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BIO:

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The visual image reproduced for the LatCrit VII poster comes directly out of critical theory, and probably even LatCrit. I call the image "Somewhat Suspended in a Doubly Decontextualized Space." The image is part of a series of paintings about brownness, femaleness, and outsiderness. I call the series [*588] "Latindia," a term coined by Professor Berta Hernandez-Truyol, who used it in a very productive and yet difficult LatCrit session we had on the indigenous aspects of our Latina identities. Professor Hernandez's points were that none of us are pure products, and indeed that the very notion of blood purity is the bedrock of any racist society. It seemed an important and obvious point, until we went around the room. I heard that some conferees did indeed regard themselves as pure products, others knew they were not pure products, but nevertheless referred to themselves that way in an effort to atone for a painful historic past, or to be relieved from having to reconcile a painful historic past with what seems an irreconcilable present. Others wanted to begin piecing the various strands of the past together, even if those strands didn't respond to a linear narrative or otherwise make sense. But what stayed with me was the narrative vehemence that those who claim purity (whatever its manifestation) can assume in relation to those who can't (or more accurately, won't) claim such a heritage. To be pure in America, in a sense is part of being accepted. But pure what? None of us can say. I began to wonder just why it is that purity - ambiguous as the concept is - seems to loom so large in the American psyche.

[br n:fig1,l(.10,.10)[mg f:'ore30101.eps',w26.,d39.]

"Somewhat Suspended in a Doubly Decontextualized Space"

The image reproduced here directly counters the idea of blood, or even cultural, purity. In my opinion, blood purity is a racist fiction, and cultural purity is a myth, especially in a world driven by media and computer technology. The woman in the image is brown, but she is not pure. She is female, but she is not a woman in the traditional sense because she is androgynously ambiguous, except when she is masked. If I had to sum it up (and that is exactly what the LatCrit editors are asking me to do), I'd say that the image is a postmodern portrait of a single person. Not a disturbed person, mind you, but a person who lives quite responsibly in a culture that raises aggressive linearity to the status of a stereotypical ideal. The dressed up figure hiding behind the leaf mask in the center of the canvas wears the mask so as to function in the world. The naked figure is the person unmasked, pensive, concerned, split with indecision, in a word, human. The face at the far right is partial, distorted, uncertain, ambiguous, even twisted; not only is the viewer unable to define her, she herself rejects definition. She will not
be placed in someone else's category, even if that other person insists. Or maybe it is the opposite, maybe she is planted (limited) in societal boxes and categories. I can't say. But I know that she claims her status as an image of a person, even if she doesn't look like what the viewer would expect the image of a person to be. The blue body that appears at first as negative space is ethereal, strong, decontextualized; this body, like all of the others, exceeds the frame of the painting, suggesting that there is more outside of what we know or expect, more than we are aware of, or otherwise allow.

In a way, the painting is about personal and professional indecision, unknowingness in the face of personal challenge. It is sad, to some degree, but also defiant. Frankly, not all the aspects of the woman in this painting are concerned with the currently approved labels for a body that is brown, female, and ambiguous, as she understands that the "approved" labels are often void of her imagic presence. Similarly, she is not at all concerned with notions of blood purity, or cultural purity, or family purity, or any of society's other hallowed myths. Indeed she is discarding the most stubborn cultural idea that a person is unchangeable, monolithic over time, and otherwise doomed to singularity. This woman, in her aspects, refuses stereotype. She - in all her parts - demands her own imagic presence. She rejects, possibly transcends, the familiar images of brown women we as viewers know. In not being what we usually see (and thus expect), she thus encourages the viewer to accept the particularity of her brownness, her femininity, her androgynity, her kaleidoscopic "personality," in essence, her parts, her differences.

Art links powerfully with symbol, often challenging the standards, rules, rubrics, and braces that are so often mistaken as a natural, unchangeable part of life. Art can upset the vision of our privilege, or it can empower the vision of our powerlessness in the face of privilege. We are told this about famous artists' work so that now we too can see (understand) their genius. Van Gogh upset the vision of what at the time constituted the proper way to depict a landscape. Rothko challenged the idea that art needs a defined image in order to be about something. Warhol intentionally merged art, commodity, and cliche with his view that art, even high art, need not be unique in the traditional sense. It could be massed produced, like his Brillo boxes, or inexact and cheap, like his silkscreens, or repetitive, maybe even shallow, like the multiple Marilyns who at once look empty and deeply, painfully full in both color and black and white. Indeed Warhol was known for saying that his art had no hidden meaning, it was no more than paint on a canvas.

My point is that images and symbols can be powerful ways of challenging deeply held beliefs that others take as given. But images are also used unconsciously, inherited from our American past and employed to teach the very ideas that divide us. The symbol of blood purity, even though muted, is still a powerful one. It is the basis of historic wrongs, as well as of current wrongs, in the sense that it purports to establish a clear line where in biology, or feeling, or any other human aspect there is no such division. Similarly the idea of gender purity gives us the traditional (ideal) man or woman, bodies bent into stereotypes in order to live out society's approved gender roles. So too with the modern portrait, with its emphasis on the singular aspect of the individual, and particularly of what the individual looks like. Looks, of course, at once being the defining force in a life and the least relevant to our sense of what is ultimately important. Think of augmented breasts, for example. Why are they so popular when we all know (or at least are told) that the size of breasts is irrelevant to one's worthiness to be loved?

I wish I could take full credit for somewhat suspending myself in a doubly decontextualized space, but the truth is that the title of this work of art was given to me by a peer reviewer who was reading an essay I’d written on the Native American as a symbol in property law. The peer review process involved two peer reviewers, one from law and one from an unknown (to me) discipline, as the reviews were anonymous. The law reviewer's comments were helpful and aggressively linear. The other reviewer's comments were equally helpful. However, the comments signaled to me that he or she grasped what I was communicating about the use of symbols in law. The reviewer noted that certain passages in the essay, because they were invoking multiple levels of interpretive ambiguity, were intentionally decontextualized from historical or social frames. In addition, the reviewer responded to my idea about how symbols are powerful precisely because they are decontextualizable, if not decontextualized. Symbols are a timeless language. Hence "somewhat suspended in a doubly decontextualized space." The comments puzzled me at first, but they sounded poetic to my ear, and so I pondered them. Many in our profession would deride this language as jargon, but when I thought about the phrase, as one would ponder a work of art, I realized these words were an academic gem - a seemingly unintelligible sentence making quite a bit of sense about life in the postmodern era.

We may not all live in the postmodern era. It's possible the privileged among us still live securely entrenched in a modernist ethic. Their world works. Their lives and economic cushions are secure. But the woman in
my image, does not live in a modern world. She lives in a postmodern one. She has deconstructed, in a sense, the idea of the - or a - singular personality, as a woman of color who teaches in an American law school has to do on a daily basis. She has recognized her inner Tibet and her inner America, as the Dali Lama encourages us to do. She is aware of her soft spots and her hard edges, her masked performances and her relapses into a healing quiet. She knows when she is rejected (or accepted), and why. This woman is a biological mixture, a social mixture, a gender mixture--a being of incredible mixture, and she knows it, she wants it, and she lives it despite the personal and social cost to her.

Sometimes when I am asked what my work means, I cannot say. This is particularly true for visual images, and (alas) sometimes for written work. But in my sensibility, the art I've lived with - or been able to live with - doesn't shout. It speaks in whispers. I notice - it allows me to notice - changes here, colors there. It allows me to observe it and draw my own conclusions over time. It serves as a canvas for my own psyche to project upon as a way of continuing and deepening the relationship I have with myself. In that way, I believe, the images one surrounds oneself with, precisely because they do sink deep, play a part in forming the person. This includes art images, but it also includes media images, and more relevant to this discussion, the legal images we surround ourselves with. Images, I believe, are important to the study of law as a culture.

Art - visual art - presents symbols for our "reading." We "read" a painting the same way we "read" books or poems. If this is so - and it certainly is for me - then my painting illustrates Native American Studies Professor Gerald Vizenor's idea of survivance. Survivance is different than mere survival. Survivance is something more than mere survival. With survivance, we - like the woman in the painting - imagine ourselves for our own purposes, even if others don't understand. Survival, on the other hand, means we live on, breathing, eating, going forward in life, letting others imagine us for their purposes and within the confines of their limited knowledge about what it is that makes us "different" or "similar." Survivance is an artist's idea.

Vizenor says that survivance refers to our ability to imagine ourselves. It takes strength, after all. Do we, can we, imagine ourselves? Or must we live by others' imaginings? Individually, culturally, collectively? How indeed do we imagine ourselves into the present, into the culture, into law, into justice, into our bodies, our souls, our sexualities, or even into our God(s)? As we are law professors when we gather together for LatCrit, where in the law is our survivance? How are we (and our students) denied entrance into the imagic presence that law represents in this country? When and why are we allowed in? Are we imagined flatly? Wrongly? Are we at once projected and simultaneously cut out, like the "Indians" in the old John Wayne movies? Are we distorted into stereotypes created for us, or worse, assumed by us? Imagining ourselves richly is one of LatCrit's projects. The project is about making it possible for all of us to gather, to talk, to engage in the process of imaging ourselves and our work fully, creatively and powerfully as Latina and Latino scholars.

FOOTNOTE-1:

These are revolutionary times. All over the globe men are revolting against old systems of exploitation and oppression, and out of the wounds of a frail world, new systems of justice and equality are being born. The shirtless and barefoot people of the land are rising up as never before. The people who sat in darkness have seen a great light. We in the West must support these revolutions. It is a sad fact that because of comfort, complacency, a morbid fear of communism, and our proneness to adjust to injustice, the Western nations that initiated so much of the revolutionary spirit of the modern world have now become the arch anti-revolutionaries... Our only hope today lies in our ability to recapture the revolutionary spirit and go out into a sometimes hostile world declaring eternal hostility to poverty, racism, and militarism...

Philip Vera Cruz stated that a movement is an idea, a philosophy. Leadership "is only incidental to the movement. The movement should be the most important thing... The movement must go beyond its leaders. It must be something that is continuous, with goals and ideals that the leadership can then build upon."n3

LatCrit VII, held May 2-5, 2002, in Portland, Oregon, adopted the theme Coalitional Theory and Praxis: Social Justice Movements and LatCrit Community.n4 The conference's opening roundtable set an activist tone by centering within LatCrit discourse several progressive movements for sociopolitical transformation existing in academia and beyond. This opening roundtable, and the conference overall, were designed:

To deepen our collective encounter with the project of imagining what it means to aspire to, and in fact to create, a coherent sociopolitical movement of scholars and activists within the legal academy... [and to ask] what practical lessons can LatCrit learn from successes and failures other sociopolitical movements have experienced in their efforts to transform legally mediated structures of power?n5

From the discussions at LatCrit VII emerged six symposia clusters, some housed in this volume of the
Centering Latina/o Social Movements in LatCrit

With a historical experience rooted in such academic discourses as Critical Legal Studies, Feminist Legal Theory, Critical Race Theory, Critical Race Feminism, and Queer Legal Theory, LatCrit emerged in the mid 1990s as a movement within legal academia. Early on, the LatCrit movement aimed to disseminate its scholarship outside the legal academy “to agents of social and legal transformation,” as well as to adopt a commitment toward "praxis" not always rewarded in traditional academic circles. Still, the primary mission, and the success, of LatCrit, has been the opening of an academic discourse on law and policy regarding Latinas/os, who previously were near invisible in legal academia; indeed, even in most scholarly discussions of race. To date, the LatCrit movement has begun producing a substantive vision in areas of racial and religious identity, as well as local, national, and international labor relations, language policy, Latinas/os in the academy, coalition-building, criminal justice, cultural intersections, and other subjects.

By now, it is apparent that even within the confines of academia, the LatCrit movement has broken new ground in its commitment to articulate an anti-subordination and anti-essentialist future for Latinas/os. However, academic movements have serious limitations, particularly those seeking sociopolitical change in hierarchical power structures. These limits include the lack of institutional rewards (including outright hostility manifested in tenure denials) for nontraditional scholarship and for praxis that seeks to effect community change, as well as the shortcomings of legal and lawyer-based strategies for community empowerment, mass mobilization, and social transformation. To LatCrit's collective credit, scholars such as Kevin Johnson and others have recognized these limits.

In seeking to spark and to influence social change, there are important lessons that LatCrit scholars may learn from the successes and failures of past and current sociopolitical movements originating in Latina/o communities. Further, LatCrit scholars must keep an eye toward the progress of these community-based movements to help ensure that LatCrit projects aid their causes and are accessible to these movements. Moreover, at a time when most progressive social agendas seem stymied, LatCrit discourse might contribute to the articulation of a new path toward an anti-subordination future.

Looking back, one could consider the 1960s and the scope of social upheavals rippling across the globe as both a prelude and backdrop to Latina/o movements for social change within the United States. The 1960s saw the rise and rearticulation of the Civil Rights movement, the Antiwar movement, and Feminism as interrelated mass social movements. Additionally, revolutionary iterations such as the Black Panthers, the Black Power movement, and the Weathermen faction of the SDS (Students for a Democratic Society) received both heightened media and police attention. However, one must be careful to critically interrogate those histories as much for what they omit and what communities are marginalized as for what issues they foreground.

Of the many past and current movements for social change grounded in Latina/o communities, perhaps the two most substantial have been the Chicano movement of the 1960s and the farm worker/labor movement of the 1960s and 1970s. Others of note include the ongoing movement for Puerto Rican independence, the Antiwar movement, and the Weathermen faction of the SDS (Students for a Democratic Society). Of course, our study is mindful that the dominant race-based movement for social change in the last century has been the 1960s Civil Rights movement led by African Americans, but consideration of Latina/o movements may help deepen and expand our understandings of that very important ongoing struggle.

A. The Tools of Latina/o Revolutions

Our comparison of LatCrit with Latina/o-community-based movements for social change begins by examining the missions and tenets of these
movements. The farm worker movement initiated by Cesar Chavez and Dolores Huerta sought to "change the conditions of human life" for farm workers, who were predominantly Latina/o. As Chavez once put it, "all my life, I have been driven by one dream, one goal, one vision: to overthrow a farm labor system in this nation which treats farmworkers as if they were not important human beings ... [but as] beasts of burden to be used and discarded." This labor movement made progress on several fronts, working to overcome paltry wages, miserable working and housing conditions, sexual harassment of women workers, and improper use of pesticides as perhaps the first large-scale environmental effort on behalf of people of color. Mass mobilization, the hallmark of any social movement, was accomplished under the rallying motto of "Viva La Causa!" (Long Live the Cause), and the nationalist cry of "Viva La Raza!" (Long Live the [Mexican] People).

The Chicano movement's mission was embodied in such documents as El Plan del Barrio, with its call for bilingual education and economic development in the barrios, and El Plan Espiritual de Aztlan (The Spiritual Plan of Aztlan), which sought economic self-determination, bilingual education, restitution for past exploitation, and creation of an independent political party. Later, the Chicano movement used repressive police tactics and brutality as a galvanizing force, as well as anti-war sentiments in the Chicana/o community directed at the Vietnam War.

The Puerto Rican independence movement seeks to liberate the island of Puerto Rico from United States control. Described more fully in the LatCrit symposium cluster on Puerto Rico, the struggle to oust the U.S. military presence in Vieques is but one manifestation of the larger ongoing effort toward self-determination and the end of centuries of colonial rule.

LatCrit is a decidedly scholarly movement composed primarily of law professors and activist lawyers. By contrast, the leaders of these prominent Latina/o movements, such as Cesar Chavez, Dolores Huerta, Philip Vera Cruz and Rodolfo "Corky" Gonzales, tended to be grassroots organizers from the working class, not lawyers or academics. Still, lawyers and academics have played some role in grassroots Latina/o struggles. Although the farm worker movement sought to influence labor policy through mass mobilization and economic pressure, litigation was used on occasion, such as the 1969 defamation lawsuit filed by Chavez against members of the Desert Grape Growers League, and the lawsuit brought by the California Rural Legal Assistance organization that succeeded in outlawing the short-handled hoe, a farm implement that caused undue spine injury.

While the Chicano movement relied primarily on nationalist mobilization through school walkouts and anti-war protest rallies, it employed innovative legal strategies to defend Latinas/os charged with criminal offenses in the struggle. Funded in part by donations to the Chicano Legal Defense Committee, legendary Chicano activist lawyer Oscar "Zeta" Acosta drew his defensive theories from guarantees of free speech and equal protection to validate picketing and to attack institutional racism in selecting grand jurors, while conducting ongoing dialogue in Chicana/o publications to educate his gente (people) on his strategies of defense.

Lawyers and intellectuals propelled the independence movement in Puerto Rico from its earliest moments. For example, in the 19th century, Jose de Diego, one of the intellectual precursors of this movement, was a lawyer. Today, the independence party officials tend to be lawyers and former law professors. Litigation has also played a role in this struggle, from challenges to the Little Smith Act to lawsuits against the United States stemming from environmental degradation in Vieques.

Particularly in the 1960s, several Latina/o organizations formed to deploy litigation and legal maneuvers in aid of larger societal struggles. For example, the Mexican American Legal Defense and Educational Fund (MALDEF), formed in 1968, participated in the legal defense of affirmative action and the right of Mexican children of undocumented immigrants to public schooling, as well as challenged California's Proposition 187 and redistricting injurious to Latina/o political representation. In the late 1960s, to bolster its campaign against the derogatory media image of the Frito Bandito, the National Mexican-American Anti-Defamation Committee threatened to file a $610 million defamation lawsuit against the Frito-Lay Corporation, its advertising agency, and the television networks CBS and ABC on behalf of all Mexican Americans. Further, that Committee invoked the FCC's then-existing fairness doctrine as an administrative strategy of counterspeech against the Bandito image.

The Puerto Rican Legal Defense Fund similarly has employed litigation against racial defamation and other cancers in the Puerto Rican experience. Over the years, that Fund has litigated in aid of school desegregation efforts, and against...
discrimination in housing, n65 employment, n66 and election laws and procedures. n67 Further, the Fund participated in litigation challenging Department of Defense regulations barring homosexuals from the Navy and Naval Academy. n68

As the primary scholarly group of law professors addressing Latina/o concerns, the LatCrit movement is well situated to aid these legal efforts. n69 Yet, LatCrit's connections to these groups thus far have been disappointing. n70 Among the possibilities for more active and sustained involvement are to create sabbatical internships for LatCrit scholars in these Latina/o litigation and policy organizations, and to aid ongoing litigation by participating in amici brief writing and offering expert witness testimony. LatCrit scholars might even help to recruit progressive law students into these organizations by creating a pipeline to the legal academy from these organizations. Finally, LatCrit scholars and these groups might keep an eye toward each other's work, so that LatCrit can develop scholarship in aid of active litigation, and that these groups might shape litigation agendas based on doctrinal [*609] prerogatives identified by LatCrit scholars. n71

As a scholarly movement, LatCrit has tended to espouse nonviolent solutions to subordinating relationships, such as advocating for, or opposing, legislation, and suggesting curricular and other changes in legal education. n72 Nonviolence tends to be the norm for academic movements composed of scholars within privileged institutions, particularly law professors in legal institutions whose survival depends on respect for the rule of law.

However, this begs the question: To what degree is the "rule of law" entitled to respect? To the extent that the "rule of law" systematically countenances, indeed ratifies and endorses, institutional practices that eviscerate the interests of individuals and communities of color through the criminal justice system, or embraces a tortured decision like Bush v. Gore, n73 one might begin to question the near-reflexive predisposition to nonviolence. Nonetheless, if only in the interest of instrumental self-protection, in a society where might makes right, nonviolence may not only be desirable but necessary.

Of the various Latina/o movements, the farm labor movement most fervently articulated a principle of nonviolence. Influenced by Gandhi and Martin Luther King, Jr., Cesar Chavez employed nonviolent strategies of boycotts, marches, and personal disciplines such as fasts and worship. n74 By contrast, the Chicano [*610] movement looked to rhetoric of the Black Panthers in adopting a right to self-defense against oppressive Anglos and Anglo institutions; n75 as did the youthful Brown Berets group, which invoked the philosophy of Malcolm X in calling on use of "any and all means necessary ... to resolve the frustrations of our people." n76 Yet, overall, the Chicano Movement proved predominantly nonviolent in execution. n77 A few fringe elements of this movement did practice violence, most notably the Chicano Liberation Front, which took credit for bombings of government targets in Los Angeles in 1971. n78

Two Latina/o movements were associated with violence - the 1960s land grant movement and the Puerto Rican independence struggle. Led by Reies Lopez Tijerina, the New Mexico land grant movement sought to reclaim national forest land from the federal government by aggressive tactics. In one 1966 incident, Lopez Tijerina and other activists, while occupying forest land, took two law enforcement officers hostage and put them on "trial" for trespassing before releasing them. Later, in 1967, Lopez Tijerina and others attempted to make an armed citizen's arrest of a district attorney, leaving a jailer and police officer [*611] wounded in the ensuing gun battle. n79

The Puerto Rican independence movement sought to utilize violence to achieve its objectives, most dramatically the 1950 assassination attempt against President Truman and the 1954 shooting of five Congressmen within the U.S. House of Representatives by four Puerto Rican nationalists. n80 In the 1970s, a Puerto Rican nationalist group, FALN, n81 claimed credit for several bombings in Chicago, New York, and Puerto Rico, including one bombing that killed four and injured over fifty in a historic New York tavern. n82

Unfortunately, while the public may regard Latinas/os as violent and most Latina/o movements as militant, what went far less publicized was government (and private) n83 action that surveiled, infiltrated, and repressed Latinas/os involved in these struggles. n84 For example, the FBI surveilled the Brown Berets and Puerto Rican nationalists. n85 The Los Angeles Police Department targeted the Brown Berets, n86 and police breaking up an East Los Angeles Chicana/o anti-war rally in 1970 gassed the crowd and killed bystander journalist Ruben Salazar. n87 Police infiltrated the Puerto Rican Young Lords political party group and prosecuted its leaders, [*612] allegedly in rigged trials. n88 Within Puerto Rico, too, government efforts to sabotage the nationalist movement were sustained and bloody. n89

B. Membership of Latina/o Movements
I believe that there will ultimately be a clash between the oppressed and those who do the oppressing. I believe that there will be a clash between those who want freedom, justice and equality for everyone and those who want to continue the system of exploitation. I believe that there will be that kind of clash, but I don't think it will be based on the color of the skin...

From its inception, the LatCrit movement has benefitted from diverse participation in its community-building project unbounded by race, ethnicity, sexual orientation, gender, religion, or age. At LatCrit VII, for example, conference speakers included Asian Americans, African Americans, Anglos, Native American men, a Jewish man, a Palestinian man, and two dozen Latinas/os from diverse backgrounds. Inclusion in the LatCrit community has never depended on skin color, language, sexual orientation, religion, or such characteristics. Rather, LatCrit association has stemmed from a willingness to confront "the ways in which the Law and its structures, processes and discourses affect people of color, especially the Latina/o communities." LatCrit scholarship has profited from LatCrit's diverse solidarity among RaceCrits, QueerCrits, FemCrits, and those participating in other progressive academic movements. This diversity has spurred LatCrit scholars to develop blueprints for coalitional-based social change in such areas as political representation, language policy, and racial profiling.

[*613] The 1960s Civil Rights movement ultimately moved beyond African Americans to embrace a class-based coalition. In 1972, George Jackson declared that "after revolution has failed, all questions must center on how a new revolutionary consciousness can be mobilized around the new set of class antagonisms that have been created by the authoritarian reign of terror. At which level of social, political and economic life should we begin our new attack?"

Similarly, the farm labor movement led by Cesar Chavez and Dolores Huerta was a class-based struggle that aimed to attract membership and support beyond the Latina/o community. Chavez once observed:

If we wanted civil rights for us, then we certainly had to respect the rights of blacks, Jews, and other minorities... .

That's why today we oppose some of this La Raza business [in the Chicano Movement] so much. When La Raza means or implies racism, we don't support it. But if it means our struggle, our dignity, or our cultural roots, then we're for it... . We can't be against racism on the one hand and for it on the other.

... [At the time of my earlier involvement with the Community Service Organization,] the constitution of most [barrio-based] groups said members had to be Mexican, but our constitution had no color, race, religion or any other restrictions, and we stuck to it.

As Chavez lamented, the Chicano movement was marked by a nationalist orientation toward self-determination and anti-assimilationism that was hostile toward Anglos. The movement's manifesto, El Plan Espiritual de Aztlan, declared:

Brotherhood unites us, and love for our brothers makes us a people whose time has come and who struggles against the [*614] foreigner "gabacho" [Anglo] who exploits our riches and destroys our culture... . We are a bronze people with a bronze culture. Before the world, before all of North America, before all our brothers in the bronze continent, we are a nation, we are a union of free pueblos, we are Aztlan... .

Nationalism as the key of organization transcends all religious, political, class, and economic factions or boundaries. Nationalism is the common denominator that all members of La Raza can agree upon.

In the late 1960s, other groups and struggles related to the Chicano movement shared its limiting ideology of nationalism, a direction that contributed to the Chicano movement's eventual stagnation. Despite the Chicano movement's nationalist bent, the history of struggle for dignity in Latina/o and other communities of color is marked by minority coalition on issues as diverse as school desegregation litigation to, most recently, coalition against derogatory or absent portrayals of people of color by network television and other media.

Addressing concerns expressed over marginalization of female voice(s) at the LatCrit I conference, the organizers of subsequent LatCrit conferences have sought to honor inclusive Latina, female, and feminist perspectives. Subsequent conferences, for example, fostered gender-based analysis of Latina/o issues. In Latina/o movements, Latinas often were subordinated, as they have been in the Latina/o culture and in the dominant Anglo model. Foreshadowing the early LatCrit conference "blow-up," at a 1969 Chicano movement conference in Denver, Latinas held an impromptu workshop, producing a statement condemning chauvinism within the movement.
Women were denied leadership roles and were asked to perform only the most traditional stereotypic roles - cleaning up, making coffee, executing the orders men gave, and servicing their needs. Women who did manage to assume leadership positions were ridiculed as unfeminine, sexually perverse, promiscuous, and all too often, taunted as lesbians.\textsuperscript{104}

One Chicano leader had even decried feminism among activists as a government-backed initiative to destroy the Chicano and Black liberation movements.\textsuperscript{105} These marginalizations were replicated in the youthful Chicana/o organization Brown Berets\textsuperscript{106} and the early history of the Puerto Rican Young Lords political party.\textsuperscript{107} Although the farm worker movement was \textsuperscript{[616]} buoyed by Dolores Huerta's position as a leader of the United Farmworkers organization, Huerta was criticized then as neglectful of her family, and marginalized later in the historical record and memory among Anglos of the farm labor movement, which continues today under Huerta's guidance.

The LatCrit movement also seeks to include the youthful voices of students, thus far law and graduate students, in its scholarly practice. Almost every conference has included student speakers; most recently, over a dozen law students from Berkeley attended LatCrit VII, one speaking at a concurrent panel, others informally to the conference during meals, and one publishing an article in the LatCrit VII symposium.\textsuperscript{108} Boalt's participation in the conference also led to the inclusion of part of the LatCrit VII symposium in the La Raza Law Journal. Recently, Lisa Iglesias and Frank Valdes reviewed the history of past inclusion of students within LatCrit activities, and the exciting new opportunities being developed for law students interested in aiding the LatCrit movement.\textsuperscript{109}

Latina/o movements reached out to youth as well, not to law students, but to college students, nonstudents, and high school youth. The latter were mobilized as part of the 1968 Chicana/o school "blowouts" in which thousands of Chicana/o students walked out of Los Angeles high schools to protest educational conditions.\textsuperscript{110} Students also played key roles in supporting Chicana/o anti-war rallies.\textsuperscript{111} Youthful Latina/o organizations formed during the 1960s included the still active Chicana/o student group MEChA (Movimiento Estudiantil Chicano de Aztlán), the Brown Berets,\textsuperscript{112} and the Puerto Rican Young Lords political party.\textsuperscript{113} The farm worker movement, with its class and political-based identity, embraced student activists regardless of ethnicity, particularly college students from Berkeley.\textsuperscript{114} The LatCrit movement needs to develop inroads to educate and to mobilize undergraduate and high school students,\textsuperscript{115} and to steer students from subordinated communities toward legal education. However, such students also need support once in law school in order to resist powerful norms pushing for co-optation and political demobilization.\textsuperscript{116}

II

Seekin' the Cause in the Post-Civil Rights Era

Revolution

Where did it go?
Can't say that I know
Those times of revolution
Of burnin', burnin', burnin'
All so cool and gone
What was, just was
We tried, my brother
To hold on to our fate
Or was it late for revolution?
Too tired, too tired, sister
To hold my fist so high
Now that it's gone
Too tired brother, sister
To hold my fist so high
Now that it's gone
Gone away
Where did it go?
Can we say we know
Those times of revolution
Our time of revolution\textsuperscript{117}

\textsuperscript{[618]} Of course, the revolution has failed. Fascism has temporarily succeeded under the guise of reform. The only way we can destroy it is to refuse to compromise with the enemy state and its ruling class. Compromises were made in the thirties, the forties, the fifties. The old vanguard parties made gross strategic and tactical errors. At the existential moment, the last revelation about oneself, not many of the old vanguard choose to risk their whole futures, their lives, in order
to alter the conditions that Huey P. Newton describes as "destructive of life."n118

Although some commentators contend the Latina/o sociopolitical movements addressed above have evolved and remain active,n119 no doubt they have long lost their heyday mobilizing momentum and have slipped from the public’s consciousness. Several factors played a role in dampening the mobilization of these groups in the late 1960s and early 1970s. Among them was the conservative political backlash against the farm worker movement after the assassination of presidential candidate Robert Kennedy in 1968 and the subsequent election of Richard Nixon, who opposed workers' interests. Nixon also successfully implemented the Republican's "Southern Strategy" whose racial repercussions resound today. Using race as a wedge issue, Nixon managed to shift (for the foreseeable future) the votes of the southern states into the republican column. n120 Also playing a role was government repression and sabotage of these social movements.n121 During the 1980s, the Reagan administration and attendant conservative ideology emphasizing individual merit [*619] and supply side economics did not bode well for Latinas/os in general and for Latina/o labor organizing in particular. Furthermore, Reagan's appointees to the federal bench, including the Supreme Court, consolidated the coalescing conservative judicial majority in the federal courts. Internal forces also shatted these Latina/o movements. In the Chicano movement, these forces included the dominance of individual egos, ideological splits, and the lack of a national structure and explicit, understandable ideology.n122

More fundamentally, these movements were bounded by what Lisa Iglesias has called their exclusionary visions of community - the labor movement's class-based essentialism and the Chicano movement's race-based essentialism.n123 The Puerto Rican independence movement shares this nationalist agenda that hampers cross-national solidarity. By contrast, the LatCrit scholarly movement has sought a political identity n124 that aims to mobilize and build community around those willing to address Latina/o issues in imagining a post-subordination future. Still, LatCrit faces its own external and internal perils of survival and growth that sometimes mirror those plaguing the larger Latina/o social movements. Among these are the "star" system in academia emphasizing individual careerism over community-building, n125 backlash from conservative forces in academia, n126 and the potential for schisms along such lines as gender, class, national origin, race, and language. n127

[*620] The growth of LatCrit as an academic movement in the post-civil rights era belies the current stagnation of social movements within the Latina/o community that lack national leaders and national mobilizing structures. Because the vision of LatCrit scholars extends beyond academia to anti-subordination transformation locally, nationally, and internationally, the LatCrit movement must continue to aspire toward developing scholarship that social movements can draw upon, and toward conducting praxisn128 that connects to and helps mobilize support for these groups. In determining the academic and praxis pathway toward mass mobilization for social change in Latina/o communities, LatCrit scholars must be mindful of the likelihood that successful strategies will entail coalition among subordinated groups. Further, LatCrit scholars must remain apprised of mobilizing forces in these other groups that may well resonate for Latinas/os.n129 Among the many substantive areas where LatCrit might contribute a scholarly framework toward mobilization and an engagement of praxis are resistance to U.S. military intervention abroad, promoting community policing, examining labor and immigration policies critically, advocating the continuance of affirmative action programs in higher education and employment, n130 leading K-12 funding reform, n131 and aiding political [*621] participation.n132 We examine each briefly below.

The Chicano movement, and offshoots such as the Brown Berets, embraced an anti-war ideology directed at the Vietnam War. This sentiment stemmed from imperatives of nationalism and cultural survival (given the disproportionate casualties of color in the war) and from concerns over U.S. soldiers of color killing foreigners of color.n133 With the withdrawal of U.S. troops from Vietnam, this anti-war impetus ended. Today, the war on terrorism raises the same concerns of a disproportionate impact on U.S. soldiers of color, and on U.S. and international communities of color who represent the enemy. The amorphous war on terrorism holds the promise of coalition among Latinas/os, Asian Americans, Arab Americans, and others bearing the brunt of backlash. Thus, LatCrit initiatives of critical scholarship and praxis directed toward abuses in the war on terrorism are worthwhile. n134

LatCrit scholars have begun to examine police-community relations, such as racial profiling,n135 repressive police tactics, n136 and [*622] the war on drugs.n137 The interrogation of urban themes in
upcoming LatCrit VIII will present a further opportunity for continued examination of community policing practices, particularly the impact of September 11 on racial profiling and other detrimental police practices, and more generally in casting police and law enforcement authorities as heroes and those who criticize them as anti-American. Inclusion of police-community relations also harbors potential for coalescing Black/Brown interests given their disproportionate prison populations.

Labor has been a focus of LatCrit scholars, most recently in this LatCrit symposium.n138 The LatCrit movement's connection to labor causes was particularly evident when UFW co-founder Dolores Huerta delivered a keynote address at LatCrit V. That conference theme of class and economic inequality brought home the reality that Latina/o interests lie largely with those of the working class. Despite the sustained scholarly focus of LatCrit on labor, class, and immigration policy, the LatCrit movement suffers from an absence of input from the working class. Touring the side streets of San Antonio by bus does not constitute input from the working class. Even hearing from activists as we have done at some conferences is not the same as developing a sustained process for input from field and factory workers who in some areas are predominantly Latina/o. The LatCrit movement needs to embrace an institutional means of connecting directly with these workers, so that their causes will inform our scholarship and spur our praxis, helping to position LatCrit scholars at the crest of future galvanizing forces in labor, rather than as mere scribes of history. A challenge for LatCrit scholars [*623] is to work to meaningfully bridge the distance between the relatively bourgeois lives that law professors (LatCrit and other) lead and the economically marginal lives that many Latinas/os and other communities of color find themselves enmeshed in.

