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# Progressive Race Blindness?: Individual Identity, Group Politics, and Reform

Darren Lenard Hutchinson

*University of Florida Levin College of Law*, [hutchinson@law.ufl.edu](mailto:hutchinson@law.ufl.edu)

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PROGRESSIVE RACE BLINDNESS?:  
INDIVIDUAL IDENTITY, GROUP POLITICS,  
AND REFORM

Darren Lenard Hutchinson\*

*Critical Race Theorists advance race consciousness as a positive instrument for political and legal reform. A growing body of works by left-identified scholars, however, challenges this traditional progressive stance toward race consciousness. After summarizing the contours of this budding literature, this Article criticizes the “progressive race blindness” scholarship on several grounds and offers an alternative approach to race consciousness that balances skepticism towards the naturalness of race with a healthy appreciation of the realities of racial subjugation and identity.*

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\* Visiting Assistant Professor, University of Pennsylvania Law School. Assistant Professor, Southern Methodist University School of Law. B.A., University of Pennsylvania; J.D., Yale Law School. This Article benefited from conversations with Regina Austin, Devon Carbado, Christi Cunningham, and Terry Smith.

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### INTRODUCTION

One of the most contested doctrines in contemporary constitutional law is the “colorblindness” principle. Drawing upon themes of fairness articulated in modern racial justice movements, the U.S. Supreme Court has consistently held that race is a presumptively impermissible basis for public policy and legislative processes.<sup>1</sup> Thus, racial classifications trigger strict scrutiny—the Court’s most exacting judicial review.<sup>2</sup> The Court has also held that it must have a consistent approach to racial classifications: Racial classifications trigger strict scrutiny whether they are intended to harm persons of color or to remedy the effects of racial discrimination.<sup>3</sup> This latter doctrinal development—the application of strict scrutiny to remedial race-conscious legislation and policies—has generated a tremendous amount of scholarly debate.<sup>4</sup>

Critics of colorblindness have attacked the doctrine from a variety of perspectives. Many liberal scholars and jurists have criticized the Court for blurring the distinction between affirmative action and policies that subjugate persons of color. They contend that affirmative action is a benign form of discrimination that pursues compelling policy ends and should, therefore, receive a more deferential level of scrutiny from the Court.<sup>5</sup> Recently, a number of scholars have asserted that the Court’s opposition to race consciousness, particularly in the context of remedial usages of race, is inconsistent with the original intent of the Framers of the Fourteenth Amendment.<sup>6</sup>

1. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213–27, 237–39 (1995); *Shaw v. Reno*, 509 U.S. 630, 642–44, 648–49 (1993); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–98, 510–11 (1989).

2. See *Adarand*, 515 U.S. at 227; *Shaw*, 509 U.S. at 652; *Croson*, 488 U.S. at 490.

3. See *Adarand*, 515 U.S. at 202.

4. See Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 *How. L.J.* 1, 5–14 (1995) (discussing the academic and political debates over affirmative action).

5. See *id.* at 64–69.

6. See, e.g., Jed Rubenfeld, *Affirmative Action*, 107 *YALE L.J.* 427, 429–32 (1997) (arguing that originalism cannot justify the U.S. Supreme Court’s opposition to affirmative action); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 *MICH. L. REV.* 245 (1997) (arguing that the Framers of the Equal Protection Clause only intended to prohibit class distinc-

These scholars have persuasively argued that the Framers of the Fourteenth Amendment did not seek to prohibit all forms of race consciousness and that they even approved several legislative measures designed to assist blacks in the postbellum era. Critical Race Theorists have portrayed the colorblindness doctrine as a tool of oppression.<sup>7</sup> In several important works, Critical Race Theorists have argued that race, though socially constructed, remains salient in the lives of persons of color—as a source of both marginalization and resistance.<sup>8</sup> The Court's colorblindness doctrine fails to appreciate the positive usages of race by persons of color and the pervasiveness of racial inequality and discrimination.<sup>9</sup> Critical Race Theorists have also demonstrated that the Court's opposition to remedial race consciousness legitimizes racial inequality, because colorblindness treats as acceptable the existing unequal distribution of social resources and weakens efforts to redistribute social resources in a more egalitarian fashion.<sup>10</sup> Critical Race Theorists have argued further that the Court must view race consciousness in a more nuanced and contextualized manner: The Court must seek to identify and to root out invidious, rather than remedial, racial classifications.<sup>11</sup>

Despite the general opposition to colorblindness among liberal scholars and Critical Race Theorists, several left-identified commentators have recently begun to challenge this conventional thinking concerning race.<sup>12</sup> These progressive theorists contend that society should abandon the concept of race and that people of color should lead this effort.<sup>13</sup> These scholars claim that the negative history of race renders it a peculiar location for people of color to center their identities.<sup>14</sup> Specifically, the authors maintain that by clinging to race as an aspect of individual and group identity, people of color allow a construct rooted in domination to define their existence and fail to reconstruct their lives in a way that transcends the language of the dominant culture.<sup>15</sup>

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tions that lacked a "public purpose"); Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 482 (1998) (arguing from an originalist perspective that the U.S. Constitution does not prohibit the federal government from enacting all forms of race-conscious legislation, including affirmative action).

7. See Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 53–55 (1991).

8. See generally Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (discussing the role of race consciousness in black antiracist activism).

9. See Spann, *supra* note 4, at 48–63 (arguing that the Court's affirmative action jurisprudence obscures the significance of race).

10. See *id.* at 13.

11. See Gotanda, *supra* note 7, at 46–53.

12. See, e.g., *infra* notes 17–18, 20, 24 and accompanying text (discussing progressive race blindness scholarship).

13. See *infra* notes 25–32 and accompanying text.

14. See *id.*

15. See *infra* notes 25–28 and accompanying text.

These scholars' stated political and intellectual commitments stand in contrast to those of conservative scholars and jurists whose embrace of color-blindness has greatly restricted legislative efforts to combat the effects of racial subordination. Nevertheless, these left-identified scholars have faced criticism that their arguments ignore race's positive value—its utility as a tool for resisting racism. In response to such critiques, some of these scholars have qualified their claims. They now argue that people of color should discard race as an aspect of individual identity or group culture but should continue to recognize and to respond to racial subordination in the larger society.<sup>16</sup>

This Article responds to the advocates of “progressive race blindness” with several critiques of their central claims. Part I examines the contours of progressive race blindness in greater detail, giving centrality to the emergence of this theory in legal scholarship. Part I sets forth the common themes articulated in progressive race blindness arguments and highlights important differences among its proponents. Part II isolates several problems with the progressive race blindness literature and demonstrates that these weaknesses make the literature unhelpful as a political or legal theory and even dangerous to the cause of antiracism. Part III offers suggestions for future theorizing in the context of progressive race blindness. Although the proponents of progressive race blindness can overcome some of the limitations of their work, this Article ultimately argues that people of color should continue to “see” race as a dimension of both their individual and group identities.

## I. PROGRESSIVE RACE BLINDNESS: THE THEORY

### A. General Themes

Although most critical scholars support race consciousness, a small group of critical scholars have taken the position that society should abandon the concepts of race and racial identity. Scholars in the humanities, such as Anthony Appiah and Paul Gilroy, have produced the bulk of this scholarship. Recently, however, scholars such as Christi Cunningham, Richard Ford, and Reginald Leamon Robinson have begun to embrace progressive race blindness in legal analysis. This part discusses the central themes of progressive race blindness. Because the proponents of progressive race blindness do not think identically, this part also discusses, when relevant, certain important differences among the ideas of these scholars.

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16. See *infra* notes 33–43 and accompanying text.

