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## Beyond Black and White: Selected Writings by Asian Americans within the Critical Race Theory Movement Perspective.

Harvey Gee

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## PERSPECTIVE

### BEYOND BLACK AND WHITE: SELECTED WRITINGS BY ASIAN AMERICANS WITHIN THE CRITICAL RACE THEORY MOVEMENT

HARVEY GEE\*

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Where is “home”? When people ask me where I’m from, I frequently don’t know what they really want to know. Even those Asian Americans who can trace their lineage within the borders of the United States for three or four generations frequently experience the conflation of foreignness with otherness, as in the oft-expressed reaction to our presence: “you speak such good English!”<sup>1</sup>

## I. INTRODUCTION

In the United States, the latter half of the twentieth century has proven to be a time of profound demographic change.<sup>2</sup> Unfortu-

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1. Margaret (H.R.) Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 UCLA ASIAN PAC. AM. L.J. 4, 6 (1995).

2. See TERRY EASTLAND, ENDING AFFIRMATIVE ACTION: THE CASE OF COLOR-BLIND JUSTICE 149 (1996) (stating that since the 1965 Amendment to the Immigration and Nationality Act, immigration has increased and the nature of the immigrant population has changed dramatically as large numbers of Asians and Latinos have come to the United States); Bill Ong Hing, *Making and Remaking Asian Pacific America: Immigration Policy* (noting the increasing number of Asian Pacific Americans in the United States), in THE STATE OF ASIAN PACIFIC AMERICA: POLICY ISSUES TO THE YEAR 2020, at 127-28 (1993); Frank H. Wu, *Changing America: Three Arguments About Asian Americans and the Law*, 45 AM. U. L. REV. 811, 811 (1996) (describing the dramatic twentieth-century demographic shift produced by the surge in Asian and Latino immigration); Felicity Barringer, *Census Shows Profound Change in Racial Makeup of the Nation*, N.Y. TIMES, Mar. 11, 1991, at A1 (revealing that 25% of Americans claim African, American-Indian, Asian, or Hispanic ancestry); John Elson, *The Great Migration*, TIME, Sept. 22, 1993, at 28 (discussing the effects of the “tide of humanity that has washed over the American continent during the last three or four decades of the 20th century”); Edward Fiske, *Minorities a Majority in New York*, N.Y. TIMES, Mar. 22, 1991, at B2 (explaining that with a 26.8% increase in the Hispanic population, minorities became a majority for the first time in New York City during the early 1990s); William A. Henry III, *Beyond the Melting Pot*, TIME, Apr. 9, 1990, at 28 (noting that 25% of Americans describe themselves as nonwhite and predicting that this number will rise in the future); Tom Mathews et al., *America’s Changing Face*, NEWSWEEK, Sept. 10, 1990, at 46, 47 (explaining that: (1) from 1900 to 1910, 8.8 million immigrants arrived in the United States, of whom approximately 89% were European; (2) in the 1980s, 10 million immigrants arrived in the United States, of whom approximately 10% were

nately, the racial and political reform policies of the post-modern Civil Rights Movement have failed to respond fully to these dramatic social changes.<sup>3</sup> Consequently, a new generation of progressive intellectuals has evolved, attempting to transform the manner in which law, race, and racial power are understood and discussed in America.<sup>4</sup> Critical Race Theory is one manifestation of this transformation and reflects the perception that “conventional legal scholarship fails to satisfactorily address the complexities of race and the law in the United States.”<sup>5</sup>

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European; and (3) as a result of the change in immigration law in 1965, Hispanic and Asian immigrants are now “the largest contingent of new Americans”).

3. See Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 962-63 (1995) (discussing how post-modern civil rights reforms, specifically affirmative action programs, have failed to address demographic changes in the Asian and Latino communities effectively); Frank H. Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 248 (1995) (arguing that although profound demographic changes are underway, “the law has lagged behind, failing to respond to these changes”); cf. Michael Omi, *Out of the Melting Pot and into the Fire: Race Relations Policy* (arguing that despite growing complexities of racial tensions, “race relations literature continues to retain an exclusively black/white focus”), in THE STATE OF ASIAN PACIFIC AMERICA: POLICY ISSUES TO THE YEAR 2020, at 199 (1993).

4. See Richard Delgado, *Introduction to CRITICAL RACE THEORY: THE CUTTING EDGE* xiii, xiii (Richard Delgado ed., 1995) (describing Critical Race Theory as “a dynamic, eclectic and growing legal movement,” and its young writers as challenging racial orthodoxy by “shaking up the legal academy, questioning comfortable liberal premises, and leading the search for new ways of thinking about . . . race”); Robert L. Hayman, Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 HARV. C.R.-C.L. L. REV. 57, 59 (1995) (declaring that, since 1989, Critical Race Theory has emerged as an important component of postmodern jurisprudence).

5. Kevin R. Johnson, *Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 BERKELEY WOMEN'S L.J. 142, 142 (1996); see *Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xiii, xvi (Kimberlé Crenshaw et al. eds., 1995) (describing scholars' use of Critical Race Theory to show that the current structure of civil rights rhetoric is not an inevitable meaning of racial justice, but rather is the result of collective strategies and discourses formed in particular political, cultural, and institutional negotiations and conflicts); GARY MINDA, *POST MODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 171 (1995) (stating that Critical Race scholars claim that existing civil rights scholarship “fails to adequately address perceptions and consciousness of racial minorities” who experienced racial oppression and discrimination); Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACK-LETTER J. 85, 85-86 (1994) (stating that “Critical Race Theory (CRT) is a collection of critical stances against the existing legal order from a race-based point of view”). Brooks poses the question: “What would the legal landscape look like today if people of color were the decision-makers?” *Id.* at 86; cf. RICHARD W. BAUMAN, *CRITICAL LEGAL STUDIES: A GUIDE TO THE LITERATURE* 184 (1996) (reporting that Critical Race scholars try to

The Critical Race Theory Movement is comprised largely of left-wing scholars, most of whom are racial minorities situated in the nation's legal academies, who seek to challenge "the ways in which race and racial power are constructed and represented in American legal culture and society."<sup>6</sup> In large part, Critical Race Theory scholarship offers racial minorities an opportunity to add a distinct perspective to legal scholarship by revealing the viewpoint of those who have been subjected historically to social domination and subordination.<sup>7</sup> In addition, Critical Race Theory scholars question the traditional assumptions of both liberals and conservatives with respect to the goals and means of traditional civil rights reforms.<sup>8</sup>

Since its inception, where it once reflected only the voices of African Americans and whites, Critical Race Theory has grown considerably as an intellectual movement.<sup>9</sup> Significantly, during the

convey a sense of how traditional legal discourse omits the experiences of people of color who must overcome racism on a daily basis).

6. *Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii, xiii (Kimberlé Crenshaw et al. eds., 1995).

7. *See id.* (describing Critical Race Theory as a movement by liberal scholars that challenged "the ways in which race and racial power are constructed and represented in American legal culture and, more generally, in American society as a whole"); *see also* Cornel West, *Foreword* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xi, xi (Kimberlé Crenshaw et al. eds., 1995) (stating that "Critical Race Theorists have, for the first time, examined the entire edifice of contemporary legal thought and doctrine from the viewpoint of law's role in the construction and maintenance of social domination and subordination"); Stephen Shie-Wei Fan, *Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants*, 97 COLUM. L. REV. 1202, 1202 (1997) (stating that "[C]ritical [R]ace [T]heory endeavors to explore the systemic and pervasive nature of racism in society, and by scrutinizing the ways in which current rights jurisprudence fails to attend fully to the . . . racialized attitudes . . . in society at large and within the legal system itself").

8. *See Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii, xix (Kimberlé Crenshaw et al. eds., 1995) (stating that Critical Race Theory seeks to challenge the "exhausted vision of reformist civil rights scholarship"); *see also* ROY L. BROOKS ET AL., CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES 14 (1995) (contending that Critical Race Theory attacks traditionalism and reformism as conceptually flawed ideologies).

9. *See* Patricia J. Williams, *De Jure, De Facto, De Media*, NATION, June 22, 1997, at 10 (stating that Critical Race Theory "is by no means a 'black' movement," but rather it is a movement composed of "black, white, Latino, Asian and South Asian, Native American, gay, straight, libertarian, Marxist, gentile, Jewish, Buddhist, feminist, Hindu, Muslim, Republican, pleasant, uncooperative and agnostic" individuals), *available in* 1997 WL 8866705. As one commentator has noted, "Critical Race Scholars understand that differences between racial minorities are important. However, these differences have yet to be developed fully. As a result, Critical Race Scholarship tends to focus on the black-white racial paradigm, excluding Asian Americans and other racial minorities." Robert S.

mid-1990s, the Movement expanded to encompass the concerns of Asian Americans, Latinos, and other nonwhites.<sup>10</sup> Importantly, this expansion has opened up an ideological and intellectual space for Asian Americans to insert new understandings of race jurisprudence and to dispel common perceptions of Asian Americans as “model minorities” and “perpetual foreigners,” both of which have become the dominant images held by many mainstream Americans.<sup>11</sup> In fact, for too long, Asian Americans have found themselves marginalized and in racial limbo.<sup>12</sup> As Daphne Kwok, Chair of the National Council of Asian Pacific Americans, explained at a recent symposium, “We, too, are assumed to be foreigners despite our long history in the United States.”<sup>13</sup> Another commentator, also explaining the unique circumstances that Asian Americans have faced, remarked, “Like the immense spread of land and water that is their ancestral cradle, [Asian Americans] are united more by the label that others put on them than by language, religion or ethnic or national ties.”<sup>14</sup>

This Perspective explores the growing role of Asian Americans in transforming and advancing race relations in this country. In

Chang, *Towards an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1266-67 (1993).

10. See Cornel West, *Foreword* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xi, xi (Kimberlé Crenshaw et al. eds., 1995) (asserting that Critical Race Theory is a scholarly and politically committed movement in the law that addresses issues raised by Latino, Asian, and African Americans).

11. See, e.g., Joseph Dolman, *Asians Shouldn't Deny Their Success*, NEWSDAY, June 14, 1996, at A53 (considering the model minority myth as limiting Asian American's upward-mobility), available in 1996 WL 2526212; Harvey Gee, *The Other Minority: Asian Americans and Affirmative Action*, ASIANWEEK, Mar. 7, 1997, at 5 (arguing that behind the facade of Asian Americans as a successful minority group lies the fact that Asian Americans have been the victims of past and present hostility and discrimination); Emil Guillermo, *Are Asian Americans the New Jews?*, SAN DIEGO UNION-TRIB., July 8, 1996, at B7 (dispelling Asian American stereotypes and discussing the need for affirmative action programs), available in 1996 WL 2168484; Benjamin Pimental, *Affirmative Action Gets Asian American Backing*, S.F. CHRON., July 19, 1995, at A12 (indicating that “the model minority myth masks the abundant evidence of historical and continuing racial discrimination against Asian Pacific Americans”), available in 1995 WL 5291328.

12. See ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 2-5 (1996) (arguing that Asian Americans have been marginalized and are unrecognized within the black/white paradigm of race analysis in the United States).

13. *Returning Racial Divides*, LAW QUADRANGLE NOTES (U. Mich. L. Sch.), Summer 1998, at 29. The symposium was entitled “Rethinking Racial Divides: Asian Pacific Americans and the Law.” See *id.*

14. *Id.* at 28.

particular, this Perspective analyzes Asian-American contributions to Critical Race Theory and explains why Asian Americans can no longer depend on being represented by African Americans and whites in contemporary discussions about race relations and in the underlying struggle for civil rights. In this regard, this Perspective uses four influential works by leading Asian-American scholars as a starting point for defining an emerging Asian-American jurisprudence.

Part II of this Perspective begins by providing a general overview of Critical Race Theory and its burgeoning role in jurisprudence. Part III discusses selected Critical Race works that reflect the expansion of the civil rights movement to accommodate the narratives of Asian-American legal scholars. In particular, Part III focuses on the difficulties of analyzing Asian-American concerns within the traditional black/white paradigm. Finally, Part IV addresses the role and identity of Asian Americans in post-modern jurisprudence and suggests the need to replace the current black/white distinction with new paradigms for race relations.

