

COLORISM: A DARKER SHADE OF PALE

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In this Article, Professor Banks argues that colorism, skin tone discrimination against dark-skinned but not light-skinned blacks, constitutes a form of race-based discrimination. Skin tone discrimination coexists with more traditional forms of race discrimination that impact all blacks without regard to skin tone and phenotype, yet courts seem unwilling to recognize this point. Professor Banks uses employment discrimination cases to illustrate some courts' willingness to acknowledge subtler forms of race-based discrimination, like skin tone discrimination, for white ethnic and Latino/a plaintiffs, but not for black plaintiffs. The inability of courts to fashion coherent approaches to colorism claims involving black claimants means that dark-skinned blacks will continue to experience more extreme forms of race discrimination than experienced by light-skinned blacks. In addition, failure to address colorism claims by black litigants will have broader implications as courts face the more complex racelike cases likely occur in the twenty-first century.

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INTRODUCTION

The sliding scale of color bedeviled everyone, irrespective of where one stood on the color chart¹

As we leave the twentieth century, news commentators repeatedly warn that the United States of the next century will be “a little darker.”² They mention the influx of nonwhite migrants from Central and Latin America, sub-Saharan Africa, and Asia³ as well as the increasing numbers of multi- and biracial individuals⁴ and interracial and interethnic marriages.⁵ At the same time as commentators warn we are becoming a bit darker

1. PAULI MURRAY, *PROUD SHOES: THE STORY OF AN AMERICAN FAMILY* 90–91 (1956).

2. Harry Murphy, *Economy to Require Opportunities for Minorities*, *ATLANTA J. & CONST.*, Mar. 16, 1991, at A16 (“[D]emographic studies such as the census demonstrate that the United States is becoming less white almost by the day Not only is America growing ever darker of skin, but in today’s world economy, many of our trading partners are peopled by non-whites.”); see also Neil Modie & Scott Maier, *Political Clout for Minorities Doesn’t Match Population*, *SEATTLE POST INTELLIGENCER*, Mar. 9, 1991, at A1 (showing that the 1990 census data suggests that minority groups have grown at faster rates than the white population).

Census Bureau projections indicate that the proportions of people of color will increase to almost half (48 percent) by the year 2050 The black and indigenous populations will double, the Hispanic population will triple, and the Asian American population will almost quadruple over the same time period. In contrast, the non-Hispanic White population will increase by only 5 percent.

JUANITA TAMAYO LOTT, *ASIAN AMERICANS: FROM RACIAL CATEGORIES TO MULTIPLE IDENTITIES* 23 (1998).

3. See Roberto Suro, *The Next Wave; How Immigration Blurs the Race Discussion*, *WASH. POST*, July 19, 1998, at C1 (arguing that Latina/o and Asian immigrants blur the traditional black-white paradigm).

4. Although the exact number of multiracial individuals is unknown, estimates of the number of children “living in families where one parent is white and the other is black, Asian, or American Indian” have tripled from less than 400,000 in 1970 to 1.5 million in 1990. Lawrence Wright, *One Drop of Blood*, *NEW YORKER*, July 25, 1994, at 49. These estimates do not take into account single parents or children whose parents are divorced. See generally Jerelyn Eddings & Kenneth T. Walsh, *Counting a ‘New’ Type of American: The Dickey Politics of Creating a ‘Multiracial’ Category in the Census*, *U.S. NEWS & WORLD REP.*, July 14, 1997, at 22 (arguing against recognition of a multiracial census category).

5. See Roger Sanjek, *Intermarriage and the Future of Races in the United States*, in *RACE* 103 (Steven Gregory & Roger Sanjek eds., 1994) (arguing that increased intermarriage in the twenty-first century will blur traditional racial categories); Michael A. Fletcher, *Interracial Marriages Eroding Barriers*, *WASH. POST*, Dec. 29, 1998, at A1 (arguing that increasing rates of interracial marriages may cause race to lose much of its meaning); Orlando Patterson, *Race Over*, *NEW REPUBLIC*, Jan. 10, 2000, at 6 (arguing that increased immigration from Asia, Central and Latin America, and the Caribbean, coupled with an increase in interracial and interethnic marriage, will eliminate race as a problem in the twenty-first century as racial boundaries blur).

as a nation, racial conservatives,⁶ other politicians,⁷ and courts push for color-blind laws.⁸

There is continuing disagreement over how the government should treat socially constructed differences like “race.”⁹ Proponents of a colorblind society

6. See, e.g., Robert Marguand, *Hour of Truth for Affirmative Action*, CHRISTIAN SCI. MONITOR, Aug. 28, 1997, at 1. “Some conservatives argue that an emphasis on race-based remedies is itself divisive and contributes to, rather than cures, racial problems.” *Id.*

7. See, e.g., William Goldschlag, *High Court Limits Affirmative Action*, N.Y. DAILY NEWS, June 13, 1995, at 6; *Center for New Black Leadership Decries Piscataway Affirmative Action Case Bribe: A New Low for ‘Civil Rights’ Organization*, P.R. Newswire, Nov. 21, 1997; *Crossfire* (CNN television broadcast, July 17, 1990), available in LEXIS, Nexis Library, Transcript File, transcript #97 (discussing the Civil Rights Act of 1990).

8. See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny test to affirmative action programs); *Richmond v. Croson*, 488 U.S. 109 (1989) (city minority set aside program); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (teacher layoff and seniority program).

9. I use the term “race” in quotation marks to remind the reader that race is not only socially constructed, but laden with such heavy baggage that the word “race” should never be used except in quotation marks. See Wright, *supra* note 4, at 50; see also 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 (1994) (defining races as groupings of people based loosely on historical, social, ancestral, and physical components). Ian F. Haney López argues that

race must be understood as a *sui generis* social phenomenon in which contested systems of meaning serve as the connections between physical features, races, and personal characteristics. . . . Race is neither an essence nor an illusion, but rather an ongoing, contradictory, self-reinforcing process subject to the macro forces of social and political struggle and the micro effects of daily decisions.

Id. at 7. Contemporary discussions of race and racial formation in the United States generally concede that racial categories are socially constructed. As Michael Omi and Howard Winant point out, “[f]rom the very inception of the Republic to the present moment, race has been a profound determinant of one’s political rights, one’s location in the labor market, and indeed one’s sense of ‘identity.’” MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* 1 (1994); see also, HOWARD WINANT, *RACIAL CONDITIONS* 13–21 (1994). This view is consistent with the commonly accepted belief within the scholarly community, and, increasingly, with general public opinion. Popular magazines like *Newsweek* announce that “race is a mere ‘social construct’—a gamy mixture of prejudice, superstition and myth.” Tom Morganthau, *What Color Is Black?* NEWSWEEK, Feb. 13, 1995, at 64 (describing the belief of most scientists, but not the general public). Ten years ago, even the Supreme Court recognized that legal definitions of racial categories change over time. See *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 610 (1987). The notion that race is an objective condition assumes that racial definitions are constant, although periodic adjustments and reclassifications might be necessary. In contrast, the notion that race is subjective, an ideological or social construct, assumes that racial meanings are contextual and fluid. Race is used constantly as a signifier, but racial meanings constantly change. Thus, racial identities are unstable, and race has no meaning except that ascribed to it. Racial identities are being created and recreated everyday. Leslie Espinoza and Angela Harris write:

This is the problem of race. It is both easily knowable and an illusion. It is obviously about color and yet not about color. It is about ancestry and bloodlines and not about ancestry and bloodlines. It is about cultural histories and not about cultural histories. It is about language and not about language. We strive to have a knowable, systematic explanation for race. We struggle with its elusivity. We name our categories, we refine our categories, and then inevitably we find too many exceptions to the categories, too many people who just do not fit. Race should be rational and it is not.

oppose providing rights or privileges to any group based on race,¹⁰ and some would abolish racial categories altogether. Arguments for a colorblind society assume that the abolition of or a deemphasis on race and racial categories will lead to the creation of a society in which race confers no special rights or privileges. Ignored in the debate about the merits of a colorblind society is the impact of markers like skin tone and phenotypical characteristics on the economic fortunes of individuals raced¹¹ as nonwhite.

Skin tone, for example, may sometimes mediate how “black”¹² people are racialized in the United States. In 1997, the television show *Nightline* aired

Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585, 1609–10 (1997) (discussing the tension between scholars who reject the black-white paradigm and those who believe in “black exceptionalism”).

10. See, e.g., CLINT BOLICK, *THE AFFIRMATIVE ACTION FRAUD: CAN WE RESTORE THE AMERICAN CIVIL RIGHTS VISION?* (1996) (arguing that affirmative action programs should be based on class rather than on race); TERRY EASTLAND, *ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE* (1996) (arguing that affirmative action programs run counter to the nation’s ideals and prevent fair treatment of all citizens); RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996) (arguing that affirmative action programs should be based on class rather than on race). *But cf.* BARBARA R. BERGMANN, *IN DEFENSE OF AFFIRMATIVE ACTION* (1996) (arguing that affirmative action programs are necessary components of antiracism and antisexism).

11. I use “race” as a verb here and in other places in this essay to remind readers that race in the United States is often imposed on some groups of people.

12. I consciously use the term “black” throughout this article rather than the more current “African American”. As historian Armstead Robinson said:

The widespread adoption of the more currently fashionable term, African-American, resulted from the powerful influence of the media upon American society rather than from a consensus within the black community. In the 1960s, the black power movement inaugurated a period of intensive discussion which resulted in widespread acceptance of terms such as black and Afro-American. These terms earned validity by surviving sustained debate in a veritable cauldron of public discussion. In contrast, the newer term African-American has been adopted all too easily even though a broad cross-section of blacks object strongly though in resigned silence to this term, some out of respect for the distinctiveness of Africa. For after all, the term African-American precludes the possibility of a distinctive term for the native African who has become an American citizen.

Armstead Robinson, Introduction, in *Afro-American Landmarks in Virginia* (unpublished manuscript, on file with author). In this Article, I use the terms “black” and “Afro-American” to refer to people of African descent. I use the term Afro-American to distinguish native-born from foreign black people. As Professor Robinson suggests, what we call ourselves is a political act that expresses our identity and culture. The name we call ourselves has been a constant source of friction within the black community. See, e.g., Bettye Collier-Thomas & James Turner, *Race, Class and Color: The African American Discourse on Identity*, 14 J. AM. ETHNIC HIST. 5 (1994) (discussing the history of racial designation of blacks and the connection between color and class in self-identification). I chose to use the term black as a generic term for persons of African descent in this country because its popularization during the 1960s marked a conscious effort by black intellectuals, artists, and student activists to find a name that both demonstrated class unity and discouraged intraracial colorism. See *id.* at 24–25. For a more detailed discussion of the views of legal scholars on this point, see Alex

a program entitled “America in Black and White—Shades of Prejudice” that briefly explored what the program’s host, Ted Koppel, described as “a strong perception [within the African American community] that . . . in America . . . lighter skinned blacks have a [sic] easier time and are more likely to succeed than darker skinned blacks.”¹³ The *Nightline* program suggested that colorism, discrimination based on skin tone, has a significant economic impact on dark-skinned blacks.¹⁴

Sometimes very light-skinned blacks benefit economically as compared to dark-skinned blacks because they are not readily identified by potential employers as black. Law professor Cheryl Harris writes about her grandmother, a light-skinned “black” woman, who used her white skin to secure a better paying job to support her family.¹⁵ By passing for white, hiding her nonwhite ancestry, and capitalizing on her European physical features, Harris’s grandmother improved her economic situation. Professor Harris uses this story to illustrate how her grandmother’s skin color served as a proxy for race, concluding that whites continue to have a property interest in their white skin because it confers certain economic privileges denied to those whose skin is not white.¹⁶ Yet, Harris’s example demonstrates implicitly that a few light-skinned blacks also received similar privileges.¹⁷ Even today, blacks with light brown skin

M. Johnson, Jr., *How Race and Poverty Intersect To Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods*, 143 U. PA. L. REV. 1595, 1596 n.8 (1995); and Johnny Washington, ‘Black’ or ‘African American’: What’s in a Name?, in AMERICAN MOSAIC: SELECTED READINGS ON AMERICA’S MULTICULTURAL HERITAGE 57 (Yong I. Song & Eugene C. Kim eds., 1993).

13. *Nightline: America in Black and White—Shades of Prejudice* (ABC television broadcast, Feb. 28, 1997), available in LEXIS/News Library, Transcript #97022801-j07 [hereinafter *Nightline*].

14. See *id.* News commentator Michel Queen reported on *Nightline* that dark-skinned blacks experience less success in the fashion industry than light-skinned blacks, and on average earn substantially less than light-skinned blacks. I discuss studies substantiating this point in Part I of this Article.

15. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1710 (1993).

16. See *id.* at 1713.

17. Even though the circumstances Professor Cheryl Harris describes occurred a long time ago, there are more contemporary examples of racial passing by light-skinned persons raced as black. Ohio Law School Dean and Professor Gregory Williams wrote about his light-skinned black father passing for white in Virginia to support his family in the 1940s. See GREGORY HOWARD WILLIAMS, *LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK* (1995). When singer Mariah Carey’s first album debuted in 1990, the *New York Times* touted her as a 20-year old *white* soul singer. See Stephen Holden, *Recordings: Three Voices and the Dangers of Compromise*, N.Y. TIMES, July 8, 1990, § 2, at 22. A year later, Stephen Holden wrote, without classifying Carey racially, that “her father, an aeronautical engineer, is black and Venezuelan. Her mother . . . is of Irish descent.” Stephen Holden, *The Pop-Gospel According to Mariah Carey*, N.Y. TIMES, Sept. 15, 1991, at § 2, at 28. The same year, another article in the *New York Times* characterized Carey as a mulatto, the product of an interracial marriage. See Gail Lumet Buckley, *When a Kiss Is Not Just a Kiss*, N.Y. TIMES, March 31, 1991, at § 2, at 1. It is unclear whether Mariah Carey in 1990 was actively or passively *passing* for white or whether she self-identified as white or nonblack. Racial self-identification is made difficult by externally constructed

tones, although clearly identified as black, may have some economic advantage over blacks with darker skin tones, especially in workplace settings.

Just as critical studies scholars write that there are degrees of whiteness,¹⁸ in this Article I argue that there are degrees or layers of blackness. Yet, the traditionally paradigmatic instance of race discrimination in America is discrimination by a member of one racialized group against a person from a different racialized group (interracial discrimination). The traditional paradigm operates even when the alleged basis for discrimination is not race, but rather ethnicity, nationality, or color. Courts typically treat these latter categories as proxies for race.

More recently, the traditional American race discrimination paradigm has come under sustained challenge in cases brought by white ethnics and Latinas/os against members of their own race.¹⁹ In these cases, courts sometimes view ethnicity or color as a proxy for race. These same courts have been more reluctant to dissociate color from race in the context of cases brought by blacks.²⁰ Therefore, I argue in this Article that U.S. courts rigidly adhere to the commonly accepted notion that a person with *any known* African ancestry is raced as black.²¹ An overwhelming majority of people raced as black in the United States, however, have mixed ancestry and vary

notions of race. Adrian Piper, for example, also the light-skinned offspring of an interracial marriage, asserts that she passes for black because that is how she is constructed in the United States. Adrian Piper, *Passing for White, Passing for Black*, in *PASSING AND THE FICTIONS OF IDENTITY* 244 (Elaine K. Ginsberg ed., 1996). For a discussion on racial passing and the importance of skin tone and phenotype in establishing race, see Robert Westley, *First-Time Encounters: "Passing" Revisited and Demystification as a Critical Practice*, 28 *YALE L. & POL'Y REV.* 297 (2000) (arguing that authentic whiteness in law is constructed as racial purity).

