Dialectic of color-blindness

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Abstract
This article draws on the social theory of Theodor W. Adorno in order to critique the discourse of 'color-blindness' and articulate an alternative individualist ideal of racial justice. I begin by noting that Adorno's criticism of law in *Negative Dialectics* anticipates arguments against color-blindness advanced in critical race theory. I then explicate Adorno's understanding of law in relation to his broader account of social domination. Race can be situated within this account through the concept of 'second nature'. The notion of racial second nature elucidates the contradiction within color-blindness between formal equality and substantive inequality. As an alternative to the color-blind norm, I posit Adorno's utopian ideal of emancipated individuality as an appropriate aspiration for racial justice. This ideal enables the jurisgenerative transformation of liberal rights concepts, which have at once enabled and constrained the struggle for racial equity.

Keywords
Theodor W. Adorno, anti-discrimination law, color-blindness, critical race theory, G. W. F. Hegel, racism

1 Introduction
The concept of *color-blindness* has had a dialectical history. In 1896 Justice John Marshall Harlan declared that 'our constitution is color-blind' in his dissenting opinion in *Plessy v. Ferguson*. Harlan invoked the principle of color-blindness to protest the legal enforcement of segregation in Louisiana. A half-century later, Thurgood Marshall championed the same principle as a civil rights lawyer in his efforts to dismantle Jim Crow. After the elimination of *de jure* segregation, however, the mantle of color-blindness was taken up by the opponents of integration and racial remedy. The critical edge of the...
color-blind principle then turned into its opposite – a reactionary mandate for the preservation of the status quo of racial inequality. This color-blind jurisprudence counsels that affirmative action programs are as guilty of racial discrimination as Jim Crow; that racial prejudice can only be eliminated by expunging race from the cognizance of the law. For the color-blind theorist, the recognition of race is inadvisable, and the use of law to ameliorate racial disparities is itself a form of racism.

By contrast, critical race theorists and their intellectual heirs argue that such consciousness is a condition of the possibility of a just social order. They contend that the continuing prevalence of racial inequality – as a consequence of historical oppression and ongoing individual, institutional, and structural racism – requires that the state adopt race-conscious policies. For only such consciousness affords the legal, and ultimately political, capacity to counter discrimination and inequality. Such theorists critique color-blind discourse from various perspectives by, for example: pointing to the absurdity of equating affirmative action with Jim Crow; or revealing the self-contradiction inherent in the color-blind norm; or demonstrating how color-blindness defends and promotes social stratification.

Such a defense of race consciousness must resist the charge that racial remedies only reify pernicious racial constructs. Color-blind theorists maintain that efforts to mitigate racial inequality, through such policies as affirmative action, disparate impact tests, or minority voting districts, only lend support to racism by confirming its very categories. Color-blindness also portrays itself as the defender of individualism and meritocracy, as against the interest-group politics of racial remedy. According to this polemic, race-conscious politics undervalues individual autonomy by insisting that systemic racial discrimination still has some causal impact on individual outcomes.

I enter this debate over race and the law by developing a critique of color-blindness and a utopian ideal for racial justice out of the philosophy of Theodor W. Adorno. Adorno’s insights on the relationship between social domination and legal formalism in Negative Dialectics are remarkably appropriate to the particular case of color-blind jurisprudence as an impediment to racial equality. Adorno understands the law to be a ‘primal’ example of how identity logic excludes the consideration of the crucial differences that compose reality. Color-blind law, in particular, exhibits such pathologies, as it fails to acknowledge how extant racial hierarchy impacts individual outcomes.

I elucidate this critique of color-blindness by first demonstrating how Adorno’s critique of law anticipates some of the insights and dilemmas of critical race theory (section II). I ground these anticipations in Adorno’s understanding of the role of law within a system of social domination (section III). I then suggest that race can be understood through the notion of ‘second nature’, the Hegelian concept of social habituation that Adorno interprets as an implement of social domination (section IV). With this bridge between Adorno’s critical stance and American racial formations, I argue that the contradictions within color-blind discourse can be grasped through Adorno’s critique of law (section V). As an alternative to the oppressive identity logic of color-blindness, I offer Adorno’s procedure of determinate negation as a model for a legal practice capable of undermining structures of racial domination. I maintain that Adorno’s utopian ideal of an individuality that is open to otherness might provide a guiding norm for a politics of racial justice (section VI). The ideal of individual emancipation might transform
existing liberal conceptions of rights claims, and avoid the pitfalls of a politics of cultural difference (section VII).

II Adorno’s critique of law

Adorno’s critique of law in *Negative Dialectics* parallels the critique of color-blindness that has been advanced in critical race theory. In the section on ‘Law and Equity’, Adorno uses the natural law principle of ‘equity’ to reveal the ‘untruth of positive law’. By contrasting law with equity, Adorno draws attention to the distinction between formal and substantive equality, and the negation of the latter by means of the former.

Adorno observes that ‘the claim of equity – meant to be a corrective for the injustice in law – can be knocked down by the rational legal system as favoritism, as inequitable privilege.’ We see this logic in the critique of affirmative action, which construes such programs as racial favoritism. For example, Alexander Bickel, famously argued in an Anti-Defamation League brief against affirmative action for the Supreme Court that: ‘discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of a democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored.’ Through the lens of a formal characterization of equality in the law, the effort to redress racially unequal outcomes by way of race-conscious policy is to be condemned as an exercise in favoritism, ‘a matter of whose ox is gored’. Because conventional liberal jurisprudence relies on the treatment of all persons as formally equal, it construes race-conscious efforts to bring about substantive equality as instituting inequitable racial privileges.

Critical race theorists argue, against this view, that a purely formal application of law blinds itself to the ways in which historically entrenched inequality creates bias in facially neutral practices. As Kimberlé Crenshaw puts it, a ‘belief in color-blindness and equal process . . . would make no sense at all in a society in which identifiable groups had actually been treated differently historically and in which the effects of this difference in treatment continued into the present’. Adorno expresses a very similar critical insight in a striking dialectical formulation in his analysis of ‘The Legal Sphere’:

Law is the primal phenomenon of irrational rationality. In law the formal principle of equivalence becomes the norm; everyone is treated alike. An equality in which differences perish secretly serves to promote inequality; it becomes the myth that survives amidst an only seemingly demythologized mankind. For the sake of an unbroken systematic, the legal norms cut short what is not covered, every specific experience that has not been shaped in advance; and then they raise the instrumental rationality to the rank of a second reality sui generis.

When the law applies formal equality to a circumstance in which individuals have been rendered substantially unequal by economic and social stratification, it ‘secretly serves to promote inequality’. The lived experience of black individuals – who continue to face social exclusion and marginalization, and who are perceived by others through a dense web of stereotypes – is denied by a legal formalism that finds discrimination only in the
intentional malice of the bigot. We see an ‘equality in which all differences perish’ in Justice Clarence Thomas’ finding of a ‘moral and constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality’.15 We see a similar ‘irrational rationality’ in Chief Justice Roberts’ assertion that ‘the way to stop discrimination on the basis of race is to stop discriminating on the basis of race’.16 This quasi-tautological formulation is founded upon the denial of a difference between discrimination that affirms unequal privilege and discrimination that dismantles it. As Justice Stevens put it in a similar context, Roberts’ view disregards ‘the difference between a “No Trespassing” sign and a welcome mat’.17

Adorno’s critique of law thus reveals the dialectical burdens under which the cause of racial justice has labored: formal equality has secretly served substantial inequality; the rights that undermined segregation are now being used to undermine racial remedies. But to understand how Adorno’s thought can contribute to the critique of color-blindness, and not merely echo its dilemmas, we must understand how his critique of law is anchored in his broader project of a negative dialectics. This requires, first, locating law in the broader relationship between systems of concepts and systems of social domination. We can then situate race within Adorno’s left-Hegelian framework, such that his insights about social domination can be extended to racial stratification.