## 1. Race Is Socially Constructed

The proponents of progressive race blindness all start from the proposition that race does not exist in nature; instead, race is a product of human effort and interaction. Reginald Leamon Robinson, for example, argues that “race is not biologically factual. It is not real. As such, race does not have any meaning that survives its social and historical context. Race exists, if ever, in our individual and cultural consciousness.”<sup>17</sup> Similarly, Richard Ford observes that “[i]t is now almost common knowledge that the idea of race-as-biological-difference has been discredited as a matter of science.”<sup>18</sup> Advocates of progressive race blindness embrace the persuasive contemporary social theories that dispel traditional accounts of race (and other identity categories) as products of biology. These categories are instead products of social construction: Politics, history, economics, and social relations—rather than biology—fabricate race.<sup>19</sup>

## 2. Race Can Be Abandoned

Because they subscribe to constructivist theories of race, advocates of progressive race blindness contend that race does not have an inevitable existence. On the contrary, race is a concept that society can discard. Robinson challenges the normalization of racial identity. He contends that race consciousness provides life support for the racial category. Robinson argues that “[i]f we do not constantly and consciously meditate on it, race cannot exist. Unfortunately, we fuel this social construct with our mental

17. Reginald Leamon Robinson, *The Shifting Race-Consciousness Matrix and the Multiracial Category Movement*, 20 B.C. THIRD WORLD L.J. 231, 232–33 (2000).

18. Richard T. Ford, *Race As Culture? Why Not?*, 47 UCLA L. REV. 1803, 1806 (2000); see also K. Anthony Appiah, *Race, Culture, Identity: Misunderstood Connections*, in K. ANTHONY APPIAH & AMY GUTMAN, *COLOR CONSCIOUSNESS: THE POLITICAL MORALITY OF RACE* 30–72 (1996) (arguing that “people are the product not of essences but of genes interacting with one another and with environments, and there is little systematic correlation between the genes that fix color and the like and the genes that shape courage or literary genius”); C. Christi Cunningham, *The “Racing” Cause of Action and the Identity Formally Known as Race: The Road to Tamazunchale*, 30 RUTGERS L. REV. 709 (1999) (describing race as a “construct”).

19. The constructivist theory of race is well-established. See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S*, at 60 (1986) (“Race is indeed a pre-eminently sociohistorical concept. Racial categories and the meaning of race are given concrete expression by the specific social relations and historical context in which they are embedded.”); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27 (1994) (“Race must be viewed as a social construction. That is, human interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization.”); Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 STAN. L. REV. 747, 777 (1994) (“Race cannot be self-evident on the basis of skin color, for skin color alone has no inherent meaning.”); John A. Powell, *The “Racing” of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. 99, 102 (1997) (“[R]ace is an experiential truth and it is a categorical error to attempt to reduce the meanings and functions of race to scientifically verifiable measurements.”).

kindling and intellectual logs.”<sup>20</sup> Christi Cunningham urges persons of color to “mourn” racial subjugation by setting aside race as a component of their personal identities.<sup>21</sup> She contends that persons of color can and should “let die our malignant *proxies* for [community],” such as racial identity, and re-create identity on nonartificial grounds.<sup>22</sup> Richard Ford makes a similar claim as Cunningham’s—that race should be disaggregated from identity and culture. He argues that

[o]ne can consistently support group consciousness for the sake of antisubordination politics while remaining skeptical of the coherence of group culture or culture-as-traditions and ambivalent or even hostile to traditionalism and the idea that the norms and practices of any group should be preserved from pressure to change.<sup>23</sup>

Paul Gilroy exhibits a strong faith in the ability of society to transcend race. His excitement stems from the scientific discrediting of the naturalness of race. Gilroy argues that the term race linguistically implies a natural differentiation among individuals that masks a deepening crisis in racial categorization brought about by constructivist understandings of identity:

[Race] stands outside of, and in opposition to, most attempts to render it secondary to the overwhelming sameness that overdetermines social relationships between people and continually betrays the tragic predicaments of their common species life. The *undervalued power* of this crushingly obvious, almost banal human sameness, so close and basically invariant that it regularly passes unremarked upon, also confirms that the crisis of raciological reasoning presents an important opportunity where it points toward the possibility of leaving “race” behind, of setting aside its disabling use as we move out of the time in which it could have been expected to make sense.<sup>24</sup>

The import of social construction theories for the proponents of progressive race blindness is clear: Because human interaction and agency, rather than biology, create and re-create race, humans can dismantle and set aside their usage of racial categorization.

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20. Robinson, *supra* note 17, at 233; see also Reginald Leamon Robinson, *The Underclass and the Role of Race Consciousness: A New Age Critique of Black Wealth/White Wealth and American Apartheid*, 34 IND. L. REV. 1377, 1382 (2001) (“[R]ace does not use us. Rather, we experience race if and only if we give our attention to race and its consciousness.”).

21. See Cunningham, *supra* note 18, at 722–28.

22. *Id.* at 728.

23. Ford, *supra* note 18, at 1807.

24. PAUL GILROY, *AGAINST RACE: IMAGINING POLITICAL CULTURE BEYOND THE COLOR LINE* 29 (2000) (emphasis added).

### 3. Humans Should Discard Racial Identity

In addition to believing that we can discard the concept of race, progressive race blindness theorists believe that we *should* part company with racial categorization. Advocates of progressive race blindness have assumed a highly skeptical posture towards the utility of race in their scholarship. These scholars have argued “against race” on several grounds.

#### a. Racial Classifications Have Produced a Legacy of Injuries and Wrongs

Advocates of progressive race blindness point to the injurious history of racial classifications as a justification for radically deconstructing race consciousness. Racial categories, they argue, have historically served as a site of violent subjugation; because these categories are artificial, chosen, *and* oppressive, we should endeavor to destroy them. The progressive race blindness theorists contend that by clinging to racial classification, we embrace an identity rooted in subordination and domination. Cunningham, for example, argues that “[t]he process of racing is a malignancy that infects our identities, like those who raped our ancestors and thus became our ancestors and ourselves. This trauma is evidenced by self-identification that rages against racism yet clings to concepts of race that make it possible in defining who we are.”<sup>25</sup> Robinson takes an equally—if not more—morbid view of racial identification. To Robinson, race consciousness buys into a flawed structure in which “we internalize race’s limitations—self hatred, alienation, and segregation.”<sup>26</sup> The implications of living within the “limitations” of race are especially troubling for persons of color. According to Robinson, race consciousness breeds a culture of inferiority, victimization, and helplessness among persons of color.<sup>27</sup> If Robinson’s claims are true, then progressive movements like antiracism should not fight for the legal and political recognition of such a psychologically destructive construct as race.

#### b. Racial Classifications Essentialize Groups

Proponents of progressive race blindness also argue against race consciousness on the grounds that race essentializes groups of individuals by

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25. Cunningham, *supra* note 18, at 724.