18. See e.g., THEODORE W. ALLEN, *THE INVENTION OF THE WHITE RACE* (1994 & 1997) (arguing that class struggle rather than some "natural" antagonism resulted in the racial oppression of enslaved laborers brought from Africa); ALAN M. DERSHOWITZ, *THE VANISHING JEW: IN SEARCH OF JEWISH IDENTITY FOR THE NEXT CENTURY* (1998) (arguing that the American Jewish culture may vanish as American Jewry becomes more assimilated into the dominant culture); NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995) (arguing that Irish Catholic immigrants used the church, labor unions, and the Democratic Party to gain acceptance as whites in America); DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991) (examining how the white community defines itself and how it defines other groups).

19. See discussion *infra* Part II.

20. See *id.*

21. See F. JAMES DAVIS, *WHO IS BLACK: ONE NATION'S DEFINITION* 4-6 (1991). "The nation's answer to the question: 'Who is black?' has long been that a black is any person with *any known* African black ancestry." *Id.* at 5 (citing BREWTON BERRY & HENRY L. TISCHLER, *RACE AND ETHNIC RELATIONS* 97-98 (4th ed. 1978); GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 113-18 (1944); JOEL WILLIAMSON, *NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES* 1-2 (1980)).

widely both in skin tone and phenotypical characteristics.²² Only in the United States is the racial category “black” constructed in a way that heightens the stigma of inferiority imposed on African ancestry.²³ African ancestry trumps all other racial markers.

In practice, however, differences in skin tone and phenotype among black people do have meaning in the United States, especially for blacks with the darkest skin tones and the least European phenotypes. Social science studies indicate that blacks and whites, and perhaps other nonwhites, distinguish among blacks based on skin tone.²⁴ Yet, the government’s definition of the racial category black²⁵ impedes recognition by courts that black people can be differentially racialized. To the extent that discrimination laws seek to address impermissible treatment based on membership in a different racialized group, the reluctance of courts to view shades of color as a relevant criterion in discrimination claims by and against blacks is ill founded.

The need for courts to pay attention to discrimination based on skin tone and phenotype is heightened by the changing demographics of American society. In the twenty-first century, discrimination cases are less likely to be of the traditional transracial type and more likely to be about gradations in

22. See DAVIS, *supra* note 21, at 21 (“At least three-fourths of all people defined as American blacks have some white ancestry, and some estimates run well above 90 percent.”); IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 180 (1996) (estimating that black Americans get 25 percent of their genes from white sources); Stephen H. Caldwell & Rebecca Popenoe, *Perceptions and Misperceptions of Skin Color*, 122 *ANNALS INTERNAL MED.* 614, 615 (1995) (“As for the African-American population in the United States, geneticist Luigi Cavalli-Sforza has estimated that 30% of their genes derive from ‘white’ sources.”).

23. The United States is the only country in the world to apply the rule of hypodescent to persons with African ancestry. See DAVIS, *supra* note 21, at 13. For example, “Latin American countries generally count as black only unmixed African blacks, those only slightly mixed, and the very poorest mulattoes.” *Id.* at 11. “Under the Northwest European variant, full assimilation may occur when the mixed person has known black ancestry but appears white.” *Id.* at 119. For a more complete discussion of this point, see generally *id.* at 81–122. Ariela Gross points out, however, that the hypodescent rule is only 130 years old, as demonstrated by litigation during the antebellum period over who was white and who was black. Ariela J. Gross, *Litigating Whiteness: Trial of Racial Determination in the Nineteenth-Century South*, 108 *YALE L.J.* 109, 114–19 (1998).

24. See discussion *infra* Part I.B.

25. See *Directive No. 15, Race and Ethnic Standards for Federal Statistical and Administrative Reporting*, 43 *FED. REG.* 19,269, 19,269 (1978). Directive No. 15 defines as black “[a] person having origins in any of the black racial groups of Africa.” *Id.* For the 2000 census, the definition of a black person remains unchanged, however: the black category is now called “black” or “African-American.” See Steven A. Holmes, *People Can Claim One or More Races on Federal Forms*, *N.Y. TIMES*, Oct. 30, 1997, at A1.

physical characteristics among members of ostensibly the same racialized group.²⁶ This Article examines the differential treatment of skin tone discrimi-

26. Some commentators who favor retention of racial categories argue for broadening the government-sanctioned categories to include multi- and biracial individuals as a way of diluting the effect of rigid racial categories. See, e.g., Kenneth E. Payson, *Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Raced People*, 84 CAL. L. REV. 1233, 1290 (1996) (promoting a multiracial category as a step toward "dismantling the dividing lines of race"); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 960, 988 (1995) (rejecting a colorblind approach as unacceptable in favor of a multiracial category which helps avoid racial balkanization). Deborah Ramirez argues that a shift away from monolithic categories to multicultural ones would "debunk racial stereotypes, as race becomes a multifaceted concept." *Id.* at 986–87. She also notes that "multicultural empowerment facilitates trans-racial coalitions not only among minority groups of color, but also between minority and non-minority populations." *Id.* at 988.

The debates about race and racial categories suggest that the United States is moving away from its traditional rigid definition of who is black toward a more Latin American notion of race. Although most Latinas/os have European white, black African, and Native American ancestors, only a small percentage consider themselves black, usually very dark-skinned Latinas/os with physical characteristics most often attributed to people of African descent. For a discussion of this point, see Leonard M. Baynes, *If It's Not Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 DENVER U. L. REV. 131, 146–53 (1997) (arguing that there is a specific antiblack bias). In Latin America, skin tone and phenotype combine with socioeconomic status to determine the racial status of persons not clearly marked as white. See, e.g., CARL DEGLER, *NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES* 98–112, 226 (1971) (describing a color caste hierarchy in Brazil with privileged whites at the top, persons of mixed ancestry in the middle, and dark-skinned blacks at the bottom); Tanya Katerí Hernández, *The Construction of Race and Class Buffers in the Structure of Immigration Controls and Laws*, 76 OR. L. REV. 731, 737 n.26 (1997) (arguing that Congress's conclusion that Puerto Ricans were primarily white was based on faulty census data which reflected "the proclivity for Latin Americans to claim whiteness as identity of status regardless of actual African ancestry"); Sebastian Rotella, *Blacks Making Themselves Heard*, BALTIMORE SUN, May 2, 1998, at 2A (describing the reemergence of black consciousness in Latin America).

Several legal commentators, however, warn of the danger to racially subordinated groups, like blacks, in any widespread adoption of colorblind laws or expansion of racial categories. Tanya Hernández, looking at both Brazil and Cuba, warns of the dangers inherent in adopting the Latin American approach to race. See Tanya Katerí Hernández, "Multiracial" Discourse: *Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97, 121–22 (1998) [hereinafter Hernández, "Multiracial" Discourse] (discussing racism in Brazil directed at persons of African descent); Tanya Katerí Hernández, *An Exploration of the Efficacy of Class-Based Approaches to Racial Justice: The Cuban Context* (unpublished manuscript, on file with author) (arguing that the failure of socialist Cuba to eliminate racial discrimination through colorblind socioeconomic redistribution programs suggests that substituting class-based affirmative action for race-based programs in the United States will be similarly unsuccessful). Some Latin American countries deny that race has any significance. See DEGLER, *supra*, at 98–112 (questioning claims that class, not race, keeps blacks in Brazil at the bottom of the socioeconomic ladder); Florestan Fernandes, *The Negro Problem in a Class Society*, 1951–60, in 2 *BLACKNESS IN LATIN AMERICA AND THE CARIBBEAN: SOCIAL DYNAMICS AND CULTURAL TRANSFORMATIONS* 102 (Arlene Torres & Norman E. Whitten, Jr. eds., 1998); Arlen Torres, *La Gran Familia Puertorriqueña "Ej Prieta de Beldá" (The Great Puerto Rican Family Is Really Really Black)*, in *BLACKNESS IN LATIN AMERICA AND THE CARIBBEAN: SOCIAL DYNAMICS AND CULTURAL TRANSFORMATIONS*, *supra*, at 285. *But cf.* Angel R. Oquendo, *Re-Imagining the Latino/a Race*, 12 HARV. BLACKLETTER J. 93, 102 (1995) (arguing that the black-white racial paradigm in the United

nation in the context of employment discrimination claims to determine whether race is any more or less socially constructed in one case than in the other.

In this Article, I suggest that colorism, skin tone discrimination against dark-skinned but not light-skinned blacks, constitutes a form of race-based discrimination. Skin tone discrimination coexists with more traditional forms of race discrimination that affect all blacks without regard to skin tone and phenotype. I use employment discrimination cases to illustrate the willingness of the courts to acknowledge more subtle forms of race-based discrimination for white ethnics and Latinas/os, and the inability of the courts to fashion a coherent approach to colorism claims involving black claimants.

In Part I, I discuss the origins of colorism practices affecting black Americans, concluding that there is a strong connection between the perception of light-skinned privilege and notions of white superiority. Then I examine studies of colorism, concluding that the perception within the black community that light-skinned blacks get economic preference over dark-skinned blacks has some empirical support. Given the empirical evidence that light skin can be a source of privilege for black Americans, Part II examines courts' treatment of colorism claims, concluding that most courts are more willing to acknowledge racelike discrimination against ethnic whites and Latinas/os than against black claimants. Part III discusses one case in which a court adopted a more realistic analytical approach to a colorism claim.

In Part IV, I argue that despite our recognition that race in America involves a complex bundle of factors including ancestry, phenotype, hair texture, and language, skin tone remains a primary determinant of racial status for persons of African descent. As a result, there are no simple solutions to the problem of colorism. Nevertheless, courts already have the basic jurisprudence to address some colorism claims brought by black litigants and must be prepared for the more complex claims they are likely to confront in the twenty-first century.

I. COLORISM: TRUTH OR FICTION?

A. Origins of Colorism Practices

In 1986, Tracy Walker, a black clerk-typist in the Atlanta office of the Internal Revenue Service (IRS), was terminated.²⁷ Her supervisor, another black woman, wrote that Walker had an "attitude problem" and was late for

States leads Latinas/os to deny "any connection or kinship to blacks" because of the hypodescent rule). See generally *NO LONGER INVISIBLE: AFRO-LATIN AMERICANS TODAY* (Minority Rights Group ed., 1995).

27. See *Walker v. Secretary of the Treasury*, 713 F. Supp. 403, 404 (N.D. Ga. 1989).

work, lazy, and incompetent.²⁸ Tracy Walker filed an employment discrimination suit against the IRS, alleging that these reasons were fabricated and attributing her termination to the hostility of Ruby Lewis, her dark-skinned black supervisor.²⁹ Her allegation amounted to the assertion that Lewis disliked Walker because of her light skin tone.

The IRS argued that Walker's claim should be dismissed because "color" as used in Title VII of the Civil Rights Act of 1964 was synonymous with "race."³⁰ Because both Walker and her supervisor were black, the IRS asserted, there could be no race claim. The federal trial judge rejected this argument and refused to dismiss the lawsuit even though Walker was unable to prove directly that Lewis disliked light-skinned blacks. Instead, the judge wrote: "[t]here is evidence that Ms. Lewis might have harbored resentful feelings towards *white people*, and therefore by inference, possibly towards light-skinned black people."³¹

The alleged basis for dispute between Walker and Lewis, skin tone bias, would not surprise most black people. Rooted in slavery,³² the exact origin of colorism within the black community is unclear. Light-skinned preferences within that community undoubtedly mirrored white sentiments.³³ The ruling in *Walker v. Secretary of the Treasury*³⁴ seems to support claims of light-skinned color bias.³⁵ Because of her light skin color, Walker became a surrogate white woman in the eyes of the law.

The scholarly and popular literature regarding the "mulatto,"³⁶ from the end of the Reconstruction era to the first World War, reflected and fostered color bias within the white community.

Whites tended to view mulattoes as more intelligent than blacks but not the equal of Caucasians . . . [and believed that b]ecause mulattoes were intellectually superior to blacks, with whom they were

28. See *id.*

29. See *id.*

30. See *id.* at 405.

31. *Id.* at 404-05 (emphasis added). Tracy Walker ultimately lost her case after a trial on the merits. See *Walker v. Secretary of the Treasury*, 742 F. Supp. 670 (N.D. Ga. 1990), *aff'd*, 953 F.2d 650 (11th Cir. 1992).

32. See Collier-Thomas & Turner, *supra* note 12, at 11. Some slave owners placed a higher economic value on slaves of mixed ancestry. This difference in value may well have been job-specific. Some evidence exists that dark blacks were preferred as field workers because white planters believed mixed-race slaves were physically weaker and more likely to stir up rebellion.

33. See *infra* note 35 and accompanying text.

34. 742 F. Supp. 670 (N.D. Ga. 1990), *aff'd*, 953 F.2d 650 (11th Cir. 1992).

35. See *infra* notes 37-39, 51-58 and accompanying text.

36. As Professor Judy Scales-Trent points out, "mulatto" also is a problematic term. It is a derivative "from the Spanish 'mulato,' young mule"—a sterile hybrid. Judy Scales-Trent, *On Being Like a Mule*, in *NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, COMMUNITY* 99-100 (1995).

racially grouped, they were leaders in every line of activity undertaken by Negroes. . . . whites [also] believed that 'mixed bloods' were hybrids, morally weak, and physically degenerate.³⁷

Some historians also speculate that after the end of slavery many light-skinned blacks, because they had accumulated more skills, had an economic advantage over dark-skinned blacks.³⁸ Critics, often dark-skinned blacks, complained about "blue veinism," the attempt to establish "pluralistic elites within the [black] community where the degree of acceptance was granted in accordance with one's approximation to the dominant 'psychomatic norm images.'"³⁹ This colorphobia within the black community increased with the advent of Jim Crow laws near the end of the nineteenth century.⁴⁰ The black community internalized this colorphobia in ways that subordinated some group members to others.

Michael Omi argues that members of a racially subordinated group may be "differentially racialized," creating different levels of status and power within the group.⁴¹ In-group colorism, the preference for light-skinned blacks, within the black community is an example of Omi's point. Colorism within the black community is often blamed solely on a dominant culture that significantly influences how the different tiers of status and power are constructed and maintained within the black community.

37. WILLARD B. GATEWOOD, *ARISTOCRATS OF COLOR: THE BLACK ELITE, 1880-1920*, at 150 (1990). Whites also believed that mulattos "were 'stirrers-up of strife,' constantly demanding greater rights and privileges for themselves and awakening false aspirations among the black masses." *Id.* Between 1910 and 1920, eugenicists published many articles asserting that there was a correlation between success of certain black people and "their possession of White blood." Hernández, "Multiracial" Discourse, *supra* note 26, at 128 n.160 (citing, as an example, E.B. Reuter, *The Superiority of the Mulatto*, 23 AM. J. SOC. 83, 87 (1917) ("The most simple and obvious means of accounting for the observed superiority of the mulattoes is to deny the equality of the parent races and to attribute the superiority of the mixed-blood individuals to the fact of a superior racial heredity.")).