III Concept, law and social totality

Adorno’s analysis of concept, law and social totality takes up Marx’s critical reading of Hegel. For Marx, the theoretical identity Hegel posited between subject and object, between thought and reality, is mediated in practice by the conditions of social production. Law helps to implement this mediation, as it sets the coercive rules through which the objective world is transformed according to subjective needs. The law forges a formal link between particular objects and the social totality, by furnishing a system of abstract concepts that coercively reproduce a set of economic constraints.

This relationship, between the formality of law and the substantiality of the system of social domination, can only be understood with reference to a third term: the positive, conceptual formulations of philosophy, which reflect and idealize the substance of social relations. As Adorno puts it, ‘the whole which theory expresses is contained in the individual object to be analyzed. What links the two is a matter of substance: the social totality. But the link is also a matter of form, of the abstract legality of the totality itself: the legality of barter.’18 Theory, which refers to science and philosophy broadly, subsumes particular items of cognition within general categories of thought, so as to systematize empirical data according to a rational ordering of the understanding. Theory can achieve this categorization in thought partly because of the categorization in reality of particular objects and individuals according to general commodity and class categories, respectively. Law is a formal mechanism that forges this substantive, material categorization of persons and things in society, by way of the contract, i.e. ‘abstract legality’ or ‘the legality of barter’. Law is thus an intermediate sphere between theory, which idealizes social substance, and society, which is the concrete origin of theoretical abstractions. As a conceptual system for the implementation of coercion, law reaches out both to the
social totality and to its theoretical reflection in thought. Because of law’s mediating role, a critique of law is uniquely positioned to comprehend in theory the structures of social domination.

Adorno’s reference to the ‘legality of barter’ as a link between individual objects and theory can be read as an implicit critique of Hegel’s Philosophy of Right as a whole. Adorno implies that property and contract, the categories of ‘Abstract Right’ that begin Hegel’s exposition, permeate the entirety of the liberal conception of law that he reconstructs. The empty concept of personhood expressed in these concepts disregards and disparages individual particularity. In abstracting away from individuals in order to treat all alike, the law denies the specificity of individual circumstances within a context of social domination. It is for this reason that Adorno considers law to be ‘the primal phenomenon of irrational rationality’. Adorno takes the ‘legality of barter’, or contract law, as the essential legal category because it distills the role of legal formalism in social domination. Contract law fails to recognize that a ‘free’ contract between an employer and a worker who needs the job to survive may not be so free. It recognizes only the formal freedom of the contract, and the abstract equality of promisee and promisor, not the conditions of substantial subjugation in which it often operates. In this respect, contract law displays an irrational rationality: rational for its logical consistency; irrational for its removal from the concrete circumstances of its operation. It displays the coercive, positivistic side of Hegel’s philosophy that Adorno wants to reject.

Law in this way exemplifies Adorno’s claim that ‘concepts on their part are moments of the reality that requires their formation, primarily for the control of nature’. Adorno sees the law as a ‘primal’ case of the role of concepts in social domination, precisely because a law is a coercively enforced concept. As Adorno and Horkheimer write in Dialectic of Enlightenment, ‘the generality of the ideas developed by discursive logic, power in the sphere of the concept, is built on the foundation of power in the sphere of reality’. This relationship between power in the sphere of the concept and power in the sphere of reality would be difficult if not impossible to achieve were it not for law, which is at once a concept and a reality, and which thereby coordinates structures of power in subjective and objective domains.

Adorno’s critique of law thus arises from his more general conception of the relationship between categories of thought and processes domination. As quoted above, discursive formations are required ‘primarily for the control of nature’. In Dialectic of Enlightenment, Horkheimer and Adorno argue that the human effort to dominate nature is the root of social domination. The intellectual aspect of natural domination begins in prehistory with magic and myth, but finds its most extreme form in modern natural science: ‘What human beings seek to learn from nature is how to use it to dominate wholly both it and human beings.’ Science enables natural domination by categorizing distinct aspects of nature according to abstract concepts, so that they can then be worked up according to the rules of production. Economic modernization, which comes hand in hand with empirical science, enables social domination by organizing the members of society in the same way as science organizes natural objects – according to general material principles, so that each particular person need not be treated as an individual, but rather can be shaped according to the needs of economic exploitation:
The blessing that the market does not ask about birth is paid for in the exchange society by the fact that the possibilities conferred by birth are molded to fit the production of goods that can be bought on the market. Each human being is endowed with a self of his or her own, different from all others, so that it could all the more surely be made the same. But because that self never quite fitted the mold, enlightenment throughout the liberalistic period has always sympathized with social coercion.27

This process of ‘molding’ persons according to the needs of the market could not take place absent a system of abstract legal principles that enforces the various forms of classification and routinization inherent in capitalist production. We therefore find the law implicitly embedded in each of the forms of natural and social domination that Horkheimer and Adorno identify. It sets the terms for natural exploitation through property and contract law. It represses drives to social deviance through the deterrent effect of criminal law. And it enforces the political unity necessary to achieve the domination of the many by the few through public law. Thus, though Dialectic of Enlightenment does not explicitly thematize law, it is a constant presence, linking the categories of thought and the structure of social reality through abstract principles of adjudication. In each instance, the law enables the subsumption of particulars under universal categories in the service of social domination.

The concept of nature that drives Horkheimer and Adorno’s account of social domination is necessarily somewhat of a black box. This is because Horkheimer and Adorno understand nature as external to human reason.28 As the opaque other of reason, nature is in principle impossible to define. Nonetheless, the above passage suggests that Adorno and Horkheimer do not simply mean by ‘nature’ the world of animals, plants and minerals. While we cannot say what nature qua nature is, the ‘self’ that ‘never quite fitted the mold’ can be understood as a trace of dominated nature. In this notion of a kernel of nature within the subjective personality, we can discern the beginnings of a utopian concept of individuality. I will return to this ideal in sections VI and VII, where I argue that race-conscious law and politics should be oriented towards the negation of constraints upon spontaneous individuality. But in order to fully explicate the relevance of Adorno’s analysis to the problem of racial inequality, it is first necessary to situate the concept of race within his philosophical vocabulary. This I attempt through the concept of ‘second nature’. Instead of recognizing and respecting the kernel of differentiated nature in individual personalities, second nature disguises manufactured racial domination as a natural fact.