26. Robinson, *supra* note 17, at 241.

27. See Reginald Leamon Robinson, *A Means of Preventing Escape from the Control of Her White Masters*, 15 *TUORO L. REV.*, 401, 432–33 (1999) (“Taken together, illiteracy, Lynchian tactics, and violence, a white master’s plague of death and fear concretizes the belief that blacks must live in a racialized box, and they must resist imagining a raceless life.”) (citation omitted); Robinson, *supra* note 17, at 245 (arguing that race consciousness requires blacks to “think against a backdrop of white supremacy in which they are inherently inferior”); Robinson, *supra* note 20, at 1433 (“By racializing our experiences, we rely on a race consciousness that renders us victims, and in so doing we reject our spirituality.”); *id.* at 1385–86 (lamenting the liberal rejection of “learned helplessness” theories of racialized poverty).



falsely implying that they experience life at a unitary location. Ford, for example, eschews linking race and culture because he fears that this will pose problems of cultural authenticity. Framing claims of cultural oppression in racial terms risks litigating the messy question of what forms of cultural expression are legitimate.<sup>28</sup> Cunningham considers race a “malignant proxy” for community,<sup>29</sup> and Robinson contends that racial categorization oppresses and limits the behaviors and choices of blacks by rigidly defining those activities that are “authentically” black.<sup>30</sup>

### c. Race Consciousness Breeds Alienation

Some progressive race blindness theorists have also argued that race consciousness breeds alienation—on both an individual and a community level. Race consciousness alienates the individual from his or her “true” self, a self unmarred by the myth of racial subjectivity.<sup>31</sup> Race consciousness also separates all of us from one another by imposing artificial divisions among the populace.<sup>32</sup>

## B. Important Distinctions Among Theorists of Progressive Race Blindness

Although the advocates of progressive race blindness are united in their suspicion of race consciousness and racial identity, there are some important differences in their approaches that warrant discussion. My review of the budding literature on progressive race blindness shows that the authors disa-

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28. See Ford, *supra* note 18, at 1811. Ford argues that: The rights argument that protects culture as the authentic expression of the individual litigant must invite—in fact it must require—courts to determine which expressions are authentic and therefore deserving of protection. The result will often be to discredit anyone who does not fit the culture style ascribed to her racial group.

*Id.*

29. Cunningham, *supra* note 18, at 728.

30. See Reginald Leamon Robinson, “Expert Knowledge:” *Introductory Comments on Race Consciousness*, 20 B.C. THIRD WORLD L.J., 145, 160–63 (2000).

31. See, e.g., Cunningham, *supra* note 18, at 722–29 (arguing that in order to live “whole” lives persons of color need to “mourn” race and re-create their identities); Robinson, *supra* note 17 at 237 (arguing that by embracing race consciousness “we foolishly believe that ‘blackness’ or ‘whiteness’ represents our true, spiritual identity and our true beingness”).

32. See Robinson, *supra* note 17, at 236–37. Robinson basically argues that racial groups exist in a self-imposed “darkness” that inhibits mutual understanding:

Ultimately, then, it is as if we—blacks, whites, and others—walk into a well-lit room, turn out the lights, forget about the light switch, and then curse the darkness. Because we turned out the light, the idea of darkness must already have existed within our consciousness. By dimming the light, we sought the dark. After we create darkness, then we alienate ourselves from each other by becoming vested in our racialized roles, all the while blaming the liberal state for solely creating race and for deliberately giving race its particularly venal content.

*Id.*

gree as to how much they wish to deconstruct the concept of race. The authors also disagree as to whether race consciousness among persons of color contributes to their inequality.

### 1. Does Race Exist?

Among the legal scholars, Robinson has been the most extreme and steadfast in his deconstruction of, and animosity toward, race. At times, Robinson assumes the mantra of a martyr in his deconstruction of race consciousness: "I will continue my crusade, my mission, to destabilize race and its consciousness so that we all—blacks, whites, and others—can be free to know ourselves again. In so doing, I risk madness and beckon professional isolation."<sup>33</sup> In addition, Robinson has produced the most sustained legal scholarship opposing race consciousness from a "progressive" perspective,<sup>34</sup> and his race-blind position has become more inflexible with each publication. Writers like Cunningham and Ford, in contrast, have exhibited a more modest opposition to racial construction. Cunningham's single work on this matter seems to distinguish the "personal" from the "political." Cunningham argues that persons of color should abandon race as a concept that defines "who they are" as a matter of self-identification but embrace the concept of race as a political entity to respond to the reality of racial oppression.<sup>35</sup> She explains that race has many descriptive purposes. Race can describe "a violence, a cause of action, that was and is done to people of color," and race can refer to elements of personal identity (or "who we are").<sup>36</sup> Cunningham wishes to discard the latter usages of race—the identity quotient—but maintain race as a concept for shaping political and equality movements.<sup>37</sup> In fact, Cunningham believes that political and personal usages of race are inevitably incompatible:

Concepts of identity will remain in conflict as long as constructions that function to race us are internalized in our identity. As long as race names who we are as well as our cause of action, we will be trapped by identity and strategy contradictions. Separating what was done to us from who we are means accepting the death of what has been lost—that part of our identity, history, status, and culture that was destroyed.<sup>38</sup>

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33. Robinson, *supra* note 30, at 149.

34. See, e.g., Robinson, *supra* note 30; Robinson, *supra* note 27; Robinson, *supra* note 17; Robinson, *supra* note 20.

35. See Cunningham, *supra* note 18, at 715–16 (stating that the purpose of her article is to establish an argument for considering race as a "cause of action" while "re-considering race as a foundation for identity").

36. *Id.* at 716.

37. See *id.* at 715–18.

38. *Id.* at 716.

Cunningham argues that the historical wrongs associated with race along with ongoing efforts to remedy those wrongs legally and politically render it an inappropriate basis for self-identification and identity construction among persons of color.<sup>39</sup>

Ford also believes that “seeing” race has some value to social justice movements. Ford rejects the vulgar antiessentialism by commentators such as Robinson and Appiah, who take the constructivist theory to an extreme conclusion: Because race is socially constructed it is nonexistent.<sup>40</sup> Ford cautions against “rush[ing] to the conclusion that races do not exist.”<sup>41</sup> Ford reasons:

The critique of the existence of biological racial groups was advanced as support for an entirely distinct critique of the salience of racial categories. This crude move needn’t detain us long: It is obvious that a refutation of the physical existence of a thing does not entail a refutation of the sociological fact that there is widespread belief in it and that social behavior is structured by that belief.<sup>42</sup>

Thus, Ford does not support the radical deconstruction of race advocated by Robinson. Nevertheless, Ford believes that progressive scholars should limit the scope of their race talk by disaggregating race from culture. He believes that racializing culture risks essentializing racial groups.

## 2. Race Consciousness and Racial Inequality

Legal scholarship on progressive race blindness also differs in the degree to which the authors attribute racial inequality to race consciousness. Again, Robinson’s views are the most extreme on this matter. Robinson argues that race consciousness among persons of color—rather than institutionalized and structural racism—sustains racial inequality. In a recent article, for example, Robinson questions popular sociological literature that links “concentrated poverty” with racial injustice.<sup>43</sup> Applying what he calls “New Age Philosophy,” Robinson attributes poverty in communities of color

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39. See *id.*

40. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1296 n.180 (1991) (criticizing “vulgar constructionism” that leaves no “room for identity politics”); Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1774–75 (1990). Matsuda argues:

Professor Crenshaw avoids the simplistic anti-essentialism that deconstructs subordinated group identity until subordination no longer seems to exist. There is a certain sophisticated attraction to the critique that says something like, “All women could not possibly share the same experience of subordination; therefore, gender-based cultural claims are vulgar and diversionary.” A similar critique of race as a category of analysis is also in vogue.

