

# MULTIRACIAL MALAISE: MULTIRACIAL AS A LEGAL RACIAL CATEGORY

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[R]ace is at once an empty category and a powerful instrument.

—Melissa Nobles<sup>1</sup>

Racism is about race: more races can lead . . . to changes in the way racism is presented, and ultimately to more, rather than less, racism.

—Paulette M. Caldwell<sup>2</sup>

## INTRODUCTION

The fiftieth anniversary of *Loving v. Virginia*,<sup>3</sup> which struck down Virginia's antimiscegenation statute, provides an opportunity to reflect on *Loving's* impact. A 2017 Pew Research Center analysis of U.S. Census Bureau data found that interracial marriages constitute 17 percent of all marriages,<sup>4</sup> which represents an increase of 14 percent since the U.S. Supreme Court decided *Loving* in 1967.<sup>5</sup> One byproduct of the increase in

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1. MELISSA NOBLES, *SHADES OF CITIZENSHIP: RACE AND THE CENSUS IN MODERN POLITICS* 12 (2000).

2. Paulette M. Caldwell, *The Content of Our Characterizations*, 5 *MICH. J. RACE & L.* 53, 63 (1990).

3. 388 U.S. 1 (1967) (finding that Virginia's antimiscegenation statute violated the due process and equal protection guarantees of the Fourteenth Amendment).

4. Gretchen Livingston & Anna Brown, *Intermarriage in the U.S. 50 Years After Loving v. Virginia*, PEW RES. CTR. (May 18, 2017), <http://www.pewsocialtrends.org/2017/05/18/intermarriage-in-the-u-s-50-years-after-loving-v-virginia> [<https://perma.cc/3FYN-N2PP>].

5. Jesse J. Holland, *I in 6 Newlyweds' Spouse Is of Different Race or Ethnicity*, ASSOCIATED PRESS (May 18, 2017), <https://www.apnews.com/f0795fbaf4d04ca793d834f3d1eff57b> [<https://perma.cc/KQ99-WBHH>]. The largest groups to intermarry are Asians (29 percent) and Hispanics (27 percent). *Id.* Blacks and whites intermarry at lower rates with whites having the lowest rate of intermarriage (11 percent for white compared to 18 percent for blacks), which suggests continued resistance to black-white interracial marriages. *Id.* "Despite those numbers, intermarriage is rapidly becoming more popular among blacks and whites." *Id.*

interracial marriages is the growing number and prominence of multiracial children. For example, a July 2017 Brookings Institution report characterizes Barack Obama, born six years before *Loving*, as the person who gave growing “prominence” to the emergence of multiracial people in America.<sup>6</sup>

Increasingly, there is interest in the offspring of interracial unions and how they compare to monoracial individuals. The Brookings Institution, for example, reported that “there is no test score gap between white and multiracial high school students.”<sup>7</sup> The report seems to define “multiracial” very narrowly as people with parents from different racialized groups.<sup>8</sup> Yet the multiracial population in the United States is not a new phenomenon. By limiting multiracial “to first-generation children of interracial couples,”<sup>9</sup> as others have, the report fails to acknowledge older and larger generations whose genealogical mixture is more distant. Many of the people within this older multiracial population are racially classified by government and custom as black or African American, and they constitute “around 40 [percent] of the total population.”<sup>10</sup> In contrast, according to the 2000 census, first-generation multiracial individuals (including those with remote African ancestry) make up roughly 2 percent of the total population and are more likely to be seen as multiracial.<sup>11</sup>

Proponents of a multiracial legal category complain that multiracial individuals are harmed by not being recognized under law as multiracial. Specifically, they argue that the law neither recognizes their personal identity nor protects their right to self-identify racially and to have that identity accepted.<sup>12</sup> Despite the long history of multiracial people in the United States, Fourteenth Amendment equal protection constitutional jurisprudence, statutory antidiscrimination laws, and the census do not formally recognize a separate multiracial category. Thus, the question is whether legal recognition is needed to remedy race-based discrimination experienced by multiracial individuals.<sup>13</sup>

Historically, courts grappling with racial-identity questions looked at three factors, phenotypical characteristics, ancestry, and racial reputation in the community, to resolve the issue.<sup>14</sup> The courts relied on a binary classification system of white and nonwhite; the underlying issue in these cases being whether one party had *any* nonwhite ancestry. Thus, until recently, Barack

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6. Jonathan Rothwell, *Multiracial Adolescents Show No Test Score Gap with Whites*, BROOKINGS INSTITUTION (July 17, 2017), <https://www.brookings.edu/research/multi-racial-adolescents-show-no-test-score-gap-with-whites/> [https://perma.cc/Y96K-HS6F].