IV Race and the concept of second nature

In Negative Dialectics, Adorno writes:

The theory of second nature, to which Hegel already gave a critical tinge, is not lost to a negative dialectics. It assumes, tel quel, the abrupt immediacy, the formations which society and its evolution present to our thought; and it does this so that analysis may bare its mediations to the extent of the immanent differences between phenomena and that which they claim to be in themselves.29
For Adorno, second nature is a critical concept meant to reveal the mediated contingency of social formations that appear to be natural, immediate and immutable. I argue that race can be understood as an element of second nature, as it is a social construction that supports structures of domination by giving a natural veneer to inequality and generating social antagonism. This understanding of race enables us to steer between what Howard Winant calls ‘the Scylla of “race as illusion” and the Charybdis of “racial objectivism”’.30

To grasp the usefulness of conceiving of race through the concept of second nature, we need to understand Hegel’s use of the term in the Philosophy of Right, as well as Georg Lukács’ appropriation of it, which shaped Adorno’s conception. In ‘Ethical Life’ Hegel describes how ‘objective’ social institutions such as the family, the market and political association habituate people in such a way that they are freed from their natural inclinations, and governed instead by higher, spiritual needs and aspirations. Second nature describes the set of subjective habits that arise from this objective context:

[If it is simply identical with the actuality of individuals, the ethical [das Sittliche], as their general mode of behavior, appears as custom; and the habit of the ethical appears as a second nature which takes the place of the original and purely natural will and is the all pervading soul, significance, and actuality of individual existence.31

Second nature mediates between the natural ground of human life and its spiritual existence by providing individuals with a habitual content which appears to them as immediate and natural, and yet has its roots in the practical education provided by family, civil society and the state.

Lukács takes up Hegel’s concept of second nature, reading it through Marx’s analysis of commodity fetishism.32 For Lukács, second nature no longer designates a subjective sphere of habit, but rather the structures of capitalist production that bring it about. Lukács writes:

[O]n the one hand, men are constantly smashing, replacing and leaving behind them the ‘natural’, irrational and actually existing bonds, while, on the other hand, they erect around themselves in the reality they have created and ‘made’ a kind of second nature which evolves with exactly the same inexorable necessity as was the case earlier on with irrational forces of nature (more exactly: the social relations which appear in this form).33

Second nature, in this reading, consists of the world of commodity exchange and the social relations it constitutes, which together confront individuals within capitalist society as a system governed by immutable ‘natural’ laws. Whereas Lukács thinks the false, natural appearance of the economic laws of capitalism will be overcome by their own internal contradiction, Adorno does not maintain this faith in historical dialectical materialism. Rather, for Adorno, second nature becomes an object of critique. Negative dialectics aims to reveal second nature’s ‘mediations to the extent of the immanent differences between phenomena and that which they claim to be in themselves’. Critical rationality must expose the extent to which social bonds, and the habits they create, are not natural or immutable, but rather correspond to particular configurations of power.
Given that Adorno’s treatment of second nature references both Hegel’s original formulation, which defines second nature as a set of habits, and also Lukács’ appropriation of the term, which defines second nature as a set of external, social constraints, it is reasonable to understand Adorno’s concept of second nature as including both subjective and objective elements. In this reading, second nature includes a socially objective reality as well as the subjective habits that this reality instills. Through this relationship between social objectivity and subjective habits, second nature provides a set of background predispositions that help to legitimate the system of social domination. The seemingly natural, unchangeable status of social inequality within capitalism produces habits of thought and action that reflect and confirm this social reality. Without critical reflection, social inequality appears not as an insufferable and unnecessary constraint on individual freedom, but rather as a fact of nature, as regrettable as droughts or floods, but no more avoidable.

Race and racism, I argue, can be understood through this concept of second nature. In this interpretation, race is a historically constituted category that is embedded in social consciousness and social outcomes in ways that support a broader system of social domination. Racism can be understood as the various individual and collective actions that impute inferiority and superiority on the nominal basis of skin color, thus constituting racial second nature. An account of race as second nature avoids the pitfalls Winant identifies of understanding race as either a truly objective phenomenon or pure illusion. Race is real insofar as it is reproduced through social processes, and exists as a real form of cognitive interpretation in the minds of individuals. At the same time, however, it is not natural, nor is it immutable. As Winant argues, racial formations vary through time, and can be transformed through political action. I will return to the possibilities suggested by the malleability of race in the concluding sections.

Racial second nature’s constituent elements, beyond economic institutions and habituation, are: psychological, creating what W.E.B. Du Bois described as black ‘double consciousness’, as well as forms of personal prejudice and bigotry; sociological, impacting the structures of family and community; geographic, segregating land into delimited white and black spaces; political, depriving black individuals of representation or political efficacy; intellectual, providing black and white children with unequal educational opportunities; and punitive, leading to the mass incarceration of young black men in particular. Together these forms of social objectivity and social consciousness constitute a racial second nature that confronts individuals and society as psychologically and empirically actual. Racial second nature contributes to social domination by reinforcing structures of economic subordination with parallel structures of racial subordination, which give a natural cast to socially produced inequality. The relationship between racism and various biological accounts of racial inequality confirms the ideological functions that supposedly natural differences play in justifying social stratification.

Racial second nature also maintains social domination by generating social antagonisms that militate against equality. Racism frustrated the growth of economic populism in the South at the end of the 19th century, as poor southern whites valued their imputed natural superiority vis-à-vis blacks, and so a coalition among the Southern underclass proved impossible to sustain. The role of racism in perpetuating economic domination
was clearly articulated in a speech by Tom Watson, the leader of Southern Populism, in 1892. Referring to poor black and white southerners, he said: ‘You are made to hate each other because upon that hatred is rested the keystone arch of financial despotism which enslaves you both. You are deceived and blinded that you may not see how this race antagonism perpetuates a monetary system which beggars you both.’ More recently, the Republican Party’s ‘southern strategy’ rested on this capacity of race to confound the straightforward dynamics of class conflict. Today, racism continues to undermine the economic interests of America’s poor and middle class, insofar as racial animosity explains strong support for anti-egalitarian policies. Racial second nature’s persistent role as an impediment to movements for political equality is an exemplary instance of how cognitive and practical habits produced within repressive social structures tend to reaffirm such structures.

Racial second nature actualizes itself through vicious dialectical reinforcement between the subjective consciousness of real or perceived racial differences (in wealth, education, etc.) and the objectification of such differences in social reality. Mediated by public and private institutions, subjective race consciousness and socially objective racial variation reinscribe one another. This is because instrumental-rational action within a racially differentiated social terrain tends to reinforce such differences in order not to face the resistance of the social ‘nature’ it confronts. Even before we consider outright bigotry and prejudice, therefore, racial inequalities impact social behavior in ways that reinforce such inequalities. Racial second nature is self-regenerative in this fashion.

With the concept of second nature and the foregoing critique of law in place, we can now enact the dialectic of color-blindness. This dialectic reveals color-blindness’ inherently contradictory content. I will begin by imitating the argument of Dialectic of Enlightenment in presenting a bleak picture of contemporary racial structures. This is not meant in any way to disparage real historical progress or present efforts to address racial inequality. Rather, I aim to point towards the negativity and injustice of racial hierarchy, explaining the active complicity of color-blindness in its perpetuation.

