FOREWORD

Countering Kulturkampf Politics Through Critique and Justice Pedagogy, Race, Kulturkampf, and Immigration

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INTRODUCTION

The Ninth Annual Latina and Latino Critical Theory (LatCrit IX) Conference was held in Malvern, Pennsylvania between April 29 and May 1, 2004. This year’s conference theme, “Countering Kulturkampf Politics Through Critique and Justice Pedagogy,” brought together a wide array of scholars, academics and activists from diverse backgrounds and disciplines to reflect on the current state of affairs. Like previous LatCrit gatherings, this year’s conference sought to create an interdisciplinary and multidimensional environment where the participants could critically address the effects of the traditional conservative and current neo-conservative legal and policy oriented initiatives that have focused on the “rollback” of the New Deal and Civil Rights legacies. This “rollback” has been especially evident in the Supreme Court’s increasing restrictions and narrowing of

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1 For a general introduction and overview of LatCrit projects and the organization’s history, please refer to the LatCrit webpage at: http://personal.law.miami.edu/~fvaldes/latcrit/overview.html or the LatCrit Informational CD.

2 For an alternative empirical assessment of the Burger Court, see Harold J. Spaeth, Burger Court Review of State Court Civil Liberties Decisions, in JUDICIAL POLITICS: READINGS FROM JUDICATURE 599-605 (Elliot E. Slotnick, ed. 1992). For an alternative empirical assessment of the Rehnquist Court, see Christopher E. Smith & Thomas R. Hensley, Assessing the Conservatism of the Rehnquist Court, in JUDICIAL POLITICS.
individual rights in polemical areas such as abortion, affirmative action, the free exercise of religion, the rights of criminal defendants, workplace protections for immigrants, and bilingual education. Participants were encouraged to offer reflections and engage in a dialogue regarding the effects of the use of Kulturkampf narratives on various aspects of both United States domestic and international law and policy.

The German notion of Kulturkampf or “culture wars” was originally adopted by Bismarck to describe his coercive policies against the Catholic clergy’s efforts to control various domestic institutions during the 1870s. At the time, local Catholic clerics, presumably under the control of the Vatican, a foreign force, sought ideological hegemony over government institutions such as public education. As Francisco Valdes expounds in this symposium’s Afterword, while the notion of “cultural wars” has been present in the U.S. legal and political landscape for more than three decades, the term was not coined until the 1992 Republican National Convention when Patrick J. Buchanan used it to describe his bid for the “Soul of America.” In 1996, Justice Antonin Scalia formally used the term Kulturkampf to describe his dissenting opinion in Romer v. Evans. Ironically, while the original notion of Kulturkampf was adopted by Bismarck to describe his challenge to the efforts by non-State actors

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5 See Webster v. Reproductive Health Services, 492 U.S. 490 (1989); see also Planned Parenthood v. Casey, 505 U.S. 833 (1992) (allowing individual states to regulate but not ban abortion services).

4 Grutter v. Bollinger, 539 U.S. 306 (2002) (holding that colleges may consider race as a factor as part of a narrowly tailored admissions process); Gratz v. Bollinger, 539 U.S. 244 (2002) (holding that the Fourteenth Amendment is limited to the protection of individuals and not groups prohibiting classifications based on race in most circumstances).

5 Employment Division of Oregon v. Smith, 494 U.S. 872 (1990) (holding that valid government regulations take precedence over individual’s religious practices).

6 Duckworth v. Eagan, 492 U.S. 195 (1989) (police not required to give complete or precise Miranda warnings to suspects).


such as the Catholic Church to take control of governmental institutions, conservatives and neo-conservatives in the United States (U.S.) have invoked this term in an effort to undermine and “rollback” progressive and civil rights oriented law and policy and to carry on an agenda that employs a narrative of culture that aims to transform the core democratic and egalitarian principles of the U.S. More importantly, liberal efforts during the 1990s to accommodate conservative challenges by adopting a language of diversity, multiculturalism and tolerance enabled the creation of an ideological framework that not only validated competing conservative ideologies, but also empowered them.

This year’s conference brought scholars and activists from diverse disciplines and interests to discuss ways in which scholars, educators, students, and activists could share competing critiques of the ideological State apparatus and further offer alternative perspectives on how to counter the impact of the Kulturkampf narrative. As noted above, the efforts by conservative and neo-conservative ideologues to redefine social, economic and political institutions, threatens to undermine and ultimately dismantle the institutional gains achieved during various historical social and political struggles by a wide array of progressive forces. For LatCrit scholars and activists these initiatives represent a return to conditions under which various forms of subordination flourished without restraints, and or the perpetuation of other forms of subordination and exploitation. The struggle over the foundations of the State apparatus is tantamount to a struggle for justice, democracy, and equality for traditionally subordinated groups in both the U.S. and within the sphere of influence of this empire.

In recent years the debates over Kulturkampf were brought to the forefront in the vicious dissenting opinions of Supreme Court Justice Antonin Scalia’s in cases such as Romer v. Evans and Lawrence v. Texas. In both instances, Justice Scalia sought to frame challenges to State initiatives that had the effect of not only discriminating against gays, but in the case of Texas also criminalizing “homosexual conduct” as cultural wars. In Justice Scalia’s cultural battlefield the discrimination and criminalization of a gay identity was reduced and represented as discrimination and criminalization of a historically and traditionally reprehensible conduct, which in turn should be fought in the political realm through “normal democratic means.”

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14 Romer, 517 U.S. at 636.
It is not hard to see how the notion of *Kulturkampf* has become a sort of code word invoked to dismiss some Fourteenth Amendment challenges to conservative laws and rulings that seek to erode some of the more important principles gained by progressive social struggles. However, what is ironic, is that while conservatives have traditionally invoked the need for the Courts to be neutral arbiters of disputes as a last resort and not interfering with the democratic process, when it comes to addressing issues that challenge their ideologies, they are the first to become activists and to use the Courts to intercede on behalf of conservative interests. One way to explain this double standard is by suggesting that conservative jurists and policy-makers are first and foremost conservative, and then legal actors. This has become more complicated with the emergence of a neo-conservative Administration that embraces market oriented policies, and the increasing political acquiescence of liberals.

My main contention is that conservative and neo-conservative ideologies are premised on anti-democratic and anti-egalitarian principles that by definition undermine the democratizing and egalitarian objectives of progressive and civil rights struggles. Moreover, while it is possible to trace continuities between conservative and neo-conservative currents, there are also some clear distinctions between the two that need to be recognized. These distinctions are important because they explain some of the nuances in the ways in which power has been exercised in order to enable increasing rollbacks on law and policy. Of course, the distinctions can also help us expose the “wolf in sheep’s clothing” that lurks in the midst of conservative and neo-conservative concessions to the challenges posed by subordinated, oppressed, and exploited subjects. These distinctions can also shed some light on some of the inequalities of power, class and status harbored by liberalism and its agents.

The *animus* toward democracy among conservative ideologues can readily be traced to the aftermath of the French Revolution and more specifically to the anti-Jacobin writings of Edmund Burke.\footnote{For a discussion of these differences, see Anne Norton, *Leo Strauss and the Politics of American Empire* (2004); Patrick J. Buchanan, *Where the Right Went Wrong* (2004); Shadia B. Drury, *Leo Strauss and the American Right* (1999); and Leo Strauss, *The Straussian and the American Regime* (Kenneth L. Deutsch & John A. Murley, eds., 1999).}

\footnote{Antonio Y. Vázquez-Antoyo, *Agonized Liberalism: The Liberal Theory of William E. Connolly*, 127 Radical Phil. 8, 16 (2004).}
Burke, an Irish conservative in a British Court, was concerned that democracy could empower a mob of individuals, guided by their passions, to commit a wide array of abuses. More importantly, equality obscured not only innate or natural differences between individuals, but also empowered subjects that were not capable of overcoming their passions to govern and become agents of the State. Conservatives like Russell Kirk who identify as the heirs of the Burkean tradition, have argued that democracy has a tendency for resolving social, economic and cultural questions by political means while subordinating religious and moral solutions. Kirk, the acknowledged Godfather of U.S. conservativism, contented that democracy allows liberals and radicals to promote “the illimitable progress of society,” while threatening to efface the natural distinctions among men from different classes and orders in society. So called paleo-conservatives like Barry Goldwater have been more explicit:

Was it then a Democracy the framers created? Hardly. The system of restraints, on the face of it, was directed not only against individual tyrants, but also against a tyranny of the masses. The framers were well aware of the danger posed by self-seeking demagogues—that they might persuade a majority of the people to confer on government vast powers in return for deceptive promises of economic gain. And so they forbade such a transfer of power first by declaring, in effect, that certain activities are outside the natural and legitimate scope of the public authority, and secondly by dispersing public authority, jealous of its own prerogatives, would have a natural incentive to resist aggression by others.

Likewise, the intellectual father of neo-conservatives, Leo Strauss, was deeply suspicious of democracy because it permitted “less wise” individuals to act on their tyrannical passions in the polity. Conservative narratives also tend to defend anti-egalitarian positions premised on a wide array of arguments. While most agree that equality can only occur in the eyes of God, and some may accept

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18 Id. at 223-231.
20 Id. at 8-9.
22 See generally LEO STRAUSS, WHAT IS POLITICAL PHILOSOPHY?, AND OTHER ESSAYS (1959). The reader may be required to engage in an esoteric reading between the lines of Strauss’ argument in order to better grasp some otherwise obscure passages meant for the masses, or more correctly written in an exoteric style. For the best discussion of the Straussian suspicion of democracy, see Nicholas Xenos, Leo Strauss and the Rhetoric of the War on Terror, 3 LOGOS 2 (2004).
a minimalist or narrow conception of equality in the legal realm, the
conservative narrative is generally premised on the reaffirmation of
natural classes and castes. To be sure, conservative thinkers like Kirk,
endorsed by the National Review, the Young Americans Foundation,
and a host of other right wing entities, have argued that conservative
thought is premised on a:

Conviction that civilized society requires orders and classes, as
against the notion of a “classless society.”... If natural distinctions
are effaced among men, oligarchs will fill the vacuum.  

More importantly, Kirk was clear that cultural battles are dangerous
and need to be fought by conservatives because:

In nature, obviously, men are unequal: unequal in mind, in body,
in energies, in every material circumstance. The less civilized a
society, and the more generally will and appetite prevail unchecked, the less equal is the position of individuals. Equality
is the product of art, not of nature; and if social leveling is carried
so far as to obliterate order and class, reducing a man to “glory in
belonging to the Chequer No. 71,” art will have been employed to
deface God’s design for man’s real nature.

Yet, while conservatives like Kirk were willing to accept some sort
of equality in the courts of law, others like Goldwater were also
honest enough to state that “(w)e are all equal in the eyes of God but
we are equal in no other respect.” Furthermore, efforts to appeal to
the law as an egalitarian institution in the face of various forms of
social, economic, political oppression, subordination, and
marginalization, were seen by Goldwater as “artificial devices for
enforcing equality among unequal men (and) must be rejected if we
would restore that charter and honor those laws.” The ultimate
premise of a conservative argument was a call for government non-
intervention, at least when dealing with civil rights challenges. This
anti-egalitarian ideology has translated into a rejection of the
Fourteenth Amendment’s Equal Protection Clause, and a host of
other interpretations of the Constitution that seek to address the
pervasive inequalities afflicting our polity, at least when convenient
and when it does not entail selecting a neo-conservative President.

The clear implications of these ideologies are the efforts to return to

23 Kirk, supra note 19, at 8.
24 Id. at 58-59.
25 Id. at 9.
26 Goldwater, supra note 21, at 64.
27 Id.
a status quo were the polity is guided and governed by the wisdom of White, Christian, heterosexual, and property owning men.

In contrast, the neo-conservative turn is much more complicated and escapes easy categorization. To be sure, while it is readily evident that neo-conservative ideologies have no qualms defending anti-democratic positions, despite the current Administration’s rhetoric, egalitarian principles are sometimes tolerated despite the underlying currents of a conservative natural rights ideology. In my opinion, what distinguishes the dominant neo-conservative narrative is a willingness to subordinate conservative principles, and for that matter all principles, to a market oriented ideology. Yet, this market oriented ideology which has bathed in the currents of the neo-liberal economic wave, also departs from a more traditional New Deal/liberal willingness to use surplus resources gained in the markets for social programs, and makes these additional resources available for war and other imperialist pursuits.\footnote{For a discussion of U.S. imperialism, see David Harvey, The New Imperialism (2003).} In a sense, the neo-conservative narrative has been both navigating the currents of a tempestuous ocean, while also trying to channel its currents in ways that maximize profits. To this extent, it is possible to argue that the neo-conservative narrative has endorsed narrowly tailored notions of equal opportunity, often betraying conservative principles, so long as these are profitable. The continuities and tensions between the conservative and neo-conservative ideologies can be readily discerned in at least two areas of contention, namely the relationship of natural rights to democratic participation, and the relationship between narrowly tailored identities and the market.

Leo Strauss, like most conservative thinkers, affirmed the natural superiority of some men over others throughout his work.\footnote{See generally Leo Strauss, Natural Right and History (1965).} While not all natural rights arguments are premised on the affirmation that natural distinctions among men will have an impact on their ability to participate in the polity, hence Abraham Lincoln’s argument in speeches like “A House Divided,”\footnote{Abraham Lincoln: His Speeches and His Writings 372-381 (Roy P. Basler, ed., 2001).} Strauss’ argument did affirm that most men were less capable of understanding political issues, and could likely perpetuate various forms of tyranny, including
democratic tyranny.\textsuperscript{32} In the context of law, Justice Scalia’s use of the notion of natural distinctions is readily evident in the language of his dissenting opinion in \textit{Romer}, where he writes that:

\begin{quote}
The Colorado homosexuals; they can be favored for many reasons – for example, because they are senior citizens or members of racial minorities. But it prohibits giving them favored status \textit{because of their homosexual conduct} – that is, it prohibits favored status \textit{for homosexuality}.
\end{quote}

As I will suggest throughout this \textit{Foreword}, part of what is at stake in the use of a natural rights argument is the affirmation of an artificial duality that can counterpose an essentialist/biological conception of identity against an alternative form of identity that is tantamount to a narrow conception of culture, or more precisely conduct. The effect of the use of natural distinctions is to create a one-dimensional conception of subjectivity that excludes the multiple dimensions and intersectionality aspects of the subject’s identity.

What is at stake in this argument is the preservation of the status quo, or rather as Justice Scalia puts it, the “current social order.”\textsuperscript{34} Moreover, Justice Scalia’s argument suggests that the Court should not interfere on behalf of subordinated subjects whose identity can be understood to be a form of conduct. It follows, that the decriminalization of a homosexual identity should be pursued in the private realm where “every group has the right to persuade its fellow citizens that its view of such matters is best.”\textsuperscript{35} The problem with this argument is that conservatives, and neo-conservatives alike, are also quite clear that the majority of people are not able to reason, and are generally guided by their passions. In other words, while conservative and neo-conservative arguments are clear that there are natural distinctions among citizens, and hence the masses should be prevented from demanding more democracy, they are also assert that various forms of discrimination against historically and traditionally subordinated subjects and groups should be resolved in an imagined public and democratic realm rather than in the Courts. Of course, reality is a bit more complex, my aim however is to clarify the tensions of this argument in order to expose the double standards inherent in conservative and neo-conservative sophistry. As I will suggest throughout this \textit{Foreword}, conservative and neo-conservative narratives are misleading and seek to reframe the terms of debate in ways that

\textsuperscript{32} See generally LEO STRAUSS, ON TYRANNY 42 (2000).
\textsuperscript{33} \textit{Romer}, 517 U.S. at 644.
\textsuperscript{34} \textit{Lawrence}, 539 U.S. at 591.
\textsuperscript{35} \textit{Id.} at 542.
discourage democratic and egalitarian challenges emanating from historically and traditionally subordinated subjects and groups. Hence the narrative of *Kulturkampf*, a narrative that recasts the debates in terms of a war between competing expressions of conduct.

Neo-conservatives also part company with traditional conservatives with regards to the role of the market, and more precisely the influence of profit in legal and policy decisions. Notions such as equality and justice are ultimately subordinated to what is best for the markets. What is right and what is just is determined by what is good for business. To be sure, in *Grutter*, Justice O’Connor had no qualms in defending certain forms of narrowly tailored race based affirmative action if these were good for the markets, or in her words “(t)hese benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”

Ironically, this argument has the potential to undermine traditionally conservative positions because the markets, when they are not being manipulated by a corporation, tend to respond to consumption, not to morality. In addition, this argument readily forgoes the democratic process in the interest of encouraging profits and successful businesses in a competitive marketplace. Perhaps this is the space where neo-conservative and neo-liberal ideologies partner up.

The *Kulturkampf* narrative enables conservative and neo-conservatives to recast issues of inequality, exploitation, marginalization, and other forms of subordination as narrow cultural wars, or more precisely fits of spite. This *Foreword* suggests that this is accomplished by employing at least two narrative strategies, namely the use of mutually contested dualities, and the representation of identity as a narrow and/or one-dimensional contested site. The dualities in question rely on the creation of artificial distinctions between binary constructions such as essential/behavioral identities, the private/public, the social/economic, etc. Additionally, those identities deemed to be “cultural,” become contested sites which are subject to narrowly tailored external definitions that seek to deny the multidimensional and intersectional complexities of a broader notion of identity.

The LatCrit initiative is part of a critical tradition of scholars who have been committed to exposing these and other double standards

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36 *Grutter*, 539 U.S. at 533-34.
37 *Romer*, 517 U.S. at 636.
and contradictions, which in turn reproduce various modalities of multidimensional subordination, oppression and exploitation. LatCrit has been providing a critical and democratic institutional space to question, reflect, and challenge these forms and other forms of subordination, while simultaneously creating an intellectual space/institution where legal scholars can explore alternative forms of resistance. This commitment has taken material form in conferences, workshops, courses, publications, and a host of other projects that seek to influence the way in which legal actors, and other activists, contribute to the transformation of the society in the pursuit of more democratic and egalitarian principles of justice. This particular symposium explores how the cultural wars can offer an alternative space for critique and for transformation.

The internal contours of this year’s conference have also been shaped by the loss of Professor Jerome McCristal Culp, Jr. Professor Culp taught at Duke University’s School of Law and was a founding member of LatCrit. He died as a result of complications associated with kidney failure on February 5, 2004. Professor Culp was not only a mentor, colleague and friend, but was also an inspiration for LatCrit. He was not only a founding pillar to the institution, but a guiding light for many Critical Race Theorists and LatCrit scholars and activists. This year’s conference and symposium memorialize the influence and loss of Professor Culp.

Since its inception almost a decade ago, LatCrit has consistently published the proceedings of the annual conference in the law journals of the sponsoring institutions.38 The publication of the

annual conference proceedings not only provides a historical record of the papers and articles presented in the annual meetings, but also contributes to the institution building process. More importantly the publication of these proceedings contributes to a widespread dialogue among scholars and activists alike. To be sure, the reader is often likely to find innovative and thought-provoking articles and commentary in the long list of LatCrit publications. This year’s LatCrit IX proceedings will be published in two parts, and in two journals, namely the *Villanova Law Review* and the *Seton Hall Law Review*. Each publication will contain an array of articles that are representative of the substantive discussions that took place during the annual conference. The *Villanova Law Review* issue contains a five interesting collections of papers that address five currents of thought. This issue begins with a tribute to Professor Jerome McCristal Culp Jr., written by friends and colleagues. The second cluster of articles addresses the strategies for coalition building and direct activism. The third cluster of papers focuses on teaching pedagogies and suggestions for critical education. A fourth and related cluster collects some essays that address questions of methodology and offer important self-critiques. The final cluster in this issue addresses questions of nationalism and sovereignty. Together, they contribute interesting and often polemical arguments to the current debate over Kulturkampf in the United States.

The proceedings included in the *Seton Hall Law Review* focus on three related areas. The first cluster of essays contains a series of papers that look at contemporary racial realities from multiple perspectives. Racial ideologies are explored from different positions and with refreshing lenses. The second cluster of readings engages the question of culture wars directly and collects various poignant critiques addressing the central theme of this year’s conference directly. A final section of this publication collects various articles that engage traditional questions of immigration from a contemporary standpoint, and in light of the recent debates over immigration law and policy in the U.S.

**I. CONTEMPORARY RACIAL REALITIES**

There are at least five ideological arguments that are shaping the contours of contemporary racial realities within the *Kulturkampf* narrative that has been driving legal and policy rollbacks in recent
years. These include a traditional conservative claim that we have reached the end of history, or rather the end of racism; the Clinton Race Initiative’s call for a national dialogue on diversity and multiculturalism;\textsuperscript{39} an essentialist conception of race; a neoconservative market oriented jurisprudence, and the War on Terrorism. The interplay of these ideologies has further restricted the parameters available for any significant legal challenge. More importantly, the new liberal orthodoxy has contributed to the depoliticization of race while legitimating a conception of culture that has enabled conservatives to recast the debates of inequality as debates of cultural diversity and tolerance. The Kulturkampf narrative has in turn perpetuated an artificial binary relationship between narrowly constructed notions of race and culture can in turn be used to counter one another and thus contribute to the creation of the conditions that have enabled the progressive dismantling of civil rights institutions.

Claire Jean Kim eloquently summarizes three of the key tenets of the contemporary conservative ideology on race in the United States, which are: “first, that White racism against Blacks has declined to the point where it is no longer a serious problem; second that the two main barriers to Black advancement are now Black cultural pathologies and liberal attempts to deny these pathologies and force wrong-headed race-conscious policies on the American people; and third, that the solution is a return to full colorblindness in law and policy.”\textsuperscript{40} Cultural pathologies, of course, are reduced to behaviors which can be readily modified with the appropriate attitude adjustment. More importantly, this argument suggests, the only way to return to a color-blind society is by eliminating the civil rights oriented institutions that encourage a racialist consciousness that that leads people to demand special treatment. In a sense, this conservative argument becomes the high-bar from which to measure the progress of rollback on race conscious institutions. More importantly, these conservative standards also seek to shift “the center” in relationship to a right-wing position at the exclusion of any form of civil rights oriented alternative.

In the realm of policy, the 1997-1998 Presidential Initiative on Race\textsuperscript{41} re-defined the status of race in society in ways that that both

\textsuperscript{39} See \textit{RACE AND ETHNICITY IN THE UNITED STATES} (Stephen Steinberg, ed., 2000).
\textsuperscript{40} Claire Jean Kim, \textit{Clinton’s Race Initiative: Recasting the American Dilemma}, 33 \textit{POLITY} 2 (Winter 2000).
\textsuperscript{41} An on-line version of the text can be found at http://clinton3.nara.gov/Initiatives/OneAmerica/ pirsummary.html.
undermined the historical gains of the civil rights movement, paving the way for significant rollbacks, and further transformed the terms of debate in ways that enabled conservative ideologues to highjack the terms of debate. Ironically, the Clinton Race Initiative would accomplish this by promoting a cultural conception of race that rejected the premises of the historical achievements of the civil rights movement. The new Liberal orthodoxy, led to the validation of a sort of mutually constitutive and essentialist conception of culture and race that reproduced additional forms of inequality and limited the possibilities to seek redress. In recasting the notion of race as form of essentialist cultural difference, the Clinton Race Initiative contributed to the dilution of the power of a race narrative in both law and policy. Whereas race and racism held a particular power of convocation, the new conception of an essentialized racial culture made it possible to redefine the race problem in the U.S. as a mere component of a diverse multicultural national identity. Thus, not only have conservative arguments sought to restrict the political impact of race, but liberals have also colluded in creating the conditions that further enable the erosion of the power racial claims can wield in society against anti-democratic and inegalitarian laws and policies.

One way to understand how the Clinton Race Initiative contributed to the creation of the conditions that have enabled conservative ideologies to re-define the contemporary legal and policy landscape is to compare it to previous Presidential initiatives. Kim’s article on Clinton’s Race Initiative notes that the 1997-98 Presidential initiative not only sought to redefine the nature of the race problem in this country, but also recasted the conceptualization of the goals and solution to this problem, in contrast to the recommendations set forth in Gunar Myrdal’s *American Dilemma* (1948) and the Kerner Commission Report of 1968. To be sure, Kim further notes that the Clinton’ Race Initiative, unlike Myrdal’s *American Dilemma* and the Kerner Commission, argued that the nature of the race problem in the U.S. could be traced to innate racial and cultural differences and that White racism had by now ceased to be the crux of the American race problem. In other words, while both the traditional liberal ideologies put forth by Myrdal and the Kerner Report respectively focused on individual and institutional forms of White racism as root causes of the race problem in the U.S., the new paradigm shift suggested that innate

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42 Kim, *supra* note 40.
45 *Id.* at 187.
cultural/racial differences were the source of the problem. Hence, this argument tacitly endorsed the use of the notion of cultural wars as a way to understand the race problem in the U.S.

Moreover, while the Myrdal report proposed that the goal of the nation should be to foster assimilation, and the Kerner report endorsed integration, the Clinton initiative envisioned a national unity with a multicultural or diverse gloss. In contrast, Kim further notes, while Myrdal proposed an educational approach to solving the problem, and the Kerner Report invoked the allocation of material resources to create social programs to counter the effects of institutionalized racism, the Clinton initiative called for more dialogue. Once the problem, goals, and solution were framed in these terms, it was not difficult for conservatives use both the language and narrative to redefine the scope of alternatives in the realm of public policy and to justify rollbacks in public programs. Likewise, the Clinton Race Initiative contributed to narrowing the available institutional options for redress, and to some degree it also redefined the liberal parameters for what forms of resistance would be tolerated. In my opinion, this liberal pandering to right-wing ideologues provided a readily accessible language and narrative of diversity that enabled conservatives to claim a seat at the table as equal members. Of course, the implication is that the unequal relations of power exercised by conservatives can be obscure, dismissed, excluded for purposes of a dialogue. In turn, conservatives not only can claim an equal voice and status to that of subordinated groups, but they can also shift the focus away from the current stratification of power and simply claim that their agenda has equal validity in any discussion of the solution of the race problem regardless of how unjust and antithetical their positions may be to the pursuit of democratic and egalitarian solutions.

Conservatives have appropriated this language in order to engage in an assault of academic institutions through a call for intellectual diversity. This assault has been predicated on the public policing of so called un-American professors and curricula by mainstream conservative and neo-conservative ideologues such as David Horowitz, Daniel Pipes Campus Watch, or more recently with

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44 Id. at 192.
45 Id.
46 For example, see the Students for Academic Freedom Homepage, at http://www.studentsforacademicfreedom.org.
47 See David Horowitz, The Campus Blacklist, FRONTPAGEMAGAZINE.COM, April 18, 2003, at http://www.frontpagemag.com/articles/ReadArticle.asp;ID=7357 (denouncing institutions of higher education as liberal enclaves).
Ann Coulter’s call for a new McCarthyism against liberals in this year’s Conservative Political Action Conference (CPAC). This call for intellectual diversity not only invokes the language of persecution and oppression to describe the status of conservative ideologues, but also obscures the status of conservatives in society at large by creating an artificial separation between institutions of higher education and society, at least when convenient. What is especially misleading about this conservative crusade is that conservative thought is in many ways antithetical to intellectual pursuits. In fact, this is the key problem implicit in this Trojan Horse, namely the intolerance towards new forms of knowledge. To be sure, most conservatives are clear that all social, political, and economic problems are at heart moral and religious problems, thus the solution to our contemporary problems can ultimately be found in the moral and religious texts. The intellectual pursuit, in contrast, does not discard new alternatives, new ways of thinking or making sense of problems, which has led to questioning foundational myths and narratives that undermine conservative ideologies.

The question of course remains, is the intellectual diversity initiative really concerned with the democratization of institutions of higher education? First, it is clear that what is at state is an effort to challenge institutions where there is a perceived predominance of liberal or left leaning academics. The intellectual diversity crusade has not been extended to institutions like Bob Jones University or Liberty University. Second, the adoption of the International Studies in Higher Education Act of 2003 (HR 3077), which has made some Title VI funding contingent on national interest and security, affirms that funding is contingent to the pursuit of intellectual projects that serve the national security interest. In other words, according to this legislation the pursuit of knowledge needs to be subordinated to a nationalist agenda that subordinates all other questions to national interest and security. More importantly, as the Solomon Amendment debates had demonstrated, conservatives have no qualms in subordinating equality to ideological interests. In the legal realm, Justice Scalia’s dissenting opinion in Lawrence speaks for itself:

Today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by

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48 See the Campus Watch Homepage at http://www.campus-watch.org/, which monitors faculty identified with the Middle East.
some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.  

Professors Jaquelyn L. Bridgeman and Aya Gruber’s essays invoke the need engage in a dialogue with conservatives and to take conservative arguments seriously. However, while Bridgeman and Gruber are clear that there may be conservatives that are unwilling to participate in a dialogue, they both see value in understanding the nuanced positions of particular conservative voices. In the case of Bridgeman, her argument suggests that it may be important for a narrative of the Black community to understand the distinct voice of Black conservatives in order to understand complexities that escape the assimilationist/integrationist paradigm. It follows that we should strive to understand the distinct and particular complexities of conservative ideologies that are emerging from traditionally subordinated communities as a way to understand the complexities of new relationships of power. Frankly, while I am not as optimistic as Professors Bridgeman and Gruber on the benefits of having a dialogue with conservatives, namely because I am convinced that what made changes possible in the realm of civil rights and race relations was not dialogue or an attitude adjustment, but rather the force of law and the State more generally. I do think that this argument can help us explain the emergence of ideological alliances between historically liberal and civil rights oriented activist groups and right-wing ideologues in the current political environment. This has certainly been the case in the polemic surrounding the nomination of Alberto Gonzales to the post of U.S. Attorney General, and his endorsement by the National Council of La Raza (NCLR) and the League of United Latin American Citizens (LULAC).

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50 Lawrence, 539 U.S. at 602.
53 Id.
54 Id.
55 Adolph Reed, Jr., Yackety-Yak About Race, in RACE AND ETHNICITY IN THE UNITED STATES 61 (Stephen Steinberg, ed., 2000).
56 I should probably note that while the NCLR has a long standing reputation for supporting an activist civil rights agenda, this does not mean that this organization has been embracing a critical or progressive agenda. Like most liberal institutions, the members of the NCLR have also reproduced a number of inter-group forms of subordination. See generally Margaret E. Montoya, Introduction: LatCrit Theory: Mapping Its Intellectual and Political Foundations and Future Self-Critical Directions, 53 U.
I think that the most recent ongoing controversy over Ward Churchill’s writings epitomizes how race is weaved into this debate on intellectual diversity. Conservative pundits have also taken pot shots at Ward Churchill’s use of the metaphor of Karl Adolf Eichmann to represent greedy Wall Street capitalists who keep the genocidal State apparatus well financed, while simultaneously profiting from war. Conservative ideologues have resorted to questioning whether Churchill is an authentic Native American rather than addressed the substance of his argument and confronted the implications for a nationalist narrative of identity. This question of authenticity is especially important because it has been framed in the context of an essentialist narrative of race premised on a White supremacist notion of membership defined by rules of hypo-descent or blood quantum. The irony of this ongoing debacle, is that conservative ideologues have been unwilling to exercise intellectual responsibility to confront Churchill’s argument. The Kulturkampf narrative has reframed Churchill’s political challenge to the realm of academic cultural wars, and has sought to discredit this argument by appealing to an essentialist narrative of racial authenticity that can presumably be used to dismiss Churchill’s ability to offer the critique in the first place.

All of the contributors to this cluster are also addressing the question of Coloniality of Power, or rather the ways in which narratives of communal identity reproduce similar ideologies of subordination which the members of these communities have in turn experienced. Stated differently, the contributors to this cluster caution that the norms of community membership need not reproduce narrowly tailored conceptions of authenticity or identity.

58 See generally HANNAH ARENDT, EICHMANN IN JERUSALEM, A REPORT ON THE BANALITY OF EVIL (1994).
They in fact call for a notion of identity/culture which can accommodate the multidimensional and intersectional aspects of the subject’s identity, and in turn expand the collective conception of group identity. Professor Carla D. Pratt’s essay discusses how the Seminole nation has reproduced traditionally exclusionary and inequalitarian racial policies, premised on a standard of hypo-descent, which have resulted in the exclusion of the Dosar-Barkus and Brunner bands of Black Seminoles.\footnote{Carla D. Pratt, Tribeal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity, 35 SETON HALL L. REV. 1241 (2005).} Pratt makes a case for a cultural conception of kinship which can accommodate other aspects of a Native American membership, such as genealogy, historical relationships, and other forms of communal membership that may be excluded by an otherwise narrow and essentialist conception of racial identity. Culture, in the context used by the contributors suggests the possibility of conceiving a sense of common ground that challenges narrow the artificial, narrow, and binary opposition between an essentialist conception of race and conduct that the Kulturkampf narrative propounds.\footnote{For an alternative perspective of this argument, see RAJAGOPALAN RADHAKRISHNAN, DIASPORIC MEDITATIONS, BETWEEN HOME AND LOCATION 89 (1996).}

In the realm of law, while conservatives like Justice Scalia concede than some people “can be favored for many reasons—for example, because they are senior citizens or members of racial minorities,”\footnote{Romer, 517 U.S. at 644.} this status can not be extended to members of traditionally subordinated groups, such as “homosexuals” whose identity can be represented as a form of conduct.\footnote{Id.} Of course, as I noted before, according to Justice Scalia, homosexual conduct is an expression of a conception of culture that is tantamount to conduct. It follows, that any effort to challenge the anti-democratic, inequalitarian and exclusionary laws and policies adopted in this country need to be understood as a further expression of cultural wars. This Kulturkampf narrative can only concede to extending equal protection to racial minorities because these subjects can not change their race, and despite what other conservatives may claim, there are some remnants of racism still pervading in our society. Perhaps this ideology is an expression of a natural rights/law narratology that is unable to come to terms with identities that are different that the base model, the White property-owning male of the Eighteenth century.
A fourth ideological current shaping the contemporary legal narrative of race subordinates questions of equal protection of the law to the exigencies of the market. This is a perspective that is readily consistent with a neo-conservative argument. Perhaps the most revealing expression of this argument can be discerned from Justice O’Connor’s opinion in *Grutter*, where she reasoned that so long as racial classifications are narrowly tailored, it may be possible to establish a compelling state interest that may justify the use of these classifications when considering the equal protection clause.\footnote{*Grutter*, 539 U.S. at 331.}

As I suggested above, Justice O’Connor alludes to an *amicus brief* submitted on behalf of a group of business men. It is readily evident that the ideological basis for this argument is premised on a conception of the courts as neutral arbiters that should only interfere in extreme situations for fear of destabilizing the market. This argument, however, undermines the traditional conservative ideology that suggests that with enough time, the natural forces shaping the market will take care of the problem of racism. Stated differently, this tension highlights a clear double standard in the conservative ideology, one that is premised on narrowly tailored constructions of race and court interventions in regulating social relations with an economic impact, which simultaneously acknowledges the inability of conservative logic to describe the current state of racial relations in the U.S.

What I find most disturbing is the unwillingness of the courts to address the core problems of inequality in our society. Rather than confronting the ever increasing economic, social and political inequities that are in turn creating the conditions that reproduce racism in our nation, and thus demand the need for remedial programs such as affirmative action, the courts continue to legitimate a conservative status quo. To be sure, Professor Valdes’ discussion of the Court’s belated apology to gays in *Lawrence* provides us with a clear example how the Court’s selective coalescence with conservative ideologues or “Blue Dogs” can contribute to the perpetuation of inequitable laws and policies. In the context of race, the Court’s narrowly tailored interventions continue to bring legitimacy to a narrative that is simultaneously encouraging the rollback of transformative policies of the civil rights movements, while selectively redressing the effects of its narrow interventions.

A final argument that I want to offer is that the current relationship between race and the cultural wars rhetoric has been shaped by some of the ideological underpinnings of the neo-
conservative agenda, which has partly conceptualized the solution to the War on Terror in cultural terms. To be sure, as Nick Xenos notes in his discussion of the philosophical underpinnings of the neo-conservative argument:

One key concept of Straussian analysis, they noted, was “regime,” a term of art used to translate Aristotle’s usage of *politeia*. Regime signifies more than a particular governmental form; it refers to the cultural substance of that form. In Strauss’s view (as well as Tocqueville’s, they think), “the regime shapes human political action in so fundamental a way that the very souls appear different.”

To be sure, the notion of “regime change” is at heart a notion premised on the uprooting of a culture and the imposition of new political culture. In order to achieve this, however, the Bush Administration has employed various forms of violence through the imperialist occupation of places like Iraq. The problem, of course, is that neo-conservatives have been employing a series of double standards in their implementation of regime change. For example, while the current neo-conservative Bush Administration has been defending the international spread of democracy and human dignity it has simultaneously adopted violent policies that endorse the torture and abuse of, often innocent, individuals.

This administration has partly been able to negotiate these double standards by manipulating cultural narratives of violence and identity.

The Bush Administration has officially dismissed the allegations that it has endorsed the torture and abuse of detainees and it has argued that this has been the result of rogue soldiers which are being held accountable in military court proceedings. While the abuses in U.S. military detention centers in Cuba, Afghanistan, and Iraq, have been dismissed as anomalies, the Administration has repeatedly endorsed a narrative of cultural/civilizational superiority and identity which denies the possibility of human rights abuses inside our

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freedom loving country. But what about the well-documented abuses committed in our nation’s correctional facilities?\textsuperscript{71} The danger of this neo-conservative narrative is that abuses committed by U.S. officials can be reduced to isolated instances abroad, and not part of a larger U.S. cultural attitude towards detainees and prisoners, a cultural attitude that is premised on committing violence against detained and/or incarcerated individuals as a way to maintain social and political order.

The last essay in this cluster, contributed by SpearIt, one of the recipients of the Annual LatCrit Student Scholar Award, addresses these and other important arguments while also offering a counter-narrative of resistance premised on the a re-conceptualization of the relationship between race (raza) and a cultural/spiritual notion of Islam, which he calls “raza islamica.” For SpearIt, the prison becomes a violent institutional site where competing forces engage in a constitutive relationship with race, religion and more broadly culture. More importantly, the prison rather than simply punishing, SpearIt argues, is also a sacred subject-forming site where some inmates acquire an empowering sense of “Self-control.” Simultaneously, SpearIt concludes, with a warning that the violence in the prison, coupled with the intersectional subject forming repressive experiences also “offers a sure recipe for reactive violence, and of all sorts, not just religious.” In a sense, SpearIt’s argument suggests that a new relationship between race and culture can lead to alternative subjectivity that may provide a form of empowerment.

The readings in this cluster raise important questions about the interplay of race and culture that resist narrow constructions of identity. In fact, virtually all of the readings in this cluster call for the conceptualization of a multidimensional identity that results from the interaction of race and other forms of identity. These essays not only challenge external conservative and neo-conservative efforts to obscure the intersectional relationships between race and culture, but also expose the tensions emerging from narrowly tailored self-conceptions of communal identity that reproduce traditional forms of subordination, and enabled by some liberal efforts to tame the political expressions of democratic demands for equality and justice. In addition, the essays in this cluster effectively pose some challenges to the moral foundations of conservative and neo conservative ideologies of race, while simultaneously challenging subjects that

\textsuperscript{71} See the host of available reports on abuses in U.S. facilities as documented by the Department of Justice Office of Inspector General at http://www.usdoj.gov/oig/special/index.htm (last visited Jan. 2, 2006).
identify with subordinated narratives of community to question how they are reproducing the hegemonic discourse of the right.

II. KULTURKAMPF

The essays in this cluster challenge the notion that essentialist constructions of identity can be derived from narrow conceptions of culture and vice-versa. LatCrit has traditionally provided a forum where scholars and activists have been able to challenge both conservative and essentialist narratives of identity and culture through a critique that draws upon multidimensional and intersectional relationships of identity and culture.72 The LatCrit project is by definition antithetical to narratives of identity that subordinate the complexities of intersectionality to narrow and one-dimensional subjectivities. In this regard, LatCrit scholarship emphasizes methodologies that transcend reductionist efforts to essentialize identities and cultural narratives. The conservative call for a Kulturkampf has been challenged by efforts to democratize the legal arena, and to push for more egalitarian laws and policies. In this sense, cultural and identity narratives can be seen as efforts to create an environment that can build coalitions across disciplines, intellectual and activist spaces, and a host of otherwise fragmented sources of knowledge. Rather than entrenching, LatCrit scholarship presents a call for a more expansive counter-hegemonic conception of culture and identity that can provide a wide array of resources to challenge the current conservative and neo-conservative discourse and its effects on law and policy. This praxis has also been part of an institution building process that continues to define the ongoing expansion of this network of scholars and activists.

LatCrit has fostered a conception of culture that rejects what Stanley Fish has called Boutique multiculturalism, which often relies on a “superficial or cosmetic relationship to the objects of its affection.”73 Culture, Wendy Brown argues, has the potential for “innovation, aspiration, and creative effort,” while simultaneously contributing to the undoing of meanings, conventional practices, and institutions.74 LatCrit has not only embraced a notion of culture that can create a space for resistance and alternative critiques of power, but it has also provided a political space where scholars are encouraged to make connections between the local and the global,

74 WENDY BROWN, POLITICS OUT OF HISTORY 133 (2001).
between the personal and the political, and across a landscape of social, political, and economic spheres. While the liberal project emphasizes the fragmentation of the spheres of influence that shape the subject’s life, and the *Kulturkampf* narrative attempts to institutionalize these gaps while selectively disregarding undesired subjectivities, LatCrit seeks to counter these tendencies by enabling scholars and activists to engage in a critical, democratic and egalitarian political dialogue.

In an interesting critique of the efforts of American Legal Realists to “get rid of the machinery of the legal culture-with its terms of art, constructed entities, and artificial rules,” in order to get closer to reality, Stanly Fish contends that “if you were to get rid of the machinery of legal culture (or of the literary culture, or of the anthropological culture) you would not be improving law, you would be replacing law with the machinery of some other discipline, with *its* specialized vocabulary, normative distinctions, taxonomies, articulations, etc.”

Like American Legal Realists, it is possible to argue that critical legal scholars from a wide array of perspectives have also been vying for a interpretive position of primacy in the legal academy and of course situating themselves in positions of influence over law students and other actors. What is interesting about LatCrit is its ability to embrace a cultural critique that is open to a wide array of disciplinary influences, as well as perspectives from outside of the legal academy. More than trying to provide an alternative “machinery” or vocabulary, LatCrit has consistently provided an intellectually oriented space that encourages democratic participation. Speaking as an outsider to the legal academy, yet spending significant time in penumbras of LatCrit, my sense has been that LatCrit has provided a democratic forum to expose critiques, ideas, and more generally resources that can be used to challenge hegemonic ideologies from competing perspectives. To be sure, while there is a clear critical agenda, there is a simultaneous transparency and openness that invites scholars to offer competing perspectives, and in turn LatCrit disseminates these throughout the legal academy.

Sylvia R. Lazos Vargas’ contribution provides a genealogy of the cultural debates among critical legal scholars that demarcates the contours of the polemics shaping the contentious battles among scholars and camps in the legal academy.

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76 Sylvia R. Lazos Vargas, ‘Kulturkampf’ or ‘fits of spite’?: Taking the Academic Culture
and concise discussion of the issues, positions, and stances that have defined legal scholars’ allegiances to particular initiatives within the legal academy and their disaffections. As an outsider to these debates, I am reluctant to comment on the effect or impact of these camps in the legal academy and more particularly on students, however, it is readily evident to me that LatCrit publications and projects are providing a continuing body of knowledge that offers law students and other scholars and activists a host of interdisciplinary resources.

Having said this, I will exercise my power as author of this Foreword to share a story that may shed some light on my comments. Some time ago, during a LatCrit retreat in the island of Vieques, I asked Celina Romany, now a practicing attorney in Puerto Rico, what had been the impact of LatCrit on her now quite successful practice. She candidly responded that judges and legal actors in Puerto Rico were often quite interested in new arguments and that her experience in LatCrit had provided her with innovative and different resources that in turn helped her develop nuanced arguments. What strikes me as most interesting is the ability to make arguments in cases that address concrete forms of material oppression while drawing on debates that have focused on identity and culture. My sense is that the emphasis on multidimensional and intersectional aspects of the subject and the group, can provide intellectual resources that allow legal actors to connect various forms of subordination and competing narratives. In a sense, the strength of LatCrit lies in its ability to create a cultural space where these connections can be made and can be disseminated in a democratic and egalitarian fashion.

Professor Tayyab Mahmud’s contribution to the Kulturkampf debates brings to bear the relationship between globalization, partially read through a post-colonial critique of colonialism, and competing representations of homogenizing narratives of South Asian Muslim culture/community in the United States. His essay, like other essays in this symposium challenges both essentialized


constructions of culture, in this case "the" South Asian culture, as well as internal or self-referential efforts to project a sense of community that denies the fractured histories and contingent identities of South Asians living in the U.S. More importantly, his argument demonstrates some of the ways in which a communal narrative, that in turn is defined by narrow and unifying conception of culture, reproduces various forms of subordination and marginalization. This ideological narrative in turn has not only perpetuated a more expansive subordination of Muslim, but also "retards the building of coalitions" between subordinated and progressive forces."

Professor Mahmud's critique exposes some of the ways in which conservative narratives of national identity and security are being employed to in the effort to construct a unifying narrative of a South Asian Muslim community, and further reproduced through a process of Coloniality of Power. At a time when the contours of a cultural wars narrative are being defined by the War on Terror vis-à-vis stereotypical narratives of the Muslim or Arab terrorist, these ideological practices obscure the contingent identities and ideologies of South Asians. This is especially dangerous because the current Kulturkampf narrative of the U.S. has been employing a nationalist conception of culture that is self referential and simultaneously dependent on the reproduction of Muslim or Arab cultural threat. In a sense, this Kulturkampf has embraced a Kulturnation definition of the self that depends on a representation of an imaginary unity that seeks to affirm itself through the invocation of a shared sense of history, culture, language, tradition, ancestry, and civilization. This Kulturnation affirms its identity in the rejection of the represented Muslim or Arab threat, and despite the strategic use of conservative Muslims, at the end of the day does not recognize Muslims as legitimate members. More importantly, as noted above, these conservative narratives undermine the possibility for critical solidarity at both a local and global level.

Professor Martha T. McCluskey's essay addresses the economic foundations of the reigning neo-conservative ideology and the impact on Kulturkampf debates. This argument exposes some of the ways in

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79 I am borrowing this term from Jürgen Habermas, Struggles for Recognition in the Democratic Constitutional State, in MULTICULTURALISM, EXAMINING THE POLITICS OF RECOGNITION 146 (Amy Gutmann, ed., 1994).
80 See SUSAN BUCK-MORSS, THINKING PAST TERROR, ISLAMISM AND CRITICAL THEORY ON THE LEFT (2003).
81 Martha T. McCluskey, The Politics of Class in the “Nanny Wars”: Where is
which economic questions are either subordinated to social concerns, or are outright excluded from the debate. Her essay discusses some of “the connections between neo-liberalism and neo-conservativism (which) often remain obscure partly because the divide between economic politics and cultural (or identity) politics is deeply embedded in the liberal ideology that grounds mainstream U.S. jurisprudence and policy analysis.” These artificial divisions between the social, economic, and the political, contribute to creating the conditions that enable conservative and neo-conservative ideologues to both focus on particular issues, displacing a more holistic approach, and/or to create artificial dualities that allow for the counterpoising and subordination of issues.

While the argument that “class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness to command extraordinary protection from the majoritarian political process” is not new, the narrative employed by conservatives to continue to subordinate economic challenges is new. The Kulturkampf narrative refines the artificial separations between the economic, the social and the political arena, by employing the language of culture/conduct as the analytic framework from which to evaluate questions of equality and justice. The Kulturkampf claim enables legal actors to reframe issues with concrete material implications as social questions while ignoring the economic aspects of a problem. Of course, this is easier to accomplish when problems of class identity are reduced to issues of behavior or conduct. McCluskey’s argument explains some of the ways in which Kulturkampf arguments obscure the “intersection of class and other social processes, most notably cultural processes.” The effect of the conservative argument, is of course, to discard the possibility of understanding class as an identity.

Since its inception almost a decade ago, LatCrit has been fostering transnational relationships among critical scholars and activists that seek to build progressive coalitions to address issues of injustice. Roque Martin Saavedra’s essay is not only representative

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82 Id.
84 Id.
of this effort, but also explores some of the ways in which questions addressed in LatCrit forums can be used in other contexts outside of the U.S. to reflect on local polemics and problems. In his essay Professor Saavedra uses the notion of *Kulturkampf* as a discursive device to reflect on the historical relationship between gays and lesbians and the Argentinean nation-state. Like other essays in this symposium, Saavedra exposes the historical use of artificial dualities, such as the public/private conception of the individual and his relationship to the nation-state to reproduce the conditions of oppression and subordination among individuals that identify with and LGBT identity. For example, Saavedra points out that while gays and lesbians used the narrative of the private space as a strategy for survival during the 1970s and 1980s, during the 1990s, the notion of the private space has perpetuated the invisibility of gays and lesbians in an Argentinean heterosexual society that has become a bit more tolerant of sexual minorities. Of course, I say a bit more tolerant, for tolerance is not tantamount to recognition of membership and equality. As Saavedra clearly points out, sexual minorities are still treated as outsiders within the Argentinean Nation-State. To be sure, Saavedra’s argument reveals the contingent and narrow character of liberal narratives of tolerance and emancipation. This essay also challenges the reader to contemplate some of the ways in which cultural wars over the definition of private/public spaces can shape the contours of new technologies of power in both the law and the political arena.

Moreover, Saavedra also warns the reader that mimicking First World solutions in a Third World context can create new forms of subordination. One example that can be discerned from his essay is the fact that the Argentinean nation-state employ different forms of repression to subordinate sexual minorities, and public affirmations of identity could result in the subject’s execution. Saavedra concludes his post-modern critique with a further exploration of the limits of transformative politics within a 19th century constitutional/legal framework. While Saavedra is clearly skeptical

87 For another example see Hugo Rojas, Stop Cultural Exclusions (In Chile): Reflections on the Principle of Multiculturalism, 55 FLA. L. REV. 121 (2003).
89 Id.
90 Id.
91 Id.
92 Id.
of the possibilities of any radical transformation within the modern/liberal nation-state, he does invoke the need to embrace a less dogmatic interpretation of the law. This could mean reading the law as a living document, and striving to move beyond originalist and narrowly tailored interpretation of the law. In a sense, *Kulturkampf* can lead us to read the law as a contested terrain with some, albeit limited, possibilities for social and political transformation.

### III. IMMIGRATION STATUS

The current *Kulturkampf* narrative has been premised on the artificial creation of narratives that are in turn counterposed to one another. For example, current conservative and Nativist narratives ascribe a cultural context to such dualities as the citizen and the alien, the nation and the foreigner, and more generally the legal and the illegal. What is distinct about the current *Kulturkampf* narrative on immigration is the appeal to the anxieties of citizens in relationship to the current War on Terrorism. This narrative has also relied on the insinuation of connections between that which is perceived as pertaining to an immigrant, or rather and “illegal alien” culture and foreign terrorists who are presumably trying to enter our nations through our unguarded gates. The reliance on a cultural context also appeals to an essentialist and potentially un-reconcilable status of difference. Thus the “illegal alien” is represented as a dangerous individual that threatens “our national way of life,” our “values,” and “freedom.”

In contrast, the neo-conservative position appeals to demands of the market, and is willing to sacrifice some of the conservative values in the interest of meeting the needs of the corporate constituency. Of course, the neo-conservative narrative draws upon the logic of a *Kulturkampf* to represent the immigrant as a one-dimensional “guest worker,” who is temporarily tolerated so long as she poses no threat to the national cultural narrative. More importantly, like the “homosexual,” the immigrant’s presence is tolerated so long as his conduct can be subordinated to a “private” sphere that can not influence the public sense of self. The essays included in this cluster challenge these and other arguments in provocative ways. More

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93 See, e.g., **Bonnie Honig, Democracy and the Foreigner** (2001).


importantly, they challenge both the conservative and neo-conservative narratives.

The basic premise of the conservative argument is that immigration has been a key cause of the balkanization of the United States, and by extension weakening the national unity in ways that make the country vulnerable to an irreversible fragmentation. The effects of this fragmentation are the erosion of a mythological American past and culture, the expansion of liberal policies that legitimate foreign cultural ideologies, and could potentially open the gates to terrorist attacks. These ideological claims are readily evident in the pages of conservative pundits like Patrick J. Buchanan’s *The Death of the West* where he contends that:

> America has undergone a cultural and social revolution. We are not the same country that we were in 1970 or even in 1980. We are not the same people. After the 2000 election, pollster William McInturff told the *Washington Post*: “We have two massive colliding forces. One is rural, Christian, religiously conservative. [The other] is socially tolerant, pro-choice, secular, living in New England and the Pacific Coast....While the awful events of September 11 created a national unity unseen since Pearl Harbor—behind President Bush and his resolve to punish the perpetrators of the massacres of three thousand Americans—they also expose a new divide. The chasm in our country is not one of income, ideology, or faith, but of ethnicity and loyalty. Suddenly, we awoke to the realization that among our thirty-one million foreign-born, a third are here illegally, tens of thousands are loyal to regimes which we could be at war, and some are trained terrorists sent here to murder Americans.”

For Buchanan, Americans that are unable to trace their ancestors to Europe are representative of the foreign enemy that “is inside the gates” and threatens the “American people” in “their own country.” This of course was clear to all loyal Anglo-Americans who were willing to see it in those days after September 11, 2001.

More recently this argument has been re-packaged with an academic veneer by Professor Samuel P. Huntington in his most recent book titled *Who We Are?* Like Buchanan before him,

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98 *Id.* at 3.
99 *Id.* at 2.
Huntington is not only concerned with rescuing a White Anglo-Saxon Protestant core national culture, but also with the cultural political and legal institutions that have defined the supposed core identity of the United States. One of his central anxieties can be discerned from his fear that immigrants who reject assimilation may somehow transform the U.S. political and legal institutions in ways that reject the core Anglo-American creed. The end result, of course, is the inevitable fragmentation of the nation, and the potential for a civil war, or at the very least a cultural war. Ironically, Huntington’s argument, like most conservative ideologies, is unable to recognize the U.S. cultural character of critical movements and initiatives, but rather echoes traditional exclusionary and inequalitarian ideologies of patriotic exceptionalism.

The essay by José Miguel Flores, one of this year’s recipients of the annual LatCrit Student Scholar award, offers an interesting examination of the ways in which global cities have emerged in marginalized urban spaces, and have provided an alternative environment where immigrants have transformed neglected urban spaces. His essay offers a fascinating examination of the ways in which local and global cultural and economic forces have supplemented each other in the constitution of global cities. Focusing on two micro-histories of Jackson Heights, New York and Boyle Heights, Los Angeles, Flores suggests that immigrant communities can be understood as sites of contestation where competing forces clash with nationalist centered values and stereotypes and ultimately shaping contours of global cities. More importantly, as Flores notes, these spaces can provide a transformative environment, which in my opinion is premised on more democratic and egalitarian forms of participation. Immigrants not only fill the vacuum left in these and other urban spaces that have been generally been abandoned by Huntington’s core Americans, and marginalized by the State, but are also likely to revitalize these urban “enclaves.” Ironically rather than coming to terms with the contradiction of urban flight, conservative ideologues have used the Kulturkampf narrative to attack the possibility of revitalization of marginalized urban spaces. Rather than addressing

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101 It should be noted that Buchanan is a practicing Catholic.
102 HUNTINGTON, supra note 100, at 60.
the problem of urban neglect and marginalization, the conservative narrative looks for the immigrant scapegoat.

The arguments in this essay also challenge the conservative re-appropriation of the liberal notion of the private/public distinction by demonstrating how an immigrant and global communities can enrich the local city landscapes in new, innovative, and creative ways. I find Flores’ essay especially interesting because while it recognizes the impact of the “criminal stigma” attached to immigrant communities, it also presents a critical example of public immigrant communities that are enhancing and revitalizing cities marginalized sectors of cities like New York and Los Angeles. Of course, in order to appreciate this Flores’ contribution, one has to be willing to accept that a U.S. national terrain can and should accommodate more global and to some degree cosmopolitan cultural expressions. I find that Flores’ essay resonates with Randolph S. Bourne’s critique of Nativism in the U.S. at the outset of World War I and his argument that perhaps there is no American culture, but rather the U.S. should be understood as a sort of “federation of cultures.”

In his latest State of the Union Address, President Bush stated that:

America’s immigration system is also outdated — unsuited to the needs of our economy and to the values of our country. We should not be content with laws that punish hardworking people who want only to provide for their families, and deny businesses willing workers, and invite chaos at our border. It is time for an immigration policy that permits temporary guest workers to fill jobs Americans will not take, that rejects amnesty, that tells us who is entering and leaving our country, and that closes the border to drug dealers and terrorists.

This argument allows neo-conservatives to both access a cheap labor force, and continue to rely on a neo-liberal market oriented economic system, while creating the conditions that allow increased surveillance and disciplining of guest workers. This language, of course, while catering to the market, is also couched in a very narrow representation of the immigrant as a temporary guest worker, perhaps one that may not threaten the core cultural values of the Anglo-American nation-state. A more expansive or holistic embrace

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of the immigrant worker, one that would recognize the cultural
contributions of the immigrant, could perhaps threaten the Anglo-
American Nativism pushing for the closure of the U.S.-Mexico
border.\footnote{106 IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-AMERICAN IMPULSE IN THE UNITED STATES (Juan F. Perea, ed., 1997).}

This policy initiative also opens the door for an interrogation of
current educational policies towards immigrants and the social,
economic and political implications of these for both immigrant
communities and society at large. María Pabón López’s discussion of
fairness and opportunity for Latino/a children” amidst the cultural

As Pabón López notes, \textit{Plyler} authorizes access to K-12 education for
undocumented children despite the increasing restrictions on
undocumented immigrant rights and the dismantling of other
educational programs such as bilingual education.\footnote{109 Id.}
The irony of this situation is that despite the Court’s progressive position in \textit{Plyler},
which extends the protections of the 14\textsuperscript{th} Amendment’s Equal
Protection Clause to undocumented persons, is that a better
educated work force of immigrant guest workers is more likely to
acquire the necessary skills to perform better in an ever changing
work place. Moreover, as Pabón López suggests, this may open the
possibility for an immigrant to work legally in the U.S.\footnote{110 Id.}

Yet, as Pabón López warns, there is also “the very endurance of
\textit{Plyler} as precedent may itself then perpetuate the ‘silent covenant’ of
the ‘shadow population’ of the undocumented, who have the right to
be educated, at least in the K-12 arena, but are unable to work and
become full members of our society, and thus achieve a sense of
belonging in this country.”\footnote{111 Id.} What I find especially intriguing about
Pabón López discussion is that it is readily evident that neo-
conservative narratives are willing to accommodate the needs of some
undocumented workers, so long as the profits outweigh the costs, and
regardless of whether conservative values and Nativist ideologies are
undermined in the process. Again, President Bush’s initiative reflects
the kind of narrow argument that navigates between accepting the
presence of immigrant/guest workers, and enforcing new
technologies of surveillance that can be used to regulate the behavior of guest workers with the threat of expedient deportation. My sense is that the egalitarian principles of Plyler are tolerated so long as they can be used to contribute to enabling the undocumented working population to be profitable in a market oriented society.\(^\text{112}\)

Pabón López’ critique of the Plyler’s “silent covenant” reinforces one of the key challenges against the historical treatment of immigrants and undocumented subjects in this country, namely the selective application of equal protection principles to non-citizens. It is undisputed that the Court has historically engaged in the selective extension of constitutional protections to non-citizens.\(^\text{113}\) The Court has neglected to extend all of the civil liberties and protections contained in the Constitution to non-citizen persons present in the U.S. In doing so, the Court has perpetuated a status quo that has enabled agents of the state to perpetuate a number of abuses against human beings that would not be tolerated against citizens,\(^\text{114}\) and in many cases violate international human rights principles. As I suggested above, the Kulturkampf narrative perpetuates a logic that allows the State to perpetuate various technologies of subordination, oppression, and exploitation of non-citizens and immigrants which are premised on a similar juridical status to that of “homosexuals” prior to Lawrence. In addition, the Kulturkampf narrative represents the immigrant status as a sort of site of confluence where competing ideologies clash and create a contingent status of subordination for the immigrant. The immigrant status becomes a fragile status where identities are fragmented, polarized, and in most instances anathemized. I think that the major contribution of these essays is the exposition of the double standards present in the artificial fragmentation of the immigrant subjectivity.

IV. LAW, POLITICS, AND CULTURE IN AN AGE OF DOUBLE STANDARDS

Jerome McCristal Culp, Jr. had a reputation for leading an ethical life and committing himself to a life long struggle for social justice. The essays included in this symposium share an ethical conviction for social and political justice. More importantly they


\(^{114}\) Mary Romero & Marwah Serag, Violation of Civil Rights Resulting From INS and Local Police’s Use of Race, Culture and Class Profiling: The Case of Chandler Roundup in Arizona, 52 CLEV. ST. L. REV. 75 (2005).
affirm a continued conviction for democracy and equality in the face of a political environment that undermines these principles in the name of *Kulturkampf* and the War on Terrorism. The LatCrit project aims to create an intellectual environment that not only nurtures critical and progressive exchanges, but also strives to create the conditions that will enable scholars and activists to engage in social, political, legal, and economic change.

*Kulturkampf* narratives invoked by conservatives in the legal as well as the political realms have sought to narrow the categorization of traditionally subordinated identities in ways that enable the continuation of various forms of subordination, marginalization and outright oppression. As the essays in this symposium have consistently demonstrated conservatives have capitalized and exploited the liberal fragmentation of the subject, an ideology that creates artificial demarcations between the private and the public self, the social and economic, race and culture, and in general the multiple dimensions of subjectivity. Conservatism’s use of the notion of *Kulturkampf* has enabled its ideologues to strategically select when to use racial and biological standards of identity to justify the subordination of other oppressed identities, while simultaneously essentializing categories such as race to prevent more expansive conceptions of cultural identity from attaining equal protection under the laws. When convenient, conservatives embrace essentialist conceptions of race and biology as standards to measure identity, but only in so far as these narratives can contribute to the subordination of undesired subject such as gays or immigrants.

One of the underlying threads among the essays in this symposium has been a cautionary warning to subordinated groups to become aware of the ways in which their collective self-defining narratives reproduce and perpetuate conservative ideologies. Most of the contributions to this symposium have explored the ways in which subordinating practices within communities with traditionally marginalized members and ultimately preventing coalition building. More importantly, the reproduction of conservative narratives within among subordinated populations forestalls the possibilities of organizing effective challenges to the anti-democratic and inequalitarian forces shaping the contours of the ideological State apparatus. In response, most of the contributions included in this symposium, argue for more encompassing and expansive conceptions of culture and identity. To be sure, most of the essays call for more complex legal and political conceptions of culture and identity that consider multidimensional and intersectional aspects of subjectivity. In a sense, there is a calling for broader conceptions of culture that
can accommodate contingent identities in ways that undermine conservative narratives of subjectivity.
INTRODUCTION
Kul*tur"kampf, n. [G., fr. kultur, cultur, culture + kampf fight.]
(Ger. Hist.) Lit., culture war;—a name, originating with Virchow (1821—1902),
given to a struggle between the Roman Catholic Church and the German government,
chiefly over the latter's efforts to control educational and ecclesiastical appointments
in the interest of the political policy of centralization.

While much time has passed since the era of Virchow and the conflicts between
the Catholic Church and German government, the Kulturkampf template remains
in full force. Presently tethered to the politics of ultra-conservatism, politicians,
jurists and government officials, engender Kulturkampf angst to repel racial identity

1 Professor of Law, Northern Illinois University, College of Law. The author
thanks the Conference hosts and the Seton Hall Law Review for its immeasurable
contribution and engagement of law.

2 See generally Patrick J. Buchanan, The Death of the West, How Dying
Compare with Plyler v. Doe, 457 U.S. 202 (1982) which recounts the financial
contributions of immigrants in Texas with tremendous economic gain to the State.
Notwithstanding their contributions, Texas, sought to deny its children an
education.

3 See e.g., Romer v. Evans, 517 U.S. 620, 635 (1996). Justice Scalia’s dissent states:
“The Court has mistaken a Kulturkampf for a fit of spite.” This language illustrates
how name-calling is employed to belittle discrimination rather than focusing on the
jurisprudence of the doctrine at issue. Compare with Maureen Dowd, Nino’s Opera
Bouffe, N.Y. TIMES, June 29, 2003, § 4, at 13 (“[Scalia] is the last one to realize that his
intolerance is risibly out-of-date.”).

4 For example, for some individuals the separation of church and state has
collapsed at the political level. Christian Soldiers, Nat’l. J., Dec. 4, 2004 (describing
how current U.S. President George W. Bush “has given members of the Religious
Right unparalleled access to the White House.”); Jannell McGrew, Parker Prepares For
politics. The strategists of their campaign employ capricious and illogical attacks against the present socio-economic conditions of dispossessed communities, or their advocates, while ignoring the violence of racial animosities.

In efforts to control the political or educational spheres “in the interest of political policy of centralization,” conservative zealots accordingly promote dangerous eclectic policies and strategies that are proving harmful to the nation. The zeitgeist of the day, and its evangelical thrust, moreover, create legal and extra legal barriers against those pursuing justice, equity, and fairness for their communities. In contrast, less attention—if any—focuses on the

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5 For example, note the California gubernatorial recall election its overriding obsession with race that spawned innumerable false characterizations against one contestant while disregarding a lethal laundry list of extramarital affairs, sexual misconduct and reported support of the Nazi regime. Notwithstanding this litany of ethical lapses, the non-person of color succeeded against his opponent of Mexican descent. From a LatCrit perspective see generally Keith Aoki, et al., Race and the California Recall: A Top Ten List of Ironies (publication forthcoming).

6 The intensity of book banning cabals in various communities underscores one effort. See e.g., Texas OKs Books With New Marriage Wording, AUGUSTA CHRON., Nov. 6, 2004, at A3 (changes made to “depict marriage as the union of a man and a woman.”); Natalie Gott, Only Man, Woman Can Be Married in Texas Books, CHICAGO SUN-TIMES, Nov. 6, 2004, at 9. Disallowing the full realm of much appreciated diversity across the nation and replacing it with narrow interpretations shows a retrenchment to periods in which diversity in education remained primarily absent. In other words, only a few short years separate when the nation’s communities of color and their histories were absent from grade school, high school and in higher education programs much less employed as educators and administrators. In California in the 1960s and 1970s, for example, only after Chicano and Chicana students protested against the status quo did some changes occur in the educational institutions of the State. See El Plan de Santa Bárbara, Manifesto in Literatura Chicana, Texto y Contexto, CHICANO LITERATURE TEXT AND CONTEXT 85-86 (ANTONIA CASTENEDA SHULAR, TOMÁS YBARRA Frausto & JOSEPH SOMMERS, EDS, 1972). It is the rejection of arguments for inclusion that renders imperative the measure of work LatCrit faces.

7 See for example the agenda of conservative Christians. Janet Jacobs, Same-Sex Marriage A Major Issue for Christian Voters, Cox News Service, Nov. 6, 2004 (”Conservative Christians stood in long lines Tuesday to help re-elect President Bush, and they expect results.”).

8 For example, compare the assault against affirmative action with poll taxes, the forced segregation of communities, or the concerted and ongoing challenges to equal treatment. These comprise but a few examples that disallow the full participation of communities.

9 Compare the present Texas redistricting battle with its legal antecedents. See,
hunger, poverty or other harmful socio-economic conditions plaguing the nation. This Cluster, Contemporary Racial Realities, of the LatCrit IX Symposium accordingly focuses on the class warfare directed against racial politics while also addressing a broad realm of social, economic, physical and violent harms communities of color witness.

Specifically, this Cluster is grounded in several of the innumerable political, racial and spiritual identities that span across the nation’s past and present political violence. The authors raise difficult questions and observations that further advance alternative visions of justice pedagogy for communities confronting law’s structural influences and marginalizing forces. This Cluster’s base thereby casts doubt on Kulturkampf tactics and in sum expands our base of knowledge relevant to the LatCrit journey.

I. CONSTRUCTING RACE, IDENTITY AND ALTERNATIVE VISIONS

In misdirecting cultural and political enlightenment and the reality of the human conditions in communities facing disparate times, Kulturekampf strategy seeks a centralization in which one voice governs to the exclusion of diversity. Accordingly it favors strict adherence to the status quo. Yet in one instance following another, the status quo invokes a return to a time in which white supremacy ruled with unmitigated restraint. Accordingly, the divisiveness and harmful fissures that orthodox zealots present would disallow this Cluster’s scrutiny of racial identity politics.

Notwithstanding the few gains made against heinous treatment, segregation, rabid discrimination, and disenfranchisement, a tremendous amount of socio-economic and class based harms remain today. This Cluster provides formidable counterarguments against e.g., White v. Regester, 412 U.S. 755 (1973) and its progeny in Texas politics.


See generally Missouri v. Jenkins, 515 U.S. 70 (1995) in which the Court describes Jim Crow practices: “In the past” the Court stated, the State had placed its “imprimatur on racial discrimination.” Laws from the Jim Crow era created “an atmosphere in which . . . private white individuals could justify their bias and prejudice against blacks,” with the possible result that private realtors, bankers, and insurers engaged in more discriminatory activities than would otherwise have occurred. Jim Crow legislation is but one example of the law’s use as a tool to enact heinous injuries against people of color. See generally Segregation Vote Reopens Racial Wounds in Alabama; Constitution: An Amendment to the State Constitution That Would Have Eliminated Anti-Black Language Was Defeated, WASH. POST, Nov. 28, 2004.
those that would deny the rich diversity of the nation’s cultural heritage as well as ignoring the legal structures that define class distinctions. As an offset against “culture war” charges, this Cluster thus encompasses unmitigated identity assertions that extend into the political, historical and spirituality realities of communities of color. From a political, historical and spirituality basis, the authors expose the elusive legal disparities directed against their specific communities. Without advocating for legal parity, the legal and extra-legal injuries that subordinate communities and correspondingly privilege the status quo remain in full force.

A. Alternative Observations and Visions

Professor Jacquelyn L. Bridgeman, in her article, “Defining Ourselves for Ourselves” asks why “Clarence Thomas and others within the black community who hold similar views are so soundly rejected by so many within the community.”12 She next tethers her assertions to claims that socio-economic success draws from status closely aligned as “white.” As the author provides:

In fact, in my experience, the privilege of receiving one or more of those labels is reserved either for those who appear (in varying degrees) to have achieved or been working toward some kind of mainstream success or achievement or who like Clarence Thomas express views that stray far from those perceived to be held by the vast majority of the black community.13 The author further explains that: “Throughout American history what it means to be black has largely been defined in opposition to what it means to be white.” She extends her thesis with arguments that assert notwithstanding:

the negative qualities and attributes that have been ascribed to African Americans as a result of this oppositional defining, a lot of that definition still defines for many what it means to be black. If we are successful in our quest to become equal members of this society, such that such oppositional defining loses its force or becomes obsolete, the question becomes who will black people be then, or perhaps more scary, will there still be black people? I am of the opinion, that there will still be black people but our notion of who they are and what that means will necessarily have to change.14

13 Id.
14 Id.
She drives her query further and asks “whether we do not hinder our ability to see problems in new ways or seek innovative solutions when we summarily reject and ostracize those within our community who do not share our views.”\textsuperscript{15} As she contends “when viewed in the context of black conservatism, Justice Thomas’ jurisprudence has a coherency and consistency that is distinctly black and is informed by his lived experience as a self-identified black man.”\textsuperscript{16} She thus proposes, “there may be value in looking seriously at what those we tend to ignore might have to say, that may help us gain insight or a new perspective on the work that we endeavor to do.”

Professor Bridgeman’s essay furthers LatCrit’s objectives by examining labels and how they could, as they have in past instances, detract not only from forms of self-identification but also diminish coalition building efforts. LatCrit’s record of self-introspection has often raised sensitive questions and painful moments, as Professor Bridgeman’s piece does, but strives for advancing and promoting new theoretical structures to improve the human condition and justice parity for their communities. The author reminds us that without engaging oppositional considerations imprecise models can gather steam and become false norms without the requisite causation factors.

Yet while Professor Bridgeman offers an invaluable and brave tool for understanding a range of complexities to “define ourselves,” a brief discussion of the Thomas appointment could have provided additional leverage in her investigation and arguments. For example, the jurist’s confirmation involved a divisive battle that left wounds, which for many, have yet to heal. The appointment experience divided not only African Americans but also injured other communities of color from various angles. An additional remedy would thus have assisted Professor Bridgeman’s essay as well as adding to the jurisprudence of LatCrit theory. Yet another example includes the false claims that surrounded the red-baiting McCarthy

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\textsuperscript{15} Demonstrating this principle is the method used to extend invitations to present at LatCrit a conference. Invitees, whether in keynotes, plenaries or workshops, are chosen from the broad LatCrit community after a series of successive conference calls, and emails. Once a conference theme is identified, whether through a retreat or general recommendation, the conference organizers facilitate the possibilities identified. This process takes several extensive weeks, and is underscored by a careful and exhaustive consideration of the candidates, ensuring gender parity and other balances are achieved at the conference. Notwithstanding the inordinate amount of work involved, even the best of plans are waylaid due to cancellations, illness, and which at times have interfered with the purpose and goals of the LatCrit project.

\textsuperscript{16} Supra note 12.
period that bore false witness against the efforts of activists and advocates. Numerous other examples also surface against individuals of color who faced charges of being “communists” or labeled as terrorists as whole communities in the present are facing.

Still another path, perhaps for future possibilities includes adding to the LatCrit record that has promoted healing during times of disparate treatment. For example, LatCrit has long promoted healing as the rich scholarship of many critical proponents illustrate in their quest to offset the disparities witnessed in their communities.17 In sum, the author’s essay fearlessly blends cogent arguments that promote self-identification on their own terms and not as defined by others.

In much appreciated detail, Aya Gruber, “Coalition Building, Navigating Diverse Identities: Building Coalitions Through Redistribution of Academic Capital, An Exercise in Praxis,”18 concisely incorporates LatCrit insights while also connecting a critical component of praxis to its theoretical base. She thus extends beyond the narrow confines of theory by including and linking the praxis needed to address the “cultural wars” in the present. From an interesting perspective, the author, who is of Asian and Russian descent illustrates how fighting against systems of subordination applied to her own struggle of finding her voice. Professor Gruber’s experience of being raised in Miami “where there are few Asian Americans and even fewer mixed Asians” underscores her questions about advancing the empowerment of “bi-racial folks or Asian Americans.” She describes how attending LatCrit IX allowed her to realize that “racial politics and progressive efforts were not about self-serving and essentialist agendas but rather about fighting against subordination and unfair privilege in whatever forms they might take.” Professor Gruber delineates her efforts in overcoming “essentialism and privilege traps.”

Her caution thus challenges the kulturkampf ideal that espouses narrowly defined universalism at the expense of diverse communities. Her proposal “that groups embrace their uniqueness but nonetheless find ways to reach out to groups that do not share their attributes” adds to the aims of Professor Gruber’s essay, but the additional message where she links her theory directly to specific examples adds

an bonus to her arguments. Specifically, as she asserts that we must “find concrete ways in which anti-subordination work can be done in the face of a multiplicity of identities.” This essay underscores that theoretical constructs must jointly address the struggles of our communities to challenge the politics of the present. In sum, her essay incorporates invaluable theoretical insights of not only past LatCrit struggles but also future possibilities. Because the author jumps outside narrow formalistic renderings of law she accomplishes inclusion of a more realistic account of the struggles our widely diverse communities witness. In sum, this grounding shows Professor Gruber is promoting building coalitions against subordination and the forced marginalization of communities that cross class differences.