Being a scholarly movement, LatCrit has addressed education issues from the outset, and in this symposium.n139 Still, the LatCrit movement has emphasized higher education, especially legal education, in its discussions of curriculum, affirmative action, tenure, and lack of institutional support, and in its praxis by joining the 1998 Society of American Law Teachers (SALT) Communities Affirming Real Equality (C.A.R.E.) march in San Francisco. To serve Latinas/os, and Blacks, whose populations are both disproportionately youthful, LatCrit's analysis must encompass issues of elementary, secondary, and preschooing. Both the Chicano movement in its "blowouts" and the Young Lords in their demand for bilingual education in New York City schools provide examples from Latina/o movements of the salience of K-12 education in the Latina/o community. At LatCrit VIII, in its urban-themed setting, and beyond, LatCrit scholars should attend to the crisis in schooling that encompasses the eradication of bilingual education, curriculum that ignores or misrepresents Latinas/os and other communities of color, funding inadequacies, and other shortcomings.

Finally, aiding the political participation of subordinated groups in a democratic society provides a basis for coalition among these groups.n140 Yet, until this year's symposium, n141 political [*624] representation of Latinas/os and other subordinated groups has not received sufficient attention within the LatCrit movement. The history of Latina/o movements and struggles evidences an attention towards securing a political voice, even to the length of forming a separate political party, La Raza Unida (the United People), which was briefly active in the late 1960s and early 1970s in several states, particularly in California, Colorado, and Texas state and local politics.n142 LatCrit scholars must forge connections with Latina/o politicians and those from other subordinated groups. n143 At the same time that globalization, the war on terrorism, and other events and circumstances pull LatCrit's gaze internationally, politics provide a counter influence that reminds LatCrit scholars of the equally salient notion that movements often start small, and in one's own backyard.

III

Opening Cluster: Social Justice Movements and LatCrit Community

 Having centered current and past Latina/o social movements within LatCrit, we turn in conclusion to the opening cluster of articles in this LatCrit VII symposium. These five articles address broader ongoing socio-political movements such as anti-globalization protest and the lesbian/gay rights movement. Here, we comment briefly on their lessons for the evolution of the LatCrit movement.n144

Evident in the opening cluster articles are the diverse backgrounds of the authors and the expansive themes they engage under the LatCrit umbrella. The first article, On Making Anti-Essentialist Arguments in Court,n145 is written by Suzanne [*625] Goldberg, a former staff attorney with Lambda Legal Defense and Education Fund, and now a professor at Rutgers-Newark Law School. Goldberg's article confronts the risks of making anti-essentialist arguments to courts in their adjudication of anti-discrimination claims by multidimensional plaintiffs, particularly in lesbian and gay rights litigation. Ward Churchill contributes the second cluster article. Churchill, a Keetoowah Band
Cochran and Professor of Ethnic Studies at the University of Colorado at Boulder, is one of the country's foremost experts on indigenous peoples and their struggles in the Americas. In his cluster article, The Law Stood Squarely on Its Head: U.S. Legal Doctrine, Indigenous Self-Determination and the Question of World Order,n146 Churchill posits that the decolonization of Native North America is a crucial component of transforming the unjust global dictatorship of the United States over world politics and economies. Ibrahim Gassama, our colleague at the University of Oregon School of Law and former counsel with TransAfrica, contributes Confronting Globalization: Lessons from the Banana Wars and the Seattle Protests. n147 His piece explores the opportunities and challenges in building an international movement against economic globalization. Next is Peggy Maisel's essay, Lessons From the World Conference Against Racism: South Africa as a Case Study. n148 Maisel, a professor at the University of Natal School of Law in Durban, South Africa, looks to South Africa's experience to illustrate the difficulties faced by former colonizing countries in meeting their obligation under the Durban Declaration to repair colonialism's damage. The final cluster article, Reparations Litigation: What About Unjust Enrichment?, n149 is written by Margalyne Armstrong, a professor at Santa Clara University School of Law who has contributed to the LatCrit movement since its inception. Armstrong's piece examines the role of the doctrine of unjust enrichment and the remedy of constructive trust in reparations litigation on behalf of the descendants of enslaved Africans.

Evident in these five opening cluster articles are several themes that resonate for Latinas/os and the LatCrit movement. For example, mindful of LatCrit's vision of an anti-essentialist future, Goldberg's article injects jurisprudential reality and a warning in illustrating the risks of pitching anti-essentialist arguments to some judges in anti-discrimination litigation. Armstrong, Churchill, Gassama, and Maisel each confront strategies for remedying the enduring and pervasive economic and socio-political harms wrought by colonialism, a legacy that has had a profound impact on Latinas/os as well as on African Americans, Native Americans, and other subordinated groups. Churchill and Gassama both acknowledge the obstacles to local and international justice posed by legitimizing mythology of the "Rule of Law." Further, in addressing litigation-based strategies, Armstrong, Churchill, and Goldberg remind those struggling against subordination of the importance of attention to constructing viable legal arguments toward social change. At the same time, these and the other articles in the cluster recognize the broader range of galvanizing and operational strategies necessary to restore or obtain dignity in subordinated communities - from grassroots protests (utilized prominently in protests against globalization in Seattle and other meeting sites for multinational economic institutions) to more formal efforts, yet conducted outside the courtroom, such as the United Nations' sponsored World Conference against Racism (WCAR).

Some of the contributors caution against a narrow approach of confronting anti-subordination that attends to seemingly localized problems with only localized strategies. Maisel, for example, concludes that South Africa's experience counsels that even the most reformed government will be unable to achieve equality for its subordinated people without a commitment from the international community.n150 Similarly, LatCrit scholars have long recognized the shortcoming of strategies toward an anti-subordination future for Latinas/os that fail to confront more general barriers in society - those local, national, and international - that subordinate all oppressed groups.

Finally, the cluster articles remind LatCrit scholars that many progressive movements toward social change must overcome what Gassama calls the war against memoryn151 - efforts to deny a place for considering past injustice whose consequences still endure. In addition to Gassama, authors Armstrong, Churchill, and Maisel advocate strategies relevant to the LatCrit movement [*627] that aim to restore our collective memory of discrimination, colonialism, and apartheid in addressing their past and present damage. Ironically, while seeking to ensure international recognition of the continuing legacy of crimes against humanity, Maisel points out how the WCAR proceedings themselves fell victim to the war against memory just three days after the conference ended when the events of September 11 rewrote our remembered history and recast our future priorities.n152 The LatCrit movement, then, moves forward, mindful of the invisibility and mistreatment of Latinas/os in our historical and cultural record, and cognizant of the challenges ahead to forging an anti-subordination future in a post-September 11 environment where communities of color are cast to warrant recrimination, not repair. n153

FOOTNOTE-1:

n1. Our article title was inspired by Miguel Pi<tilde>ro's poem, Seekin' the Cause, from his collection La Bodega Sold Dreams 23 (1985).

n2. Martin Luther King, Jr., Beyond Vietnam, Speech at Riverside Church (Apr. 4, 1967).

81 Or. L. Rev. 595
Craig Scharlin & Lilia V. Villanueva, Philip Vera Cruz: A Person-al History of Filipino Immigrants and the Farmworkers Movement 104 (Glenn Omatsu & Augusto Espiritu eds., 1992) (Philip Vera Cruz, along with Cesar Chavez and Dolores Huerta, helped build the United Farm Workers (UFW) organization. Cruz was part of the Agricultural Workers Organizing Committee of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) in 1965 and was involved in the Filipino sitdown in the Coachella Vineyards that helped trigger the formation of the UFW. Cruz served as vice-president of the UFW until 1977).

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n9. See infra Symposium Cluster, Focusing the Electoral Lens.


n15. Due to time constraints, there is no separate introduction for the opening cluster. Instead, Part III infra briefly introduces those cluster pieces.


n19. The term praxis originated with Italian Marxist Antonio Gramsci in the 1920s as a way of describing the activity of "organic intellectuals" and has been adapted and used by Critical Race theorists. See generally Paulo Freire, Pedagogy of the Oppressed ch. 4 (1970) (describing praxis toward revolution); Eric K. Yamamoto, Interracial Justice: Conflict and Reconciliation in Post-Civil Rights America (1999).

n20. The general problem of group invisibility of Latinas/os in legal and policy discourse is shared with Asian Americans. Specifically, both historically and recently, scholarship reviewing the

As William Wei points out:

Asian Americans [have] historically stood outside the institutionalized framework of American society, addressed significant social issues, participated in a plethora of political activities, and started numerous organizations in order to change the country into an authentic ethnically pluralist society. Though their organizational formats varied, the ultimate goal of all these groups was the same: to gain greater equality for Asian Americans... [However] the Asian American ... has been overlooked ... [and] Asian American activists have received short shrift even in works that mention significant events in which they have played a major role.

William Wei, The Asian American Movement 5 (1993). Everything that might be said about the relative invisibility of Asian Americans might also be said about Latinas/os.

These accounts omit the central role of Latina/o and Asian American student groups in the 1968-69 San Francisco State College Strike, which was the longest student strike of the 1960s, lasting from November 6, 1968 to March 27, 1969 at San Francisco State and from January 19, 1969 to March 14, 1969 at UC-Berkeley. See generally Karen Umemoto, "On Strike!" San Francisco State College Strike, 1968-69: The Role of Asian American Students, 15 Amerasia J. 1 (1989). There are many parallels and links between the Chicano movement in the 1960s and the Asian American movement. Asian American activist Amy Uyematsu wrote in 1971:

Asian Americans can no longer afford to watch the black-and-white struggle from the sidelines. They have their own cause to fight, since they are also victims - with less visible scars - of the white institutionalized racism. A yellow movement has been set into motion by the black power movement. Addressing itself to the unique problems of Asian Americans, this "yellow power" movement is relevant to the black power movement in that both are part of the Third World struggling to liberate all colored people.

Amy Uyematsu, The Emergence of Yellow Power in America, at 9, in Roots: An Asian American Reader (Amy Tachiki et al. eds., 1971); see also Asian Americans: The Movement and the Moment (Steve Louie & Glenn Omatsu eds., 2001).


and the Law, 33 U.C. Davis L. Rev. 1057 (2000); Symposium Cluster, Globalization or Global Subordination?: How LatCrit Links the Local to Global and the Global to the Local, 33 U.C. Davis L. Rev. 1429 (2000).


(Karin Aguilar-San Juan ed., 1994); Elizabeth V. Spelman, Inessential Woman: Problems of Exclusion in Feminist Thought (1988); 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 (arguing that viewing discrimination/subordination as occurring only along a single axis erases Black women and undermines efforts to expand the scope of feminist and antiracist politics); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581 (1990) (critiquing gender essentialism in feminist legal theory as marginalizing voices of black women).


The Black Power movement emerged from the left wing of the civil rights movement, rejecting its integrationist ideology and assimilationist approach. Instead, Black Power adherents advocated "community control," that is, local control of economic, political, social and cultural institutions in African American communities. African American urban ghettos in America, they argued, were "internal colonies" that paralleled African colonies, while the Black Power movement paralleled the national liberation movements in Africa. In this "internal colonialism" paradigm, both were legacies of nineteenth-century imperialism that had divided the Third World into colonies exploited by a capitalist-dominated world economy.

The ["internal colony" paradigm] synthesized the disparate elements of racism - economic exploitation, political powerlessness, geographic ghettoization, cultural contempt - into an intelligible system of oppression.

... The Black Panther Party for Self-Defense was founded in Oakland in 1966 by Bobby Seale, who served as its chairman, and Huey P. Newton, who served as its minister of defense. The Panthers were organized along military lines and advocated armed resistance to racial oppression, especially the police, whom they perceived as an army of occupation in the black urban ghetto.


n34. Harvey Klehr, Far Left of Center: The American Radical Left Today (1988); James Miller, "Democracy is in the Streets": From Port Huron to the Siege of Chicago (1987); Kirkpatrick Sale, SDS (1973); The Sixties Papers: Documents of a Rebellious Decade (Judith Clavir Albert & Stewart Edward Albert eds., 1984); Wei, supra note 20, at 204 ("[The SDS maintained that the] capitalist system of the United States was responsible for creating injustice at home and aggression abroad and that conventional means of change, such as the electoral system, was ineffectual, they advocated the elimination of capitalism, through violence if necessary.").


n36. Glenn Omatsu observes:

Those who took part in the mass struggles of the 1960s and early 1970s will know that the birth of the Asian American movement coincided not with the initial campaign for civil rights but with the later demand for black liberation; that the
leading influence was not Martin Luther King, Jr., but Malcolm X; that the focus of a generation of Asian American activists was not on asserting racial pride but reclaiming a tradition of militant struggle by earlier generations; that the movement was not centered on the aura of racial identity but embraced fundamental questions of oppression and power; that the movement consisted of not only college students but large numbers of community forces, including the elderly, workers, and high school youth; and that the main thrust was not one of seeking legitimacy and representation within American society but the larger goal of liberation.


n37. See sources cited supra, note 30.

n38. John C. Hammerback & Richard J. Jensen, The Rhetorical Career of Cesar Chavez 38 (1998) (remarks of Chavez). These authors relate that much of Chavez's discourse was grounded in his Mexican American heritage. For example, the United Farmworkers flag portrayed an Aztec eagle, Chavez invoked the Mexican Revolution in calling strikes, and the farm worker theme song was De Colores, a religious song in Spanish. Id. at 39. Also, the rallying motto of the workers was "Viva La Causa!" (Long Live the Cause), or "Viva La Raza!" (Long Live the [Mexican] People). Thus, we treat the UFW labor movement as a Latina/o struggle.


n41. F. Arturo Rosales, Chicano!: The History of the Mexican American Civil Rights Movement 180 (1996). Although the Chicano movement ultimately targeted several community ills, its mission statement remained to establish a Chicana/o identity and to achieve Chicana/o self-determination, as reflected by the concept of Aztlan as a spiritual, cultural, economic, and political homeland. See Juan Gomez-Quiñones, Chicano Politics: Reality and Promise, 1940-1990, at 141 (1990).

n42. See Gomez-Quiñones, supra note 41, at 141 for discussion of Aztlan.

n43. See infra note 142 and accompanying text for discussion of La Raza Unida Party.


n45. See sources cited supra note 31 for discussion of the broader Antiwar movement.

n46. See supra note 11.

(1958); Assata Shakur, Assata: An Autobiography (1987); Booker T. Washington, Up From Slavery (1900). Note the relation between the Black Power movement and the writings of Frantz Fanon, Black Skin, White Masks (Charles Lam Markmann trans., 1967); Frantz Fanon, The Wretched of the Earth (Constance Farrington trans., 1968); Albert Memmi, The Colonizer and the Colonized (Howard Greenfield trans., 1965); Huey P. Newton, To Die For the People: The Writings of Huey P. Newton (Toni Morrison ed., 1972); Frantz Fanon, Decolonization and Independence, in Toward the African Revolution: Political Essays 99 (Haakon Chevalier trans., 1967). Note also the work of Derrick Bell. See, e.g., Derrick Bell, Afroantica Legacies (1998); Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1987); Derrick Bell, Confronting Authority: Reflections of an Ardent Protester (1994); Derrick Bell, Gospel Choir: Psalms of Survival in an Alien Land Called Home (1996).


n52. Lopez, supra note 44, at 235-39 (describing articles attributed to Acosta during his defense of the so-called East LA Thirteen on charges stemming from their leadership of school walkouts in East Los Angeles).

n53. See Mario Barrera, Beyond Aztlan: Ethnic Autonomy in Comparative Perspective 171 (1988) (observing that prior to these developments there were only scattered Chicana/o intellectuals, working in isolation); Johnson & Martinez, supra note 16, at 1148 (suggesting that activism was linked closely to Chicana/o Studies scholarship).

n54. For example, Manuel Rodriguez Orellana, currently the party's Secretary for North American Relations, and a speaker at LatCrit VII, was once a law professor at Northeastern University School of Law and Inter-American University of Puerto Rico.


n56. Thanks to Pedro Malavet for these insights on the role of lawyers and litigation in the Puerto Rican independence movement. E-mails from Pedro Malavet to Steven Bender on file with Oregon Law Review.

n57. See Gomez-Quiñones, supra note 41, at 112 for background on its formation. MALDEF's website provides the organization was formed in 1968 in San Antonio. About Us, MALDEF Website, at http://maldef.org/about/index.htm (last visited Mar. 12, 2003).

n58. Hopwood v. Texas, 78 F.3d 932, 934 (5th Cir. 1996) (noting the amicus brief filed by MALDEF in this litigation attacking the admissions policy of the University of Texas School of Law).


n61. Bender, supra note 49 (manuscript at 340).
n62. Id.
n63. E.g., Puerto Rican Legal Defense Fund v. Grace, 9 Media L. Rptr., 1514, 1514 (N.Y. Sup. Ct. 1983) (dismissing defamation claim against presidential appointee who claimed the government food stamp program “is basically a Puerto Rican program”).
n64. See Morgan v. Burke, 926 F.2d 86 (1st Cir. 1991).
n69. See Laura M. Padilla, LatCrit Praxis to Heal Fractured Communities, 2 Harv. Latino L. Rev. 375, 382 (1997) (urging that LatCrits team with advocacy groups such as MALDEF toward eliminating oppression).
n70. On occasion, lawyers from these groups have participated as speakers in LatCrit conferences. For example, Kathay Feng from the Asian Pacific American Legal Center of Southern California participated in a LatCrit VII political participation workshop, and Julie Su, an attorney with the same organization, spoke at LatCrit IV.


n72. See Valdes, supra note 6.
n74. Yinger, supra note 48, at 59-60; Hammerback & Jensen, supra note 38, at 37 (noting Chavez embraced Gandhi's idea of boycott as particularly suited to mobilizing poor people because it did not require their time or money). King once sent Chavez a telegram during one of his fasts praising his commitment to justice through nonviolence, "You stand today as a living example of the Gandhian tradition with its great force for social progress and its healing spiritual powers." Yinger, supra note 48, at 50. Chavez contrasted Gandhi's philosophy, which he embraced, to that of Malcolm X, who declared in his autobiography that "it's a crime for anyone who is being brutalized to continue to accept that brutality without doing something to defend himself." Jacques E. Levy, Cesar Chavez: Autobiography of La Causa 269 (1975).

An oft-ignored dynamic in the farm labor movement is the role of women in leadership, particularly Dolores Huerta, in shaping its nonviolent direction. See Richard Griswold del Castillo & Richard A. Garcia, Cesar Chavez: A Triumph of Spirit 71 (1995).

n75. El Plan Espiritual de Aztlan, as the ideological framework of the Chicano movement, provided in its action plan for "self defense against the occupying forces of the oppressors at every school, every available man, woman, and child." El Plan Espiritual de Aztlan, Aztlan: Essays on the Chicano Homeland 4 (Rudolfo A. Anaya & Francisco A. Lomeli eds., 1989). See Lopez, supra note 44, at 217 (noting that as late as 1965, Mexican American civil rights organizations distinguished
themselves from supposed militancy in the Black community, citing a resolution sent by the League of United Latin American Citizens to President Johnson contrasting its assimilationist orientation with Black militancy evidenced by the 1965 Watts riots).

n76. Ernesto Chavez, "<exclx>Mi Raza Primero!" (My People First!): Nationalism, Identity, and Insurgency in the Chicano Movement in Los Angeles, 1966-1978, at 46 (2002) (statement of jailed Brown Beret organizer David Sanchez); see also Armando B. Rendon, Chicano Manifesto 205 (1971) (elaborating on the reference to "all means necessary" by quoting the Beret credo that "if those Anglos in power are willing to do this in a peaceful and orderly process, then we will be only too happy to accept this way. Otherwise we will be forced to other alternatives.").


n78. Rosales, supra note 41, at 207.

n79. Lopez, supra note 44, at 220-21; see generally Reies Lopez Tijerina, They Called Me "King Tiger": My Struggle for the Land and Our Rights (Jose Angel Gutierrez, ed. & trans., 2000).

n80. See Steven W. Bender, Sight, Sound, and Stereotype: The War Against Terrorism and Its Consequences for Latinas/os, 81 Or. L. Rev. 1153, 1159-60 (2002).


n82. Bender, supra note 80, at 1160.

n83. See Levy, supra note 74, at 5-6 (discussing the strategy of Cesar Chavez to turn violent repression of workers by growers and others into publicity that neutralized future violent acts against the farm labor movement and mobilized the general public).

n84. See Churchill & Vander Wall, supra note 35; see also Newton, supra note 35. To compare Mexico's response to the Zapatistas in the 1990s, see Subcommandante Marcos and the Zapatista Army of National Liberation (Frank Bardacke et al., trans., 1995).


n86. Rosales, supra note 41, at 206.

n87. Id. at 200-05 (Salazar was sipping a beer when he was hit by a tear gas projectile that a deputy sheriff fired into a tavern). See also Rendon, supra note 76, at 279 (pointing to this police response as evidence that violence as a tactic will be self-defeating and destroy the Chicana/o people because the "gringo" will respond with excessive force).


n89. See Malavet, supra note 55, at 70-73.


n91. Fact Sheet: LatCrit 1 (Apr. 29, 1999) (on file with Oregon Law Review). See also Iglesias & Valdes, supra note 18, at 1288 ("LatCrit theory represents an ongoing collective encounter with fundamental issues of anti-essentialist community and coalitional solidarity to advance anti-subordination causes, while interjecting the multiple diversities of Latinas and Latinos into public policy debates ever more sharply.").

n92. See, e.g., Feng, Aoki, & Ikesagi, supra note 60.

n93. See sources cited supra note 24.


n96. Levy, supra note 74, at 123. Chavez also said "every man who comes to the picket line is our brother, immediately, regardless of color." Hammerback & Jensen, supra note 38, at 84. Presumably, LatCrit's own "constitution" would demand for membership only a commitment toward antiesentialist and antisubordination scholarship and praxis.
n98. See discussion infra Part II. One of the leaders of the Chicana/o student organization, the Brown Berets, once warned his comrades to avoid Anglos: "Do not talk to the enemy, for he is either a dog or a devil." Chavez, supra note 76, at 46. Similarly, Malcolm X had declared that Anglos were satanic. Malcolm X & Alex Haley, The Autobiography of Malcolm X 183 (13th prtg. 1966).

In New Mexico, Reies Lopez Tijerina led a struggle against the government for restoration of Mexican farmer land rights that at times clashed with the Black-led Civil Rights movement. Although Lopez Tijerina once announced an agreement with Black Panthers leadership that "Brown and Black should be together" against the "crime and sins" of the federal government, Lopez, supra note 44, at 224, on another occasion he announced that while inviting Martin Luther King to attend his movement's convention, "We are only going to admit the Negroes when Martin Luther King speaks. After that they have to get out, because the convention belongs to our raza." Suzanne Oboler,

n99. See Johnson, Lawyering for Social Change, supra note 29, at 226 (examining the history of coalition between Latinas/os and other groups of color in efforts to desegregate schools).
n100. See Bender, supra note 49, at ch. 14 (discussing efforts of the Multi-Ethnic Media Coalition, consisting of the Asian Pacific American Media Coalition, the American Indians in Film and Television, and the National Latino Media Council).

n101. For discussions of concerns over the male-dominated approach of initial LatCrit endeavors, see Margaret E. Montoya, Class in LatCrit: Theory and Praxis in a World of Economic Inequality, 78 Denv. U. L. Rev. 467, 494-496 (2001) and Elvia R. Arriola, March, 19 Chicano-Latino L. Rev. 1, 12-13 (1998) (implicating the prominent role of male speakers, the choice of topics, and the arrangement of the conference room as leading to a spontaneous caucus, a talking circle, among Latinas, that altered future LatCrit consciousness and planning).


n103. Rosales, supra note 41, at 181-83.
n104. Ramon A. Gutierrez, Community, Patriarchy and Individualism: The Politics


n106. Chavez, supra note 76, at 57 (detailing subjugation of women in the Brown Berets organization through its paramilitary structure, its exclusion of women from leadership roles, and its emphasis on recruitment of male members); Ian F. Haney Lopez, Racism on Trial: The Chicano Fight for Justice 200-02 (2003) (examining the masculine ethos of the Berets).

n107. Oboler, supra note 98, at 54-56 (identifying subordination in the party's early days similar to that in the Chicano movement relegating female members to office work and child care duties; ultimately, however, women were admitted to the central committee of the party and given leadership roles).

n108. See Maeda, supra note 6.

n109. Iglesias & Valdes, supra note 18, at 1314-19 (describing the Critical Global Classroom and Student Scholar Program).

n110. See generally Rosales, supra note 41, at 184-95.

n111. See infra note 133 and accompanying text for discussion of the Chicano anti-war movement.

n112. See generally Chavez, supra note 76, at 42-60 (describing the goals of the Brown Berets as primarily involving education, economic, and law enforcement policies). The Brown Berets expressed a nationalist vision of unity based on Chicana/o heritage "regardless of age, income, or political philosophy." Id. at 49.

n113. See generally Oboler, supra note 98, at 51-58 (describing the movement as encompassing a critical stance toward Puerto Rico's colonial status). Primarily, the Young Lords addressed neighborhood issues such as education, local politics, and tenement housing codes.


n117. "Revolution," written by David Hildalgo and Louie Perez © 1996, Davince Music (BMI)/No K.O. Music (BMI)/Administered by BUG. All rights reserved. Used by permission.

n118. Jackson, supra note 95, at 120.


n120. Troy Duster, Individual Fairness, Group Preferences, and the California Strategy, 55 Representations 41, 53-54 (1996) (analyzing the effects of Richard Nixon's "Southern Strategy" and describing how by the 1990s "white bloc voting for white candidates and 'white group interests' has become one of the untold stories of American [and Californian] politics").

n121. Garcia, supra note 77, at 142 (characterizing the subversive tactics as constant and intense, causing job loss, arrests, economic hardship, and social
marginalization of activists, also pointing to the dynamic of potential adherents being lured away by the rise of government employment opportunities for the Latina/o middle class).

n122. Id. at 141-43 (quoting a Chicana leader as revealing she never understood what the movement meant by seeking self-determination - "Was it revolution, or a nation within a nation?").


n128. On the imperatives of LatCrit praxis, see, e.g., Margaret E. Montoya, Academic Mestizaje: Re/Producing Clinical Teaching and Re/Framing Wills as Latina Praxis, 2 Harv. Latino L. Rev. 349 (1997); Padilla, supra note 69.

n129. For example, the galvanizing issue of reparations in the African American community has relevance for Latinas/os too. See Malavet, supra note 6.


n131. While at first glance, school district funding may seem like a prosaic area of inquiry, there are some interesting developments in the area as state supreme courts take a different tack than the federal courts on the issue of district power equalization. Compare Edgewood Independent School District v. Kirby, 77 S.W.2d 391 (Tex. 1989) with San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). Both cases involve challenge to the same school district in Texas brought by parents living in a school district with a high population of poor and minority students with a low property tax base that gave rise to increasing differentials between rich (Alamo Heights) and poor (Edgewood) districts. Applying the 14th Amendment Equal Protection Clause, the U.S. Supreme Court in Rodriguez found no constitutional violation. Rodriguez, 411 U.S. at 62. By contrast, in Kirby, the Texas Supreme Court applied the Texas Constitution to find that glaring disparities between different school districts' ability to raise revenues from property taxes violated the Texas Constitution's mandate to support and maintain an "efficient" public education system, in order that "districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort." Kirby, 77 S.W.2d at 397.

n132. Note the efforts of MALDEF in voting rights litigation. See Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990) (holding that the L.A. County
81 Or. L. Rev. 595
Board of Supervisors had violated the
federal Voting Rights Act of 1965 by
intentionally fracturing the voting strength
of Latina/o voters in drawing Supervisor
voting districts); Gomez v. City of
Watsonville, 863 F.2d 1407 (9th Cir.
1988); Cano v. Davis, 211 F. Supp. 2d
1208, 1246 (C.D. Cal. 2002) (rejecting
both a 14th Amendment and a Voting
Rights Act Section 2 challenge by
MALDEF to three of the California
legislature
post-2000
congressional
districts, noting that "Latino legislators and
interest groups played a significant role in
the 2001 redistricting process" and that
Latinos comprised over twenty-two
percent of the legislature). See also
Johnson, supra note 60; Rodolfo O. de la
Garza & Louis DeSipio, Save the Baby,
Change the Bathwater, and Scrub the Tub:
Latino Electoral Participation After
Seventeen Years of Voting Rights Act
n133. Chavez, supra note 76, at 55
(quoting the Brown Berets' newspaper, La
Causa, as opining that the Vietnam War
"'is the ultimate weapon of genocide of
non-white peoples by a sick decadent puto
[cursed] western culture.'").
n134. This LatCrit VII symposium
addresses these issues. See supra note 10.
n135. See supra note 27.
n136. E.g., Lopez, supra note 44.
n137. E.g., Bender, supra note 80; Ivelaw
L. Griffith, Drugs and Democracy in the
Caribbean, 53 U. Miami L. Rev. 575, 869
(1999).
n138.
E.g.,
Symposium
Cluster,
Inter/National Migration Of Labor:
Latcritical Perspectives On Addressing
Issues Arising With the Movement Of
Workers, 13 La Raza L.J. 311 (2002); see
also Symposium Cluster, Forging Our
Identity: Transformative Resistance in the
Areas of Work, Class, and the Law, 33
U.C. Davis L. Rev. 1057 (2000);
Symposium Cluster, Globalization or
Global Subordination?: How LatCrit Links
the Local to Global and the Global to the
Local, 33 U.C. Davis L. Rev. 1429 (2000);
Christopher David Ruiz Cameron, The
Labyrinth of Solidarity: Why the Future of
the American Labor Movement Depends

on Latino Workers, 53 U. Miami L. Rev.
1089 (1999); Roberto L. Corrada, Familiar
Connections: A Personal Re/View of
Latino/a Identity, Gender, and Class Issues
in the Context of the Labor Dispute
Between Sprint and La Conexion Familiar,
53 U. Miami L. Rev. 1065 (1999); Mary
Romero, Immigration, the Servant
Problem, and the Legacy of the Domestic
Labor Debate: "Where Can You Find
Good Help These Days!", 53 U. Miami L.
n139. See supra note 14.
n140. See generally Yamamoto, supra note
19. See also James A. Regaldo,
Community Coalition-Building, in The
Los Angeles Riots: Lessons for the Urban
Future 230 (Mark Baldassare ed., 1994):
Coalition failures in this period have been
due to a combination of conceptual,
structural and organizational problems: (1)
improperly understanding the complexity
of race and class relations and issues in
Los Angeles, inclusive of a reliance on and
not going beyond building middle class
memberships and constituencies; (2)
becoming too comfortable with critically
unchallenged concepts of pluralism and
multiculturalism; (3) being oblivious to the
degree to which traditional theories and
beliefs of representative democracy and
public policy formation are not working
for communities of color; (4) failures to
broadly recognize and confront the degree
to which anti-democratic corporatist
approaches have failed those most in need
of economic development and job creation;
(5) failure to set clear and strategic goals,
realizable objectives and targeted activities
and outcomes; and (6) being unwilling to
overcome provincial outlooks and agendas.
n141. See supra note 9.
n142. See generally Rosales, supra note
41, at 228-47 (addressing the rise and fall
of La Raza Unida Party); Gomez-Qui<tild
n>ones, supra note 41, at 131-38 (stating
the party platform of La Raza Unida
included a "guaranteed annual income,
national health insurance, no land taxation,
bilingual education, parity in federal
employment, an increase in admissions to
medical schools, parity in jury selections,


support for organizing farm workers, and a call for the enforcement of the Treaty of Guadalupe Hidalgo.

n143. Susan Castillo addressed participants at LatCrit VII during her successful campaign to become Oregon's superintendent of public schools. She is the first Latina/o to hold statewide office in Oregon.

n144. Due to time constraints, we were not able to include a separate introduction to this cluster. Our truncated remarks here replace a more substantial introduction, with apologies to the cluster authors.

n145. 81 Or. L. Rev. 629 (2002).

n146. 81 Or. L. Rev. 603 (2002).

n147. 81 Or. L. Rev. 707 (2002).

n148. 81 Or. L. Rev. 739 (2002).

n149. 81 Or. L. Rev. 771 (2002).

n150. Maisel, supra note 148, at 768-69.

n151. Gassama, supra note 147, at 724.

n152. Maisel, supra note 148, at 739.

n153. For a comprehensive discussion of the aftermath of September 11th on communities of color, see infra Symposium Cluster, LatCritical Perspectives: Individual Liberties, State Security, and the War on Terrorism.
SOCIAL JUSTICE MOVEMENTS AND LATCRIT COMMUNITY: On Making Anti-Essentialist and Social Constructionist Arguments in Court

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BIO:

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SUMMARY: ... The lawyer (a law professor, if truth be told) wanted to argue in an amicus brief to the United States Supreme Court that sexual orientation, like race, was a social constructed category. ... As the final section of this essay will elaborate, in deciding trait-based discrimination cases, courts tend to assume the trait's definition without engaging openly in the project of defining that aspect of human identity, whether the discrimination was based on race, sex, ethnicity, sexual orientation, and/or other personal characteristics. ... Although courts tend to disregard that multidimensionality and instead dissect the plaintiff into distinct identity traits or lapse into focusing on one identity category without attending to the others, social construction arguments hold open the possibility for synergistic, holistic consideration of an individual and her legal claims. ... The cases involving discrimination related to accent and language skill (e.g., fluency in Spanish) help illuminate the consequences of courts' reluctance to embrace an expansive, realistic understanding of ethnicity. ... We might also think that post-civil war statutes forbidding discrimination based on race, which have been construed to forbid discrimination against ethnic groups that were recognized as races at the time of passage, would reach discrimination against individuals with Spanish-inflected accents, since language, like surname, forms part of Latina/o ethnic identity as it has been socially constructed. ...