V Dialectic of color-blindness

The civil rights revolution of the 1960s, understood as the achievement of formal equality for all citizens irrespective of race, aimed at liberating blacks from oppression and raising them at last to their rightful position in society. Yet the whole structure of today’s society radiates with inequality and degradation triumphant. In a vast network of prisons filled with blacks, in de facto segregated neighborhoods littered with foreclosed homes, and de facto segregated schools that often serve only as a pipeline to prisons, formal racial equality is contradicted by the social totality that enforces substantive inequality. In the context of this calamity, the election of President Barack Obama cannot be read as a signal that racial equality has been achieved. Rather, his presidency is an invitation to explore the gaping contradiction between formal equality, which permits the ascent of a black man to the highest office, and social and economic inequality, which consigns so many African Americans to lives of exclusion, incarceration and poverty.
The contradiction between formal and substantive equality has arisen in and through the discourse of legal color-blindness. Color-blindness takes the lesson of slavery and Jim Crow to be that any recognition of race in the law is a form of racism, which will only perpetuate racial animosity and inequality into the future. Color-blind theorists and advocates take as their guiding norm Justice Harlan’s claim in his dissenting opinion in *Plessy v. Ferguson* that ‘our constitution is color-blind’. Usually, however, they neglect the context of this claim:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.44

This, indeed, was a radical suggestion at a time when Jim Crow law was only gaining force, and the newly won freedom of blacks had been reduced to the freedom to alienate their labor.45 But today we are living in the society Justice Harlan imagined: blacks have won their struggle to achieve formal equality, but the white race has retained its social and economic domination. Color-blindness, in accordance with Harlan’s schema, preserves a sphere of social domination while maintaining an abstract form of equality in the law. When the civil rights movement couched its demands in the color-blind language of rights, it acceded to a discourse in which formal equality could reside alongside substantive inequality.46 It may have been a necessity to put demands for justice in such abstract, universal terms, but the color-blind strategy made legal efforts to further social and economic equality more difficult to legitimate and implement after *de jure* segregation had been eliminated.

The legal discourse of color-blindness exhibits the pathologies of identity logic. Color-blind law, like contract law, ignores socially objective differences between individuals in evaluating the fairness of transactions and institutional rules. The contradiction between color-blindness’ pretense of equal justice, and the grave inequality it sanctions, is suggested in the term itself. For what does color-blindness blind itself to? It blinds itself to race – to the second nature of racial differentiation that inhabits social consciousness and institutions. In the very notion of ‘color-blindness’, which refers to that which we are not supposed to see, the substantive social inequality between the races is acknowledged in the legal consciousness that excludes its consideration.

The ‘dialectical logic’ of color-blindness was first noted by Neil Gotanda in his seminal article ‘A Critique of “Our Constitution is Colorblind”’. Gotanda explicates how color-blindness simultaneously demands the recognition and ‘nonrecognition’ of race. A decision-maker, such as an employer, cannot help but recognize the race of someone under his or her power, but must somehow ensure that the person’s race does not factor into the decision to hire or not to hire, promote or not promote, him or her. As Gotanda puts it, the employer justifies the decision by saying: ‘Yes, I noticed that she was Black, but I did not consider her race in making my hiring or promotion decision.’47 This color-
blind technique is dialectical in the sense that ‘a subject is defined by its negation, hence, an assertion of nonconsideration necessarily implies consideration. The stronger and more defined the character of racial recognition, the clearer and more sharply drawn its dialectical opposite, racial nonrecognition.’

The dialectical character of color-blindness that Gotanda diagnosed enables it to play a bipolar role in history. It can further racial equality by striking down laws and practices that explicitly disadvantage racially subordinate groups, and it can stymie equality by forbidding laws and practices that explicitly take account of race in order to counter racial domination. Color-blindness’ dialectical character, exhibiting both emancipatory and oppressive moments, stems from the socially objective contradiction it expresses conceptually; that is, the contradiction between formal legal equality and substantive racial subordination. The supposed neutrality of color-blindness acts to confirm racial domination, because it consciously excludes certain forms of domination from its cognizance.

Because color-blindness is dialectical in this way, Adorno’s procedure of a negative dialectics points the way towards a better conception of civil rights and anti-discrimination law. Here again, the contrast between Hegel and Adorno provides the focal point for our analysis. Hegel’s systematic philosophy proceeds through a progressive series of contradictions, grounded in the charged relationship between knowing subject and known object. These contradictions lead to philosophic truth, rather than total skepticism or irresolvable aporias, because Hegel posits a philosophizing subject – absolute spirit – that stands over, and unites, all particular subjects and objects. In Negative Dialectics, Adorno argues that the Hegelian identity between subject and object is false because of the very nature of theoretical concepts: ‘To refer to nonconceptualities – as ultimately, according to traditional epistemology, every definition of concepts requires nonconceptual, deictic elements – is characteristic of the concept.’ Concepts, according to Adorno, are ultimately defined by a non-conceptual referent. For example, the concept ‘tree’ refers to real trees; the concept ‘humans’ refers to real humans. Without this non-conceptual referent, concepts lose all meaning, as they become wholly detached from the objective world in which they are situated. Adorno therefore insists that concepts must contain an irreducible moment of non-conceptuality against which they are defined. As a consequence, the epistemic subject that generates concepts cannot wholly comprehend objective experience through the strictures of identity logic, which denies the autonomy of its non-conceptual referent. Adorno in this way inverts the Kantian priority of the subject, arguing that the object is prior to thought and therefore cannot be reduced to it.

Adorno does not seek to apprehend non-conceptuality by abandoning rationality in search of some pre-rational encounter with the given. Rather, through a dialectic oriented towards negation, rather than identity, he aims to open thought towards the non-conceptual content that it harbors:

To change this direction of conceptuality, to give it a turn toward nonidentity, is the hinge of negative dialectics. Insight into the constitutive character of the nonconceptual in the concept would end the compulsive identification which the concept brings unless halted by such reflection. Reflection upon its own meaning is the way out of the concept’s seeming being-in-itself as a unit of meaning.
Adorno develops this negative dialectics through the very Hegelian philosophy he criticizes for its totalizing, coercive features. As Adorno and Horkheimer put it in *Dialectic of Enlightenment*:

> With the concept of determinate negation, Hegel gave prominence to an element which distinguishes enlightenment from the positivist decay to which he consigned it. However, by finally postulating the known result of the whole process of negation, totality in the system and history, as the absolute, he violated the prohibition and himself succumbed to mythology.53

Like Hegel, Adorno proposes a philosophy that proceeds by negating determinate concepts. But unlike Hegel, he will insist that this critical, negative work not be constrained by a false, positive identity between contradictory ideas. By removing Hegel’s false reconciliation achieved by way of a metaphysical identity between subject and object, Adorno intends to highlight the truth contained within speculative philosophy, and appropriate it for his critical and utopian ends.

Adorno’s negative dialectics would suggest that we treat the contradictions within color-blindness as an invitation to seek out the non-identical content that it conceals. The concept of color-blindness provides a hinge for determinate negation. In the negative space between the recognition of race as a ‘natural fact’, and its non-recognition as a decision-making criterion, lies the individual who is the object of the decision. Individuals are often caught between a racial second nature that confines their identity to social stereotypes, on the one hand, and a formal legal doctrine that forbids efforts to resist such second nature, on the other. As a consequence, individuals’ differentiated personalities are crushed between substantive domination and official blindness to such domination.

