.

30. See *supra* note 29.

31. At present, much of the scholarship about Latinas/os focuses on the invisibility of the group through the critique of the Black/White paradigm and the multidimensionality of Latina/o identity rather than a reconstructive approach to antidiscrimination law and racial group identification under the Equal Protection Clause of the Fourteenth Amendment. See Caldwell, *supra* note 2, at 99.

32. See *supra* note 26.

33. Understanding the racialization process of all groups of color in the United States as well as the history of the racialization of groups in relation to each other will further identify commonalities among groups upon which coalitions can be built. See Caldwell, *supra* note 2, at 75 (1999); Iglesias, *supra* note 25; Eric K. Yamamoto, *Critical Race Praxis*, 95 MICH. L. REV. 821 (1997); Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 UCLA ASIAN PAC. AM. L.J. 33 (1995).

34. The basic premise of constructed identities is that these inevitably subsume differences among members within the group. See Hernandez-Truyol, *supra* note 25, at 883. But see *infra* notes 221 and 301.

35. See *infra* pp. 69-72 and accompanying notes 294-305.

the Black community as it is constructed within the Black-White paradigm.³⁶ And, LatCrit Theory has focused on the limitations of the Black-White paradigm to address Latina/o concerns.³⁷ However, LatCrit scholars must do more than merely reject the Black-White paradigm and point out the ways in which critical elements of the Latina/o experience are rendered invisible within it.³⁸ A functional definition of race, one that recognizes the powerful mediating place race occupies in the lives of all who live in the United States,³⁹ particularly the lives of people of color, can transform the traditional understanding of equal protection under law.⁴⁰ A functional definition of race would recognize that the Latina/o community, as a whole, is perceived in racial terms by the White majority, and would include a Latina/o experience of racial identity. In order to include the Latina/o experience of racial identification in the United States, Latinas/os must investigate the position of the Latina/o group within the Black-White paradigm and the racial hierarchy constructed thereon, as well as investigate the manipulation of our group's racial identity.⁴¹ This effort and a unified front of communities of color and allied groups can result in a transformation of equal protection jurisprudence and anti-discrimination law.⁴²

36. See Leslie Espinoza & Angela Harris, *Embracing the Tar-Baby: LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585, 1596-1605 (1997), 10 LA RAZA L.J. 499, 510-519 (1998); Roberts, *supra* note 3, at 855 (challenging the criticism that Black critical race theory scholars have privileged the Black experience at the expense of other communities of color when they focus on Black issues without reference to other communities of color).

37. See Christopher David Ruiz Cameron, *supra* note 20, at 1357-59, and 271-73; *infra* notes 47-54. See, e.g., John O. Calmore, *Exploring Michael Omi's Messy Real World of Race: An Essay for "Naked People Longing to Swim Free,"* 15 LAW AND INEQ. J. 25 (1997); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post Structuralism and Narrative Space*, 81 CALIF. L. REV. 1241; Davis *supra* note 3; Chris K. Iijima, *The Era of We Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections in the Critique of the Black/White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47, 60 (1997); William R. Tamayo, *When the "Coloreds" are neither Black nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1 (1995); Frank Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225 (1995).

38. See Rachel F. Moran, *What if Latinos Really Mattered in the Public Policy Debate?*, 85 CAL. L. REV. 1315 (1997), 10 LA RAZA L.J. 229 (1998).

39. Ian F. Haney Lopez, *The Social Construction of Race*, 29 HARV. C.R.-C.L. L. REV. 1, 46 (1994).

40. The Supreme Court has already recognized the "fact" of racial discrimination against Mexican-Americans in *Hernandez v. Texas*, although it refused to characterize the discrimination against a Latino as racial discrimination under the Equal Protection Clause. The willingness of the Court to once recognize the racial factors to identify the existence of discrimination against Latinas/os offers the hope that the Supreme Court could be persuaded to explicitly acknowledge that discrimination against Latinas/os is tied to a Non-White group racial identity. See Ian Haney Lopez, *Race and Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143 (1997), 10 LA RAZA L.J. 57 (1998).

41. See Elizabeth M. Iglesias, *Marking the Intersections in and between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Legal Theory*, 40 B.C. L. REV. 349, 353-355 (1998); Laura Padilla, *Social and Legal Repercussions of Latinos' Colonized Mentality*, 53 U. MIAMI L. REV. 769, 780 (1999); *infra* Part (II).

42. But see Caldwell, *supra* note 2, at 99-100. In response to the Latina/o critique of the civil rights paradigm and its limited remedies for Latinas/os, Paulette M. Caldwell has cautioned that this may not be the best time to abandon the current theory of antidiscrimination law because it is not likely that further remedial

A unified fight to dismantle racial hierarchy will not require Latinas/os to “give up” anything.⁴³ Perhaps in recognizing the various racisms that continue to develop in U.S. society, communities of color can find an equal meeting ground from which to coordinate the struggle against White supremacy.⁴⁴ Such a cooperative endeavor would require that all communities of color recognize that racism affects different communities of color in different ways, and that Latina/o concerns such as bilingual education, the limits of assimilation, and immigration reforms are part of this struggle.⁴⁵

Part II examines how Latinas/os have been constructed as an indeterminate racial group by the hegemony of the Black-White paradigm for racial discourse in the United States, the legal system through judicial opinions and legislation, and how Latinas/os have been racialized as Non-White historically and today. I also address how the indeterminacy of the Latina/o racial identity reinforces racial hierarchy because of the manipulation of the Latina/o image. Part III explains how the process of Latina/o racial identification may vary from the process of racial identification assumed by the Black-White paradigm in the United States, but may nonetheless reinforce White supremacy. This section also assesses how LatCrit scholarship reflects the Latina/o indeterminate group racial identity. Part IV identifies the impact of the Latina/o indeterminate racial status on developing new approaches to antidiscrimination law and the legal remedies available to Latinas/os, the reinforcement of White supremacy, and the obstacles it creates to coalition building with other communities of color.

legislation will make it through Congress.

43. The idea that building coalitions among communities of color and recognizing the broad reach of White supremacy through all communities might require that African-Americans “give something up” was expressed at the 1994 Mid-Atlantic People of Color Conference. The response from a panelist when this was raised as a concern was that perhaps we would all be better off, without any group having to give anything up, if we unite and recognize the multiplicity of racisms that occur in the United States. See Elizabeth Martinez, *Beyond Black/White: The Racisms of Our Time*, 20 SOC. JUST. 22 (1993) (noting the multiple racisms that exist in the United States).

44. New forms of racism are created because racism is not a fixed. New racisms can form based on the multitude of relationships within the Black-White paradigm relating to communities of color and Whites. See Caldwell *supra* note 2, 76 n.74 (citing David Goldberg, ANATOMY OF RACISM (1990) who posits “that racism lacks any single, permanent fixed characteristic and new forms are created by global events, in particular the new international division of labor”); Elizabeth Martinez, *supra* note 43.

45. See Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42 (1995); Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV 101 (1997) (identifying common issues of importance to Latinos despite this diversity to include: (1) criticism of the civil rights agenda as providing answers to Latino concerns; (2) immigration; (3) limits of assimilation for Latinos in the United States; (4) the role of religion in the construction of Latino identity; and (5) racism, misogyny and homophobia among Latinos); Moran, *supra* note 26.

I.

LATINAS/OS SHARE AN INDETERMINATE RACIAL STATUS — SOMETIMES NON-WHITE, SOMETIMES WHITE, SOMETIMES UNRACED

A. *The Black-White Paradigm for Understanding Race in the United States Constructs Latinas/os as an Indeterminate Racial Group*

Latinas/os are indeterminately raced because racial identity in the United States occurs within a Black-White Paradigm, and this paradigm does not incorporate the experiences of Latinas/os and other groups of color.⁴⁶ The Black-White paradigm has been described as “the reduction of race relations in American society and law to the relations between ‘White’ Euro-Americans and to ‘black’ African-Americans.”⁴⁷ Racial inequality in this country is assessed through the prism of the Black-White paradigm and Latinas/os are rendered invisible in this construct of race relations.⁴⁸ It is a by-product of White supremacy because it explicitly accepts that White racial group identification is preferred to a Black racial group identification.⁴⁹

46. See Ruiz Cameron, *supra* note 20, at 1357-59 and 271-73; Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CAL. L. REV. 1213 (1997), 10 LA RAZA L.J. 126 (1998). See also Charles Lawrence III, *Forward Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819 (1995); Deborah Ramirez, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 957 (1995) (endorsing a multiracial identifier to break away from the bi-polar model of White majority and black minority and debunk racial stereotypes, thereby allowing race to become a multifaceted concept and describing a new model for assessing identity and a color conscious remedial system focusing on multicultural empowerment that acknowledges the importance of race but also identifies the realities of political, economic and social problems that cannot be solved through racial preferences); Tamayo, *supra* note 37, at 1 (asserting that “the Civil Rights Movement, which operates in a primarily “Black v. White” paradigm, is ill-equipped to deal with an increasingly multiracial and multicultural American,” particularly new immigrants from Asian and Latin America because they are neither Black nor White). See generally, e.g., Wu, *supra* note 37 (asserting that the primary reason that Asian-Americans are often ineligible for affirmative action benefits is because of legal analysis premised on the Black-White paradigm, which is a bipolar essentialist approach, and therefore excludes the experiences of Asian-Americans or other communities of color).

47. Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1, 5 n.19 (1998) (construing Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 775 (1994)).

48. I share the view that the Black-White paradigm renders Latina/o issues invisible. See *supra* note 47. I attribute this invisibility, in part, to the unwillingness of Latina/o leaders to assert a Non-White racial group identity. See *supra* note 23. The lack of a clear, Non-White group racial identity may have created schisms between Latinas/os and other groups of color who may not see their interests as aligned with Latina/o concerns. Latina/o acceptance of a fluid racial identity that is at times “raced” as Non-White or White, and at other times indeterminate and outside of race discourse allows the dominant culture to ignore uniquely Latina/o issues. Also, an indeterminate racial group identity allows Latina/o concerns to be characterized as special interest group concerns unrelated to fundamental questions of inequality and racial discrimination in the United States. See also Juan F. Perea, *supra* note 20 (describing the creation of Latinas/os invisibility in the context of the 1992 Los Angeles uprising and the media portrayal of Latina/o involvement, the Framers conception of the United States as a White nation, and national origin discrimination principles under antidiscrimination law).

49. See Mutua, *supra* note 17, at 1189 (suggesting that the paradigm be renamed the “White Over Black” or “Black Subjugation to White” paradigm which would better reflect the “reality of unequal and hierarchical power relations, and point to the key objective anti-racist struggle: the overthrow of white supremacy” and the position of whites at the top of the hierarchy, blacks at the bottom and Asian Americans, Latinas/os and Native Americans in the middle).

Because the Black-White paradigm establishes rigid categories in which racial identity is fixed by a Black-White dividing line, persons who are not perceived as either Black or White become subordinated to this dividing line.⁵⁰ The Black-White paradigm is so dominant that it shapes “our understanding of what race and racism mean and the nature of our discussions about race.”⁵¹ The analysis of race in our society using this Black-White divide (where White dominates over Black) is reflected in legislative and judicial decisionmaking.⁵² The Latina/o critique of the Black-White paradigm and its relevance to the Latina/o experience is also a critique of the Critical Race Theory scholarship because of its focus on racial discrimination against Blacks and its effect of excluding other groups of color from analysis.⁵³ The Black-White paradigm excludes Latinas/os from full participation in racial discourse because Latinas/os are neither Black nor White within the Black-White paradigm.⁵⁴

The foundational structure of the United States embodied in the U.S. Constitution reflects the Black-White paradigm and White supremacy. Blacks at the inception of this country were excluded from participation as citizens of the United States through the institution of slavery.⁵⁵ After the Civil War, Blacks were rendered subordinate to Whites through a system of constitutionally validated structures such as *de jure* segregation and other forms of institutionalized discrimination.⁵⁶ All other Non-Whites were also denied full participation in U.S. socio-political-legal life because citizenship remained racially limited to free White persons, although later expanded to

50. See Rodriguez, *supra* note 10.

51. Perea, *supra* note 46, at 1214 and 128.

52. See Perea, *supra* note 20.

53. See Rachel Moran, *Foreword-Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond*, 8 LA RAZA L.J. 1, 12 (1995); Perea, *supra* note 46; Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571 (1995); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957 (1995).

54. See *supra* note 29. See generally Celina Romany, *Gender, Race/Ethnicity and Language*, 9 LA RAZA L.J. 49, 49 (1996) (calling on theorists to internationalize the race relations paradigm by assessing the “North American” face of Critical Race Theory.); Berta Esperanza Hernandez-Truyol, *Building Bridges: Bringing International Human Rights Home*, 9 LA RAZA L.J. 69 (1996) (Professor Hernandez-Truyol suggests that it is necessary to incorporate international legal norms in domestic reforms).

55. See *Dred Scott v. Sanford*, 60 U.S. 393 (1857) (holding that Blacks were not citizens of the United States capable of challenging state action in federal courts).

56. A full discussion of the numerous forms of institutionalized racism against African-Americans after the Civil War is beyond the scope of this article. In general, after the passage of the 13th, 14th & 15th Amendments of the U.S. Constitution, equality was interpreted as only entailing political equality, not social equality. See *Plessy v. Ferguson*, 163 U.S. 537 (1896). Further, a harsh regime of segregation imposed by Jim Crow laws existed, as well as state-sanctioned mob violence against Blacks, until *Brown v. Board of Education*, 347 U.S. 483 (1954) overruled the separate-but-equal doctrine upheld in *Plessy v. Ferguson*, thereby paving the way for the passage of federal civil rights legislation. See generally JUAN F. PEREA, RICHARD DELGADO, ANGELA P. HARRIS, STEPHANIE WILDMAN & JEAN STEFANCIC, *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 91-164 (2000).

include persons of African nativity or descent.⁵⁷

Those involved in race discourse in law and politics must include the different experiences of racialization in the United States.⁵⁸ Any broad framework used to understand race in the United States must include those issues relevant not only to the African-American community, but also the Latina/o and other communities of color⁵⁹ because although their experiences are rendered invisible within the Black-White paradigm, these communities are still subject to the system of White supremacy in the United States.⁶⁰

B. *The Legal System Has Constructed Latinas/os as an Indeterminate Racial Group*

The construction of the indeterminate Latina/o legal racial classification has a long history and is linked to an 1897 federal district court case in Texas.⁶¹ In this case, the district court determined that a “pure-blooded Mexican”⁶² was eligible for individual

57. See The Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (1790) (repealed 1795) (providing that “any alien being a free White person . . . may be admitted to become a citizen . . .”). In 1870, the naturalization law was “extended to aliens of African nativity and to persons of African descent”. Act of July 14, 1870, ch. 254, § 7, 16 Stat. 256 (1870) (amended 1875).

