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Race-Conscious Voting Rights and the New Demography in a Multiracing America

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RACE-CONSCIOUS VOTING RIGHTS AND THE NEW DEMOGRAPHY IN A MULTIRACING AMERICA

JOHN O. CALMORE*

This Essay argues that demographic changes that add Latinos and Asians to the nation's population are unlikely to undermine the analytical framework of the Voting Rights Act of 1965, even though that framework is grounded in the biracial politics of blacks and whites in the South. Rather than the new demography, Supreme Court decisions that diminish nonwhite political power undermine the Act. This Essay looks at the significance of the new demography by contrasting two "racial situations," the largely biracial South and multiracial California. These racial and geographic experiences produce a hegemonic competition to define racial meaning and significance, set racial agendas, and define "we the people" across the nation. The analysis suggests it is wrong to assess the impact of the new demography in broad national terms, when the primary impact of the new populations will be regional. The regional impact, moreover, will not greatly impact the South, except in Florida and Texas. The South's political influence, undergirding the conservative Republican agenda across the nation, is greater than that of California and it remains the primary region where the Voting Rights Act's provisions will be contested. Finally, with particular attention to Florida, the Essay illustrates the need to focus regionally by examining the felon disenfranchisement of a disproportionate number of African Americans. This collateral consequence of mass incarceration arguably contributed to the Presidential election of George W. Bush over Al Gore in 2000. The Essay contends that, as a legacy of southern racism, felon disenfranchisement not only denies the vote to black felons, but also dilutes the vote of the black community.

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What accounts for twentieth-century race relations? This question can be broken down into more manageable parts, though each impinges on the others. How, and to what extent, were such relations prefigured by earlier history? How did political and economic processes during this century shape divergent racial orders? And how did challenges from below emerge, interact with, and force changes in racial domination from above?¹

INTRODUCTION

The more I write about “race,” the more I identify with Dizzy Gillespie. In his early career, when he stepped up to the microphone to introduce his music, he would “clam up” and make “stiff awkward

1. ANTHONY W. MARX, MAKING RACE AND NATION: A COMPARISON OF THE UNITED STATES, SOUTH AFRICA, AND BRAZIL 1 (1998). These questions are particularly pressing in relation to the interconnection of race-making and nation-state building because “these two processes were among the dominant social processes of the twentieth century.” *Id.* at 274. The challenges of the new demography are most profoundly situated within this interconnected pair of processes. Because of attention to process, I have treated race in my title as a verb, referring to America as “multiracing” rather than merely “multiracial.” See Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1806–07 (1993) (“[W]e are ‘raced’ through a constellation of practices that construct and control racial subjectivities.”); see also john a. powell, *The “Racing” of American Society: Race Functioning As a Verb Before Signifying As a Noun*, 15 LAW & INEQ. 99, 100 (1997) (asserting that understanding race as a “social construct” provides a means to evaluate and address racism); john a. powell, *Whites Will Be Whites: The Failure to Interrogate Racial Privilege*, 34 U.S.F. L. REV. 419, 420 (2000) (arguing “for a transformative approach to racial privilege”).

bows.”² Eventually, however, he gained great rapport with his audiences. As he explained, “people always thought I was crazy, so I used that to my advantage.”³ I write this Essay from a similar “advantage.” I write it within the race-making context of the epigraphic questions raised above, because I believe they will continue to direct racial inquiry as we proceed into the twenty-first century. These questions will be more complex, however, as the United States witnesses and experiences dramatic increases in the presence of Asians and Latinos.⁴

Against this backdrop of the new demography and from the springboard of race consciousness, Part I of this Essay responds particularly to the following claim underlying this Symposium: “The analytical framework established by the Voting Rights Act of 1965 and grounded in biracial politics has been seriously undermined by recent Supreme Court decisions and an increasingly multiethnic population.”⁵ While I have no quarrel with the claim regarding the Supreme Court’s negative impact on so-called minority voting rights, I am not so sure, however, that the increasingly multiethnic population will undermine the Act.⁶ Further, as I will argue in Part I,

2. SCOTT DEVEAUX, *THE BIRTH OF BEBOP: A SOCIAL AND MUSICAL HISTORY* 434 (1997).

3. *Id.*; see also Jonathan A. Beyer, Note, *The Second Line: Reconstructing the Jazz Metaphor in Critical Race Theory*, 88 GEO. L. J. 537, 539 (2000) (using jazz as a metaphor to address racial construction and representation in the law).

4. See, e.g., Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1925, 1926 (2001) (examining “race law” over the last century and setting the stage for these questions as we enter the twenty-first century).

5. *Democracy In a New America: A Symposium*, 79 N.C. L. REV. 1203, 1203 (2001).

6. In a variety of ways, the Voting Rights Act has been problematical for years in providing for effective Asian political participation and equality. See Angelo N. Ancheta & Kathryn K. Imahara, *Multi-Ethnic Voting Rights: Redefining Vote Dilution in Communities of Color*, 27 U.S.F. L. REV. 815, 817 (1993) (evaluating the Act’s effectiveness within “multi-ethnic communities”); Su Sun Bai, Comment, *Affirmative Pursuit of Political Equality for Asian Pacific Americans: Reclaiming the Voting Rights Act*, 139 U. PA. L. REV. 731, 735 (1991) (arguing that the Act does not protect Asian Pacific Americans and should be amended). In my opinion, blacks and Latinos have used the Voting Rights Act more effectively to pursue political participation that mobilizes the community, promotes a social and economic agenda, and elects responsive officials. This is the theory of “black electoral success” that Lani Guinier criticizes in arguing for proportionate interest representation. Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1079 (1991). I think blacks and Latinos are likely to continue these “empowerment” strategies, while Asians are likely to emphasize “influence” strategies through constituting the swing vote in national, state, and district elections. Latinos, as well, may increasingly present themselves as a swing vote, although it remains unclear how much of this will accrue to the benefit of the Republican Party. Marjorie Valbrun, *Hispanic Vote for GOP is Key in Texas Governor’s Contest*, THE WALL ST. J., Nov. 2, 1998, at A4; see also J. Morgan

the disparate “racial situations”⁷ of the primarily biracial South and increasingly multiracial California represent two quite different regional experiences of race in play. Each racial situation presents a hegemonic competition to define racial meaning and significance, set racial agendas, and define the national community.

In focusing sharply on black-white racial politics and polarization in the South, I do not mean to essentialize white southerners as some collective ogre. I do, however, see the negative racial politics of the South, much rooted in a bad history,⁸ being imported beyond the South, and for that reason I am very critical. Similarly, while I see more hope in California, the picture there is by no means a rosy one, as people of color argue among themselves and as many Californians across the racial and ethnic spectrum express a nativistic, racist reaction to the growing presence of largely-colored immigrant populations.⁹

Part II of the Essay elaborates on the argument that viewing the new demography in broadly national and descriptive ways may detract from particular issues that are distinctly different within the respective racial situations. As my case on point I focus on felon disenfranchisement, which disproportionately affects blacks, as a growing collateral consequence of the nation’s mass incarceration. This disenfranchisement not only constitutes vote denial to the felons, but also constitutes vote dilution to the black community.¹⁰ While the practice of felon disenfranchisement is widespread in the United

Kousser, *Beyond Gingles: Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. REV. 551, 587 (1993) (arguing that, among various advantages, influence districts protect small clusters of minorities and “encourage interracial coalitions”). Because both Asians and Latinos are heavily immigrant groups, for now the primary voting rights strategy is probably to attain citizenship through the process of naturalization. After that, we will see how things develop.

7. I take this term from JOHN HARTIGAN JR., RACIAL SITUATIONS: CLASS PREDICAMENTS OF WHITENESS IN DETRIOT 14 (1999).

8. Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77, 88–89 (1985) (“The most distinctive aspect of southern history is the region’s use of the legal system to perpetuate racial separation and the subordination of nonwhites.”).

9. In California, state initiatives have been particularly salient manifestations of anti-affirmative action and anti-immigration politics. See Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 558 (1996) (arguing against Proposition 187); Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 195 (1997) (discussing the constitutionality of Proposition 209).

10. Vote dilution is a process whereby one group diminishes the political power of another group, and the process is heavily racialized in terms of black-white group relationships. Chandler Davidson, *Minority Vote Dilution: An Overview*, in MINORITY VOTE DILUTION 1, 4 (Chandler Davidson ed., 1989).