One of my most intense disagreements with another lawyer during nearly a decade of lesbian and gay rights litigation1 concerned social constructionism. The lawyer (a law professor, if truth be told) wanted to argue in an amicus brief to the United States Supreme Court that sexual orientation, like race, was a social constructed category. n2 He reasoned that since the Court had condemned race discrimination even while recognizing the "socio-political, rather than biological" nature of race, n3 it would [*630] similarly be willing to invalidate a measure discriminating against lesbians, gay men and bisexuals, n4 even while recognizing the socially constructed nature of sexual orientation. n5

To me, the argument that sexual orientation was a social construct rather than a biological or otherwise deeply rooted, "natural" trait seemed potentially more dangerous to the plaintiffs' case than most of the arguments being made by our adversaries. My disagreement did not lie with the assertion that courts can and should remedy harms to members of socially constructed classes.n6 To the contrary, I concurred fully with the underlying Foucaultian point that society, not nature, has accorded sexual [^631] orientation its significance.n7

Instead, I feared the Court might seize on the social construction argument and find the category of "gays and lesbians"n8 too diffuse to amount to a cognizable class. n9 After all, a court needs to understand who has been harmed before deciding whether and how to order relief from an injurious classification. n10 If the Court had become persuaded that the trait of sexual orientation [*632] derived its meaning from shifting cultural understandings of gay identity, rather than a "natural" or fixed source, it could then have decided that sexual orientation, as a trait, was not susceptible to an administrable definition. As a result, the Court might have found that the lesbian and gay plaintiffsn11 did not comprise a meaningful, comprehensible group and did not suffer any shared or similar burden as a result of the measure. n12

With this concern in mind, this essay will explore possible effects of arguing in litigation that identity traits lack a strictly definable essence and are, instead, socially constructed.n13 In particular, I argue that judicial reluctance to define personal traits may limit
the effectiveness of anti-essentialist and social construction arguments in assisting courts to reach accurate, non-simplistic understandings of identity-based discrimination.

To develop this argument, I will first consider several ways in which anti-essentialist and social constructionist arguments might be presented and the potential challenges these arguments could pose for plaintiffs seeking court-ordered recovery for discrimination based on a personal trait. Next, to complicate matters, I will turn to cases in which these types of arguments have been embraced in majority opinions. As the discussion below illustrates, courts have, in some instances, explicitly accepted the concept that society, not biology or nature, creates the categories that lead us to distinguish between "types" of people. Against this background, I will then offer preliminary hypotheses about the limits of courts' willingness to accept social construction arguments in assessing identity-based discrimination claims and the continuing potential risks posed by anti-essentialist arguments in litigation. A last note will suggest some ways in which lawyers might present cases to counter essentialist notions of identity while not asking courts to grapple directly with social construction theory.

Before turning to these tasks, I should explain why I refer to anti-essentialism and social constructionism interchangeably, given that each has a different analytic emphasis and that adherence to one approach does not necessarily require adherence to the other. Put another way, it is possible to believe that identity is socially constructed yet maintain an essentialist view of the effects of that identity (or vice versa). In particular, anti-essentialist arguments challenge the essentialist notion that human identity categories are fixed and exist transhistorically and transculturally. They emphasize, instead, that human identities lack an essence that would cause all people with the same trait (such as femaleness) to coalesce as a predictable category with common interests or experiences. For example, anti-essentialists would maintain that the experience of being a woman will vary significantly depending on social conditions and other aspects of one's identity. From an essentialist viewpoint, in contrast, all women across cultures and classes and over time can be said to share some common essence or connection.

Social construction arguments, by contrast, focus on the process by which traits are imbued with significance. Through their attention to "how the identity category itself is formed," these arguments contend that identity categories are "social creations" that "result from social belief and practice, are themselves complex social practices, and may be evaluated in terms of whose interests they serve." To return to the example of "woman" from above, social constructionists take the position that the category "woman" is given meaning by societies rather than by an external "natural" force.

Although these different focuses render social constructionism and anti-essentialism non-fungible in most respects, the important point for our purposes here is that both purposefully inject ambiguity into the definition of a trait. By overtly allowing for the possibility that the meaning and significance of a trait may change over time or vary among individuals, either because society changes or because individuals experience the trait differently, both theories reject the existence of an absolute, fixed trait definition. This position, in turn, affects adjudication of trait-based anti-discrimination claims because it puts front and center the court's role in defining a trait's contours. In contrast, theories such as essentialism that disregard society's role in defining a trait or discount variations among trait-bearers shape a trait's definition leave courts in the seemingly passive position of receiving a trait definition that is mandated by or derived from "nature."

The Complications of Anti-Essentialist and Social Construction Arguments in Litigation

As suggested above, one of the greatest difficulties presented by anti-essentialist arguments in litigation relates to the jurisdiction of courts and, more specifically, to how judges perceive their role in assessing discrimination claims. It is axiomatic that a court can order a defendant to redress a plaintiff's injury only if the plaintiff has asserted an injury that the court is empowered to remedy. In the equal protection context, this means that a plaintiff must show that the government has drawn an impermissible, injurious classification based on a trait he or she possesses. To prevail on a statutory claim, such as a Title VII race or sex discrimination claim, a plaintiff must demonstrate that he or she has the trait protected by the legislation (i.e. membership in a "protected class") and that he or she has been targeted for discrimination based on that trait.

In either case, to decide whether the alleged discrimination can be remedied, a court must decide whether the discrimination occurred because of the trait in question. And to make that decision, the court must come to some understanding of the scope and definition of that trait. For example, if a court is to
decide whether an instance of harassment occurred "because of sex" or whether impermissible gender stereotyping occurred in an employment action, the court must grasp the meaning of "sex." Similarly, if a Latina relies on statutory prohibitions of ethnicity-based discrimination to challenge her loss of a job because of her Spanish-inflected accent, the court must ascribe some meaning to ethnicity to determine whether the accent-based discrimination amounted to discrimination based on her ethnicity. Likewise, if a lesbian files suit alleging abuse by police, and the police defend themselves by offering another explanation for their actions, the court cannot decide whether the plaintiff's lesbian identity was the basis for the officers' actions without an understanding of the term "lesbian." 

As the final section of this essay will elaborate, in deciding trait-based discrimination cases, courts tend to assume the trait's definition without engaging openly in the project of defining that aspect of human identity, whether the discrimination was based on race, sex, ethnicity, sexual orientation, and/or other personal characteristics. A random sampling of trait-based discrimination cases rarely reveals a court expending time defining the personal trait implicated.

Anti-essentialist arguments, in their most vigorous forms, challenge this judicial tendency to gloss over the process of understanding and defining the trait that is alleged to be the basis for discrimination. For example, in seeking relief from employment discrimination, a Latina plaintiff might explicitly define ethnicity as comprising shared cultural heritage, shared language, and shared values to help contextualize the discrimination she suffered. Or a plaintiff could urge that she is entitled to relief for losing her job after her religious wedding to another woman and, in showing the connection between lesbian identity and the discrimination she suffered, portray lesbians as women who experience and/or express an emotional or erotic attraction to other women. Or the plaintiff might, in a disability discrimination action, maintain that she is viewed by others as having an impairment that interferes with her "daily activities of living" and also allege that she experiences her deafness as a gift and a source of strength. Yet another plaintiff might allege that her supervisor harassed her because of the way in which her Latina ethnicity, her lesbianism, and her deafness came together to form her identity, as opposed to linking the harassment to any one particular trait.

Although ethnicity, sexual orientation, and disability are often popularly thought of as innate or as inherent parts of an individual in each of these examples, the plaintiff self-consciously defines the traits she believes triggered the discriminatory acts. In doing so, she adopts a definition that hinges on either self-identification or social interactions rather than involuntariness. None suggests that the trait is intrinsic, determined by birth, or understandable without reference to the society in which she lives. Put another way, these arguments embrace the idea that the traits at issue are only as significant as society deems them to be and that they would not exist as distinct identifiers absent social construction. In addition, these definitional moves also challenge a court to focus on rather than gloss over the trait's definition.

"So what?" you might say. We all know that people with the same ethnicity, sexual orientation, or disability are often thought of as a coherent group and frequently see themselves as having some connection to others with the same traits. The source of that sense of coherence, whether it is nature or society, should not be terribly important to courts.

Moreover, social construction and anti-essentialist arguments sometimes do a better job than essentialist theories of incorporating and reflecting individuals' lived experiences of being classified by others (or by themselves) as fitting within a particular community. They provide a mechanism for recognizing that identity categories both overlap and interact in individuals, unlike anti-discrimination laws and courts which typically conceive of discrimination in terms of single, clearly defined traits. For example, the plaintiff who has been targeted for discrimination precisely because of her particular combination of identity traits - as with our hypothetical plaintiff from above, who is Latina and lesbian and has a disability - needs a vehicle to express and seek relief for the discrimination she experiences based on her multidimensional identity. Although courts tend to disregard that multidimensionality and instead dissect the plaintiff into distinct identity traits or lapse into focusing on one identity category without attending to the others, social construction arguments hold open the possibility for synergistic, holistic consideration of an individual and her legal claims.

In addition, even where scientific arguments might be available to support the existence and definition of a particular trait, arguments from social construction avoid the problem of making legal protection contingent on current scientific conclusions about group membership that might be revisited and revised as research continues.

[642] With the format and benefits of anti-essentialist arguments in mind, let us return to examine
in greater depth the difficulty with making these arguments explicitly in the context of a lawsuit. As set out above, the critical background for this analysis concerns a court’s task in deciding an anti-discrimination suit. To order relief, a court must find that a plaintiff has proven discrimination based on her particular identity trait (or combination of traits). If a plaintiff alleges discrimination based on ethnicity, for example, the court will have to understand "ethnicity" as a precondition to deciding whether the alleged discrimination occurred because of that trait.

As discussed above, by focusing on the question of a trait's definition, anti-essentialist arguments inhibit courts from simply eliding that issue while answering the ultimate question whether the alleged acts amounted to discrimination. Even more significantly, by emphasizing the socially constructed nature of an identity trait, they vividly demonstrate that the trait's contours are contingent and unstable rather than fixed.

This point, at which the contours of the injured trait begin to lose their rigid definition, marks the beginning of uncomfortable territory for most courts. An anti-discrimination claim based on a trait acknowledged to be socially constructed calls not only for a judge to weigh the evidence of discrimination, which resonates as a judge-like activity, but also to engage in the sociological/anthropological enterprise of determining the indicia, or even the very existence, of a particular identity trait. Because this determination requires more than mere application of law to a set of findable facts, it appears to fall far outside the traditional zone of judicial expertise and, consequently, may pose a threat to the judicial reputation for the exercise of fair-mindedness.

Of course, as many scholars of the judicial process have pointed out, the traditionally embraced view of an impartial judiciary carefully applying neutral legal principles is itself mythic and illusory. The business of judging, even in the most desiccated breach of contract case, always calls for decisions regarding a party's fit into a legally (i.e., socially) constructed category. In contract law, as in anti-discrimination law, society has determined, and then expressed through legal regulation, under what conditions an injured party deserves a remedy.

Yet somehow this judicial undertaking seems less fraught with difficulty in a contract dispute, perhaps because although the rules related to relief are socially/legally constructed, they do not seek to embody extant traits but instead shuffle people in and out of the class entitled to recover for breach of contract according to specific criteria defined by law (e.g., existence of a valid contract, breach, damages). In contrast, in an anti-discrimination suit, one of the critical elements - the trait to be protected - is not so neatly defined. Once a court admits that the assessment of the identity trait is not a science but rather a cultural practice, the illusion that the court is merely assessing claims according to fixed, jurisdiction-limiting categories is shattered.

Thus, the judicial discomfort comes from squarely facing the question of how, if an identity category lacks fixed boundaries, a court should determine when a plaintiff is eligible for relief based on that category. Cases analyzing claims of sexual orientation discrimination neatly illustrate this tension. Consider, for example, the Sixth Circuit's refusal to invalidate a measure that sought to preclude "protected status" for gay people in Cincinnati. Because no external measure could indicate who possessed the trait of gay identity, the court wrote that it could not vouch for the existence of the class or apply heightened review to the measure's distinction based on sexual orientation.

As the court stated, "any attempted identification of homosexuals by non-behavioral attributes could have no meaning, because the law could not successfully categorize persons 'by subjective and unapparent characteristics such as innate desires, drives, and thoughts.'" Other courts have clung to a definition of sexual orientation that hinges on sexual relationships alone, perhaps because anything broader seems more directly to concede the socially constructed nature of the category. Still other courts accept that being gay implicates an identity or set of feelings and not simply sexual conduct with a same-sex partner. And other courts have simply thrown up their hands when faced with a demand to define identity categories as they relate to sexuality.

Ironically, in light of the popularity of the social construction literature on the existence of sexual orientation, the courts that do not discuss the definition of sexual orientation and those that appear to accept the definition of sexual orientation as innate or deeply rooted tend to have less difficulty in finding that differential treatment based on identity may violate the rights of gay people.

The diffuse attempts of courts to define ethnicity and assess ethnicity-based discrimination also point to a potential barrier to the effectiveness of anti-essentialist arguments for legal analysis of discrimination claims. Some courts simply treat ethnicity as the same type of characteristic as race. Others are less sure of how a particular ethnic group, such as
Latinas/os, holds together but they express certainty that a core common trait exists.\textsuperscript{70} Still \textsuperscript{[*648]} others, including the United States Supreme Court, have incorporated some sense of social construction into the identification of ethnicity: whether persons of Mexican descent constitute a class distinct from whites for equal protection purposes, for example, is to be determined not by reference to race but instead by "community norms."\textsuperscript{71} As the Court in Hernandez v. Tex. put it, "Whether such a group exists within a community is a question of fact." \textsuperscript{72}

Regardless of how fixed or fluid these definitions sound,\textsuperscript{73} a careful look illustrates that most courts gravitate toward a circumscribed view of ethnicity. The cases involving discrimination related to accent and language skill (e.g., fluency in Spanish) help illuminate the consequences of courts' reluctance to embrace an expansive, realistic understanding of ethnicity. For example, courts have been faced with numerous cases in which a party alleges ethnicity discrimination after being denied a promotion because of her accent or after being terminated for speaking Spanish, rather than English, on the job. A conception of ethnicity discrimination that embraced social construction theory \textsuperscript{[*649]} would appreciate the intimate connection between language skill (e.g., the ability to speak Spanish), accent, and ethnicity in American culture. Under this view, once a plaintiff alleged accent-based discrimination, the burden of persuasion would shift to the defendant to demonstrate that the accent/ethnicity discrimination was justified on some legitimate ground.

Yet most plaintiffs bringing accent discrimination suits lose,\textsuperscript{74} and not because their accents impede their communication skills.\textsuperscript{75} Instead, they seem to lose because the burden falls on them to justify their use of their own ethnic language or their accent as inflected by their primary, ethnic language\textsuperscript{76} rather than on the employer to justify its actions.

If language comprised part of ethnicity, as it would likely do in a socially constructed definition, the burden would fall on the employer to disprove discrimination. Yet, under the narrow view of ethnicity that most courts apply, the employee typically bears the burden of proving the connection between ethnicity and harm based on accent.

It appears that the same disinclination of courts to define a trait based on non-fixed indicia discussed above, in connection with sexual orientation, also drives the definitional process here. Nothing about accents or language skills is fixed absolutely to ethnicity. Therefore, recognition of accent and language use as \textsuperscript{[*650]} dimensions of ethnicity would require a court to engage actively in the complex process of gauging the meaning communities give to a trait rather than "simply" weighing evidence against fixed categories.\textsuperscript{77} As we have seen above, courts are disinclined to take up this charge.

II

Judicial Comfort With Anti-Essentialist Arguments

Having just demonstrated why courts may be ill at ease with anti-essentialist arguments, I will now show that the charge of discomfort is, in some respects, overstated. In fact, as highlighted above, at all levels of the judiciary, courts repeatedly affirm their awareness that certain identity features are socially constructed.

In one of the Supreme Court's earliest pronouncements regarding the definition of "white person" within the federal naturalization statute, in 1923, the Court specifically embraced the popular, common understanding of race as distinct from the scientific definition of Caucasians\textsuperscript{78} and expressed no discomfort with the lack of a clear scientific definition for group membership.\textsuperscript{79} Finding that applicant Third, a man from India, did not meet the racial eligibility standard for naturalization, the Court commented that the "popular as distinguished from [the] scientific application [of whiteness] is of appreciably narrower scope."\textsuperscript{80} At the same time, however, the Court suggested, in a quasi-scientific tone, that meaningful differences exist between \textsuperscript{[*651]} people according to race.\textsuperscript{81}

More recently, the Court faced the question whether a plaintiff of Arab ethnicity could make out a claim of race discrimination under \textsuperscript{42 U.S.C. 1981} against a university that denied his tenure application.\textsuperscript{82} The Court made clear its understanding that conceptions of race change over time. "The understanding of 'race' in the 19th century ... was different. Plainly, all those who might be deemed Caucasian today were not thought to be of the same race at the time 1981 became law." \textsuperscript{83}

The Court then detoured from its discussion of popular understandings of race to emphasize, at some length, that many scientists have disavowed the significance of race as anything other than a social category.

There is a common popular understanding that there are three major human races - Caucasoid, Mongoloid, and Negroid. Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist and traits are not discontinuous between populations; therefore, a population can only be
described in terms of relative frequencies of various traits. Clear-cut categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the "average" individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature. S. Molnar, Human Variation (2d ed. 1983); S. Gould, The Mismeasure of Man (1981); M. Banton & J. Harwood, The Race Concept (1975); A. Montagu, Man's Most Dangerous Myth (1974); A. Montagu, Statement on Race (3d ed. 1972); Science and the Concept of Race (M. Mead, T. Dobzhansky, E. Tobach, & R. Light eds. 1968); A. Montagu, The Concept of Race (1964); R. Benedict, Race and Racism (1942); L. Littlefield, Lieberman, & Reynolds, Redefining Race: The Potential Demise of a Concept in Physical Anthropology, 23 Current Anthropology 641 (1982); Biological Aspects of Race, 17 Int'l Soc.Sci.J. 71 (1965); Washburn, The Study of Race, 65 American Anthropologist [*652] 521 (1963).n84

The Court's unusual step of citing to nearly a dozen social science sources supporting the point that race is a socio-political category powerfully reinforced the justices' conceptualization of race as a trait without a naturally fixed, category-defining essence.n85

Even further, the Court determined the scope of 1981's protection by looking in dictionaries - the quintessential repositories of popular understanding, at the definition of race around the time of the statute's framing.n86

On the same day that it issued the Saint Francis College opinion, the Court also found that Jews constitute a distinct race for purposes of bringing claims under 42 U.S.C. 1981.n87 It rejected the circuit court's reasoning that "because Jews today are not thought to be members of a separate race," they could not fit within 1982's statutory protection against race discrimination.n88 Again, the Court acknowledged that contemporary definitions of race differ significantly from earlier understandings. In other words, the Court made clear that the definition of race depends not on science but instead on social views about who falls inside and outside of a particular racial category. n89 These observations echo the recognition in Hernandez that community norms rather than scientific fact dictate whether the class of Mexican Americans [*653] exists.n90

In the context of sex, the Supreme Court also firmly rejected an essentialist argument that would have allowed a state to strike men from juries in suits seeking child support from fathers.n91 The state had argued that men, by virtue of their being male, would be more likely than women to side with the male defendant than with the female complaining witness.n92 In holding that governments could not constitutionally exercise peremptory challenges to jurors based on sex, the Court refused to assume that something about being male would lead all men to adopt the same point of view (or, for that matter, that all women are similarly predictable). n93

III

On the Limits of Anti-Essentialist and Social Construction Arguments in Litigation

We might think, if we did not know better from the doctrine, that courts that recognize the socially constructed nature of race would extend race discrimination protections beyond skin color to include all characteristics society has imbued as race-related. For example, if social construction-based understandings of identity were truly embraced, a termination from employment for wearing corn rows, a hairstyle associated with African Americans, would be punished under the same antidiscrimination provisions that are regularly applied to forbid discrimination according to skin color--since both skin color and hair style are, [*654] or can be, "raced."n95 We might also think that post-civil war statutes forbidding discrimination based on race, which have been construed to forbid discrimination against ethnic groups that were recognized as races at the time of passage, would reach discrimination against individuals with Spanish-inflected accents, since language, like surname, forms part of Latina/o ethnic identity as it has been socially constructed. And we might also think, again if we did not attend to the doctrine, that courts would recognize gay identity as encompassing more than sexual conduct with a same-sex partner and would protect, when appropriate, the expression of that identity by coming out as gay or lesbian.

But as case law starkly demonstrates, judicial embrace of socially constructed identities has strict limits. After reviewing some of these limitations, this section will offer a few thoughts about why judicial acceptance of certain aspects of social construction and anti-essentialist theory regarding race and sex does not hold great promise for acceptance of social construction arguments generally.
If we look closely at the discussion of social construction in Saint Francis College, for example, we see that at the same time as the Court deconstructed race\textsuperscript{96} and construed 1981’s prohibition against race discrimination to encompass discrimination because of ancestry or ethnic characteristics,\textsuperscript{n97} it also embraced an essentialized view of ancestry and ethnicity as meaning an individual’s "stock" or ancestral lineage.\textsuperscript{n98} Not even a suggestion appeared that the insights just announced regarding the socially constructed nature of race should apply equally well to the "ethnic characteristics" category that the Court deemed protected.

Put in this context, the conceptualization of ethnicity within some LatCrit scholarship\textsuperscript{n99} as "a set of traits that may include, but [is] not limited to: race, national origin, ancestry, language, religion, shared history, traditions, values, and symbols"\textsuperscript{n100} appears far broader than the Court's crabbed conception of ancestral stock. Instead, as the Court conceived it, protection for ethnicity seems to be bounded by one's status at birth and not to include other attributes that evolve over time in connection with ethnic group membership.\textsuperscript{n101} Thus, although the Court has accepted social construction theory to a limited degree, this acceptance, alone, does not appear to mandate judicial remedies for ethnicity-based injuries targeted at accent, language use, appearance, or common cultural values or practices as a manifestation of ethnicity.\textsuperscript{n102} Similarly, the Court's flirtation with anti-essentialism \textsuperscript{[*656]} should give little hope to gay rights advocates that discrimination based on expressions of gay identity, such as having a same-sex partnership or simply being openly lesbian or gay, will be penalized in the same manner as discrimination through measures like the Colorado amendment invalidated in Romer v. Evans, which the Court treated as directly singling out gay people for restrictions on civil rights.\textsuperscript{n103}

Why this internally contradictory vision that at once embraces and disavows anti-essentialism? From the language and context of the Supreme Court's discussion as well as lower courts' analyses, it becomes apparent that judicial willingness to embrace social construction theory increases to the extent the characteristic \textsuperscript{[*657]} at issue has some tangible distinguishing feature and decreases to the extent the distinctions between those with the characteristic and those without it are more difficult to grasp. Thus, the Supreme Court is able to disavow the biological significance of race because it conceives of race discrimination as differential treatment according to color, which is often visible.\textsuperscript{n104} Similarly, because the differences between women and men typically remain apparent,\textsuperscript{n105} the Court has little difficulty rejecting essentialized notions of women and men.\textsuperscript{n106}

In contrast, distinctions based on ethnicity are more difficult to grasp.\textsuperscript{n107} A "distinctive physiognomy" is frequently not apparent.\textsuperscript{n108} Consequently, in these kinds of cases, the commitment to an anti-essentialist approach seems to dissolve as well. Instead, as in Saint Francis College, once the Court recognized that 1981's reference to race should be construed as providing protection for distinct ethnic groups, it seized upon ancestral stock to structure clear boundaries for determining membership in ethnic groups.\textsuperscript{n109} In other words, just as it appeared to embrace a social constructionist perspective regarding race, the Court backtracked by relying upon the objectively traceable criterion of ancestral \textsuperscript{[*658]} stock as the tangible identifier of ethnicity. Likewise, in Hernandez, the embrace of a social constructionist approach to group definition, through the focus on community attitudes as the determinant of whether a group exists,\textsuperscript{n110} is belied, or at least counterbalanced, by the Court's observation that "just as persons of a different race are distinguished by color, these Spanish surnames provide ready identification of the members of this class."\textsuperscript{n111}

Thus, to the extent a feature that is usually independently observable or verifiable serves as the basis for determining group membership, social constructionist theories cause few difficulties. But where the feature in question is not so easily seen, catalogued, or traced, courts seem to become less willing to find that a particular identity feature can be the basis for a discrimination claim.\textsuperscript{n112} In other words, it appears that courts will embrace a social constructionist understanding of a trait when they view that trait as also having essential components.

Why? The visibility or verifiability of a characteristic may be needed to offset the judicial concerns about indeterminacy and lack of clear boundaries that come with social construction.\textsuperscript{n113} \textsuperscript{[*659]} Without any external force dictating group membership, courts have little to rely on for assessing discrimination claims based on an identity feature other than their own sociological assessments of that characteristic. And that enterprise of shaping the contours of the characteristic entitled to relief from injury, as discussed earlier, sounds more like a legislative or social science effort than a judicial project.

As a result, it is cases involving characteristics with relatively unclear boundaries for which anti-essentialist arguments are most complicated. To the extent courts assume that individuals who share the same characteristic have connections to each another that are essential rather than socially constructed, those courts may be more likely to award remedies for injuries.
based on social group membership.\textsuperscript{n114} To the extent that legal arguments disturb a court's sense that a fixed group shares the particular trait at issue, however, the plaintiff may leave court with an intact identity but no court-ordered remedy.

How then, should we think about making anti-essentialist and social construction arguments in court? On the one hand, pursuit of essentialist arguments risk reinforcing circumscribed views about identity-based discrimination. While these arguments may be considered relatively "safe" from a litigation perspective because they do not ask courts to select among contested definitions of a trait, the strategic use of essentialism is not cost-free. Although this approach may make possible immediate litigation victories for some, it could, at the same time, undermine the ultimate aim of protecting from discrimination the full range of expression associated with a trait. In addition, narrow arguments cast in terms of "natural" or universal definitions of traits may not enable anti-discrimination protections to reach much of the \textsuperscript{[*660]} non-explicit identity-based discrimination that occurs today, as illustrated by our hypothetical plaintiffs above. Indeed, essentialist arguments about the meaning of traits may clash so fundamentally with the self-conception and life experiences of would-be plaintiffs as to render trait-based protections unavailing even before litigation occurs.\textsuperscript{n115}

On the other hand, social construction arguments may leave courts overwhelmed. Faced with having to define identity traits or with conceding the difficulty of setting out accurate, definitive parameters for trait-based discrimination, a court might instead revert to the narrowest and most rigid definition available for the traits at issue. The result, in turn, could be to limit even further the scope of applicable anti-discrimination protections.

By acknowledging these risks, this essay does not intend to suggest that anti-essentialist or social construction arguments should never, or always, be made in litigation. Certainly, when a judge has expressed a narrow conception of a protected characteristic, an advocate might have no choice but to introduce social construction theory, and ideally, an accessible explanation and application of it to the case before the court. In addition, as just suggested, a social construction analysis may be the only approach that enables an anti-discrimination measure to reach a particular injury.

But in some cases, striking the proper balance between vigorously representing an individual discrimination plaintiff and attempting to shift judicial thinking about the particular social group to which that individual belongs presents heightened challenges.\textsuperscript{n116} Where the injury at issue falls neatly within the popular, essentialist understanding of a particular trait, for example, the decision about whether to call those essentialist assumptions into question becomes more difficult. It is, however, possible to \textsuperscript{[*661]} make anti-essentialist presentations of cases without automatically inviting the difficulties enumerated above. For example, a complaint may convey a full picture of the plaintiff, rather than portraying the stripped-down sketch intended to highlight only the particular protected feature that provides the basis for the discrimination claim. Similarly, the direct examination of the plaintiff (and other witnesses) during trial can incorporate a fuller discussion of the plaintiff's multidimensional identity than the legal arguments will allow. In addition, in any multi-plaintiff suit making a claim based on one particular identity feature, plaintiffs can be selected to exemplify the wide range of individuals bearing that trait. To the extent that plaintiffs become spokespersons in the public discussion regarding a case, their simple presence can help shatter unidimensional views of any given trait.\textsuperscript{n117}

Because of the simultaneous risks of and need for social construction and anti-essentialist theories in anti-discrimination litigation, deployment of these theories requires great care. Their occasional embrace by some courts, while holding out some promise, does not signal smooth sailing for future arguments about any trait. Instead, the project of bringing legal categories more closely into line with lived experience will continue to demand that we remain attentive to what courts are and are not saying as they adjudicate individual discrimination claims by multidimensional plaintiffs.

\textbf{FOOTNOTE-1:}

\textsuperscript{n1} From 1991-2000, I was a staff attorney with Lambda Legal Defense and Education Fund.

discussion of the relationship between social construction and anti-essentialist theories, see infra notes 15-23 and accompanying text.


n4. The amicus brief was being prepared for filing in support of the lesbian and gay respondents in Romer v. Evans, 517 U.S. 620 (1996), for whom I was co-counsel. The lawsuit challenged a Colorado state constitutional amendment that forbade all government entities from protecting lesbians, gay men and bisexuals against discrimination. The Amendment provided, in pertinent part:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

Id. at 624. The Supreme Court described the amendment as precluding protections for "the named class, a class we shall refer to as homosexual persons or gays and lesbians." Id.

n5. See Saint Francis College, 481 U.S. at 610 n.4; see also infra text at notes 84-86 (discussing social construction analysis in Saint Francis College). My colleague sought to rely on Saint Francis College to show that the fact that a class is socially constructed, as opposed to naturally occurring, should not bear on a court's ability to remedy harms to members of that class. That the source of the remedy was constitutional (the Equal Protection Clause) in Romer and statutory (42 U.S.C. 1981) in Saint Francis College was not relevant to this argument.

n6. Janet Halley has made this point persuasively. See, e.g., Janet E. Halley, Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability, 46 Stan. L. Rev. 503 (1994) [hereinafter Halley, Sexual Orientation and the Politics of Biology] (critiquing litigators' use of essentialist explanations for sexual orientation); Janet E. Halley, The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity, 36 UCLA L. Rev. 915 (1989) [hereinafter Halley, The Politics of the Closet]. This essay does not aim to contest or refute this position. To the contrary, by highlighting the ways in which anti-essentialist arguments may interact with the judicial decision-making process regarding discrimination claims, I aim to draw attention to structural and theoretical barriers that may interfere with their acceptance.

n7. See generally Michel Foucault, Power/Knowledge: Selected Interviews and Other Writings, 1972-1977 (Colin Gordon ed., Colin Gordon et al., trans., 1980); Michel Foucault, The History of Sexuality (Robert Hurley trans. 1978); see also Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737 (1989) (maintaining that society, not biology, accords homosexuality its significance); Mary McIntosh, The Homosexual Role, 16 Soc. Probs. 182 (1968) (characterizing homosexuality as a label attached by others and not a condition of certain individuals). My colleague's principal aim in invoking social construction arguments, which I embraced in theory though not for litigation purposes as indicated above, was to find a way around the faulty reasoning that equated gay people with sexual acts. This unduly restricted analysis had led many courts to fail to uphold a wide range of discriminatory burdens on lesbians and gay men without meaningful review. See, e.g., Steffan v. Perry, 41 F.3d 677, 684 n.3
"It would be quite anomalous [sic], on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause.”); see also Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (characterizing homosexuality as primarily behavioral and stating that "after [Bowers v. Hardwick, 478 U.S. 186 (1986)], it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm"). But see Lawrence v. Texas, 123 S. Ct. 2472, 2478 (2003) (reversing Bowers v. Hardwick and recognizing liberty interest of lesbians and gay men in decisions about private, consensual sexual intimacy). A social construction argument could effectively show lesbians and gay men as fully human beings with distinct identities comprised of more than the specifics of their sexual behavior. See infra notes 35-39 and accompanying text; Sexual Orientation and the Politics of Biology, supra note 6, at 511-13 (describing litigators' efforts to avoid the strictures imposed by the conduct-focused cases).

n8. See Romer, 517 U.S. at 627 ("gays and lesbians" is one of the two ways in which the Supreme Court referred to the class targeted by Colorado's constitutional amendment).

n9. Under the Equal Protection Clause, a class must be "cognizable" to qualify for relief. See, e.g., Batson v. Kentucky, 476 U.S. 79, 96 (1986); Castaneda v. Partida, 430 U.S. 482, 494 (1977) (defining cognizable class eligible for equal protection relief as "one that is a recognizable, distinct class, singled out for different treatment under the laws").

n10. In its most strenuous assertion regarding the limitations of judicial power under the Equal Protection Clause, the Court rejected a challenge to a facially neutral measure with a clear disparate impact on a particular class on the grounds that the plaintiff must show the government intended to single out that class for unfair treatment. See Washington v. Davis, 426 U.S. 229 (1976); see also Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (suggesting ways in which plaintiffs might show discriminatory intent to prove the presence of a classification and thereby state a cognizable equal protection claim).

n11. Further complicating the class definition (and illustrating the anti-essentialist point) was the presence of a non-gay man among the initial group of plaintiffs to file suit. Brett Tanberg had joined the suit because, as a man with AIDS, he had experienced discrimination as a result of being perceived as gay. Lisa Keen & Suzanne B. Goldberg, Strangers to the Law: Gay People on Trial 28-29 (1998).

n12. Cf. Equality Foundation v. City of Cincinnati, 128 F.3d 289, 301 (6th Cir. 1997), cert. denied, 525 U.S. 943 (1998). See infra note 60 (discussing Sixth Circuit's invocation of this type of analysis in Equality Foundation). Shortly before this essay went to publication, the Supreme Court invalidated the Texas "Homosexual Conduct Law" in Lawrence v. Texas, 123 S. Ct. 2472 (2003). The ways in which the Court appeared to understand the concept of gay and lesbian identity will be addressed infra at notes 64 and 103.

n13. The concern with anti-essentialism as a litigation theory is limited to lawsuits based on personal characteristics. Anti-essentialist arguments regarding non-corporeal aspects of identity such as legal status (e.g., marriage, immigrant) or occupation (e.g., lawyer, psychologist) do not present the same risks as set forth below because these aspects of identity are generally thought of as acquired rather than inborn or genetically driven. See infra note 40 and accompanying text.

n14. In its simplest sense, anti-essentialism embraces the concept that the demographic categories that are often thought of as fixed in and by nature, such as race, sex, ethnicity, and sexual orientation, among others, actually "have their genesis in cultural practices of differentiation, rather than in genetics." Ian F. Haney Lopez, Retaining Race: LatCrit Theory and Mexican American Identity in Hernandez v. Texas, 2 Harv. Latino L. Rev. 279, 281 (1997) [hereinafter Lopez, Retaining
Race]. With respect to race, for example, Professor Haney Lopez explains that genetics "play[ ] no role in racial fabrication other than contributing the morphological differences onto which the myths of racial identity are inscribed." Id. at 281. See also Elizabeth M. Iglesias & Francisco Valdes, Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas, 19 Chicano-Latino L. Rev. 503 (1998); Ian F. Haney Lopez, Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory, 85 Cal. L. Rev. 1143 (1997) [hereinafter Lopez, Race, Ethnicity, Erasure]; Francisco Valdes, Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities, 9 La Raza L.J. 1 (1996). Put another way, anti-essentialism asserts that there is no "essence" to any characteristic so that we cannot assume individuals sharing an identity trait such as race, sex, ethnicity, class or any other personal characteristic will necessarily have in common either world view or other aspects of identity. See Jane Wong, The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond, 5 Wm. & Mary J. Women & L. 273 (1999). In contrast, from an essentialist perspective, "the characteristics used to define a thing are thought to inhere in its very essence and, thus, to be unchangeable." Id. at 275.