*Id.*

41. Ford, *supra* note 18, at 1806.

42. *Id.*

43. See Robinson, *supra* note 20, at 1400–11.

to the “choices” and activities of poor individuals. He argues that poor persons of color have the agency to choose poverty or wealth but instead “co-create” poverty through their race consciousness:

Despite the manner in which race consciousness . . . socializes us to co-create poverty, wealth, or residential segregation, our essential Self can still choose differently. We have absolute freedom. With this absolute freedom, we can focus on a self-empowering philosophy like New Age or a victim-centered race consciousness . . . [B]y adopting a self-empowering philosophy, one can deliberately choose to experience poverty or wealth. In so doing, she does not blame anyone else for the manner in which she experienced her creations.<sup>44</sup>

Thus, for Robinson, the effects of race consciousness are deleterious: Race consciousness imprisons poor persons of color in poverty, and the generational transmission of the “disease” of race consciousness perpetuates racialized class inequity. I have found no other writing in which an advocate of progressive race blindness has attempted to link poverty with race consciousness among poor persons of color: Robinson remains alone in this position among the works that I have reviewed. In fact, Cunningham and Ford have argued that racial justice claims should persist—even under their deconstructed visions of identity politics.<sup>45</sup> These authors believe that the structure of white supremacy impacts the material reality of persons of color. Hence, they favor the maintenance of race for the purpose of challenging and responding to inequality.<sup>46</sup>

## II. “FOR RACE”: SOME TROUBLING OBSERVATIONS CONCERNING PROGRESSIVE RACE BLINDNESS

Progressive race blindness scholarship challenges conventional thinking among critical scholars who have led the charge in responding to the Court’s colorblind jurisprudence. Advocates of progressive race blindness seem passionate in their concern for the well-being of persons of color. They also reject essentialist notions of race that hinder—rather than advance—social justice. The work of progressive race blindness theorists should compel any scholar in the field of identity theory and antidiscrimination law to rethink or defend her or his position with respect to the inevitability or desirability of racial categorization. Despite the intellectual energy exhibited by these scholars and the provocative nature of their work, however, I remain unpersuaded by their general claim concerning the dangers of

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44. *Id.* at 1432; see also Robinson, *supra* note 30, at 158–60 (arguing that persons of color embrace race consciousness to their detriment).

45. See *supra* notes 35–43 and accompanying text.

46. Presumably, Cunningham and Ford do not in turn believe that the consciousness of race required to make racial justice claims actually fosters racial injustice.

race consciousness. This part offers several critical observations concerning progressive race blindness scholarship.

#### A. Essentializing Race as Inherently Negative

The progressive race blindness scholarship suffers because it tends to essentialize race as an inherently negative—or almost always negative—construct. The fact that race is socially constructed does not mean that society should have any interest in abandoning it as a concept of identity. In order to justify the abolition of race, progressive race blindness scholars emphasize the negative history of racial oppression.<sup>47</sup> Race and race consciousness, however, need not foster subordination. If race is truly socially constructed—as the advocates of progressive race blindness forcefully argue—then we can evaluate race consciousness in the context of its usage, rather than believing the metanarrative that race is bad.<sup>48</sup> If social forces fabricate racial understanding, then critical theorists can assess the value of race by examining the social circumstances and purposes surrounding its deployment.<sup>49</sup> Jayne Chong-Soon Lee has written cogently on the dangers of essentialism in progressive race blindness arguments. Responding to the work of Appiah, Lee offers a more contextualized assessment of race that challenges Appiah's grand narrative concerning the pitfalls and dangers of race consciousness:

The most important weakness of Appiah's dismissal of race is that in declaring biological and essential conceptions of race useless and dangerous, he fails to recognize that race is defined not by its inherent content, but by the social relations that construct it. If race is always dangerous, regardless of its meaning within a specific historical and social context, *the result is an abstract and unitary conception of race*. Basically, Appiah's conception of race fails to acknowledge that meanings change dramatically with social context. For Appiah, once a conception of race is constructed, the possibility of contesting, redefining, and reappropriating it is limited.<sup>50</sup>

Progressive race blindness thus suffers from its inability to imagine positive usages of race. The essentializing of race by advocates of progressive race blindness contradicts their treatment of race as a social construct; it is, in fact, the social—as opposed to biological—nature of race that gives race a malleable quality.<sup>51</sup> Thus, the social constructivist theory of race does not

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47. See *supra* notes 25–27 and accompanying text.

48. See, e.g., Lee, *supra* note 19, at 772 (criticizing Anthony Appiah for essentializing race as a negative concept).

49. See *id.*

50. *Id.*

51. See *id.* (“Since the meaning of race depends on the specific social contexts in which it is embedded, we will find as many definitions of race as there are social contexts.”); see also Haney

compel the radical deconstruction of race consciousness embraced by some advocates of progressive race blindness. Instead, social construction theory implies a host of possibilities for the positive deployment of race. Critical scholars can assess the worth of race consciousness by examining the surrounding facts associated with its usage.

#### B. Obscuring the Relationship Between Racial Identity and Racial Resistance

Political resistance is perhaps the most positive usage of race by persons of color. Persons of color utilize racial identity to respond to racial subjugation. Race serves as an organizational instrument for challenging racial oppression.<sup>52</sup> Furthermore, in the context of law and policy, persons of color and progressive scholars have advocated the implementation of race-conscious policies that seek to remedy social inequality.<sup>53</sup> Supreme Court opposition to remedial race consciousness has sparked a generous amount of criticism from progressive scholars.<sup>54</sup> The arguments of proponents of progressive race blindness threaten to legitimize this conservative jurisprudence that neutralizes governmental efforts to combat racial injustice.<sup>55</sup> The abolition of race—a position advanced in varying degrees in progressive race blindness scholarship—would make it difficult for persons of color to resist oppression and to demand race-conscious remedies for racial oppression.<sup>56</sup>

In an apparent effort to avoid complicating racial justice efforts, some proponents of progressive race blindness have qualified their claims: They

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López, *supra* note 19, at 28 (arguing that “the meaning-systems surrounding race change quickly rather than slowly”).

52. See Crenshaw, *supra* note 40, at 1297 (“At this point in history, a strong case can be made that the most critical resistance strategy for disempowered groups is to occupy and defend a politics of social location rather than to vacate and destroy it.”); Darren Lenard Hutchinson, *Beyond the Rhetoric of “Dirty Laundry”: Examining the Value of Internal Criticism within Progressive Social Movements and Oppressed Communities*, 5 MICH. J. RACE & L. 185, 196 (1999) (“Members of oppressed communities often rally around their socially constructed identities in order to challenge the oppression and discrimination mediated by these categories.”); Chris K. Iijima, *Race as Resistance: Racial Identity as More than Ancestral Heritage*, 15 *TOURO L. REV.* 497, 509 (1999) (“At least for Asian Pacific Americans, how we define ourselves is intimately tied to the political purpose of our racial identity.”); Chris K. Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 *COLUM. HUM. RTS. L. REV.* 47, 55 (1997) [hereinafter Iijima, *The Era of We-Construction*] (“In short, political resistance to racial oppression is the content of racial identity, and progressive people of color must reclaim the terms of the debate about what constitutes it.”); Lee, *supra* note 19, at 772–73 (discussing the political usages of race).

53. See Spann, *supra* note 4, at 7–10.

54. See *id.*

55. See Lee, *supra* note 19, at 774–79 (demonstrating how essentialism in progressive race blindness would legitimize conservative Supreme Court doctrine).

56. See *id.* at 772 (“To deny the term ‘race’ any content, as Appiah would have it, is to deny a powerful metaphor to racial groups and to preclude valuable modes of resistance.”).

have crafted their arguments to accommodate the usage of race as an antisubordination tool. Cunningham, for example, wants to maintain "race as a cause of action" for racial injustice, while extricating it from notions of individual identity.<sup>57</sup> Even Appiah, who has been quite vigilant in his deconstruction of and opposition to racial categorization, now recognizes (at least in passing) the political significance of race to persons of color.<sup>58</sup> Appiah, nevertheless, qualifies his observation that race can serve as a site of resistance by cautioning advocates of race consciousness against "let[ting] our racial identities subject us to new tyrannies."<sup>59</sup>

This analytical compromise, which would keep race as a source of political resistance while abandoning or tentatively embracing it as an aspect of identity, obscures the connections between racial identity and resistance. This blurring of identity and politics occurs because progressive race blindness theorists overlook two important factors related to identity and resistance. First, progressive race blindness theorists disregard the fact that racial resistance strengthens an individual's racial identity or race consciousness. Furthermore, these theorists do not recognize that some level of race consciousness, or racial identity, serves as a prerequisite or catalyst for racial resistance. In sum, the proponents of progressive race blindness do not acknowledge that there is a symbiotic relationship between racial resistance and identity formation; the two processes are mutually reinforcing.