States,¹¹ a particularly offensive aspect of felon disenfranchisement is its patently racist origins in many southern states.¹²

I. BLACKS AND EVERYBODY ELSE IN THE “RACIAL SITUATIONS”
OF THE SOUTH AND CALIFORNIA: LOCATING THE NEW
DEMOGRAPHY

A. *Exploring the New Demography Across the Terrain of Race
Consciousness*

In 1999, Eric Yamamoto observed that “[b]y the year 2000, the familiar characterization of black versus white will no longer describe race relations in the United States. In crucial respects, the twenty-first century will be a nation of minorities.”¹³ Moreover, he believes that demographic changes will necessitate “a change in how we think about race relations and how we think about racial justice.”¹⁴ Although this certainly describes the nation in a numeric sense, black-white relations continue to play a significant role in the political, economic, and social spheres in the South.¹⁵ Nonetheless, as we enter the twenty-first century, the new demographic development is so salient that even Nathan Glazer, the former die-hard assimilationist,

11. Marc Mauer, *Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration*, 12 FED. SENT. RPTR. 248 (Mar./Apr. 2000).

12. J. Morgan Kousser, *The Understanding of the First Reconstruction: Lessons for the Second*, in *supra* note 10, at 27, 35.

13. ERIC A. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 7 (1999) (discussing the challenges and opportunities presented by the new demography).

14. *Id.*

15. I primarily define the South as Kentucky and the eleven states of the Old Confederacy: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. Between 1970 and 1990, the population of these twelve states grew by forty percent, in excess of twenty million people and double the national growth rate. PETER APPLEBOME, *DIXIE RISING: HOW THE SOUTH IS SHAPING AMERICAN VALUES, POLITICS, AND CULTURE* 8 (1996). According to the Census Bureau, six of the ten states that will add the most residents between 1993 and 2020 are in the South: Florida, Georgia, North Carolina, Tennessee, Texas, and Virginia. *Id.* The U.S. Census definition of the South is broader than my definition: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia, and the District of Columbia. HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* 72 (rev. ed. 1977). Moreover, black disenfranchisement in the South and the Voting Rights Act are so particularly linked, historically and presently, that unless the new demography is more broadly represented within the region, it will not undermine the Act. Even in California, the new demography is unlikely to undermine the Act's emphasis on race-conscious districting. Morgan Kousser, *Reapportionment Wars: Party, Race, and Redistricting in California, 1971–1992*, in *RACE AND REDISTRICTING IN THE 1990S*, 134, 190 (Bernard Grofman ed., 1998).

has declared that “we are all multiculturalists now.”¹⁶ In recognizing this fact, however, Glazer also explains why the new demography could manifest itself in a way that profoundly threatens African Americans. In his frightening view, “the two nations for our America are the black and the white, and increasingly, as Hispanics and Asians become less different from whites from the point of view of residence, income, occupation, and political attitudes, the two nations become the blacks and the others.”¹⁷ In these words, “the blacks and the others,” the new demography could represent a complex development wherein new people of color will consolidate white rule over black. At the heart of that assumption is the idea that to be like white is important, of course, but not as important as to be unlike black.¹⁸

As individualized opportunity and colorblind race (“symbolic ethnicity”) gain increasing currency, being unlike black may entail a very different meaning of “race consciousness” than that which is held by African Americans. Even as the black middle class achieves greater access to the mainstream opportunity structure and experiences a greater variety of integration, it remains stubbornly race-conscious. As I live through this irony myself, I often wonder why we are so race-conscious and what it signifies about the legacy of the civil rights movement. Race consciousness is more than a lived-out refutation of colorblindness. It appears instead to be a

16. NATHAN GLAZER, *WE ARE ALL MULTICULTURALISTS NOW* 14, 160 (1997).

17. *Id.* at 149. *But see generally* HELEN ZIA, *ASIAN AMERICAN DREAMS: THE EMERGENCE OF AN AMERICAN PEOPLE* (2000) (detailing an Asian presence in this country as people who neither desire to be like white nor unlike black); JUAN GONZALEZ, *HARVEST OF EMPIRE: A HISTORY OF LATINOS IN AMERICA* (2000) (same regarding Latinos).

18. This scenario, however, is not an inevitable result of the new demography. *See* Enid Trucios-Haynes, *Why “Race Matters”: LatCrit Theory and Latina/o Racial Identity*, 12 *LA RAZA L.J.* 1, 7 (2001) (asserting that Latino racial indeterminacy results from the prevalent black-white paradigm and advocating that racial hierarchy be dismantled); Janine Young Kim, Note, *Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 *YALE L. J.* 2385, 2387 (1999) (arguing that the black-white discourse endures in spite of changes in demography and can be useful in shaping the Asian-American civil-rights agenda); Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 *TUL. L. REV.* 1493, 1502–03 (1998) (exploring the law’s assumption of social homogeneity and advocating that this be replaced with an assumption of difference). Too often we look at the colored people who represent the new demography and blacks primarily in contexts of conflict, when there is potential collaboration that would counter the scenario that Glazer paints and I fear. *See* Genaro C. Armas, *Blacks See Growing Hispanic Population as Potentially Powerful Ally*, *HERALD-SUN* (Durham, N.C.), Apr. 8, 2001, at A8.

fundamental social identifier and group orientation for most of us.¹⁹ Moreover, “blacks are more likely than whites to express high levels of group consciousness” and this often correlates with political participation.²⁰ As the 1989 National Research Council report indicates, while middle-class blacks display the highest degrees of racial group identity and political consciousness, “racial solidarity is present throughout the black community to some degree.”²¹

Interestingly, although Justice Clarence Thomas is black, he sees race-conscious voting as essentializing, arguing that “[o]f necessity, in resolving vote dilution actions we have given credence to the view that race defines political interest.”²² In many ways, both the Supreme Court and the new demography challenge the necessity and propriety of race consciousness, which is at the heart of voting rights law.²³ Under the pressures of a colorblind regime, we know that the Court is increasingly hostile to the concept and orientation of race consciousness. Within the Court’s colorblind jurisprudence, two key questions emerge pertaining to the context of the changing demographics. First, what does race consciousness mean among Latinos and Asians? Second, will Asians and Latinos politically deploy race consciousness or, instead, adopt a politics of assimilation?²⁴

19. According to the National Research Council report on blacks and American society, race consciousness among blacks involves four components: “(1) a feeling of closeness or identification with other group members; (2) dissatisfaction with group status, especially in the political arena; (3) an attribution of the unsatisfactory group status to illegitimate causes such as discrimination; and (4) a belief that group members must act collectively to improve the group’s position.” COMM. ON THE STATUS OF BLACK AMERICANS, NATIONAL RESEARCH COUNCIL, *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 236 (Gerald David Jaynes & Robin M. Williams, Jr. eds., 1989).

20. *Id.*

21. *Id.* at 237.

22. *Holder v. Hall*, 512 U.S. 874, 903 (1994) (Thomas, J., concurring in the judgment).

23. Lani Guinier, *[E]racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 109–110 (1994) (“The question of group representation plays out with particular acrimony in the voting rights arena because of two competing forces: the inescapable race consciousness of the Voting Rights Act and the ideological aversion of many federal judges to race-conscious public policy.”). Note, by the way, that Guinier proposes group remedies that are universal and “that have the potential to empower all politically cohesive groups” through ensuring effective interest group representation that transcends color. *Id.* at 137.

24. See LINDA CHAVEZ, *OUT OF THE BARRIO: TOWARD A NEW POLITICS OF HISPANIC ASSIMILATION* 58 (1991) (“The success of this [race-conscious] voting rights strategy depends on dissuading Hispanics from integrating into the larger community.”). Various Asian and Latino scholars have rejected the politics of assimilation. See generally Kevin R. Johnson, “*Melting Pot*” or “*Ring of Fire*”? *Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259 (1997); George A. Martinez, *Latinos, Assimilation and the Law: A Philosophical Perspective*, 20 CHICANO-LATINO L. REV. 1

During the civil rights movement, integration and equal opportunity took priority, eclipsing a race-conscious orientation toward justice for black people as a distinct social group. Individual agents from the race were to take advantage of formal equality of opportunity to advance through a colorblind assimilationism. Furthermore, race consciousness was delegitimated within the core culture, because it was associated with militant black nationalists and white supremacists.²⁵ Over the last thirty-five years, however, as the difficulties of mainstream integration have continued to be problematical, blacks have come to reinforce race consciousness, even though it tends to polarize blacks from whites and to insulate them from mainstream dictates. Asian-Pacific Americans and Latinos may not grip this stubborn race consciousness as firmly. Time will tell.

Because Asian and Latino residential integration and intermarriage with whites are more prevalent than is the case with blacks, race consciousness may simply make less sense.²⁶ At bottom, each group may question whether race consciousness is an impediment or a spur to social group betterment.²⁷ Still, at least for now, race consciousness is held tightly by blacks and this feature of social identity explains, in part, why only nine percent of the black vote went to George W. Bush in the 2000 presidential election.²⁸

(1999); Harvey Gee, *Beyond Black and White: Selected Writings by Asian Americans within the Critical Race Theory Movement*, 30 ST. MARY'S L.J. 759 (1999).

25. Gary Peller, *Race-Consciousness*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 127 (Kimberlé Crenshaw et al. eds., 1995) [hereinafter CRITICAL RACE THEORY].