38. As two scholars have noted:

[A]ll too often the off-spring of miscegenation on the plantation were more likely to have been manumitted, given property, some money and provisions for education, all of which accrued to them a distinct social advantage over other that continued after slavery. This meant that the light complexioned sectors of the slave population were in a better position to assume leadership in the economic, social and political life of Black America.

Collier-Thomas & Turner, *supra* note 12, at 13. "The syndrome reproduce[d] itself over generations." *Id.*

39. G. Reginald Daniel, *Passers and Pluralists: Subverting the Racial Divide*, in *RACIALLY MIXED PEOPLE IN AMERICA* 95 (Maria P.P. Root ed., 1992).

40. See GATEWOOD, *supra* note 37, at 153-54.

41. Michael Omi, *Out of the Melting Pot and Into the Fire: Race Relations Policy*, in *THE STATE OF ASIAN PACIFIC AMERICA* 207 (1993) (describing differential racialization along class lines); see also WINANT, *supra* note 9, at 62-64 (describing differential racialization along class lines within the post-civil rights African American community).

Eric Yamamoto argues, however, that in some ways racially subordinated groups “contribute to and are responsible for the construction of their own identities and sometimes oppressive inter-group relations.”⁴² He explores the interracial conflicts in Hawaii between two racially subordinated groups, Asian Americans and Native Hawaiians. Yamamoto argues that Asian Americans contribute to the racial subordination of Native Hawaiians. He concludes that racially subordinated groups may redeploy structures of racial oppression against others.⁴³ Thus, a racialized group can simultaneously be subordinated and a subordinator of others. “The positional shift is significant because it decenters ‘whiteness’ as the singular referent for determining racial group identities and relations. It expands racial formation and racial justice inquiries into the realm of interracial relations.”⁴⁴

Yamamoto argues that the differential racialization of Asian Americans and indigenous people in Hawaii contributes to intergroup conflict.⁴⁵ Taking his analysis a step further, I am arguing that the concept of “simultaneity” also applies to situations in which some members of racially subordinated groups like blacks redeploy structures of oppression like colorphobia against other members. In-group colorism reflects not only the ways in which whites sometimes distinguish among blacks but also the ways in which the racially subordinated black community internalizes white attitudes toward light-skinned blacks by simultaneously subordinating dark-skinned blacks. In drawing social and economic distinctions within the black community based on skin tone and phenotype, blacks thus redeploy one structure of racial oppression against other blacks. Troublesome as internalized colorism may be, however, studies suggest that greater economic consequences attach when members of the dominant culture practice colorism in the hiring and promotion of blacks.⁴⁶

If light-skinned blacks gain some privilege based on their skin tone, their head start arguably translates into a kind of social capital.⁴⁷ That is, by

42. Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 UCLA ASIAN PAC. AM. L.J. 33, 38 (1995).

43. *See id.* at 47–50.

44. *Id.* at 45.

45. *See id.* at 59–60.

46. *See infra* notes 53 and 66 and accompanying text.

47. I thank my colleague Robert Suggs for suggesting this term. He defines it as “a resource that: (1) facilitates production; (2) is neither consumed nor otherwise used up in production; and (3) is derived from ordinarily informal relationships established for non-economic purposes but with economic consequences.” Robert E. Suggs, *Bringing Small Business Development to Urban Neighborhoods*, 30 HARV. C.R.-C.L. L. REV. 487, 489 n.11 (1995) (quoting James S. Coleman, *A Rational Choice Perspective on Economic Sociology*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY 166, 175–76 (Niel J. Smelser & Richard Swedberg eds., 1994)). My use of this term, however, differs slightly from his. The social capital light-skinned black people gain by virtue of skin color facilitates

virtue of their skin tone, which suggests kinship with and proximity to whites,⁴⁸ light-skinned blacks may have access to resources that racial barriers usually deny to blacks as a group.⁴⁹ Professor Cheryl Harris's light-skinned

production only indirectly and is not always derived from noneconomic informal relationships. I use "social capital" to refer to a resource "characterized by the creation and maintenance of social networks and bonds that facilitate actions and relations. For discussions of the social capital concept, see James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. 95 (1988). See also GARY S. BECKER, *HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION* (2d ed. 1980).

48. Here I mean people classified as black whose physical features, including skin tone, look more European than African, but whose parents are classified as black. See, e.g., Scales-Trent, *supra* note 36.

49. *Wall v. Oyster*, 36 App. D.C. 50 (1910), decided almost a century ago, illustrates that the social capital conferred by light skin has limitations. It may ease, but does not eliminate, race-based discrimination. Isabel Wall, the granddaughter of a prominent Washington, D.C. "aristocrat of color" family, was removed from a segregated public school for whites because the principal determined that she was a "colored child." Her maternal grandparents were white, her paternal great-grandparents were a white man and a very light mulatto woman; and her paternal grandparents were a son of these grandparents and a white woman. See *id.* at 51.

The trial judge described Isabel as "white" in personal appearance and acknowledged that neighbors and friends treated and recognized her as white. See *id.* at 51–52. The court, however, after noting that the District of Columbia statute requiring separation of the "races" in public schools contained no definition of the word "colored," concluded that "race" is not determined based on skin color alone. Skin color simply serves as "one avenue for the conveyance of information upon the subject of racial identity to the mind of the investigator." *Id.* at 55.

Other factors here seem to have included the physical appearance of the child's father ("while of light complexion, [he] presents to the eye racial characteristics which identify him of negro blood"); the social associations of the child's grandfather—mainly with "colored" people; and the popular meaning of the term "colored." *Id.* at 52–53, 58. The court concluded that, in the United States, the word "colored," when used to designate race, "means a person of negro blood, pure or mixed; and . . . applies no matter what may be the proportions of the admixture, so long as the negro blood is traceable." *Id.* at 58 (emphasis added).

Mary Church Terrell, a prominent black civic leader, supported the Walls' lawsuit, arguing publicly that Isabel Wall was white because her mother was white, and the condition of the child followed the mother. In private, however, Terrell said that "the child [should be] classified as white to escape 'the hardships, humiliations and injustices' suffered by those 'classified as colored' in 'a prejudice-ridden city' like Washington." GATEWOOD, *supra* note 37, at 166. Terrell's argument refers to the rule applied in most slave-holding states during the seventeenth, eighteenth, and early nineteenth centuries, that the legal status of a black child's mother determined whether the child was born free or enslaved. See, e.g., EDMUND S. MORGAN, *AMERICAN SLAVERY AMERICAN FREED: THE ORDEAL OF COLONIAL VIRGINIA* 335–36 (1975). Terrell's public and private comments about *Wall* illustrate perceptions within the black community of the value of light skin and whiteness in general. After losing the legal battle, the Walls quietly moved to another section of Washington, D.C., where father and daughter "passed" as white. Using an assumed name, Isabel was enrolled in a school for white students. See GATEWOOD, *supra* note 37, at 167.

The claim advanced by the plaintiffs in *Wall* sounds like the claims of multiracial individuals today. Like some parents of these individuals, Isabel Wall's father believed that she should benefit in ways dark-skinned children similarly classified as black could not, based on her white ancestry, her skin color, and her European phenotype. In connection with the census, the federal government issues directives aimed at standardizing racial categories for use in connection with the census and other purposes. These racial categories are used by both the public and private sectors. The definitions have changed over the years, and the most recent definitions do not include a multiracial

grandmother, who passed as white to get a job reserved for white women, is a more extreme example of the social capital conferred on blacks with light skin.⁵⁰ Not only anecdotal but also social scientific evidence supports the view that light skin is a source of social capital for some blacks.

B. Studies of Colorism

Social science research confirms that light-skinned blacks are evaluated more positively than their dark-skinned counterparts in a variety of social situations.⁵¹ In the 1950s, black social scientist E. Franklin Frazier wrote, in a controversial study of the black middle class, that light-skinned blacks led a more privileged existence than dark-skinned blacks.⁵² Frazier's beliefs reflected the findings of several studies that

in past generations, higher-status blacks tended to have lighter skin tones than lower-status blacks and that light skin tone was an important criterion for attaining prestige within the black community. According to these studies, the dominant white society had historically extended social and economic privileges, not available to darker

category. The push by multiracial groups for this category resulted in several congressional hearings at which proponents of this additional category claim argued that multiracial people are unfairly forced to choose among racial communities rather than being allowed to acknowledge their mixed ancestries. See Hernández, "Multiracial" Discourse, *supra* note 26, at 98 n.2, 99 n.9, 106 n.42.

50. See Harris, *supra* note 15, at 1710, 1713.

51. See, e.g., Howard E. Freeman et al., *Color Gradation and Attitudes Among Middle-Income Negroes*, 31 AM. SOC. REV. 365 (1966); Darlene Powell-Hopson & Derek S. Hopson, *Implications of Doll Color Preferences Among Black Preschool Children and White Preschool Children*, 14 J. BLACK PSYCHOL. 57 (1988); Edward H. Ransford, *Skin Color, Life Chances, and Anti-White Attitudes*, 18 SOC. PROBS. 164 (1970); Nayda Terkildsen, *When White Voters Evaluate Black Candidates: The Processing Implications of Candidates Skin Color, Prejudice, and Self-Monitoring*, 37 AM. J. POL. SCI. 1032, 1034 (1993) (citing ST. CLAIR DRAKE & HORACE R. CLAYTON, *BLACK METROPOLIS* (1962)).

52. Franklin Frazier, in explaining the systematic demagogory touting black inferiority, writes:

Since the Negro's black skin was a sign of the curse of God and of his inferiority to the white man, therefore a light complexion resulting from racial mixture raised a mulatto above the level of the unmixed Negro. Although mulattoes were not always treated better than the blacks, as a rule they were taken into the household or were apprenticed to a skilled artisan. Partly because of the differential treatment accorded the mulattoes, but more especially because of general degradation of the Negro as a human being, the Negro of mixed ancestry thought of himself as being superior to the unmixed Negro. His light complexion became his most precious possession.

E. FRANKLIN FRAZIER, *BLACK BURGEISIE* 135 (1957). Skin color, however, did not overcome the stigma of race. Frazier continues, "[i]n some parts of the South [mulattoes] constituted a sort of lower caste, since no matter how well [off] they might be economically, they always bore the stigma of Negro ancestry." *Id.* at 137. Frazier "viewed color as an indication of . . . opportunity, acculturation, education, and wealth." GATEWOOD, *supra* note 37, at 149 (citing FRAZIER, *supra*, at 405-06).

blacks, to light-skinned blacks. . . . [As a result,] the most successful blacks were disproportionately lighter in complexion.⁵³

Frazier's conclusions mirrored the findings of the Swedish economist Gunnar Myrdal. In 1944, Myrdal wrote in his pathbreaking study of black Americans that "[w]ithout a doubt a Negro with light skin and other European features has in the North an advantage with white people when competing for jobs available to Negroes."⁵⁴ Myrdal concluded, however, that the "actual quantitative correlation between class and color is not known."⁵⁵

Contemporary studies question whether skin tone continues to influence life chances in the black community. A study conducted in the early 1980s by Verna Keith and Cedric Herring suggested that things did not change between the pre-civil rights 1950s and the post-civil rights 1980s.⁵⁶ Using data from 1979–1980, Keith and Herring found that very light-skinned blacks were on the average more educated than dark-skinned blacks and were more likely to be employed as professional and technical workers, while dark-skinned blacks were more likely to be employed as laborers.⁵⁷ Although education is a more important variable in predicting socioeconomic status, Keith and Herring concluded that "skin tone proves to be more

53. Verna M. Keith & Cedric Herring, *Skin Tone and Stratification in the Black Community*, 97 AM. J. SOC. 760, 761 (1991) (citing Gunnar Myrdal's study). Myrdal wrote:

Mixed bloods have always been preferred by the whites in practically all respects. They made a better appearance to the whites and were assumed to be mentally more capable. They had a higher sales value on the slave market Many white fathers freed their illegitimate mulatto offspring . . . , or gave them the opportunity to work out their freedom on easy terms. Some were helped to education and sent to the free states in the North. Some were given a start in business or helped to acquire land [While] [e]mancipation broadened the basis for a Negro upper class [b]lackness of skin remained undesirable and even took on an association of badness.

1 MYRDAL, *supra* note 21, at 696–97. In their 1945 study of blacks in New York City, social scientists St. Clair Drake and Horace R. Clayton wrote that many blacks, male and female, "feel that white people, by favoring lighter Negroes, make it hard for dark-skinned Negroes to secure personal-service jobs as well as other types of employment." DRAKE & CLAYTON, *supra* note 51, at 499.

54. 1 MYRDAL, *supra* note 21, at 697. He conceded, however, that in 1944, the light-skinned privilege was not as available in the South because of the less favorable socioeconomic condition of blacks there. Myrdal continued that "[p]erhaps of even greater importance is the fact that the Negro Community itself has accepted this color preference." *Id.* Even the esteemed black intellectual W.E.B. DuBois was not above colorphobia. In 1923 DuBois, a very light-skinned black, wrote an article in the *Century Magazine* critical of dark-skinned Jamaican-born Marcus Garvey's "Back to Africa" movement. DuBois described Garvey as a "little, fat, black man, ugly, but with intelligent eyes and a big head." Garvey then attacked DuBois in the pages of the *Negro World* accusing DuBois, among other things, of calling his own race "black and ugly." Marcus Garvey, *W.E.B. DuBois as a Hater of Dark People*, in VOICES OF A BLACK NATION: POLITICAL JOURNALISM IN THE HARLEM RENAISSANCE 99–100 (Theodore G. Vincent ed., 1990).

55. 1 MYRDAL, *supra* note 21, at 698.

56. See Keith & Herring, *supra* note 53, at 767–68.

57. See *id.* at 760–78.

consequential than . . . parental socioeconomic status and all of the sociodemographic variables.”⁵⁸ Thus, their conclusions virtually parallel those of studies completed before the civil rights movement.⁵⁹

58. *Id.* at 772. “Skin color may . . . constitute[] a special trauma for black women, since a woman’s worth traditionally rests on her physical appearance much more than a man’s for whom money and position count more than looks, at least on the marriage market.” Brita Lindberg-Seyersted, *The Color Black: Skin Color as Social, Ethical, and Esthetic Sign in Writings by Black American Women*, 73 ENG. STUD. 51, 64 (1992). In 1904, the black essayist Nannie Helen Burroughs wrote a series of articles criticizing color consciousness among black men “who would rather marry a woman for her color than her character.” She also criticized black women who used skin lighteners and hair straighteners. PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 115 (1984).

In their study, Keith and Herring found that skin tone is a more significant stratifying factor for women than men when “determining education, occupation, and family,” but not personal income. Keith & Herring, *supra* note 53, at 773. Both pairs of researchers (Keith and Herring, Drake and Clayton) attribute the differential effects of black women’s family as opposed to personal income to a preference by successful black men for light-skinned wives. Thus, there may be a stronger correlation between socially constructed notions of attractiveness based on skin tone for black women than for black men. Once more, contemporary findings seem to mirror earlier ones. In their 1945 study, Drake and Clayton concluded that skin tone has more significant economic consequences for black women than black men.