58. This is beginning to occur among legal scholars. See Angela P. Harris, *Forward: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1994); Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 ASIAN PAC. AM. L.J. 33, 61 (1995) (describing the contingent position of Asians in Hawaii in relation to native Hawaiians); See also Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (offering a theory for including discrimination resulting in a disparate impact as a violation of the Equal Protection Clause).

59. See also, e.g., Yamamoto, *supra* note 58, at 61 (describing the contingent position of Asians in Hawaii in relation to native Hawaiians); Pat Chew, *Asian Americans: The “Reticent” Minority and Their Paradoxes*, 36 WM & MARY L. REV. 1 (1994) (examines model minority myth of Asian Americans as successfully assimilated and underlying paradoxes).

60. For many of these groups, immigration policy is a central concern because these policies construct community by determining which family members may join relatives in the United States and the nature and extent of the limitations on the entry of those relatives. For example, the Immigration and Nationality Act establishes the categories of family relatives who may join a United States citizen or lawful permanent resident through the immigration process to include: immediate relatives of U.S. citizens (spouses and children), the spouses and unmarried sons and daughters of citizens and lawful permanent residents, the married sons & daughters of citizens, as well as the brothers and sisters of citizens. See 8 U.S.C. § 1151(b), 1153(a) (2000). The breadth of family relationships is deceptive because visa backlogs for certain categories and individuals from countries with a high volume of applications can be very lengthy. See 8 U.S.C. § 1153(a). Also, new requirements for all immigrant entries such as contractual affidavits of support and minimum income requirements for those seeking the entry of their relatives may have a disproportionate effect on immigrant communities of color because of lower income earnings. See 8 U.S.C. § 1183(a). (2000); Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine*, 14 GEO. IMMIGR. L.J. 273, 289-291 (2000) (noting the disproportionate impact on poor, working people and people of color of facially neutral laws such as the public charge inadmissibility provision of the Immigration and Nationality Act which requires that all persons entering the U.S. demonstrate that they are not likely to become a public charge).

61. *In re Rodriguez*, 81 F. 337 (W.D. Tex. 1897).

62. *Id.* at 349.

naturalization, despite the racial limitation in the naturalization law at the time that should have rendered him ineligible for citizenship.⁶³ In *Rodriguez*,⁶⁴ the district court decided that, despite Rodriguez's status as a Non-White, he was eligible for naturalization.⁶⁵

In *Rodriguez*, the district court struggled to develop a contextual definition of "White" that was inclusive rather than exclusive in order to naturalize Rodriguez. As a self-described "pure-blooded Mexican," Rodriguez was a Non-White person based on the existing scientific classifications.⁶⁶ The district court asserted it was following the spirit of the naturalization law by finding that Rodriguez was eligible for citizenship despite his Non-White status.⁶⁷

The district court relied upon prior Supreme Court cases that recognized that all persons born in the United States, regardless of race, were U.S. citizens.⁶⁸ The district court was also influenced by the Treaty of 1848,⁶⁹ by which Mexico ceded the territory of Texas to the United States, thereby providing for the incorporation of thousands of Mexicans as U.S. citizens, regardless of color.⁷⁰ In addition, the district court was persuaded by the Texas Constitution⁷¹ that had conferred United States citizenship upon Mexicans, although collectively rather than individually, by various acts of naturalization despite their Non-White racial identification.⁷²

The *Rodriguez* case is significant because it illustrates how factors external to the existing racial classification system helped to impose an indeterminate racial status upon Mexican-Americans.⁷³ Although the court recognized that Rodriguez "would probably not be classed as white" under "the strict scientific classification of the

63. See Act of July 14, 1870, *supra* note 58.

64. 81 F. 337 (W.D. Tex. 1897).

65. See *id.* at 355.

66. *Id.* at 349.

67. See *id.* at 354.

68. See *id.* at 353.

69. Treaty with the Republic of Mexico, Treaty of Peace, Friendship, Limits and Settlement with the Republic of Mexico, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922.

70. See 81 F. at 350-351 (citing the Treaty with the Republic of Mexico, *supra* note 70, art. 8, 9 Stat. 922, 929).

71. TEX. CONST. of 1836, § 10, cited in 81 F. at 350 ("All person (Africans, the descendants of Africans, and the Indians excepted) who were residing in Texas on the day of the Declaration of Independence, shall be considered citizens of the Republic, and entitled to all the privileges of such.").

72. See 81 F. at 350.

73. See generally IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 43 (1996) (tracing history of racial exclusion from citizenship for different Asian national origin groups); Enid Trucios-Haynes, *The Legacy of Racially Restrictive Immigration Laws and Policies and the construction of the American National Identity*, 76 ORE.L.REV. 369 (1997).

anthropologist," the court still refused to ascribe any racial classification upon Rodriguez.⁷⁴ Rodriguez's racial identity, for purposes of applying the naturalization law, was neither White, nor Native-American, nor Black.⁷⁵ Rodriguez, the individual, was implicitly assigned an indeterminate racial status because of the foreign policy concerns based on related treaty obligation to Mexico: the district court decided that the spirit of the naturalization law required a grant of citizenship.⁷⁶ The existence of a distinct Latina/o Non-White racial identity was therefore submerged in *Rodriguez* in order to reach the desirable result of permitting Mexicans to naturalize individually because of the socio-political pressures related to the 1848 Treaty and the U.S. acquisition of land from Mexico.⁷⁷

Rodriguez is significant because it establishes an indeterminate Latina/o racial identity under U.S. law, and marks a line of distinction between Latinas/os and other Non-White people in the United States in order to serve the U.S. foreign policy interests.⁷⁸ By virtue of a judicially crafted exception to the White race requirement for naturalization that existed at the time,⁷⁹ Latinas/os were shielded from the brutal racial limitation on naturalization, and perhaps, as a result, were less racially conscious than other Non-White groups.⁸⁰

Another case, *Hernandez v. Texas*,⁸¹ also illustrates how Latinas/os have been constructed as an indeterminate racial group. In *Hernandez*, the Mexican-American plaintiff, Hernandez, had been indicted for murder by an all White grand jury, and Hernandez moved to quash the indictment, arguing that people of Mexican descent were purposefully excluded from the jury.⁸² The League of United Latin American Citizens (LULAC), who represented Hernandez, raised a Fourteenth Amendment challenge, "asserting that exclusion of this class deprived him, as a member of the class, the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution."⁸³ LULAC had taken on the case to test the constitutionality of the systematic exclusion

74. 81 F. at 349.

75. *See id.*

76. *See* 81 F. at 354.

77. *See* Martinez, *supra* note 13, at 326.

78. It is significant that *Rodriguez* was decided relatively early in the decades-long fight by other Non-Whites to gain the benefit of naturalization. For example, Asians, as a group, were not granted the right to naturalize until 1952, nearly a half century later. *See* HANEY LOPEZ, *supra* note 73.

79. *See* Martinez, *supra* note 78.

80. *See generally* HANEY LOPEZ, *supra* note 73 (the racial exclusion from citizenship principally was applied to different Asian national origin groups based).

81. *Hernandez v. Texas*, 347 U.S. 475 (1954).

82. *See id.* at 476. *See also* Haney Lopez, *supra* note 40 for an excellent analysis of this case and the Supreme Court's sub-rosa recognition of racial discrimination against Mexican-Americans.

83. 347 U.S. at 477.

of Mexicans and other persons of Latin American descent from service as jury commissioners, grand jurors and petit jurors.⁸⁴ In describing the discrimination against Mexican-Americans in Jackson County, Texas, the Supreme Court referred to traditional indicia of racial discrimination.⁸⁵ However, it was unwilling to directly acknowledge that the Equal Protection Clause protected Latinas/os as a racial group.⁸⁶ Rather, the Supreme Court stated that Mexican-Americans were entitled to equal protection to the extent that they were discriminated against as a group marked by "other differences from the community norm," other than race.⁸⁷

In *Hernandez*, the Supreme Court ignored the obvious racial character of the evidence presented about discrimination against Latinas/os, and instead characterized the discrimination experienced by Mexican-Americans in Jackson County, Texas as non-racial.⁸⁸ This characterization was inconsistent with the evidence it relied upon to show that Mexican-Americans were discriminated against as a group distinct from other members of the community. The evidence of segregated public facilities, a history of racial group identification distinguishing between Whites and Mexicans, and the systematic exclusion of Mexican-Americans from participation in public life typically would be recognized as evidence of racial discrimination.⁸⁹

The collection of census data and other forms of formal government classification is another way in which an indeterminate racial group identity is imposed upon the Latina/o community. The Office of Management and Budget Statistical Directive No. 15 "has for more than twenty years . . . provided the common language to promote uniformity and comparability of data on race and ethnicity."⁹⁰ Under this

84. Haney Lopez, *supra* note 40, at 58 n.2 and 1144 n.2.

85. The evidence of the racial group status of Mexican-Americans in Jackson County, Texas and discrimination against Mexican-Americans included: "(1) people in the county routinely distinguished between "White" and "Mexican" persons; (2) business and community groups largely excluded Mexican-Americans from participation; (3) children of Mexican descent were required attend segregated school for the first four grades, until just a few years prior to the Supreme Court's decision; (4) at least one restaurant in the country displayed a sign announcing "No Mexicans Served;" (5) there were two men's toilets on the Jackson County courthouse grounds at the time of the underlying trial, one unmarked and the other marked "Colored Men" and "Hombres Aqui" ("Men Here"); and (6) there was a stipulation that there had been no record of any person within the prior 25 years with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson Country although the county was 15% Mexican-American." Haney Lopez *supra* note 40, at 73-74 and 1159-60.

86. See Haney Lopez, *supra* note 40, at 74-77 and 1160-63.

87. 347 U.S. at 478. In more recent cases, the Supreme Court decisions have exhibited an incoherent view of the Latina/o group identity. In *Hernandez v. New York*, 500 U.S. 352 (1991), the Supreme Court appeared to view the Latina/o group as a race and ethnic group in a challenge to jury exclusion based on Spanish language ability. See Maya Murray, *supra* note 19, at 508; *id.* at 589 n. 17-19 (noting that the courts have not yet resolved the question of whether Latinas/os are a race or ethnicity, and referring to judicial references to the Latina/o group, e.g., discrimination against Latinas/os as both race and color discrimination in *Castaneda v. Partida*, 430 U.S. 482, 492 (1976) and the nature of the Latin Americans as both racial and ethnic in *Pagan v. Dubois*, 884 F. Supp. 25, 28 (D. Mass. 1995).

88. See Haney Lopez, *supra* note 40, at 77 and 1163.

89. See *id.* at 73-74, 1159-60.

90. Notice of Decision on the Revision to the Standards for Classification of Federal Data on Race

directive, statistics are gathered in a way that separates race from ethnicity, and Latinas/os are only identified as an ethnic group whose members may fall within different racial categories.⁹¹ Hence, the federal government establishes a construct that places Latinas/os outside of the racial categories it identifies: Black, White, Indian (American) and Asian or Pacific Islander.⁹²

The U.S. Census has consistently imposed the limited racial categories recognized within the Black-White paradigm on the Latina/o community. Latinas/os have been asked to identify themselves as either Black, Hispanics, or White Hispanics, without recognition that perhaps a Latina/o might be an Amerindian Hispanic or Asian Hispanic.⁹³ This lack of recognition for other categories of racial identification among "Hispanics" clearly indicates an effort to force Latinas/os into the dominant racial paradigm that limits its focus on Black and White racial groups in the United States.⁹⁴

The Latina/o community has been reluctant to adopt a specific racial classification of Hispanic. A separate Latina/o race category had been proposed for the 1980 census.⁹⁵ However, organizations representing Latina/o interests vigorously opposed the designation of Latinas/os as a distinct racial group.⁹⁶ The willingness of the U.S. government to recognize a separate racial category for Latinas/os and the reticence of the dominant political organizations advocating Latina/o interests also illustrates the contested racial group identification of Latina/os.⁹⁷

Latinas/os had been designated for Census purposes as White in the Censuses of 1940 and 1950, unless definitely Native American or some other race besides White.⁹⁸ The 1960 Census also coded Latinas/os as White unless they were Black, Native American or some other race.⁹⁹ In an attempt to identify the Latina/o population

and Ethnicity, 62 Fed. Reg. 58,782 (1997). See also Directive No. 15: Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19,260 (1978); Luis Angel Toro, *A People Distinct from Others: Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 TEX. TECH L. REV. 1219, 1221 (1995) (describing how racial group identification by the federal government adopts a biological definition of race as a fixed, definite trait assigned at birth).

91. Toro, *supra* note 90, at 1225.

92. See *id.* (referring to the 1990 Census Questions).

93. See Angel R. Oquendo, *Reimagining the Latina/o Race*, 12 HARV. BLACKLETTER J. 93, 99-100 (1995) (proposing that Latinas/os reject this racial dualism).

94. See *id.*

95. The idea of combining race and Hispanic origin to create a separate racial group for Latinas/os was proposed by one of the advisory committees for the 1980 Census, but it was rejected because of strenuous opposition from Latina/o community groups. As a result the proposal was abandoned by the Census Bureau because of lack of community support. Rodriguez, *supra* note 10.

96. See *id.*

97. See *id.*

98. See Gloria Sandrino-Glasser, *Los Confudidos: De-Conflating Latinas/os' Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69, 126 (1998).