Perhaps the clearest contemporary example of how resistance to oppression fashions identity occurred during the Black Power Movement of the 1960s. Antiracist activists used the language and structure of race to contest oppressive racial *practices* and to re-cast black racial *identity* in a more positive light.<sup>60</sup> Yet, the construction of identity through resistance is not unique to race, and racial identity construction does not stand in isolation from other forms of identity and domination.<sup>61</sup> Thus, when Cunningham, for example, makes the moderate claim that we should maintain race as a cause of action but dismiss it as a component of individual identity, she must

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57. Cunningham, *supra* note 18, at 715–16.

58. See APPIAH, *supra* note 18, at 104 ("Racial identity can be the basis of resistance to racism . . .").

59. *Id.*; see also *id.* at 98–99 (arguing that the political usage of race can constrain individual liberty).

60. See Crenshaw, *supra* note 40, at 1297 (discussing subversion of black identity by Black nationalists); Darren Lenard Hutchinson, "Closet Case": *Boy Scouts of America v. Dale and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility*, 76 TUL. L. REV. 81, 111 (2001) (same).

61. See SHANE PHELAN, GETTING SPECIFIC: POSTMODERN LESBIAN POLITICS 52 (1994) ("Becoming lesbian is indeed a process of resistance to patriarchal heterosexuality."); Darren Lenard Hutchinson, "Claiming" and "Speaking" *Who We Are: Black Gays and Lesbians, Racial Politics, and the Million Man March*, in BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER 28 (Devon W. Carbado ed., 1999) (discussing the construction of black gay identity).

explain how one can engage in resistance to racial subordination without reinforcing her or his status as a racialized individual. Unfortunately, Cunningham's work does not answer this important question.

The progressive race blindness scholarship also blurs the reality that racial consciousness or identity serves as a prerequisite or catalyst for racial resistance. Persons of color have written extensively on how their racial identity—shaped by experiences with subordination—gives them valuable “experiential knowledge” for challenging racial injustice.<sup>62</sup> Similarly, progressive whites have persuasively argued that white obliviousness to race and racial identity impedes whites' understanding and appreciation of racial oppression.<sup>63</sup> For whites or persons of color, race consciousness and identity help create the circumstances for meaningful racial resistance. Accordingly, the progressive race blindness compromise, which seeks to maintain political race but to extricate race from identity and culture, presents an unworkable position. Political resistance to racial subordination constructs and reinforces racial identity and consciousness; racial identity and consciousness are prerequisites for racial resistance. By opposing or questioning racial identity, proponents of progressive race blindness offer a theory that renders racial resistance an extraordinarily difficult or even impossible proposition.

### C. Ignoring the Multidimensionality of Identity and Subordination

One of the more striking aspects of progressive race blindness is its unitary focus on race as an identity for disposal. Although many forms of identity are socially constructed and are grounded in histories of oppression and marginalization, the advocates of progressive race blindness single out race for deconstruction. Their arguments imply that race, in particular, warrants discarding. They do not even consider what we should do with other forms of identity, and they do not suggest a comprehensive abolition of identity

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62. Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864, 1864–65 (1990) (“Critical Race Theorists are attempting to integrate their experiential knowledge, drawn from a shared history as ‘other,’ with their ongoing struggles to transform a world deteriorating under the albatross of racial hegemony.”); see Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2034 (“[L]ike Critical Feminist Theory, Critical Race Theory is largely experiential, grounded in the experience of scholars of color as participants in a society whose history has been soiled by racism and racist acts toward people of color.”).

63. See, e.g., Barbara J. Flagg, “Was Blind, But Now I See”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993) (“Transparency often is the mechanism through which white decisionmakers who disavow white supremacy impose white norms on blacks. Transparency operates to require black assimilation even when pluralism is the articulated goal; it affords substantial advantages to whites over blacks even when decisionmakers intend to effect substantive racial justice.”); *id.* at 973–74 (“Given whites’ tendency not to be aware of whiteness, it’s unlikely that white decisionmakers do not similarly misidentify as race-neutral personal characteristics, traits, and behaviors that are in fact closely associated with whiteness. The ways in which transparency might infect white decisionmaking are many and varied.”).



categories. Furthermore, many of the arguments of progressive race blindness theorists are directed toward persons of color, as if persons of color are the only individuals invested in race consciousness or that race consciousness among persons of color is especially problematic.

The most troubling aspect of race centrality in progressive race blindness theories is that it implies a separability of identity categories and systems of oppression. When progressive race blindness theorists advocate the termination of racial identity without commenting on the persistence of gender, sexuality, class, and other identities, they suggest that their racial deconstruction does not implicate other forms of social identity. Yet, as a rich body of scholarship has demonstrated, identity categories do not exist in isolation from one another.<sup>64</sup> Instead, identity is multidimensional: The various identity categories interact to shape our individual and collective identities and experiences.<sup>65</sup> The progressive race blindness critique falsely implies a separability of identity categories, because this scholarship advocates the abolition of race but not other identity categories. The progressive race blindness critique fragments identity.

Critical scholars have cautioned against efforts to analyze identity categories as unrelated and separate phenomena. For example, Audre Lorde, a black lesbian theorist, has criticized the fragmentation of identity in social justice movements:

As a Black lesbian feminist comfortable with the many different ingredients of my identity, and a woman committed to racial and sexual freedom from oppression, I find I am constantly being encouraged to pluck out some one aspect of myself and present this as the meaning-

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64. See, e.g., Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 375 (discussing the "interlocking system of oppression based on race and gender that operates to the detriment of all women and all blacks"); Crenshaw, *supra* note 7, at 1242-43 (noting that "[f]eminist efforts to politicize experiences of women and antiracist efforts to politicize experiences of people of color have frequently proceeded as though the issues and experiences they each detail occur on mutually exclusive terrains" and arguing that they do not); Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1090 (1996) ("It is crucial to recognize that various forms of oppression . . . are intertwined. Oppressions of gender intersect with other oppressions, including those of race, sexuality, class and ethnicity."); Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991) ("As we look at . . . patterns of oppression, we may come to learn, finally and most importantly, that all forms of subordination are interlocking and mutually reinforcing."); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 374 (1995) (observing that "oppressions of various sorts always interlock because popular prejudice travels in multiples").

65. See generally Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285 (2001) (discussing the complexity of subordination).

ful whole, eclipsing or denying the other parts of self. But this is a destructive and fragmenting way to live.<sup>66</sup>

The progressive race blindness critique implicates Lorde's complaint. Proponents of progressive race blindness imply a severability of identity in their arguments which seek the abolition of racial but not other forms of identity. Their arguments fragment identity and betray efforts to foster a more multidimensional understanding of identity and subordination.

#### D. Failure to Provide a Practical Agenda

Another weakness in progressive race blindness scholarship is that it fails to explain how to end race consciousness. Ending "race as we know it" is a tall order in a society that has been rigidly defined and marked by race.<sup>67</sup> Despite the implementation of legal provisions guaranteeing formal equality, racial inequality, white supremacy, institutional racism, and the subjugation of persons of color are enduring features of American economic, legal, political, and social life.<sup>68</sup> Furthermore, the protracted efforts of progressive elements to rid society of inequality have lessened, but not eradicated, the problem.<sup>69</sup> Undoubtedly, the persistence and ubiquity of racism has led the progressive race blindness scholars to advance the abolition of race.<sup>70</sup> But the proven durability of racism counsels against the advancement of a race-blind agenda without any programmatic detail. This is not to say that every piece of scholarship that offers a new vision should provide a literal road

66. AUDRE LORDE, *Age, Race, Class, and Sex: Women Redefining Difference*, in *SISTER OUTSIDER: ARTICLES AND SPEECHES* 120 (1984).