[W]hen Negroes show preferences or draw invidious distinctions on the basis of skin-color, Bronzeville call them “partial to color.” And “partial to color” always means “partial to less color”—to light color. The outstanding example of partiality to color is seen in men’s choices of female associates When the charge is made that successful Negro men put a premium on women that “look like white,” it would be more accurate to say that they seem to put a premium on marrying a woman who is not black or very dark-brown.

DRAKE & CLAYTON, *supra* note 51, at 497–98.

Literature by and about black women reflects a similar thread. Literary critic Mary Helen Washington writes,

[i]f the stories of these writers are to be believed, then the color/hair problem has cut deep into the psyche of the black woman. It is that particular aspect of oppression that has affected, for the most part, only women the color theme almost always plays at least a peripheral role—more often a significant one—in the lives of the women characters created by women writers the idea of beauty as defined by white America has been an assault on the personhood of the black woman.

MARY HELEN WASHINGTON, *BLACK-EYED SUSANS: CLASSIC STORIES BY AND ABOUT BLACK WOMEN* xvii (1975). Author and poet Alice Walker writes that skin tone discrimination within the black community is an especially divisive influence on black women. See ALICE WALKER, *IN SEARCH OF OUR MOTHERS’ GARDENS: WOMANIST PROSE* 290–91, 311 (1983).

59. See Keith & Herring, *supra* note 53, at 777. More recently, two social scientists using data from a 1980 sample of black adults found that blacks “with lighter skin have greater education, occupational prestige, personal income, and family income than those with darker skin and that these relationships are not explained by the fact that lighter-skinned blacks come from higher socioeconomic status backgrounds.” Michael Hughes & Bradley R. Hertel, *The Significance of Color Remains: A Study of Life Chances, Mate Selection, and Ethnic Consciousness Among Black Americans*, 69 SOC. FORCES 1105, 1109 (1990). Reviewing earlier studies, Hughes and Hertel concluded that there had been “no substantial change in the relationship between skin color and socioeconomic status from 1950 to 1980.” *Id.* at 1114. These researchers did conclude, however, “that [today] skin color appears to affect education less for young people than older people.” *Id.* at 1115.

A more recent study of 2000 men in Los Angeles found that race, skin tone, and the existence of a criminal record are major factors in determining whether men with similar educational backgrounds are employed. According to the study, being black and dark-skinned reduced a man's odds of working by 52 percent.⁶⁰ The researchers were testing the validity of the "cultural capital hypothesis" that underlies the conservative Republicans' Contract with America.⁶¹ This hypothesis suggests that "a decline in individual responsibility and in family values, rooted primarily in the liberal social-welfare programs of the 1960s, is principally responsible for rising rates of persistent poverty, joblessness, family disruption, out-of-wedlock births, and gang- and drug-related violence."⁶²

After controlling for criminal record, the researchers found that "[l]ight-skinned African-American men were more likely than their dark-skinned counterparts to be working, although their rate of unemployment (20 percent) was still relatively high compared with that of white males."⁶³ The light skin tone advantage, the researchers concluded, seemed greatest for black males with thirteen or more years of education. Only 10.3 percent of light-skinned black men with some college education were unemployed compared with 19.4 percent of similarly educated dark-skinned black men. More importantly, the unemployment rates of white males and light-skinned black males were almost identical.⁶⁴ This study suggests that light skin tone appears to mitigate, but not completely eliminate, the employment consequences of racial bias for light-skinned blacks with some college education.

In determining skin tones, the researchers instructed interviewers to rate the men surveyed according to color using three skin color categories: light, medium, and dark. The researchers concluded that the impact of skin tone was fuzzier for medium-skinned black men, but lumped them with light-skinned black men because their responses more closely resembled those of

60. See James H. Johnson, Jr. & Walter C. Farrell, Jr., *Race Still Matters*, CHRON. HIGHER EDUC., July 7, 1995, at A48.

61. The Contract with America was a 10-point program "engineered by House Speaker-to-be Newt Gingrich of Georgia and signed by more than 300 GOP candidates before the Nov. 8 [1994] election It promised that within the first 100 days of GOP control, the House would vote on welfare reform, tough crime-fighting laws, higher defense spending, tax cuts and votes on constitutional amendments requiring a balanced budget and term limits." David Bauman, *Central Lawmakers Set Goal: Enact Contract with America*, GANNETT NEWS SERVICE, Dec. 21, 1994, available in LEXIS, Nexis Library, News File, Wires Folder.

62. Johnson & Farrell, *supra* note 60.

63. *Id.* Additionally, "dark-skinned African-American males with a criminal record had a jobless rate of 54 per cent, compared with 41.7 per cent for light-skinned African-American males and 25 per cent for white males." *Id.*

64. See *id.* "[T]he unemployment rate for light-skinned black males was only a little higher than the 9.5-per-cent rate for white males with comparable schooling." *Id.*

light- as opposed to dark-skinned respondents.⁶⁵ This finding suggests that skin tone has the most severe employment consequences for dark as opposed to light- or medium-skinned black men.⁶⁶ In-group antipathy alone cannot explain this disparity in economic outcomes, because a disproportionate number of employers are not black.

Given the studies' suggestion that light skin tone is linked with economic privilege, the discrimination claim in the *Walker* case seems ironic and counterintuitive. Tracy Walker claimed that her *light* skin tone caused the loss of her job at the IRS because of the racialized antagonism of her dark-skinned black supervisor. Walker's claim, however, is not really aberrant. The dualism in blacks' perception of the relevance of skin tone categories in a highly racialized society may explain this seeming irony. Myrdal, for example, found that the existence of a light-skinned preference within the black community "does not prevent the expression of strong antagonisms to[ward] light-skinned persons by the rest of the group."⁶⁷

65. See Telephone Interview with James H. Johnson, Jr., Professor of Geography, Business, and Sociology, University of North Carolina at Chapel Hill (July 24, 1995).

66. There may also be health consequences associated with dark skin. At least three studies found a significant correlation between skin tone and blood pressure levels. See, e.g., Robert F. Murray, Jr., *Skin Color and Blood Pressure: Genetics or Environment?*, 265 JAMA 639 (1991). Two studies found that education and social class were the key factors in higher blood pressure levels, not skin tone. The most recent study, however, found a strong correlation between darker skin color among persons of lower socioeconomic status and higher blood pressure levels. See Michael J. Klag et al., *The Association of Skin Color With Blood Pressure in US Blacks With Low Socioeconomic Status*, 265 JAMA 599 (1991).

67. 2 MYRDAL, *supra* note 21, at 1383. After Harlem Renaissance writer Alice Dunbar-Nelson, described as "fair enough to 'pass' for white," was

tormented and ostracized by the darker children in school as a "[l]ight nigger, with straight hair," she moved north to college, where she came "up against a dead wall of hate and prejudice and misunderstanding" for the same reason At her first teaching job she and other "half white" teachers [were] dogged by "spite" and "unreasonable prejudice" Thus, her whole life [was] spent between the Scylla and Charybdis of intra- and interracial hell.

GLORIA T. HULL, *COLOR, SEX & POETRY: THREE WOMEN WRITERS OF THE HARLEM RENAISSANCE* 34, 101-02 (1987). Gloria Wade-Gayles, in her contemporary memoir, writes that her childhood peers tormented her about the women in her family:

"High yellow women. Uppity. Think their color make them better than anybody else." I remember that tensions around color were often serious in the housing project. "I can't begin to tell you," my aunt said to me recently, "what a hard time Bertha and I had because of our color." She remembers the ugly name-calling and the accusation that they were children of a white man who disowned them and, worse, that, like all high-yellow women, they would seek out white men as lovers. "Yellow shit," fair-skinned black women were called. "Dark-skinned women had a hard time But we had a hard time too."

GLORIA WADE-GAYLES, *PUSHED BACK TO STRENGTH: A BLACK WOMAN'S JOURNEY HOME* 16 (1993).

Even the light-skinned W.E.B. DuBois, while denouncing intraracial colorism, remarked that he stopped dating "one 'colored' girl because she looked quite white, and I should resent the

Skin tone differences, however, seem to have only minimal effects on the attitudes of blacks toward black political candidates.⁶⁸ In contrast, skin tone, in addition to race, may be a factor considered by white voters when evaluating black political candidates.⁶⁹ One social scientist speculates that dark-skinned black political candidates running for office or seeking more prestigious offices in predominately white districts may be evaluated more negatively than light-skinned black candidates.⁷⁰

In a recent study, each participant was given a two-page informational packet about one of three fictitious gubernatorial candidates from a neighboring state. A photograph of either a white male, a light-skinned black male, or a dark-skinned black male was attached to the packet. The participant was asked to rate the candidate, and to indicate whether she or he would vote for him. The researcher found the white participants rated the white candidates higher than the either the dark-skinned or the light-skinned black candidate with identical qualifications.⁷¹ In addition, the dark-skinned candidate was more harshly evaluated than his light-skinned counterpart, especially by people rated as racially intolerant.⁷² As a result, the researcher concluded that dark-skinned black political candidates face “a triple bias—race, prejudice, and skin color.”⁷³ This study and the historical evidence of whites’ attitudes toward mulattos suggest that some whites may be strongly influenced by skin tone as well as by a person’s racial identity.

Students participating in a survey conducted by Midge Wilson, a professor at DePaul University, reacted similarly. When viewing two pictures of the same black woman, one with light skin and the other with dark skin, the students attributed positive qualities to the light-skinned black woman and very negative qualities to the darkened version of the same picture.⁷⁴ Thus, colorism within the black community reflects the dominant

inference on the street that I had married outside my race.” Scales-Trent, *supra* note 36, at 81. Professor Scales-Trent cites other notable examples, including former Washington, D.C., mayor, Marion Barry, who urged his light-skinned second wife Effi Barry to use a sunlamp to darken her skin because “folks were talking all about how his wife was ‘too light.’” *Id.* at 79.

68. See Richard Seltzer & Robert C. Smith, *Color Differences in the Afro-American Community and the Differences They Make*, 21 J. BLACK STUD. 279, 282–85 (1991).

69. See Terkildsen, *supra* note 51.

70. See *id.* at 1033.

71. See *id.* at 1048.

72. See *id.*

73. *Id.*

74. See *Nightline*, *supra* note 13.

“Midge Wilson: We found that there was a positive halo effect around the light-skinned woman on various adjectives like to what extent do you see this woman as popular, socially skilled, likely to be happy in her love life, successful, intelligent.” One student remarked that the dark-skinned woman looked like a prostitute. Still another student that the normal size black woman looked larger than the light-skinned version. Other students, looking at pictures

culture's attitude toward blacks who look least—and most—European. Discrimination based on skin tone, whether practiced by blacks, whites, or other non-whites, constitutes a form of race-based discrimination. Yet, when faced with colorism claims, courts often respond in confusing and contradictory ways.

II. COLORISM AND THE COURTS

Litigants usually rely on two statutes to advance colorism discrimination claims: Title VII of the Civil Rights Act of 1964⁷⁵ and 42 U.S.C. section 1981.⁷⁶ Section 1981 guarantees all persons the same rights as white citizens,⁷⁷ and makes no reference to either the words “race” or “color.” Title VII contains both terms, but defines neither.

A. Section 1981 Cases

1. Early Colorism Cases

Latinas/os⁷⁸ do not fit neatly within America's traditional rigid racial categories.⁷⁹ Writing in *The New Yorker*, Lawrence Wright found it inconceivable

of two black Americans, each with a dark and lighter version “considered the darker people less cordial, less appealing and less attractive than the lighter skinned version of the same person.”

Id.

75. Pub. L. No. 88-352, § 703, 78 Stat. 255 (1964). Title VII provides in relevant part: It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (1994).

76. 42 U.S.C. § 1981 (1994). Section 1981(a) provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id.

77. *Id.* Section 1981 and its companion, section 1982, 42 U.S.C. § 1982 (1994), “were intended to ‘break down all discrimination between black men and white men.’” *Franceschi v. Hyatt Corp.*, 782 F. Supp. 712, 715–16 (D.P.R. 1992) (citing CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866) (remarks of the chief congressional supporter of both sections, Senator Trumbull, Chairman of the Judiciary Committee)).

78. I use the term *Latina/o* throughout this paper when referring to people who come from or who have ancestors from “the territory in the Americas colonized by Latin nations, such as Portugal, Spain, and France, whose languages are derived from Latin.” Oquendo, *supra* note 26, at 97. The term “Hispanic” has been rejected by some because of its association with “the Spanish colonial power of centuries ago.” *Id.* at 96.

79. In the 1970s, the Office of Management and Budget promulgated *Directive 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting*, prescribing racial and ethnic cate-

that Latinas/os could be a race because of the great variation of “races”—black, white, and Native American—and the large percentage of mestizas/os within this group of people.⁸⁰ Because section 1981 does not cover discrimination based on national origin, courts often struggle to fit discrimination claims by Latina/o plaintiffs into the section 1981 framework.

In some early section 1981 colorism cases involving Latina/o plaintiffs, courts used ethnicity as a synonym for race if the plaintiff’s racial identity was unclear. These courts linked skin tone with ethnicity in recognizing a race claim. For example, in 1977, when the Mexican American plaintiff in *Vigil v. City of Denver*⁸¹ sued his public employer under section 1981 alleging discrimination based on race, color, and national origin,⁸² the court allowed the color claim, reasoning that Mexican Americans often are identified on the basis of their skin tone, and thus a claim of discrimination based on color may be a basis for discrimination against Mexican Americans.⁸³ Even though Mexican Americans were classified by the government in the 1970s as white for census purposes,⁸⁴ the court said:

Although skin color may vary significantly among individuals who are considered Mexican-Americans, skin color may be a basis for discrimination against them. We note that skin color may vary significantly among individuals who are considered “blacks” or “whites”; both these groups are protected by § 1981, and § 1981 is properly asserted where discrimination on the basis of color is alleged. Indeed, the Supreme Court has concluded that in the Denver area, Mexican-Americans are victims of the same type of discriminatory treatment as blacks: “[N]egroes and Hispanoes in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students.[”]⁸⁵

gories to be used in reporting federal statistics. See LOTT, *supra* note 2, at 35. Of the five categories, the “Hispanic” category is the only one classified as an ethnic rather than racial category. The ethnic designation “Hispanic” acknowledged that discrimination might occur because of national origin without regard to a person’s race. Thus, persons identified as Hispanic also could designate race—white or black. See *id.* at 42.

80. See Wright, *supra* note 4, at 52.

81. No. 77-F-197, 1977 WL 41 (D. Colo. May 23, 1977).

82. See *id.*

83. See *id.* at *1–*2.

84. In the 1930 census, Mexicans were classified as a separate race, but by the 1940 census the category was removed after protests from Mexico over the implication that a separate racial category for persons of Mexican ancestry meant that they were not white. See Sharon M. Lee, *Racial Classifications in the US Census: 1890–1990*, 16 ETHNIC & RACIAL STUD. 75, 79 (1993). In the 1980 census, “individuals who wrote in their race as ‘Brown’ or ‘Mexicano’ were not reassigned to another category (for example, White) but were counted as ‘Other.’” *Id.* at 80. For further discussion of this point, see *infra* note 131.