99. See *id.*

of the U.S. and determine the percentage of Latinas/os in the United States in response to the Latina/o interest group pressure, the 1970 Census focused on the "Spanish heritage population" defined as those with a Spanish surname or Spanish language usage in the five southwestern states, those born in Puerto Rico or within the three Mid-Atlantic states, and those Spanish speaking individuals in the rest of the United States.¹⁰⁰

The 1980 Census attempted to cure the deficiencies of the 1970 Census, which was viewed as identifying Hispanics too broadly and inaccurately.¹⁰¹ The 1980 Census asked individuals to indicate their national origin or ancestry (descent) as Mexican, Puerto Rican, Cuban or other Spanish/Hispanic Origin.¹⁰² A significant number of Latinas/os responding to this census indicated their national origin group in the "other" box for race.¹⁰³ The 1990 Census sought to address this unanticipated response from Latinas/os by requesting a separate racial and ethnicity identification.¹⁰⁴ The 2000 Census contained five racial categories: American Indian or Alaska Native, Asian, Black or African-American, Native Hawaiian or Other Pacific Islander and White.¹⁰⁵ There were two categories for ethnicity: "Hispanic or Latino," and "Not Hispanic or Latino."¹⁰⁶

For census purposes, it is clear that a narrow, biological racial identification is implicit and, as a result, Latinas/os may not be correctly counted.¹⁰⁷ This difficulty is made clear by the fact that "no single set of racial categories has been used in more than two censuses, and most were only used once."¹⁰⁸ The Census Bureau has reported that 40% of Latina/o respondents in 1980 and 1990 "failed to check both a race and an ethnicity box . . . and it is estimated that over 97% of the persons reporting in the "other race" category were Hispanic.¹⁰⁹ One problem is that Latinas/os responding to the census may not identify with the racial categories reflected in the Black-White paradigm

100. See *id.*

101. See Clara E. Rodriguez, *Race, Culture and Latino "Otherness" in the 1980 Census*, 73 SOC. SCI. Q. 930 (1992) (identifying one problem of the 1970 Census, which was that it did not account for Spanish speaking individuals who might not have any ancestors in a Spanish speaking country).

102. See *id.*

103. See *id.* at 932; Michael Omi, *Our Private Obsession, Our Public Sin: Racial Identity and the State: The Dilemmas of Classification*, 15 LAW & INEQ. 7, 14 (1997); Elizabeth Martin et al, *Context Effects for Census Measures of Race and Hispanic Origin*, 54 PUB. OPINION Q. 551, 554 (1992).

104. See generally Michael Omi, *Racial Identity and the State: The Dilemmas of Classification*, 15 LAW & INEQ. 7, 14 (1997).

105. 62 Fed. Reg. 58, 782 (1997).

106. *Id.*

107. See Luis Angel Toro, *A People Distinct from Others: Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 TEX. TECH L. REV. 1219 (1995).

108. Elizabeth Martin et al, *supra* note 103, at 553.

109. Omi, *supra* note 104, at 13.

and incorporated in the census,¹¹⁰ although Latinas/os may view themselves as a separate *racial* group since the overwhelming Latina/o identification as an “other race” (neither Black nor White) implies that Latinas/os possess a *racial* identity that is not reflected in the Census questions. One study found that regardless of how the question is asked about Latina/o origin on the census form, a percentage of Latinas/os did not identify with any of the racial categories listed on the Census Form because they saw themselves as an “Other” race and outside of the distinctive U.S. racial construct.¹¹¹

Another way in which the legal system structures Latinas/os as an indeterminate race is reflected in the narrow definition of race that focuses on biology in antidiscrimination law.¹¹² Race viewed as a biological trait cannot include changeable and voluntarily adopted cultural aspects of identity such as language, accent and customs.¹¹³ The Supreme Court’s interpretation of the Equal Protection Clause of the Fourteenth Amendment similarly protects Latinas/os only to the extent there is discrimination based on national origin as described above.¹¹⁴ Title VII of the Civil Rights Act of 1964 also provides protection against employment discrimination based on national origin that has been interpreted as synonymous with ancestry.¹¹⁵ Currently, the constitutional and statutory protection against national origin discrimination represents the best vehicle for Latinas/os to challenge discrimination, because Latinas/os are not recognized by the Supreme Court as a biological race.¹¹⁶ However, the legal interpretation of national origin is at odds with the plain meaning of the term.¹¹⁷ National origin means the place of one’s birth and is not the same as one’s ancestry, which refers to one’s family history.¹¹⁸ Latinas/os born in the United States, who possess a U.S. national origin, are only protected if there is discrimination based on some characteristic tied to their ancestry. This means that the courts must focus on ethnic traits such as language difference, surname, accent, or other similar characteristic.¹¹⁹

110. Elizabeth Martin et al, *supra* note 103, at 552.

111. *See id.* at 563.

112. *See* Eric K. Yamamoto, *Critical Race Praxis*, 95 MICH. L. REV. 821, 845 (1997) (discussing the limitation of antidiscrimination law and the civil rights paradigm which focuses primarily on White-on-black discrimination).

113. *See id.* at 847.

114. *See, e.g.,* *Loving v. Virginia*, 388 U.S. 1 (1967) (race); *Hirabayashi v. United States*, 320 U.S. 81, 100-01 (1943) (ancestry); and *Hernandez v. Texas*, 347 U.S. 475, 479 (1954) (national origin).

115. *See* *Espinoza v. Farah Mfg*, 414 U.S. 86, 89 (1973) (analyzing the legislative history regarding the definition of the term national origin in Title VII).

116. *See generally* Ruiz Cameron, *supra* note 20.

117. *See* Juan Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571, 574 (1995).

118. *Id.*

119. *But see, e.g.,* *Fragante v. City of Honolulu*, 888 F.2d 591 (9th Cir. 1989), cert. denied, 494

Latinas/os are not fully protected by anti-discrimination law because they do not fit within a narrow biological definition of race that focussed on color and bloodlines, yet they are considered an insider racial group in public policy debates about government benefits, immigration law, affirmative action, and other issues.¹²⁰ The Supreme Court has yet to recognize that culture biases and discrimination against Latinas/os based on language ability, presumed foreignness as non-citizens, and other experiences, are a form of racial discrimination.¹²¹ A key factor in discrimination that has been challenged by Latinas/os is related to Spanish language usage.¹²² However national origin protection under Title VII has not included language discrimination because language, as a changeable trait, is not considered an immutable characteristic.¹²³ Recent challenges to English-only rules in places of employment have contested the idea that language usage is a choice and that an individual can choose to speak only one language when he or she is bilingual or multilingual.¹²⁴

C. *Latinas/os Are Viewed Socially as a Non-White Racial Group and Most Latinas/os Experience Their Lives as Non-White People in The United States.*

Although Latinas/os have become an “indeterminate” minority,¹²⁵ identified at times as Non-White, White,¹²⁶ and non-racial and, therefore, outside of the racial hierarchy, a Non-White racial group identity has been ascribed to Latinas/os.¹²⁷

U.S. 1081 (1990) (finding no violation of the Title VII proscription against national origin discrimination by a plaintiff with a heavy accent).

120. See generally Yamamoto, *supra* note 112 (discussing the limitation of antidiscrimination law and the civil rights paradigm which focuses primarily on White-on-Black discrimination).

121. Racial discrimination for Latinas/os would include the intersection of an ascribed Non-White racial status and such factors as color, class, country of origin, length of U.S. residence, gender, citizenship status, language, indigenous ancestry and culture, the elements of the multidimensional Latina/o identity. See generally Martinez, *supra* note 43.

122. The Spanish language has been identified as an important aspect of Latina/o identity, even for those who are not fluent speakers or even Spanish speakers at all. See Maya Murray, *supra* note 19. See also Angel R. Oquendo, *Reimagining the Latina/o Race*, 12 HARV. BLK.LTR.L.J. 93, 97 (1995) (advocating the Spanish language as a central organizing aspect of Latina/o identity).

123. See *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980).

124. See Cameron, *supra* note 117.

125. I use this term to highlight the role of Latinas/os within the U.S. racial hierarchy similar to the “model minority” label that has been assigned to Asian Americans. See Robert S. Chang, *supra* note 37.

126. Martha Menchaca, *Chicano Indianism*, in *THE LATINO CONDITION, A CRITICAL READER* at 393 (Jean Stefancic and Richard Delgado, eds., 1998) (legislative and court documents from 1848 to 1947 showing that the color of Mexican-origin people strongly influenced whether they were treated under law as White or Non-White).

127. The ascribed Non-White racial identity of Latinas/os is based on the social construction of race, and therefore, racial group. The social construction theory for defining racial identification focuses on the shared experiences of group members and exposes the fallacy of biological race traits determining inevitable

Latinas/os, as a group, are socially constructed as a Non-White racial group.¹²⁸ Professor Haney Lopez has identified three basic factors that determine how social race is created, maintained and experienced in the United States based on the premise that biological race traits do not exist and racial identity is formed by human interaction: (1) chance based on morphology and ancestry;¹²⁹ (2) context based on the social setting in which races are recognized, principally a "Black-White" paradigm that racialized all persons of color as this relates to morphology and ancestry;¹³⁰ and (3) choice about racial identity exercised in a social context ranging from clothing choices to the ability of some individual people of color to "pass" and jump races to a White racial identity.¹³¹ Professor Gotanda has asserted that the key factors used to identify a particular racial

distinctions among racial groups. Racial groups are "groups of people bound together by historically contingent, socially significant elements of their morphology and/or ancestry." Haney Lopez, *supra* note 89. Groups become racialized and are recognized as Non-White in the U.S. when they are defined as inherently inferior either because of traditional notions of genetic differences, or because members of the group are perceived as the products of backward, deficient cultures. See Luis Angel Toro, *A People Distinct from Others: Race and Identity in Federal Indian Law and Hispanic Classification in OMD Directive No. 15*, 26 TEX. TECH L. REV. 1219, 1229 (1995). Many have written about how Latinas/os in general or particular national origin sub-groups, such as Mexicans, have been viewed as a racial group. See, e.g., Sandrino-Glasser, *supra* note 98, at 69 (identifying how race and nationality have been fused to homogenize different Latina/o national origin groups, such as Mexicans, Puerto Ricans and Cubans, and to create a dominant racial identity for Latinas/os as Non-White). Some assume that Latinas/os are a racial group without further explanation. See, e.g., Kevin R. Johnson, *Immigration and Latino Identity*, 19 CHICANO-LATINO L. REV. 197 (1998) (discussing the connection between immigration and the Latina/o group identity, specifically tensions between Mexican-American citizens and Mexican immigrants to the United States); Laura M. Padilla, *Social and Legal Repercussions of Latinos' Colonized Mentality*, 53 U. MIAMI L. REV. 769, 773 (1999) ("[r]acist and discriminatory behavior toward Latinos is clearly deep-rooted").

128. See *supra* notes 16 and 96; *infra* notes 133-153. The Latina/o socially constructed racial identity is based on two facets of the Latina/o racial experience in the United States are unique to the Latina/o community: (1) the incongruence between the Non-White external, social racial identity of Latinas/os and the internal non-racial or White racial identity of many individual Latinas/os; and (2) the legal construction of Latinas/os as an indeterminate racial group identity which renders Latina/o issues and concerns invisible under antidiscrimination law. There are other facets of the social construction of race in the United States shared by all communities of color, e.g. the dominance of an assimilation model to modify the experience of all groups of color and the implicit acceptance by communities of color of a hierarchy of oppression model of racial justice. See also Espinoza & Harris, *supra* note 36, at 1641, and 555 (describing conflict between communities of color that might create an "'oppression sweepstakes'" where each community asserts that its victimization is the worst); Trucios-Haynes, *supra* note 73 (describing how the assimilation model for discussing race relations modifies the experience of all communities of color in the United States).

129. See Haney Lopez, *supra* note 39. Haney Lopez uses the example of Piri Thomas from his autobiography, *Down These Mean Streets*, to illustrate the chance that morphology and ancestry played in Thomas' racial identification both externally and internally. Thomas, a Puerto Rican man of Amerindian, African and Spaniard descent, was dark-skinned like his father although the rest of his family had lighter complexions. Thomas' phenotype did not rigidly place him within the Black-White paradigm when his family lived in Spanish Harlem, however, when the family moved to Babylon, Long Island, Thomas was labeled by his classmates as Black.

130. See *id.*

131. As Ian F. Haney Lopez notes, "Choices about racial identity do not occur on neutral ground, but instead occur in the violently racist context of American society. Though the decision to pass may be made for many reasons, among these the power of prejudice and self-hate cannot be denied." See *id.* at 49.

group can differ among racial groups.¹³² The social view of Latinas/os as a distinct racial group would include such traits as an attributed “foreignness” which may be equated with non-citizenship,¹³³ language, accent, race, color, gender, culture, length of U.S. residence, country of origin, and indigenous ancestry.¹³⁴

The Non-White identity ascribed to Latinas/os has a long history in the United States.¹³⁵ Starting in the 1800's, Mexican-Americans experienced residential segregation,¹³⁶ while Mexican-American children received a segregated education in many parts of the Southwest both before and after *Brown v. Board of Education*.¹³⁷ Mexican-Americans also were commonly referred to as an inferior race in the Southwest.¹³⁸ Further, “Chicanos have been defined as alien to the mainstream white society whose members viewed themselves as a superior European civilization in America.”¹³⁹ The history of this Non-White racial identity is evident from such racial

132. Neil Gotanda has examined racial group identity to describe the position of Asian Pacific Islander Americans and the key factor of the “foreignness” as an element of racial group identity. Gotanda, *supra* note 15, at 1087 (Hyung-Chan Kim ed., 1992). See also Yamamoto, *supra* note 58, at 39 (describing the contingent position of Asians in Hawaii in relation to the native Hawaiian population). Many authors have identified the role that an ascribed foreignness can have on the racialization of groups of color. See Johnson, *supra* note 14, at 1268 and 182 (“Latinos are viewed as foreign to the Anglo-Saxon core of the United States”); Taylor Saito, *supra* note 15; Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71 (1997).

133. The focus on racial group identity where foreignness is a central feature is relevant to Latinas/os. The term “nativist racism” has been used to describe nativist movements in the United States based on the insurmountability of cultural differences which are directed at immigrants who are perceived as Non-White. See Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CAL. L. REV. 1395, 1401-1405 (1997), 10 LA RAZA L.J. 309, 315-19 (1998). Professor Gotanda’s work provides a useful model for situating all groups of color within the U.S. racial hierarchy and identifying forms of economic and social subordination using three ideological characteristics of the social practice of race in the United States underlying the African-American racial category, which differ from the characteristics ascribed to the Asian American racial category: (1) a purely domestic view of race without consideration of international influences; (2) the erasure of prior social identity in terms of tribe, nation and language groups; and (3) the presumption of and identification of biological race traits. See Gotanda, *supra* note 15. But see Moran, *supra* note 38; (challenging the use of a composite image of Latinas/os and Asian Americans as similar in terms of immigration, racialized identity and civil rights remedies).