For additional discussions of essentialism, see, e.g., Feminist Legal Theory: An Anti-essentialist Reader (Nancy E. Dowd & Michelle S. Jacobs eds., 2003); Angela Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581 (1990); Forms of Desire: Sexual Orientation and the Social Constructionist Controversy 25, 28 (Edward Stein ed., 1990) [hereinafter Forms of Desire].

n15. In comparing the two, Daniel Ortiz has suggested that "the constructivist debate concerns the transhistorical and transcultural stability of identity categories, whereas the antiessentialism debate concerns [the categories'] contemporary reach." Daniel Ortiz, Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity, 79 Va. L. Rev. 1833, 1847 (1993).


n17. Cheshire Calhoun, Denaturalizing and Desexualizing Lesbian and Gay Identity, 79 Va. L. Rev. 1859, 1863 (1993). Essentialist arguments can be agnostic on the question whether the identity's stability is "due to the presocial, intrinsic nature of the identity ... or the transhistorical and transcultural stability of certain social facts." Id. See also supra note 2.

n18. In making this point, essentialists also tend to neglect intersectional identities. See Martha Minow, Not Only For Myself, Identity, Politics, and the Law 57 (1997).

n19. A compelling body of scholarship is emerging specifically to contest the stability of the category "woman" and the binary distinction between men and women. See, e.g., Taylor Flynn, Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality, 101 Colum. L. Rev. 392, 418 (2001); Julie A. Greenberg, When is a Man a Man, and When is a Woman a Woman, 52 Fla. L. Rev. 745 (2000); Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender, 144 U. Pa. L. Rev. 1 (1995). See generally Butler, supra note 3, at 16 (1990) (explaining that gender is performed and describing gender as "a complexity whose totality is permanently deferred, never fully what is given at any juncture in time. An open coalition ... will affirm identities that are alternately instituted and relinquished according to the purposes at hand.")

n20. Ortiz, supra note 15, at 1836, 1838.

n21. "Woman is not born, but made" is one classic characterization of this point. See

In the context of sexual orientation, Edward Stein has offered this helpful explanation of essentialism and social constructionism with regard to sexual orientation:

Essentialists hold that a person's sexual orientation is a culture-independent, objective and intrinsic property while social constructionists think it is culture-dependent, relational and, perhaps, not objective... Essentialists think that being a heterosexual or homosexual is like having a certain blood type or being a person taller than six feet. The essentialist would have no problem saying that there were heterosexuals and homosexuals in Ancient Greece; it is just a matter of whether or not a person has the relevant properties (such as a certain gene, hormone, psychological condition, etc. or some combination of these). Even though people in past cultures may have had no idea what constitutes a gene, a hormone, an Oedipal complex or whatever the relevant properties are, they either did or did not have such properties, and thus the essentialist would claim that they were thereby either heterosexual or homosexual (or whatever the appropriate categories of sexual orientation are). In contrast, while social constructionists agree that people in all cultures engaged in sexual acts, they think that only in some cultures (e.g., our culture) are there people who have sexual orientations.

Edward Stein, Conclusion: The Essentials of Constructionism and the Construction of Essentialism, in Forms of Desire, supra note 2, at 325-26.

n22. Although essentialist-based categories may also blur upon close examination, the anti-essentialist approach affirmatively invites courts to engage in the process of defining a trait, which foregrounds the issue of a trait's ambiguity. An essentialist approach may allow the court to elide the question of its own role in developing a trait's definition with the suggestion that any definition will derive from nature rather than the court's assessment of sociological factors.

Additional theories regarding identity might also lead to categorical instability. However, because anti-essentialism is a central tenet of the LatCrit project, it is the focus here.

n23. Of course, a "natural" definition would also have to be derived by the court, albeit from ostensibly natural facts. The claim to a natural source suggests, however, that the definition would be objectively testable whereas the popular views embodied in a socially constructed definition would necessarily entail greater exercise of subjective judgment. This dependence on subjective views carries with it greater potential for ambiguity since differently-positioned people might offer varied and even contradictory perceptions of a trait in contrast to the more fixed characterization that would be expected from a natural source.


n25. See supra note 10 and accompanying text (explaining that a plaintiff must show that a cognizable class has been singled out for injury before stating an equal protection claim).


n27. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (explaining first requirement for plaintiff's prima facie case under Title VII's prohibition against race discrimination as a showing "that he belongs to a racial minority"); Int'l Bd. Of Teamsters v. United States, 431 U.S. 324, 358 (1977).
("The importance of McDonnell Douglas lies ... in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.") (emphasis added).

As many have noted, the Court's initial focus on the plaintiff's possession of the trait, rather than on the defendant's reliance on the trait, is misplaced. All individuals have each of the traits protected by Title VII - such as race and sex. See E. Christi Cunningham, The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases, 30 Conn. L. Rev. 441, 452-53 (1998) (showing that courts have treated the first McDonnell Douglas requirement as referring to "protected class" membership and critiquing that modification).

Even an analysis that more properly considers the defendant's action in response to a perceived trait rather than the plaintiff's possession of that feature requires a court to engage in the process of understanding the trait's scope to determine whether protection is available, thus implicating this essay's concern with the role of courts in defining human characteristics.


n30. This is not to suggest that a court needs to develop a complex or detailed understanding of the term. In some cases, direct evidence that includes specific reference to a plaintiff's protected identity (e.g., an employer's statement that "I won't hire any women for this kind of work.") may be sufficient to demonstrate discriminatory reliance on that trait without requiring a thorough understanding of the trait itself.

n31. See infra notes 74-76 and accompanying text (discussing accent discrimination cases).

n32. Cf. Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997). In cases lacking direct evidence, an additional analytic stage requires the court to assess whether the plaintiff's evidence demonstrates that discrimination occurred based on his or her protected characteristic(s). An anti-essentialist perspective may shape this evidentiary review, as well, by calling into question assumptions regarding intent commonly accorded to certain words or actions. However, the focus here will remain on the first two stages identified above, as it is these stages in which anti-essentialist arguments concentrate on the definition of identity features.

n33. See Oncale, 523 U.S. 75 (emphasis Title VII's protection against discrimination "because of sex" but not explaining that phrase); Vicki Schultz, Reconceptualizing Sexual Harassment, 107 Yale L.J. 1683, 1743-44 (1998) (observing that courts often "look for deep-seated sexual motivations ... [avoiding] gender-based considerations that [are] closer to the surface.").

n34. For example, in neither Romer v. Evans, 517 U.S. 620 (1996), nor J.E.B. v. Alabama, 511 U.S. 127 (1994), did the Court define sexual orientation or sex, which were the traits at issue. The cases involving transgendered individuals defy this trend, with courts tending to delve deeply and energetically into the process of defining sex. See, e.g., Greenberg, supra note 19 (discussing cases). In a sense, these cases' obsession with defining sex help prove my point because of their stark contrast with non-transgender sex discrimination cases that never once mention secondary sex characteristics or X and Y chromosomes.

n35. See Lopez, Race, Ethnicity, Erasure, supra note 2, at 1188-89; Retaining Race, supra note 2, at 279-80 (quoting Professor Perea's definition of ethnicity as "a set of traits that may include, but are not limited to: race, national origin, ancestry, language, religion, shared history, traditions, values, and symbols, all of which contribute to a sense of distinctiveness among members of the group"); see also Fernando J. Gutierrez, Gay and Lesbian: An Ethnic Identity Deserving Equal Protection, 4 Law &
Sexuality 195, 208-09 (1994) (offering similar definition of ethnicity).

n36. See, e.g., Shahar v. Bowers, 120 F.3d 211 (11th Cir. 1997) (en banc).

n37. This draws from the definition of sexual orientation generally accepted by psychologists. See, e.g., Gregory M. Herek, Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research, 1 Law & Sexuality 133, 134 (1991). Another dimension of that definition emphasizes that sexual orientation is deeply rooted and fixed in place early in life, if not prenatally or genetically. Id. at 149-52. My example posits defining lesbian identity without regard to this portion of the definition.


n38. See 42 U.S.C.A. 12102(2)(A) (West 2002) (defining disability in part as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual"). See also Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) (interpreting 42 U.S.C. 12102(2)(A)).


n40. Certainly, numerous other identities are not widely viewed as innate in the sense of being inborn. Religion, marital status, veteran's status, source of income, and other identity features that may significantly shape an individual's life are all widely recognized to be acquired or instilled. In those cases, protective legislation typically will define the class in detail and regulations will set forth independent methods for verifying class membership through documentation. Religion is one significant exception to this in that a person's religious identity is neither inborn nor subject to a finite, verifiable definition. However, in some respects, religion is sui generis because of our nation's history. The central commitment to free exercise of religion, bounded by the Establishment Clause's barrier to excessive judicial involvement with assessing religious identity claims, has evolved into an acceptance of self-declaration as the means for establishing this type of class membership. As a consequence, the porous, socially constructed nature of the contours of this class is so deeply and widely known that claims seeking assessment of religious discrimination, which necessarily implicate the need for a court to understand "religion," are not typically seen as requiring a court to venture beyond its areas of expertise.

n41. Often the perpetrator of discrimination responds to multiple traits of his or her target; however, a careful plaintiff will tailor the litigation to concentrate only on traits that receive protection.

n42. See, e.g., Zapata v. IBP, Inc., 19 F. Supp. 2d 1215, 1219 (D. Kan. 1988) (treating individuals of Mexican and Spanish descent and those with Spanish surnames as one unified group). Of course, the connection among trait-bearers is strongest where the trait is a minority trait within the community.

n43. In particular, many people who have features that would commonly be considered disabilities do not consider themselves "impaired" and do not want to adopt that self-presentation as a means to obtain protection against discrimination based on disability. See Paula E. Berg, Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law, 18 Yale L. & Pol'y Rev. 1, 36-37 (1999) (describing how plaintiffs engaged in discrimination litigation must stigmatize and objectify...
their impairment to obtain legal protection); see also Laura L. Rovner, Perpetuating Stigma: Client Identity in Disability Rights Litigation, 2001 Utah L. Rev. 247, 252 (2001) (In seeking damages, the "client may be required to portray ... a 'victim' identity, which may not only clash with how she sees herself, but may also be the exact image that she ... is trying to eradicate."); Bahan, supra note 39.

n44. See Kathryn Abrams, Title VII and the Complex Female Subject, 92 Mich. L. Rev. 2479, 2481 (1994) (observing that many courts "requiree that claimants disaggregate and choose among the elements of their identities" rather than recognizing the ways in which different aspects of an individual's identity may, in the aggregate or in combination, result in an experience of discrimination not simply redressed under one identity category).

n45. See Tanya Kateri Hernandez, Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race, 4 J. Gender Race & Just. 183, 184-89 (2001) (discussing ways in which women's experience of sexual harassment may be affected by race); Abrams, supra note 44; see also Elizabeth M. Iglesias, Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!, 28 Harv. C.R.-C.L. L. Rev. 395 (1993).


n47. See, e.g., Williamson v. A.G. Edwards, 876 F.2d 69 (8th Cir. 1989) (rejecting discrimination claim by black gay man on grounds that the discrimination suffered related to plaintiff's sexual orientation rather than race); see also Abrams, supra note 44.

n48. See Iglesias, supra note 45 at 470 (discussing "the unitary consciousness of law"); see also Wendi Barish, "Sex-Plus" Discrimination: A Discussion of Fisher v. Vassar College, 13 Hofstra Lab. & Emp. L.J. 239 (1995); Mary Elizabeth Powell, Comment, The Claims of Women of Color Under Title VII: The Interaction of Race and Gender, 26 Golden Gate U. L. Rev. 413, 422 (1996). Professor Devon Carbado has demonstrated that this failure to recognize the interrelationship of identity features occurs among advocates as well as judges. See Devon W. Carbado, Black Rights, Gay Rights, Civil Rights, 47 UCLA L. Rev. 1467, 1469 (2000) (showing how "black antiracism and white gay and lesbian civil rights advocacy continues to reflect essentialized notions of black and gay identity" so that blacks are presumed to be heterosexual and gay people are presumed to be white) (footnote omitted). Cf. All the Women Are White, All the Blacks Are Men, But Some of Us Are Brave: Black Women's Studies (Gloria T. Hull et al. eds. 1982).

n49. See Halley, Sexual Orientation and the Politics of Biology, supra note 6, at 513-14 (discussing dangers of relying on scientific proof of a characteristic's immutability); Kenji Yoshino, The Epistemic Contract of Bisexual Erasure, 52 Stan. L. Rev. 353, 377 (2000) (reviewing methodological problems with several major sexuality studies); Keen & Goldberg, supra note 12, at 43-45 (reviewing dispute about using scientific evidence in Romer v. Evans litigation to demonstrate immutability of sexual orientation for purposes of suspect classification analysis).

n50. Of course, it is always possible to argue that the plaintiff falls within the protected class because he or she is "perceived as" a member of that class rather than because he or she is actually a class member. See 42 U.S.C. 12102 (2)(C) (2002) ("The term 'disability' means, with respect to an individual ... being regarded as having such an impairment."); see also, e.g., Murphy v. United Parcel Service, Inc., 527 U.S. 516, 516-17 (1999) (mistaken belief is a way in which a person may be perceived as having a disability); Sutton v. United Air Lines, Inc., 527 U.S.
471, 473 (1999) (holding "petitioners ... failed to allege properly that they [were] 'regarded as' ... having an impairment that 'substantially limits' a major life activity.'"). Because this type of claim does not obviate the need for a plaintiff to characterize the perceived characteristic as either scientifically ordained or socially constructed, the additional layer added by the "perceived as" framing of a complaint does not affect the analysis here.

n51. In Saint Francis College v. Al-Khazraji, all parties agreed that the plaintiff fit within the class of Arab-Americans. Therefore, the anti-essentialist analysis in that case pertained only to whether Arab-Americans would be considered to be a race distinct from "whites" within 42 U.S.C. 1981. Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987).

n52. But see Kenji Yoshino, Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell," 108 Yale L.J. 485, 498 (1998) [hereinafter Yoshino, Assimilationist Bias].

There is no such thing as a purely biologically visible trait, for visibility is always relational, requiring a performer and an observer. Whether a trait is visible will thus depend not only on the trait but also on the 'decoding capacity of the audience,' which in turn will depend on the social context.

Id.

n53. Although the political realm is largely beyond this essay's scope, it bears noting that anti-essentialist arguments present significant challenges in the political/legislative realm as well. The political difficulties presented by a group's perceived indeterminacy have been reproduced in the national census, for example, which, in each recent decade, has adopted a new approach to asking individuals self-identify by race or ethnicity. See Enid Trucios-Haynes, Why "Race Matters:" LatCrit Theory and Latina/o Racial Identity, 12 La Raza L.J. 1, 14-15 (2001) (identifying census code for Latina/os in 1960 as white (unless they were Black, Native American, or another race), as "Spanish heritage population" in 1970, as Mexican, Puerto Rican, Cuban or other Spanish/Hispanic origin in 1980, as requiring selections of race and ethnicity in 1990, and as requiring selection of race and ethnicity - "Hispanic or Latino" or "Not Hispanic or Latino"--in 2000. See generally Michael Omi, Racial Identity and the State: The Dilemmas of Classification, 15 Law & Ineq. 7 (1997).

n54. Cf. Hernandez Truyol, supra note 46, at 388 (relying on social scientists to establish the emergence of Mexican American ethnic identity).

n55. This reference to courts' reputation for fairness is intended to be aspirational, not descriptive. Many scholars have sought to establish that fairness is not among courts' primary considerations. See, e.g., Jed Rubenfeld, The Anti-Discrimination Agenda, 111 Yale L.J. 1141 (2002) (suggesting the Supreme Court's political agenda based on recent cases); Girardeau A. Spann, Affirmative Action and Discrimination, 39 How. L.J. 1, 92 (1995) (maintaining that the Supreme Court has decided cases with racist, rather than fairness, considerations in mind).


n57. Conceivably, a dictionary could serve as an external source of trait definition. However, unlike in Saint Francis College, where the Court looked to a dictionary for insights into historical understandings of race, see infra text accompanying note 87, most personal traits today are the subject
of contested definitions. A court would have to choose among varied dictionaries and varied definitions to select its preferred definition and, in doing so, would implicate itself in the process of defining the trait.

n58. When settled categories become unsettled, judges, and people generally, lose "the security that all individuals draw from rigid social orderings." See Yoshino, supra note 49, at 428. Indeed, my discomfort regarding the use of a social construction argument to explain gay identity might have anticipated the Supreme Court's potential discomfort at the prospect of defining gay identity or sexual orientation, which the Court ultimately did not attempt to do in deciding the case.

The power of this contention is not limited to the litigation context. Cf. id. at 407, 409 (asserting that gay rights advocates have deemphasized bisexuals while pursuing civil rights for gay people because "stabilizing gay identity" allows for "effective political mobilization" by "ensuring that the line of battle is clearly drawn"). Indeed, it has taken on particular force in response to efforts to pass antidiscrimination laws that include the category of sexual orientation. See also infra text accompanying note 60.


n60. Id. The original Sixth Circuit panel to reject the lesbian and gay plaintiffs' challenge to Cincinnati's charter amendment that forbade "protected status" for gay people also maintained that a class without externally fixed boundaries could not even properly be the subject of an antidiscrimination measure.

The reality remains that no law can successfully be drafted that is calculated to burden or penalize, or to benefit or protect, an unidentifiable group or class of individuals whose identity is defined by subjective and unapparent characteristics such as innate desires, drives, and thoughts.


The preponderance of credible evidence suggests that there is a biologic or genetic "component" of sexual orientation, but even Dr. Hamer, the witness who testified that he is 99.5% sure there is some genetic influence in forming sexual orientation, admits that sexual orientation is not completely genetic. The ultimate decision on "nature" vs "nurture" is a decision for another forum, not this court, and the court makes no determination on this issue.

Id. (emphasis in original).

n61. Equality Foundation, 128 F.3d at 293 (quoting Equality Foundation, 54 F.3d at 267) (opinion on remand).

n62. See, e.g., Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) ("It would be quite anomalous [sic], on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause."); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes."); High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed.Cir.1989) (describing homosexuality as behavioral).

n63. However, as strong social constructionists would maintain, attributing a person's selection of sexual partners to an innate sexual orientation fails to see that sexual orientation would not exist as an aspect of identity but for society according weight to an individual's

n64. See, e.g., People v. Garcia, 92 Cal. Rptr. 2d 359 (2000)

It cannot seriously be argued in this era of "don't ask; don't tell" that homosexuals do not have a common perspective - "a common social or psychological outlook on human events" - based upon their membership in that community. They share a history of persecution comparable to that of blacks and women. While there is room to argue about degree, based upon their number and the relative indiscernibility of their membership in the group, it is just that: an argument about degree. It is a matter of quantity, not quality... This is not to say that all homosexuals see the world alike. The Attorney General here derides the cognizability of this class with the rhetorical question, "What 'common perspective' is, or was, shared by Rep. Jim Kolbe (R-Ariz.), RuPaul, poet William Alexander Percy, Truman Capote, and Ellen DeGeneres?" He confuses "common perspective" with "common personality." Granted, the five persons he mentions are people of diverse backgrounds and life experiences. But they certainly share the common perspective of having spent their lives in a sexual minority, either exposed to or fearful of persecution and discrimination.


In Lawrence v. Texas, 123 S. Ct. 2472 (2003), the Court was asked to invalidate a restriction on particular sex acts when engaged in by same-sex partners on the grounds that the law violated the rights of gay people. Although none of the opinions fully engaged in the process of defining gay identity, the majority opinion appeared to recognize that sexual conduct is "but one element" of being lesbian or gay. In discussing the relationships of same-sex couples, the Court observed that "when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." Id. at 2478.

n65. In Ryczek v. Guest Services, 877 F. Supp. 754, 762 (D.D.C. 1995), the court admitted that it was "not well-prepared to resolve" the question whether the defendant in a sexual harassment lawsuit was a lesbian or a bisexual. Commenting that "the prospect of having litigants debate and juries determine the sexual orientation of Title VII defendants is a rather unpleasant one," the court highlighted the definitional difficulties in the form of a discussion about proof. Id.

One can only speculate as to what would be legally sufficient to submit the issue of a supervisor's bisexuality to the jury. Would the supervisor's sworn statement of his or her bisexuality be adequate? Would the supervisor need to introduce affirmative evidence of his liaisons with members of both sexes? Surely Congress did not anticipate that the language of Title VII would eventually produce such concerns.

Id. at 762 n.7.

n66. Psychological experts tend to define sexual orientation as deeply rooted and implicating the erotic attraction to others and the expression of that attraction. Herek, supra note 37, at 134.

n67. See, e.g., Quinn v. Nassau Cty. Police Dep't, 53 F. Supp. 2d 347 (E.D. N.Y. 1999) (upholding jury finding that police officials had violated gay officer's constitutional rights without discussing concept of sexual orientation); Weaver v. Nebo School Dist., 29 F. Supp. 2d 1279 (D. Utah 1998) (invalidating school district's restriction on teacher's ability to speak about her sexual orientation outside the classroom without discussing meaning
of sexual orientation); cf. Watkins v. U.S. Army, 837 F.2d 1428 (9th Cir. 1988), rev'd by 875 F.2d 699 (9th Cir. 1989) (en banc) (concluding that "homosexuals constitute a suspect class" after analyzing sexual orientation with respect to historical discrimination, its immutability, and its relationship to merit and then striking down military's prohibition on service by gay men and lesbians).


n69. See, e.g., Cuiello-Suarez v. Autoridad de Energia Electrica de Puerto Rico, 737 F. Supp. 1243, 1249 (D. P.R. 1990) (finding that "Dominicans and Puerto Ricans can both be considered to be part of the Hispanic race at the present time"); Nieto v. United Auto Workers Local 598, 672 F. Supp. 987, 989 (E.D. Mich. 1987) ("although the verbal harassment was replete with reference to green cards, boats, wetbacks and borderpatrols [sic], suggesting national origin discrimination, this is racial discrimination within the meaning of section 1981"); see also Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617 (1987) (holding "Jews constituted a group of people that Congress intended to protect" within protections against race discrimination).

n70. See, e.g., Zapata v. IBP, Inc., 19 F. Supp. 2d 1215, 1219 (D. Kan. 1988) ("In this holding we consider that Mexican American, Spanish American, Spanish-surname individuals, and Hispanics are equivalents, and it makes no difference whether these are terms of national origin, alienage, or whatever."). But see United States v. Rodriguez, 588 F.2d 1003, 1007 (5th Cir. 1979) (rejecting plaintiffs claim of discrimination in jury selection based on statistical showing that registered voters of "Latin origin" were not included in jury pool; "This naked claim, however, does nothing to guide us to a finding that appellant has identified a single cognizable group rather than several, E.g. [sic] Cuban-Americans, Puerto-Ricans, Argentine-Americans, Spanish-Americans, etc.").

n71. See Hernandez v. Tex., 347 U.S. 475, 478 (1954); see also id. at 479 ("petitioner's initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from 'whites."). Some lower courts have embraced this type of situational analysis for determining the existence of an ethnic group as a matter of law. See, e.g., Commonwealth v. Rico, 711 A.2d 990 (Pa. 1998)

We conclude that whether Italian-Americans comprise a cognizable group needing protection from community prejudices ... is a question of fact ... . In order to demonstrate cognizability, a defendant must show the ethnic group: (1) is defined and limited by some clearly identifiable factor or factors; (2) possesses a common thread of attitudes, ideas or experiences; (3) shares a community of interests such that the group's interest cannot be adequately represented if the group is excluded from the jury selection process; and, (4) has experienced or is experiencing discriminatory treatment and is in need of protection from community prejudices.

Id. at 994.

n72. 347 U.S. at 478. Ian Haney Lopez has suggested that "the Court in Hernandez rejected a racial understanding of Mexican Americans in part because it subscribed to a concept of race as something natural and therefore stable, fixed, and immutable." Lopez, Race, Ethnicity, and Erasure, supra note 14, at 1179.

n73. As shown below, notwithstanding its flexible-sounding characterization, even Hernandez ultimately results in a definition of ethnicity that has a fixed, though not innate, component. See infra text at notes 110-11.
n74. See, e.g., Garcia v. Spun Steak, 998 F.2d 1480 (9th Cir. 1993) (rejecting claim that termination for speaking Spanish constituted national origin discrimination under Title VII); Fragante v. Honolulu, 888 F.2d 591, 596, 599 (9th Cir. 1989), cert. denied, 494 U.S. 1081 (1990) (finding that "accent and national origin are inextricably intertwined in many cases" but rejecting plaintiff's employment discrimination claim because of the "effect of his Filipino accent on his ability to communicate") (emphasis in original); Korpai v. A.W. Zengler's Grande Cleaners, Inc., No. 85 C 9130, 1987 WL 20428, at 2 (N.D. Ill. Nov 24, 1987) ("Discrimination based on foreign immigration and speech with an accent is not discrimination based upon Hungarian ancestry or Hungarian characteristics, for purposes of Section 1981."); Sirajullah v. Illinois State Medical Ins. Exch., No. 86 C 8668, 1989 WL 88301 (N.D. Ill. Aug. 2, 1989); see generally Christopher David Ruiz Cameron, How the Garcia Cousins Lost their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy, 10 La Raza L.J. 261 (1998) (discussing the question of accent discrimination and its relation to race-based and ethnicity-based discrimination); Matsuda, supra note 55. But see Carino v. Univ. of Oklahoma Bd. of Regents, 750 F.2d 815 (10th Cir. 1984) (upholding determination that plaintiff suffered discrimination because of his national origin and related accent).

n75. See Matsuda, supra note 56 at 1337-38, 1345 (discussing in detail the excellent communication skills of Manuel Fragante and other plaintiffs in accent discrimination lawsuits).

n76. See cases cited supra note 74.

n77. One could argue that courts engage in this type of weighing process in every anti-discrimination law suit where no direct evidence exists. However, the fundamental question in play in this example is not whether a particular piece of evidence supports a claim that a plaintiff was discriminated against because of his or her Latino/a surname but instead whether accent is part of ethnicity.

n78. See United States v. Bhagat Singh Thind, 261 U.S. 204, 208-09 (1923). Cf. Ozawa v. United States, 260 U.S. 178, 195 (1922) ("The intention [of the naturalization statute] was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified.").) (emphasis added).

n79. In distinguishing the narrower, popular understanding of "white," the Court also observed that the term "'Caucasian' is a conventional word of much flexibility." Thind, 261 U.S. at 208. See also id. ("as used in the science of ethnology, the connotation of the word [Caucasian] is by no means clear"). For discussion of similar lower court cases charting a course between the scientific and popular understandings of race, see generally Lopez, White By Law, supra note 3.

n80. Thind, 261 U.S. at 209.

n81. Id. at 209 ("It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them to-day.").


n83. Id. at 610.

n84. Id. at 610 n.4.

n85. See also id. at 613 (noting that "a distinctive physiognomy is not essential to qualify for 1981 protection").

n86. The Court also looked to the legislative history of 1981 and found that the debates preceding the statute's passage made reference to Arabs and other ethnic groups as distinct races. Id. at 612. Notably, Spanish and Mexicans were also characterized as distinct races notwithstanding the Court's decision not to treat people of Mexican descent as a distinct race in Hernandez v. Texas, 347 U.S. 475 (1954) (finding that lack of Spanish-surnamed individuals serving on
juries in a Texas county constituted discrimination based on ancestry in violation of equal protection guarantees).


n88. Id. at 617.

n89. See also Amini v. Oberlin College, 259 F.3d 493, 503 (6th Cir. 2001) (characterizing Supreme Court's definition of race as "expansive" and finding that plaintiff's self-identification as Middle Eastern fit within 1981's definition of race); DeSalle v. Key Bank of Southern Maine, 685 F. Supp. 282 (D. Me. 1988) (upholding claim of race discrimination based on plaintiff's Italian ethnicity); Wamget v. State, 67 S.W.3d 851, 855 (Tex. Crim. App. 2001) ("We agree that the notion of 'race' ought to be as broadly understood for purposes of Batson and the Equal Protection Clause as it has been interpreted by the Supreme Court in the context of other post-civil war legislation such as Section 1981.").


n92. Id. at 137-38.

Respondent maintains that its decision to strike virtually all the males from the jury in this case "may reasonably have been based upon the perception, supported by history, that men otherwise totally qualified to serve upon a jury in any case might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women equally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of the complaining witness who bore the child."

Id. (citation and footnote omitted).

n93. But see Nguyen v. INS, 533 U.S. 53, 87 (2001) (O'Connor, J., dissenting) (criticizing the Court for upholding a law distinguishing between mothers and fathers for purposes of petitioning for a child's naturalization; "There is no reason, other than stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms.").

n94. Although Saint Francis College and Shaare Tefilah discuss social construction theory in the context of interpreting 1981, the Court does not limit its embrace of that theory to the scope of that particular anti-discrimination statute.


n95. See Amy H. Kastely, Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law, 63 U. Cin. L. Rev. 269, 275 (1994) ("In the United States, numerous cultural details are raced: possessions, practices, even political opinions are tagged white or black and separated into oppositional groups."); cf. Leslie Espinoza and Angela P. Harris, Embracing the Tar-Baby - LatCrit Theory and the Sticky Mess of Race, 85 Cal. L. Rev. 1585, 1601 (1997) (In discussing "color prejudice," the authors contend that "in a perverse way ... to be 'authentically' African American is to be noticeably dark-skinned, continually vulnerable to being raced as black.").

n96. 481 U.S. 604, 610 n.4 (1989) ("The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance.").

n97. Id. at 613.

n98. Id. at 610 (discussing dictionary definitions of race "as a 'continued series of descendants from a parent who is called the stock'") (citations omitted) (emphasis in original); see also id. at 613 (explaining that plaintiff-respondent Al-Khazraji could make out a race discrimination claim under 1981 if he could show he was discriminated against because "he was born an Arab").
n99. For related scholarship outside of LatCrit, see generally Critical Race Theory: The Key Writings That Formed the Movement (Kimberle Crenshaw et al., eds., 1995); Critical Race Theory: The Cutting Edge (Richard Delgado ed., 1995).

n100. Juan F. Perea, Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII, 35 Wm. & Mary L. Rev. 805, 833-34 (1994); see also Lopez, Race, Ethnicity, Erasure, supra note 14, at 1188 and Lopez, Retaining Race, supra note 14, at 280. Ethnicity has also been defined as both the sense and the expression of collective, intergenerational cultural continuity. Joshua A. Fishman, The Rise and Fall of the Ethnic Revival: Perspectives on Language and Ethnicity 4 (Joshua A. Fishman et al., eds., 1985) (internal quotations omitted).

n101. See Garcia, 13 F.3d at 298 (Reinhardt, J., dissenting from denial of rehearing en banc) ("Language is intimately tied to national origin and cultural identity: its discriminatory suppression cannot be dismissed as 'inconvenience' to the affected employees"); see also Ruiz Cameron, supra note 74, at 278 (describing the Spanish language as "central to Latino identity" and a "fundamental aspect of ethnicity").