85. *Vigil*, 1977 WL 41, at *1–*2 (citing *Keyes v. School Dist. No. 1*, 413 U.S. 189, 198 (1973) (citation omitted)).

The court linked ethnicity and discrimination based on dark skin tone with discrimination against blacks, suggesting that dark skin tone is a negative racial marker.

Courts' willingness to draw connections between race and the ethnicity and skin tone of Latinas/os is a thread running through the section 1981 cases involving Latina/o litigants. In *Cubas v. Rapid American Corp.*,⁸⁶ the plaintiff, a Cuban-born naturalized citizen, alleged discrimination based on race and alienage, claiming that "Cuban-Americans *may be* considered a non-white racial group within the meaning of § 1981."⁸⁷ Conceding that case law provides little guidance,⁸⁸ the district court declined to determine the plaintiff's race, but concluded that as a matter of law it cannot discount the possibility that the plaintiff suffered "elements of racial discrimination."⁸⁹

Courts seem less willing to make this connection when the race of the Latina/o litigant is clearly identified. In *O'Loughlin v. Procon, Inc.*,⁹⁰ a section 1981 race claim, the plaintiff, described as "a black male citizen of Cuba,"⁹¹ lost in part because the court concluded that the absence of claims by other blacks about racial slurs was proof that the plaintiff's claims were groundless.⁹² The court failed to consider that because the plaintiff, Hugh O'Loughlin, was black *and* Cuban, he might have been differentially racialized from black Americans due to his ethnicity.⁹³

86. 420 F. Supp. 663 (E.D. Pa. 1976).

87. *Id.* at 665 (emphasis added).

88. *See id.* at 666 n.2.

89. *Id.* at 666. ("We cannot find, as a matter of law, that the alleged discrimination against the plaintiff as a Cuban American did not contain elements of racial discrimination.")

90. 627 F. Supp. 675 (E.D. Tex. 1986).

91. *Id.* at 676.

92. *See id.* at 678.

93. Ethnicity often is confused with national origin. National origin usually refers to the country of recent origin, whereas ethnicity is often used to denote ancestry, the cultural identity or origin of one's ancestors. In fact, from a legal perspective there may be little real difference between race and ethnicity in the United States; the terms may simply represent "categories of social hierarchy[,] . . . just labels for different magnitudes of distance from the most desirable status on a continuum of okayness. The farther out a population is on that continuum, the more likely it will be seen as a racial group." Adolph Reed, Jr., *Skin Deep: The Fiction of Race*, VILLAGE VOICE, Sept. 24, 1996, at 22. Juan Perea argues that the term *national origin* "does not, and cannot, correctly encompass the protection of ethnic traits or ethnicity [and] is not helpful in describing accurately or recognizing the kind of discrimination that should be prohibited under Title VII." Juan F. Perea, *Ethnicity and Prejudice: Reevaluating 'National Origin' Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 810 (1994) (citing JOE R. FEAGIN, RACIAL AND ETHNIC RELATIONS 8-9 (3d ed. 1989)). Juanita Tamayo Lott writes that what constitutes ethnicity varies from country to country. "In Canada, the focus is on ancestry. . . . In Malaysia, as well as in India and Indonesia, religion, language, and caste are definitive features. In the United States, attention is to skin color and blood quantum." LOTT, *supra* note 2, at 25.

Thus, if a plaintiff's race is unclear, as in *Vigil* and *Cubas*, the courts use ethnicity and skin tone as surrogates for race. As one court said in allowing a claim by a Mexican American, under section 1981, race encompasses "some non-racial . . . ethnic groups."⁹⁴ When, however, the plaintiff's race is clearly identified, as in *O'Loughlin*, courts tend to ignore the impact of skin tone and ethnicity. This tendency has a disproportionate impact on litigants with apparent African ancestry.

Courts' refusal to consider the impact of ethnicity in race claims involving black litigants is even more apparent in disputes between two black litigants. In *Sere v. Board of Trustees*,⁹⁵ the plaintiff, a black Nigerian, sued his light-skinned black American supervisor, alleging discrimination based on race and national origin. The federal district court dismissed Sere's discrimination claim, treating his case as a national origin claim and thus not cognizable under section 1981.⁹⁶ The court labeled both Sere and his light-skinned black American supervisor as black, and it noted that Sere's replacement was a light-skinned black American.⁹⁷ In dismissing Sere's colorism claim, the trial judge acknowledged that discrimination based on skin tone can occur among members of the same racialized group, but concluded that the plaintiff failed to establish that a colorism claim was actionable under section 1981.⁹⁸ The court opined that recognition of colorism claims would force courts to engage "in the unsavory business of measuring skin color and determining whether the skin pigmentation of the parties is sufficiently different to form the basis of a lawsuit."⁹⁹ Yet, in other cases involving Latinas/os, courts seem more willing to engage in just this sort of inquiry.

In both *O'Loughlin* and *Sere*, the courts view race discrimination very narrowly. This narrow construction of race for parties with any African ancestry ignores ethnic or color differences between the parties that result in different racial statuses. In *O'Loughlin*, the court measured the claim of a black Cuban in relation to an employer's treatment of black Americans. The court in *Sere* treated the claim of a black Nigerian like a suit between two black Americans, rather than a claim between a black Nigerian and a light-skinned black American. Arguably, Sere was claiming that his black American supervisor discriminated against him because, as a Nigerian, he might have physical, cultural, or linguistic characteristics different from those of most black

94. *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968, 970 (10th Cir. 1979) (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976)).

95. 628 F. Supp. 1543 (N.D. Ill. 1986), *aff'd*, 852 F.2d 285 (8th Cir. 1988).

96. *See id.* at 1546. The court did allow the Title VII national origin claim.

97. *See id.*

98. *See id.*

99. *Id.*

Americans.¹⁰⁰ The definition of the racial category “black” is firmly grounded in the rule of hypo-descent.¹⁰¹ Any *remote* African ancestry makes one indistinguishably black and blinds courts to the racial meanings conveyed by ethnicity and skin color. The preference by some white and black employers for light-skinned black employees is grounded in the stigma attached to African slavery. Thus, skin tone bias, rather than traditional racial animus, can be an alternative basis of discrimination against a dark-skinned person of African descent.

2. *Saint Francis College v. Al-Khazraji*

As the preceding discussion suggests, courts in the early section 1981 colorism cases failed consistently to recognize ethnic or color differences when analyzing race-based discrimination claims. Any uncertainty in this area should have been resolved when the U.S. Supreme Court in *Saint Francis College v. Al-Khazraji*¹⁰² recognized that a section 1981 race claim can lie between

100. Justice William J. Brennan, concurring in *Saint Francis College*, wrote:

It is true that one's ancestry—the ethnic group from which an individual and his or her ancestors are descended—is not necessarily the same as one's national origin—the country “where a person was born, or, more broadly, the country from which his or her ancestors came.” Often, however, the two are identical as a factual matter: one is born in the nation whose primary stock is one's own ethnic group. Moreover, national origin claims have been treated as ancestry or ethnicity claims in some circumstances.

Saint Francis College v. Al-Khazraji, 481 U.S. 604, 614 (1987) (quoting *Espinoza v. Farah*, 414 U.S. 86, 88 (1973)).

101. The sociologist F. James Davis wrote:

The definition [of who is black] reflects the long experience with slavery and later with Jim Crow segregation. In the South it became known as the “one drop rule,” meaning that a single drop of “black blood” makes a person a black. It is also known as the “one black ancestor rule,” some courts have called it the “traceable amount rule,” and anthropologists call it the “hypo-descent rule,” meaning that racially mixed persons are assigned the status of the subordinate group. This definition emerged from the American South to become the nation's definition, generally accepted by whites and blacks alike. Blacks had no other choice. . . . [T]his American cultural definition of blacks is taken for granted as readily by judges [and] affirmative action officers.

DAVIS, *supra* note 21, at 5 (citations omitted) (citing HOWARD M. BAHR ET AL., *AMERICAN ETHNICITY* 27–28 (1979); MELVIN HARRIS, *PATTERNS OF RACE IN THE AMERICAS* 56 (1964)). For other discussions of the rule of hypodescent, see Neil Gotanda, *A Critique of 'Our Constitution Is Color-Blind,'* 44 *STAN. L. REV.* 1, 23–26 (1991). “[W]ith rare exceptions, ethnicity theory isn't very interested in ethnicity among blacks. The ethnicity approach views blacks as one ethnic group among others. It does not consider national origin, religion, language, or cultural differences among blacks, as it does among whites, as sources of ethnicity.” OMI & WINANT, *supra* note 9, at 23. Omi and Winant conclude that “Blacks are thus aggregated—and treated as the great exception—because they are so clearly racially identified in the US.” *Id.* For a discussion of changing legal definitions of who is black in Virginia, see A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 *GEO. L.J.* 1967, 1967 n.2, 1968, 1972–73, 1975–82 (1989).

102. 481 U.S. 604 (1987).

parties of different ethnicities who are members of the same race. The plaintiff, Majid Ghaidan Al-Khazraji, a man of Iraqi descent, claimed that he was denied tenure in violation of section 1981 because he was of the Arabian race.¹⁰³ Iraqis are classified as white under United States law.¹⁰⁴ Saint Francis College argued unsuccessfully that Al-Khazraji, a white person, could not sue another white person alleging racial discrimination under section 1981.¹⁰⁵

Pointing out that racial categories in this country have changed since the nineteenth century when section 1981 was enacted, the Court cited examples of European ethnic groups that were considered separate races in the 1860s and 1870s.¹⁰⁶ It acknowledged that “[c]lear-cut [racial] categories do not exist . . . [and] some, but not all, scientists . . . conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature.”¹⁰⁷ Thus, the Court concluded that Congress intended section 1981 to protect “identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics,” whether or not the discrimination would be classified as racial in terms of modern scientific theory.¹⁰⁸

103. See *id.* at 606.

104. See *id.* at 610.

105. See *id.* at 609, 613.

106. See *id.* at 610 n.4, 611–13.

107. *Id.* at 610 n.4.

108. *Id.* at 613. The Court’s language, disclaimers notwithstanding, sounds like a combination of historic and scientific characterizations of race. The Court stated that identifiable classes of persons are “genetically part of an ethnically and physiognomically distinctive subgrouping of *homo sapiens*.” *Id.* The Court’s reasoning seems circular. Justice Byron White’s language is equivocal, not clearly rejecting scientific notions of race while acknowledging that race, for Europeans at least, has a social basis. As recently as 1987, the Court was unwilling to totally abandon “the security of immutable racial categories.” Gotanda, *supra* note 101, at 29–30. Gotanda notes that:

The Court’s modern discussions of race purport to be disengaged from the older scientific tradition.

....

However, the Court [in *Saint Francis College*] was not ready to back away entirely from the idea that racial categories were based in natural science. Justice White continued, “[t]he Court of Appeals was thus quite right in holding that § 1981, ‘at a minimum,’ reaches discrimination against an individual ‘because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens*.’” Justice White’s references to genetics and a “sub-grouping of *homo sapiens*” have a clear scientific tilt. But in the next sentence, Justice White again turned away from the physical and back towards the social. “It is clear from our holding . . . that a distinctive physiognomy is not essential to qualify for § 1981 protection.”

Id. Justice Brennan’s concurring opinion, admitting that the Court often confuses ancestry or ethnicity and national origin, did not adequately explain this inconsistent language. See *Saint Francis College*, 481 U.S. at 614 (Brennan, J., concurring). Justice Brennan stated that

[p]ernicious distinctions among individuals based solely on their ancestry are antithetical to the doctrine of equality upon which this Nation is founded. Today the Court upholds Congress’ desire to rid the Nation of such arbitrary

The equivocal language in *Saint Francis College* about the legal meaning of race for section 1981 purposes led to confusion in the lower courts about the meanings of race and ethnicity, especially when skin tone was added to the mix.

3. Later Colorism Cases

The Court in *Saint Francis College* arguably permitted interethnic discrimination claims to be brought in American courts. The post-*Saint Francis College* cases have tended to recognize interethnic claims between members of the same racial group—unless the parties are black. The First Circuit, for example, suggested in *Sinai v. New England Telephone & Telegraph Co.*¹⁰⁹ that an Israeli of Jewish/Hebrew ancestry could establish a race-based discrimination claim against a white person (presumably not of Jewish/Hebrew ancestry) under section 1981 by stating that “the jury could find that Israel is one of those countries in which the populace is composed primarily of a particular race.”¹¹⁰ The Third Circuit has also treated discrimination claims between ethnic whites as interracial claims.¹¹¹

Yet, a black litigant who brought a post-*Saint Francis College* interethnic claim fared no better than the pre-*Saint Francis College* litigant in *Sere*. In *Ohemeng v. Delaware State College*,¹¹² a black Ghanaian college professor asserted a race-based discrimination claim under both section 1981 and Title VII. The employer, Delaware State College, an historically black college, discharged Ohemeng rather than considering him for two positions for which he qualified. Instead, the college hired two Americans, a black and a white. Relying, no doubt, on the rationale in *Saint Francis College*, Ohemeng initially

and invidious discrimination . . . I write separately only to point out that the line between discrimination based on . . . “place or nation of . . . origin” . . . is not a bright one.

Id. In Justice Brennan’s view, ancestry points to the ethnic group from which an individual or her ancestors are descended, while national origin identifies the country of an individual’s origin (where she was born or from which her ancestors came). Justice Brennan agrees that discrimination based on birthplace alone is an insufficient basis for a section 1981 claim. *See id.*

109. 3 F.3d 471 (1st Cir. 1993).

110. *Id.* at 474. This reasoning seems not only parochial and inaccurate but also unnecessary and confusing in light of *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987). *Shaare Tefila Congregation*, decided the same day as *Saint Francis College*, applied the reasoning of that case, holding that a person of Jewish ancestry could state a claim against a white person under section 1982, which guarantees all citizens the “same right” to lease real property “as is enjoyed by white citizens.” *Id.* at 616.

111. *See, e.g.,* *Khair v. Campbell Soup Co.*, 893 F. Supp. 316 (D.N.J. 1995) (Egyptian); *Chandoke v. Anheuser-Busch, Inc.*, 843 F. Supp. 16 (D.N.J. 1994) (Indian); *Gorwara v. AEL Indus., Inc.*, 784 F. Supp. 239 (E.D. Pa. 1992) (Indian).

112. 676 F. Supp. 65 (D. Del. 1988).

argued that “he belonged to a subset of the Negroid race having a distinct ancestry or distinct ethnic characteristics” from black Americans.¹¹³ Professor Ohemeng stated a claim similar to that of the plaintiff in *Saint Francis College*, but the district court in a footnote responded that the “plaintiff [had] not factually developed that claim.”¹¹⁴ One wonders what more Professor Ohemeng needed to prove. In a footnote, the court said that Ohemeng had failed to establish a race discrimination claim under either section 1981 or Title VII because he was replaced by a black American.¹¹⁵

The meaning of the court’s footnote is unclear and troubling in light of other language in the case. In another footnote appearing in the discussion of the defendant’s motion for summary judgment on the Title VII claim, the court questioned whether Ohemeng had established a race claim because he and his black American “replacement” both are “black,” and a plaintiff must establish “that he belongs to a racial minority.”¹¹⁶ Either the court was applying two different notions of race—a monolithic all-encompassing definition of race under Title VII and a less rigid *Saint Francis College* definition under section 1981—or the court was asking Professor Ohemeng to establish that a Ghanaian is racially different from a black American in the sense of not being considered racially “black.”