26. Regarding respective experiences in residential segregation, see Douglas Massey, *The Residential Segregation of Blacks, Hispanics, and Asians, 1970-1990*, in IMMIGRATION AND RACE: NEW CHALLENGES FOR AMERICAN DEMOCRACY 44, 72 (Gerald D. Jaynes ed., 2000). According to a recent study, "Hispanics and Asians, the nation's fastest growing minority groups, marry partners of different races at about three times the rate of blacks and five times the rate of whites." Tony Pugh, *Mixed Marriages on the Rise in U.S.: Racial, Ethnic Barriers Abating as Country Becomes More Diverse*, HOUS. CHRON., Mar. 25, 2001, at A12. The trend in intermarriage, however, is concentrated, as half of the nation's mixed marriages are in just four states—California, Texas, New York, and Florida. Moreover, nearly a quarter of such couples reside in California. *Id.*

27. Currently, however, some legal theorists seek "to recover and revitalize the radical tradition of race consciousness among African Americans and other peoples of color—a tradition that was discarded when integration, assimilation and the ideal of colorblindness became the official norms of racial enlightenment." Kimberlé Crenshaw et al., *Introduction*, in CRITICAL RACE THEORY, *supra* note 25, at xiv.

28. Alfredo Corchado, *Analysts Say Bush Must Gain Minorities' Faith: Questions About Legitimacy of Vote Complicate Efforts*, DALLAS MORNING NEWS, Jan. 18, 2001, at 10A.

B. Localizing the New Demography: From the South to California

Rather than looking nationally, sometimes we must look regionally to examine the experience and ramifications of the new demography. Demographers now view the nation as divided between “gateway” areas that have a highly diverse population, largely due to immigration, and other areas that remain mostly white, or mostly black and white, such as the South.²⁹ Thus, in addressing voting rights we must pay more attention to specific space because, as John Hartigan observes, “Racial identities are produced and experienced distinctly in different locations, shaped by dynamics that are not yet fully comprehended.”³⁰ The focus on “racial situations” compels us to acknowledge and work with the recognition of “the distinctive role of places in informing and molding the meaning of race.”³¹ I think that the commentary about the scope and magnitude of multiracial community development in California, particularly the Los Angeles region, has the effect of downplaying the continued significance and persistence of the black-white paradigm in other regions of the country.³²

In demographer William Frey’s opinion, a national view of the new demography may obscure the fact that America’s broad regions differ distinctly in their racial-ethnic makeup.³³ The regional variations in distribution of Asians and Latinos suggest that demographic changes will not undermine the analytical framework of the Voting Rights Act in the South, because in that region the presence of Asian and Latino voters will be small.³⁴ Indeed, the

29. William Booth, *California Minorities Are Now the Majority: Non-Hispanic Whites Dip Below 50%*, WASH. POST, Aug. 31, 2000, at A1.

30. HARTIGAN, *supra* note 7, at 14.

31. *Id.*

32. Typical is this observation: “California has been a trendsetter for the nation for the past several decades. And nowhere can one detect the changing shape of emerging America better than in L.A., where newcomers to the United States have transformed the country’s second largest metropolis in complex ways and have set the region on a new course sure to be followed in other urban areas.” Roger Waldinger & Mehdi Bozorgmehr, *The Making of a Multicultural Metropolis*, in *ETHNIC LOS ANGELES* 3, 4 (Roger Waldinger & Mehdi Bozorgmehr eds., 1996). This book presents an excellent look at ethnic transformation, but after reading it I am more secure in my claim that the region, like the state, is *sui generis* and unlikely to be replicated even in approximate terms.

33. William H. Frey, *Multiple Melting Pots*, 15 *WORLD & I* 3641, May 1, 2000, available at 2000 WL 9050850.

34. According to Frey:

To demonstrate the fallacy of applying nationwide projections to specific regions, consider the Census Bureau’s 2030 scenario, which shows that one out of four Americans will be either Hispanic or Asian, with whites constituting less than 60 percent of the national population. On the eve of the 2000 census, 25 individual

biracial, black-white paradigm will persist in significance in the South. This conclusion is based, in part, on examining where the people who represent the new demography primarily live now and are likely to live in the next twenty-five years. According to Frey's projections, by 2025, ten states will be significantly racially and ethnically diverse as a function of the new demography, with only Texas and Florida representing the South.³⁵ In the South, in spite of increasing rates of Asians and Latinos, race relations, the good and the bad, will primarily be black and white. Beyond Florida and Texas, the other eight states that will reflect the new demography are Arizona, California, Hawaii, Illinois, Nevada, New Jersey, New Mexico, and New York.³⁶ The other forty states will remain largely white or black and white.³⁷ Within these states, there will be multiracial diversity in some metropolitan areas, primarily gateway cities, but for the most part the new demography will be more imagined than experienced, more hearsay than eye-witnessed.³⁸ California will remain uniquely multiracial. Certainly, in California where non-Hispanic whites only constitute 49.9 percent of the thirty-three million residents and no racial or ethnic group constitutes a majority,³⁹ the social relations, politics, and evolving culture have already moved beyond the black-white paradigm in dramatic ways.⁴⁰

metropolitan areas already exhibit a diversity that conforms to the 2030 national demographic profile. These include large metro areas like Los Angeles, San Francisco, Miami, Houston, and San Diego as well as many smaller metropolitan areas in California, New Mexico, and several on the Mexican-Texas border. *At the same time, more than half (148) of the country's 271 metropolitan areas are at least 80 percent white. They are located in the Northeast, Midwest, and Rocky Mountain states as well as much of the South—where blacks rather than the new immigrant minorities constitute the primary nonwhite group.*

Id. (emphasis added).

35. *Id.*

36. *Id.*

37. *Id.*

38. William H. Frey, *A Closer Look at the Melting Pot Myth*, NEWSDAY, Mar. 19, 2001, at A23. I concede, however, that the Latino growth rate makes it very hard to predict distribution down the line. In some places the growth rate is so large, however, because the number of Latinos was so few to begin with. For, example, although North Carolina is not one of the states Frey designates, it led the nation in Latino growth, up 394 percent since 1990, followed by Arkansas, Georgia, Tennessee, and Nevada. The growth in these states "resulted from a higher-than-expected influx of immigrants during the prosperous 1990s." Genaro C. Armas, *U.S. Hispanic Population Surges in Small, Farming Towns*, HERALD-SUN (Durham, N.C.), Apr. 1, 2001, at B8.

39. Booth, *supra* note 29.

40. From 1990 to 1999, California's Latino population increased by thirty-five percent to 10.5 million. The Asian population grew by thirty-six percent to 3.76 million. The black population only grew from 2.1 million to 2.2 million. Latinos, Asians, and African Americans, respectively, represent 31.6 percent, 11.4 percent, and 6.7 percent of the state

From this perspective, I see two competing "racial situations" that are located in the South and California. These situations are place-dependent to a degree, but not completely, because the situations insert themselves into national discourse and consciousness beyond borders. Still, these important but vastly different spatial experiences of racial life are inadequately addressed. These spatial-experiential paradigms, one rooted in the South and one blossoming in California, represent competing visions and explanations of how race is simultaneously represented culturally and deployed politically. The cultural representations and political agendas, working in tandem, that come out of these disparate racial situations are spatial manifestations of what Michael Omi and Howard Winant identify as the process of "racial formation" and its related "racial projects."⁴¹ They define racial formation as the social-historical process "by which racial categories are created, inhabited, transformed, and destroyed."⁴² Racial formation occurs through the linkage of representation and structure, and here is where racial projects come into play. Omi and Winant characterize a racial project as "simultaneously an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines."⁴³

Hartigan elaborates on the Omi-Winant framework in a way that directs my argument. He departs from Omi and Winant's broad frame of reference, "because the national scale of attention [they] deploy in rendering historical and political versions of racial categories and their meanings can obscure the nuanced modes of differentiation that obtain in distinct geographical zones within the nation."⁴⁴ Thus, in the way that Hartigan considers Detroit as a particular racial formation, I am considering the South and California, respectively, as particular racial formations.⁴⁵

population. *Id.*

41. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S*, at 56-57 (2d ed. 1994).

42. *Id.* at 56.

43. *Id.* at 57.

44. John Hartigan Jr., *Locating White Detroit*, in *DISPLACING WHITENESS: ESSAYS IN SOCIAL AND CULTURAL CRITICISM* 180, 182-83 (Ruth Frankenberg ed., 1997).