One could argue that the Court's reference to ancestral stock does not foreclose successful claims for discrimination based on characteristics that are attributed to persons of a particular lineage, such as social style or accent or eating habits. However, the Court's indication that Al-Khazraji could make out a 1981 claim only if he could prove that he suffered discrimination because he was "born an Arab" rather than because he acted in ways attributed to Arabs suggests that the judicial concern is with the narrowest conception of ethnic characteristics.

n102. Although the Supreme Court has not yet directly assessed the nature of ethnicity-based discrimination since deciding St. Francis College, a number of circuit and district court decisions, particularly those dealing with linguistic discrimination, do not generally provide cause for optimism. In Garcia v. Spun Steak, for example, the court wrote that "the fact that an employee may have to catch himself or herself from occasionally slipping into Spanish [to comply with an English-only rule] does not impose a burden significant enough to amount to the denial of equal opportunity." 998 F.2d 1480, 1488 (9th Cir. 1993). As Christopher David Ruiz Cameron put it, "so insisting that somebody who has the ability to speak English now be required to do so does not seem nearly so serious to [Anglo judges] as situations in which employees are terminated because of the color of their skin." Ruiz Cameron, supra note 74, at 277 (1998); see also Fragante v. Honolulu, 888 F.2d 591 (9th Cir. 1987) (accepting connection between national origin and accent but finding that discrimination based on accent was justified); Beatrice Bich-Dao Nguyen, Accent Discrimination and the Test of Spoken English: A Call for an Objective Assessment of the Comprehensibility of Nonnative Speakers, 81 Cal. L. Rev. 1325, 1342-43 (1993) (discussing unsuccessful accent-related discrimination claim by Chinese-born professor).

n103. Compare Romer v. Evans, 517 U.S. 620 (1996) (rejecting explicit classification discriminating against gay people), and Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997) (finding violation when officers failed to provide adequate protection to plaintiff because of her perceived sexual orientation), with Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (upholding plaintiff's termination from Boy Scouts on account of his expressed identity as gay), and Shahar v. Bowers, 120 F.3d 211 (11th Cir. 1997) (en banc)(validating state attorney general's decision to rescind offer of employment because of plaintiff's religious marriage to another woman). Technically, the amendment at issue in Romer referred to "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." Romer, 517 U.S. at 625. However, because the Court treated the amendment as implicating the rights of "gays and lesbians," id. at 627, the potentially challenging questions of trait definition did not arise.
Likewise, in Lawrence v. Texas, 123 S. Ct. 2472 (2003), the restriction on same-sex sexual relations at issue was understood by the Court to target gay people. See id. at 2482 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."). id. at 2486. ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual.") (O'Connor, J., concurring).

n104. Saint Francis College v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987) (noting the "common popular understanding that there are three major human races - Caucasian, Mongoloid, and Negroid). See also id. at 609 (distinguishing Al-Khazraji's suit from earlier suit involving suit by "white person" against "a black"). Of course, notwithstanding this general assumption, color differences do not always predict a person's race as socially constructed. See Judy Scales-Trent, Commonalities: On Being Black and White, Different and the Same, 2 Yale J.L. & Feminism 305 (1990).


n107. In Saint Francis College, the Supreme Court comments that "it may be that a variety of ethnic groups, including Arabs, are now considered to be within the Caucasian race." 481 U.S. at 610. See also Ruiz Cameron, supra note 74, at 279 (observing that "Spanish-speaking ability is the historic basis upon which Anglo society discriminates against Latinos.").

n108. Cf. Saint Francis College, 481 U.S. at 613 ("[A] distinctive physiognomy is not essential to qualify for 1981 protection."). The Court's merged analysis of race and ethnicity contrasts with the more typical popular treatment of race and ethnicity as distinct categories. As Ian Haney Lopez has suggested, "in effect, race has been used as a marker of differences believed to be physical and innate, whereas ethnicity has been applied in ways suggesting cultural distance." Lopez, Race, Ethnicity, Erasure, supra note 14, at 1189.


n111. Id. at 481 n.12. But see Commonwealth v. Rico, 711 A.2d 990 (Pa. 1998) ("The mere spelling of a person's surname is insufficient to show that he or she belongs to a particular ethnic group.").

n112. In the context of equal protection, Kenji Yoshino has written about the strong "visibility" presumption that shapes a court's likelihood to designate a trait-based classification as suspect or quasi-suspect and, therefore, as warranting heightened judicial review. He points to corporeal visibility - "the perceptibility of traits such as skin color that manifest themselves on the physical body in a relatively permanent and recognizable way" as the key by which courts identify groups needing heightened judicial solicitude. Yoshino, Assimilationist Bias, supra note 52, at 497. The analysis here, while including physically visible features, extends further to other non-visible physical features, such as "hidden disabilities," and non-physical features subject to verification, such as ancestral lineage. Id. at 497-98. Cf. id. at 495:

The courts appear to be making a distinction between "corporeal" and "social" traits. If a trait is perceived to be defined by nature rather than by culture, then the courts will be more likely to call it immutable. Race and sex, for example, are clearly viewed as biologically determined. If, on the other hand, the trait is perceived to be more defined by culture, the courts will withhold the immutability designation. Religion and alienage, for example, are
viewed not to have a biological substrate and, thus, are not deemed immutable.

Id.

n113. Two additional reasons may also affect the courts' analyses in these cases. First, it may be that some courts perceive tangible features as the most salient in an antidiscrimination practice because they appear to be immutable and therefore involuntary in a way that warrants judicial protection. But see Halley, Sexual Orientation and the Politics of Biology, supra note 6, at 507-11. In addition, courts might be more disposed to grasp social construction theory in cases involving racial classifications because the social status of whites is at stake. See, e.g., United States v. Thind, 261 U.S. 204, 208-09 (1923).

n114. One might argue that courts are concerned with the existence of a bright-line for distinguishing among characteristics rather than with the essential or non-essential nature of a characteristic. However, as the litany of recent decisions interrogating the meaning of disability under the Americans with Disabilities Act has shown, a bright line rule is not necessary to persuade a court to find discrimination. See generally Berg, supra note 43. Nor is the bright line of self-expression or self-identification as a trait-bearer typically deemed adequate to warrant protection, as the cases involving accent, language use, and sexual orientation-related expression demonstrate.

n115. A collateral cost for lawyers making strategic use of essentialist arguments may be to reinforce the perception of lawyers as insensitive to clients' needs and as willing to trade away justice for short-term victory. However, by declining to make an essentialist argument that might appeal to a judge, a lawyer also risks being criticized for being insensitive to clients' needs by potentially raising an additional barrier to recovery for a client. Further, lawyers making anti-essentialist and social construction arguments may find themselves accused of seeking to stretch the law beyond its intended reach.


n117. For example, in challenges to sodomy laws and anti-gay measures filed while I was at Lambda Legal Defense, we sought to insure that our group of plaintiffs reflected the differences in age, occupation, race, sex, dis/ability, religion, ethnicity and other dimensions of identity to counter the widely held assumptions that gay people are monolithically white, male, and wealthy. However, while this strategy challenges the essentialist assumption that those who possess a particular trait have a common appearance, career path, or other demographically significant characteristics, it does not develop the ways in which sexual orientation interacts with those diverse identity traits in any one plaintiff or raise the possibility that the meaning of being gay or lesbian differs with each individual plaintiff.
WARD CHURCHILL*


SUMMARY: As anyone who has ever debated or negotiated with U.S. officials on matters concerning American Indian land rights can attest, the federal government's first position is invariably that its title to/authority over its territoriality was acquired incrementally, mostly through provisions of cession contained in some 400 treaties with Indians ratified by the Senate between 1778 and 1871. When it is pointed out that the U.S. has violated the terms of every one of the treaties at issue, thus voiding whatever title might otherwise have accrued therefrom, there are usually a few moments of thundering silence. The official position, publicly framed by perennial "federal Indian expert" Leonard Garment as recently as 1999, is then shifted onto different grounds: "If you don't accept the treaties as valid, we'll have to fall back on the Doctrine of Discovery and Rights of Conquest." This rejoinder, to all appearances, is meant to be crushing, forestalling further discussion of a topic so obviously inconvenient to the status quo.

While the idea that the U.S. obtained title to its "domestic sphere" by discovery and conquest has come to hold immense currency among North America's settler population, one finds that the international legal doctrines from which such notions derive are all but unknown, even among those holding degrees in law, history or political philosophy. The small cadre of arguable exceptions to the rule have for the most part not bothered to become acquainted with the relevant doctrines in their original or customary formulations, instead contenting themselves with reviewing the belated and often transparently self-serving "interpretations" produced by nineteenth century American jurists, most notably those of John Marshall, third Chief Justice of the Supreme Court. Overall, there seems not the least desire - or sense of obligation - to explore the matter further.

The situation is altogether curious, given Marshall's own bedrock enunciation of America's self-concept, the hallowed proposition that the U.S. should be viewed above all else as "a government of laws, and not of men." Knowledge of/compliance with the law is presupposed, of course, in any such construction...
of national image. This is especially true with respect to laws which, like those pertaining to discovery and conquest, form the core of America's oft and loudly-proclaimed contention that its acquisition and consolidation of a transcontinental domain has all along been "right," "just" and therefore "legal."\textsuperscript{n7} Indeed, there can be no questions of law more basic than those of the integrity of the process by which the United States has asserted title to its land-base and thereby purports jurisdiction over it.

The present essay addresses these questions, examining U.S. performance and the juridical logic attending it through the lens of contemporaneous international legal custom and convention, and drawing conclusions accordingly. The final section explores the conceptual and material conditions requisite to a reconciliation of rhetoric and reality within the paradigm of explicitly American legal (mis)understandings. It should be noted, however, that insofar as so much of this devolves upon international law, and with the recent emergence of the U.S. as "the world's only remaining superpower,"\textsuperscript{n8} the implications are not so much national as global.

I

The Doctrine of Discovery

Although there are precursors dating back a further 200 years, the concepts which were eventually systematized as discovery doctrine for the most part originated in a series of Bulls promulgated by Pope Innocent IV during the late thirteenth century to elucidate material relations between Christian crusaders and Islamic "infidels."\textsuperscript{n9} While the pontiff's primary objective was to establish a legal framework compelling "Soldiers of the Cross" to deliver the fruits of their pillage abroad to such beneficiaries as the Vatican and Church-sanctioned heads of Europe's incipient states, the Innocentian Bulls embodied the first formal acknowledgment in Western law that rights of property ownership were enjoyed by non-Christians as well as Christians. "In Justice," then, it followed that only those ordained to rule by a "Divine Right" conferred by the "One True God" were imbued with the prerogative to "rightly" dispossess lesser mortals of their lands and other worldly holdings.\textsuperscript{n10}

The law remained as it was until 1492, when the Columbian "discovery" of what proved to be an entire hemisphere, very much populated but of which most Europeans had been unaware, sparked a renewed focus upon questions of whether and to what extent Christian sovereigns might declare proprietary interest in the assets of others.\textsuperscript{n11} Actually, the first problem was whether the inhabitants of the "New World" were endowed with "souls," the criterion of humanity necessary for us to be accorded any legal standing at all. This issue led to the famous 1550 debate in Valladolid between Frey Bartolome de las Casas and Juan Gines de Sepulveda, the outcome of which was papal recognition that American Indians were human beings and therefore entitled to exercise at least rudimentary rights.\textsuperscript{n12}

As a corollary to the Valladolid proceedings, Spanish legal theorists such as Francis de Vitoria and Juan Matias de Paz were busily revising and expanding upon Innocent's canonical foundation as a means of delineating the property rights vested in those "discovered" by Christian (i.e., European) powers as well as those presumably obtained in the process by their "discoverers."\textsuperscript{n13} In the first instance, Vitoria in particular posited the principle [\textsuperscript{*667}] that sovereigns acquired outright title to lands discovered by their subjects only when the territory involved was found to be literally unoccupied (terra nullius).\textsuperscript{n14} Since almost none of the land European explorers ever came across genuinely met this description, the premise of territorium res nullius, as it was called, was essentially moot from the outset (albeit, as will become apparent, the English - and much more so their American offshoot - would later twist it to their own ends). In places found to be inhabited, it was unequivocally acknowledged in law that native residents held inherent or "aboriginal" title to the land.\textsuperscript{n15} What the discoverer obtained was a monopolistic right vis-a-vis other powers to acquire the property from its native owners, in the event they could be persuaded through peaceful means to alienate it. On balance, the formulation seems to have been devised more than anything as an attempt to order the relations between the European states in such a way as to prevent them from shredding one another in a mad scramble to glean the lion's share of the wealth all of them expected to flow from the Americas.\textsuperscript{n16}

Under the right of discovery, the first European nation to discover American [or other] lands previously unknown to Europe had what is similar to an exclusive European franchise to negotiate for Indian land within the discovered [area]. International law forbade European nations from interfering in the diplomatic affairs which each carried on with the Indian nations within their respective "discovered" territories. The doctrine thus reduced friction and the possibility of warfare between the competing European nations.\textsuperscript{n17}
That this principle was well-developed in international law and understood perfectly by America's "Founding Fathers" is confirmed in an observation by no less luminous a figure than Thomas Jefferson:

We consider it as established by the usage of different nations into a kind of Jus gentium for America, that a white nation settling down and declaring that such and such are their limits, makes an invasion of those limits by any other white nation an act of war, but gives no right of soil against the native possessors.n18

"That is to say, [we hold simply] the sole and exclusive right of purchasing [land] from [indigenous peoples within our ostensible boundaries] whenever they should be willing to sell."n19 The requirement that the consent of indigenous peoples was needed to legitimate cessions of their land was what prompted European states to begin entering into treaties with "the natives" soon after the invasion of North America had commenced in earnest. n20 While thus comprising the fundamental "real estate documents" through which the disposition of land title on the continent must be assessed, treaties between European and indigenous nations also served to convey formal recognition by each party that the other was the equal in terms of legal stature ("sovereignty"). n21 To quote Jefferson again, "the Indians [have] full, undivided and independent sovereignty as long as they choose to keep it, and ... this might be forever." n22 Or, as U.S. Attorney General William Wirt would put it in 1828:

[Be it] once conceded, that the Indians are independent to the purpose of treating, their independence is, to that purpose, as absolute as that of any other nation... . Nor can it be conceded that their independence as a nation is a limited independence... Like all other independent nations, they have the absolute power of war and peace. Like all other independent [nations], their territory is inviolable by any other sovereignty... They are entirely self-governed - self-directed. They treat, or refuse to treat, at their pleasure; and there is no human power which can rightfully control ... their discretion in this respect.n23

From early on, the English had sought to create a loophole by which to exempt themselves in certain instances from the necessity of securing land title by treaty, and to undermine the discovery rights of France, whose New World settlement patterns were vastly different from those of England.n24 Termed the "Norman Yoke," the theory was that an individual - or an entire people - could rightly claim only such property as they had converted from wilderness to a state of domestication (i.e., turned into town sites, placed in cultivation, and so forth). n25 Without regard for indigenous methods of land use, it was declared that any area found to be in an "undeveloped" condition could be declared terra nullius by its discoverer and clear title thus claimed.n26 By extension, any discovering power such as France which failed to pursue development of the sort evident in the English colonial model forfeited its discovery rights accordingly. n27

The Puritans of Plymouth Plantation and Massachusetts Bay [*670] Colony experimented with the idea during the early seventeenth century - arguing that while native property rights might well be vested in their towns and fields, the remainder of their territories, since it was uncultivated, should be considered unoccupied and thus unowned - but the precedent never evolved into a more generalized English practice.n28 Indeed, the Puritans themselves abandoned such presumption in 1629. n29

Whatever theoretical conflicts existed concerning the nature of the respective ownership rights of Indians and Europeans to land in America, practical realities shaped legal relations between the Indians and colonists. The necessity of getting along with powerful Indian [peoples], who outnumbered the European settlers for several decades, dictated that as a matter of prudence, the settlers buy lands that the Indians were willing to sell, rather than displace them by other methods. The result was that the English and Dutch colonial governments obtained most of their lands by purchase. For all practical purposes, the Indians were treated as sovereigns possessing full ownership rights to the lands of America.n30

So true was this that by 1750 England had dispatched a de facto ambassador to conduct regularized diplomatic relations with the Haudenosaunee (Iroquois Six Nations Confederacy)n31 and, in 1763, in an effort to quell native unrest precipitated by his subjects' encroachments upon unceded lands, King George III issued a proclamation prohibiting English settlement west of the Allegheny Mountains. n32 This foreclosure of the speculative interests in "western lands" held by George Washington and other members of the settler elite - and the less grandiose aspirations [*671] to landed status of rank-and-file colonials - would prove a major cause of the American War of Independence.n33

Although it is popularly believed in the U.S. that the 1783 Treaty of Paris through which England admitted defeat also conveyed title to all lands east of the Mississippi River to the victorious insurgents, the
The preliminary legal pretext for U.S. expansionism, set forth by John Marshall in his 1810 Fletcher v. Peck opinion, amounted to little more than a recitation of the Norman Yoke theory, quite popular at the time with Jefferson and other American leaders. The proposition that significant portions of Indian Country amounted to terra nullius, and were thus open to assertion of U.S. title without native agreement, was, however, contradicted by the country's policy of securing by treaty at least an appearance of indigenous consent to the relinquishment of each parcel brought under federal jurisdiction. The presumption of underlying native land title lodged in the Doctrine of Discovery thus remained the most vexing barrier to America's fulfillment of its territorial ambitions.

In the 1823 Johnson & Graham's Lessee v. McIntosh case, Marshall therefore undertook a major reinterpretation of the doctrine itself. While demonstrating a thorough mastery of the law as it had been previously articulated, and an undeniable ability to draw all the appropriate conclusions therefrom, the Chief Justice nonetheless managed to invert it completely. Although he readily conceded that title to the territories they occupied was vested in indigenous peoples, Marshall denied that this afforded them supremacy within their respective domains. Rather, he argued, the self-assigned authority of discoverers to constrain alienation of discovered lands implied that prepotency inhered in the discovering power, not only with respect to other potential buyers but vis-a-vis the native owners themselves.

Since the sovereignty of discoverers - or derivatives like the U.S. - could in this sense be said to overarch that of those discovered, Marshall held that discovery also conveyed to the discoverer an "absolute title" or "eminent domain" underlying the aboriginal title possessed by indigenous peoples. The native "right of possession" was thereby reduced at the stroke of a pen to something enjoyed at the "sufferance" of the discovering (superior) sovereign.

The principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired... Their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of...
the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive right to those [*675] who made it... n50

"The Indian inhabitants are [thus] to be considered merely as occupants."n51 However extravagant [my logic] may appear," Marshall summed up, "if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, ... it cannot be questioned." n52 In other words, violations of law themselves become law if committed by those wielding enough power to get away with them. For all the elegant sophistry embodied in its articulation, then, the Johnson v. McIntosh opinion reduces to the gutter cliche that "might makes right." In this manner, Marshall not only integrated "the legacy of 1,000 years of European racism and colonialism directed against non-Western peoples" into the canon of American law, but did so with a virulence unrivaled even by European jurists upon whose precedents he professed to base his own. n53

There were of course loose ends to be tied up, and these Marshall addressed through opinions rendered in the "Cherokee Cases."n54 In his Cherokee Nation opinion, the Chief Justice undertook to resolve questions concerning the precise standing to be accorded indigenous peoples. Since the U.S. had entered into numerous treaties with them, it was bound by both customary international law and Article 1 10 of its own constitution to treat them as coequal sovereigns. Marshall's verbiage in Johnson had plainly cast them in a very different light. Hence, in Cherokee Nation, he conjured a whole new classification of politicolegal entity "marked by peculiar and cardinal distinctions which exist no where else." n55

It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, [*676] with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will ... . Their relation to the United States resembles that of a ward to his guardian.n56

"The Indian territory is admitted to compose a part of the United States," he continued.n57 "In all our maps, geographical treatises, histories, and laws, it is so considered... . They are [therefore] considered as within the jurisdictional limits of the United States ... [and] acknowledge themselves [to be] under the protection of the United States." n58 What Marshall had described was a status virtually identical to that of a protectorate, yet as he himself would observe in Worcester a year later:

The settled doctrine of the law of nations is that a weaker power does not surrender its independence - its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.n59

It follows that a protectorate would also retain its land rights, unimpaired by its relationship with a stronger country.n60

At another level, the Chief Justice was describing a status similar to that of the states of the union (i.e., subordinate to federal authority, while retaining a residue of sovereign prerogative). Yet he, better than most, was aware that if this were so, the federal government would never have had a basis in either international or constitutional law to enter into treaties with indigenous peoples in the first place, a matter which would have invalidated any U.S. claim to land titles accruing therefrom. Small wonder, trapped as he was in the welter of his own contradictions, that Marshall eventually threw up his hands in frustration, unable or unwilling to further define Indians as either fish or fowl. In the end, he simply repeated his assertion that the U.S./Indian relationship was unique "perhaps unlike that of any two people in [*677] existence."n61

Small wonder, too, all things considered, that the Chief Justice's Cherokee Nation opinion was joined by only one other member of the high court.n62 The majority took exception, with Justices Henry Baldwin and William Johnson writing separate opinions, n63 and Justice Smith Thompson, together with Justice Joseph Story, entering a strongly-worded dissent which laid bare the only reasonable conclusions to be drawn from the facts (both legal and historical). n64

In Justice Thompson's opinion:

It is [the Indians'] political condition that constitutes their foreign character, and in that sense must the term foreign be understood, as used in the constitution. It can have no relation to local, geographical, or territorial position. It cannot mean a country beyond [the] sea. Mexico or Canada is certainly to be considered a foreign country, in reference to the United
States. It is the political relation in which one ... country stands to another, which constitutes it [as] foreign to the other.n65

Nonetheless, Marshall's views prevailed, a circumstance allowing him to deploy his "domestic dependent nation" thesis against both the Cherokees and Georgia in Worcester.n66 First, he reserved on constitutional grounds relations with all "other nations" to the federal realm, thereby dispensing with Georgia's contention that it possessed a "state's right" to exercise jurisdiction over a portion of the Cherokee Nation falling within its boundaries.n67 Turning to the Cherokees, he reiterated his premise that they - and by implication all Indians within whatever borders the U.S. might eventually claim - occupied a nebulous quasi-sovereign status as "distinct [independent] political communities" subject to federal authority. n68 In practical effect, Marshall cast indigenous nations as entities inherently imbued with a sufficient measure of sovereignty to alienate their territory by [*678] treaty when and wherever the U.S. desired they do so, but never with enough to refuse.n69

As legal scholars Vine Deloria, Jr. and David E. Wilkins have recently observed, the cumulative distortions of both established law and historical reality bound up in Marshall's "Indian opinions" created a very steep and slippery slope, with no bottom anywhere in sight.

The original assumption [was] that the federal government is authorized and empowered to protect the Indians in the enjoyment of their lands. Once it is implied that this power also involves the ability of the federal government by itself to force a purchase of the lands, there is no way the implied power can be limited. If the government can force the disposal of lands, why can it not determine how the lands are to be used? And if it can determine how the lands are to be used, why can it not tell the Indians how to live? And if it can tell Indians how to live, why can it not tell them how to behave and what to believe?n70

By the end of the nineteenth century, less than seventy years after Cherokee Nation and Worcester, each of these things had happened. Within such territory as was by then reserved for indigenous use and occupancy, the traditional mode of collective land tenure had been supplanted by federal imposition of a "more civilized" form of individual title expressly intended to compel agricultural land usage.n71 Native spiritual practices had been prohibited under penalty of law, n72 and entire generations of American Indian youngsters were being shipped off, often forcibly, to boarding schools where they were held for years on end, forbidden knowledge of their own languages and cultures while they were systematically indoctrinated with Christian beliefs and [*679] cultural values.n73 The overall policy of "assimilation," under which these measures were implemented, readily conforms to the contemporary legal definition of cultural genocide. n74

Meanwhile, American Indians had been reduced to utter destitution, dispossessed of approximately 97.5% of our original land holdings,n75 our remaining assets held in a perpetual and self-assigned "trust" by federal authorities wielding what Marshall's heirs on the Supreme Court described as an extra-constitutional or "plenary" - that is, unlimited, absolute, and judicially unchallengeable - power over our affairs. n76 Suffice it here to observe that nothing in the Doctrine of Discovery empowered any country to impose itself on others in this way. On the contrary, the "juridical reasoning" evident in the Marshall opinions and their successors has much in common with, and in many respects prefigured, the new body of law - repudiated first by an International Court of Arbitration opinion in the 1928 Island of Palmas case, n77 then more sweepingly in the 1945 United Nations Charter n78 [*680] and the U.N.'s 1960 Declaration on the Granting of Independence to Colonial Countries and Peoplen79 - purported to legitimate the imperialism manifested by Europe during the early twentieth century. n80

III

Rights of Conquest

Although they are usually treated as an entirely separate consideration, conquest rights in the New World accrued under the law of nations as a subpart of the discovery doctrine. Under international law, discoverers could acquire land only through a voluntary alienation of title by native owners, with one exception - when they were compelled to wage a "Just War" against native people - by which those holding discovery rights might seize land and other property through military force.n81 The U.S. clearly acknowledged that this was so in the earlier mentioned Northwest Ordinance, where it pledged that indigenous nations would "never be invaded or disturbed, unless in just and lawful wars authorized by Congress." n82

The criteria for a Just War were defined quite narrowly in international law. As early as 1539, Vitoria and, to a lesser degree, Matias de Paz asserted that there were only three: the natives had either to have refused to admit Christian missionaries among them, to have arbitrarily refused to engage in commerce with the discovering power, or to have mounted some
Indians. n89 incapable of application" by the U.S. to American relations between the conqueror and conquered, [is] which regulates, and ought to regulate in general, the right of discovery,"n88 and, resultingly, that the "law America were not claimed by right of conquest, but by acknowledging that the "English possessions in ultimately forced to distinguish between the two, in the preceding section. In fact, the high court was even less legal merit than the flights of fancy discussed as if they were synonymous, a conflation evidencing this issue by treating discovery Cherokee Nation, John Marshall sought to transcend Particularly in his Johnson opinion, but also in Admiral War, also known as the "Kellogg-Briand Pact" or "Pact of Paris."n94

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.n87

Particularly in his Johnson opinion, but also in Cherokee Nation, John Marshall sought to transcend this issue by treating discovery [*682] and conquest as if they were synonymous, a conflation evidencing even less legal merit than the flights of fancy discussed in the preceding section. In fact, the high court was ultimately forced to distinguish between the two, acknowledging that the "English possessions in America were not claimed by right of conquest, but by right of discovery,"n88 and, resultingly, that the "law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, [is] incapable of application" by the U.S. to American Indians. n89

A further complication is that as early as 1672, legal philosophers like Samuel Pufendorf had mounted a serious challenge to the idea that even such territory as was seized in the course of a Just War might be permanently retained.n90 Although Hugo Grotius, Emmerich de Vattel, William Edward Hall, John Westlake and other such theorists continued to aver the validity of conquest rights through the end of the nineteenth century, n91 a view very similar to Pufendorf's had proven ascendany by the 1920s.

Oddly, given its stance concerning American Indians, as well as its then-recent forcible acquisitions of overseas colonies like Hawai'i, Puerto Rico, and the Philippines,n92 the U.S. assumed a leading role in this respect. Although the Senate refused to allow the country to join, President Woodrow Wilson was instrumental in creating the League of Nations, an organization intended "to substitute diplomacy for war in the resolution of international disputes."n93 In some ways more important was its centrality in [*683] crafting the 1928 General Treaty on the Renunciation of War, also known as the "Kellogg-Briand Pact" or "Pact of Paris."n94

With the [treaty], almost all the powers of the world, including all the Great Powers, renounced the right to resort to war as an instrument of state policy. By Article 1, "the High Contracting Parties solemnly declare, in the names of their respective peoples, that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another." By Article 2, the Parties "agree that the settlement or solution of all disputes or conflicts, of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."n95

In 1932, Secretary of State Henry Stimson followed up by announcing that the U.S. would no longer recognize title to territory seized by armed force.n96 This new dictum of international law, shortly to be referred to as the "Stimson Doctrine of Non-Recognition," n97 was expressly designed to "effectively bar the legality hereafter of any title or right sought to be obtained by pressure or treaty violation, and ... [to] lead to the restoration to [vanquished nations] of rights and titles of which [they] have been unjustly deprived." n98 Within a year, the doctrine's blanket rejection of conquest rights had been more formally articulated in a League of Nations Resolution and legally codified in the Chaco Declaration, the Saaverda Lamas Pact, and the Montevideo Convention on the Rights and Duties of States. n99 In 1936, the Inter-American Conference on the Maintenance of Peace also declared a "proscription of territorial conquest, and that, in consequence, no acquisition made through violence shall be recognized." n100 [*684] The principle was again proclaimed in the Declaration on the Non-Recognition of the Acquisition of Territory by Force advanced by the Eighth Pan-American Conference in 1938.
As a fundamental of the Public Law of America ... the occupation or acquisition of territory or any other modification or territorial or boundary arrangement obtained through conquest by force or non-pacific means shall not be valid or have legal effect...

The pledge of non-recognition of situations arising from the foregoing conditions is an obligation which cannot be avoided either unilaterally or collectively.

By the time the Supreme Court penned its bellicose opinion in Tee-Hit-Ton, the Stimson Doctrine had already served as a cornerstone in formulating the charges of planning and waging aggressive war pressed against the major nazin defendants at Nuremberg and the Japanese in Tokyo (tribunals instigated and organized mainly by the U.S.). It had also served as a guiding principle in the (again, effectively U.S. instigated) establishment of both the Organization of American States and the United Nations, entities which in their very charters, like the ill-fated League of Nations before them, are devoted to "the progressive codification of [international] law ... for purposes of preventing war." Correspondingly, Stimson's "new dictum" found its most refined and affirmative expression in the charters' provisos, reiterated almost as boilerplate in a host of subsequent U.N. resolutions, declarations, and conventions, concerning the "equal rights and self-determination of all peoples."

Contradictory as the Tee-Hit-Ton court's blatant conquest rhetoric was to the lofty posturing of the U.S. in the international arena, it was even more so with respect to a related subterfuge unfolding on the home front. By 1945, the United States was urgently seeking a means of distinguishing its own record of territorial expansion from that of the nazis it was preparing to hang for having undertaken very much the same course of action. The workhorse employed in this effort was the so-called Indian Claims Commission (ICC), established to make retroactive payment to indigenous peoples whose property had been "unlawfully taken" over the years. The purpose of the Commission was, as President Harry Truman explained upon signing the enabling legislation on August 14, 1946, to foster an impression that the U.S. had acquired none of its land base by conquest.

This bill makes perfectly clear what many men and women, here and abroad, have failed to recognize, that in our transactions with the Indian tribes we have ... set for ourselves the standard of fair and honorable dealings, pledging respect for all Indian

property rights. Instead of confiscating Indian lands, we have purchased from the tribes that once owned this continent more than 90 percent of our public domain...

The game was rigged from the outset, to be sure, since the ICC was not empowered to return land to native people even in cases where its review of the manner in which the U.S. had acquired it revealed the grossest sorts of illegality. The terms of compensatory awards, moreover, were restricted to payment of the estimated value of the land at the time it was taken - often a century or more before - without such considerations as interest accrual or appreciation in land values during the intervening period. Still, despite its self-serving and mostly cosmetic nature, the very existence of the ICC demonstrated quite clearly that, in terms of legality, U.S. assertion of title to/jurisdiction over Indian Country can no more be viewed as based in "conquest rights" than in "rights of discovery." All U.S. pretensions to ownership of property in North America must therefore be seen as treaty-based.

IV

Through the Lens of the Law

When Congress established the ICC in 1946, it expected within five years to "resolve" all remaining land rights issues concerning American Indians. The Commission was to identify and catalogue the basis in treaties, agreements and statutes by which the U.S. had assumed lawful ownership of every disputed land parcel within its purported domain, awarding "just compensation" in each case where the propriety of the transaction(s) documented might otherwise be deemed inadequate. By 1951, however, the 200-odd claims originally anticipated had swelled to 852. The lifespan of the ICC was extended for another five years, then another, a process which was repeated until the "third generation" of commissioners finally gave up in exhaustion.

By the time the Commission suspended operations on September 30, 1978, it had processed 547 of the 615 dockets into which the 852 claims had been consolidated, none in a manner satisfactory to the native claimants (nearly half were simply dismissed). Title to virtually the entire state of California, for instance, was supposedly "quieted" in the "Pit River Land Claims Settlement" of the mid-1960s by an award amounting to forty-seven cents per acre, despite the fact that the treaties by which the territory had ostensibly been ceded to the U.S. had never been ratified by the Senate.
Most importantly, in its final report the ICC acknowledged that after three decades of concerted effort, it had been unable to discern a legal basis for U.S. title to what the federal Public Lands Law Review Commission had already described as "one third of the nation's land." n116 The fact is that about half the area of the country was purchased by treaty or agreement at an average price of less than a dollar per acre; another third of a [billion] acres, mainly in the West, was confiscated without compensation; another two-thirds of a [billion] acres was "claimed by the United States without ... pretense of [even] a unilateral action extinguishing native title." n117

There can be no serious question of the right of indigenous nations to recover property to which their title remains unclouded, or that their right to recover lands seized without payment equals or exceeds that of the United States to preserve its "territorial integrity" by way of paltry and greatly-belonged compensatory awards.n118 Restitution rather than compensation is, after all, the guiding principle of the tort provisions embodied in international public law. n119 Nor is this the end of it. Within the area ostensibly acquired by the U.S. through treaties or agreements, many of the instruments of cession are known to have been fraudulent or coerced. These must be considered invalid under Articles 48-53 of the Vienna Convention on the Law of Treaties. n120

A classic illustration of a fraud involves the 1861 Treaty of Fort Wise, in which not only did federal commissioners forge the signatures of selected native leaders - several of whom were not even present during the "negotiations" - but the Senate altered many of the treaty's terms and provisions after it was supposedly signed, then ratified the result without so much as informing the Indians of the changes.n121 On this basis, the U.S. claimed to have obtained the "consent" of the Cheyennes and Arapahoes to its acquisition of the eastern half of what is now the State of Colorado. n122 

Examples of coercion are also legion, but none provides a better illustration than does the 1876-77 proceeding in which federal authorities suspended distribution of rations to the Lakotas, who at the time were directly subjugated by and therefore dependent upon the U.S. military for sustenance, and informed them that they would not be fed again until their leaders had signed an agreement relinquishing title to the Black Hills region of present-day South Dakota.n123 Thus did the Congress contend that the 1851 and 1868 treaties of Fort Laramie, in each of which the Black Hills were recognized as an integral part of the Lakota homeland, had been "superseded" and U.S. ownership of the area secured. n124

Without doubt, North America's indigenous nations are no less entitled to recover lands expropriated through such travesties than they are the territories already discussed. Although it is currently impossible to offer a precise estimate regarding the extent of the acreage involved - to do so would require a contextual review of each U.S./Indian treaty, and a parcel-by-parcel delineation of the title transfers accruing from invalid instruments - it is safe to suggest that adding it to the approximately thirty-five percent of the continental U.S. which was never ceded would place something well over half the present gross "domestic" territoriality of the United States at issue.n125

The U.S., of course, holds the power to simply ignore the law in inconvenient connections such as these. Doing so, however, will never serve in itself to legitimate its comportment. Instead, its continued possession of a vast expanse of illegally-occupied territoryn126 - an internal colonial empire, as it were n127 - only destines it to remain what it was at its inception: an inherently criminal or "rogue" state. n128 It is through this lens that U.S. pronouncements and performance from Nuremberg to Vietnam must inevitably be evaluated. n129 So, too, President George Herbert Walker Bush's 1990 rhetoric concerning America's moral/legal obligation to kill more than a million Iraqis while militarily revoking their government's forcible annexation of neighboring Kuwait. n130

On the face of it, the only reasonable conclusion to be drawn is that the unsavory stew of racial/cultural arrogance, duplicity and abiding legal cynicism defining U.S. relations with indigenous nations from the outset has come long since to permeate America's relationship to most other countries. How else to understand Bush's 1991 declaration that the display of U.S. military might he'd ordered in Iraq was intended more than anything else to put the entire world on notice that, henceforth, "what we say, we do as President George Herbert Walker Bush's 1990 rhetoric concerning America's moral/legal obligation to kill more than a million Iraqis while militarily revoking their government's forcible annexation of neighboring Kuwait. n130

For the past fifty years, federal policymakers have been increasingly adamant in their refusal of the proposition that the U.S. might be bound by customs or conventions conflicting with its sense of self-interest.n134 More recently, American delegates to the

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United Nations have taken to arguing that new codifications of international law must be written in strict conformity to their country's constitutional and even statutory requirements, and that, for interpretive purposes, the distortions of existing law advanced by American jurists such as John Marshall be considered preeminent. n135 In effect, the U.S. is seeking to cast an aura of legitimacy over its ongoing subjugation of American Indians by [*692*] engineering a normalization of such relations in universal legal terms.