134. See Siegfried Wiessner, *Esa India! LatCrit Theory and the Place of Indigenous Peoples Within Latina/o Communities*, 53 U. Miami L. Rev. 831, 853 (1999) (referring to the indigenous aspect of Latina/o identity). Other elements of the Latina/o identity that have been identified include the international or transnational aspect of the Latina/o experience. See Celina Romany, *Gender, Race/Ethnicity and Language*, 9 LA RAZA L.J. 49, 49 (1996); Enid Trucios-Haynes, *LatCrit Theory and International Civil and Political Rights: The Role of Transnational Identity and Migration*, 28 Inter-Am L.Rev. 293 (1996-7); Wiessner, *supra* at 853.

135. See Richard Delgado, *Rodrigo’s Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667, 673 (1997); Haney Lopez, *supra* note 40, at 1162 and 76; Sandrino-Glasser, *supra* note 98 (identifying how race and nationality have been fused to homogenize different Latina/o national origin groups such as Mexicans, Puerto Ricans and Cubans, and to create a dominant racial identity for Latinas/os as Non-White).

136. See Martinez, *supra* note 13, at 336.

137. See Perea, *supra* note 46, at 1242-43 and 156-57.

138. See *id.* at 1224 and 138.

practices as the lynching of Mexicans from the 1880s through the 1930s,¹⁴⁰ the use of the term “greaser” as a racial epithet,¹⁴¹ and U.S. government publications warning of the inferiority of Latin Americans who were ninety percent of Indian blood.¹⁴²

Puerto Ricans similarly were viewed as a racial group unworthy of citizenship after the territory was acquired by the United States in the Spanish-American War of 1899.¹⁴³ The concern was expressed in Congress that “millions of negroes” from Puerto Rico would have access to the mainland if American citizenship were granted to the people of Puerto Rico.¹⁴⁴

Today, and “racism burdens the lives of Latinas/os,”¹⁴⁵ and this racism is evident from recent public policy skirmishes about immigration reform where debates regarding immigration are racialized, and view Latinas/os as Non-White in the U.S. racial caste system.¹⁴⁶ One could view the debates about Proposition 187¹⁴⁷ and

139. Luis Angel Toro, *Law and Hispanic Classification*, 26 TEX. TECH L. REV. 1219, 1245 (1995).

140. *See id.* at 1247. Perea, *supra* note 46.

141. *See id.* at 1246.

142. *See id.* at 1247.

143. Sandrino-Glasser, *supra* note 98, at 120.

144. *See id.* at 121 (citing Benjamin Ranger, “WE THE PEOPLE” AND OTHERS: DUALITY AND AMERICA’S TREATMENT OF ITS RACIAL MINORITIES 973 (1983)).

145. Perea, *supra* note 46, at 1225, 139.

146. *See* PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA’S IMMIGRATION DISASTER 9* (1995) (proposing drastic immigration restrictions because of concern that non-citizens are incapable of assimilating in the United States, because of their racial Non-White status). *But see* Kevin R. Johnson, *Fear of an “Alien Nation”: Race, Immigration and Immigrants*, 7 STAN. L. & POL’Y REV. 111, 112 (1996) (noting Brimelow’s book is reflective of a strong anti-Latino sentiment, which reflects the belief that immigrants from Latin America damage and threaten America as a nation). Professor Bill Hing also suggests that the opposition to immigration stems from the belief that the U.S. national identity is based on a White, Western European, Christian identity, which is weakened by continued Latina/o and Asian immigration. *See* Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL L. REV. 863, 870-74 (1993).

147. Proposition 187, *Initiative Statue—Illegal Aliens—Public Services, Verification, and Reporting* (proposed law, Cal. 1994) (codified at Cal. Penal Code §113, 114, 834(b) (West Supp. 1999)); Cal. Welf. & Inst. Code § 10001.5 (West Supp. 1999); Cal. Health & Safety Code § 130 (West Supp. 1999); Cal. Educ. Code § 48215, 66010.8 (West Supp. 1999); Cal. Gov’t Code § 53069.65 (West Supp. 1999). Proposition 187 was an initiative measure, submitted to the voters of the State of California in the November 8, 1994 general election. It was passed by a vote of 59% to 41% and became effective the following day. The purpose of Proposition 187 was to provide for cooperation between the agencies of state and local government with the federal government, and to establish a system of required notification by and between these agencies to prevent undocumented persons from receiving benefits or public services in the State of California. The initiative’s provisions require law enforcement, social services, health care and public education personnel to (i) verify the immigration status of persons with whom they come in contact; (ii) notify certain defined persons of their immigration status; (iii) report those persons to state and federal officials; and (iv) deny those persons social services, health care, and education. *League of United Latin Am. Citizens v. Wilson*, 908 F.Supp. 755 (C.D. Cal. Mar. 13, 1998), *aff’d in part and dismissed in part*, 131 F.3d 1297 (9th Cir. Apr. 21, 1998) (enjoining implementation and enforcement of Proposition 187).

Proposition 209¹⁴⁸ in California, first focusing on immigration and an obviously disenfranchised group, and then moving to anti-affirmative action and other politically weakened groups, as tied to the same racialized opposition to an increasingly diverse society.¹⁴⁹ Thus, Latinas/os are perceived as “illegal aliens” flooding the borders of the United States¹⁵⁰ and abusing the system by obtaining public assistance benefits,¹⁵¹ much like the stereotype of the “welfare queen.”¹⁵²

There is evidence that Latinas/os have begun to recognize the impact of the Black-White paradigm on their lives,¹⁵³ and adopt a racial identity within the Black-

148. Proposition 209, *Discrimination—Public Entities—Initiative Constitutional Amendment* (proposed constitutional amendment, Cal. 1996), enacted as Cal. Const. art. I, § 31 (eliminated group preferential treatment by banning preferences in public employment, public education, or public contracting on the basis of race, sex, color, ethnic or national origin. Proposition 209, was passed by the California electorate on November 5, 1996. It provides: “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. “ Proposition 209 was originally enjoined as a likely violation of the equal protection clause, and that it was preempted by Title VII. *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480, 1499-1510 (N.D. Cal. 1996), *rev'd*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997). The Ninth Circuit found that under rational basis review the measure did “not violate the Equal Protection Clause in any conventional sense” and also did not restrict minorities’ political access. 122 F.3d 692, 702 (9th Cir. 1997).

149. See Lawrence III, *supra* note 46, at 837-38, who notes that “the “code words” of the 1994 political campaigns [included]: criminal, crime rate, inner city, welfare mother, illegal immigrant, social program participant, unqualified candidate, illegitimate children, affirmative action.” He asks the questions:

“Is there any American voter who does not hear the racial subtext of these images? Is there any person of intelligence who cannot recognize the purposeful manipulation of White fears in the tough-on-crime, welfare reform, antiimmigrant rhetoric?”

Id.; Perea, *supra* note 46, at 1225, 139.

150. See Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1544-45 (1995) (noting that “the stereotypical ‘illegal alien’ . . . is a Mexican who has ‘snuck into the United States in the dark of night.’ The image in the minds of many is that of a poor, brown, unskilled, young male.”).

151. See Richard A. Boswell, *Restrictions on Non-Citizens’ Access to Public Benefits: Flawed Premise, Unnecessary Response*, 42 UCLA L. REV. 1475, 1500 (1995) (referring to political debates emphasizing the “stories of aliens who take advantage of one or more forms of public benefits soon after their arrival”). See also *id.* at 1512 (noting that “undocumented immigrants have been blamed for sapping public benefits and bankrupting state and local governments”). See generally Charles Wood, *Losing Control of America’s Future – The Census, Birthright Citizenship, and Illegal Aliens*, 22 HARV. J.L. & PUB. POL’Y 465, 494-495 (1999) (asserting that the children of undocumented women who are U.S. citizens because of their birth in this country “deprive the American people of the ability to determine the future of their own nation, including its demographic and cultural characteristics.”). The idea that the United States is losing its national identity, and therefore immigration policies be enacted that reinforce this country’s cultural history, has been identified by many scholars as the desire to maintain a White national identity within the United States. See, e.g., Hing, *supra* note 146, at 873-74.

152. Lisa A. Crooms, *Don’t Believe the Hype: Black Women, Patriarchy, and the New Welfareism*, 38 HOW. L.J. 611, 622 (1995) (“The image of the welfare queen [is] that of a poor, black mother who first became pregnant as a teenager. Her sexual irresponsibility resulted in her dropping out of school and joining the AFDC rolls. Rather than marry the child’s father and make the best of the situation, she chose to remain single, collect AFDC and have more children by different fathers.”).

153. See, e.g., Mutua, *supra* note 17, at 1204 (noting that many Spanish-speakers feel forced to

White paradigm of the United States.¹⁵⁴ The current acculturation process of second generation Latinas/os includes feeling forced to identify as members of a Non-White racial group using a White-over-Black construct.¹⁵⁵

Some scholars have advocated that Latinas/os acknowledge this Non-White racial identity, in order to facilitate in the coalition building process with other Non-White communities. For example, Bill Piatt has stated that the coalition building process with Blacks requires that Latinas/os acknowledge their Non-White identities because Latinas/os reinforce White supremacy when they claim to be White.¹⁵⁶ George Martinez has stated that "Mexican-Americans should embrace a non-white identity to facilitate coalition building with African-Americans."¹⁵⁷ Martinez finds that the legal construction of Mexican-Americans as White has generated tensions that "form a barrier to coalition building" between African-Americans and Latinas/os.¹⁵⁸ Martinez describes how Mexican-Americans have been characterized as "free riders" by African-Americans, who assert that they have fought for civil right, while "Mexican-Americans have ridden their coat tails and share in the benefits." Other Latina/o scholars assume the Latina/o position as a racially subordinated group, without discussing the contested nature of that assertion.¹⁵⁹

D. *The Indeterminate Latina/o Group Racial Identity Permits the Exploitation of Racial Fears and the Manipulation of Racial Issues.*

A Latina/o indeterminate group racial identity facilitates the manipulation of the Latina/o image to exploit racial fears. Latinas/os, on one hand, are characterized as an integral part of racial problems in the United States, yet legal remedies for race discrimination do not include this reality experienced by most Latinas/os.¹⁶⁰ This incongruence between law and reality harms Latinas/os directly not only by limiting antidiscrimination remedies, but also by manipulating our group image to increase fears of a growing Non-White population in the United States.

A Latina/o indeterminate group racial identity permits the portrayal of

learn English in order to avoid oppression by Whites).

154. See Rodriguez, *supra* note 10.

155. See Rachel F. Moran, *Bilingual Education, Immigration, and the Culture of Disinvestment*, 2 J. GENDER RACE & JUST. 163, 208 (1999) (discussing study of children of immigrants in San Diego, California many of whom "linked their ability to become American to their racial identity" and expressed the "view that a non-White identity was an impediment to being fully American"); Alejandro Portes & Min Zhou, *Should Immigrants Assimilate?*, PUB. INTEREST 116, Summer 1994, at 18, 19-20 (noting the Non-White racial group identity ascribed to newer immigrants limits assimilation).

156. See PIATT, *supra* note 6, at 156-179.

157. Martinez, *supra* note 17, at 214.

158. See *id.* at 215.

159. *Id.*

160. See *supra* notes 121-125 and accompanying text.

Latinas/os as a substantial part of larger racial problems, making these issues appear much more threatening or intractable. Latinas/os can be characterized as another racial minority taking advantage of the system in such areas as affirmative action and social welfare benefits. The code words designed to inflame racial fears in public policy discussions about such issues include “urban crime”, “illegal alien”, and “welfare queen”, “wetbacks giving birth to U.S. citizen babies.”¹⁶¹ Opposition to increased legal immigration has focused on the threat of a larger Non-White population, specifically a larger Latina/o and Asian population.¹⁶² Latinas/os are implicated either explicitly or implicitly as part of the problem.¹⁶³

Recent legislation reflects this racialized fear of a larger Latina/o population in the United States. For example, anti-immigrant measures such as California’s Proposition 187 would have limited access to public education, health and social welfare benefits by undocumented persons in California.¹⁶⁴ Federal legislation limited social welfare benefits to both documented lawful permanent residents as well as undocumented immigrants.¹⁶⁵ Such legislation demonstrates the hysteria of the sentiment that the United States has lost control of its borders, not just because of the problem of undocumented workers coming from Latin America, but because of the color of these workers.¹⁶⁶ Proposals to limit birthright citizenship that is accorded to the United States born children of undocumented persons also exemplify the desire to limit Latina/o participation because U.S. citizen children born of undocumented parents is perceived as a Latina/o issue.¹⁶⁷

The Latina/o image is used to increase racial fears when Latinas/os are viewed as an impetus to further balkanization among racial groups. The belief that amendments to the immigration laws have permitted greater immigration of Latinas/os and Asians since 1965, and therefore has caused increased balkanization among racial groups, relies on a Non-White Latina/o identity.¹⁶⁸ The offered antidote to this problem is a limitation on legal immigration.¹⁶⁹

161. See *supra* notes 150-152 and accompanying text.

162. See BRIMELOW, *supra* note 146.

163. See, e.g., Johnson, *supra* note 127.

164. See *supra* note 148.

165. See Personal Responsibility and Work Opportunity Reconciliation Act (re-1996) (codified as amended at 42 U.S.C.A. § 601 et seq. (1997)); Illegal Immigrant and Immigration Reform Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.).

166. See Kevin R. Johnson, *supra* note 127; *Panel to urge abolishing INS: other Agencies could perform its duties, report says*, THE DALLAS MORNING NEWS, Aug. 5, 1997 at 3A, 1997 WL 11510084 (“Congress and many of the nation’s governors are growing increasingly exasperated with the immigration service’s inability to cope with soaring requests for citizenship and crack down on undocumented immigrants.”).