67. See Robert J. Cottrol, *The Long Lingering Shadow: Law, Liberalism, and Cultures of Racial Hierarchy and Identity in the Americas*, 76 *TUL. L. REV.* 11, 18–19 (2001). Cottrol makes the following observation:

In this world, the United States of the first half—indeed more than the first half—of the twentieth century, the role of law in maintaining the nation's systemic racial hierarchy was unambiguous. The law sanctioned a clear system of white supremacy and black subordination, notwithstanding the imperatives of the Civil War Amendments.

*Id.*

68. See, e.g., *id.* at 21 ("The development and enforcement of egalitarian legal norms over the last generation and a half has helped to lessen, but has by no means erased, often profound differences between the experiences and circumstances of blacks and whites in the United States."); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment*, 101 *HARV. L. REV.* 1331, 1378–79 (1988) ("Racial hierarchy cannot be cured by the move to facial race-neutrality . . . . White race consciousness, in a new form but still virulent, plays an important, perhaps crucial, role in the new regime that has legitimated the deteriorating day-to-day material conditions of the majority of Blacks."); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317, 330 (1987) ("But racism in America is much more complex than either the conscious conspiracy of a power elite or the simple delusion of a few ignorant bigots. It is a part of our common historical experience and, therefore, a part of our culture.").

69. See generally sources cited *supra* note 68.

70. See *supra* notes 20–24 and accompanying text.

map for implementing its concerns. The centrality of race in American life, however, means that the radical deconstruction that the progressive race blindness theorists advocate will require innovative, if not invasive, efforts. Nevertheless, there is very little in progressive race blindness scholarship that explains how we might accomplish their provocative ideas. Perhaps such detail is lacking because the task they have assumed is an impossible one.

#### E. Ignoring the Magnitude and Varieties of Racism

A final problem with progressive race blindness theory is that some of the authors fail to appreciate the magnitude and complexity of racial hierarchy. The work of Ford and Robinson illustrate this point. Ford argues that racial justice claims should be divorced from claims of cultural oppression.<sup>71</sup> Ford's primary ground for skepticism is his belief that the blending of race and culture will harm persons of color by essentializing cultural identity and group membership and that the litigation of "race-as-culture" discrimination claims will empower courts to define "authentic" and "inauthentic" cultural participation.<sup>72</sup> Ford's analysis fails to comprehend the variety of forms in which racism exists. In particular, Ford does not appreciate the cultural forms of racism and their detrimental effects upon persons of color. In the context of employment discrimination, for example, employers have discriminated on the basis of a battery of workplace rules, such as language ("English-only"), dress, and grooming codes, that operate negatively upon persons of color; these regulations penalize employees for wearing clothing, speaking languages, or wearing hairstyles that are racially identifiable.<sup>73</sup> As several scholars have recognized, the failure of courts to protect race-as-culture results from a narrow view that race has a fixed, static, and even biological quality; race, however, is active, practiced, and expressive.<sup>74</sup> The courts'

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71. See Ford, *supra* note 18, at 1807.

72. *Id.* at 1811. Ford also claims that the recognition of cultural claims will place antidiscrimination law on a dangerous slippery slope where spurious claims of behavioral discrimination will weaken the civil rights imperative, thus harming antiracism. See *id.* at 1804 (warning of the dangers of "bicyclists" and obesity civil rights litigation).

73. See Leti Volpp, *Righting Wrongs*, 47 UCLA L. REV. 1815, 1821–22 (2000) (criticizing Ford for not recognizing the existence of cultural racism).

74. On the active nature of identity, see Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 839 (1987) (arguing that "[i]ndividuals . . . conceive their special identities through a wide amalgam of acts" and, consequently, "we must criticize the cavalier fashion with which courts dismiss individuals' claims that employers' racially, sexually, or ethnically premised rules unjustly restrict personal integrity and expression"); Caldwell, *supra* note 64, at 366–67, 371–81, 385–88 (criticizing courts for not treating employers' regulation of black women's physical appearance in the workplace as a form of racial, gender, and cultural domination); Christopher David Ruiz Cameron, *How the Garcia Cousins 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,

separation of race and culture allows employers and other discriminators to force “Others” to assimilate white, heterosexual, and male norms, while purporting to regulate “neutral” behaviors such as dress, language, and hair-style.<sup>75</sup> Ford’s desire to place a wall of separation between race and culture, coupled with his general suspicion of behavioral civil rights claims, legitimizes this narrow, status-enforcing jurisprudence.

In addition to legitimizing racially hierarchical jurisprudence, at least one advocate of progressive race blindness—Reginald Leamon Robinson—has essentially argued that persons of color create their own inequality by subscribing to race consciousness. Robinson adheres to what he calls New Age Philosophy, and he posits that a tenet of this philosophy is the notion that individuals possess unfettered “free will” or agency.<sup>76</sup> Thus, structural racism does not create material inequality among persons of color. Rather, persons of color remain poor because of their own choices, race consciousness being the most problematic of these choices. Robinson argues that by embracing race consciousness, persons of color accept white supremacist notions concerning the inferiority of persons of color and, thereby, impose artificial limitations upon their own life opportunities. Robinson’s arguments sound strikingly familiar: They parallel a rhetoric of cultural inferiority advanced by conservative theorists who have attempted to blame persons of color, particularly poor women of color, for the economic deprivation experienced by communities of color. A large body of academic literature has refuted the contentions of these conservative scholars and has unmasked the racial and gendered assumptions of their work.<sup>77</sup> Robinson, however, rejects

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1367–72 (1997) (arguing that courts fail to treat employers’ Spanish-language discrimination as a manifestation of national-origin discrimination because they do not appreciate the centrality of Spanish language in constructing Latino/a identity); Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 2008 (2000) (arguing that the doctrinal treatment of “race as an immutable trait means that merely ‘cultural’ behaviors and practices do not receive legal protection unless they can be strongly linked back to the ‘immutable’ characteristics of race or national origin” and that “[t]he separation of ‘race’ from ‘culture’ . . . gives employers and government agencies broad room to force employees marked as racially ‘other’ to assimilate to a socially ‘white’ standard”); Hutchinson, *supra* note 60, at 111 (arguing that identity categories have “expressive dimensions”).

75. See Harris, *supra* note 74, at 2008.

76. Robinson, *supra* note 20, at 1422–23.

77. See MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* 16–43 (1989) (criticizing culture-of-poverty theories); WILLIAM RYAN, *BLAMING THE VICTIM* 119–20 (2d ed. 1976) (same); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987) (attributing racialized poverty to economic dislocation); Stanley F. Battle, *Homeless Women and Children: The Question of Poverty*, 14 CHILD & YOUTH SERV. 111, 114–20 (1990) (criticizing culture-of-poverty theories); Donald P. Judges, *Bayonets for the Wounded: Constitutional Paradigms and Disadvantaged Neighborhoods*, 19 HASTINGS CONST. L.Q. 599, 683–89 (1992) (discussing literature refuting culture-of-poverty theories); Hyman Rodman, *Culture of Poverty: The Rise and Fall of a Concept*, 25 SOC. REV. 867 (1977) (criticizing culture-of-poverty theories); Marta Tienda & Haya Stier, *Joblessness and*

the qualitative and quantitative findings of this scholarship, asserting that the scholarship evades the question of individual responsibility.<sup>78</sup> Robinson's arguments attempt to repackage the conservative culture-of-poverty theory as a progressive postmodernist critique.