Next, Professor Carla Pratt’s, “Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity,” grapples with law’s one drop rule, which structured racial identities and deprived the liberty interests of banished tribal members identified as Black.

Federal law held tribes hostage to newly defined memberships and thus mandated difficult choices. Caught between scylla and charybdis, tribes faced forced removal from their land and witnessed unbearable losses with attendant gain to the federal sector from the land the government accrued from former tribes. The difficult circumstances that federal law imposed on tribes thereby imposed a whirl of difficult circumstances for tribes that sought to survive newly imposed federal definitions.

Professor Pratt describes the use of law as a weapon in redefining long held relationships, that subjected communities of color to slavery, and social, economic and educational subjugation. The tribes, faced with incomprehensible challenges, faced extinction unless they denounced their Black members. The message of her essay evolves from this structural account of law and its re-definition of the relationship between American Indians and the Black members of their communities. Yet the author’s account of this legal history illustrates how the rule of hypo-descent remains in force today as “covertly operating to construct Native American identity.”

The essay ultimately recounts how Native American tribes were forced to “subscribe[] to the basic assumptions of the dominant culture” as a survival tool. Native American tribes have long endured a highly conflicted relationship with federal law and Professor Pratt’s essay highlights one aspect of law’s colonizing force. Thus, while federal law defines what constitutes a tribe, internal tribal relationships are also impacted. This essay ultimately refutes kulturkampf in clear terms that federal law drives in significant part
racial identity and politics. The author addresses how as a survival tactic Indians were forced to adopt the legal dictates imposed by the federal government in excluding their Black members. Its attendant consequences thus sacrificed and deprived the tribes of their former Black members in order to survive as tribe.

Professor Pratt’s extensive account additionally moves this history into the present and shows through contemporary rulings of the present that the “one drop rule” remains in defining tribal membership. Against the backdrop of Davis v. United States, the author’s focus on the “politics of racial identity” and offers further primary evidence of law’s structural force.

The Davis decision involves law’s colonizing brutality in its treatment of the Dosar-Barkus and Bruner bands of the Seminole Nations. The Seminole nations, in their early history included Black members that had fled to Florida, a non-slavery territory under Spanish governance, from slavery inflicted surrounding territories. Eventually, Blacks and Indians joined forces and engaged in common endeavors. These coalitions, however, were rendered vulnerable during the colonization and federal governance of the newer territories. Federal law thereafter imposed the banishment of Black members without sacrificing the survival of the tribes. The consequences of this legal tool, moreover, subjected its former tribal members into the incomprehensible world of slavery.

This history of exclusion ultimately led to the litigation in Davis. As Professor Pratt explains, “they sought to participate in certain tribal programs which are funded by a judgment paid by the United States for tribal lands taken by the U.S. government in 1823 when the tribe was in Florida.”

In a model of pure legal formalism, the United States Supreme Court rejected the merits of their claims by relying on the rules of civil procedure. As Professor Pratt declares, “most Americans still perceive anyone with known African ancestry and their skin coloration, hair texture or facial features that serve as evidence of African ancestry, to be ‘black’ or African American.” Yet as she illustrates, the legal influences of hypo-descent remain in “federal law and the law of some Native American tribes” and thereby construct Native American identity. Accordingly legal formalism in its purest

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21 Id.
sense disallowed what is perceived as “black” from Native American communities and its heritage. The decision and attendant federal law thus forces the adoption of an “assumption that whiteness is to be prized and non-whiteness devalued on a scale relative to the degree of color of one’s skin, with blackness constituting the most devalued state of being.” It further transformed a previous relationship and cast off its excluded members into a subordinated class and thus raised yet even further formidable challenges for its community.

The author’s lesson thus provides primary evidence of the law’s colonizing force in showing how law is employed to challenge identity. It demonstrates how subordination is the child of legal formalism. Its unlawful progeny is the lesson of the present, and underscores that critical advocacy must remain diligent against the kulturkampf of the season.

CONCLUSION

The authors of this Cluster advance long grounded theory, purpose and goals of LatCrit. The common themes center on proclaimed identities against the malign forces that seek to collapse their communities into a universal false norm. The essays enable LatCrit coalition building, engagement of alternative forms of pedagogy, and plead for new directions. They also speak to the future of the LatCrit project with a contribution from a newer generation of critical thinkers. In sum, the essays take a stand against the onslaught of neo-conservatives who are attacking our diversity with newer and more sophisticated weapons that “seek to rollback” or “check the civil rights and human rights gains that helped democratize some regions... during the Twentieth Century.”

Against the rabid turmoil of the present, this Cluster’s insights fearlessly address the danger of kulturkampf’s charging tactics that lack requisite specificity and causal connections. The authors engage critical issues, provide negative externalities on diverse communities’ confrontations with law, and in bringing them to the forefront consciously engage kulturkampf on their own terms.

Navigating Diverse Identities: Building Coalitions Through Redistribution of Academic Capital—An Exercise in Praxis

Aya Gruber

INTRODUCTION

I have experienced two philosophically epiphanic moments in my adult life. The first occurred during a solitary traversing of the mountains in the Guanxi province of China, and the second occurred at LatCrit IX. What I mean by epiphany is less a collection of thoughts than a singular feeling. Much like the Joycean artist, I felt at these moments an internal sense of realization and well-being, a feeling that something had just clicked into place. In China, I had a moment of finally feeling at peace with the uncertainty of my own future and life’s goals. Similarly, at LatCrit IX, I had a momentary feeling of peace with the intricacies of my racial identity and my progressive agenda.

The organizers of the Second Annual Junior Faculty Development Workshop at LatCrit IX, the first LatCrit conference I have ever attended, convened a plenary session on the LatCrit movement and LatCrit principles. After Tayyab Mahmud elegantly

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1 See generally JAMES JOYCE, A PORTRAIT OF THE ARTIST AS A YOUNG MAN (1916).

2 The Junior Faculty Development Workshop convened for two days. Its purpose was to provide tips to junior faculty and “provide junior faculty with a ‘network’ to turn to for future professional advice.” LatCrit IX Program Schedule 3 (Ninth Annual LatCrit Conference, Villanova University School of Law, Villanova, Pa., Apr. 29, 2004–May 2, 2004) (program schedule on file with the Seton Hall Law Review).

3 Although Angela Harris and Francisco Valdes were scheduled to facilitate the workshop entitled “On Jurisprudence: LatCrit Principles/LatCrit Values,” Tayyab Mahmud actually made this presentation. Angela Harris and Francisco Valdes, Facilitators, “On Jurisprudence: LatCrit Principles/LatCrit Values” (workshop held at Ninth Annual LatCrit Conference, Villanova University School of Law, Villanova,
explicated the history of the LatCrit movement, including its roots in legal realism, critical legal studies, critical race theory, and feminist legal theory, the conversation turned to the construction of identity, the use of the term “people of color,” and antisubordination goals. At this point, I made a comment about the tension between singular minority empowerment and anti-essentialist coalition building. I stated that as a biracial person, it had been my experience that being unable to capture an essentialist identity of myself and navigating the complicated maze of race and identity without a firm destination had left me feeling unsettled. After a moment, Tayyab Mahmud replied with an eloquent response to which I would not do justice were I to attempt to repeat it verbatim here; thus, I will put it plainly. He stated, “Being unsettled is okay.” I believe—although this memory may be a case of my own tendency to engage in revisionist history—he went on to say something like, “Being unsettled is actually good.”

Boom, there it was! It just hit me and flooded through me like a wave: a moment of true realization. I then understood that for so many years (and certainly as a law student, lawyer, and later academic), I had been grappling with where to fit my voice in the struggle for antisubordination and whether I was entitled a voice, given that I could not fit neatly into any of the categories of subordinated groups. I had always believed in the empowerment of subordinated groups, but that belief rarely, if ever, translated into an agenda involving groups to which I might conceivably belong, namely, biracial folks or Asian Americans. Rather, I spent most of my efforts attempting to secure more rights for what I considered and continue to consider one of the most unfairly subordinated groups in

Pa., Apr. 29, 2004–May 2, 2004 (hereinafter LatCrit IX)).

4 My mother is a second generation Japanese American, and my father is a second generation Russian American. I was born and raised in Miami, Florida, where there are few Asian Americans and even fewer mixed Asians.

5 There was one unique time in which I tried to embrace explicitly a multiracial identity and agenda. I made an unsuccessful attempt to start a group for interracial students at Harvard Law School. When I first entered Harvard Law School, perhaps out of my own naiveté, I was astounded at the number of mixed-race people at the law school. There were so many other gender and race-based groups on campus, and I felt that interracial students could have a say on antidiscrimination laws, census issues, and the like. At the beginning, many first year law students were very excited over the prospect of such a group, and we had extremely fruitful initial meetings. As time went on, however, students became worried about resumes and school work. Our group had no outlines; we had no particular job connections; in short, we had no power. The biracial African Americans tended to drift away to BLSA, the Asians went to APALSA, and so on. I remember one student, a mixed Native American, Caucasian, Asian, Latino. He held on to the very end, but a group of two is of little use.
our country: indigent minority criminal defendants. I realized at LatCrit IX that racial politics and progressive efforts were not about self-serving and essentialist agendas but rather about fighting against subordination and unfair privilege in whatever forms they might take. I began to think about how academicians could overcome essentialism and privilege traps by devoting their efforts to the causes of “others.”

As the conference moved from workshop to panels, the centralized theme of “Countering Kulturkampf Politics Through Critique and Justice Pedagogy” included varied discussions of essentialism and multiplicity, and I began to understand more about intersectionality and post-intersectionality theory. From Victor

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6 I began interning at the Miami-Dade County Public Defender at age sixteen. In law school, I spent much of my time at the criminal defense clinic. Prior to becoming an academician, I was a staff attorney with the Public Defender Service of Washington, D.C., and the Miami Federal Defender.

7 By “others,” I mean members of minority groups whose minority traits are different from the minority academician’s specific minority traits.

8 LatCrit IX Program Schedule, supra note 2, at 1.

9 The LatCrit ideology includes critiques of essentialist doctrines, which tend to reduce people to a single subordinating trait. By doing so, essentialist doctrines, which may seem progressive, can actually reinforce institutions of privilege. See Trina Grillo & Stephanie M. Wildman, Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other -Isms), 1991 DUKE L.J. 397, 401 (observing that many feminist theories center on “white issues . . . rendering women of color invisible”). Lisa Iglesias and Frank Valdes describe essentialism and anti-essentialism as follows:

“Essentialism” and “anti-essentialism” are key concepts in LatCrit theory, however, both terms mean different things in different contexts. Generally, “essentialism” is a label applied to claims that a particular perspective reflects the common experiences and interests of a broader group, as when working class men purport to define the class interests of “workers,” or white women purport to define the interests of all “women,” without acknowledging intragroup differences of position and perspective. Indeed, essentialist categories are routinely invoked precisely in order to suppress attention to intragroup differences, and thereby to consolidate a group’s agenda around the preferences of the group’s internal elites. By contrast, “anti-essentialist” theory seeks to reveal intragroup differences precisely in order to expose relations of subordination and domination that may exist within and among the members of any particular group.


10 African American women scholars first introduced intersectionality theory in their critiques of essentialist racial and gender ideologies. See, e.g., Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. CHI. LEGAL F. 139. Darren Lenard Hutchinson describes intersectionality theory as follows: The pioneering works of critical race feminists have made the “intersectionality” model an established jurisprudential method among
Romero’s interesting ideas on coalition building through self-sacrifice, Camille Nelson’s presentation on race and mental disability, and SpearIt’s thought-provoking presentation discussing racial coalitions built by radical Islam, to Robert Chang’s moving celebration of Jerome Culp’s legacy, I learned about the complex relationships between systems of subordination and empowerment and began to formulate some legal academic strategies in the post-intersectionality progressive movement. Now, having spent the weeks since the conference reading various works on intersectionality, post-intersectionality, and multidimensionality theory, I have developed antidiscrimination and identity theorists. Equality scholars have illuminated the inadequacies of essentialism in a host of doctrinal and political contexts by employing intersectionality. But the intersectionality critique extends beyond antessentialism. Intersectionality theorists have also demonstrated the complexity and multiplicity of identity and oppression and the need for a more comprehensive analysis of subordination that resists the traditional temptation to analyze systems of subordination as unrelated and nonconverging phenomena.


Post-intersectionality theory has several goals. It seeks to analyze and refine the intersection analogy and further describe the multiplicitous nature of human beings. It also focuses on legal strategies and advocacy that embrace the multidimensional nature of voices in the progressive movement. See Robert S. Chang & Jerome McCristal Culp, Jr., After Intersectionality, 71 UMKC L. REV. 485 (2002); Nancy Ehrenreich, Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems, 71 UMKC L. REV. 251 (2002); Hutchinson, supra note 10; Peter Kwan, Intersections of Race, Ethnicity, Class, Gender & Sexual Orientation: Jeffrey Dahmer and the Cosynthesis of Categories, 48 HASTINGS L.J. 1257, 1264 (1997); Francisco Valdes, Sex and Race in Queer Legal Culture: Ruminations on Identities & Interconnectivities, 5 S. CAL. REV. L. & WOMEN’S STUD. 25 (1995).

Victor Romero spoke during the “Connections Across Differences” panel. Victor Romero, “Rethinking Minority Coalition Building: Valuing Self-Sacrifice, Stewardship, and Anti-Subordination” (subpanel discussion held at LatCrit IX, supra note 3).

Camille Nelson’s talk was part of the “How Race Operates” panel. Camille Nelson, “A Dangerous Intersection: Assessing the Interplay of Race and (Mental) Disability” (subpanel discussion held at LatCrit IX, supra note 3).

SpearIt also spoke during the “How Race Operates” panel. SpearIt, “God Behind Bars: Race, Religion & Revenge” (subpanel discussion held at LatCrit IX, supra note 3).

Multidimensionality theory, as set forth by Darren Lenard Hutchinson, involves considering the multidimensional nature of subordination. Hutchinson sees subordinating factors and their accompanying harms as varied rather than universal and critiques gay scholarship for ignoring this framework:

Instead of conceptualizing race as separate from and oppositional to sexuality (and, thus, susceptible to comparison), multidimensionality examines the interactions of these statuses to highlight the diverse harms gays and lesbians face. Multidimensionality portrays these harms without diminishing—but rather, acknowledging and
formative thoughts on building coalitions between differently subordinated groups. These thoughts relate back to Tayyab’s initial remark that “being unsettled is okay.”

The vast majority of the participants in the LatCrit IX conference possess one or more subordinating traits. LatCrit is composed of women, people of color, gays, religious minorities, immigrants, and people with some combination of these traits. We are all, however, empowered in many ways. Some of the women and gays are white. Some of the minorities and gays are men. Some of the people of color are heterosexual. Many of the participants are non-immigrants. Almost all of us are educationally and economically privileged. Many of the participants are even privileged within their own academic institutions, having gained tenure or administrative positions. What we all also possess is a measure of academic capital, which, in effect, is our ability to create change through what we teach, what we say, what we do, and what we write. Academic capital, like political or economic capital, is an asset. Because we cannot talk and write about everything, our capital is limited by time, energy, and even inclination. This Essay discusses how we can marshal our

emphasizing—the importance of race and other sources of empowerment and disempowerment. Thus, multidimensionality provides a methodology for moving beyond the failed analogies while recognizing—rather than distorting—the true impact of race. . . . By excluding issues of racial and class subordination from analysis, gay and lesbian legal theorists and political activists negate the experiences of people of color and the poor and give centrality to the experiences of race- and class-privileged individuals. Consequently, they create harmful conflicts with antiracist agendas and people of color and propose theories that inadequately explain and confront (if at all) the subordination of the poor and racially marginalized.


16 By “subordinating trait,” I mean those characteristics of human beings that lead others to subordinate them, for example, race, gender, sexuality, socioeconomic status, or ethnicity. Other LatCrit scholars have referred to a person bearing a subordinating trait as “singly burdened” and a person bearing several subordinating traits as “doubly (or multiply) burdened.” Ehrenreich, supra note 11, at 256–57, 272–73. I must admit, I have not yet mastered LatCrit linguistics, and I can only hope that I am using at least some of the terms correctly. I am also cognizant of the need for precision in this type of discourse, so I will try to define my own vague terms.

17 Indeed, the more prominent a teacher or scholar, the more her academic capital is worth. When, for example, Derrick Bell writes, people read. For a description of Professor Bell’s accomplishments and an overview of his publications, see his curriculum vitae, available at http://www.law.nyu.edu/faculty/profiles/bios/bell_l_bio.html (last visited Apr. 14, 2005).
own academic capital so as to create coalitions and advance the antisubordination agenda.\footnote{Frank Valdes describes the commitment to antisubordination and coalition building as a recognition of interconnectivity: [I]nter-connectivity is a personal awakening to the tight interweaving of systems and structures of subordination. It represents a personal involvement with the cultivation of a consciousness that remains aware of this past, and alert to its malingering manifestations in the present. It entails a personal, and continuing, effort to exert inter-connective sensibilities in the task of forging a capacious, if not universal, theory of subordination. It calls for a personal engagement on various levels of political and theoretical operation in law and society toward a better future. Valdes, supra note 11, at 49.}

Although anti-essentialism is one of the touchstones of the LatCrit movement,\footnote{See Sylvia R. Lazos Vargas, The Latina/o and APIA Vote Post-2000: What Does It Meant to Move Beyond “Black and White” Politics?, 81 OR. L. REV 783, 813 (2002) (“A central tenet in LatCrit racial theory is its commitment to anti-essentialism”); Francisco Valdes, Barely at the Margins: Race and Ethnicity in Legal Education—A Curricular Study with LatCritical Commentary, 13 Berkeley La Raza L.J. 119, 147 (2002) (noting the LatCrit movement’s “longstanding commitments to antiessentialism multidimensionality, and antisubordination in and through legal education, discourse, and praxis”).} I would venture that most academicians in the critical or rights fields tend to write about the struggles of those who share at least one of their minority traits or who possess very similar traits. Often—but not always—women write about gender discrimination, Asians write about Asians and immigration, African Americans write about racial discrimination, and gays write about gay rights and heterosexism. There is a natural tendency to identify with the subordinated parts of oneself and write from that perspective, which is not necessarily a bad thing. It is important for those with similar minority traits to come together in order to garner strength and power for fighting against their oppression. Moreover, it feels natural to write from the perspective of one’s own negative experiences. Writing from the perspective of the oppressor as opposed to the oppressed can be an extremely disconcerting thing.\footnote{Francisco Valdes discusses his difficulty speaking at a Lesbians and the Law conference. He recollects that his “maleness became a lightning rod for discontent.” Valdes, supra note 11, at 29.}

What I am arguing, however, is that such a feeling of being unsettled is “okay.” In order to build coalitions and advance a general strategy of antisubordination, one must, as Eric Yamamoto opines, envision oneself as both oppressed and oppressor.\footnote{Eric Yamamoto observes: [T]he interracial justice concept locates racial group agency and responsibility within the tension between continuing group}
effectuate this idea, I propose that academicians in the progressive movement devote some part of their academic capital to the struggle of those who are wholly unlike them—those to whom the progressive academicians most likely represent the oppressor class. In this manner, progressives will be able to redistribute to other subordinated groups the power gains they have made in their individual lives and causes. The converse of this ideal is that we all must, as people who identify with others who share our subordinating traits, open our arms to those in “oppressor groups” who seek to devote their academic capital to “our” causes.

In addition, redistribution of academic capital in a coalition-conscious way serves as a response to the power of institutionalized racial privilege. Charles Pouncy suggests that efforts of critical scholars are sometimes limited by conscious or unconscious use of subordinating institutional legal structures. The program to redistribute academic capital serves as a check on the pervasive allure of privilege and can help keep academicians focused squarely on antisubordination goals. In addition, minority law professors can capitalize on their acceptance by privileged institutions by devoting resources to the goals of those who are less privileged. In this way, one can “confront the institutions of privilege and subordination by using one’s ability to participate in those institutions to subvert them from within.”

The rest of this Essay will be dedicated to answering what is no doubt the obvious set of questions: Why should academicians devote capital to writing from an “oppressor’s” point of view? How does this

subordination and emerging group power. It posits that amid social structural shifts, racial groups may be, in varying ways, simultaneously privileged and oppressed, empowered and disempowered, uplifting and subordinating. It means understanding the influences of dominant, mostly white institutions in the construction of interracial conflicts. It also means understanding ways in which racial groups contribute to and are responsible for the construction of their own identities and sometimes oppressive inter-group relations. It thus acknowledges situated or constrained racial group agency and responsibility.


23 Charles Pouncy made this comment upon reviewing an earlier draft of this Essay. He highlighted for me the connection between the concept of redistribution of academic capital and subversion of structures of racial privilege.
question relate to intersectionality and post-intersectionality theory? What are the pros and cons of this proposal? To that end, Part I of the Essay will briefly describe intersectionality theory as a way to ground and center the proposal. Part II will discuss the allure of identity politics and respond prospectively to potential reservations about the proposal. Part III will explain why the proposal furthers antisubordination goals and fosters multidimensional coalitions.

I. INTERSECTIONALITY AND POST-INTERSECTIONALITY THEORIES

Anti-essentialist writings have laid out the argument that each of us is a collection of different attributes. In this society, one’s attributes, whether gender, race, class, sexuality, or other characteristics, affect one’s status differently in various contexts. What may be subordinating and stigmatizing in one context can be empowering in others. This duality is often the case with stereotypes—they inure to the benefit or detriment of the subject depending on the context. For example, the stereotype of women as “weak” or “nurturing” subordinates them in the business context, yet actually empowers them in the parental context. In part because of these stereotypes, women suffer disempowerment and discrimination in the workplace but seem to fare much better than men in family court, especially in the context of child custody. Although each individual’s attributes affect the individual and society differently in different contexts, creating what is sometimes referred to by critical scholars as “shifting bottoms,” progressives are wary of anti-

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24 Yamamoto, for example, deconstructs the concept of Asian-ness. He observes that questions about Asian American as a racial category give rise to questions about the category’s shifting borders: Under what circumstances do individuals faced with justice issues shift between pan-racial and ethnic identities? How do differences concerning history, culture, economics, gender, class, mixed ancestry, immigration status and locale contribute to malleable victim and perpetrator racial identities? How do unstable racial identities detract from or provide opportunities for deeper understandings of interracial harms and group responsibility for healing? Yamamoto, supra note 21, at 43–44.

25 LatCrit employs “analyses that recognize and target the interlocking nature of different forms of oppression and privilege based on different axes of social position and group identity, whether race, ethnicity, sex, gender, class, sexual orientation, religion, ability, nationality or other similar constructs.” Iglesias & Valdes, supra note 9, at 1322.

26 Athena Mutua proposed the idea of “shifting bottoms” as a complement to the LatCrit project of rotating centers. LatCrit had instrumentalized the concept of multiplicity by rotating its center and devoting at least one panel of the conference to concerns of non-Latina minorities. Athena Mutua observed that the LatCrit
essentialism leading to the co-opting of minority status by privileged members of society. Thus, there must be a point at which an individual’s characteristics can be described more generally as either privileged or subordinating.

There is an important need to generalize here in order to avoid hopeless relativism. If the individual is thought of only as a project must be cognizant of the shifts in the status of different groups in different contexts. She described “shifting bottoms” as follows:

I believe the “bottom” metaphor leads us to the idea that the groups represented at the “bottom” shift, depending on the issue and circumstance. The shifting “bottom” directs us to shift our focus, shift our thinking, and perhaps shift our analytical tools when we are trying to understand the experiences of different groups. It instructs us to look specifically at how different groups and issues are constructed and experienced both in similar and dissimilar ways. This essay suggests that although Blacks are at the bottom of a colorized racial hierarchy, Latino/as are at the bottom of a racialized language hierarchy, at a minimum, and perhaps at the bottom of a racial system marked by the Spanish language, among other things. The “bottom” has indeed shifted.


For example, some conservatives claim that because of affirmative action programs and diversity goals, white men are a minority. See, e.g., Martin D. Carcieri, A Progressive Reply to the ACLU on Proposition 209, 39 SANTA CLARA L. REV. 141, 149–50, 156–57, 177 & n.151 (1999) ("[T]he current trend in the private sector is to disfavor the hiring of white males in order to project the appearance of diversity . . . ."). Although Justice Thomas does not imply that white men are a minority, he buys into this logic in his Adarand concurrence, when he states, “In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.” Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring) (citations omitted).

By privileged trait, I mean the converse of a subordinating trait. It is a trait that brings with it institutional advantages. For example, whiteness is generally privileged over other racial traits, maleness over femaleness, heterosexuality over gayness, citizenship over immigrant status, and so forth. Thus, for example, identifying a person as a “white female” is recognizing that the person possesses a subordinating trait and a privileged trait. Now, it is true that the interplay of those traits and others she possesses is different in different contexts. Nonetheless, there is a need for some generalization here.

Robert Westley warns of the dangers of contextual multiplicity theories:

Categorization of white people as the racial victims of reform efforts made on behalf of people of color is now a mainstay of conservative political backlash. It is an idea that has insinuated itself into federal equal protection jurisprudence with disastrous effect on the continuing viability of affirmative action and voting rights, forcing critical race scholars to re-examine the utility of framing the domination of people of color in terms of acontextual notions of racism or antidiscrimination. It has divided communities of color; some now see any racial redress which requires the cooperation of whites as futile, while others seek to reclaim the remedial focus in various ways.
collection of disparate attributes that act differently at different times, then group-think is almost impossible. Without some level of group-think, minority empowerment is simply not feasible, and indeed the LatCrit movement would have little basis for coalescence.\textsuperscript{30} As a result, it is helpful to categorize certain attributes as generally privileged or generally subordinating. It is true, semantically, that subordinating traits can be described in certain scenarios as privileged.\textsuperscript{31} Blackness, Latina-ness, femaleness, and gayness, for example, all can be described as privileged features in the limited areas where African Americans, Latinas, women, and gays have strong holds on power, such as several spheres of popular culture. Margaret Montoya made the point during one of the panels that, despite the prevalence of bigotry and heterosexism, minorities and gays often have a corner on the market of what is “cool.”\textsuperscript{32} The important political reality, however, is that not all traits are similarly situated. Blackness and Latina-ness are traits that generally cause one to be subordinated whereas whiteness generally allows one to enjoy privilege. Femaleness is generally subordinating and maleness privileged. Gayness is generally subordinating and heterosexuality privileged. Poverty is subordinating and wealth privileged.

The first writings on intersectionality envisioned certain people as being at the junction of two or more subordinating traits.\textsuperscript{33} Kimberle Crenshaw criticized both essentialist feminist and critical race movements for ignoring, in their discourse and strategies, black women, who stood at the crossroads of both race and gender subordination.\textsuperscript{34} Crenshaw’s important scholarly contributions urged courts and theorists alike to consider discrimination against black women as unique and distinct from discrimination against blacks or discrimination against women.\textsuperscript{35} While Crenshaw and similar authors


\textsuperscript{30} Steven Bender and Keith Aoki describe the LatCrit movement as seeking “a political identity that aims to mobilize and build community around those willing to address Latina/o issues in imagining a post-subordination future.” Steven W. Bender & Keith Aoki, \textit{Seekin’ the Cause: Social Justice Movements and LatCrit Community}, 81 Or. L. Rev. 595, 619 (2002) (footnotes omitted).

\textsuperscript{31} See \textit{supra} note 26 for a discussion of “shifting bottoms.”

\textsuperscript{32} Margaret Montoya & Robert Westley, Facilitators, “On Scholarship: What to Write, How to Finish” (workshop held at LatCrit IX, \textit{supra} note 3).

\textsuperscript{33} See Crenshaw, \textit{supra} note 10 (discussing the intersectional experience of black women in terms of race and gender).

\textsuperscript{34} Id. at 140.

\textsuperscript{35} Id.
considered the cases of “doubly-burdened” \textsuperscript{36} individuals, post-intersectionality theorists analyzed individuals as a collection of both subordinating and privileged features, thereby characterizing human beings as both oppressed and as having access to institutions of privilege. \textsuperscript{37}

The concept that individuals are collections of traits rather than essentialist beings resulted in a guarded rejection of identity politics by progressives. \textsuperscript{38} The LatCrit movement, for example, began to see itself less as a movement solely designed to increase unilaterally the political power of Latinas and more as a movement embracing general goals of antisubordination and coalition building. \textsuperscript{39} As such, the LatCrit movement now embraces all varieties of antisubordination discourse, not solely those addressing Latina rights. Regularly represented in LatCrit symposia and conferences are queer theory, race relations discourse, feminist legal thought, populist strategies, mental disability advocacy, and other concepts involving the empowerment of individuals and groups subject to discrimination. \textsuperscript{40}

In addition, the rejection of essentialism led to several theories concerned with bridging the gap between disparately situated and, at times, conflicting minority groups. Several of the panels at LatCrit IX discussed the intersection of race and gender, different races, race and sexuality, and race and socioeconomic status, and also addressed ways to build meaningful coalitions. \textsuperscript{41} In the post-intersectionality

\textsuperscript{36} See, e.g., Ehrenreich, \textit{supra} note 11, at 275 (describing the terms “singly-burdened” and “doubly-burdened”).

\textsuperscript{37} See Yamamoto, \textit{supra} note 21, at 38 (discussing the multiplicitous nature of individuals).

\textsuperscript{38} See \textit{supra} note 9 for a discussion of essentialist doctrines. I say guarded because, as noted above, a total rejection of group-think makes coalitions impossible. Also, only by invoking some essentialist notions of identity can the relativism problem be overcome and subordination prevented from being reduced to total contextualism. See \textit{supra} notes 29–31 and accompanying text for a discussion of the need for some level of group-think to achieve a coalition.

\textsuperscript{39} See Mutua, \textit{supra} note 26, at 1184–85 (describing the LatCrit movement’s effort to rotate its center around non-Latina issues of subordination).

\textsuperscript{40} LatCrit IX, for example, hosted the following presentations not directly related to Latina issues: Nancy Ehrenreich, “North American Exceptionalism and Failures of Feminist Coalition: On Genital Cutting Here & Abroad” (subpanel discussion held at LatCrit IX, \textit{supra} note 3); Shirley Turpin-Parham, “Preserving the History of the Underground Railroad” (subpanel discussion held at LatCrit IX, \textit{supra} note 3); Verna Williams, “Single Sex Education and the Construction of Race and Gender” (subpanel discussion held at LatCrit IX, \textit{supra} note 3); and Adrian Wing, “The Future of Critical Race Feminism in the Age of Terror” (workshop held at LatCrit IX, \textit{supra} note 3).

\textsuperscript{41} Panels on coalition building included: Michele Alexandre, “The Black/Latino
world, progressive scholars have embraced a project of developing strategies aimed at unifying the multiplicity of agendas, ideologies, races, genders, sexualities, classes, and ethnicities within the progressive movement to further a coherent agenda. These progressive scholars criticize essentialist identity politics and note that conflicts and stratifications within the movement, whether perceived or real, have given fuel to conservatives who seek to dismiss progressive agendas and claim that progressives’ failure to coalesce is a reason to reject progressive politics.  

Recognizing the importance of unification, progressive scholars set forth strategies for creating coalitions among seemingly disparate subordinated groups. Many of these theories are featured in a 2002 symposium issue of the *UMKC Law Review* entitled, “Theorizing the Connections Among Systems of Subordination.”

Nancy Ehrenreich,

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42 Nancy Ehrenreich describes the white conservative “divide and conquer” tactic: 
Right-wing discourse is replete with arguments to the effect that one progressive reform cannot be accepted because it will jeopardize the rights of some other group that progressives like to support. Such arguments imply that the interests of identity groups are at cross-purposes, so that it is impossible to accommodate all of them. In so doing, they also implicitly criticize the reform efforts of particular groups, suggesting that those efforts ignore the legitimate interests of others and thus reflect little more than narrow self-interest. Ehrenreich, supra note 11, at 259. Darren Lenard Hutchinson observes that the resistance to internal criticism in the progressive movement, which exposes such rifts, is based in part on the fear of disunification: 

[Activists and theorists have opposed internal criticism because they fear that such criticism will cause disunity within oppressed communities, thus detracting from collective opposition to subordination. Members of oppressed communities often rally around their socially constructed identities in order to challenge the oppression and discrimination mediated by these categories. The interposing of internal criticism is perceived as a threat to this history of “unified” political action.]


for example, advocates a process of “symbiosis,” by which different groups—including even privileged groups—can unify around convergent goals and neutral values. By this theory, she hopes to avoid several identity-based problems that divide the progressive movement. Others regard with skepticism the proposition that there exists a neutral solution, or indeed any solution, to the problems presented by identity.

This Essay is yet another attempt to discuss how to bridge the identity gap. Rather than asking subordinated groups to sublimate what is unique about them in favor of that which different groups share, I am instead proposing that groups embrace their uniqueness, but nonetheless find ways to reach out to other groups that do not share their attributes. Through this theory, I will try to meet Robert Chang and Jerome Culp’s challenge to find concrete ways in which antisu\-bordination work can be done in the face of a multiplicity of identities. They remark:

How do you maximize antisubordination activity when groups conflict? One method that we’ve explored requires sacrifice by disclaiming privilege. . . . If there are to be meaningful and longstanding coalitions between African Americans and Asian Americans, sacrifices, at least in the short term, are necessary.

Indeed, Ehrenreich theorizes that some members of dominating groups can be convinced of the perils of privilege to their own interests. She argues, for example, that some, but not all, men can be convinced that patriarchy actually hurts them. Ehrenreich, supra note 11, at 324.

Ehrenreich discusses four specific problems created by identity politics: (1) The Zero Sum Problem: the seeming impossibility of simultaneously furthering the interest of different groups; (2) The Battle of Oppressions Problem: the fight among groups for priority based on their unique oppression; (3) The Infinite Regress Problem: the problem of all arguments reducing to individualism making group based initiatives unlikely; and (4) The Relativism Problem: the amorphous nature of oppression and the idea that anyone could be oppressed depending on the context. Id. at 316–23.

Chang and Culp argue:
Professor Ehrenreich proposes that we step outside the bounds of our identities and identify with the common “enemy.” Indeed, the hope seems to be to step outside the bounds of all identities and create an anti-essentialist solution to problems caused by identity oppression. This is a great hope. Unfortunately, it is not possible, and as we move to create coalitions, it may prove to be ultimately unsuccessful.

Chang & Culp, supra note 11, at 487; see also Mary Romero, Historicizing and Symbolizing a Racial Ethnic Identity: Lessons for Coalition Building with a Social Justice Agenda, 33 U.C. DAVIS L. REV. 1599, 1599 (2000) (“Although groups centering on discrete identities struggled to find a rallying point from which to advocate social justice and coalition building, this has proven to be a difficult project.”).

Chang & Culp, supra note 11, at 490–91.
The willingness to sacrifice is in turn dependent on trust. And perhaps therein lies the real challenge. How do we establish trust in the absence of formalized accountability? It is a question we are still working on as we try to move past the intersection. It is the question we invite others to explore.\footnote{Id.}

To begin exploring this question, I will start with an analysis of why, despite the general rejection of essentialism in the current progressive discourse, identity politics are so widely practiced by minority scholars.

II. THE ALLURE OF IDENTITY POLITICS: RESERVATIONS AND RESPONSES

This Part identifies several considerations that contribute to the allure of identity politics. Some of these considerations, I will argue, are powerful, important, and should inform my proposal, while others should be resisted. This Part has been divided into five reservations that the proposal could engender and the responses thereto.

A. Dilution of Power

Reservation: Pursuing the agenda of differently subordinated groups will take away members and advocacy from one’s own minority group, thereby diluting its power.

There is power in numbers. Subordinated groups, whether they are African Americans, immigrants, women, or laborers, have learned from history that coming together is an effective way—perhaps the only effective way—of countering institutionalized privilege.\footnote{See, e.g., Lani Guinier & Gerald Torres, The Miner’s Canary: Enlisting Race, Resisting Power, Transforming Democracy (2002) (advocating political cohesion within minority groups).} Indeed, the LatCrit movement prioritizes coalition building as a central goal.\footnote{The LatCrit movement extended the idea of intragroup cohesion to forging coalition between disparate minority groups. See, e.g., George A. Martínez, African Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition, 19 CHICANO-LATINO L. REV. 213, 214 (1998) (calling for an “epistemic coalition comprised of all minority groups so that each group achieves knowledge about themselves and their place in the world”).} The question is why groups tend to coalesce around specific shared ethnic, gender, racial, or sexual traits rather than other more general traits, such as, the fact that they all have suffered subordination. Why are there not more identity groups containing
both white women and African American men, both Asian Americans and gays, both poor white workers and immigrants? There are infinite answers to these questions, ranging from perceived or real “cultural” differences and conflicting agendas to the replication of patterns of privilege. Here, I would like to discuss another reason for group identity politics.

One of the reasons why groups coalesce around particular subordinating traits rather than subordination in general, I submit, is the desire to protect the importance of their specific rights discourse, which the majority seeks to silence. For example, African Americans may fear that by pursuing agendas other than African American-centered agendas, the power of the African American movement will be diluted and the white privileged class will gain advantage in the end. This fear is all too real, given the conservative movement’s attempt to show that racial affirmative action is an illegitimate proxy for legitimate economic affirmative action.

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51 See Rachel F. Moran, What If Latinos Really Mattered in the Public Policy Debate?, 85 CAL. L. REV. 1315, 1319 (1997) (noting that Latina-Asian coalitions in Los Angeles “may have remained weak because of the racial, ethnic, linguistic, cultural, and class differences between the two groups”).

52 Kevin Johnson offers the following example:
African Americans often have been concerned about the negative impacts of immigration on their community, and less concerned than Latinas/os with immigration enforcement as a civil rights issue. Many poor and working-class African Americans have felt in competition with Latina/o immigrants for low-skilled jobs and have seen some industries move from having predominately Black to Latina/o work forces. Some claim that employers prefer hiring undocumented Latinas/os over domestic African Americans. The “rivalry between blacks and Latinas/as . . . is fueled by innumerable factors, including contests over jobs, access to education and housing, and politicking of a wedge variety. . . . Blacks often see Latinas/as as a racially mobile group capable of leapfrogging over them, with access to whiteness and all that it entails. . . .” Such sentiments tend to foster African American support for immigration restrictions and heightened immigration enforcement.


53 See infra notes 84–87 and accompanying text for a discussion of how scholars should strike a balance between promoting their group’s goals and the goals of other subordinated groups, thereby lessening the effect of dominant power structures.

54 Coalition building and intergroup agendas divert time and effort from identity-based agendas. See Johnson, supra note 52, at 361–62 (“Political coalitions between diverse communities are complex and often fragile. Building such alliances requires significant time and effort to build trust.”).

55 This pernicious argument is made in Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996):
The use of race, in and of itself, to choose students simply achieves a
argument, African American academicians are naturally loath to take up a pro-economic affirmative action agenda in fear that it will dilute the effectiveness of their claims for racial justice.

An analogy to dilution analysis in the academic context can be made in the romantic relationship and procreation context. Jim Chen, for example, argues that one way to build personal coalitions among disparate racial or ethnic groups is through cross-racial domestic unions and procreation. Conversely, some minorities who are against cross-racial unions articulate the fear that cross-racial procreation could ultimately lead to a total dilution of a specific minority’s history, cultural practices, and even physiological traits.

student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants. . . . While the use of race per se is proscribed, state-supported schools may reasonably consider a host of factors—some of which may have some correlation with race—in making admissions decisions. . . . Schools may even consider factors such as whether an applicant’s parents attended college or the applicant’s economic and social background. For this reason, race often is said to be justified in the diversity context, not on its own terms, but as a proxy for other characteristics that institutions of higher education value but that do not raise similar constitutional concerns. Unfortunately, this approach simply replicates the very harm that the Fourteenth Amendment was designed to eliminate.

Id. at 945–46.

Jim Chen’s argument can certainly be taken to a disturbing eugenic extreme. He argues that legal and social harmony can be achieved through “cross-breeding”:

With each passing American generation, integration nudges social reality closer toward legal utopia. Despite legal and physical barriers, people of different races and ethnicities will mix their cultural traditions over time. If ever a manifest destiny gripped this nation, this continent, this hemisphere, it was the fate that made America the world’s biological and sociological clearinghouse. Five centuries of tempestuous interaction between the Old and New Worlds have spawned countless instances of cross-fertilization, both in ecological and in human terms.

Jim Chen, Unloving, 80 Iowa L. Rev. 145, 151 (1994). In addition, race-mixing alone, without social structural change, would not necessarily solve the problem of institutionalized racism. See discussion infra Part II.B on how the mixed-race people could themselves replicate patterns of privilege through their choices of identification.

The fear is that assimilation, interracial reproduction, and Americanization will lead to the eradication of individual ethnic groups and practices. Kenneth Karst explains:

The word [assimilation] raises hackles among writers and community organizers who see threats to the survival of a culture and to an assumed group political solidarity. These fears are well founded. The integration of individuals into the larger society usually does imply some weakening of their “identification with” the racial or ethnic groups that served as their ancestors’ “primordial” identities.
This fear is not unfounded in a world where ethnic cleansing exists and in a country that attempts to supplant individual racial awareness with a diluting concept of color-blind “Americanness.” Thus, the argument is that it disempowers minorities when their members mix with other races, especially dominant races, because to do so lessens the numbers in—and, ultimately, the strength of—the minority group. Likewise, one might fear that pursuing other minorities’ agendas would disadvantage one’s own minority group by decreasing its number of advocates, lessening the strength of its message, and, in the end, diluting its power.

Responding to this reservation, one can note that there is an important distinction between procreation and distribution of academic capital, which is relevant to my proposal. Generally, one unites domestically and has children with limited numbers of other persons. In this sense, one’s “reproductive capital” is extremely limited. It would be unusual, for example, for one to have an African American child to offset the fact that one has previously had a biracial child, in order to avoid dilution problems. This problem does not exist with academic capital. Although academic capital is limited in some sense, it is not limited in the manner noted above. One could devote, for example, eighty percent of one’s intellectual pursuits to writing about the subordination of one’s own minority group and twenty percent to writing about other subordinated


Jerome Culp criticizes the tendency to embrace color blindness as a cure for racial evils. He states, “colorblindness permits us to avoid any discussion of the morality or justice of assimilation, nationalism, or cultural difference. Instead, its proponents simply assert that justice and morality are vested within colorblindness.” Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. Rev. 162, 163 (1994).

In addition, one could hardly propose such a solution to the problem of racial dilution without appearing a bit crazy. Romantic relationships, marriage, and especially procreation, are topics about which one would likely have trouble proposing legal or moral strategies based on race. Indeed, Jim Chen’s suggestion that cross-racial breeding represents the path toward Utopia was regarded with skepticism and even derogation in the legal academy. See Ilhyung Lee, *Race Consciousness and Minority Scholars*, 33 CONN. L. REV. 535 (2001) (discussing the strong negative reaction of progressive scholars to Chen’s article).

It is extremely important for minority scholars not to abandon the agendas of their particular groups. As Jerome Culp has pointed out, even black legal scholarship (as opposed to black jurisprudence) is still in a formative stage, requiring that substantial academic capital be devoted to its development. Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKÉ L.J. 39, 40. Similarly, Robert Chang declares an “Asian American Moment” and calls for specific Asian-American-related legal scholarship. Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative*
groups. In this way, a person can pursue both the agenda of those with whom she shares minority traits and an antisubordination agenda generally.

B. Marginalization

Reservation: Identifying with other subordinated groups will cause the member's own minority group to be similarly marginalized.

Between subordinated groups and within subcategorizable subordinated groups, there are those who fear that identifying with more marginalized group members will lead to a diminution of their group's gains. Latina scholars, for example, could fear that allying with gays will make them lose whatever racial gains they have made in heterosexist white society.61 In other words, those who may be receptive to the scholar's Latina-only message may not listen to a Latina/gay message. Minority groups that have had some access at "fitting in," such as heterosexual white women, African American men, and Asians, could believe that espousing philosophies that support other racial minorities, gays, transgender folks, certain religious minorities, and the socially disadvantaged (like criminal defendants), would radicalize them in the eyes of many and give them less general credibility.62 Put another way, people of color who have "made it" and are able to participate in institutions of privilege may be reluctant to trade this participation for the sake of those differently subordinated. This fear may be one of the reasons why

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61 There are two possible reasons for this belief. First, the Latina may feel that her issues are legitimate whereas gay issues are illegitimate or fringe. See Darren Lenard Hutchinson, Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics, 47 BUFF. L. REV. 1, 16 (1999) (“When skeptics reject the need to embrace multidimensional theories of equality, they falsely imply that their own essentialized theories are ‘authentic’ and ‘pure.’”). Second, the Latina may see the gay issues as legitimate and important, but nonetheless bend to the dominant structure that marginalizes gay issues. See Ehrenreich, supra note 11, at 259–63 (discussing how identity politics supports entrenched systems of subordination).

62 Certain black clerics expressed agitation at comparisons between black civil rights struggles and the gay right to marry movement. Michael Paulson, Top Clerics Join to Support Amendment, BOSTON GLOBE, Feb. 8, 2004, at B1, available at, http://www.boston.com/news/local/massachusetts/articles/2004/02/08/top_clerics_join_to_support_amendment (last visited Jan. 30, 2006). Reverend Wesley A. Roberts, the president of the Black Ministerial Alliance and pastor of Peoples Baptist Church, for example, stated, “I don’t see this as a civil rights issue, because to equate what is happening now to the civil rights struggle which blacks had to go through would be to belittle what we had gone through as a people.” Id. By doing so, Reverend Roberts contrasted a perceived legitimate rights issue with a perceived illegitimate or fringe rights issue. Id.
some minority groups exclude members who stand at the intersections of more than one minority trait:

[E]xclusion may often be part of an effort to legitimate and gain respect for a group’s claims to oppression. As Sherene Razack and Mary Louise Fellows note, relying on Regina Austin, “Blacks who are considered deviant by whites are excluded from standing in the Black community ‘because they undermine our claims to greater respect and a larger share of the nation’s bounty.’” Similarly, lesbians have been excluded from the (white) women’s movement because of fear that homophobia would jeopardize that movement’s goals. Exclusion and vulnerability work together to disable resistance and reinforce subordination.

Simply put, given the existing institutional structure of privilege, it may be easier to advance a singular agenda, such as equality for African Americans, than a multivariate agenda, such as equal rights for all people of color, all genders, and all sexualities. In addition, the more a single minority group makes gains in garnering equality for its members, the less the members will want to compromise those gains for the sake of individuals unlike them. The “that’s-not-our-issue” phenomenon is illustrated by Frank Valdes in discussing some lesbians’ hostility toward including a discussion of transexuality in a “Lesbian Legal Theory” conference. Darren Lenard Hutchinson similarly discusses how white, gay activist Richard Mohr views the integration of racial and feminist theory into the gay rights movement as “a wasteful drain on the movement” and claims that racial and women’s equality fights “are not gays’ fights.”

On a related though slightly different note, progressive theorists observe that some minorities capitalize on their privileged traits in a way that actively subordinates other minorities. Nancy Ehrenreich describes the phenomenon of “compensatory subordination,” whereby “lower-status” folk, because of their psychology of oppression, capitalize on their dominant traits and subordinate

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63 Ehrenreich, supra note 11, at 289 (quoting Mary Louise Fellows & Sherene Razack, The Race to Innocence: Confronting Hierarchical Relations Among Women, 1 J. GENDER, RACE & JUST. 335, 350 n.42 (1998)).
64 This belief also accepts a false essentialist ideology that members of a certain group “are all the same.” See supra note 9 for a discussion of essentialism.
65 Valdes, supra note 11, at 37 (discussing reactions from members of the lesbian legal community that “transsexuals, and discussion of them, are out of place in lesbian venues”).
others who do not possess those traits. She offers several examples, including the seemingly high rate of domestic violence committed by working-class men, the racism of poor whites, and sexual harassment by “low-status” men. Frank Rudy Cooper discusses how compensatory subordination can explain racial profiling by police officers. He observes that many police officers are “[w]orking-class White males” who “tend to base their self-identities on conceiving of themselves as superior to men of color.”

I find these constructions of the lure of identity politics at once instructive and disanalogous. Ehrenreich’s empirical support for compensatory subordination theory is a bit disconnected because even if the research she cites is valid to show that, for example, poor men are more likely to engage in domestic violence than rich men, it does not appear to support the more general idea that subordinated people compensate for their subordination by acting out against other minorities relative to whom they are empowered. Assuming that it is true that “poor whites” are more likely to be sexist and racist, it simply does not lead to the conclusion that other types of subordinated people will engage in compensatory subordination. Poverty is a condition that is often accompanied by lack of education and a certain day-to-day hardship and frustration that are certainly ingredients of a racist, sexist, or homophobic disposition. I doubt, however, that a minority who is highly educated and does not face

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67 See Ehrenreich, supra note 11, at 276, 291–95.
68 Id.
70 Id. at 367-68.
71 This proposition should be approached with a certain amount of skepticism. Although, at this time, I have no specific information on the methodology used to conclude that “lower status” men engage in domestic violence more than “higher status” men, I assert that such a conclusion is extremely difficult to make. If the conclusion is based on reports of or arrests for domestic violence, there are numerous reasons why “lower status” people may end up in the criminal system more often than “higher status” people, apart from the simple conclusion that “lower status” people commit more crimes. One could posit, rather than concluding that “lower status” people commit more bad acts, that the bad acts of “higher status” people are more often kept secret.
72 Ehrenreich explains the phenomenon of compensatory subordination as follows: “[W]hen systems of subordination coexist, they tempt singly burdened individuals to subordinate others in order to compensate for their own vulnerability and powerlessness.” Ehrenreich, supra note 11, at 300. I assert, however, that one simply cannot conclude that there is a general phenomenon that minorities act out against those relative to whom they are empowered from the supposed evidence that some men displace their anger from workplace emasculation by abusing their spouses or female co-workers.
such day-to-day hardships would act out “compensatory subordination.” This disparity makes Ehrenreich’s theory of compensatory subordination almost wholly inapplicable to the audience to whom this type of discourse is interesting. No one would ever say that minority male law professors are more likely to be sexist or racist than white male law professors because they are compensating for other subordination. Moreover, those economically advantaged minorities who are in fact racist, sexist, or homophobic may possibly be so because they are compensating for their minority status, but they may be so for a myriad of other reasons as well.\footnote{Ehrenreich admits that there are other explanations for acts of subordination by “low status” people: I’m a bit uncomfortable with this example, for the conclusion it relies upon reinforces prevailing stereotypes about class differences. My own guess would be that the real-life pressures low-income men suffer account for as much if not more of their abusive behavior than any difference in cultural norms involving attitudes towards masculinity. This view is supported by the correlation between unemployment and male violence. \textit{Id. at 292 n.197.}} As a result, even assuming the truth of “compensatory subordination” in the context of the economically and educationally disadvantaged, it likely cannot explain scholars’ tendency to engage in identity politics.

What is instructive about the discussion of compensatory subordination is the idea that the relative empowerment of some minorities does not lead them to use their power on behalf of other minorities with whom they do not share traits.\footnote{Frank Wu discusses the fears of relatively empowered minority groups in the context of the Asian American legal agenda: [L]ike anyone else who gains a measure of empowerment after agitating from the outside, Asian Americans are learning that it turns out to be altogether another issue how to use that power once on the inside. Given the risks of backlash towards uniting along racial lines even for defensive purposes such as addressing hate crimes, not to mention the tendency toward complacency once the urgency of mutual protection begins to subside, Asian Americans together must develop a principled agenda if we are to give the concept of “Asian American” as a group any substantive content. Such principles must be genuine, which is to say universal; they cannot appeal to Asian Americans exclusively or be indefensible if expressed openly in a diverse democracy. \textit{Frank H. Wu, The Arrival of Asian Americans: An Agenda for Legal Scholarship, 10 ASIAN L.J. 1, 5–6 (2003.).}} It underscores the idea that minorities themselves can participate to some degree in power structures that ultimately subordinate them. I do not believe the reason for this disparaging action, in many contexts, is that the
minorities are acting out against other minorities; rather, it is that minorities, who have fought so hard for the little power they have, do not want to lose it by taking up the cause of someone even more disempowered. In this sense, some minorities, well-educated or not, are in part controlled by the dominant power structure that decides which minority agendas to privilege and which to disadvantage. 75

While the fear of marginalization may be very real, it is not a reason to reject the proposal outlined in the introduction. First, the proposal does not envision alliances so strong that they are necessarily intertwined in all contexts. Thus, for example, the Latina law professor could advance a Latina-only agenda with certain audiences, advance a gay rights agenda with others, and even advance a mixed Latina/gay strategy when expedient. 76 In our professional lives, we teach different courses, write about different things, and speak on a variety of subjects. This proposal is quite modest in that it counsels us to, at the very least, devote a fraction of our scholarship to the rights of others. This scheme does not necessarily require that it permeate all our academic endeavors. Second, we ought to be very critical about the costs of our own minority groups’ power gains within the dominant infrastructure. If these gains come at the expense of larger agendas, other minorities’ rights, or the rights of more subordinated members within the group, perhaps these gains are not worth their expense. 77

Some argue, however, that immediate gains to minority groups are more important than loftier, yet harder to achieve, general antisubordination goals. 78 Consider the current debate in gay

75 See Ehrenreich, supra note 11, at 259–63.
76 I submit that as a practical matter, it is difficult to be consistent with one’s agenda in all contexts. While advancing the goal of antisubordination generally, one might have to tailor the discussion to achieve maximum effectiveness for a given audience.
77 For example, if the only way an Asian American interest group can curry favor with a powerful white interest group is to advance an anti-gay marriage policy, the Asian American group has a moral responsibility to think twice about such an alliance. I disagree with Ehrenreich, however, that there is an easy way to show the Asian American group that forgoing the alliance with the powerful white group is in their best interest. See Ehrenreich, supra note 11, at 324; supra text accompanying note 44. Instead, one must convince the Asian American group that sometimes groups must act contrary to their interests in order to support more important goals. See Wu, supra note 74, at 6 (“Perhaps it is easier to identify what ought not be done, rather than what ought to be done. Aside from the obvious point of avoiding self-congratulation, the most important admonition is to reject self-interest.”).
78 Samuel Marcosson observes that “[f]or over a decade now . . . there has been an active campaign by [lesbian, gay, bisexual, and transgender] activists to expand the institution of civil marriage to include equal recognition of the marriages between same-sex partners.” Samuel A. Marcosson, Multiplicities of Subordination: The
scholarship over gay marriage. Some believe that the gay marriage issue is a fundamental question of rights and one that may be resolved favorably to the movement in the imminent future. To them, gay marriage represents a power gain to the gay rights movement. Others feel, however, that by fighting for gay marriage and making it the central issue, the movement has accepted the dominant culture’s exclusion of alternative forms of familial unions and child bearing and rearing. In this sense, the gay rights movement sacrifices long-term equality for the momentary advantage of participating in a very heterosexual form of union. Samuel Marcosson argues that those who stand to benefit from gay marriage will not be persuaded that it is in their best interests to abandon that quest to pursue larger equality in romantic unions. Rather, he proposes that the solution to this impasse involves reordering goals. He argues that the gay rights movement can first be concerned with winning the gay marriage issue, but thereafter fight for broader familial rights. The idea is that small steps precede big steps. Now,

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Challenge of Real Inter-Group Conflicts of Interest, 71 UMKC L. REV. 459, 460 (2002).

Hutchinson asserts:
By decreeing legal marriage “the most important” goal for gay and lesbian politics, scholars and activists obscure racial, class, and gender distinctions among gays, lesbians, bisexuals, and transgender people, construct gay and lesbian political agendas upon gender, class, and racial hierarchies, and create conflict among antiracist, feminist, anti-heterosexist, and antipoverty activists and scholars.


Marcosson observes that supporters of gay marriage will not likely be swayed away from their position by more ethereal antisubordination goals:
The victory may not be as complete in terms of attacking the mechanisms of subordination, and the benefits may not extend as far and to as many individuals as a different approach might someday achieve, but the balance of the singly burdened group's interests tilts heavily in favor of obtaining the benefits (with certainty) today instead of (perhaps) achieving a fuller victory tomorrow.

Marcosson, supra note 78, at 471.

Marcosson contends:
Reinforcement of the systems of subordination is a bad thing, and it is a bad thing specifically for sexual and gender minorities, including those who would get married if they had the opportunity. But the status quo represents a far worse state of affairs. Right or wrong, marriage is a valorized institution, and same-sex couples are barred from enjoying the benefits of that status. Right or wrong, civil marriage carries a host of legal and financial benefits, and gay men and lesbians
the critique of this proposal is that the small step of gay marriage is actually a gross impediment to the big step of equality for minorities because it solidifies dominant power structures.

Granted, there is a delicate balance to be struck here. There is always the risk that by taking on the struggle of the other, one may be ideologically disadvantaging one’s own group. The reservation addressed here, however, is less about conflicting agendas and more about loss of credibility. My argument is that scholars, if need be, should sacrifice some mainstream credibility, which is likely premised on dominant structures of privilege and bigotry, for the sake of promoting the interests of the worst off. To the extent that the scholar has taken up the cause of a group whose interests conflict with his groups’ interests, there are several ways to address this problem. The scholar may indeed, as Nancy Ehrenreich suggests, attempt to convince himself and his group that it does further their interests to pursue the struggles of the other. Alternatively, the scholar may find ways to articulate to his group that some of their interests are tied to institutions of privilege that harm all minorities. The scholar could even advance two seemingly disparate agendas, as Marcosson suggests. The scholar could write about the rights of gays to marry and simultaneously question the institution of marriage. More likely, however, the scholar will choose to write about rights of others that do not conflict with the interests of his group. To bring it back to the Latina law professor example, she can first take steps to push forward the Latina agenda, which is not likely to directly conflict with gay rights, and thereafter or simultaneously advance a pro-gay rights agenda.

Id.

Ehrenreich observes:
I see no reason not to try, as well, to appeal to dominant groups’ sense of self-interest. To point out, for example, the ways in which masculinity norms harm men is not to deny male power or to suggest that women are not subordinated. But it may win converts to a more feminist view of gender roles and norms. Not all men will be convinced of the harms of patriarchy, but some will. And the resulting coalition may be strong enough to carry the day.

Ehrenreich, supra note 11, at 324.

See supra notes 73–75 and accompanying text for a discussion of how some empowered minorities choose not to use their power to aid more disempowered minority groups, not because they are acting out against the more disempowered minority groups, but because they are participating in the very power structures that subordinate them.

See supra notes 83–84 and accompanying text for a discussion of Marcosson’s suggestion that gay activists could first concern themselves with winning the gay marriage issue and thereafter pursue more generalized equality goals.
C. External Criticism

Reservation: People of color recognizing their own participation in oppression will give ammunition to conservatives to criticize, stereotype, and dismiss minority scholars and scholarship.

Members of minority communities understandably embrace at times a “show no weakness” ideology. They fear that by recognizing that each individual possesses both subordinating and privileged traits, minorities make themselves targets of those who seek to stereotype and trivialize them. Darren Lenard Hutchinson observes that this fear sometimes prevents internal critiques in the progressive movement:

[M]any of the opponents of internal criticism believe that such criticism will exacerbate the negative construction of oppressed individuals by the larger society. For example, Black men have opposed public critiques of Black sexism and Black anti-female violence on the grounds that such critiques may ultimately reinforce negative social stereotypes of Black men as violent and threatening.88

There are several responses to this reservation. Hutchinson makes the point that the risk of further stigmatization is outweighed by the gains of internal critiques.89 Similarly, one could argue that redistribution of academic capital will achieve more good than harm. In addition, there is the empirical issue of whether multidimensional thinking actually does further racists’ ability to stereotype minorities. The reality is that those who wish to marginalize and stereotype minorities will find a way to do so. The fact that the progressive academic community engages in post-intersectionality analysis is unlikely the ground upon which racists base their characterizations of minorities. A similar argument has been made by conservative minorities against affirmative action. They claim that affirmative action will lead to the larger community stigmatizing minorities and assuming them unqualified.90 My response to this contention is

88 Hutchinson, supra note 42, at 195–96.  
89 Hutchinson observes: The commonly feared “disunity” and “negative” depictions of the oppressed are substantially outweighed by the potential benefits of an acceptance of internal dissent: the strengthening of coalitions within and across the body of subordinate communities; the much needed inclusion of excluded “voices” within progressive discourse; and the transformation of equality discourse into an instrument for confronting complex subordination. Id. at 197.  
90 Justice Thomas passionately argues in Adarand: So-called “benign” discrimination teaches many that because of
always that it is the racist predilection toward stigmatizing minorities against which one should fight, not the positive program that the racist happens to use as a ground for his prejudice.

Moreover, to some bigoted white people, the thought that, for example, some African Americans are homophobic would unfortunately be construed as a positive or unifying racial factor rather than a stigmatizing factor.\textsuperscript{91} For those in the majority who see homophobia as a negative factor, the fact that African American academicians are engaging in pro-gay scholarship and post-intersectionality work dealing with building gay–African American coalitions would undercut any presupposition that African Americans are homophobic.\textsuperscript{92} In the end, the risk of stigmatization is likely chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government’s use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are “entitled” to preferences.


\textsuperscript{91} One conservative news source reports:

Yet, despite the attempt by gay activists to find empathy for their cause from black Americans, several conservative groups are encouraging black churches to outright deny the erroneous comparison.

. . . .

Matt Daniels, executive director for the Alliance for Marriage, argues “communities of color” strongly support traditional marriage and a constitutional amendment that would define marriage as between one man and one woman.

Interestingly, black Americans, who have traditionally voted overwhelmingly for Democrats, are torn between supporting Republicans, the party that opposes gay marriage or the Democrats, who are leading the effort to give marriage rights to homosexuals.


\textsuperscript{92} For example, any claim that the African American community is homophobic
decreased rather than increased by following the proposal discussed in this Essay.

D. Illegitimacy

Reservation: It is illegitimate for an outsider to engage in critical analysis on behalf of a subordinated group, and the outsider will impose her disparate experience on the group.

Another barrier to post-intersectionality work is the belief that scholars may not legitimately advocate on behalf of those with whom they do not share a subordinating trait. The argument is that only through the experience of similar discrimination can one truly explicate the goals of the marginalized group. In addition, there is the concern that members of “oppressor groups” will, consciously or unconsciously, impose their views and experiences on the subordinated group. For this reason, progressives criticize the history of black experience, for example, being defined by liberal or conservative whites. Against a backdrop of racial exclusion and white domination in the civil rights scholarship field, Richard Delgado put these concerns bluntly:

[While no one could object if sensitive white scholars contribute occasional articles and useful proposals (after all, there are many more of the mainstream scholars), must these scholars make a career of it?] The time has come for white liberal authors who write in the field of civil rights to redirect their efforts and to encourage their colleagues to do so as well. There are many other important subjects that could, and should, engage their formidable talents. As these scholars stand aside, nature will take its course; I am

is undercut by the testimony of Hilary Shelton, Director of the Washington NAACP, opposing the amendment banning gay marriage and stating in part:

The NAACP is greatly disappointed that President George Bush and others have decided to enter this election cycle by endorsing an amendment that would forever write discrimination into the U.S. Constitution, rather than focusing on the crucial problems and challenges that affect the lives of all of us.


See Culp, supra note 60, at 97 (“American legal scholarship occasionally has dealt with black concerns; however, this treatment has almost universally been from the perspective of the white majority. Black views are ignored and their concerns are subordinated to overriding issues of how black questions impact on white rights.”).
reasonably certain that the gap will quickly be filled by talented and innovative minority writers and commentators. The dominant scholars should affirmatively encourage their minority colleagues to move in this direction, as well as simply make the change possible.\textsuperscript{94}

Related to this concern is the reservation that when one engages the struggle of others, one loses many of the tools of persuasion held by those who advance their own causes. First, one cannot legitimately claim to be the victim of the discrimination. The vehemence, emotion, and rhetoric of victimhood is a very powerful tool. While it can lead to troubling doctrines, like the crime victims’ rights movement,\textsuperscript{95} it can also underlie powerful discourse in the quest for rights. In addition to the loss of the power attendant to victim status, one loses the ability to engage in the persuasive tool of personal narrative to underscore theoretical points. Pedro Malavet discusses the power of narrative as follows:

Minority and subordinated communities utilize narratives to counter the “singular homogenized experience” produced by the essentializing of identities imposed by majority society. Narrative, thus, is a vehicle to speak the truth to the “power”—the dominant American society. LatCritters embrace and celebrate the narrative. More specifically, LatCrit scholarship must and does include storytelling, because it is both antinormative and antiessentialist. In fact, our failure to use narrative would contribute to the preservation of privilege and, thus, to normativity and essentialism.\textsuperscript{96}

When a person writes about the subordination of those unlike him, that person loses the ability to describe the pain and struggles of being subordinated from a personal perspective. One thus loses the persuasive power that individual storytelling brings.

In responding to this set of concerns, I begin by questioning the general contention that only those within a certain subordinated group may legitimately write about the subordination. Such a contention would prevent any scholarship on behalf of others.\textsuperscript{97}


\textsuperscript{97} Some theorists, however, would open up the category of antisubordination work to any person of color so long as they could speak in a general voice of color.
While it is extremely important that minority scholars have a voice and that rights discourse is not dominated by white male scholars,\(^\text{98}\) this imperative does not mean that one may only legitimately write about groups in which she is a member. First, the “voice of color”\(^\text{99}\) can be used for or against subordinating, depending on who is using it. For example, when Justice Clarence Thomas emotionally opposes affirmative action as stigmatizing minorities, he does so in a voice of color. His manipulation of language seeks to show the reader his special insights on affirmative action because of his color.\(^\text{100}\) Similarly, Stephen Carter uses his voice of color to attack affirmative action, as Alex Johnson observes:

Most interesting about Professor Carter’s claims and contentions is that he used his status as an African American to attack affirmative action. In other words, if he had adopted a formal-race approach to attack affirmative action, he would have made no mention of his status as an African American. However, the very first sentence of the book, “I got into law school because I am black,” connotes that the reader should take the author’s race into account when reading and interpreting the work. Professor Carter used the sentence to color (pun intended) the reader’s perception of the work by asking the reader to employ an

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See generally Culp, supra note 60. Presumably, then, blacks could write about Latina issues, Asians about gay issues, etc. White men could not write about minority issues. Opening up the categories becomes complicated, however. Can white women write about the struggles of Latina women, black men, immigrants? Can black men weigh in on the struggles of lesbians?\(^\text{98}\)

Mari Matsuda states:

I want to hear the voices that represent different ways of living and knowing, particularly those ways that come out of the culture of the historically subordinated. I want to hear as well the literal voices of difference—differences in language, accent, cadence, and sound that have made the streets of the North American cities I love vibrant and alive. I ask that we nurture these voices and keep them from fading. My urgency in this quest is tied to my belief that it is what we must do, as a nation, to save our national soul.


\(^{100}\) Alex Johnson describes the concept of “voice of color”:

[P]roponents of the existence and value of the voice of color allege that scholars of color speak to all issues with a distinctive voice, especially to certain race-related ones, because scholars of color have shared the molding experiences created by racism that caused the voice of color to emerge.


See supra notes 27 & 90 for a discussion of Justice Thomas’ concurrence in *Adarand.*
interpretive framework that acknowledges Carter’s status as an African American.\textsuperscript{101} Consequently, voices of color could be used to advance or retard an antisubordination agenda. Similarly, white voices historically have and continue to make important discursive contributions to antisubordination causes.\textsuperscript{102} In addition, as the instant proposal relates to scholars who are minorities themselves, one could expect that those who engage in the enterprise of writing about the struggles of other minority groups will do so with sensitivity, empathy, and understanding.

Moreover, limiting group-rights scholarship only to those in the particular group is disadvantageous to minority groups whose members are few or whose members have not broken into the ranks of the legal academy.\textsuperscript{103} In addition, perfect synthesis between writer and subject is not likely given the multiplicity of traits that make up individuals and groups. Scholars with some connection to a certain subordinated group often write about experiences they have not personally felt. For example, Asian American and Latina scholars who are not immigrants write about the struggle of immigrants in this country. Although the scholars and their subjects may share the trait of Asian-ness or Latina-ness, such scholars cannot personally claim to have felt the discrimination to which immigrants are subjected. Likewise, women write about domestic violence they have never personally experienced.\textsuperscript{104}

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\textsuperscript{101} Alex M. Johnson, Jr., Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship, 79 IOWA L. REV. 803, 846 (1994) (quoting STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 11 (1991)).
\textsuperscript{102} Frank Wu observes: [I]t is important to emphasize that scholarship about Asian Americans need not be written by Asian Americans alone. Just as not every Asian American is an Asian Americanist (i.e., a scholar concentrating on Asian Americans), so too not every Asian Americanist is an Asian American. Asian Americanists have rarely promoted racial nationalism and none have supposed that racial membership confers racial expertise. Two of the best among recent publications on the internment of Japanese Americans during World War II are Greg Robinson’s By Order of the President and Eric Muller’s Free to Die for Their Country. The leading empirical work on Asian Americans and the admissions process at the University of California was produced by William Kelder. Wu, supra note 74, at 3 (footnotes omitted).
\textsuperscript{103} See infra notes 121–22 and accompanying text for a discussion of the benefits of a redistribution of academic capital, particularly for smaller minority groups.
\textsuperscript{104} Wu states that “[s]cholarship suffers for the neglect of comparative possibilities.” Wu, supra note 74, at 10.
\end{flushright}
The concern that one may impose one’s own beliefs and experiences on other subordinate groups is important and merits discussion. Especially as persons who have experienced some discrimination related to our own subordinating traits, there may be a tendency to superimpose our experiences on others. The remedy, however, is not to refrain from writing about others, but rather to be extremely cognizant of the risk of imposing one’s own experiences on others. Moreover, inserting oneself into the discourse is not necessarily a bad thing. Comparative analysis of one’s own experiences with the experiences of others can lead to fruitful discoveries and interesting theory. Ediberto Roman remarks:

[If groups have commonalities, these stories should be told together in order to promote understanding and encourage coordinated action. . . . These intellectual endeavors should be continued in academic as well as political arenas. Again, exploring “common ground” of harmed groups has the potential of leading those groups to promote dialogue and change.]

Turning to the contention that writing about others makes one unable to engage in “victim talk,” claims of victim status are powerful but dangerous. While past victimization is often a predicate for gaining current rights, “victim talk” centers the discourse away from equality and antisubordination and more toward emotional reactions to the very worst cases of abuse. Furthermore, “victim talk” is often connected with the very essentialist and stereotypical characterizations to which progressives generally object. Consequently, one should be wary of engaging in “victim talk” even when one is a member of the subordinated group. Being unable to engage others in narratives of victimization should not impede one from discussing the struggles of others.

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106 I have elsewhere discussed how the victims’ rights movement has undermined equality and rights in the criminal context:

[T]he narrative of victims’ rights serves as a rhetorical tool to justify and moralize the seemingly vengeful retributivist trend in criminal law. For this reason, “harmed and humble” victims are characterized as vengeful rather than forgiving, angry rather than merciful. Like the tough-on-crime movement, the victims’ rights movement has grown into a major socio-political force in the criminal system.


107 See Gruber, *supra* note 95, at 662.
In addition, the inability to engage in personal narrative does not necessarily render such scholarship unpersuasive. First, personal narrative is only one way in which storytelling can convey effectively an antisuubordination message. Often progressive writers convey the stories of others. Whether historical accounts of women or people of color, stories about migrant workers, or narratives involving domestic violence victims, the telling of non-law professor stories is a powerful and persuasive tool in the arsenal of discursive options for supporting a theory. I think about how interesting and useful it was to hear Hamid Kahn’s account of the lives of taxi drivers in New York during LatCrit IX.\textsuperscript{108} Moreover, one can engage in narrative from the perspective of a member of the “oppressor” class becoming involved in the struggles of others. For example, Frank Valdes eloquently recounts his experience of being a male on a Lesbian Legal Theory panel as a preface to his discussion of community and interconnectivity.\textsuperscript{109} Such narrative is the story about a person of color’s attempt to renounce unfair privilege and identify with differently subordinated groups, which can be as or more powerful than stories of victimization.

In keeping with my above contention, I will briefly indulge a discussion of my own attempts to counter legitimacy concerns as a public defender. As a public defender in Washington, D.C., I represented an indigent clientele, the vast majority of whom were African American men. The Public Defender Service actively engages in the fight to secure defendants’ rights in a legal system, which if it is not invidiously discriminatory against them, at the very least is factually hostile to them. Currently, as an academic, my substantive scholarship has focused on securing justice for criminal defendants by reconceptualizing current criminal doctrines.\textsuperscript{110} I can honestly say, however, that at times I felt a bit conflicted about my work with

\textsuperscript{108} Hamid Kahn, “‘Culture’ and ‘Terrorism’ in the Rhetoric of Imperialism” (panel discussion held at LatCrit IX, supra note 3).

\textsuperscript{109} Valdes observes:
I therefore begin, as I did then, with the acknowledgment that I am viewed and treated—and hence privileged—as a man. Indeed, I self-identify as such. Under conventional sex/gender norms I therefore am unable to credibly function as a lesbian or to experience life as a lesbian. Nonetheless, I sometimes claim inclusion in the lesbian category to poke at the sex/gender essentialisms that rigidly and absurdly confine us all. Gender-bending is important and (sometimes) rewarding political work.
Valdes, supra note 11, at 30.

\textsuperscript{110} See generally Gruber, supra note 95; Gruber, supra note 106 (articles discussing wrongful victim conduct as a potential defense to criminal liability).
indigent defendants. In many aspects, they were wholly unlike me: indigent, African American, and male. Many of my clients in Miami were Latino, arguably an ethnicity with which I could possibly identify, as my outward appearance is most often taken for Latina. These clients, however, were nearly all Spanish-speaking and immigrant, two characteristics I do not possess. During my entire three-year tenure as a local and federal defender, I had only one white client and one Asian American client, neither of whom was female.

My sense of unsettledness came from my inability to engage in identity politics regarding my clients. Put another way, I could neither figure out nor explain why I had the right to represent my clients, as individuals or as a group. What privilege to advance their cause could I claim? What gave me the right to maintain the issue of their subordination as my own and fight against it? Eventually, however, these feelings of illegitimacy subsided as the struggle manifested itself as far more important than my place in the struggle. What turned out to matter in the end was not whether I was the right person to be a public defender, but whether I was a good defender—whether I produced change. This motivation, I suspect, would likely be the result of engaging in scholarship about the rights of others. At first, there may be some unease concerning legitimacy. I believe, however, if the scholarship is meaningful and produces change, legitimacy will be relegated to an ancillary concern, if any concern at all.

E. Discomfort

Reservation: Engaging the struggles of others is not as comfortable as engaging the struggles of one’s own group. Likewise, welcoming voices from the “oppressor class” is unsettling.