167. See BRIMELOW, *supra* note 146.

168. See *id.*

169. See *id.*

The 1965 Amendments to the Immigration and Nationality Act formally shifted the focus of immigration policy from national origin to family reunification.¹⁷⁰ Before 1965, discriminatory national origin quotas favored the entry of northwestern European immigrants into the United States.¹⁷¹ As a result, immigrants from other parts of the world were often excluded. The 1965 amendments to the Immigration and Nationality Act, enacted one year after the passage of the 1964 Civil Rights Act,¹⁷² were heralded as an integral part of the civil rights movement seeking equality for all noncitizens in the immigration laws. This shift in policy has become the source of much of the criticism of immigration policy today, because of the racial character of the immigrant stream since 1965.¹⁷³ The immigrant population within the last decade has been dominated by Asian/Pacific Islanders and Latino/as,¹⁷⁴ with 48% of all immigrants to the United States coming from Asian/Pacific Islander countries.¹⁷⁵

The link between immigration policy and balkanization among groups, particularly schisms between the African-American community and the Latina/o community, has been highlighted by those seeking to limit the current streams of immigration, predominantly Asian and Latina/o.¹⁷⁶ It has also been noted that immigration policy became such a divisive issue in the 1990s because of the increased Asian and Latina/o immigration and U.S. Census Bureau predictions that the White population of the United States could become a racial minority.¹⁷⁷

170. Act of October 3, 1965, 79 Stat. 911. The 1965 amendments to the Immigration and Nationality Act eliminated the national origins quota system, a system that assigned immigrant visa availability based on national origin of the populations groups that had immigrated to the United States by the early twentieth century.

171. See Johnson, *supra* note 150, at 1547-48.

172. 42 U.S.C. § 2000a-2000h (1988) [prohibiting racial discrimination in voting (Title I); public accommodations (Title II); public facilities (Title III); public schools (Title IV); federal funded programs (Title VI); government employment (Title VII)].

173. See Johnson, *supra* note 150 (noting that lawful immigrants have been coming increasingly from developing nations since Congress lifted quotas on immigration in 1965).

174. In 1991, Mexicans comprised 63% of the Latino/a population, Puerto Ricans 11% and Cubans 5%. NATIONAL COUNCIL OF LA RAZA, THE STATE OF HISPANIC AMERICA 1991: AN OVERVIEW 1 (1992).

175. BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850 - 1990 54, 53-61 (1993) [hereinafter *Immigration Policy 1850- 1990*]. In 1990, the United States Asian/Pacific Islander American population included 850,000 Japanese Americans, 1.65 million Chinese Americans, 1.4 million Filipino Americans, 800,000 Korean Americans, and 1.01 million Southeast Asians. See also Paul Brest & Miranda Oshige, *Affirmative Action for Whom*, 47 STAN. L. REV. 885, 892 n.240 (citing YEN LE ESPIRITU, ASIAN AMERICAN PANETHNICITY: BRIDGING INSTITUTIONS AND IDENTITIES 105 (1992)).

176. See, e.g., Perea, *supra* note 46, at 1230 and 140 (pointing out how there is "a widespread sense that immigrant Latinos/as are displacing Blacks.").

177. See also Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. LAW & POL'Y REV. 35, 36 (1996) (proposing that immigration policy be limited by constitutional restrictions and viewed as a civil rights issue)

II.

LATINAS/OS HAVE EMBRACED AN INDETERMINATE RACIAL IDENTITY IN
 THE UNITED STATES BECAUSE LATINA/O RACIAL IDENTITY IN THE
 UNITED STATES IS SHAPED BY CONCEPTIONS OF RACIAL IDENTITY
 EXTERNAL TO THE U.S. BLACK-WHITE PARADIGM.

Even though most Latinas/os in the United States are treated as a Non-Whites, racial diversity within the Latina/o community has led Latinas/os to accept an indeterminate racial identity. The diversity of the Latina/o peoples in the United States confounds efforts to create a group identity.¹⁷⁸ The dynamics of Latina/o identity are fluid and include Spanish, African, and Amerindian cultures, and conquest by both the English and Spanish.¹⁷⁹ We are: recent immigrants and people whose families lived in the United States for generations; people from many different nations in Latin America, although the largest groups are from Puerto Rico, Cuba and Mexico; citizens, refugees, legal residents and undocumented workers; people of mixed race ancestry, primarily a combination of Amerindian, African and Spaniard peoples, as well as part Anglo-American; people with varied language skills who are fluent in the Spanish language, speak an indigenous language, or only speak English; and people born in one of the many nations of Latin America or born in the United States.¹⁸⁰

The diversity of Latinas/os is further reflected in the fact that many Latinas/os do not identify with the strict division between Black and White in the United States.¹⁸¹ For many, the Black-White paradigm is a U.S. phenomenon that is largely irrelevant to their own racial identity.¹⁸² Many Latinas/os identify themselves within a racial hierarchy in Latin American, which is imported to the U.S. and passed onto successive generations.¹⁸³ Many, if not all of the countries of Latin America, as well as the

178. See Ilan Stavans, *Life in the Hyphen*, in *THE LATINO CONDITION, A CRITICAL READER* 32, 34 (Jean Stefancic and Richard Delgado, eds. 1998).

179. See Suzanne Oboler, *Hispanics? That's What They Call Us*, in *THE LATINO CONDITION, A CRITICAL READER* 3,4 (Jean Stefancic and Richard Delgado, eds. 1998). See also e.g. Oquendo, *supra* note 93, at 97 (noting that Latino is short for "latinoamericano" and strictly refers to people from countries in the Americas colonized by Latin nations (Portugal, Spain and France) which would include French-speaking countries of the Caribbean, but not former British or Dutch colonies). See generally, e.g., Enid Trucios-Haynes, *Latinas/os In The Mix: Applying Gotanda's Models of Racial Classification and Racial Stratification*, 4 *ASIAN L.J.* 39, 39 (1997).

180. See generally Alejandro Portes, *From South of the Border: Hispanic Minorities in the United States*, in *IMMIGRATION RECONSIDERED: HISTORY, SOCIOLOGY AND POLITICS* 160 (Virginia Yans-McLaughlin ed., 1990) (reporting the diverse experiences of Mexican-American, Puerto Rican and Cuban-American communities in the United States).

181. See *supra* Part II (A); notes 111-112 and accompanying text.

182. See *id.*

183. See Rodriguez, *supra* note 10, at 131-132. See also, e.g., Wiessner, *supra* note 134, at 838 (describing the use of a negative stereotype of an "Indian" used by an individual who was from Chile, a country where few Amerindians lived).

Caribbean, also have entrenched color and racial barriers to full participation.¹⁸⁴ Thus, the collective racial history of Latinas/os in the United States includes experiences from Latin America and the Caribbean, as well as experiences in the United States.¹⁸⁵ Some scholars have pointed out that Latinas/os have a fundamentally different view of race, which might offer an alternative, more inclusive paradigm for racial group identification because of the Latin American paradigm.¹⁸⁶

Racial identity is ascribed to individuals differently in Latin America in comparison to the United States.¹⁸⁷ In Latin America, there is no sharp dividing line between Black and White.¹⁸⁸ Rather, race is viewed on a "continuum with no fixed demarcation between categories," with an individual's racial identification subject to change based on "social variables . . . such as education and class."¹⁸⁹ Racial identity is more "fluid" than the rigid categories that are identified in the Black-White paradigm in the United States, where differences among Whites and among Blacks are subordinated to this dividing line.¹⁹⁰

Latinas/os who understand their racial identification within the Latin American

184. See Estelle T. Lau, *Can Money Whiten? Exploring Race Practice in Colonial Venezuela and its Implications for Contemporary Race Discourse*, 3 MICH. J. RACE & L. 417 (1998) (describing a system of racial exemptions purchased by Non-Whites from the Crown to officially proclaim a White racial heritage and all of the social advantages attached thereto); Matt Moffett, *The Ad Boys of Brazil Discover They Aren't In Sweden Anymore*, WALL ST. J., Dec. 30, 1998, at A1 (describing the limited opportunities for Black models in Brazil despite the fact that 44% of the population is Black or mixed race). See generally Peter Wade, *Race and Class: The Case of South American Blacks*, 8 ETHNIC & RACIAL STUD. 233, 235 (describing the function of race in Latin America as making barriers more inflexible in a stratified class system and limiting social mobility).

185. There are racial barriers in the United States that operate against Latinas/os more explicitly for those individuals and groups who are perceived to be more African. See Laura E. Gomez, *Constructing Latina/o Identities*, 19 CHICANO-LATINO L. REV. 187, 190 (1999) (noting that LatCrit can be instrumental in confronting racism both historically and present, against Latinas with a more noticeable Indian or African ancestry in comparison to those who identify or are identified by others as more Spanish or European); Tanya Kateri Hernandez, "Multiracial" Discourse: Racial Classification in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97, 136-138 (1998); Thomas J. Sugrue, *Expert Report, Reports Submitted on behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 261, 300 (1999) (finding that Black Latinas/os are worse off in terms of poverty in the United States as a consequence of a long subordinate status in most Latin American countries, and because they face similar discrimination by color that affects African-Americans in the United States).

186. See, e.g., Hernandez-Truyol, *supra* note 25; Francisco Valdes, *supra* note 47, at 8-9. See also, e.g., Francisco Valdes, *Under Construction: Lat Crit Consciousness, Community and Theory*, 10 LA RAZA L.J. 1, 21-22 (1998), 85 CAL. L. REV. 1087, 1107-08 (1998) (introducing the symposium devoted to LatCrit theory as a genre of critical legal scholarship and as a new voice in outsider scholarship).

187. See Hernandez-Truyol, *supra* note 25; Rodriguez, *supra* note 10, at 131-32.

188. See *supra* note 10.

189. See Rodriguez, *supra* note 10, at 131. See also, e.g., Clara E. Rodriguez & Hector Cordero-Guzman, *Placing Race in Context*, 15 ETHNIC & RACIAL STUD. 523, 527 (1992) (citing Nancy Denton & Douglas S. Massey, *Racial Identity Among Caribbean Hispanics: The Effect of Double Minority Status on Residential Segregation*, 54 AM. SOC. REV. 790 (1989), which discussed the elements of the Spanish colonial system that contributed to a greater blending of the people of the Spanish Caribbean).

190. See Rodriguez, *supra* note 10, at 131.

paradigm may themselves contribute to the indeterminate racial identity ascribed to the group in the United States because they do not see how they fit within the Black-White paradigm. The imposed U.S. racial identification process, emphasizing phenotype or color, creates a dual identity for many Latinas/os.¹⁹¹ There is an internal cultural identity, for example as a Latina/o or Puerto Rican, and an external racial identity, as Black or White.¹⁹² A conflict between internal and external identification may occur when Latinas/os, who are externally constructed as a racial group in the United States, may possess a contrary internal racial identification.¹⁹³ Those Latinas/os who do not recognize the hegemony of the U.S. construct may view themselves as outside of the system of White supremacy.¹⁹⁴ According to Professor Hernandez-Truyol, race in the Black-White paradigm and the “Latina/o” racial construct represent “polar opposite” views of race.¹⁹⁵ In comparison to the U.S. rule of hypodescent that ascribes a Black racial identity to persons who possess one drop African blood, the Latin American construct reflects an hypodescent rule for whiteness, where one drop of White blood can attribute a White racial identity.¹⁹⁶

Latina/o indeterminate racial identity may be the product of coexisting dual racial paradigms resulting in perceptual dissonance between internal and external racial identification when the Black-White racial paradigm is secondary to cultural-racial identification.¹⁹⁷ Migration between locales with different racial paradigms may also influence internal racial identification.¹⁹⁸ When an individual moves from one place

191. See *id.* at 141 (noting that for many Latinas/os “their world was inverted: their racial appearance became more important than their culture.”).

192. See *id.* at 138-141. See also, e.g., Clara E. Rodriguez, *Puerto Ricans: The Rainbow People*, in *RETHINKING TODAY'S MINORITIES* 87, 106-107 (Vincent N. Parillo ed., 1991) (noting that the definition of a person as Latino connotes for some a subtle but often undefined and ambiguous racial difference).

193. See Hernandez-Truyol, *supra* note 25, at 898, 904-905.

194. The U.S. Census responses of Latinas/os support this. It is estimated that more than 97% of the persons who identified themselves as “other race” in the 1990 Census were Latinas/os who simply do not see themselves as fitting within the U.S. construct. Omi, *supra* note 104, at 14.

195. See Hernandez-Truyol, *supra* note 25, at 897.

196. [C]aribenos/os subscribe to the notion of blanqueamiento (Whitening) — ironically also a “one-drop” rule of sorts. However, under the caribena/o perspective, one drop of White blood starts you on the route to acceptability also constructed as Whiteness. Only this caribena/o approach to race can explain statistical reports that approximately 95% of persons identifying themselves as Latina/o also identify themselves as White. Considering that, “[a]s a matter of fact most Latinas/os are racially mixed, including combination of European White, African Black and American Indian,” an NLW [non-Latino White] outlook would yield sensationally contrasting results. Indeed, by NLW standards, it is an impossibility that 95-97% of Latinas/os are “White,” although this is Latinas/os own reality. *Id.*

197. See Clara E. Rodriguez & Hector Cordero-Guzman, *Placing Race in Context*, 15 *ETHNIC & RACIAL STUD.* 523, 538-39 (1992) (noting the difference between individual racial classification and the classification identified by the interviewer where the interviewer classified a respondent as Black, White, or Other and the individual respondent identified himself within a different racial category from that identified by the interviewer).

198. See *id.* at 525-526 (studying Puerto Ricans because they are perceived to have adopted a Latin American continuum racial paradigm with fluid racial categories, and because they are a group that has

with a particular racial paradigm, such as Latin America, to another place with a different racial paradigm, does she adopt dual racial paradigms, or does she adhere to her own perceptions of race?¹⁹⁹ One study confirms that Latinas/os possessing a more African phenotype have adopted a U.S. understanding of racial identity.²⁰⁰ It has been suggested that one indication of whether Latinas/os are assimilated in the United States is whether they identify themselves using U.S. racial referents.²⁰¹

The incongruence between internal and external racial identification is important because racial identity as a group, or as an individual, is a composite of these forms of identification.²⁰² External identification of Latinas/os is an integral aspect of the group image, and external identification is affected by many factors such as the informal meanings associated with a particular identity.²⁰³ In comparison to internal identification, which may reflect an individual's choice of racial group assignment, external group identification in many instances is not a matter of choice.²⁰⁴ The disconnect between internal identification and external identification may obscure the fundamental nature of the Black-White paradigm within the United States, and obscure its impact on individual Latinas/os.²⁰⁵ This lack of individual recognition must be challenged and examined in the context of the general understanding that Latinas/os are Non-White within the larger racial framework in the United States.²⁰⁶

significant contact with the U.S. Black-White racial model. Puerto Rico also shares a similar history with the United States, including African slavery, and a clear demarcation between free Whites and slaves).