45. Although the South and California are the dominant racial formation sites, they are not exclusive. See, e.g., Glenn D. Magpantay, *Asian-American Voting Rights and Representation: A Perspective from the Northeast*, 28 *FORDHAM URB. L.J.* 739, 739-40 (2001) (analyzing voting rights, primarily the prospects for proportional representation, in Asian-Pacific communities within Massachusetts, New Jersey, and New York). Moreover, a significant theme in Lat/Crit scholarship is that the local is global. Sylvia R. Lazos Vargas, *Globalization or Global Subordination?: How LatCrit Links the Local to Global*

Tomas Almaguer's historical analysis of California presents an analysis along these same lines.⁴⁶ Although his work moves us beyond the black-white paradigm in order to appreciate the multicolored experience of race, he also recognizes the uniqueness of the California racial situation. He explains that "[t]he historical materials documenting the racialized patterns of group inequality and conflict that unfolded in nineteenth century California do not support an analytical framing based on the black/white binary relationship forged elsewhere in the United States."⁴⁷ Just as exploring racism on the national level has historically biased the analysis toward the black-white paradigm, the California-specific focus will bias it toward looking at relations that are atypical of the national paradigm. It is not clear to what degree the California racial situation will extend beyond its borders to impact either within the national consciousness or specific state geography. As I mentioned earlier, however, outside of Florida and Texas, the multicultural-world trends of California are not yet extant in the South.

Through the process of racial formation and through the designed and de facto development of racial projects, the spatial-experiential paradigms of the South and California are sites of cultural and political contestation over race. And they are quite different in almost every way. More particularly, as racial projects, these sites "connect what race *means* in a particular discursive practice and the ways in which both social structures and everyday experiences are racially *organized*, based upon that meaning."⁴⁸ Beyond grossly describing the new national landscape, the new demography is more meaningfully considered, most of the time, within more local contexts. It is there that specific cultural habits, social structures, and institutional arrangements, on one hand, and

and the Global to the Local, 33 U.C. DAVIS L. REV. 1429, 1437 (2000). Yet, within the context of voting rights as discussed throughout this symposium, I am focusing on domestic, regional "racial situations."

46. See TOMAS ALMAGUER, *RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA* (1994).

47. *Id.* at 206. Progressive scholars ought to undertake this project for all states that have a significant racial history, as Richard Delgado and Jean Stefancic have done for California and Colorado. See generally Richard Delgado & Jean Stefancic, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521 (2000) (examining the history of racial mistreatment in California); Richard Delgado & Jean Stefancic, *Home-Grown Racism: Colorado's Historic Embrace—and Denial—of Equal Opportunity in Higher Education*, 70 U. COLO. L. REV. 703 (1999) (emphasizing the importance of regional and state histories of the treatment of people of color).

48. OMI & WINANT, *supra* note 41, at 56.

everyday experiences, on the other hand, are organized around the meanings of race that derive from discursive practice. Some of that practice is national, but most is local or regional.

Because the South reflects the purest expression of conservative values and politics, its influence transcends its regional borders. Indeed, at present the United States is more the South than it is California. As Peter Applebome argues, “[T]he most striking aspect of American life at the century’s end—in a way that would have been utterly unimaginable three decades ago at the height of the civil rights era—is how much the country looks like the South.”⁴⁹ The South looks back in time for future direction, whereas California has a different orientation. Because of the incorporation of immigrants and others from out of state, it is a place of new beginnings and dreams. In spite of backlash, in California history has less hold and traditional ways are less entrenched. Prior ownership of the place is less secure.

In many ways, while the South is America, California is a foreign country. According to Applebome, the South—becoming America—is a place “that’s bitterly antigovernment and fiercely individualistic, where race is a constant subtext of daily life, and God and guns run through public discourse like an electric current.”⁵⁰ It is a place “where influential scholars market theories of white supremacy, where the word ‘liberal’ is a negative epithet, where hang-’em-high law-and-order justice centered on the death penalty and throw-away-the-key sentencing are politically all but unstoppable.”⁵¹ It is “a place obsessed with states’ rights, as if it were the 1850s all over again and the Civil War had never been fought.”⁵² Applebome concludes, “such characteristics have always described the South. Somehow, they now describe the nation.”⁵³

What makes California exceptional is not that there is no South there, because there really is quite a bit of the South there. However, in California, there are many forces—human agency and other factors—that work to countervail the characteristics that describe the South in Applebome’s depiction.⁵⁴ Within California, there is no

49. APPLEBOME, *supra* note 15, at 6; *See generally* JOHN EGERTON, *THE AMERICANIZATION OF DIXIE: THE SOUTHERNIZATION OF AMERICA* (1973).

50. APPLEBOME, *supra* note 15, at 8.

51. *Id.*

52. *Id.*

53. *Id.* at 9.

54. While Bush consolidates a base in the South, he writes off California. Richard L. Berke, *Bush is Paying Scant Attention to California*, N.Y. TIMES, Apr. 15, 2001, at A1 (reporting that President Bush apparently has “relegated the state to political purgatory, reflecting his advisers’ judgment that he cannot win here in 2004”).

clear hegemony resulting from either race discourse or race politics. Within the South, there is no strong counter hegemony to either the neoconservative/far right race discourse or race politics. Whereas the left's attempt to establish an insurgent multiculturalism has a chance in California, it has no chance in the South. In California, it seems that the only constant is change. Demography plays an important role in reconfiguring social, cultural, and political landscapes. As Connie Rice, a civil rights lawyer, says, "[t]he definition of being a Californian is going to get more interesting every year."⁵⁵

As it becomes harder to assign dominance to a single group, different alliances are likely to emerge to address different issues. Rice predicts, "[b]loc voting won't be identifiable by race in the next twenty-five to thirty years."⁵⁶ It will more often be based on class, income, or region.⁵⁷ Some attribute the changed political landscape in California—as it becomes more liberal—to the very demographic shifts that, for the most part, elude the southern region. Thus, the state is now dominated by Democrats, who appeal to voters as more immigrant-friendly. Indeed, only a single Republican holds statewide office in California.⁵⁸

As the Republican West and South gain population, a Presidential candidate could now win the election if he or she were to carry exactly those states that Richard Nixon carried in *losing* to John F. Kennedy in 1960.⁵⁹ This regional pairing, in terms of population and influence, is South-dominant. The South is the Republican party's strongest constituency in the nation, with George W. Bush in the White House, Trent Lott of Mississippi as minority leader in the Senate, and Congressional leaders Dick Armey and Tom Delay of Texas.

Republican dominance in the South extends to the judiciary as well. The United States Court of Appeals for the Fourth Circuit Court of Appeals sits in Richmond, Virginia. Its jurisdiction covers North and South Carolina, Virginia, Maryland, and West Virginia.⁶⁰ Among the eleven numbered circuits, it has the largest proportion of African-American residents—twenty-two percent.⁶¹ Yet, until the recent appointment of Roger Gregory, the Fourth Circuit *never* had a

55. Booth, *supra* note 29.

56. *Id.*

57. *Id.*

58. *Id.*

59. APPLEBOME, *supra* note 15, at 8.

60. 28 U.S.C. § 41 (Supp. V 1999); Allison Mitchell, *Senators Confirm 3 Judges, Including Once-Stalled Black*, N.Y. TIMES, July 21, 2001, at A28.

61. Mitchell, *supra* note 60.

confirmed black judge sitting on it.⁶² While the racial representative function of a judge is not solely a matter of skin color, black judges can and do express a point of view that reflects black community values and perspectives that militate against legitimating the false notion of the impartial, colorblind judiciary.⁶³

Finally, in the recent Presidential election, George W. Bush gained all the electoral college votes from the southern states—the only region that constituted a solid voting bloc for him.⁶⁴ This dilutes the African-American vote, because it “operates to diminish [black] potential voting strength that derives from the group’s geographic concentration.”⁶⁵ This reinforces Matthew Hoffman’s prior

62. *Id.* Senator Trent Lott, the Republican leader, cast the lone vote against him. *Id.* The court has five vacancies among its fifteen judgeships. Over the last seven years President Clinton appointed three black judges from North Carolina to fill the vacant slots, but each time Senator Jesse Helms exercised his prerogatives to block the nominations from even reaching the Senate floor for a vote. John B. Judis, *Round Midnight*, 12 AMERICAN PROSPECT 1112, Feb. 12, 2001, available at 2001 WL 7680875.

63. Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 469–70 (2000).

64. Associated Press, *Bush’s Electors Remain Faithful, Sealing His Win of Presidency*, ST. LOUIS POST-DISPATCH, Dec. 19, 2000, at A1; see also Ronald Brownstein, *Bush Needs to Appeal to Moderates and Keep His Base*, DESERT NEWS, Dec. 31, 2000, at AA6, available at WL 30717611 (“The electoral map tells a clear story. Bush . . . re-established the Republican dominance of the South [winning] every state of the old Confederacy, plus Oklahoma and Kentucky.”). Moreover, the electoral college vote advantage of President Bush is likely to continue. According to Michael Hedges, if the 2000 electoral vote had been based on the reapportionment directed by the 2000 census, Bush would have gained 278 votes instead of the 271 he actually won. With the exception of California, Bush carried the states that gained congressional seats, while most of the states carried by Gore lost seats. The states gaining seats under the 2000 census are Arizona, California, Colorado, Florida, Georgia, Nevada, North Carolina, and Texas. Michael Hedges, *Count Puts a New Twist on Election: Census Data Show Republicans’ Shift*, HOUS. CHRON., Dec. 29, 2000, at 20.