I put this reservation last, but it is likely empirically the biggest impediment to my proposal. Simply, people are more comfortable discussing those topics to which they have a connection. Some African Americans will naturally gravitate toward race-related scholarship, women to feminist legal theory, and Latinas to Latina legal theory. We care about the struggles of our own groups, of those

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111 When I began my career as a public defender, my African American clients were most concerned about my legitimacy based not on my whiteness, but rather on my femaleness, age, and Asian-ness. Clients wondered how a “little girl” could represent them effectively. Generally, however, these concerns subsided as clients observed my lawyering in court. Interestingly, once I won a murder trial, word got around at the jail. Inmates I had never met began to write me to solicit my services, having “heard” that I was a good lawyer.
who are like us, our parents, and our loved ones. It is not that we do not care about the struggles of others, but because of the reservations outlined above and the fear of an icy reception by those who view us as members of “oppressor classes,” engaging the struggles of others can be unsettling. Likewise, as members of subordinated groups, it may be uncomfortable for us to accept within our ranks members of oppressor groups. There could be a fear, for example, of professors entrenched in the dominant power structure appropriating the LatCrit movement.\footnote{112}

In responding to this concern, I go back to Tayyab Mahmud’s wise words that “being unsettled is okay.” Although it is more comfortable to write about our own traits and experiences and surround ourselves with those of similar experiences, sometimes change only comes through discomfort. Often in our personal lives, cross-racial friendships tend to be more difficult than others, but they also can be some of the most rewarding, fulfilling, and mind-expanding.\footnote{113} In our pedagogy, we challenge students to move beyond their preconceived notions, which entails taking them and us out of the “comfort zone.”\footnote{114} In all honesty, I am sometimes suspicious of comfort, because with comfort comes a certain

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\footnote{112}{Richard Delgado and others observe how white male law professors have historically appropriated civil rights scholarship to the exclusion of scholars of color. \textit{See} Delgado, \textit{supra} note 94, at 562–63.}

\footnote{113}{Robert Chang and Jerome Culp discuss cross-racial friendship as a model for scholarly coalitions. \textit{See} Change & Culp, \textit{supra} note 11, at 490–91 (comparing challenges of coalition building to the challenges of interracial friendship).}

\footnote{114}{There are some important caveats to be added here. First, I am certainly not saying that the conditions of our discomfort in the classroom are good. Obviously, much of our discomfort in teaching progressive thought, especially as minority law professors, is a direct result of the operation of racism and the dominant power structure in society and the legal academy. Second, there can be a point at which the discomfort is so bad that the law professor is forced to abandon her attempts to introduce diverse and intellectually-stimulating classroom discourse. Charles Pouncy recounts the hostile reactions from students and administrators when he attempted to introduce heterodox economic theory into his business law classes: The fact that heterodox economic theory provides useful platforms for the discussion of class, race, gender, and markets makes it an excellent vehicle for discussion of the ideological components of business law. However, the use of such theories in contemporary law classrooms, particularly by professors of color or members of other marginalized groups, can make such professors lightning rods both for those students who are particularly committed to the preservation of unearned privilege and power and for the institutional processes that have arisen in law schools to maintain the current distribution of power, privilege, and authority. \textit{Charles R.P. Pouncy, Applying Heterodox Economic Theory to the Teaching of Business Law: The Road Not Taken, 41 SAN DIEGO L. REV. 211, 216 (2004).}}
complacency, and complacency tends to be incompatible with change. Bernice Johnson Reagon describes the challenges of coalition building by remarking, “Most of the time you feel threatened to the core and if you don’t, you’re not really doing no coalescing.” More than merely moving out of one’s primary area of scholarship, building connections with those who identify themselves with the oppressor class can be extremely challenging. Thus, one must approach this project with open-mindedness, a willingness to empathize, and, most importantly, a sense of humility. Exercises in humility are always a good thing for those who have achieved a certain level in the social hierarchy. Engaging the struggles of others, then, requires a certain responsibility on the part of the academic. The academic should not only attempt to understand the struggle of the other in the context of the social and/or political system, but also must analyze her own place in the institution of privilege.

The converse is that those in subordinated groups must be willing to accept the scholarship of outsiders. I do not believe that this acceptance will lead to a flood of white males desiring to do, for example, women-of-color scholarship. Most of those who are privy to this proposal will be minorities in the progressive movement. I would argue, however, if a white male, with an appropriate disposition, did desire to engage in such scholarship, he should be welcomed. One measure of power that comes from being a minority, especially being one of the worst off, is the ability to claim “ultimately oppressed” status and actively exclude those identified as oppressors. This power, however, should be exercised with caution,


116 Phoebe Haddon asserts that “openness to change, critical introspection and humility are hard but necessary components of coalition building and must be undertaken by all participants.” Haddon, supra note 115, at 334.

117 See supra notes 21–23 and accompanying text for a discussion about directing the proposal toward academicians in the progressive movement.

118 When I use the words “appropriate disposition,” I mean a person with a commitment to the enterprise. Conversely, “inappropriate disposition” would refer to a person who sought to engage in twisted rights talk for the sake of promoting a conservative agenda. In my opinion, it is likely, however, that this person will engage in deceptive rights jurisprudence regardless of whether progressives welcome him.

119 This measure goes hand in hand with the problem of identity politics that Nancy Ehrenreich describes as the “battle of oppressions problem.” She explains: [Group conflict] inevitably leads to the battle of oppressions—to a rhetorical war over which group is worse off, which is most oppressed.
if at all. While it is probably wise to be wary of those from the privileged groups attempting to dominate progressive discourse, if a member of the privileged group is sincerely interested in the struggle of minorities, she should not be excluded a priori. Exclusivity is often a barrier to equality.

This section has discussed the allure of identity politics in light of five specific reservations one might have about my proposal. I have addressed each reservation with the aspiration of encouraging others to consider issues of minority status and subordination multidimensionally. I hope that we can all break out of our comfort zones in an effort to build coalitions with those different from us. In the next section, I will describe some of the potential benefits from this exercise.

III. THE BENEFITS

I have hinted at several benefits of the proposal to devote academic capital to the issues of others. This Part will more clearly explicate the goals of the proposal and where it fits into the coalition building and antisubordination agenda of the LatCrit movement. One of the most important goals of the proposal is redistribution of power gains among subordinated groups. For better or worse, certain groups have gained relative power in social and legal structures while others remain almost wholly disempowered. Minority groups or individuals that have gained some amount of social acceptance, economic power, or both have the ability and resources to fulfill their own agendas, sometimes rather swiftly. Other groups, however, suffer constant stigmatization, have no

As Patricia Hill Collins puts it, when “[n]otions of an unproblematic unity are “obsolete . . . groups police one another to maintain their place in the pecking order . . . . [D]ifferent groups vie for center stage, often striving to be the most oppressed or the most different.” Perhaps such intergroup rivalries are motivated by groups’ fears of being shut out of scarce resources (not only economic resources, but also publicity and public empathy); perhaps they are connected to a more intangible and emotional need to attain the status of paradigmatic victim.


Examples of minorities who have gained relative amounts of power might include white women, men of color, certain gay groups, and wealthy immigrants. See, e.g., Richard Delgado, Locating Latinos in the Field of Civil Rights: Assessing the Neoliberal Case for Radical Exclusion, 83 TEX. L. REV. 489 (2004) (reviewing GEORGE YANCEY, WHO IS WHITE?: LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE (2003) (discussing the view that certain minorities who gain power become “white,” and the differing abilities of disparate groups to achieve this status)).
economic resources, and are not members of any power elite in our nation. These groups stand to benefit the most from a gain in numbers and advocacy on their behalf by prominent law professors. Hopefully, as a result of redistribution of academic capital, the very worst off groups will be more empowered than before.

In addition, there is a persuasive quality when an outsider takes up the cause of a subordinated group. This persuasion not only affects the outsider’s own minority group but also society at large. Recall when the Massachusetts legislature engaged in debates over a constitutional amendment to ban gay marriage. One can hardly deny the pure persuasive and emotive power of Dianne Wilkerson, an African American senator, who declared with tears in her eyes, “I know the pain of being less than equal and I cannot and will not impose that status on anyone else. . . . I could not in good conscience ever vote to send anyone to that place from which my family fled.” Similarly, African American representative Byron Rushing warned the legislature that by adopting the amendment, the Constitution was in danger of resembling its state “in the days before the Civil War.” Rushing also criticized members of the black clergy who had condemned gay marriage, stating, “I am saying to that small group of leaders, shame on you.”

This discourse was extremely powerful in several ways. It emphasized to the black community the analogy between racial oppression and bigotry against gays, thereby helping to secure

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121 Examples of more subordinated minorities might include transgender people, poor immigrants like migrant workers, certain religious minorities, and persons with multiple minority traits. Id.


support for gay rights among the larger black community.\textsuperscript{126} The discourse was also powerful vis-à-vis society at large. First, it exemplified to society that minorities would be a united front on the gay marriage issue. Second, and perhaps more importantly, it refuted by example those who believe that gay rights is an issue of small interest-group politics rather than fundamental equality. When African Americans weighed in on the gay rights issue from an outsider perspective, they could be seen as “objective,” emphasizing the fact that denial of marriage rights is fundamentally unjust.\textsuperscript{127} Moreover, the message was a powerful reply to those who would seek to stigmatize African Americans as being homophobic because of the few black religious leaders who opposed gay marriage.\textsuperscript{128} By lending their powerful voices to the gay rights agenda, the African American congressional leadership may not have been able to secure the defeat of the pernicious amendment, but they played a pivotal role in the struggle for justice, and they did it as outsiders.

In addition to benefits gained by the subordinated groups on whose behalf the academic engages in scholarship, the academic process itself is enhanced. When we teach our students, many of whom are white, straight males, about the struggles of racial minorities, women, sexual minorities, and others, we hope that they will learn something in the process. We hope that they will begin to engage in a type of reasoning that allows them to empathize with the struggles of others, whether through the application of certain “universal” values like equality and justice or through forging analogies to their own life experiences. This process, however, may not be intuitive to our students in a world where people generally fight on behalf of their own and not others. By fighting on behalf of others, we engage in the precise reasoning that we hope to instill in

\textsuperscript{126} These voices were arguably necessary to counter the many voices of opposition to gay marriage in the black community. Even Jesse Jackson criticized comparisons between the civil rights movement and the gay rights movement, stating that “[g]ays were never called three-fifths human in the Constitution,” and “they did not require the Voting Rights Act to have the right to vote.” Boykin, \textit{supra} note 91, at 46 (internal quotation marks omitted). Indeed, despite these statements by prominent members of the African American community, the NAACP issued a statement to the Senate Judiciary Committee condemning the marriage amendment. \textit{See supra} note 92.

\textsuperscript{127} It thereby countered the appropriation of the “black” opinion by conservative groups. \textit{See supra} note 91.

\textsuperscript{128} Some progressives could believe, as does African American Harvard Chaplain Reverend Peter Gomes, that “[t]he African American religious community has spent so much time trying to prove to the white community that it is the same, that for all intents and purposes it shares many of the worst prejudices of the white community.” Boykin, \textit{supra} note 91.
our students and society at large. When engaging in scholarship about others, we can either discuss the set of values that makes us understand their treatment as unjust, as did Representative Rushing,\textsuperscript{129} or discuss analogies between our situations of oppression and theirs, as did Senator Wilkerson.\textsuperscript{130} This exercise is not only important for academics, it also sends a message that empathetic reasoning is valid and useful, that identifying with others is an important endeavor.\textsuperscript{131}

Another benefit of this exercise is self-discipline. When we write about our own struggles all the time, the line between self-interest and the pursuit of more general justice and equality can become blurred. Identity politics is sometimes expedient,\textsuperscript{132} but it can definitely be abused. There certainly are those who claim minority status in order to advance their own careers or the agendas of their subgroup, but once they achieve a position of power, it does not translate to distributing gains to other subordinated groups or general antisubordination agendas. By making sure that we engage the struggles of others, we are constantly vigilant that we support the antisubordination cause generally and not our own personal causes particularly.\textsuperscript{133} Moreover, relatively empowered minorities can use their gains from participation in institutionalized privilege to give a voice to the most subordinate groups. In this way, relatively empowered professors of color can actively subvert the institutions of privilege that subordinate all minorities. In this sense, all power gains made by a particular group would lead to the dismantling of unfair privilege and furtherance of the cause of antisubordination.

\textsuperscript{129} See supra note 125 and accompanying text for a discussion of Representative Rushing’s warning to the legislature that its attitude toward gay Americans mirrored its discriminatory attitude toward African Americans.

\textsuperscript{130} See supra note 124 and accompanying text for a discussion of Senator Wilkerson’s analogy between the oppression of African Americans in the past and gay Americans today.

\textsuperscript{131} See Roman, supra note 105, at 384–85 (discussing the value of identifying and comparing common experiences of harmed groups).

\textsuperscript{132} See supra notes 48–50 and accompanying text for a discussion of the importance of building coalitions among disparate minority groups.

\textsuperscript{133} Gabriel J. Chin, Sumi Cho, Jerry Kang, and Frank Wu assert:

APAs [Asian/Pacific Americans] must be mindful of their own blindspot: We possess a “simultaneity” in which we can be both victim and perpetrator of racial oppression. We must reject a self-congratulatory embrace of the model minority myth and policies justified only by the narrowest self-concern. Most importantly, we must denounce the prejudice within our own communities, which allows us to care less about social justice and more about individual self-interest.

Finally, writing about the subordination of others is a way to build bridges and conduct fruitful exchanges of knowledge and experiences. One thereby can make connections, conduct research, and learn about areas outside of one’s immediate scholarly agenda. This dialogue will foster new alliances and interconnections between different subordinated groups. It will start positive dialogue amidst perceptions of conflict and competition. Consequently, by consciously redistributing our academic capital, we can create coalitions, exercise praxis, and further the goal of antisubordination.

CONCLUDING REMARKS

The vast majority of what I have discussed is not new or novel. This proposal stands on the shoulders of the many progressive academics who have pioneered the path of intersectionality, multidimensionality, and coalition building. This Essay represents my initial thoughts on how to instrumentalize these important ideas. My epiphany was about multidimensionality. My feelings were borne out of the realization that by choosing an elite existence as a law professor, one need not abandon antisubordination and justice ideals, as exemplified by the very nature of rights scholarship and the LatCrit movement. I see the possibility of an integration of what we do, who we are, and what others need. In a profession that often rewards self-interest and ambition and vilifies empathy and self-sacrifice, legal academicians can change the ethics and tenor of legal discourse by engaging in scholarship that rebuts essentialist assumptions and thoughtfully navigates the complex and interesting framework of multidimensionality.
Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity

Carla D. Pratt

I. INTRODUCTION

“Law is embroiled in the politics of identity. It names parties, defines their speech and conduct, and assigns their rights and duties. Its judgments declare, enjoin, and award the tangible and intangible benefits of race and racial privilege.”

Law has been deeply involved in the politics of defining racial identity. The rule of hypo-descent, also known as the “one-drop rule,” was codified as law in many states in an effort to define the group of people who were black and therefore subject to the deprivation of liberty through the institution of slavery and later subject to social, economic, and educational subjugation through Jim Crow. Although the rule has been repealed from the statutory compilations of law in those states that once had such a rule, it continues to operate on a cognitive and cultural level in American law and society. On a social and cultural level, most Americans still perceive anyone with known African ancestry and the skin coloration, hair texture, or facial features that serve as evidence

* Assistant Professor of Law, Pennsylvania State University, Dickinson School of Law. This Essay was inspired by many of the presentations at the Ninth Annual LatCrit Conference, Villanova University School of Law, Villanova, Pa., Apr. 29, 2004–May 2, 2004, with particular inspiration being derived from the comments and writings of Professor Tanya Hernandez whose work in the area of Latina-Latino identity demonstrates how a race ideology that esteems whiteness and denigrates blackness has operated to construct Latina-Latino identity in a way that ultimately serves to advance the interests of white supremacy. See, e.g., Tanya K. Hernandez, Multiracial Matrix: The Role of Race Ideology In The Enforcement of Antidiscrimination Laws, A United States-Latin America Comparison, 87 CORNELL L. REV. 1093 (2002).


of African ancestry, to be “black” or African American.\footnote{It is this type of racial essentialism that golfer Tiger Woods and other multiracial people have resisted in seeking to construct their identity. While I argue against racial essentialism, in this context, I do think that multiracial people with African ancestry must resist the temptation to privilege their non-black ancestry over their African ancestry in constructing their personal identity. I cringe when I hear people in my own family boast about their Indian ancestry in a manner that implicitly suggests that Indian ancestry somehow elevates them above African Americans who have no Indian ancestry. The temptation to identify oneself as something other than black is understandable given the privileges that flow to non-black people, but yielding to this temptation is yielding to the systems of oppression that serve to perpetuate the “mytho-narrative” that black or African is inferior to all other racial categories. See Reginald Leamon Robinson, \textit{The Racial Limits of the Fair Housing Act: The Intersection of Dominant White Images, the Violence of Neighborhood Purity, and the Master Narrative of Black Inferiority}, 37 WM. AND MARY L. REV. 69, 73–74 (1995) (defining the “master narrative of black inferiority” as “a systemic story, whether openly spoken or silently acted upon, that describes, solely on racial terms, how and why whites legitimately hold power over blacks”) (footnotes omitted).}

Unbeknownst to many, the rule of hypo-descent still operates in law on a structural level, particularly with respect to federal Indian law and the law of some Native American tribes. Within some Native American tribes, the rule is still covertly operating to construct Native American identity. In the struggle to preserve their very existence, some Native American tribes have subscribed to the basic assumptions of the dominant culture, including the assumption that whiteness is to be prized and non-whiteness devalued on a scale relative to the degree of color of one’s skin, with blackness constituting the most devalued state of being.

Few extant cases are more illustrative of law embroiled in the politics of racial identity than the case of \textit{Davis v. United States},\footnote{\textit{Davis v. United States}, 199 F. Supp. 2d 1164 (W.D. Okla. 2002), \textit{aff’d}, 343 F.3d 1282 (10th Cir. 2003), \textit{cert. denied}, 124 S. Ct. 2907 (2004).} which the United States Supreme Court recently declined to review. \textit{Davis} was brought by two groups of people who are members of a federally recognized Indian tribe called the Seminole Nation of Oklahoma. These groups, or “bands” of people, as they are commonly referred to in Indian discourse, are known as the Dosar-Barkus and Bruner bands of the Seminole Nation.\footnote{\textit{Id.} at 1167.} They brought a lawsuit in federal court seeking to obtain treatment equal in nature and degree to the treatment received by other members of their tribe. Specifically, they sought to participate in certain tribal programs that are funded by a judgment paid by the United States for tribal lands taken by the United States government in 1823 when the tribe was in Florida.\footnote{\textit{Id.}} The federal courts ultimately refused to allow these bands of
Seminoles to have their case heard on the merits by holding that Rule 19 of the Federal Rules of Civil Procedure precluded the hearing of the case because the tribe was an indispensable party which could not be joined in the action due to its sovereign immunity. 7 The Seminole tribe’s culture war over the Dosar-Barkus and Bruner bands of Seminoles has even resulted in tribal efforts to amend the Seminole constitution in a manner that would exclude these Seminoles from tribal membership. 8 Why are these bands of Indians treated differently from the remainder of their tribe? Why is their own tribe so hostile to them? What separates them from the majority of their tribe? They are black.

This Essay explores how law has utilized the master narrative 9 of white supremacy and black inferiority to construct Native American identity in a way that presently enforces the rule of hypo-descent. I must concede that while the Seminole Nation or “tribe” is not culturally representative of the diversity of Indian Nations or tribes in the United States, an inquiry into the experience of the Seminoles provides a basis for identifying how the master narrative of white supremacy and black inferiority is used to construct Native American identity, and how the construction of Native American identity in this fashion serves to further advance white supremacy.

II. RACE IDEOLOGY OF THE SEMINOLES FROM A HISTORICAL PERSPECTIVE

In order to contextualize the extant Seminole dispute and to understand the narrative of black inferiority operating within the tribe, it is necessary to understand some of the history of the Seminole Nation. In the eighteenth and nineteenth centuries, European explorers who landed in the geographic region of what is now the southeastern United States conducted campaigns of violence against the indigenous populations, killing many Native American

7 Id. at 1176. For more discussion of the Davis case, see Martha Melaku, Seeking Acceptance: Are the Black Seminoles Native Americans? Sylvia Davis v. The United States of America, 27 AM. INDIAN L. REV. 539 (2003).
8 The tribe sued the federal government because the Department of the Interior refused to recognize certain amendments to the Seminole constitution that would have effectively dissolved the membership status of most of the tribe’s black members. See Seminole Nation of Okla. v. Norton, 206 F.R.D. 1 (D.D.C. 2001).
9 I use the term “master narrative” in much the same way as other scholars have used the term. It describes how “culturally-embedded . . . racism . . . deploys exclusionary concepts of race and privilege in ways that [serve to] maintain intergroup conflict” and white supremacy. Lisa C. Ikemoto, Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed ‘Los Angeles’, 66 S. CAL. L. REV. 1581, 1582 (1993).
people. Several tribes were nearly decimated, with only a few members left to survive. Rather than try to survive independently, the remnants of these tribes banded together to form a new unified group of Native Americans living together in present day Florida.

Like these indigenous refugees, Africans were also fighting Europeans for their very survival and freedom. Africans who escaped slavery in the American colonies, and subsequently the Southern states, fled to the non-slave territory of Spanish-owned Florida and initially formed a coalition with the Native American people who were living there. This group of people, both Native American and African, became known as the Seminoles. Hence, the term Seminole has been used historically to refer to this multiracial group of people living together in a community rather than to persons of the same ancestral lineage or racial group.

As a result of this historical connection between Native Americans and Africans, Indian or “Red Seminoles” sometimes married African or “Black Seminoles,” creating biracial offspring—“Brown Seminoles.” Red Seminoles began to use the term “estelusti”

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11 See J. Leitch Wright, Jr., Creeks and Seminoles: The Destruction and Regeneration of the Muscogulge People 1–2 (1986).
13 See Wright, supra note 11, at 6.
14 See id.
15 The discourse referring to the Seminoles has privileged whiteness through the use of language. Most literature only uses a color adjective to describe the Black Seminoles, thereby rendering the Red Seminoles and even the White Seminoles as colorless and normative. Moreover, people who would be socially constructed by most Americans as white because of their fair skin color, and eye and hair color, are recognized in most of the written literature as simply Indian or Native American. Their whiteness is deemed irrelevant to their status as Native Americans, whereas the people who have both African and Native American ancestry are typically referred to as the “Black Seminoles.”

In the historical section of this Essay, I will attempt to treat people equally as well as be as accurate as possible in recounting the historical interactions of the three groups of people to which I refer. Accordingly, in this part of the Essay, I will refer to people who have only Native American ancestry as “Red Seminoles” or “Indian.” Also, I will refer to people who have European and Native American ancestry or who have all European ancestry but who lived as part of the tribe as “White Seminoles” or “White Indians.” Finally, the people who have African and Native American ancestry or all African ancestry, but who lived as part of the tribe will be referred to as “Black Indians” or “Black Seminoles.” Later in this Essay, I admittedly resort to essentialist racial categories to avoid confusion in the course of abstract argument.

to refer to the Black Seminoles, but the status of the estelusti within the tribe varied. Some estelusti either married into or were adopted into the tribe. In the eighteenth century, the Red Seminoles’ relationship with the Black Seminoles was not really based on slavery as we use that term to refer to southern slavery in the United States. The Black Seminoles who did not marry or otherwise integrate fully into the Seminole tribe had a relationship with the tribe more akin to a sharecropper. Black Seminoles that were not part of red tribal families resided on and cultivated land in towns separate from the Red Seminoles. Black Seminoles also owned herds of livestock. Because the Red Seminoles depended on the Africans’ “greater agricultural skill and the resulting economic advantage,” the Red Seminoles granted the Black Seminoles “ownership” rights in exchange for an annual share of their produce and livestock. Moreover, because many of the Black Seminoles were multilingual, speaking Spanish, English, and Native American languages, they served as interpreters and intermediaries when the Red Seminoles dealt with whites. Finally, black male Seminoles owned guns and served as Seminole warriors alongside the Red Seminoles in wars between the Seminole tribe and the Europeans. Accordingly, the Seminole tribe’s pre-1840 relationship with people of African descent was one of sharing culture and resources. And if there truly was a pre-1840 version of slavery in the Seminole tribe, it was significantly different than the institution in the southern states and other Native American tribes.

By the time Spain ceded Florida to the United States in 1819, this collaborative relationship between Red and Black Seminoles was firmly established. Nonetheless, whites who interacted with the Seminoles referred to the Black Seminoles as “slaves” because during this period of time, blackness was culturally and, in many respects, legally synonymous with slave status. But the characteristics of

17 Littlefield, supra note 12, at 4.
19 See generally Littlefield, supra note 12, at 8.
20 Id.
21 Id.
22 Id. at 9.
23 Littlefield, supra note 12, at 8.
24 Id.
25 Id.
26 Id. at 6–7.
27 Id. at 5–6.
28 See Wright, supra note 11, at 98.
Seminole slavery, which allowed blacks to live in separate villages and serve essentially as sharecroppers and respected mediators, brought the Seminole tribe into conflict with both whites and the nearby Creek Indians who believed that the Black Seminoles were slaves that escaped from white or Creek slave owners. Both whites and Creeks viewed black settlements in Seminole territory as a threat to slavery throughout the South. Moreover, the United States government did not wish to continue fighting wars with the Seminoles, and the government understood that much of the Seminoles’ military strength was due to their alliance with the people whom the United States government called “Negroes.” Hence, the master hand began to use other indigenous peoples, primarily Creeks, as pawns in a campaign to divide and conquer the Red and Black Seminoles.

To disrupt the racial alliance between red and black people living in the Seminole Nation, the United States government promoted black slavery by hiring wealthy slave-owning Creek Indians to persuade Seminole chiefs to become true slave masters. After hearing the Creek Indians explain the financial, political, and cultural benefits of adopting the master’s form of slavery for Black Seminoles, a war over culture and race erupted in the Seminole tribe. The tribe was split politically and morally over how to treat the Black Seminoles. Some Red and White Seminoles wanted Black Seminoles to hold the same status as black slaves in the southern confederate states, while other Red Seminoles, probably those who had a kinship with the Black Seminoles, wanted equality or at least free status for Black Seminoles. As a result of this intertribal Kulturkampf, some Seminole Indians began practicing a truer form of black slavery by utilizing Black Seminoles as field laborers.

The master hand also sought to divide the Red and Black

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29 West, supra note 10.
30 LITTLEFIELD, supra note 12, at 5, 7, 8.
31 Id. at 11–12.
32 KATZ, supra note 16, at 56.
33 By 1837, Chief Osceola, who had a black wife, had become the leader of a band of Black and Red Seminoles who organized resistance to U.S. and Creek slaveholders. Id. at 59. Osceola’s band pledged “to defend their black brothers and sisters to the death.” Id. at 60. See also Seminole Nation v. United States, 78 Ct. Cl. 455, 459 (1933) (“In their ancient habitat the Seminoles were not averse to the presence of the Negro race among their tribe. The wife of Osceola, one of their most noted, brave, and celebrated chiefs, was a descendant of a fugitive slave, and it was on account of her recapture as a fugitive that this intrepid half-breed chief waged a cruel and protracted warfare against the whites in which Negro troops participated to an important extent.”).
35 See KATZ, supra note 16, at 57.
Seminoles by persuading the Black Seminoles that they would be better off politically if they would separate themselves from the Seminole tribe and surrender to the United States government. Major General Jesup negotiated with the Black Seminoles and promised them that they would settle in a separate village in the Seminole Nation in Indian Territory, would be under the protection of the United States government, and would never be separated from each other or sold into slavery. As a result of this promise, some Black Seminoles separated from the tribe and surrendered to the United States government.

In the early 1840s, the Seminole tribe began the process of removal to Indian Territory. Nearly five hundred Seminoles of African descent accompanied the Seminole tribe to Indian Territory. After the Seminole tribe arrived in Indian Territory (presently Oklahoma), their relationship with the Black Seminole “slaves” changed. The Red Seminoles, feeling pressure from pro-slavery War Department officials, as well as some of their own tribal members and the other four large tribes in Indian Territory, found it politically inexpedient to maintain their close relationship with the blacks.

As a result of this tribal disassociation, the Black Seminoles became targets of slave hunters. The United States government failed to honor its promise to protect the Black Seminoles from slavery. Creek Indians raided the Seminole Nation and claimed many of the Black Seminoles as slaves, asserting that they had either fled from them or their ancestors while in Florida. In an effort to resolve the cultural conflict over whether blacks could be deemed Indian, the United States Attorney General interceded and ruled that Black Seminoles were slaves under United States law. Accordingly, the Black Seminoles who were not taken by the Creeks were ordered to return to their proper Seminole owners to serve as true slaves. Rather than submit to a lifetime of bondage, in 1849 approximately eight hundred members of the Black Seminole Wild Cat band, including their famous leaders Wild Cat and John Horse, fled to

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37 LITTLEFIELD, supra note 12, at 12.
38 Id. at 13.
39 See KATZ, supra note 16, at 70.
40 PORTER, supra note 18, at 119.
41 KATZ, supra note 16, at 70 (citing Restoration of Certain Negroes to the Seminoles, 4 Op. Att’y Gen. 720 (1848)).
42 LITTLEFIELD, supra note 12, at 126–27.
Mexico. The Black Seminoles who remained in Indian Territory were treated as true slaves and their struggle in Indian Territory to establish their freedom proved futile until after the Civil War.

During the Civil War, the Seminole tribe elected to fight with the Confederacy to preserve the institution of slavery—although there were some dissenters who fought with the Union. In 1866, after the Civil War ended, the federal government treated the Seminole tribe as a defeated enemy and forced the tribe to enter a treaty with the government wherein the tribe agreed to surrender certain tribal lands, end slavery in its Nation, and adopt the freed slaves or “freedmen” as citizens of the tribe. The tribe honored the terms of the treaty and adopted the freed slaves as citizens of the tribe. Many whites and Indians believed the government had wrongfully forced the tribe to take the “Negroes” into the tribe. As a result, much resentment developed toward the Black Seminoles or “freedmen.” In the early 1900s, when the federal government enacted laws mandating that tribal lands be allotted in severalty to tribal members, that resentment was exploited. Whites capitalized on these feelings of resentment and once again pitted the Seminoles, whom they perceived as “Indian,” against the freedmen, who were referred to as “Negroes.” An editorial in a newspaper in the soon-to-be-established state of Oklahoma opined that, “The right of the negro to Indian lands and the treatment of the Indians at the hands of the government will be the two main issues with which the fight will be made for the Indian vote in the new state . . . .” Thus, rather than attempt to convince the tribes that granting land allotments to freedmen was a fair and equitable deed in light of the decades of forced uncompensated labor the tribes had extracted from the African slaves, white politicians fanned the flames of resentment and argued that it was unfair for the federal government to take Indian lands and give them to the Negro.

43 Katz, supra note 16, at 71. Little has been written about the underground railroad leading to Mexico. On his journey to Mexico, Wild Cat also took along some Cherokee and Creek slaves who learned the route to the Rio Grande so that they could return to Indian Territory and lead other blacks to freedom. Id.
44 Littlefield, supra note 12, at 13.
45 See generally id. at 182–87.
47 Littlefield, supra note 12, at 203.
The end of slavery in the Seminole Nation did not result in true equality for the freed slaves. The leaders of the Seminole Nation chose to continue the master narrative of white supremacy and subjugated the Black Seminole freedmen by granting them a type of second class tribal citizenship. Voting rights for freedmen were limited and other basic civil rights were restricted. For example, the Indian Territory became the state of Oklahoma in 1907. The first law passed in the new state, known as “Senate Bill One,” adopted the black codes of Jim Crow, thus ensuring that blacks in Oklahoma continued in a state of subjugation. The Seminoles and the other major tribes in Oklahoma were then forced by state law to enforce the segregationist agenda by excluding blacks from Indian schools and disassociating with blacks to an even greater degree—even the black people who were considered citizens of the Seminole Nation.

The most glaring example of the Seminole Indians’ view that Black Seminoles were inferior to Indian Seminoles arises out of the allotment process. When the tribe was forced by federal legislation to allot its tribal land to individual members of the tribe, it was required to make a list of all the citizens of the Seminole Nation so that the land could be allotted to the individual members in fee. In furtherance of this goal, the federal government formed the Dawes Commission, which was charged with the administrative duty of compiling the list or “roll” of citizens of the Seminole Nation. The federal government, with the advice and consent of the Seminole tribal leaders, decided to create racially segregated rolls of membership. The primary roll, which was intended to identify the “real Indians,” is known as the “Blood Roll.” The secondary roll, which was intended to identify the “Negro” freed slaves still residing within the Seminole Nation’s geographical boundaries, is called the “Freedmen Roll.”

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51 See West, supra note 10. For an example of segregated towns and boarding schools, see HANNIBAL B. JOHNSON, ACRES OF ASPIRATION: THE ALL-BLACK TOWNS IN OKLAHOMA 159–60 (2002).


53 Id. at 2, 39.

54 See generally id. at 49.

55 See generally id.
people who are “Indian” by “blood.” Accordingly, the Blood Roll contains the name of the individual person as well as that person’s quantum of Indian blood. For example, if the person had three white grandparents and one Indian grandparent, that person would be listed on the Blood Roll and the fraction “1/4” would be next to his or her name. The Dawes Commission and the tribe, however, did not record the blood quantum of the people on the Freedmen Roll despite the fact that some of the freedmen did have Indian blood. The rule of hypo-descent was adopted to construct the racial identity of Black Seminoles as “Negro” regardless of whether a particular person had Indian ancestry or not. The rule also served to construct the racial identity of Native Americans as “Indians,” which meant having all or some indigenous ancestry, but generally no African ancestry.

Some freedmen may have possessed Indian blood from the pre-removal historical period when the Red Seminoles intermarried with Black Seminoles. Other freedmen obtained their Indian blood as a result of the institution of slavery. Just as white slave owners took sexual liberties with enslaved African women, so too did Native American slave owners, resulting in many slaves having mixed ancestry. However, the tribe and Dawes Commission ignored the fact that some slaves had reddish brown skin and straight silky black hair.

The Dawes Commission and the tribe used the tribal custom of matrilineal families to justify excluding the overwhelming majority of freed slaves with Indian blood from the blood rolls. The matrilineal

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56 See generally id.
59 Katz, supra note 16, at 57.
60 Sexual encounters between Native American slave masters and African slave women were documented by the Commissioner of Indian Affairs in 1866 wherein he reported, “There is a large number of young freedwomen who have from one to eight children, born while they were slaves, and who never had husbands. Many of these children are mixed bloods . . . .” J. H. Johnston, Documentary Evidence of the Relations of Negroes and Indians, 14 J. OF NEGRO HISTORY 21, 42 (Jan. 1929).
61 See Brief for the Federal Appellees at 13–14, Davis v. United States, 343 F.3d 1282 (10th Cir. 2002) (No. 02-6198) (“The Dawes Commission Rolls, which generally establish Indian blood degree of various citizens of the Seminole Nation, were prepared according to the Tribe’s traditional matrilineal structure. This means that an individual belongs to the tribal band to which his mother belongs. Accordingly, a
tradition dictates that a child belongs to the tribal band of his or her mother. The tradition arises from the fact that the paternity of a child was not always clear and could not be determined accurately. However, there was never any question that a child belonged to his or her mother, so children were deemed part of the mother’s tribal band. While this rule of matrilineal descent is ostensibly race neutral, the racial realities of the time make it evident that the invocation of the rule with respect to enrollment of the Black Seminoles was racially motivated. The Dawes Commission and the tribal law makers knew that in the overwhelming majority of instances of Indians having children with Africans, it was the paternal line that contributed the Indian ancestry. In other words, everyone knew that it was the male Indian slave master, not his wife, who crept to the African slave quarters at night. Accordingly, instances of Indian women birthing offspring fathered by African men were virtually nonexistent when compared with the numerous instances of African women giving birth to offspring fathered by Indian men. The Dawes Commission and the tribal leaders understood this racial and gender reality when they chose to invoke the matrilineal rule of descent as the guiding principle for enrollment. This means that they also understood that use of the rule would have the effect of excluding most of the freedmen with Native American ancestry from the Blood Roll.

Historically, it is understandable that Indian tribal leaders would seek to disassociate the tribe from blacks. Indian tribal leaders perceived the former slaves’ identity through the lens of the master narrative of black inferiority reinforced by the rule of hypo-descent, which meant that any person with any African ancestry was simply “Negro” or black. African blood was deemed so corrupt in both society and law that it was perceived to taint the bloodstream to the point that no other racial ancestry could be recognized in a person with African blood. Moreover, the master narrative of black

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62 Id.

63 In one case, a woman who was three-quarters Indian and one-quarter African was placed on the Freedmen Roll by the Dawes Commission. Miller v. Allen, 229 P. 152 (Okla. 1924). She sued to be recognized as a blood Indian. Id. at 152. The court defined the issue as “whether or not the enrollment record of the Five Civilized Tribes is conclusive as to plaintiff’s descent and race as negro or Indian.” Id. The court reasoned that, “[i]f slavery were in force at this time, Annie Miller, the plaintiff, would be a slave. One drop of slave blood taints the stream and makes it African in
inferiority was at work informing tribal leaders that blackness was ugly, ignorant, lazy, immoral, and, in every way, inferior to whiteness and “Indianness.” For decades the tribe had been bombarded by the cultural messages of the dominant white American society. These cultural messages both explicitly and implicitly informed the Native American that he was superior to the “Negro.” Whites were the politically powerful and the economically wealthy racial group. The white army had vast resources and superior weapons. It is only logical that Native Americans would seek to aspire to be like the group of people who had social, political, and economic security and stability. Whites offered Native Americans a position on the ladder of racial hierarchy several rungs above blacks, and the fear of being positioned equally with blacks—on the very bottom that is—motivated Native American tribes to accept this intermediate placement. The master narrative was able to lull the Native Americans into the position of being the intermediate racial class in the Indian Territory, therefore serving as a racial buffer between whites and blacks much as the middle class in America serves as the economic buffer between the over-privileged and the severely underprivileged classes of people.

The Seminoles, like other Native American slaveholding tribes, internalized the basic assumptions of the dominant white American culture and redeployed the subordinating tools of the dominant culture by creating a racial caste system wherein red or white people, who were members of the tribe, were viewed as “Indian” and were granted full tribal rights and privileges. These rights and privileges included the right to identify themselves as Seminole and obtain recognition from the Bureau of Indian Affairs of their status as Native Americans. Meanwhile, the tribe constructed an identity for Black Seminoles that replicated the master narrative of the dominant culture. The institutions of slavery and Jim Crow were imported from the dominant culture and redeployed by the tribe in an effort to elevate the racial status of Native Americans to one more on par with its descent.” Id. at 154. Accordingly, Annie Miller’s native ancestry was ignored and the rule of hypo-descent operated to deny her the identity, status, and benefits of being Indian. Id.

See DEBO, supra note 48, at 292. Debo notes that the Oklahoma Territory Seal depicted a white frontiersman and an Indian clasping hands and recalls how the Governor of the state of Oklahoma portrayed the red and white stripes of the American flag as symbolic of the red and white man united under a blue sky. Id. Moreover, the Oklahoma constitution elevated the Indian to the status of white by defining the term “colored” to apply only to persons of African descent. Id.

One editorial observer noted, “The average Indian, especially of that class which controls political matters of his nation, considers himself as far above the negro socially as does the white man.” Tritos, supra note 49.
the racial status of whites. The tribe deployed the rule of hypo-
descent to construct the identity of Black Seminoles. Any freed slave
was simply a “Negro” regardless of whether the person had Native
American ancestry or not. The master narrative offered Indians an
association with the supreme race—whites, which would afford
Indians many of the privileges enjoyed by whites. But whites were
willing to extend some of the privileges of whiteness to Indians only if
the Indians subscribed to and implemented the social, cultural, and
legal subjugation of blacks. Tribal leaders did not wish to further
denigrate Native American identity by associating it with blackness, so
they invoked the matrilineal tradition as a tool to exclude blacks from
the Blood Roll, thereby effectively denying many freed slaves the
Indian portion of their identity. An acknowledgment of any of the
freedmen as blood members of the tribe, and therefore “Indian” in
identity, would have served to undermine the rule of hypo-descent,
which was essential for preserving Jim Crow. In addition,
acknowledgment of the freedmen as true “blood” Indians would have
sent the message that Indians considered blacks as equals on a
political and social level. Such a message would have been dangerous
because it would have undermined the mytho-narrative of black
inferiority that had been used to justify slavery and Jim Crow.

It is important to note that some white people recorded in the
blood rolls are alleged to have had no Indian blood at all, but were
added to the rolls under fraudulent circumstances in order to receive
an allotment of land. Nonetheless, the descendants of those whites
would be recognized by the Seminole Nation today as “true” blood
Indians. Conversely, many of the descendants of the people placed
on the Freedmen Roll, known today as the Dosar-Barkus and Bruner
bands of Seminoles, or the “Black Seminoles,” are descended from
Native Americans. Unfortunately for the Black Seminoles, there are
rarely any marriage or birth records to prove their ancestral
connection to the tribe since Native American slave masters did not
marry their African mistresses nor legitimate the offspring produced
by those sexual encounters. Likewise, biracial children produced by
post-slavery, out-of-wedlock unions were rarely legitimated. Without
documented proof of an ancestral connection to someone on the
Blood Roll, such as a marriage license or birth certificate, the
descendant of a freedman will not be recognized by her tribe even if
DNA tests reveal Native American ancestry.

66 See generally CARTER, supra note 52, at 51, 73–74.
III. INDIAN IDENTITY UNDER FEDERAL AND TRIBAL LAW

Lying at the heart of the current dispute within the Seminole tribe is the question of what it means to be Native American and/or Seminole. The two are not one and the same. Native American identity is not purely cultural, nor is it solely based on race or phenotype. Native American identity is at times racial, ethnological, cultural, and political. A person can be Indian in one instance, yet not Indian in another.

A Caucasian or person of little Indian ancestry might become a tribal member by adoption for some purposes, such as voting and participation in tribal government, but not be an Indian for purposes of federal criminal jurisdiction. An Indian whose tribe has been terminated will not be considered Indian for most federal purposes. Nevertheless, such a person remains an Indian ethnologically and continues to be a tribal member for internal tribal purposes.67

Much to its credit, the Seminole Nation, unlike other slaveholding tribes, honored the terms of the 1866 treaty it entered with the United States government and granted tribal membership to its freed slaves. This act made the black freedmen members of the Seminole tribe, but it did not make them “Indian.” Their status as “Negroes” continued and the tribe treated them differently than Indian and white members of the tribe.

To be Seminole does not necessarily mean that one is Native American ethnologically. Some Black Seminoles probably have no Native American ancestry, yet they view themselves as Native American on a cultural level because of their long history of affiliation with the Seminole tribe. Many Black Seminoles celebrate and practice the traditions of Seminole culture even though they may have no Native American ancestry. Through the creation of the Dawes Roll, the federal government and the tribe collaboratively defined Native American identity utilizing race, rather than culture, as the hallmark of Indian identity. In creating the Blood Roll, the federal government and the tribe defined Indian identity as all persons possessing Native American blood or ancestry, except those persons who also possess African ancestry from their maternal line. The Dawes Commission and the tribe put a limit on the definition of

Indian identity by invoking the matrilineal rule which they understood would exclude from the Blood Roll most black people who had Native American blood. The effect of exclusion from the Blood Roll is to deny the individual’s Native American identity. The creation of the Blood Roll as the official record of all Indians generated a false cultural belief within the tribe, the federal government, and American society that all of the “real” Indians were named on the Blood Roll, and the people on the Freedmen Roll were “just black.” Thus, the Seminole’s tribal policy of failing to recognize the Indian identity of its black freed slaves served as a validation of white supremacy. By recognizing most white people with Indian ancestry as Indian while simultaneously refusing to recognize most black people with Indian ancestry, the policy prized whiteness and continued the enforcement of the rule of hypo-descent.

IV. THE MODERN-DAY APPLICATION OF THE RULE OF HYPO-DESCENT

The fact that makes the Seminole tribe’s history relevant to the extant dispute in *Davis* is that the tribe and federal Indian law still utilize the racially-biased Dawes Commission Blood Roll as the exclusive mechanism for ascertaining who is Indian and thereby entitled to all applicable tribal and federally created rights and privileges. Only a person who can prove an ancestral connection to a person identified on the Blood Roll can obtain a card from the federal government certifying that he or she is an Indian. The tribe and the federal government use a document which has its genesis in slavery and Jim Crow as the exclusive and final authority for determining who is Indian and who is not.

V. USE OF BLOOD QUANTUM TO DEFINE NATIVE AMERICAN IDENTITY

Ideally, we should respect the self-determination of the indigenous people of the United States, which means that they should be the ones to define Native American identity. Presently,
the Seminole Nation has elected to limit Native American identity to those people who are lineal descendants of a person identified on the tribe’s federally created Blood Roll. By utilizing this approach, the tribe, in conjunction with federal law, has not defined Indian identity broadly enough to encompass all persons with Indian blood or ancestry.\textsuperscript{70} Arguably, the Seminole Nation has a legitimate purpose in trying to exclude from tribal membership those persons who have no Native American ancestry.\textsuperscript{71} But little interest seems to be served in excluding people who have a cultural affiliation with the tribe and may have an ancestral connection. Moreover, if ancestry or “bloodline” is truly the litmus test for determining Indian identity, the Seminole Nation may wish to conduct DNA tests on its members of European ancestry since some white persons who had no Indian ancestry are suspected to have made it onto the Dawes Commission’s rolls due to fraud and bribery.\textsuperscript{72} Because the Seminole Nation is not trying to ascertain which of its black members have Indian “blood” or ancestry, it seems that they are not truly using a biological ancestral connection as the litmus test to define Native American identity, but rather the flawed and racially-biased Dawes Rolls. Surely there is a better way.

VI. ALTERNATIVES TO STRICT ADHERENCE TO THE RACIALLY BIASED DAWES ROLL

If the tribe is inclined to reclaim all people who have a connection to the Seminole Nation, it could take a different approach to defining the Indian identity of its members. For example, the tribe could use the common denominator of culture as
the test for defining who is truly a Seminole Indian. This approach makes sense given that the people whom the tribe would identify as full-blood Seminoles are not really full-blood “Seminoles” because the Seminoles are not one people ethnologically. As stated previously, the Seminoles are a culture comprised of many different indigenous and African peoples. The people who historically comprised the Seminole tribe came from various tribes in Africa as well as tribes here in America. These African people and people from various American tribes, such as the Creek, Yamasee, Hitchiti, Natchez, Shawnee, and Yuchi, banded together in an effort to survive. If the Seminole Nation is comprised of people who descended from the Yamasee or Natchez Indians, those people’s claim to being Seminole is primarily based upon their ancestral tribe’s absorption into the multicultural tribe known as the Seminoles. Hence, the notion that someone has “Seminole blood” is a fiction.

Moreover, historically, a number of white people without any Native American ancestry either married or were adopted into the tribe, and were treated as Indian members of the tribe. This suggests that being Seminole is not simply based on blood, but rather on a desire to assimilate into the culture that was created by the multicultural group of people who became known as Seminole. Today, being a Seminole culturally would mean having an ancestral connection to people who, through their language, spirituality, dress, music, food, and customs and traditions, identified themselves as Seminole. When contextualized by the history of the tribe, being a Seminole Indian could mean being culturally connected to the people who banded together to ultimately form the Seminole Nation of Oklahoma. To ascertain who is a Seminole today, under this framework, one would need to establish an ancestral connection to someone who was part of the Seminole Nation, regardless of his or her race. This could be done by using both the Blood Role and the Freedmen Roll, since the freedmen also comprised the Seminole Nation.

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73 See L. Scott Gould, Mixing Bodies and Beliefs: The Predicament of Tribes, 101 COLUM. L. REV. 702, 710 (2001) (arguing that the use of race to construct Indian identity and tribal membership is European in origin and that “cultural survival for most tribes may depend on eliminating race as the essential criterion for membership”).
74 WRIGHT, supra note, 11, at 1–2.
75 LITTLEFIELD, supra note 12, at 202.
76 Black Seminoles today practice many of the cultural traditions of the Seminole tribe. They share oral histories of the tribe and prepare Seminole foods and crafts. See John Tidwell, The Maroons, AM. LEGACY, Winter 2003, at 50.
Support for this approach is grounded in history and law. When the Seminoles entered into the 1866 treaty with the United States government, the Seminole Nation agreed to adopt the freedmen of African descent “as citizens or members of said tribe” and to give them “all the rights of native citizens.”\(^77\) While the Seminole Nation has argued that it merely intended to grant political citizenship and equal rights to blacks living in its geographical boundaries, at least one court interpreted the treaty in light of the Seminole Nation’s historical interactions, including intermarriage with Black Seminoles.

In *Seminole Nation v. United States*, the Seminole Nation argued that the United States government’s allotment of tribal lands to black freedmen was a violation of the Treaty of 1866.\(^78\) The Seminole Nation argued that the treaty conveyed citizenship rights to the black freedmen, but not membership rights.\(^79\) The Seminole Nation argued that citizenship rights meant only that blacks would have the same civil rights as native Indians, whereas membership rights would convey civil, property, and voting rights to members of the tribe.\(^80\) The Court of Claims reviewed the history of the Seminole Nation and found that the Nation historically had not distinguished between citizenship in the Nation and membership in the tribe.\(^81\) Accordingly, the court held that the Seminole Nation intended to grant tribal membership rights to the Black Seminoles equal to native Indian members of the tribes.\(^82\)

Admittedly, the court was confined by the racial conceptions of identity prevalent during the early twentieth century, and did not go so far as to say that blacks living in the Seminole Nation are racially Indian. The court did say that Black Seminoles have the same rights as Red Seminoles. If Black Seminoles have the same rights as and share a history and culture with the Red Seminoles, it seems that race

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\(^77\) Treaty with the Seminole Indians, Act of Mar. 21, 1866, 14 Stat. 755, 756, art. 2. The treaty provided:

\[\text{inasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color, who may be adopted as citizens or members of said tribe.}\]

\(^78\) Id.

\(^79\) Id. at 457–58.

\(^80\) Id. at 458.

\(^81\) Id. at 460.

\(^82\) Id. at 473.
should not stand as the basis for excluding the Black Seminoles from claiming Indian identity or the benefits thereof. In other words, given the social and legal history of the Seminoles, a cultural definition of Seminole identity seems appropriate. Under a cultural ideology of Seminole identity, all persons who are descended from any Seminole, whether on the Blood or Freedmen Roll, would be entitled to tribal membership and thereby all of the attendant burdens and benefits, without regard to race. If being Seminole is defined in this way, then all of the Black Seminoles qualify as Seminole Indians. However, the master narrative of race rejects the history of the Seminoles, as well as the notion of cultural identity, and seeks to invoke the racial rules of Jim Crow to define Indian identity.

If the tribe is unwilling to define “Seminole” as encompassing all people of the Seminole culture, the tribe could define tribal Indian identity as those persons who have an ancestral connection to someone on any Seminole tribal roll and have Native American ancestry of some kind as demonstrated through DNA testing. This approach, which I will call the “ancestral approach,” would address the tribe’s concern that only those persons who have an ancestral connection to the indigenous peoples of the Americas should be deemed “Indian.” The ancestral approach would also enable the Black Seminoles who have Indian blood, but no paper documentation of such, to prove their ancestral connection to the tribe and participate fully in tribal membership and programs. Allowing Black Seminoles the opportunity to prove their Indian identity through DNA testing would serve as a repudiation of the master narrative of black inferiority by asserting that black people will no longer be subject to the rule of hypo-descent and that in no way does their blackness degrade, diminish, or destroy their Indian identity. While this approach is less inclusive, and is still arguably race-based because it would exclude people based on racial ancestry, it would at least serve to repudiate the rule of hypo-descent, since it would allow for the inclusion of people who have both native and African ancestry, but who are presently excluded from full tribal membership because of the Dawes Commission’s racially-flawed scheme.

VII. CONCLUSION

This Essay has attempted to expose how the narrative of black inferiority and racism in general has affected the construction of Native American identity. Presently, the Seminoles continue to downgrade their historical association with African Americans in an
effort to disassociate themselves with blackness. Admittedly there are benefits to doing so. Disassociation is perhaps the primary operating rule of racism. Disassociation by the privileged—meaning those outside of the oppressed group—ensures that they do not lose their privileged status. Just as association with criminals will result in being treated as one, association with blacks historically has resulted in being treated like blacks—inferior to all other racial categories. By segregating Indian identity from blackness, the tribe insulates itself from becoming the target of the master narrative of black inferiority. Such segregation redeems the tribe from the pejorative images of blackness. Today, the tribe basks in the benefits of disassociation, and continues to ignore and/or disavow its history of kinship with Africans.

Moreover, the Seminoles are using law, specifically the law of sovereign immunity, to protect a tribal identity that was created by utilizing a racist ideology. The use of sovereign immunity to protect tribal identity in this instance ignores the racist origins of the legal rules that define Indian Seminole identity and serves to further subjugate people of color, specifically black Indians, by continuing the enforcement of the corrupt rule of hypo-descent.
Defining Ourselves for Ourselves

Jacquelyn L. Bridgeman∗

If there were no white people could there be black people and if so, how would they be defined?

I. INTRODUCTION

It is May 2003. I am a new law professor attending my first ever LatCrit conference. It is the morning of the first day of the New Teachers portion of the program. We are seated around a table having a discussion about the regional people of color conferences. Someone poses the question, “Why is it that more people from LatCrit don’t attend the people of color conferences?” Part of the answer supplied, “Clarence Thomas would probably be welcome at the regional people of color conference, but not at LatCrit.” I find this answer quite intriguing, if for no other reason than I am not entirely sure that Clarence Thomas would be welcome at the people of color conferences either.† At least most of the people of color I know are not fans of Clarence Thomas. Some would even go so far as to assert that although he may have black skin, he is not really a person of color.§

Fast forward one year to May 2004. I am once again at the

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‡ See, e.g., Stephen F. Smith, The Truth About Clarence Thomas and the Need for New Black Leadership, 12 REGENT U. L. REV. 513, 528–29 (1999-2000) (“The most disturbing charge against Justice Thomas is a racist one—that he holds views that no ‘true’ black person could hold. . . . that Justice Thomas is not really black . . . .”).
annual LatCrit conference and once again the subject of Clarence Thomas arises, this time in the context of a panel presentation by Angela Onwuachi-Willig. Professor Onwuachi-Willig’s discussion centers around her forthcoming article which explains that when viewed in the context of black conservatism, Justice Thomas’ jurisprudence has a coherency and consistency that is distinctly black and is informed by his lived experience as a self-identified black man. As Professor Onwuachi-Willig elegantly articulates, although Thomas’ intellectual ability has been called into question by those both inside and outside of the black community, when viewed in the context of his black conservative framework, Justice Thomas’ jurisprudence is not merely white conservativism in black face, or a reiteration of that put forth by his fellow justices on the Supreme Court; rather, it is something uniquely his own, informed by his experience as a black man in America. I am struck by this, not so much because of the fact that Justice Thomas has his own jurisprudence that is distinctly African-American, but because he could have a jurisprudence informed by a distinctly black perspective, and could have achieved a prominent place in American society yet still be soundly rejected by such a large portion of the black community.

As the Ninth Annual LatCrit conference came to an end and I was on the airplane on my way home to Wyoming, thoughts of Clarence Thomas and the discussion around Professor Onwuachi-Willig’s work lingered in my mind. Although I do not personally align myself with the black conservatives, and I am hard pressed to think of a controversial Thomas opinion with which I agree, I found that I was bothered by the fact that Clarence Thomas and others within the black community who hold similar views are so soundly rejected by such a large portion of the black community.


Onwuachi-Willig, *supra* note 3, ms. at 8.


See Calmore, *supra* note 1, at 180; Merida & Fletcher, *supra* note 1, at W8; see also Neil A. Lewis, *Justice Thomas Raises Issue of Cultural Intimidation*, N.Y. TIMES, Feb. 14, 2001, at A28 (noting how Thomas has been “the object of withering criticism for his conservative views that are at odds with the views of most other black Americans”).
rejected by so many within the community. African Americans as a group have struggled for years in this country, trying to break out from under the oppressiveness of subordination. Although we have had some success as of late, many discussions at this year’s LatCrit conference and elsewhere demonstrate that there is still a ways to go. More importantly, such conversations show that new strategies or approaches may be needed to address the chronic American problem of subordination of a wide range of groups.

As I soared over the earth at 35,000 feet, I found myself wondering if we do not hinder our ability to see problems in new ways or seek innovative solutions when we summarily reject and ostracize those within our communities who do not appear to share our views. Perhaps more bothersome, I wondered if we do not duplicate some of the patterns of silencing and marginalization that we ourselves constantly struggle against, when we refuse to take seriously those within our communities who view the world differently.

The goal of this Essay is to look more closely at the process of ostracism and policing of “black” norms within the African-American community. In so doing, this Essay argues that part of what fuels
this policing of norms is ironically the progress that blacks have made in American society over the last few decades. As African Americans become more integrated into mainstream society and are deemed to fit within those mainstream norms, there is a fear and a risk of losing oneself, and in losing one’s race and culture.\textsuperscript{12} Throughout American history what it means to be black has largely been defined in opposition to what it means to be white.\textsuperscript{13} This Essay argues that despite the negative qualities and attributes that have been ascribed to African Americans as a result of this oppositional defining, a lot of that definition still determines for many what it means to be black. If we are successful in our quest to become equal members of this society, so that such oppositional defining loses its force or becomes obsolete, the question becomes who will black people be then, or perhaps more disconcerting, will there still be black people? I am of the opinion that there will still be black people but our notion of who they are and what that means will necessarily have to change. In fact for many, that notion has already begun to change, or at least to broaden.

Part II of this Essay explores the concepts of “sell-out,” “Uncle Tom” and other such words used to policy a perceived “authentic blackness.” This part of the Essay explains how such terms are used to police certain norms and what the policing of those norms says about how African Americans see themselves. Part III discusses why the self-definition embodied in the use of those terms is problematic, and Part IV concludes with a call for African Americans to take


advantage of the present opportunity to define ourselves in more positive and productive ways.

II. SELLOUTS, UNCLE TOMS, OREOS, AND INCOGNEGROS: WHAT THESE TERMS TELL US ABOUT HOW AFRICAN AMERICANS SEE OURSELVES

“Sell-out,” “Uncle Tom,” “Oreo,” “Incognegro,” “Traitor to the Race,” are all terms with which those who have grown up in the black community are familiar. They are terms used within the black community to identify and disparage those who are not deemed to fit the prevailing conception of blackness. Many famous and not so famous members of the African-American community have earned themselves these labels at one point or another. Two that come readily to mind are Clarence Thomas for his aforementioned conservative views, which are perceived by many within the black community to be detrimental to the community, and Christopher Darden for his prosecution of O.J. Simpson. Both Justice Thomas and Christopher Darden are accomplished and successful by mainstream standards, but both are ostracized by and alienated from large portions of the black community.

16 See infra discussion following note 46.
17 See infra discussion accompanying notes 47–48.
18 See, e.g., Smith, supra note 2, at 528–29 (describing how Justice Thomas has been referred to as a “Traitor to his Race”); Onwuachi-Willig, supra note 3, ms. at 66.
19 See, e.g., Calmore, supra note 1, at 226 (“Justice Thomas is not just another Supreme Court justice with whom we disagree. Rather, as a justice, he not only engages in acts that harm other African Americans like himself, but also gives aid, comfort, and racial legitimacy to acts and doctrines of others that harm African Americans unlike himself . . . .”); A. Leon Higginbotham, Jr., Justice Clarence Thomas in Retrospect, 45 HASTINGS L.J. 1405, 1418–24 (1994) (describing the increased harm caused when those of a subordinated group who occupy positions of power aid in and give legitimacy to their subordination).
20 See CHRISTOPHER A. DARDEN & JESS WALTER, IN CONTEMPT (1996) (describing throughout the treatment the author received as a result of prosecuting the O.J. Simpson case).
21 Id. at 210 (“The Times story was keyed to Martin Luther King, Jr. Day, which was the next day. That was the perfect day to announce to Southern California that I was reviled in the black community, that I was an Uncle Tom.”); Calmore, supra note
As I continued my journey home from the 2004 LatCrit conference, miles above the earth at breakneck speeds, I contemplated the idea of sell-outs, Oreos and race traitors. I found myself wondering why it is that people like Clarence Thomas elicit such a visceral reaction from so many within the African-American community. Why is there such apparent fear and widespread denunciation of people who appear, at least to some, as not being “black enough,” whatever being “black enough” might actually mean? As I contemplated this, I realized I had never heard those terms used to describe drug dealers, gang-bangers, or high school drop outs, although I find it hard to believe that the effects of such people on the black community are any less detrimental than anything Clarence Thomas has done. In fact, in my experience, the “privilege” of receiving one or more of those labels is reserved either for those who appear (in varying degrees) to have achieved or to be working toward some kind of mainstream success or achievement, or those who like Clarence Thomas express views that stray far from those perceived to be held by the vast majority of the black community.

The remainder of this Part of the Essay explores why such terms might be used to police a definition of blackness that can be so negative and exclusionary. It begins by explaining how such terms are used to demark and define a “sphere of blackness” that is based on more than one’s physical features and is characterized by an anti-conservative bent, an opposition to whiteness, and an urban flavor. It then posits an explanation for why many within the African-American community would embrace a self-view that is not entirely of our making and is in large part negative and self-defeating.

As mentioned, “Sell-out,” “Uncle Tom,” “Oreo,” “Incognegro,” and “Traitor to the Race,” are a sampling of some of the terms used
within the black community to identify and disparage those who are not deemed to fit the prevailing conception of blackness. For those to whom these terms are not familiar, these are derogatory terms. They are terms used to identify, label or “call out” and ostracize those who might otherwise be presumed to be part of the black community, but who have in some way violated the norms of the community. They serve a policing function within the black community in that they help to set what the norms of blackness will be and to punish effectively those who fail to exhibit those norms. The act of labeling with such words serves to establish the norms of blackness, because such words are used to demark what lies within the “zone of blackness” and what does not. For example, if members of the black community call Justice Thomas a “Sell-out” or “Uncle Tom” because of his conservative views, what those members are essentially doing is signaling that such views (and presumably those who hold them) lie outside the zone of blackness. In contrast, the opposite of such views lies within the zone of blackness. Thus, while there may not be a universal definition of blackness that all of us can point to, the use of these labels for some people who espouse certain ideas, or engage in certain behaviors, does let us know that those ideas and behaviors are not acceptable as part of what it means to be black. Accordingly, the use of these labels helps the community police and define its appropriate norms of blackness.

In addition to establishing the norms of blackness in this way, such labeling also serves to punish effectively those who do not adhere to the established norms. To be branded with one of these labels is to be singled out, ostracized, and marginalized from the greater community. For example, in his book In Contempt, Christopher Darden describes the effects he suffered when being considered an Uncle Tom and traitor for his work as a prosecutor on the O.J. Simpson case:

And then I broke down. I gave in to the hollowness inside me.
Like a man standing for hours in a strong current, I gave up and allowed myself to be swept away by my own sorrow and sacrifice. I

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25 See supra notes 14–21 and accompanying text.
26 Baynes, supra note 11, at 216 (“So many times in the African American community a person is ostracized for not being ‘Black’ enough.”) (footnote omitted).
27 Id.; Fordham & Ogbu, supra note 23, at 185 (describing how “black people have a tendency to negatively sanction behaviors and attitudes they consider to be at variance with their group identity symbols and criteria of membership”).
28 Fordham & Ogbu, supra note 23, at 181; Smith, supra note 2, at 528–29.
29 Fordham & Ogbu, supra note 23, at 181.
had taken this case because I believed that my duty was to seek justice, no matter how famous, rich, and black the defendant. I had naively believed my presence would, in some way, embolden my black brothers and sisters, show them that this was their system as well, that we were making progress. I had believed that African-Americans were the most just people on the planet and that they would convict a black icon when they saw the butcher, the pattern of abuse, and the overwhelming evidence.

Instead, I was branded an Uncle Tom, a traitor used by The Man. I received death threats and racist letters from blacks and whites alike.

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My law career was over. I was alone, isolated from a community I had served so honestly for the last fourteen years.  

Thus, for those who wish to be part of the African-American community, such labeling effectively works as a punishment, and perhaps as a deterrent from openly engaging in such behavior or espousing such ideas in the future.

If such labeling involves a demarcation of what is not “black enough,” then it would seem that the use of such labels is informed by a notion of what is “black enough.” In other words, what norms must a person who considers herself to be a member of the black community have to embody in order to escape being addressed by such derogatory labels? It becomes apparent, when one reviews the different situations and people to which such labels are applied, that there is no consensus within the black community as to who is or is not black. Just as there does not appear to be a consensus as to what kinds of behavior or traits a person must exhibit before having one of those labels ascribed to him or her, whether or not a person earns such a label also appears to be at least somewhat contingent on who

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30 DARDEN & WALTER, supra note 20, at 11–12.
31 If the effect of not following the norms is to be ostracized, then it would follow that in order to escape such ostracism, one would at least outwardly conform to such norms. STEELE, supra note 12, at 101–02, 106; Fordham & Ogbu, supra note 23, at 193–97 (describing the way high achieving African-American students who might otherwise be labeled as “acting white,” and therefore be ostracized by their peers, engage in various behaviors such as “clown[ing]” and skipping class to mask their achievement, conform to community norms, and therefore escape stigma and labeling).
32 A good example of this is Bill Cosby and The Cosby Show (which aired on NBC from 1984 to 1992). While some viewed the show as a much needed and refreshing depiction of black American life, others viewed the show as pandering to white audiences and questioned the degree to which it portrayed an “authentically black” experience. See MICHAEL ERIC DYSON, REFLECTING BLACK: AFRICAN-AMERICAN CULTURAL CRITICISM, 78–84 (1993).
the person in question is. For example, in a speech marking the fifty-fifth anniversary of *Brown v. Board of Education*[^33] made at an NAACP dinner in May 2004,[^34] and again about a month later at the annual Rainbow/PUSH conference,[^35] comedian and entertainer Bill Cosby expressed many views regarding the African-American community usually attributed to black conservatives.[^36] Particularly, he challenged African Americans to “turn the mirror around”[^37] and took blacks to task for lacking in educational priorities, for poor parenting, and for criminal activity.[^38] While some criticized Cosby for what were seen as elitist and oversimplified remarks,[^39] many within the black community applauded his statements.[^40] Even if not applauded everywhere, Cosby has yet to receive the type of condemnation and alienation directed at Thomas, and others considered to be black conservatives, for similar remarks.

Although a discussion of what could be the cause of the different reactions to Cosby on the one hand, and Thomas and other black conservatives in the African-American community on the other is beyond the scope of this Essay, the difference does illustrate that what is “black enough” and what causes one to be labeled “sell-out” is contingent and contextual. However, while there may not be a consensus regarding the exact definition of blackness and all of its nuances and contours, there are some general aspects of that definition that one can identify.


[^36]: See generally John H. McWhorter, *Losing the Race* (2000) (discussing throughout aspects of black-American culture and self-identity, such as “anti-intellectualism,” that he finds problematic); Shelby Steele, *A Dream Deferred* 3–5 (1998) (describing how he was labeled a black conservative and shamed by others in the black community for not embracing and speaking out against a view of black identity that is “victim-focused”).


[^38]: See *supra* notes 34–35; Politically Incorrect Cosby Shocks Crowd, UPI, May 21, 2004.


First, it is obvious from the use of such labels that the definition of blackness that underlies these terms refers to more than just skin color, hair texture, or facial features. As mentioned above, many black conservatives, such as Clarence Thomas, have earned such labels. However, there is no question that based on skin color, features, and hair, Thomas is considered by everyone to be black. Thus, having certain physical features and considering oneself and having others consider one to be black, is apparently not enough to fit the underlying definition. In fact, it would appear that what merely having such discernable features does is make one susceptible to being branded with such labels. After all, if members of the black community have no reason to think a person is black, there is no basis for thinking that person is a sell-out, Oreo, or traitor to one’s race. Thus, the social construction of “black” that underlies the use of these labels goes far beyond physical features.

Second, it would appear that “authentic blackness” has an anti-conservative political element. While perhaps not clearly articulated, this is evidenced by the nearly universal way in which black conservatives, like Clarence Thomas, have been broadly rejected by large parts of the African-American community.

Third, the underlying definition appears to be one of opposition. Specifically, what constitutes blackness, at least in large part, appears to be the opposite of what is considered to be “white.” For example, when someone calls a person an “Oreo,” what that person is literally saying is that the person to whom he or she is referring is black on the outside, but white on the inside. In other words, while the person may physically appear to be black, that person embodies what is considered to be white. The derogatory meaning of this term derives from the presumed “whiteness” within.

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41 Fordham & Ogbu, supra note 23, at 184.
42 Thomas, supra note 3, at A21.
43 Indeed there are some who exhibit little to no physical characteristics that would suggest African ancestry who, nonetheless due to background, association with other blacks, speech patterns, and other characteristics, are sometimes considered authentic members of the black community. See, e.g., Dowd, supra note 22, at A31 (explaining how many blacks regard former President Bill Clinton “as one of their own”).
45 Robinson, supra note 12, at 424 (predicting how blacks will reject the author as a black conservative for expressing certain views); Steele, supra note 36, at 3–5; J.C. Watts, What Color Is a Conservative? 3 (2002).
46 Forde-Mazrui, supra note 9, at 728; Fordham & Ogbu, supra note 23, at 180–83.
The appropriate black person must be black through and through, or in other words, not white. Similarly, a person is considered “incognegro” when he or she appears to prefer to live or exist within the white world or is not deemed to sufficiently acknowledge his or her blackness. I first became acquainted with this term my freshman year of college. There was an outwardly appearing African-American student in the dormitory adjacent to mine. He was thought by many within the black community to be black because of his darker skin, facial features, and coarse hair which he wore in short dreadlocks. While the community presumed he was of African descent, he did not attend any of the noted black community functions, he was not known to have black friends, and he rushed and was accepted into a white fraternity. It was in reference to him that I first heard the term “incognegro.” The perception in the black student community was that he denied his blackness and hid in the white world—he was incognegro. Similarly, one of the ways a person can be considered a “sell-out” is to be perceived as allowing himself “to be used to further white interests for personal gain at the expense of the broader African American community.”

Thus, it would appear that a large part of what is considered authentic blackness is a negation of, or at least a strong resistance to, what is perceived to be white. It is worth examining, however, just what types of traits are often considered to be white, such that a person earns the dubious distinction of one of these labels. Among these “white accoutrements” are success in school, speaking Standard English, attending predominantly white institutions, working in predominantly white workplaces, and working in higher level jobs that blacks and people of color have traditionally not engaged in. It also sometimes includes subscribing to positions or

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47 Debra Dickerson, Bill Cosby—America’s Granddad Gets Ornery, at http://slate.msn.com/id/2103794 (July 13, 2004) (explaining that Bill Cosby’s critics are wrong to say that he is “incognegro”).

48 Nunn, supra note 14, at 1473. In fact, it is precisely this perception of Thomas within the black community that has led to much of his condemnation. Merida & Fletcher, supra note 1, at W8.


50 See Brown, supra note 23, at 321–22; Forde-Mazrui, supra note 9, at 728; Fordham & Ogbu, supra note 23, at 186; McWhorter, supra note 36, at 83.

51 Baynes, supra note 11, at 216; Fordham & Ogbu, supra note 23, at 186. I refer to this only as an example of what sometimes leads to a person being referred to as a sell-out. I do not intend to comment on the debates over language and the question of whether African Americans have a unique form of speech that should be valued and preserved.

52 Fordham & Ogbu, supra note 23, at 182.
views not deemed to be held by a majority of the black community.\footnote{Smith, \textit{supra} note 2, at 528.} If such things are considered to be white, and what is white and what is black are in opposition, then it follows that the opposite of the aforementioned things are at least part of the definition of blackness that informs the use of such terms. Thus, poor performance in school, working at low-level jobs, poor grammar, and poverty, among other negative traits, have become part of what it means to be black.\footnote{Brown, \textit{supra} note 23, at 334–38; Fordham & Ogbu, \textit{supra} note 23, at 180–83.} In other words, part of the definition of blackness that such terms are used to police involves the embodiment and acceptance of some of the most negative stereotypes that have been directed at black people over time.\footnote{See Richard Delgado & Jean Stefancic, \textit{Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?}, 77 \textit{CORNELL L. REV.} 1258 (1992), reprinted in \textit{CRITICAL RACE THEORY}, at 225 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) (describing some of the stereotypes ascribed to African Americans and other “outsiders” throughout American history).}

In addition to the above, the definition of blackness that underlies such terms also appears to have a distinctly urban flavor. While living in the suburbs or rural areas may not automatically brand one a sell-out, blacks who live in these areas do not appear to conform to the underlying norm of blackness either.\footnote{See \textit{J OHN MCWHORTER, AUTHENTICALLY BLACK: ESSAYS FOR THE BLACK SILENT MAJORITY} 13–14 (2003).} In addition to an urban bias, this underlying definition is arguably distinctly male and heterosexual as well.\footnote{Devon W. Carbado, \textit{Men in Black}, 3 \textit{J. GENDER RACE & JUST.}, 427, 427–29, 435 (2000); Fordham & Ogbu, \textit{supra} note 23, at 194 (relaying student stories describing how deviation from perceived oppositional norms (like achieving in school) calls into question one’s “manhood” based on the perception that “males who do not make good grades are less likely to be gay”).}

Consequently, the view of the black community, presupposed by the use of terms like sell-out, Uncle Tom, and Oreo, is a rather narrow one. It is not a view that readily accepts differing perceptions among the African-American community, and it is not a view that takes into consideration the wide range of experiences of those who consider themselves to be black. In addition to being narrow, such a view also accepts and embodies some of the most derogatory stereotypes of black people. Given this, one must necessarily ask why so many within the black community would police norms to protect such a self-definition.

I posit that much of the reason for such policing is fear. Records from the year 1619 contain one of the earliest references to Africans
having been brought to America, viewed by some as the genesis of the chattel slave system in this country.\textsuperscript{58} Over time, the legitimation and perpetuation of the American system of chattel slavery was dependent on perpetuating belief in the inferiority of blacks and the superiority of whites and keeping blacks as a group separate and distinct from whites.\textsuperscript{59} By the same token, part of the process of becoming a slave involved stripping the newly arrived Africans of their culture and heritage and the sense of identity that comes with that kind of self-knowledge.\textsuperscript{60} Although some aspects of African culture survived, most of it was lost. Thus, the Africans who were brought here as slaves and their descendants were left to form a new definition of themselves in a society that defined them as inferior and more particularly as the opposite of white.\textsuperscript{61} Not only did this society define them as inferior and in opposition to whiteness, it also established barriers at every turn to prevent their participation as equal and valued members of the society.\textsuperscript{62}

Out of the crucible of the experience of the Africans that were brought to America as slaves, and their descendants, there has emerged a unique and culturally distinct group of people that is neither entirely African nor an assimilated part of the mainstream American culture.\textsuperscript{63} Part of what defines this group as a unique and separate group within American society is the fact that it is not white. And while, as demonstrated above, such an oppositional definition involves many negative traits which are inaccurate with respect to most of the black community, such an oppositional definition still embodies, at least in part, what it means to be black. We know we are


\textsuperscript{59} In few places is this view articulated better than in Chief Justice Taney’s opinion in \textit{Dred Scott v. Sandford}, 60 U.S. 393, 409 (1857) (“They show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings . . . . And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.”).

\textsuperscript{60} Peter Hogg, Slavery: The Afro-American Experience 33–34 (1979) (describing the “seasoning” and forced name change of slaves).