Although Robinson's work is undeniably provocative, it fails in many respects. First, Robinson's analysis does not effectively respond to the large body of literature that has refuted many of the claims made by culture-of-poverty theorists.<sup>79</sup> Instead, Robinson simply faults this literature for not taking personal behavior—rather than white supremacy—into account. Despite the empirical research that demonstrates how structural racial inequality constructs poverty, Robinson, wedded to the notions of free will and agency, concludes that the unwise choices of persons of color play the central role in their poverty. Because poor persons of color, according to Robinson, are in fact free agents, they must have chosen poverty; wealth was a viable, but unelected, option for them. According to Robinson, poor persons of color are not victims of structural and material inequality. Instead, they are trapped by their own racialized thinking: They accept a script of black inferiority and live their lives accordingly.

I do not wish to document the impact of structural racism and economic dislocation on the material conditions for poor persons of color; a host of literature has already demonstrated the operation of racism and economic dislocation on the maintenance and structuring of poverty.<sup>80</sup> Instead, I wish to unveil the most serious and dangerous failing of Robinson's work: his unfounded dismissal of the existence of structural racism. In his zeal to portray race as a social construct, Robinson denies the existence of racism. As such, racism, like race itself, assumes a fictional quality.<sup>81</sup> Robinson's argument takes social construction theory to an illogical and unrealistic place. The fact that race is socially constructed does not negate its tangible

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*Shiftlessness: Labor Force Activity in Chicago's Inner City*, in *THE URBAN UNDERCLASS*, 135, 151–52 (Christopher Jencks & Paul E. Peterson eds., 1991) (criticizing culture-of-poverty theories and attributing racialized poverty to economic dislocation); Maxine Baca Zinn, *Family, Race, and Poverty in the Eighties*, 14 *SIGNS* 856 (1989) (same). See generally CHARLES A. VALENTINE, *CULTURE AND POVERTY: CRITIQUE AND COUNTER-PROPOSALS* (1968).

78. See generally Robinson, *supra* note 20 (criticizing sociological literature that links racism and poverty).

79. See sources cited *supra* note 77.

80. See *id.*

81. See *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896). In *Plessy*, the Court rejected the argument that racial apartheid enforced white supremacy, describing this contention as fictional and imagined:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

*Id.* at 551.

and lived quality.<sup>82</sup> Historical, political, legal, and economic forces involved in the production of race (for example, slavery, segregation, oppressive violence, and employment and educational discrimination) have skewed (and continue to skew) the distribution of life-sustaining resources in favor of whites.<sup>83</sup> The social quality of race does not alter this white supremacist resource allocation. Nor does it mean that a mere transformation in the consciousness among persons of color can eradicate racism's harmful and pervasive effects. In fact, the race blindness that Robinson advocates would preclude persons of color from effectively describing and countering their oppression. Robinson does very little to prove his thesis that rampant internalized racism in communities of color explains racialized economic inequality.<sup>84</sup> Instead, Robinson's "psychoanalytic" arguments concerning poor persons of color leave the impression that he holds stereotypical and essentialist views of the very group he purports to defend.

### III. BEYOND RACE TRASHING: EMBRACING THE MANY FACES OF RACE

The budding progressive race blindness movement offers a provocative analysis of contemporary race relations. The authors in this movement correctly view race as a social construct. Thus, they are aligned with Critical Race Theorists and other progressive scholars who, moved by poststructuralism and postmodernism, have rejected biological notions of race. The point

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82. See Iijima, *The Era of We-Construction*, *supra* note 52, at 53 ("Although race is socially constructed and not an immutable biological characteristic, the effect of the phenomenon of race is nonetheless real."); Charles R. Lawrence III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 *STAN. L. REV.* 819, 835 n.71 (1995) ("To recognize that race is socially constructed does not make it any less real."); John A. Powell, *The Colorblind Multiracial Dilemma: Racial Categories Reconsidered*, 31 *U.S.F. L. REV.* 789, 791 (1997) ("While the claim that race is an illusion draws on the work of late- and post-modernists—particularly the work of Omi and Winant, which purports that race is socially constructed—the conclusion that race is not real does not comport with the deeper implication of this insight.").

83. See Flagg, *supra* note 63, at 954–55 (discussing racial inequality and concluding that colorblindness cannot achieve racial justice). See generally Samuel L. Myers, Jr., "The Rich Get Richer and . . ." *The Problem of Race and Inequality in the 1990s*, 11 *LAW & INEQ.* 369 (1993) (discussing racial inequality in a host of areas). As T. Alexander Aleinikoff argues:

It is difficult to peruse an American newspaper today without confronting the continuing significance of race in the nation. Whether it is statistics that demonstrate unrelenting racial inequality in most of the important signifiers of social and economic well-being, debates over civil rights legislation, Supreme Court nominations, the arts, athletes and managers, police misconduct, political campaigns, or even military affairs and foreign policy, we are constantly made aware that we are far from a color-blind society.

T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 *U. COLO. L. REV.* 325, 330 (1992).

84. Robinson cites to anecdotal evidence and popular culture to prove this theory. See Robinson, *supra* note 20, at 1440. This "evidence" cannot support as devastating a conclusion as the assertion that racism does not exist and that poor persons of color acquiesce to racism.

of departure between the race blindness movement and Critical Race Theory, however, is that the former seems influenced by an extreme version of postmodernism. The progressive race blindness movement's zeal for deconstruction has blinded its participants to the material and tangible manifestations of race, to the political value of race as a means for resisting subordination, to the ways in which racial resistance shapes and constructs identity and culture, and to the relationships among race and other socially constructed identities. Efforts to denaturalize race, however, do not require us to ignore the utility or concrete social impact of race. Instead, it is possible to maintain a nuanced approach to race that blends postmodernist and modernist thinking. Critical Race Theory embodies this complexity. In particular, critical race contestations with Critical Legal Studies scholars over the efficacy of a regime of legal rights provide a workable model for blending postmodern skepticism of race with the reality that race, though constructed, has concrete and helpful dimensions.

#### A. Critical Race Theory, Critical Legal Studies, and "Rights Trashing"

The Critical Legal Studies movement emerged in order to examine the ways in which the law reinforces hierarchical social relations. Critical Legal Scholars draw from several political and intellectual movements, including Marxism, Legal Realism, poststructuralism, and postmodernism. Critical Legal Scholars contend that legal doctrine is indeterminate, contradictory, and partial to privileged classes. Far from being a site of abstract and neutral reasoning, law, Critical Legal Scholars contend, is ideological and political. Critical Legal Scholars also argue that the law invokes imposing images and technical language in order to mystify its audiences and to convince them that legal arrangements are natural and inevitable. Critical Legal Scholars often target legal rights in their critiques. Critical Legal Scholars believe that rights are malleable and that they alienate individuals from one another and induce a false consciousness among oppressed people who, believing they are truly protected by rights, do not actively resist their oppression. Several, though not all, Critical Legal Scholars trash rights and argue that progressives should stress informality over the structure of rights; rights simply reify law and nurture the illusion of law's naturalness. Postmodernism leads Critical Legal Scholars to question reliance upon law as a vehicle for achieving justice. Critical Legal Scholars conclude that rights are part of an oppressive social regime and that progressive scholars should forcefully deconstruct their seemingly natural status.<sup>85</sup>

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85. For a sampling of works on Critical Legal Studies, see *CRITICAL LEGAL STUDIES* (James Boyle ed. 1992); *CRITICAL LEGAL STUDIES* (Alan Hutchinson ed. 1988); MARK A. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); and ROBERTO UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1990).