7. *Id.*

8. *See id.*

9. Aaron Gullickson & Ann Morning, *Choosing Race: Multiracial Ancestry and Identification*, 40 SOC. SCI. RES. 498, 501 (2011).

10. *Id.* at 500–01.

11. *Id.*

12. *See infra* notes 24–30, 38 and accompanying text.

13. *See, e.g.*, Scot Rives, Note, *Multiracial Work: Handing Over the Discretionary Judicial Tool of Multiracialism*, 58 UCLA L. REV. 1303, 1334 (2011).

14. *See generally* ARIELA J. GROSS, WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA (2008). For a more recent example, see *Malone v. Haley*, No. 88-339 (Mass. Sup. Jud. Ct. Suffolk Cty. July 25, 1989).

Obama, despite his white mother, would be classified racially as black, since twentieth-century notions of race held that any *known* African ancestry made one black.<sup>15</sup>

Admittedly, since *Loving*, conventional notions of race in the United States have “destabilized” as a result of “increases in immigration, intermarriage, and cross-racial adoptions.”<sup>16</sup> Reflecting the era of racial self-identification,<sup>17</sup> racial categories are more fluid in the twenty-first century, even for people who, historically, racially classified as black. These attitudinal changes are reflected in a 2007 Pew Research Center finding that “[n]early four-in-ten African Americans (37%) say that blacks can no longer be thought of as a single race” because of increasing diversity within that community.<sup>18</sup>

Conventional blackness, where one is “black” if one’s African ancestry is visible or known,<sup>19</sup> is on the wane. As critical race theory legal scholar Neil Gotanda posits, race—particularly the racial category “black”—while a consistent and constant “social divider,” is not a “stable, coherent legal and social concept.”<sup>20</sup> Today, people with some African ancestry may move away from blackness and, in some respects, the legal multiracial category movement is an example.<sup>21</sup>

The focus of this Article is the underlying assumption of the Brookings Institution report that multiracial individuals constitute a separate racial category. My discussion of legal racial categories focuses only on government “racial” definitions. Multiracial individuals should enjoy the

15. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1737 (1993); see, e.g., Jason Carroll, *Behind the Scenes: Is Barack Obama Black or Biracial?*, CNN (June 9, 2008, 3:28 PM), <http://www.cnn.com/2008/POLITICS/06/09/btsc.obama.race/> [<https://perma.cc/3CDP-RAQT>] (“A columnist examining Obama’s background summed up his racial identity into one equation: white + black = black.”).

16. For a discussion and critique of these arguments, see David Roediger, *The Retreat from Race and Class*, MONTHLY REV. (July 1, 2006), <http://monthlyreview.org/0706roediger.htm> [<https://perma.cc/4WPT-UC5F>].

17. See Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 306 (2017) (discussing how, after the dissolution of the Naturalization Act, “[i]ndividual autonomy over racial identity became the norm, as individuals rather than courts became able to self-identify their own race”); Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1530 (2014) (arguing that the racial self-identification movement “assumes that many individuals will fluidly move between racial identities”).

18. PEW RESEARCH CTR., OPTIMISM ABOUT BLACK PROGRESS DECLINES: BLACKS SEE GROWING VALUES GAP BETWEEN POOR AND MIDDLE CLASS 4, 24 (2007), <http://pewsocialtrends.org/assets/pdf/Race.pdf> [<https://perma.cc/FWK2-K4LE>]. Younger black Americans, particularly those who were born after *Loving*, are more likely to report that blacks are no longer a single race. *Id.*

19. Neil Gotanda, *A Critique of ‘Our Constitution is Color-Blind,’* 44 STAN. L. REV. 1, 24 (1991).

20. *Id.* at 23.