A salient example will be found in the ongoing U.S. rejection of language in the United Nations Draft Declaration on the Rights of Indigenous Peoples - and a similar declaration drafted by the OAS - reiterating that self-determination is guaranteed to all peoples by the U.N. Charter. n136 Instead, American diplomats have been instructed to insist that indigenous peoples the world over must be accorded only a "right of internal self-determination" which is "not ... synonymous with more general understandings of self-determination under international law" but which conforms perfectly with those set forth in the United States' own Indian Self-Determination and Educational Assistance Act of 1975. n137 Most specifically, as was stated in an official cable during January 2001, "the U.S. understanding of the term 'internal self-determination' indicates that it does not include a right of independence or permanent sovereignty over natural resources." n138

The standard "explanation" offered by U.S. officials when queried about the legal basis for their government's position on native rights has been that "while the United States once recognized American Indian [peoples] as separate, distinct, and sovereign nations, it long since stopped doing so." n139 This, however, is the same, legally speaking, as saying nothing at all. According to no less an authority than Lassa Oppenheim, author of the magisterial International Law, voluntary relinquishment is the sole valid means by which any nation may be divested of its [*693*] sovereignty. n140 Otherwise, "recognition, once given is irrevocable unless the recognized [nation] ceases to exist." n141 As always, the U.S. is simply making up its own rules as it goes along.

As should be obvious, the implications of such maneuvers are by no means confined to a foreclosure upon the rights of native peoples. The broader result of American "unilateralism" is that, just as it did with respect to North America's indigenous nations, the U.S. is now extrapolating its presumptive juridical primacy to global dimensions. n142 The initiative is especially dangerous, given that the place now held by the U.S. within the balance of world military power closely resembles the lopsided advantage it enjoyed against American Indians during the nineteenth century. n143 The upshot is that, should the present trend be allowed to continue, the United States will shortly have converted most of the planet into an equivalent of "Indian Country." n144 In fact, especially with regard to the so-called Third World, this has already, for all practical intents and purposes, come to pass. n145

V

The Nature of Modern Empire

"It's an old story, really," writes Phyllis Bennis, one of "a strategically unchallenged dominion, at the apogee of its power and [*694*] influence, rewriting the global rules for how to manage its empire. Two thousand years ago, Thucydides described how Mylos, the island the Greeks conquered to ensure stability for their Empire's golden age, was invaded and occupied according to laws wholly different from those governing democratic (if slavery dependent) Athens. The Roman empire followed suit, creating one set of laws for Rome's own citizens, imposing another on its far-flung possessions. In the last couple of hundred years the sun-never-sets-on-us British empire did much the same thing. And then, at the end of the twentieth century, having achieved once unimaginable heights of military, economic, and political power, it was Washington's turn." n146

The American-style fin de 20th siecle law of empire took the form of the U.S. exempting itself from UN-brokered treaties and other international agreements that it demanded others accept. It was evident in Washington's rejection of the International Criminal Court in 1998, its refusal to sign the 1997 Convention against anti-personnel land mines, its failures [to accept] the Convention on the Rights of the Child, the Law of the Sea, the Comprehensive Test Ban Treaty and more. n147

Actually, the roots of the current U.S. posture run much deeper than Bennis suggests. As its record concerning the earlier-mentioned California Indian treaties readily demonstrates, the United States had by the mid-1850s already adopted a policy of selectively exempting itself from compliance with treaties to which it asserted others were nonetheless bound. n148 The Supreme Court's 1903 opinion in Lone Wolf v. Hitchcock effectively extended this procedure to encompass all treaties and agreements with indigenous nations. n149 From there, it became only a matter of time before the U.S. would begin to approach the
Legal scholar Felix S. Cohen once accurately analogized American Indians as a "miner's canary" providing early warning of the fate in store for other sectors of the U.S. populace. The principle can now be projected to worldwide proportions. Given the scale of indignity and sheer physical suffering the U.S. has inflicted and continues to inflict upon indigenous peoples trapped within its "domestic" domain, it is self-evidently in the best interests of very nearly the entire human species to forcefully reject the structure of "unjust legality" by which the U.S. is attempting to rationalize its ambition to consolidate a position of planetary suzerainty. The only reasonable question is how best to go about it.

Here, the choice is between combating the endless array of symptoms emanating from the problem or going after it at its source, eradicating it root and branch, once and for all. Again, the more reasonable alternative is self-revealing. Unerringly, then, the attention of those desiring to block America's increasingly global reach must be focused upon unpacking the accumulation of casuistic jurisprudence employed by the U.S. as a justification for its own geographical configuration. Since, as has been established herein, there is no viable basis for the United States to assert territorial rights based on the concept of terra nullius or any other aspect of discovery doctrine, and even less on rights of conquest, it is left with a legally defensible claim to only those parcels of the continent where it obtained title through a valid treaty. As has also been shown herein, this adds up to something less than half its professed North American territoriality. To its "overseas possessions" such as Guam, Puerto Rico, and Hawai'i, the U.S. holds no legal right at all.

Viewed from any angle, the situation is obvious. Shorn of its illegally-occupied territories, the U.S. would lack the critical mass and internal jurisdictional cohesion necessary to impose itself as it does at present. This is all the more true in that even the fragments of land still delineated as Indian reservations are known to contain up to two-thirds of the uranium, a quarter of the readily-accessible low sulfur coal, a fifth of the oil and natural gas, and all of the zeolites available to feed America's domestic economy. Withdrawal of these assets from federal control would fatally impair the ability of the U.S. to sustain anything resembling state-corporate business as usual. By every reasonable standard of measure, the decolonization of Native North America must thus be among the very highest priorities pursued by anyone, anywhere who is seriously committed to achieving a positive transformation of the global status quo.

A major barrier to international coalescence around this sort of "deconstructionist" agenda, among sworn enemies of the U.S. no less than its allies, has been the exclusively statist "world order" or "world system," as Immanuel Wallerstein terms it, in which both sides are invested. Only states are eligible for membership in the United Nations, for instance, a conflation which once caused American Indian Movement leader Russell Means to quip that "the organization would more rightly have been called the United States, but the name was already taken." Although it may be no surprise to find a veritable U.S. appendage like Canada citing John Marshall's McIntosh opinion as "the locus classicus of the principles governing aboriginal title" in the formulation of its own judicial doctrine, it is quite another matter to find the then-still decolonizing countries of Africa adopting the thinking embodied in the thinking of the United Nations. Belgium, in the process of relinquishing its grip on the Congo, advanced the thesis that if terms like decolonization and self-determination were to have meaning, the various "tribal" peoples whose homelands it had forcibly incorporated into its colony would each have to be accorded the right to resume independent existence. Otherwise, the Belgians argued, colonialism would simply be continued in another form, with the indigenous peoples involved arbitrarily subordinated to a centralized authority presiding over a territorial dominion created not by Africans but by Belgium itself. To this, European-educated Congolese insurgents like Patrice Lumumba, backed by their colleagues in the newly-emergent Organization of African Unity (OAU), counterpoised what is called the "Blue Water Principle," that is, the idea that to be considered a bona fide colony - and thus entitled to exercise the self-determining rights guaranteed by both the Declaration and the U.N. Charter - a country or people had to be separated from its colonizer by at least thirty miles of open ocean.
Although the Blue Water Principle made no more sense during the early 1960s than it had when Justice Smith Thompson rebutted John Marshall's initial iteration of it in 1831, it was quickly embraced by U.N. member states and Third World revolutionary movements alike. For the member states, whether capitalist (First World) or socialist (Second World), adoption of the principle served to consecrate the existing disposition of their "internal" territoriality, irrespective of how it may have been obtained. For the Third World's marxian revolutionaries, it offered the same prospect, albeit quite often with regard to positions of "post-colonial" state authority to which they were at the time still aspiring. For either side to acknowledge that a "Fourth World" comprised of indigenous nations might possess the least right to genuine self-determination would have been, and remains, to dissolve the privileged status of the state system to which both sides are not only conceptually wedded but owe their very existence.

The stakes embodied in this denial are staggering. There are twenty different indigenous peoples along the peninsula British colonizers called Malaya (now Malaysia), 380 in "post-colonial" India, and 670 in the former Dutch/Portuguese colony of Indonesia. In South America, the numbers range from thirty-five in Ecuador to 210 in Brazil. There are scores, including such large nationalities as the Yi, Manchus and Miao, encapsulated within the Peoples Republic of China. In Vietnam, two dozen-odd "montagnard tribes" of the Annamese Cordillera have been unwillingly subsumed under authority of what the Vietnamese constitution unilaterally proclaims "a multinational state." The same situation prevails for the Hmongs of Laos. Not only the Chechens of the south but at least three-dozen smaller northern peoples remain trapped within the Russian rump state resulting from the breakup of the Soviet Union. In Iraq and Turkey, there are the Kurds; in Libya and Morocco, the Bedouins of the desert regions. Throughout sub-Saharan Africa, hundreds more, many of them partitioned by borders defended at gunpoint by statist regimes, share the circumstance of the rest. Similar situations prevail in every quarter of the earth.

Observed from this standpoint, it's easy enough to see why no state, regardless of how bitterly it might otherwise be to the United States, has been - or could be - willing to attack the U.S. where it is most vulnerable. The vulnerability being decidedly mutual, any precedent thus established would directly contradict the attacking state's sense of self-preservation at the most fundamental level. Hence, the current process of militarily-enforced politico-economic "globalization" - world imperialism, by any other name - must be viewed as a collaborative endeavor, involving even those states which stand to suffer most as a result (and which have therefore been most vociferously critical of it). It follows that genuine and effective opposition can only accrue from locations outside "official" venues, at the grassroots, among those who understand their interests as being antithetical, not only to globalization, per se, but to the entire statist structure upon which it depends.

VI

Returning the Law to Its Feet

It's not that native peoples are especially accepting of their lot, as has been witnessed by such bloody upheavals as Katanga and Biafra since 1960. In 1987, cultural anthropologist Bernard Nietenmann conducted a global survey in which he discovered that of 125 armed conflicts occurring at the time, fully eighty-five percent - amounting to a "third world war," in his view - were being fought between indigenous nations and states claiming an inherent right to dominate them. Among the sharper clashes have been the ongoing guerrilla struggles waged by the Kurds, the Nagas of the India/Burma border region, the southern Karens and northern Kayahs of Burma (Myanmar), the Tamils of Sri Lanka (formerly Ceylon), the Pacific islanders of Belau, Fiji and elsewhere, the so-called Moro peoples of the southern Philippines, the Timorese and Papuans of Indonesia, as well as the Miskito and other native peoples of Nicaragua's Atlantic coast. To this list may now be added the series of revolts in Chechnya and the recent Mayan insurgency in the Mexican province of Chiapas.

The list extends as well to the venerable states of western Europe. In Spain, the Basques, and to a lesser degree the Catalans, have been waging a protracted armed struggle to free themselves from incorporation into a country of which they never consented to be a part. In France, aside from the Basques around Navarre, there are the Celtic Bretons of the Channel coast. The Irish are continuing their eight-century-long military campaign to reclaim the whole of their island, while, on the "English Isle" itself, the Welsh, Scots and Cornish - Celtic peoples all - have increasing taken to asserting their rights to autonomy. So, too, the Celtic Manxmen on the Isle of Mann. Far to the north, the Saamis ("Lapps") are also pursuing their right to determine for themselves the relationship of Saamiland (their traditional territory, usually referred to as...
"Lapland") vis-a-vis Norway, Sweden, Finland and Russia. In Greenland, the primarily Inuit population, having already achieved a "home rule" arrangement with their Danish colonizers, are pushing for full independence. In Canada, there have been armed insurgencies by native peoples at Oka, Gustafsen Lake and elsewhere, as well as the emergence of a tentatively autonomous Inuit territory called Nunavut.

Those who see dismantlement of the present U.S. territorial/power configuration as the pivot point of constructive change are thus presented with the prospect of linking up with a vibrantly global Fourth World liberation movement, one which has never been quelled, and which cannot be satisfied until what Leopold Kohr once called the "breakdown of nations" - by which he actually meant the breakdown of states - has been everywhere accomplished. Direct predictions concerning the horrors supposedly attending "the coming anarchy," blink the fact that the hegemony of statism has generated an estimated fifty million corpses from wars alone over the past half-century. Adding in those lost to the "underdevelopment" and "diseconomies of scale" inherent to the world system as it is now constituted would increase the body count at least twenty times over. Also to be considered is the radical and rapidly accelerating truncation of fundamental rights and liberties undertaken by all states - the "freedom-loving" U.S. far more than most of those it condemns as "totalitarian" - in order to concretize and reinforce their imposition of centralized authority. As well, the massive and unprecedented degree of cultural "leveling" entailed in the systematic and state-anchored transnational corporate drive to rationalize production and unify markets the world over.

Rectifying John Marshall's seminal inversion of international legal principle - negating his negation, so to speak - and thus "returning the law to its feet" would serve to undermine one of the most potent components of the master narrative through which statism and its imperial collaterals have been presented as though they were natural, inevitable and somehow beneficial to all concerned. General exposure, in their own terms, of the falsity intrinsic to such "truths" stands to evoke a "legitimation crisis" of such proportions and intractability that the statist system could not sustain itself. This "end of world order" - or, more accurately, transformative reordering of international relations in favor of a devolution of state structures into something resembling the interactive clusters or federations of "mini-nationalisms" which were the norm before the advent of European hegemony, restoring human scale and bioregional sensibility to the affairs of peoples, can only be seen as a positive trajectory.

Putting a name to it is a more difficult proposition, however. Insofar as its thrust centers in a wholesale (re)assertion of the rights of Fourth World peoples, such a path might correctly be depicted as an "indigenist alternative." Still, given that so sweeping a reconfiguration of humanity's relationship with itself and its habitat must encompass those who are of the Fourth World in neither identity nor present orientation, the old standby of "anarchism" might well prove a more apt descriptor. Regardless of its labeling, the result will inevitably be far more just, and thus more liberatory, than that it will replace. And to that we might all aspire.

FOOTNOTE-1:


n3. The customary law from which this principle is adduced is codified in the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]. For analysis, see Sir Ian Sinclair, The Vienna Convention on the Law of Treaties 1-21 (2d ed. 1984). For further amplification of the fact that the customary principles set forth in the Vienna Convention were very much in effect at the time U.S. Indian treaties were negotiated, see Samuel Benjamin Crandall,
Treaties: Their Making and Enforcement (2d ed. 1916).


n12. For probably the best and most detailed analysis of the debate, see Lewis Hanke, Aristotle and the American Indians: A Study in Race Prejudice in the Modern World (1959).


n15. See Felix S. Cohen, The Spanish Origin of Indian Rights in the United States, 31 Geo. L.J. 1 (1942); Felix S. Cohen, Original Indian Title, 32 Minn. L. Rev. 28 (1947); Nell Jessup Newton, At the Whim of the Sovereign: Aboriginal Title Reconsidered, 31 Hastings L.J. 1215 (1980).

n16. At least one scholar has contended that the arrangement was designed only to regulate relations between European states and carried no negative connotations vis-a-vis native standing at all. Milner S. Ball, Constitution, Court, Indian Tribes, 1987 Am. B. Found. Res. J. 1.

n17. Indian Law Resource Center, United States Denial of Indian Property Rights: A Study of Lawless Power and Racial Discrimination, in Rethinking Indian Law 15, 16 (Nat'l Lawyers Guild Comm. on Native American Struggles et al. ed., 1982). Such divvying up of turf amounted to a universalization of the principle expounded by Pope Alexander VI in his Bull Inter Caetera of May 4, 1493, dividing interests in the southern hemisphere of the New World between Spain and Portugal. See Williams, supra note 9, at 80-81.

n18. Washburn, supra note 7, at 56 (quoting Thomas Jefferson).
n19. Id.

n21. See Vienna Convention, supra note 3, art. 2(1)(a) (stating "'Treaty' means an international agreement concluded between States in written form and governed by international law.").

n23. Op. Att'y Gen. 613-18, 623-33 (1828). Later theorists, mainly positivists like Westlake and Hyde, argued that treaties with Indians and other "backward" peoples did not carry the same force and effect as treaties between "civilized" states. See, e.g., Charles C. Hyde, International Law Chiefly as Interpreted by the United States 163-64 (1922). However, there is nothing in the interpretation of customary law codified in the Vienna Convention to support their views.

n24. In substance, where the English sought ultimately to displace or supplant indigenous peoples altogether, the French ambition was to harness modified versions of existing native economies to their own profit. See Hugh Edward Egerton, A Short History of British Colonial Policy 164-65 (6th ed. 1920); see also Charles J. Balesi, The Time of the French in the Heart of North America, 1673-1818 (1992); Klaus E. Knorr, British Colonial Theories, 1570-1850 63-104 (2d ed. 1963).

n25. Williams, supra note 9, at 233-80.

n26. The idea has yielded a still-lingering effect. Its basic premise plainly underlay the 1862 Homestead Act by which any U.S. citizen could claim a quarter-section (160 acres) of "undeveloped" land, merely by paying a nominal "patent fee" to offset the expense of registering it. Pub. L. No. 37-64, 12 Stat. 392 (1862). S/he then had a specified period of time, usually five years, to fell trees, build a house, plow fields, etc. Id. If these requirements were met within the time allowed, the homesteader was issued a deed to the property. Id. While it remains "on the books," claims under the Act were last pressed to a significant extent in Alaska during the 1960s and early 1970s.

n27. Such reasoning formed a portion of the legal basis upon which England waged four wars against the French in North America: King William's War (1689-1697), Queen Anne's War (1702-1713), King George's War (1744-1748) and the "Seven Years War," which actually lasted fourteen years (1749-1763). See Albert Marrin, Struggle for a Continent: French and Indian Wars, 1690-1760 (1987).


n32. This was following England's final victory over France in the last of the so-called French and Indian Wars. See supra text accompanying note 27. On the Proclamation of 1763 (RSC 1970, App. II, No. 1, at 127) and subsequent legislation, see Jack Stagg, Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 7 October 1763 (1981). See also Bruce Clark, Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada 134-46 (1990).


n34. For the complete text of the Treaty of Paris (Sept. 3, 1783), see The Record of American Diplomacy: Documents and Readings in the History of U.S. Foreign
n35. For the text of the Treaty Between the United States and France for the Cession of Louisiana (Apr. 30, 1803), see id. at 116-17. On similar acquisitions, see generally David M. Pelcher, The Diplomacy of Annexation: Texas, Oregon and the Mexican War (1973).


n37. See Vine Deloria, Jr., Self-Determination and the Concept of Sovereignty, in Economic Development in American Indian Reservations 22-28 (Roxanne Dunbar Ortiz & Larry Emerson eds., 1979). See also supra text accompanying note 6 for an example of hyperlegal posturing.

n38. This concerns a written plan submitted to the Congress in which the "Father of his Country" recommended using treaties with Indians in much the same fashion Hitler would later employ them against his adversaries at Munich and elsewhere (i.e., to lull them into a false sense of security or complacency which placed them at a distinct military disadvantage when it came time to confront them with a war of aggression).

Apart from the fact that it was immoral, unethical and actually criminal, this plan placed before the Congress by George Washington was so logical and well laid out that it was immediately accepted practically without opposition and at once put into action. There might be - almost certainly would be - further strife with the Indians, new battles and new wars, but the end result was, with the adoption of Washington's plan, inevitable: Without even realizing it had occurred, the fate of all Indians in the country was sealed. They had lost virtually everything.


n39. 1 Stat. 50 (1789). For background, see generally Prucha, supra note 22.

n40. As the indigenous population was steadily eroded by disease and ad hoc attritional warfare all along the frontier, plummeting to only a few hundred thousand by 1812, the United States population had swelled to 7.5 million. While the U.S. could field 12,000 regulars and at least four times as many militiamen, even the broad alliance attempted by Tecumseh figured to muster fewer than 5,000 fighters in response. For U.S. population data, see 1 Niles Weekly Reg. (Nov. 30, 1811). On native population size, see Henry F. Dobyns, Their Numbers Become Thinned: Native American Population Dynamics in Eastern North America (1983). On U.S. troop strength, see J.C.A. Stagg, Enlisted Men in the United States Army, 1812-1815: A Preliminary Survey, 43 Wm. & Mary Q. 615 (1986). On Tecumseh's alliance, see Allan W. Eckert, A Sorrow in Our Heart: The Life of Tecumseh (1992).

n41. 10 U.S. (6 Cranch) 87 (1810). To all appearances, the opinion was an expedient means to facilitate redemption of scrip issued to troops during the American independence struggle in lieu of cash. These vouchers were to be exchanged for land parcels in Indian Country once victory had been achieved (Marshall and his father received instruments entitling them 10,000 acres apiece in what is now Kentucky, part of the more than 200,000 acres they jointly amassed there). On the Marshalls' Kentucky land transactions, see Jean Edward Smith, John Marshall: Definer of a Nation 74-75 (1996). On the case itself, see C. Peter McGrath, Yazoo: The Case of Fletcher v. Peck (1966).

n42. Robert A. Williams, Jr., Jefferson, the Norman Yoke, and American Indian Lands, 29 Ariz. L. Rev. 165 (1987). It should be noted that the notion that the concept of terra nullius might ever have been applied in any legitimate sense to inhabited areas was firmly repudiated by the International Court of Justice ("World Court") in its Advisory Opinion on Western Sahara, 1975 I.C.J. 12, 35. For analysis, see Questions Concerning Western Sahara: Advisory Opinion of the

n43. See generally Reginald Horsman, Expansion and American Policy, 1783-1812 (1967).

n44. 21 U.S. (8 Wheat.) 543 (1823). For background, see Norgren, supra note 5, at 92-95; see also David E. Wilkins, American Indian Sovereignty and the U.S. Supreme Court: The Making of Justice 27-35 (1997).

n45. Johnson, 21 U.S. at 574.

n46. The United States ... maintains, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of [the U.S. itself] allow [it] to exercise.

   Id. at 587.

n47. Id. at 588.

n48. "It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends [however] to the complete ultimate [or absolute] title." Id. at 603.

An absolute [title] must be an exclusive title, ... a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown [now held by the U.S.], subject only to the Indian right of occupancy, [a matter] incompatible with an absolute and complete title in the Indians.

   Id. at 588.

n49. Id. at 573.

n50. Id. at 574.

n51. Id. at 591.


n53. Williams, supra note 9, at 317.


n55. Cherokee Nation, 30 U.S. at 16.

n56. Id. at 17 [emphasis added].

n57. Id.

n58. Id.

n59. Worchester, 31 U.S. at 561.

n60. There are numerous examples of this being so. See Vine Deloria, Jr., The Size and Status of Nations, in Native American Voices: A Reader 457 (Susan Lobo & Steve Talbot eds., 1998).

n61. Cherokee Nation, 30 U.S. at 16.


n63. Id. at 106-07.


n65. Cherokee Nation, 30 U.S. at 54-55 [emphasis added].


n68. Id. at 557, 559.

n69. "Indian tribes are still recognized as sovereigns by the United States, but they
are deprived of the one power all sovereigns must have in order to function effectively - the power to say 'no' to other sovereigns." Vine Deloria, Jr. & David E. Wilkins, Tribes, Treaties, and Constitutional Tribulations 70 (1999).

n70. Id. at 29.


n72. "The sun-dance, and all other similar dances and so-called religious ceremonies are considered 'Indian Offenses' under existing regulations, and corrective penalties are provided." U.S. Dep't of Interior, Office of Indian Affairs, Circular 1665 (Apr. 26, 1921).


n74. Article II(c) of the 1948 Convention on Prevention and Punishment of the Crime of Genocide outlaws as genocidal any policy leading to the "physical destruction... in whole or in part, [of] a national, ethnical, racial or religious group, as such." Convention on Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 9, 1948, art. II(c), 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). Article II(e) specifically prohibits any policy devolving upon the forced transfer of children. Id. at art. II(e).

n75. For details, see Charles C. Royce, Indian Land Cessions in the United States, 18th Annual Report, 1896-97 (1899).

n76. The implications of the term, first employed by the Marshall Court in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), were set forth more fully in U.S. v. Kagama, 118 U.S. 375 (1886), and finalized in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). In the latter case, Justice Edward D. White opined that "Congress possesses full power [over Indian affairs, and] the judiciary cannot question or inquire into [its] motives... . If injury [is] occasioned ... by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts." Lone Wolf, 187 U.S. at 568. By 1942, the courts were even more blunt, stating that Congress wielded "full, entire, complete, absolute, perfect, [and] unqualified" power over indigenous nations within its borders. Mashunkashey v. Mashunkashey, 134 P.2d 976, 979 (1942). For background, see Rachel San Kronowitz et al., Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations, 22 Harv. C.R.-C.L.L. Rev. 507 (1987); Nell Jessup Newton, Federal Power over Indians: Its Sources, Scope, and Limitations, 132 U. Pa. L. Rev. (1984); David E. Wilkins, The Supreme Court's Explication of 'Federal Plenary Power': An Analysis of Case Law Affecting Tribal Sovereignty, 1886-1914, 18 Am. Indian Q. 349 (1994).


Early Nineteenth Century to the Present (1964).

n81. For a broad exploration of the concept, see Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations (1977).


n83. Franciscus de Vitoria, De Indis Recenter Inventis, in De Indis et de Jure Belli Reflectiones 151 (1917); Silvio Zavala, Los Doctrinas de Palacios Rubios y Matias de Paz ante la Conquista America, in Memoria de El Colegio Nacional (1950). For background, see Williams, supra note 9, at 85-108.

n84. Sharon Korman, The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice 52-56 (1996); Matthew M. McMahon, Conquest and Modern International Law: The Legal Limitations on the Acquisition of Territory by Conquest 35 (1940).


n87. *Id. at 291*.

The Alaska natives [who had pressed a land claim in *Tee-Hit-Ton*] had never fought a skirmish with Russia [which claimed their territories before the U.S.] or the United States ..., To say that the Alaska natives were subjugated by conquest stretches the imagination too far. The only sovereign act that can be said to have conquered the Alaska native was the *Tee-Hit-Ton* opinion itself.

Newton, supra note 15, at 1244.


n94. See Ian Brownlie, International Law and the Use of Force by States (1963); Lothar Kotzsch, The Concept of War in Contemporary History and International Law (1956).

n95. Korman, supra note 84, at 192.


n97. Korman, supra note 84, at 238-39. See also Langer, supra note 96.
n98. Korman, supra note 84, at 239 (quoting letter from Secretary of State Henry Stimson to Senator W.E. Borah (Feb. 23, 1932)).


n100. Langer, supra note 96, at 78 (quoting Declaration of Principles of Inter-American Solidarity and Cooperation, Dec. 21, 1936).

n101. Korman, supra note 84, at 241-42 (quoting Declaration on Non-Recognition of the Acquisition of Territory by Force, 34 Am. J. Int’l. L. 193 (1940)). In its 1945 Act of Chapultepec, the Inter-American Conference on Problems of War and Peace not only asserted non-recognition of conquest rights as customary law but declared that the principle of "non-recognition had been incorporated into the [black letter] international law of American States since 1890." Id.

n102. Deviation from standard capitalization due to author's preference.


n106. Hitler, for one, was quite clear that the nazi "lebensraumpolitik" was based, theoretically, practically and quite directly, on the preexisting model embodied in the U.S. realization of its "manifest destiny" vis-a-vis American Indians and other racial/cultural "inferiors." Adolf Hitler, Mein Kampf 403, 591 (John Chamberlain et al. eds., 1939) (1925); Hitler's Secret Book 46-52 (Salvatore Attanasio trans. 1961). Another iteration will be found in a memorandum prepared by an aide, Col. Friedrich H<uml o>ossbach, summarizing Hitler's statements during a high-level "F<uml u>hrer Conference" conducted shortly before Germany's 1939 invasion of Poland. 25 Trial of the Major Nazi War Criminals Before the International Military Tribunal 402-13 (1947). The relationship between nazi and U.S. theory/practice is closely examined in Frank Parella, Lebensraum and Manifest Destiny: A Comparative Study in the Justification of Expansionism (1950) (unpublished M.A. Thesis, Georgetown University, available at http://muse.jhu.edu/demo/aiq/24.3friedberg.html). See also Norman Rich, Hitler's War Aims: Ideology, the Nazi State, and the Course of Expansion 8 (1973); John Toland, Adolf Hitler 802 (1976).


n109. All the ICC accomplished was to "clear out the underbrush" obscuring an accurate view of who actually owns what in North America. Deloria, supra note 1, at 227. See also Ward Churchill, Charades Anyone? The Indian Claims Commission in Context, 24 Am. Indian Culture & Res. J. 43 (2000).

n110. Hearings on H.R. 1198 and 1341 to Create an Indian Claims Commission Before the House Comm. on Indian Affairs, 79th Cong. 81-84 (1945).


n114. The remaining sixty-eight dockets were turned over to the U.S. Court of Claims. Russel Barsh, Behind Land Claims: Rationalizing Dispossession in Anglo-American Law, 1 Law & Anthropology 15 (1986).


n118. The territorial integrity of all member states is guaranteed in Chapter I, Article 2(4) of the U.N. Charter, supra note 78. The guarantee presupposes, however, that there was a degree of basic legal integrity involved in the territorial acquisitions by which member states composed themselves in the first place. In cases where this is not so, the rights to self-determination of involuntarily subordinated or usurped peoples always outweighs the right to preserve territorial integrity. See Lee C. Buchheit, Secession: The Legitimacy of Self-Determination (1978); Ved Nanda, Self-Determination Under International Law: Validity of Claims to Secede, 13 Case W. Res. J. Int'l L. 257 (1981).


n120. Sinclair, supra note 3, at 14-18. Treaty fraud, which is specifically prohibited under Article 49 of the Convention as a matter of jus cogens, has been defined by the International Law Commission (ILC) as including "any false statements, misrepresentations or other deceitful proceedings by which a State may be induced to give a consent to a treaty which it would not otherwise have given." Id. at 173-74. Coercion, which is prohibited under Articles 51-52, also as a matter of jus cogens, involves "acts or threats" directed by one nation involved in a treaty negotiation against another (or its representatives). Id. at 176-81. The ILC has concluded that "the invalidity of a treaty procured by the illegal threat or use of force is a principle which is lex lata in ... international law," and that the nullity of treaties invalidated on this basis is absolute. Id. at 177 (quoting Y.B. of the Int'l Law Comm'n 246 (1966)).


n124. U.S. title was formally asserted in an Act (19 Stat. 254) passed by Congress on Feb. 28, 1877. It should be noted that while the express consent of three-quarters of all adult male Lakotas was required under Article 12 of the 1868 treaty for any future land alienations by that people to be legal, the signatures of barely fifteen percent were obtained on the Black Hills cession agreement.


n126. For a related development of the thesis, see Rodolfo Acuña, Occupied America: The Chicano's Struggle Toward Liberation (1972).


n128. See Blum, supra note 8; see also Noam Chomsky, Rogue States: The Rule of Force in World Affairs (2000).

n129. As Justice Robert H. Jackson put it while serving as lead U.S. prosecutor at Nuremberg, "we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us." Bertrand Russell, War Crimes in Vietnam 125 (1967); see also Robert H. Jackson, Opening Statement for the United States before the International Military Tribunal, November 21, 1945, in From Nuremberg to My Lai 28 (Jay W. Baird, ed., 1972). As concerns U.S. replication of the major offenses of which the nazis were convicted, see Quincy Wright, Legal Aspects of the Vietnam Situation, in The Vietnam War and International Law 271 (Richard Falk ed., 1968); Ralph Stavins et al., Washington Plans an Aggressive War (1971).


n132. Examples of such Bushian rhetoric during the second half of 1990 are legion, culminating in his announcement during a thirty-four state summit conference conducted in Paris during November, 1990, that the effect of international legality itself could be "neither profound nor enduring if the rule of law is shamelessly disregarded" in the Persian
n133. The U.S. formally repudiated the jurisdiction of the International Court of Justice in 1986, when the ICJ ruled against it in Nicaragua v. United States, 1986 I.C.J. 14 (June 27, 1986); U.S. Terminates Acceptance of ICJ Compulsory Jurisdiction, 86 U.S. Dept of State Bull. (Jan. 1986). It has subsequently refused to accept jurisdiction of the newly-established International Criminal Court (ICC), unless its policymakers and military personnel are specifically exempted from prosecution. Geoffrey Robertson, Crimes Against Humanity: The Struggle for Global Justice 321-24, 446-48, 450 (1999). On the U.S. refusal of international law, per se, see Blum, supra note 7, at 184-99; Bennis, supra note 102, at 279-82.