\textsuperscript{61} Brown, supra note 23, at 338; see supra note 13 and accompanying text.

\textsuperscript{62} Dred Scott, 60 U.S. at 409; Higginbotham, supra note 58; C. Vann Woodward, The Strange Career of Jim Crow 11 (1974); Derrick Bell, Race, Racism, and American Law (5th ed. 2004) (describing throughout the barriers established to deny African Americans full participation in American society).

black, because we are not white. Therefore, the question becomes, if we become more white, or start embodying what it means to be white, will we still be black? Put another way, if we all become like Clarence Thomas, what is going to happen to black folks? If a large part of the way we see and define ourselves is in opposition to whiteness and more of us become “whitelike,” does that mean we will no longer exist, at least as a separate and unique group? We as a people may not particularly care for the often negative and oppositional way in which we are defined, but if part of how we see ourselves does in fact involve that definition and we lose that definition, then to some extent we arguably have lost our identity. Thus, one could argue that part of why we police these norms, as negative as they may be, is due to the fear of losing that hard fought-for sense of identity and sense of self. In other words, it is better to exist as a negative than to not exist at all.

Despite how important it may be for us to define ourselves, and to have a unique sense of our black identity, the perception of ourselves that underlies the use of such terms as Uncle Tom and Oreo is problematic for a number of reasons.

III. THE PROBLEM WITH THE IDEA OF SELL-OUTS, UNCLE TOMS, OREOS, AND INCONEGROS

A. The Oppositional Identity Problem

As explained in Part II, part of the view of authentic blackness that underlies the use of such terms as “sell-out” involves an acceptance and embodiment of many of the negative stereotypes against which blacks have fought for centuries. So why, one might ask, did such concepts become part of how at least some of us view ourselves? I think part of the answer to that question lies in the fact that since the beginning of the history of this country blacks have been defined by someone other than themselves and have largely been rejected by those doing the defining. Thus, apart from the fact that defining oneself in opposition to whites may mean accepting the negatives about one’s self which that entails, on another level it

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65 See supra notes 46–55 and accompanying text.

makes sense to resist the culture and views of those who have subordinated African Americans as a group. Thus, such a definition is not so much an ascription of negative views to oneself, as it is a rejection of those who have treated and continue to treat one badly.\textsuperscript{67}

While the impetus to reject what may be perceived by some to be mainstream culture is understandable, it is problematic because if the definition of everything white in this society is necessarily good and positive, and one defines oneself in opposition to that, then the inevitable result of one’s self-definition is going to be an embracing of the bad and negative. Not only that, if one defines oneself in opposition to standards that one does not set, is that really self-definition? In other words, perhaps rather than defining ourselves, all we have done is embrace the way mainstream culture has defined us. The negative attributes that have been ascribed to blacks throughout American history are legion and well known and need not be reiterated in detail here. But if whites are viewed as rich, industrious, intelligent, well-educated, and articulate, then the oppositional definition of blacks sees authentic blackness as poor, lazy, stupid, uneducated, and inarticulate.\textsuperscript{68}

For centuries, blacks have fought to become equal and valued members of this society, to be able to take advantage in full measure of all the things that this society has to offer. In other words, to have the opportunity to be rich, well-educated, and valued for one’s intelligence and other positive attributes that one has to offer the greater whole. How can it then be that one cannot be rich, intelligent, well-educated, articulate, and black? Obviously, one can be all of these things, and then some, and black at the same time. Yet, as demonstrated above, part of the definition of blackness that we police with such words as “sell-out” and “Uncle Tom” indicates that this is not so. If we cannot be both authentically black and achieve mainstream success, or authentically black and hold a variety of views, or authentically black while at the same time living and participating in all facets of this society, what kind of self-defeating dichotomy have we established for ourselves?\textsuperscript{69} If the ultimate goal is to become full members of this society while remaining true to ourselves and our black identity, then we must be able to do both at the same time.

\textsuperscript{67} Fordham & Ogbu, \textit{supra} note 23, at 181.
\textsuperscript{68} \textit{Id.}
\textsuperscript{69} See, e.g., Margaret M. Russell, \textit{Beyond “Sellouts” and “Race Cards”: Black Attorneys and the Straitjacket of Legal Practice}, 95 Mich. L. Rev. 766, 773–74 (1997) (describing the way such false dichotomies limit the options of black attorneys).
Let me make clear that I am in no way endorsing assimilation in the sense of negating and eliminating black culture. In fact I am advocating the opposite. What I propose is a self-definition that originates from within the black community, but one that is constructive in its explanation of what it means to be black rather than oppositional and negative.  

B. The Exclusion of Certain Views Problem

As mentioned above, persons with views like those espoused by Clarence Thomas and others like him are viewed by many as not being authentically black. But as Professor Onwuachi-Willig explains in her article, there may actually be a coherency to Justice Thomas’ jurisprudence which, although different from the views of some within the black community, does embody a black perspective. While progress has certainly been made with respect to race relations in this country over the last several decades, we still have a ways to go. The view among some is that continuing to work for progress within the frameworks we have thus far used will not cause us to realize any more substantial gains. If in fact what we are doing is not working, or is not producing the results we would like, then perhaps one strategy is to look for other ways of thinking about and doing things. When we reject and/or marginalize someone out-of-hand under the rubric of “sell-out” without actually listening to what they have to say, we run the risk of missing potentially valuable contributions to the discussion that may help us continue our struggle in more productive ways.

Perhaps more importantly, when we refuse to take seriously the contributions of those who do not apparently think like ourselves, we run the risk of replicating the acts of silencing and marginalization that are hallmarks of systems of subordination. There is a significant difference between disagreeing with Justice Thomas’ views on the merits and writing him off as Justice Scalia’s puppet, assuming he has no thought process of his own just because he happens to be a

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70 Angela P. Harris, Foreword: The Unbearable Lightness of Identity, 11 BERKELEY WOMEN’S L.J. 207, 208–09 (1996) (describing W.E.B. DuBois’ attempt at the turn of the 20th century to “take the concept of ‘race’ away from white folks: to transform it from an alibi for subordination”).

71 See supra notes 1–2 and accompanying text.

72 See supra notes 3–5 and accompanying text.

73 See supra note 7.

74 See sources cited supra notes 7–8.

75 See supra notes 9–10 and accompanying text.
black conservative.\textsuperscript{76}

\textit{C. The Under-inclusiveness Problem}

As mentioned above, the definition of blackness underlying the use of words like sell-out has a distinctly urban, inner-city flavor.\textsuperscript{77} To some extent this is understandable, as a good number of African Americans do in fact live in urban areas and within the inner city.\textsuperscript{78} However, there is a substantial number who do not, and presumably a wealth of black experience that does not fit this norm. While as of 2002 only 12.5\% of the African-American population did not live in a metropolitan area, this still accounts for over four million blacks who do not live in the city, hardly an unsubstantial number.\textsuperscript{79} When the definition of what it means to be black is primarily based on one aspect of lived experience, the definition essentially privileges a segment of the total experience. If the quintessential definition of blackness is based on the lived experience of those in the inner city, does that mean that there is no space for blacks without that experience to become authentically black?\textsuperscript{80} Certainly it does not, but if it does not, then how else is such authenticity to be defined, and who is going to make that determination?\textsuperscript{81}

I have spent the vast majority of my life in the Mountain West and in particular in the state of Wyoming. One of the positively defining moments of my life was when the owner of the Black Cowboys museum in Denver, Colorado came to speak to my third-grade class. Although I had spent most of my life among cowboys and through school had been steeped in the history of my home state, it was not until that presentation that I realized that that history included people a lot like me. It was not until then that I learned

\textsuperscript{76} Onwuachi-Willig, supra note 3, ms. at 7–8 n.20.

\textsuperscript{77} See supra note 56 and accompanying text.


\textsuperscript{79} Id.

\textsuperscript{80} Please note that I am not trying to disparage or take away from the salience of that experience. Rather I am trying to highlight the fact that, while important, it is one of many types of lived experiences within the black community and it is not clear why it should hold a dominant place within the definition of black that underlies the use of such terms as “sell-out.”

\textsuperscript{81} Harris, supra note 70, at 212 (noting that “in a world where identities are always fluid, dynamic, and multiple, the question must always be ‘who is defining, how is the definition constructed, and why is the definition being propounded.’”) (internal citations omitted).
that one could be both black and a cowboy.\textsuperscript{82}

We already live in a society that degrades and negates our existence and legitimacy of being at every turn. When our vision of ourselves omits the variety of our experience, those that are omitted find they have no place in either mainstream culture or black culture. Thus, a truer and more productive definition of ourselves would wholly embrace the wealth of our experiences.

\textbf{D. The “It’s Not Our Culture” Problem}

As discussed, part of what fuels the policing of “authentic blackness” within the black community is a fear of losing one’s self if one were to adopt aspects of what is considered the majority culture.\textsuperscript{83} It may be that such fear is misplaced. This fear appears to be premised on at least two assumptions that may be false. One, that blacks will never be able to fully assimilate into the majority United States culture in the first place, and two, that there is a majority United States culture to assimilate into that is separate and apart from black culture and black experience. Focusing on the second aspect, there appears to be an implicit assumption that the majority has not been influenced by or contains no aspect of black culture. However, one need not look very closely to see the widespread influence of blacks on all aspects of American culture. From music, to clothing, to language, from food, to television, to movies, since this country’s inception blacks have had a tremendous impact on the way American culture has developed.\textsuperscript{84}

Accordingly, when one accuses someone of adopting or succumbing to “white or mainstream culture” it may not be as clear as it would first seem what that person is referring to. Put another way, I would posit that “white culture” largely is and has been a myth in this country, at least to the extent one would like to think of it as a culture completely devoid of influence from those that are thought to sit largely on the outside of that culture.\textsuperscript{85} However, what is not a myth is the oppression and discrimination suffered throughout the history of this country by those that do sit on the outside, and how this society, whether overtly or covertly, has worked to keep those groups on the outside.

In adopting the negative aspects perpetuated by the larger

\begin{itemize}
\item \textsuperscript{82} \textsc{William Loren Katz}, \textit{The Black West} 143–60 (3d ed. 1987).
\item \textsuperscript{83} See supra notes 63–64 and accompanying text.
\item \textsuperscript{84} \textsc{Ralph Ellison}, \textit{What America Would Be Like Without Blacks}, in \textit{Going To The Territory} 104 (1986).
\item \textsuperscript{85} Id.
\end{itemize}
society as part of our self-definition, we implicitly accept the view that sees us as outsiders, as others; we concede that we have no place in this country that we have helped to build from the ground up. This country is no less ours than it is anyone else’s, and although the prevailing perception is often to the contrary, mainstream American culture is no less ours as well. Therefore, the underlying view of ourselves and our place in this society that helps us define who we are should not be so quick to concede that we are not entitled to a legitimate place within that society.

IV. CONCLUSION

Over the last several decades, the demographics of the United States have changed substantially.\(^{86}\) Whereas African Americans used to be the largest minority group, that is no longer the case.\(^{87}\) Whereas the framework for viewing race relations in the United States was largely through the black/white dichotomy, that has also begun to change.\(^{88}\) In my view, these types of changes are good because they help upset the status quo and give us an opportunity to reinvent ourselves.\(^{89}\) As the black/white duality dissipates, the country becomes more diverse, and African Americans become more equal and valued participants in American society, the old markers by which we have defined ourselves are fading and will necessarily need to change. Rather than clinging to these old markers and continuing to engage in a discourse that serves to marginalize and silence members of the community, while protecting norms that are negative and harmful, we should take these changes as an opportunity to redefine ourselves—an opportunity to redefine ourselves in a way that not only rejects the negatives projected on us by the greater society, but refuses to let such views occupy a central place in how we


\(^{87}\) U.S. Census Bureau, U.S. Dep’t of Commerce, Population by Race and Hispanic or Latino Origin for the United States: 1990 and 2000 (Apr. 2, 2001), available at http://www.census.gov/population/cen2000/phc-t1/tab01.pdf (indicating the total number of Hispanics or Latinos as slightly larger than that of blacks or African Americans); cf. Powell, supra note 86, at 1398–1405 (describing the contested and contingent way census categories have been defined over time and how that has contributed to white dominance).

\(^{88}\) See *Critical Race Theory*, supra note 55, at 343–84; sources cited supra note 13.

\(^{89}\) Robinson, *Matrix*, supra note 64, at 261–64.
see and define ourselves. Such a definition would recognize and accept our differences of opinion and lived experience and proclaim that there is value in the variety of ways there are to be black.\footnote{90} If there were no white people would there be black people? I think there would be, but maybe for once, how those people are defined would be solely up to us.

\footnote{90 See generally Madhavi Sunder, \textit{Cultural Dissent}, 54 \textit{Stan. L. Rev.} 495, 500–01 (2001) (advocating a "cultural dissent" approach—one that views identity as pluralistic and fluid, and such that individuals within an identity-group can choose among many ways of living within a culture—instead of a "cultural survival" approach that reinforces old notions of imposed identity).}
KULTURKAMPF

The Global Matrix and the Predicament of ‘Postmodernisms’:
An Introduction to the Critique of Kulturkampf

Denise Ferreira da Silva*

Let’s go ahead, set up our dichotomies and choose our colors. Now read the text: what matters is what the options already prescribe, the meaning of being before or after the “/,” the possible and potential “truths” a particular position enables and/or precludes? Explicitly or implicitly, the authors in this cluster address this question when each shows how the recent articulation of the term Kulturkampf rehearses the pair public/private, the founding liberal distinction. When doing so, they delimit the challenge facing progressive legal scholarship in a global (juridical, economic, and ethical) configuration ruled by the conservative versions of the liberal principles of diversity and multiculturalism. After each account of neoconservative reactions to the social (racial, gendered/sexual, economic) subaltern’s demands for (juridical and political) representation, as I hope the reader will notice, it becomes evident that any progressive rebuttal of the tale of “cultural wars” should begin with the acknowledgement that the prevailing formulation of the domain of the private deploys racial and cultural difference as markers of those who fail to embrace the principle of universality. When doing so they ask the reader to be aware of easy dichotomies that recall the liberal ontology in which the principle of universality and its signifiers produce the political scene as an abstract, transcendent, configuration in which (racial, gender/sexual and cultural) difference enters as a troubling rather than a constitutive aspect of social life.

Through three moves these papers indicate the need for a (re)formulation of the social which would not be immediately resolved in the neoliberal-neoconservative reframing of the

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public/private dichotomy. First, to advance a conception of justice (social justice), which seemingly contradicts law’s universality principle, each addresses a signifier—race, religion, gender, and sexuality—that refers to what I will call later the Global Matrix. By doing so, they indicate how the writers of the tale “cultural wars” deploy the principle of universality in an ethico-political battleground in which these categories emerge as moral signifiers. Second, they refuse neoconservative reconfigurations of cultural (identity) politics that rewrite universality in a transparent domain of the public and projects/demands for social justice onto a blurred domain of the private. Third, none err by taking sides. Each cautions us that the sides only come into being together—that the neoconservative version of cultural difference already assumes that juridical universality organizes the public domain. Put differently, when read as a unit, these papers show that a viable critique of the tale of the “cultural wars” should include the recognition that the terms—the positions the hegemonic principles of diversity and multiculturalism write—demarcate a political stance which ignores that the global now constitutes the site of a productive struggle and a scene of ethical embattlement created by the neoconservative reading of the postmodern landscape. Not surprisingly, each author makes these moves separately. After all they engage a tradition—liberal thought—which like all traditions never ceases to re-invent itself.

While naming this tradition will not resolve the predicament it poses at the core of any critical legal project—but more particularity to Critical Race Theory (CRT)—it does help us to understand why progressive legal scholarship should engage neoconservative articulations of the private in defenses of juridical universality. Undoubtedly, the critical position these papers delineate, the one to which LatCrit has been consistently moving towards, emerges in a terrain which has been mapped by articulations of the principle of universality, the one which distinguishes liberal (onto-epistemological) accounts. This terrain has been demarcated by a notion of juridical universality—the founding thread that goes back to Locke’s formulation of the idea of the rule of law itself. Through the distinction between public and private, this troubling, yet productive inheritance has manufactured the social subject presupposed in what Michel Foucault terms the juridico-political conception of power.1 While immersed in ordered actual relationships of exchange, as Peter Fitzpatrick reminds us, this social (legal and political) subject has been always a global figure. For the

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“individual,” the “self-regulated subjectivity,” the autonomous figure classic liberal theorizing describes emerging in Europe, “is a condition for the existence of modern, liberal legality”, who shares in law’s unique nature which is that it “is no longer tied to any extraneous order, now deriving its force and origin purely from its intrinsic being.”

For this reason, when interrupting the public/private dichotomy with the question of the law’s (in)ability to ensure social justice, the papers in this cluster necessarily displace juridical universality—that of the law and of the social subject it institutes—when they recall the limits of the social ontology that renders the possibility of collective existence contingent upon the conception of the law as an autonomous, exterior, controlling, force.

Nevertheless, the conception of (social) justice critical legal theorizing (and other postmodern projects) advocates relies upon the rendering of the principle of universality that produced the subaltern subjects against which neoconservatives now unleash their “moral wars,” the one which renders it possible to address the limits of juridical universality. Here, I refer to the post-Enlightenment projects of knowledge of society—anthropology, sociology, psychoanalysis, etc.—which attempt to reconcile the abstract essence which is actualized in the market, the state and legal apparatus, and the actual differences that characterize modern collective existence, ones which produce the modern (social) subject as a spatial/temporal, a global-historical thing. That is, each shows how in the tale of the “cultural wars,” the place of the proper social (legal and moral) subject only encompasses a particular kind of human beings, but ones whose (cultural) particularity only makes sense when contrasted with other past and contemporary modes of being human.

Because I cannot discuss the details of this second articulation of universality, namely scientific universality, in the limited space of this introduction, I move to show how, when exploring how a given social scientific signifier—race, class, culture, gender/sexuality—is reformulated in the neoliberal/neoconservative tale of “cultural wars,” this cluster invites us to consider these categories as signifier of the Global Matrix. In this invitation, I find the suggestion that we have reached the limits of the 1980s politics of difference (or identity politics or cultural politics), and that it has been absorbed into the

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3  For a critique of these projects of knowledge see Denise Ferreira da Silva, Homo Modernus, forthcoming.
‘original’ social model, which critical legal theorizing rejects, and which is now re-articulated in the tale of “cultural wars.” Consistently, this social ontology does not immediately allow for a mapping of the Global Matrix—the ethical-juridical configuration which encompasses the kind of human differentiation upon which critical legal theorizing grounds its challenges to legal formalism and upon which the writers of the tale of “cultural wars” rest their return to their claim that the “individual,” or the “original” social (legal/moral) thing is the sole subject of the private entitled to claim juridical universality. Rejecting the privileged position, the public domain which remains a monopoly of the “original” liberal subject—European, while, male, property owner—each paper invites us to revisit the axioms of liberalism informing the neoconservative rendering of the Global Matrix.

What this cluster suggests is the need for another model, a global-historical model, which assumes that the kind of difference communicated by the categories of race, class, culture (religion, language, etc.), and gender/sexuality, is not an individual (or collective) substantive attribute. Instead, it indicates that these consist in productive political strategies and are effects of social scientific representations, which now govern the global (juridico, economic, ethical) configuration. My point is that, when arguing for the need to reconcile juridical universality and the recognition of social differentiation, in a formulation of justice which addresses the effects of juridical domination and economic exploitation, these papers indicate that demands for social justice cannot presume (as in the case of the Civil Rights movement) the nation-state as the sole ethico-political paradigm. On the one hand, they indicate that to undermine the productive effects of the signifiers of the Global Matrix, and to redress the subjections they entail and justify, we need an ethical principle which privileges representation both (a) in the recognition that existing legal structures re-present a particular set of principles of the “original” (autonomous) legal subject, (b) in the production of a critical scholarship that re-presents, re-tells and re-signifies the global-historical trajectory of subaltern social subjects, and (c) that in order to understand this trajectory as an effect of the social scientific signifiers which now organize our ‘postmodern’ social (juridical, economic, and moral) configurations.

Each paper articulates a critique of the tale of Kulturkampf to address (at least) one crucial question that should be raised by any critical reading of, and political response to, the tale of the “cultural wars.” (1) How do we reframe the subaltern legal perspective in such a way to preempt the most destructive strategies deployed in the
scene of theoretical embattlement? (2) How do we retain social difference as the basis for demands for justice (juridical and political representation) without re-producing subaltern subjects as homogeneous and fixed cultural entities, i.e. as they have been constructed in social scientific scholarship? (3) How do we reconcile the various social scientific signifiers—class, gender/sexuality, race, culture—in a critical project which does not repeat the pitfalls of universality, i.e. the move that erases how western (colonial and global) juridical, economic, and symbolic apparatuses produce subaltern subjects in the various global regions? Finally, (4) how do we engage in the struggle for subaltern representation while aware that it will reinforce neoconservative agendas which recognize difference but only to write a moral tale which renders its demands for justice un-reconcilable with juridical universality? From a position in between Derrick Bell’s racial realism and Kimberlé Crenshaw’s strategic liberalism, they suggest that progressive legal theorizing needs to map the Global Matrix—to identify its constitutive pairs and to excavate and dissipate the “truth” they produce. As they trace the effects of neoconservative appropriations of politics of representation, each paper describes the obstacles and suggests strategies for overcoming the founding public/private dichotomy which informing legal scholarship and in the global ethico-political grammar.

I. THE RACE CRITIQUE: ITS OFFSPRING AND DISCONTENTS

In “Kulturkampf or ‘fits of spite’?: Taking the Academic Cultural Wars Seriously,” Sylvia Lazos-Vargas addresses the question of what should be the normative basis of the now fractured legal scholarship. Instead of calling for an armistice, she welcomes the battle. She reminds us that the contention is productive only if a common ground for disagreement is identified, if destructive strategies are avoided. That is, for Lazos-Vargas the academic “cultural wars” are both necessary and productive in the present situation of American legal scholarship. The problem, however, is that each of the contending parts she names—neo-traditionalists, radicals, assimilationists and latcriters—inhabits a moral position which, in its turn, defines what is to be valued and that which is to be obliterated. For this reason, instead of engaging each perspective as a position in the larger moral field which could be called legal scholarship, the

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4 Here I have in mind, Derrick Bell’s famous statement that black will never enjoy equality in the United States and Kimberlé Crenshaw’s defense of the right strategy in Kimberlé Crenshaw et al, Critical Race, Theory, The New Press, 1995.
contenters choose to attack individuals and not their perspective—a consistent liberal war tactic, to be sure.

When describing how this particular deployment of morality, which addresses individuals and not their ideas, enters the academic arena, she shows how the founding division public/private division plays out in two fronts. In the neo-traditionalists- Critical Race Theory (CRT) front, it tellingly actualizes the fundamental division – rational/irrational – communicated by the signifier race, which here takes the form of a distinction between objective/subjective, change/permanence, or truth/prejudice, etc. On the one hand, neo-traditionalists’ statements redeploy the rational/irrational pair when accusing race crits of lack of intellectual rigor and emotionalism to delineate the proper (moral) boundaries where proper legal scholarship is produced. That is, she shows how here the race signifier is not immediately, explicitly articulated but that it organizes a distinction between “the professional” and its “others” when neo-traditionalists accuse race crits of being badly trained legal scholars. On the other hand, forced to play according to the rules the “professional/non-professional” (rational/irrational) pair institute, race crits cannot but charge that their foes deploy racial stereotypes, that their reading of critical race scholarship lacks “objectivity,” that it is resistant to change, based upon prejudice, etc. In this scene of embattlement, both sides deploy race as a moral signifier, which delimits the position that remains faithful to the signifiers of (academic) universality—namely, objectivity, change, truth, etc.

When contention takes place among racial subaltern legal scholars, the battle becomes overly personalized while at the same time the ethico-political stakes become more explicit. At stake here, Lazos-Vargas argues, is a “minority perspective” as a point of departure for theoretical critique. Among scholars of color, arguments regarding the appropriateness of a “minority” theoretical-methodological perspective indicate a divide in terms of whether the assimilationist (civil rights perspective), a radical, or a more complex (LatCrit) critical position should prevail. While the line separating the assimilationists from the others is easy to spot, the one separating the radical and the complex one is not. According to Lazos-Vargas, the divide here has to do with the reliance upon historical-materialism and its promises of a critical corner outside hegemonic liberalism. If one recalls that historical materialism’s greatest promise was nothing but the realization (by universalizing it) of liberalism’s premise and promise that everyone is born and exists free and equal, then the predicament which, according to radical “old-
timers,” haunt lat-criters is nothing more than the promise of liberation we all share. When Lazos-Vargas advocates a “healthy dialogue,” however, she suggests that this embattlement can be productive. Though she does not offer a path, her account of “academic Kulturkampf” suggests at least a guiding question: Either progressive legal (radicals and complex) scholars engage in a battle of ideas which will indicate an alternative to the premises and promises of liberalism or they will remain prisoners of the constitutive liberal dichotomy the rational/irrational—the one deployed in the neoconservative tales of Kulturkampf—which distinguishes between an intrinsically violent “state of nature” and an abstract composite, the body politic.

II. POST-MOMS

Why and how the neo-conservative rewriting of the public/private dichotomy has been so successful is a question at the core of Martha T. McCluskey’s “The Politics of Class in the ’Nanny Wars’: Where is Neoliberalism in the Kulturkampf?” In this piece, Professor McCluskey shows how it results from an artful deployment of public/private dichotomy in an ethico-political account which reconfigures another dear liberal pair, namely culture/economics, in which liberalism’s highest value, freedom, is constructed as a monopoly of the (righteous) individual. Anyone familiar with the trajectory of modern philosophy would not cringe at this unexpected marriage of economy and morality in which the family becomes the site of a moral battle where the contending parts are differentiated according to how they view and behave towards marriage and childbearing/rearing. For one thing, Locke’s proper political subjects—individuals able to conceive and ‘sign-on’ to the social contract—are European (white) males, property-owners, and heads of households. The liberal social (juridico/economic) subject has always sided with the family—if for anything because the family was also his property, though he was not willing to trade it in the market.

What Professor McCluskey’s piece highlights however is not this recent re-enactment of the liberal play. She is concerned with the fact that progressive intellectuals enter the moral battle from a defensive position. Instead of challenging this founding public/private dichotomy, they choose the public, namely the economic, and accept the neoliberals and neoconservatives’ resolution of the signifiers of the Global Matrix—race, gender, class, sexuality, and religion. That is, against progressive agendas that dismiss this separation by establishing that private has always been
public—the victory of 1960s Civil Rights, nationalist, feminist, and youth movements—neo-conservatives embrace their claim but rewrite it within the liberal logic which conceives of the private as individual, as a matter of (subjective) values and preferences. When doing so, they turn the 1980s (cultural, identity) politics of representation on its head by advancing a politics of individual self-representation. With this, neo-conservatives reinstitute the classical social (legal/political) subject in a moral tale that rewrites the Global Matrix when they attribute a ‘failure’ to actualize proper moral (family) values to (racial, gendered-sexual) subalterns’ cultural difference. For this reason, her analysis of Flanagan’s piece published in *The Atlantic Monthly* provides not so much an indictment of the feminist project itself, which has consistently (at least the second wave) focused upon patriarchy, but a version which seeks to keep the feminist (economic) bathwater and the baby too! The inability to recognize the political/economic determinants of their “freedom” results not from the fact that feminism does not acknowledge class and race as producers/signifiers of female social (juridico and economic) trajectories. As we well know, there have been many versions of the feminist project—in the U.S. women of color and third world feminists did not take long to call the attention to their middle-class, white, feminist comrades of their own universalizing tendencies. What Professor McCluskey notes is how the neoconservative rewriting of the “original” liberal figure, the individual, finds its way into feminist discourse. That is, she indicates how feminist discourse resurrects the social subject postmodern critical (feminist, racial, queer, etc.) interventions proclaimed no longer existent when it privileges the Global Matrix as grounds for ethico-epistemological-political engagement. Whether the nanny is an undocumented immigrant from Venezuela, a refugee from Guatemala, or Puerto Rican, in the Global Matrix she belongs in a slot that always precludes her from occupying the position of the “individual.” Hence, no matter how conscious the females she liberates become of the political/economic inequities neo-liberalism re-produces, as long as her employers do so from their position as U.S. white (or otherwise), middle-class females always already individuals, she will always inhabit the mark assigned to social (racial, gendered/sexual, economic) subalterns. The nagging question, of course, is whether and how progressive legal scholarship can advance a mapping of the public sphere which comprehends the global (racial/cultural) subalterns, the ones whose subjection has for the last hundred years or so delimited the position of the proper social subject, the one the notion of juridical universality both presupposes
and institutes. When asking this question I am not intimating that progressive legal scholarship is doomed because it shares in the predicament haunting any ethico-political project circumscribed (enabled/precluded) by the liberal social ontology. As the Brazilian saying goes, the hole is farther down.

Following the path already determined by the context they choose to intervene, each engage the dichotomy itself as the matter at stake, and all hold on to the “/” for without it critique itself would have no sense. For moving towards (re)formulations of the above questions, the papers in this cluster choose to inhabit the “/.” As each displaces this dichotomy, they respond to the challenges the cultural presents to the legal, which is represented as the latest rehearsal as a public versus private war. The public before the private? What is the crit legal scholar to do before this choice? What are the options? Both? And? Either/Or? As each displaces the term Kulturkampf to uncover at the core of the liberal project productive fissures that, instead of rendering it irrelevant, make the critic’s task all the more crucial when the hegemonic ethico-political grammar discourse seeks to erase the dichotomy, not by collapsing the terms or by eliminating difference as the assimilationist strategy predicated, but by highlighting difference and describing the positions each social scientific signifier institutes. Such strategy, as the rhetoric and practices the “faithful freedom-lovers” now deploy against the rest of the planet indicate, renders quite easy the (moral) justification of projects which seek not only to (legally/politically) exclude but to incarcerate or eliminate those global subalterns, the cultural warriors, the neoconservative tale places on the non-valued side of the “/.”
How Equality Became Elitist: The Cultural Politics of Economics from the Court to the “Nanny Wars”

Martha T. McCluskey

I. ECONOMICS AND CULTURE IN RIGHT-WING POLITICS

On the surface, the term “culture wars” appears to capture controversies over the “social” or “moral” order, not the economic order. But “free-market” economic ideology is a key hidden player on the right-wing team in the “culture wars.” In turn, the “culture wars” debate serves that free-market fundamentalism by deploying “morality” both to mask and to legitimate rising economic inequality and the upward redistribution of resources. By turning class into culture, and culture into class, as journalist Thomas Frank argues, Republicans made economic victimization a conservative cause in the 2004 presidential campaign.1

In the late-twentieth-century United States, the “culture wars” intensified along with the right’s power over government, media, culture, and academics. This rightward political movement advanced through two prongs, neoconservativism and neoliberalism, both of which have aimed to undo policies particularly associated with 1960s egalitarian and democratic reform movements. Neoconservativism focuses on culture—restoring traditional ideas of “morality,” “responsibility,” and “community.”2 Neoliberalism focuses on economics—restoring traditional laissez-faire policies of “market efficiency” and “competitiveness.”3

1 Thomas Frank, Why They Won, N.Y. TIMES, Nov. 5, 2004, at 31.
3 See Lisa Duggan, The Twilight of Equality? Neoliberalism, Cultural Politics, and the Attack on Democracy 10 (2003) (“Neoliberalism, a political label retrospectively applied to the ‘conservative’ politics of the Reagan and Thatcher regimes in the U.S. and Great Britain, rocketed to prominence as the brand name for the form of pro-corporate, ‘free market,’ anti ‘big government’ rhetoric shaping Western national policy and dominating international financial institutions since the
In the conventional view, neoconservatives are the primary opponents of the progressive side of the culture wars, with neoliberals as neutral—or even allies—on “social” questions. Although the divide between economics and culture sometimes splinters the right, this divide also creates two prongs that can work to strengthen the right’s grip on politics. By fueling the “culture wars,” the right helps deflect the problem of “class warfare” away from right-wing economic policies and onto egalitarian social policies.

From the Supreme Court to the mass media, the idea of the “culture wars” helps shift blame for elitism onto liberal attempts to disrupt traditional social hierarchies, shifting that blame away from conservative policies that widen both economic class divisions and “social” divisions based on race, gender, sexuality, disability, and religion. For example, Justice Scalia characterized the Court’s equal protection ruling in Romer v. Evans as a decision to take the elite side in the “culture wars,” describing it as part of a pattern where the “lawyer class” protects its right to hand out jobs on the basis of country club membership but refuses to allow the non-elite majority to protect their “traditional sexual mores” against homosexuality. Thomas Frank describes this construction of a cultural elite as a right-wing strategy for seducing “Middle America” into sacrificing its economic interests for illusory “cultural” power:

Vote to stop abortion; receive a rollback in capital gains taxes. Vote to make our country strong again; receive deindustrialization. Vote to screw those politically correct college professors; receive electricity deregulation. . . . Vote to strike a blow against elitism; receive a social order in which wealth is more concentrated than ever before in our lifetimes, in which workers have been stripped of power and CEOs are rewarded in a manner beyond imagining.

In response to the often regressive impact of the “culture wars,” some opponents of right-wing politics advocate turning from culture to economics as the key to reviving progressive law and politics. Progressive legal scholarship in the United States has echoed left-wing activists’ history of frequently dividing over the relative importance of class politics versus “identity politics.”

early 1980s.”); Enrique R. Carrasco & M. Ayhan Kose, Income Distribution and the Bretton Woods Institutions: Promoting an Enabling Environment for Social Development, 6 TRANSNAT’L L. & CONTEMP. PROBS. 1, 5 n.15 (1996) (explaining that neoliberal policies are based on an idea of growth led by the private sector, a political focus on trade liberalization, and minimal state intervention in the market).

5 Id. at 652–53 (Scalia, J., dissenting).
Recently, for example, some have suggested that progressive law reform efforts should turn their focus from “culture” to “economics”: promoting, for instance, universal health insurance instead of gay marriage; class-based rather than race-based affirmative action in higher education; or funding for public education rather than rights for students with learning disabilities.  

But others have responded to the right wing’s success in mobilizing cultural politics on behalf of elitist economic policies by resisting, rather than reinforcing, the class versus culture divide. Challenging liberal and leftist critics of “identity politics,” Lisa Duggan argues:

Neoliberalism was constructed in and through cultural and identity politics and cannot be undone by a movement without constituencies and analyses that respond directly to that fact. Nor will it be possible to build a new social movement that might be strong, creative, and diverse enough to engage the work of reinventing global politics for the new millennium as long as cultural and identity issues are separated, analytically and organizationally, from the political economy in which they are embedded.

For years, activists and scholars focusing on the Global South have astutely and actively resisted right-wing social and economic policies by treating them as interdependent. For feminists focusing beyond North America and Europe, international finance, trade, and economic development policy have long been high on the agenda, so that questions of gender, sex, and family are questions of global economics as well as of culture and identity.  

Gayatri Spivak, for example, critiques the erasure of economics from cultural politics and cultural studies, but also warns against the old economic determinism that ignores the cultural politics of economics—such as the fact that women form much of the international surplus army of labor in the contemporary global economy.  

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9 See Mark Kelman & Gillian Lester, Ideology and Entitlement, in Left Legalism/Left Critique 134 (Wendy Brown & Janet Halley eds., 2002).
10 Duggan, supra note 3, at 5 (emphasis omitted).
been a particularly rich source of discussions of the connections between free-market economic policies and ideologies of race, gender, and nationality. Elizabeth Iglesias, for example, views neoliberal policies as reinforcing the anti-democratic hierarchies of colonial and neocolonial market structures.

II. ECONOMICS AND CULTURE IN LAW

Nonetheless, the connections between neoliberalism and neoconservativism often remain obscure, partly because the divide between economic politics and cultural (or identity) politics is deeply embedded in the broader ideology of classical liberalism that grounds mainstream United States jurisprudence and policy analysis (whether politically “liberal” or “conservative”). In this scheme, laws
regulating race, gender, religion, family form or sexual orientation are primarily about the social or moral order. In contrast, laws regulating business, jobs and international finance are about the economic order.

In the mainstream view, questions of law and economics require understanding market forces that are at least partly separable from culture and ideology. The well-funded law and economics school of thought purports to emphasize free contract, distinct from ascribed status, and to evaluate policies through mathematical calculations of costs and benefits, distinct from religious or moral judgments. The conventional wisdom assumes that questions of “economic efficiency” (at least in theory) involve objective, scientific, universal principles conducive to national and international harmonization in the interest of all. In contrast, the conventional wisdom assumes “cultural” issues in law generally involve subjective, inevitably contested moral questions that cannot be resolved without privileging the beliefs of some people over those of others.

This mainstream view not only divides economics from cultural politics, but often helps present this divide as a hierarchy that privileges the role of law in promoting “markets” and marginalizes the role of law in producing and remediying race, gender, sexual, religious, or disability subordination. This scheme reflects and reinforces a political climate where policies promoting social equality get ridiculed as “political correctness,” but policies promoting economic inequality get taken seriously as “economic correctness” (in the pseudo-scientific guise of “efficiency”).

differ over how to apply classical liberalism—where to draw the lines separating state from family, for example. See id. at 6–7.

See, e.g., ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 3–23 (2d ed. 1997) (portraying economic analysis of law as a scientific and mathematical approach to evaluating policies).

The idea of objective “efficiency” separate from subjective “equity” was a product of the political and historical effort to legitimate neoclassical economics as a science, but in practice the distinction between efficiency and equity can only be made based on faith or politics, not science. See Martha McCluskey, Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State, 78 IND. L.J. 783, 788–89 & nn.16–21 (2003) [hereinafter McCluskey, Efficiency and Social Citizenship].

Recall *Plessy v. Ferguson*, the infamous 1896 opinion that authorized more than a half-century of American apartheid by upholding a state law requiring railroad cars to be divided into “white” and “colored” sections. By concluding that this racial segregation was a “social” matter, outside of the state or market, the Supreme Court was able to dismiss the resulting racial inequality as too contingent and personal to be a serious constitutional problem. In the Court’s view, racial segregation is only a badge of inferiority if “the colored race chooses to put that construction upon it.” At the same time, by describing the racial inequality as “social,” the Court was able to portray it as too essential and inevitable to be susceptible to legal intervention. *Plessy* depicted the racial segregation in question as driven by natural physical differences, “racial instincts,” and “general sentiment”—forces that the law is “powerless to eradicate.” The Court assumed that “social” equality must await changes in “natural affinities” free from judicial intervention.

A century or so later, Justice Scalia makes similar moves when he divides culture from political and economic rights in *Romer v. Evans* and *Lawrence v. Texas*. By describing those cases as battles in a “culture war,” Justice Scalia shifts the focus from government subordination to private preference and personal taste. For example, in his *Lawrence* dissent, Justice Scalia describes the majority’s decision to strike down Texas’ sodomy law as a product of “law-profession culture,” which is driven by a “homosexual agenda,” and as a decision to “[take] sides in the culture war” beyond the Court’s proper role of making sure “that the democratic rules of engagement are observed.” Like the Court’s opinion in *Plessy*, Justice Scalia’s invocation of culture makes the inequality appear too contingent but at the same time too fixed and universal to be amenable to

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19 163 U.S. 537 (1896).
20 *Id.* at 552.
21 *Id.* at 544, 551.
22 *Id.* at 551.
23 *Id.*
24 *Id.*
25 *See* 517 U.S. 620, 636 (1996) at 636 (Scalia, J., dissenting) (characterizing Colorado’s constitutional amendment banning antidiscrimination protection for gay men or lesbians as an issue of “Kulturkampf” not prejudice).
26 *See* 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (admonishing the Court for having departed from the role of “neutral observer” and for having “taken sides in the culture war” in its decision to strike down a Texas law criminalizing same-sex sodomy).
27 *Id.* (Scalia, J., dissenting).
28 *Id.* (Scalia, J., dissenting).
constitutional redress. Justice Kennedy’s majority opinions in both *Romer* and *Lawrence*, in contrast, echo Justice Harlan’s dissent in *Plessy* by linking the state laws at issue to questions of broad and systemic political, legal, and market power.\textsuperscript{29} Likewise, concurring in *Lawrence*, Justice O’Connor notes the impact of the criminalization of same-sex sodomy on employment, housing, and family rights.\textsuperscript{30}

By turning caste into culture, the reasoning in the *Plessy* majority and in Justice Scalia’s dissents serves right-wing economic as well as cultural politics. It is true that “free market” advocates’ anti-government ideology may lead some to reject Justice Scalia’s (and *Plessy*) embrace of government-imposed “culture.” But those libertarians concerned with minimizing government control of economic elites likely will find plenty to celebrate and support in Justice Scalia’s (if not *Plessy*) construction of a cultural realm that can take the blame for problematic political economies away from both government and market. Both the “free market” and cultural branches of the right wing often work together to gain from (and finance) an overarching message that construes individual freedom primarily as government deference to a romanticized idea of nineteenth-century tradition in both “culture” and “market.”\textsuperscript{31}

In contrast, opponents of right-wing cultural politics tend to define individual freedom as the ability to express “cultural” preferences without restraint from external authority, whether majoritarian, paternal, natural, or supernatural. But that view of cultural liberalism often appears to present a tough trade-off for progressives. Social equality seems to require protecting individual freedom in cultural matters. On the other hand, economic equality seems to require restricting individual freedom in market matters.\textsuperscript{32} As a result, progressives tend to support freedom from government

\textsuperscript{29} Indeed, Justice Kennedy opened his opinion in *Romer* by quoting Justice Harlan’s dissent in *Plessy*, saying that “the Constitution ‘neither knows nor tolerates classes among citizens.’” *Romer*, 517 U.S. at 623 (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

\textsuperscript{30} *Lawrence*, 539 U.S. at 582 (O’Connor, J., concurring).


\textsuperscript{32} This conundrum is behind liberal jurisprudence’s obsession with reconciling the post-*Lochner* constitutional rejection of economic rights with the Warren Court’s constitutional embrace of other rights.
regulation in the interest of individual choice on cultural or moral issues, but to oppose what might seem to be a comparable individual freedom of choice on economic issues.

In short, that framework appears to give progressives a choice between, on the one hand, an old paternalistic order based on cultural status and coercion that includes economic protection, or, on the other hand, a new order based on contract and freedom in place of status that promotes individual economic risk and responsibility. For example, in the political and legal debate over the sodomy law challenged in Lawrence, progressives joined forces in the cultural wars with right-wing economic libertarians (such as the Cato Institute) to advocate for individual freedom from government regulation.\textsuperscript{33} That coalition, however, risked lending strength to an ideology that makes eliminating the New Deal’s economic egalitarianism the leading means to achieving greater “social” equality free from status markers of race, gender, and sexuality. The globalized free-market economy is another example of an apparent tough trade-off for progressives between cultural and economic equality. In the conventional wisdom, neoliberal free-trade policies risk greater economic inequality, but supposedly bring openness in culture, which dislodges traditional social stratification and moral regulation.\textsuperscript{34} After the 2004 presidential election, some argued that Democrats can only advance progressive economic policies if they back off from supporting liberal moral policies (like gay marriage)\textsuperscript{35}—recalling the earlier New Deal compromise that won economic security (for some) by acquiescing in the “social traditions”


\textsuperscript{34} See, \textit{e.g.}, THOMAS L. FRIEDMAN, \textit{THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION} 207–09 (1999) (providing anecdotes of how global capitalism expanded opportunities for some Middle Eastern women to escape restrictive religious, gender, and family traditions).

\textsuperscript{35} See, \textit{e.g.}, Jonathan Freedland, \textit{Soul Searching on the Left . . . and a softening of the right?: Democrats Can’t Win Until Their Politics Are Born Again}, \textit{GUARDIAN} (London), Nov. 6, 2004, at 24 (arguing that the Democrats will have to meet “red state” voters at least halfway on moral issues); Jesse Joynes, Letter to the Editor, \textit{Christian Values Don’t Fit with Democratic Party}, St. Petersburg Times (Fla.), Nov. 6, 2004 (arguing, from his perspective as a low-income Christian “working man” who voted for Bush, that if the Democrats cannot adopt “Christian” values they should “abandon all social policy and go back to representing solely the economic interest of working people”), \textit{available at} http://www.sptimes.com/2004/11/06/Opinion/Christian_values_don.shtml (last modified Nov. 6, 2004).
of the old Southern Confederacy.  

But while the left agonizes over trade-offs between class politics and cultural politics, and between government intervention and personal freedom, the right works to have it both ways. The liberal idea of an inevitably tragic choice between individual freedom or government intervention is misleading, because it begs the questions of what government intervention (and on whose behalf) counts as individual freedom, and which individual rights are construed as government intervention—which in turn depend on the question of what counts as “public” and what counts as “private.” Identity and status—ideas about race and gender in particular—have long shaped the answers to those questions.

The right’s recent political successes have been facilitated by linking free-market ideology with neoconservative cultural ideas so that “individual freedom” gets associated with policies that promote both economic and social hierarchies in the popular imagination. The Olin Foundation, formed in 1977, has since “invested” $50 million in law and economics scholarship as part of a broader “crusade” aimed at promoting “non-egalitarian” ideology, with the explicit purpose of creating cultural or moral, as well as economic change. The rhetoric of economic libertarianism is saturated with references to cultural politics. For instance, economic libertarians often use the phrase “the nanny state” to disparage “liberal” welfare and regulatory policies, thereby suggesting that freedom from government control is linked to the restoration of a “proper” hierarchy of gender, race, and class. Economic libertarians and

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36 See Robert C. Lieberman, Shifting the Color Line: Race and the American Welfare State (1998) (analyzing how New Deal social programs were structured to maintain white supremacy); Leon Wieseltier, The Elect, New Republic, Nov. 22, 2004, at 12 (“If this were 1960, Karl Rove would have arranged referenda on segregation.”).


social conservatives work together through lavishly funded think tanks and law firms to challenge the welfare and regulatory states as government “intervention” that detracts from both personal and political strength.\textsuperscript{40} For example, moral and economic arguments worked together to promote welfare reform as a problem of a “cycle of dependency” needing the solution of more “personal responsibility.”\textsuperscript{41}

But when neoconservative cultural arguments threaten progressive economic policies, advocates of progressive policies do not need to make a tough trade-off between culture and class. Progressives can do more to reframe the debate about the “culture wars,” so that “social” inequality and “moral” questions no longer appear separate from the political economy, and so that economic equality no longer appears antithetical to cultural freedom.

III. Economics and Culture in Popular Culture

Within a dominant ideological framework that divides the “social” and “political” from the “economic,” increased media attention to America’s economic inequality may nonetheless work to reinforce both neoconservative and neoliberal ideas and policies. As one example that might serve as a cautionary tale about the problems with this new focus on class conflict over cultural conflict, consider the cover story of the \textit{Atlantic Monthly}’s March 2004 issue, \textit{How Serfdom Saved the Women’s Movement: Dispatches from the Nanny Wars}.\textsuperscript{42}

Author Caitlin Flanagan, who opens the essay with her own experience as a new mother balancing a baby and a writing career, discusses the limits of feminist efforts to reform the gendered structure of work and family. She summarizes writer Naomi Wolf’s approach to feminist motherhood: “She had wanted a revolution; what she got was a Venezuelan.”\textsuperscript{43} Empathizing with Wolf, the author dismisses feminist debates about the gender politics of housework as

\textsuperscript{22} (Olin Foundation leader outlining his political and philanthropic project of challenging “‘big mother’ down in Washington” who treats Americans like “self-indulgent infants who need a federal nanny to look after us at every waking moment”).

\textsuperscript{40} \textsc{Stefancic & Delgado}, supra note 31, at 83–95 (discussing how conservative support for restrictive welfare reform drew on both economic libertarian and corporate interests, as well as on cultural and religious conservatives, to demonize welfare and welfare recipients).

\textsuperscript{41} See McCluskey, \textit{Efficiency and Social Citizenship}, supra note 17, at 807–32.


\textsuperscript{43} \textit{Id.} at 126 (discussing Naomi Wolf, \textit{Misconceptions: Truth, Lies, and the Unexpected on the Journey to Motherhood} (2003)).
outdated and silly. After all, Flanagan explains, neither she nor her husband have ever changed their own bedsheets. In the author’s view, ivory-tower feminist theory urges privileged young women to challenge the prevailing gender order, but feminists in the real world instead ease the burdens of women’s inequality by accepting and exacerbating class and race inequality. The essay describes this development in feminism as a divine economic intervention. Like “magic” from a “fairy godmother,” the “forces of global capitalism” delivered to the doors of affluent white American families an abundant supply of immigrant women of color eager to change diapers and clean toilets for low wages.

The lesson of this Atlantic Monthly story is that feminists should give up their “fixation” with “ending the mommy wars” and promoting “work-life balance” in favor of attention to what the author suggests is the more “real and heart-rending struggle of poor women and children.” As the author explains it, professional-class mothers have no serious material complaints about gender oppression—since “we” can turn to the plentiful supply of immigrant Latina nannies and maids to do what she calls the “shit work” at “our” convenience and under “our” control. Instead, the problems of “feminist working mothers” are simply a matter of inevitable tragic trade-offs between different choices for personal fulfillment: kids or career; and the moral angst of using race and class privilege to make that choice a bit less vexing.

44 See id. at 113 (“[B]ecause of these petty, almost laughably low concerns—the unmade beds, the children with their endless questions, the crumbs and jelly on the counter, the tendency of a good fight over housework to stop the talking and the kissing and the, well, you know—one of the most profound cultural revolutions in American history came perilously close to running aground.”).
45 Id. at 111 (dismissing Alix Kates Shulman’s 1970 essay on the marital division of household labor and adding that she and her husband also delegate to a nanny chores like scrubbing the bathtubs, dusting the bookcase, mopping the floors, and washing her sons’ laundry).
46 See id. at 126 (describing Naomi Wolf’s questioning of “a foreordained hierarchy of class and gender” and her ideal of egalitarian parenthood as unrealistic dreams “formed while tripping across green New Haven quadrangles on her way to feminist-theory classes”).
47 See id. at 114 (describing the politics of racial and economic justice as personal moral “equivocations” that “simply evaporated”).
48 Id. at 115.
49 Id. at 128.
50 See id. at 126–27 (describing the author’s own disillusionment at finding out motherhood and homemaking involved more than “lying on the couch reading and drinking coffee and talking on the telephone” before she found a nanny to restore her leisure).
51 See id. at 128 (insisting that “an upper-middle-class woman” must suffer “agony”
However, this argument for turning moral or political concern from gender to class does not aim to get Naomi Wolf and similarly affluent white American women to follow or support their Latina sisters in revolution, or even in Venezuelan-style economic reforms. To the contrary, the author criticizes feminist efforts to unite women across class lines as elitist fantasies: American mothers, she claims, want personal domestic servants, not universal public day care. The author concludes that feminists should simply focus on getting affluent women to make the current status hierarchy work better by complying with the minimal legal rules for household help. Her solution? Pay those Social Security taxes, ladies!

In contrast to Mary Romero’s careful analysis of the complex interdependence of race, class, and gender oppression in the nanny trade, Flanagan’s essay frames the problem as liberalism’s traditional trade-off between cultural politics and class politics. It presents gender equality as the reason for nannies’ economic oppression (and mostly drops race out of the picture). In Flanagan’s view, the movement of privileged women into the professional workplace, made possible by feminism, created the demand for low-wage domestic servants. With women’s freedom to work outside the home and “anguish” if she is separated from her child and denied the chance to go to “Mommy and Me” classes, due to that mother’s selfish and spoiled inability to accept that she cannot have it all).

52 Venezuela, in particular, is currently an important site of political struggle between the free-market (neoliberal) economic approach promoted by the United States and a more progressive approach favoring increased funding for education, health, public utilities, housing, and agricultural development. See Silene Ramirez, *Venezuela Spurns IMF, Says Its Recipes Not Needed*, REUTERS, Apr. 25, 2004, available at www.arena.org.nz/venimf.htm; Brian Ellsworth, *The Oil Company as Social Worker*, N.Y. TIMES, Mar. 11, 2004, at W1 (describing how the Venezuelan government is using oil profits to fund programs benefiting the nation’s impoverished majority contrary to the advice of the private multinational oil industry); see also Duncan Campbell, *Famous Names Speak Up for Chavez in Venezuela Poll*, GUARDIAN (London), Aug. 5, 2004, at 17 (reporting on statement of support from writers, academics, politicians, and artists around the world on behalf of Venezuelan President Hugo Chavez and his policies).

53 See Flanagan, *supra* note 42, at 124–25 (asserting, “get a bunch of professional-class mothers together, and they will freely admit that day care sucks; get a nanny,” and citing an advice book focusing on elite business school graduates).

54 See id. at 128 (giving author’s solution to “upper-middle-class working mothers[’]” guilt); id. at 122–23 (criticizing arguments that Zoe Baird’s failure to pay her nanny’s Social Security taxes should not have been a barrier to Baird’s appointment as Attorney General).

comes women’s freedom to exploit workers and to be exploited as workers. The answer to this tough trade-off, the essay concludes, is to adjust the trade-off slightly: affluent working mothers should stop demanding even more independence and freedom from the costs of kids and family, and should instead support an expanded vision of domestic paternalism that includes better treatment of dependent servants.

But a closer reading of the story shows that the economic inequality it confronts is linked to continued political pressure for gender inequality, not only to demands for gender equality. It is not just feminist pressure for women to be equal economic actors in the workplace that fuels affluent women’s demand for nannies, but also traditional gender, race, sex, and class-based ideas about domesticity and motherhood. The essay mentions two primary reasons affluent women reject professional day-care centers in favor of in-home nannies. First, nannies enhance affluent women’s domestic authority in a way that maintains gendered separate spheres—the child is in the home, and the hired caregiver is like family. Second, affluent women need nannies because their 24/7 professional jobs require that they hire caregivers who are also available to work long, unpredictable hours.

Although the story claims that “serfdom saved the women’s movement,” it could also be read to support the conclusion that this domestic “serfdom” saved the patriarchy. Flanagan’s story carefully excludes husbands and fathers from the picture she paints of child care and housework in the homes of the affluent, married, white women with whom she identifies, and she embraces without discussion the assumption that domesticity and parenthood are distinctly female responsibilities, passions, and agonies. Moreover, she identifies the feminist movement with white, professional, American women, erasing from view any consideration of, for example, feminist organizing by Latin American women who seek alternatives to migrant domestic labor.

Finally, Flanagan readily buries the evidence of racial hierarchy in the nanny trade under the rubric of economic class, which she in turn distances from more recent political struggles by using the perhaps quaint-sounding term of “serfdom.” If she had more boldly

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56 See Flanagan, supra note 42, at 109.
57 Id. at 124 (citing advice book for professional women noting that the need to spend time transporting a child to and from day care could be obviated by having an in-home nanny).
58 Id. at 109.
concluded that not “serfdom” but “racism” or “white supremacy” saved the women’s movement, perhaps the essay would appear less cute and comfortable in its acquiescence in a hierarchical status quo. Although she notes that the nanny trade consists largely of white-skinned women hiring dark-skinned women, Flanagan fails to discuss whether affluent white Americans choose immigrant nannies over day care not just to conserve time, money, and sentimental attachment to at-home motherhood, but also to maintain and enhance a racialized division of domesticity, work, and power. As the ideology of affluent American womanhood changed to center on mother–child bonding in the late twentieth century, and as domestic civil rights laws increased the economic power of some black American workers, American families largely replaced African American domestic servants with Latina women. Studies of the nanny trade report a recent tendency among white affluent Americans to romanticize the maternal qualities of Latina immigrant women and to identify them with a simple, loving, and docile peasant culture.

When Flanagan reports that “you can take your pick” of nannies available to immediately start caring for your child, she notes that the current casualness with which nannies are traded among affluent families reflects “slaveholding traditions.” She discusses this commodification as a gender problem devoid of racial ideology. She worries that the nanny trade threatens the affluent woman’s identity as a mother (even as it reinforces it) because the mother risks selling part of her baby’s love when she buys a nanny’s care. Dorothy Roberts, however, explains that the ideology of American

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59 See Joan Williams, Unbending Gender: Why Family and Work Conflict and What To Do About It 36 (2000) (noting how both unpaid mothers and paid domestic servants in the 1930s and 1940s focused their work on maintaining the home rather than on entertaining or educating children).

60 See Barbara Ehrenreich & Arlie Russel Hochschild, Introduction to Global Woman: Nannies, Maids and Sex Workers in the New Economy 1, 6 (Barbara Ehrenreich & Arlie Russel Hochschild eds., 2002) (reporting that sixty percent of domestics were African Americans in the 1940s but that a majority now are Latina and many are foreign-born).

61 See Arlie Russell Hochschild, Love and Gold, in Global Women, supra note 60, at 15, 23–25 (showing that this maternalism is not a natural cultural trait of certain immigrant groups, but is constructed in response to the demands of affluent American families); see also Rhacel Salazar Parreñas, Servants of Globalization: Women, Migration and Domestic Work 177–79 (2001) (discussing the intersection of race and class differences in the demand for black, Filipina, and Latina domestic labor).

62 Flanagan, supra note 42, at 127.

63 Id. at 127–28.
motherhood has long relied on and reproduced a racial division of labor in which “menial” mothering work is identified with dark-skinned women and “spiritual” mothering with white women. Flanagan describes her own decision to enlist a nanny to fulfill her dreamy ideal of at-home mothering as a crisis of her own sense of entitlement to be free from what she considers menial work. “Wasn’t I designed for more important things than putting away Lego blocks and loading the dishwasher? I was. It was time. Cherchez la femme.” The story is softened with self-deprecating irony that makes it easier for Flanagan to trivialize the question of whether the sense of privilege that incited her nanny search was simply a “feminist-type, really cheesed-off kind of funk” or also a feeling of white racial entitlement.

The essay’s misleading focus on gender equality as the central cause of nannies’ economic inequality ironically undermines its call for more attention to class oppression. This “nanny wars” essay turns economic equality from a public policy issue into a personal moral problem. The author presents affluent women’s demand for more child-care support from employers or the government as selfish whining or foolish idealism driven by elite academic culture or individual character, divorced from politics or economics. Following this premise, the author concludes that the solution to the child care problem is not subsidized day care but a little more self-sacrifice, empathy, and charity from affluent women toward the less privileged “others” whose domestic services they employ. That answer, however, reinforces the economic and racial inequality it claims to redress by affirming affluent white women’s entitlement to exercise their benevolent authority as the best way to ease the inevitable burdens on struggling subordinate “others.” The essay ignores the question of whether the specific small step it proposes—increased compliance with Social Security tax laws—requires going beyond the moral sentiments of privileged women to include structural or public measures such as stronger government enforcement of tax and labor regulations or reforms in immigration laws that would give migrating workers more bargaining power over job benefits.

By criticizing the “nanny wars” as a cultural battle apart from economic and political conflicts, the essay takes the heat off class

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65 Flanagan, *supra* note 42, at 126.
66 Id. at 127.
67 Id.
politics. Its discussion of class obscures from view the self-interested actions of fathers, wealthy capital owners, shareholders and directors of global corporations, or politicians who shape international financial institutions, putting off the table any possibility of their moral obligations and responsibility to sacrifice some gains for the well-being of others. Affluent mothers—along with the feminist academics or writers who try to influence them—are the only moral agents in the story. Employers’ demands for more profit or for workers available eighty hours a week, for instance, are taken for granted as natural forces, not selfish interests.

The Atlantic Monthly essay depicts the nanny’s economic disadvantages as natural, inherent in her status as a racialized other who appears to have no right or power to make her own demands for better choices about balancing work and family. Instead, the nanny seems to be a commodity passively imported by the international economy to save the affluent American family. And conversely, the author’s fairy godmother explanation of how affluent white, heterosexual, American families got “their” nannies seems to ground those families’ race and class privileges in divine right. By depicting this economic inequality as a force beyond the reach of human politics, this narrative makes affluent Americans’ moral obligations seem limited to personal decisions to obey the tax laws, rather than public actions to oppose the neoliberal policies of structural adjustment and privatization that impoverish so many Latin American women.68 And by suggesting that economic disadvantage is a mysterious attribute of racialized others, rather than a government strategy that enriches wealthy capital owners at the expense of most workers, this narrative helps prevent affluent American women from considering how neoliberal policies can also put them at risk. After all, some of their nannies were also formerly middle-class mothers and wives with professional careers.69

Flanagan’s essay fills an important gap in mainstream media discussions of feminism by highlighting the class and race bias of many well-publicized commentators on motherhood. But by

69 See Hochschild, supra note 61, at 16–18 (noting that Filipina women working as nannies in the United States tend to have professional training and job experience in fields such as nursing, teaching, and administration).
opposing class oppression to gender politics, the essay joins these writers in taking broader questions of political economy out of gender politics. Flanagan reinforces neoliberal economic ideology by making class inequality appear to be primarily a matter of culture, rather than of law and policy. Why is it that mainstream American popular media represents feminists as affluent white professionals who talk about the joys (or angst) of motherhood, instead of the evils of the International Monetary Fund (IMF); and that the prevailing images of Latinas portray them as domestic servants who don’t talk much about either gender equity or the IMF? Neoliberal policies promoting increasingly concentrated corporate control of the media are part of the explanation.

IV. INTEGRATING ECONOMICS, POLITICS, AND CULTURE

The Atlantic Monthly essay, like much legal scholarship, treats the problem of economic inequality as a problem separate from the central mission of state and market. Ironically, the failure to challenge the liberal tradition dividing economics from culture and from the state helps to make class differences appear to be a problem of “culture.” The market’s presumed freedom from traditional status hierarchy or state-enforced moral prescriptions helps make economic inequality appear to be a problem of private preferences or personal character—and therefore relegated to “culture.” Mainstream law and policy analysis wrongly treats economic inequality as a question of “redistribution,” a moral question distinct from questions of economic efficiency or basic political rights. The “Nanny Wars” essay reflects this framework by addressing economic class as a problem of personal charity or morality by the affluent toward those on the losing end of the global market’s “magic.”

To transform the class politics of the nanny wars in particular, or the cultural wars more generally, advocates of progressive economic policy will need to go further to challenge the economic and cultural ideologies that work in concert to present the privileges of current market winners as generally the result of neutral public policy,

70 See Melissa Block & Joel Rose, New Report Says Characters on Prime Time Television Shows Remain Markedly Less Diverse Than the Nation as a Whole (NPR radio broadcast, Apr. 21, 2004) (reporting on study by advocacy group, Children Now, finding that Latino and Latina characters on television are four times more likely than characters of other races to be portrayed as domestic workers).

71 See C. EDWIN BAKER, MEDIA, MARKETS AND DEMOCRACY (2002) (analyzing impact of media deregulation and free trade on democracy and diversity).

72 See McCluskey, Efficiency and Social Citizenship, supra note 17, at 787–88 (criticizing the distinction between efficiency and redistribution).
virtuous morality, and divine justice. Perhaps a progressive politics that integrates class and culture could strive to turn around the “nanny state” epithet, making the idea of “nannies” gaining real power in state, market, and family not ridiculous or dangerous but essential to democracy, freedom, and justice.
“Kulturkampf[s]” or “fit[s] of spite”?:
Taking the Academic Culture Wars Seriously

Sylvia R. Lazos Vargas

INTRODUCTION

Polarization and heated debate within legal academia are nothing new. Some might argue that vigorous contentiousness, even if not always civil, is essential to a healthy intellectual culture. Others would note that lawyers, legal academics especially, are a highly contentious bunch with a reputation for aggressive behavior.¹

Heated debates between traditionalists and new emerging jurisprudential movements have been part of modern legal academia. Other notable jurisprudential battles include the exchanges between the defenders of classical legal theory and the legal realists in the 1930s through late 1950s. These were followed by the battles between the legal realists and legal process theorists in the 1940s and late 1950s. The legal process school, in turn, spurred a counter-critique by the law and society movement of the 1960s; then followed critical legal studies (CLS), feminist jurisprudence, Critical Race Theory (CRT), and last but not least, law and economics in the 1970s. Fifteen years ago, from his podium as Dean of Duke Law School, Paul Carrington suggested that “nihilist teachers,” a reference to CLS practitioners, had “an ethical duty to depart the law school . . . .” In the debate that followed, Dean Carrington was accused of censorship

¹ Justice Myron Leavitt Professor of Law, University of Nevada–Las Vegas, William S. Boyd School of Law. Thanks to Jean R. Sternlight for her insightful comments.

² I am paraphrasing from Justice Scalia’s opening line in Romer v. Evans, 517 U.S. 620 (1996), where he commented in dissent: “The Court has mistaken a Kulturkampf [culture war] for a fit of spite.” Id. at 636 (Scalia, J., dissenting).

³ See Paul D. Carrington, Of Law and the River, 34 J. LEGAL EDUC. 222, 227 (1984). He defines nihilists as people who believe that “law is a mere deception by which the powerful weaken the resistance of the powerless.” Id. (citing Roberto Mangabeira Unger, The Critical Legal Studies Movement, 96 HARV. L. REV. 561 (1983)).
and intolerance.\(^4\) Dean Carrington’s defenders eventually pled for the academic freedom to express such views.\(^5\) Meanwhile, CLS as a jurisprudential movement has principally gone international, and in the United States only a handful of scholars continue to explore CLS.

Fundamentally, this Article asks whether strife and disagreement are a necessary part of academic discourse. Part I describes the academic Kulturkampfs aimed at CRT that have taken place in the last ten years both outside of and within the CRT movement.\(^6\) Part I particularly examines what it is that academics are actually fighting about, whether the debate is actually overly personal, and whether these “fits of spite” are a part of the necessary conflict of major intellectual movements that are required to advance the collective knowledge. Describing the past and ongoing academic Kulturkampfs is a necessary first step to understanding whether the divide can be bridged and whether the conflict that we experience might lead to the better production of knowledge.

Part II further analyzes what is causing the division in the ongoing academic Kulturkampfs. Scholarship shrouds the differences in seemingly neutral terms, but much of the struggle is fueled by personal concerns. With respect to outsider critiques of CRT, the sources of strife can be reduced to three central questions. First, do whites, in particular men and heterosexuals, oppress minorities and women? Second, are racism, sexism, and homophobia so endemic that they have become permanent fixtures in American society? Finally, how do you make objective judgments of others in a world where neutrality and objectivity are suspect? Kulturkampfs also play out with insider critiques. Recently, we have seen struggles about who defines the discipline of CRT, and seen reactions to the assimilationist–separationist dilemma. Some of the questions cannot be answered, or the differences bridged, but we can ameliorate anxieties by being more exact and careful in how we differ. While resolution may not be possible, it is important to identify the fundamental gaps as well as areas of common ground.

With the democratization of legal academia to include law

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\(^4\) For an overview of this exchange, see generally David A. Kaplan, *A Scholarly War of Words over Academic Freedom*, NAT’L L.J., Feb. 11, 1985, at 1; and “Of Law and the River,” and of Nihilism and Academic Freedom, 35 J. LEGAL EDUC. 1 (1985) (various authors), which documents revealing exchanges between Dean Carrington and CLS and other liberal scholars (hereinafter “Of Law and the River”).

\(^5\) “Of Law and the River”, supra note 4 passim. Dean Carrington currently devotes the bulk of his scholarship to alternative dispute resolution, not to jurisprudence.

\(^6\) For the sake of convenient nomenclature, I will refer to CRT, LatCrit, and APIA critical studies collectively as CRT.
professors of different genders, races, and sexual orientations has come a loss of community, cohesion, and coherence. But what has been gained has been a more democratic and inclusive community. To believe that academics can again speak with a unified voice is no longer possible. Instead of despairing, legal academics must come to accept a new order in which disagreement is a constant. In this new order, the way in which legal academics choose to disagree will be just as important as the merit of their ideas.

I. THE MANY FLAVORS OF ACADEMIC KULTURKAMPF

Legal academia's version of the culture wars is getting so shrill that it has become difficult to tell whether one is experiencing an aggressive exchange, colored with some occasional “fit[s] of spite,” or whether legal academia is about to become prey to a divisive “Kulturkampf.” In the last decade and a half there have been at least four eruptions of academic Kulturkampfs. Each in its own way has left its mark on the further development of scholarship and the individual jurisprudential movements. This Part examines these four eruptions.

A. Vanilla Versus Chocolate: Neo-Traditionalists Versus the Race Crits

Professors Farber and Sherry’s publication in 1997 of *Beyond All Reason* touched off a high profile round between the race crits and the neo-traditionalists. In their book, the authors restate for popular consumption the critiques they had previously published in law review articles. Even though *Beyond All Reason* contains nothing new, this repackaged missive had greater impact, as measured by the frequency with which it has been engaged, having been reviewed by close to a dozen reputable scholars. In addition, it prompted high-profile bashing by prominent judges, reputable news media, and legal commentators.

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8 For earlier just as withering critiques of CRT, see generally Arthur Austin, *The Empire Strikes Back: Outsiders and the Struggle over Legal Education* (1998); Richard A. Posner, *Duncan Kennedy on Affirmative Action*, 1990 Duke L.J. 1157, 1159–60 (attacking CRT on the ground that it is not “real” scholarship and does not deal with appropriate legal concerns); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 Geo. L.J. 251 (1992) (distinguishing between forms of CRT narratives that are more or less helpful to understanding difficult constitutional dilemmas).  
enjoyed a higher profile than other equally blistering critiques might be that these are liberal scholars, and their criticism was more notable because it comes from quarters where support might have been expected.10 As well, they are two highly regarded and well-published constitutional law scholars teaching at top law schools.

The attacks unleashed on CRT as a result of the publication of Beyond All Reason were scathing. Judge Posner, in his book review essay published in The New Republic, took the occasion to call all critical scholars the “lunatic fringe” and critical race scholars “whiners” and the “lunatic core.”11 In his New York Times book review, Judge Alex Kozinski of the Ninth Circuit accused “multiculturalists [of] rais[ing] insuperable barriers to mutual understanding.”12 The Wall Street Journal published an essay asserting that feminist jurisprudence and CRT were “antithetical to the very notion of law” and warning lawyers to be wary of the “mediocre legal scholars” now inhabiting law schools who teach that “American society is

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10 Accord Richard Delgado, On Telling Stories in School: A Reply to Farber and Sherry, 46 VAND. L. REV. 665, 668 (1993) (characterizing Farber and Sherry otherwise as “serious and careful commentators” and “well-intentioned” and therefore regarding the task of correcting their “thematic” errors as a necessary one).

11 See Posner, The Skin Trade, supra note 9, at 40; see also id. at 45 (“[C]ritical race theorists come across as whiners and wolf-criers.”); id. at 42 (“[C]ritical race theorists teach by example that the role of a member of a minority group is to be paid a comfortable professional salary to write childish stories about how awful it is to be a member of such a group.”). Tellingly, Professor Posner’s most in-depth analysis of critical race theory is his twenty-two page discussion of Patricia Williams’ narratives in Alchemy of Race and Rights in his almost 600-page opus, Overcoming Law. See Richard A. Posner, Overcoming Law 368–84 (1996) (discussing Patricia J. Williams, Alchemy of Race and Rights (1991)).

12 See Alex Kozinski, Bending the Law: Are Radical Multiculturalists Poisoning Young Legal Minds, N.Y. TIMES, Nov. 2, 1997, at 46 (reviewing Farber & Sherry, supra note 7). Kozinski also accuses critical race theorists of conspiring in the “judicial appointments” “game” of “picking judges who will enshrine the right policy into the Constitution.” Id.
pathologically racist and sexist . . . .”13 In The New Republic, Jeffrey Rosen argued that Johnnie Cochran was an example of an “applied critical race theorist” when he “shameful[ly]” played the “race card” in the O.J. Simpson trial.14

These critiques are characterized by their highly combustible quality. Informed accounts in the popular press of the debate between the new crits and the neo-traditionalists were rare to nonexistent. I could only locate one article in the major newspapers that attempted to present both sides of the debate.15 Most of the popular press articles carried inflammatory titles, such as Law’s Racial Academics Get Thrashing They Deserve,16 An Academic Theory Threatens the Foundations of the Law,17 and Danger: Critical Race Theory Approaching from the South.18

Not surprisingly, these high-profile barbs sparked a series of counter-volleys. In a 1999 Minnesota Law Review symposium, “Essays in Response to Beyond All Reason,” critical race scholars Jerome Culp and John Calmore charged that Farber and Sherry lacked good faith and had mischaracterized CRT.19 But each went further. Professor

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15 See, e.g., Neil A. Lewis, Black Scholars View Society with Prism of Race, N.Y. TIMES, May 5, 1997, at A11 (interviewing or quoting Jeffrey Rosen, Dan Farber, and Suzanna Sherry as well as Tanya Lovell Banks, Anthony Cook, and Patricia Williams).
16 Michael Skube, Law’s Radical Academics Get Thrashing They Deserve, ATLANTA J. & CONST., Nov. 16, 1997, at 12L (commenting that CRT “retail[s] absurdities”).
17 William Domarski, An Academic Theory Threatens the Foundations of the Law, 143 CHICAGO DAILY L. BULL., Oct. 21, 1997, at 3 (praising Farber and Sherry for “taking us away” from the “Alice in Wonderland” world of the radical multiculturalists).
19 John O. Calmore, Random Notes of an Integration Warrior—Part 2: A Critical Response to the Hegemonic “Truth” of Daniel Farber and Suzanna Sherry, 83 MINN. L. REV. 1589, 1617 (1999) (“[T]he most troubling [thing] about the Farber-Sherry view is that I do not see good faith there. . . . [T]here is just too much bad, ‘unavoidable conclusion’ stuff . . . .”); Jerome McCreustal Culp, Jr., To the Bone: Race and White Privilege, 83 MINN. L. REV. 1637, 1654–55 (1999) (asking, almost rhetorically, how the author’s work regarding minority assimilation could have been misread, and connecting Farber and Sherry’s mischaracterization of his work to attacks in the national media characterizing CRT as having an “ugly streak”).
Calmore accused Farber and Sherry of “dehumaniz[ing]” CRT scholars by playing into negative racial stereotypes,²⁰ of “hav[ing] written quite the officious and condescending book . . . [which] should really be buried,”²¹ and of “act[ing] as secret agents of a very right-wing racial project” describing the attacks as “not friendly fire at all, but, rather, enemy fire . . . a command for the critical race theorists to ‘shut up’ and ‘stay in your place.’”²² Finally, Professor Calmore posited that Farber and Sherry’s “racism represents a bias for people of color, but only as long as people of color stay in our place.”²³ Professor Culp charged that Farber and Sherry wrote a book that “appeases the conservative thirst to smite infidels” and “has only the barest pretensions of the objectivity or the thoroughness that they require of others.”²⁴ He connected Farber and Sherry’s uncharitable mischaracterization of his work to attacks on CRT by the national media.²⁵

CRT theorists were not the only ones that charged that Farber and Sherry’s critique was excessive and unhelpful. Feminist scholar Kathryn Abrams detailed at length her countercharge that Farber and Sherry uncharitably abbreviated feminist and critical race scholars’ works, painting feminists and critical race theorists to be extreme and nonsensical.²⁶ Professor Edward Rubin as well was critical of Farber and Sherry’s overbroad arguments, seeing crits more as the current heirs of postmodern continental philosophy, than as a “threat” to traditional academic values.²⁷ Professor Deborah Malamud countered Farber and Sherry’s charge that critical race scholarship is anti-Semitic, arguing that this argument is both overbroad and overly simplistic, and fails to take into account the unique socioeconomic situation of Eastern European Jewish

²⁰ Calmore, supra note 19, at 1598. Professor Calmore further explains that, “[i]n many ways, Farber and Sherry have taken the humanity out of critical race theory and linked it to the racial grotesque.” Id.
²¹ Id. at 1591.
²² Id. at 1605.
²³ Id. at 1606.
²⁴ Id., supra note 19, at 1638, 1655.
²⁵ Id. at 1654–55. For other critical race theorists’ critiques, see generally Delgado, Book of Manners, supra note 9, at 1059 (drawing parallels between Farber and Sherry’s work and white imperial scholarship and arguing that this kind of thrust drowns out the works of young critical scholars who might have something new and innovative to say); Roithmayr, supra note 9, at 1658 (suggesting that Farber and Sherry seem to imagine that a handful of “angry radical scholars, dark-skinned fanatics in their Che Berets” might take over legal academia).
²⁶ Abrams, supra note 9, at 1091.
²⁷ See Rubin, supra note 9, at 552.
emigrants at the turn of the century. Farber and Sherry responded by cataloging the “insults [that] flow freely in the law reviews” and accusing these critical theorists of using charges of racism to avoid valid criticisms. The titles of two other essays in the Minnesota Law Review symposium further illustrate the “gloves off,” “no-prisoners” approach that characterized this important debate. For example, Matthew Finkin’s contribution was entitled “QUATSCH!,” colloquial German for “nonsense.” Professor Subotnik used the not too subtle acronym “CRAT,” which comes close to “crap,” to describe CRT. Steven Gey was only a tad more polite, entitling his essay Why Rubbish Matters. Amazingly, Farber and Sherry maintain that they wish to “encourage dialogue.” The problem, as they see it, is with “the most radical forms of deconstruction.” Yet, it is difficult to see how this strident rhetoric, only briefly captured here, can ever possibly lead to intellectual engagement. Not only is this debate more shrill than illuminative, it also comes through as a very personal fight for everyone involved.