21. Charles Byrd, organizer of the 1996 Multiracial Solidarity March in Washington, D.C., specifically rejects the notion that society treats “mixed-race” individuals “as a ‘subset’ of ‘blackness.’” JARED SEXTON, AMALGAMATION SCHEMES: ANTIBLACKNESS AND THE CRITIQUE OF MULTIRACIALISM 57 (2008). The Declaration of Racial Independence composed in 1997 by another multiracial advocate cites the “One Drop Rule” as a sign of racial hostility toward multiracial individuals. *Id.* at 68–69.

freedom to self-identify as they wish—and, like others, be afforded the protections of antidiscrimination law. The question is whether a separate legal racial category is needed to provide that protection. Race in this country has been “crafted from the point of view of [white] race protection”<sup>22</sup>—protecting the interests of white Americans from usurpation by nonwhites and, unless the creation of a separate multiracial legal category advances this goal, change will be resisted.

Commentaries grounded in Fourteenth Amendment Equal Protection Clause and federal statutory antidiscrimination jurisprudence shape the construction of racial categories in U.S. law. This jurisprudence influences the racial categories and definitions used for the census. The next Part briefly discusses the attempt to get a multiracial category on the U.S. census.

### I. THE MULTIRACIAL RACE CATEGORY CONTROVERSY

The Office of Management and Budget (OMB) acts as a gatekeeper designating the racial and ethnic categories used by the federal government in the census and on various government reporting forms.<sup>23</sup> The push for a “multiracial” category on the U.S. census and the OMB’s directive on racial and ethnic standards for statistics dates back to the late 1970s.<sup>24</sup> Early proponents were the white and black parents of multiracial children.<sup>25</sup> Their primary concern was that children of these interracial marriages would be racially categorized as black.<sup>26</sup> Attempts to add a multiracial category to census forms for the 1990 and 2000 censuses failed.<sup>27</sup> Instead, for the 2000 census, the compromise offered was the option of checking multiple race boxes.<sup>28</sup> Not satisfied, the multiracial category movement (MCM) and some

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22. JAMES Q. WHITMAN, *HITLER’S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW* 106 (2017).

23. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, DIRECTIVE NO. 15: RACE AND ETHNIC STANDARDS FOR FEDERAL STATISTICS AND ADMINISTRATIVE REPORTING (1977), <https://wonder.cdc.gov/WONDER/help/populations/bridged-race/Directive15.html> [<https://perma.cc/78BZ-9M36>].

24. For a history of late twentieth-century efforts to better define racial categories used in the census, see HEATHER M. DALMAGE, *TRIPPING ON THE COLOR LINE: BLACK-WHITE MULTIRACIAL FAMILIES IN A RACIALLY DIVIDED WORLD* 143–151 (2000).

25. Tanya K. Hernández, ‘Multiracial’ Discourse: *Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97, 106 (1998).

26. *Id.* (citing Lewis R. Gordon, *Specificities: Culture of American Identity: Critical ‘Mixed Race’?*, 1 SOC. IDENTITIES 381, 382 (1995)). See generally Kevin D. Brown, *The Rise and Fall of the One-Drop Rule*, in *COLOR MATTERS: SKIN TONE BIAS AND THE MYTH OF A POST-RACIAL AMERICA* 44 (Kimberly Jade Norwood ed., 2013). Arguably, the black-white parents of these children want to convey some of the “property interests” of whiteness to their biracial children. See Harris, *supra* note 15, at 1725 (arguing that whiteness comes with legally protected benefits, which are the property interests of whiteness).

27. Bijan Gilanshah, *Multiracial Minorities: Erasing the Color Line*, 12 LAW & INEQUALITY J. 183, 184–86 (1993); Rives, *supra* note 13, at 1315.

28. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,788–90 (Oct. 30, 1997).

“multiracial identity legal scholars”<sup>29</sup> continue to push for a separate racial category.<sup>30</sup>

Critics of a multiracial category argue that the term is “too broad to be statutorily useful.”<sup>31</sup> The question of definition is apparent when reviewing how states responded to the MCM’s push for a multiracial category on local data collection forms. Between 1992 and 2000, several states enacted legislation or regulations acknowledging a multiracial category.<sup>32</sup> But there is no agreement about who falls within the category. A few states define multiracial as persons having biological parents of different races.<sup>33</sup> Other state regulations (most often for public education forms) use the term without definition.<sup>34</sup> Many states have rejected attempts to add a multiracial category to state forms.<sup>35</sup>

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29. This term was coined by Tanya Hernández. Tanya Katerí Hernández, *Racially-Mixed Personal Identity Equality*, 15 *LAW CULTURE & HUM.* 1, 2–3 (2017).