**VI The utopian ideal of individuality**

A negative dialectics of race apprehends the socially constituted racial inequalities that the formalities of color-blind law suppress, disparage and discard. It thereby uses the concept of race to unseal the non-conceptual, that is, the individual person. It negates the negation of racial inequality by first recognizing this inequality, and then acting upon it in opposite fashion so as to free the individual personality from the racial dimensions of social domination. As Adorno writes:

> The power of the status quo puts up the facades into which our consciousness crashes. It must seek to crash through them ... Surviving in such resistance is the speculative moment: what will not have its laws prescribed for it by given facts transcends them even in the closest contact with objects, and in repudiating a sacrosanct transcendence.54

The sacrosanct transcendence of color-blindness must give way to a form of legal judgment that comes into closest contact with the particulars of social structure, lending support to individuals’ efforts to break free from domination.

This form of legal discourse and practice is not oriented towards any organization of society around hypostasized racial identities and their enforcement.55 Instead, it is
oriented towards the utopian ideal of individual emancipation. As Horkheimer and Adorno write in *Dialectic of Enlightenment*:

> Each human being has been endowed with a self of his or her own, different from others, so that it could all the more surely be made the same. Because the self never fitted the mold, enlightenment throughout the liberalistic period has always sympathized with social coercion.\(^{56}\)

The claim here that the self ‘never fitted the mold’ suggests that there is a kernel of individual, natural differentiation which social coercion cannot extirpate, but which it nevertheless seeks to repress.\(^{57}\) While Horkheimer and Adorno are referring to forms of social coercion that habituate people to the conditions of social labor, the concept of social coercion can be extended to a broader set of social practices by way of the concept of second nature.

We can understand forms of stereotyping, discrimination and color-coded opportunity structures as various elements of second nature that coerce the non-identical individual into a racial mold which she or he never fits. As Adorno writes in *Negative Dialectics*:

> ... a contradiction like the one between the definition which an individual knows as his own and his ‘role,’ the definition forced upon him by a society when he would make a living – such a contradiction cannot be brought under any unity without manipulation, without the insertion of some wretched cover concepts that will make the individual differences vanish.\(^{58}\)

This ‘definition which an individual knows as his own’ becomes determinate in its resistance to the coercive constraints foisted upon it by society. Thus, while a critical legal practice would be oriented toward releasing the individual from racial structures, the experience of struggle within and against such structures would remain an element of the personality of the emancipated individual. This trace of societal domination on the individual personality might be painful, but it may also endow the self with an ego-identity oriented towards the negation of not only its own social constraints, but those of others.

Adorno is not naively uncritical about individuality, and understands certain forms of individuality as false and pernicious. He rejects as false an individual who takes his social bonds to be the source of his freedom, and does not recognize that he is everywhere in chains.\(^{59}\) *Dialectic of Enlightenment* likewise contains a critique of a certain kind of individualism, tracing the development of compulsive ego-identity formation from the myth of Odysseus, and critiquing the violence done to inner nature in this process. And yet, in *Negative Dialectics*, Adorno maintains the possibility of a form of individuality that is not defined by coercive self-identification: ‘The subject’s non-identity without sacrifice would be utopian.’\(^{60}\) Adorno’s appropriation of Hegel is again helpful in understanding his intent: ‘The most enduring result of Hegelian logic is that the individual is not flatly for himself. In himself, he is his otherness and linked with others. What is, is more than it is. This “more” is not imposed upon it but remains immanent to it, as that which has been pushed out of it.’\(^{61}\) These ‘others’ can be
understood as objects, but also as other non-identical persons. Individuality, on this reading of Adorno, entails an openness to other differentiated people as well as to natural differentiation.62

This notion of individuality, as radically distinct, yet constituted by its relations with others, affords the possibility to rethink the purpose of anti-discrimination law and other forms of racially ameliorative policy. As Robert Post observes, the ‘dominant’ form of anti-discrimination law aims to eliminate ‘irrational’ forms of prejudice, such that social actors make decisions that are purely instrumentally rational.63 In this conception, it is clearly discriminatory when an employer does not hire a qualified black applicant out of racial malice. However, anti-discrimination law does not perceive a problem when an employer’s facially neutral policies have a racially disparate impact, so long as such policies are reasonably related to ‘job performance’. Adorno’s critique of the instrumentalization of persons under capitalism shows what is so troubling about this understanding of the purpose of anti-discrimination law. This form of anti-discrimination law raises ‘the instrumental rationality’ of economic calculus ‘to the rank of a second reality sui generis’, by striking down racial domination only where it conflicts with the controlling interests of the marketplace. Adorno’s thought counsels that the purpose of race-conscious law should not be to mold every individual according to the current dictates of the market. Rather, its purpose should be to release and foster individual differentiation, such that social organization is not premised upon homogenization, categorization and the regression of thought from self-conscious reflection to the rote performance of tasks. Instead, social organization should be premised upon the insight that individual differentiation and mutual recognition are the font of the spontaneity, creativity and adaptability of a free society. This would not mean some purely cosmetic form of corporate diversity. Rather, it would entail laws aimed at the reorganization of the economy, society and polity along an egalitarian basis, such that individuals could develop their unique capacities in and through their relationships with others, instead of being constrained to fill a pre-set racial, gendered and economic node in a system of social domination.

VII Conclusion

The Adornian critique of color-blindness I have offered in this study maintains that individuals can be emancipated from structures of racial domination only if the law is conscious of race and adopts strategies to negate racism and racial inequality. The problem with color-blindness, in this view, is that it forecloses the possibility of such consciousness, and instead maintains a system of social domination by reverting to overly formal criteria of justice. Advertising a respect for the individual, irrespective of her or his skin color, color-blindness in fact ignores the lived experience of individuals within the antagonistic social terrain of racial second nature.

I do not take up the view that color-blindness is pernicious because it ignores forms of cultural difference. I thus aim to avoid a certain kind of identity politics, which takes ethnic differences between groups as a basic fact of society that the formal categories of law unjustly disparage. Once racial second nature is understood primarily as an element of structures of social domination, rather than as an ethnic-cultural heritage, race can be deployed as a powerful critical legal and political concept.
It may be true that rights claims tend to subsume genuine cultural differences among American ethnic groups under the banner of liberal universalism, which itself contains a particular cultural heritage. However, critiquing color-blind rights discourse by arguing for the recognition of cultural difference is problematic on several fronts. First, cultural differences are contested and internally differentiated. An argument against color-blindness that insists on the recognition of cultural difference therefore risks essentializing culture. It may privilege some self-interpretations of a given culture over others, and may force individuals into scripted, externally imposed, and perhaps pernicious, cultural molds. Second, arguments for cultural difference risk reducing economic and political domination to mere ethnic variation, thus de-politicizing the content of racial identity. Third, an emphasis on the reality of cultural difference may open the door for a neo-conservative diagnosis of racial inequality on the basis of alleged cultural pathologies of subordinate groups. Fourth, a critique of color-blindness that affirms cultural difference runs counter to strong American norms of individuality, thus blunting its own political efficacy.