The Farber and Sherry attacks are now over a decade old. They did encourage virulent and unfair attacks in the media on CRT and its practitioners. Notwithstanding, CRT is still firmly lodged within

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28 See Malamud, supra note 9, at 921–40; see also Hills, supra note 9, at 185 (criticizing Farber and Sherry’s overuse of consequentialist arguments).
29 See Daniel A. Farber & Suzanna Sherry, Beyond All Criticism?, 83 Minn. L. Rev. 1735, 1738–40 nn.6–24 (1999).
30 Matthew W. Finkin, QUATSCH!, 83 Minn. L. Rev. 1681 (1999). Finkin believes that CRT is comparable to fascism. Id. at 1700.
31 See Daniel Subotnik, What’s Wrong with Critical Race Theory?: Reopening the Case for Middle Class Values, 7 Cornell J.L. & Pub. Pol’y 681, 682 n.4 (1998) (“I use this acronym to distinguish race theorists from CRITs.”).
33 Farber & Sherry, supra note 7, at 141.
34 Id. at 140. This may be an attempt perhaps on their part to not include in their attacks certain genres of CRT that they do respect, particularly feminist scholarship, in which Professor Sherry sees herself participating.
35 Accord Austin, supra note 8, at 199 (“A plea for a friendly dialogue is seemingly incongruous in the face of the heated exchanges . . . .”); Anne M. Coughlin, C’est Moi, 83 Minn. L. Rev. 1619, 1630 (1999) (finding it “harder than ever to imagine the two schools meeting”).
36 See, e.g., infra notes 135–37 and accompanying text; Abrams, supra note 9, at 1112 n.38 (interjecting that she takes her Jewish identity seriously and finding unseemly charges that the “multiculturalists” are anti-Semitic); see also supra note 19 (providing responses of Professors Calmore and Culp to Farber and Sherry).
37 In their book, Beyond all Reason, supra note 7, the authors reconfigure their criticism initially published in Daniel A. Farber & Suzanna Sherry, Telling Stories Out of School: An Essay on Legal Narratives, 45 Stanford L. Rev. 807 (1993).
legal academia, and is arguably doing well. There is at least one CRT scholar at most of the elite law schools, CRT workshops and conferences continue in one form or another, and the second generation CRT movements such as LatCrit and APIA (Asian/Pacific Islander American) critical scholarship are doing well within legal academia. CRT’s influence has expanded beyond legal scholarship, as there are now anthologies in education, sociology, and religious ethics.

B. Java, Mocha, or Coffee?: Randall Kennedy and the Dispute over a “Voice of Color”

Predating this row came a very high-profile challenge to CRT by Professor Randall Kennedy in his *Racial Critiques of Legal Academia*. This Kulturkampf never approached the combustible quality of the *Beyond All Reason* exchanges, and unlike the *Beyond All Reason* exchange, it has had a far greater positive impact on the development of critical race scholarship. Professor Kennedy, in an article published just before he made tenure at Harvard Law School, critiqued critical race theorists Derrick Bell, Richard Delgado, and Mari Matsuda, arguing that critical race scholars exhibit “a tendency to evade or suppress complications that render their conclusions problematic . . . [because] [t]hey fail to support persuasively their claims of racial exclusion or their claims that legal academic scholars

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38 For some the jury is still out; see, for example, POSNER, OVERCOMING LAW, supra note 11, at 105 (“[A] dislocation of the settled ways of thinking could improve the field. Law and economics has had this effect, and feminist legal scholarship as well. Maybe minority scholarship will too.”). But Professor Jeffrey Stempel notes that “substantial . . . acceptance” is all that is necessary for outsider jurisprudence to take a hold in legal academia. Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 697 n.137 (1993). Stempel cites as evidence that feminism, CLS, and law and economics, in spite of initial strident objections, obtained substantial acceptance in academe within a few years. *Id.*

39 See, e.g., PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION (1999) (providing a study by a historian applying theoretical work by Williams and others to studying how race was “reconstructed” during the post-Civil War era); RACE IS—RACE ISN’T: CRITICAL RACE THEORY AND QUALITATIVE STUDIES IN EDUCATION (Laurence Parker et al. eds., 1996) (performing series of studies that apply work by Williams, Delgado, and Bell to race conflicts in primary education); SHARON D. WELCH, SWEET DREAMS IN AMERICA: MAKING ETHICS AND SPIRITUALITY WORK (1999) (applying Williams’ and other CRT theoretical approaches to rethinking a religious ethic of progressive social change and current issues of multiculturalism).


of color produce a racially distinctive brand of valuable scholarship.”  

Professor Kennedy contended that these critical minority scholars placed too much emphasis on an experienced commonality of “oppression,” and in particular, that Professors Delgado and Bell overstated the relative influence of racial prejudice. In a passage that was close to getting personal, Professor Kennedy confronted Professor Derrick Bell’s ongoing one-man crusade against Harvard Law School, which had failed to hire any African American women faculty for almost three decades. Kennedy asserted that Bell failed to engage competing hypotheses to explain the small number of professors of color in elite law schools. In critiquing Professor Mari Matsuda’s work, Professor Kennedy asserted that she overstated the values of a “special” or “distinct” minority legal scholarship and by making that argument stigmatized other minority scholars by claiming that they speak as “victims of racial oppression.”

The Kennedy critique occasioned great consternation among critical race and liberal scholars. Randall Kennedy’s high visibility position within legal academia, as one of two African American male professors who had succeeded Derrick Bell at Harvard Law School, played a critical role in the notice that his attack received. Interestingly, Randall Kennedy styles himself a “race relations” scholar, and has written extensively, albeit primarily from an individualistic perspective, about the (mis)treatment and (mis)characterizations of African Americans in the law.

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42 Kennedy, Racial Critiques, supra note 40, at 1749.
43 Id. at 1770, 1776.
44 DERRICK BELL, CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTOR (1994). The relationship, as depicted in published writings, between Professors Kennedy and Bell can be currently characterized as highly personal and acrimonious. Compare Derrick Bell, The Strange Career of Randall Kennedy, NEW POLITICS, Summer 1998, at 55 (describing Kennedy as “quite willing to take his differences with black people public in ways that—whether intended or not—serve to comfort many whites and distress blacks” and that “render him an apologist [for] aspects of [a] . . . system that are less overtly racist than in earlier times but no less ominous in the threat they pose for all blacks”), with Randall Kennedy, Race Relations Law in the Canon of Legal Academia, 68 FORDHAM L. REV. 1985, 2001–04 (2000) (responding to Bell’s critique and arguing that Bell is overly certain of what is the “correct” civil rights position on controversial race relations issues) [hereinafter Kennedy, Race Relations Law].
45 Id. at 1778.
46 Kennedy, Racial Critiques, supra note 40, at 1764.
47 See Kennedy, Race Relations Law, supra note 44, at 1985–2010 (arguing that race relations law should be taught as a standard part of a law school’s curriculum).
48 See, e.g., RANDALL L. KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION (2003); RANDALL L. KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD (2002); RANDALL L. KENNEDY, RACE, CRIME, AND THE LAW...
The response by critical race scholars was published in a symposium issue of the *Harvard Law Review*. Perhaps the most perceptive counter-critique was Dean Alex M. Johnson’s *The New Voice of Color*. In his analysis, Dean Johnson argued that Bell, Matsuda, and Delgado speak from a communalistic perspective and from egalitarian ideology, while on the other hand, Kennedy’s interpretation of racial experience is individualistic and meritocratic. Further, Kennedy does not make claims for the entire community of racial minorities; rather, he insists that the individual voice of African American conservatives and neo-conservatives be given as much weight as the voices of egalitarian progressives such as Bell, Delgado, and Matsuda. By contrast, Johnson characterized Matsuda, Bell, and Delgado as wishing to improve the circumstances of those in minority communities who are most disadvantaged and as believing that responsibility for alleviating this wrong lies in the white male community which historically has been advantaged by such social hierarchies.

At the time, the Kennedy versus Bell–Delgado–Matsuda controversy was believed to be divisive among minority legal scholars, and some criticized Kennedy privately for making his critique so pointed and public. Randall Kennedy’s *Racial Critiques of Legal Academia*, a symposium response appearing in the *Minnesota Law Review*, Professor Alex Johnson’s friendly comment, and other well-written and influential commentary by Professors Duncan Kennedy and Richard Delgado helped to highlight that at the heart of this


51 Id. at 2036, 2040–42.

52 Id. at 2047.

53 Id. at 2040, 2045–47.


55 See, e.g., Richard Delgado, *Enormous Anomaly? Left–Right Parallels in Recent Writings About Race*, 91 Colum. L. Rev. 1547 (1991) (identifying the gap between “neo-conservatives” and “crits” as resulting from different emphases on individual agency and volition, use of history, and whether the key to racial oppression is individual acts of discrimination or systemic societal forces); Richard Delgado,
controversy was a genuine and deep difference of opinion as to what a minority perspective might be, its potential value to legal scholarship, how prevalent and endemic racism was rooted in American society and elite institutions, and what methodologies should be used in analyzing racial issues. These are fundamental differences that go to the heart of the CRT enterprise, and continue to divide scholars, both within CRT and without. The issues of anti-essentialism and the problematic use of terms like “subordination,” which simultaneously disempowers even as it identifies a systemic inequality, broached by Professor Kennedy, remain important and his critique helped CRT recognize, at a very initial point, that there would be ongoing disagreements as to the value of CRT or “Black scholarship.” Professor Kennedy remains outside of the CRT movement, but remains committed to continue to explore “the depth, complexity, and pervasiveness of racial controversies in the United States.” He has recently called for law schools to do a better job educating young lawyers in the complexities of race relations; to fail to do so, he intimates is the equivalent of educational malpractice. This is a position that CRT scholars would enthusiastically endorse.

C. Lemons or Lemonade?: APIA Crits and the Call for a New Legal Movement

A very similar split occurred in an exchange that featured Jim Chen, Farber and Sherry’s then-colleague at the University of Minnesota Law School, and eight critical race and liberal scholars. Professor Chen launched the first strike in Unloving, a short essay


56 For example, Delgado’s collection on critical race theory includes Randall Kennedy’s critique as well as Leslie Espinoza’s rebuttal. See CRITICAL RACE THEORY: THE CUTTING EDGE 431–57 (Richard Delgado ed., 1995) [hereinafter DELGADO, CRT: THE CUTTING EDGE]. In a section entitled, “Criticism and Self-analysis,” Delgado acknowledges Kennedy’s contribution to CRT: “[S]ometimes a movement’s themes and distinctive contours will emerge most clearly in the crucible of criticism.” Id. at 431. As well, Professors Jerome Culp and Alex Johnson underscore points of agreement between their CRT perspective and Kennedy’s, yet both maintain that Kennedy’s “race relations” approach is unpersuasive. See Jerome McCristal Culp, Jr., Toward a Black Legal Scholarship: Race and Original Understandings, 1991 DUKE L.J. 39, 103; Johnson, supra note 50, at 2040.


58 See id.

that criticized Professor Robert Chang’s declaration of an “Asian American Moment” propitious for launching a new critical Asian American legal scholarship.\textsuperscript{60} Professor Chang was hearkening back to the 1980s when a group of critical scholars had declared a key “moment” for critical race theory.\textsuperscript{61} Chen’s objection to Chang’s rally call centered around what he characterized as “racial fundamentalism,”\textsuperscript{62} a mode of racial thinking that he boiled down to the tenet, “dark skin good, white skin bad.”\textsuperscript{63} Chen argued that Chang’s “racial fundamentalism” opposed assimilation,\textsuperscript{64} ignoring the reality of what Chen viewed as inevitable “creolization”—by which Chen meant interbreeding—of America,\textsuperscript{65} and fostered segregation and isolation of racial and ethnic minorities.\textsuperscript{66} Moreover, Chen argued that Chang condemned the “creolization” of America.\textsuperscript{67} As support, Chen pointed to a Chang footnote in which he bemoans that his “future children and their future children will always be Asian Americans.”\textsuperscript{68} From this remark, Chen concluded that Chang “certainly seems as though he positively wants his descendants to have naught but Asian blood.”\textsuperscript{69}

\textsuperscript{60} See Robert S. Chang, Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space, 81 CAL. L. REV. 1241, 1314 (1993) (“The time has come to announce once again an Asian American Moment. With it comes an Asian American Legal Scholarship . . . .”); see also ROBERT S. CHANG, DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE 48 (1999) (“A critical Asian American legal studies is needed to change the current racial paradigm, which is inadequate to support a more complete discourse on race and the law.”).

\textsuperscript{61} See CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xvi-xix (Kimberlè Crenshaw et al. eds., 1995); Culp, supra note 56, at 40 (announcing “an African-American Moment, when different and blacker voices will speak new words and remake old legal doctrines”).

\textsuperscript{62} Chen describes racial fundamentalism as proposing,

(1) that white racism has always thwarted and will always thwart equality for nonwhites in America, (2) that nonwhites will always be at a disadvantage within white-dominated society, and (3) that nonwhites should therefore celebrate their own isolation rather than take part in the self-abnegation that is assimilation.


\textsuperscript{63} Id. at 156.

\textsuperscript{64} Id. at 158 (“Chang has plainly rejected the goal of integration through multiracial assimilation and adaptation.”). But see infra note 74 (rebutting this reading of Chang’s work).

\textsuperscript{65} Chen, supra note 59, at 150, 152 (“I regard the United States of America as the Creole Republic . . . . Crossbreeding in the Creole fashion . . . extends to the bedroom. Sexuality, like water and money, seeks its own level.”) (footnotes omitted).

\textsuperscript{66} Id. at 161–62.

\textsuperscript{67} Id. at 155 (“What I call ‘racial fundamentalism’ rejects . . . the rise of the Creole Republic.”).

\textsuperscript{68} Id. at 158 (citing Chang, supra note 60, at 1318–19 n.403).

\textsuperscript{69} Id. at 159.
Eight scholars responded to Chen in the Iowa Law Review's subsequent symposium on *Unloving*. As in the prior symposium counter-critiquing Professor Randall Kennedy, many articulated broader themes highlighting once again that at the core of this debate are fundamental differences in perspectives on race relations in America. Several argued that Chen's optimistic claims of the inevitable American "creolization" are neither persuasive, nor backed by either history or the current politics of majority–minority relations. Chen's view that Americans of all ethnicities and race would eventually assimilate was viewed by some as unsupported musings. Others rebutted Chen's ungenerous reading of Chang's footnote.

Professor Chen's highly charged personal attack of Professor Chang, however, prompted responses with a personal edge. Several scholars condemned *Unloving* as "backlash scholarship," "vicious
sarcasm,”76 “verbal violence,”77 “character assassination and attempt to silence another,”78 and “an attack ad with academic pretensions.”79 Professor Greene’s *Gunga Din*80 used an imaginary dialogue between minority students who interviewed Professor Chen on campus to make the point that within some law faculties, Professor Chen was being interviewed as a “minority” who could not be as competent as the white candidates. For example, one imaginary student described Chen as a “poster child for the model minority,”81 who plays into conservative backlash politics.82 Professor Greene’s imaginary student continued by stating, “minority conservatism is driven by self-interest, self-hate, and greed.”83

Chen responded by being “unrepentant” and accusing the “Unloving Eight” of being “bitter and vindictive,” and wanting to “houn[d] him out of law teaching altogether.”84 Chen went on to write a series of essays against affirmative action prior to tenure. But after being voted tenure at Minnesota,85 Professor Chen has stayed largely out of racial issues, concentrating his scholarly energies on administrative law, agricultural law, and federalism issues.

Meanwhile, Professor Robert Chang’s call to begin the self-conscious development of APIA critical scholarship has been heeded. Not only has there been a robust work product by many of the contributors to the response to the *Unloving* symposium, APIA scholars have had an ongoing series of workshops where serious scholarship is presented and young scholars are mentored in their projects.

**D. Cracking Coconuts: LatCrit and the First Generation CRT Founders**

The most recent missive in the academic literature involves one of the founders of critical race theory, Professor Richard Delgado,
and the LatCrit movement, which he calls “the new generation of critical theorists.” The vehicle for Professor Delgado’s critique is his detailed book review of the anthology, *Crossroads, Directions, and a New Critical Race Theory*, edited by critical race and LatCrit theorists Francisco Valdes, Jerome McCristal Culp, and Angela P. Harris.

The crux of Professor Delgado’s critique is that LatCrit has strayed from a materialist analysis of race that focuses on power, history, and similar material determinants of minority-group oppression. CRT, Delgado laments, has become too focused on “text, discourse, and mindset” and has largely neglected the important ongoing challenges to the civil rights of minorities.

Richard Delgado and Derrick Bell, also a pioneer of CRT, emphasize the class and political components of racial discrimination. Bell’s racial realism, and Delgado’s thesis that “racism is as inherent in Americans as DNA,” share the premise that racial oppression is endemic to American society. Both have applied neo-Marxist concepts of class struggle to racial conflict. There are three corollaries to this perspective that racial oppression is deeply

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87. Id.


89. See Delgado, *Blind Alleys*, supra note 86, at 125

90. Id.; see also id. at 123–24 (“An ‘idealist’ school holds that race and discrimination are largely functions of attitude and social formation. . . . In recent years, idealist approaches and discourse analysis have moved to the fore.”).

91. Id. at 138 (citing the loss of civil rights of Muslims in the war against terrorism as a necessary area of inquiry that LatCrit has neglected). Professor Delgado explains, “The little attention progressive writers have devoted to today’s situation has consisted of examining the predictable issues of rhetoric, mindset, and image . . . .” Id. He queries “how critical race theorists would see the current situation facing this country in its struggle against terrorism and for the loyalties of democratic, modernizing elements in the Muslim world.” Id. at 137.

92. See *Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice* (1987) [hereinafter *Bell, Saved*]; *Derrick Bell, Faces at the Bottom of the Well* (1992) [hereinafter *Bell, Faces*].

93. See Richard Delgado & Daniel A. Farber, *Is American Law Inherently Racist?*, 15 T.M. Cooley L. Rev. 361, 373 (1998) (arguing that racism is inherent and intractable, like DNA); see also Delgado, CRT: The Cutting Edge, supra note 56, at xiv (contending that racism is inherent).

94. Bell emphasizes, in particular, how slavery was condoned and interwoven into our Constitution. See *Bell, Saved*, supra note 92, at 26–42 (examining constitutional provisions sanctioning slavery).
rooted in American society. First, American society is not a unified whole, but rather is fragmented and divided. Second, race relations in America are better described as an ongoing struggle, where one group wins out, not because of the inherent worthiness of their ideas, but because they are in a position of power. Third, political structures, as well as legal institutions, maintain racial divisions. Bell, Delgado, and other key writers have substantiated their view of race relations with a close study of American history. Professor Delgado has dedicated his academic life to understanding how systemic racial oppression permeates American society, and how the law has ignored the justice claims of racial minorities by framing such issues in formalist legal formulations.

From the beginning, CRT has drawn on the wealth of psychological and sociological literature on racial attitudes to demonstrate how unconscious racial attitudes are deeply ingrained in America’s psyche and social habits. Gunnar Myrdal’s classic, the American Dilemma, written almost half a century ago, is a psychological and sociological treatise on America’s deeply rooted race problem. Richard Delgado recognized, obliquely, that cognitive theories and conflict theories—based on interdisciplinary insights—have merit and are an important part of CRT. The question and the critique, however, is about how much emphasis on non-materialist theories is useful when a legal movement is dedicated to the promotion of racial justice. Delgado’s essay puts it this way: “Nothing is wrong with working to improve racial attitudes, conscious or subconscious. Yet, we should not be overly sanguine about the...
possibilities for change through this avenue alone.\textsuperscript{100} Angela Harris reminded us that, in critical race theory and other identity movements, there is an ongoing tension between idealist–liberal perspectives and determinist–materialist analyses.\textsuperscript{101}

Richard Delgado is concerned that LatCrit may be “fracturing” CRT. In his view, not enough emphasis is being placed within LatCrit on the important new cutting edge questions. He admonishes that more attention should be paid to the tension between the war on terrorism and the civil rights of racial minorities.\textsuperscript{102} Delgado urged that close attention should be paid to the impact of “the extraordinary growth of the Latino population” in the last decade and a half.\textsuperscript{103} Immigration, Delgado mused, may be “the new civil rights issue of the century.”\textsuperscript{104} Finally, Delgado encouraged greater attention be given to the role of racial minorities in our country’s two-party political system.\textsuperscript{105}

Delgado’s admonitions are well taken. LatCrit scholars have been busy working on the very questions he raises, as Dean Kevin Johnson responded in his rejoinder to Delgado.\textsuperscript{106} My own work is currently preoccupied with what Delgado calls “the extraordinary growth of the Latino population.”\textsuperscript{107} The LatCrit VIII symposium paid major attention to the cutting edge issue of Latino and APIA voting issues beyond 2000.\textsuperscript{108} Victor Romero, Eric Yamamoto, Kevin Johnson, Bill Ong Hing, Berta Hernandez-Truyol, and Raquel Aldana and others have written extensively about how the war on terrorism is jeopardizing the civil rights of racial minorities.\textsuperscript{109}

\textsuperscript{100} Id. at 143–44.
\textsuperscript{101} See Angela P. Harris, Foreward: The Jurisprudence of Reconstruction, 82 CAL. L. REV. 741, 749–60 (1994).
\textsuperscript{102} Delgado, Blind Alleys, supra note 86, at 151.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{107} Delgado, Blind Alleys, supra note 86, at 151. My own view on this “extraordinary growth” can be found in Sylvia R. Lazos Vargas, Cambio de Colores (2002). For an additional take on this population explosion and its effects on the American workplace, see Leticia M. Saucedo, The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations, 80 NOTRE DAME L. REV. 303 (2004).
\textsuperscript{109} See, e.g., Raquel Aldana-Pindell, The 9/11 “National Security” Cases: Three
LatCrit is now a mature movement that coexists with other second-generation CRT jurisprudential movements. The Crossroads anthology, Delgado’s critique, and Kevin Johnson’s response are signs that LatCrit is a healthy scholarly movement. Professor Minow observed that, “[t]o be taken seriously in the business of law and legal scholarship means becoming the subject of sustained criticism.” Delgado and his CRT first-generation contemporaries spawned a second-generation movement, LatCrit, which is healthy, unruly, contentious, and ambitious, but yet fits within the key tenets of CRT with its own styled emphasis. Just as CRT grew from Professor Randall Kennedy’s critique, so LatCrit will benefit from Professor Delgado’s challenge.


Nancy Ehrenreich has frequently made this point at various LatCrit conferences and retreats.
II. IDENTIFYING THE GREAT DIVIDES IN THE ACADEMIC KULTURKAMPFS

The many splits in legal academia could lead one to despair, hide one’s head in the sand, or conclude that meaningful intellectual engagement, the advance of race relations, and civil academic disagreement are not possible. This Part further analyzes the causes of the ruptures in the academic Kulturkampfs and points to strategies that might be useful in dampening these culture wars.

A. Outsider Critiques: To What Black Hole Does the Many-Headed Hydra of CRT Lead?

Farber and Sherry and the many outsider critics make the following claims: (1) that law scholars can ascertain a truth that is verifiable; (2) that law can fashion “objective” standards; and (3) that practitioners of law, regardless of their philosophic bent or identity, can clearly discern what is reasonable.

Professors Hills, Levit, Mootz, and Rubin have noted that Farber and Sherry’s modernist claim is out of sync with this century’s philosophical developments regarding objectivity and truth. The last century of developments in philosophical thought and social science, particularly postmodern philosophy, have undermined the notion of a unitary truth. Instead, this body of work, which has

112 See Lee, supra note 59, at 539 (describing CRT Kulturkampfs as having a particular ugly edge).
113 Farber & Sherry, supra note 7, at 760.
114 Hills, supra note 9.
115 Levit, supra note 9.
116 Mootz, supra note 9.
117 See Rubin, supra note 9, at 535–37 (chiding Farber and Sherry for failing to acknowledge that CRT is a derivative of continental postmodern philosophy and neo-Marxist thought).
118 Professors Roderick Hills and Edward Rubin focus their critique on this point. Professor Hills argues that Farber and Sherry’s “enlightened liberalism” is “astoundingly anemic” because Farber and Sherry do no more than claim that their truth is superior. Hills, supra note 9, at 192–93. Professor Rubin faults Farber and Sherry for failing to address the forceful CRT insight that classes who hold power in society are in a position to construct what truth and objectivity means, and thus legitimize their superior power and class status. See Rubin, supra note 9, at 537–38 (observing “that society’s assertions about the objectivity or truth of socially contingent systems, such as merit and law, reveals [sic] a basic defect in its underlying conception of truth”). Professor Rubin explains that “critical race theory thus reveals the political and manipulative nature of our society’s prevailing concept of objectivity, or truth.” Id. at 538. This fundamental insight, Professor Rubin notes, is derivative of continental critical theory; thus, CRT can be viewed as part of this larger critique of modernist premises. Id. at 535–36.
been particularly influential in the social sciences, posits that objectivity cannot be independent of a claimant’s culture or world viewpoint. \textsuperscript{120} Scholarship based on the premise that “truth” is socially constructed asserts that the cognitive schemas that we carry in our heads and our cultural preconditioning influence what we believe to be the “objective” “truth.” \textsuperscript{121} Another line of scholarship explains that what we have come to call “reason” has the potential to exclude women and minorities because of the manner in which they have been socialized to express themselves. \textsuperscript{122}

As Professor Farber and Judge Posner, another harsh critic of CRT, demonstrate in their own work, “postmodern” premises have greatly influenced legal thinking. In the \textit{Problems of Jurisprudence}, Judge Posner asserts that most American lawyers are legal pragmatists; that is, American law as practiced is more interested in solving legal problems contextually than it is in asserting stable unitary meta-principles. \textsuperscript{123} Moreover, Judge Posner rejects unitary, objective truth; “[t]here is knowledge if not ultimate truth.” \textsuperscript{124} He champions a form of legal pragmatism that looks at problems with full awareness of “limitations of human . . . knowledge, the difficulty

\textsuperscript{120} The classical claim to this position is made by anthropologist Clifford Geertz in \textit{The Interpretation of Cultures}. \textit{See Clifford Geertz, The Interpretation of Cultures} 30 (1973) (positing that to study a culture we should examine shared realities, myths, social identity, ethnicity, status, and “attempts by particular peoples to place these things in some sort of comprehensible, meaningful frame”). \textit{See also Renaldo Rosaldo, Culture and Truth: The Remaking of Social Analysis} 202 (2d ed. 1993) (“The temptation to dress one’s own ‘local knowledge’ of either the folk or professional variety in garb at once ‘universal’ and ‘culturally invisible’ to itself seems to be overwhelming.”). For another view of this classical claim, see \textit{Raymonde Carroll, Cultural Misunderstandings: The French-American Experience} 125–26 (Carol Volk trans., 1988), in which the author urges us to accept that “my truth is precisely that, ‘my’ truth.” She continues, “I must become able to conceive that the ‘aberrant’ behavior that wounds me . . . may be informed . . . by the truth of the . . . other. . . . “). \textit{Id.}

\textsuperscript{121} \textit{See supra} note 120. \textit{See also} Lawrence, \textit{supra} note 97 (arguing that unconscious discrimination is so pervasive that it requires a more far-reaching contextual analysis of discrimination cases); Linda Hamilton Krieger, \textit{The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity}, 47 STAN. L. REV. 1161, 1211 (1995) (describing stereotypes as a subset of the “vast array” of structures that comprise human cognition and concluding that discrimination therefore occurs not impulsively but as the result of an accumulation of subtle distortions in perceiving objective data).

\textsuperscript{122} \textit{See Jane Mansbridge, Feminism and Democracy}, \textit{Am. Prospect}, Spring 1990, at 126, 127 (“Subordinate groups sometimes cannot find the right voice or words to express their thoughts, and when they do, they discover they are not heard. . . . [They] are silenced, encouraged to keep their wants inchoate, and heard to say ‘yes’ when they mean ‘no.’”).


\textsuperscript{124} \textit{Id.} at 466.
of translations between cultures, the unattainability of ‘truth,’ the consequent importance of keeping diverse paths of inquiry open, and the dependence of inquiry on culture and social institutions . . . .”

In several law review articles, Professor Farber attacks legal formalism. In one, he praises Grant Gilmore’s attack on Langdellian formalism, quoting Gilmore’s statement that “the body of the law, at any time or place, is an unstable mass in precarious equilibrium . . . .” In another article, he argues for a form of practical reasoning in which judges exercise their experience to fine “tune their [cognitive] schemata to the specifics of the case.” He contends that judges must eschew “naive” formalism and hew a middle road between “excessive confidence in the power of the ‘word’” and “unguided discretion.”

Likewise, Suzanna Sherry wrote a controversial law review article, Civic Virtue and the Feminine Voice in Constitutional Adjudication, in which she argued that “modern men and women, in general, have distinctly different perspectives on the world . . . .” The male perspective paralleled pluralistic liberal theory, the approach that currently dominates constitutional interpretation. She further argued that a feminine style of jurisprudence, which more closely resembled communitarian norms, might be more adaptive for modern society.

The premise of a subjective truth, then, one could argue, is not at the root of what these critics find troublesome in critical scholarship. These critics have accepted the premise that there is no absolute truth, and that differing cultural and gender perspectives affect how different groups interpret truth. Instead, what these critics find disturbing is critical scholarship’s powerful combination

125 Id. at 465; see also id. (arguing that judges must adopt awareness of “translations” between cultures).
128 Id. at 559.
130 Id. at 545–44.
131 Id. at 544.
132 See Robert L. Hayman, Jr., The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism, 30 HARV. C.R.-C.L. L. REV. 57, 106 (1995) (“Undeniably, pluralization, or postmodernization . . . . comes at a certain . . . price . . . . the comfortable, self-assured determinacy afforded by homogeneity. But this determinacy was always illusory . . . .”).
of the postmodern perspective of truth with structuralist analysis. For critical theorists who are influenced by postmodernism, power permeates all social structures and relationships. The truth and norms that will be viewed as “objective” and “neutral” are those that reflect the perspective of the dominant classes. Farber and Sherry understand the implications of critical theory when they admonish: “Don’t let the isms fool you . . . the basic theory is . . . reality is socially constructed by the powerful in order to perpetuate their own hegemony.”

Farber and Sherry’s work is useful in discerning the principal concerns of traditional scholars, because they so exhaustively, candidly, and somewhat emotionally, articulate the ways in which they find critical thinking disturbing, or in their words, “beyond all reason.” Farber and Sherry reveal that they also have an emotional-identity stake in this debate by the manner in which they derisively refer to critical scholars, engage in not too subtle name calling, and charge that CRT scholars are not really intellectual.

Critical scholarship intertwines structuralist insights and discourse analysis with identity politics, making for a powerful and volatile combination. It is folly to think that these issues are abstract and removed; rather, they are immediate and personal. In a critique of Farber and Sherry by Professor Ann Coughlin, who has criticized CRT, she explained why CRT and its progeny touch a raw nerve:

[T]he radical project attacks the political and ethical foundations of the work that traditional legal scholars do and, thereby, calls into question the kind of people who we believe we are. To put it mildly, it is more than a bit distressing for legal scholars . . . to hear that their entire professional enterprise has been enlisted in support of a racist, sexist, and homophobic status quo, let alone to read that they themselves are racist-sexist-homophobic bigots.

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133 Farber & Sherry, supra note 7, at 23.
134 Id., tit.
135 Id. at 101 (claiming that the radicals are sloppy scholars).
136 Id. at 142 (alleging that the critical scholars are “paranoid [in] style and rigidity”).
137 See, e.g., id. at 9 (asserting that the radicals “have relatively little interest in the nuances of philosophical theories”). It is this aspect of Farber and Sherry’s work that has led Culp to accuse them of exercising white privilege “to the bone.” Culp, supra note 19, at 1639. Calmore likewise makes the case that Farber and Sherry have fallen prey to demeaning stereotypes of racial minorities. See Calmore, supra note 19, at 1598.
138 Coughlin, supra note 35, at 1622. See, e.g., Abrams, supra note 9, at 1111–13 (interjecting that the author takes her Jewish identity seriously and finding unseemly charges that the “multiculturalists” are anti-Semitic); see also supra note 19 (citing Calmore’s and Culp’s responses to Farber and Sherry).
The personal/emotional concerns that are at the bottom of the critics’ discomfort can be reduced to the following three issues. First, do whites, men, and straights oppress minorities, women, gay men, and lesbians? Second, is oppression so endemic that racism, sexism, and homophobia are permanent fixtures of American society? Third, how does one make judgments of others in a world where neutrality and objectivity are suspect? Let us explore each of these issues in turn.

1. Agency: Do Whites, Men, and Straights Oppress Minorities, Women, and Homosexuals?

As to the issue of agency, Farber and Sherry criticize what they call the “social construction” thesis that “objective knowledge is a power relation, one category of people benefiting at the expense of another category of people.”139 They locate the agency for “this covert oppression” of women, minorities, and gay and lesbians in “straight white males. . . . Everyone else is either a victim, a collaborator, or an unwitting dupe.”140

In modernist thinking, someone must exercise power when there is a power relationship. Moreover, there is intentionality between cause and effect because when one group benefits over another, that relationship exists only because someone willed or caused it. If one can make the claim that this dominant–subordinate relationship is unjust, then the actor in the dominant position has moral culpability. Peter Margulies, a Farber and Sherry critic, put it this way: Farber and Sherry believe that the problem with replacing the Enlightenment commitment to “reason and cognition” with appeals to “rhetoric and emotion” is that “the monsters of our unreasoning imagination,” that is “anti-Semitism, Holocaust revisionism, and religious fanaticism” will take center stage.141

Yet, structuralism generally does not attach motivation to the structure of inequality.142 Neither does it make moral judgments about those who benefit from structures of power.143 Instead, structuralism limits itself to describing structures of discourse and knowledge and how these structures construct dominant–subordinate

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139 Farber & Sherry, supra note 7, at 24.
140 Id.
141 See Margulies, supra note 9, at 1126–27.
142 Foucault, for example, refused to locate structures of power, arguing instead that power infuses every social relationship. Michel Foucault, Language, Counter-Memory, Practice: Selected Essays and Interviews 221 (1977).
143 The criticism can be made that this body of thought is amoral, since its main thrust is to debunk the liberal premise of individual independence and autonomy.
relationships and ideologies.\textsuperscript{144}

Critical race theorists could perhaps diffuse the anxiety that majority scholars feel when they read this scholarship by perhaps using more precise vocabulary when they describe structures of racism and oppression. Of course, this would do nothing to diffuse anxiety that would be raised just because one is addressing these issues.

Farber and Sherry have it right when they complain that critical scholars spend almost all their effort in ferreting out racism, sexism, and homophobia in legal practices that on the surface appear neutral. When critical scholars describe the social, cultural, and political dynamics that account for such endemic biases, they generally refer to these systemic constructions as “oppression” and “subordination.”\textsuperscript{145} In the last decade, critical scholarship and LatCrit theory have begun to distinguish among the various forms of oppression and subordination and work through the implications of various dynamics. For example, there is an important distinction between blatant Bull Connor racism,\textsuperscript{146} unconscious stereotyping,\textsuperscript{147} and benefiting from social assumptions because one is a member of a dominant group.\textsuperscript{148} The law reflects as well that these are not uniform acts of discrimination.\textsuperscript{149} Those who are conscious that they

\textsuperscript{144} Antonio Gramsci, a neo-Marxist, found oppression to be a function of the oppressed classes’ “false consciousness.” Gramsci’s concept of hegemony involved “false consciousness,” consent by the great masses, and the coercive apparatus of state power. See generally SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971).

\textsuperscript{145} See, e.g., MARILYN FRYE, THE POLITICS OF REALITY 1–16 (1983).

\textsuperscript{146} Bull Connor was the Alabama police commissioner who most of us have seen on TV clubbing and hosing down the freedom riders of the Civil Rights era. “Bull Connor” racism refers to such blatant forms of racism. For the most part, such racism seems remote; it is conduct that most Americans condemn, but they also view it as mainly “engaged in only by other (uneducated, mostly Southern, and morally reprehensible) whites.” Sylvia R. Lazos Vargas, Deconstructing Hom[geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect, 72 TUL. L. REV. 1493, 1524 (1998).

\textsuperscript{147} See Lawrence, supra note 97; Krieger, supra note 121.


\textsuperscript{149} In Title VII, the doctrinal tool used to differentiate among different types of discrimination is the intent requirement. See generally Ann C. McGinley, ¡Viva La Evoluci??: Recognizing Unconscious Motive in Title VII, 9 CORNELL J.L. & PUB. POL’Y 415.
are engaging in acts of prejudice or stereotyping are more legally accountable than individuals who benefit unconsciously from cultural assumptions.

Also, the concepts of white/male/heterosexual “privilege” developed in the literature imply no active agency. Rather, privilege describes benefits that accrue to members of a dominant class because of their group membership. Social structures and cultural assumptions cause the dominant group to be viewed as possessing characteristics that mark them as superior to, and more able than, those who are members of the relational “other.” For example, men are leaders and active, while women seek cooperation and are passive. In addition, members of the dominant group will benefit when society incorporates that group’s norms and viewpoint as the default standard for the entire society. For example, in the business environment, it has usually been the case that aggressive leadership style—a norm favored by men—is more valued, and therefore more often rewarded than a cooperative enabling style—a norm favored by women. In exercising privilege, the dominant group “goes along” with these advantages, choosing not to see them. Privilege then is an “invisible” aspect of gender, racial, and sexual orientation difference. In the minds of those who hold privilege there are no racist thoughts. Neither do they view themselves as agents of the oppression of minorities. At play are both a lack of consciousness and a lack of willingness to question the sources of many advantages that these

(2000).

Martha Minow writes:

[A]tribution of difference . . . locates the problem in the person who does not fit in rather than in relationships between people and social institutions. The attribution of difference hides the power of those who classify and of the institutional arrangements that enshrine one type of person as the norm, and then treat classification of difference as inherent and natural while debasing those who are different. . . . When public or private actors label any groups as different it disguises the power of the namers, who simultaneously assign names and deny their relationships with and power over the named. Naming another as different seems natural and obvious when . . . social practice, and communal attitudes reinforce that view.

Martha Minow, Making All the Difference 111 (1990).

Professor Iris Marion Young describes the process as follows:

Cultural imperialism involves the universalization of a dominant group’s experience and culture, and its establishment as the norm. . . . The culturally dominated undergo a paradoxical oppression, in that they are both marked out by stereotypes and at the same time rendered invisible. As remarkable, deviant beings, the culturally imperialized are stamped with an essence.

Iris Marion Young, Justice and the Politics of Difference 59 (1990).
members enjoy because they are white, male, or heterosexual.

A more nuanced approach to describing the various forms of discrimination could help to bridge the existing paradigm gap, and might help to make the discourse seem less accusatory. Moreover, a more nuanced approach is more descriptively accurate. If critical scholars are to argue for laws that change the social and cultural background that constructs race, gender, and sexual orientation, then they must also describe more cogently those situations under which the law should hold actors individually accountable. A second implication is that critical scholars should endeavor to use terms that more accurately describe the forms of subordination that they are trying to capture. To indiscriminately use terms like “racism,” “oppression,” and “prejudice,” lends itself to confusion about what critical scholars are actually attempting to describe and theorize. Finally, critical scholars should not lose sight that these labels continue to be loaded terms. While it may be too much to indiscriminately proscribe such terminology because it allegedly is a “conversation stopper,” critical scholars should nonetheless recognize that these terms have a powerful effect. To use the term “racism” in a universalistic sense has the potential to desensitize the legal community to this term. A more nuanced approach could mean that the critical project may become less threatening to those scholars who perceive themselves to be in the group of “privileged” beneficiaries that critical scholarship indicts. Such moderation in tone, and not in substance, could help to further engagement.

2. Are Racism, Sexism, and Homophobia So Endemic as to Be Permanent Fixtures of American Society?

CRT in its fatalistic form is deeply troubling and difficult to accept. Farber and Sherry disapprovingly quote Delgado’s assertion that “[r]acism is natural and normal—the ordinary state of affairs . . . .” They also retell with unveiled dismay Derrick Bell’s Space Traders hypothetical that depicts white Americans as willing to bargain with aliens who will take all American blacks away in exchange for saving

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152 This is my own description of Bell and Delgado’s view that racism is endemic to American society. Both Bell and Delgado contest the description of their theories as fatalistic. Delgado argues that his premise that racism is endemic should encourage us to be vigilant and not surrender. Delgado & Farber, supra note 93, at 372. Bell argues that his “racism is permanent” thesis is addressed to members of racial communities and functions to admonish them not to be overly confident in civil rights remedies and to become more self-reliant. See Bell, SAVED, supra note 92, at 12; see also infra notes 158–61 and accompanying text.

155 Farber & Sherry, supra note 7, at 24.
the rest of the world. Farber and Sherry cite these passages to show that critical theory is extreme, making three assertions in support of that point. First, they assert that CRT only seeks to “expose” such “pathologies.” Second, they contend that CRT posits that “[r]eason is a political entity,” designed to ensconce racism, sexism, and homophobia. Third, they argue that CRT contends that justice is merely a “rhetorical device.”

This is a strong medicine for anyone, particularly for liberal whites who see themselves as champions of racial and social justice. While the proposition that racism is endemic may be discomforting to whites, it is a fact of life for minorities. Bell describes that, when he retells the *Space Traders* parable, African American audiences instinctively grasp the racial truth behind it and nod their heads in assent and recognition. The Farber and Sherry skepticism contrasts with this resonance that Bell achieves with black audiences.

Professor Bell is brutally honest about how he sees race operating in this country. He encourages both racial minorities and whites to take an honest look at race relations and ask several hard questions. First, what does it say about whites’ moral makeup that whites participated for so long in the gruesome system of slavery and accepted its indirect and direct benefits? Second, why do a majority of whites refuse to vote for policies that would relieve the suffering of poor people, many of whom are racial minorities? Third, why do whites appear to be unconcerned that there continues to be ongoing discrimination against racial minorities, even if it is unconscious? Fourth, why are whites not bothered when there are so few racial minorities among society’s elites, as CEOs of corporations, influential politicians, and leading educators? Finally, do whites target racial minorities as scapegoats in order to imagine their status to be better

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154 Id. at 25.
155 Id.
156 Id.
157 Id. at 24–25 (citing Derrick Bell, *Radical Realism*, 24 CONN. L. REV. 363, 364 (1992), for the proposition that law and courts are “instruments for preserving the status quo and only periodically and unpredictably serve as a refuge of oppressed people”) (internal quotation marks omitted).
158 See Derrick Bell, *Who’s Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 903 (recounting that most white audiences react to this story with denial and disbelief, while black audiences find the story plausible).
159 See BELL, *FACES*, supra note 92, at 6–8.
160 Id.
161 Id.
162 Id.
off than it really is, and in order to identify with privileged elites? The answer for Bell is that whites are only too willing to look away from racial problems and racial minorities’ plight. Whites will advocate changes to social and political systems that relieve blacks’ racial oppression only when it benefits them.

Bell concludes:

Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary “peaks of progress,” short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies. We must acknowledge it, not as an act of submission, but as an act of ultimate defiance.

What is at play here is a fundamental schism in the interpretation of American history, the American legal and political system, and the nature of race relations. It is what Thomas Kuhn describes in his *The Structure of Scientific Revolutions* as an irresolvable paradigm gap. The proponents of the racial realist paradigm cannot convert the defenders of the traditional paradigm, and vice versa. One could view this as a form of the irresolvable “half empty/half full” debate. Bell and Delgado both take a backward perspective that emphasizes what Bell calls America’s holocaust—slavery. Most traditional liberal theorists, like most white Americans, take a forward-looking perspective that emphasizes the 1960s civil rights transformation of American race relations. Yet another perspective on this schism is to note that Bell and Delgado are

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163 Id.
164 This is Bell’s “interest convergence” theory. See generally Bell, *supra* note 157; Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).
165 BELL, FACES, *supra* note 92, at 12.
166 THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 10–11 (3d ed. 1996). I acknowledge Professor Stempel’s critique that the concept of paradigms and paradigm gaps is overused in scholarly literature. See Stempel, *supra* note 38, at 696 (criticizing overuse of the concept of paradigms among legal scholars but applying it to the field of dispute resolution). Further, Professor Stempel makes a very cogent argument that Kuhn’s concept of how knowledge evolves does not fit well with respect to legal thought. See id. at 695–705. Legal theory does not undergo dramatic jumps forward, as have the sciences. Id. at 696. Law is moored to traditional concepts, in large part because of common-law methodology. Finally, law is not “scientific,” but mirrors social thinking and reflects the ongoing changes in social science, philosophy and moral thought. Id. at 738. In sum, there are no sudden transformations, just slow plodding. Nonetheless, I will use these concepts because they are useful to explain why well-meaning white liberal scholars, like Farber and Sherry, are unable to accept much of what CRT scholars are trying to say, and because Kuhn’s concept of engagement is at the core of how I believe legal knowledge evolves.
addressing minority communities. Both believe that unflinching honesty with respect to American liberal democratic politics is essential for minority members to avoid being lulled into false comfort. Racial realism frees minorities from false hope and enables them to renew their pursuit of racial justice with “ultimate defiance.”

When critics listen in, however, they hear a dialogue that appears to condemn all white Americans.

Kuhn’s key insight is that disciplinary knowledge is as much a social construct as it is a scientific undertaking. Disciplinary norms and practices can constrain what practitioners can observe and even understand. When groups function from fundamentally distinct knowledge assumptions, both opponents and proponents talk past each other. Each group uses its own sets of assumptions and principles to argue that their “paradigm” is superior. What results is circularity because neither group can convince the other that its arguments have merit. Moreover, because these groups function from a distinct set of assumptions, often the very terms that they use will not have the same meanings.

Racial realism is fundamentally unsettling. Most white scholars, as is the case with many critical race scholars, find it difficult to reconcile their legal work with a perspective that asserts that law is incapable of solving racial and gender injustice. Racial realism’s main attribute—its unflinching willingness to look at the ugliness of America’s racial past and present—also accounts for why racial realism has managed to swallow up much of the current debate. Its fatalism seems to question everything that is familiar, including whether Americans are capable of transforming themselves into less prejudiced individuals. While this is a powerful insight, it is unsettling to many scholars, who write because they believe they can persuade legal actors to reconsider how they interpret legal principles.

Further, CRT is threatening to whites’ sense of a fair and

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167 *See Bell, Faces,* supra note 92, at 12.
168 *See George A. Martinez, Philosophical Considerations and the Use of Narrative in Law,* 30 RUTGERS L.J. 683, 689–92 (1999) (describing how whites and minorities do not share the same conceptual framework and arguing that CRT narratives are largely addressed to minority communities which share a common life experience).
169 *See Kuhn,* supra note 166, at 160–91.
170 *Id.* at 151.
171 *Id.* (“Each group uses its own paradigm to argue in that paradigm’s defense . . .
172 *Id.*
173 *Id.* at 202.
innocent self.\textsuperscript{174} With uncanny prescience, Bell foretold that the questions raised by racial realism are “easier to reject than refute . . .\textsuperscript{1} .”\textsuperscript{175} As Kuhn and Bell would have predicted, the (white) critics have strenuously rejected the (nonwhite) view of race relations. \textit{No CRT critic}\textsuperscript{176} has attempted to respond to the hard questions raised by Bell and Delgado. Yet, many of these same critics claim to be just as committed as critical theorists to the goal of racial equality.

In the case of such an irreconcilable gap, Thomas Kuhn recommends engagement.\textsuperscript{177} Kuhn advocates that insiders and outsiders not stop talking to each other, and that they attempt to find common ground on which to continue a dialogue.\textsuperscript{178} It is engagement by both sides of the divide, so to speak, that eventually leads to “scientific revolutions.”

There is a sliver of common ground between the CRT theorists and the critics. It is hopeful that in a debate between Richard Delgado and Dan Farber, Professor Farber asserts that he has a great deal in common with Delgado because he believes that “racial inequality” is “central and require[s] the most serious possible attention.”\textsuperscript{179} Similarly, Mark Tushnet, in his exchange with critical race theorists, also reiterated his commitment to racial equality, and acknowledged that the CRT scholarship he is critiquing “substantially enhance[s] my understanding of the law.”\textsuperscript{180}

Critical scholars should take these academics at their word. They should refuse to be distracted by rhetorical debates as to whether racial realism is “paranoid.”\textsuperscript{181} There can be common

\textsuperscript{174} Lazos Vargas, \textit{supra} note 146, at 1524–26 (describing white racial innocence as an essential attribute of white American identity); \textit{see also} Thomas Ross, \textit{Innocence and Affirmative Action}, 43 \textit{VAND. L. REV.} 297 (1990) (explaining that the affirmative action debate is framed in the rhetoric of “white innocence” and that this avoids dealing with problems of unconscious racism). Ross observes that “by repressing our unconscious racism we make coherent our self-conception of innocence and make sensible the question of the actual victimization of blacks.” \textit{Id.} at 312.

\textsuperscript{175} \textit{See} Bell, \textit{Faces}, \textit{supra} note 92, at 12.

\textsuperscript{176} \textit{See} authors cited \textit{supra}, note 9.

\textsuperscript{177} Bell, \textit{Faces}, \textit{supra} note 92, at 12.

\textsuperscript{178} Kuhn, \textit{supra} note 166, at 161–90.

\textsuperscript{179} Delgado & Farber, \textit{supra} note 93, at 374. In reality, Professor Delgado and I share a great deal in our views of law and American society. Both of us see the issue of racial inequality as being central and requiring the most serious possible attention. Both of us reject the conservative dogma of color blindness, and both of us believe that there is an imperative need for dialogue and discussion of this topic.

\textsuperscript{180} \textit{See} Tushnet, \textit{supra} note 8, at 259 n.32. Professor Tushnet’s critique can be understood as urging that CRT narrative scholarship be more precise so that it can be better understood (or heard) by mainstream constitutional scholars. \textit{Id.} at 259.

\textsuperscript{181} \textit{See} supra note 136 and accompanying text.
ground. The debate has to be refocused by asking how the law can fulfill its commitment to racial and gender equality.

3. How Do Whites, Men, and Heterosexuals Evaluate Minorities Without Risking Being Called “Racist,” “Sexist,” or “Homophobic”?

Critical scholars’ attack on merit and objectivity can be interpreted at a deeply personal level. Farber and Sherry reveal this when they pose the following rhetorical question: “If objectivity is a myth, and knowledge and merit are socially constructed, where does that leave those who cling to traditional . . . aspirations? The answer: at some risk of being labeled racists and bigots.”

They further allege that critical scholars believe that “all current merit standards are infected by racial or gender bias.” Farber and Sherry capture critical scholars’ attack on merit when they observe that critical scholars reduce merit to mere “mindset,” the “bundles of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.”

Randall Kennedy’s critique of Bell, Delgado, and Matsuda is also based on his own belief that structures of merit in institutions function well enough, and that a black scholar could be judged fairly.

Merit, as an institutional practice, impacts on both critics and critical scholars directly. Critics, like Farber, Sherry, Tushnet, and Posner, have attained positions of influence in legal academia. They make decisions as to who will enter the ranks of legal academia, vote on the tenure of colleagues, and serve on the editorial boards of university presses and peer-reviewed journals. On the other hand, critical scholars, many of whom are junior, are vulnerable to criteria

182 Farber & Sherry, supra note 7, at 33 (emphasis added).
183 Farber & Sherry, supra note 29, at 1748.
184 Farber & Sherry, supra note 7, at 29 (internal quotation marks omitted).
185 Cf. Kennedy, Racial Critiques, supra note 40, at 1762–64 (urging CRT scholars to undertake more academic rigor in their critiques). See also Duncan Kennedy, supra note 54, at 712–17 (pointing out that part of the gap between Randy Kennedy and CRT scholars revolves around whether there can be a neutral assessment of merit in legal academia, which is dominated by white elites).
186 See Jerome McCristal Culp, Jr., Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy, 41 DUKE L.J. 1095, 1095 (1992). Professor Culp believes that “a disproportionate number of blacks will not make tenure” if tenure standards are the same as for white professors. Id. Making a similar point but coming from a completely different viewpoint, Judge Posner also believes that “a disproportionate number of blacks will be turned down” for tenure. However, because this will be “awkward” for mostly white academic institutions, Posner asks rhetorically, “are there to be two tracks . . . [with a second tier] affirmative action track . . . limited to blacks?” Posner, OVERCOMING LAW, supra note 11, at 105.
that cause their work to be viewed as unmeritorious because these traditional scholars have already come to the conclusion that critical scholarship is “paranoid,” “lunatic,” or dangerously anti-foundational, charges that have been legitimized because high-profile scholars and the media have reified them.

In this case, bridging the paradigm gap has immediate and important implications. Critical scholarship is a jurisprudence that challenges not only traditional perspectives, but also confronts the personal, intellectual, and emotional comfort of traditional scholars. These traditional scholars are the same colleagues who sit in judgment at tenure time.

Tenure is supposed to be awarded on the basis of merit, but is it? Critical race scholars have attacked the premise that merit is a neutral concept. Such a critique does not lead to the conclusion that critical scholars reject merit altogether. Rather, critical race scholars advocate reconceptualizing merit in ways that take into account the potential for cultural biases, whether such biases be based on race, gender, or sexual orientation. Lani Guinier advises that standards of merit must be carefully scrutinized in order to ensure that subjectivity is minimized, and that “objective” standards do not implicitly favor one group over another. The critique of merit is not unfamiliar. Farber and Sherry themselves acknowledge that “merit” as an institutional practice has been imperfect, tending towards elitism and self-replication.

The continued inclusion of critical scholars within legal academia is important. The Supreme Court in Grutter v. Bollinger explained that diversity of viewpoints and perspectives in elite institutions whose very purpose is the construction of knowledge is an

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187 See supra note 136 and accompanying text.
188 See supra note 11 and accompanying text.
189 See generally FARBER & SHERRY, supra note 7.
190 See supra notes 13–18 (citing to popular press commentary attacking CRT, echoing what journalists understood critics to be saying).
192 Farber and Sherry capture critical scholars’ attack on merit. “Judgments about . . . academic merit . . . reflect the ‘mindset’ of the dominant social groups . . . their ‘bundles of presuppositions, received wisdoms, and shared understandings.”’ FARBER & SHERRY, supra note 7, at 52. They go on to argue that because Jewish and Asian American scholars have been able to succeed in academic institutions, their success “proves” that the standards that have benefited them are not fundamentally flawed. See id. at 57–59.
essential project to a stable democracy. Legal jurisprudence has evolved because the legal academy has been sufficiently pluralistic to include those who defend comfortable notions and those who challenge them. Legal knowledge is not unitary. No single jurisprudential outlook dominates. Instead, there is a multiplicity of approaches, with no single jurisprudential view ever being able to confidently claim preeminence. It is important that legal knowledge remain a pluralistic enterprise. This dictates that a healthy academic environment be one where various jurisprudential outlooks can be aired, are engaged, and where each is in competition with the other. Yet legal academia is also a social institution, so there are social forces at play that push legal academics towards uniformity, conformance, self-duplication, and “dumbing down” through the bureaucratization of legal institutions any ideas and practices that may threaten the status quo.

For legal scholarship to remain a dynamic and pluralistic enterprise, the tendency towards uniformity and conformance must be consciously resisted. Each individual legal scholar who is tenured will be making decisions as to who can gain entry into the legal academy through the process of voting on tenure. If traditional scholars as individuals allow their discomfort with the ideas of critical race scholarship to temper their judgment as to the professional merit of critical race scholars who are up for tenure, then the consequence will be that fewer critical scholars will be part of legal academia. No one would win in the long run with such results. Academics must strive to judge those who make them uncomfortable in as “neutral” a manner as possible, by which I mean first, that those who judge must become aware of their emotions and not allow them to color the outcome, and second, that the judgment of merit not become a quarrel about world perspectives on race or gender. Professor Edward Rubin has argued that critical scholarship can be judged fairly by majority scholars. In particular, he has argued that

194 Id. at 330 (agreeing with the district court that the “[diversity] policy promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races” and that “classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds”) (internal quotation marks omitted) (second alteration in original). See generally Sylvia R. Lazos Vargas, Does a Diverse Judiciary Attain a Rule of Law That Is Inclusive? What Grutter v. Bollinger Has to Say About Diversity on the Bench, 10 MICH. J. RACE & L. (forthcoming May 2005).

195 Although this is not the thrust of Professor Minda’s recompilation of legal movements, his book makes this point nicely. See GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END (1995).
CRT and other outsider scholarship should be evaluated phenomenologically, according to criteria of coherence, persuasiveness, significance, and applicability.\textsuperscript{196} Professor Rubin argues that the doubt and anxiety that CRT scholarship triggers in majority scholars by CRT’s challenge to core beliefs can be put to good use.\textsuperscript{197} Doubt and anxiety can be redirected such that one becomes more self-critical about one’s own philosophical and epistemological position. It is through the process of being challenged and formulating responses to those challenges\textsuperscript{198} that legal scholarship can advance. Scholarship, both majority and CRT, becomes more precise, more reflective, and more balanced through this process of critique and counter-critique.

Rubin’s approach hearkens back to Kuhn’s observation that the key to the evolution of disciplinary knowledge is intellectual engagement rather than agreement.\textsuperscript{199} Although insiders may come to understand what outsiders are arguing, they will likely remain unpersuaded that the outsider paradigm is superior to theirs.\textsuperscript{200} Through continuous engagement and explication the outsider paradigm gains greater acceptance as an increasing number of participants becomes familiar with the ideas and comes to accept its premises.\textsuperscript{201} As Kuhn explains, there are important pitfalls in the process of engaging a competing knowledge community. Outsiders must recognize that there is a fundamental communications gap between insiders and outsiders. They must become “translators” of their views.\textsuperscript{202} For example, confusion and dissention may be caused when the same vocabulary is used in different ways.\textsuperscript{203} Such fundamental misunderstanding can be avoided by more careful explication of terminology and fundamental assumptions. Challengers can communicate their views and assumptions through “share[d] everyday vocabularies.”\textsuperscript{204} By using common concepts and principles, supporters of the outside paradigm can “translate” their

\begin{itemize}
\item \textsuperscript{197} Id. at 946.
\item \textsuperscript{198} Rubin advises that “the very process of formulating counter-arguments, which is a mechanism for outright rejection of the author’s work when uncritically performed, becomes a datum for assessing that work’s quality in the context of a more disciplined evaluative theory.” Id.
\item \textsuperscript{199} KUHN, supra note 166, at 203.
\item \textsuperscript{200} Id.
\item \textsuperscript{201} Id. at 153, 201–04.
\item \textsuperscript{202} Id. at 202.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Id.
\end{itemize}
own theories to the established group, and better depict the fundamental ways in which their view differs and the consequences of that difference. Finally, supporters can “develop . . . hardheaded arguments” and show with “concrete results” that their “paradigm” better explains certain kinds of difficult problems that the established paradigm has been unable to address.

In sum, academic Kulturkamps are distressing at one level, because they signal that outsiders and insiders are talking past each other and unwilling to consider what the other has to offer. However, both Rubin and Kuhn have been helpful in their observations that an academic ethic of engagement can help bridge the gap. The goal is not agreement, but that each side develop non-emotional and hard-headed approaches to explaining their own positions and be willing to be open to the others’ basic premises and challenges.

B. Insider Critiques: Coping with a Many-Headed Hydra

As Professor Francisco Valdés underscores, LatCrit’s principal analytical methodology evidences a multidimensional analysis. Because he believes the dynamics of subordination—race, gender, class, culture, history, social group formation—are too complex to be captured in one or two dimensions or “intersectionalities,” Valdés urges “multidimensional critique . . . [as] another step toward helping the LatCrit community better visualize and understand the nature of . . . critical legal theory and praxis.” Professor Lisa Iglesias has noted that this methodology enables LatCrit to “take[e] a stance against all forms of subordination.” In addition, LatCrit has strived to be inclusive of multiple perspectives and groups in order to break through artificial structures and classifications that might impede the exploration of how to attain antisubordination goals.

Such flexibility and inclusiveness can also be a source of tension,

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205 Id. at 153.
206 Id. at 203.
207 Id.
210 Valdes, supra note 208, at 899.
which can be grouped around two clusters. The first cluster asks, who defines the discipline of CRT? The second cluster inquires whether or not CRT foments non-assimilation.

1. The Power of Framing and Naming: Who Defines a Movement?

Professor Delgado’s critique of LatCrit is based on his observation that LatCrit has strayed from its CRT materialist roots. In his view, LatCrit has “lost its focus” after a promising beginning. Getting back to basics, or becoming more rigorous analysts, is what Professor Delgado believes is needed.

Sociologist Pierre Bourdieu has written extensively about legal academia as a social institution. He notes that the production of knowledge by academics is a forum of contestation and power. Bourdieu observes that academics, as producers of cultural knowledge, have an interest in what kind of knowledge is produced. That interest may be a larger group interest, such as the CRT interest in racial justice, or it could be personal, such as a researcher’s personal desire for status within her profession. People who are able to define a discipline and a movement can also situate their own accomplishments within the discipline, or they can delegitimize an entire legal movement. Over a decade ago, Professor Jerome Culp accused Judge Posner of seeking to delegitimize critical race theory by framing and naming:

[M]y criticism is that Judge Posner wants to control the assumptions of the debate. . . . He demands the right to control those assumptions without dealing with alternative assumptions proposed by black scholars. This demand to control the assumptions underlying the discourse is at the heart of the dispute . . . . White scholars often ask black scholars to jump through some appropriate hoop before they will be listened to by “real” scholars. If black scholars are doing some mode of analysis in legal scholarship improperly, then Judge Posner should demonstrate how.

All critiques involve framing and naming. What Bourdieu calls for is not that ongoing critiques cease, but rather that the scholar

\[212\] See Delgado, Blind Alleys, supra note 86, at 123–24.
\[214\] See id.
\[215\] Id.
\[216\] See id. at 24–25.
\[217\] Culp, supra note 186, at 1098–99 (footnote omitted).
understand the social motivations and interests that are involved in her intellectual practice.  

There will always be difficulties when insiders try to define valid methodologies and the core subject matter of a movement, as Professor Richard Delgado tried to do in *Blind Alleys*, or what is merit-worthy scholarship, as Professor Randall Kennedy did in his *Critique of Minority Academia*.  LatCrit’s key strength is that the definition of the movement has been a collective affair.  The very structure of the LatCrit symposia is open, allowing those who have already attained a standing within the LatCrit academy, like Richard Delgado, to contribute in symposia and anthologies alongside those who are just entering the profession.  The practice of composing forewards, afterwords, and cluster introductions in LatCrit symposia among rotating CRT scholars from various disciplines is designed to import different individual and disciplinary perspectives.  This is a self-conscious effort to rethink and re-situate LatCrit within its own growth dynamic and in the larger context of legal knowledge.

For this reason, the definition of LatCrit is a moving target.  This is a good thing, but for some it is an unfamiliar practice that is too uncertain.  The principal tenets continue to be hammered out in LatCrit symposia.  The expectation is that the movement will grow and redefine itself as new members contribute to legal knowledge, and as the social and political context changes.  For example, responding to the increased governmental powers and policies after 9/11, which disproportionately impact citizens of color and noncitizens, is now a major part of the LatCrit enterprise.  As LatCrit grows and responds to new pressures it may appear to lose its focus, but these may just be the growing pains and the cost of commitment to a “no star” system that ensures the inclusion of all contributors.

2. Does Critical Race Theory Encourage Non-Assimilation and Separatism?

The assimilation–separatist debate is at the heart of the role of minorities/outsiders in America, where the assimilationist ethic is very strong.  The debate between Professors Robert Chang and Jim Chen is partly about very different views about minorities in the civic polity.  Professor Chen, as “an American of Taiwanese decent,” reacted to Chang’s proposal for an APIA legal movement as evidence

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218  See *BOURDIEU*, * supra* note 213, at 6–7 (observing that “[t]here is no object that does not imply a viewpoint, even if it is an object produced with the intention of abolishing one’s viewpoint”).

of “racial fundamentalism.” By using this term, Professor Chen intended to recall other religious fundamentalist movements, which are illiberal, absolutist, and separatist. Chen carried the “racial fundamentalism” argument into the personal realm, accusing Chang of advocating in a footnote a perspective of racial authenticity that is deeply coercive—that members of minority groups should marry and adopt only their own.

The Chen–Chang debate has played out before in the Randall Kennedy–Bell–Delgado–Matsuda rift. These public schisms show that minority “communities” are diverse and can be contentious. While individuals may feel pressure to conform to what they believe might be a “politically correct” view, they actually do not. And there is not sufficient solidarity about what is a racial perspective that would prevent any single minority from expressing his or her own individual view about the significance of racial experience in America. This is part of the reason that identity issues and racial narratives seem to crowd out the scholarly discourse, as Professor Delgado has complained. Everyone can weigh in with some legitimacy.

Foremost, the Chen–Chang debate raises the familiar melting-pot/assimilationist dilemma and the issue of how individual racial identity weighs into how one views that tension. The dominant cultural paradigm in the United States has been the notion of a “melting pot” by which immigrants become assimilated into American culture. However, melting-pot assimilation requires that the majority be willing to accept the new entrant groups as equals. Chang’s call for a more sustained analysis of the experience of Asian Americans is based on his view that discrimination and oppression experienced by Asian Americans has been hostile and aggressive. Such racism is manifested in different ways, such as the perceived “foreignness” of Asian Americans and the recurring belief that they

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220 Id. at 155; see also supra Part I.C.
221 See supra notes 62–63 and accompanying text.
222 See supra note 68 and accompanying text.
223 See supra note 69 and accompanying text; see also Chen, supra note 59, at 155–67.
224 Cf. Delgado, Blind Alleys, supra note 86, at 131 (critiquing compilation of essays in Crossroads, supra note 88, dealing with racial identity as not attaining a “unique voice of color” but rather as overindulging the personal emotional tribulations connected with being a minority in legal academia).
225 See Lazos Vargas, supra note 146, at 1531–34 (discussing the cultural mandate of the “‘melting pot’ myth”); see also Kevin R. Johnson, “Melting Pot” or “Ring of Fire”?: Assimilation and the Mexican-American Experience, 85 CAL. L. REV. 1259 (1997).
226 See Chang, supra note 60, at 1286–1303.
are not sufficiently loyal to the American nation. Under Professor Jim Chen’s alternative view, racial attitudes are changing. Racial/ethnic minority individuals, particularly those who have achieved upper and middle class status, can find increasingly less resistance to integration, assimilation, and acculturation. This provides opportunities for individual minorities to assimilate in melting pot fashion.

These two perspectives are not necessarily mutually exclusive. As the earlier Kennedy debate showed, individual minorities interpret their own minority racial experience very differently. Chen and Chang disagree on facts and theory, but mostly they differ on how they conceive their own racial identity in a society where discrimination against racial minorities is real and ongoing.

LatCrit and APIA scholarship has defined race as a complex historical, cultural, phenomenological, and psychological social dynamic. Racial/ethnic communities incorporate diverse cultural traditions, and may encourage assimilation. Regional histories are another important differentiator. In the case of Asian Americans, their racial oppression was most acute in California, the Northwest, and Hawaii, where Japanese Americans experienced forced internment during World War II. These are areas where we would expect the boundaries of race to be at their most inflexible and unforgiving.

With such variability, it follows that an individual’s interpretation of his or her racial experience will also be highly varied. Jim Chen does not feel or view himself as an outsider minority scholar, and he prominently protested the possibility that a fellow scholar of Asian decent might view him as such. To make this “choice” so publicly and trenchantly seems an odd sort of theater. Nonetheless, Professor Chen’s racial identity “choice” is as legitimate as Bob Chang’s racial identity “choice.”

However, all things are not equal. These competing narratives of racial experience were received differently. Jim Chen’s perspective validated many of the beliefs held by white academics, among them those who are hostile to CRT. Chen’s narrative was embraced as

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228 See supra note 51 and accompanying text.

229 Chen protested what he perceived as the presumptuousness of Chang’s declaration of an “Asian American Moment.” See Chen, supra note 59, at 145. He makes a point of calling himself an “American of Taiwanese descent,” id. at 146, who resists Chang’s “secessionist manifesto,” and his call for “racial segregation.” Id. at 145.
validation of a hostile view of the precepts of CRT. On the other hand, Chang, from the very beginning, meant to challenge established legal academia. His public announcement of his racial perspective and his aim to challenge legal academia by calling for a moment of APIA critical scholarship made white academics uncomfortable. Chang’s path was by far the riskier.

CONCLUSION

Legal academia has gone through various Kulturkampfs, with CRT having gone through more than its share. The question is not whether there will be more in the future because undoubtedly there will be. The gaps are based in knowledge and perspective, but what seems to impede the dialogue most is how identity and ego get in the way of a healthy dialogue.

Critical theorists can help bridge the gap. First, they must reclaim the prerogative to define the critical project. In a movement like LatCrit the challenge of framing the movement is inherently difficult because LatCrit is self-consciously inclusive, elastic, and dynamic. Critical scholars, however, should constantly articulate what they stand for and should resist the temptation, put forth by critics, to simplify the contours and content of critical scholarship. Some may argue that complexity and contradiction might weaken the voice of critical scholarship. However, the insider Kulturkampfs show that anti-essentialism and complexity more accurately capture what CRT is and may be able to minimize controversy and confusion.

The critical question is not whether there will be ongoing Kulturkampfs, but whether there can be an ongoing ethic of engagement. Both sides must continuously explain how it is that they differ and the basis for their differences. Both sides must seek to establish a common language so that there can be some progression of understanding of our human condition and how the law affects it.

In sum, what is required is that both critical theorists and the critics exhibit patience with each other and attempt to acknowledge their knowledge gaps. In addition, both sides need to probe beyond the distracting rhetoric and earnestly identify where there is common ground. There is one practice that unifies legal academics. Justice is a value that is neither outmoded nor suspect.
IMMIGRATION

Immigration and the Allure of Inclusion

*Ediberto Roman*

**INTRODUCTION**

The legal predicament of Victor Navorski is a classic tale of a man without a country and is unfortunately replete with metaphors for the plight of immigrants to this land. Navorski’s saga begins when he is detained at the border of the United States, which in his case is at one of New York City’s airports. He is legally unable to leave his port of entry and locale of detention because the government of his homeland, Krakozhia, was recently overthrown and the United States has not recognized the new regime. After surviving in a legal and literal state of limbo for several months, Navorski eventually musters up the courage to illegally cross the border by leaving the airport in order to enter the United States and fulfill his family’s dream.

Victor Navorski’s saga was not addressed in the media or courtrooms but in theaters and home videos, as he is a fictional character played by Tom Hanks in the film “*The Terminal.*” Navorski’s character is based on the tragic real-life saga of Merhan Karimi Nasseri, who after being expelled from Iran without a passport has lived in France’s Charles de Gaulle Airport since 1988. Nasseri has been unable to leave the French airport because his briefcase containing legal documents, including a refugee certificate permitting him to reside in England, were

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stolen in a French train station.⁴ Because it is based on fact, Nasseri’s saga is obviously far more consequential; nonetheless, both stories in many ways trace the trials of legal and illegal immigrants throughout the Western world. These two stories reflect, in a microcosm, the real-life trials of millions of immigrants; the protagonists are faced with immigration regimes that are apparently filled with arbitrary distinctions, irrational motivations, and bureaucratic nightmares.

I. IMMIGRANT STORIES

Essentially, all immigrant stories concern labels and their consequences, including the fiction of the legal and illegal “alien.”⁵ These labels in turn are created by immigration regimes that have the effect of establishing identities of both welcomed and unwelcome newcomers into a society. These fictions or labels occur within what can be described as the legal fiction of the nation-state. In many respects, all immigrant debates and accounts are tales of inclusion and membership within legal frameworks that decide which groups of people are deemed worthy of eventual formal membership within a political structure. Indeed, the label of “alien” situates persons as “outside of ‘We the people’ and therefore places them by definition as outsiders.”⁶ Typically, under western immigration systems, those deemed worthy of membership are classified as legal aliens or immigrants, who in turn are allowed the right to convert their status to full participants within the society, known as naturalized citizens. The naturalized citizens are contrasted, in immigration parlance, with those that are deemed to have entered the nation-state illegally; in other words individuals who arrive in ways that are inconsistent with the means deemed appropriate by the nation-state are deemed to be illegal aliens. For all intents and purposes, illegal aliens, exist in the shadows of the society with virtually no political presence or rights. In fact, the label of illegal alien alone justifies the disregard of any pretense of rights that should be afforded to “legal” members of society. For instance, in explaining why Haitians in the early 1990s were repatriated to their homeland without any judicial or administrative process, in apparent

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⁴ See Matthew Rose, Waiting for Spielberg, N.Y. TIMES, Sept. 21, 2003 at 82.
⁶ Id. at 1685.
violation of international law, President George H. Bush declared that these individual were not refugees but “illegals.”

All too often, unfortunately for those groups in need or desire of entry, the distinctions between the appropriate and inappropriate methods of entry do not appear to be based upon sound moral or legal grounds or justifications.

Both the Navorski and Nasseri stories contain symbolisms that illustrate these ambiguities and arbitrary enforcement of immigration laws. For instance, in both situations the victims of the legal conundrums, through no fault of their own, were prevented from leaving their peculiar place of detention—an airport—and could not legally leave those confines in order to fulfill their wishes of entering their targeted countries.