30. Tina Fernandes, *Antidiscrimination Law and the Multiracial Experience: A Reply to Nancy Leong*, 10 *HASTINGS RACE & POVERTY L.J.* 191, 213 (2013); Rives, *supra* note 13, at 1334. Not all multiracial legal scholars agree with this approach. *See, e.g.*, Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 *AM. U. L. REV.* 469, 543–44 (2010) (arguing for a focus on racial perception rather than racial categories); Rich, *supra* note 17, at 1569 (arguing for a legal right to racial self-definition). Some multiracial advocates support abandoning racial categories altogether. SEXTON, *supra* note 21, at 69 (“[A]ny government classifying its citizenry by race perpetuates racism.” (quoting Nathan Douglas, *Declaration of Racial Independence*, *INTERRACIAL VOICE* (1997), <https://web.archive.org/web/20000308064629/http://www.webcom.com/~intvoice/natdoug2.html>)). Others argue for “racial privacy.” *Id.* at 64.

31. NOBLES, *supra* note 1, at 140.

32. Kim M. Williams, *Parties, Movements, and Constituencies in Categorizing Race: State-Level Outcomes of Multiracial Category Legislation*, in *STATES, PARTIES, AND SOCIAL MOVEMENTS* 197, 200 (Jack A. Goldstone ed., 2003).

33. A LexisNexis search found only four state statutes recognizing a multiracial category and defining “multiracial” as biological parents of different races. *See* CAL. GOV’T CODE § 8310.9(b)(1) (Deering 2018); GA. CODE ANN. § 50-18-135(a) (2018); IND. CODE ANN. § 5-15-5.1-6.5(b) (Lexis 2018); MICH. COMP. LAWS SERV. § 18.1206a(1)(a) (LexisNexis 2018).

34. *See, e.g.*, 14 DEL. ADMIN. CODE § 103.2.10 (2018) (describing data for education statistics); OHIO REV. CODE ANN. § 3313.941(B) (LexisNexis 2017) (describing data for school statistics); OR. ADMIN. R. 705-010-0040(4)(e) (2018) (describing data for student groups); WASH. REV. CODE ANN. §§ 28A.300.042, 28A.300.505 (2018) (describing data for school statistics). According to one report, North Carolina had an “other” category, instead of “multiracial,” on forms used to collect data for educational institutions. NAT’L CTR. FOR EDUC. STATISTICS, DEP’T OF EDUC., NCES 98-034, *STATE SURVEY ON RACIAL AND ETHNIC CLASSIFICATIONS 4* (1998), <http://nces.ed.gov/pubs98/98034.pdf> [<https://perma.cc/6QSU-2PNX>].

35. Other states opt to follow the federal model permitting multiracial persons to check more than one race box on state forms. CAL. GOV’T CODE § 8310.9(b)(1); *see also* Racial Identification of Individuals Under the Maryland Criminal Justice System, 85 *Md. Op. Att’y Gen.* 38 (2000). With the exception of New Hampshire, there is virtually no reported information explaining rejection of a multiracial category. The reasoning by the New Hampshire state legislative committee provides some insights into why states may have rejected a multiracial category: “While the committee was sympathetic to the intent of the sponsor, it was discovered that most, if not all, forms used by the state requiring this information are mandated by the federal government. Any change to these state form[s] could result in the loss of federal funds.” H. Comm. on Exec. Dep’ts and Admin., H.R. 1997, Reg. Sess. (N.H. 1997), [http://gencourt.state.nh.us/SofS\\_Archives/1997/house/HB259H.pdf](http://gencourt.state.nh.us/SofS_Archives/1997/house/HB259H.pdf) [<https://perma.cc/WLE3-NMTD>] (committee report on H.R. 259). The Maryland State

Further, discrimination claims by multiracial individuals tend to mirror claims by monoracial plaintiffs. Even in cases where multiracial individuals appear racially ambiguous, racial animus often arises after employers, property owners, school officials, and other decision makers learn of a person's nonwhite ancestry.<sup>36</sup> Thus, Tanya Hernández's research of race discrimination claims by multiracial plaintiffs concludes that existing antidiscrimination jurisprudence is sufficient to address these claims.<sup>37</sup>