## II. CRITICAL RACE THEORY

“The American Nation has always had a specific ethnic core. And that core has been white.”<sup>15</sup>

Critical Race Theory, in its purest form, is best understood as the antithesis to the traditional belief in “color-blindness.”<sup>16</sup> Critical Race theorists posit that the “color-blind” model is an inadequate attempt by the Supreme Court of the United States to address social racism because color-blindness actually perpetuates racism and supports the existing racial hierarchy.<sup>17</sup> According to Critical Race

15. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

16. See Harvey Gee, Comment, *Changing Landscapes: The Need for Asian Americans to Be Included in the Affirmative Action Debate*, 32 GONZ. L. REV. 621, 645 (1997) (noting Critical Race Theorists' view that Critical Race Theory is understood as the antithesis to “color-blindness”).

17. See John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2143-44 (1992) (arguing that the dominant society relies heavily on cultural racism and stereotypes in the interpretation and evaluation of subordinate groups); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 44-55 (1991) (criticizing the Supreme Court's use of traditional equal protection analysis as a standard that hides racism); Frank R. Parker, *The Damaging Consequences of the Rehnquist Court's Commit-*

theorists, a legal system that distinguishes between whites and non-whites is necessary in order to vindicate the rights of minorities who have suffered from subordination in the past due to racial classifications.<sup>18</sup> In essence, Critical Race theorists postulate that because legislative bodies have historically utilized racial classifications to discriminate against minorities<sup>19</sup> and racial classifications in the law have persisted—thus legitimizing the notion that individuals are defined by their race—members of society can no longer avoid thinking of themselves and others in racial terms.<sup>20</sup> As a result, Critical Race theorists demand that the modern-day legal system address the systemic effects that derive from this mode of “racial-thinking.”<sup>21</sup>

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*ment to Color-Blindness Versus Racial Justice*, 45 AM. U. L. REV. 763, 773 (1996) (asserting that color-blindness masks conscious or unconscious racism and concluding that the Supreme Court’s color-blind approach to jurisprudence increases divisions of society along racial lines between the educated, wealthier “haves” and the uneducated, poor, unrepresented “have-nots”); see also IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 137 (1996) (asserting that unconscious racism underlies current legal constructions of race in facially neutral laws); Terence J. Centner et al., *Environmental Justice and Toxic Releases: Establishing Evidence of Discriminatory Effect Based on Race and Not Income*, 3 WIS. ENVTL. L.J. 119, 123 (1996) (highlighting the Equal Protection Clause’s failure to provide people of color a means to “avoid disproportionate exposure to environmental risks or other environmental inequities”).

18. See Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 2-3 (1991) (stating that “[a] color-blind interpretation of the constitution legitimates, and thereby maintains, the social, economic, and political advantage that whites have over other Americans”); Harvey Gee, Comment, *Changing Landscapes: The Need for Asian Americans to Be Included in the Affirmative Action Debate*, 32 GONZ. L. REV. 621, 645-46 (1997) (describing Critical Race Theory as promulgating the notion that the “color-blind” ideal actually supports racial hierarchy).

19. See IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 125 (1996) (asserting that vindicating the rights of minorities has required maintaining a legal system that distinguishes between whites and nonwhites, even when those classifications arose from efforts to subordinate those construed as nonwhite).

20. See Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695, 701 (1996) (asserting that “[w]hite Americans do not appear to have a sense of racial identity that is not linked to ethnicity or class, unless when juxtaposing themselves against Blacks, Asian Americans, or sometimes Latinos/as”); see also ROY L. BROOKS ET AL., *CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES* 15 (1995) (acknowledging that Critical Race Theory posits that the current legal system does not recognize the damage from past racism or the significant legal differences between various races).

21. See John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160-61 (1992) (asserting that “[C]ritical [R]ace [T]heory challenges the dominant discourses on race and racism as they relate to the law”).



Critical Race theorists further assert that racial discrimination is a perpetual legal and social problem that has rendered the color-blind principle a fallacy in contemporary constitutional discourse.<sup>22</sup> Basically, because the principle operates on a silent assumption that every individual is measured against standards established by the historical white majority, it does not recognize the realities of continued social racism and prejudice.<sup>23</sup> Professor Neil Gotanda, a prominent Critical Race scholar, argues that the theory of race color-blindness, when applied to the complexity of civil society, actually materializes into a "disguised form of racial privileging."<sup>24</sup>

In addition, in the effort to examine the law's role in the construction and maintenance of the social domination and subordination of minorities,<sup>25</sup> Critical Race theorists have attacked conventional scholarly discourse that has often been used by both conservatives and liberals as a sounding board for their views rather than as a means for developing solutions to society's most

22. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine* (labeling the "Constitution is color-blind" slogan as a means-oriented approach and asserting that the use of the theory today has been separated from its origins), in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 29, 31-32 (Kimberlé Crenshaw et al. eds., 1995); see also ROY L. BROOKS ET AL., *CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES* 14 (1995) (asserting that Critical Race Theory attacks the formal equal opportunity notion as "dead on arrival," or in other words, conceptually flawed).

23. See Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 76 (1993) (arguing that "color-blindness masks conscious or unconscious racism"); John A. Powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889, 895 (1995) (criticizing the assumption by proponents of color-blindness that true equality among the races exists).

24. Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135, 1139 (1996); see Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 76 (1993) (arguing that "color-blindness masks conscious or unconscious racism"); John A. Powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889, 895 (1995) (criticizing the assumption by proponents of color-blindness that a true equality exists among the races).

25. See Charles R. Lawrence III et al., *Introduction* to MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT* 1, 6 (1993) (explaining that "Critical Race Theory expresses skepticism toward dominant legal claims of neutrality, objectivity, color blindness, and meritocracy"); John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160-61 (1992) (asserting that Critical Race Theory challenges the dominant discourse on race and racism as the theory relates to law and identifies values and norms that have been distinguished and subordinated under the law).

pressing issues.<sup>26</sup> Thus, essentially, Critical Race theorists have engaged in historical and socioeconomic analyses in order to reveal the “hidden meanings” behind legal decisions<sup>27</sup> and to uncover the internal legal culture that perpetuates the historical biases that favor whites.

Although it has emerged as the most recent and most rapidly developing jurisprudence in the postmodern era,<sup>28</sup> Critical Race Theory has been criticized for being highly theoretical,<sup>29</sup> devoid of practical value, and unobjective. In addition, the validity of Critical Race Theory is challenged and criticized for its incoherent narrative approaches to legal story telling.<sup>30</sup> Many detractors of Critical Race Theory also consider it a “conceptual ghetto filled with dangerous low-income scholarship unworthy of reading.”<sup>31</sup> Moreover, they argue that because racial minority scholars have

26. See Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 199 (1984) (describing the Critical Legal Studies Movement as “a full frontal assault on the edifice of modern jurisprudence”); see also Richard Delgado, *Introduction to CRITICAL RACE THEORY: THE CUTTING EDGE* xiii, xiv (Richard Delgado ed., 1995) (describing Critical Race Theory’s “challenge to racial oppression and the status quo”).

27. See Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 622 (1989) (relating that scholars of the Critical Legal Studies Movement are “committed to the task of uncovering the hidden assumptions and values of the dominant legal discourse”).

28. See Eleanor Marie Brown, Note, *The Tower of Babel: Bridging the Divide Between Critical Race Theory and “Mainstream” Civil Rights Scholarship*, 105 YALE L.J. 513, 518 (1995) (offering Critical Race Theory as an alternative approach to inadequacies inherent in a constricted dominant civil rights discourse).

29. See Harvey Gee, Comment, *Changing Landscapes: The Need for Asian Americans to Be Included in the Affirmative Action Debate*, 32 GONZ. L. REV. 621, 654-55 (1997) (noting that Critical Race Theorists do not focus on practical solutions and that “Critical Race Theory is often faulted for its tendency not to offer alternative solutions to problems where it is applied”); cf. *Introduction to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xiii, xiv-xv (Richard Delgado ed., 1995) (describing the approach of Critical Race Theory as using humor, storytelling, and satire as vehicles).

30. See Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CAL. L. REV. 853, 869-70 (1995) (critiquing Critical Race Theory’s characterization of “merit” as being anti-Semitic and anti-Asian); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 807 (1993) (criticizing Critical Race Theory as part of a new form of legal scholarship); see also GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END* 220 (1995) (discussing criticisms of Critical Race Theory that focus on “the merit[s] of legal scholarship” based upon acceptable academic standards).

31. Patricia J. Williams, *De Jure, De Facto, De Media*, NATION, June 22, 1997, at 10, available in 1997 WL 8866705.

experienced racial oppression, this experience influences their views and is reflected in their writing.<sup>32</sup> In fact, two frequent critics, Daniel Farber and Suzanne Sherry, contend that “[t]he point of [Critical Race Theory] stories remains obscure in part because of the paucity of explicit reasoning connecting them to a clear conclusion . . . [T]he stor[ies] merely [lay] on the table, offering an aesthetic experience like a coffee table ornament, but [they] fail to move the discussion forward.”<sup>33</sup>

Interestingly, such general critiques of Critical Race Theory have broadened the debate about the legitimacy of Asian-American legal scholarship. Specifically, some Asian Americans, skeptical of the value and legitimacy of Critical Race Theory, have raised their voices and questioned the principles and goals underlying Asian-American legal literature.<sup>34</sup>

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32. See Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1805 (1989) (intimating that Critical Race Theorists write based on their biased views as racial minorities).

33. DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 86 (1997).

34. See Jim Chen, *Unloving*, 80 IOWA L. REV. 145, 158-59 (1994) (arguing that Asian-American legal scholarship by “trendy ‘people of color’” is a form of “racial fundamentalism” whose value remains questionable); Jim Chen, *Untenured but Unrepentant*, 81 IOWA L. REV. 1609, 1609-10 (1996) (responding to Asian-American legal scholars who are critical of Chen’s critique of Asian-American legal scholarship and Critical Race Theory); see also Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467, 1479 (1996) (discussing the present backlash lead by Professor Jim Chen against Reconstruction scholarship); Margaret Chon, *Chon on Chen on Chang*, 81 IOWA L. REV. 1535, 1536 (1996) (exploring the quarrel between Robert Chang and Jim Chen and examining their views on Reconstruction scholarship); Garrett Epps, *What’s Loving Got to Do with It?*, 81 IOWA L. REV. 1489, 1489 (1996) (characterizing Professor Jim Chen’s attack on Professor Chang as “a kind of academic mugging, intending to wound if not disable or destroy its object”); Neil Gotanda, *Chen the Chosen: Reflections on Unloving*, 81 IOWA L. REV. 1585, 1585 (1996) (asserting that Jim Chen’s *Unloving* employs multiple methodologies containing mixed messages, representing “a juxtaposition of stories, legal analyses, and moments of deep personal anger”); Natsu Saito Jenga, *Unconscious: The “Just Say No” Response to Racism*, 81 IOWA L. REV. 1503, 1503 (1996) (discussing Jim Chen’s response to Robert Chang’s proposal for an Asian-American scholarship); Peter Kwan, *Unconvincing*, 81 IOWA L. REV. 1557, 1557 (1996) (finding Professor Jim Chen’s notions and criticisms of Asian-American scholarship to be erroneous and troublesome); Alfred C. Yen, *Unhelpful*, 81 IOWA L. REV. 1573, 1573 (1996) (stating that because “Professor Jim Chen apparently cares deeply about racial harmony in America and has strong ideas about how to achieve the utopia he imagines[, [i]t’s a pity, then, that his article *Unloving* contributes so little to honest discourse about that subject” ). But see Jim Chen, *Untenured but Unrepentant*, 81 IOWA L. REV. 1609, 1612 (1996) (arguing that critics of his article, *Unloving*, have erred in their analysis of his work).