Using what is termed here as the Navorski-Nasseri phenomenon as a rhetorical tool, this essay briefly reviews aspects of the exclusionary history of domestic immigration law and juxtaposes the rhetoric of inclusion associated with immigration and this country’s history of racialized exclusionary immigration practices. After describing the apparent disconnect between notions of inclusiveness associated with the rational structure of U.S. immigration law and immigration policies in practice, this essay develops a fictional analogy using three imaginary countries to highlight the dramatic differences in the implementation of U.S. immigration law. Against this backdrop, the essay then discusses the articles of Maria Pabon Lopez, Jose Miguel Flores, and Arthur Read that are part of the immigration cluster of LatCrit IX. The Lopez article explores the aftermath of the Plyler v. Doe, decision and its affect on undocumented children. The Flores piece explores the effect of globalization on luring Latin American communities to the United States. The Read piece questions the propriety of the President’s proposed guest workers’ program.

II. THE FICTION OF INCLUSIVENESS UNDER DOMESTIC IMMIGRATION REGIMES

America is all too often described as a nation of immigrants. From the welcoming words at the feet of the statute of liberty inviting the poor, the tired, and huddled masses yearning to be free, this national creed or narrative suggest a welcoming and inclusive land.

7 Id.
Notwithstanding the millions of immigrants that can bear witness to this national narrative, the history of mass migration to this land is also filled with examples of policies and practices that evince anything other than a welcoming narrative. Perhaps the most obvious disconnect between an inclusive national narrative and practice is evidenced by this country’s treatment of racial minority immigrants. While the United States is among the most open in terms of acceptance of immigrants, with hundreds of thousands admitted every year, the history of United States immigration demonstrates that for people of color, and other disfavored groups, legal immigration to this land was all too often an elusive rather than an inclusive proposition. Professor Bill Ong Hing, in his book, *Defining American Through Immigration Policy*, traces the earliest manifestations of immigration limits. He notes that the fear of foreigners motivated early attempts at immigration control; including the 1798 Alien and Sedition laws which were aimed at silencing political opposition and French revolutionaries. Similarly, in his book *The ‘Huddled Masses’ Myth*, Dean Kevin Johnson traces what he terms as the darker and harsher aspects of this country’s immigration story. Dean Johnson methodically traces the little-known racialized history of exclusion in U.S. immigration laws. This exclusionary history against racial minorities is believed to have begun in the 1800’s with local, state, and federal exclusion and mistreatment of Chinese immigrants. These laws included: Congress’ passage of the Chinese exclusion laws that effectively barred all Chinese immigration, and the Supreme Court’s endorsement of Congress’s virtually absolute power to exclude foreigners in *The Chinese Exclusion Case*. Other examples include: the 1907-1908 Gentleman’s Agreement between the U.S. and Japan, which severely restricted Japanese immigration. The Immigration

10. *Id.* at 18.
12. *Id.* at 42.
13. *Id.* at 17.
16. **Roger Daniels,** *Asian America: Chinese and Japanese in the United*
Act of 1917 which expanded exclusion of immigration to the “ Asiatic barred zone;” 17 the naturalization law system that limited naturalization to “ White” and after a civil war to African ancestry immigrants. 18 Subsequent exclusionary acts include the 1924 National Quota System, which was designed to “ ensure stability in the ethnic composition of the United States.” 19 There are also, unfortunately, more recent manifestations of racial exclusion. 20 For instance, there is the Immigration Act of 1965, though often viewed as progressive and liberalizing, nonetheless imposed a 120,000 person ceiling on migration from the Western Hemisphere. This limitation was part of a compromise to the fear of a drastic increase in immigration from Latin America. 21 The motivations behind the Reagan administration’s commencement of the interdiction and repatriation of Haitian nationals seeking admittance to land is also subject of considerable criticism. 22 The George H. Bush, Bill Clinton, and George W. Bush administrations have all followed this policy of aggressive Coast Guard interdiction at sea and summary denials of asylum claims by Immigration and Naturalization Service officials. Professor Steve Legomsky examined this policy and concluded “[t]he public would never [have accepted] this if the boat people were Europeans.” 23 As one author described, “ In the end, asylum seekers from Haiti, one of the few nations near the United States with a large black population, suffered some of the hardest treatment imaginable at the hands of the U.S. government.” 24

III. IMMIGRATION REGIMES AND THE CITIZENSHIP CONSTRUCT

Exclusionary raced-based acts against immigrants of color are not now championed by the government as the basis for its practices and should obviously never have been the hallmarks of any rational immigration regime. Immigration regimes should be based on rational economic, political, and humanitarian policies relating to both the desires of entrants to a land and the receiving country’s

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17 Immigration Act of 1917, Ch. 29, § 3, 39 Stat. 874, 875-76 (1917).
19 Johnson, supra note 11, at 22-23.
21 Johnson, supra note 11, at 25.
22 Id. at 40.
24 Johnson, supra note 11, at 42.
interest and ability to accept those entrants. Thus, immigration affects both bodies that move and the juridical status or label that is imposed upon them by virtue of whether the government of destination is accepting of those movements. In other words, immigration concerns both a physical phenomenon and legal construction through labels such as “alien” and “citizen,” which define who are the members of society and who are unwelcome. Immigration, as a legal construct, is thus one of the primary vehicles used to create a status that both creates identity and defines membership. At least in Western constructions, those who enjoy the preferred status of full social and political participants of society are recognized as the “citizens.” Persons with citizenship status stand in sharp contrast with those with silenced, marginalized, and limited rights holders of a society, known as aliens. Immigration law is thus “illuminating resource for studying the place of domestic groups in the U.S. social hierarchy.” Through this legal regime, “the government is afforded free reign to treat non-citizens . . . as it sees fit.” As demonstrated above, this discretion has facilitated the disconnect between the treatment of minority immigrants to the rhetoric of inclusion associated with domestic immigration. Specifically, despite the fact that most Americans are descendants of immigrants and the national character of this welcoming and embracing land to immigrants is evidenced by Emma Lazarus’ timeless declaration in the New Colossus poem, racial minorities have largely not faced a welcoming land throughout the history of this land. Nonetheless, the vast majority of Americans abide by the popular belief that holds that to be an American citizen, a person did not have to be of any particular national, linguistic, religious, or ethnic background. All he or she had to do was commit him or herself to the political ideology centered on the abstract ideas of liberty, equality, and republicanism. Thus, the universal ideological character of American nationality is largely believed to be open to anyone who legally enters this land and has the will to become an American citizen.

The central discussion of the citizenship concept in the United States Constitution is addressed in the first section of the Fourteenth Amendment, which provides: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

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26 JOHNSON, supra note 11, at 40
27 Id.
the United States, and the state wherein they reside." This fairly straightforward clause establishes two basic ways to achieve citizenship: (1) by birth, and (2) through naturalization. Citizenship by birth can occur by being born within the physical boundaries of this land, also known as "jus soli," which in Latin means by soil. The second means to acquire citizenship by birth is "jus sanguinis," which in Latin means by blood, by being born outside United States' territory to one or both United States citizen parents.

The other means to attain official membership or citizenship is through naturalization—the process that an immigrant may undertake if he or she chooses to become a citizen. Naturalization creates citizenship status through the means and process set forth by Congressional enactment. As a result, though the applicant initiates the naturalization process, once begun, the applicant nonetheless does not control whether he or she will be deemed to have earned the right to be a citizen.

The ultimate goal for many immigrants is to become a permanent resident or citizen. The interest in becoming a citizen is understandable because citizenship is a broad concept that is supposed to signify the rights afforded and obligations imposed in the Constitution, but also is supposed to guarantee an "individual's membership in a political community and the resulting relationship between allegiance and protection that binds the citizen and the state. It includes the sense of permanent inclusion in the political community in a non-subordinate condition.

Practically speaking, citizenship also allows one to seek eligibility for the full compliment of economic rights and government largess provided to citizens. Thus, theoretically citizenship signifies an individual's "full membership" in a community where the ideal of equal membership is theoretically to prevail.

Scholars have argued that because equality and belonging are inseparably linked, to acknowledge citizenship is to confer "belonging" to the United States.

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28 U.S. CONST. amend. XIV, § 1.
29 ALEINIKOFF, supra note 25, at 276.
IV. CONTEMPORARY IMMIGRATION LAW

Despite being within a legal framework with a history that is less than pristine, the primary United States immigration statute, which establishes a largely rational paradigm for those seeking to legally enter and stay in this land, is the Immigration and Nationality Act (INA) of 1952. Though this statute is a contemporary immigration statute that set forth this country’s mandate concerning immigration, even this act contains vestiges of antiquated exclusionary regimes. Nonetheless, pursuant to its effort to create a rational and just system, under the INA there are several types of immigrants, including labor migrants, professional migrants, entrepreneurial migrants, and refugees and asylees. The INA also recognizes a system where otherwise deportable or inadmissible aliens may seek safe haven in this country if they are in fear of persecution by forces in their homeland.

2 observed that "to all general purposes we have uniformly been one people-each individual citizen every where [sic] enjoying the same national rights, privileges and protection." The Federalist No. 2, at 10 (John Jay) (Jacob E. Cooke ed., 1961). Madison in Federalist No. 57 observed "who are to be the electors of the Representatives [in Congress.] Not the rich more than the poor; not the learned more than the ignorant; not the naughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States. No qualifications of wealth, of birth, of religious faith, or of civil profession are permitted to fetter the judgment or disappoint the inclination of the people." The Federalist No. 57, (James Madison) (Jacob E. Cooke ed., 1961). Scholars have also agreed that the concept of citizenship is associated with notions of equality. Professor Ackerman observed that "[in claiming citizenship, an individual - is first and foremost - asserting the existence of a social relationship between himself and others. More specifically, a citizen is (by definition) someone who can properly claim the right to be treated as a fellow member of the political community. Bruce A. Ackerman, Social Justice in the Liberal State, 74 (Yale University, 1980). Professor Fox, who recently examined the history of the term, observed that while "Madison and the other authors of The Federalist Papers may have had little to say about the substance of ... citizenship, they did believe that such a thing existed, that it defined a sphere of equality." James W. Fox, Jr., Citizenship, Poverty, and Federalism, 1787-1882, 60 U. Pitt. L. Rev. 421 (1999). James Kettner similarly noted "revolution created the Status of 'America citizen' and produced an expression of the general principles that ought to govern membership in a free society ... and it ought to confer equal rights." James H. Kettner, The Development of American Citizenship, 1608-1807 (1978).

34 ALEINIKOFF, supra note 25, at 276.
35 Id. at 277.
36 Id. at 278.
37 Id. at 280.
the years, after enactment of the INA, amendments to that statute were passed to affect the admissibility of several groups of immigrants and asylum seekers. These amendments facilitated the ability of certain groups to emigrate, permanently reside, and become citizens in this land. Many of the policies of the INA, despite effectively noting the beginning of the end of mid-century race-based race quotas to immigration, initiated other policies that continued to raise questions concerning the motivations of the act. For instance, the 1952 amendments included in the list of individuals to be excluded from immigration those who were “afflicted with psychotic personality.” After the provision was struck down by the Ninth Circuit in Fleuti v. Rosenberg, the Act was amended to exclude those afflicted with “sexual deviation.” Immigration scholars have concluded that these amendments were intended to exclude gays and lesbians. Another example of controversy associated with the contemporary regime is the 1965 amendments to the INA, which eliminated the discriminatory quota system of dating back to the 1920s, but initiated the use of discriminatory diversity visas. These diversity visas limited immigration from the western hemisphere to 120,000 persons. This change had its intended affect of limiting Latino/a immigration.

Given America’s repeated examples of its reluctance to accept racial minorities as legal immigrants, it is not difficult to appreciate why there may be some cynicism and differing impressions concerning the inclusive rhetoric of immigration. This in turn may leave many immigrants, who in recent times are perceived to be largely from Central and South America, with the impression they face entering a land that is not nearly as welcoming as its national narrative declares. The practices of interdiction at sea and aggressive border patrols make this view abundantly clear. The cynicism with respect to this country’s immigration rules is perhaps best highlighted by the film “The Terminal.” The utterly arbitrary reason for denying Navorski’s entry merely because his homeland changes governments appears analogous to the denial of or limits on immigration for certain groups merely because of where a person is from or whether we oppose the political structure of the immigrant’s

41 HING, supra note 9, at 82-91; JOHNSON, supra note 11, at 140-51.
42 JOHNSON, supra note 11, at 25.
homeland. There is an irony in that the fictional portrayal of Victor Navorski is probably an enormously effective and non-threatening means to address struggles for identity and inclusion faced by immigrant groups. Navorski’s tale is also so engrossing because of its plethora of statements concerning this country’s identity and acceptance of outsiders. For instance, shortly before he is stopped at the airport, Navorski witnesses scores of other foreigners arriving and departing the airport area, yet upon first being detained, he cannot understand why he is unable to even step a foot outside the airport. While in the film the basis for the other individual cases of immigration is not discernable, outside the explicitly fictional world of film, the immigration policies of the U.S. and most western nation-states all too often do not appear more coherent than something out of a fictional tale like The Terminal. The sheer absurdity of Navorski’s exclusion is due to a regime change in his homeland, which leaves him literally “stuck at the border.”

Similarly, in the far more troubling real life travesty of Merhan Nasseri, the French government has prevented him from leaving an airport for over a decade because he was of being expelled from his homeland for protesting against a dictator and then had his legal documents stolen. Unfortunately, Navorski and Nasseri’s troubles are not unlike the apparent arbitrariness associated with legal distinctions drawn to permit and prevent individuals seeking entrance into the United States. Not unlike the arbitrary practices in the film, contemporary domestic immigration policies, while framed as rational policies deemed to protect the economic and political integrity of the country’s infrastructure, upon, closer examination, raise questions as to whether the application of immigration laws are affected by illegitimate grounds such as the racial identity or privileged political status of the immigrant. Navorski’s general interest in entering this country was not unlike the hundreds of other travelers depicted in the film. However, because of circumstances beyond his control, namely the coup d’etat that occurred in his homeland, he is deemed, as the film depicts, “unacceptable.” The film therefore ultimately

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43 See supra note 4.
44 Prior to the enactment of the illegal Immigration Reform and Immigrant Responsibility Act of 1996, a noncitizen denied admission at a port of entry into this country was considered an “excludable,” the act replaced that label with the work “removal.” A noncitizen denied admission at a port of entry into this country was considered an “excludable,” the act replaced that
proves to be a provocative critique of how this government treats outsiders and foreigners.

In the actual events in which the film is based, the victim of arbitrary entry rules, Merhan Nasseri has been unable to leave a French airport for over a decade. If Nasseri was detained in a U.S. airport and had other, perhaps preferred, identity markers, such as originating from a communist country, instead of theocracy-based dictatorship, he probably would not be detained indefinitely at an airport. Nasseri, however, is left with no alternative but to live off of the assistance of his adoptive airport family. This problematic condition is exacerbated by the fact that over the years, Nasseri’s physical and mental health has been in a rapid state of decline. The arbitrariness faced by both Nasseri and Navorski, described here as the Nasseri-Navorski Phenomenon, can often be evidenced in how in practice this country often draws lines and deems otherwise similarly situated peoples ineligible for entry. This perceived arbitrariness is highlighted when racial constructions are implicated.

V. ENTERLAND, EXILIOLAND, AND NEVERENTERLAND: CITIZENSHIP AS A NONFICTION GENRE

A quick reference to this country’s treatment of three similar and neighboring peoples illustrates the arbitrary distinctions that affect immigrant groups desirous of entering this land. In addition, when examining the treatment of the immigrants from these lands, questions arise whether the disparate treatment is at least in part due to racial constructions. One need not look much further than a few hundred miles to the south of the State of Florida to appreciate a Nasseri-Navorski phenomenon. In the tales of the three lands described below, the imagined quality of immigration and membership are highlighted. Despite similar locales and histories, but vastly differing constructions of race, the immigration and emigration positions of these three peoples are dramatically disparate. The first of these people are from the land that will be called “Enterland.” As the name suggests, the people of this country can enter and leave freely to and from the United States. They are a people from the Caribbean who are not much different from the nationals of nearby islands. Though their native tongue is

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Spanish, their culture, like those of the people of the surrounding countries, largely derives from African, indigenous, and peninsular roots. As a result of historical happenstance, this country and by extension its people are formally part of the United States. These people never chose to become part of the United States; they just happen to live in a land that became the booty of war. Though the people of this land are U.S. citizens they do not share the same rights of other Fourteenth Amendment U.S. citizens within the mainland U.S. or U.S. citizens living in another country, for that matter.

Though these people may exist in a subordinate citizenship status, it is that very status that has nevertheless provided them with a preferred migration status. Specifically, despite the fact that nationals of this land are not equal citizens in that they do not have formal representation in the government that controls their lives, their anomalous status empowers them with the right to freely enter, leave, and even reside in the U.S. mainland. When one compares them to similarly situated island people of the Caribbean, one can readily take note of the fact that they are similar to many in this region that are deemed as a matter of law far less acceptable or worthy of residing in the U.S. Unlike most other Caribbean people, or nationals from just about any other country for that matter, if the people of Enterland wish to enter and stay in the United States, they can do so for any reason and without any restrictions. In fact, they may enter for cultural, political, or purely economic reasons. All they have to do is purchase or otherwise obtain a ticket and board an airplane bound for the United States. The primary reason for the status of this group is that their land and its people were acquired by the U.S. after the Spanish-American War. As a result, the people of this island group have both a subordinate status under a legal regime of U.S. citizenship, but a preferred status under the U.S.

49 Id.
50 See supra note 29, at 3.
51 Id.
53 See supra note 30, at 55; supra note 29, at 5; supra note 31, at 1121.
immigration regime vis-à-vis other aliens who do not enjoy mainland citizenship.

The people of the second group are from the country called “Exilioland.” These people, like the people of Enterland, primarily speak Spanish and are made up of peoples from Africa, Spain, and indigenous descendants. In fact, in anthropological circles, the people of Enterland and Exilioland are widely believed to be originally from the same or similar Awarak Indian tribes. Though the people of Exilioland are not formal members of the United States, the people of this group are deemed to be a politically desirable group. In large measure this is because these people are inhabitants of a repressive dictatorial regime whose political philosophy is antithetical to the United States’ interests in the region. Others, who are perhaps more sympathetic to that regime, would note that Exilioland is also the only country in the hemisphere which has steadfastly opposed the United States’ hegemonic geopolitical interests in the region. In either case, the people of this land are also arguably more acceptable in large measure because of their value as ideological trophies: they live under a repressive government that follows a political system, namely Communism that is deemed repugnant to this land’s democratic system of governance.54 The people of this group have the ability to stay in this country if they merely touch dry land. As such, the people of this group hold a preferred immigrant or entrance status, although the people of this group often reject the notion that they are in fact immigrants, instead claiming an exile status. In fact, as a result of the 1965 amendments to the INA, Congress adopted a new preference designed to broaden overseas refugee programs.55 Persons could qualify for this program by establishing that they had “fled” persecution in a “communist or communist-dominated country.”56 As a result of those amendments, under current immigration laws, the people of this group are presumed to be political asylum seekers—despite any attendant economic motives for emigration—and are virtually always

56 Id.
allowed to stay in the U.S. and they are allowed to become U.S. residents faster than any other exile, asylum, or immigrant group. 57 In the immigration “wet-foot, dry-foot” legal distinction, basically created for this group of people, the federal government of this land created a special status for this group. 58 This policy was nevertheless more restrictive than previous policies aimed at people from such lands such as Exilioland. Unlike other immigrant or exile groups seeking asylum, the people of this land are allowed to stay in this land irrespective of whether they can prove a well-founded fear of persecution. 59 Like the people of Enterland, some of the people of Exilioland may seek to migrate to the mainland U.S. for economic or other reasons. 60 Nevertheless, the people of Exilioland are essentially legally deemed to always arrive for political asylum reasons, irrespective of whether their undisclosed reasons were primarily based upon economic necessity or other concerns. 61 Though some have suggested that the rationale for the unique presumed-asylum status of these people is because this group is extraordinarily politically active and has a powerful voice in the State of Florida, 62 which has often been a pivotal state in national elections, the rationale behind or irrationality of such law applicable to this group is beyond the reach of this essay. What is relevant to this project is that despite the fact the first two Caribbean people have similar histories, originate from similar peoples, experience similar histories as colonies of Spain, gained their independence from Spain in the same armed conflict, and arguably were controlled by the U.S., at least for a certain period, their immigration status is dramatically different. 63

Members of one group, because they are part of the United States’ colonial possessions and are ostensibly U.S. citizens, may enter and leave the U.S. Members of the other group, however, because of

57 Id.
58 Id. at 530.
59 See Fullerton, supra note 54, at 527.
60 See Valdes, supra note 54, at 285.
61 See Valdes, supra note 54, at 530.
62 See Hernandez-Truyol, supra note 54, at 535.
this government’s stance against communism and perhaps the proximity of their homeland to the United States, are able to obtain an expedited asylum status only upon touching dry land of the continental U.S. However, the ability of the people of Exilioland to immigrate to the U.S. is significantly more challenging than that of the people of Enterland. The people of Enterland, because of century-old legal fictions that declared that Enterland is paradoxically both foreign and domestic, are deemed worthy of entry without having to struggle to literally touch United States soil. The people of Exilioland must defy their homeland’s repressive laws, illegally emigrate, and touch dry land. Recent events have exemplified the absurdity and arbitrariness of such requirements. In an actual fact pattern that is probably more peculiar than most law professors could envision when drafting a final exam, on January 4, 2006, a group of 15 individuals from Exilioland were able to touch “dry-land” by landing on a section of the old Seven Mile Bridge off the coast of the Florida Keys.\(^{64}\) Despite evidently achieving the threshold marker for entry—touching dry land—federal immigration officials ruled that because the bridge was not currently used by pedestrians and is not actually “touching one of the Keys, the bridge was not in fact dry land. In yet another vivid example of the peculiar immigration rules of this land, the immigrants were deemed never touched dry land and were then repatriated to their homelands, undoubtedly facing reprisals from that government. Recently, the federal government agreed to exam the propriety of the “wet-foot, dry-foot” policy in part due to a hunger strike initiated by a local political and community leader of the Exilioland people residing in the United States.

The people of Exilioland, because of their closed society, unlike those in Enterland, cannot simply take an airline flight to the United States. Instead, they must risk their lives, often in makeshift boats, in shark-infested high seas in order to touch U.S. land. Moreover, the people of Exilioland, unlike the people of Enterland, are not able to readily and easily return to their homeland.

The people of the third island group come from a land called “Neverenterland.” These people like the people of Enterland and Exilioland, reside on an island in the Caribbean, were once colonial subjects, and derive from Indigenous, African,
and European cultures, yet are deemed largely unacceptable or ineligible for any immigration status that will easily permit them entrance.\textsuperscript{65} In addition, in racial construction terminology they also happen to be considered black. It is the racial construction of these people that is arguably the greatest difference in the perception of these otherwise similarly situated and constructed people. The people of Neverenterland are not part of the U.S. colonial landscape and do not reside within a political framework that is threatening to the United States.\textsuperscript{66} Despite the fact that they reside only a few hundred miles away from Exilioland and Enterland in arguably the same Archipelago of islands known as the Antilles,\textsuperscript{67} these people are neither free to enter the United States or are deemed worthy of easily applying for political asylum.\textsuperscript{68} When they arrive on U.S. land, even if they touch dry land, they are deemed to be in this country solely for economic reasons and under this country's current immigration regime are presumptively ineligible to stay in the country.\textsuperscript{69} Despite the fact that the people of Enterland essentially seek to come to this land for economic reasons, they are allowed to do so without ever facing any perilous journeys at sea. Yet the people of Neverenterland routinely risk their lives in dangerously overcrowded makeshift transport boats, and are rarely allowed to remain within the U.S.\textsuperscript{70} Unlike the people of Exilioland, even if the people of Neverenterland touch dry land, they typically cannot stay in this country. They are deemed to be “ineligible” under domestic immigration law or “unacceptable” as it is described in the film The Terminal. In many respects Victor Navorski, though in the film he is apparently from a European Country, his disparate treatment makes him resemble someone from Neverenterland rather than Krakozhia. The people of Neverenterland are constructed as unworthy entrants who arrive solely for economic reasons, and despite Emma Lazarus’ noble national narrative and an economic system that hails economic upward mobility, under current domestic immigration policies, an economic motivation


\textsuperscript{66} See Weissman, supra note 65, at 260.

\textsuperscript{67} See SCARANO , supra note 52, at 3.

\textsuperscript{68} Kevin R. Johnson, Open borders?, 51 UCLA L. REV. 193 (2003).

\textsuperscript{69} Angela P. Harris, Equality Trouble: Sameness and Difference in Twentieth-Century Race Law, 88 CAL. L. REV. 1923 (2000).

\textsuperscript{70} Id.
for entry is an insufficient reason for with exception to those from Enterland, to be permitted to stay in this country.\textsuperscript{71}

As one may by now appreciate, the people of Enterland, Exilioland, and Neverenterland are actually from Puerto Rico, Cuba, and Haiti, respectively. As addressed above, these people live in the same island region, have similar histories, often seek to arrive in this land for a better life, but are treated differently.\textsuperscript{72} While the author of this essay appreciates that this country cannot easily allow any and all people to migrate, what is sought here is to highlight, not unlike the portrayal in \textit{The Terminal}, the questionable and troubling lines drawn and the fictions created to exclude some and include others. This is not to say that the people of Cuba or Puerto Rico are unworthy of entering and staying within the United States, but the fact is that many of the interests of the people of Puerto Rico, and arguably for many from Cuba, in arriving probably have more to do with quality of life issues, such as economics than with political statements, yet both groups are able to stay when they arrive in this land. Although the people of Haiti live in a desperate economic state and political repression not too dissimilar to the plight of the people of Cuba, they are not allowed to stay in this land, even upon touching dry land. In fact, referring back for a moment to the recent debate revolving around the 15 Cuban migrants who recently had the misfortune of landing on an old bridge, although many opponents of the wet-foot, dry-foot policy have sound reason to challenge that policy, cynics of immigration priorities may argue with some force that but for the Cuban community’s influence in local politics in the pivotal State of Florida in national elections, the federal government would not have agreed to revisit its odd wet-foot, dry-foot distinction for Cuban migrants. Indeed it is likely that 100 hunger strikers from Haiti would not have caused such an immediate response by the federal government. Ironically, Haitian immigrants to this land are neither politically influential in national politics,\textsuperscript{73} and paradoxically did not have the good “fortune” to have been colonized by the United States, and as a result are unwelcome to stay in this land.\textsuperscript{74}

\textsuperscript{71} \textit{Id.} at 1930.
\textsuperscript{72} \textit{Id.}
\textsuperscript{73} Many minority groups could look to the Cuban Exile community’s success in becoming one of the few minority groups, if in fact it is fair to characterize them as one, to gain significant political and economic influence on a local and, to some extent, a national level.
\textsuperscript{74} Perez, \textit{supra} note 63, at 440.
VI. THEORETICAL CHALLENGES TO THE CITIZENSHIP NARRATIVE

The Nasseri-Navorski phenomenon is also used here to highlight the arbitrariness of immigration rules and regulations touched upon by the articles in the immigration cluster of the IX Annual LatCrit Conference. While the articles themselves are difficult to unify other than by noting, in the broadest sense, their common themes, they do in one form or another note the peculiar consequences of immigration priorities. The three articles in the immigration cluster highlight the vulnerable and anomalous status of alien groups within this land. The articles of Jose Miguel Flores, Maria Pabon Lopez, and Arthur Read provide diverse writings touching upon often arbitrary rules of exclusion and inclusion.\(^{75}\) The articles question the legal creations used to define which groups can stay and actively participate in all affairs in this land. Stemming from a panel touching upon immigration, educational access, and social justice. The articles address a host of provocative issues related to the contemporary immigration debate. In fact, the ironies and injustices addressed by the works fit within the metaphors raised by the Nasseri-Navorski Phenomenon.

In the first article, Lopez explores the issue of the right to education as applied to undocumented Latina and Latino children.\(^ {76}\) She argues that the so-called “immigration crisis” in the public’s imagination has led to state and federal governmental restrictions on the ability of Latina and Latino groups to effectively participate in all aspects of society.\(^ {77}\) In part because of the fear of foreigners heightened by the post-September 11, 2001 world, the efforts at restrictions have included limits on the ability of non-citizens to obtain driver’s licenses,\(^ {78}\) access to health care,\(^ {79}\) access to public assistance\(^ {80}\) and access to education.\(^ {81}\) Lopez characterizes the children of

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\(^{75}\) See e.g., Maria Pabon Lopez, Reflections Regarding the Education of Latino/a Undocumented Children: Plyler v. Doe and Beyond, 35 SETON HALL L. REV. 1367 (2005).

\(^{76}\) Id.

\(^{77}\) Id.


\(^{81}\) See, e.g., Hoffman Plastic Compounds v. NLRB, 535 U.S. 137, 149 (2002); Plyler,
undocumented parents as hostages in the immigration crises, particularly in their access to effective education. She argues this plight exists despite the United States Supreme Court’s decision in *Plyler v. Doe*\(^{52}\) which held that undocumented children are entitled to state funded education. Based on the *Plyler* decision, Lopez observes that undocumented children’s right to education should have been secure without any efforts to limit that right. Despite the pronouncement of *Plyler*, Lopez argues that these vulnerable students continue to face severe challenges in educational access and achievement. For instance, she notes that state efforts in California,\(^{83}\) Arizona,\(^{84}\) and Massachusetts,\(^ {85}\) have attempted to dismantle bilingual education. In essence, Lopez’s central thesis is that in an era antagonistic to immigrants, Latina and Latino children, particularly those of undocumented workers, are the most at risk.

In the year that so many institutions in the legal academy have celebrated the fiftieth anniversary of the groundbreaking decision of *Brown v. Board of Education*,\(^ {86}\) Lopez questions the impact of *Plyler* and laments the failure of courts and scholars to use that decision to assist undocumented children.\(^ {87}\) The paper argues that *Plyler* must be read as an integral part of *Brown’s* legacy and notes that education, though not currently formalized as a fundamental right by U.S. constitutional law, is an essential aspect of membership in this society.

The Lopez article is of some moment in that it advocates for greater emphasis on a decision that speaks not only to the importance of education, but also to the reality that children of undocumented workers are part of this society. The piece effectively highlights a perhaps underappreciated decision in terms of its importance to the right of education and the rights of undocumented children.\(^ {88}\) Somewhat surprisingly, the article does not, however, use the decisions in *Plyler, Brown, and the recent*

\(^{52}\) 457 U.S. at 220.

\(^{82}\) 457 U.S. 202( 1982).


\(^{86}\) 347 U.S. 483 (1954).

\(^{87}\) *Plyler*, 457 U.S. at 220.

\(^{88}\) Id.
Supreme Court affirmative action decisions in *Gratz v. Bollinger*,\(^9\) and *Grutter v. Bollinger*,\(^9\) which are also addressed in the article, to advocate for the recognition of education as a fundamental right. Though the *San Antonio Independent School District v. Rodriguez*,\(^9\) decision, which refused to hold that education is a fundamental right, was re-affirmed in *Plyler*, advocates of the rights of undocumented children nonetheless should question *San Antonio*’s logic and constitutional basis. From a political perspective, without the recognition of education as fundamental right, undocumented children will continue to be at risk and subject to political whim. The primary basis for the Supreme Court’s refusal in *San Antonio* to recognize the fundamental nature of education stems from the fact that education is not an enumerated right in the Constitution.\(^9\) What the *San Antonio* Court failed to acknowledge was that there are numerous fundamental rights that are not enumerated in the Constitution. Those rights include the right to marry,\(^9\) the right to travel,\(^9\) the right to raise children,\(^9\) and the right to procreate.\(^9\) As Lopez illustrates, under the current educational as well as immigration regime, the most vulnerable in our society have continuously been subject to attack. She illustrates that as recently as the year 1996; two federal proposals would have effectively overruled *Plyler*. In two proposed amendments to the Illegal Immigration reform and Immigrant Responsibility Act (“IIRIRA”),\(^9\) Representative Elton Gallegly failed but almost further limited the rights of the undocumented.\(^9\) Lopez further points out that at the state level, California’s anti-immigrant Proposition 187, if it had not been struck down, contained a provision that was designed to overrule *Plyler*.\(^9\) Without the recognition of education as a fundamental right it is unlikely that the status of undocumented children will change much for

\(^{90}\) 539 U.S. 244 (2003).

\(^{91}\) 539 U.S. 306 (2003).

\(^{92}\) 411 U.S. 1, 37 (1973).

\(^{93}\) Id.


\(^{97}\) Zablocki, 434 U.S. at 385.


\(^{99}\) Lopez, supra note 75.

\(^{100}\) Id.
Thus, Lopez effectively highlights that in the current intolerant and arbitrary immigration system, the most vulnerable of innocents are often subject to legal attack merely because this society is antagonistic to the parents of those innocents. The Lopez article demonstrates that in the context of education, undocumented children fit within the Nasseri-Navorski Phenomenon. Not unlike Navorski, who is given the right to stay at the airport border until his legal status is resolved but is repeatedly stifled in his efforts to feed himself, undocumented children were theoretically granted the right to public education in Plyler, but have often had that right challenged and in practice limited. While Navorski was afforded a right, lodging without food, that right was illusory. Though Plyler similarly afforded the children of the undocumented public education, repeated efforts at curbing immigrant rights, Lopez argues, have devalued the value of Plyler.

In the second article of this cluster, Jose Miguel Flores addresses issues touching upon what he describes as “globalization from below,” or in other words globalization’s effect of luring Latina and Latino communities to American cities. Interestingly enough, many observations made by Flores concerning Asian and Latina migration into cities do not squarely fit within the Navorski-Nasseri phenomenon termed here, but the themes raised in the Flores piece do track statements made in the film The Terminal. For instance, because Navorski’s interim home was in the airport, those who came to his aid were people of color who found economic opportunity in the airport. Flores notes that in many immigrant communities, other immigrant groups created institutions of support. For instance, Flores argues that as a result of globalization, new forms of participation and representation are developing in immigrant communities. This observation is perhaps the most interesting portion of the article in that the author uses vivid examples of the creation of transnational economic networks, including entities such as the Tepeyac Association of New York, which provides cultural support to Mexican immigrant communities. A similar notion of self-empowerment could be observed in the

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Terminal when individuals representing minority or outsider groups in the airport provided Navorski with food and social support.

In what could be described as a sociologically focused project, without a significant emphasis on immigration or the other domestic laws, Flores observes that as a result of globalization, Latinas and Latinos “are lured to America’s cities by the economic forces.” While this thesis is interesting, how this recent migration differs from migration throughout the last century is not explored by the Flores article. Nonetheless, the piece makes some worthwhile observations. By examining the Latina and Latino migration in New York’s Jackson Heights and Los Angeles’ Boyle Heights, Flores attempts to highlight the _new mestizaje_ or the mixing of cultural forces occurring in American cities. Another question is raised by this part of the thesis, namely, whether this mixing of cultures is a byproduct of globalization, trends of migration, or other forces. Nonetheless, Flores in a cogent fashion traces the changing face of American cities as well as the development of networks of immigrant-centered programs.

The third article in the cluster, written by Arthur Read, is perhaps the most provocative and ambitious in that it squarely confronts a policy that is often characterized as benefiting new immigrant workers. The article questions the propriety of temporary or guest workers programs, which he argues all too often disproportionally affect immigrant and minority communities. Specifically, the article challenges President Bush’s efforts at characterizing the expansion of such programs as immigration reform.

In his advocacy for expanded temporary worker’s programs, the President argued that under his proposal, the program will match the employers with temporary workers, when American employers cannot fill job openings with Americans. In return, according to the President, the workers will obtain a provisional legal status as well as employment. Once again, a related subject was depicted in the rhetorical tool used here to organize these articles— _The Terminal_. Not unlike the only real choice undocumented workers

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often have for employment, Navorski was left with no other alternative to make a livelihood other than to take an illegal or “off the books” construction job. In part what makes the Read article so insightful is that it challenges an effort proposed by the President which was promoted as a vehicle of immigration reform aimed at providing legal employment opportunities for otherwise undocumented workers.\textsuperscript{103} Read characterizes the President’s proposals as “the big lies.”\textsuperscript{104} In somewhat summary fashion, the article points out that the primary reason that employers interested in such programs cannot find American workers is because they are unwilling to pay living wages.\textsuperscript{105} The article compares the President’s proposal with the 1942 “Bracero” program, which the article suggests led to abuses. In essence, the article points out that the proposed expanded temporary workers program ultimately harms all workers. In what is perhaps the only suggestion a reader may have for this piece is that in a relatively brief fashion the article raises so many interesting points and sets forth so many interesting arguments, that the project begs for a more expansive examination of the subject. In addition, the article makes only passing reference to the economic costs of its proposals. Nevertheless, this is an impressive work that is so important and thoughtful that it will likely lead to further works on the subject. For instance, in a persuasive summation of his argument, Read observes:

When the rights of undocumented and migrant workers are not protected, the rights of all workers are diminished. Unscrupulous employers seek out undocumented immigrants or temporary workers because they believe that there are no consequences for violating their rights. These employers gain a competitive advantage over employers who abide by the law. This creates a perverse incentive for employers to hire undocumented workers, over citizens or authorized workers.\textsuperscript{106}

\textsuperscript{103} Id.

\textsuperscript{104} Id.


\textsuperscript{106} See Michael J. Mayerle, Proposed Guest Worker Statutes: An Unsatisfactory Answer to a Difficult, If Not Impossible, Question, 6 J. SMALL & EMERGING BUS. L. 559, 564-66 (Fall 2002); Michael Holley, Disadvantaged By Design: How the Law Inhibits Agricultural Guest Workers From Enforcing Their Rights, 18 HOFSTRA LAB. & EMP. L.J. 575, 583-85 (Spring 2001).
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In conclusion, both Nasseri and his fictional alter ego, Victor Navorski, exist in many ways in a status that similar to the odd immigration status of the Caribbean people of Haiti. Both Nasseri and Navorski were placed in a strange place where they should have been deemed eligible immigrants and visitors, but were nonetheless are deemed unworthy of entry due to forces outside their control. This essay similarly compares the national narrative of “the land of immigrants” and the welcoming invitations to the “hungry and huddled masses yearning to breathe freely” with a history of exclusionary policies that were immorally aimed at excluding disfavored groups. Politics and prejudice, and not cogent economic, political, or humanitarian considerations, have for too long been the basis for a considerable portion of our immigration regimes. Each of the articles in the LatCrit cluster examines provocative immigration issues and likewise questions and explores what appears to be a peculiar and often times arbitrary legal regimes. These articles also arguably go beyond their explicit statements concerning immigration; they also speak to issues touching upon the legal construction of membership and otherness. As these articles point out, opportunity, participation, membership, and immigration are inseparably linked. All too often the rhetoric of membership has conflicted with reality when one bothers to explore the history of people of color seeking membership. The articles in this cluster aptly highlight contemporary manifestations of this tension. By examining the failure of formal legal approaches to provide meaningful opportunities, and humane reform, the articles critique the real life struggles of outsiders within a legal framework that often does not live up to its purported basis or rationality.
Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe

Maria Pabón López

INTRODUCTION

The struggle for educational fairness and opportunity for Latino and Latina children continues even amidst the anti-immigrant campaigns currently raging against noncitizens1 in the United States. Census 20002 highlighted the reality of the increased number of noncitizens in the country, particularly Latinos, and has precipitated


a renewal of nationwide concern over an “immigration crisis.” This perceived crisis has given rise to myriad new restrictions on the participation of noncitizens in United States society.

In recent years, both the states and the federal government have placed restrictions upon the civic participation of noncitizens in virtually all areas of the United States’ societal landscape. These new restrictions on noncitizens, which have sparked a new civil rights movement—a so-called Immigrant’s Rights Movement—touch areas as varied as driver’s licensing, workplace protections, access to health care, welfare benefits, and education, among others.

From the dismantling of bilingual education through voter initiatives in California, Arizona, and Massachusetts, to the

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4 The Immigrant Workers Freedom Ride, which took place in October 2003, is an example of the linkage of the Civil Rights movement to the Immigrant Rights movement. See Steven Greenhouse, Immigrants Rally in City, Seeking Rights, N.Y. TIMES, Oct. 5, 2003 at A1 (discussing Immigrant Workers Freedom Ride campaign, in which eighteen buses carrying nine hundred immigrants from ten cities traveled over two weeks across the United States to Washington, D.C. and New York in an effort to raise consciousness for the rights of immigrants); AFL-CIO, The Struggle for Immigrant Workers’ Rights Is a Fight for Civil Rights, at http://www.aflcio.org/issuespolitics/immigration/civil_rights.cfm (last visited Apr. 18, 2005).


9 See infra Part IV.

10 Bilingual education was dismantled in California in 1998, following the passage of Proposition 227. See Kevin Johnson & George Martinez, Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education, 33 U.C. DAVIS L. REV. 1227, 1227 (2000). The proposition passed “by a sixty-one to thirty-nine percent margin.” Id.

11 Arizona voters approved Proposition 203 in 2000. See Elizabeth Becker et al.,
attempted denial of education to undocumented children perpetrated in the 1990s in California’s Proposition 187. Latino children are suffering disproportionately in the culture war in our midst. It is my contention that these children, and in particular the undocumented ones, are caught in the middle of this war against noncitizens. Undocumented children who, as the Supreme Court recognized, are blameless and present in this country through no fault of their own, have been unwillingly thrust into this unwelcome role.

This recent phenomenon in our polity has developed despite the Supreme Court’s *Plyler v. Doe* decision. Simply put, the *Plyler* Court held that undocumented children are entitled to a state-funded primary and secondary education. Yet Latino undocumented students remain hostages in the “immigration crisis” siege, notwithstanding *Plyler*’s guarantee of a free public education and the promise of educational equality rooted in two earlier Mexican-American school desegregation cases.
These vulnerable students generally still face severe challenges to their educational prospects. Thus, more than twenty years after *Plyler*, it is necessary to understand what has happened to the education of Latino undocumented children in the United States. What can we learn from *Plyler* and its aftermath? What is the future of *Plyler v. Doe*? Why is it that *Plyler*’s promise of educational equality has not reached its full potential? And finally, what meaning does *Plyler* have in the current discussion of membership and exclusion in our society? These are largely unanswered questions that no article can completely address. In an attempt to shed some light on these murky questions, however, this Article explores the various aspects of the United States educational system and how the Latino undocumented student has fared post-*Plyler*.

Part I of this Article examines the current situation of Latino undocumented students in an effort to understand the challenges facing both the students and the educational systems in which they are immersed. Using census and other available data, Part I discusses the number of undocumented students currently in American schools and sets forth a picture of their educational status and attainment. Also, this section provides a review of the challenges and obstacles standing in the way of educational achievement for Latino undocumented students, painting a portrait of their daily realities.

In order to provide an understanding of the nuances of *Plyler v. Doe*, Part II closely examines the opinion and Part III explores its subsequent history. Next, Part IV reviews the circumstances in which *Plyler* has come under attack and assesses the continued vitality of *Plyler*. Finally, Part V offers an analysis of the two recent major affirmative action cases. The aim of Part V is to examine the Court’s most recent pronouncements regarding equal protection as it pertains to education and those cases’ effects on the vitality of *Plyler*. In particular, Part V discusses access to higher education for the undocumented, using research of pending federal legislation and also by reviewing all fifty states’ laws regarding higher education for undocumented students.

This Article will show that *Plyler* stands for the proposition that education, although not a fundamental right, is an integral aspect of membership in our community. Thus, *Plyler* is still a vital opinion

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second Mexican-American desegregation case is *Westminster School District v. Mendez*, 161 F.2d 774, 781 (9th Cir. 1947), in which the court found that the segregation of school children of Mexican descent was a violation of the Fourteenth Amendment. In this sense, *Westminster* may be viewed as a precursor to the landmark decision of *Brown v. Board of Education*.

19 *Seeinfra notes 87–95 and accompanying text.*
even in the face of the current “immigration crisis” because Plyler stands for abolition of castes and an affirmation of equality—two precepts which should still be bedrock principles of the critical democratic moment in which we live.

This Article argues, however, that these two propositions for which Plyler stands are dead letters in the face of the reality of the undocumented student. The unwelcome but inescapable reality for undocumented students is that, without the prospect of normalizing their immigration status, the education they receive is useful individually for personal growth, but is of no consequence for the betterment of the overall condition of Latinos in the United States because the undocumented remain unable to participate in our democratic society. In that sense, Plyler v. Doe may join Brown v. Board of Education\(^\text{20}\) as a decision embodying the interest convergence covenants in which educational opportunities for minority students exist only when the students’ interests and the nation’s interests converge.\(^\text{21}\) Analyzing Plyler under an interest convergence model demonstrates that the nation’s interest is the maintenance of an underclass of undocumented, low-wage earners who fuel the nation’s economy by performing work that is undesirable to many United States natives. The continued existence of this underclass must be related to the limited educational attainment of those in the group, a result perpetuated by the lackluster effect of Plyler as a catalyst for further educational gains for Latino undocumented children.\(^\text{22}\)

I. THE STATUS OF LATINO AND UNDOCUMENTED STUDENTS IN THE UNITED STATES

A. General Data Regarding Latino and Immigrant Students

According to the latest census data, 10.5 million students in the United States are children of immigrants, and one-fourth of these students are foreign born.\(^\text{23}\) More than one-third of the children of

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\(^{22}\) Admittedly, this view may change over time with a greater acceptance by the United States populace of the undocumented worker. As the number of retiring Americans increases, and there is a realization that the Social Security benefits available for them would be larger, or they could retire earlier with new entrants into the Social Security system who bring the fruits of their labor into the system, acceptance of undocumented workers may grow.

immigrants\textsuperscript{24} hail from Mexico while one-fifth come from other Latin American countries.\textsuperscript{25}

The census data also show that there are over 11.4 million Latino children under the age of eighteen in the United States.\textsuperscript{26} This number represents 16\% of all the children in the United States, even though only 12\% of the overall population is Latino.\textsuperscript{27} This population increased by approximately ten million between 1990 and 2000, accounting for 38\% of the United States’ population growth during that decade.\textsuperscript{28} Finally, the Census Bureau estimates that by the year 2050, Latinos in the United States will number ninety-eight million—more than three times their current number—representing about 25\% of the total population.\textsuperscript{29}

B. Data on Undocumented Students in the United States

Because of the nature of the lives of undocumented persons as being in the “shadows” of the United States population, there is no actual data regarding the number of undocumented persons in the country; only estimates are available. It is also difficult to estimate the number of undocumented schoolchildren in the United States.\textsuperscript{30} Undocumented parents are reluctant to come forward and identify themselves to census takers or benefit providers for fear of being reported to the authorities. The latest estimates show that two out of every ten undocumented persons in the country are undocumented students.\textsuperscript{31} The federal government has recently addressed this concern. “The Census Bureau is developing a research plan aimed at

\begin{itemize}
\item \textsuperscript{24} The term “immigrant” is not used with its strict immigration law meaning for purposes of the data compilation cited above. It instead includes the following immigration law categories: immigrants, non-immigrants, refugees, legal permanent residents and even certain naturalized citizens. \textit{Id.} at 11.
\item \textsuperscript{25} \textit{Id.} at 7.
\item \textsuperscript{27} \textit{Id.}
\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{29} \textit{Id.}
\end{itemize}
eventually developing new information on the population of illegal immigrants residing in the United States.\textsuperscript{32} Thus, the information needed to more accurately determine the number of undocumented students in the country should be available in the near future.

C. Data Regarding the Educational Attainment of Latino Students

Recent data suggest that much of the increase in minority enrollment in elementary and secondary schools is attributable to Latinos. Yet, they have higher drop-out rates and lower high school completion rates than African American or White-Anglo students.\textsuperscript{33} In 2000, 39% of public school students at the K–12 levels were minorities.\textsuperscript{34} Of these, slightly less than half, or 44%, were Latino.\textsuperscript{35} In terms of change over time, the overall percentage of minority students in public schools increased by 17% between 1972 and 2000.\textsuperscript{36} Slightly more than 10% of the increase was attributable to Latinos, while the number of African American students increased by only 2%.\textsuperscript{37} The drop-out rate for Latino students is 28% as compared with 7% for White-Anglo students and 13% for African American students.\textsuperscript{38}

Even though there is a positive relationship between education and salary for all racial/ethnic groups in this country, data from a recent study suggest that incomes of Latino men are lower than those of Anglo men at most educational levels.\textsuperscript{39} Finally, aggregate national statistics document lower achievement levels for Latino immigrant students in several areas, including standardized testing.\textsuperscript{40}

\textsuperscript{32} GAO Report, supra note 30, at 18.
\textsuperscript{33} Status and Trends, supra note 26.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id. Specifically, in 2000, the median earnings of Hispanic men age twenty-five and older were $13,000 less than that of white men, while the median earnings of Hispanic women age twenty-five and older were $6500 less than that of white women. Id.
D. Data on Limited English Proficiency (“LEP”) Students in the United States

Although the following figures are not restricted to undocumented or Latino children, they are worth reviewing because it is apparent that the current influx of new immigrant groups means continuing increases in the number of students who enter United States schools with little or no English proficiency.\(^\text{41}\) Between 1990 and 2000, the overall LEP student population in the United States increased by more than half, from 14 million to 21.3 million.\(^\text{42}\)

Between 1980 and 2000, the number of children in the United States speaking a language other than English at home more than doubled, from 5.1 million to 10.6 million.\(^\text{43}\) The most recent census data show that two-thirds of all non-English-speaking families speak Spanish.\(^\text{44}\) The data further show that 2.6 million students are LEP, representing 5% of all students in United States schools.\(^\text{45}\) About 1.7 million of these are United States natives.\(^\text{46}\) The Census Bureau also estimates that 1.8 million school-age children live in households in which no one age fourteen or older speaks English “very well.”\(^\text{47}\)

Studies have shown that noncitizen students are at serious risk for failure in the absence of bilingual education, as they are disproportionately represented among LEP students.\(^\text{48}\) The data have also shown that it is often the case that LEP affects school achievement.\(^\text{49}\)

E. Other Challenges Facing Undocumented and Latino Students

1. Fear of Deportation

Undocumented children also face challenges in terms of their mental and emotional health because of the added stress associated with the fear of deportation and separation from family members.\(^\text{50}\) This fear of deportation, in particular, can extend all the way to the school gate. For example, in Virginia, “[p]ublic employees in higher

\(^{41}\) Status and Trends, supra note 26.
\(^{42}\) Fix & Passel, supra note 23, at 11.
\(^{43}\) Id. at 20.
\(^{44}\) Id.
\(^{45}\) Id. at 22.
\(^{46}\) Id.
\(^{47}\) Immigrant Children, supra note 40.
\(^{48}\) Id.
\(^{49}\) Id.
\(^{50}\) Id.
education are encouraged to voluntarily disclose to the Immigration and Naturalization Service and to the Office of the Attorney General in Virginia factual information indicating that a student on campus is unlawfully present in the United States, or enrolled without proper authorization.\footnote{Memorandum from Alison P. Landry, Assistant Attorney General, to Presidents, Chancellor, Rectors, Registrars, Admissions Directors, Domicile Officers and Foreign Student Advisors (INS Designated School Officials) and the Executive Director of the State Council for Higher Education in Virginia (Sept. 5, 2002), available at http://www.steinreport.com/va_colleges_11152002.htm.}

Fear of deportation also has its source in the fact that the federal government has invited local law enforcement agencies to enforce immigration laws, and the invitation has been accepted in some states and localities.\footnote{The invitation of local sheriffs, highway patrols, and police agencies to enforce immigration law raises Tenth Amendment federalism issues under \textit{New York v. United States}, 505 U.S. 144 (1992). At least one immigration scholar has concluded that the form in which the federal government has obtained the cooperation of local law enforcement, through an invitation, rather than a mandate, avoids Tenth Amendment concerns. \textit{See Huyen Pham, The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Law Enforcement to Enforce Immigration Law Violates the Constitution}, 31 FlA. St. U. L. Rev. 965, 975–76 (2004).} For example, in Florida, state law enforcement entered into a Memorandum of Agreement with the federal government in 2002 whereby state law enforcement agents were trained by the Immigration and Naturalization Service (INS), then worked under federal supervision and were able to enforce federal immigration law.\footnote{Id. at 970–71 (citing Memorandum of Understanding Between the INS and the State of Florida (July 26, 2002), \textit{reprinted in 79 Interpreter Releases 1138}, app. II, at 1120 (2002)). For a recent example of another locality entering into an agreement with the Immigration and Customs Enforcement Bureau of the Department of Homeland Security, see Press Release No. SHB-17A-05, Los Angeles Sheriff’s Office, Homeland Security Under Secretary Asa Hutchinson Announces Memorandum of Understanding with Los Angeles County: MOU Provides for Immigration Enforcement Training for LA Sheriff’s Department’s Custody Employees (Feb. 24, 2005) (copy on file with author).} Thus, deportation for the undocumented student may only be as far away as a call to the local police for any infraction of state law.

2. Migrant Students’ Concerns

In addition, there is another segment of the Latino undocumented student population—the children of migrants—that faces severe challenges. Migrant students travel seasonally with their parents and families, following the various crop harvests that provide them seasonal employment from state to state. These students experience daunting obstacles on a routine basis. Their parents
enroll them in school, then withdraw them as soon as they have to leave in their quest for work. The students are enrolled again in their new schools once they arrive at their next destination.\footnote{See Cinthia Salinas & Maria E. Franquiz, Making Migrant Children and Migrant Education Visible, in SCHOLARS IN THE FIELD: THE CHALLENGES OF MIGRANT EDUCATION (Cinthia Salinas & Maria E. Franquiz eds., 2003).} For example, the academic transcript of a migrant student shows “grading periods for the same 7 high schools, for the same 4 weeks over each of 4 years.”\footnote{Michael A. Olivas, Storytelling Out of School: Undocumented College Residency, Race, and Reaction, 22 HASTINGS CONST. L.Q. 1019, 1081 (1995).}

In addition to the constant geographic displacement and the educational disadvantages that may ensue from this lifestyle, migrant students, who number nearly 800,000 in the United States, face other obstacles in their daily lives, including severe poverty, inadequate housing, and “the stigma of being a migrant.”\footnote{Id.; cf Plyer v. Doe, 457 U.S. 202, 223 (1982) (remarking on the stigma of illiteracy, which the Supreme Court stated would mark the undocumented students for their lifetimes).} These are severe obstacles to educational achievement, regardless of immigration status.

3. Resegregation and Inadequate Financing

Due to housing segregation patterns, the United States is currently undergoing educational resegregation.\footnote{The 2000 Census data showed increasing residential segregation for Latinos in almost all parts of the country. This, along with migration, explains much of the increased segregation in schools. See Gary Orfield & Chungmei Lee, Brown at 50: King’s Dream or Plessy’s Nightmare, at http://www.civilrightsproject.harvard.edu/research/reseg04/resegregation04.php (Jan. 2004); see also Erica Frankenberg et al., A Multiracial Society with Segregated Schools: Are We Losing the Dream, at http://www.civilrightsproject.harvard.edu/research/reseg03/resegregation03.php (Jan. 2003) (describing patterns of resegregation in the United States in the last twelve years).} Supreme Court decisions limiting school desegregation and authorizing a return to neighborhood schools have been seen as precursors to resegregation in the United States.\footnote{Id.; see also Missouri v. Jenkins, 515 U.S. 70 (1995); Freeman v. Pitts, 503 U.S. 467 (1992); Bd. of Educ. of Okla. City Pub. Schs. v. Dowell, 498 U.S. 237 (1991). See generally Joseph R. McKinney, Commentary, The Courts and White Flight: Is Segregation or Desegregation the Culprit?, 110 EDUC. L. REP. 915 (1996).} In particular, Latinos are disproportionately affected because of the rise of predominantly Latino neighborhood schools after busing was discontinued.\footnote{See, e.g., Keyes v. Cong. of Hispanic Educators, 902 F. Supp. 1274 (D. Colo. 1995). In Colorado, for example, in 1991, only 1% of Latino students were in intensely segregated minority schools (more than 90% minority enrollment), while
Supreme Court for the year 2000–2001 show that 76.3% of Latino children attend schools where “minorities made up a majority of the student body.”60 Increased segregation of Latino students is most apparent in the western part of the country, where 80% of Latino students attend predominately minority schools—schools with 50–100% minority enrollment.61 Between 1968 and 2001, the percentage of Latino students in intensely segregated schools—schools with 90–100% minority enrollment—more than tripled from 12% to 37%.62 Thus, Latino undocumented students who live in urban areas are likely experiencing the resegregation of United States public schools and the concomitant ill effects of this phenomenon,63 including high drop-out rates, less-qualified teachers, and fewer educational opportunities.64

Another challenge for the Latino undocumented student is one that faces many urban minority students in the United States. As a result of San Antonio v. Rodriguez,65 school districts are not required to have equal financing throughout a state. In fact, after Rodriguez, school-finance equity concerns must be challenged via state constitutional provisions. If a state constitution does not specifically address educational equity in school financing, those challenging unequal school financing will probably be left without any recourse.

Furthermore, because school districts are mostly funded by property taxes, poorer areas with lower property values and lower property taxes result in school districts with inadequate finances, limiting their ability to fulfill their educational mission. In Rodriguez, the Supreme Court countenanced a school-financing scheme that relied on property taxes in the face of an equal protection challenge. Applying the rational basis standard of review,66 the Court held that such a system did provide for a basic school education, bearing a rational relationship to a legitimate state interest.67 In line with
Rodriguez, minority students disproportionately reside in poorer school districts where they generally perform below average on standardized tests and where, in fact, schools are most expensive to operate. 68 The presence of Latinos among the minorities in this group 69 is clearly apt to include undocumented students.

4. Higher Risk Factors for Latino Students in Higher Education

A recently published longitudinal study of 15,000 eighth-grade students in the United States shows that, on average, Latinos are overrepresented with respect to higher education risk factors. Such figures show how unprepared these students are for postsecondary education. 70 In particular, the study found Latinos are overrepresented in the following risk areas: having parents without a high school degree ("educational legacy"); having a low family income; having siblings who have dropped out of school; being held back in school; having a C or lower grade point average; changing schools; and having children while still in high school. 71 The report concludes that:

At almost every level . . . Latino youth face an upward struggle. The impact of these forces is to suppress the educational opportunity for these youth and lead them to a future that requires more effort to keep on current standing with other students, much less than trying to climb up the ladder of opportunity. 72

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69 Id.
71 Swail, supra note 70, at 28.
72 Id. at 32.
II. PLYLER V. DOE: A CLOSER LOOK AT A LANDMARK DECISION

A. Applicability of the Equal Protection Clause to the Undocumented and the Standard of Review Applied: Highlights of the Majority Opinion

_Plyler v. Doe_ is the leading case regarding the education of Latino undocumented students in the United States. It stands among a pantheon of landmark educational cases, such as _Brown v. Board of Education_ and _Regents of the University of California v. Bakke_. Yet it is far from just a historical opinion. Indeed, _Plyler_ is a vital opinion because of the nation’s economic interest regarding the availability of the noncitizen work force. A closer examination of the case will afford an opportunity to examine the message the Court sent regarding membership and equality, one that should resonate even to this day.

_Plyler_ is a groundbreaking case in that, for the first time, the Supreme Court clearly stated that undocumented persons are protected under the Equal Protection Clause of the Fourteenth Amendment. Earlier cases had established that undocumented noncitizens are persons entitled to protection under the Due Process Clause of the Fourteenth Amendment.

The _Plyler_ Court arrived at this conclusion by stating that “whatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term.” The Court did so, building upon established precedent that aliens are “guaranteed due

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74 347 U.S 483 (1954); see also Kevin Johnson, _Civil Rights and Immigration: Challenges for the Latino Community in the Twentieth Century_, 8 LA RAZA L.J. 42, 44 (discussing _Plyler_ as a high-water mark for Latinos before the Supreme Court and comparing it to _Brown_).
77 _Plyler_, 457 U.S. at 213; see also Michael A. Olivas, _HRRA, The DREAM Act, and Undocumented College Student Residency_, 30 J.C. & U.L. 435, 443 (2004) (discussing how “[p]rior to _Plyler_, the Supreme Court had never taken up the question of whether undocumented aliens could seek Fourteenth Amendment equal protections”).
78 See Olivas, _supra_ note 77, at 443.
79 _Plyler_, 457 U.S. at 210.
process of law by the Fifth and Fourteenth Amendments.\textsuperscript{80} This principle had been established in 1886 in \textit{Yick Wo v. Hopkins},\textsuperscript{81} where the Court held that the Fourteenth Amendment guarantee of equal protection of the laws was “universal in [its] application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.”\textsuperscript{82} In \textit{Plyler}, the Court reaffirmed \textit{Yick Wo} and extended the reach of the Fourteenth Amendment’s Equal Protection Clause to the undocumented.\textsuperscript{83} The Court took this step because, under the Fourteenth Amendment, it is “persons” within the state’s jurisdiction that are to be protected from the denial of equal protection. Thus, the Amendment’s protections would apply to those within a state’s borders, even if they are unlawfully present.\textsuperscript{84}

A notable aspect of the opinion with regard to the applicability of the Equal Protection Clause to the undocumented is the Court’s inquiry into the congressional debate surrounding the passage of the Fourteenth Amendment. In particular, the Court cited the following language from the debate recorded in the early legislative history of the Amendment: “Is it not essential to the unity of the Government and the unity of the people that all persons, \textit{whether citizens or strangers, within this land}, shall have equal protection in every State in this Union in the rights of life and liberty and property?”\textsuperscript{85} In other words, the Court used the early legislative history of the Fourteenth Amendment to buttress its ruling that the Equal Protection Clause applied to the undocumented plaintiffs in the case.

Once the Court had determined the applicability of the Equal Protection Clause to the undocumented, its next task was to decide which level of scrutiny to apply to the governmental classification. In determining whether a statute passes constitutional muster under the Equal Protection Clause, the decision regarding which level of scrutiny to apply is paramount. Indeed, the level of scrutiny guides the Court’s analysis and determines not only how narrowly tailored to a state interest the challenged measure must be, but also how important the state interest must be in enacting the legislation.

The \textit{Plyler} Court found that strict scrutiny was inappropriate for two reasons. First, in the Court’s view, undocumented noncitizens

\textsuperscript{80} Id.
\textsuperscript{81} 118 U.S. 356 (1866).
\textsuperscript{82} Id. at 369.
\textsuperscript{83} \textit{Plyler}, 457 U.S. at 212 n.10.
\textsuperscript{84} Id. at 210.
\textsuperscript{85} Id. at 214 (quoting \textit{CONG. GLOBE}, 39th Cong., 1st Sess. 1090 (1866) (remarks of Rep. Bingham)).
are not a suspect class because their unlawful presence in the country in violation of federal law is not, in the Court’s words, a “constitutional irrelevancy.” The second reason why the Court rejected strict scrutiny was the existing precedent that education is not a fundamental right that would require a narrow tailoring of the legislation and a compelling state interest to justify its curtailment. Thus, the *Plyler* Court reaffirmed the holding in *San Antonio Independent School District v. Rodriguez*—that education is not a fundamental right—despite Justice Marshall’s plea to overrule it.

It is clear that Justice Brennan, who dissented in *Rodriguez* yet wrote the majority opinion in *Plyler*, did not have the votes to overrule *Rodriguez* via *Plyler* and hold that education is a fundamental right. In his *Rodriguez* dissent, Justice Brennan disagreed with the majority’s view that the only rights that may be deemed fundamental are those explicitly and implicitly guaranteed in the Constitution and instead stated that “‘fundamentality’ is . . . a function of the right’s importance in terms of the effectuation of those rights which are constitutionally guaranteed.

In fact, in his *Rodriguez* dissent, Justice Brennan used the following language from Justice Marshall’s dissent in the same case: “As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must

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86 Id. at 223.
87 Id. (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28–39 (1973) (holding that education is not a fundamental right and that “a State need not justify by compelling necessity every variation in the manner in which education is provided to its population”)).
be adjusted accordingly.” As discussed below, Justice Brennan’s majority opinion in Plyler, a little more than a decade later, reflected this view. Indeed, the Plyler Court applied what, in effect, amounts to a heightened, almost intermediate level of scrutiny, rather than a traditional rational basis standard.

Yet, the application of this heightened level of scrutiny to the denial of an education to undocumented children would not have been Justice Brennan’s predictable position based on his previous statement in the Rodriguez dissent. There, the Justice asserted that education is “inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment.” Based on the close nexus between the constitutional guarantees of the First Amendment and the non-fundamental right to an education, Justice Brennan opined in his Rodriguez dissent that “any classification affecting education must be subjected to strict judicial scrutiny.” This turned out not to be the case in Plyler, however, where Justice Brennan did not find education to be a fundamental right and thus did not apply strict scrutiny to a state law denying education to undocumented children.

After the Court rejected the strict scrutiny standard in Plyler, it continued its equal protection analysis by applying a rational basis test to a Texas law that deprived undocumented children of a public education. Yet, though the Court purported to apply the traditional rational basis test, a close reading of the opinion reveals that the Court actually employed a more demanding standard.

Application of a heightened rational basis test in Plyler began with the recognition that education is “perhaps the most important function of state and local governments.” The Court then found that the state’s decision to deny an education to undocumented

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92 Id. at 62–63 (Brennan, J., dissenting) (quoting Rodriguez, 411 U.S. at 102–03 (Marshall, J., dissenting)).
93 See infra notes 96–104 and accompanying text.
94 Rodriguez, 411 U.S. at 63 (Brennan, J., dissenting).
95 Id. (Brennan, J., dissenting).
96 This application of heightened scrutiny under the rational basis standard of review seems stronger than traditional rational basis because under traditional rational basis the classification only needs to be rationally related to a legitimate government interest. See Robert C. Farrell, Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans, 32 Ind. L. Rev. 357, 382 (1999); see also Rachel F. Moran, Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond, 8 La Raza L.J. 1, 14 (1995) (discussing Supreme Court’s application of “rationality with a bite” standard).
students could hardly be considered rational unless it furthered some substantial state goal.\footnote{Id. at 224.} In assessing the rationality of the state statute, the Court warned that the cost to the nation and to the innocent children involved must be taken into account.\footnote{Id.} The Court further stated that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education”\footnote{Id. at 223 (quoting Brown, 347 U.S. at 493).} and noted that because the state took it upon itself to provide an education to children, it had to be made “available to all on equal terms.”\footnote{Id. (quoting Brown, 347 U.S. at 493).}

The fact that it would be unfair to penalize the undocumented students for their parents’ illicit act was another concern for the Court.\footnote{Id. at 220.} The Court found that undocumented children “can affect neither their parents’ conduct nor their own status.”\footnote{Plyler, 457 U.S. at 220 (quoting Trimble v. Gordon, 430 U.S. 762, 770 (1977)).} Because the Texas law was directed towards children and imposed its discriminatory burden on the basis of a characteristic for which the children had no control, the Court found that there could not be a rational justification for penalizing the children for their presence in the country.\footnote{See id.}

Furthermore, the Court was concerned about the creation of a permanent caste of undocumented resident aliens, which, in its view, could result because of their lack of education.\footnote{Id. at 219.} The Court stated that “[l]egislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of ‘class or caste’ treatment that the Fourteenth Amendment was designed to abolish.”\footnote{Id. at 218 n.14.} The Court recognized that depriving undocumented children of an education could result in the creation of a caste by imposing “a lifetime hardship on a discrete class of children not accountable for their disabling status.”\footnote{Id. at 223.}

The Supreme Court expressed further concerns about the existence of this so-called “shadow population”—an undocumented underclass—allowed to remain in the United States by lax immigration enforcement and as a cheap labor source that need not be granted any of the benefits afforded to citizens or legally admitted
noncitizens. The Court’s view, the existence of this undocumented underclass “presents most difficult problems for a Nation that prides itself on adherence to principles of equality under the law.”

The Court next addressed the state’s argument that the goal of reducing state expenditures by denying a free public education to the children of the undocumented was a legitimate one. The Court responded that there was no “evidence in the record suggesting that illegal entrants impose any significant burden on the State’s economy.” In fact, the district court had noted in Doe v. Plyler that “families of undocumented children contribute no less to the financing of local education than do citizens or legal residents of similar means.”

Additionally, the state’s singling out of undocumented children for denial of a free public education because “their unlawful presence within the United States renders them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State,” was similarly unpersuasive to the Court. Even though undocumented children would be subject to deportation, the Court found that many of them would remain in the country indefinitely, and some would even become lawful residents or United States citizens.

Finally, the Court concluded that “if the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest.” This formulation, of course, is a higher form of scrutiny than the traditional rational basis test, as discussed above. Ultimately, because the state made no showing of a substantial state interest, the Court invalidated the Texas law.

Thus, the Plyler Court contextualized the inequality inherent in the state’s denial of an education to undocumented children. The

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108 Id. at 219.
110 Id. at 228.
113 Id., 457 U.S. at 230.
114 Id. at 230.
115 See supra notes 96–104 and accompanying text.
Court’s equal protection analysis resulted in its use of a rational basis level of scrutiny in theory, but not in practice. Notwithstanding this contextualization and the Court’s sweeping language regarding the existence of an undocumented underclass, undocumented students have not been afforded rights without resistance, as discussed below.\footnote{117}

\paragraph{B. Three Concurrences: Justices Marshall, Blackmun, and Powell}

Three members of the Court wrote concurrences in Plyler: Justices Marshall, Blackmun, and Powell. Justice Marshall’s concurrence reaffirmed his view that “an individual’s interest in education is fundamental”\footnote{118} and rejected the rigid two-tier approach in equal protection jurisprudence, calling instead for varying levels of scrutiny “depending upon the ‘constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.’”\footnote{119} Both assertions were reiterations of views that Justice Marshall had expressed in earlier dissents.\footnote{120} But as discussed earlier, the Plyler majority tacitly employed a “sliding scale” approach to the standard of constitutional review in its equal protection analysis.\footnote{121}

Justice Blackmun’s concurrence emphasized his view that “the nature of the interest at stake is crucial to the proper resolution” of the case and reaffirmed that, when analyzing whether a fundamental right exists for equal protection purposes, there are meaningful distinctions among the multitude of social and political interests regulated by the states.\footnote{122} In Justice Blackmun’s view, “denial of an education is the analogue of denial of the right to vote: the former relegates the individual to second-class social status; the latter places him at a permanent political disadvantage.”\footnote{123} The Justice also enunciated his conviction that the classification of undocumented children was not a “monolithic” one and that many of the students would remain in this country permanently.\footnote{124}

Finally, Justice Powell wrote separately “to emphasize the unique

\footnotesize{\textsuperscript{117} See infra Parts IV & V.}\textsuperscript{118} \textit{Plyler}, 457 U.S. at 230 (Marshall, J., concurring).\textsuperscript{119} \textit{Id.} at 231 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 99 (1973)).\textsuperscript{120} \textit{Id.}\textsuperscript{121} \textit{See supra} note 96 and text accompanying notes 115–16.\textsuperscript{122} \textit{Plyler}, 457 U.S. at 231 (Blackmun, J., concurring).\textsuperscript{123} \textit{Id.} at 234 (Blackmun, J., concurring).\textsuperscript{124} \textit{Id.} at 236 (Blackmun, J., concurring).
character” of the case. In Powell’s view, the undocumented children were being severely disadvantaged by factors such as the federal government’s inability to control the border and the attractiveness of jobs in the United States, and he agreed that they were victims who should not be left on the streets uneducated. Justice Powell also opined that excluding the undocumented children “from a state-provided education is a type of punitive discrimination based on status that is impermissible under the Equal Protection Clause.”

It should be noted that Justice Powell played a key role in the evolution of the majority decision in Plyler. In addition to drafting his concurrence, Justice Powell engaged in several written exchanges with Justice Brennan and requested that Justice Brennan share with him several versions of the draft opinion. Thus, it has been said that the ultimate result in Plyler became “almost nothing more than a direct reflection of [Powell’s] views of social policy.” In other words, because the Justice found the Texas statute problematic and misguided as a matter of social policy, he regarded it as unconstitutional. In fact, another effect of Justice Powell’s role in the evolution of the majority opinion is the dilution of the doctrinal arguments in the previous drafts, leaving it with “almost no generative or doctrinal significance because it invoked too many considerations.” This, of course, is one of the areas in which the dissent strongly criticized the majority opinion, as will be explored in Part II.C.

C. Dissent: The Beginning of the Attack on Plyler?

The 5–4 decision in Plyler reveals a deeply divided court. Chief Justice Burger’s dissent pointed out that the majority cobbled together a custom-made standard of review by “patching together bits and pieces of what might be termed a quasi-suspect class and quasi-fundamental rights analysis, [and] . . . spin[ning] out a theory custom-tailored to the facts of these cases.” Justice Burger stated

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125 Id. at 236 (Blackmun, J., concurring).
126 Id. at 237–38 (Powell, J., concurring).
127 Id. at 240 (Powell, J., concurring).
128 Tushnet, supra note 90, at 1866–73.
129 Id. at 1873.
130 Id.
131 Id.
132 Plyler, 457 U.S. at 244 (Burger, C.J., dissenting). The Plyler opinion was criticized at the time as “appear[ing] to be ad hoc and divorced from other related bodies of law created by the Court.” Phillip B. Kurland & Dennis J. Hutchinson, The
that if “ever a court was guilty of an unabashedly result-oriented approach, this case [would be] a prime example.”133 The dissent further averred that, unpalatable though it may have seemed, the choice to enact legislation was a political one, and not a function of the Court.134 In Chief Justice Burger’s view, it is up to Congress, not to the Court, to “assess the social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”135

The dissent did not dispute that the denial of an education to this group of children would create a permanent caste of noncitizens. In fact the specter of this permanent caste was a “disturbing one;” yet it was Chief Justice Burger’s contention that this was “one segment of a larger problem” for the “political branches to solve.”136 Justice Burger further argued that the majority in Plyler “seeks to do Congress’ job for it,”137 and that it failed to allow the political process to run its course.138

As with any deeply divided opinion of the Supreme Court, it is likely that such a vigorous dissent may have contributed to Plyler’s vulnerability to attack from both federal and state quarters.139 Also, in a sense, Chief Justice Burger’s words are prophetic in that the only recourse for undocumented children who have received an education and want to further pursue the American dream still lies in the political process. Only by means of that process may the undocumented embark upon a path to legalization, and the ability to work legally and attend postsecondary educational institutions free of the obstacles they face today.140

III. SUBSEQUENT HISTORY OF PLYLER: UNDOCUMENTED TODAY, DOCUMENTED TOMORROW?

The named plaintiffs in Plyler, which was a class action lawsuit, were sixteen Mexican children who could not establish that they had

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133 Plyler, 457 U.S. at 244 (Burger, C.J., dissenting).
134 Id. at 253–54.
135 Id. (internal quotation marks omitted).
136 Id. at 254.
137 Id.
138 Id. This argument, of course, could be considered by some a convenient and politically expedient solution.
139 See infra Part IV.
140 See infra Part V.B.
been legally admitted into the United States.\textsuperscript{141} The State argued that these children should be singled out because they were less likely to remain within the State and put their education to “productive social or political use within the State.”\textsuperscript{142} As noted, the Court dismissed this argument, asserting that no State has such a guarantee.\textsuperscript{143} The Court noted that “many of the undocumented children . . . will remain in this country indefinitely, and that some will become lawful residents or citizens.”\textsuperscript{144} According to available data, this prediction proved true not only for the vast majority of the \textit{Plyler} plaintiffs, but for noncitizens in general.\textsuperscript{145}

The available citizenship data show that, of the noncitizens that arrived in the United States before 1970, 80.5\% obtained citizenship by 2002.\textsuperscript{146} Furthermore, of those who entered the country between 1970 and 1979, 66.6\% had obtained citizenship by 2002 and 45\% who entered between 1980 and 1989 had obtained citizenship.\textsuperscript{147} Finally, of those who entered in 1990 or later, 12.7\% had obtained citizenship.\textsuperscript{148}

What about the \textit{Plyler} plaintiffs? What has been their experience? More than a decade after the opinion was issued, thirteen of the sixteen children were interviewed by journalists for a leading national newspaper. The interviews disclosed that ten of them finished high school in Tyler, Texas.\textsuperscript{149} All of those interviewed are now legal residents and most of them have full-time employment.\textsuperscript{150} Although many have taken college courses, none has graduated from a four-year institution.\textsuperscript{151} They work as teacher’s aides, automobile mechanics, assembly-line workers, managers, painters, and stock clerks.\textsuperscript{152} Some work in the very school district that

\textsuperscript{141} See \textit{Plyler}, 458 F. Supp. at 571 & n.1 (“Prior to the trial of this case on the merits, the court ordered that the action be maintained as a class action on behalf of all undocumented school-aged children of Mexican origin residing within the boundaries of the Tyler Independent School District.”).
\textsuperscript{142} \textit{Plyler}, 457 U.S. at 229–30.
\textsuperscript{143} Id. at 230; see supra text accompanying notes 113–14.
\textsuperscript{144} \textit{Plyler}, 457 U.S. at 230.
\textsuperscript{146} Schmidley, supra note 145.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Feldman, supra note 145, at Al.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
tried to bar them, and three are full-time housewives.\textsuperscript{155} Of the four families which these sixteen children comprised, only one has moved out of Tyler.\textsuperscript{154} Indeed, they appear to have attained the American dream by moving from undocumented to documented members of United States society.