Advocates for a multiracial legal category argue that the discrimination that multiracial individuals experience is grounded in their identification as a separate and distinct racial group.<sup>38</sup> While there is admittedly a biological aspect to race, "biology is not fundamental. The origins of race are sociocultural and political, and the main ways race is used are sociocultural and political."<sup>39</sup> Thus there also is sociopolitical content attributed to race.<sup>40</sup> Perhaps a more accurate characterization of efforts to obtain a multiracial category on the census and other government forms is that advocates want legal recognition of a sociopolitical racial category.<sup>41</sup>

Further, multiracial is both an ascribed and a personal identity usually imposed on or adopted by children of interracial parentage. Given the personal nature of racial identification for multiracials, "[t]here is no single multiracial population."<sup>42</sup> Thus, the larger question is whether multiracialism can be theorized as its own legal racial category. The next Part more closely examines the claim for a multiracial legal racial category.

## II. THEORIZING MULTIRACIALISM

Advocates who "cast[] 'multiraciality' as a new social phenomenon" characterize the need for a multiracial category "as an issue of accuracy and fairness."<sup>43</sup> Their concern was that multiracial individuals lacked an option for accurately recognizing *all* of their heritage because "without proper racial

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Attorney General offered a similar justification. *See Racial Identification of Individuals Under the Maryland Criminal Justice System, supra.*

36. Hernández, *supra* note 29, at 3–5.

37. *Id.*

38. NOBLES, *supra* note 1, at 135.

39. Paul Spickard, *Does Multiraciality Lighten?: Me-Too Ethnicity and the Whiteness Trap*, in *NEW FACES IN A CHANGING AMERICA: MULTIRACIAL IDENTITY IN THE 21ST CENTURY* 290 (Loretta I. Winters & Herman L. DeBose eds., 2003) (citing *The Illogic of American Racial Categories*, in *RACIALLY MIXED PEOPLE IN AMERICA* 16 (Maria P.P. Root ed., 1992)).

40. Osagie Obasogie's empirical research of blind people's notion of race illustrates how race is made visible by social practices. *See generally* OSAGIE K. OBASOGIE, *BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND* (2014).

41. According to OMB, "The racial and ethnic categories set forth in the standards should not be interpreted as being genetic, scientific, or anthropological in nature. For the purposes of these standards, race is a socio-political construct." FED. INTERAGENCY WORKING GRP. FOR RESEARCH ON RACE & ETHNICITY, INTERIM REPORT TO THE OFFICE OF MANAGEMENT AND BUDGET: REVIEW OF STANDARDS FOR MAINTAINING, COLLECTING, AND PRESENTING FEDERAL DATA ON RACE AND ETHNICITY 6, [https://www.whitehouse.gov/sites/whitehouse.gov/files/briefing-room/presidential-actions/related-omb-material/r\\_e\\_iwg\\_interim\\_report\\_022417.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/briefing-room/presidential-actions/related-omb-material/r_e_iwg_interim_report_022417.pdf) [<https://perma.cc/4VAK-MTZU>].

42. Gullickson & Morning, *supra* note 9, at 510.

43. NOBLES, *supra* note 1, at 135.

and ethnic classifications, multiracial people are ‘invisible’ in the health care system.”<sup>44</sup> The option of checking multiple boxes on the census addresses the first part of this complaint, but the second concern mistakenly treats race and ethnicity as necessary markers in biomedical research.<sup>45</sup> It overlooks the fact that racial identity for many post-*Loving* multiracial individuals is personal and sometimes fluid—identity is not group based.

It is important to remember that “[t]hroughout history, [powers within the United States used] racial designations . . . as tools of dominance, serving to separate and penalize those not defined as white.”<sup>46</sup> Since “race is not grounded in genetics or nature, the project of defining races always involves drawing and maintaining boundaries between those races.”<sup>47</sup> One question is what factors influence the drawing of boundaries.

More than two decades ago, Neil Gotanda theorized about the racialization process in the United States.<sup>48</sup> He continues to argue that the black-white racial paradigm in America is the product of “the erasure of tribe, ethnicity, and nationality” and the substitution of a largely two-race system: black and white.<sup>49</sup> Thus, discussions about the racialization of nonwhite groups, like Asian Americans, Latinos, and more recently Middle Eastern-North Africans (MENA), occur within the black-white paradigm.<sup>50</sup> As such, the default inquiry by these other outsider groups is how close they are to blackness or whiteness.<sup>51</sup> Given the strong preference for monoracial over multiracial

44. *Id.* (citing language from *About Us*, PROJECT RACE, [http://www.projectrace.com/about\\_us/our\\_history/project-race/](http://www.projectrace.com/about_us/our_history/project-race/) [https://perma.cc/94A5-RAFA] (last visited Apr. 13, 2018)).