Sere, *O’Loughlin*, and *Ohemeng* seem inconsistent with other interethnic colorism cases like *Vigil* and *Cubas*. One wonders why courts seem more willing to draw distinctions based on skin tone for Latinas/os and white European ethnics than for black litigants. The outcomes in *Sere* and *Ohemeng* seem to confirm my suspicion that the rule of hypodescent is deeply, and often silently, embedded in the race jurisprudence of this country. While the understanding of race for many groups has changed since the mid-nineteenth century when the earlier version of section 1981 was adopted by Congress, the understanding of who is black remains unchanged.

Rather than address the complexities of racelike discrimination directed at black people, judicial application of antidiscrimination law causes “people to frame their identities in terms of the racial categories recognized by law,”¹¹⁷ not by reality. This shortcoming interferes with attempts to remedy past and continuing race-based discrimination against black people based on their African ancestry.

113. *Id.* at 68 n.2.

114. *Id.*

115. *See id.* at 68 n.1, 69 n.3.

116. *Id.* at 68. The court asserted that Ohemeng could establish a prima facie case based on national origin under Title VII because he was a “native Ghanaian” who was replaced by a black “native American.” *Id.*

117. HANEY LÓPEZ, *supra* note 22, at 125.

B. Title VII Colorism Cases

Unlike section 1981, Title VII specifically mentions “color” as a protected category. The legislative record’s silence on the meaning of the term “color” leaves courts free to determine on their own whether color is synonymous with “race” as traditionally understood, or whether color constitutes an independent category. Because there are no Title VII federal appellate cases directly on point, the few district courts that addressed this issue looked to section 1981, “[t]he historical predecessor to Title VII” for guidance.¹¹⁸

Given the anecdotal and social scientific evidence regarding colorism discussed earlier, one would assume that the most common colorism case would involve a dark-skinned claimant suing to address the inequity resulting from the social capital possessed by light-skinned members of the same racialized group.¹¹⁹ Yet, two of the earliest Title VII in-group colorism cases, *Ali v. National Bank of Pakistan*¹²⁰ and *Walker*, involved light-skinned claimants. In *Ali*, a light-skinned Pakistani from the Punjab province accused his supervisor, a dark-skinned Pakistan citizen from the Sind province, of discrimination based on skin tone variation among Pakistanis. The federal district court dismissed the Title VII claim, saying that *Ali* failed to establish that his treatment was based on skin color.¹²¹ The court suggested, however, that colorism claims arising from discriminatory practices not linked to racial subordination in the United States are actionable under federal law.¹²²

Recently, another district court suggested that color can be a surrogate for race in Title VII discrimination actions between individuals of the same race. The judge wrote that “it is the subjection of a person to intentional discrimination—because of the belief that he or she belongs to a given race—that renders such behavior actionable.”¹²³ This reasoning works for

118. See, e.g., *Hansborough v. City of Elkhart Parks & Recreation Dep’t*, 802 F. Supp. 199, 203 (N.D. Ind. 1992) (citations omitted). In *Hansborough*, the black plaintiff failed to establish an intraracial discrimination claim.

119. *Sanders v. University of the District of Columbia*, No. 88-3614 SS, 1991 U.S. Dist. LEXIS 7448 (D.D.C. June 4, 1991), looks more like the intraracial case one would anticipate. In this case, a dark-skinned black woman sued unsuccessfully, claiming that her light-skinned black supervisors “gave preferential treatment to other light-skinned black employees, at her expense.” *Id.* at *2-*3.

120. 508 F. Supp. 611 (S.D.N.Y. 1981).

121. See *id.* at 614. The court also rejected Muhammed Ashraf Ali’s national origin claim. See *id.*

122. See *id.* at 613. The court stated that colorism claims may be based on “indigenous discriminatory practices around the world having nothing to do with the American experience.” *Id.* This raises an interesting point, whether discrimination based on foreign colorism practices, like those at issue in *Ali*, is actionable under Title VII. However, this question is beyond the scope of this Article.

123. *Hansborough*, 802 F. Supp. at 206 (quoting *Franceschi v. Hyatt Corp.*, 782 F. Supp. 712, 724 (D.P.R. 1992)).

interethnic suits between whites and between members of nonwhite groups like Latinas/os and Asians, but as *Sere*, *O'Loughlin*, and *Ohemeng* indicate, courts in both Title VII and section 1981 cases do not apply this reasoning to interethnic claims between blacks.

As mentioned previously, by treating Tracy Walker's colorism claim as a surrogate for a race-based claim, the court in *Walker* does what the courts in *Sere* and *Ohemeng* refused to do. In *Walker*, the court treats the colorism claim as synonymous with a race claim. By acknowledging Tracy Walker's mixed racial ancestry, the court creates a space for colorism claims between people who are raced the same. Yet *Walker* is problematic. In *Walker*, the court acknowledged Tracy Walker's mixed racial ancestry, but implicitly treated her dark-skinned black supervisor as "unmixed." As *Walker* and the section 1981 cases involving Latina/o plaintiffs suggest, courts seem more willing to entertain colorism claims for persons with mixed racial ancestry.

A similar conclusion by the trial judge in *Felix v. Marquez*¹²⁴ seems crucial to recognition of the colorism claim in that case. Carmen Felix, a Puerto Rican native, sued another Puerto Rican native claiming that she was discriminated against because of her race. The judge concluded that a discrimination claim by one Puerto Rican "with a mixed racial ancestry" against another Puerto Rican, presumably of "unmixed" racial ancestry, represented one of those rare colorism cases.¹²⁵ After a detailed discussion of Felix's genealogy and phenotypical characteristics, the trial judge noted that Felix's maternal grandfather was black, and that her father "had the physical characteristics of a person with a partial African ancestry."¹²⁶ His comments on the appearance of a witness in the case reaffirmed the importance, in his mind, of skin tone as a racial marker. He wrote: "with due respect for his emphatic testimony that [the witness] considers his race to be Puerto Rican, his color would cause him to be identified in the continental United States as Black."¹²⁷ In *Felix*, the plaintiff's skin tone and phenotype used in tandem with genealogy operated as racial markers.¹²⁸

124. No. 78-2314, 1981 WL 275 (D.D.C. Mar. 26, 1981).

125. *Id.* at *11 ("Color is a rare claim, but considering the mixture of races and ancestral national origins in Puerto Rico, it can be an appropriate claim for a Puerto Rican to present."). In a footnote immediately preceding this quote, Judge Pratt wrote that

[a]lthough the legislative history of these acts [federal statutes using the term color] is silent on the meaning of the term "color," and no definitive interpretation has been provided by the courts, this court is constrained to believe that "color" is a particularly appropriate term in the context of this case involving a person from Puerto Rico with a mixed racial ancestry.

Id. at *11 n.11.

126. *Id.* at *2. In comments on the color and appearance of other employees who testified, the judge distinguished between those individuals who looked white, of mixed race, or black. *See id.* at *8 n.6.

127. *Id.* at *8 n.6.

128. *See id.* at *2.

The decision in *Felix* also suggests that race is a separate and distinct category from ethnicity.¹²⁹ Sidestepping the fact that both parties were Puerto Ricans, and the legal meaning attaching to this fact, the judge explained that a pure colorism claim was rare “because color is usually mixed or subordinated to claims of race discrimination.”¹³⁰

The court sees color claims as being subsumed by race, obscuring the way in which skin tone within a racialized group can mediate racial discrimination. As a result, what on its face appears to be an intragroup colorism claim becomes an interracial colorism claim. This result is possible because the court treats Puerto Ricans as an ethnic group composed of many races.¹³¹

III. A PREVIEW OF FUTURE COLORISM CLAIMS?

None of the cases discussed thus far look like the colorism cases I anticipate in the future. *Sere* and *Ohemeng* are intraracial claims among members of different ethnic groups, while *Walker* is an intraracial colorism claim between members of the same ethnic group. *Felix*, on the other hand, is an interracial colorism case between members of the same ethnic group. I expect future colorism claims that challenge employment practices favoring light- over dark-skinned members of the same race. In most cases, employers will be nonblack. These colorism claims will be interracial, between members of two different racialized groups. A potential defense to colorism claims is that the employer hires or promotes members of the plaintiff's racial group, so there is no race-based discrimination.

129. This kind of reference to race in connection with the colorism claim was repeated at other places in the opinion. Specifically, the judge at the outset referred to the plaintiff's mixed racial ancestry. See *id.* at *5.

130. *Id.* at *11. The district court noted that unlike section 1981, Title VII specifically mentions color as a protected category. Unfortunately, there was no legislative history to guide the court in determining whether “color” as used in the statute was synonymous with “race.” See *id.* at *11 n.11.

131. Classifications of Latinas/os or Hispanics for U.S. Census purposes has been problematic. [P]rior to 1980 most Hispanics classified themselves as racially white within the United States. In 1960 and 1970 over 95 percent of the immigrants from Latin America were classified as white. In 1980 the Census Bureau broadened its racial classifications to allow the Hispanic population to indicate their “Spanish” origin category, but the immigrants from Latin America continued to classify themselves as other than black or white. Antonio McDaniel, *The Dynamic Racial Composition of the United States*, 124 DAEDALUS 179, 189 (1995). Tanya Hernández writes that Afro-Latinas/os “experience racism based upon their African-linked phenotype.” Tanya K. Hernández, *Over the Rainbow? Puerto Ricans and the ‘Multiracial’ Category in the Year 2000 Census*, CRITICA J. P.R. POL’Y & POL., Aug. 1996, at 1, 6. For further discussion of this point see Thomas G. Mathews, *The Question of Color in Puerto Rico*, in SLAVERY AND RACE RELATIONS IN LATIN AMERICA 299–323 (Robert Brent Toplin ed., 1974).

One 42 U.S.C. section 1982 case, *Rodriguez v. Gattuso*,¹³² looks more like the interracial colorism claims I anticipate in the future. Roberto Rodriguez, described by the court as “a United States citizen of black Latino ancestry,”¹³³ spoke by telephone with Biagio Gattuso about renting one of his apartments. When Rodriguez, who is dark skinned, met with Gattuso, he was told that the apartment was no longer available. The next day, when Rodriguez’s wife Carol, characterized by the court as “a United States citizen of white Latino ancestry,”¹³⁴ telephoned to confirm that the apartment was not available, Gattuso told her that the apartment was vacant, and she agreed to meet with him. After meeting with Carol Rodriguez, Gattuso wanted to meet her husband before finalizing the deal. A few days later, when both Roberto and Carol arrived to finalize the agreement, Gattuso “reacted in an excited and nervous manner, offering several excuses.”¹³⁵ Gattuso claimed that there were two couples ahead of Roberto and Carol Rodriguez, that the apartment would not be ready for another few weeks, and that he did not know whether Roberto and Carol Rodriguez were capable of paying the rent.¹³⁶

The court permitted the colorism claim under section 1982 and the Fair Housing Act,¹³⁷ saying that

[m]ost often “race” and “color” discrimination are viewed as synonymous, just as the term “white citizens” is most often contrasted with “black citizens”—a racial distinction. But the very inclusion of “color” as a separate term in addition to “race” in Section 3604(b) implies strongly that someone who is of the same race (“race” used in the ethnic sense, not the broader sense announced in *St. Francis College v. Al-Khazraji* as the 19th century understanding of that term) but who is treated differently because of his dark skin has been discriminated against because of his *color*—something expressly forbidden by Section 3604(b).¹³⁸

Thus, the federal district court in *Rodriguez* does a better job of seeing the differences and connections among race, ethnicity, and skin color. Ironically, *Rodriguez* was decided by the same district court that denied the colorism claim in *Sere* six years earlier.

132. 795 F. Supp. 860 (N.D. Ill. 1992).

133. *Id.* at 861.

134. *Id.*

135. *Id.* at 863.

136. *See id.*

137. The Fair Housing Act of 1968 prohibits discrimination in housing based on “race, color, religion, sex, familial status, or national origin.” Pub. L. No. 90-284, 82 Stat. 83 (1968) (codified at 42 U.S.C. § 3604(b) (1994)).

138. *Rodriguez*, 795 F. Supp. at 865 (citations omitted) (emphasis added).

In *Saint Francis College*, the Supreme Court recognized that discrimination based on ancestry or ethnicity violates the Equal Protection Clause of the Fourteenth Amendment,¹³⁹ and treated ancestry or ethnicity claims like race-based claims. *Saint Francis College* also suggested that discrimination based on color is similarly prohibited. A close reading of the cases, however, suggests that courts seem willing to treat discrimination claims based on color, descent, or ethnicity as racelike for all groups *except* people of African descent. While courts seem ready to admit the significance of differences among groups of people legally classified as nonblack, they refuse to acknowledge ethnic or skin tone differences among people raced as black. This differential treatment may reflect an implicit understanding of how racial classifications are used by society to regulate behavior, in this instance, the employment opportunities of black men (and women).¹⁴⁰

IV. IMPLICATIONS AND REFLECTIONS

A. Dark Skin No More: The Continuing Quest for Light Skin

In 1949, Walter White, a prominent white-looking leader of the National Association for the Advancement of Colored People, wrote an article in *Look Magazine* praising the development of “a chemical that can change the color of skin from black to white.”¹⁴¹ White argued that skin color, more than phenotype, determines race in the United States, and white skin would allow

139. See, e.g., *Hernandez v. Texas*, 347 U.S. 475, 479 (1954) (holding that the Fourteenth Amendment prohibits the exclusion of otherwise eligible persons from jury service solely because of ancestry or national origin); see also *Oyama v. California*, 332 U.S. 633, 646 (1948) (holding under the Equal Protection Clause, that discrimination based on race is permissible only in the most exceptional circumstances); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (holding that distinctions based on ancestry violate fundamental American notions of equality).

140. See HANEY LÓPEZ, *supra* note 22, at 111–55 (1996). “The very practice of legally defining Black identity demonstrates the social, rather than natural, basis of race. . . . In the name of racially regulating behavior, laws *created* racial identities.” *Id.* at 119; see also Richard Ford, *Urban Space and the Color Line: The Consequences of Demarcation and Disorientation in the Postmodern Metropolis*, 9 HARV. BLACKLETTER J. 117, 130 (1992) (“Because race is an unstable identity, its deployment depends on a symbolic connection between the characteristics that code as race but to which race cannot be reduced (skin color, facial features, etc.) and some stable referent. . . . [T]he maintaining technologies of race [are] primarily economic and spatial.”).