Yet, despite the growing controversy over the validity of Critical Race Theory as a legitimate school of thought, many scholar-activists are nevertheless applying contemporary aspects of Critical Race Theory in their analysis of the treatment of Asian Americans in the United States in order to further their effort of making important contributions to our understanding of the complexities of an increasingly multicultural and multiracial society.<sup>35</sup> As Professor Kevin Johnson has observed, "In analyzing race relations, we must take care to appreciate the complexities, the historical circumstances, and the dynamic nature of racial oppression."<sup>36</sup> Referring to Asian Americans as an example, Professor Natsu Taylor Saito echoes this sentiment:

The history of Asian Americans and the law is becoming well documented, if not widely known. [Through] a growing body of Asian American legal scholarship as well as by civil rights and community organizations . . . the pervasive presumption of foreignness attaching to Asian Americans has been identified, and ties between nativism and racism have been noted.<sup>37</sup>

### III. HISTORY OF DISCRIMINATION AGAINST ASIAN AMERICANS: NATIVISM AND THE RACIALIZATION OF ASIAN AMERICANS AS FOREIGN

"There is a race so different from our own that we do not permit those belonging to it to become citizens of the U.S. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race."<sup>38</sup>

The racialization of Asian Americans as foreign-born outsiders has been a pervasive undercurrent in Asian-American history, as reflected in immigration,<sup>39</sup> business,<sup>40</sup> and education,<sup>41</sup> as well as

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35. See Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos As "Foreigners," and Social Change*, 76 OR. L. REV. 347, 368 (1997) (acknowledging the incorporation of Critical Race Theory concepts in some scholars' analyses despite the controversy surrounding the theory).

36. *Id.* at 367-68.

37. Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 265 (1997).

38. *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).

39. See Robert S. Chang, *Towards an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 1 ASIAN L.J. 1, 49-50 (1994) (describing the legacy of discrimination against Asian Americans that resulted from discriminatory laws and policies); Esther Ngan-Ling Chow, *The Feminist Movement: Where*

on social and political levels.<sup>42</sup> Unfortunately, this discrimination began as soon as the first Chinese immigrants set foot on American

*Are All the Asian American Women?* (discussing early nineteenth-century legislation that excluded Chinese immigrants from being lawful members of society), in *FROM DIFFERENT SHORES: PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA* 184, 187 (Ronald Takaki ed., 2d ed. 1994); RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA* 200-01 (1993) (describing the hostile political climate toward Chinese immigrants). Historically, the Chinese have been singled out for separate, racist treatment in United States immigration law. See *id.* (describing legal efforts to discourage Asian immigration). In fact, immigration law developments in the 1800s, particularly the last third of the century, were dominated by racial devices employed to control the Chinese laborers and deny them formal rights. See *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (upholding the Chinese Exclusion Act); see also Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 1 *ASIAN L.J.* 1, 55-56 (1994) (discussing the Chinese Exclusion Acts). These formal, legal devices included treaties, statutes, and cases. See Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 *UCLA L. REV.* 1, 12-13 (1998) (discussing Supreme Court cases and Asian Exclusion Laws that prohibited Asians from immigrating to the United States); see also Charles J. McClain & Laurene Wu McClain, *The Chinese Contribution to the Development of American Law* (discussing anti-Chinese laws that restricted immigration and rights of Chinese immigrants), reprinted in *CHINESE IMMIGRANTS AND AMERICAN LAW* 135, 148-53 (Charles McClain ed., 1994).

40. Business prospects for Asians were also limited because of discrimination. See *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (invalidating racially motivated laundry ordinances); see also Charles J. McClain, Jr., *The Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 *CAL. L. REV.* 529, 529 (1984) (detailing accusations of "unfair labor" made against the Chinese by labor leaders, newspapers, and politicians).

41. See, e.g., *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (holding that the school district's failure to provide English language instructions was violative of the Civil Rights Act of 1964); *Gong Lum v. Rice*, 275 U.S. 78, 85-87 (1927) (interpreting the separate but equal doctrine against a native-born Chinese United States citizen who was attending a separate public school).

42. See Gabriel Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigrants*, 46 *UCLA L. REV.* 1, 23 (1998) (discussing racially motivated exclusion of Asian immigrants during the nineteenth century); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: "A Magic Mirror" into the Heart of Darkness*, 73 *IND. L.J.* 1111, 1120 (1998) (describing horrendous treatment of Chinese immigrants by federal, state, and local governments during the 1800s); Su Sun Bai, Comment, *Affirmative Pursuit of Political Equality for Asian Pacific Americans*, 639 *U. PA. L. REV.* 731, 749 (1991) (reporting that Asian Americans encountered formal discrimination "since the beginning of Asian immigration in the mid-1800s"); see also Charles J. McClain & Laurene Wu McClain, *The Chinese Contribution to the Development of American Law* (describing anti-Chinese ordinances and taxation laws that existed during the early days of Chinese immigration), reprinted in *CHINESE IMMIGRANTS AND AMERICAN LAW* 135, 137-44 (Charles McClain ed., 1994).

shores.<sup>43</sup> During the nineteenth century, Chinese immigrants were lured to California during the Gold Rush to work in the mines and provide cheap labor for the construction of the transcontinental railroad.<sup>44</sup> Whereas many white Americans were initially curious about the “Chinaman,” this curiosity quickly faded and resentment against the Chinese grew rapidly.<sup>45</sup> In this respect, Chinese immigrants soon fell victim to the ill-will of whites, despite having gained a reputation of being exceedingly industrious and hardworking.<sup>46</sup> Although no consensus exists as to any one particular explanation of the prejudice that whites have held against the Chinese, many scholars have suggested that harassment against the Chinese stemmed from their “foreign culture” and different appearance.<sup>47</sup>

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43. See U.S. COMMISSION ON CIVIL RIGHTS, RECENT ACTIVITIES AGAINST CITIZENS AND RESIDENTS OF ASIAN DESCENT 7 (1986) (explaining that discriminatory laws were enacted against immigrants as soon as they arrived in the United States); Daina Chiu, Comment, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1060 (1994) (asserting that Americans have historically discriminated against Asian Americans by precluding Asians from participating in American society and by enacting immigration laws).

44. See Frank H. Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 232 (1995) (reporting that Chinese immigrants constituted 90% of the workforce that constructed the transcontinental railroad); see also Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529, 548 (1984) (examining Chinese Americans' struggle for racial justice).

45. See RONALD TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA 200-01 (1993) (describing the hostile political climate toward Chinese immigrants); see also Esther Ngan-Ling Chow, *The Feminist Movement: Where Are All the Asian American Women?* (discussing early nineteenth-century legislation that excluded Chinese immigrants from being lawful members of society), in FROM DIFFERENT SHORES: PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA 184, 187 (Ronald Takaki ed., 2d ed. 1994).

46. See Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529, 535 (1984) (describing Chinese as hard working but thrifty with their incomes); see also RONALD TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA 202-03 (1993) (discussing the Chinese presence in the South following the Civil War and the general outlook of plantation owners in regards to the use of Chinese labor). The Chinese were viewed as models of diligence and were seen as models for African Americans. See *id.* at 202. Often working in the most dangerous conditions and for extremely low wages, the Chinese laborers were sometimes considered as “‘educators’ of former slaves.” *Id.*

47. See, e.g., Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1076-77 (1994) (explaining that harsh reactions to Chinese cultural practices were common); Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER,

Unfortunately, Chinese Americans were not the only Asian Americans to be subjected to a history of discrimination. Japanese immigrants and their American-born children also endured great hardship and animosity, even before the bombing of Pearl Harbor.<sup>48</sup> Much of this anti-Japanese animus grew out of the perception that the Japanese were an economic threat.<sup>49</sup> Of course, this hostility was fueled by the bombing of Pearl Harbor and the subsequent internment of Japanese Americans, an action that was held to be constitutional by the Supreme Court of the United States in *Korematsu v. United States*.<sup>50</sup>

Much to America's chagrin, the Japanese-American internment and the nineteenth century anti-Chinese legislation are quite illustrative of how the ethnic backgrounds of immigrants can inflame public opinion and legal policy as well as how race and immigration status are often combined to enhance the unpopularity of immigrants. In fact, this latter interrelationship between race and immigration has even been categorized into what is now referred to as "nativism," a term that has been defined as an "intense opposition to an internal minority" because of the minority's foreign connections.<sup>51</sup> However, nativism does not emphasize the race of immigrants; instead, it focuses on the "foreign" and "un-American" characteristics of "internal minorities."<sup>52</sup> In this regard, the term nativism has often been linked to the history of Asian-American

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RACE & JUST. 177, 184 (1997) (reflecting on characterizations of Chinese culture that "effectively combined the racialized narrative of a harsh, heathen and unassimilable Chinese culture with a gendered dimension that reflected images of sexual slavery"); Harvey Gee, Comment, *Changing Landscapes: The Need for Asian Americans to Be Included in the Affirmative Action Debate*, 32 GONZ. L. REV. 621, 629 & n.42 (1997) (outlining possible reasons for anti-Chinese behavior).

48. See Harvey Gee, Comment, *Changing Landscapes: The Need for Asian Americans to Be Included in the Affirmative Action Debate*, 32 GONZ. L. REV. 621, 631 (1997) (discussing the history of anti-Japanese animus in the United States).

49. See *id.* (explaining that Japanese immigrants were viewed as an economic threat by Americans of European lineage).

50. See *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (upholding the internment of Japanese Americans during World War II as constitutional); see also Harvey Gee, Comment, *Changing Landscapes: The Need for Asian Americans to Be Included in the Affirmative Action Debate*, 32 GONZ. L. REV. 621, 631 (1997) (describing the impact of Pearl Harbor on the treatment of Japanese Americans).

51. Linda S. Bosniack, "Nativism" the Concept, in *IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSES IN THE UNITED STATES* 279, 281 (Juan F. Perea ed., 1997).

52. *Id.*

discrimination. As Professor Frank Wu has astutely observed, “[A]sian Americans have in turn been shaped by the law. . . . They have been defined by it as individuals and as communities.”<sup>53</sup>

#### IV. ASIAN-AMERICAN CONTRIBUTIONS TO THE CRITICAL RACE MOVEMENT

“Today, I can still recall my shock when I first boarded a city bus and found that whites rode in the front and ‘coloreds’ rode in the rear. Just where exactly did an Asian fit in?

I too have a skin color, but I am not black.”<sup>54</sup>

As a racial minority group that has been historically discriminated against, Asian Americans have sought to challenge, through legal scholarship and Critical Race Theory, the traditional legal discourse that has often glossed over Asian-American issues.<sup>55</sup> To stake out an Asian-American narrative space, these Critical Race scholars have begun to detail the distinctive experiences of racial discrimination faced by Asian Americans. In particular, their work has attempted to point out the inability of the American legal system to recognize that discrimination differs among racial and ethnic groups.<sup>56</sup> Accordingly, Asian Americans today have been

53. Frank H. Wu, *From Black to White and Back Again*, 3 *ASIAN L.J.* 185, 206 (1996).

54. Chang-Lin Tien, *Affirming Affirmative Action* (reflecting, in an autobiographical anecdote, upon his confusion when arriving in the segregated South during the 1950s), in *LEAP ASIAN PACIFIC AMERICAN PUBLIC POLICY INSTITUTE, PERSPECTIVES ON AFFIRMATIVE ACTION . . . AND ITS IMPACT ON ASIAN PACIFIC AMERICANS* 19, 19 (1996).

55. See Robert S. Chang, *Passion and the Asian American Legal Scholar*, 3 *ASIAN L.J.* 105, 108-09 (1996) (noting an increase in Critical Race work by Asian-American legal scholars); Harvey Gee, Comment, *Changing Landscapes: The Need for Asian Americans to Be Included in the Affirmative Action Debate*, 32 *GONZ. L. REV.* 621, 653-54 (1997) (discussing the increase in Asian-American legal scholarship); cf. GABRIEL CHIN ET AL., *BEYOND SELF-INTEREST: ASIAN PACIFIC AMERICANS TOWARD A COMMUNITY OF JUSTICE* 1 (1996) (stating that many Americans know little about Asian Americans because of the segregation of Asian Americans from mainstream society).