Given these perils, it is worth articulating an alternative that does not rest upon failures of cultural recognition in the law. Without denying either the existence of cultural difference or the need for its legal recognition in certain contexts, I place the argument against color-blindness on a different footing. In the alternative I offer, race does not refer to cultural difference but to a second nature that supports structures of social domination by naturalizing economic inequality and generating social antagonisms that negate class interest. I combine this analysis of race with a utopian ideal of individual emancipation that can inform legal and political practice. Thus, instead of arguing that color-blind law fails to acknowledge cultural difference, I make the claim that color-blind law fails to acknowledge individual difference, insofar as it does not recognize and confront the racial structures through and against which individual personalities are partially defined. In this individualist focus, I am in accord with K. Anthony Appiah, who argues that ‘socioeconomic disparities between groups’ are unfair ‘from the point of view of an individual’. This places the argument against color-blindness on the terrain of individualist liberal norms. However, it gives these norms a dialectical twist: only by recognizing and negating the supra-individual structures that undermine individual autonomy can we further individual emancipation. In this way, the Adornian critique of color-blindness lays the groundwork for a ‘jurisgenerative’ politics in which the demos reinterprets the meaning of liberal rights concepts, transforming them from principles that limit political action into a critical vocabulary for actively negating structures of racial inequality.

This jurisgenerative transformation of liberal principles addresses a key dilemma of critical race theory. Kimberlé Crenshaw and Patricia Williams have voiced trenchant objections to the unmitigated attack on liberal rights discourse carried on in the critical legal studies movement, the progenitor of critical race theory. Critical legal studies scholars, such as Alan Freeman, argue that liberalism is an ideology that legitimates social domination by convincing people of the justice and neutrality of the legal system. Crenshaw and Williams both contend that this dismissal of liberalism as mere ideology gives short shrift to the powerful role that rights discourse played in the civil rights movement, and the important place it has in the political self-consciousness of
many African Americans. Crenshaw, for example, notes that liberal discourse provided a vocabulary through which blacks could note the disparity between the reality of Jim Crow and American liberal ideals. Nonetheless, Crenshaw recognizes that liberalism, in its color-blind form, has stunted the potential of the civil rights movement. Conventional liberalism seems incapable of a more sustained attention to material racial inequalities that constrain individual action even in the absence of *de jure* segregation. The jurisgenerative transformation of liberal individualism might enable critical race theory to transcend such limitations while making use of liberalism’s normative power. The Adornian critique of racial domination I have offered recognizes that individual freedom is imperiled by racial second nature. By meting out resources, opportunities, symbolic value and political power according to race, and by carving society into antagonistic segments, racial domination prevents individuals from exercising their rights to life, liberty and property. Instead, the extent of individuals’ rights is usually over-determined by their place in the racial hierarchy. Once we understand that these rights have meaning only where social structures enable rather than prevent their use, liberal individualism can offer a convincing moral, political and legal vocabulary for advancing racial justice.

This transformed understanding of individualism emphasizes the negative capacity of human thought and action to resist and dismantle existing social forms, and develop new ways of life that remedy their failures. Individuals can at once actualize their spontaneous, negative and creative potential, and protect such potential in others, by advocating a new understanding of liberal legalism. Law must stand against social structures that increase the salience of social and economic forces in determining individual thought and action. It should stand for social structures that support individual particularity and its empowerment. At first blush, this approach might seem to condone color-blindness, which counsels that individuals should be considered as isolated actors, as though their race did not matter. But color-blindness ignores the extent to which individual outcomes are overshadowed by racial categorizations in a highly racially stratified society. The potential of individual actors for spontaneous thought and action wanes when their race becomes significantly predictive of their life-prospects. Therefore, policy that aims to affirm individual freedom must reduce the power of race to stymie individual differentiation. In some cases, as with policing, this may require safeguards against the use of race as a proxy for criminality. In others, as with affirmative action, this may require explicit efforts to increase minority representation in public and private institutions in order to counterbalance the historical effects of racism, such as the racially disparate impact of ‘legacy’ considerations in college admission. There is no cure-all approach. But the dialectical strategy of negating the negation of racial domination with race-conscious policy, combined with the guiding norm of individual freedom, helps to clarify the means and ends of the struggle for racial equality.

Particularly given the reactionary trend of constitutional interpretation in the high courts, individual emancipation from racial domination will require democratic engagement, directed at transforming juridical norms. Democratic participation might repair the disconnection between the legal equality of color-blindness and the factual inequality of racial second nature, as citizens exercise their authority as not merely subjects, but authors, of the law.72 The intersubjective connectedness within Adorno’s account of...
individuality leaves hope that the constitutive relation between self and other may generate political impetus to lend voice to suffering and undermine structures of oppression.

**Notes**

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3. Norman Podhoretz, in an acclamatory retrospective on the genesis of neo-conservatism, captures this transition:

   ... some on the Right who had opposed the civil-rights movement even before it was radicalized in the late 60’s, who had never had any use for Martin Luther King, Jr. when he was alive later learned under the tutelage of the neoconservatives that one of the most effective weapons they could wield in the fight against affirmative action was King’s dream of a world in which all would be judged not by the color of their skin but by the content of their character. In this way many conservatives came to embrace the ideals which had animated the civil rights movement. (Norman Podhoretz, ‘Neoconservatism: a Eulogy’, *Commentary* [March 1996]: 19–27 [24])


10. ibid.
11. John David Skrentny argues, in fact, that the ‘basic idea’ of affirmative action ‘comes from the centuries-old English legal concept of equity, or the administration of justice according to what was fair in a particular situation, as opposed to rigidly following legal rules, which may have a harsh result’. John David Skrentny, *The Ironies of Affirmative Action* (Chicago, IL and London: University of Chicago Press, 1996), p. 6.


17. *Adarand*, at 229 (Stevens, J., dissenting). Whereas *Parents Involved* concerned attempts to integrate schools, *Adarand* concerned minority privileges in government contracting. Both cases represent the Supreme Court’s turn to color-blind jurisprudence, which Stevens opposed.


19. ibid., p. 309.

20. See, for example, *Lochner v. New York*, in which the Supreme Court struck down a state labor law which limited hours of work at bakeries, on the grounds that it violated a right of free contract, which the court had read into the 14th Amendment:

> There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state interfering with their independence of judgment and of action. (198 U.S. 45, 56 [1905])

*Lochner* was overturned during the New Deal, but the theory of contract it expresses remains dominant. Current contract law in the United States does, in theory, recognize certain cases where a contract may be void for ‘unconscionability’, even where there has been no fraud or duress. However, the Official Comment to § 2-302 of the Uniform Commercial Code defines unconscionability as ‘oppression or unfair surprise, not disturbance of allocation of risks because of superior bargaining power’. Courts have, nonetheless, on very rare occasions, voided contracts in part because of a ‘gross inequality of bargaining power’. *Williams v. Walker-Thomas, Inc.* 350 F.2d 445 (C.A. D.C. 1965).