45. For a criticism of the use of race or ethnicity in biomedical research, which argues that race is a social, not so much a biological, phenomenon, see Dorothy E. Roberts, *Legal Constraints on the Use of Race in Biomedical Research: Toward a Social Justice Framework*, 34 J.L. MED. & ETHICS 526, 529 (2006); Taunya Lovell Banks, *Funding Race as Biology: The Relevance of ‘Race’ in Medical Research*, 12 MINN. J.L. SCI. & TECH. 571 (2011).

46. Kim M. Williams, *Linking the Civil Rights and Multiracial Movements*, in THE POLITICS OF MULTIRACIALISM: CHALLENGING RACIAL THINKING 77, 78 (Heather M. Dalmage ed., 2004).

47. Abby L. Ferber, *Defending the Creation of Whiteness: White Supremacy and the Threat of Interracial Sexuality*, in THE POLITICS OF MULTIRACIALISM: CHALLENGING RACIAL THINKING, *supra* note 46, at 43, 46.

48. *See generally* Gotanda, *supra* note 19.

49. Neil Gotanda, *The Racialization of Islam in American Law*, 637 ANNALS AM. ACAD. POL. & SOC. SCI. 184, 187 (2011).

50. *See, e.g.*, Aihwa Ong, *Cultural Citizenship as Subject-Making: Immigrants Negotiate Racial and Cultural Boundaries in the United States*, 37 CURRENT ANTHROPOLOGY 737, 739 (1996) (claiming that “discriminatory modes of perception, reception, and treatment order Asian immigrants along a white-black continuum”); *see also* Caldwell, *supra* note 2, at 63–67.

51. Jasmine B. Gonzales Rose, *Race Inequity Fifty Years Later: Language Rights Under the Civil Rights Act of 1964*, 6 ALA. C.R. & C.L.L. REV. 167, 209 (2014) (“Under the black-white paradigm, non-black minority groups can only seek legal redress to the extent to which they can successfully analogize their experience to that of African Americans.”). For example, in challenging a Mississippi state law mandating the separation of white and “colored” school children, lawyers for the Chinese American child argued unsuccessfully that Chinese “stand nearer to the white race than they do to the negro race.” Brief for Appellees at 774, *Rice v. Gong Lum*, 104 So. 105 (1925) (No. 24-773), in 139 Miss. 760 (1925).

categories, and the measuring of legal race against whiteness, a more appropriate inquiry is whether the *real* racial binary is white versus nonwhite.

Some legal scholars criticize the black-white racial binary as underinclusive.<sup>52</sup> Early multiracial discourse reasserts a similar argument that “[m]ultiracial identity is a discrete and integral racial identity that stands alone; . . . not a subset of another racial identity.”<sup>53</sup> The criticism mirrors that of other nonwhite groups.<sup>54</sup> Nevertheless, the real complaint of many visible multiracial people is that they are racially categorized as nonwhite.

However, not all multiracial scholars support a multiracial category. Some oppose government-identified racial categories and see racial identity as personal and private.<sup>55</sup> But, conventional racial categories are largely ascribed—externally imposed—not internally driven.

In this regard, Gotanda identifies four ways that race appears in constitutional law jurisprudence: status race—the inferior status of the racial category; formal race—the completion of a recognized formal category; historical race—a history of subordination by the superordinate group; and culture race—the presence of a distinct culture from collective group practice.<sup>56</sup> Gotanda draws these categories directly from the black-white experiences and racial practices in the United States. In that sense, they exemplify the black-white racial paradigm. Assuming that these four usages of race accurately delineate the black-white racial categories, the next step is to apply them as criteria to test the proposed multiracial category.

Gotanda’s status-race model seems to most closely approximate the claims of multiracial individuals, namely, that they are treated as a subordinated racialized people because of their interracial parentage. But there is no *negative* ascribed racial profile applied to multiracial individuals by the dominant culture. Although there is literature about the “tragic mulatto,” a stereotype grounded in the notion that the offspring of blacks and whites were tainted by their black ancestry and thus inferior to whites,<sup>57</sup> governments, and the public, tend to treat racial categories as monoracial and mutually exclusive.