56. See, e.g., Robert L. Hayman, Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 *HARV. C.R.-C.L. L. REV.* 57, 74 (1995) (contending that reliance on traditional race notions has precipitated a disparity between theory and reality); Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory & Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 *LA RAZA L.J.* 1, 4, n.14 (1996) (implying that traditional race discourse does not address the race or power status quo in America adequately); Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 *STAN. L. & POL’Y REV.* 35, 36 (1996) (positing that the related nature of civil rights and immigration are more reflective of contemporary political reality than traditional thought); cf. Pat K. Chew, *Asian Americans: The “Reticent” Minority and Their Paradoxes*, 36 *WM. & MARY L. REV.* 1 (1994) (addressing the



struggling to regain their history, to tell their stories, and to articulate their claim to American society through legal writing.<sup>57</sup> As Professor Robert Chang asserts, "the time has come to announce . . . an Asian American [movement]. This [movement] is marked by the increasing presence of Asian Americans in the legal academy who are beginning to raise their voices to 'speak new words and remake old legal doctrines.'"<sup>58</sup>

Four recent works illustrate the unique emergence of Asian Americans in race jurisprudence and provide the necessary analytical framework for understanding the social and legal construction

prevalent misconception that Asian Americans are not discriminated against in America Society); Margaret (H.R.) Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 UCLA ASIAN PAC. AM. L.J. 4, 4-12 (1995) (discussing a lack of accurate identity definition for Asian Americans and the perceived corresponding deprivation of effective, authentic representation); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 57-63 (1994) (introducing the problems of using "cultural defenses" that may obscure complex issues of gender oppression and other valid individual experiences); Frank H. Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 225 (1995) (advocating the departure from the traditional view of race that has focused primarily on a distinction between black and white). Describing his personal experiences, Professor Frank Wu stated:

I am grateful [to be a spokesperson] because for too long the Oriental was the Chinese laundryman [,] . . . Japanese gardener, Madame Butterfly[,] and the dragon lady—a series of inscrutable images of people who were silent. They played in "yellow face," carrying credibility when a Caucasian translated the experience, for East and West were not good fellows well met. If they had a voice, they were not heard; if they spoke, it was with an accent to announce an ancient aphorism.

Frank H. Wu, *Providing Some Perspective: On Being a Professional Asian American*, ASIANWEEK, Feb. 21, 1997, at 9, available in 1997 WL 11561869.

57. See Robert S. Chang, *The End of Innocence or Politics After the Fall of the Essential Subject*, 45 AM. U. L. REV. 687, 689 (1996) (commenting that "[t]his new Asian American consciousness [is] accompanied by a struggle to regain history, a struggle to tell [their] own stories, and [a struggle] to articulate [their] claim to rights in American society"); Margaret (H.R.) Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 UCLA ASIAN PAC. AM. L.J. 4, 11 (1995) (arguing that "Asian Americans experience tremendous difficulty in articulating . . . their 'authentic' native voices"); see also GARY MINDA, *POST MODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 197 (1995) (stating that Asian-American scholars offer a unique narrative account of exclusion and marginalization); WILLIAM WEI, *THE ASIAN AMERICAN MOVEMENT* 54 (1993) (discussing the community of scholars and artists that, through a more accurate understanding of their history, hope to find a voice embodying a more meaningful and complex identity).

58. Robert S. Chang, *Towards an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1245-46 (1993) (citing Jerome M. Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 40).

of the Asian-American identity in the United States. To begin, Lisa Lowe's *Immigrant Acts: On Asian American Cultural Politics* ("*Immigrant Acts*")<sup>59</sup> discusses the early perceptions of Asian Americans as intrinsically foreign and unassimilable, the perceived threats of Asian Americans to American institutions and society, and how these perceptions of "foreignness" transformed into resentment toward Asian Americans.<sup>60</sup> Richard Delgado's anthology, *Critical Race Theory: The Cutting Edge* ("*Cutting Edge*"),<sup>61</sup> continues this legal discourse by addressing the stereotypes of Asian Americans as "model minorities" and "perpetual foreigners," the inability of the black/white paradigm to accommodate those who are "neither black nor white," and the need to expand the traditional bipolar racial outlook to include all who strive towards a community of racial justice.<sup>62</sup> Likewise, *Critical Race Theory: The Key Writings That Formed the Movement* ("*Key Writings*"),<sup>63</sup> edited by Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, explores the historical and contemporary dynamics of race, racial classifications, and the myth of "color-blindness."<sup>64</sup> Finally, Mari Matsuda's *Where Is Your Body? And Other Essays on Race, Gender, and the Law* ("*Where Is Your Body?*")<sup>65</sup> analyzes contemporary issues unique to Asian-American women and critiques Asian-American feminism in light of the

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59. LISA LOWE, *IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS* (1996).

60. See LISA LOWE, *IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS* 5 (1996) (discussing Asian immigration and attempting to communicate the role of this immigration in the racialization of the United States); cf. Robert S. Chang, *Towards an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1265 (1993) (arguing that traditional civil rights work presents coverage and theoretical problems for Asian Americans). The coverage problem arises when civil rights advocates neglect to consider Asian Americans when battling discrimination. See *id.* The theoretical problem occurs when traditional civil rights work does not reflect the reality of all Asian Americans and the cultures from which they come. See *id.* at 1266.

61. *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado ed., 1995).

62. See generally *id.* (compiling various essays that demonstrate the "innerworkings" of Critical Race Theory).

63. *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al. eds., 1995).

64. See generally *id.* (compiling essays that formed the foundation of the Critical Race Theory Movement).

65. MARI J. MATSUDA, *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* (1996).

intersectionality between race and gender.<sup>66</sup> These four writings discussed in this Perspective are significant because they represent the future of race relations in this country, and they provide an excellent introduction to the role of Asian Americans in contemporary social, political, and legal debate.

A. *Constructing Asian-American Identities During the Exclusion Era*

The racialized identification of Asian Americans as foreign and “un-American” emerged through a process that involved the social construction of an Asian “race.”<sup>67</sup> These expressions of racial nativism against Asians reverberated in the form of laws barring Asians from meaningful participation in American society, and they are outlined fully by Professor Lisa Lowe in *Immigrant Acts*.<sup>68</sup> Her work focuses on the role assumed by Asian immigrant workers in the development of the American and global economies.<sup>69</sup> Leading the reader through an ambitious and incisive analysis of Asian immigration to the United States, this book balances aspects of cultural studies and law. Specifically, rather than exploring Asian-American history through traditional racialized categories, *Immigrant Acts* embarks on a new direction by challenging the linked concepts of fixed borders and fixed citizenship.<sup>70</sup> *Immigrant Acts* also importantly demonstrates that an understanding of the history and actions of Asian immigration is vital in reconstructing the history of immigration administration and law.<sup>71</sup>

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66. *See generally id.* (discussing issues of race and gender as they pertain to legal scholarship).

67. *Cf.* Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity*, 4 *ASIAN L.J.* 71, 80-81 (1997) (asserting that Asian Americans have, through the racialization process, been classified as foreign).

68. LISA LOWE, *IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS* (1996). Professor Lowe teaches comparative literature at the University of California, San Diego.

69. *See id.* at 4-5 (discussing Asian immigrant workers in America).

70. *See id.* at 9 (asserting that “Asian immigrants and Asian Americans have not only been ‘subject to’ immigration exclusion and restriction but have also been ‘subjects of’ the immigration process and are agents of political change, cultural expression, and social transformation”).

71. *See id.* at ix (claiming that Asian immigration contributes to the understanding of race as a struggle for cultural, economic, and political membership in the United States).

At the outset, Lowe's thesis is clear—the historical economic exploitation of Asians continues through the modern era.<sup>72</sup> In this regard, Lowe begins by discussing the early views of Asian immigration as a source of cheap and easily controlled labor.<sup>73</sup> In doing so, *Immigrant Acts* closely examines the racialization of Asians and Asian Americans in the United States from an economic perspective.<sup>74</sup> Lowe posits that probing the reasons behind Asian immigration to the United States is fundamental to understanding the racialized economic and political foundations of the United States as a nation.<sup>75</sup> Thus, three primary points can be drawn from Lowe's book: (1) Asians have been economically and politically excluded from society; (2) an American society dominated by white hegemony uses racial stereotyping to craft and define the Asian identity within the United States; and (3) a racial hierarchy has emerged among whites, blacks, and Asians.

As to the first point, Lowe asserts that during the nineteenth and twentieth centuries the predominantly white American society defined the Asian immigrant in all aspects—legally, economically, and culturally.<sup>76</sup> As created by whites, these definitions have cast Asian immigrants as persons considered to be exotic, barbaric, and alien.<sup>77</sup> Lowe explains further that “Asian laborers immigrating to the United States from the nineteenth century onward [were characterized by whites] as the ‘yellow peril’ threatening to displace white European immigrants.”<sup>78</sup> In demonstrating this conflict, Lowe provides examples of the exclusionist rhetoric that existed

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72. *See id.* (declaring that “[u]nderstanding Asian immigration to the United States is fundamental to understanding the racialized foundations of both the emergence of the United States as a nation and the development of American capitalism”).

73. *See id.* at 7 (stating that the regulation of immigration has been a “crucial locus through which U.S. interests have recruited and regulated both labor and capital from Asia”).

74. *See id.* at 4 (examining “racializations of Asians as physically and intellectually different from ‘whites’”).

75. *See id.* at 14 (arguing that the history of the disenfranchisement of Asians reflects the manner through which economic demands have been mediated by a legal apparatus that racializes Asian immigrants and Asian Americans).

76. *See id.* at 4 (explaining that “definitions have cast Asian immigrants both as persons and populations to be integrated into the national political sphere and as the contradictory, confusing, unintelligible elements to be marginalized and returned to their alien origins”).

77. *See id.*

78. *Id.*

during this time. This rhetoric ranged from nativist agitation to arguments that Asian social organizations threatened the integrity of American political institutions.<sup>79</sup> According to Lowe, these “oriental racializations” portrayed Asians as physically and intellectually different from whites, especially during periods of economic downturn.<sup>80</sup> Thus, when coupled with nativist anti-Asian backlash, these perceptions promoted the promulgation of “immigration exclusion acts and laws against naturalization of Asians in 1882, 1924, and 1934.”<sup>81</sup>

In addition to describing the economic and political exclusion of Asian Americans, Lowe discusses how Americans created and re-created the Asian-American identity to fit the present economic and political conditions of America.<sup>82</sup> For example, Lowe argues that “[w]hile the official narratives of immigrant inclusion propose to assimilate immigrants as citizens, the conditions of Asian immigrant women in the United States directly contradict any promises of incorporation, equal opportunity, and equal representation.”<sup>83</sup> Lowe refers to this treatment of Asian immigrants as the “contradiction,”<sup>84</sup> because although “Asian states have become prominent as external rivals in overseas imperial[ist] war[s] and in the global economy, . . . Asian immigrants are still a [vital] racialized labor force within the domestic national economy.”<sup>85</sup> Moreover, according to Lowe:

Immigration exclusion acts and naturalization laws have thus been not only means of regulating the terms of the citizen and the nation-state but also an intersection of the legal and political terms with an orientalist discourse that defined Asians as an “other” [in cultural

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79. *See id.* at 5 (asserting that “[e]xclusionist rhetoric ranged from nativist agitation . . . to declarations about racial the unassimilability of the Japanese, to arguments that Asian social organization threatened the integrity of American political institutions”).

80. *See id.* at 4-5 (explaining that Asians were portrayed as physically and intellectually different than whites).

81. *Id.* at 5.

82. *See id.* at 71 (asserting that “the essentializing of Asian American identity . . . reproduces opposition that subsume other nondominant groups in the same way that Asian and other groups are marginalized by the dominate culture”).

83. *Id.* at 162.

84. *See id.* at 8 (stating that “‘contradictions’ of Asian immigration . . . have placed Asians ‘within’ the U.S. nation-state, its workplaces, and its markets, yet linguistically, culturally, and racially marked Asians as ‘foreign’ and ‘outside’ the national polity”).