21. Hegel, however, recognizes that formally just contract relations can cause harm when they interact systemically. G. W. F. Hegel, *Elements of the Philosophy of Right*, ed. Allen Wood, trans. H. B. Nisbet (Cambridge and New York: Cambridge University Press, 1991), § 232. He argues that the reconciliation between man and society advertised by contract law and the free market yields a coercive system that limits individual freedom and reduces a large mass of people to a ‘rabble’ (§ 244). Hegel attempts to solve the problem of poverty through welfare interventions and a political form of union membership in the ‘corporation’ (§§ 242, 249–56). These forms of public provision do not solve the basic contradictions of political economy, however. They can only remedy some of their consequences. And, since political representation in Hegel’s state is only available for members of professional associations,
and not for unskilled laborers, the institutions of public law will not hear the voices and needs of many of those people who fall victim to the contradictions of the market place (§ 252A). Nonetheless, Hegel’s recognition of the insufficiency of formal legal categories to achieve justice exemplifies the emancipatory content that Adorno finds in moments of determinate negation. In his acknowledgement of the poverty endemic to capitalism, and the failure of formal law to address it, Hegel gives credence, at least momentarily, to Adorno’s claim that ‘the need to lend a voice to suffering is a condition of all truth’ (Adorno, *Negative Dialectics*, pp. 17–18).

22. ibid., p. 11.


24. Adorno’s understanding of law as an intermediary between objective and subject power is comparable with Habermas’ observation of an ‘internal tension between facticity and validity’ within the structure of liberal law; see Jürgen Habermas *Between Facts and Norms*, trans. W. Rehg (Cambridge, MA: MIT Press, 1998), p. 82. Whereas, for Adorno, the dialectical relation between ‘power in the sphere of the concept’ and ‘power in the sphere of reality’ creates a nearly impenetrable identity between social domination and its reflection in thought, Habermas sees the legitimating function of democratic law-making as a relatively autonomous power, which can uproot structures of domination and implement just laws according to rational principles developed by a deliberative public (ibid., p. 32). I turn to the possibilities of democratic action to negate racial domination in the concluding section.

25. Adorno and Horkheimer’s overarching argument in *Dialectic of Enlightenment* was anticipated by Marx in a passage from his ‘Speech at the Anniversary of the People’s Paper’, which mirrors their intent so closely that it may well have been their inspiration: ‘At the same pace that mankind masters nature, man seems to become enslaved to other men or to his own infamy. Even the pure light of science seems unable to shine but on the dark background of ignorance. All our invention and progress seem to result in endowing material forces with intellectual life, and in stultifying human life into a material force’. (Karl Marx, ‘Speech at the Anniversary of the People’s Paper’, in *The Marx–Engels Reader*, ed. Richard Tuck (New York and London: W. W. Norton, 1978), p. 578. Tellingly, this passage is the inscription for Alfred Schmidt’s study, *The Concept of Nature in Marx*, which was originally his doctoral dissertation, written under Horkheimer and Adorno at the Frankfurt Institute for Social Research. Alfred Schmidt, *The Concept of Nature in Marx*, trans. B. Fowkes (London: NLB, 1971[1965]).


27. ibid., p. 9.

28. In conceiving of nature as a material substrate external to reason, Horkheimer and Adorno follow Marx. In Alfred Schmidt’s reading, Marx departs from Hegel in conceiving of nature as external and prior to thought, praxis and history. In a sort of transcendental materialism, then, Marx conceives of nature as separate from human consciousness, and yet only interpretable in light of social-rational categories. Schmidt, *Concept of Nature*, p. 70.

34. The Hegelian grounding of Adorno’s concept of second nature is evident from the passage from *Negative Dialectics* that opens this section. Buck-Morss argues that Adorno’s understanding of second nature was ‘implicitly referring’ to Lukács’ use of the term in *History and Class Consciousness*, quoted above. Buck-Morss, *Origin*, p. 55.
36. ‘[T]he Negro is . . . gifted with second-sight in this American world, – a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one’s self through the eyes of others, of measuring one’s soul by the tape of a world that looks on in amused contempt and pity’. (W. E. B. Du Bois, *The Souls of Black Folk* [New York: Penguin, 1996], p. 5)
38. ibid, p. 63.
40. K. Anthony Appiah illustrates this well:
   Suppose that, for whatever reason, the black group to which I obviously belong scores aver-
   agely low on a test that is genuinely predictive of job performance. Suppose the test is expen-
   sive. And suppose I would have, in fact, a high score on this test . . . In these circumstances it
   may well be economically rational for an employer, knowing what group I belong to, simply
   not to give me the test, and thus not to hire me. (K. Anthony Appiah, ‘Race, Culture, Identity:
   Misunderstood Connections’, in K. Anthony Appiah and Amy Gutmann, *Color Conscious: The
   [100])
41. Beyond intentional forms of bigotry and obvious discrimination, the conception of race as sec-
   ond nature accommodates a ‘structural’ perspective on racial oppression, which, in Iris Marion
   Young’s formulation, ‘refers to systemic constraints on grounds that are not necessarily the
   result of the intentions of a tyrant. Oppression in this sense is structural, rather than the result
   of a few people’s choices or policies. Its causes are embedded in unquestioned norms, habits,
   symbols, in the assumptions underlying institutional rules and the collective consequences of
   following those rules.’ Iris Marion Young, *Justice and the Politics of Difference* (Princeton,
43. On the concept of the ‘school-to-prison pipeline’, see, for example, Tona M. Boyd, ‘Legisla-
   tive Responses to the School-to-Prison Pipeline’, *Harvard Civil Rights – Civil Liberties Law
44. Plessy v. Ferguson, 163 U.S. 537, 557 (1896). I owe to Ian Lopez the insight that Harlan’s remark has to be read against this context, which is always ignored by proponents of what he calls ‘reactionary colorblindness’. Lopez observes that, even during this time of de jure segregation and Jim Crow, ‘the Supreme Court used colorblind reasoning to preserve racial hierarchy, by upholding facially neutral but nevertheless deeply racially oppressive state action’, such as poll taxes; see Lopez, ‘Nation of Minorities’, pp. 992–5. My goal here is to describe why the principle of color-blindness is at times compatible with, and in fact supports, structures of racial oppression.


46. As Crenshaw writes, ‘Blacks did use rights rhetoric to mobilize state power to their benefit against symbolic oppression through formal equality ... Yet today the same legal reforms play a role in providing an ideological framework that makes the present conditions facing underclass Blacks appear fair and reasonable’ (Crenshaw, ‘Race, Reform and Retrenchment’, 1382–3). This is not to deny that the civil rights movement made demands for economic, and not merely legal, equality. Rather, Crenshaw’s point is that the rights discourse deployed to advance certain aspects of the civil rights agenda carried with it certain limitations that conservatives later exploited.

47. Gotanda, ‘Critique’, 16.

48. ibid., 23.

49. Adorno, Negative Dialectics, p. 12.

50. Albrecht Wellmer, building on Habermas’ communicative theory of rationality and Wittgenstein’s philosophy of language, argues that Adorno’s idea of ‘the concept’, as opposed to a non-conceptual referent, remains trapped within the ‘philosophy of the subject’. Albrecht Wellmer, The Persistence of Modernity, trans. D. Midgely (Cambridge, MA: MIT Press, 1991). Adorno’s critique of the concept parallels Wittgenstein’s insofar as he aims to use what might be called a language game – dialectics – to disclose the falsity of singular, unified concepts advertising an unambiguous meaning. Wellmer argues, however, that precisely because Adorno continues to proceed on the Hegelian supposition that actuality consists in a dialectical relationship between subject and object, he is unable to specify how concepts tend to distort particulars by subsuming them within general categories. He suggests that Adorno’s critique would benefit from a refiguring of ‘the concept’. The concept should be grasped not as a metaphysical entity, but rather concretely, as a linguistic construction, entertained and sustained by a community of speaking and listening, writing and reading beings. Wellmer is surely right that the rigid dialectic between subject and object, and the idea of an ‘other’ totally beyond the grasp of thought, blinds Adorno to the emancipatory possibilities of language and communicative rationality. A more intersubjective Adornian theory must remain sensitive, however, to extra-linguistic, socially objective forces that impinge upon subjective consciousness and intersubjective communication. Further, it must realize that the emancipatory potential in the play of language is conditioned by, and must ultimately refer back to, a social reality that is not purely linguistic.