On the other hand, one calculation suggests that in light of the dramatic increases in nonwhite population, if nonwhites voted in the same percentage in 2004 as they voted in 2000, Bush would lose by 3.4 million votes in 2004. *Meet the Press* (NBC television broadcast, Apr. 29, 2001), available at WL 24103221 (Tim Russert interviewing Karl Rove, a key advisor to the President). Because the four states with the most electoral votes—California, Florida, New York, and Texas—are also the four most diverse states that reflect the new demography, the nonwhite population’s vote will be significant to both major political parties in the presidential election in 2004. In 2000, President Bush gained thirty-five percent of the Latino vote, forty-one percent of the Asian vote, and just nine percent of the black vote. Steve Sailer, *Ideas Without Consequences*, NATIONAL REVIEW, June 11, 2001, at 59 (book review of ANGELA D. DILLARD, GUESS WHO’S COMING TO DINNER NOW? MULTICULTURAL CONSERVATISM IN AMERICA (2000)). As with the 2000 presidential election, Florida is likely to be the key state in 2004. Ronald Brownstein, *2004 Already Shaping Up as a Rerun of Florida Feud Presidency: With the Electoral Map Split Nearly Evenly, GOP and Democrats View the State as Pivotal*, L.A. TIMES, Apr. 20, 2001, at A1.

65. Davidson, *supra* note 10, at 4.

contention that this form of vote dilution calls into question the legitimacy of the winner-take-all system of the electoral college.⁶⁶ From 1948 to 1968, there was a gradual realignment of white southerners, a development that indicates that “the current Republican domination of the electoral college in the South is no accident.”⁶⁷ As Hoffman demonstrates, this domination “is in large part the result of a conscious effort by white southern politicians—first by segregationist Democrats, and later by racially conservative Republicans—to make race a focal point of Presidential politics.”⁶⁸ Although only nine percent of blacks nationwide voted for George W. Bush,⁶⁹ the electoral college’s dilution of the southern black vote emboldened him not simply to ignore black interests, but also to insult black people. The sharpest insult stems from his appointment of John Ashcroft as Attorney General.⁷⁰ Thus, Bush’s image among many blacks as an “illegitimate President” does not really trouble him, for this appointment can only reinforce that image.

I am not surprised that Bush garnered only nine percent of the African-American vote.⁷¹ Given the interrelation between racism and political-cultural conservatism, I am surprised that Bush got such a high percentage of black votes.⁷² Consider briefly, a moment of

66. Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935, 949–50 (1996).

67. *Id.* at 959.

68. *Id.*; see also THOMAS BYRNE EDSALL with MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 139 (1992) (discussing Ronald Reagan’s racialized colorblindness—“Reagan had found an ostensibly neutral language that would become a powerful tool with which to advocate stands that polarized voters on race-freighted issues—issues ranging from welfare to busing to affirmative action.”).

69. Corchado, *supra* note 28.

70. Ellis Cose, *Getting Ready for the Fire This Time*, NEWSWEEK, Jan. 22, 2001, at 29 (“By nominating John Ashcroft and other hard-core conservatives, Bush has turned [black] wariness into rage.”).

71. DeWayne Wickham, *Blacks Rightly Ignore GOP*, USA TODAY, Nov. 9, 2000, at 29A. See also *Blacks More Negative About Government Than Whites, Survey Shows*, XINHUA ENG. NEWSWIRE, July 11, 2001, available at 2001 WL 24551373 (stating that as the government has shifted from Democrats to Republicans, “black Americans have become much more negative about the general way things are going . . . , as well as about the President, Congress, and the Supreme Court”).

72. David Bositis argues that Bush was not a rational choice for African-American voters, because at the national level African Americans distrust Republicans: “The GOP leadership in Washington is dominated by white southerners . . . who were sent to office by white southern voters who left the Democratic Party because of its embrace of civil rights. This was the basis of Richard Nixon’s ‘southern strategy,’ with the GOP making negative racial appeals to attract white southern voters.” David Bositis, *Gore Was Rational Choice for African Americans*, MINNEAPOLIS-ST. PAUL STAR TRIB., Dec. 10, 2000, at 33A.

history. In 1964, the Republican Presidential candidate Barry Goldwater planted anti-civil rights, anti-black seeds that failed to bear fruit for him, although they did for many subsequent Republican candidates, including Richard Nixon in 1968, Ronald Reagan in 1980 and 1984, George Bush in 1988, and, finally, George W. Bush in 2000.

It is ironic that Republicans have been able to build on Goldwater's 1964 campaign. He carried his home state of Arizona by a scant 4,782 vote margin out of the 480,770 votes that were cast.⁷³ The only other states he carried were the Deep South states of Alabama, Georgia, Louisiana, Mississippi, and South Carolina.⁷⁴ The issue of race was central.⁷⁵ As Michael Goldfield notes, "despite his electoral failure . . . , Goldwater successfully became a vehicle for projecting racism as a national issue, making it more respectable to the population in the country as a whole and tying it to conservative themes."⁷⁶ Like his Republican predecessors, from Nixon on, George W. Bush has effectively built his politics on this connection, now veiled, between racism and conservative themes. This brand of "colorblind politics" evolves from the 1964 Goldwater campaign, the 1968 George Wallace campaign ("segregation now, segregation forever"), Richard Nixon's 1968 "southern strategy," and the full-fledged emergence of a dominating white racist coalition during the Presidential terms of Ronald Reagan and George Bush, from 1980-1992.⁷⁷

The racist taint of conservative politics is driven by southern politics and the primary focus has been to subordinate blacks in particular. While the racist messages of this conservatism are masked by code words, its momentum, largely unchecked, contributed to the ascendancy of George W. Bush, who was supported by a majority of voters throughout the South, although not in California. When the Voting Rights Act was passed in 1965, it sought to address the political conflict that raged throughout the South between blacks and whites. The Voting Rights Act imposed provisions on the South that

73. EDSALL, *supra* note 68, at 42.

74. MICHAEL GOLDFIELD, *THE COLOR OF POLITICS: RACE AND THE MAINSPRINGS OF AMERICAN POLITICS* 309 (1997).

75. EDSALL, *supra* note 68, at 42.

76. GOLDFIELD, *supra* note 74, at 309.

77. This trajectory, at least through Goldwater to the elder George Bush, is well-documented. See, e.g., Hoffman, *supra* note 66, at 949-62 (discussing the connections among race, presidential politics, and the winner-take-all rule of the electoral college); GOLDFIELD, *supra* note 74, at 296-318 (discussing the political construction of a dominant white racist coalition); STEVEN A. SHULL, *AMERICAN CIVIL RIGHTS POLICY FROM TRUMAN TO CLINTON: THE ROLE OF PRESIDENTIAL LEADERSHIP* 36-53 (1999) (discussing Presidential leadership regarding civil rights).

“represented a direct and pervasive federal assault on the deeply-rooted practice of controlling the local political process in order to maintain the economic and social subordination of blacks.”⁷⁸ The legacy of that conflict continues today, unmitigated by an increasing population of Latinos and Asians. In the foreseeable future, the black-white paradigm will persistently describe race relations in the South even as the country becomes “a nation of minorities.” How we think about race relations and how we think about racial justice will have to take this reality into account. This is the racial situation that competes with that of California.

In sum, the recent Presidential election confirms David Abbott and James Levine’s view that black voters in the South “have had little more influence on most modern Presidential general elections than Bulgarians. Their votes, although technically cast, have not usually counted.”⁷⁹ This vote dilution through the electoral college process is a significant reason that blacks were so outraged by the debacle in Florida, because the black vote could have made a real difference this time. For example, one estimate suggests that the ballots of black voters in Florida were rejected 14.4 percent of the time, compared with a 1.6 percent rate of rejection for non-black voters.⁸⁰ According to one report, “black voters are outraged. They are filing affidavits, saying they weren’t allowed to vote, or, in one case near Tallahassee, that they had to dodge a police roadblock to get to the polls, or that voting equipment in black precincts is old and faulty.”⁸¹ Admittedly, a lot of blacks and others experienced confusion during the election, but many African Americans feel that dirty tricks—“something purposeful and foul”—were part of a deliberate effort to disenfranchise them.⁸² Black votes should count more than those of the Bulgarians, and the fact that they did not last November is a function of racial subordination. This confirms the black-white paradigm’s persistent relevance not only in the South, but also where Dixie rises beyond. Just as systemic political and social forces have produced minority vote dilution in the South, the Supreme Court has provided obstacles as well.

78. EDSALL, *supra* note 68, at 84.

79. DAVID W. ABBOTT & JAMES P. LEVINE, *WRONGWINNER: THE COMING DEBACLE IN THE ELECTORAL COLLEGE* 94 (1991).

80. Associated Press, *Civil Rights Glance*, June 9, 2001, available at 2001 WL 22913811 (reporting on findings of the U.S. Commission on Civil Rights).