85. *Id.* at 5.

and racial terms] in times when the United States was militarily and economically at war with Asia.<sup>86</sup>

Perhaps one of the most important points drawn from *Immigrant Acts* is one that Lowe makes implicitly—that a racial hierarchy has emerged among whites, blacks, and Asians. As well informed as Lowe is in her analysis of Asian immigration, she nevertheless omits an expansive discussion of the roles that Chinese immigrants and African Americans have played in maintaining white supremacy.<sup>87</sup> Notably, Lowe fails to discuss the origins of the racial differences and the dynamics between Chinese immigrants and African Americans, thereby undermining a proper understanding of the contemporary tensions existing between these two ethnic groups. A more satisfying treatment of the racial positioning of Asian Americans in relationship to African Americans during Reconstruction would have encompassed, for example, a discussion of how Chinese migrant workers and African Americans were “tied historically to the global network of labor migration as slaves and coolies.”<sup>88</sup>

Despite this latter point, perhaps the thrust of *Immigrant Acts* is its trenchant analysis of the historical and contemporary treatment of Asian Americans as the “foreigner within” the United States.<sup>89</sup> Thus, through discussions of the continued exploitation of Asians and other racialized immigrants throughout and beyond the period of “enfranchisement” after 1965, *Immigrant Acts* serves to emphasize that a critical interrogation of both the concept of citizenship and the state’s role as the guarantor of citizens’ rights has been,

86. *Id.*

87. See GARY Y. OKIHIRO, MARGINS AND MAINSTREAMS: ASIANS IN AMERICAN HISTORY AND CULTURE 43-45 (1994) (discussing how Asian Americans and African Americans were utilized to maintain the political and economic supremacy of white persons).

88. *Id.* at 45; see Alfred Chueh-Chin Yen, Speech at the First Annual People of Color Legal Scholarship Conference (Mar. 29, 1996) (asserting that Asian Americans were exalted as good laborers when they arrived because they were seen as a solution to African-American slave labor), in Panel, *The Diversity Among Us*, 19 W. NEW ENG. L. REV. 19, 40 (1997); Frank H. Wu, *At Lowell High, Who Is Equal to Whom?*, S.F. CHRON., Sept. 21, 1994, at A23 (stating that during Reconstruction, former white slave traders and owners “started recruiting Chinese laborers from overseas to set them against freed black slaves”), available in 1994 WL 4052021.

89. See LISA LOWE, IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS 155 (1996) (relating the past and current travails of Asian Americans working in the United States).

and remains, necessary.<sup>90</sup> All in all, *Immigrant Acts* is significant for its scope of analysis and its conclusion that the attribution of foreignness and the portrayal of Asians as outsiders are social characterizations that reinforce a racial hierarchy and an existing social and economic dynamic within the United States.

### B. *Contemporary Discrimination Against Asian Americans*

A review of the history of discriminatory treatment against Asian Americans leaves few doubts that Asian Americans have been discriminated against because of their perceived "foreignness."<sup>91</sup> As Professor Lowe fervently explains, the inequalities of the past pervade the present, with past discrimination evolving into informal societal discrimination against Asian Americans.<sup>92</sup> From a cultural standpoint, Asian Americans occupy a unique position in the post-civil rights era. As neither black nor white, "the life stories of Asian Americans are very different from those of other minority groups."<sup>93</sup> Moreover, the new Asian-American narrative demonstrates that discussion about race should not focus solely on the experiences and conditions of African Americans.

Notably, the recent inclusion of Asian Americans within the constantly evolving Critical Race Theory Movement has allowed Asian Americans to move from the margins to the mainstream in race jurisprudence. The progress of Critical Race Theory is symbolized by the publication of two inaugural collections of accumu-

90. See *id.* at 8 (asserting that Asian immigration has placed Asians "within" the United States nation-state, but "outside" the national polity).

91. See Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verite and the Pedagogy of Vincent Chin*, 1 MICH. J. RACE & L. 347, 385 (1996) (asserting that discriminatory immigration and naturalization laws against Asian-American immigrants and their descendants created an image of Asian Americans as "foreigners").

92. See Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 897-98 (1993) (discussing the effects of discrimination and stratification upon Asian Americans); cf. Robert S. Chang, *Reverse Racism!: Affirmative Action, the Family and the Dream That Is America*, 23 HASTINGS CONST. L.Q. 1115, 1126-27 (1996) (discussing the discrimination that has prevented Asian Americans from gaining admission into universities).

93. Pat K. Chew, *Asian Americans in the Legal Academy: An Empirical and Narrative Profile*, 3 ASIAN L.J. 8, 19 (1996).

lated Critical Race scholarship, *Key Writings* and *Cutting Edge*.<sup>94</sup> As a collection of various Critical Race essays, these books provide the cardinal framework for understanding the construction of race in American law, culture, and society.<sup>95</sup> These collected works share a common purpose of addressing race relations in the United States by examining the manner in which American laws have failed to accommodate the voices of racial minorities.

### 1. The Japanese Internment and “Color-Blindness”

In the *Key Writings* collection, Mari Matsuda asserts, in *Looking to the Bottom: Critical Legal Studies and Reparations*, that unlike traditional legal scholars, “those who have experienced discrimination speak with a special voice to which we should listen.”<sup>96</sup> In Matsuda’s opinion, a perspective from those who have seen and felt the shortcomings of liberal civil rights reforms assists race scholars in interpreting the law and defining racial justice.<sup>97</sup> Matsuda demonstrates the feasibility of her theories by using the World War II internment reparations as an example of “law derived from the bottom.”<sup>98</sup> Essentially, Matsuda argues that a critical race assessment of reparations recognizes racial injustice.<sup>99</sup>

Similarly, Neil Gotanda, in *A Critique of “Our Constitution Is Color-Blind,”* which is also contained in *Key Writings*, challenges the notions of model color-blindness and rejects laws that

94. CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995).

95. See generally CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995) (surveying Critical Race authors who address the construction of race in American law, culture, and society); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al., eds., 1995) (compiling various works that have contributed to the development of Critical Race Theory). A comprehensive review of every Critical Race writing in both *The Key Writings* and *The Cutting Edge* is beyond the scope of this Perspective.

96. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 63, 63 (Kimberlé Crenshaw et al. eds., 1995).

97. See *id.* (opining that “[l]ooking to the bottom . . . can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice”).

98. See *id.* at 67-68 (using the example of the Japanese-American internment during World War II to discuss the value of learning from personal experiences, history, and culture).

99. See *id.* at 76 (considering reparations as a “formal acknowledgment of historical wrong”).



subordinate communities of color.<sup>100</sup> Gotanda argues that the courts should utilize a revised approach to race by recognizing the “systemic nature of subordination in American society.”<sup>101</sup> According to Gotanda, the notion of constitutional color-blindness is “inadequate to deal with today’s racially stratified, culturally diverse, and economically divided nation.”<sup>102</sup> Gotanda concludes that a literalist “color-blind” interpretation of the United States Constitution—coupled with the strict-scrutiny analysis employed by the Supreme Court of the United States in race jurisprudence—actually perpetuates racism and hides the reality of racial subordination, and therefore, should be abandoned.<sup>103</sup>

The works by Matsuda and Gotanda contained in *Key Writings* also reveal how the color-blind philosophy is weakened significantly when it is applied to the Asian-American experience. To begin with, Matsuda demonstrates that looking at the historical and contemporary experiences of Asian Americans in this country proves that the ability to view Asian Americans as a racial group on a personal level requires a highly developed sense of color-consciousness on a theoretical level.<sup>104</sup> As Matsuda points out, the World War II Japanese American internment cases, such as *Korematsu v. United States*,<sup>105</sup> illustrate how the placement of national

100. See Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind”* (arguing that the Supreme Court’s color-blind constitutionalism fosters white radical domination and that “a color-blind interpretation of the Constitution legitimates and thereby maintains the social, economic, and political advantages that whites hold over other Americans”), in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 257, 257 (Kimberlé Crenshaw et al. eds., 1995).

101. *Id.* at 272.

102. *Id.* at 274.

103. See *id.* at 272 (illustrating the necessity for abandoning the color-blind constitutional analysis that is apparently preferred by the Supreme Court).

104. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations* (suggesting that those “who have experienced discrimination [speak] with a special voice to which we should listen”), in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 63, 63 (Kimberlé Crenshaw et al. eds., 1995); see also Ian G. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 *HARV. C.R.-C.L. L. REV.* 1, 27-28 (1994) (claiming that race is not biologically determined, rather, it must be viewed as a social construction). López further asserts that “[h]uman interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization.” *Id.* Within this racial formulation, race is not a determinant of a residue of some other social phenomenon, but rather stands on its own as an amalgamation of competing social forces.

105. 323 U.S. 214 (1944).

security interests above civil rights can subordinate any person, including an American citizen, on the basis of race.<sup>106</sup>

Further, as derived from the essays by Matsuda and Gotanda, the Japanese-American internment and its racial dynamics demonstrate how the social and cultural constructions of race can materialize into the legal construction of race. Specifically, this experience reveals how Japanese Americans were excluded from equal protection under the law simply because they were viewed under a citizen/foreigner paradigm, instead of a black/white paradigm. Thus, in a sense, one can argue that the Supreme Court upheld the constitutionality of the internment by characterizing every person of Japanese descent, regardless of their citizenship, as “foreign.” This “foreignness” component, however, has only been attributed to Japanese Americans, not Italian Americans or other European Americans.<sup>107</sup> Yet, with the decision in *Korematsu*, one can interpret the Court as condoning the subversion of the constitutional rights of Japanese Americans, thereby isolating these citizens from equal participation in a democratic society and revealing the fallacy of a “color-blind” Constitution.

## 2. Contemporary Nativism, the Model Minority Myth, and Interethnic Racial Conflict

In *Towards an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, Professor Robert Chang writes that the legal needs and problems in Asian-American communities have received insufficient attention.<sup>108</sup> In another article, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed “Los*

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106. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations* (discussing World War II Japanese-American internment cases), in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 63, 67 (Kimberlé Crenshaw et al. eds., 1995).

107. See Neil Gotanda, “Other Non-Whites” in *American Legal History: A Review of Justice at War*, 85 *COLUM. L. REV.* 1186, 1190-91 (1985) (discussing the notion of foreignness associated with Japanese Americans, but noting that “[t]he linkage between [o]ther non-Whites and foreignness has eroded considerably in Supreme Court decisions since the end of World War II”).

108. See Robert S. Chang, *Towards an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space* (addressing issues facing Asian Americans in America, which are often neglected by traditional legal discourse), in *CRITICAL RACE THEORY: THE CUTTING EDGE* 322, 324 (Richard Delgado ed., 1995).

*Angeles*," Lisa Ikemoto offers an insightful analysis of the racial tension between new Asian immigrants and African Americans, as well as the role of white supremacy in contemporary racial politics.<sup>109</sup> Although both articles are included in the *Cutting Edge* and share similar themes, they diverge in their focus and approach. Chang provides an overview of many issues that face Asian Americans by illustrating that they do not comport with a traditional understanding of race.<sup>110</sup> Ikemoto, conversely, focuses solely on the inter-ethnic conflicts between new immigrants and the African-American community.<sup>111</sup>

a. Contemporary Nativism and the Model Minority Myth

Chang's article specifically serves to inform readers about important contemporary race issues facing Asian Americans.<sup>112</sup> He suggests that many people are ignorant of the violence and discrimination that have plagued Asian Americans since their arrival in the United States.<sup>113</sup> Further, he believes that even those who are familiar with the history of discrimination against Asian

109. See Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles"* (exploring the media's portrayal of the racial conflict and tension that erupted in Los Angeles after the verdict was announced in the 1992 Rodney King trial), in *CRITICAL RACE THEORY: THE CUTTING EDGE* 305, 305 (Richard Delgado ed., 1995).

110. See Robert S. Chang, *Towards an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space* (asserting that the model minority myth, which portrays Asian Americans as hardworking, intelligent, and successful, enables the dominant culture "to justify ignoring the unique discrimination faced by Asian Americans"), in *CRITICAL RACE THEORY: THE CUTTING EDGE* 322, 327 (Richard Delgado ed., 1995).