52. Adorno, Negative Dialectics, p. 12.
53. Horkheimer and Adorno, *Dialectic of Enlightenment*, p. 18. That this is Adorno’s view in particular (and not necessarily or exclusively Horkheimer’s) is evident from this comparable passage in Adorno’s essay ‘*Skoteinos, or How to Read Hegel*’:

According to Hegel there is a constitutive need for the nonidentical in order for concepts, identity, to come into being; just as conversely there is a need for the concept in order to become aware of the nonconceptual, the nonidentical. But Hegel violates his own concept of the dialectic, which should be defended against him, by not violating it, by closing it off and making it the supreme unity, free of contradiction. (Theodor W. Adorno, *Hegel: Three Studies*, trans. S. W. Nicholsen [Cambridge, MA: MIT Press, 1994], pp. 89–148 [p. 147])


55. Judges concerned with ‘anti-balkanization’ caution that the use of racial classifications to address inequality may have a tendency to deepen racial resentment and threaten individual dignity. Justices Kennedy and O’Connor, for example, have reasoned that, because racial classifications may trigger perceptions of unequal treatment, more subtle, ‘facially-neutral’ methods of addressing racial inequality are preferable. While this concern is not without merit, roundabout methods of furthering racial equality may not be as effective as direct interventions, and a concern for the semblance of social harmony ought not to trump demands for a more equal society. Moreover, as Reva Siegel argues, concerns about social harmony tend to be voiced mainly in cases of ‘reverse-discrimination’, where dominant groups are disadvantaged by racially ameliorative policies. An equitable application of the anti-balkanization principle would need to do much more to recognize the damage to social harmony and the dignity of minority groups that severe racial stratification engenders. See Reva Siegel, ‘From Colorblindness to Anti-balkanization: an Emerging Ground of Decision in Race Equality Cases’, *Yale Law Journal* 120 (2011): 1278–1366.


59. We might take Adorno’s reading of Hegel as reflecting his own views on this point:

Hegel explicitly and implicitly orders human beings, as those who perform socially necessary labor, to subject themselves to an alien necessity. He thereby embodies, in theoretical form, the antinomy of the universal and particular in bourgeois society. But by formulating it ruthlessly, he makes this antinomy more intelligible than ever before and criticizes it even as he defends it. Because freedom would be the freedom of real, particular individuals, Hegel disdains the illusion of freedom, the individual who, in the midst of universal unfreedom, behaves as though he were already free and universal. (Theodor Adorno, ‘Aspects of Hegel’s Philosophy’, in *Hegel: Three Studies*, [pp. 1–52], p. 46 [emphases added])


61. ibid., p. 161.
62. As Seyla Benhabib writes: ‘The rationalist-moral utopia of the Enlightenment is rejected by Adorno in favor of the utopia of the nonidentical; individual autonomy is now understood as the capacity of the self to ‘let diffuse nature be’ and yet retain a coherent sense of selfhood. At the social level this would imply a form of togetherness in diversity, or unity in difference. (Seyla Benhabib, ‘Critical Theory and Postmodernism: On the Interplay of Ethics, Aesthetics, and Utopia in Critical Theory’, Cordozo Law Review 11 [1989–90], 1435–48 [1446]) Given the aesthetic orientation in Adorno, his emphasis is on the individual’s affinity with natural objects, but we can plausibly interpret his notion as admitting also an openness towards other persons.


66. For an enlightening study of neo-conservative ‘cultural racism’ see Thomas McCarthy, Race, Empire, and the Idea of Human Development (Cambridge and New York: Cambridge University Press, 2009), pp. 84–93. See also Lopez, ‘Nation of Minorities’, pp. 1006–12, for a discussion of the origins of the ‘ethnic’ account of black cultural inferiority, as developed by Patrick Moynihan and Nathan Glazer.

67. Certain liberal multiculturalist theories, which draw on the experience of Canada and other commonwealth countries with indigenous peoples and well-defined sub-national cultures, often emphasize the need to balance individual rights against group autonomy through democratic means. See, for example, James Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity (Cambridge and New York: Cambridge University Press, 1995), and Monique Deveaux, Gender and Justice in Multicultural Liberal States (Oxford: Oxford University Press, 2006). This approach is surely relevant to parallel questions in the American context, regarding immigrant groups, religious and cultural minorities, and American Indians. However, black–white inequality is not exclusively a question of cultural autonomy and group recognition. The emancipatory thrust of the 13th and 14th Amendments and the landmark statutes of the civil rights revolution was to relieve black individuals of racial oppression, not to grant rights to the black community as a distinct cultural entity. Social and political recognition of cultural identity may indeed be important to concerns facing the black community. See, for example, W. E. B. Du Bois, The Conservation of Races (Washington, DC: the American Negro Academy, 1897), and The Philosophy and Opinions of Marcus Garvey, ed. Amy Jacques Garvey (Dover, MA: Majority Press, 1986); more recently, see Robert Gooding-Williams, ‘Race, Multiculturalism, and Democracy’, Constellations 5(1) (1998): 18–41. But the ideal of individual freedom, properly understood, nonetheless speaks directly to the plight of African Americans whose life liberty, and property are often narrowly circumscribed by structures of racial domination.

68. Appiah and Gutmann, Color Conscious, p. 100.

69. ‘In such processes, a democratic people, which considers itself bound by certain guiding norms and principles, engages in iterative acts by reappropriating and reinterpreting these,
thereby showing themselves to be not only the subject but also the author of the laws.’ See Seyla Benhabib, with Jeremy Waldron et al., *Another Cosmopolitanism*, ed. Robert Post (Oxford and New York: Oxford University Press, 2008), p. 49.


71. Freeman argues that ‘the production of liberal scholarship is really part of the process of fashioning a legitimating ideology that makes the world appear as if it were not the one we live in, that holds out utopian promises while assuring their non-attainment, that cuts off access to genuine possibilities of transformation’. Alan Freeman, ‘Truth and Mystification in Legal Scholarship’, *Yale Law Journal* 90 (1981): 1229–37 (1235).

72. As Habermas argues, the tension between legal and factual equality – between citizens’ ‘power to decide freely according to their own preferences’ and ‘the social effects that legal regulations have’ on citizens – must be addressed through democratic self-government: ‘Legitimate law closes the circle between the private autonomy of its addressees, who are treated equally, and the public autonomy of enfranchised citizens, who as equally entitled authors of the legal order, must ultimately decide on the criteria of equal treatment’ (Habermas, *Between Facts and Norms*, p. 415).