199. *See id.* at 537-38. (noting that some respondents used a dual racial paradigm that incorporated culture as racial identity, e.g. Puerto Rican race, and one that is based on appearance and biological referents as used in the United States).

200. *See Rodriguez, supra* note 10, at 140-41.

201. *See id.* *But see Moran, supra* note 156, at 206-208.

202. Racial group identification further reflects creative choices of individuals and groups defining themselves and others. *See Joane Nagel, Constructing Ethnicity: Creating and Recreating Ethnic Identity and Culture*, 41 SOC. PROBS. 152, 152 (1994) (commenting that social scientists are rethinking models of group identity that are rooted in assumptions about the inevitability of assimilation, and models today emphasize the social construction of groups for which boundaries, identities and cultures are negotiated, defined, and produced through social interaction inside and outside communities).

203. *See id.* at 156 (noting that informal meanings associated with identity would include the day-to-day racism experienced by middle class Black Americans, which demonstrates the informal social ascription. Despite economic success, there are incidences of hostility, suspicion, and humiliation in public and private interactions with non-Blacks, which illustrate the power of informal meaning to shape interethnic relations).

204. *See id.* (noting that group identity is both optional and mandatory because individual choices are circumscribed by the categories which are generally socially and politically defined categories with varying degrees of stigma or advantage attached to them).

205. *See id.* (noting the power of race as a socially defining status in U.S. society that can make intra-racial distinctions such as ancestry or skin tone unimportant in interracial settings because of "the fundamental "black/White color boundary").

206. Deflected racial classification can also affect individual racial identity. An individual's external racial identification can be affected by deflected racial classification. Deflected racial classification can occur when one member of the family does not look White- European, which results in reclassifying an entire family as Black when some members of the family may be more White-European in appearance. As a result,

Although Latinas/os as a group are constructed with a racial identity within the Black-White paradigm, some assert that the Black-White paradigm may never become flexible enough to incorporate the diverse experiences of Non-White groups.²⁰⁷ The dominance of the Black-White paradigm is a concern for Latinas/os to the extent that Latina/o issues are rendered invisible within it, and Latinas/os do not find it meaningful to describe their experiences in the United States.²⁰⁸ One Latino scholar claims that placing Latinas/os within the Black-White paradigm would represent a “false social reality” because Latinas/os are comprised of not only diverse races, but also diverse ethnicities, genders, religions, cultures, nationalities, classes, abilities and sexualities, but also noting that race and ethnicity are necessary components of LatCrit anti-subordination analysis.²⁰⁹ Other Latina/o scholars have advocated a rejection of a race-based strategy modeled on the African-American civil rights approach, which reflects the paradigm, because of its limited utility, in many instances, for Latinas/os who are not considered a racial group under United States law.²¹⁰

There is a concern that the true diversity of Latinas/os must be incorporated in any racial construction of the group.²¹¹ For example, Professor Hernandez-Truyol rejects the dominant legal paradigm that focuses on identity based on a single attribute, such as race or gender.²¹² Latina/o multidimensionality, she asserts, can not be addressed within this paradigm.²¹³ Professor Hernandez-Truyol proposes a LatCrit theoretical model that focuses on the internal identification of Latinas/os to reflect the multidimensionality of Latinas/os.²¹⁴ Others have discussed the multidimensional identity of Latinas/os, and the diversity of national origin groups within the Latina/o

a racial identity may be attributed to all family members based on the appearance of one family member. Deflected racial classification also occurs when children are used as a racial identifiers for the entire family. See Rodriguez, *supra* note 192, at 107.

207. See Perea, *supra* note 46, at 1219-32 and 133-46. See also Moran, *supra* note 26, at 10; Moran, *supra* note 38, at 1339-42 and 253-56.

208. See *supra* note 208.

209. See Valdes, *supra* note 186.

210. See Johnson, *supra* note 45, at 73; Moran, *supra* note 26, at 10.

211. See, e.g., Hernandez-Truyol, *supra* note 54, at 405 (referring to the “insensitivity and the under and over-inclusiveness of any generic Latina/o categorization and the homogenization it engenders [to] further the myth of a monolithic latina/o identity” which ignores the fact that latinias/os are a racially and culturally diverse group).

212. See Hernandez-Truyol, *supra* note 25, at 883-84.

213. See *id.* (noting the Latina/o multidimensionality accounts for individuals who are a combination of races, or are one race, but also a particular gender, nationality, color, or language skills level). Others have written about the need to recognize multiracial and multipositioned people as separate and distinct groups. See e.g., Ruth Colker, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW 8-9 (1996); Kateri Hernandez, *supra* note 185, at 104 n.34 (identifying other scholars who discuss the positive and negative aspects of a multiracial census category).

214. See Hernandez-Truyol, *supra* note 25, at 884.

community, which makes a common identity difficult to construct.²¹⁵

The idea that an individual can possess a layered identity has been addressed by social scientists.²¹⁶ This layered identification does have a racial meaning within the Black-White paradigm.²¹⁷ A Cuban can be either White or Black. For example, Marielitos have been characterized as “poorer, less educated, and mostly black or mixed Cubans.”²¹⁸ Under Professor Hernandez-Truyol’s theory, Latina/o diversity requires that multidimensionality be at the center of the LatCrit paradigm to address the diversity of Latinas/os and the layered identity of Latinas/os.²¹⁹ In contrast, others assert that the Black-White paradigm may be broadened to include the multidimensionality of Latinas/os within the dominant race construct in this society.²²⁰

Acknowledging race as an overarching concept that structures Latina/o lives in the United States, which can be a means of solidarity with other groups of color, is not inconsistent with recognizing the diversity of Latina/o people.²²¹ Despite the concern about the limits of any single categorization to capture the diversity of national origins, citizenships, and languages that exists in the Latina/o communities of the United States, there are examples of constructed political, cultural and racial identities that bridge these differences. For example, common references to Asian Pacific Islander Americans or African-Americans similarly mask the diversity within these communities.²²² It is perhaps the hope of LatCrit Theory that we can help redefine the relevant terms to include the Latina/o position. However, we must also recognize that no single word will ever fully reflect the diversity of our community. For example, the term Asian-American ignores the long history of racial oppression of Chinese immigrants as distinguished from that suffered by the Japanese, and further is distinct from the experiences of newer immigrants, such as the Vietnamese and other groups.²²³

215. See, e.g., Stavans, *supra* note 178 (referring to the forces that have kept a group identity as Latinos/as from forming, including the reality of distinct geographical settings, primarily urban for Puerto Ricans, and rural for Mexican-Americans.).

216. See, e.g., Joane Nagel, *Constructing Ethnicity: Creating and Recreating Ethnic Identity and Culture*, 41 SOC. PROBS. 152, 155 (1994) (noting that layered identity is reflected in the Native American, Asian American and Latina/o communities, where, for example, an individual of Cuban ancestry may be a Latina vis-à-vis non-Spanish speaking groups, a Cuban-American vis-à-vis other Spanish-speaking groups, a Marielito vis-à-vis other Cubans, and White vis-à-vis African-Americans).

217. See *id.*

218. See Sandrino-Glasser, *supra* note 98, at 89.

219. See Hernandez-Truyol, *supra* note 25, at 884-85.

220. See Haney Lopez, *supra* note 40; Martinez, *supra* note 17.

221. See E. Christi Cunningham, *The “Racing” Cause of Action and The Identity Formerly Known as Race: The Road to Tamazunchale*, 30 RUTGERS L.J. 707, 714-15 (1999).

222. See, e.g., Chang, *supra* note 37, at 1260-61 (noting how the model minority myth of Asian Americans does not address the relative assimilation and economic success of each different Asian community in the United States, including Japanese, Chinese, as well as more recent immigrants such as the Vietnamese).

223. See generally *id.*

Some LatCrit scholars appear ready to adopt the Latin American conception of race as a key aspect of the Latina/o position in the United States because of its apparent inclusiveness and lack of fixed lines of demarcation.²²⁴ We should be cautious about advocating a Latin American understanding of racial identity. The Latin American race construct embodies the same spectrum of subordinated groups: Black or indigenous people at one end of the spectrum, and Whites, who hold themselves out to be more or entirely “Spaniard” at the other privileged end.²²⁵ The Latin American version reflects a “White-over-Black” racial construct despite the relative lack of fixed racial categories and ease of movement into a different category.²²⁶ In Latin America race matters and, if an individual is perceived as Non-White, racial identification adds an additional hurdle to social advancement and upward mobility by requiring racial as well as economic integration.²²⁷ Race introduces a certain fixed element of identity in Latin America and is a significant element in the processes of social mobility.²²⁸

Latina/o scholars also should be wary of advocating an alternative racial construct that may reinforce White supremacy. Latinas/os asserting a White racial identity may reflect the forces of White supremacy throughout Latin America and the incorrect perception that adoption of a Non-White racial identity for Latinas/os within the United States is voluntary.²²⁹ Although some Latinas/os may not experience the full

224. The relative ease of moving from one category to another does not eliminate the racial hierarchy. Whiteness can be achieved through education and social status. Still though, Black or Amerindian classification remains the least desirable. This idea of “blanqueamiento” has been characterized as the Latin American equivalent of racial passing and a mechanism for integration and assimilation. See Wade, *supra* note 184, at 243. See also Estelle T. Lau, *Can Money Whiten? Exploring Race Practice in Colonial Venezuela and its Implications for Contemporary Race Discourse*, 3 MICH. J. RACE & L. 417 (1998).

225. See Rodriguez, *supra* note 10 (“The emphasis on the racial superiority of White Europeans during Spain’s colonization period became part of Spain’s legacy in Latin America.”). The self-perception that one is Spaniard rather than mixed race is one that appears to be common among Latinas/os. My father’s family is fond of speaking of our Spanish ancestry [there are towns near Bilbao, Spain called Trucios and Villaverde de Trucios], while ignoring our indigenous and mixed race heritage [my grandmother was from Panama - a woman of Amerindian, African and White ancestry]. I identify myself as a Black Latina. See also Kevin R. Johnson, *Race, Ethnicity, & Nationhood: “Melting Pot” or “Ring of Fire”?: Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259, 1272-73 (1997), 10 LA RAZA L.J. 176, 186-87 (1998) (noting his mother’s and grandmother’s self-identification as Spanish, rather than Mexican).

226. The “White Over Black” construct might need to be altered to: “White-Over-Black/Amerindian” to reflect the full force of the Latin American version. See generally Siegfried Wiessner, *Esa India! LatCrit Theory and the Place of Indigenous Peoples Within Latina/o Communities*, 53 U. MIAMI L. REV. 831 (1999).

227. See Wade, *supra* note 184, at 243 (study of race classification and the burden on Afro-Latinas/os in South America).

228. See *id.* at 245 (asserting that race is not a secondary factor to class in terms of discrimination, and that both racial and economic integration must occur for South American Blacks to be truly integrated).

229. The voluntariness of racial identification is contested. Although the Latin American racial construct appears to emphasize voluntariness because of the ability to move from one racial category to another, there are more fixed racial categories in the United States. See Joanne Nagel, *Resource Competition Theories*, 38 AM. BEHAV. SCIENTIST 442 (1995). In the United States racial classification is often assigned by government actors without an individual’s participation. In Louisville, Kentucky I have been assigned polar opposite racial classifications by the same government actor. In December 1997, I received two traffic citations in a two week period. The traffic citation notes the race of the individual and on one citation I was marked as Black. I instructed the officer to check both Black and Hispanic. The second citation marked me as White,

force of racism because they are not perceived as Non-White, particularly some mixed Anglo-Latinas/os, this is not the experience of many Latinas/os.²³⁰ Also, the perceived choice of being White or Non-White within the U.S. system, may be tied to the racialized identity of different Latina/o national origin groups in this country. That is, to refer to oneself as Cuban, prior to the 1980s and the Marielito Cuban migration,²³¹ may have signified a White racial identity. The existence of an expanded and clearly multiracial Cuban population in the United States, may change the voluntariness of racial identification.²³² Individuals from Puerto Rico and the Dominican Republic where there is a much larger Black community, may not possess a choice regarding racial identification.²³³ As a result, individuals from these national origin groups may possess both an internal and external racial identification that aligns with the U.S. Black-White paradigm.

LatCrit theory can be a means to acknowledge and inform our community that hypodescent rules for Blackness in the United States, and blanqueamiento for Whites in Latin America, are twin concepts representing a distinction without a difference.²³⁴

White supremacy is international and perhaps LatCrit theory can incorporate this perspective. This is only possible, however, if we are willing to see the comparable structures for what they are: different versions of the same process. The uniquely Latina/o racial identification process is important because it is enmeshed within Latina/o politics in the United States, and because LatCrit theory seeks to address transnational issues.²³⁵

and I again instructed the officer to correct the citation. I became aware of the possibility that I might be assigned a racial category on government forms different from my own identification when my son was born in a Louisville hospital in March 1997. The nurses were filling out the birth certificate form and had marked that he was White, and one of the Black nurses told my husband and I that they were incorrectly classifying my son as White. My husband, who was present at the birth and who was at the hospital virtually the entire two day period that I was there, is a dark-skinned Black man. I am often seen as biracial. We corrected the birth certificate.

230. See *supra* note 186. See also Johnson, *supra* note 225 and 197 (noting that many Anglo-Latinas/os experience microaggressions in the form of racist statements made in front of them, or the assumption that they are not really "Latina/o" because of their more White appearance).

231. Cuban migration to the United States has occurred in waves. "The fourth wave of Cuban immigrants arrived in 1980, in what is generally known as the "Mariel boatlift," and those coming were referred to as "Marielitos." See Sandrino-Glasser, *supra* note 98, at 85. The popular images of the Marielitos characterized them as "poorer, less educated and mostly black or mixed Cubans, with a large percentage being either criminal or mentally ill." *Id.*

232. See generally, e.g., Rodriguez, *supra* note 226.

233. See generally *id.*

234. See Caldwell, *supra* note 2, at 62.

235. See Romany, *supra* note 134, at 49; Enid Trucios-Haynes, *International Law, Human Rights, and LatCrit Theory: The Role of Transnational Identity and Migration*, 28 INTER-AM L.REV. 293 (1996-7); Wiessner, *supra* note 134, at 853.