81. Joel Englehardt, *Black Voters Angered by Election Day Hurdles*, *PALM BEACH POST*, Dec. 10, 2000, at 1A.

82. Melanie Eversley, *Florida’s Flawed Vote Haunts Minorities—Many Suspect GOP Plot*, *ATLANTA J. CONST.*, May 28, 2001, at A8.

C. *The Supreme Court's Misrecognition of Whiteness*

Through an imposition of colorblind *injustice*, the Supreme Court is undermining the Voting Rights Act by rearticulating its antidiscrimination principles to “diminish minority political power.”⁸³ While the Supreme Court majority opinions are death to black race consciousness, they are amazingly naïve or intellectually dishonest when it comes to appreciating that whiteness is also deployed in bloc voting ways.⁸⁴ This misrecognition of whiteness as individualized and benign steers many Supreme Court cases off-track.⁸⁵ The recent voting rights decisions such as *Shaw v. Reno*,⁸⁶ *Miller v. Johnson*,⁸⁷ and *Bush v. Vera*⁸⁸ emphasize that rights inhere primarily in individuals who are separate from a social group that has a racial identity. These decisions transport the ideology of individualized colorblindness across contexts, from affirmative action to vote dilution.⁸⁹ Individualized colorblindness triumphs over social group race consciousness. In the vote-dilution context, however, this is peculiar because, as Chandler Davidson observes, vote dilution is a racialized group phenomenon: “It occurs because the propensity of an identifiable group to vote as a bloc waters down the voting strength of another identifiable group, under certain conditions.”⁹⁰ As Davidson states, “one individual acting alone could not dilute the vote of another individual or of a group of individuals.”⁹¹

83. J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 451–53 (1999).

84. Voting is simply an illustration of the general phenomenon of deploying whiteness. See generally WHITE REIGN: *DEPLOYING WHITENESS IN AMERICA* (Joe L. Kincheloe et al. eds., 1998). Indeed, some see that whiteness, even though divorced from crass white supremacy, has a committed basis of solidarity and deliberate bonding. Christine E. Sleeter, *White Silence, White Solidarity*, in *RACE TRAITOR* 257, 261 (John Garvey & Noel Ignatiev eds., 1996) (“White racial bonding refers ‘to interactions that have the purpose of affirming a common stance on race-related issues, legitimating particular interpretations of oppressed groups, and drawing we-they boundaries.’”).

85. Whites often do not take their whiteness for granted. See IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 19–33, 155–202 (1996). Some see that there is a property interest in whiteness. Cheryl Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1707, 1714–15 (1993). Others see whiteness as a privilege that must be unmasked. STEPHANIE M. WILDMAN with contributions by MARGALYNE ARMSTRONG ET AL., *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 8 (1996).

86. 509 U.S. 630 (1993).

87. 515 U.S. 900 (1995).

88. 517 U.S. 952 (1996).

89. Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 *GEO. L.J.* 279, 317 (1997).

90. Davidson, *supra* note 10, at 4.

91. *Id.*; see also BERNARD GROFMAN, LISA HANDLEY, & RICHARD G. NIEMI,

Thus, the vote dilution remedies that white individuals are challenging so successfully were put into place to counter white racial bloc voting that prevented blacks from electing candidates of their choice.⁹² Racially polarized voting by whites forced the formulation of a remedy that would allow blacks to fight fire with fire, so to speak. That remedy, race-conscious and group-based, is dismissed as simply as observing that two wrongs do not make a right. These decisions are as outrageously improper as that in *Bush v Gore*,⁹³ all under the rubric of some “newest equal protection.”⁹⁴

The Court has reduced race law to what Girardeau Spann calls “pure politics,” endorsing a veiled majoritarianism.⁹⁵ In the context of voting rights, its approach fails to appreciate that a right of effective political participation in the election process makes no sense if that right is viewed as undermining the transcending notion that rights are simply individual. An inevitable effect and objective of apportionment, for example, is to treat individual voters as part of a social group. The Supreme Court has singled out race as the singular, most inappropriate basis for the attribution of group identity and aggregation.⁹⁶ Race, other than whiteness, is inappropriate to form the basis for “any sophisticated right to genuinely meaningful electoral participation.”⁹⁷

MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 131–32 (1992) (criticizing the courts’ treatment of voting rights by emphasizing the imagined or hoped-for colorblind society over the actual institutionalization of racial and ethnic divisions).

92. See *Thornberg v. Gingles*, 478 U.S. 30, 51 (1986) (white bloc voting occurs when “the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate”).

93. See *Bush v. Gore*, 121 S. Ct. 525 (2000); SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000* 47–49 (2001) [hereinafter *ELECTIONS GO BAD*].

94. See *ELECTIONS GO BAD*, *supra* note 93, at 47–49 (2001) (discussing the impact of *Bush v. Gore* on equal protection jurisprudence).

95. Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1974–75 (1990) (arguing that minority interests can best be protected by the political process).

96. *Richmond v. J.A. Croson*, 488 U.S. 469, 493–94 (1995).

97. As Samuel Issacharoff points out:

[T]he right to cast an effective ballot implicate[s] more than simply the equal weighting of all votes, as per the one-person, one-vote rule. To be effective, a voter’s ballot must stand a meaningful chance of effective aggregation with those of like-minded voters to claim a just share of electoral results. For this reason, any sophisticated right to genuinely meaningful electoral participation must be evaluated and measured as a group right, that of groups of voters seeking the outcomes promised to them through the electoral system.

Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 883–84 (1995); see also Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201, 1202 (1996) (distinguishing between voting and equal protection law in other areas).

The race opinions of a five-to-four majority on the Supreme Court achieve a false coherence through an incredible process of decontextualization.⁹⁸ As a consequence of this radical decontextualization, the Supreme Court majority appears literally blinded by color as it—the same five characters each time⁹⁹—neither acknowledges nor recognizes the degree of racially polarized *white* bloc voting and therefore will not permit black bloc voting in what really amounts to self defense. The Court acts as if black bloc voting is the first move rather than the second, the initial fire rather than the return fire. Through this misrecognition of whiteness, the Court majority subjects this second move to strict scrutiny as it claims to be unable to distinguish invidious from benign racial discrimination.¹⁰⁰ The second move, blacks taking race predominantly into account, violates the equal protection rights of whites, because they are deemed to suffer *individual* “expressive harm.”¹⁰¹ Individual rights trump efforts to redress vote dilution, a group harm.¹⁰²

98. Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1732 (1989) (criticizing the Court for achieving “its superficial order through a process of decontextualization”). See generally *Croson*, 488 U.S. at 469; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

99. The five justices are Chief Justice Renquist and Justices Scalia, Thomas, Kennedy, and O'Connor.

100. According to Justice O'Connor, “express racial classifications are immediately suspect because, [a]bsent searching judicial inquiry . . . , there is simply no way of determining whether classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.” *Shaw v. Reno*, 509 U.S. 630, 642–43 (1993) (quoting *Croson*, 488 U.S. at 469). Justice Stevens, however, argues, that “[i]nvidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial based preferences reflect the opposite impulse: a desire to foster equality in society.” *Adarand*, 515 U.S. at 243 (Stevens, J., dissenting).

101. This “expressive harm”

is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about. On this view, the meaning of a governmental action is just as important as what that action does. Public policies can violate the Constitution not only because they bring about concrete costs, but because the very meaning they convey demonstrates inappropriate respect for relevant public values.

Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506–08 (1993). See *Bush v. Vera*, 517 U.S. 952, 1053 (1996) (Souter, J., dissenting) (acknowledging this harm).

102. Standing is granted in these cases, although plaintiffs have not suffered the traditional injury-in-fact. Allowing “expressive harms” to dispense with this traditional standing requirement has been described as “unprincipled and lacking support in equal protection and voting rights jurisprudence.” Judith Reed, *Sense and Nonsense: Standing in the Racial Districting Cases as a Window on the Supreme Court’s View of the Right to Vote*, 4 MICH. J. RACE & L. 389, 393 (1999) (implicitly supporting the more general conclusion).

As I noted above, felon disenfranchisement represents the most blatant example of depriving individual voting rights and poses significant obstacles to minority voting power. I now turn to this subject.