n134. For an in-depth study of this process at work, see Lawrence J. LeBlanc, The United States and the Genocide Convention (1991).

n135. Article I(2) of the so-called Sovereignty Package attached to its much-belated 1988 "ratification" of the 1948 Genocide Convention pledges the U.S. to comply only insofar as "nothing in the Convention requires legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." Lugar-Helms-Hatch Sovereignty Package, S. Exec. Rep. 2, 99th Cong. (1985), adopted Feb. 19, 1986, reprinted in LeBlanc, supra note 134, at 253-54. Such comportment has become so routine that otherwise establishmentarian analysts have begun to remark upon the traditional Washington stance that the U.S. is above international law. See id. See generally Glenn T. Morris, Further Motion by the State Dep't to Railroad Indigenous Rights, 6 Fourth World Bull. 3; Robertson, supra note 133, at 327.


n138. Churchill, supra note 137.

n139. Leonard Garment offered the formulation during a panel sponsored by Americans for Indian Opportunity, and televised by C-Span in 1999. See generally supra note 4 and accompanying text.


n143. As the matter was recently framed by French Foreign Minister Hubert Vedrine, "the predominant weight of the United States and the absence for the moment of a counterweight ... leads it to hegemony." John Vinoceur, Going It Alone, U.S. Upsets France; So Paris Begins a Campaign to Strengthen Multilateral Institutions, Int'l Herald-Trib. (Paris), Feb. 3, 1999, at A1. See also Jan Morris, Mankind Stirs Uneasily at American Dominance, L.A. Times, Feb. 10, 2000, at B9.

n144. For an early - and rather prescient - assessment of this prospect, see Sandy Vogelgesang, American Dream Global


n147. Id.


n149. See supra note 76. For additional discussion of the peculiarly one-sided and legally unfounded notion of treaty abrogation implicit to the opinion, see Blue Clark, Lone Wolf v. Hitchcock: Treaty Rights and Indian Law at the End of the Nineteenth Century 4-5, 70-74, 110 (1994).

n150. During the 1997 conference in Ottawa which resulted in promulgation of the Convention on Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction, to cite one notorious example, U.S. representatives argued straightforwardly that the treaty should bind every country in the world except theirs. When the 129 signatory states in attendance refused to accept the premise that the U.S. should be uniquely exempted from compliance, the U.S. delegation withdrew in a huff. Robertson, supra note 131, at 198-99; Bennis, supra note 104, at 279-80. As of this writing (Feb. 2003), the U.S. has not endorsed the Convention, although it went into force in March 1999. Instead, it has indulged in a flagrant violation by dropping thousands of cluster bombs - outlawed under the treaty - on Afghanistan since October 2001.

n151. Upon even cursory examination, it becomes evident that virtually every one of the multitudinous post-World War II U.S. military/paramilitary interventions abroad has been harnessed to these ends. See, e.g., Noam Chomsky, Deterring Democracy (Hill & Wang, 1992) (1991); Noam Chomsky, Year 501: The Conquest Continues (1993). It should be noted that, according to no less authoritative a figure than Secretary of State Colin Powell, the U.S., having employed criminal means to replace Afghanistan's Taliban regime with a government of its own choosing in late 2001, is now gearing up to do the same in Iraq (Iran and North Korea have been named as likely follow-ups). It should also be noted that military force has not been the only means employed to accomplish the subordination of other countries, nor have the victims necessarily been confined to the Third World. See, e.g., Stephen McBride & John Shields, Dismantling a Nation: The Transition to Corporate Rule in Canada (2d ed. 1997).


n153. Despite our retention of the largest landholdings on a per capita basis of any North American population group, and despite that land being some of the most mineral-rich in the world, internal colonial exploitation of our resources by the U.S. has left American Indians in a material circumstance so degraded that by the late 1990s our average lifespan was one-third less than that of the settler population. Overall, the Indian health level is the lowest and the disease rate the highest of all major population groups in the United States. The incidence of tuberculosis is over 400 percent higher than the national average. Similar statistics show that the incidence of strep infections is 1,000 percent, meningitis is 2,000 percent higher, and dysentery is 10,000 percent higher. Death rates from disease are shocking when Indian and non-Indian populations are compared. Influenza and pneumonia are 300 percent greater killers among Indians.
Diseases such as hepatitis are at epidemic proportions, with an 800 percent higher chance of death. Diabetes is almost a plague. And the suicide rate for Indian youths ranges from 1,000 to 10,000 percent higher than for non-Indian youths; Indian suicide has become epidemic.


n156. The U.S. Congress actually issued a statutory apology to the Kanaka Maoli on the 100th anniversary of its admittedly illegal participation in the armed overthrow of Hawai'i's constitutional monarchy. S.J. Res. 19, 103d Cong., 107 Stat. 1510 (1993). Signed by President Bill Clinton on Nov. 23, 1993, id., Public Law 103-150 made no offer to restore the native people's property and other sovereign rights. Nor did it mention that Hawai'i's being declared a U.S. state in 1959 was accomplished in a manner violating the requirements of Chapter IX of the U.N. Charter, and was thus simply another illegality. See Haunani-Kay Trask, From a Native Daughter: Colonialism and Sovereignty in Hawai'i 27-32 (2d ed. 1999). On Guam, see Chamorro Self-Determination (Robert Underwood & Laura Souder eds., 1987). On Puerto Rico, see Ronald Fernandez, Prisoners of Colonialism: The Struggle for Justice in Puerto Rico (1994); see also Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution (Christina Duffy Burnett & Burke Marshall eds., 2001). By far the best overview of federal holdings, including such little-considered places as "American" Samoa and the "U.S." Virgin Islands, will be found in Arnold H. Leibowitz, Defining Status: A Comprehensive Analysis of United States Territorial Relations (1989).


n158. My use of the word "seriously" here is intended in opposition to the liberal notion that solutions to the kinds of intractable socioeconomic, political, and environmental problems generated by the existing system can somehow be obtained through recourse to the system itself. Regardless of the rhetorical militancy in which such propositions are often larded, they are inherently superficial and ultimately reinforcing of systemic hegemony. See Ernesto Laclau & Chantal Mouffe, Hegemony and Socialist Strategy: Towards a Radical Democratic Politics (2d ed. 2001).

n159. For some of the better descriptions of the statist system, see Boyle, supra note 93; see also Hedley Bull, The Anarchical Society: A Study of Order in World Politics (1977); Fritz Kratochwil, Foreign Policy and International Order (1978).


n164. The "Belgian Thesis," as it was called, had been articulated for more than a decade prior to the U.N. debate. See, e.g., Foreign Ministry of Belgium, The Sacred Mission of Civilization: To Which Peoples Should the Benefit be Extended? (1953).


n166. Indeed, some Third Worlders felt that both the principle and its OAU endorsers did not go far enough. Rather than simply preserving the individuated-state structure inherited from European colonialism, Pan-Africanists like Kwame Nkrumah sought to forge a single continental "megastate" along the lines of the U.S. or the USSR. See Elenga M'buyinga, Pan-Africanism or Neo-Colonialism: The Bankruptcy of the O.A.U. (Michael Pallis trans., Zed Press 1982) (1975); Kwame Nkrumah, Neo-Colonialism: The Last Stage of Imperialism (Int'l Publishers, 1966) (1965).


n168. See generally Nietschmann, supra note 161; George Manuel & Michael Posluns, The Fourth World: An Indian Reality (1974). At least one writer has
referred to the Fourth World as being a "Host World" upon which the other three have been constructed. Winona LaDuke, Preface: Natural to Synthetic and Back Again, in Marxism and Native Americans, at i (Ward Churchill ed., 1983).


n170. Nietschmann, supra note 161, at 240.

n171. Id. For background, see Greg Urban & Joel Sherzer, Nation States and Indians in Latin America (1991).


n173. Id. at 116. For more on the Montagnards, see generally Churchill, Acts of Rebellion, supra note 155, at 247.


n182. For an interesting iteration of more-or-less the same perception, see Gustavo Esteva & Madhu Suri Prakash, Grassroots Postmodernism: Remaking the Soil of Cultures (1998). See also John Zerzan, Elements of Refusal (2d ed. 1999).


n185. See generally A People Without a Country, supra note 176.

special-focus issue entitled India: Cultures in Crisis).


n189. See David Robie, Blood on Their Banner: Nationalist Struggles in the South Pacific (1989).


n193. For a good overview, see John K. Cooley, Unholy Wars: Afghanistan, America and International Terrorism 174-84 (2d ed. 2000).


n199. Ellis, supra note 196, at 139-64.

n200. For a map of Saamiland, see IWGIA Newsletter (Int'l Work Group for Indigenous Affairs, Copenhagen, Den.), No. 51/52 Oct./Dec. 1987, at 84.


n204. See Robert D. Kaplan, The Coming Anarchy: Shattering the Dreams of the Post Cold War (2000). Kaplan and others of his ilk delight in pointing to the bloodbath in the former Yugoslavia as previewing far worse to come, were the statist system to disintegrate. See, e.g., Bogdan Denitch, Ethnic Nationalism: The Tragic Death of Yugoslavia (1994). Ignored altogether in such analyses are the facts that the animus provoking such bloodletting is a legacy of statist imposition on the one hand, and efforts to reimpose centralized state authority on the other.
n205. Bennis, supra note 104, at 274.


n208. As Antonio de Nebrija famously put it in 1492, language might be seen as "a perfect companion to empire" in the sense that the colonizer's imposition of his own tongue upon the colonized would serve to undermine the latter's cultural integrity and concomitant capacity to resist subordination. See Patricia Seed, Ceremonies of Possession in Europe's Conquest of the New World, 1492-1640, at 8 (1995). By the 1880s, linguistic imposition had progressed to a program of systematically supplanting indigenous languages. See, e.g., David Wallace Adams, Education for Extinction: American Indians and the Boarding School Experience, 1875-1928, at 137-42 (1995) (estimating that today, fully half the world's 6,000-odd languages are in danger of disappearance within the next few years, and half the remainder over the coming generation); Martin Carnoy, Education as Cultural Imperialism 69-72 (1974).


n211. On the concept of "Master Narratives" - also known as "Great" or "Grand" Narratives, as well as "metanarratives," see Fredric Jameson, Political Unconscious: Narrative as Socially Symbolic Act (1981). In the sense the term is used here, it figures into the Gramscian notion of hegemony. See Walter L. Adamson, Hegemony and Revolution: A Study of Antonio Gramsci's Political and Cultural Theory 170-79 (1980); Judith Butler, Restaging the Universal: Hegemony and the Limits of Formalism, in Judith Butler et al., Contingency, Hegemony, Universality: Contemporary Dial-logues on the Left 11 (2000).

n212. Jürgen Habermas, Legitimation Crisis (1973).


n219. See Richard Falk, Anarchism and World Order, in End of World Order, supra note 213, at 277-98. See also Harvey Starr, Anarchy, Order, and Integration: How to Manage Interdependence (1999). For a more concrete exploration of how an anarchist arrangement of international relations might look in practice, see Juan Gomez Casas, Anarchist Organization:
Long before the 1999 "battle" in Seattle, n1 when a diverse group of anti-globalization activists protested and disrupted a World Trade Organization (WTO) meeting, a group of Americans met with the prime minister of a Caribbean country, to discuss the country's economic problems. In Part I, I discuss the banana dispute in its broader context, emphasizing how the WTO dispute resolution process and the substantive biases of the global trade establishment marginalized the interests most affected by the dispute: those of the developing countries where bananas are cultivated. n2 Another major banana trading company, Del Monte, also endorsed the European program, suggesting only "minor modifications. n3 The U.S. complaint charged that the EU banana regime actually operated to deny American banana companies full access to European markets in violation of fundamental free trade principles codified in the General Agreement on Tariffs and Trade (GATT). n4 Without a way to participate in the global economy, the alternatives are starvation or destructive involvement in another aspect of globalization - the international drug trade. n5 It appears that, at a minimum, the Seattle protests exposed many of the problems within the global trade-centered economic system and encouraged some supporters of globalization to reexamine their faith. n6

[\textsuperscript{707}] Long before the 1999 "battle" in Seattle, n1 when a diverse group of anti-globalization activists protested and disrupted a World Trade Organization (WTO) meeting, a group of Americans met with the prime minister of a Caribbean country, to discuss the country's economic problems. The major concern was a case brought before the WTO by the United States and some Latin American banana producing countries against the European Union for allegedly giving preferential treatment to Caribbean bananas. n2 The case was instigated by Chiquita Brands, the United States-based multinational corporation with extensive holdings and operations in Latin America. Many believed that a Chiquita victory at the WTO would essentially destroy the banana industry in several Eastern Caribbean countries. n3 The rather diverse American group, composed of academics, labor representatives, environmental and family farm activists, as well as politicians, was in complete agreement with their Caribbean host when the conversation focused on the dismaying behavior of the Clinton administration, n4 the aggressive tactics of Chiquita, or the unfairness of global trading rules. However, when the prime minister, in appealing for better trade terms with the United States, specifically asked for their support to have his country included in an expanded version of the North American Free Trade Agreement (NAFTA), tension grew. n5 At that point, disappointment registered on the faces of some group members, especially those representing prominent environmental and labor organizations in the United States. One participant, a vociferous critic of NAFTA, raised her hand as if to object as others held their breath anticipating an international incident. Fortunately the conversation ended before any major disagreement surfaced.

Fast forward to early December 1999 and a labor-led, anti-WTO protest march in Seattle. It was a rather diverse group of demonstrators as young men and women mixed easily with middle-aged and elderly demonstrators; blue-collar workers chanted "This is what democracy looks like" in unison with college students; environmental activists linked hands with farm workers. n6 However, one could easily count the number of marchers of color present, even as the few that were there made up with enthusiasm what they lacked in terms of numbers. n7 Indeed, contrasted with the onlookers lining the route as the demonstration wound through the streets of downtown Seattle, the demonstrators stood out in almost alien-like racial homogeneity. Media-fed images of Third World trade officials expressing irritation at the demonstrators and disdain for President Clinton's feeble attempts to co-opt some of the demonstrators'
The 1999 ruckus in Seattle may be seen as an important stage in the evolution of global opposition to the structure and practice of the Bretton Woods Institutions (BWIs). It could mark the beginning of a new, more confrontational, stage in the global movement of the discontented to slow down if not halt the march of market fundamentalism. Until recently, there has been far too little appreciation of common interests against this aspect of globalization. These interests transcend traditional divides of national boundaries, race, class, and history. For decades activists in developing countries have complained about market fundamentalism and other destructive practices of the BWIs. Now their cries appear to penetrate beyond a small group of concerned activists and academics in the West. Seattle, in such light, was a welcome development, an opportunity to bring the disenchanted from the center and the periphery together.

The protesters in Seattle and subsequent forums have made laudable contributions toward the development of a more effective anti-globalization movement, not the least of which has been to make the shadowy enclaves of bureaucratic elitism marginally more transparent and accountable. Yet in a world grown too comfortable with the fact that poverty and inequality are growing steadily and that nearly fifty percent of humanity barely survives on an average of less than two dollars a day, even greater urgency should be brought to the work that must be done.

This Article examines opportunities and challenges facing those working to build a global movement against negative aspects of economic globalization. Even though I focus on the role of the WTO in the banana wars, many of the same points could be made by examining the work of the other members of the global economic triumvirate. However, the course of the banana wars with their murky and deplorable origins, peculiar alliances, complex combination of issues, and insights into the dispute resolution process of the WTO, best illustrates many of the points I would like to make.

In Part I, I discuss the banana dispute in its broader context, emphasizing how the WTO dispute resolution process and the substantive biases of the global trade establishment marginalized the interests most affected by the dispute: those of the developing countries where bananas are cultivated. In Part II, I outline two key strategies employed in defense of globalization (that can be extracted from the course of the banana dispute and the Seattle protests): (a) the justification of existing power imbalances through the language and process of law; and, (b) the relentless, cult-like defense of the present order by denying both the historical experiences of the discontented and the possibilities for alternatives to the present system.
Part III, I discuss how a reinvigorated anti-globalization movement can become more effective on a global scale by developing the capacity and flexibility to think, organize, and act dynamically in multiple, intersecting ways, avoiding the tendency to romanticize the local or vilify uncritically the global. I stress the need to be aware of, to respect, and to cultivate diverse historical experiences while recognizing the dynamic nature of perspectives, interests, and alliances in the struggle over globalization.

Understanding the Banana Wars: More than Bananas

The banana wars were about much more than bananas, a fruit of dubious nutritional value, but apparently much loved by many Europeans. The wars actually predated the establishment of the WTO but in their most recent manifestation, they came before the newly-established World Trade Organization in the form of a complaint brought by the United States. The United States acted in response to a Section 301 complaint filed in October 1994 by Chiquita Brands International, the successor to the notorious United Fruit Company. Chiquita, one of two major banana-trading companies with headquarters in the United States, employs the vast majority of its approximately 45,000 person work force in several Latin American countries. It was virtually alone in the multinational corporate community in its unrelenting opposition to a preferential banana-trading arrangement between the European communities and several very poor developing countries. Dole, the other leading United States banana company, for example, suggested a compromise, believing that a "precipitous change in current trading arrangements would cause a disproportionate amount of harm to ACP and European banana producing regions; and the need for transparent and stable regulation in the banana sector." Another major banana trading company, Del Monte, also endorsed the European program, suggesting only "minor modifications." A brief history of the European banana arrangement or program is in order. The European banana program originated in the Lome Convention, a series of trade and economic cooperation agreements between the European Union (EU) and sixty-nine Atlantic, Caribbean, and Pacific (ACP) countries. European Union Council Regulation 404/93 established the program in 1993 and was set to expire in 2002. The regulation integrated various preferential trade agreements, remnants of European Colonialism, which facilitated banana imports into several European nations. One of its stated aims was to assist banana producers operating out of certain former European colonies. Essentially the program reserved a relatively small quota of banana imports for these former colonies.

The United States, after considerable prodding from Chiquita, took issue with the expressed altruism of the Europeans. The U.S. complaint charged that the EU banana regime actually operated to deny American banana companies full access to European markets in violation of fundamental free trade principles codified in the General Agreement on Tariffs and Trade (GATT). The United States insisted that the primary beneficiaries of what they termed a protectionist device were the European-controlled banana shipping and marketing companies operating out of producer countries. Specifically, the complaints charged that the European regime violated the following provisions of the GATT: Article I (Most-Favoured Nation treatment), Article II (schedules of concessions), Article III (National Treatment Obligation), Article X (publication and administration of trade regulations), Article XI (general elimination of quantitative restrictions), and Article XIII (non-discriminatory administration of quantitative restrictions). In addition, it charged that the regime violated provisions of WDO Agreements on Import Licensing Procedures, Agriculture, and the General Agreement on Trade in Services (GATS). The WTO Dispute Settlement Body (DSB) established a single panel to review the complaint on May 8, 1996.

Eastern Caribbean countries whose bananas entered Europe under the European program felt especially vulnerable to the combined superpower-multinational corporate assault on their economic lifeline and pleaded that the program was critical to their survival as independent, viable modernizing societies. For some of the affected countries, like Dominica and St. Lucia, banana sales to Europe accounted for as much as fifty percent of their total exports. The Jamaican banana industry, ranking second only to sugar in economic importance within the agricultural sector, provided employment for about 40,000 people.

The banana case was one of the first opportunities for the WTO to test its new dispute resolution process. After decades of pursuing dispute resolution under the GATT in ways that were unstructured and considered by some as undisciplined, the new world trade body developed a more contoured and legalistic framework for resolving trade disputes in 1994. The new dispute resolution framework promoted a more adjudicative process and promised greater
efficiency. It provided multiple stages, but bound them with shorter timelines culminating in final reports that do not depend on consensus for adoption. n43

The new system is also significantly more formalistic in terms of its operation as it employs more clearly defined procedural rules to apply old substantive doctrines. n44 This formalism supports its efficiency goal which came under pressure due to a substantial growth in the number of disputes that it attracted. n45 Formalism also protects the institution from "inefficiencies" that could arise from more serious consideration of issues outside the narrow traditional concerns of open market adherents. n46 The combined effect of these procedural changes in the dispute resolution process has been to reinforce historic inequalities under cover of legal process.

The WTO treatment of the banana dispute reflects [*718] procedural and substantive biases that marginalized those most affected by the outcome - complainants, as well as defendants from developing countries. Simply put, these developing country participants lacked the experience as well as the material and technical resources to participate fully in the lengthy, highly specialized and stylized processes that dispute resolution in the WTO era has now become. n47 Furthermore, their profound equitable concerns fell outside the narrow doctrinal framework that governs the work of the dispute panel. The developing countries who signed on as complainants signed off their sovereign interests to the United States and a domineering multinational corporation while the developing country defendants concealed whatever concerns they may have had about their arrangements with the European countries to fight a more immediate desperate battle for survival. Fundamental questions about multinational corporate behavior, historical inequities, access to markets in developed countries for agricultural producers in general, crushing national debt burdens, and the like, could not be aired in this particular WTO forum.

Eventually, the WTO panel ruled in favor of the complainants finding "aspects of the European Communities' import regime for bananas are inconsistent with its obligations" under the GATT and related agreements. n48 A series of procedural and substantive appeals by both sides resulted in a clear confirmation of the complainants' position even as tension between the parties increased. n49 A lengthy wrangling over implementation of the WTO rulings followed, accompanied by threats of sanctions and warnings of a trade war that could destroy the WTO. n50 The Americans rejected the steps the Europeans initially offered to take in response to the WTO rulings as totally unsatisfactory and threatened wide-ranging sanctions. In turn, the Europeans condemned [719] the United States response to their offer as itself a violation of the WTO/GATT process and complained to the WTO about the threats. Meanwhile, the small banana producing countries in the Eastern Caribbean, most affected by the outcome, continued their protests in vain.

Eventually, the United States/Chiquita position prevailed as the complainants, consistent with the new WTO standards, received WTO permission to impose sanctions on European imports. n51 When the Europeans failed to reform the banana program to satisfy the demands of the WTO rulings, the United States began to impose sanctions. n52 After further lengthy negotiations, the Europeans relented and reached an agreement with the United States on April 11, 2001 to implement the WTO conclusions and recommendations. n53 In the compromise agreement, the Europeans agreed to abandon their quotas gradually and move toward a tariff-only regime for banana imports by January 1, 2006. n54 In the interim, the Europeans agreed to implement a tariff-rate quota system that would gradually reduce the preferences given to banana imports from ACP countries without completely eliminating them. n55 At the November 2001 WTO ministerial meeting in Doha, Quatar, the Europeans sought and [*720] received waivers of GATT Article I (Most-Favoured Nation) and GATT Article XIII (non-discrimination in administering quotas) for a new EC-ACP treaty called the "Cotonou Agreement." n56 The agreements between the European defendants and the United States-led complainants, together with the WTO waivers received for the new Cotonou Agreement, provide temporary breaks for the ACP banana producers while putting pressure on them to find long-term solutions to their fundamental economic and political disadvantages.

II

Defending Globalization: Two Strategies

The banana dispute illustrates the key role that the WTO plays in defending economic globalization. In this Section, I discuss two key strategies that defenders of globalization employ to limit challenges to the present order: (1) the entrenchment of power disparities through increased legalization or judicialization of trading relationships and (2) waging a relentless war against memory by denying or devaluing consideration of past injustices that have continuing consequences and obligations. Both of these strategies are readily seen in the consideration of the banana dispute.

A. Employing Law to Entrench Power
The seemingly never-ending banana dispute reflects an ongoing clash between the realities of old-style power politics and the ideals of those who continue to yearn for a legal order divorced from power politics. In this sense, the dispute speaks to the frustrations of those who bemoan blatant irregularities and unfairness in the global economic system. It also speaks to the hopes of those who believe that the cure for what ails the system is more law - more clearly defined rules and processes.

However, it is not too soon to conclude that the turn toward more law, heralded by the new WTO dispute resolution process, means a lessening neither of the power of those who have it nor of their willingness to employ it to defend narrow chauvinistic interests. Advanced industrial countries, for example, are quick to complain about even de minimis violations of trade rules by the poorest countries, yet they spend billions of dollars subsidizing [*721] their domestic agricultural enterprises and keeping out agricultural products from developing countries; thus, depriving developing countries of their most likely trading advantage.n57 The welcoming legal face of the new process does not mean a more level playing field. n58 It certainly does not mean greater transparency in the system or more equitable consideration. In procedural justice terms, developing countries simply lack the economic resources, the experience playing the game, and the technical expertise necessary to engage in the sort of sustained investigation, monitoring and complex legal maneuvering required to pursue claims adequately under the new system.n59 In substantive terms, the trading rules and doctrines are still the same, essentially prescribing an extremely narrow and inflexible approach to economic development that has ill-served most poor countries.

It should be recognized that regardless of the outcome of the WTO complaint, the people to whom it mattered most - the people of Jamaica, Dominica, Saint Lucia, and other ACP banana producing countries - would have lost. The very structure of the global free trade regime, as well as its operations, ensures that these people would always be losers. Tragically, all the propaganda they get from the international economic development establishment, their leaders, and indeed, from activists who periodically offer to help them win something from the process, tell them otherwise; thus ensuring that they retain some hope in an otherwise hopeless situation, faith in an otherwise faithless process.

The European banana preferential scheme did not significantly [*722] obligate the European countries and it was certainly not within the control of their banana producing former colonies. Essentially, the Europeans gave gifts to their former colonies that really came at the expense of other developing countries. Even this characterization would seem overly generous. The fact is that banana farmers in "beneficiary" countries, like European banana consumers who pay very high prices for the product, do not have much bargaining power within the program.n60 The European based banana marketing corporations who serve as distributors get the lion's share of the more than $2 billion a year in revenues generated. As Professor Bhala puts it, these companies "collect monopoly rents at the expense of the ostensible beneficiaries... the ACP countries." n61

The structure of the banana industry in many of these countries helps to explain this outcome. In conversations with Caribbean banana farmers during our 1996 visit, many farmers extolled their status as independent producers - as opposed to the status of workers in the corporate-owned plantations in Latin America - but acknowledged that their status came with substantial risks. In order to improve competitiveness through quality, they have to follow a strict crop inspection regime that places a heavy burden on the independent farmers to produce acceptable crops.n62 The distributors, according to these farmers accept only crops that meet their quality standards. In a sense then, these banana distributors limit their risks, maintain control, and profit from a regime that is promoted under the banner of altruism. It is difficult to distinguish their conduct and role from the much vilified Chiquita corporation.

The destinies of several small poor countries may have been at stake, but the WTO dispute was fundamentally about the rules multinationals should follow in carving up the spoils of globalization.

The GATT/WTO system, along with allied World Bank and the International Monetary Fund operations, have not fostered global equality to any appreciable degree and indeed, arguably, [*723] are central to maintaining global inequality today.n63 The newer more legalistic framework of the WTO helps to launder the ideology of free trade, seeking to mask its violence-laden past and its deeply political and corporatist core with stultifying legalisms. Without a sufficiently critical eye, the changes make the WTO's contributions seem neutral, benign, democratic and progressive.n64 The language of law buffers the historic readiness to dominate, to win in the narrowest sense, and to make those who refuse to conform pay dearly. The genius of the new process is that it does offer the carrot of hope - the possibility that next time it will be better, everyone will be treated fairly -
coupled with the stick of even more punitive actions against those who refuse to go along.

The global economic triumvirate works in close coordination to promote market fundamentalism. Failure to adhere to the dictates of any one of them leads inevitably to retaliation by all. The never-ending short-term IMF loans, for example, are tied to privatization and open markets. Longer term World Bank assistance requires "good governance," which translates into privatization and open markets, and the WTO of course is about open markets first and last.n65

To quiet discontent among elites in the developing world, the WTO and its siblings offer training programs that bring officials from developing countries to Western capitals to tutor them on the "new" rules and processes of globalization and to help them forget old realities. Similar faith was once expressed in another global institution - the International Court of Justice. Then in 1984, the United States, facing certain defeat in a case brought by Nicaragua, decided it did not want to play the legal game anymore.n66 More recently, United States enthusiasm for international [*724] crimes tribunals waned in the face of a near global consensus for a permanent International Criminal Court that could try anyone, including Americans.n67 Perhaps it would take the United States or one of the other major powers withdrawing from the jurisdiction of the new WTO dispute resolution process to expose the sham behind the mask of legality.

B. Waging War against Memory: But the Present is So Much Like the Past

What unites the anti-W.T.O. crowd is their realization that we now live in a world without walls. The cold-war system we just emerged from was built around division and walls; the globalization system that we are now in is built around integration and webs. In this new system, jobs, cultures, environmental problems and labor standards can much more easily flow back and forth.n68

Propagandists for globalization, such as New York Times columnist Thomas Friedman, argue incessantly that we are witnessing a profound and inevitable transformation of human relationships across physical, social and even psychological boundaries.n69 Some of them glorify this transformation with religious fervor, insisting that it is the only way to salvation for everyone. n70 Others merely accept its inevitability with a pragmatist's conceit. n71 These advocates for the only true path, also known as the Washington Consensus, are engaged in a relentless war against memory, a struggle against our recollection of the past. Their task is not just to rewrite history when necessary, but to help us forget so we may not conceive other possibilities. When we forget our past or accept their restatement of it we are deprived of agency. We lose our transformative potential and give [*725] up our capacity, our right, indeed our duty, to fully participate in ongoing efforts to reorder our world in fundamental ways.

The enthusiasm of globalization advocates is nothing new and it is quite understandable once it is recognized that history for them is usually only a few decades old. The promise of globalization is so new and exciting and inevitable to them because they know or care so little about the past. Theirs is just another end of history account.n72 Their analyses rarely incorporate a time before the end of the Second World War and the start of the so-called Cold War. Slavery and the age of conquests, for example, are locked away in their minds, protected by cultivated mass amnesia. Imperial subjugation and colonial domination of many of the inhabitants of Asia, Africa, and the New World are more often subject to revisionist history-telling than a courageous acknowledgement of their enduring costs.

For many in the world today - call them non-white, Third World, the South - the present largely reflects much of the past. And the past for these people is often a bottomless memory hole of pain and suffering, much of it intimately connected to forces that may have gone under other names, but bespeak globalization. Today, many are awe-struck by the technological revolution fueling globalization. However, we should not forget that galleons and muskets were revolutionary technologies in their time. Accounts of those days were likewise filled with the arrogance of those who smugly saw the "end of history," the superiority of their ideology, culture and technology, the inevitable future, and the absolute futility of continued resistance.

The experience of the several ACP countries that fought tenaciously only to lose the legal battles to preserve access to western European countries for their banana crop illustrates the difficulty of conceiving the present as appreciably different from the past. It is simply impossible to understand their predicament or to formulate options for them without a comprehension of their past. The construction of a different world for them must begin by recognizing that these people had very little say in the introduction of the banana crop into their communities. Indeed many of them had no choice in how they came to populate their present territories. Today, they cling to the banana crop even though they could not hope to compete economically with the large South and Central America-based banana plantations. The Caribbean [*726] farms lack the acreage, soil quality, and cheap labor of their
competition. The WTO's whole-hearted promotion of efficiency, meaning "lowest cost production," ensures that they could never compete in global trading unless they could get consideration of other values, such as promoting stable families and communities as well as reparations for past wrongs.

Yet, the belief of the globalization faithful in efficient markets and privatization proceeds from a fundamentalist cult-like perspective that is every bit as strong as belief among the religiously faithful in a Supreme Being. Take the following assertions of one such faithful, Paul Krugman:n73

(1) The raw fact is that every successful example of economic development this past century - every case of a poor nation that worked its way up to a more or less decent, or at least dramatically better, standard of living - has taken place via globalization; that is, by producing for the world market rather than trying for self-sufficiency. Many of the workers who do that production for the global market are very badly paid by First World standards.

(2) For what it is worth, the most conspicuous examples of environmental pilage in the Third World have nothing to do with the WTO. The forest fires that envelop Southeast Asia in an annual smoke cloud are set by land-hungry locals; the subsidized destruction of Amazonian rain forests began as part of a Brazilian strategy of inward-looking development. On the whole, integration of the world economy, which puts national actions under international scrutiny, is probably on balance a force toward better, not worse, environmental policies.

Ignoring for now the absence of factual support for these assertions stated as fact,n74 the cavalier dismissal of history is striking. No indication is made of the myriad ways nations come into this world, nor any acknowledgement of transnational or transcontinental impact, or of violent exploitation and its innumerable consequences. Slavery, genocide, colonial conquests, apartheid, global and regional conflicts, wars of national liberation, the Monroe Doctrine, the Marshall Plan, Communism, the Cold War are only some of the missing elements. Closely connected to the dismissal of history is the absence of context and a profound lack of appreciation of agency and contingency.

Propagandists often point to various Asian nations as proof of their assertions. China, Taiwan, South Korea, and Malaysia have been cited as examples of what may be called "model minority" nations that have successfully employed the modernizing force of global free trade.n75 However, even a cursory examination of the economic policies pursued by these nations would show that little of whatever prosperity they have achieved has been connected to the advice of the guardians of economic globalization. n76 China, which was admitted into the WTO only recently, has benefited from trade and foreign investment, but surely not from throwing open its markets or removing foreign exchange controls. According to one recent report, "for ... most of the developing world except China (and to a lesser extent India), globalization as practiced today is failing." n77 But the question must be asked: to what extent has China's limited success been the result of political and strategic factors such as Western efforts to "rope" China into the global capitalist economy? In any case, China still represents a clear case of government-directed modernization, not free trade. No advocate for a more equitable world economic order would object to lesser developed countries receiving the same access to Western markets that China has been able to gain with so little reciprocity on its part. This reality is nowhere endorsed in the operations manual of the market fundamentalists.

India, on the other hand, has been a very reluctant participant in many aspects of free trade, especially as it relates to intellectual property protection. Korea, too, has imposed technology transfer requirements, protected its market, and pursued Japanese-style government-directed or coordinated investment policies to push industrialization. Its strategic relationship with the United States may have also given it considerable room to adapt market fundamentalist prescriptions to its needs. Few others are given such flexibility by the global economic triumvirate.