The experience of the Plyler plaintiffs reflects the view of Professors Aleinikoff and Rumbaut, who have cited studies showing that, despite the fears of a multicultural nation underlying this “immigration crisis,” noncitizen acculturation within United States society is continuing its progress, as it has in the past.\textsuperscript{155} Thus, the available evidence to date show that the State’s argument in Plyler that the undocumented children would not put their education to use to benefit the state of Texas has proven to be false. This evidence comports with the economists’ view of the social benefits of an education, which recognizes that education has a value to society beyond its value to the individual student.\textsuperscript{156}

Among these social benefits are “a more-educated and better-informed electorate, lower rates of crime and violence, lower rates of poverty, better health and nutrition, and, generally a more smoothly functioning society.”\textsuperscript{157} These social benefits ensue regardless of immigration status because the undocumented person of today could indeed become the permanent resident or citizen of tomorrow.

IV. PLYLER UNDER ATTACK

As time has passed and Plyler has endured as precedent, it has not been immune from attack; there have been legislative efforts to overrule the decision. In fact, the right to K–12 education for undocumented students has been under siege both at the federal and state levels as part of the current culture war against illegal immigration.

A. Federal Proposals

There were two federal proposals—in 1995 and 1996—that would have effectively overruled Plyler.\textsuperscript{158} These essentially identical

\textsuperscript{155} Id.
\textsuperscript{154} Id.
\textsuperscript{157} Id.
\textsuperscript{158} H.R. 4134, 104th Cong. (1996); H.R. 1377, 104th Cong. (1995); see also Nat’l
proposals came at the time of the passage of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). The Gallegly amendments to the IIRIRA, sponsored by California’s Congressman Elton Gallegly, would have authorized “[s]tates to deny public education benefits to certain aliens not lawfully present in the United States.” The Gallegly amendments reflected the view that allowing undocumented students the opportunity to receive an education “promote[ed] violations of the immigration laws,” imposed “significant burden[s] on States’ economies and deplete[ed] states’ limited educational resources.” The proposed amendments also expressly permitted states to charge tuition fees to undocumented children. This, of course, was prohibited by Plyler as a denial of equal protection. The Gallegly amendments were not included in the final legislation. Opposition by Texas senators Kay Bailey Hutchison and Phil Gramm as well as an organized publicity campaign by a number of public interest groups contributed to the amendments’ defeat.

B. State Proposals: California’s Proposition 187

In California, following a very fractious and divisive campaign in which its proponents chanted “Save our State,” Proposition 187 passed by a close vote on November 8, 1994. Once the ballot initiative passed, it became effective the next day. One of its key provisions, Section 7, contravened the mandate of Plyer in that it


160 H.R. 4134.

161 Id.

162 Id.

163 Id.

164 See supra notes 114–15 and accompanying text.

165 Undocumented Students, supra note 158, at 7.

166 Sidney Weintraub et al., Responses to Migration Issues, in U.S. COMM’N ON IMMIGRATION REFORM, MEXICO–U.S. BINATIONAL MIGRATION STUDY REPORT 437, 468 (1997), available at http://www.utexas.edu/lbj/uscir/binpapers/vol-5weintraub.pdf (last updated Apr. 20, 1998); see also Butler, supra note 76, at 1485 (noting that a bipartisan effort united to have Gallegly amendments defeated).


168 LULAC, 908 F. Supp. at 763.
denied undocumented children in the state a free public school education. This provision was judicially invalidated in *League of United Latin American Citizens v. Wilson* ("LULAC").

The *LULAC* litigation was decided in two opinions. Both the 1995 and 1997 decisions explicitly reaffirmed *Plyler*. In 1995, a district court in the Central District of California held that Section 7, which required the exclusion of undocumented students from public schools, was preempted by federal law under the Supremacy Clause, based on the Supreme Court’s equal protection analysis in *Plyler*. In addition, in 1997, the court again followed *Plyler*, and noted also that Section 1643 of the California law expressly deferred to *Plyler* in providing that “[n]othing in this chapter may be construed as addressing alien eligibility for a basic public education as determined by the Supreme Court of the United States under *Plyler v. Doe*.”

At the time of Proposition 187’s introduction and passage, opinions as to whether the Court would overrule or affirm *Plyler* via the *LULAC* litigation varied, but most commentators believed that *LULAC* would reach the Supreme Court and result in an overruling of *Plyler*. *LULAC* was not brought before the Supreme Court, however, and the parties dropped their appeals following an agreement to enter into dispute resolution regarding the issues raised in the appeal.

Although the federal proposal overruling *Plyler* did not pass and California’s Proposition 187 was invalidated in a judicial reaffirmation of *Plyler*, both of these instances serve as hallmarks of the culture wars surrounding the education of Latino undocumented

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169 Id. at 774.
171 *LULAC*, 908 F. Supp. at 774.
172 Id.
children. What these attacks on \textit{Plyler} reveal is a deep-seeded resentment towards undocumented immigrants, mostly due to the high cost that states bear when educating their children. This was an argument, however, that the Court rejected in \textit{Plyler} as an insufficiently rational basis for denying educational opportunities to undocumented children.\footnote{\textit{Plyler,} 457 U.S. at 229. A recent legislative proposal in Arizona would require school officials to verify the immigration status of parents of students before allowing them to enroll their children, in direct contravention of \textit{Plyler.} \textit{See} Associated Press, \textit{Arizona to Clamp Down Even Harder on Illegals,} March 4, 2005, \textit{available at} http://www.newsmax.com/archives/articles/2005/3/4/112027.shtml.}

\section{Plyler's Challenge to Bring About Broader Change for Undocumented Students}

Much like \textit{Brown v. Board of Education,} \textit{Plyler} called for unprecedented reforms addressing the needs of marginalized youth and imposed duties on the states regarding their education. Although \textit{Plyler} has certainly opened many doors for individual undocumented schoolchildren,\footnote{See supra Part III.} it has not had the intense effect upon educational systems that \textit{Brown} has had over the years. In fact, it may be that \textit{Plyler} acts as a form of preserving the undocumented as a separate class, ensuring a primary and secondary education for their children, but nothing more within society. Does this mean that \textit{Plyler} would not withstand attack if the issue of the education of the undocumented were to come before the Supreme Court again? As discussed below, the Court’s latest pronouncements of equal protection in education suggest otherwise.

\subsection{Equal Protection: Context Matters}

In the area of equal protection and education, we have seen the evolution from the school desegregation mandated in \textit{Brown}, to affirmative action in higher education as a race-conscious remedy. In two companion cases, \textit{Grutter v. Bollinger}\footnote{539 U.S. 306 (2003).} and \textit{Gratz v. Bollinger},\footnote{539 U.S. 244 (2003).} the Supreme Court recently ruled that colleges may consider race as part of a narrowly tailored, race-conscious admissions plan.\footnote{\textit{Grutter,} 539 U.S. at 334.} A race-conscious admissions program that does not “unduly burden individuals who are not members of the favored racial and ethnic groups” satisfies the narrow-tailoring requirement.\footnote{\textit{Id.} at 341 (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 630 (1990))}
automatic award of points based on race, however, are impermissible. In the Court’s view, because the Fourteenth Amendment protects persons, not groups, classifications based on race are “in most circumstances irrelevant and therefore prohibited.” The Court found that close judicial scrutiny is required to “ensure that the personal right to equal protection of the laws has not been infringed.”

In *Grutter*, the Supreme Court recognized that “context matters” in an equal protection analysis. In the Court’s view, strict scrutiny provides a structure in which to examine the “importance and the sincerity of the reasons” set forth for the classification within each context. In this contextualization of equal protection doctrine, the Court has departed from its decision in *Adarand Constructors, Inc. v. Pena*. There, the Court did not give weight to the social context behind the benign racial classification aimed at remedying past discrimination, a sentiment echoed by Justice Scalia, who stated that “[i]n the eyes of government, we are just one race here.”

The opinions in *Gratz* and *Grutter* establish that any policy that treats one racial group differently than another must employ narrowly tailored measures that further a compelling governmental interest. The Court has indicated that a narrowly tailored policy will survive strict scrutiny, thereby leaving open the idea that if a state can show a compelling governmental interest in denying education to undocumented children, and the means of denial is narrowly tailored, it would be upheld under the Equal Protection Clause of the Fourteenth Amendment. It is noteworthy, however, that the Supreme Court clarified that only an “exact connection between justification and classification” will support the use of racial classifications. *Plyler* gives us a clue as to what a compelling

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182 See *Gratz*, 539 U.S. at 270 (holding that automatic distribution of “20 points, or one-fifth of the points needed to guarantee admission,” virtually guaranteed admission to the underrepresented minority and in effect made race a deciding factor rather than merely a plus factor).
184 Id. (quoting *Adarand*, 515 U.S. at 227) (emphasis in original quoted source).
185 Id. at 327.
186 Id.
187 Id.
189 Id. at 239 (Scalia, J., concurring).
190 See *Gratz*, 539 U.S. at 270; *Grutter*, 539 U.S. at 326.
191 See *Gratz*, 539 U.S. at 270 (quoting Fullilove v. Klutznick, 448 U.S. 448, 537 (1980)).
governmental interest might be in the area of education. In holding that the school district’s policy was unconstitutional, the Court found that the district had failed to show that educating undocumented children imposed a substantial burden on the state, referring to almost negligible costs associated with the education of those children.

Today, however, there are approximately 1.6 million undocumented students in the United States, and the once negligible costs are now in the billions. Yet, the context of inequality and the existence of an underclass of undocumented individuals still survives. Presumably, that would be taken into account before the Court would consider overruling Plyler.

B. Access to Higher Education for Undocumented Students: Mixed Success

Another area in which Plyler has faced challenges in creating educational opportunity is in postsecondary education for the undocumented. Access to higher education is still an unattainable reality for undocumented students. For undocumented students, the obstacles to access to higher education range from the denial of admission, to an inability to obtain student loans, to being charged nonresident tuition, all because of lack of legal immigration status. The following two sections will detail the efforts being undertaken at the state and federal levels to ensure access to postsecondary education for undocumented Latino students in the United States.

1. Federal Efforts: Work in Progress

At the federal level, there have been several proposals to allow undocumented students access to higher education. Most notably,
the DREAM Act would amend the IIRIRA and repeal 8 U.S.C. § 1623, which denies education benefits to undocumented students if a United States national would not be eligible for the same benefits, without regard to State residence. Also, under certain circumstances, the DREAM Act would allow adjustment to legal status for undocumented students who complete a college education. Section 4 of the DREAM Act provides for the cancellation of the removal of an undocumented student who has been admitted to an institution of higher education or who has earned his or her high school diploma or GED. Under this provision, the student’s status would be adjusted to that of an alien lawfully admitted for permanent residence. The Student Adjustment Act of 2003 is the House companion bill to the Senate’s DREAM Act and also would permit states to determine residency requirements for higher education purposes. The House version also contains provisions for the adjustment of an undocumented student’s illegal status. Both bills were left pending at the end of the 108th Congress and are expected to be reintroduced in 2005.

The Supreme Court’s rationale in Plyler regarding the unfairness of penalizing undocumented children for their parents’ illegal acts, as well as the concern over the creation of a permanent caste of undocumented residents, would seem to be applicable to the undocumented student seeking access to higher education in this day and age. Commentators have similarly suggested that public policy supports the desirability of federal activity in furtherance of providing higher education opportunities for undocumented students.

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199 Id. § 5(d)(1)(D).
200 Id.
201 Id.
203 Id.
204 See supra notes 102–04 and accompanying text.
205 See supra notes 105–07 and accompanying text.
206 See Alfred, supra note 175, at 618.
2. State Efforts: Activity in the Majority of the States

Across the country, there has been action at the state level to allow access to higher education for undocumented students. A recent examination of the laws of the fifty states on this topic discloses the following results. Eight states—California, Illinois, Kansas, New York, Oklahoma, Texas, Utah, and Washington—permit undocumented students to pay resident tuition rates. These states grant in-state tuition based not on residency but on the basis of graduation from a high school in that state. Twenty-one additional states have considered legislation allowing undocumented students to pay in-state tuition rates. Most of these bills, however, never even made it to a vote or were postponed indefinitely in committees. The remaining twenty-one states have not considered the issue at all.

Undocumented students seeking a higher education, however, have been dealt severe blows in recent litigation in two states. In the first case, several undocumented students sued Virginia higher education institutions for failure to admit them under a state policy. In Equal Access Education v. Merten, the plaintiffs, several undocumented students and one association, claimed that federal

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207 See Jessica Salsbury, Comment, Evading Residence: Undocumented Students, Higher Education, and the States, 53 Am. U. L. Rev. 459, 473–75 (2003). See, for example, Cal. Educ. Code § 68130.5 (West 2005) which exempts undocumented students from paying nonresident tuition rates if they have attended high school in California for three or more years and have graduated from a California high school or received the equivalency thereof. See also Tex. Educ. Code Ann. § 54.052(j) (Vernon 2004), which classifies an undocumented student as a resident if the student resides with his or her parent or guardian for three or more years while attending high school in the state and has graduated from a Texas high school or received the equivalency of a high-school diploma.

208 There are two types of laws granting undocumented students in-state tuition. One grants them in-state tuition by exempting them from paying nonresident tuition while the other type classifies an undocumented student as a resident. See the California and Texas examples, supra note 207. See also Victor Romero, Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls, 27 N.C.J. Int’l L. & Com. Reg. 393, 404–07 (2002); Salsbury, supra note 207, at 473.

209 The states that have considered legislation are: Alaska, Arizona, Colorado, Delaware, Florida, Georgia, Hawaii, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Virginia, and Wisconsin. See, e.g., H.B. 2518, 46th Leg., 1st Reg. Sess. (Ariz. 2003); S.B. 1367, 92nd Gen. Assem. (Mo. 2004).

210 States that have not even considered the issue are Alabama, Arkansas, Connecticut, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Montana, New Hampshire, Nevada, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, West Virginia, and Wyoming.


immigration law preempted the denial of admission to Virginia institutions of higher education, and that such denial violated the Commerce and Due Process Clauses of the Constitution. The plaintiffs have found themselves on the losing side of all of the rulings in the case. For instance, unlike Plyler, where the plaintiffs proceeded anonymously, the five undocumented students in *Equal Access Education* were not allowed to proceed anonymously. As a result, three of the individual plaintiffs were unable to continue in that role for fear of being deported. The next setback was a pretrial dismissal of a large part of the plaintiffs’ case. Finally, the undocumented students lost the case altogether when the remaining aspects of the case were dismissed after the court found that the universities were using the appropriate federal standards to identify the undocumented students. Thus, as *Equal Access Education* illustrates, the rights of the undocumented students in the higher education context have been left unprotected in what would appear to be the beginning of an erosion of *Plyler*’s promise of educational equality.

More recently, a lawsuit has been filed on behalf of two dozen United States citizen students, or parents of students, who pay nonresident tuition at Kansas universities. They are challenging the recently enacted Kansas law that offers in-state tuition to undocumented students who have graduated from and attended high school in Kansas for at least three years or have obtained their GED in Kansas.

The plaintiffs in the case allege that the Kansas law, H.B. 2145, violates § 505 of IIRIRA, which prohibits an illegal alien from receiving a benefit for which a United States citizen is ineligible. Plaintiffs also assert that H.B. 2145 contravenes federal law in that it

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213 Id. at 585.
215 See *Equal Access Educ.*, 305 F. Supp. 2d at 592 n.3.
216 Id. at 614.
221 See *Hebel*, supra note 219.
222 Id.
creates distinct immigration classifications only operative in Kansas that are not based on federal standards used to determine who is a lawful resident in the United States. Plaintiffs also allege that implementation of H.B. 2145 will encourage and induce the “transport of aliens into and across the United States” in violation of federal immigration law. Finally, the plaintiffs allege that a law drawing a distinction on the basis of alienage must meet the requirements of the Equal Protection Clause under the heightened standard of review, and that, because these students will not be able to work once they are educated, the arguments regarding their contribution to the workforce are unpersuasive. This case is still pending. If the court does not contextualize the equal protection claim and instead follows the Adarand model, there is a possibility that the plaintiffs will succeed.

CONCLUSION: THE CONTINUED VITALITY OF PLYLER

It is my contention that the importance of the Plyler debate to the education of undocumented Latino children turns on whether, once educational achievements are obtained, the undocumented will be able to become productive members of United States society, an aim the Supreme Court embraced in Plyler. As Professor Victor Romero stated:

[W]ithout a guarantee that an undocumented person can achieve lawful immigration status following graduation from college, such a person will always live under the double threat of being ineligible to lawfully hold a job and possible removal from the United States. And, since immigration regulation is a federal power, state legislatures could not tie academic achievement or state residency to immigration status. The power to change one’s immigration status rests solely on Congress’s shoulders.

In my view, the continued vitality of Plyler lies in the renewed call for immigration reform, so that once the undocumented student is educated in our country, he or she will have the opportunity to work legally in the United States. The spirit and message of Plyler would have the undocumented student achieve a measure of educational parity, as education is the great equalizer. To this extent, the undocumented may appear to have entered into the confines of

223 Id.
224 Id.
225 Id.
226 See supra note 114 and accompanying text.
227 See Romero, supra note 208, at 406–07 (footnotes omitted).
“post-national” citizenship, if not formal citizenship.\textsuperscript{228} Post-national citizenship could serve as a way in which the undocumented may assert their claims by virtue of their personhood, based on universal human rights, education being one of the basic human rights.\textsuperscript{229} Yet, the very endurance of \textit{Plyler} as precedent may itself then perpetuate the “silent covenant”\textsuperscript{230} of the “shadow population”\textsuperscript{231} of the undocumented, who have the right to at least a secondary (high-school) education, but are unable to work and become full members of our society, and thus are unable to achieve a sense of belonging in this country. Because the nation’s interest in maintaining a cheap and expendable labor force has converged\textsuperscript{232} with the expectation of an education for undocumented children, \textit{Plyler} survives to this day.

That \textit{Plyler} can be viewed as an interest convergence case is further evinced by the fact that it was decided at a time when the hiring of undocumented workers had not yet been outlawed by the Immigration Reform and Control Act (IRCA),\textsuperscript{233} and thus, it still was considered to serve the nation’s interest to have undocumented workers and their families in the country. I contend that providing the children of undocumented workers a free public education would still be to the nation’s benefit, as in fact Justice Powell noted when he stated that education may be one of the reasons for the undocumented to come to the United States.\textsuperscript{234}

Viewing \textit{Plyler v. Doe} in this light, and assessing the current situation of undocumented students in the United States, it is apparent that their educational advancement will occur when there is a convergence between the nation’s interest in allowing the normalization of their immigration status and the nation’s need for

\begin{footnotesize}
\textsuperscript{228} See Peter Schuck, \textit{The Re-Evaluation of American Citizenship}, 12 GEO. IMMIGR. L.J. 1, 30 (1997) (describing “post-national citizenship” as a construct of the concept of citizenship based not on national identity but on “universal personhood”) (internal quotation marks omitted).
\textsuperscript{229} Id.
\textsuperscript{230} Professor Derrick Bell has identified silent covenants with respect to social reform, in particular with respect to school desegregation. In his view, “to settle potentially costly differences between two opposing groups of whites, a compromise is effected that depends on the involuntary sacrifice of black rights or interests.” \textit{Bell}, supra note 21, at 29. In the case of undocumented students, their sacrifice of the potential for a better life can be seen as the compromise for the existence and endurance of \textit{Plyler}.
\textsuperscript{231} \textit{Plyler}, 457 U.S. at 218.
\textsuperscript{232} For a thorough analysis of the interest convergence theory with respect to \textit{Brown v. Board of Education}, see \textit{Bell}, supra note 21, at 59.
\textsuperscript{233} Immigration Reform and Control Act, § 274A, 8 U.S.C.A. § 1324a (West 2004).
\textsuperscript{234} \textit{Plyler}, 457 U.S. at 237 (Powell, J., concurring).
\end{footnotesize}
the work that the undocumented perform. “After almost two decades of anti-immigrant legislation, President Bush has finally announced a proposal to allow temporary guestworker status to undocumented workers under certain conditions. If the guestworker proposal announced by the President is any indication, it may be that such interests are about to converge.

235 See Press Release, President Bush Proposes New Temporary Worker Program, supra note 76.
AFTERWORD

“We Are Now of the View”∗
Backlash Activism, Cultural Cleansing, and the
Kulturkampf to Resurrect the Old Deal

Francisco Valdes**

INTRODUCTION

For the ninth time in as many years, LatCritters1 met in 2004


∗∗ Professor of Law and Director, Center for Hispanic and Caribbean Legal Studies, University of Miami. I thank the organizers, sponsors and participants of the LatCrit IX conference, upon which this symposium is based, and in particular the symposium contributors and law review editors whose work has created a lasting record of that stupendous conference. This Afterword should be read in conjunction with its counterpart in the Villanova Law Review, which published the other half of this symposium. Additionally this Afterword and its counterpart are in part based, and build, on previous efforts to analyze critically backlash kulturkampf as an overarching sociolegal phenomenon that necessarily frames the work of contemporary legal scholars. In particular, see Culture, “Kulturkampf” and Beyond: The Antidiscrimination Principle Under the Jurisprudence of Backlash, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 271, 273-76 (Austin Sarat ed. 2004) and Afterword—Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality and Responsibility In Social Justice Scholarship—Or, Legal Scholars as Cultural Warriors, 75 DENVER U. L. REV. 1409 (1998). Finally, I dedicate this Afterword to Jerome Culp—friend and warrior—who passed away in February 2004; this LatCrit conference was the first he missed, and we in turn missed him dearly. As always, all errors are mine.

during the Cinco de Mayo weekend not only to help recall the unjust events of that day a century and a half ago, but also to center and challenge its continuing legacies in law and society.

2 These legacies live on in many forms and many ways, of course, and this year, the


LatCrit IX conference theme beckoned our critical collective attention toward "Countering Kulturkampf Politics Through Critique and Justice Pedagogy." With this year’s call and focus, the LatCrit IX conference invited all OutCrit scholars and friends to train attention on the retrogressively synergistic consequences of kulturkampf on law and on society. In other words, to critically consider the consequences of reaction and retrenchment to our communities, aspirations, profession and, even, to our lives.

In response, the contributors to this symposium have covered a wide range of issues regarding both the culture wars and the value of social justice pedagogies as an act of resistance to their ideological and political pressures. As a set, the symposium authors have

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4 To view the LatCrit IX Call for Papers, please visit the LatCrit website http://www.latcrit.org.

5 OutCrit positionality is framed around the need to confront in collective and coordinated ways the mutually-reinforcing tenets and effects of two sociological macro-structures that currently operate both domestically and internationally: Euroheteropatriarchy and neoliberal globalization. Therefore, among them are the legal scholars who in recent times have pioneered the various strands of outsider critical jurisprudence—OutCrits. For further discussion of this designation, see Francisco Valdes, Outsider Scholars, Legal Theory and OutCrit Perspectivity: Postsubordination Vision as Jurisprudential Method, 49 DePaul L. Rev. 831 (2000) (discussing the relationship between Euroheteropatriarchy and OutCrit theory and praxis). The term "outsider jurisprudence" was first used by Professor Mari J. Matsuda. See Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim’s Story, 87 Mich. L. Rev. 2320, 2323 (1989). LatCrit theory is one strand in outsider jurisprudence, along with critical race theory, critical race feminism, Asian American scholarship, and Queer legal theory. See generally Francisco Valdes, Afterword - Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits and LatCrits, 53 U. Miami L. Rev. 1265 (1999) (drawing lessons for LatCrit from the experiences of other outsider efforts, principally those of RaceCrits and QueerCrits).

6 The LatCrit IX symposium is a joint publication of this law review and the Villanova Law Review. Each journal is publishing different “clusters” of essays defined thematically based on the proceedings of the LatCrit IX conference. To view past symposia, visit the LatCrit website at http://www.latcrit.org.

7 These contributions include the uses of various familiar identity axes, such as race, gender, sexuality and class, to define and wage backlash kulturkampf. See, e.g., Carla D. Pratt, Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity, 35 Seton Hall L. Rev. 1241 (2005); Martha T. McCluskey, How Equality Became Elitist: The Cultural Politics of Economics from the Court to the "Nanny Wars," 35 Seton Hall L. Rev. 1291 (2005). Looking to the outgroup communities from which we hail and for whom we labor, the symposium contributions also examine cultural warfare, as well as oppositional practices, in various local settings. See, e.g., Anita Revilla, Raza Womyn Majestoria, 50 Vill. L. Rev. 799 (2005); Victor Romero, Rethinking Minority Coalition Building: Valuing Self-Sacrifice, Stewardship and Anti-Subordination, 50 Vill. L. Rev. 823 (2005); Antonia Darder, Schooling and the
brought to us this new cross-disciplinary resource of substantive and pedagogical knowledge to help comprehend and combat the ways in which this neocolonial cultural warfare seeks to degrade our identities, communities, principles and, even, our work.

This Afterword now closes this year’s conference-based LatCrit symposium with a similar focus on the sociolegal phenomenon centered in this year’s theme: the causes and consequences of the backlash kulturkampf. This macro-phenomenon, which has come to dominate law and policy during the past two or so decades, has framed and informed the emergence and evolution of LatCrit theory during the past nine years, as well as that of critical outsider jurisprudence—or OutCrit—theories and efforts more generally. This macro-phenomenon also has framed and informed the emergence and evolution of backlash jurisprudence. Both of these broad jurisprudential developments—the emergence of OutCrit and backlash versions of post-liberal jurisprudence—employ the liberal legacies of latter part of the twentieth century; both use the liberal legacy of formal equality as the point of departure: backlashers insist the legacy must be rolled back while OutCrits demand it be made more socially relevant. But these twin jurisprudential developments have not met with the same reception: the past two decades or so have witnessed backlash scholars systematically plucked from the legal academy (and other arenas) by backlash politicians to enact their opinions into Law through the judicial power of the federal government, while outsider scholars continue to elaborate a post-

\[Empire of Capital: Unleashing the Contradictions, 50 Vill. L. Rev. 847 (2005).\] Looking beyond the United States, these accounts additionally include national as well as international and transnational analyses of cultural warfare in various sociolegal frameworks. \[See, e.g., Angel Oquendo essay; Maria Clara Dias essay; Martin Saavedra essay; Gil Gott essay; Berta Hernandez essay. And, finally, looking into our own profession—the professorate—these accounts similarly delve into the academic culture wars, and their significance to our work. \[See, e.g., Mary Romero essay; Imani Perry essay; Alicia Alvarez essay; Sylvia Lazos essay; Fran Ansley & Cathy Cochran essay; Natasha Martin essay; Nelson Soto essay.\]

\[8\] The companion to this Afterword, which appears in the portion of the LatCrit IX symposium being published by the Villanova Law Review, should be read in tandem with the analysis outlined below. \[See supra note 6; see also Francisco Valdes, Afterword—Culture by Law: Backlash as Jurisprudence, 50 Vill. L. Rev. 1135 (2005) [hereinafter Culture by Law]. In addition, and as noted below, this summary sketch builds on earlier works that collectively aim to make sense of the culture wars and their jurisprudential dimensions.\]


\[10\] Notable exemplars are Antonin Scalia and Robert Bork, plucked from the law
subordination social vision (chiefly) from within the legal academy.\textsuperscript{11}

In pursuit of this basic objective and agenda, as elaborated below, backlashers presently in control of the federal courts use the very “judicial review” power that, as a jurisprudential camp, they most denounce—and in precisely the selectively “activist” ways that they denounce most loudly—to upset the legislative choices made through the “democratic” process.\textsuperscript{12} At the same time, outsider scholars have continued to experiment with traditional and nontraditional methods of scholarship to elucidate a socially just society under the antisubordination principle,\textsuperscript{13} thereby providing a fundamentally different policy alternative to backlash and retrenchment—an alternative that will remain available to the nation when the furies of this kulturkampf have spent themselves, and when the nation may once again resume its fitful march away from the identity-based faculties of the University of Chicago and Yale University, respectively, to become judicial appointees. The former remains perched on the Supreme Court while the latter was appointed to the key Court of Appeals in the nation’s capital, where he enacted his opinions into law until his attempted appointment to the Supreme Court under President Reagan was defeated. Bork’s attempted appointment and defeat were undertaken, and have been understood, as a key skirmish of the culture wars. See generally \textit{Norman Viera & Leonard Gross, Supreme Court Appointments: Judge Bork and the Politicization of Senate Confirmations} (1998).

\textsuperscript{11} For a collection of examples, see \textit{Crossroads, Directions and a New Critical Race Theory} 379 (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds. 2002).

\textsuperscript{12} For an illustrative sketch of some examples see generally infra Part II; see also infra notes 89-91 and accompanying text.

\textsuperscript{13} The antisubordination principle is generally associated with critical outsider jurisprudence, although its initial articulation originates with Owen Fiss. See Owen M. Fiss, \textit{Groups and the Equal Protection Clause}, 5 J. PHIL. & PUB. AFFAIRS 107 (1976). In both its original articulation and its OutCrit elaboration, the antisubordination principle is conceived as a jurisprudential honing of the antidiscrimination principle in order to “get at” the social problems associated with domination and subjugation. See Paul Brest, Foreword—\textit{In Defense of the Antidiscrimination Principle}, 90 HARV. L. REV. 1 (1976) (articulating the principle and reviewing the Supreme Court’s elaboration and application of it). The antidiscrimination principle, as interpreted in the form of formal equality, was made “blind” to the social and conceptual asymmetries between domination and subjugation, and was likewise made to regard all kinds of “discrimination” as equal, and equally suspect. This construction of antidiscrimination as remedial law and policy thus failed to distinguish between remedial and invidious forms of “discrimination,” which in turn enabled notions of “reverse discrimination” that were used effectively to halt race-conscious remedial state actions tailored to similarly race-conscious acts of invidious discrimination. See infra Part II. Under the antidiscrimination principle as thus applied, remedies to discrimination were transmuted into discrimination; the remedy became the problem because the problem was defined as “discrimination” and the cure “antidiscrimination” whereas the actual problem was and is subordination, and the cure thus must be tailored to antisubordination. See generally Jerome M. Culp, Jr., et al., \textit{Subject Unrest}, 55 STAN. L. REV. 2435 (2003) (discussing antidiscrimination and antisubordination).
structural injustices that punctuated its founding and have bedeviled it since. For the moment, however, social retrenchment through backlash jurisprudence, especially as elaborated by the five justices presently in control of the federal judicial power,\textsuperscript{14} is a key part of these culture wars and their stated aims: the “take back” of civil rights and social multiculturalism by mandate of formal Law.

Thus, as recent sociolegal experience teaches—and as the LatCrit IX conference theme suggests—the recent history of social and legal backlash spanning the past several decades sketched below, during which claims of judicial activism have surfaced persistently, provides a rich backdrop to a national assessment of law, democracy, equality and justice in the United States.\textsuperscript{15} The culture wars that have framed our jurisprudential endeavors and experiments provide a potentially rich source of insight to understand how and why our efforts (as well as those of the backlashers) have succeeded (or not), and to assess what may or should come next. As the conference theme notes, as the symposium contributors illustrate, and as this Afterword seeks to emphasize, the intersection of cultural warfare, critical scholarship and social justice education constitutes a timely—and perhaps increasingly so—site of investigation and action for any critical scholar of any stripe concerned with the use of law and policy to re/engineer social and material realities.\textsuperscript{16}

\textsuperscript{14} Backlash jurisprudence, as the summary of some key highlights in Part II shows, reaches both into substantive and procedural fields of law to accomplish social retrenchment across wide bands of constitutional law, oftentimes in the name of tradition, democracy and federalism. The jurisprudential hard core of the “backlash bloc” leading this campaign of redirection from the Supreme Court consists of Antonin Scalia and Clarence Thomas, with the usually reliable complicity of William Rehnquist in firm control of the institutional powers and prerogatives of the Chief Justice. This bloc is completed by its two vacillating members, Sandra Day O’Connor and Anthony Kennedy, whose support is crucial to the operation of the bloc—and because their support vacillates, the bloc is unable to operate with the success and efficiency that the appointing executives had hoped to accomplish with each of these appointments. Nonetheless, each and every member of this bloc was appointed to power expressly as part of the backlashers’ roll-back agenda. When vacillating members of the bloc deviate from the script, they are excoriated by the other members for doing so. See, e.g., \textit{Casey v. Planned Parenthood}, 505 U.S. 833, 944 (1992) (Scalia, J. dissenting). As their fifty-some 5-4 backlash opinions in the last decade of the twentieth century aptly illustrate, this quintet operates as a bloc often enough to single-handedly enact a constitutional “counter-revolution” congruent with the social and ideological agenda of the backlash politicians who installed them into power. For an illustrative sketch, see \textit{infra} Part II.

\textsuperscript{15} Indeed, in some ways the culture wars are a contestation precisely over the social and legal conceptions of these big-picture concepts. See generally \textit{infra} note 17 and sources cited therein.

\textsuperscript{16} Both outsider and backlash jurisprudence underscore the interactivity of Law and Society. Outsider jurisprudence focuses on social transformation through legal
Part I opens the Afterword with an overview of the culture wars' origins, as they built momentum in the second half of the last century in reaction to the social effects of New Deal and Civil Rights lawmaking legacies, and then outlines the three broad lines or prongs of attack through which the neocolonial social ideologies and identity-inflected cultural imperatives of this reactionary roll-back campaign have been largely pursued. Part II then provides a capsule critical sketch of some key rulings in recent culture war cases spanning various doctrinal categories, which jointly illustrate some of the substantive legal domains and key or recurrent interpretative techniques most salient in backlash jurisprudence. Part III concludes the Afterword and symposium with brief notes on the individual interventions, institutional reforms and collective insurrections that LatCrit and other OutCrit scholars do and should employ to combat this ongoing surge of reaction and retrenchment, both in the short and longer term, through critical scholarship, social justice pedagogies and other forms of antisubordination praxis. This Afterword, in sum, aims to center the patterns and agendas of backlash kulturkampf, both in law and in society, in order to raise awareness and resistance of the interconnections that make this phenomenon extraordinary.

reformation while backlash jurisprudence engineers social retrenchment through legal retrenchment. The two are socially conscious, outcome-conscious. Both are concerned about the uses of law to construct culture, and the uses of culture to promulgate Law. See Valdes, Antidiscrimination, supra note 5.

In the form of this Afterword, this mapping of origins, law and resistance is but a rough sketch—a sketch of illustrative highlights regarding the substance and method of backlash jurisprudence, and of its consequences, as part and parcel of the backlash kulturkampf sweeping through the United States today. This sketch builds on earlier efforts to articulate this phenomenon, and to underscore its relevance to the principles and projects that LatCrit and other OutCrit scholars do or should undertake. This Afterword is part of a larger work-in-progress elucidating backlash jurisprudence as part and parcel of the culture wars, which in turn builds on previous efforts. See Francisco Valdes, Culture, “Kulturkampf” and Beyond: The Antidiscrimination Principle Under the Jurisprudence of Backlash, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 271 (Austin Sarat ed. 2004), (focusing broadly on three theoretical perspectives—backlash jurisprudence, liberal legalisms and critical outsider jurisprudence—to compare their approaches to equality law and policy); Francisco Valdes, Warts, Anomalies and All: Four Score of Liberty, Privacy and Equality, 65 OHIO ST. L.J. 1341 (2005) (focusing specifically on Lawrence v. Texas and generally on liberty-privacy as a central doctrinal terrain of social and legal retrenchment) [hereinafter Four Score]; Francisco Valdes, Afterword—Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality and Responsibility in Social Justice Scholarship—Or, Legal Scholars as Cultural Warriors, 75 DENVER U. L. REV. 1409 (1998) (focusing on the implications of cultural warfare for sexual orientation scholarship specifically, and for all OutCrit scholars generally) [hereinafter Beyond Sexual Orientation]. These works, in turn, inform and are informed by related concerns or issues that form part of my larger scholarly agenda. See Francisco Valdes, Outsider
It bears note at the outset that this Afterward proceeds from a critical appreciation of the alternative accounts proffered elsewhere to help explain the jurisprudential maneuvers and outcomes of the culture war rulings issued by backlash judges. Those accounts and the one presented below diverge in sometimes marked ways because they emphasize the familiar aspects of legal indeterminacy and judicial discretion, whereas the account unfolded here aligns more closely with the recent research into the behavior of individuals appointed to be judges—research that examines whether those behaviors produce patterns of consistency between their personal ideological preferences, as manifested in pre-appointment statements or actions, and their post-appointment adjudicatory acts. This research, which has given rise to the “attitudinal model” for analyzing and gauging the influence of personal predilection in formally judicial acts, has documented a clear and stunning consistency in the convergence of political ideology and adjudicatory outcome—a convergence that effectively portrays a near-complete collapse of the idealized distinction between law or principle and politics or ideology.

The basic conclusions of this field were more recently corroborated by a study of the cases argued during the 2002 Supreme Court Term. Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking, 104 COLUM. L. REV. 1150 (2004).
under the “legal model” of analyzing the behavior of judicial appointees, and thereby corroborates the conclusions drawn from the illustrative survey of backlash rulings undertaken here.\textsuperscript{20}

But this Afterword does not proceed from, nor try to assert, a simple complaint of politicized judicial appointees acting in politically calculated ways; this complaint, though serious enough to occupy the nation since the founding, also has a venerable history that stretches back to 1800 and the first factional transfer of federal political power after the Constitution’s adoption, when the Adams administration and the Federalist Party handed over the reins of the executive and legislative branches to Jefferson and his supporters but tried, before the inauguration of their victorious opponents, to wield their lame duck powers to seize long-term control of the judicial branch. That original “court packing scheme” produced a series of political machinations in which Congress and the President used their powers to rescind Federalist legislation creating new judicial

\textsuperscript{20} In like vein, this Afterword also proceeds from a wry recognition of the dangers that may accompany a too-frank exposé of the human-civil rights subversion launched and orchestrated from the Supreme Court bench by kulturkampf appointees installed into those positions during the past decade or two precisely (and explicitly) for this reactive purpose. See generally Owen Fiss, \textit{Another Equality}, ISSUES L. SCHOLARSHIP, at http://www.bepress.com/ils/iss2/art20. In this essay, Fiss critiques the use of narrative by critical race and other OutCrit theorists “as a substitute for the reasoned argument traditionally associated with the law. Narrativity as OutCrit method, Fiss believes, “is a way of subverting the authority of the Court [but] . . . we should criticize the Court for what it says, not subvert its authority in a deliberate or flagrant way or mock its commitment to public reasons by responding to its decisions with stories. The Third Reconstruction will need the Court,” he concludes. \textit{Id.} at 24. In this Afterword, narrativity is not the focus; rather the focus is on a substantive critique of the strategic maneuvers that pervade “what the Court says” and, more specifically, what the backlash bloc says in the name of the Court. In my view, the content of the opinions issued by this bloc in the name of the Court mock that institution’s historic aspiration or “commitment to public reason” in increasingly flagrant ways that have prompted increasingly widespread recognition that the ideal of the Rule of Law in the United States has thereby been put into serious question. See, e.g., \textit{infra} note 25 and sources cited therein.

In my view, the benefits of the exposé—critical awareness, consciousness-raising and active resistance—outweigh the fear of the dangers—erosion of the federal judiciary’s institutional legitimacy in the longer term; indeed, in my view, the feared dangers are due more to the increasingly blatant (and thus difficult to ignore or obscure) gyrations of backlash judges to reach their preferred results than to the public’s observation of them. Nonetheless, in recognition of the feared nihilism—and because to do so is descriptively and conceptually accurate as well—this Afterword attempts throughout the analysis presented below to accentuate the distinction between the federal judiciary as an institution and the individuals who currently wield its awesome powers to wage backlash kulturkampf in the guise of constitutional adjudication and interpretation—especially the literal handful of individuals who form the backlash bloc on the current Supreme Court. See \textit{supra} note 14.
officers and refused to deliver commissions that the Federalists had been unable to finalize prior to the expiration of their terms in power.\textsuperscript{21} Since then, the power wielded by federal judicial appointees has been controversial, perhaps most so during the period of mounting activism leading up to the mid-1930s, when a bare majority of the Supreme Court exercised the judicial review power time and again to trump New Deal lawmaking. With this conspicuous history as background, it would be too simple to complain at this late stage of political judicial appointees and politicized judicial opinions. Indeed, the point that all judges—“liberal” as well as backlash—perform their official duties under the influence of political ideology is amply demonstrated by the findings of attitudinal research, and is herewith conceded.\textsuperscript{22}

Thus, the critique or complaint leveled here goes beyond that basic complaint; the critique presented below measures backlash jurisprudence first and foremost against the rhetoric and principles that its adherents noisily espouse, and purport to apply in critical judgment of others, to justify the righteousness of their zealous endeavors to undo the law and policy legacies they so strongly despise. This critique is based not on the observation that federal judges of all ideological stripes can and do “make law” influenced by their cultural and political sense of the world, but on the observation that backlash jurisprudence fails, spectacularly, to approximate a principled body of law on its own terms—and, more importantly, to the potentially enduring detriment not only of the vulnerable social groups it targets directly but also of the nation as a whole in its unfinished repudiation of the various identity-rooted viruses of domination and oppression embedded in the original constitutional compromises regarding race, gender, property and other still-entrenched markers of social stratification.\textsuperscript{23} This critique is not a

\textsuperscript{21} Those machinations, of course, produced the famous case of \textit{Marbury v. Madison}, 5 U.S. 107 (1803), in which the Federalist judges, led by the newly-appointed Chief Justice John Marshall, declared for themselves the power to review the constitutionality of federal legislative and executive acts—and invalidated the Federalist legislation creating the commissions in controversy. For background, see James E. Simon, \textit{What Kind of Nation: Thomas Jefferson, John Marshall and the Epic Struggle to Create a United States} (2002) (elaborating a comprehensive analysis of the life-long animosities and conflicts between these two members of the founding generation, and how their relationship represented a microcosm of the political struggles that framed the founding).

\textsuperscript{22} \textit{See supra} note 19 and sources cited therein.

\textsuperscript{23} These viruses are encapsulated in various formative exclusions, which limited individuals’ opportunity to participate or compete in the new nation’s political and economic development, to white propertied men, and in particular in the constitutional compromise over race-based slavery—a compromise that enshrined
generalized lament over the impossibility of neutral principles or judicial legitimacy writ large but rather a more specific charge of intellectual dishonesty to occlude power abuses in the launching and waging of a ferocious “counter-revolution” in the name of the nation’s Constitution and from the nation’s highest court of law, abuses that, from various perspectives, have subverted not only the perception and reality of Rule of Law within the United States in substantive terms but that also have undermined the collective capacity of a diverse nation to sustain trust and confidence in its judicial institutions.

I. BACKLASH, JURISPRUDENCE AND KULTURKAMPF: BACKGROUND AND CONTEXT

While the term “kulturkampf” may (and does) refer to various periods in different social and political settings, in the United States at the turn of the millennium the term had come to signify the national coordination of political efforts to retrench civil rights and New Deal legacies in both social and legal terms. These

federal protection of human chattel as the supreme law of the land in at least two textual ways: (1) the constitution forbids the federal government from freeing enslaved humans or interfering with their status as property until 1808, thus permitting social, political and economic entrenchment during this period, and it requires all free states to extradite escaped slaves back to their “masters” in the slave states. See generally Thurgood Marshall, Reflections on the Bicentennial of the United States Constitution, 101 HARV. L. REV. 1 (1987) (reflecting on the original identity-based constitutional exclusions and their enduring consequences).

24 Kenneth L. Karst, Religion, Sex, and Politics: Cultural Counterrevolution in Constitutional Perspective, 24 U.C. DAVIS L. REV. 677 (1991) (elaborating a relatively early analysis of the phenomena now known as backlash kulturkampf and jurisprudence); see also Owen Fiss, The Forms of Justice, 93 HARV. L. REV. 1, 5 (1979) (noting that the nation was and is “in the midst of a counter-revolution; not because we are at the verge of a new discovery, but because the discovery of an earlier era is now in jeopardy”).

25 This self-inflicted damage is exemplified by the public acknowledgement of the current Court’s most senior Republican appointee, John Paul Stevens, who frankly conceded in the aftermath of the 5-4 halt to vote-counting in 2000 that the bloc’s action in Bush v. Gore had seriously shaken “the nation’s confidence in the judge as an impartial guardian of the rule of law.” 531 U.S. 98, 129 (2000). To repeat, this dangerous loss of trust results from the judges’ hypocrisy, and not from a frank acknowledgement or critical expose of it.

26 Culture wars and kulturkampf are associated with German politics, both during the Bismarckian struggle to assert secular state authority over Catholic dogma in the form of public policy and during the efforts of the Nazi Party to reform German culture in line with their racist ideology. See generally Richard J. Evans, The Coming of the Third Reich 118-53 (2005) (focusing on the culture wars waged in Germany as part of the Nazi rise to power).

27 See Valdes, Beyond Sexual Orientation, supra note 17, at 1427, n. 70 (defining the term and describing the phenomenon).
orchestrated efforts span multiple categories of identity and policy
but, in addition to race and ethnicity, they have focused inordinately
on sex, gender and sexuality (and, concomitantly, on religion and
“morality”). Thus, it is no coincidence that, twice now, and both
times in sexual regulation cases, the high Court’s chief wit, Antonin
Scalia, has invoked the notion of “kulturkampf” to deride the Court’s
decisions protecting a vulnerable group from majoritarian
subordination. Dissenting from Romer v. Evans, and again from
Lawrence v. Texas, he ridicules the majority’s analysis and holding as
mere participation in the “culture wars” sweeping the United States
during the last quarter or so of the Twentieth Century. In doing so,
Scalia reminds us all of the times in which we live—the context in
which these cases have been litigated and adjudicated, and the
zeitgeist under which LatCrit and other genres of critical outsider
jurisprudence came to be.

As with backlash jurisprudence and outsider jurisprudence, the
stirrings of today’s “culture wars” go back to the 1970s and 1980s, to
the times when the liberal antidiscrimination initiatives of earlier
decades were increasingly contested from all sides. But the moment
of its official declaration occurred in 1992, from the podium of the
Republican National Convention, when presidential contender
Patrick Buchanan declared “cultural war” for the “soul of America.”
Since then, the invocation of “cultural war” to explain and motivate
political action has take place repeatedly. By the turn of the

28 Illustrating this point, news accounts following the 2004 electoral cycle
reported that “abortion has become a prime target” of “Democratic strategists and
lawmakers quietly” as they “discuss how to straddle the nation’s Red-Blue divide” and
that they have concluded that the “issue and the message need to be completely
rethought” because “along with gay marriage, abortion is at the epicenter of the
culture wars, another example used by Republicans to highlight the Democrats’
supposed moral relativism.” Debra Rosenberg, Anxiety Over Abortion: Pro-Choice
Democrats Eye a More Restrictive Approach to Abortion as One Way to Gain Ground at the
Polls, NEWSWEEK, Dec. 20, 2004, at 38 (also reporting that the conclusions of this
reassessment were espoused and endorsed by that year’s party standard-bearer, John
Kerry). Whether or not this particular conclusion is sound, it serves to illustrate how
sex and sexuality, along with race, nationality and ethnicity, have been positioned at
the “epicenter” of backlash kulturkampf.

31 See Valdes, Antidiscrimination, supra note 9 at 276-82 (comparing and
contrasting these two jurisprudential camps and their positions vis a vis the culture
wars).
32 See infra note 68.
33 The term’s usage in law and society thus marks and reflect the mounting
pursuit and awareness of the backlash agenda that animates this cultural warfare; in
1980, the term was used in public newspapers, magazines and related media 4 times;
century, in the year 2000, the term had been used 1,902 times in the public media, including in the tense context of resolving the November 2000 presidential election. This kulturkampf of backlash is not, however, a simple case of rough-and-tumble politics as usual, wherein self-interested “factions” are expected to jockey for social and economic goods. Rather, this multi-year phenomenon is a concerted and multi-pronged campaign for the “soul” of the nation in which the named and targeted “enemy” consistently has been one or more of the nation’s historically marginalized and now-still-vulnerable social groups: racial and ethnic minorities, women of the “feminist” type, poor persons of all colors, consumers, environmentalists, workers, Queer communities and sexual minorities, immigrants from the South and East, including the Middle East, and other Others. In effect, this targeting amounts to a kind of “cultural cleansing” that, in the name of “history and tradition”, will leave the purified society looking and feeling like the 1780s as much as politically and physically possible.

Plainly, this kulturkampf of retrenchment seriously and detrimentally affects many if not all outgroups. But, just as plainly, the culture wars find “different” groups positioned “differently” vis a vis the formal and actual retrenchment of rights through backlash. In 1990, 76 times; and in 1992—the year of formal declaration—575 times. See Valdes, Antidiscrimination, supra note 9, at 283.

For example, in defending the 2000 nomination of John Ashcroft—a prominent but recently defeated backlash politician from Missouri—to take over the federal Justice Department and become the nation’s chief federal law enforcement officer, a backlash-identified talk show host based in the nation’s capital declared, “This is culture war—two mutually exclusive world views continue to fight for preeminence in our culture.” James Kuhnhenn & Ron Hutcheson, Ashcroft is Next Political Flash Point; Partisan Lines are Clearly Drawn, MIA. HERALD, Jan. 11, 2001 at 1A.

The re-segregation of higher public education provides a pointed example. See generally infra notes 107-108 and sources cited therein.

As Bowers v. Hardwick indicates, for instance, backlash jurisprudence began taking hold just as sexual minorities—specifically lesbians, gay men, bisexuals and transsexuals—began to claim formal equality and antidiscrimination rights under existing laws or precedents. See Valdes, Culture by Law, supra note 8. In effect, then, the historical moment for the surge of backlash kulturkampf and retrenchment occurred at roughly the same time as sexual minorities began seeking vindication of antidiscrimination rights in federal courts within the broader context of “civil rights.” Thus, for racial/ethnic minorities, backlash kulturkampf endeavors to roll back affirmative action programs and for sexual minorities the aim is to preclude the attachment of formal equality altogether. While immigrants, women, racial/ethnic minorities, native Americans, the disabled, the poor, sexual minorities all feel the sting of retrenchment, they feel it “differently.”

Consequently, the social, cultural, political and legal dynamics of backlash kulturkampf implicate the “sameness-difference” concerns and discourse associated with various strands of critical outsider jurisprudence. See, e.g., MARTHA MINOW,

These differentials mean that the aspects or techniques of cultural warfare have been tailored for and directed at “different” groups in group-specific ways—in ways that account for each group’s standing in relationship both to formal law and to social reality. But the overarching pattern of backlash jurisprudence as part and parcel of these culture wars has been the pursuit of a self-subscribed “anti-anti-discrimination agenda” under the guise of principled adjudication.

As sketched below, backlash activism has included the aggressive review of precedent to narrow their civil rights reach; the heightening of procedural rules to block civil rights claims on technical grounds; the strict interpretation of legislative initiatives on behalf of civil rights communities under both principal instruments for doing so—the Commerce Clause and Section 5 of the Fourteenth Amendment; and, finally, a proactive and unilateral reinterpretation of the Tenth and Eleventh amendments to expand “states rights” affirmatively under “fundamental postulates” based on the personal views and preferences mainly of five judges. Under backlash jurisprudence, burdens of evidence and/or rules of procedure are invoked, and then deployed to shield discrimination from viable claims. Similarly, precedent is critiqued, ignored and rejected—or manipulated through “creative” distinction—while legislation is cabin'd. See infra Part II; see also Kevin M. Clermont, Theodore Eisenberg and Stewart J. Schwab, How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals, 7 EMPLOYEE RTS. & EMP. POL’Y J. 547 (2003) (focusing on judicial bias against plaintiffs in employment discrimination cases); Kevin M. Clermont and Theodore Eisenberg, Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ From Negotiable Instruments, 2002 U. ILL. L. REV. 947 (same); William B. Gould, IV, The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response, 64 TULANE L. REV. 1485 (1990) (focusing on retrenchment in that key term of the Supreme Court); Charles R. Lawrence, III, “Justice” or “Just Us”: Racism and the Role of Ideology, 35 STAN. L. REV. 831 (1983) (focusing on race and White Supremacy); Nancy Levit, The Caseload Conundrum, Constitutional Restraints and the Manipulation of Jurisdiction, 64 NOTRE DAME L. REV. 321 (1989) (critiquing the interposition of jurisdictional and prudential barriers to deflect civil rights actions); Robert P. Smith, Explaining Judicial Largesse, 11 FLA. ST. U. L. REV. 133 (1983) (surveying techniques of judicial manipulation of facts and doctrine); Keith Wingate, A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?, 49 Mo. L. REV. 677 (1984) (critiquing the heightened rules of pleading that various federal judges had erected to rebuff civil rights claimants). These and similar practices have prompted various scholars to question the principled nature of their opinions.

In broad historical perspective, then, the ultimate objective of backlash kulturkampf has been to shift the normative trajectory of sociolegal development
As outlined below, a bare majority of the current appointees increasingly has inscribed backlash jurisprudence onto the constitutional heritage of the nation, oftentimes with sweeping pronouncements issued in their sharply-divided 5-4 opinions, scrambling existing jurisprudential patterns, over the spirited objections of the dissenters, to impose social regression regarding civil and human rights along the familiar neocolonial fault lines of power, property, opportunity and identity; indeed, backlash activism has reached such a “fever pitch” in recent years that the regular updating of a leading treatise on constitutional law has been suspended, for the first time since 1978, “because so many precedents that had once seemed settled now appear at risk of being overruled” single-handedly by this willful quintet.  


40 See Jeffrey Toobin, Breyer’s Big Idea, The NEW YORKER, Oct. 31, 2005, at 36 (reporting the suspension and quoting the treatise editor); see also infra Part II (summarizing some of the culture war cases and backlash activist techniques). For additional analyses of backlash kulturkampf in law and society, see generally Kevin R.
A. The Culture Wars in Law and Society: Overview, Origins and Imperatives

The origins of the current culture wars within the United States may be proximately traced to the “silent majority” and (later) “moral majority” rhetoric made prominent by Richard Nixon in national electoral politics as the 1968 Republican candidate for the presidency, a tactic that built on and sought to exploit for rank political gain preceding fulminations over “liberal activist judges” who in those years were dismantling apartheid and other entrenched forms of structural stratification based on “traditional” supremacist identity politics in this country. The antidote for such judicial

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41 “The term ‘silent majority’ so delighted the president that after he wrote it in a November 1 draft [of a major televised speech] at 4:00 a.m., he called [White House Chief of Staff] Haldeman to announce, ‘the baby’s been born.’ The peroration was widely thought to have been a deliberate attempt to polarize by dividing the nation into tiny minorities of noisy protesters deliberately obstructing peace and a large majority of quiet patriots.” Carol Gelderman, All the Presidents’ Words: The Bully Pulpit and the Creation of the Virtual Presidency 84 (1997); see also Douglas Anderson, Nixon, Agnew and the ‘Silent Majority’: A Case Study in the Rhetoric of Polarization 35 West. Speech 243 (1971) (elaborating a rhetorical study of Nixon’s politicking); see generally Stephen E. Ambrose, Nixon: The Triumph of a Politician 1962-1972, 310-14 (1989) (providing a general political biography of that decade, including the rhetoric and politics of his Silent Majority Speech in 1969). Nixon’s politics and rhetorics of course were also part of his long-running denunciation of the mass media, which he viewed as an abiding “enemy” of his political ambitions and agenda, a view carried forward by his culture war successors, including perhaps most notably, Ronald Reagan. See, e.g., Walter Porter, Assault on the Media: The Nixon Years (1976); Joseph C. Spear, Presidents and the Press: The Nixon Legacy (1984). This “assault” included a structural consolidation of the national media, prompted through regulatory actions of federal backlash appointees under Nixon, Reagan and similar politicians, which has led to a silencing of opposition to backlash politics. See, e.g., infra note 78 and sources cited therein on media regulatory changes and their anti-democratic character.

42 This era of “liberal activist judges” is depicted as beginning in the 1960s under Chief Justice Earl Warren, and is portrayed as the complaint of backlashers, who “promise that their replacements will not be so free-wheeling.” Sullivan, supra note 18, at 293. For historical accounts, see Lucas A. Powe, The Warren Court and American Politics (2000); J. Harvie Wilkinson, III, From Brown to Bakke: The
overreaching, politicians like Nixon argued, was the appointment of


Given the nature of the backlashers’ rhetoric when set against this larger backdrop, their current and ongoing campaign to recapture and control the federal judiciary has received widespread scholarly attention, some critical and some descriptive. E.g., DAVID M. O’BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 56-86 (2000); RICHARD L. PACELLE, JR. THE TRANSFORMATION OF THE SUPREME COURT’S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION (1991); MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER (1991); HERMAN SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION (1988); Valdes, Antidiscrimination, supra note 9, at 287-91 (providing an extensive bibliography on the general topic).

This backlash attack on precedent and legislation from the New Deal and Civil Rights eras, and the obsession with perceived or actual instances of judicial will that it has engendered, also has erupted onto the pages of the law reports. This phenomenon is captured in the opinions issued in Dronenbrug v. Zech, 741 F.2d 1388 (D.C. Cir. 1984),reh’ en banc denied 746 F.2d 1579 (1984). The appellate panel in that case was dominated by two of the most virulent backlash judges in the federal judiciary, if not the whole country—Antonin Scalia and Robert Bork—and the panel’s opinion was composed by the latter. The dissenting opinion to the denial of rehearing en banc filed by Circuit Judges Robinson, Wald, Mikva and Edwards, and the responding “statements” filed by Judges Ginsburg, Bork, Scalia and Starr, make for a fascinating mini-seminar in the role of courts in the United States as a formally “democratic” nation committed to the Rule of Law with much current relevance: two of those judges currently sit on the Supreme Court—Scalia and Ginsburg. The panel opinion penned by Bork is a textbook example of backlash activism specifically in the area of liberty-privacy and sexual orientation; it displays the effort to roll back precedent, in part by straining “to confine those decisions to their facts.” 746 F.2d at 1580 (Robinson, III, C.J., Wald, J., Mikva J., and Edwards, J. dissenting from denial of rehearing en banc.)
”strict constructionist” judges who would simply “follow the law” rather than “legislate from the bench.” The social consequences of


This “strict construction” sloganeering, oftentimes accompanied by assertions of “states’ rights,” employs the rhetorical strategies developed over history by political factions that feared the federal government’s powers could interfere with local power arrangements, beginning with the antifederalists of the eighteenth century and continued by the Jeffersonians during the period of Alexander Hamilton’s influence in the George Washinton administrations, which they bitterly opposed. Ironically, key founders like Jefferson and Madison became opposed to the federal government that they had helped to establish, but only until they themselves were elected President of that government, at which they time they no longer cared to be bound by a “strict construction” of the powers they then wielded. This strategic pose and rhetoric later were thematized in the nineteenth century by southern interests intent on preserving and expanding slave territories in the United States. This same line was continued during the post-Civil War Jim Crow era and into the twentieth century, by the Ku Klux Klan and “segregationists” who vowed to maintain the North American system of de jure apartheid that, in legal terms, represented their notion of federal “strict construction” and expansive “states rights.” This historical continuity eventually produced the famous clashes between federal troops and state militias during the integration of southern schools following Brown v. Board of Education, 347 U.S. 483 (1954). In Cooper v. Aaron, 358 U.S. 1 (1958), the Supreme Court found it necessary to re-assert the power of judicial review claimed and exercised by the judges since Marbury v. Madison in 1802 in the effort to curb these twin assertions as a matter of law.

Notably, Marbury’s renowned author, John Marshall, had forcefully rejected the strict construction argument during those formative years, as exemplified by McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). In McCulloch, the Supreme Court upheld federal legislation chartering a federal bank even though the text of the Constitution does not expressly enumerate the power to charter corporations among those vested in the federal legislature. In a unanimous opinion authored by John Marshall, the Court juxtaposed two basic approaches to constitutional interpretation: the “just” or “sound” approach versus the “narrow” or “strict” approach. Opting for the former, those judges reasoned that the former would entail a “baneful influence” on the nation due to the “absolute impracticality of maintaining it without rendering the government incompetent to its great objects.” Id. at 417-18. This rendering has been precisely the goal of every advocate who interposed these arguments in North American constitutional history, and it likewise is the goal of cultural warfare and backlash activism: disabling the government from its capacity to reform entrenched social hierarchies established in part by force of law in eras of formal subordination based on race, ethnicity, gender, sexual orientation and other forms of social stratification, and that now are structurally entrenched culturally and materially in law and society. Historically dominant groups now waging
this political argument, of course, were clear: existing structures of subordination emplaced de jure through nominal democracy oftentimes in the form of state law and federal policy during prior eras of formal inequality, such as structures or norms that favor men over women or whites over nonwhites based largely on sex, race and ethnicity, would be freed of any politically independent scrutiny, and remain a seemingly “natural” or “traditional”—and therefore supposedly unassailable—fixture of North American “culture” and society. Indeed, the foreseeable social consequences of Nixon’s “silent/moral majority” and “strict construction” rhetoric were clear enough that this identity-inflected political argument was directed chiefly at populations in the southern states of the former Confederacy, where they were deemed to be most politically popular, as part of the so-called “southern strategy” that successfully handed the presidency to the Republicans in 1969, and for most of the elections since then, thus breaking the liberal sway begun in 1932 with Franklin Roosevelt’s first landslide. From the beginning of this reaction to that legacy and its aftermath, a principal strategy of the gathering culture wars was to recapture the federal judiciary and cabin the federal judicial review power as a tool of social transformation—and to reclaim that power as a tool of social stratification.

backlash kulturkampf calculate, correctly, that their privilege and dominance vis a vis historically subordinated groups is best preserved, and perhaps amplified, by disabling the possibility of federal power to reform historic injustices that have enriched and empowered them. See infra Part II; see also supra note 17 and sources cited therein.

See Kevin P. Phillips, The Emerging Republican Majority (1969) (laying out the principal contemporary account of this “southern strategy” and its ideological purposes); A. James Reichley, Conservatives in an Age of Change: The Nixon and Ford Administrations, 174-204 and 407-20 (1981) (providing a substantive analysis of the strategy and policy choices or issues used to help implement it); Terrel L. Rhodes, Republicans in the South: Voting for the State House, Voting for the White House, 19-39 (2000) (documenting the actual impact of this strategy on voting patterns since then to conclude that in “presidential elections in the latter third of the twentieth century, the South became increasingly susceptible to Republican incursions” and that Nixon’s 1972 re-election “is a useful starting point for an examination of contemporary Republican strength in the South” due, in great measure, to his southern strategy).

This recapture and redirection of the federal judicial power has been managed on two levels: public and legal, or political and jurisprudential. In public or political spheres or contexts, backlashing judges and politicians seek to exaggerate the breadth of the precedents they wish to overturn, portraying them as merely illegitimate handiwork of self-indulgent judges bent on “legislating from the bench” a mass destruction of liberty and justice. In this way, neocolonial elites help to fan the politics of fear and control that fuel backlash and provide foot soldiers for the electoral dimensions of today’s kulturkampf. See, e.g., Sullivan, supra note 18, at 293.
Consequently, in the tumultuous decades since the 1970s and 80s, much of the impetus for the dismantlement of antidiscrimination legislation and precedent has come from the highest levels of the federal bench. Over time, this backlash campaign of redirection has generated an environment of obsessive attention to the roles, powers and actions of federal judicial appointees, which both informs mainstream public discourses and increasingly pervades legal culture. Indeed, “constitutional theory ("[T]he conservative caricature of the liberal Justices pictures them just making up whatever law suited their sense of justice. The conservative promise is that their replacements will not be so free-wheeling."). In this way, they play the kind of “wedge politics” that propelled into legislative and executive office the politicians who thereby have taken control of the federal government during the past two or so decades of cultural warfare—politicians like Richard Nixon, Ronald Reagan and George Bush—and who then used these public positions to help install into power today’s judges precisely so they would engineer this redirection of the federal judicial power. See supra notes 41-43 and sources cited therein. Oftentimes, “wedge politics” are “identity politics” that seek to pit majority-identified social groups against the nation’s historically marginalized minorities, as exemplified by the uses of race, nationality, ethnicity, sex and sexuality to fuel a politics of fear and control that help to animate the backlash factions. See Valdes, Beyond Sexual Orientation, supra note 17, at 1427, n.73 (discussing identity-inflected wedge issues and their uses to incite backlash politics).

In legal or jurisprudential venues or contexts, on the other hand, backlashing judges and politicians seek to constrict the significance of targeted precedents, sometimes explaining away or narrowing their holdings and distinguishing or mischaracterizing their facts—or simply insisting that those precedents did not mean what they said. A classic example is the backlash attempt, beginning with Bowers v. Hardwick's 5-4 ruling in 1986, to baldly re-characterize the body of liberty-privacy precedents since the 1923 ruling in Meyer v. Nebraska. Thus, the ongoing backlash effort to cast that long line of cases as “flattened-out collections of private acts” rather than a “continuous stream of rulings about human freedom” is paradigmatic of this tactic. See Tribe, supra note 18, at 1932-38. For a detailed discussion, see Valdes, Four Score, supra note 17. This disingenuous manipulation of information and position in popular versus legal venues—so transparently calculated to suit the politics of varied settings and audiences and to promote always the agendas of backlash in and through them—has succeeded in making reaction and retrenchment the dominant feature of today’s sociolegal zeitgeist, at least for this historical moment.

Ironically, or perhaps predictably, this campaign of recapture and redirection has prompted advocates seeking to vindicate civil rights claims to plea before alternative venues, both political and juridical; indeed, in a remarkable modern-day display of original theories of North American federalism in action, the past two decades have witnessed state courts granting the relief that federal judges increasingly dismiss with disdain. In the original theory of vertical federalism, a touted virtue was that aggrieved citizens would be able to shift loyalties, and to seek alternative forms of redress from, their state or national governments: when one (or the other) is hostile to a class of the populace, the theory goes, vertical federalism allows the possibility that the those groups or persons will be vindicated by the alternative sovereign. James Madison provided the quintessential articulation of this theory in Federalist No. 10 and No. 51 (presenting the conceptual framework for and reasoning behind the “compound republic of America” and specifying its beneficial distinctions as compared to a direct democracy or a monarchy). And,
in the past several decades has been obsessed with the question of how to constrain judges exercise of will.\textsuperscript{47} From a backlash perspective, the focus of the obsession is on constraining perceived or actual exercises of judicial power—whether willful or not—that may further the “liberal” social changes associated with New Deal and/or Civil Rights lawmaking, and accompanied with very little attention to exercises of will that accomplish their retrenchment.\textsuperscript{48}

But backlashers’ abuse of the federal judicial power to de-legitimize social justice claims—in particular those grounded in New Deal and Civil Rights sources of law and policy—and the obsessive attention they have drawn to the notion of “judicial legislation” in turn have drawn increasingly sharp critiques of backlash jurisprudence, including serious questions about a new wave of “judicial activism” in the construction of social and legal retrenchment—a new wave that in conceptual, doctrinal and political terms harkens back to tense times in the history of American law.\textsuperscript{49}

Those times go back to the very origins—and eventual establishment in the late 1930s despite “activist” judicial opposition—of the “liberal” legacy that backlashers strive now to roll back.\textsuperscript{50} That confrontation indeed, during the past two decades of intensifying cultural warfare against traditionally subordinated groups, the state courts of jurisdictions as diverse as Vermont and Hawaii or Massachusetts and Alaska have recognized social justice claims that the newly stacked federal courts have made haste to rebuff in ringing terms. See, e.g., Valdes, \textit{Beyond Sexual Orientation}, supra note 17, at 1435-38 and sources cited therein on cultural warfare and prong one in some of these states; see also \textsc{David Moats}, \textsc{Civil Wars: A Battle for Gay Marriage} (2004) (focusing on Vermont specifically). Thus, even while federal tribunals are turned against the nation’s most vulnerable and disadvantaged groups and persons, state tribunals have provided them safe harbors from time to time, and this divergence also helps to bring the questionable nature of backlash jurisprudential moves or assertions into sharper relief. For example, in 1986, Kentucky’s Supreme Court invalidated that state’s sodomy statute. \textit{See} Special Feature, \textit{Commonwealth v. Wasson: Invalidating Kentucky’s Sodomy Statute}, \textit{81 K Y. L. J.} 423 (1992-93). \textit{See generally} Shirley S. Abrahamson, \textit{Divided We Stand: State Constitutions in a More Perfect Union}, 18 \textsc{Hastings Const. L.Q} 723 (1991) and Paula A. Brantner, \textit{Note, Removing Bricks from a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws}, 19 \textsc{Hastings Const. L.Q} 495 (1992) (both on state constitutions and judiciaries as alternative venues for the vindication of social justice claims to a hostile federal judiciary).

\textsuperscript{47} Sullivan, \textit{supra} note 18, at 293.

\textsuperscript{48} For an illustrative sketch of some examples, \textit{see infra} Part II.

\textsuperscript{49} \textit{See infra} note 52 and accompanying text on the famous 1930s confrontation between the Court and the President.

\textsuperscript{50} That era’s willfulness, sometimes denominated “Lochnerism” because of the notorious ruling in \textit{Lochner v. New York}, 198 U.S. 45 (1905), that exemplified it “hovers like a specter to be continually banished.” Sullivan, \textit{supra} note 18, at 293. From an \textsc{OutCritical} perspective, today’s five-person majority does seem bent on replaying that a kind of willfulness whenever it “suits their sense of justice.” \textit{Id.} Yet the political context in which they act is diametrically different, a difference that
severely discredited the Court institutionally before it finally allowed the New Deal to be legislated, after several landslide elections, thus clearing the stage for the succeeding “liberal” era of executive and legislative social programs that backlash jurisprudence currently strives to dismantle through the culture wars.\textsuperscript{51} Since 1937’s “switch in time,” that multi-year effort of willful judges in control of the Supreme Court’s judicial review power to thwart state and federal New Deal initiatives in the name of the Constitution has become widely recognized as the paradigmatic example of “judicial activism” and unprincipled constitutional adjudication—an example definitively disavowed by successive judges since then\textsuperscript{52} but that “hovers like a spectre to be continually banished.”\textsuperscript{53}

Nonetheless, backlash jurisprudence today seems determined to engineer by law a resurrection of the pre-1937 ideology advocated by those activist judges—at least in effect, if not by design. Not coincidentally, for example, the 1930s activists had valorized the same kinds of federalism claims based on “states’ rights” and property rights, and had demonized federal power to prevent local abuses of child laborers, consumers, women and other politically or economically vulnerable persons and groups, as do today’s backlash activists—\textsuperscript{54}a choice of “values” and interpretations that historically permits today’s willfulness to go unchecked if not affirmatively applauded and politically rewarded. See infra note 57 and accompanying text.

For an overview of that era and its legacies in constitutional terms, see G. Edward White, \textit{The Constitution and the New Deal} (2001) (elaborating an analysis that seeks to revise conventional understandings of that period and reactions to it since then). Since the 1930s, a “collective canonization and demonization” of federal judges as a class, and of particular individuals has taken hold based on “ideological labels” that, in turn, have become kulturkampf buzzwords. Id. at 209. During the past several decades of cultural warfare, this strategic process of ideological canonization and demonization also has helped to produce the “obsession” over exercises of “will” that abuse the federal judicial power and that “hovers like a spectre to be continually banished.” See Sullivan, supra note 18 at 293. Ironically, or cynically, backlash judges routinely make full use of the potential for judicial activism under judicial review. Despite their longstanding condemnations of the practice—a condemnation that is a professed bedrock of backlash jurisprudence—they wield that very power as actively as any judge ever did. See infra Part II and supra note 17 and sources cited therein.

See infra note 56. For notable accounts of those times, see William E. Leuchtenburg, \textit{Franklin D. Roosevelt and the New Deal, 1932-1940} (1963); William E. Leuchtenburg, \textit{The Origins of Franklin D. Roosevelt’s “Court Packing” Plan}, 1966 \textit{Sup. Ct. Rev.} 347; see also White, supra note 51.

Sullivan, supra note 18, at 293.

The 1930s activist judges anchored their opposition to the New Deal in the asserted liberty right of contract, which as they interpreted it repeatedly favored the interests of big business and employers, but required increasingly obvious judicial gyrations to maintain. \textit{E.g.}, \textit{Lochner v. New York}, 198 U.S. 45 (1905) (striking down a...
state fair employment statute limiting the working day to no more than 10 hours and the work week to no more than 60 hours on the grounds that this regulation “interferes with the right of contract between employer and employee” alike). That judicial imposition of economic liberty, as the judges themselves since have acknowledged, exemplified the Framers’ concerns over “judgment” and “will”—the latter, will, being a judge’s abuse of a court’s power to effectuate the judge’s preferred policy position. E.g., The Federalist No. 10, at 226, 230 (Alexander Hamilton) (Roy P. Fairfield ed. 1981) (“The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”). For incisive accounts of “original” concerns and exchanges regarding federal judicial power and its potential abuse by individuals appointed to be judges, see Jack N. Rakove, Original Meanings: Politics and the Making of the Constitution (1996); Leonard W. Levy, Original Intent and the Framers’ Constitution (1988). By 1937, that prime historical example of the legitimate concern over judicial activism had become untenable, and came to an embarrassing end that continues to haunt and embarrass the institution, as its invocation in liberty-privacy cases ranging from Griswold to Bowers and Casey pointedly show. See Valdes, Four Score, supra note 17 (comparing these cases and their express concerns over judicial activism).