II. FELON DISENFRANCHISEMENT: AN “OUT OF SIGHT, OUT OF MIND” FORM OF VOTE DENIAL AND DILUTION

This part of the Essay discusses felon disenfranchisement,¹⁰³ focusing on its racially adverse impact on blacks and Latinos, the significant impact their vote, if granted, could make in election results, and challenging this practice as vote denial to the offenders and vote dilution to their communities.¹⁰⁴

A. *The Impact of Felon Disenfranchisement*

As the nation celebrates American Democracy, pointing with triumphant pride to the fact that across the land there is virtually universal suffrage, over four million convicted felons cannot vote under varied circumstances.¹⁰⁵ They constitute the largest single group of citizens who are prohibited by state laws from voting in both state and federal elections.¹⁰⁶ Of this total, 1.5 million, or 37.5 percent, are African Americans.¹⁰⁷ With the exception of Maine, Massachusetts, and Vermont, forty-seven states disenfranchise offenders while they are incarcerated.¹⁰⁸ Thirty-two states go farther and disenfranchise parolees while twenty-nine states disenfranchise probationers.¹⁰⁹ Remarkably, nine states (recently reduced from thirteen) deny felons the right to vote for the rest of their lives.¹¹⁰

Despite the real gains in anti-discrimination law made under constitutional amendments and the Voting Rights Act, felons—

103. Throughout discussions of this subject, the words “disfranchisement” and “disenfranchisement” are used interchangeably.

104. See generally Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L. J. 537 (1993) (reviewing the history of felon disenfranchisement and suggesting that challengers use section 2 of the Voting Rights Act to demonstrate that disenfranchisement is illegal).

105. ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 308 (2000).

106. *Id.*

107. Mike Schneider, *Restoring Civil Rights*, A.P. NEWSWIRE, May 11, 2001.

108. Mauer, *supra* note 11, at 248.

109. *Id.*

110. These states include Alabama, Florida, Iowa, Kentucky, Mississippi, Nevada, New Mexico, Virginia and Wyoming. Norma Fritz, *Electoral Debacle: Our Response*, CIVIL LIBERTIES, Mar. 2001, at 2, 5.

mostly African-American and Latino males, many of them young¹¹¹—probably remain disenfranchised not only because they are nonwhite, but also because they lack political support.¹¹² The recent problems in Florida, many pointed out by Walter Farrell and James Johnson,¹¹³ open up a new opportunity to focus on this problem. As Lani Guinier points out, in Florida alone, for example, as a result of permanent disenfranchisement, more than 400,000 ex-felons—almost fifty percent of them black—were ineligible to vote in last November’s election.¹¹⁴ Florida, moreover, “has the largest number of people affected by this rule.”¹¹⁵ Thirty-one percent of the black men in Florida are disenfranchised because of prior felonies.¹¹⁶

During the 2000 Presidential election, Florida officials sought to counter voter fraud by purging the rolls of felons. Again, many blacks saw this as another concerted attack on black voters, because forty-four percent of the names on the felon list were black and the felon purge eliminated 8,456 blacks from the voter rolls before the election.¹¹⁷ Ultimately, too late for the election, of the 4,847 people who appealed, 2,430 were judged not to have been convicted felons.¹¹⁸ Given the profiles of the felons, disproportionately black and Latino, it is likely that if these voters had not been purged, the outcome of the election may well have been different. As Michael Tomasky observes, “[t]o put it bluntly: A wildly inaccurate purge of voters, which the state of Florida knew to be inaccurate but did nothing to

111. Allen J. Beck & Jennifer C. Karburg, U.S. Dept. of Justice, Prison and Jail Inmates at Midyear 2000, at 9 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim00.pdf> (last visited Aug. 23, 2001) (on file with the North Carolina Law Review).

112. KEYSSAR, *supra* note 105, at 308 (observing that indeed they “probably possess negative political leverage: it would be costly to any politician to embrace their cause. Their ongoing exclusion from the polity also is a stark sign of the limits of the legal revolution that has occurred.”). Detroit Congressman John Conyers, however, has introduced a bill, the Voting Rights of Former Offenders Act, to restore voting rights to felons. Press Release, *Federal Document Clearing House, Conyers on Former Felon Voting Rights*, Jan. 29, 1997, available at 1997 WL 4429001.

113. See Walter C. Farrell, Jr. & James H. Johnson, Jr., *Minority Political Participation in the New Millennium*, 79 N.C. L. REV. 1215, 1240–41 (2001) (discussing voting difficulties experienced by minorities in Florida during the 2000 election).

114. Lani Guinier, *What We Must Overcome*, 12 THE AMERICAN PROSPECT 26, Mar. 12, 2001, available at 2001 WL 7680923.

115. Fritz, *supra* note 110, at 5.

116. Robert E. Pierre, *Botched Name Purge Denied Some the Right to Vote*, WASH. POST., May 31, 2001, at A1.

117. Melanie Eversley & Gary Kane, *Black Leaders Sense Sinister Motive in Purge*, PALM BEACH POST, May 27, 2001, at 17A.

118. John Lantigua, *How the GOP Gamed the System in Florida*, NATION, Apr. 30, 2001, at 11.

correct, cost Al Gore Florida, and the presidency.”¹¹⁹ This egregious variation on the theme of felon disenfranchisement is outrageous.

This particular injustice aside, the larger problem of felon disenfranchisement demands redress. According to Marc Mauer, “if current criminal justice trends continue, we can expect that thirty to forty percent of black males born today will lose the right to vote for a least part of their adult lives.”¹²⁰ Because the rate of incarceration has increased so dramatically in the last forty years, social scientists speculate that had the current level existed in 1960, “it is very likely that Richard Nixon would have defeated John Kennedy in the popular vote and possible that Nixon would have won the electoral college vote as well.”¹²¹

Many of the problems in Florida, like felon disenfranchisement, are rooted in a racist history and are fundamentally structural. They predate the recent debacle.¹²² According to 1990 census data on the proportion of black and white prisoners to the total black and white population for the state, out of a black population of 1,759,534 there were 25,385 prisoners.¹²³ Although the white population in Florida totaled 10,749,285 the number of white prisoners was significantly less than the black prisoners, numbering 18,206.¹²⁴ That is, while the white population in Florida outnumbered blacks by ten million, black inmates outnumbered white inmates by over seven thousand. As a collateral consequence of incarceration, blacks in Florida have less opportunity than white members of the electorate to participate in the political process and to elect candidates of their choice.¹²⁵

119. Michael Tomasky, *The Media and the Florida Fiasco*, TIKUN, May 1, 2001, at 58.

120. Mauer, *supra* note 11, at 249.

121. Christopher Uggen & Jeff Manza, *The Political Consequences of Felon Disenfranchisement Laws in the United States* (Draft, Aug. 11, 2000) (presented to the American Sociological Association), *discussed in* SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 10 (2001 Supp.).

122. *See, e.g.*, William H. Chafe, *Troubling Echoes of Hayes-Tilden*, HERALD-SUN (Durham, N.C.), Dec. 24, 2000, at A11 (“Remarkable parallels exist between the presidential elections of 1876 and 2000.”).

123. Alice E. Harvey, Comment, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145, 1152 tbl.1 (1994).

124. *Id.*

125. *Id.* at 1147 (“Due to the disproportionate percentage of black convicted felons removed from the already limited pool of eligible black voters, ex-felon disenfranchisement negatively impacts the black vote.”).

B. The South's Racialized Adoption of Felon Disenfranchisement

While the policy of felon disenfranchisement may appear to be race-neutral, its southern roots date from nineteenth century acts of intentional racial discrimination and are perpetuated through legacy effects. As an artifact of reaction to the Civil War amendments and Reconstruction, states in the South have employed the criminal law in a tailored way to disfranchise blacks, primarily or exclusively. Thus, Andrew Shapiro observes, "Narrower in scope than literacy tests or poll taxes and easier to justify than understanding or grandfather clauses, criminal disenfranchisement laws provided the southern states with 'insurance if courts struck down more blatantly unconstitutional clauses.' The insurance has paid off: A century after the disenfranchising conventions, criminal disenfranchisement is the only substantial voting restriction of [that] era that remains in effect."¹²⁶

In 1890, the state of Mississippi led the southern states in rewriting their felon disenfranchisement laws to subtly disqualify blacks. It amended a state constitutional provision that disenfranchised citizens convicted of "any crime" with a narrower list of various petty crimes that that state viewed as more likely to be committed by blacks than whites.¹²⁷ Although these provisions were facially neutral—or colorblind—they were really intended to discriminate against blacks.

In the 1896 decision of *Ratliff v. Beale*,¹²⁸ the Mississippi Supreme Court spoke approvingly of the state constitutional convention's attempt to reach "the proper settlement of the electoral franchise [which] had been the subject of more reflection and thought for a period of years than was bestowed upon all other subjects as to which our constitution underwent material change."¹²⁹ The court noted that its "unhappy state" had, in rapid succession, gone "from civil war through a period of military occupancy" and a period, next, "in which the control of public affairs had passed to a recently enfranchised race, unfitted by educational experience for the responsibility thrust upon it."¹³⁰ In upholding restrictions to the franchise, the court observed candidly:

126. Shapiro, *supra* note 104, at 538.

127. Andrew L. Shapiro, *The Disenfranchised*, 35 AM. PROSPECT 60 (Nov./Dec. 1997), available at 1997 WL 21293207 [hereinafter *Disenfranchised*].

128. 20 So. 865 (Miss. 1896).