IV.

THE IMPACT OF LATINA/O INDETERMINATE RACIAL STATUS

A. *Discrimination Against Latinas/os is Ignored Because of the Indeterminate Latina/o Group Racial Identity.*

The Latina/o indeterminate racial group identity permits discrimination against Latinas/os to be ignored and remain unremedied. This occurs because the dominant Black-White paradigm structures discourse about all racial issues, and discrimination against Non-Whites who are not Black becomes nearly invisible. Discrimination against Non-Whites who are not Black under this paradigm is identified as less problematic than discrimination against Blacks. For instance, the classifications that predominantly impact Latinas/os are not viewed as discrimination against a racial group and, therefore is more easily justified because it seemingly may focus on some “legitimate” reason for distinctions between Latinas/os and Whites such as language ability.²³⁶ Discrimination based on language ability may be unremedied under antidiscrimination law because it is not perceived as race-based.²³⁷

Under current antidiscrimination law, Latinas/os are protected only so much as the discrimination is based on national origin. The guidelines of the Equal Employment Opportunity Commission (EEOC) prohibits discrimination based on “physical, cultural or linguistic characteristics corresponding to a different national origin,” or because of an individual’s place of origin.²³⁸ One writer has commented that “[t]here is no meaningful legal protection against discrimination based on the ethnicity of Latinos,” as long as ethnicity is distinguished from race.²³⁹ This lack of antidiscrimination law protection has been attributed to Congress’s principle concern of prohibiting discrimination based on race or color.²⁴⁰ National origin further has been

236. For example, discrimination against Latina/o children through segregation in public school education in Arizona, California, and Texas was justified in some cases based on the asserted language difficulty of Mexican-American children, and this justification was accepted by some courts both before and after *Brown v. Board of Education*, 347 U.S. 483 (1954). See George A. Martinez, *Legal Indeterminacy, Judicial Discretion and The Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555, 574-618 (1994). See, e.g., *Independent School District v. Salvatierra*, 33 S.W.2d 790 (Tex. Civ. App. 1930), cert. denied, 284 U.S. 580 (1931); *Hernandez v. Driscoll Consol. Indep. Sch. Dist.*, 2 Race Rel. L. Rptr 329 (S.D. Tex. 1957).

237. See Johnson, *supra* note 45, at 73-74.

238. Equal Employment Opportunity Commission Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606 (1999). See also Perea, *supra* note 20, at 984.

See generally Maya Murray, *supra* note 19, at 515 (noting that the self-identification that the EEOC Guidelines allow for Latinos is misleading).

239. See Perea, *supra* note 20, at 984.

240. See *id.*

interpreted as different from language discrimination, which is deemed non-actionable because language is not an immutable trait.²⁴¹

The failure of current antidiscrimination law to address uniquely Latina/o concerns results from a narrow definition of race and racial group used by state and federal governments, as well as courts of law, all of which rely on biological race definitions such as those incorporated in OMB Directive 15.²⁴² This definition of race as a biological trait has been rejected by scientists and academics.²⁴³ The idea that racial groups are socially constructed, and are identified by a shared set of experiences, and a common way of being perceived,²⁴⁴ makes it possible to understand Latinas/os as a race entitled to appropriate remedies for discrimination based on race. A demand that the civil rights paradigm fully address the complete range of discrimination experienced by groups with a Non-White racial group status in this country would include Latinas/os.²⁴⁵ An effective demand for a broader definition of racial discrimination requires a united political stance among communities of color that currently does not exist.²⁴⁶

Some scholars view the Latina/o identity as an ethnic identity, proposing an expanded antidiscrimination protection for ethnicity.²⁴⁷ Professor Juan Perea has also focused on the ethnicity of Latinas/os. Professor Perea would adopt a broader view of ethnic traits than those currently protected under the national origin paradigm.²⁴⁸ His view of ethnicity incorporates "physical and cultural characteristics that make a social group distinctive," either in group members eyes or in the view of outsiders, including traits in addition to race such as "national origin, ancestry, language, religion, shared history, traditions, values and symbols."²⁴⁹ There is a concern that Latina/o discrimination described as race-based rather than ethnicity "would inappropriately conflate the separate racial and ethnic identities that are a reality for Latinas/os of African ancestry who are primarily, but not exclusively, from the Caribbean."²⁵⁰

241. See *supra* note 124. See also Ruiz Cameron, *supra* note 20.

242. See, e.g., Notice of Decision on the Revision to the Standards for Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58, 782 (1997).

243. See Haney Lopez, *supra* note 39, at 11-21.

244. See *id.*

245. See Caldwell, *supra* note 2, at 100; *supra* notes 26 and 208-11.

246. See generally, e.g., *supra* note 27.

247. See Maya Murray, *supra* note 19; Valdes, *supra* note 47, at 5.

248. See Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571, 577-79 (1995).

249. See *id.* at 575. Haney Lopez has characterized Professor Perea's definition of ethnicity as broad enough to include some racial differences. See Haney Lopez, *supra* note 40 at 1154 n.35 and 68 n.35. See also Joane Nagel, *Resource Competition Theories*, 38 AM. BEHAV. SCIENTIST 442 (1995) (defining ethnicity to include race as one of the many factors that Professor Perea's definition would also include).

250. See Kateri Hernandez, *supra* note 185, at 173 n.10 (construing Tanya K. Hernandez, *Over the*

It is the indeterminacy of the Latina/o identity accepted at the individual level and at the group level that effectively removes Latina/o issues from the race relations discourse in this country. The remedies for discrimination against Latinas/os must be established firmly within the civil rights paradigm.²⁵¹ Through Latina/o advocacy of a clear, Non-White racial group identity, it is possible to redefine remedies to include all of the discrimination that is perpetrated against all people of color.

B. *A Latina/o Indeterminate Group Racial Identity Reinforces White Supremacy.*

Latinas/os, as members of a group that largely is understood to be a Non-White racial group, may find that we reinforce White supremacy.²⁵² Latinas/os reinforce White supremacy to the extent that Latinas/os are compared as a more favorable racial group to African-Americans and these comparisons are not publicly challenged.²⁵³ For example, an article about the 1992 Los Angeles Uprising reports the conflict between the Latina/o and African-American communities.²⁵⁴ The article asserted that employers in Los Angeles preferred “docile” Mexicans as employees in comparison to African-Americans.²⁵⁵ The image of Latinas/os as docile, and therefore preferable workers, impliedly states that African-Americans are more difficult employees.²⁵⁶ Neither is true, but this perception can become an accepted fact when published and restated. This perceived difference between Latina/o and African-American employees can become part of the dominant perceptions of each group.

Latinas/os and LatCrit scholars must also acknowledge the position we occupy within the racial hierarchy established by White supremacy. To do so, we must be willing to explore the ways in which our position within the U.S. racial hierarchy situates Latinas/os as second line guardians in the system of White supremacy, and how

Rainbow? Puerto Ricans and the "Multiracial" Category in the Year 2000 Census, CRITICA J. P.R. POL'Y & POL., Aug. 1996, at 1,6).

251. See Caldwell, *supra* note 2, at 100.

252. See *supra* notes 26-27, 157, and accompanying text. See also Richard Delgado, *Rodrigo's Fourteenth Chronicle: American Apocalypse*, 32 HARV. C.R.-C.L. L. REV. 275 (1997) (comparing the role of Latinas/os within the U.S. racial context to the role of “coloreds” in South Africa, who were overseers and clerks during the apartheid era.).

253. See also Robert S. Chang, *Who's Afraid of Tiger Woods*, 19 CHICANO-LATINO L. REV. 223, 224 (1998) (noting that Tiger Woods as a role model may offer the lesson that those who do not “engage in the discourse of victimhood” or do not ask for affirmative action can overcome because of their hard work and merit which becomes part of the false narrative of racial progress).

254. See Jack Miles, *Blacks vs. Browns: African-Americans and Latinos*, ATLANTIC MONTHLY, Oct. 1992, at 41.

255. See *id.* For a discussion of how this stereotype of “docile” Mexicans developed in the United States, 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, 1273-75 (1992).

256. See Miles, *supra* note 156.

Latina/o identity is used to moderate the Black experience.²⁵⁷ All racial groups in the United States reinforce White supremacy as “second line guardians” in the system because racial groups are constructed in relation to each other and, in some sense, each group is used to define the experience of the other racial groups.²⁵⁸ We must identify the ways in which the Latina/o experience is described in a way to criticize other people of color. This requires Latinas/os to recognize that our group identity may be used to splinter communities of color, and to examine closely the devices that fracture coalitions sometimes before these even have been assembled.²⁵⁹

One example is the way in which statistical data can be used to exemplify the “good” attributes of one group with an implicit denigration of another group.²⁶⁰ For example, a recent study based on census data reflecting five decades of Latina/o experience established that Latinas/os, more than any other group in our society, have the “highest percentage of labor force participation, worked more hours per week, worked more in the private sector and were twice as likely as whites to form families composed of couples and children.”²⁶¹ This data illustrates a picture of Latinas/os in sharp contrast to popular discourse about immigrants and Latinas/os.²⁶² While this data is useful to counter negative assertions in debates about the impact of Latinas/os in various communities, we must understand how this hardworking image may be used to make a comparison to the perception of African-Americans as less hardworking.²⁶³ This type of data can create the false impression of broad Latina/o labor force participation.

Another study has shown that native Latinos did not participate at the same high rates of foreign born Latinos, which may indicate the impact of the U.S. structures on native born.²⁶⁴ LatCrit scholarship can be useful in placing this difference in context.

257. See also Gotanda, *supra* note 8, at 238-246 (referring to the way in which the Asian American “model minority” myth has been used to moderate the perceptions of African-Americans in light of the *People v. Superior Court (Du)*, 5 Cal.App.4th 822 (1992)).

258. See Yamamoto, *supra* note 112, at 891-92.

259. See Caldwell, *supra* note 2, at 75.

260. See Jose Cardenas, *Profile: David Hayes-Bautista, The Myth Buster This sociologist's research challenges negative stereotypes of Latinos, demonstrating their strong family ties, work ethic and good health*, L.A. TIMES, May 24, 1999, at E1.

261. *Id.*

262. See *supra* note 157.

263. The statistics for Latina/o labor force participation do not reveal the underlying reality of systematic exclusion from employment opportunities or the potential citizen-immigrant distinction that exists. For example, another study has shown that in California Latinos “generally have higher labor force participation rates than Anglo or African-American male counterparts,” however this higher participation rate is due, in part, to “a younger population and... the very high participation among Latinos born outside of the U.S.” See Jorge H. del Pinal, *Latinos and California's Future: Too Few At The School's Door*, 10 LA RAZA L.J. 631, 642 (1998). Again, the risk exists that this information will be received as a reason to distinguish between Blacks and Latinos and used as a justification by Latinos to show that we deserve some level of benefits that others do not.

264. See *id.*

Latinas/os also reinforce White supremacy if we adopt the dominant perspective on racial group identification, i.e., that the White racial group identification is preferred. One way immigrants are acculturated in the United States is through their identification within the racial hierarchy system.²⁶⁵ Newcomers “quickly learn what to belong to” — the White racial group, if possible.²⁶⁶ Further, Latinas/os who possess an indeterminate racial identity simply may not see this acculturation process for what it is — a uniquely U.S. racial identification process.

C. *A Latina/o Indeterminate Group Racial Identity Limits Latina/o Coalition Building With Other Communities of Color.*

An indeterminate racial identity also thwarts Latina/o coalition building with other communities of color.²⁶⁷ Latina/o ambivalence about a Non-White group racial identity not only limits our ability to acknowledge the Latina/o group position within the U.S. racial hierarchy, which may reinforce the hierarchy, but it may create unnecessary divisions with communities of color that may distrust Latina/o efforts to oppose racial injustice.²⁶⁸

Coalition building requires that each group openly acknowledge the ways in which it has assisted in the maintenance of racial hierarchy. As Professor Yamamoto points out, there are many racial injustices that have been committed by each community of color in relation to other communities of color.²⁶⁹ Communities of color will only be

265. See Toni Morrison, *On the Backs of Blacks*, reprinted in ARGUING IMMIGRATION 97 (Nicolaus Mills ed., 1994) (“describ[ing] the hatred of Blacks as the defining, final, necessary step in the Americanization of immigrants” (construed in Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CAL. L. REV. 1213, 1230 (1997), 10 LA RAZA L.J. 127, 144 (1997)); STUDS TERKEL, RACE: HOW BLACKS AND WHITES THINK AND FEEL ABOUT AN AMERICAN OBSESSION 11 (1992) (quoting Dr. Kenneth B. Clark: “One thing White immigrant groups could do in America was to believe they were moving upward because the blacks were always there: down below.... The Poles, Jews, Italians, and Irish could all get together in their hostility to the blacks. It has become another aspect of the democratic creed.”). Cf., Robert Suro, *Recasting the Melting Pot: Later-generation Latinos are writing a new immigration story*, AM. DEMOGRAPHICS, Mar. 1999, at 30 (stating that for Latinas/os “an understanding of minority group status comes only after enough assimilation to perceive historical grievances against the White majority and to acquire hyphenation — that is to move from being Mexican to becoming Mexican-American.”).

266. See Elena Featherston, *Preface* to SKIN DEEP, WOMEN WRITING ON COLOR, CULTURE AND IDENTITY (Elena Featherston ed., 1994) (referring to the Bill Moyers television series *World of Ideas* in which Toni Morrison noted that “Black is the glue that holds America together.”). See also Espinoza & Harris, *supra* note 36, at 1596 and 510 (commenting on the need to address the question of “black exceptionalism” in U.S. race discourse, i.e., the idea of a uniquely situated position of African-Americans whom all other groups in U.S. society are contrasted).

267. See generally, e.g., Caldwell, *supra* note 2, at 62 (noting that one obstacle to coalition building and the goal of a multicultural democracy is “conflicting politics of racial identity and empowerment strategy, exacerbated by intergenerational clashes based on differences in values and experience [which] persist within and across groups of color”).