Today, as Griswold, Bowers, and progeny also show, the same basic notion—“liberty” protected by due process—is at the heart of privacy jurisprudence, and of the backlashing efforts to arrest it. Id. This similarity—the focus on “liberty”—lends itself to superficial comparisons designed to promote backlash kulturkampf; in particular, as Bowers specifically illustrates, this similarity permits strategic but inapposite assertions that today’s recognition of liberty-privacy is as much of an illegitimate judicial concoction as the “judicial activism” that blocked reform legislation two generations ago under the asserted liberty to enter into private commercial contracts: even though some of the same judges articulated both the economic and the personal aspects of liberty during the 1920s, one key distinction between the jurisprudence delineating each is that personal liberty—the line of cases elaborating liberty-privacy from 1923 onward—now is the cumulative work-product of multiple judges across ideologies and generations, each of which “built” substantively on precedent, rather than the concentrated handiwork of a small cadre of judges single-handedly engineering an abrupt break from established jurisprudential patterns to promote a larger coordinated campaign aiming to redirect the long-term evolution of law and society.

and consistently have undergirded neocolonial power hierarchies materially and socially in the United States since the ratification of the Constitution. Thus, while the particulars between then and now


For a current “official” portrait, see Council of Economic Advisers, Changing America: Indicators of Social and Economic Well-Being by Race and Hispanic Origin 2 (1998) (noting that “race and ethnicity continue to be salient predictors of well-being in American society . . . [affecting] health, education, and economic status”). Thus, while “significant progress has been made in expanding the promise of America to members of minority groups . . . the legacy of race and color continues to limit opportunities. The life chances of minorities and people of color in the United States are constrained by this legacy AND by continued discrimination and racial disparities that are often the result of discrimination”—the combined effects of the past as the present. See The President’s Initiative on Race, The Advisory Board’s Report to the President 59, Sept. 1998 (emphasis added). Despite the New Deal and Civil Rights reforms, neocolonial socioeconomic patterns not only remain firmly in place but the divisive material gaps they create seem to be growing under the sway of backlash lawmaking. E.g., Sheldon Danziger & Peter Gottschalk, A 20-Year Glitch in America, WASH. POST, Jan. 5, 1993, at A15 (discussing how “income inequality and economic hardship” widened the gap between the “haves” and the “have nots” during the 1980s, during which time “the ranks of the rich increased to an all-time high” as the impact of Reagan’s backlash policies took hold).

The cumulative socioeconomic impact of these “constraints” in turn are reflected in the demographics of power centers in North American society. Fortune 1000 boards continue to be “bastions of aging white males”—they account for three quarters of all board seats that control corporate policy in North America and, increasingly by the extension of globalization, the world. See, e.g., Good Old Boys’ Network Still Rules Corporate Boards, USA TODAY, Nov. 1, 2002, at 1; see also Hispanic Association on Corporate Responsibility, Summary, 2002-03 Corporate Governance Study (Dec. 2002) (reporting that “Hispanics” account for 1.8% of the 10,417 board seats in the Fortune 1000 list). The same phenomenon is manifest on the federal judiciary, a similar demographic bastion that reflects the same neocolonial legacies of history on this continent: two thirds of all federal judges in 2002 were white (and apparently heterosexual) males. See Alliance for Justice, Status of the Judiciary: April 2002 Summary Update, at http://www.allianceforjustice.org/judicial; Federal Judicial Center, The Federal Judges Biographical Database, at http://www.fjc.gov/history. These judges in turn seem “blindly” to reproduce themselves, demographically at least. By example, most of the Supreme Court clerks in 2001 were, again, mostly white (and apparently heterosexual) males. See Tony
of course are varied, in ultimate and practical terms today’s backlashing judges seek to undo the historical, structural and substantive significance of the “switch in time”—especially in the form of constitutional case law—and to bring about a restoration of legitimacy to the long-discredited assertions of the 1930s activists.\(^5\)

The backlash project of today is to bring back a return of the old deal—the status quo that framed North American society before the lawmakers eras ushered by the New Deal in the mid-1930s and built upon since then during the Civil Rights period of the 1960s.

This project is made possible by a major and key difference between the activism of the judges during the first and second halves of the Twentieth Century—a difference, in fact, that helps to explain the success of today’s activist judges despite their have taken up the same basic agenda and posture as their 1930s antecedents: the judges of the 1930s sought to interject the federal judicial power to thwart the policymaking choices of contemporaneous legislative or political majorities, whereas today’s judges seek to deploy the same power to unravel the established policymaking choices and precedents of their legislative, executive and judicial predecessors. The willfulness of the 1930s judges was checked by the historically contemporaneous reactions—and timely retaliation—of the Legislative and Executive branches, famously described as Franklin Roosevelt’s “court-packing”

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Mauro, *Court Loses Ground on Minority Clerks*, THE RECORDER, Oct. 30, 2001, at 1 (reporting both the historic and current “dearth” of clerks other than white (and openly heterosexual) men). Finally, and similarly, the same histories and legacies of constraint have produced the same demographic disparities that still define the legal professorate of the United States today. See infra note 72.

\(^5\) For their part, since that embarrassing collision the judges of the Supreme Court repeatedly have distinguished between “economic” liberty and “personal” liberty under substantive due process on the grounds that majoritarian efforts to regulate the former are no more than state management of the market while majoritarian efforts to regulate the latter amount to a state take-over of individual autonomy or destiny. This distinction substantively amounts to acknowledgement that the state has wide leeway in the regulation of individual participation in the “public” spheres of economic markets but narrow leeway in the regulation intimate choices in the “private” spheres of education, relationships and lifestyle through which individuals typically endeavor to direct their social destiny in the course of living their everyday lives. *E.g.*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) (upholding state regulation of working hours, noting that “if our recent cases mean anything, they leave debatable issues as respects business, economic and social affairs to legislative decision”); see also Lincoln Federal Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949) (upholding state regulation of employment contracts while emphasizing that economic liberty is generally subject to intensive state regulation because such regulations “do not run afoul of some specific federal constitutional prohibition” and, in addition, it should be noted, because constitutional text and design grant the federal government extensive powers over commercial activities).
scheme. No such check from the other branches exists today, as activist judges march in substantial lockstep with, and in the service of, the cultural and political imperatives made dominant by backlash kulturkampf in all three branches of the federal government.\footnote{See Leuchtenburg, supra note 52. Thus, it bears emphasis that today’s backlash activism is more than simply a form of judicially imposed legal and social retrenchment. Today’s law-politics synchronicity was orchestrated, and is enabled, by the multi-pronged pursuit of cultural warfare. In fact, today’s backlash activism, in great measure, is a direct product of backlash kulturkampf: the backlashing politicians who have taken control of the political branches in and through the culture wars have installed today’s activist judges into power with a clear sense of purpose, made publicly explicit from time to time: precisely to perform this rights take-back. See supra notes 41-43 and sources cited therein. Beginning in the 1980s, the second Reagan administration intensified the use of ideology to tailor judicial appointments and, in time, judicial behavior to the backlash agenda. See infra notes 66-67 and sources cited therein. In short, today’s federal judges practice their neocolonial activism as scripted by the cultural (and legal) politics of their appointments to the federal bench—appointments that, as discussed below, are both a product and a tool of backlash kulturkampf. See infra Part II. Thus, contemporaneous retaliation by the Congress or the President to restrain the judges is not only politically unavailable as a “check and balance” on runaway activism, but to the contrary, today’s backlash activists are politically applauded and rewarded.

Moreover, and perhaps even more perversely from a separation of powers perspective, federal judges who dare to resist substantial obeisance to the political demands or ideological imperatives of backlash kulturkampf in their opinions have become the targets of retaliation, receiving threats of hostile, disciplinary scrutiny from the politicians in control of the other two branches. See Bob Herbert, In America: A Plan to Intimidate Judges, N.Y. TIMES, Dec. 2000, at A29 (documenting the coordinated effort to force judicial compliance with backlash imperatives); Edward Walsh & Dan Eggen, Aschcroft Orders Tally of Lighter Sentences: Critics Say He Wants “Blacklist” of Judges, WASH. POST, Aug. 7, 2003, at A1 (reporting a Justice Department directive ordering U.S. attorneys across the country to be “more aggressive” in reporting judicial deviations from the federal sentencing guidelines, which had been promulgated in large part to discipline “liberal” judges painted as “soft” on criminals and too sympathetic to the constitutional rights of the accused). Ironically, the Supreme Court recently held those guidelines unconstitutional. See United States v. Booker, 543 U.S. 220 (2005).

The obvious aim of these law-politics dynamic is to cow independent judges, and to coerce as may be necessary their conformance with the politics of backlash—so much so that even the backlash-identified current Chief Justice recently was prompted to complain of this concerted effort at congressional intimidation of federal judges. See Linda Greenhouse, Chief Justice Attacks a Law as Infringing on Judges, N.Y. TIMES, Jan. 1, 2004, at 14 (reporting Rehnquist’s “unsually pointed” criticism to enactment of a federal statute similar to the Ascroft directive, which “places federal judges under special scrutiny for sentences that fall short of those called for the federal sentencing guidelines”). A year later, Rehnquist sounded the same skeptical note in his annual report on the state of the federal judiciary: “There have been suggestions to impeach federal judges who issue decisions regarded by some as out of the mainstream. And there have been several bills introduced in the last Congress that would limit jurisdiction of the federal courts to decide constitutional challenges to certain kinds of government action.” These actions include efforts “to strip the federal courts of jurisdiction to hear challenges to the phrase “under God” in the Pledge of Allegiance, to the display of the Ten
Coupled with concurrent efforts to control electoral politics and federal public resources, this focus on controlling the federal judicial power has helped to establish the principal contours of backlash kulturkampf.

B. Backlash Agendas and the Prongs of War: Identity and Politics, Status and Power

Today’s culture wars are organized generally around three principal sociolegal offensives. The three work in tandem socially and legally. They are interactive and mutually-reinforcing, and help to sustain varied forms of privilege, discrimination and subordination based on race, ethnicity, class, sex, culture, sexual orientation and the like, which similarly interlock in law and society. As evidenced by the illustrative mini-case study presented in this Afterword’s counterpart, as well as by the summary capsules sketched below, in this scheme a combination of identity-based biases and prejudices—fairly described as a “Euro-heteropatriarchy”—predominates: a combination of supremacist ideologies that formed in Europe, in particular its northwestern environs, and was inflicted on the world via European conquest and Eurocentric commerce. This particular combination of identity ideology favors the white European male who is both heterosexual and masculine. It favors European-identified cultures—customs, languages, religions. It combines, in the form of neocolonial identity politics, the racism, nativism, androsexism, heterosexism and cultural chauvinism of those regions, which in the centuries of colonialism were exported globally and, more recently, are being reinforced through the social, economic, cultural, legal and political processes of corporate globalization. In purpose and
effect, the culture wars aim to reanimate the hegemony of colonial-era traditions within the United States, interrupting anew a slow and troubled historical progression from formal subordination, to formal equality and antidiscrimination, to, perhaps some day, antisubordination and social transformation. Domestically, the neocolonial imperatives of backlash identity politics are being reinforced via the three “prongs” or fronts of the culture wars.

1. Electoral Politics and Raw Majoritarianism: A Return of Democratic Despotism?

The first of these, the targeted use of majoritarian politics to repeal or undermine “liberal” legislation or precedent, is primary because it sets the stage for the second and third prongs or fronts. The basic tactic here is straightforward and time-honored: electing to office politicians that are specifically committed to legislating the “social agenda” identified with neocolonial supremacy. But the aim of this kulturkampf—control of the “soul” of the nation and its future through wholesale exclusions of outgroups from civic life and other forms of rank oppression—does not represent a simple case of politics as usual, as the Supreme Court itself was prompted to recognize in cases like Romer and Lawrence. The basic objective of backlash kulturkampf—and in particular the national cultural cleansing desired by ardent backlashers to permanently cast the nation’s demography and character in the image and imperatives of the original immigrants—marks a key difference between the politics of fear and control pursued through today’s cultural warfare from the garden variety of electoral power politics expected to occur under the Constitution. Thus, quite explicitly by the 1990s, this primary front


60 For examples, see Valdes, Beyond Sexual Orientation, supra note 17, at 1431, n.91.

61 See Valdes, Four Score, supra note 17.

62 In keeping with the identity-driven objectives of the culture wars, this agenda of reaction and retrenchment revolves around several recurrent themes: elimination of affirmative action across the board; restriction of immigration from nonwhite societies; reduction of even minimal “safety-net” benefits to the poor; and especially to the immigrant poor; constriction of women’s reproductive rights, including prohibition of abortion; deactivation of environmental safeguards; de jure exclusion of sexual minorities from the “tent” of formal equality. This backlash agenda, conversely, simultaneously seeks enactment of English-supremacy laws, and of tax cuts, subsidies and rebates for wealthy corporations, groups and individuals, and of myriad other social and economic proposals that foreseeably, if not intentionally, serve to shore up the social, cultural, political and economic value of being a white, male, heterosexual, middle-class heir of earlier, perhaps colonizing, immigrants from northwestern Europe. See generally supra notes 38-40 and sources cited therein; see
or prong of the culture wars had been mobilized in the name of the “angry white male” bent on taking back what he still imagines always to have been naturally, eternally and righteously his on this continent. Packaged in the guise of formal “democracy,” backlashing politicians relentlessly have pursued this first line or prong of the culture wars, repeatedly exploiting culturally oriented “wedge issues” to create sociopolitical polarization and, in the process, to re-seize federal lawmaking power and thereby reconsolidate the cultural supremacy of the nation’s “traditional” socioeconomic elites.

At the federal level, as already noted, this core effort is proximately traceable to the politics of Richard Nixon and his assertion of a “silent majority” seething quietly against the social effects of the preceding legal progress in domestic civil rights, but the watershed moment was the election of Ronald Reagan and the occupation of the White House by his savvy coterie of handlers, who especially in the second term used every institutional means available to arm backlashers for the culture wars. Indeed, after Nixon’s

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63 See Valdes, Beyond Sexual Orientation, supra note 17 at 1429-30 and sources cited therein (discussing this type of essentialized majoritarian identity politics, and their activation to mobilize foot-soldiers in the political campaigns that constitute the culture wars’ first prong).

64 To pursue this goal, this first prong has taken two principal forms. The first, as indicated by the historical notes above, has been the capture and domestication of the ‘representative’ branches of the federal and state governments. But when this conventional sort of electoral politics have fallen short, as they sometimes do, majoritarian cultural warriors have turned this first line of attack toward ‘popular’ referenda to commandeer policy-making when elected officials hesitate to play backlash politics. At the state level, this ‘direct’ form of electoral attack has produced Prop 187, and then Prop 209, in the bellwether state of California, which materially and symbolically have made criminals of the undocumented and resegregated state educational institutions. This form of attack also is aptly illustrated by the ‘popular’ campaigns to overturn judicial antidiscrimination rulings under the state constitutions of Hawaii and Alaska in same-sex marriage cases through a direct amendment of those states’ fundamental charters. For examples, see Valdes, Beyond Sexual Orientation, supra note 17, at 1435. This use of “direct democracy” at the local level to circumvent the processes and outcomes of “deliberative democracy” at all levels of public governance—at least when such deliberation fails to produce backlash policymaking—in turn has raised questions about the meaning of both kinds of “democracy” in a society putatively devoted not only to republican self-government for its own sake, but as a means toward a foundational yet long-postponed aspiration that still adorns the portico of the Supreme Court and other public buildings: “equality and justice for all.” See generally supra note 46 and sources cited therein.

65 See supra notes 41 and sources cited therein.

66 See Sheldon Goldman, Reagan’s Judicial Appointments at Mid-Term: Shaping the Bench in His Own Image, 66 JUDICATURE 335 (1982-83); Jon Gottschall, Reagan’s
electioneering, Reagan’s clearly was the next key national milestone in the build-up to today’s kulturkampf through electoral politics: his eight years in the White House consolidated the dynamics of cultural warfare in various ways along all three prongs or fronts of these culture wars. Of these, two are perhaps most notable. The first was his sweeping re-composition of the federal judiciary: upon leaving office, Reagan had appointed more than half of all sitting federal judges, including one third of the current Supreme Court Justices, plus the current Chief Justice. The second most notable effect was that Reagan’s years, compounding those of Nixon’s, provided the training grounds for the troops that succeeded to power in the 1990s, including those that in 1994 were swept into power under Newt Gingrich’s “Contract with America” campaign. They were, as noted

Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution, 70 JUDICATURE 48 (1986-87); Sheldon Goldman, Reagan’s Judicial Legacy: Completing the Puzzle and Summing Up, 72 JUDICATURE 318 (1989) (all on President Reagan’s judicial appointments and their ideological effects on the federal judiciary). By the turn of the century, President Reagan’s escalated ideological scrutiny and techniques to ensure ideological purity had produced a paralyzing polarization in the confirmation process, especially in election years: in 1988, when Ronald Reagan faced a Democratic Senate, the senators approved 42 of his judicial nominees; in 1992, when George Bush similarly faced a Democratic Senate, the senators approved 66 of his judicial nominees; in 1996, when Bill Clinton faced a Republican Senate, the senators approved a mere 17 of his judicial nominees. See Frank Davies, Senate Stalling New Judges: Republicans Block New Judgeships, MIA. HERALD, Feb. 6, 2000, at 1A (reporting the increased blocking of federal judicial appointments on ideological grounds that comport to kulturkampf politics, and displaying how the culture wars’ prongs operate interactively).

During his eight years in power, Reagan secured the appointments of Sandra Day O’Connor, Antonin Scalia and Anthony Kennedy, as well as the elevation of William Rehnquist to the position of Chief Justice.

Among the rising foot soldiers of those years was a young speechwriter-staffer from the Nixon years by the name of Patrick J. Buchanan, who later vied for the Republican nomination himself. It was he, as explained earlier, who issued the backlashers’ formal declaration of cultural warfare from the podium of the 1992 Republican National Convention, announcing a new campaign for the “soul of America” through which these self-denominated cultural warriors of retrenchment intended to “take back . . . our cities, and take back our culture and take back our country . . . block by block.” See supra notes 31-35 and accompanying text. Thus, while the storms of backlash have been gathering since the 1960s and 1970s, perhaps the pivotal moment of triumph in the steady escalation of culture war through majoritarian electoral politics came a mere two years after Buchanan’s official declaration of 1992—in the 1994 congressional elections, which put into legislative office the standard bearers of the “Contract with America” and its agenda of buttressing existing structures of neocolonial supremacy through sociolegal retrenchment. See Chris Black, Buchanan Beckons Conservatives to Come “Home,” BOSTON GLOBE, Aug. 18, 1992, at A12; Paul Galloway, Divided We Stand: Today’s “Cultural War” Goes Deeper than Political Slogans, CHI. TRIB., Oct. 28, 1992, at C1. Since then, as noted immediately above, this social conflict has been waged with a vengeance to “take back” the civil rights gains of the past century in the name of the
above and in the parlance of their day, the rising representatives of the “angry white male.” This “front” of the culture wars, as this sketch indicates, exploits the numerical, structural, economic and social capital arrogated and accumulated by the original immigrants, particularly those from England, and retained to this very day by their successors-in-interest for the private benefit not only of the earlier immigrants from the colonial era but also of their neocolonial heirs today and tomorrow.

The cumulative cultural and institutional effects of this first prong or front have been twofold: first, a substantial gutting of civil rights law and the steady (re)normalization of a social environment

“angry white male.” See generally JAMES DAVIDSON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991); JAMES DAVIDSON HUNTER, BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA’S CULTURE WAR (1994).


70 It bears at least passing note that, this backlash resort, or deference, to “direct democracy” in the name of the federal Constitution is supremely ironic: it turns the theory of that constitution, as articulated by its federalist framers, on its head. From their original perspective, the federalists considered raw majoritarianism as a form of “democratic despotism” akin to monarchical despotism—a perspective formed in the crucible of both the revolutionary period in the 1770s as well as the critical period immediately afterward, spanning the 1780s. During this period of sovereignty, the legislatures of the autonomous former colonies, usually elected directly by the eligible voters of the state, enacted statutes that disturbed the property claims of the revolutionary elites—and that helped to prompt the energy they put behind the new Constitution’s adoption. This experience with the “tyranny of the majority” caused James Madison and other key framers to emphasize “deliberative democracy” as a check on mob rule in the name of majoritarian pregogative. In this way, the propertied local and national elites of the first generation became the first “minority” to seek constitutional protection from the dictates of rampant (from their perspective) formal democracy. In this way, they set both the stage and the example for succeeding minorities, including those under attack via raw majoritarianism mechanisms in today’s backlash kulturkampf. E.g., The Federalist No. 10 and No. 51 (James Madison) (discussing the problems they perceived with direct democracy); see also, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, 393-417 (1969) (describing this “Critical Period” of direct democracy or “democratic despotism” leading up to the Constitutional Convention). Though immediate self interest may not have been the sole motivation for the revolutionary and propertied elites of the various former colonies to jettison the Articles of Confederation and to replace them with the markedly different design of the Constitution, their preoccupation with property rights prompted James Madison to conclude that the new charter must be structured to ensure that “the rights of persons were subjected to those of property.” See WOOD, supra note 70, at 410 (quoting Madison’s correspondence to Jefferson). Since then, this specific focus on “property versus democracy” among the framing generation has been widely acknowledged as a key, if not exclusive, motivation for the constitutional compromises actually forged in Philadelphia. For an excellent review, see generally JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990).
increasingly hostile to immigrants, sexual minorities, racial and ethnic minorities, women, the poor, the disabled, and other Others; and, second, the use of this electoral clout to launch the second prong or front of the culture wars. This second prong, the installation into lifetime federal judgeships of persons who will use federal judicial powers to reinforce the gains made under the culture wars’ first prong or front, is a strategic move made both to protect backlash legislation as well as to clip back offensive precedent. The two prongs, as this brief sketch indicates, work hand in hand.

2. Judicial Review, Judicial Will and Backlash

Jurisprudence

The second line or prong of attack amounts to court-packing, pure and simple, but on a massive scale. Beginning with and since Nixon’s efforts, the national judiciary has been methodically restocked, as much as politically possible, on the basis of race, gender, class and—especially—ideology to restore positively the dominance of Euro-heteropatriarchal “tradition” and those it favors in law and society.\textsuperscript{71} Demographically and politically, this process has sustained the over-representation of white, male and heterosexual control over the judicial powers of the federal (and state) government.\textsuperscript{72} Rhetorically, they have raised and used the banner of “strict construction” when it comes specifically—and selectively—to civil and human rights, and to contract the so-called liberal legacy, whether expressed in legislative, executive or judicial forms of law and policy. Coupled with equally strategic intonations, and selective versions, of history, tradition, democracy and federalism, backlash

\textsuperscript{71} The so-called “Federalist” Society has served as a key funnel in this process. See Valdes, Antidiscrimination, supra note 9, at 279-80. At first blush, this organization’s naming seems merely odd, given their embrace of classically antifederalist dogma, such as denunciation of federal power generally, and the attendant calls for a selective “strict construction” of federal authority coupled with an unbridled expansion of “states rights” under the Tenth and Eleventh Amendments. See The Anti-Federalist Papers and the Constitutional Convention Debates (Ralph Ketcham ed. 1986) (summarizing the failed antifederalist agenda to defeat the ratification campaign of the federalist sponsors of the Constitution); see also infra notes 91-103 and accompanying text on recent backlash opinions displaying this dual approach to constitutional interpretation, coupling “strict” construction of federal authority with expansive construction of the Tenth and Eleventh Amendments.

\textsuperscript{72} See Valdes, Antidiscrimination, supra note 9, at 282 and sources cited therein on the demography and ideology of the federal judiciary in recent years. Not coincidentally, the legal academy of the United States reflects a similar demographic portrait today, as it did during the formative years of critical outsider jurisprudence. Id. at 277. See also supra note 62 and sources cited therein (on Reagan’s recomposition of, and pivotal impact on, the make-up and ideology of the federal judiciary).
appointees have generated substantively and ideologically preferred outcomes, effectively re-tightening the grip of neocolonial traditions over both law and society. Tactically, the two key broad purposes behind this second line or prong are, first, to neutralize federal judicial review as an independent check on contemporary backlash lawmaking and, second, to overturn liberal (or otherwise inconvenient) precedents, or other sources of law, established during the hated New Deal-to-Civil Rights eras. In these key ways, the second prong of the culture wars clears the way for the legislative or “democratic” lawmaking conduct, in turn enabled by backlashers’ successful campaigns under the their kulturkampf’s first prong—and even as the first prong also produces the power to make the appointments that will generate the necessary rulings.

This second front or prong of the culture wars has produced the intended effect: turning the nation’s courts into passive or active tribunals, as the case may demand, so that backlash-identified interests generally may count on federal judges to enable sociolegal retrenchment and shield their backlash lawmaking from independent judicial scrutiny. As a result, backlash jurisprudence is characterized both by mighty intonations of an urgent need for “judicial restraint” as a key part of federalism and separation-of-powers concerns that in the preceding decades had been trampled by “liberal activist judges”—as well as by their own unhesitant use of judicial activism to sweep aside formal obstacles to their agenda of social retrenchment. Despite their ringing denunciations of “liberal activism,” today’s backlash judges have exposed themselves to the same denunciations, and to charges bordering on hypocrisy or worse, in their transparent analytical gyrations to generate ideologically preferred outcomes. The jurisprudential results, and the categorical

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73 See infra Part II.
74 Bruce Ackerman, The Court Packs Itself, AM. PROSPECT, Feb 12, 2001, at 48 (noting that the decision in the Gore litigation was “not the first time in history that the Supreme Court has made a decision that called its fundamental legitimacy into question” but that this time was unique because of the direct meddling in electoral politics at the highest level). According to one former Supreme Court clerk, these charges flew between the justices themselves, as well as their chambers. See Edward Lazarus, Closed Chambers: The Rise, Fall and Future of the Modern Supreme Court 288-325 (1999) (the author clerked for Justice Blackmun in 1988 to 1989). In addition, many scholars have pointed out the doctrinal or analytical oddities unveiled in backlash rulings. See Valdes, Antidiscrimination, supra note 9, at 287-89 and sources cited therein (providing a bibliography of recent scholarship questioning the substantive integrity of this jurisprudence). This skepticism mushroomed after the intervention of the five-member backlash bloc and their 5-4 demand that all vote counting be stopped in the 2000 presidential election, thereby claiming the power—for the first time in the nation’s history—effectively to select the
consistency of the social, economic and political “winners” and “losers” under the doctrinal re/formulations of backlash jurisprudences, perhaps are most crisply exemplified by the Supreme Court itself, as discussed below.75


The third line or prong of attack is the targeted control of the federal spending power to fund or de-fund particular programs or policies, as the case may be, in order to accomplish de facto roll-backs that cannot be effectuated wholesale, or directly. This third prong perhaps is best illustrated by the funding battles over abortion, legal aid for the poor, social services for immigrants and so-called ‘welfare mothers,’76 but it also is shown in the current campaign, under the notorious Solomon Amendments, to withhold federal funds—including financial aid to students—from universities and colleges that do not permit military recruiters and ROTC programs to bring discrimination onto university campuses due to the military’s institutionalized policies of discrimination on the basis of sex, gender and sexual orientation.77 This third prong of the culture wars aims to reassert control over the federal budget to starve programs that aid foes and to nourish the power and coffers of friends. Under this line of attack, working in tandem with the prior two lines of the culture wars, programs and policies that serve as lifelines to vulnerable communities and groups—including law students who need federal loans to secure an education—effectively are threatened or cut, even though backlashers may not have been able to muster the power to effectuate a direct, substantive take-back of the ‘right’ or ‘benefit’ under assault.78

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75 See infra Part II; see also supra note 40 and sources cited therein on backlash activism and legal retrenchment through cultural warfare.

76 For examples, see Valdes, Beyond Sexual Orientation, supra note 17, at 1438-40 and sources cited therein.

77 Just this year, the Third Circuit Court of Appeals invalidated this act of congressional oppression, in pursuit of cultural warfare specifically against sexual minorities, under the First Amendment. See Forum for Academic and Institutional Rights v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004). For background information on this legislation and the efforts of legal educators to ameliorate its effects as well as to reverse it, see Francisco Valdes, Solomon’s Shames: Law as Might and Inequality, 23 THURGOOD MARSHALL L. REV. 352 (1998).

78 This prong of the culture wars also works in tandem with the others, as illustrated by Rust v. Sullivan, 500 U.S. 173 (1991), in which the Supreme Court rubber-stamped the selective defunding of programs that provide abortion-related information to thwart in practice, as much as possible, women’s right to informed
As this brief sketch indicates, law and policy are central to the
and unfettered reproductive choice. In this particular case, the first prong of the
culture wars produced the legislature with the will and animus to target women’s
rights for systematic and strategic retrenchment, the second produced the courts
that would undermine reproductive rights jurisprudentially and shield
discriminatory or abusive legislation from effective challenges, and the third line of
attack produced the de-funding statute when other jurisprudential and legislative
efforts to erase abortion altogether continued to falter despite intensifying backlash
fire. For similar examples of this dynamic, see Valdes, Beyond Sexual Orientation, supra
note 17, at 1439-40, n.126.

These three prongs or fronts of the culture wars effectively serve to help
reanimate the historic dominance of colonial-era traditions within the United States,
interrupting anew a slow and troubled historical progression from formal
subordination, to formal equality and antidiscrimination, to, perhaps some day,
antisubordination and social transformation. See supra note 13 and sources cited
therein on antidiscrimination and antisubordination. But this cultural warfare is not
limited to these three principal lines of reaction and attack: these established lines of
backlash kulturkampf have been accompanied by additional efforts focused on
control over the instruments or means of knowledge production and dissemination
as part of cultural formation and politics. These reinforcing efforts notably have
included the creation of a think tank network to concoct justifications for this take-
back campaign for public consumption. For an excellent expose of this particular
aspect of backlash kulturkampf, see Jean Stefancic & Richard Delgado, No Mercy:
How Conservative Think Tanks and Foundations Changed America’s Social
Agenda (1996).

These efforts also have included the systematic “deregulation” of the means of
mass communication since the 1980s to permit, if not facilitate, their formal
consolidation in ever-larger combinations of capital, which in turn have helped
impose centralized corporate control over broadcast journalism as a profession, as
well as to unravel longstanding public policies in favor “viewpoint diversity” in the
mass media. See Edwin Baker, Media Concentration: Giving Up on Democracy, 54 Fla. L.
Rev. 839 (2002) (surveying the policy changes effectuated during the past two
decades of cultural warfare, during which policy was redirected from the long-held
objective of “dispersed ownership” and replaced with the policy of “media
concentration” currently in place, and evaluating the impact of the media ownership
rules and patterns as a “huge non-democratic organized force that has major power
over politics, public discourse and culture”). This redirection of media policy and
politics was effectuated through executive appointments the Federal
Communications Commission, whose actions have been challenged judicially with
mixed results. For a recent example involving these media concentration policies in
the context of a particular mega-merger, see Prometheus Radio Project v. FCC, 373
F.3d 372 (2004) (upholding in part and invalidating in part the FCC’s ownership
policy decisions). The end result has been an increasingly concentrated and
homogenized use of the media to construct mass perceptions and public
consciousness in ideological and cultural alignment with the politics of fear and
control that help to motivate backlash in law and society—an unprecedented
concentration of private power over mass media through a redirection of federal
public policy to further entrench the cultural hegemony of neocolonial interests,
“values” and politics at the expense of a heterogeneous and multicultural society.
This structural disabling of independent media outlets to neutralize a potential or
actual obstruction to the backlash agenda thus has been part and parcel of today’s
kulturnkampf at least since Nixon’s notorious bashing of the so-called “liberal” media.
See supra note 41.
waging of backlash kulturkampf to bring about a social and formal restoration of the old or “traditional” deal that governed North American society since colonial times. As this sketch also illustrates, the culture wars’ three prongs are interactive and mutually-reinforcing. Though backlashers are not yet able to synchronize or control the outcomes of their campaigns perfectly, they methodically manipulate the levers of power in carefully orchestrated ways that pose the most acute threat to the possibility of social equality in North America today. To advance these aims, today’s backlash appointees have employed manifold tools and concepts to redraw entire areas of constitutional jurisprudence to their ideological liking.

II. LAW, IDENTITY AND ANXIETY: BACKLASH ACTIVISM AS CONSTITUTIONAL JURISPRUDENCE

As the mini-case study sketched in the counterpart to this Afterword illustrates, liberty-privacy law—and majoritarian regulation of gender and sexuality—have been central to the assertion of backlash politics in the form of backlash jurisprudence. This doctrinal centrality makes manifest the salience of supremacist anxieties within backlash circles over gender and sexual identities, and over their social evolution and articulation during the past century and today. The salience of other sociolegal identity categories targeted by backlashers (and fueled by similar anxieties of threatened supremacies) is similarly underscored by other doctrinal areas subjected to substantive and/or procedural and evidentiary transmutation under backlash activism during the past two decades or so.

Most notable, perhaps, is the salience of race and ethnicity, and of backlash anxieties over the legal and social disturbance of “traditional” hierarchies based on them, as illustrated first and foremost by the direct interventions into the substance and administration of antidiscrimination law under both statutory and constitutional federal equality mandates. The gathering clouds of backlash (and the limits of liberal vision) can be seen in early cases like *Washington v. Davis*, the 1976 ruling that made plain how prevalent conceptions of equality were socially limited to formal, as opposed to actual, aspirations. In that case, the Justices decided that state actions with a foreseeable or predictable disparate negative impact on traditionally subordinated groups would not be deemed impermissible discrimination in most constitutional equality cases

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unless the victim-plaintiff could prove an actual subjective motive or “intent” to cause or exacerbate such disparities. In choosing to opt for this doctrinal standard—a choice neither inevitable nor calculated to effectuate formal equality in social terms—the Justices of course chose to place foreseeably difficult, if not insurmountable, evidentiary obstacles to the vindication of violated civil or constitutional equality rights: already able to occlude actual intent and adept at it, henceforth defendants would also be better able to couch their discriminatory practices in ostensibly neutral actions that more easily shielded them from legal liability. Perhaps unwittingly, those judges presaged some of the rhetorics and techniques that since have become backlash hallmarks; perhaps the Supreme Court’s 1989 term best marks the earliest moment of ascendancy for backlash jurisprudence in institutional terms.

Three 1989 rulings—*Atonio v. Wards Cove Packing Co., Inc.*[^82], *City of Richmond v. J.A. Croson Co.*[^83], and *Patterson v. McLean Credit Union*[^84]—exemplify backlash jurisprudence, and its social hostility to civil rights in race/ethnicity cases, while pretending fidelity to the antidiscrimination principle. The first and third focus on race in antidiscrimination employment contexts, both under the Constitution and federal legislation, while the second case focuses on race and the Fourteenth Amendment in affirmative action nonfederal set-aside programs. In each case, the majority claimed neutral and righteous adherence to the antidiscrimination principle and its remedial mandates. In each instance, however, the result was to roll back equality policies or “affirmative action” programs designed primarily to interrupt self-perpetuating racial hierarchies instilled over time by rules of law, and thus to implement in socially meaningful terms the “opportunity” promised to all by formal equality. Each ruling in this trio signals and exemplifies backlash antidiscrimination jurisprudence, and its hostility to civil rights laws socially while paying lip service to them formally.[^86]


[^84]: 491 U.S. 164 (1989).

[^85]: For an incisive review of this trio, see Gould, supra note 38.

[^86]: In the first, *Wards Cove*, the judges effectively overturned an inconvenient precedent, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which had held that a showing of a subjective intent to discriminate was not the only way to prove discrimination under the statutory scheme established by Congress; unlike a claim made under the Constitution and effectively precluded by *Washington v. Davis*, *Griggs*
had held that the disparate impact of a facially neutral employment practice also could suffice to prove a statutory violation. Yet in Ward’s Cove the judges opined to the contrary: in their opinion, employment practices that actually had segregated workers of color in the lowest-paying and lowest-status job categories of the workplace were not deemed sufficient to state a claim of discrimination because the segregation could, the judges speculated, be a “pool” problem.

In Croson, the judges decided that remedial efforts of state and local governments to ameliorate the present effects of pervasive societal discrimination in the past based on race would be subjected to the same level of hostile judicial scrutiny as applied historically to invidious forms of discrimination designed to subordinate social groups on the basis of race, nationality or ethnicity. By choosing to apply this “fatal” form of strict scrutiny to affirmative action programs enacted by state or local governments, the Croson judges not only interposed their power over democratic decision-making in ways markedly inconsistent with the general valorization of majoritarianism in backlash jurisprudence. For an example of such valorization, see Valdes, Culture by Law, supra note 8 (discussing the majority opinion’s intonation of deference to democracy in Bowers, decided by a 5-4 vote, and reversed last year by another 5-4 vote). In effect, they circumscribed the discretion of today’s majorities to disgorge some of the ill-gotten gains arrogated and bequeathed by their predecessors-in-interest. And to impede local equality efforts in this way, they strained for a novel conceptual formulation that superficially justifies their assertion of this power: henceforth, democratic policy initiatives designed to disgorge the ill-gotten gains of white supremacy through majoritarian practices of invidious discrimination would be formally equated in backlash jurisprudence with remedial policies or programs designed to ameliorate the continuing legacies of those practices. This inversion is not only Orwellian, but it also is foreseeably likely to short circuit legislative interest in policy innovations that might translate the formal commitment to equality into a socially relevant set of practices and outcomes.

Even more aggressively or actively, in the last of this 1989 trio the judges decided to reconsider a well-established precedent sua sponte, without any request from the parties. Brushing aside another precedent they apparently considered inconvenient, Runyan v. McCrary, 427 U.S. 160 (1976), the judges in Patterson announced that the antidiscrimination protection in private employment contracts mandated by Section 1981, the Civil Rights Act of 1866, henceforth would be limited strictly to the moment of the contract’s “formation”—and not to actions and omissions preceding formation or constituting performance. Consequently, the periods of time that may be denominated as contract negotiation and contract performance, and the actions taken by employers during that time, became immunized from statutory regulation. The predictable and practical social effect of this willful reconsideration and rejection of a precedent that had withstood the test of time under the watch of many judges was to eviscerate the statute’s ambit and severely limit its capacity to promote employment equality in operation.

Though reversals of precedent are supposed to be rare and circumspect, the activism based on speculation that the Ward’s Cove judges displayed made plain that traditional institutional canons would not restrain backlash kulturkampf in the form of backlash jurisprudence. In order to help set the stage for wholesale reversals in the form of backlash jurisprudence, then-Judge William Rehnquist asserted in 1990 that Supreme Court precedents decided by a 5-4 vote and “over spirited dissents” merited lesser deference as precedent. Payne v. Tennessee, 501 U.S. 808, 828-29 (1991) (reversing two precedents from 1987 and 1989). Because most of the backlash reversals of precedent are themselves 5-4 rulings reached over spirited dissents, this assertion in turn should make it easier to justify in coming years the reversal of most backlash rulings rendered during this period of backlash kulturkampf.
Notwithstanding the contorted justifications proffered in those opinions, the ideological valence and political imperatives of the choices and actions taken in the 1989 cases were obvious to contemporary observers, and remain so today. As Justice Marshall famously said shortly afterward, “the Court’s approach to civil rights cases has changed markedly . . . . It is difficult to characterize last term’s decisions as a product of anything other than a retrenching of the civil rights agenda.” Since then, and through the 1990s, the five-member cadre of backlash justices needed to proclaim backlash rulings as the “supreme law of the land” has coalesced with increasing frequency to unravel delicate strands of antidiscrimination and related fields of law, oftentimes in the name of history and tradition and/or democracy and federalism. Since then, a bare majority of the current appointees to the Supreme Court has embarked on an ambitious campaign of doctrinal revision that seems organized primarily by outcome-oriented concerns that track the neocolonial dynamics of the culture wars and endorse the imperatives of reaction and retrenchment: whether driven by simple coincidence or ideological imperative, the fact remains that in culture war cases, sexual minorities, racial/ethnic minorities, religious minorities, women, environmentalists and/or the disabled, among other Others, invoked the law’s protection but were judicially rebuffed and pushed beyond the reached of conveniently redrawn jurisprudential borders. This constancy holds true with few exceptions, and usually takes place through the juridical manipulation of asserted conflicts between the demands of history, tradition, democracy and federalism against the needs or wants of civil rights—or, as the matter oftentimes has been phrased, a conflict between federal might (on behalf of outgroups) and states’ rights (on behalf of ingroups).

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88 Though not the focus of this summary sketch, it bears note that backlashers exploit even purely technical or “procedural” cases as retrenchment opportunities. For example, in *Allen v. Wright*, 468 U.S. 737 (1984), the early core of judges associated with backlash spearheaded a decision that black school children and their parents had no standing to challenge illegal tax exemptions to racially discriminatory private academies because they had not personally applied for admission to them, even though the pleadings stated injury based on “elementary economics” that reduced integrated education. Likewise, in *Lujan v. Defenders of Wildlife*, 504 U.S. 505 (1992) the same basic core of backlash justices rebuffed the claims of environmentalists, again interposing standing requirements: the problem here, declared those judges, was that the environmentalists had not purchased airline tickets to the locales in question. Hence, their injury was not imminent. At the same time, the same basic set of appointees perceived standing in *Northeastern Florida Chapter of Associated General Contractors v. Jacksonville*, 508 U.S. 636 (1993), for white
In the early 1990s, the backlash bloc turned its attention to race and its intersection with electoral politics—the first prong of the culture wars. Four important interventions during that decade, including Shaw v. Reno in 1993, punctuated their efforts in voting rights cases to whittle away methodically at federal civil rights legislation designed to help pry open the doors of the political system—legislation designed to enable the meaningful participation in formally “democratic” lawmaking of racial minorities traditionally excluded de jure and de facto from the electoral, and hence lawmaking, process. The sociolegal background of these interventions is clear: after generations of exclusion, coinciding with the formative years of the Republic and the accumulation or entrenchment of economic position and social status, outgroups were in no position suddenly to claim their political rights under formal

construction workers complaining of a minority set-aside program—even though none of them had tried to apply for a contract under the challenged program. These cases showed that sometimes the judges will accept loss of “opportunity” to satisfy the requisite of “injury” while other times they demand the injury be something more, something difficult to satisfy; and which of the two they pick appears to depend on whether or not these five justices like or dislike the type of claim and claimant before them. For similar examples and critiques, see supra note 38 and sources cited therein on the manipulation of litigation results by federal judicial appointees. Indeed, these sorts of in/consistencies have induced dissenting justices (as well as other commentators) to observe that backlash jurisprudence on procedural, jurisdictional and related fields “is no more than a poor disguise” for these judges’ attitudes toward the underlying claims and claimants. E.g., Allen, 468 U.S. at 766 (Brennan J., dissenting).

The other 1990s voting rights cases following from Shaw include Miller v. Johnson, 515 U.S. 900 (1995), wherein lower federal judges twice had struck down state legislative redistricting plans that, based on the 1990 Census, included two and three black-majority districts. Instead, the lower courts had ordered a plan with a single such district, thus cutting the potential electoral strength of racial minorities by half or more. In another one of these cases, Abrams v. Johnson, 521 U.S. 74 (1997), the same basic scenario recurred. When they reached the Supreme Court, the backlash bloc of five upheld both judicial reductions in the state legislative plans, declaring that those state legislative efforts, generated in part by the Voting Rights Act to maximize minority representation, amounted to an impermissible form of racism. And, during that same term, the same five justices indirectly struck down federal regulations in Reno v. Bossier Parish, 520 U.S. 471 (1997), that had required the Justice Department to consider dilution of minority voting strength when state voting procedures are modified, effectively licensing statutorily-prohibited “retrogression” in voting rights gains. In these three cases, as in Shaw, backlash jurisprudence interjected newly heightened evidentiary standards to trump democratic decision-making in the form of local and state redistricting plans as well as in the form of the federal legislation that since 1965 had mandated such efforts. See also infra note 91. After these four rulings over a four-year period by the same bloc of five judges, the growing but numerically-outnumbered racial/ethnic minorities of the United States are positioned for even greater marginality in the electoral politics that produce law—including antidiscrimination law and its retrenchment or expansion—via the ongoing culture wars.
federal equality against the localized ingroup machines that by and large ran their states, if not their local communities and neighborhoods. After decades of poll taxes, literacy tests, and other devices used by entrenched elites in the states to deny in practice the formal right to vote to racial minorities, the Voting Rights Act of 1965 was enacted to lend federal weight to minority rights to full and meaningful access to electoral power, including a mandate of no “retrogression” in gains. The law worked to some extent, creating an unprecedented level of minority elected officials; but as with other civil rights legislation, meager social effects triggered fierce traditionalist reaction. And precisely because control of elections and their results is key to the neocolonial agenda of the culture wars, backlash jurisprudence has been quite active—and “activist”—in the voting rights law: to retrench unwelcome minority advances in lawmaking prowess, backlash jurisprudence incongruously pits Equal Protection’s antidiscrimination mandate on behalf of local white ingroups, and against the principal congressional remedy tailored to multiple generations of anti-minority voting rights discrimination. Perversely, this inverted judicial concoction serves to eviscerate or circumscribe that majoritarian (or “democratic”) remedy in the very name of formal equality.

This area of backlash activism was marked for transmutation in 1993’s Shaw v. Reno,90 which set aside a redistricting plan established pursuant to established interpretations of constitutional equality law and accepted applications of the Voting Rights Act. This ruling set the stage for the subsequent voting rights cases of that decade and backlashers’ substantive retooling (and practical diminution) of minority voting rights, and thus of electoral influence. Despite their professed deference to majoritarian lawmaking, backlashers displayed no compunction in their use of judicial power to trump the law and policy choices of the Congress and President as embodied in the Voting Rights Act. Moreover, as in Croson and other backlash rulings, today’s appointees were forced to redraw case law dramatically in order to narrow the previously well-established remedial uses of race and ethnicity, in this instance under the Voting Rights Act. As in Croson and most other backlash rulings, the practical effects of their opinions and choices help to frustrate, rather than to effectuate, the central purpose of a remedial statute—in this instance, eliminating the historic and present suppression of outgroup electoral power based specifically on race and ethnicity. In addition to baring the teeth of backlash, Shaw and its kulturkampf progeny illustrate the

interactive and mutually reinforcing interplay of the culture wars’ first two prongs, in which the first prong produces the power to legislate and to appoint judges, who in turn will exercise their institution’s powers to dismantle existing legal structures and shield new backlash legislation from any serious or principled review.\footnote{Thus, despite their custom of intoning the need for judicial deference to majoritarian democracy, in these rulings the backlash bloc deployed the federal judicial power under their current control to trump longstanding democratic policy choices, embodied in the Voting Rights Act, to further stack the political deck against racial-ethnic minorities in the periodic contests of formal or nominal democracy—exercises of power that, as described above, constitute the first and primary “front” or prong of the culture wars. See supra notes 58-75.}

Having narrowed the federal power to promote democracy in substantive terms under this landmark legislation, the backlash appointees were poised to tackle federal power to promote antidiscrimination as law and policy in more general terms: by 1995, when the preceding years of backlash appointments finally jelled into a more-or-less solid line-up to control the Court’s powers, the backlash bloc began to pronounce a “new” kind of backlash federalism that suddenly presented just-as-new problems for federal antidiscrimination lawmaking and enforcement in varied doctrinal or social categories. Since then, these efforts have focused, but certainly have not been limited to, four constitutional provisions that interact sharply in backlash opinions. The first, Congressional power under the Commerce Clause of Article I, is the only one of the four found in the body of the original document. The other three are found in the amendments to the original: the Tenth Amendment, the Eleventh Amendment, and Section 5 of the Fourteenth Amendment, which contains its enforcement provisions. The Commerce Clause and Section 5 have proven over history to be the main sources of federal legislative authority over civil rights law and policy—over federal authority to legislate the antidiscrimination principle into law, and to enforce the Equal Protection Clause of the Fourteenth Amendment in relatively proactive ways that help to break up local neocolonial oligarchies, and their grip on access to wealth, power and opportunity. Thus, as with the Voting Rights Act, the sociolegal background of these interventions is clear; using the Tenth and Eleventh Amendments, by the mid-1990s these five judges were prepared to begin in earnest to put an end to that.

circumscribe federal legislative power under Section 5 and the Commerce Clause, respectively. In Adarand, the judges overturned a key precedent—Metro Broadcasting, Inc. v. FCC[^94]—to subject Congress’ use of remedial Section 5 powers to “strict” judicial scrutiny, thus giving the backlash bloc heightened power to invalidate civil rights legislation while simultaneously inhibiting legislative capacity to use antidiscrimination law to root out socially entrenched realities instilled and valorized de jure. In Lopez, they declared that Congress had no power to regulate guns around public schools under the Commerce Clause because gun control is not related to commerce; under the Tenth Amendment gun regulation falls beyond federal reach. While Lopez thus was not an antidiscrimination suit, the reduction of federal legislative power under the Commerce Clause came freighted with historical and potential significance for antidiscrimination law and policy,[^95] as was borne out during the next several terms.[^96]

The very next year, 1996, the backlash bloc was busy emplacing the related doctrinal conditions necessary for this sweeping reduction in the remedial antidiscrimination powers of the federal government, as exemplified by their pronouncements in Seminole Tribe of Florida v.


[^95]: The social reduction or elimination of discrimination in and through federal regulation of the economy had become an especially salient element in the elaboration of the antidiscrimination principle because of prior decisions of the Court, which in earlier times had restricted the meaning of the Fourteenth Amendment. Denied in the Civil Rights Cases, 109 U.S. 3 (1883), the power by a prior set of judges to legislate antidiscrimination law directly under the Fourteenth Amendment, Congresses of the Twentieth Century turned to other Article I powers under the Constitution. As a result, the Civil Rights Act of 1964—an antidiscrimination linchpin—and other landmark civil rights laws were enacted, and upheld, as exercises of the Commerce Clause power. When backlash judges chip away at this particular power, they do so with full knowledge of that power’s central role in the historic development—and maintenance—of antidiscrimination law as national policy in the United States. Moreover, the Fourteenth Amendment is explicitly directed at state action, and thus Section 5 powers are similarly restricted—or so held these same judges in a recent case involving both the Commerce Clause and Section 5. See infra notes 100-101 and accompanying text. The historical and substantive bottom line is clear: the Commerce Clause is and has been the primary basis for federal capacity to reach “private” discrimination, while Section 5 is and has been the main federal means to compel state compliance with federal standards equality. Both are essential pillars of federal antidiscrimination lawmaking and law enforcement. Using federalism generally, and the Tenth and Eleventh Amendments specifically, backlash jurisprudence therefore targets both for retrenchment. See also infra notes 98-103 and cases cited therein.

[^96]: See infra notes 100-103 and accompanying text on the 2000 term federalism cases.
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Florida," a case key to this set-up. In Seminole Tribe, this bloc of five judges again single-handedly decided that Congress had no power under the portion of the Commerce Clause relating to “Indian tribes” to subject states to suits in federal court for violations of federal rights. More generally, in Seminole Tribe these five judges—again single-handedly overturning precedent—declared that the Eleventh Amendment trumped Article I, and that Congress therefore could not authorize suits against states under the Commerce Clause for violations of federal rights. Within a few short years, the backlash appointees had managed to begin sideling the principal sources of federal antidiscrimination lawmaking employed during the past century to enact most of today’s civil rights federal statutes—thus bringing them all into constitutional question.

Exacerbating these mid-1990s interventions, the same five judges then followed up on their Seminole Tribe ruling three terms later, in three backlash rulings of the 1999 term that emphasized their determination to render Section 5 of the Fourteenth Amendment the exclusive source of federal legislative power to abrogate state immunity in the enforcement of federal civil rights laws. But the backlash bloc furthermore used these federalism cases to constrict even this power, in effect emphasizing their intent to employ the federal judicial review power not only to incapacitate federal legislative power over civil rights pursuant to the Commerce Clause, but also to monitor actively Congressional enactments under Section 5 designed to enforce the Fourteenth Amendment’s equality mandate on behalf of social or economic outgroups. These and similar backlash rulings, imputed to federalism, have asserted “for the first time since the founding of the Republic that Congress has no authority to subject a State to the jurisdiction of a federal court at the behest of an individual asserting a federal right”—an astonishing assertion entailing wholesale reversals of precedent that, therefore, have prompted spirited protests from that same Bench. In other words, the five backlash judges effectively (and again single-handedly) declared in these remarkable opinions that Congress of course may pass its antidiscrimination and civil rights laws, but it


98 In Alden v. Maine, 527 U.S. 706 (1999), the same bloc further declared that federal rights cannot be asserted in state courts either—unless the states agree to let themselves be sued. In two more cases of the 1999 term involving the same parties, Florida Prepaid v. College Savings Bank, 527 U.S. 627 (1999), these same five justices—again overturning precedent—extended “states rights” yet again, declaring that states were immune to patent and unfair advertising suits under federal statutory schemes.

99 E.g., 517 U.S. at 100 (Souter J., dissenting).
cannot authorize suits by private citizens to enforce those concededly constitutional laws, nor to remedy their actual violation. Formal, but not social, equality is likely to survive this sort of backlash activism.

Pushing ahead with their forced contraction and redirection of well-established law and policy, the same five backlash appointees of the current Court banded together again in the first term of the new millennium to pronounce, in United States v. Morrison, 100 that Congress could not, under the Commerce Clause, enact the civil remedy provisions of the Violence Against Women Act, because violence against women—like gun control in Lopez—was deemed, in their view, unrelated to “commerce.” Moreover, Section 5 powers also failed here, the judges declared in Morrison, because, in their view, the problem of “violence against women” simply did not merit the sort of statute or remedy that Congress enacted.101 Morrison thus illustrates aptly the vise into which the backlash judges have put federal civil rights power: the cumulative doctrinal valence of the backlashers’ opinions in Morrison and other culture war cases is designed to eviscerate the potential for either the Commerce Clause or Section 5 to serve as sturdy bases of federal civil rights legislation in the new millennium. With these strings of cases, the five backlash judges responsible for these willful rulings single-handedly here created the means for backlashers in all branches and levels of government to side-step the two main tools used historically by Congress to enact into law federal antidiscrimination policy, thus helping to turn back the hands of time to the 1930s, when a similarly activist group of judges on the Supreme Court used that tribunal to block federal power to legislate social or formal reform.102 With these and similar rulings of the new millennium, the backlash bloc deploys

100 529 U.S. 598 (2000).

101 And in another backlash ruling of the 2000 term, U.S. v. Morrison, supra note 100, the same five judges furthermore concluded that Section 5—the second main Congressional tool to promote equality—was no answer either, because the statute sought to reach violence against women generally, including private rather than state action. By limiting progressively the potency of Section 5 through selectively strict construction, the backlash quintet solidifies the social and legal entrenchment of neocolonial inter-group hierarchies and supremacies, as well as magnifies their ideological agenda. See supra notes 72-75 and accompanying text.

102 By cutting down the power of Congress to regulate commerce in general, these five justices foreseeably, if not calculatedly, make it more likely that entrenched “private” biases and prejudices fanned by Law in preceding generations will continue to pervade both social and economic transactions, and to preserve through the net effects of those transactions the historic skews established formally, socially and economically under de jure regimes of subordination. Thus, the social stratification of society constructed through de jure subordination becomes the entrenched de facto status quo in social and economic relations.
the federal judicial power to prohibit the use of the Law to undo what the Law previously was marshaled to do; backlash appointees use the federal judicial power to deny to the remedy the tools necessary to match and fit the harm, thus leaving in place the *de facto* status quo previously established and consolidated *de jure*.¹⁰³

The summary capsules sketched above of course present an abbreviated and incomplete rendition of neocolonial kulturkampf through backlash jurisprudence. But, as this critical sketch indicates, backlash retrenchment sweeps across multiple swaths of constitutional law, and adversely affects many if not all outgroups, whether based on race or ethnicity, gender or sexual orientation, and disability or age. And as in *Patterson*, *Croson*, *Adarand*, *Lopez*, *Morrison*, and so many of the culture war cases sketched above, backlash jurisprudues assert without compunction their control of the federal

¹⁰³ The new millennium also saw the same judges’ continued and intensified employment of the Eleventh Amendment to shield states from federal or citizen efforts to force compliance with federal rights, and these cases sometimes have required backslashers to retrench well-established precedents on Congress’ Section 5 powers as well. For example, in *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), Congress had exercised its Section 5 powers to ban employment discrimination based on disability and to require accommodations that would open access for the disabled to the nation’s social and economic mainstreams. But the backlash bloc decided that Congress simply had failed to develop a legislative record in the exercise of its democratic will to support sufficiently, in the view of these five justices, the legislative conclusion that disabled workers required federal legislative antidiscrimination action to ensure their equal protection in employment under the law. For good measure, the judges went further in this case, holding that Section 5’s reach would henceforth be halted at the state level, and therefore will be not be able to reach local governments, such as cities and counties, where most of the workplace discrimination at issue in *Garrett* took place anyway. In this way, the backlash bloc engineered a remarkable contraction of democratic decision-making at the federal level, interposing their own power as a bloc in current control of the Supreme Court to restrict the potential for pro-equality democratic lawmaking, and doing so yet again at the direct expense of a long-marginalized social group: disabled workers.

In another 2000 case, *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), the same bloc of five judges joined to issue Part IV of the opinion, attributed to the Court, in which they declared that Congress also lacks power under Article I to abrogate states’ sovereign immunity, even when a state law or practice allegedly violates a federal law or right that is within the constitutional purview of Congress. Additionally, the same five judges used that same portion of the opinion to block suits by a state’s own citizens—an expansion of the Eleventh Amendment beyond its plain text, which expressly refers only to immunity from suits against states by citizens of “other” states. U.S. CONST. amend XI. This blatantly selective textual expansion seems, again, most likely to help suppress the use of legal process to vindicate substantive antidiscrimination claims based on federal law. Moreover, in *Kimel*, as in *Garrett*, the backlash judges went further: Section 5 was no answer here either, they opined, this time asserting that the statute was not “appropriate legislation” because its remedies were more potent than the judges thought necessary, or appropriate. *Kimel*, 528 U.S. 62, 82-93.
judicial power to undo established precedent and democratic or majoritarian lawmaking, whether in the form of state or federal legislation, when those sources of law stand in the way of accomplishing the backlash agenda of the national culture wars—and regardless of their contrary proclamations at other times formally adoring judicial restraint, deference to democracy and the like.\textsuperscript{104} The backlash record in jurisprudencemaking thus emerges as tightly consistent with the neocolonial agenda of backlash kulturkampf: when state power is used on behalf of outgroups or to uphold the “liberal” legacy of the Twentieth Century, the use is invalidated or narrowed, either directly through substantive pronouncements or indirectly through evidentiary, procedural and similar roadblocks; when state power is used on behalf of ingroups to retrench the “liberal” legacy, it is accommodated, congratulated, validated. The “losers” are: federal powers over the enforcement of all civil rights; women’s equality and reproductive choice; immigrants’ ability to build a dignified and secure life; gun control legislation to protect schools and schoolchildren; the environment; black children in elementary and secondary public schools and their parents; the disabled; older workers; the criminally accused; the voting strength of African Americans, Latinas/os, Asian Americans and other racial/ethnic minorities; sexual minorities and their ability to cultivate without persecution their intimate relationships; families, careers and other basic elements of life; and the disabled and their opportunity to function socially and with dignity. As a set and individually, the contorted opinions in these and similar culture war cases since the mid-to-late 1980s to the dawn of the new millennium have thrown new roadblocks in the way of this nation’s unfinished and acrimonious progression toward social equality and social equity under the rule of law. And with the dawn of the new millennium, the patterns and imperatives of backlash kulturkampf through backlash jurisprudence not only remain unabated, but appear poised

\textsuperscript{104} In all of these cases, however, the backlash judges continue paying lip service to the principles underlying the precedent and legislation that they subvert. At no time does backlash jurisprudence confess its disdain for the national commitment to the antidiscrimination principle. Instead, as briefly sketched above, various techniques appear to mask the purpose and effects of their opinions: conflicts with competing values are conjured, and used to curtail civil rights; rules of evidence and procedure are invoked, and then deployed to shield discrimination from viable claims; precedent is critiqued and rejected—or manipulated through “creative” distinction; pro-equality legislation is cabined. See supra notes 80-103 and accompanying text. The details and crannies of these culture war cases are myriad, but the overarching pattern of their doctrinal and social results is not. See supra notes 26-59 and accompanying text.
to continue with increasing stridency its systematic unraveling of the policies and precedents of established in previous generations, or by other institutions of law.

However, as this symposium and other LatCrit publications help to illustrate, critical legal scholars in the United States (and beyond it) continue seeking ways to preserve the limited and fragile gains secured under the antidiscrimination principle while simultaneously articulating the principles and techniques of an antisubordination framework. Thus, if measured in national and immediate terms, this sociolegal moment seemingly belongs to backlashers and their neocolonial agenda of bringing back the old deal. Yet the OutCrit labors that continue to elaborate evolutionary understandings of “equal justice for all” simultaneously help to ensure that law and policy remain viable means of resuming the nation’s fitful historic march toward the ultimate goals of justice and equality in the not-too-distant the future. This moment, in sum, represents a juncture from which both backlashers and OutCrits issue urgent calls to the nation.

III. ESTABLISHING THE WAYS AND MEANS OF PRESENT AND FUTURE RESISTANCE: SOCIAL JUSTICE PEDAGOGIES AND CRITICAL LEGAL EDUCATION

Control of knowledge, and of knowledge construction, at bottom is as central to the success of backlash kulturkampf as is control over the legislative, executive, and judicial powers of the federal government. And as critical education theorists have shown, all forms of education over time become institutions that tend to operate either as instruments of colonization and self-colonization, or of the contrary—emancipation and self-emancipation. Under this view, formal education oftentimes operates to justify the world constructed by the cultural, economic and political elites that

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105 See, supra note 3 for previous LatCrit symposia and visit the LatCrit website, http://www.latcrit.org, for a more up-to-date listing of publications.
106 See Valdes, Antidiscrimination, supra note 9 at 273 (contrasting the liberal, critical and backlash jurisprudential approaches to the antisubordination principle); see also Jerome M Culp, Jr., et al., Subject Unrest, 55 Stan. L. Rev. 2435 (2003) (discussing antidiscrimination and antisubordination).
107 For the classic articulation, PAOLO FREIRE, PEDAGOGY OF THE OPPRESSED (rev. ed. 2000). For one law student’s insightful view of his educational experience in social and structural terms, see David Aaron DeSoto, Ending the Conquest Won Through Institutionalized Racism in Our Schools: Multicultural Curricula and the Right to an Equal Education, 1 HISP. L.J. 77 (1998).
dominate society and control its institutions of education. In the usual course of things, then, mainstream formal education tends to serve the interests of the status quo; in its usual form, education formalizes and systematizes the inculcation of cultural politics to ratify the world as is. In short, “education” in practice oftentimes is tantamount to domestication in fact.

In the context of the lands now known as the United States, this practice effectively means that education—legal and otherwise—operates to justify the world constructed by Eurocentric elites during the heyday of militarist colonialism and imperialism, and furthermore celebrates the reinforcement of those legacies through a new heyday of corporate globalization based on colonial bequests. As inherited by each generation of humans, legal education specifically serves to justify and perpetuate the social legacies of colonial conquest as constructed by, or embedded in, various forms of law and policy. This service of course is performed both by what is left out as well as by what is put into the content or substance of contemporary legal education; by leaving out, for instance, knowledge of the systematic imposition on this nation and others of supremacist identity politics through law and policy— a systematic imposition of power that forms a key part of the legal story that explains so much of the injustice manifest in contemporary students’ social inheritance,

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and which every new generation struggles to understand; indeed, this sociolegal inheritance is the status quo that remains under contest in the current culture wars.

A. The Backlash Agenda and Ignorance as Education: Reinforcing Unjust Power

One example of deceptively-sanitized knowledge offered via contemporary (and uncritical) legal education is found in the omission of the so called “insular cases” from the case books and courses employed to teach constitutional law to new classes of entering students nationwide every year. The Insular Cases, a series of controversies decided as the 19th Century turned into the 20th, lent a judicial patina to North American imperialism during the years of manifest destiny to justify the conquest and subjugation of people in territories that are not states of the United States on the basis of specifically Euro-heteropatriarchal identity politics. People, such as those in Puerto Rico, were deemed unfit on racial, ethnic and cultural grounds to become part of the American nation state. This

110 Among the Insular Cases, perhaps the most significant one is *Downes v. Bidwell*, 182 U.S. 244 (1901), in which the Supreme Court ratified the North American administration of Puerto Rico as a territory. See generally JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL (1985). These cases capture a brutal side of constitutional law and nation-building, and for this reason are not to be found anywhere that a typical contemporary law student might venture. The end result is a skewed understanding of legal history and constitutional law. See generally, Sanford Levinson, Why the Canon Should be Expanded to Include the Insular Cases and the Saga of American Expansionism, 17 CONST. COMMENT. 241 (2000).

This particular curricular gap or skew of course is congruent with the structural bents of mainstream legal education in the United States, which from the time of its formalization was shaped in explicit ways by the social, cultural and political dominance of white, Anglo-American nativist-racism as well as societal sexism. See, e.g., Daria Roithmayr, Deconstructing the Distinction Between Bias and Merit, 85 CAL. L. REV. 1449, 1475-92 (1997) (recounting how the American Bar Association, the bar examination, the Law School Aptitude Test and other “gatekeeping” mechanisms were originated and calculated to be racist, anti-immigrant, sexist and anti-Semitic); William C. Kidder, The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity, 9 TEX. J. WOMEN & L. 167 (2000) (discussing how the LSAT continues to project that history into the present); see also ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s (1983) (providing a comprehensive account of the politics—including the identity politics—that dominated the institutionalization of formal legal education); see generally NICHOLAS LEMANN, THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY (1999) (providing a similar history focused, more generally, on the standardized tests used in various educational settings in the United States).

111 See RUBIN FRANCIS WESTON, RACISM IN U.S. IMPERIALISM (1972) (providing a comprehensive account of U.S. imperialism and white supremacy, and illustrating how the areas targeted by those imperialist ventures now are the sources of today’s
act of institutionalized omission and others like it enables the sanitized history of the status quo spoon fed to students, day in and day out across the country and globe, to keep each succeeding generation socially tranquilized, economically exploited, culturally subjugated and politically subordinated. In its dominant uncritical form, mainstream education teaches every generation to genuflect to, and then how to help maintain rather than challenge, the cultural, economic and social skews inflicted on these lands since 1492.

Awareness and wariness of this power and knowledge is precisely why critical theory is absent or marginal, still, in formal law school curricula from coast to coast, effectively withholding thereby for most law students any structured opportunity to acquire self-liberating knowledge in the general course of a typical legal education. Thus, historically as well as presently, the principal aim and effect of uncritical mainstream legal education is to prevent the possibility of self-decolonization and, instead, to help promote the assimilation and domestication of each new generation in the putative name of progress and prosperity. In contrast, by critical legal education I therefore mean a formal educational experience that aims to provide students with the knowledge and skills to promote social emancipation as well as self-emancipation. At the most basic and provisional level, critical education signifies the active application of critical theory, and in particular of outsider jurisprudence, to the fields of formal knowledge that we teach in law school classrooms or elsewhere. Critical legal education is the pedagogy that teaches law through the lens of LatCrit and OutCrit theorizing—a critical social justice pedagogy representing a fusion of conventional doctrine and LatCrit knowledge together with critical education theory. Like critical pedagogy, critical legal education is aimed at ending the remains of colonial conquest.

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immigrant communities, including Cuba, Puerto Rico, Hispaniola, the Philippines and other areas in and beyond the Americas); see generally SCOTT NEARING & JOSEPH FREEMAN, DOLLAR DIPLOMACY: A STUDY IN AMERICAN IMPERIALISM (1925) (providing a contemporary critical analysis of U.S. expansionism and its socioeconomic imperatives).


114 See id. at 72-74. This mission statement thus claims for critical legal education a grounding and vision similar to the kinds of “critical pedagogy” posited more generally among critical education theorists for educational ventures devoted, as are these and similar efforts, to social justice for the traditionally-subordinated of the world. Critical pedagogy refers to an educational approach rooted in the tradition of
As these notes indicate, the key initial ingredients for establishment of critical legal education therefore are critical educators and critical scholarship: the former, incorporating and using the latter in the classroom, is the first necessary step toward creating the means and conditions for the delivery of a critical education to today’s law students. Thus, the (limited) diversification of the North American legal professorate racially and otherwise during the past two or so decades, and the emergence of critical outsider jurisprudence that these “outsiders” in legal academia have helped generate during that time, have put into place the two key initial conditions for interested law students to learn the skills, knowledge and modes of inquiry that will allow them to develop the critical capacities to reflect, critique and act to transform the broader societal conditions under which they, and we, live.

B. Toward a Critical Legal Education: A Survey of Current Efforts

Work toward a critical education in North America in recent years has spanned several categories of effort. The first might be critical theory. Critical educators perceive their primary function as emancipatory and their primary purpose as commitment to creating the conditions for students to learn the skills, knowledge and modes of inquiry that will allow them to inquire critically about the role that society has played in their self formation. More specifically, critical pedagogy is designed to give students the tools to examine how society has functioned to shape and constrain their aspirations and goals and to prevent them from even dreaming about a life outside the one they presently know. Critical legal education and pedagogy, at their best, provide lifelines of power based on knowledge and principle to marginalized students struggling to become aware of the ways and means through which felt and known oppressions are normalized, materialized, even valorized.

This work suggests various—at least seven—features that help to define such an education, if it is to achieve its bedrock emancipatory aims. The first of these features is the centrality of specific history, so that we may understand the present and its origins—its social construction across the generations. The second is the importance of interdisciplinarity in all categories of study and approaches to knowledge, and in legal education specifically, to help contextualize the law and its social operations. The third feature is the necessity of dialectical method—that is, a give-and-take designed to ensure interactivity, through which knowledge and skill are transmitted and internalized more effectively and organically. Fourth is the indispensability of multidimensional critical analysis to avoid the blind spots of essentialisms and the pitfalls of stereotypes. The fifth feature is recognition of the key and symbiotic relationship twines theory to action, a process through which social activism is sharpened by critical awareness and vice versa, an ongoing process to help ensure solidly grounded theory and practice. Sixth is heightened awareness and understanding of the processes and consequences of dominant forms of globalization to help put a spotlight, a critical spotlight, on the latest iteration of colonial identity politics. And the seventh feature of a critical legal education is a methodical mapping both of contextual particularities and the interlocking patterns that particularities form across multiple borders, so that we ensure both a
described as *individual intervention*. That is, courses which faculty members all over the country create and introduce to the curriculum and sustain as part of the curriculum through their personal commitment to the teaching of that course year after year. The second might be described as *institutional reforms*. A prime contemporary example of this kind of institutional reform is the “critical race concentration” at the UCLA School of Law, which provides a structured two-year curriculum for students interested in the study of race and law in multi-dimensional and critical terms. The third example might be described as *collective insurrections*, by which I mean the collective efforts of scholars and activists from different institutions, identities, disciplines, world regions and time zones who strive to transcend the limitations and the borders of time, space and culture to design and mount collective interventions in the business-as-usual routines that mainstream, conventional, or traditionalist legal education spoon feeds to us on a daily basis. In this last category are two examples mounted by LatCrit and OutCrit scholars from various disciplines, institutions and countries to establish accessible opportunities for students across and beyond the United States: the Critical Global Classroom (CGC), a study-abroad program in law, policy and social justice activism and the LatCrit...
Student Scholar Program (SSP), which provides scholarships and mentoring opportunities for students in law and other disciplines anywhere in the world to conduct and publish research on race and ethnicity. These three kinds of reformatory efforts—whether in the form of individual interventions, institutional reforms or collective insurrections—strive to establish criticality in legal education to help create substantive areas of knowledge and effective conceptual platforms from which students may “make waves” as agents of social and legal transformation. Combined with the production and application of OutCrit scholarship, these three types of interventions into the variegated ways and means of formal legal education help to set the stage for a longer-term capacity to promote progress toward a postsubordination society—and, more to the point, these types of interventions likewise help to preserve our collective capacity to expose and ameliorate, and eventually to undo, the many ravages of backlash kulturkampf.


This program invites students from any discipline in good standing at any accredited institution any place in the world to submit an original, unpublished manuscript related to questions of race, ethnicity and law. These parameters are deliberately flexible to accommodate innovative cross-disciplinary work devoted to race, ethnicity and social justice: students who enroll in seminars or similar classes, where they already are devoting time to the development of substantive papers, are well positioned to participate in this program every year. As another ongoing collective experiment in critical legal education, the Student Scholar Program aims to help students produce the knowledge that helps to explain the present—explain it in historical, contextual and multidimensional terms. For more information on the SSP and other LatCrit projects, please visit the LatCrit website at http://www.latcrit.org.

These two new experiments in collective social justice programs not only strive to institutionalize critical legal education, but they also are designed to work hand in hand: both the CGC and the SSP are designed to operate as lifelines to students at law school campuses nationwide and beyond. Both respond to student accounts, which we oftentimes hear, of intellectual and human isolation experienced by critically-minded students in their so-called home institutions. Both offer programmatic opportunities to study areas of law and approaches to policymaking that otherwise might not be available to today’s socially conscious students in structured, formal settings. Moreover, both the CGC and the SSP are intended to help cultivate critically-minded students who might be interested in pursuing a teaching career in law or other disciplines. Both the CGC and the SSP are designed to work synergistically as lifelines to students, as well as pipelines for them into the legal—or other kinds of—academies. Both are examples of collective insurrections in the name of critical legal education. Along with the never-ending work of individual faculty from coast to coast, these collective experiments seek to establish the makings of critical legal education within the confines of traditional legal institutions. See Valdes, Critical Legal Education, supra note 113, at 89-96.
CONCLUSION

Time and again, the “culture war cases” of the past two decades or so—whether deemed doctrinally in the realm of liberty-privacy, equality and antidiscrimination, voting rights and democracy or other areas of law and policy vital to the well-being of traditionally subordinated groups in the United States—occasion backlash rulings made possible by the court-packing prong of the culture wars. As such, backlash jurisprudence represents the juridical portion of this larger societal reaction to the meager social and political gains secured to “outsiders” by the formal legal advances of the New Deal-Civil Rights eras. Thus, with few exceptions, today’s backlashing judges continue to use every constitutional opportunity to actively and methodically redraw established or evolving lines of law and policy in favor of neocolonial elites, and to retrench New Deal and Civil Rights legislation, constitutional precedent and other sources of formal equality. To accomplish this basic aim, and as the illustrative sketch of cases presented above shows, backlashers resort to substantive, evidentiary and procedural devices to buttress neocolonial hierarchies of privilege and to rebuff minority claims to justice and access. This substantive effect, is not one big coincidence but rather one giant calculation—as the very declaration of formal backlash made clear from the outset; these judicial practices, in short, reflect and reinforce the larger dynamics of backlash kulturkampf that, in turn, help/ed to compose today’s bench for this very purpose.

These doctrinal revisions—and the social legacies they aim to entrench further in the legal and social norms of the nation—is what LatCrits and other OutCrits must confront and combat; it is this repudiation of the Civil Rights and New Deal legacies that LatCrits and allied scholars must work now to repudiate in turn. In this context, and at this urgent historical juncture, this year’s conference theme and symposium provide a welcome and needed contribution to the antisubordination scholarship that remains the bedrock of critical outsider jurisprudence, including LatCrit theory and praxis. But in addition to the ongoing production of this critical counter-knowledge, LatCrits and allied OutCrits must take the work on critical legal education sketched above to the next level: scholarship, while important as an enduring record and tool, is alone insufficient. We must also work individually, collaboratively and creatively to import critical knowledge, including our growing body of scholarship, into today’s education of tomorrow’s leaders. As this year’s conference and symposium underscore, our work as activist
scholars must continue to focus *both* on the production of critical knowledge as well as on the incorporation of social justice pedagogies into contemporary systems of formal education.