129. *Id.* at 867.

130. *Id.*

Within the field of permissible action under the limitations imposed by the federal constitution, the convention *swept the circle of expedients to obstruct the exercise of the franchise by the negro race*. By reason of its previous condition of servitude and dependence [read "slavery"], this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from that of the whites—a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites. *Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics* and the offenses to which its weaker members were prone.¹³¹

Alabama, Louisiana, South Carolina, and Virginia also used a selective pattern of disenfranchisement in order to keep the electorate as white as possible.¹³² An Alabama legislator declared that "excluding wife beaters alone would get rid of 60 percent of eligible blacks while removing few whites."¹³³ Given the discriminatory purposes behind these laws, they violated the equal protection clause of the fourteenth amendment. For that reason, in *Hunter v Underwood*,¹³⁴ the United States Supreme Court invalidated a 1901 Alabama constitutional disenfranchisement provision that covered persons convicted of various felonies and misdemeanors, including "any crime involving moral turpitude," although it did not do so until 1985.

C. Challenges to Disenfranchisement Laws under the Voting Rights Act

The *Hunter* case's reach proved to be limited, because "few states—and none outside the South—had legal codes and track records that demonstrated intent as clearly as did Alabama's."¹³⁵ Still, *Hunter's* significance lies in its intimation that success for a criminal disenfranchisement plaintiff meant arguing that challenged statutes were illegal because they violated laws protecting the minority right

131. *Id.* at 868 (emphasis added).

132. Shapiro, *supra* note 104, at 541.

133. *Disenfranchised*, *supra* note 127.

134. 471 U.S. 222 (1985) (involving a suit brought by a white and black, who had permanently lost the franchise because they were convicted of having written a bad check).

135. KEYSSAR, *supra* note 105, at 306.

to vote rather than the fourteenth amendment. With the 1982 amendments to the Voting Rights Act and the 1986 Supreme Court decision in *Thornberg v. Gingles*,¹³⁶ these claims could be filed without having to produce smoking-gun evidence of discriminatory purpose. Instead, claimants could challenge the racial effect of disenfranchisement laws when viewed in the context of the “totality of circumstances.”¹³⁷ The legal claim asserted is that felon disenfranchisement laws violate the Voting Rights Act because they disproportionately affect blacks and Latinos in two ways: (1) these laws *deny* the votes to a class of individuals who are disproportionately nonwhite and (2) these laws *dilute* voting power of communities that are disproportionately nonwhite.¹³⁸

While it is uncertain whether this litigation will prove to be successful, the issues must still be pushed in various arenas from Congress, where Representative John Conyers has proposed legislation, to the audiences of mass media and scholarship. The United States has the most restrictive, unjust disenfranchisement laws of any democratic nation in the world, particularly those laws that impose lifetime bans.¹³⁹ The harsh consequences that can result are excessive, racial injustices.¹⁴⁰ According to Virginia law, for instance,

136. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb (1994)); 478 U.S. 30 (1986).

137. *Gingles*, 478 U.S. at 79. See generally Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983) (providing an extensive review of the events leading to the Act's passage).

138. An argument on this basis was first put forward in the 1986 Tennessee case of *Wesley v. Collins*, 791 F.2d 1255, 1259-61 (6th Cir. 1986). Although plaintiffs were rebuffed in this case, “the approach continued to gain adherents among both civil rights and prisoners' rights activists, many of whom believed the *Wesley* decision to be flawed.” KEYSSAR, *supra* note 105, at 307. Two recent cases give rise to some optimism. See, e.g., *Farrakhan v. Locke*, 987 F. Supp. 1304, 1313 (E.D. Wash. 1997) (holding that the Voting Rights Act can apply to felon disenfranchisement laws and finding that a claim was stated for vote denial, but not vote dilution); *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (en banc). In *Baker*, the district court dismissed plaintiffs' complaint for failure to state a claim. *Baker v. Cuomo*, 842 F. Supp. 718 (S.D.N.Y. 1993). On appeal, the Second Circuit, sitting en banc, split five to five, thereby affirming the district court. *Pataki*, 85 F.3d at 921. Several of the judges wrote opinions, however, and this case indicates possible vote dilution arguments for plaintiffs in similar cases.

139. Mauer, *supra* note 11, at 248; see also Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753, 755-56 (2000) (contrasting American and German disenfranchisement provisions and arguing that America should adopt the German approach).

140. George Fletcher characterizes felon disenfranchisement as “civil death” or “the modern version of the idea of infamia as applied in Roman law.” George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA

an eighteen year-old convicted of felony drug possession in that state who successfully completes his sentence to a drug treatment program is disenfranchised for life even though he may not have spent a day in jail.¹⁴¹ We see then that felon disenfranchisement, as a collateral consequence of mass incarceration, not only disproportionately affects nonwhites and their communities, but it also offends racial justice and fundamental fairness. It embarrasses, or ought to embarrass, our Democracy.

CONCLUSION

We have a unique historical opportunity to allow the new demography to set the stage for us to engage in a richer conversation—"strong democratic talk."¹⁴² The nation can, if only it will, begin to develop a richer set of visions, commitments, and practices to remake the nation, multiculturally speaking.¹⁴³ Race is messy, not neat and not easily closed. It is either too early or too late for neat closure. Thus, as Asians and Latinos diversify the nation's complex social mosaic, we must focus on achieving social justice, multiracial democracy, and an open society. These three features of the multicultural makeover are a packaged deal, synergistically linked and bundled together. Keeping our eyes on the prize, so to speak, should direct our collective attention right here.

In arguing that we should focus on voting rights within the local racial situations of the South and California, I am not suggesting that it is wrong to move beyond the black-white paradigm. But moving beyond that paradigm is problematic in ways that Asians and Latinos must more carefully acknowledge. It must be more than a cry, "We're here, too. What about us?" The issues presented by the new demography extend far beyond simply looking at new faces that are neither black nor white. Simply recognizing this descriptive feature of the evolving nation begs too many questions related to the quest for

L. REV. 1895, 1899 (1999). He states, "[t]he basic issue is whether categorical divestment of voting rights introduces an impermissible element of caste into the American political system." *Id.* at 1902.

141. Mauer, *supra* note 11, at 248.

142. BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 182, 186 (1984) (suggesting that such talk employs "language that is broad and novel enough to bridge conflicting perceptions of the world yet sufficiently genuine enough to withstand the later pounding of the subscribing parties").

143. Here, I think the multiculturalism must be insurgent, broadening the focus from mere identity construction and diversity tolerance to focusing on "relations of power and racialized identities [that] become paramount as part of a language of critique and possibility." Henry A. Giroux, *Insurgent Multiculturalism and the Promise of Pedagogy*, in *MULTICULTURALISM: A CRITICAL READER* 325, 326 (David Theo Goldberg ed., 1994).

social justice. As we move beyond just black and white, the movement must be contextually directed, and it must pay very close attention to the precise epigraphic questions that lead this Essay.

Generally, it is only by moving past the black-white paradigm that this country can achieve a truer democracy and a just society. But we need to look carefully, within contexts, at what is at stake and who are the stakeholders. From this view, whites cannot move past the black-white paradigm to secure a false sense of racial redemption and reconciliation in order to feel like our society is more open and less racist. Whites and people of color cannot move past it to delude ourselves into believing that we can defeat racism without still taking into account the social significance and the material consequences associated with race. In other words, we cannot reduce race to class or to ethnicity. Finally, we cannot ignore the black-white paradigm to embrace or exploit the new immigrants while closing the lid ever more tightly on those, of whatever color and class, who persistently remain at the bottom of the racial hierarchy. If the new demography brings new agents to the task of re-negotiating the culture to reflect social justice, multiracial democracy, and an open society, then all of our children will profit.

As I enter the middle-age years, I find my hope for a better time and place running more to my children than to myself. I wish I could be more optimistic about the short term. Yet, when I think of Dixie rising in time and space beyond the old South, I cannot help but recall Julia Reed's profile of David Duke, about a decade ago. She observed that while he did not represent the "old racism" of the Ku Klux Klan, the message that resonated with many whites was their confidence that he was "going to put the niggers down."¹⁴⁴ Reed recalled, moreover, that now almost thirty-five years ago, a president of the White Citizens Council, Roy Harris, captured the persistent problem of race in the South. He said in simple terms of truth: "Some people think the nigger is beneath their dignity. They talk Constitution but they look at the nigger. They talk states' rights but they mean nigger. This will never be a dead issue. Some issues never die."¹⁴⁵ Although this position diminishes in the South, it echoes beyond. Today, among the loudest echoes of the White Citizen's Council are those that disturbingly emanate from the Supreme Court majority, where "They talk Constitution, but they look. . . . They talk states' rights, but they mean"

144. Julia Reed, *His Brilliant Career*, N.Y. REV. BOOKS, Apr. 9, 1992, at 20, 23.

145. *Id.* at 24.