111. See Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles"* (discussing the emergence of an interethnic conflict between African Americans and Korean merchants), in *CRITICAL RACE THEORY: THE CUTTING EDGE* 305, 305 (Richard Delgado ed., 1995).

112. See Robert S. Chang, *Towards an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space* (explaining how both traditional civil rights work and present-day critical race scholarship fail to address unique Asian American issues), in *CRITICAL RACE THEORY: THE CUTTING EDGE* 322, 329-30 (Richard Delgado ed., 1995).

113. See *id.* at 327 (arguing that society does not believe Asian Americans when they complain of discrimination); see also Daina C. Chui, Comment, *The Cultural Defense: Beyond Exclusion, Assimilation and Guilty Liberalism*, 82 *CAL L. REV.* 1053, 1063 (1994) (asserting that American society has historically discriminated against and marginalized Asian Americans).

Americans fail to link this history with current discriminatory acts.<sup>114</sup>

In Chang's view, Asian Americans, as with most racial groups, have endured great levels of nativism.<sup>115</sup> According to Chang, nativism is the message of "America first," or more precisely, "white Americans first."<sup>116</sup> Chang further explains that nativism is traditional racism coupled with feelings of xenophobia.<sup>117</sup> He uses a three-prong approach in his discussion of the "nativistic racism" that plagues Asian Americans and results in racially motivated hostilities against Asians: (1) a struggling economy; (2) the expansion of Asian communities; and (3) a growing nativist movement.<sup>118</sup> Moreover, in discussing this nativistic treatment, Chang poignantly recounts the history of racial intolerance toward Asian Americans.<sup>119</sup> Chang also demonstrates the fluidity of "racialized" stereotypes of Asian Americans by stressing that these stereotypes have been, and still are, commonly employed for political purposes.<sup>120</sup>

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114. See Robert S. Chang, *Towards an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space* (arguing that even individuals who are aware of Asian American history "often fail to make the connection between the history and the problems that continue to plague Asian Americans"), in *CRITICAL RACE THEORY: THE CUTTING EDGE* 322, 323 (Richard Delgado ed., 1995).

115. See *id.* at 325 (noting rising levels of discrimination against Asian Americans spurred by nativism).

116. See *id.* at 325-26 (asserting that nativistic racism lurks behind race stereotypes of the Japanese "taking over" and related stereotypes of the Japanese economic domination).

117. See *id.*

118. See *id.* at 324 (arguing that anti-Asian sentiment stems from economic troubles and nativism).

119. See *id.* at 329-34 (tracing the history of intolerance directed toward Asian immigrants and Asian Americans). According to Chang, the dominant white American society has, since the eighteenth century, discriminated against Asian Americans in numerous areas, including immigration, business, and education. See *id.* at 325-26; see also John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 *ASIAN L.J.* 55, 61-63 (1996) (describing anti-Chinese enactments during the nineteenth century at both the state and federal levels that were in large part due to the intense racial nativism against Chinese immigrants).

120. See Robert S. Chang, *Towards an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space* (discussing the historical and contemporary "scapegoating" of Asian Americans during periods of economic downturn), in *CRITICAL RACE THEORY: THE CUTTING EDGE* 322, 324-25 (Richard Delgado ed., 1995); see also David Boaz, *Yellow Peril Reinfests America*, *WALL ST. J.*, Apr. 7, 1989, at A14 (describing anti-Asian policies in the United States that affect direct foreign investment policies); cf. Thomas Galvin & Ying Chan, *Shocking Asian Slur—Senator's Crack Jolts*

To illustrate further the nativistic racism and stereotyping that plagues Asian Americans, Chang delineates the use of the "model minority myth" as a disingenuous stereotype created to perpetuate the dominance of white Americans.<sup>121</sup> According to various commentators, this myth depicts Asian Americans as one monolithic ethnic group that achieves economic success and social acceptance through education and hard work without governmental assistance or racial preferences.<sup>122</sup> However, Professor Frank Wu suggests that the reality is that:

Asian Americans have not achieved economic success except in a superficial sense. Comparing equally educated individuals, whites earn more money than Asian Americans. Qualifications count less than race, in a pattern of regular discrimination, not so-called 'reverse' discrimination. The discrimination which Asian Americans in fact face can be reinforced by the exaggerations of the myth.<sup>123</sup>

Correspondingly, Chang contends that by combining Asian-American success with traditional conservative American values, "[t]he

*Hearing*, DAILY NEWS (New York), July 11, 1997, at 2 (reporting that Asian-American groups claim that the hearings to investigate campaign abuses are actually about "Asia Bashing"), available in LEXIS, News Library, Majpap File. For example, Republican Senator Sam Bowmack stunned the audience at a hearing "investigating campaign abuses . . . with an ethnic slur likening Democratic money man John Huang to a Chinese launderer." *Id.* The Senator asked, "[N]o raise money, no get bonus?" *Id.*

121. See Robert S. Chang, *Towards an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space* (asserting that the model minority myth harms racial minorities and poor whites), in CRITICAL RACE THEORY: THE CUTTING EDGE 322, 326-29 (Richard Delgado ed., 1995).

122. See Pat. K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 24 (1994) (arguing that society's perception that Asian Americans do not experience discrimination is fallacious); Frank H. Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 243-45 (1995) (exploring the historical and modern stereotypes of Asian Americans); Richard Halstead, *Charges of Racism Hurlled in Dispute Between Unions*, S.F. BUS. J., Mar. 17, 1986, at 1 (reporting that Asian-American independent contractors complain of unions discriminating against them and that Asian Americans do not need economic assistance), available in 1986 WL 2309446; Kenneth Lee, *Angry Yellow Men: Exploiting Asian Discontent: Conservatism and Asian Americans*, NEW REPUBLIC, Sept. 9, 1996, at 11 (explaining that despite stereotypes of success, Asian Americans need and support affirmative action), available in 1996 WL 9233560; Chancellor Chang-Lin Tien, *A View from Berkeley*, N.Y. TIMES, Mar. 31, 1996, at 4A (reporting on complaints by Asian Americans of the model minority myth).

123. Frank Wu, *Changing America: Three Arguments About Asian Americans and the Law*, 45 AM. U. L. REV. 811, 814 (1996); see Pat K. Chew, *Asian Americans: The "Reticent Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 24 (1994) (discussing the paradox that "Asian Americans Are the Model Minority, but They Are Not").

model minority myth plays a key role in establishing a racial hierarchy” that denies the reality of Asian-American oppression, “while simultaneously legitimizing the oppression of other racial minorities and poor whites.”<sup>124</sup>

In essence, Chang rejects the racial stereotyping of Asian Americans by dismissing the model minority myth.<sup>125</sup> He contends instead that the myth ignores both the history of discrimination and the contemporary problems facing Asian Americans.<sup>126</sup> Chang asserts that, as a result, this myth renders the oppression and discrimination of Asian Americans invisible.<sup>127</sup> In fact, although some Asian Americans embrace the myth as a compliment,<sup>128</sup> thereby eliciting Chang’s disdain, Chang rebukes these self-congratulatory Asian Americans, stating, “To the extent that Asian Americans accept the model minority myth, we are complicitous in the oppression of other racial minorities and poor whites.”<sup>129</sup>

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124. Robert S. Chang, *Towards an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 322, 327-29 (Richard Delgado ed., 1995); see Pat K. Chew, *Asian Americans: The “Reticent” Minority and Their Paradoxes*, 36 *WM. & MARY L. REV.* 1, 46-48 (1994) (discussing the stereotype that Asian Americans have somehow achieved what other minority groups have failed to accomplish); Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verite and the Pedagogy of Vincent Chin*, 1 *MICH. J. RACE & L.* 347, 394-95 (1996) (stating that “while Asian Americans are exalted in the mainstream media and American mindset as formidable profiles of work ethic success, the deprecation of African Americans, Native Americans, Latina/o Americans, and poor Whites has been magnified”); *Success Story of One Minority Group in U.S.*, *U.S. NEWS & WORLD REP.*, Dec. 26, 1966, at 73 (describing America’s 300,000 Chinese Americans as “a model of self-respect and achievement” because they had managed to overcome hardship and discrimination).

125. See Robert S. Chang, *Towards an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space* (arguing that to accept such a myth “is to participate in the oppression of Asian Americans”), in *CRITICAL RACE THEORY: THE CUTTING EDGE* 322, 329 (Richard Delgado ed., 1995).

126. See *id.* at 328-29 (explaining that “the model minority myth diverts much-needed attention from the problems of many segments of the Asian American community” including “not get[ting] the same return for their educational investment as . . . their white counterparts”).

127. See *id.* at 326 (pointing to the dominant culture’s ignorance of Asian-American needs).

128. See *id.* at 327 (recognizing the “substantial following” of the model minority myth “both inside and outside the Asian American community”).

129. *Id.* at 329.

## b. Interpreting the Master Narrative

Looking at racial hierarchy as well, Lisa Ikemoto employs the term "Master Narrative" in her article entitled *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles"* to describe the white supremacy perspective and its "conflict-creating power" over minorities.<sup>130</sup> As Ikemoto explains, the tension between African-American and Asian-American communities has been exasperated by the model minority myth and the stereotype of Asian Americans as representing fierce economic competition.<sup>131</sup> To make this point, Ikemoto utilizes the exacerbation of social constructions by the media.<sup>132</sup>

As Ikemoto points out, pervasive negative images of Korean immigrants and African Americans influenced the manner in which the violence erupted in Los Angeles and the means by which the media portrayed the riots.<sup>133</sup> Prior to the riots, as Ikemoto reveals, the media gave the racial and economic tensions that existed between the two communities only limited attention.<sup>134</sup> However, after the violence erupted, the Master Narrative of white supremacy filtered stories of interethnic conflict.<sup>135</sup> As Ikemoto notes, most of

130. See Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles"* (asserting that the Master Narrative will be used to describe white supremacy's conflict-constructing power, which perpetuates the existing hierarchy), in *CRITICAL RACE THEORY: THE CUTTING EDGE* 305, 306-07 (Richard Delgado ed., 1995).

131. See *id.* at 311 (discussing the conflict between African Americans and Korean Americans); see also Neil Gotanda, *Multiculturalism and Racial Stratification* (discussing the racial hierarchy between the stereotype of African Americans and the Korean model minority stereotype), in *MAPPING MULTICULTURALISM* 240 (Avery F. Gordon & Christopher Newfield eds., 1996). Gotanda notes that "[i]mplicit is the idea that 'minorities' and 'model' racial minorities are subordinated to an 'invisible majority.' That invisible majority [represents] the White majority and its position of White racial privilege." *Id.*

132. See Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles"* (indicating that some stories of the riots were filtered out by the major media), in *CRITICAL RACE THEORY: THE CUTTING EDGE* 305, 311 (Richard Delgado ed., 1995).

133. See *id.* at 309-10 (describing the stories of the conflict filtered out by the media that represented and reinforced the stereotypes of Korean immigrants and African Americans).

134. See *id.* at 310 (describing the media coverage that featured news stories about "the much-photographed Latasha Harlins and Soon Ja Du, gangmember looters, and armed Korean storeowners").

135. See *id.*

the media coverage actually stereotyped African Americans as slothful or belligerent, while at the same time encouraging Korean immigrants to view African Americans as a threat to upward mobility.<sup>136</sup> Interestingly, the media also encouraged African Americans to view Korean immigrants as usurping that which was reserved for them.<sup>137</sup>

Ikemoto also discusses the racialization of Asian Americans in the United States in terms of the “racial positioning” of Korean and African Americans within a racial hierarchy created by whites.<sup>138</sup> According to Ikemoto, within these socially constructed categories, racial minorities are ranked in a race-based caste system; in other words, as a racial minority group, Asian Americans are considered to be an “in between” group situated between whites at the top and African Americans at the bottom.<sup>139</sup> Ikemoto asserts that the “[m]edia-selected images and words both represent and reinforce th[is] constructed conflict” between the two communities of color.<sup>140</sup> For example, when the riots erupted, some residents blamed Korean merchants for the riots whereas others blamed the African Americans for the racist activity.<sup>141</sup> Ikemoto argues that this blame should be placed instead on society’s systematic practice of “white-over-colored supremacy” that

136. *See id.* at 310 (explaining how skewed media images of the riots have become part of the identities defining African and Korean Americans so that “apparently race-neutral categories—criminals and property-owning crime victims” are now associated with African Americans and Korean Americans, respectively); *see also* William R. Tamayo, *When the “Coloreds” Are Neither Black nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 *ASIAN L.J.* 1, 12-13 (1995) (describing the “Black v. immigrant” conduct following the Rodney King verdict and stating that many immigrants reacted with hostility toward the African-American community).