Gotanda’s formal-race model also is inapplicable to multiracial individuals. Until 1970, enumerators, in determining a person’s race for census purposes, were instructed in the case of multiracial individuals to select the nonwhite (or most subordinate group) when attaching a formal race

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52. See, e.g., Juan F. Perea, *The Black/White Binary Paradigm of Race: The ‘Normal Science’ of American Racial Thought*, 85 CALIF. L. REV. 1213, 1220 (1997).

53. NOBLES, *supra* note 1, at 132.

54. Caldwell, *supra* note 2, at 65–75.

55. RALINA L. JOSEPH, *TRANSCENDING BLACKNESS: FROM THE NEW MILLENNIUM MULATTA TO THE EXCEPTIONAL MULTIRACIAL* 25 (2013); SEXTON, *supra* note 21, at 57 (“We reject the notion of white racial purity, and we affirm the right of otherwise self-determined individuals to identify as they see fit—not as others would force them to identify.” (quoting Charles Byrd, Founding Editor, *Interracial Voice*, Keynote Address at the First Annual Multiracial Solidarity March (July 20, 1996)). Others assert that the existence and acknowledgement of multiracial people tends to “undermine[] the very categories of racism.” Spickard, *supra* note 39, at 291.

56. Gotanda, *supra* note 19, at 37–40, 56.

57. NOBLES, *supra* note 1, at 67.

to that individual.<sup>58</sup> The census consistently resisted efforts to formally recognize a separate multiracial category. Granted, terms signaling racial mixtures like “mulatto,” “quadroon,” and “octoroon” appeared in the census during the late nineteenth century,<sup>59</sup> but they referred to subcategories of the racial category “black,” not separate racial categories.<sup>60</sup> “Mixed-bloods,” defined as white-Native American mixtures, is the only consistent multiracial category recognized by the census.<sup>61</sup>

Some multiracial legal identity scholars might argue that the formal erasure of multiracial individuals, subsuming them into existing monoracial categories, formalizes their racial nonexistence. While this might be true, the question remains: If racial identity is personal for most multiracial individuals, what harm does legal nonrecognition cause if adequate legal remedies exist when race-based discrimination occurs?

Today, some social science literature, like the Brookings Institution study mentioned at the outset, offers a positive view of multiracial individuals, even multiracial individuals with remote African ancestry. In the states that recognize “multiracial” as a separate legal racial category, multiracial is not maintained and reinforced by subordinating legal doctrine; rather, it serves an affirming function—not a subordinating one.

Further, historic racial animus, reflected in antimiscegenation statutes, was directed toward intermarriage between monoracial people. Granted, antimiscegenation statutes might create the perception of animus directed at multiracial children because intermarriage presented the possibility of multiracial children.<sup>62</sup> However, there is no history of discrimination based on multiracial status because, until very recently, governments did not recognize multiracial people as a separate and distinct group. Hernández explains that the racial discrimination most frequently cited by multiracial

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58. See *id.* at 72; PEW RESEARCH CTR., MULTIRACIAL IN AMERICA: PROUD, DIVERSE AND GROWING IN NUMBERS 19–32 (2015), [http://assets.pewresearch.org/wp-content/uploads/sites/3/2015/06/2015-06-11\\_multiracial-in-america\\_final-updated.pdf](http://assets.pewresearch.org/wp-content/uploads/sites/3/2015/06/2015-06-11_multiracial-in-america_final-updated.pdf) [<https://perma.cc/BX5N-4AP2>].

59. “Mulatto” appeared in the census from 1870 until the 1930 census when enumerators were instructed to employ the “One-Drop” rule. NOBLES, *supra* note 1, at 52, 67–68. The terms “quadroon” and “octoroon” appeared in the 1880 and 1890 censuses, but “the purpose was to determine the extent of racial mixture among blacks and whether the race was becoming more ‘purely Negro.’” *Id.* at 55.

60. *Id.* at 58. The term “mulatto” included “quadroons, octoroons, and all persons having any perceptible trace of African blood.” *Id.*

61. Karl Eschbach et al., *Changes in Racial Identification and the Educational Attainment of American Indians, 1970–1990*, 35 DEMOGRAPHY 35, 35–36 (1998); Ann Morning, *New Faces, Old Faces: Counting the Multiracial Population Past and Present*, in NEW FACES IN A CHANGING AMERICA: MULTIRACIAL IDENTITY IN THE 21ST CENTURY, *supra* note 39, at 41, 43–44.