141. Walter White, *Has Science Conquered the Color Line?*, LOOK MAG., Aug. 30, 1949, at 94. The editors of *Look Magazine* wrote next to a picture of Walter White on the front page of the article: “Walter White is one of America’s most famous Negro leaders. His skin color (he is only one-sixty-fourth Negro) enables him to live in either world, black or white.” *Id.* Only after making this qualifying statement did the editors note that White had won the National Association for the Advancement of Colored People’s Spingarn Medal in 1937 for his fight against lynching and anti-black race riots. See *id.* at 94.

more persons of African descent to pass as white.¹⁴² In the article, he predicted that the discovery of the new skin bleach would signal a new era in which skin color no longer would be a determinant of a person's ability or social acceptance.¹⁴³

For some, the quest for light skin tone continues as the twentieth century ends. Advertisements for skin bleach or fade creme still appear in national magazines aimed at black readers.¹⁴⁴ Even more troubling, in 1997, medical researcher Scott McIvor received an e-mail message from a physician who wanted McIvor's help. The physician had a patient who, understanding that researchers had identified the genes that affect skin pigmentation, wanted to change his racial appearance.¹⁴⁵

The persistent perception about the desirability of light skin as a criteria for full membership in American society throughout the twentieth century seems destined to continue into the next century. Yet, the works of Judy Scales-Trent and Gregory Williams on their lives as "white" black people in

142. See *id.* at 95. There is a certain irony in White's remarks. In 1931, black satirist, critic, anti-Communist, and ultraconservative George Schuyler published *Black No More*, a novel about a black man, Max Discher, who becomes white through a chemical process, as an attack on the color caste system in the United States. In the novel, a black doctor, Dr. Junius Crookman, invents a whitening process because he believes that becoming white is the only solution to the country's race problem. Of course, Crookman's solution creates havoc. See GEORGE SCHUYLER, *BLACK NO MORE* (1931).

143. See White, *supra* note 141, at 95.

144. A sample of the August 2000 edition of four national magazines aimed at blacks disclosed at least one advertisement for skin bleach or skin fade creme in all but one, *Essence*. *Ebony* had a full page advertisement for Vantex Skin Bleaching Creme, *Nothing to Hide*, EBONY, Aug. 2000, at 17. Black Opal had a full page advertisement in *Today's Black Woman* for a fade creme to lighten dark spots and skin discoloration. TODAY'S BLACK WOMAN, Aug. 2000, at 12. *Upscale* contained advertisements for three different products, Clear Essence Medicated Fade Creme, Black Opal Fade Products, and Daggett & Ramsdell's Skin Bleach Cream. UPSCALE, Aug. 2000, at 65, 83, 139.

In 1997, the continuing popularity of skin bleaches or fade cremes seemed evident when Walgreen's, a national drug store chain, featured promotional specials during Black History Month for skin bleach and hair relaxers. See *Drugstore's Coupons Seen as Offensive*, UPI, Feb. 24, 1997, available in LEXIS, Nexis Library, News Group File, All. The contemporary popularity of skin bleach among persons with dark skin extends beyond the United States. See Serge F. Kovalski, *In Jamaica, Shades of an Identity Crisis; Ignoring Health Risk, Blacks Increase Use of Skin Lightener*, WASH. POST, Aug. 5, 1999, at A15 (noting the increased popularity of skin bleaching in Jamaica); Corinna Schuler, *Africans Look for Beauty in Western Mirror*, CHRISTIAN SCI. MONITOR, Dec. 23, 1999, at 1 (noting the renewed popularity of skin bleaching creams in South Africa); Chris Oliver Wilson, *Call to Ban Creams for Blacks that Lighten Skin*, SUNDAY TELEGRAPH, Mar. 17, 1996, at 11 (warning of the dangers of hydroquinone, a chemical used in many skin lighteners used by blacks and Asians in Britain and throughout Africa). In 1992, when researchers at Old Dominion University in Virginia interviewed 66 black women, 36 percent said they wished they could lighten their skin. See Steven Johnson, *Beauty Standards Penalize Ethnicity, Say Non-Caucasians*, BALTIMORE SUN, Aug. 24, 1994, at 1D.

145. See Rick Weiss, *Gene Enhancements' Thorny Ethical Traits: Rapid-fire Discoveries Force Examination of Consequences*, WASH. POST, Oct. 12, 1997, at A1.

America illustrate that, in the United States, race is more than color.¹⁴⁶ Race is so powerful in this country, especially for persons of African descent, that it can even operate in the absence of color. Nevertheless, as nonwhite racial categories become more fluid in the twenty-first century, light skin tone may well mediate some of the harsher aspects of being black in America.

The colorism cases demonstrate the extent to which courts recognize, explicitly or implicitly, the fluidity of race when determining who is white and who is nonwhite, but not black. The tendency of courts to leave the meaning of the racial signifier "black" relatively constant suggests that a critical issue for the twenty-first century will be to determine the place persons of apparent African descent will occupy within the social order of the United States. Yet, race is more than a signifier of difference or identity.¹⁴⁷ Susan Stanford, writing in the context of struggles over the relationship between and among race and gender, states that "different systems of stratification require acknowledging how privilege and oppression are often not absolute categories, but rather, shift in relation to different axes of power and powerlessness."¹⁴⁸ Her analysis also applies to the ways in which colorism practices further socially constructed notions of race even among people raced as black.

The confusion of courts regarding the complexities of racialization will become even more apparent when the increasing number of people who classify themselves as bi- and multiracial, or white, nevertheless encounter discrimination because others identify them as black or nonwhite.¹⁴⁹ Ironi-

146. See Beverly I. Moran, *Exploring the Mysteries: Can We Ever Know Anything About Race and Tax?*, 76 N.C. L. REV. 1629, 1630 (1998); see also WILLIAMS, *supra* note 17; Scales-Trent, *supra* note 36.

147. Howard Winant writes that race is "a marker of the infinity of variations we humans hold as a common heritage and hope for the future." WINANT, *supra* note 9, at 21.

148. Susan Stanford Frieman, *Beyond White and Other: Relationality and Narratives of Race in Feminist Discourse*, 21 SIGNS 1, 7-8 (1995).

149. A recent Census Bureau study "found that very few people would classify themselves as multiracial if given the opportunity to do so." Steven A. Holmes, *Census Tests New Category To Identify Racial Groups*, N.Y. TIMES, Dec. 6, 1996, at A25. One result of including a multiracial category on the census would be to reduce the number of people identifying themselves as black or Asian. See *id.* Considering the high rate of out-marriage among Asians, this finding is not surprising. But in light of the low rate of out-marriage among blacks, one possible conclusion is that blacks would use the multiracial category to lessen the stigma or social isolation that attaches to being black. See *id.* Eldrick "Tiger" Woods, the golf prodigy, is a contemporary example. Woods proudly acknowledges his multiracial background. In an interview, Woods stated "that his father was 'a quarter Native American, a quarter Chinese and half African American,' and that his mother was 'half Thai, a quarter Chinese and a quarter white.' . . . But this is an empty equation because social usage and the major market appeal of Tiger Woods classifies him as black." Henry Yu, *How Tiger Woods Lost His Stripes*, L.A. TIMES, Dec. 2, 1996, at B5. A *Sports Illustrated* writer characterized Woods as "the yellow-black-red-white man, . . . [the] hope in the American experiment, in the pell-mell jumbling of genes." Gary Smith, *The Chosen One*, SPORTS ILLUSTRATED, Dec. 23,

cally, those features most often associated with black people—dark skin color, a broad nose, woolly hair, large buttocks, and thick lips—and most easily used as racial markers, will have less evidentiary weight in establishing discrimination without recognition of colorism claims.¹⁵⁰

Despite the need to recognize and address discrimination based on skin tone; caution about colorism claims is warranted. One lesson the Title VII and section 1981 cases teach us is that colorism claims between black litigants are difficult to sustain and to distinguish from claims based on personal antagonism unrelated to skin color.¹⁵¹ Further complicating matters is the

1996, at 52 (naming Woods “Sportsman of the Year”). His mother refers to him as the “Universal Child,” the person who “can hold everyone together.” *Id.* at 36. Cynthia L. Nakashima writes that multiracial individuals are forced to choose the racial or ethnic group with which they belong— “[i]n many cases the ‘choice’ is made for the person by society, based on his or her physical appearance.” Cynthia L. Nakashima, *An Invisible Monster: The Creation and Denial of Mixed-Race People in America*, in *RACIALLY MIXED PEOPLE IN AMERICA*, *supra* note 39, at 162, 176. This statement is problematic because it denies the individual the capacity to choose voluntarily to identify with one or more racial and/or ethnic groups and presumes that one’s race or ethnicity is imposed externally.

150. In several recent administrative Title VII cases before the Equal Employment Opportunity Commission (EEOC), the complaining parties described themselves as of mixed race. See *Oates v. Runyon*, 1997 EEO PUB LEXIS 785 (EEOC Mar. 13, 1997) (describing plaintiff’s race as “mixed” and her skin tone as “light brown”); *Hill v. Runyon*, 1996 EEO PUB LEXIS 3187 (EEOC May 28, 1996) (alleging discrimination based on “race (mixed)”); *Waller v. West*, 1995 EEO PUB LEXIS 3764 (EEOC Aug. 8, 1995) (comparing plaintiff with a fellow employee described as “a mixed race individual who did not consider himself black or African-American”); *Lambert v. Brown*, 1994 EEO PUB LEXIS 4127 (EEOC July 8, 1994) (alleging race discrimination and plaintiff describing himself as “mixed—predominately Caucasian and Native American”); *Ellis v. Runyon*, 1994 EEO PUB LEXIS 2696 (EEOC Mar. 1, 1994) (alleging discrimination based on race (“mixed”) and national origin (African American)).

In two of these cases, the EEOC addressed the mixed race claim. In the first case, *Ellis v. Oates*, the complaining party challenged a disciplinary action and subsequent discharge from the U.S. Postal Service growing out of a verbal altercation and hair pulling incident between her and a woman the EEOC characterized as another “black female employee.” *Oates*, 1997 EEO PUB LEXIS 785, at 1. The EEOC reversed the final agency determination. Yet, it treated what seemed to be an intraracial colorism claim by a party who described herself as mixed and light brown skin, as a traditional race discrimination claim by a black woman. In the second case, *Ellis v. Runyon*, *Ellis* alleged that his failure to be reappointed to a transitional letter carrier position was the result of race (“mixed”), national origin (“African American”), physical disability, discrimination, and reprisal. *Ellis*, 1994 EEO PUB LEXIS 2696, at 2. The EEOC affirmed the final agency decision, holding that *Ellis* established that he was a member of a protected group “in that he [wa]s black.” *Id.* at 6. Once more the EEOC treated a mixed race claim of a person with some African ancestry as a traditional race discrimination case.

151. See *Hansborough v. City of Elkhart Parks & Recreation Dep’t*, 802 F. Supp. 199, 206 (N.D. Ind. 1992). In *Hansborough*, the federal district court explored the requirements of an intraracial colorism claim and dismissed the plaintiff’s claim for failure to make any preliminary showing of discrimination. The court stated that in each case the trier of fact must focus on the defendant’s perception of the plaintiff as belonging to a particular group rather than on physiognomic characteristics. The court acknowledged that intraracial colorism claims are difficult to sustain and distinguished actionable claims from what it characterized as personal antagonism unrelated to skin color. See *id.* at 207.

question of whether color preference and the resulting discrimination may be something practiced by all cultures as a result of politically and socially motivated bias,¹⁵² an issue raised by the *Ali* case.¹⁵³

In addition, any recognition of colorism claims also must address the difficulty with using the courts to make skin tone distinctions with significant legal implications. The federal district judge in *Felix*, for example, had great difficulty making legally significant color distinctions.¹⁵⁴ The subjective character of color distinctions is illustrated by the way the judge describes Carmen Felix, as of a medium shade, and the way she describes herself, as dark olive.¹⁵⁵ Arguably these terms carry different implications. The judge's characterization of Felix as of a medium shade suggests that her complexion is medium brown, and brown skin tone has a distinct racial connotation in the United

152. There are several studies documenting a light-skinned preference among foreign children with no known contact with racial concepts prevalent in this country. See, e.g., Deborah L. Best et al., *Color Bias in a Sample of Young German Children*, 38 PSYCHOL. REP. 1145, 1146, (1976) (noting how young children in Germany evidenced a similar pro-light-skinned bias leading the researchers to speculate that "a color bias [may] originate[] in early learning experiences which may be related to the diurnal nature of the young human and which has nothing to do with race"); D.L. Best et al., *Extension of Color Bias Research to Young French and Italian Children*, 6 J. CROSS-CULTURAL PSYCHOL. 390, 405 (1975) (discussing how young children in France and Italy appear to mirror the adult tendency in the United States, France, and Italy to evaluate white more positively than black, and light-skinned humans more positively than dark-skinned humans); Saburo Iwawaki et al., *Color Bias Among Young Japanese Children*, 9 J. CROSS-CULTURAL PSYCHOL. 61, 70 (1978) (discussing how young Japanese children evidence the same degree of pro-light-skinned and anti-dark-skinned bias as children in Western countries). There also are other studies of foreign colorism practices that may or may not be related to some "race" or caste discrimination. See, e.g., Christopher Bagley & Loretta Young, *Evaluation of Color and Ethnicity in Young Children in Jamaica, Ghana, England, and Canada*, 12 INT'L J. INTERCULTURAL REL. 45-59 (1988) (discussing light-skinned preference among children in disparate countries); Sarla Banerjee, *Assortative Mating for Colour in Indian Populations*, 17 J. BIOSOC. SCI. 205 (1985) (discussing light-skinned preference when selecting marriage partners); A. Henik et al., *Color, Skin Color Preferences and Self Color Identification Among Ethiopian- and Israeli-Born Children*, 3 ISRAELI SOC. SCI. RES. 74 (1985) (discussing light-skinned preferences involving light- and dark-skinned Jews in Israel).

Arguably, some of these preferences may be connected to the precolonial dominance of dark-skinned groups by invading light-skinned groups. For example, one nonracial explanation of light skin preference is that it simply reflects "a general prolight/antidark bias" stemming from early learning experiences equating light with day and dark with night, that are reinforced by other social processes such as the use of blackness to symbolize badness or evil, and whiteness to symbolize goodness. John E. Williams & J. Kenneth Morland, *Comment on Banks's "White Preference in Blacks: A Paradigm in Search of a Phenomenon,"* 86 PSYCHOL. BULL. 28, 31 (1979) (discussing research in this area and questioning whether racial bias is a cause of light skin preference among black people); see e.g., HANEY LÓPEZ, *supra* note 22, at 173-74 (citing FRANTZ FANON, BLACK SKIN WHITES MASKS 188-89 (Charles Lam Markmann trans., 1967) (discussing European associations of blackness with evil and whiteness with goodness)).

153. See *supra* notes 120-122 and accompanying text.

154. *Felix v. Marquez*, No. 78-2314, 1981 WL 275, at *8 (D.D.C. Mar. 26, 1981).

155. "Felix's own skin color, which she described as dark olive, appeared to the court to be a medium shade." *Id.* at *8 n.6.

States: It means *nonwhite*. However, the term “olive,” used by Felix is often used to describe Southern Europeans like Italians or other European ethnic groups considered white in the United States. Descriptions of skin tone in this country invariably convey race.¹⁵⁶ Thus, solutions are understandably elusive.