137. *See* Frank H. Wu, *Affirmative Action Choices* (stating that “Asian Americans are encouraged to view African Americans, and programs focused on them, as threats to their own upward mobility, whereas African Americans are led to see Asian Americans, many but not all of whom are immigrants, as another group that has usurped what was meant for them”), in *LEAP ASIAN PACIFIC AMERICAN PUBLIC POLICY INSTITUTE, PERSPECTIVES ON AFFIRMATIVE ACTION . . . AND ITS IMPACT ON ASIAN PACIFIC AMERICANS* 33, 34 (1995).

138. *See* Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed “Los Angeles”* (asserting that the racial hierarchy of conflict created by “white supremacy” racializes Korean-American and African-American identities), in *CRITICAL RACE THEORY: THE CUTTING EDGE* 305, 305 (Richard Delgado ed., 1995).

139. *See id.* at 310 (describing how Korean Americans are racialized as merchants and how African Americans are racialized as criminals suffering from poverty).

140. *Id.* at 309.

141. *See id.* at 305.



pitted the two outsider groups against each other.<sup>142</sup> Ikemoto professes that “despite the absence of obvious whiteness in a conflict described as intergroup, culturally embedded white supremacy (racism) provides the operative dynamic.”<sup>143</sup>

In a succinct manner, Ikemoto additionally discusses the common explanations for the Los Angeles riots that circulated during the aftermath of the uprising.<sup>144</sup> These explanations concerned the competition between Korean Americans as the “out-group” and African Americans as the “in-group” for a piece of an “economic pie” already considered too small.<sup>145</sup> Specifically, she explains how each group relied on the racial stereotypes of the other,<sup>146</sup> which consequently promoted the realization of a zero-sum gain wherein one community could succeed only upon the other’s failing.<sup>147</sup> Consequently, under the Master Narrative, African Americans, who took a nativist position, viewed Korean merchants as immi-

142. *See id.*

143. *Id.*

144. *See id.* at 312 (asserting that the symbolized conflict was only between Korean and African Americans, and “to the extent that the apparent Korean Americans/African Americans conflict contributed to the conclusion that a multicultural/multiracial society is doomed to conflict, it displaces white supremacy as the central race issue”).

145. Ikemoto uses the analogy of a breadline to address the complaints by African Americans about Korean Americans. *See id.* at 307-08. Instead of going to the back of the line, African Americans believed that Korean Americans cut in line in front of them. *See id.* at 308-09.

146. *Cf. id.* at 309 (describing how African Americans relied on anti-Asian stereotypes in forming their opinions of Korean Americans).

147. *See id.* at 309 (relating that racial positioning of African Americans and Korean Americans was not about marketplace competition, but a plot of “relative subordination, subordinated domination, [and] subordinated storytelling”); *see also* Jami Floyd, *The Other Box: Intersectionality and the O.J. Simpson Trial*, 6 HASTINGS WOMEN’S L.J. 241, 269-70 (1995) (arguing that the difference between “blacks and Asian Americans emerge[s] as a tale of relative non-whiteness” where racial identity is constructed oppositionally and also noting that “conflict becomes inevitable and coalition becomes impossible”); Reginald Leamon Robinson, “*The Other Against Itself: Deconstructing the Violent Discourse Between Korean and African Americans*,” 67 S. CAL. REV. 15, 64 (1993) (asserting that legal narratives of African Americans and Asian Americans reinforce the racial injustice that they suffer, and as a result, fueling the violent discourse simmering between the two groups); Frank Wu, *First Couple of Affirmative Action: Two Georgetown Professors Put a Human Face on the Policy Debate*, ASIANWEEK, June 5, 1997, at 12 (quoting from an interview with Critical Race theorist Charles Lawrence that “[t]he data shows African Americans don’t lose jobs to Asian immigrants, but that’s the story we are told in the way white supremacy works”), available in 1997 WL 11562048.

grants later in time, that is, as foreigners and less American.<sup>148</sup> Ikemoto argues that this nativist position created the misperception “that Korean Americans do not understand the plight of Blacks in America, and that if they did [understand the African-American struggle], they would wait their turn.”<sup>149</sup> Ikemoto also indicates that African Americans presented this entitlement claim as further validation of the nativistic position “that Korean American merchants were not giving back to the Black community.”<sup>150</sup> Unfortunately, such misguided beliefs only serve to confuse the shared interests of racial justice sought by both minority communities.

According to Ikemoto, Korean Americans responded to these African-American claims “by casting themselves as actors in the ‘American Dream’—Koreans working hard to support their families, survive as immigrants, and [eventually] succeed as entrepreneurs.”<sup>151</sup> In effect, Korean Americans positioned themselves as “whites,” by subscribing to the “dream produced and distributed by the dominant society.”<sup>152</sup> Thus, in Ikemoto’s view, by perceiving themselves as more “white” than “black,” Korean Americans perceived African Americans as threats against their sacred livelihoods.<sup>153</sup>

In conclusion, Ikemoto argues that the subordinated must compete for space within the Master Narrative while at the same time striving to claim identities outside the Master Narrative.<sup>154</sup> She believes, however, that once “outsider groups” understand how to identify “constructions” made by the Master Narrative, they will be better able to “defin[e] the difference as a basis for coalition and

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148. See Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed “Los Angeles”* (discussing African American attitudes toward Korean Americans), in *CRITICAL RACE THEORY: THE CUTTING EDGE* 305, 309 (Richard Delgado ed., 1995).

149. *Id.* at 308.

150. *Id.* African Americans also charged Korean merchants with failing to hire them, rudeness, and exploitative pricing. See *id.*

151. *Id.*

152. *Id.* at 309.

153. See *id.* (discussing racial positioning between Korean Americans and African Americans).

154. See *id.* at 312-13 (arguing that society must compete within the Master Narrative while working to understand it in order to disassemble it).

fairness”<sup>155</sup> rather than as a wedge that will divide all communities of color.<sup>156</sup>

### C. *The Intersectionality of Race, Culture, and Gender*

Although the growth of legal literature regarding discrimination against Asian Americans has increased significantly, less attention has been focused on the experiences of Asian women in America.<sup>157</sup> Like most other minority women, Asian women face a combination of burdens that remain largely unrecognized and unnoticed.<sup>158</sup> Essentially, Asian women fall within three forms of legally prohibited discrimination: race, gender, and national origin.<sup>159</sup> However, this fact is often overlooked due to existing race and gender dialogues that marginalize Asian-American women.<sup>160</sup> As a result, issues relating to Asian-American women are

155. *Id.* at 313.

156. *See id.* (asserting that understanding the manner in which the Master Narrative works helps society understand itself better).

157. *See* Karin Wang, *Battered Asian American Women: Community Responses from the Battered Women's Movement and the Asian American Community*, 3 *ASIAN L.J.* 151, 158-59 (1996) (noting the difficulties in situating Asian Americans within the white-centered feminist movement).

158. *See* Althea Yip, *Two Movements in One: The Re-Emergence of the Asian American*, *ASIANWEEK*, Apr. 3, 1997, at 11 (describing Asian women as an invisible minority within an invisible minority), available in 1997 WL 11561932. Yip argues that the women's movement, as a whole, focuses on white middle-class women's issues, whereas the Asian-American movement focuses on men; as a result, the Asian-American movement has designated Asian women as unimportant. *See id.*

159. *See* Esther Ngan-Ling Chow, *The Feminist Movement: Where Are All the Asian American Women?* (asserting that, whereas white women experience sexism, Asian-American women suffer from both sexism and racism), in *FROM DIFFERENT SHORES: PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA* 188 (Ronald Takaki ed., 2d ed. 1994); Virginia W. Wei, Note, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin*, 37 *B.C. L. REV.* 771, 773 (1996) (explaining how “Asian women face an intersection of three forms of legally prohibited discrimination: race, gender and national origin”).

160. *See* Mary Elizabeth Powell, Comment, *The Claims of Women of Color Under Title VII: The Interaction of Race and Gender*, 26 *GOLDEN GATE U. L. REV.* 413, 415 (1996) (discussing “how a single characteristic construction of Title VII has distorted and marginalized the claims of women of color”); Virginia W. Wei, Note, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender and National Origin*, 37 *B.C. L. REV.* 771, 771 (1996) (describing discrimination based on national origin and race that is unique to Asian women and the inability of traditional civil rights laws to address this discrimination adequately).

often glossed over by both white feminists, who claim to speak for all women, and Asian-American legal scholars, who claim to speak for all Asian Americans.<sup>161</sup>

In *Where Is Your Body?*,<sup>162</sup> Mari Matsuda compiles a compelling collection of essays that has a positive purpose. Generally, *Where Is Your Body?* argues that discrimination against women of color cannot be categorized as solely race-based or gender-based.<sup>163</sup> In this regard, Matsuda argues that the history of oppressed groups *must* be considered when creating new principles of law.<sup>164</sup> Furthermore, Matsuda, writing as a *sansei* (second-generation Japanese American) feminist, discusses the need for Asian Americans to break free from the oppression of white dominance by denouncing privilege and ending all forms of subordination.<sup>165</sup>

161. See Karin Wang, *Battered Asian American Women: Community Responses from the Battered Women's Movement and the Asian American Community*, 3 *ASIAN L.J.* 151, 182-83 (1996) (describing how issues relating to Asian-American women are often "overlooked or even ignored"). According to Wang, "The white-centeredness of the anti-domestic violence movement focuses on the white woman as the essential battered woman while the male-centeredness of the Asian American civil rights movement establishes the experiences of the Asian American man as the essential Asian American experience." *Id.*; see GARY MINDA, *POST-MODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 147-48 (1995) (reporting that Kimberlé Crenshaw claims that women of color are "overlooked" and sometimes "excluded" by white feminists who claim to speak for all women); see also Esther Ngan-Ling Chow, *The Feminist Movement: Where Are All the Asian American Women?* (asserting that the American feminist movement has been predominantly composed of white, middle-class women to the exclusion of African Americans, Latinos, and Asian-American women), in *FROM DIFFERENT SHORES: PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA* 184 (Ronald Takaki ed., 2d ed. 1994).

162. MARI J. MATSUDA, *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* (1996).

163. See MARI J. MATSUDA, *Asian Images* (indicating that specific experiences and histories are relevant to jurisprudential inquiry and are necessary to form our definition of justice), in *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* 161, 164-69 (1996).

164. See MARI J. MATSUDA, *When the First Quail Calls: Multiple Consciousness a Jurisprudential Method* (reiterating the assertion that timing is a key element of jurisprudential inquiry and that society should look to history as a guide), in *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* 3, 11 (1996); cf. Maria Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 *GOLDEN GATE U. L. REV.* 817, 817-18 (1993) (discussing the indivisibility of racism and sexism in workplace harassment cases involving women of color).

165. See MARI J. MATSUDA, *Introduction to WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* xi (1996) (speaking from a position of a *sansei* feminist committed to ending all forms of subordination).