62. See, e.g., *Louisiana Justice Who Refused Interracial Marriage Resigns*, CNN (Nov. 3, 2009, 10:43 PM), <http://www.cnn.com/2009/US/11/03/louisiana.interracial.marriage/index.html> [<https://perma.cc/G7NB-QVF9>] (describing the Louisiana Justice of the Peace who refused to marry an interracial couple because of his belief that children might be born of the union and interracial marriages do not last).

people surveyed is being called a “mono-racial” nonwhite racial slur.<sup>63</sup> Thus, the claimed “racial” discrimination stems from multiracial individuals’ nonwhite ancestry.<sup>64</sup>

Finally, there is no culture of multiracialism—no collective group cultural practices—because multiracialism is grounded in self-identity that varies widely among multiracial people. Their situation is distinguishable from newer racialized groups like Asian Americans and Latinos. Gotanda argues that what distinguishes the racial experiences of Asian Americans and Latinos from the black-white racial paradigm is culture.<sup>65</sup> Each large group is a collection of ethnicities—they are pan-ethnic groups,<sup>66</sup> many with different languages, histories, and cultural practices. These groups are racially categorized based on their bodies—skin tone, phenotype, ancestral home—and assigned legal racial categories.<sup>67</sup> These nonwhite groups have significant histories of subordination based on their assigned race or ethnicity. In contrast, multiracial individuals see themselves as individuals, not as a group with similar histories, experiences, and cultures.

As this suggests, it is unclear from the small number of discrimination claims filed by multiracial individuals whether any ascribed subordination occurs because of their multiracial bodies as opposed to the nonwhite aspect of their raced body. Courts in racial discrimination cases involving multiracial claimants understand this point and, when making legal determinations, implicitly acknowledge the connection between ancestry, skin tone, phenotype, and racial categorization.<sup>68</sup>

#### CONCLUSION

Melissa Nobles writes: “[c]ounting by race is justified precisely because of the subjectivity of race and its political salience in American life, not because of any objective reality.”<sup>69</sup> The default racialization process is to “add on” new formal-race categories. But these new categories—Asian American, Latino, or MENA—also include distinct and additional dimensions, which are consistent with Gotanda’s four usages of race and explain why these groups are neither black nor white by law.

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63. Hernández, *supra* note 29, at 3. Hernández writes that the type of racial discrimination most frequently cited by multiracial people “includes pointed, derogatory comments about non-whiteness and blackness in particular.” *Id.*

64. See Marc P. Johnston & Kevin L. Nadal, *Multiracial Microaggressions: Exposing Monoracism in Everyday Life and Clinical Practice*, in MICROAGGRESSIONS AND MARGINALITY: MANIFESTATION, DYNAMICS AND IMPACT 123, 132–137 (Derald Wing Sue ed., 2010).

65. Neil Gotanda, *New Directions in Asian American Jurisprudence*, 17 ASIAN AM. L.J. 5, 31–33 (2010).

66. For a discussion of pan-ethnicity, see Robert S. Chang & Neil Gotanda, *The Race Question in LatCrit Theory and Asian American Jurisprudence*, 7 NEV. L.J. 1012, 1015, 1023–24 (2007).

67. The label “Asian American” only dates back to the 1960s. Gotanda, *supra* note 49, at 188. Gotanda identifies three dominant Asian American tropes: foreignness, model-minority, and terrorist. Gotanda, *supra* note 65, at 38–46.

68. Rives, *supra* note 13, at 1319–20.

69. NOBLES, *supra* note 1, at 77.

But not all proposed add-on categories warrant legal recognition. As the Supreme Court warned in *City of Richmond v. J.A. Croson Co.*,<sup>70</sup> simply placing a racial category in a law is insufficient to withstand closer scrutiny by courts faced with new categories.<sup>71</sup> If accuracy in racial identification is the *real* concern, the multiple-boxes option seems to address this issue. Without more evidence, the claim that multiracial individuals constitute a separate racial group for census (or antidiscrimination) purposes fails to satisfy the criteria identified by Gotanda and used by the government.

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70. 488 U.S. 469 (1989).

71. *See generally* Neil Gotanda, Mapping the “Muslim” Category: An Examination of Race, Identity, Religion, and the Black-White Racial Paradigm (May 15, 2017) (unpublished manuscript) (on file with author).