268. See Perea, *supra* note 46, at 1231 and 145 (describing how Cornel West and Toni Morrison view non-Black groups with suspicion and as quasi-White racial groups whose claims to justice are not as pressing because they are not viewed as caused by “real racism”).

269. See Yamamoto, *supra* note 112, at 891-92 (identifying the inherent limitations of the Black-White paradigm for dealing with interracial justice claims between communities of color, using the idea of situated group power of communities of color that recognizes that groups can be both simultaneously oppressed

able to form effective coalitions when each community forthrightly assesses its own complicity, knowing or unseen, in the maintenance of the hierarchy and White supremacy.²⁷⁰

LatCrit Theory is an essential part of this coalition building project. LatCrit scholars face the serious challenge of recognizing that we, Latinas/os, are not all the same,²⁷¹ while simultaneously attempting to construct community among Latinas/os and between Latinas/os and other communities of color. LatCrit Theory is integral to identifying how the bipolar, Black-White model of race relations obstructs the ability to construct coalitions.²⁷² Among the goals of LatCrit scholars and other progressive voices, is the construction of alliances that are built on a shared goal of a reordered society that eliminates the power of White supremacy.²⁷³

Latina/o leaders and scholars should assist in the development of a pan-Latina/o movement that includes a unified Non-White group identity.²⁷⁴ The racial experience of many Latinas/os as Non-White is a reality that should not be ignored, and can be the effective link among diverse Latina/o national origin groups.²⁷⁵ It has been suggested that Latinas/os adopt a political racial identity.²⁷⁶ For example, Professor Angel Oquendo offers a theory that would shift the focus from a material to a "spiritual" concept of race that would incorporate culture rather than a material focus on phenotype.²⁷⁷ He provides two reasons for identifying Latinas/os as a racial group. First, most groups are identified as ethnic groups in official as well as ordinary

and oppressive).

270. *Cf. id.*

271. See Earl Shorris, *LATINOS: A BIOGRAPHY OF THE PEOPLE* xv (1992) ("Just tell them who we are and that we are not all alike.").

272. See Lawrence III, *supra* note 46, at 827 (noting that the issue of how the Black-White paradigm operates in a multicultural, including multiracial, society is a critical element in developing a contemporary jurisprudence of reconstruction and transformation in pursuit of equality for all in the United States).

273. For example, Professor Robert S. Chang has asserted that alliances may be most fruitful if we focus on similar experiences and struggles with White supremacy and subordination. See Robert S. Chang, *The End of Innocence or Politics After the Fall of the Essential Subject*, 45 AM. U. L. REV. 687, 693 (1996).

274. National organizations such as the National Council of La Raza, the Mexican-American Legal Defense and Education Fund, and the Puerto Rican Legal Defense and Education Fund can be instrumental in building a revised model of race discrimination which would include Latinas/os through lobbying, legislative initiatives of the Congressional Hispanic Caucus, and through litigation strategies.

275. See *supra* note 18 and accompanying text.

276. See Oquendo, *supra* note 93, at 115. The idea of constructing linkages among different Latina/o national origin-based groups seeking similar political objectives might be viewed as similar to the public perception deliberately created by Black civil rights leaders in the 1960s of a monolithic community, which in reality comprised various sub-groups that did not agree about tactics and goals. See Alex M. Saragoza et al, *Who Counts? Title VII and the Hispanic Classification*, in *THE LATINO CONDITION, A CRITICAL READER* 44, 47-48 (Jean Stefancic and Richard Delgado, eds. 1998).

277. See Oquendo, *supra* note 277, at 115.

descriptions, except for the African-American community.²⁷⁸ In this regard, Latinas/os should not reinforce the dominant perception that “what distances African-Americans is qualitatively different than what separates them [Latina/os] from the White majority.”²⁷⁹ Second, a broader adoption by the Latina/o community of the idea of “La Raza” of indigenous people of North America prior to European conquest is part of Latina/o heritage.²⁸⁰ This indigenous ancestry continues to be an organizing factor for Latina/o political activism.²⁸¹

There are models for community of color coalition-building that have worked in other countries. In South Africa, the challenge to the apartheid system required unification among communities of color and other allied groups, including members of the dominant class.²⁸² Some people who were designated as “Coloured” under apartheid chose to identify themselves as “Black” as a political statement.²⁸³

A unified Non-White group racial identity may aid Latinas/os in building coalitions with other communities of color.²⁸⁴ For Latinas/os, this may be the first step toward the development of a model to address inter-minority conflict. Other scholars also have called for a more practical approach to race theory and an explicit focus on the empowerment of racial groups,²⁸⁵ new understandings and extensions of existing antidiscrimination law,²⁸⁶ and an alternative racial formation analysis to link conceptually the experiences of various groups of color in relation to White supremacy.²⁸⁷ A call for an alternative racial formation analysis or a broad

278. *See id.*

279. *Id.*

280. *Id.*

281. *See* Wiessner, *supra* note 134.

282. Lawrence III, *supra* note 46, at 827.

283. *Id.* Professor Lawrence describes the Coloured identification as Black in South Africa as:

a symbol of resistance to the labels that defined and divided them under apartheid, and a deliberate choice to identify with the bottom of the old hierarchy. It is a statement of their solidarity in opposition to White supremacy. It is a reminder that when they are divided and in conflict with one another, when they harbor racist attitudes and engage in racist acts against their African, or Asian, or mix-raced sisters and brothers, that conflict, that racism, is the product of apartheid and White supremacy.

Id. *See also* Chang, *supra* note 273, at 687 (describing a broader view of race that would include the Korean business owner's assertion of a Black racial identity).

284. *See supra* notes 36-46 and accompanying text.

285. *See, e.g.,* Harris, *supra* note 58, at 778.

286. *See* Lawrence III, *supra* note 58.

287. *See* Sumi K. Cho, *Multiple Consciousness and the Diversity Dilemma*, 68 U. COLO. L. REV. 1035 (1997).

understanding of racial identity that includes the Latina/o experience is necessary so we can begin to link our struggle with the struggles of other communities of color.²⁸⁸

Eric Yamamoto recently offered an ideal framework for developing an interracial justice jurisprudence, which views communities of color as occupying varying positions of situated power, as a way to combat the structures of White supremacy.²⁸⁹ Professor Yamamoto's framework holds communities of color responsible for their role in the reinforcement of (as second line guardians) of White supremacy because, while not fully autonomous, these groups of color operate as more than mere extensions of racially oppressive structures and operations.²⁹⁰ Communities of color must acknowledge and endeavor to fully understand their complicity in maintaining racial hierarchy, and any attempt to develop links among communities of color must directly identify issues relating to interracial harms and injuries.²⁹¹ As Professor Yamamoto asserts, it is only by addressing intergroup justice claims and rebuilding intergroup relationships that the healing processes necessary as a precursor to political or economic alliances across communities of color can occur.²⁹²

LatCrit Theory is critical to the development of an interracial justice jurisprudence organized around the identity issues that are faced collectively by Mexican-Americans, Puerto Ricans, and Cuban Americans, as the largest Latina/o communities in the United States,²⁹³ as well as by the other Latina/o national origin groups that are growing in number.²⁹⁴ LatCrit Theory seeks to address issues of central concern to this broader Latina/o community, such as 1) the transnational identity of our community²⁹⁵ and the impact of immigration,²⁹⁶ 2) overarching similarities among Latina/o peoples, including language, in many instances, and a shared history of

288. See Chang, *supra* note 284, at 693.

289. See Yamamoto, *supra* note 112.

290. See *id.* at 891.

291. *Id.*

292. See *id.* at 895.

293. See e.g., Sandrino-Glasser, *supra* note 98 (identifying how race and nationality have been fused to homogenize different Latina/o national origin groups [Mexicans, Puerto Ricans and Cubans] and to create a dominant racial identity for Latinas/os as Non-White).

294. See Bruce Lambert, *40 Percent in New York Born Abroad*, N.Y. TIMES, July 24, 2000 (noting that the population of Dominicans in New York City rose by more than two-thirds from 1990 to 1999 based on a 1999 Census Bureau study indicating that Dominicans are a major Latina/o group).

295. See Trucios-Haynes, *supra* note 235; Wiessner *supra* note 134, at 853. The transnational identity of Asian Pacific Islander Americans has also been identified as a source of a multidimensional identity. See Neil Gotanda, *Chen the Chosen: Reflections on "Unloving,"* 81 IOWA L. REV. 1585 (1996).

296. Immigration issues are often construed as particularly important to Latina/o in part because of the disproportionate impact of many immigration law and policies on Latinas/os. See Kevin R. Johnson, *supra* note 60, at 291 (noting that in fiscal year 1999 over 92% of the noncitizens deported from the United States were from Mexico or other Latin American countries, although the removal grounds for deportation of noncitizens are facially neutral).

colonization and conquest by the United States in Latin America;²⁹⁷ and 3) “cultural resistance to Anglo assimilation.”²⁹⁸

Scholars of LatCrit Theory must directly address the position in which Latinas/os are situated within the U.S. system of racial hierarchy.²⁹⁹ Latinas/os also must acknowledge responsibility for the way in which our group is viewed as an indeterminate racial group, and how this identification relates to the racial oppression of all communities of color within a system of White supremacy. Such an analysis must include a candid assessment of the advantages gained by being perceived as an “indeterminate” racial group, as well as a realistic understanding of how this situated position impacts interracial community coalition building.

Coalitions among various Latina/o national origin groups have been successful and further efforts to construct a group identity for Latinas/os in the United States should focus on the Non-White racial status of Latinas/os.³⁰⁰ These successes might become models for future efforts to bring the diverse community members together. Latinas/os should not ignore the way in which the group identity has been socially and politically constructed, or accept the indeterminate racial identity that we have been accorded under law. Race is meaningful in the way that the Latina/o group is constructed in the United States, and the every day lives of most Latinas/os in this country.³⁰¹ LatCrit scholars should begin to address more directly the impact of that socially constructed racial identity on Latinas/os in the United States.³⁰² This approach would require that scholars identify the connection between the constructed racial identity of Latinas/os and other communities of color in the United States, because group identity within a hierarchy structure is relationally defined.³⁰³ The identification of the Latina/o racial identity

297. See Angel Oquendo, *Re-imagining the Latina/o Race*, 12 HARV. BLACKLETTER. L.J. 93, 120 (1995).

298. See Romany, *supra* note 134, at 50.

299. See Caldwell, *supra* note 2, at 62.

300. For example, there were successful pan-Latino political movements in cities with large Latina/o populations of diverse national origin, such as in Chicago where Mexican-American groups and Puerto Rican groups joined together “to increase their access to governmental programs, political decision-making and publicly funded services.” Alex M. Saragoza et al, *Who Counts? Title VII and the Hispanic Classification*, in THE LATINO CONDITION, A CRITICAL READER 44, 48 (Jean Stefancic & Richard Delgado, eds., 1998).

301. See *supra* Part II(C).

302. The current focus on the multidimensionality of the Latina/o identity is important because LatCrit theory has the potential of restructuring legal approaches to discrimination issues. It is also important to identify how Latinas/os are situated within the racial hierarchy constructed using the Black-White paradigm and how this situated position structures Latina/o group relationships with other communities of color. See Laura E. Gomez, *Constructing Latina/o Identities*, 19 CHICANO-LATINO L. REV. 187 (1998); Elizabeth M. Iglesias, *Out of the Shadow: Marking Intersections In and Between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Legal Theory*, 40 B.C. L. REV. 349 (1998); Laura M. Padilla, *Social and Legal Repercussions of Latinos' Colonized Mentality*, 53 U. MIAMI L. REV. 769 (1999).

303. In a racial hierarchy, each racial group is assigned a position contingent on the position of other groups in the hierarchy. See generally Gotanda, *supra* note 8, at 238-250 (assessing use of cultural characteristics for groups of color that reinforce White majority views of racial categories in the case of *People v. Superior Court (Du)*, 5 Cal.App.4th 822 (1992)). Haney Lopez., *supra* note 39, at 1.

would further require the legal definitions of race to include how a group is socially constructed. In this way, Latinas/os are integral to the development of a new definition of race, one that includes more than biological connections, and reflects myriad of racisms to which Non-White people are subjected in the United States.³⁰⁴

CONCLUSION

The fact is that "race matters,"³⁰⁵ and continues to matter in the United States.³⁰⁶ Non-White people are identified in terms of racial group identity, and defined by the majority in many instances by the ascribed racial group identity, despite the wishful thinking expressed by Justice Scalia in *Adarand Constructors, Inc. v. Peña* that ". . . we are just one race here. It is American."³⁰⁷ The racial hierarchy of White supremacy continues to exist in the United States and it affects us all.³⁰⁸ Examining the Latina/o position within this racial hierarchy is crucial to a complete understanding of how the racial hierarchy is structured, and how Latinas/os may themselves support this system, both individually and as a group.³⁰⁹ In part, the Latina/o position depends upon both internal and external racial identification factors, as well as the legal construction of the Latina/o group.

In terms of our own group identity, Latinas/os have come to a crossroads. We must choose the road that leads to self-recognition, self-determination and coalition building with other communities of color. We must shed our invisibility in race relations discourse by openly acknowledging and strongly asserting the group's socially constructed Non-White racial identity. Doing so will create a more contextualized understanding of racial identity in this country that includes language, culture, national origin, immigration status and other aspects of Latina/o multidimensionality.

304. See generally Martinez, *supra* note 33, at 33-34.

305. CORNEL WEST, RACE MATTERS (1993).

306. *Id.*

307. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239, 115 S.Ct. 2097, 2119 (1995) (Scalia, J., concurring in part and concurring in the judgment).

308. The continued segregation in housing and education of Blacks and Latinas/os from Whites illustrates the sustaining nature of White supremacy in this country. See Richard H. Sander, *Housing Segregation and Housing Integration: The Diverging Paths of Urban America*, 52 U. MIAMI L. REV. 977 (1998); Anna M. Santiago, *Trends in Black and Latino Segregation in the Post-Fair Housing Era: Implications for Housing Policy*, 9 LA RAZA L.J. 131 (1996); Thomas J. Sugrue, *Expert Report, Reports Submitted on behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 261 (1999).

309. See Caldwell, *supra* note 2, at 62.