To begin, Matsuda is concerned with the Asian-American identity as a social construction shaped and formed through mainstream myths and stereotypes.<sup>166</sup> According to Matsuda, the media is one of the primary dispensers of stereotypes that is attributed to the subordination of Asian Americans.<sup>167</sup> Not only does Matsuda review the pattern of using the "positive" stereotypes of the model minority, but she also discusses and provides examples of the negative, often dehumanizing, stereotypes of Asians in film.<sup>168</sup> According to Matsuda, typical negative stereotypes include depicting Asians as the inscrutable sinister evil agent or as being docile and subservient.<sup>169</sup> Matsuda's concern that these static images deny the fluidity and complexity of actual experiences is depicted in her response to the images created by Hollywood and perpetuated by mainstream society:

We may have to reject positive stereotypes in order to reject negative ones. The image of Asians as cooperative math geniuses may help us get jobs. It may advantage Asians over other minorities in the eyes of the dominant culture. It is evident in the adoption preferences of some white couples who say they do not want a nonwhite baby unless it is an Asian girl. And when the girl grows up, she may benefit

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166. See MARI J. MATSUDA, *Asian Images* (discussing the model minority myth and other inaccurate, and sometimes insulting, stereotypes of Asian Americans), in *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* 161, 162-63 (1996).

167. See *id.* (discussing stereotypes depicted in the media); see also Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film* (examining how movies depict minorities negatively), in *CRITICAL RACE THEORY: THE CUTTING EDGE* 56, 57-58 (Richard Delgado ed., 1995); Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 *CORNELL L. REV.* 1258, 1270-73 (1992) (describing the negative stereotypes of Asian Americans and other minorities as depicted in media and popular culture throughout American history); Charles R. Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 *STAN. L. REV.* 819, 830-31 (1995) (describing Asian American stereotyping in films which influence anti-Asian sentiment in mainstream society). In war movies, soldiers—whether Chinese, Japanese, Korean, or Vietnamese, and regardless of which side they represent—demonstrate a disregard for life by attacking in waves or committing suicide. See WILLIAM WEI, *THE ASIAN AMERICAN MOVEMENT* 48 (1993). Asians are often portrayed as evil Fu Manchu types, bumbling Chinese detectives who speak with heavy accents, or martial artists who are prone to death and destruction. See *id.*

168. See MARI J. MATSUDA, *Asian Images* (citing additional examples of degrading stereotypes of Asians in film), in *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* 161, 163 (1996).

169. See *id.* (offering examples of Asian stereotypes in film, such as that of the subservient individual).

from a stereotype that says she is appropriate to report the evening news, especially if she is paired with a silver-haired white man. What is going on here?<sup>170</sup>

In *Where Is Your Body?*, Matsuda also analyzes the societal attitudes that permeate popular culture and affect the treatment of Asian Americans.<sup>171</sup> By describing, through a series of personal anecdotes, the bigotry that Asian Americans currently endure, Matsuda proves that racism and bigotry still exist today. For example, Matsuda describes her first year at Harvard Law School, during which she and a friend went to the food service manager to complain about the paper wrapper used to serve egg rolls.<sup>172</sup> According to Matsuda, “[t]he wrappers had a caricature of coolie, with a wide, buck-toothed grin and two slanting lines for eyes, hunched over in a subservient posture and wearing an oversized, cone-shaped hat.”<sup>173</sup> Moreover, Matsuda recalls the countless times she sat and watched movies that contained racist imagery or epithets gratuitously thrown in without any connection to the plot.<sup>174</sup> According to Matsuda, these are all vernacular images of Asians that constitute hate speech directed at Asian Americans.<sup>175</sup> In this sense, Matsuda concludes that the “list of epithets, jokes about slant-eyes, connotations of sex and filth, coolie caricatures and put-downs” circulating in American popular culture represent “a genre on its own.”<sup>176</sup> In response to this genre, Matsuda urges that those who use racist images be held accountable for the damaging effects that the genre has on Asian Americans.<sup>177</sup>

Finally, in *Where Is Your Body?*, Matsuda demonstrates the near-impossibility for Asian Americans to be neutral in race relations. According to Matsuda, as Asian Americans attempt to de-

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170. *Id.* at 168.

171. *See id.* at 168-69 (discussing societal attitudes, based on inaccurate stereotypes that affect the manner in which Asian women are treated in employment positions and in job interviews).

172. *See id.* at 162-63.

173. *Id.*

174. *See id.* at 163 (recalling her experiences sitting in dark movie theaters and having to be subjected to dehumanizing stereotypes of Asians in films).

175. *See id.* at 162 (describing vernacular images of Asians that constitute hate speech).

176. *Id.*

177. *See id.* at 167 (calling for the accountability of those who use hate speech to degrade Asian Americans).

fine their place in American society, they are becoming the “racial bourgeoisie” situated between black and white.<sup>178</sup> In a chapter entitled, “We Will Not Be Used,” Matsuda rhetorically asks, “If white, as it has been historically, is the top of the racial hierarchy in America, and black, historically, is the bottom, will yellow assume the place of the racial middle?”<sup>179</sup>

As this perception becomes a reality for Asian Americans, the role of Asian Americans as the “middle” in a racial hierarchy—negotiating disputes between African Americans and whites—is a critical one. Asian Americans can reinforce white American supremacy by believing falsely that they can either be just like whites by attaining cultural assimilation, thus maintaining the status quo, or they can align themselves with African Americans and Latinos who are also seeking racial justice.<sup>180</sup> With this alternative in mind, Matsuda urges Asian Americans to reach beyond their individual self-interests and seek civil rights reforms by supporting

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178. See MARI J. MATSUDA, *We Will Not Be Used: Are Asian-Americans the Racial Bourgeoisie?* (describing the danger of Asian Americans becoming racial bourgeois), in *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* 149, 154 (1996).

179. *Id.* at 154; see also Jami Floyd, *The Other Box: Intersectionality and the O.J. Simpson Trial*, 6 HASTINGS WOMEN'S L.J. 241, 269 (1995) (asserting that “Asian Americans are presented as the middleman minority and are used by the [white] establishment as proof that, yes, some colored people can make it”); Natsu Saito Jenga, *Finding Our Voices, Teaching Our Truth: Reflections on Legal Pedagogy and Asian American Identity*, 3 ASIAN PAC. AM. L.J. 81, 83 (1995) (stating that social stratification in mainstream society “is dominated not only by racial hierarchy, but [also] by a bipolar black/white structure,” and that “Asian Americans are often placed in the ‘middle’ of this structure, sort of yellow buffer zone between black and white”); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 826 (1997) (suggesting that noticeably absent from traditional civil rights litigation strategy and legal discourse is a critical inquiry on the connection between law and racial hierarchy, including Asian Americans’ purported status as a “‘middle minority’ [buffer] in the continuing subordination of African Americans”).

180. See MARI J. MATSUDA, *We Will Not Be Used: Are Asian-Americans the Racial Bourgeoisie?*, in *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* 149, 150 (1996); see also Frank H. Wu, *From Black to White and Back Again*, 3 ASIAN L.J. 185, 204-05 (1996) (discussing how Asian Americans can “assert that they are not black in order to be accepted as white,” as a way of cooperating with, and sustaining, white supremacy); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 894 (1997) (discussing how Asian Americans and whites are characterized “as victims of racial preference for African Americans and Latinos”).

affirmative action and opposing efforts to restrict immigration to the United States.<sup>181</sup>

#### V. CHANGING AMERICA: THE EMERGENCE OF NEW PARADIGMS FOR RACE RELATIONS

“‘Are you black or are you white?’ For Asian Americans the obvious answer would seem to be ‘neither.’”<sup>182</sup>

As a group, these selected writings represent a tour de force of Critical Race Theory work by Asian Americans. These articles and essays uncover the inherent difficulties in any racial analysis of Asian Americans by demonstrating that the concept of race is both a social and ideological construction. Treated individually, each piece opens a new set of inquiries for future research and analysis. Together, these contributions to Critical Race Theory serve as the basis for a new cultural synthesis, giving definition and depth to the Asian-American identity. The works by these Asian-American writers demonstrate that color-blindness is an inadequate social and legal policy, and that by debating race relations only in black/white terms, we as a society fail to address important issues concerning other racial groups and women in a constructive manner.

Moreover, these works illustrate that the inclusion of Asian Americans is crucial to any meaningful exploration of the contemporary relationship between race and the law. As the United States approaches the close of the twentieth century, Asian Americans face the immense challenge of confronting existing institutions of power and domination in their attempt to redefine the Asian-American experience. As Professor Chris Iijima explains, “The failure to centralize the overarching political context and nature of identity construction can lead and has led to an incoherence in critiques of race definition and race relations.”<sup>183</sup>

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181. See MARI J. MATSUDA, *We Will Not Be Used: Are Asian-Americans the Racial Bourgeoisie?* (arguing that Asian Americans should take activist positions on issues such as immigration and affirmative action), in *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW* 149, 153 (1996).

182. ANGELO N. ANCHETA, *RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE* 2 (1996).

183. Chris K. Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 *COLUM. HUM. RTS. L. REV.* 47, 67 (1997).



Recognizing the dominant black/white paradigm in the law, Asian Americans historically have been forced to fit within race relations discourse by analogizing themselves to either whites or blacks. Specifically, the insertion of Asian Americans in race analysis reveals the incoherent positioning of racial groups with respect to one another in a black/white framework, resulting in "a myriad of false binary forms."<sup>184</sup> However, as past history has shown, a racial paradigm based on unidimensional differences is wholly inadequate in addressing the racial issues confronting Asian Americans. In fact, the racialization of Asian Americans as immigrants, foreigners, or as model minorities existing between black and white demonstrates that the failure to recognize racial differences results in racial injustice.<sup>185</sup>

Furthermore, the representation of Asian Americans in race jurisprudence proves that the present race relations discourse needs to be broadened to allow those situated between black and white to articulate their experiences independent of a black/white framework. At the very least, Asian-American experiences illustrate how traditional notions of race are constantly being transformed by political conflict.<sup>186</sup> As Professor Ian Haney López explains, "Consider, for example, the insertion of Asians into the White/Black system of racial meanings in the wake of the recent Los Angeles riots. There, Asians-as-victims-of-Black-violence came to stand in for Whites in the racial semiotics."<sup>187</sup> This example underscores clearly how the legal needs and problems of Asian-American communities go unnoticed due to the traditional binary model of race relations, which forces all racial minorities to fit into either the category of black or white.

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184. IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 166 (1996).

185. See Frank H. Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 272 (1995) (illustrating the necessity for abandoning the color-blind constitutional analysis preferred by the Supreme Court).

186. *Cf. id.* at 249-51 (stating that considering race as dividing neatly into black and white is becoming useless, and that "Asian Americans alone belie the black-white paradigm").

187. IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 166 (1996).

## VI. CONCLUSION

“If America is not willing to confront this most obvious question of race—black-white race relations—then how can it begin talking about Asian American, Latinos, Native Americans, and all the other more complicated relations we have to deal with?”<sup>188</sup>

Although the writings discussed in this Perspective carry a view toward contemporary race relations that is cynical at best, and pessimistic at worst, their real significance lies in their inclusion of Asian Americans. Prior to the advent of Critical Race Theory, Asian Americans, and writings about Asian-American issues, had only a minor presence in race jurisprudence. These contributions to Critical Race Theory by Asian Americans are creating new race relations paradigms in this country that move beyond black and white towards the ultimate goal of substantive racial justice. These emerging paradigms also better reflect the reality of the nation’s racial complexity and the interplay of multiple racial and ethnic experiences. As Professor Bill Ong Hing expounded:

We need to promote constant awareness of interethnic group relations, elimination of conscious and unconscious racism, and social acceptance of people of color. We must reach a new level of consciousness, strive to develop a new inclusive vocabulary, explore new ways of being American, and recognize the variety of racial and ethnic issues that face our society.<sup>189</sup>

Regardless of whether or not one agrees with the many arguments professed by this new generation of Asian-American scholars, the importance of this “Asian-American Movement” rests with the fact that Asian Americans are raising their voices to speak to mainstream America and others in legal academia about the need for a new commitment to race relations and multiculturalism. Consequently, as Asian Americans grow in prominence and as they emerge politically within this new dynamic, their presence in legal literature will likewise be acknowledged with either great admiration or fervent criticism.

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188. Bert Eljera, *Legal Activist: Finding Answers to Questions About Race and the Law*, ASIANWEEK, Feb. 28, 1997, at 9 (quoting Neil Gotanda).

189. BILL ONG HING, *TO BE AN AMERICAN: CULTURAL PLURALISM AND THE RHETORIC OF ASSIMILATION* 178 (1997).

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