Critical Race Theorists share Critical Legal Scholars' skepticism toward law's purported neutrality. They accept Critical Legal Scholars' indeterminacy thesis, believe that the law reinforces hierarchical social relations, and concur with the notion that the law is a limited, perhaps even improper, instrument for pursuing equality. Yet, Critical Race Theorists do not share the Critical Legal Scholars' desire to move beyond a rights structure. Although they concede that rights are malleable and socially constructed, they are also aware of the importance of rights in the struggle for racial justice. Several Critical Race Theorists contributed to a symposium in the *Harvard Civil Rights-Civil Liberties Law Review*<sup>86</sup> in which they criticized Critical Legal Scholars for failing to recognize the importance of rights for communities of color. Although they acknowledge the limitations of rights talk, Critical Race Theorists also believe that rights play a vital role in antiracism. Patricia Williams, for example, eloquently conveys the simultaneous mistrust of and reliance upon rights by blacks:

To say that blacks never fully believed in rights is true; yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before. We held onto them, put the hope of them into our wombs, and mothered them—not just the notion of them. We nurtured rights and gave rights life. And this was not the dry process of reification, from which life is drained and reality fades as the cement of conceptual determinism hardens round—but its opposite. This was the resurrection of life from 400-year-old ashes; the parthenogenesis of unfertilized hope.<sup>87</sup>

Critical Race Theorists, therefore, embrace both a postmodernist skepticism toward the efficacy, neutrality, and inevitability of law and a concomitant modernist reliance upon law and enlightened reasoning as sources of antiracist resistance.<sup>88</sup>

In a thoughtful account of the divide between Critical Race Theory and Critical Legal Studies, Angela Harris argues that the task for Critical Race Theorists is to “live in the conflict between modernism and postmodernism.”<sup>89</sup> Harris offers a healthy resolution to the apparent internal contradiction of Critical Race Theory. Critical Race Theorists cannot completely reject postmodernism, because “the old optimistic faith in reason, truth, blind justice, and neutrality, have not brought us to racial justice,

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86. Symposium, *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987).

87. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 430 (1987).

88. See Angela P. Harris, *The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 748–54 (1994) (discussing the postmodernist and modernist strands of Critical Race Theory).

89. *Id.* at 762.



but have rather left us 'stirring the ashes.'<sup>90</sup> Nevertheless, a wholesale commitment to postmodernism (and complete rejection of modernist principles) is undesirable because "faith in reason and truth and belief in the essential freedom of rational subjects have enabled people of color to survive and resist subordination."<sup>91</sup> Both postmodernism and modernism offer strategic advantages for antiracist theory. Rather than seeking to resolve its internal conflict, Critical Race Theory should seek to "inhabit that very tension."<sup>92</sup>

### B. Dual Consciousness and Progressive Race Blindness: Beyond Race Trashing

The dual consciousness of Critical Race Theory can help move progressive race blindness beyond its substantive limitations. Critical Race Theorists recognize that race is socially constructed,<sup>93</sup> that racial mythology has caused a great deal of suffering in communities of color,<sup>94</sup> and that racial categorization risks essentialism.<sup>95</sup> Critical Race Theory, however, blends this postmodern skepticism of race with an appreciation of the material real-

90. *Id.* at 759.

91. *Id.* at 753.

92. *Id.* at 760. Other scholars have observed this dual consciousness of Critical Race Theory that combines skepticism toward the law with a commitment to reasoning and rights. See, e.g., Barnes, *supra* note 62, at 1865–66 (arguing that "dual consciousness" is a "central element" of Critical Race Theory); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 341 (1987) ("The minority experience of dual consciousness accommodates both the idea of legal indeterminacy as well as the core belief in a liberating law that transcends indeterminacy.").

93. See Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 906 (observing that "Critical Race Theory writing embraces an experientially grounded, oppositionally expressed, and transformatively aspirational concern with race and other socially constructed hierarchies"); Anthony E. Cook, *The Spiritual Movement Towards Justice*, 1992 U. ILL. L. REV. 1007, 1008 (arguing that Critical Race Theory seeks "to elucidate the ways in which those in power have socially constructed the very concept of race over time"); Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637, 1638–39 (1999) ("Race is only skin deep because it is always a social construction (but a very important social construction) and the work of Critical Race Theory is to go beyond the socially constructed boundaries and is exactly about understanding race's importance but scientific insignificance."); Haney López, *supra* note 19, at 6 (advancing "a new theory of race as a social complex of meanings"); Robert L. Hayman, Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 HARV. C.R.-C.L. L. REV. 57, 70 (1995) (observing that "Critical Race Theorists reject the conception of the self as innate, immutable, and autonomous, and insist instead on the recognition of 'race' as—like all attributes of personhood—a political construction"); Powell, *supra* note 19, at 100 ("[R]ace is not a single, unitary concept, but rather one that mutates and adapts across sociohistorical contents.").

94. See, e.g., Cook, *supra* note 93, at 1008 (arguing that the social construction of race "has transformed certain differences in color, culture, behavior and outlook into hierarchies of privilege and subordination").

95. One of the most important theoretical developments in Critical Race Theory is scholarship that seeks to expand and to make more comprehensive racial categories. See generally Hutchinson, *supra* note 65, at 285 (discussing antiessentialist dimensions of critical race and antiheterosexist legal theories).

ity of race and its role in antiracist reform. Race has a tangible and real quality in that it distributes social resources, constitutes identity, organizes communities of color politically, and can serve as a structure for remedying inequality.<sup>96</sup> This modernist vision, which treats race as an inevitable structure, co-exists with critical race deconstruction of racial categorization.

The duality of Critical Race Theory can help redirect the content of progressive race blindness theory in order to move that work beyond its theoretical limitations. Progressive race blindness theorists, in varying degrees, disregard the material impact of race, the reality of structural racism, the positive usages of race as a tool of resistance, and the multidimensionality of identity.<sup>97</sup> Given the socially constructed but material nature of race, proponents of progressive race blindness should reexamine their staunch commitment to extreme postmodern accounts of identity. If they balance their skepticism of race with an understanding of the social significance of racial identity and race consciousness, progressive race blindness theorists can offer an analysis of race that does not dismiss the importance of race to antiracism and to the psyche of persons of color. Only a nuanced theory of race that acknowledges both its constructed and material dimensions can lead to a realistic account of racial injustice and, potentially, to the articulation of workable antisubordination theories.

#### CONCLUSION

This symposium has provided the space for considering new and provocative theories of race. The progressive race blindness movement offers a fresh approach to race that seeks to shatter biological and essentialist thinking among progressive theorists and persons of color. While progressive movements should welcome and accommodate dissenting voices, the work of progressive race blindness scholars ultimately undermines the goals of these movements. Progressive race blindness fails to recognize the positive and contextual meanings of race and the relationship of race to other identity categories and forms of subjugation. While the postmodern analysis of identity as a social—rather than biological—phenomenon has added valuable contributions to contemporary equality theories, critical theorists must not forget the material dimensions of identity. Although identity categories are socially produced, they have substantive dimensions: Identity categories correlate with the unequal distribution of vital social resources and serve as ongoing sources of discrimination in a variety of social contexts.

The dual consciousness of Critical Race Theory can help bridge the competing realities of race as fictional but real. Critical Race Theory blends

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96. See *supra* notes 46–63 and accompanying text.

97. See *supra* notes 46–66 and accompanying text.

skepticism toward legal abstraction with a passionate commitment to utilizing legal structures to revitalize conditions in oppressed communities. Advocates of progressive race blindness can learn from the work of Critical Race Scholars who challenged the radical deconstruction of the Critical Legal Studies movement. Skepticism toward race need not lead to a wholesale rejection of its utility for social justice movements. Instead, a sophisticated approach to race that blends modernist and postmodern narratives can offer a richer account of racial justice that preserves available (and limited) instruments for resisting domination. The political importance of race to *all* oppressed communities and progressive movements counsels against the efforts of the progressive race blindness movement to move beyond race. Ultimately, critical scholars must continue to articulate theories that reconstruct and unveil, rather than submerge and obscure, the meanings of race.