B. Simple Solutions to Colorism Claims?

As my prior discussion of colorism cases suggests, some judicial precedents support recognizing intragroup colorism claims. The problems presented by cases like *Sere*, *Ohemeng*, *O’Loughlin*, and *Walker* could easily be addressed without dramatically changing current civil rights jurisprudence. Yet, some scholars oppose recognition of intragroup colorism claims. They argue that intragroup claims undercut race-based claims¹⁵⁷ and divert attention from “the larger issue of societal racism.”¹⁵⁸ This rationale for the nonrecognition of colorism claims trivializes the economic implications of these claims for substantial numbers of black people who lack the social capital conferred at birth upon their light-skinned racial counterparts.

Opposition to intragroup colorism claims within the black community might also be fueled by the fear that, as in the *Walker* case, light-skinned black plaintiffs will prevail over dark-skinned black defendants—thereby enhancing, rather than equalizing, the social capital created by light skin tone. If a light-skinned black preference translates into tangible socio-economic benefits or social capital, these opponents argue, then allowing light-skinned blacks to recover for skin tone discrimination would be somewhat analogous to whites prevailing in reverse discrimination cases.

Arguably, these two circumstances are distinguishable. Reverse discrimination claims usually involve attacks on nonwhite racial preferences designed to remedy past and continuing discrimination or racial imbalance in favor of whites. These claims can and should be distinguished from race-based discrimination claims by whites based on some invidious racial animus directed toward them because they are white. By analogy, with claims of this second sort, intragroup claims by light-skinned plaintiffs (like *Walker* or *Ali*), if based on proof of race-related animus such as skin tone, should be permitted.

156. “The association of light skin with status and thus attractiveness meant that skin color became a vehicle for bias among African-Americans, even though light skin was less common than dark. Value-laden terms evolved that reflected bias, such as *high-yellow*, *ginger*, *cream-colored*, and *bronze*.” Ronald E. Hall, *Bias Among African-Americans Regarding Skin Color: Implications for Social Work Practice*, 2 RES. ON SOC. WORK PRAC. 479, 480 (1992) (citations omitted).

157. See Recent Case, 103 HARV. L. REV. 1403, 1408 (1990).

158. Collier-Thomas & Turner, *supra* note 12, at 7.

Some proponents of intragroup claims, while supportive of attempts to expand federal civil rights laws to cover different forms of race-based discrimination,¹⁵⁹ would focus on the defendant's conduct, rather than the plaintiff's skin tone.¹⁶⁰ They argue that the subjectivity of race and ethnicity often makes racial identification of plaintiffs difficult.¹⁶¹ Under this conduct-focused theory, courts would inquire into whether the defendant's acts "invoked a racist ideology . . . [not] whether society commonly perceives the plaintiff to belong to a separate race."¹⁶² According to these proponents, a racist act would be any act communicating "that the plaintiff is a member of a group that shares a genetic makeup distinct from some comparative group."¹⁶³ Therefore, the defendant's impression of the plaintiff's racial identity, not the plaintiff's perception of her or his own identity, would be the key to recovery.

While helpful, this approach suffers from a fundamental limitation. Its supporters propose eliminating racial identification as a trigger for intragroup colorism claims because, as mentioned previously, race and ethnicity are subjective. Subjective racial perceptions, however, are the most common signifiers of race and determinants of social and economic status. Denying the reality attached to perceptions of another's racial identity ignores an important way in which race is constructed in this country.

One commentator acknowledges that courts currently permit intragroup colorism claims between members of white ethnic groups, but proposes only that "blacks [have] the same right as whites to claim intraracial discrimination."¹⁶⁴ This approach does not go far enough in remedying the problem because it only addresses intragroup claims like *Sere* and *Ohemeng*. Recognition of intragroup colorism claims alone would not address the larger problem posed by interracial colorist employment practices.

Other scholars, like Deborah Ramirez, argue that we should abandon racial categories as we move toward a more multicultural society.¹⁶⁵ However, the deliberate nonrecognition of race in a legal context makes the acknowledgement and identification of racism more difficult because race-conscious policies like affirmative action rely on these categories to overturn, not to

159. See Sandi J. Robson, Note, *Intra-Racial, Color-Based Discrimination and the Need for Theoretical Consistency After Walker v. Internal Revenue Service*, 35 VILL. L. REV. 983, 1006-07 (1990); see also Linda A. Lacewell & Paul A. Shelowitz, Case Comment, *Beyond a Black and White Reading of Sections 1981 and 1982: Shifting the Focus from Racial Status to Racist Acts*, 41 U. MIAMI L. REV. 823 (1987).

160. See Robson, *supra* note 159, at 1001.

161. See Lacewell & Shelowitz, *supra* note 159, at 849-50.

162. *Id.* at 849-50.

163. *Id.*

164. Amy Weinstein, Case Comment, *Must Employers Be Colorblind? Title VII Bars Intra-Racial Employment Discrimination*, 68 WASH. U. L.Q. 213, 224 (1990).

165. See Ramirez, *supra* note 26, at 974.

enforce, racial oppression.¹⁶⁶ Even Ramirez grants that simply abolishing racial categories will not change people's beliefs or behaviors, especially when there are "proven patterns of institutional bias [that] may require racial and ethnic classifications to remedy past identified discrimination against particular groups."¹⁶⁷

Further, to be without a racial identity in a thoroughly racialized society like the United States is like having *no* identity.¹⁶⁸ Thus, Peggy Pascoe argues that eliminating racial categories simply perpetuates racism.¹⁶⁹ She sees race in the mid-twentieth century as nothing more than a broader version of ethnicity.¹⁷⁰ Race-related discrimination continues, and denying the economic and social meanings the United States still attaches to race by abolishing racial categories will not make race-based and race-related discrimination disappear.

Granted, the continued existence of legalized racial categories reinforces commonly held notions of race and encourages people to think of themselves and others in racial terms.¹⁷¹ Nevertheless, the law must be able to respond to subordinating uses of race, especially when they have significant economic consequences. As the colorism cases suggest, negative consequences arise for the most vulnerable segments of the black community when courts and governments blindly apply a monolithic definition of the racial category "black" based on the hypodescent rule.¹⁷² In addition, complicity

166. See *id.* at 968–69.

167. *Id.* at 985.

168. See WINANT, *supra* note 9, at 16. Neil Gotanda writes that a person with no identity in a racialized society has two options: "[F]ollow an assimilationist approach, seeking adaptation to majority society . . . [or not assimilate and] be constitutionally condemned to a marginal existence in the future society." Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135, 1141 (1996).

169. See Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of "Race"* 83 J. AM. HIST. 44, 67 (1996).

170. See *id.* As a result, cultural arguments are not considered racist today because conservatives define race so narrowly. See *id.* at 68.

171. See HANEY LÓPEZ, *supra* note 22, at 125 ("The necessary persistence of racial categories in law lends legitimacy to the notion that race exists in fact, leading people to think not only of others but of themselves in racial terms."). As Professor Haney López points out, "[v]indicating the rights of minorities has required maintaining a legal system that distinguishes between Whites and non-Whites, even though these classifications arose from efforts to subordinate those constructed as non-Whites." *Id.*

172. Governments still apply and enforce the rule of hypodescent with respect to people with almost any African ancestry. A clear example is the unsuccessful effort of Susie Guillory Phipps in the 1980s to get Louisiana to change the racial designation on her birth certificate from "black" to "white." See DAVIS, *supra* note 21, at 8–11; Calvin Trillin, *American Chronicles: Black or White*, NEW YORKER, Apr. 14, 1986, at 62. State law declared that anyone with one thirty-second "Negro blood" to be black. The Louisiana state trial and appellate courts upheld the constitutionality of the fractional racial classification statute. See *Doe v. State*, 479 So. 2d 369 (La. Ct. App. 1985). As Davis points out, both the Louisiana and the United States Supreme Courts "saw

of the black and the larger civil rights communities with the dominant political powers in policing rigid adherence to the hypodescent rule constrains most civil rights jurisprudence, leaving the complex way race operates in this country underexposed and unremedied.¹⁷³ Thus, the black and the larger civil rights communities must be willing to reject their rigidly monolithic approach to race when arguing for meaningful racial justice.

Howard Winant writes that the creation of a racial democracy involves the democratization of racial identity.¹⁷⁴ He advocated open discussion about the commonalities and differences that exist between and among distinct racialized groups.¹⁷⁵ Black identity in the United States is an amalgamation of cultures from distinct African origins, as well as from more contemporary Afro-Caribbean and Afro-Latina/o cultures. The fundamental points of commonality between these different groups with African ancestry are the Atlantic slave trade experience and the dominant society's collective antagonism toward persons of African descent—what Lisa Ikemoto characterizes as the master narrative of white supremacy.¹⁷⁶

It is possible that in the next century racial attitudes toward black people will soften, and legal notions about who is black will be modified. The increase in interracial marriage and the numbers of multiracial individuals may cause a blurring of traditional racial boundaries.¹⁷⁷ Critics of affirmative action tout the increase in interracial marriages as proof of how colorblind the United States has become,¹⁷⁸ but as Robert Chang points out, “even with

no reason to disturb the application of the one-drop rule” in Phipps's case. DAVIS, *supra* note 21, at 11. The Louisiana Legislature, responding to the unfavorable publicity, repealed the statute in 1983 after the Phipps trial court decision. LA. REV. STAT. ANN. § 42:267, *repealed by* Acts 1983, No. 441, § 1. For a discussion of Louisiana's efforts to codify racial classifications, see Kenneth A. Davis, *Racial Designation in Louisiana: One Drop of Black Blood Makes a Negro!*, 3 HASTINGS CONST. L.Q. 199 (1976); and Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255, 279 (1983).

173. For a discussion of this point in the context of class distinctions within the black community, see Roy L. Brooks, *Race as an Under-Inclusive and Over-Inclusive Concept*, 1 AFR.-AM. L. & POL'Y REP. 9, 26 (1994).

174. See WINANT, *supra* note 9, at 53.

175. See *id.*

176. See Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed “Los Angeles,”* 66 S. CAL. L. REV. 1581 (1993) (discussing how “master narrative” of white supremacy constructs racial conflict).

177. See Michael Lind, *The Beige and the Black*, N.Y. TIMES, Aug. 16, 1998, § 6 (Magazine), at 38 (arguing that interracial marriages, rather than blurring racial lines, may replace the traditional black-white division with a new division between beige and black).

178. See, e.g., Douglas J. Besharov & Timothy S. Sullivan, *One Flesh: America Is Experiencing an Unprecedented Increase in Black-White Intermarriage*, NEW DEMOCRAT, July–Aug. 1996, at 19, 19–21; Ben Wattenberg, *In the Realm of Race, the Trend Is Blend*, BALTIMORE SUN, Nov. 29, 1996, at 27A (discussing the increase in out-marriages for Asians and Latinas/os, and even touting an increase for blacks).

the increased rate of white interracial marriage, in 1987, twenty years after *Loving v. Virginia*, 99 percent of white Americans were married to other whites.¹⁷⁹ As the century ends, the rate of interracial marriage for blacks, especially black women, has not changed significantly.

The unwillingness of whites to marry outside their recognized racial or ethnic group signals the degree of perceived social and cultural difference.¹⁸⁰ Richard Alba points out that black Americans represent the “extreme case,” with the lowest rate of interracial marriage of any group; the increase in black interracial marriage, 10 percent for black men and 4 percent for black women, is strikingly low when compared with the intermarriage rate for Asian Americans (approximately 66 percent), Hispanics (70 percent), and Native Americans (50 percent).¹⁸¹ Thus, perceived social and cultural differences between blacks and other groups are still great, although changing slowly. Given the resistance of nonblacks to interracial marriage with blacks, any possible blurring of racial boundaries for persons of African descent may result in a reformulation of antiblack discrimination directed against those people who look most stereotypically black—dark-skinned people with non-European features¹⁸²—without regard to racial classification.

CONCLUSION

No matter how problematic recognition of interracial colorism claims may be, they will be advanced in the next century. The press by both white parents and their biracial children for government recognition of biracial, multiracial, or multiethnic designation by the United States Census Bureau suggests that in some states, at least, traditional notions of race will become less important in the near future. Writers for a news magazine discussing the movement by biracial children for formal recognition by the Census Bureau ask whether a biracial or multiracial category would “give lighter-skinned people a further leg up the American social ladder?”¹⁸³ They note that “[s]kin color in the black community is still very much an issue.”¹⁸⁴ These writers,

179. Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family, and the Dream that Is America*, 23 HASTINGS CONST. L.Q. 1115, 1124 (1996) (citation omitted).

180. “A high rate of intermarriage signals that individuals of putatively different ethnic backgrounds no longer perceive social and cultural differences significant enough to create a barrier to a long-term union.” Richard D. Alba, *Assimilation's Quiet Tide*, 119 PUB. INTEREST 3, 13 (1995).

181. See *id.* at 16–17.

182. To a lesser extent the same type of discrimination could be directed toward other multi- and biracial individuals with dark skin and non-European features. A fuller discussion of this form of colorism is, however, beyond the scope of this Article.

183. Connie Leslie et al., *The Loving Generation: Biracial Children Seek Their Own Place*, NEWSWEEK, Feb. 13, 1995, at 72.

184. *Id.*

however, ignore the importance attributed to skin color by the dominant political community in the United States and the broader implications of the recognition of interracial colorism claims.

As the colorism cases suggest, the preference for light skin and the resulting economic consequences are not limited to people raced as black. A national study of the socioeconomic impact of skin color and phenotype among Mexican Americans conducted in the late 1980s made similar findings. This study used two indicators of phenotype—skin color and physical features. The researchers found that Mexican Americans whose physical appearance is more European occupy a higher socioeconomic status than Mexican Americans with the physical appearance of indigenous Native Americans.¹⁸⁵ The study suggests that formal recognition of biracial and multiracial individuals, while blurring the importance of race in employment decisions, will not end discriminatory racial categorization.

The study's findings further confirm what the black community has long suspected, that when hiring nonwhites, white employers prefer to hire people of color who look most like whites. This preference for light skin disproportionately affects persons with African ancestry, but it is not limited to blacks. Thus, even if multiracial and biracial categories gain legal acceptance, and this acceptance results in the disruption of the racial category of black, or African American, dark-skinned nonwhites will continue to experience forms of race-related discrimination not experienced by their light-skinned counterparts.

Almost fifteen years ago, Mari Matsuda wrote: "To an extent not yet clear, color plays a significant role in American racism, with gradations in color roughly paralleling graduations of sustained racism inflicted upon a group."¹⁸⁶ In the twentieth century, Matsuda's description sounded very much like an account of the kind of racism prevalent in Latin America. In the twenty-first century her description may well apply to race relations in the United States, and courts must be prepared to attack all forms of race-based discrimination directed at persons of African descent.

185. See, e.g., Carlos H. Arce et al., *Phenotype and Life Chances Among Chicanos*, 9 HISPANIC J. BEHAV. SCI. 19, 32 (1987); Douglas S. Massey & Nancy A. Denton, *Racial Identity and the Spatial Assimilation of Mexicans in the United States*, 21 SOC. SCI. RES. 235, 251–55 (1992) (noting that white Mexicans are less residentially segregated than mestizo Mexicans).

186. Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 335 n.50 (1987).