[*728] In Malaysia's case, it should be recalled that it did not hesitate to impose exchange controls when its economy was threatened during the Asian financial crisis of 1997 amidst howls of protests from Western investors, the IMF and other believers in economic orthodoxy.n78 According to Stiglitz, who was the Chief Economist at the World Bank at the time: "Today, Malaysia stands in a far better position than those countries that took IMF advice." n79 In general, these "model" Asian nations testify to the role of agency and contingency. Some of them saw alternatives to the Washington consensus and grabbed them. Others were the beneficiaries of time and place such as the struggle between the West and the former Soviet Union. Their "success" actually supports the view that the Washington consensus or market fundamentalism does not represent the only true path. Globalization as we know it is thus far from inevitable unless propagandists succeed in their fundamental task.
of defeating our memory and our capacity to change our lives - our present and our future.

The extensive official record of the banana dispute before the WTO does not begin to capture the enormous tragedy wrapped in legal formalism. To fully understand this, we must begin with history of how these people came to be on these tiny islands with geographies and economies totally unsuited for the cold efficiency-driven value system that characterizes the global trading regime - a regime that inexorably commodifies everything, making people and produce indistinguishable. Then, we should incorporate context, agency, and contingency.

The farmers who labor to produce their bananas for European tables today came to these islands through one of history's greatest crimes perpetrated on Africans. Slavery should be seen for what it was: a violent and brutish European-centered push for a sort of globalization in which Africans and the produce and treasures of the "new world" were prized commodities. The cultivation of bananas that began on these islands only in the twentieth century, is merely the current link in the chain of human misery that began with this earlier effort at globalization. Ironically, banana cultivation was the result of a sincere push to diversify the economies of these islands away from sugar cane. Bananas, being a year-round crop and resilient to the vagaries of the climate, was preferred even though the climate and soil condition in many of these places meant back-breaking work for very modest yields. That these farmers are today fighting so hard to hold on to this crop against tremendous multinational forces is testament to the survival imperative. At stake for many is not just individual survival, but the viability of their fragile economic and social structures. Without a way to participate in the global economy, the alternatives are starvation or destructive involvement in another aspect of globalization - the international drug trade.

Yet opportunities for legitimate participation are limited and the process as a whole is rigged to ensure the preservation of the status quo. The proliferation of international legal agreements and the push toward more adjudicative processes have not altered historic relations of dependency. This is essentially what the banana dispute illustrates. Like their African ancestors, who had very little to do with the colonization of their land or the capture and forcible transfer of their kinfolk to these tiny islands in the Caribbean, the present day inhabitants of ACP banana-producing countries were relegated to outsider or "Third Party" status in the formal consideration of their future. Indeed, the process of determining the economic and social viability of these societies under the WTO rules seems frozen in time and does not require too much imagination to evoke a comparison with the way the Portuguese and Spanish crowns met to divide up the world five centuries ago.

As difficult as the earlier, more political GATT dispute resolution process was, it at least had the virtue of honesty: the weak knew going into it that they had little hope of gaining anything that was not of greater benefit to the strong. The new more legalistic/adjudicative process that came into being in 1995 promised too much and has given very little. The well-publicized crude hijacking of the dispute process by a relatively minor multinational corporation confirmed the enduring centrality of old power relationships. The United States has no banana industry; few American jobs were at stake, yet it fought tenaciously on behalf of a corporation that had the foresight to contribute to the political coffers of the two major American political parties. The violence of old - invasion by marines, gunboat diplomacy, violent overthrow of unfriendly governments - is now often unnecessary. Countries new to political independence, woefully limited in human and material resources, and characterized by unstable, incompetent or corrupt leadership, can now be enticed to sign on to a scheme that vigorously champions lessons from a past filled with horrors for the dispossessed. Pacta sunt servanda. That old standby remains part of the "new" law of globalization.

The rejection of the European preferential trading scheme was a resolute refusal to acknowledge that the past has a place in the present. However, instead of openly stating that the world trading system cannot accept a plan - grossly inadequate as it is - to acknowledge some European responsibility for their imperial, slave-trading, colonialist past, the WTO hid behind neutral sounding GATT-legal principles and a rigid alienating quasi-adjudicative dispute resolution process.

The Chiquita Brands-United States victory has laid the groundwork for further injustices as it now provides Europe with a "legitimate" excuse to limit further efforts to provide some form of "reparations" to these former colonies. Indeed it would hardly be a surprise if the WTO rulings lead to retrenchment.

After Seattle: Toward a New Anti-Global Order

The big economic question for the next century, in other words, is really political: Can the Second Global Economy build a constituency that reaches beyond the
sort of people who congregated at Davos? If not, it will eventually go the way of the first. n82

The intensity of passion and the breadth of concern demonstrated by opponents of the new globalization, often described as "corporate globalization" by prominent Western activists like Ralph Nader, caught the global neo-liberal leadership in Seattle by surprise. The WTO Seattle meeting broke down under the weight of inside and outside differences. n83 The global economic triumvirate no longer had the freedom to meet anywhere and their record and authority to prescribe came under vigorous and persistent challenge. The leadership scrambled to respond, sometimes ridiculing some of the protesters and at other times rhetorically co-opting many of their issues. n84

As the Krugman excerpt above suggests, supporters of the present order understand the importance of expanding its constituency. Efforts to accomplish this have already begun in earnest. The World Bank has moved seemingly to embrace all sides preaching "sustainable development in a dynamic economy" and a governance agenda that supposedly promotes the "rule of law" without political interference. n85 Criticisms of IMF policies are now in vogue, even coming from members of a panel appointed by the United States Congress to review the work of international financial institutions. With a new director-general from Thailand, some see hope for a change in some of the WTO's policies concerning the developing world. It appears that, at a minimum, the Seattle protests exposed many of the problems within the global trade-centered economic system and encouraged some supporters of globalization to reexamine their faith. n86 Others, still convinced of the correctness of their vision, prefer to seek new converts.

[*732] A similar task faces the anti-globalization coalition. It must now build upon its successes to expand and deepen its coalition. Perhaps one yardstick by which it could measure progress in this regard would be when it is no longer necessary for Western activists to travel the world chasing the leaders and managers of globalization at every meeting. A broader and deeper movement would have leaders and supporters everywhere ready to challenge the globalization agenda. Three developments must occur to move the anti-globalization movement beyond its present stage to become even more effective on a global scale. The movement should: (1) incorporate more voices from the developing world; (2) recognize the dynamic nature of perspectives, interests and alliances; and (3) develop the capacity and flexibility to organize and act dynamically in multiple, intersecting ways, avoiding the tendency to romanticize the local or uncritically vilify the global.

A. Incorporating More Voices from the Developing World

In spite of its considerable positive contributions, the Seattle confrontations also exposed contradictions and weaknesses among the anti-globalization activists. As anti-WTO demonstrators marched through downtown Seattle, they could be heard chanting "this is what democracy looks like." n87 Understandably, they were expressing satisfaction with the diverse grassroots representation within their ranks. Yet even a casual observer could note the dearth of people of color. When the BWIs were being established a half-century ago, only a minority of humanity had any form of self-determination even as they were enrolled into the process. The United States and the United Kingdom did not think it odd to speak on behalf of most of the world. Today, as the anti-globalization campaign matures, one observes the same lack of representation among its leadership, a lack of diversity that may rival that within the ranks of the guardians of globalization.

It would appear that the leaders of the anti-globalization movement are as convinced as the globalization leaders are of the obviousness of their claims and their capacity or right to speak for everyone. The notable failure of diversity has consequences in terms of the setting of priorities, choice of tactics, and overall strategy. Globalization activists from the West should work harder to avoid the same messianic impulses of globalization [*733] proponents that led them to propose and enforce uniform approaches to the problems of developing countries.

Let us examine one of the major criticisms of globalization to illustrate this point further. A central charge of anti-globalization activists is that institutions like the WTO and agreements like GATT work to subvert the democratic process. n88 For example, Ralph Nader and Lori Wallach wrote: "Under the new system, many decisions that affect billions of people are no longer to be made by local and national governments but instead, if challenged by any WTO Member Nation, would be deferred to a group of unelected bureaucrats seating behind closed doors in Geneva." n89 Economist Herman Daly also has warned against the rush to eliminate the nation-state's capacity to regulate commerce. n90 He argues quite correctly that "corporate globalization weakens national boundaries and the power of national and sub-national communities, while strengthening the relative power of transnational corporations." n91
Yet this new "progressive" defense of national sovereignty and democratic values ought always to be properly put in context. It reflects to a considerable degree the experiences of a small percentage of humanity - those who have memories of a time of communal stability, democratic legitimacy and sovereign control. From the perspectives of the huge number of humanity who have never experienced such, who have never had the choice not to be part of globalization, this argument states too much and ignores as much. At a minimum, it fails to appreciate how history has operated to destabilize many communities inside and outside the West. Many of the world's people have never had this idyllic democracy nor the experience of substantial control of the direction of their communities. Whether it was slavery, colonialism, ethnic cleansing, or Cold War rivalry, they have been, for as long as many can recollect, intimately subject to global trends and conflicts. For them, it is not enough to talk about preserving democracy; one must also address how to build and nurture democracy as well as other measures of self-determination.

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B. Recognizing Shifting Perspectives, Interests and Alliances

The banana case demonstrates the danger of oversimplifying the globalization debates and the need to recognize, understand, and appreciate constantly shifting perspectives, interests and alliances. At the most basic level, the dispute pitted the developed and developing worlds as well as multinationals on both sides of the equation. The fact that the narrowest and most myopic of perspectives may have prevailed in this instance speaks more to the artificially constraining impulses of the WTO dispute resolution process rather than to the interests and perspectives of the parties. The banana case, a richly textured dispute with a multitude of interests, was squeezed into a formalistic fantasy of legal process. The results added nothing to either global understanding or wealth.

Take one of the complainants' charges - that the true beneficiaries of the European quotas are not the people of the producing countries, but the European-controlled banana marketing and shipping conglomerates such as Fyffes or Geest.n92 This charge is actually quite accurate and portends another simmering dispute. The complainants assert with reason, that these "European" corporations have used the cover of aiding weak producer economies to gain important advantage in the European market over their American competitors.n93 A World Bank report supported the charge, stating that for every dollar earned by the Caribbean countries on banana export, about twelve dollars are earned by the largely European marketing middlemen. n94 If the Europeans were truly interested in supporting these desperate economies, there are surely better ways of doing this.

The fundamental aim of the European preferential regime must be recognized. The regime serves to tie former colonies economically as well as politically to their former colonial masters, ensuring an unbroken chain of unequal relationship that stretches over centuries in many cases. This suggests that even in the era of this new globalization, when economic power is increasingly shifting away from nations to global corporations, the [*735] historic collaboration between state and corporation to project national hegemony has not been abandoned. The United States-Chiquita and the European-Fyffes/Geest collaboration are in this sense remnants of historic desires for control.

The banana dispute thus evidences concerns and fault lines about globalization even within sectors in advanced industrial societies. With "American" companies holding sway over vast, highly efficient Central American fruit plantations, some Europeans sought to maintain their own spheres of control in these smaller "European" enclaves even when it meant subsidies for less efficient production and marketing. These ties protect some European domestic communities for political, economic or cultural reasons. They guarantee a "European" source, in this case, for a fruit that many Europeans desire but that is not cultivated in Europe.n95 They also help to project cultural values and maintain strategic global interests of nations. Apparently, the open market promises of globalization do not completely reduce the attractiveness of local/national control or influence. This desire for the "local" remains an unsuppressed feature of the globalization debate.n96 All parties retain some aspects of it even though it seems only the most powerful are allowed to get away with its expression.

C. Organize and Act Dynamically - Avoid Romanticizing the Local or Uncritically Vilifying the Global

To meet the renewed efforts post-Seattle, of the globalization supporters to gain converts and co-opt their issues, leaders of the Western-based anti-globalization movements must adopt a more flexible and dynamic strategy to expand and deepen their global coalition. To do this, I suggest two changes in their strategies to combat globalization. First, the opposition must become, in a sense, less ideological. Second, the opposition should become more skeptical
of the romanticized notion of the local that is a centerpiece of many of their arguments against globalization.

It is critical that opponents of globalization avoid making the same mistakes that globalizers have made in promoting a one-size-fits-all solution to every problem and projecting an ideological inflexibility toward global solutions of all kinds. A dynamic, flexible approach recognizes that the problem is not a simple global versus national (or local) dichotomy. It is actually more about the appropriate level of decision-making for specific types of problems. Global approaches have been very successful in dealing with many problems, especially in the areas of war prevention and human rights standard-setting. Many questions regarding environmental degradation and economic advancement could also benefit from global as well as local or mixed approaches. Flexibility allows for more choices and encourages diversity of perspective. A great danger lurks in a rigid ideological approach that rejects certain measures out-of-hand. It is quite clear, given the multiplicity of interests in the developing world and the different historical standpoints, that a rigid ideological approach emanating from the West is not likely to be successful. People in developing countries have become attuned to recognizing imperial claims regardless of whether they emanate from the right or from the left.

It is also important that the Western-based movement develop or articulate a more textured understanding of the local or national in their criticism of globalization. Too often, the rejection of globalization posits a return to a local basis of decision-making that is unattractive or even alien to many people in developing countries today. This is not just because of the centuries of outside intervention. For a significant number of people in the developing world, the local is often the locus of oppression, both in terms of traditional practices and in terms of veneration of the sovereign. Many of the oppressed in these societies welcome the introduction of the global to limit the influence of traditional powers and to provide more options for them. Women and youths, for example, have sometimes welcomed the introduction of Western assembly work as an opportunity to escape both the daily grind of village life, and the influence of overbearing communal elders. Certainly, global human rights standards have been embraced in many societies because of their alternative visions of power relationships across gender, class, and ethnicity. Again, it must be recognized that there are matters that should be local and those that could be better dealt with at other levels all the way up to the global. Flexibility and a profound readiness to learn from those most at risk should dictate the response of the anti-globalization movement to these issues.

Conclusion

This Article has employed insights from the Seattle protests and the lengthy banana dispute before the WTO to discuss challenges facing opponents of economic globalization. While the Seattle protests opened up possibilities for advancing an anti-globalization agenda, they also alerted guardians of globalization to their weaknesses. The Article has argued that opponents of globalization face the urgent task of expanding and deepening the movement to incorporate more voices from the developing world. Globalization has succeeded to a considerable degree because it has employed law and legal processes to mask historic unequal power relationships and waged an unrelenting war against the memory and relevance of past injustices. It remains a potent force. To successfully meet its challenges, opponents must welcome diverse voices, recognize shifting interests and perspectives, and adopt more flexible and dynamic approaches to their work.

FOOTNOTE-1:


The Seattle demonstrations were followed by major demonstrations in many other venues hosting meetings of multinational economic institutions, including Washington, D.C., Montreal, Davos, Prague, and Genoa. See Alexander Cockburn & Jeffrey St. Clair, Five Days that Shook the World: Seattle and Beyond (2000).


n4. After assuring petitioners on behalf of the affected Caribbean banana producers that the United States would not bring a WTO complaint, the Clinton administration quickly did so without notice. The administration's change of heart was widely believed to be largely a consequence of substantial political campaign contributions made by Chiquita to the Democratic Party. Chiquita's CEO, Carl Lindner, is also a longtime benefactor of the Republican Party. See Brook Larmer, Brawl Over Bananas, Newsweek, April 28, 1997, at 43-44; Randall Robinson, The Debt: What America Owes to Blacks (2000); Lori Wallach & Michelle Sforza, Whose Trade Organization? Corporate Globalization and the Erosion of Democracy: An Assessment of the World on One Trade Organization 140-43 (1999).


n8. Ann Marie Erb-Leoncavallo, The Road from Seattle, 37 UN Chron. 28 (2000). The reaction of the American anti-globalization activists to the Prime Minister's desire for free trade status and the paucity of third world representation at the Seattle protests illustrate differing perspectives brought to the anti-globalization struggles and suggest that Western anti-globalization activists make too broad a claim when they presume to speak for everyone.

n9. The debate over globalization has focused considerable negative attention on the Bretton Woods Institutions (BWIs), the triumvirate of global economic institutions - the World Bank, the International Monetary Fund (IMF), and the World Trade Organization (WTO) - conceived at the end of the Second World War to bring economic order and prosperity to the world. Until recently, the brunt of popular discontent fell upon the closely allied World Bank and the IMF, with the passion of critics directed at their prescriptions for the developing world. Lately, the WTO has arguably borne the weight of criticism, becoming the favored target of anti-globalization activists. This shift of focus can be partially explained by the fact that the WTO is a relatively brand new institution; its establishment was delayed for almost half a century after its conception largely because of domestic United States opposition. The nations of the world could not agree on a comprehensive institutional framework for regulating world commerce until 1994. While its core principles, such as nondiscrimination, were honed over centuries of international commerce, the WTO is structurally and in terms of institutional style an infant body, a work in progress, and thus may appear to be more receptive to outside demands. See Paul Demaret, The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization, 34 Colum. J. Transnat'l L. 123 (1995). See also David Korten, The Failures of Bretton Woods, in The Case Against the Global Economy 20 (Jerry Mander & Edward Goldsmith eds., 1996). Moreover, it is becoming increasingly clear that negative effects from the WTO's policy prescriptions are more readily felt in advanced industrial communities than the negative effects from the policies of the World Bank and the IMF. The growing influence of the WTO in the economic life of everyone, those living in the developed world as well as those in developing countries, has expanded the community of the discontented exponentially beyond those concerned with economic conditions in the developing world. This development is consistent with Benjamin Barber's observation that "there is no activity more

n10. Market fundamentalism may be described as extreme faith in the power of market forces to solve all of a nation's economic problems; an uncritical support for rapid liberalization and deregulation of markets and privatization of industries. This is also referred to as the "Washington Consensus." See Stiglitz, supra note 9, at 20, 67; Rosenberg, supra note 9; Paul Blustein, Globally Disillusioned, Oregonian, Sept. 27, 2002, at D1. See generally, Robert Kuttner, Everything for Sale - The Virtues and Limits of Markets (1997).


n12. After Seattle, protesters disrupted other meetings of international economic institutions around the world. See Erb-Leoncavallo, supra note 8, at 28-31. Even United Nations sponsored events were not spared. At the World Summit on Sustainable Development, held in Johannesburg in September 2002, protesters, mainly from Western nations, jeered Secretary of State Colin Powell during his address in protest over the administration's record on the environment and development assistance. James Dao, Protesters Interrupt Powell Speech as UN Talks End, N.Y. Times, Sept. 5, 2002, at A10. See also Rajagopal, supra note 11.


n15. See Stiglitz, supra note 9; Kuttner, supra note 10.

n16. See Stiglitz, supra note 9; Rosenberg, supra note 9; Blustein, supra note 10.


n18. Cockburn & St. Clair, supra note 1; Stiglitz, supra note 9; Rosenberg, supra note 9.


n21. The European Union countries import more than three million tons of the fruit annually, most of it coming from Latin American countries. The Atlantic Caribbean and Pacific (ACP) countries, who are ostensibly the beneficiaries of the European Union preferential regime, export about 727,000 tons of the fruit into the Union. Bhala, supra note 3, at 850.

n22. Pre-WTO complaints were brought by several Latin American countries against the import regimes of individual European countries, but, under the rules of the General Agreement on Tariffs and Trade (GATT) prevailing then, no report was adopted. The implementation of the Lome Convention consolidated concessions by the European Union in 1993 and the establishment of the new WTO dispute resolution process shortly thereafter provided impetus for the new round of trade complaints. See Bhala, supra note 3, at 849.


n25. See Larmer, supra note 4, at 44. For more on this company's sorry record of human rights violations and political interference in Latin American countries, see Stephen Schlesinger & Stephen Kinzer, Bitter Fruit: The Story of the American Coup in Guatemala (1999) and Diane K. Stanley, For the Record: The United Fruit Company's Sixty-Six Years in Guatemala (1994).

n26. See Jeff Harrington, Chiquita Spurs Trade Dispute with Complaints against


n28. See Position of Del Monte Fresh Produce Regarding Regulation 404/93 (on file with author).

n29. The first Lome Convention was concluded in 1975. The Fourth Lome Convention was adopted in 1990 with a ten-year life span. The primary purpose of the convention was to promote economic development in former European colonies in Africa, the Caribbean, and the Pacific region (ACP) utilizing aid and trade assistance. Bananas were covered under Protocol No. V of the Convention. The convention expressly required the EU to ensure that bananas continue to have preferential access after the establishment of the EU. Twelve ACP states that have traditionally exported bananas into the EU benefit from the preferences: Cote D'Ivoire, Cameroon, Suriname, Somalia, Jamaica, Saint Lucia, St. Vincent and the Grenadines, Dominica, Belize, Cape Verde, Grenada, and Madagascar. See Bhala, supra note 3.


n31. The United Kingdom and France were the staunchest defenders among the Europeans of the preferential trading arrangements. See Bhala, supra note 3, at 849.

n32. With most of its banana operations located in Central America, Chiquita claimed in 1996 that it had lost fifty percent of its European market due to the operation of the preferences. According to Chiquita, the preferences for the ACP countries amounted to a quota that limited imports from Latin America. See Bhala, supra note 3, at 873; Brimeyer, supra note 3, at 148.

n33. See World Trade Organization, European Communities - Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States.

n34. Id.


n36. Id. See also Panel to Examine EC Banana Regime, WTO Focus (WTO, Geneva, Switz.), June-July 1996, at 5.

n37. Panel to Examine EC Banana Regime, supra note 36; see also Francis Williams, World Trade: Banana Trade under Scrutiny, Financial Times (London), May 9, 1996, at 6.


n40. Gassama, supra note 20, at 12.

n41. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, 33 I.L.M. 1226 (concluded at Marrakesh; entered into force, January 1, 1995). See also U.S. Plans Trade Appeal in Europe Banana Case, N.Y. Times, Aug. 19, 1995, at 32. Opponents of European banana preferences had complained about them under the old GATT system before it was replaced by the new WTO dispute settlement process in 1995. Even though complainants had received favorable
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reports from GATT panels, they could not gain satisfaction under the pre-WTO process which was relatively more dependent on compromise and more susceptible to delays. See Frances Williams, WTO Ruling Could Ruin Poor Banana Economies, Financial Times (London), Sept. 10, 1996, at 4.


n43. See Kym Anderson, The WTO Agenda for the New Millenium, 1999 Econ. Rec. 77. See also Demaret, supra note 9; About The WTO, supra note 42.

n44. As the course of the banana dispute demonstrated, the "clearly defined" rules are actually quite flexible when they implicate matters of major importance to one of the major WTO powers. In this case, the Europeans successfully dragged out settlement of the dispute for several years as they collaterally attacked the report upholding the complainants' position, and vigorously resisted implementation proposals from the victorious parties.

n45. See Jackson, supra note 42.

n46. Panel reports are characterized by excruciatingly lengthy and boring recitation of facts and restatement of basic doctrines. They also are decidedly devoid of any efforts to go outside the narrowest interpretation of principles, supposedly out of concern that failure to hold sovereign nations strictly to their agreements leads to further conflict. One is left without any expectation that these panels could be forums for progressive interpretations of trade principles and doctrines.

n47. Small nations that could not afford large permanent staff of legal specialists have sought to enlist outside private counsel to represent their interests. In the banana case, the United States objected to such representation. Jackson, supra note 42. The Appellate Body ruled against the United States position but that ruling has not been widely accepted yet. Id.

n48. See World Trade Organization, supra note 33. See also Press Release, Office of the United States Trade Representative, USTR Hails WTO Report (Apr. 29, 1997); Jackson et al., supra note 24, at 424-25, 902-07.

n49. EC-Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, Sept. 9, 1997. See also Bhala, supra note 3; Brimeyer, supra note 3.


n51. This was the first time that the GATT-WTO system had granted a party authority to impose sanctions against another. However, the amount of sanctions authorized by the WTO was substantially less than what the United States had wanted to impose. Ecuador also sought and received permission to impose sanctions on the European defendants, becoming the first developing country to do so. See Brimeyer, supra note 3; Bhala, supra note 3.


n57. According to the New York Times: "James D. Wolfensohn, president of the World Bank, accused wealthy countries of 'squandering' $1 billion a day on farm subsidies that often have devastating effects on farmers in Latin America and Africa." Andrews, supra note 14, at A8. Stanley Fischer, who was the IMF deputy managing director in the 1990s, said protectionist policies by the United States, Europe and Japan were "scandalous." Id.


n59. The international agencies are promoting training programs and other technical assistance that supposedly will help poor countries develop the expertise necessary to be more effective in trade matters. See, e.g., Mike Moore, Africa and the Multilateral Trading System: Challenges and Opportunities, Address Before the Conference of African Trade Ministers (Sept. 23, 1999), at WTO News, Speeches-Director General Mike Moore, http://www.wto.org/english/news/e/spmm e/spmm e.htm. Initiatives like these minimize the harsh reality of the enormous resource gap between rich and poor and the domestic pressures on the powerful countries to extract as much advantage as they can from trade. See Rosenberg, supra note 9.

n60. See Bhala, supra note 3, at 963. As Bhala puts it "The EC's preferential trading arrangement is rotten for European consumers and provide far less succor to ACP countries than is commonly realized ... the point is that Europeans pay far more than they need to for bananas, and banana plantation workers in poor countries get far less." Id.

n61. Id.


n63. See Bartram S. Brown, Developing Countries in the International Trade Order, 14 N. Ill. U. L. Rev. 347; Stiglitz, supra note 9, at 3-22; Rosenberg, supra note 9; Wallach & Sforza, supra note 4. For a searing critique of the international and bureaucracy in general, see Graham Hancock, Lords of Poverty (2nd ed. 1992).

n64. This is one way to account for the oft-repeated mantra that "international economic integration is not only good for the poor; it is essential." Rosenberg, supra note 9.


n68. Friedman, Senseless, supra note 13, at A23.


n70. Friedman is perhaps the most visible apostle of the "globalization is inevitable" creed. See Friedman, Globalization, Alive and Well, supra note 13; Thomas

n71. See Barbara Crossette, Globalization Tops 3-Day U.N. Agenda for World Leaders, N.Y. Times, Sept. 3, 2000, 1, at 1. But see Barber, supra note 9, for a deeper examination of the complex forces that are at play in the world and the opportunities and challenges they present. See also Blustein, supra note 10, at D1.


n73. See Krugman, supra note 69. See also, Paul Krugman, Pop Internationalism (1996); Paul Krugman, Reckonings; Once and Again, N.Y. Times, Jan. 2, 2000, 4 at 9 [hereinafter Krugman, Reckonings]. Admittedly Professor Krugman is a moderate fundamentalist who has, on occasion, raised questions about the responsiveness of the present global order and opposed some of the policy prescriptions of the BWIs. See, e.g., Paul Krugman, Saving Asia: It's Time to Get Radical, Fortune Mag., Sept. 7, 1998, at 74.


n75. Rosenberg, supra note 9; Friedman, Globalization, Alive and Well, supra note 13.

n76. See Stiglitz, supra note 9, at 89-132.

n77. Rosenberg, supra note 9.

n78. Stiglitz, supra note 9, at 122-26.

n79. Stiglitz, supra note 9, at 125.

n80. Wallach & Sforza, supra note 4, at 140-43.


n82. Krugman, Reckonings, supra note 73. Krugman's observation was directed to the defenders of globalization. It was an urgent call for reform; to incorporate some of the concerns of the discontented, but by no means a call for fundamental transformation. By "Second Global Economy," he is distinguishing between the current world economic vision and order constructed "largely under American leadership" since the Bretton Woods conference, and an earlier "First Global Economy: The Era from the Mid-19th Century Onward in which new technologies of transportation and communication made large-scale international trade and investment possible for the first time." Id. Krugman, of course, ignores an even earlier era of global trade connecting Europe to Africa, Asia, and the Americas - a time when many human beings were bought and sold as commodities, and native communities were brutally subjugated.

n83. See Trade Negotiations Begin on Agriculture and Services, Moore Reports on Post-Seattle Consultations, WTO Focus (WTO, Geneva, Switz.), Jan.-Feb. 2000, at 4-11. See also Rajagopal, supra note 11.

n84. Paul Krugman's lament was tinged with sarcasm: "It is a sad irony that the cause that has finally awakened the long-dormant American Left is that of - yes! - denying opportunity to third-world workers." Krugman, Reckonings, supra note 73. See also Mike Moore, Seattle Conference Doomed to Succeed, Opening Address to the WTO's 3rd Ministerial Conference (Nov. 30, 1999), at http://www.wto.org/ english/news e/spmm e/spmm16 e.htm; Statement by Mike Moore, Director-General, WTO (Dec. 7, 1999) at http://www.wto.org/english/news e/spmm e/spmm19 e.htm.


n86. See Joint Statement by the Heads of the IMF, the World Bank, and the World
Trade Organization (Nov. 30, 1999), at http://wto.org/english/news e/pres99 e/pr153 e.htm. See also Dirk Beveridge, Poor Nations Seek Their Place at World Trade Table, Feb. 12, 2000; Associated Press, IMF Ordered to Address Debt Crisis, N.Y. Times, Sept. 29, 2002, 4, at 3.

n87. As heard by the author at the Seattle protests.


n89. Nader & Wallach, supra note 88, at 94.

n90. Id.

n91. Id. at 95.


n93. See Holman W. Jenkins, Jr., Yes, We Have No Banana Policy (Can We Borrow Yours?), Wall St. J., Feb. 10, 1999, at A23.

n94. Id.

n95. Spain imports bananas from islands in the Atlantic under its control. Bhala, supra note 3.

It is difficult to get people to remember, let alone focus on the accomplishments and ongoing challenges that emerged during the United Nations sponsored World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance (the WCAR) held just over a year ago in Durban, South Africa. The reason is simple: that conference ended on September 8, 2001, and what we remember about that period is now permanently obscured by what happened just three short days later. But the events of September 11 make it more imperative than ever that we address the evils of racism, racial discrimination, and xenophobia. It is important that we remember what the Durban Conference achieved and, more importantly, continue our work to reach the vision for the world announced there. This Article seeks to help refocus attention on that important need.

By way of establishing some historical context, the conference in Durban was the third conference sponsored by the United Nations to formulate and move ahead on a worldwide anti-racist agenda. The first two conferences, held in 1978 and 1983, were considered successful primarily because they effectively mobilized world support behind the struggle to end apartheid in South Africa.n1 It was thus symbolic that the United Nations held the third conference in South Africa in celebration of the peaceful [*740] demise of that hated regime. Like the first two conferences, the conference in Durban demonstrated how many countries of the world could unite to issue a moral pronouncement that opposed all forms of racism, racial discrimination, and xenophobia. Thus, all countries that attended the entire session agreed by consensus to a final document titled the Declaration and Programme of Action of the World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance (WCAR)n2 (often referred to as the Durban Declaration).

Perhaps the most significant advancement made during this third World Conference, and one that was among the most contested, was the assertion that slavery, in both its current and past manifestations, is a crime
democratic society. Therefore, looking at events in government has consistently struggled to create a truly discriminatory that were central to the prior regime. The National Congress (ANC) was born with the express purpose of ending the years of racial hatred and economic reforms. The WCAR made abundantly clear the fact that racism and economic disparity are thoroughly intertwined, with people of color suffering from the highest rates of poverty, malnutrition, lack of education, housing, and poor health throughout the world. Indeed, as one who personally attended the conference, perhaps my most vivid long-term memory will be of the various indigenous groups who emerged forcefully on the world stage at the WCAR to make known their current suffering both in racial and economic terms. I include here, for example, the Dalit (the so-called "untouchables" in India), the Romany (more commonly known as "Gypsies," a term many despise), indigenous peoples, and landless people, all of whom held passionate demonstrations at the conference. These groups forced the official delegates to at least listen to their concerns, although that did not always translate into definitive action.

A full review of what the Durban Conference did and did not achieve is beyond the scope of this Article. Indeed, only the passage of time will reveal that answer. Instead, this Article will focus on the current struggle of the host country, South Africa, to overcome its notorious past as a means of assessing what is involved in the present day struggle to eliminate the scourge of racism and poverty. South Africa seems especially appropriate as the subject of such a case study because of that country's history and the fact that the government led by the African National Congress (ANC) was born with the express purpose of ending the years of racial hatred and discrimination that were central to the prior regime. Further, during its eight years of existence, the current government has consistently struggled to create a truly democratic society. Therefore, looking at events in South Africa should teach us about the obstacles that must be overcome to reach that goal even where there is a strong will to do so.

Before assessing South Africa's efforts to create the type of society envisioned in the Durban Declaration, Part I describes what happened prior to and during the WCAR that led to the adoption of that declaration. This review is helpful because, among other things, it reveals both the areas of agreement and division between nations regarding responsibility forremedying the past effects of racism, slavery, and colonialism. That knowledge, in turn, allows for a more accurate assessment of both the ability of South Africa to effect change as well as the international support South Africa can expect from other countries. To further prepare for an assessment of how well South Africa is meeting its obligations under the Durban Declaration, Part II describes the current situation in the country and how its history of colonialism and apartheid has brought it to this point. Part III then contains an analysis of the efforts of the new South African government to eradicate the racial disparities that are the legacy of the past. As recognized in its new constitution, those efforts are assessed in relation to the achievement of both social justice - i.e., the elimination of prejudice and discrimination - and also economic justice - i.e., the reduction of poverty and deprivation. Finally, as the delegates to the WCAR recognized, the achievement of economic justice in this globalized world is dependent on the support of the wealthier Western and developed nations. Thus, Part IV concludes the analysis by considering how South Africa's efforts have been aided or hampered by those countries. In the end, it is hoped that this Article will provide some insight into what must be done to create the type of world so elegantly and passionately described in the Durban Declaration.

I

The WCAR

The World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance included delegations from 169 countries that convened on August 31, 2001 in Durban after a series of preparatory conferences held throughout the world. These preparatory conferences met in order to define issues and agree on a platform of action to present for further refinement at the final conference. The hope expressed at these preliminary meetings was that the member states of the United Nations would make a serious commitment to end racism and its attendant evils throughout the world.
Just prior to the WCAR, organizations from civil society met at an international, non-government organizations forum that was held from August 28 to September 1. The formal work of that session was to agree on a declaration to present to delegates at the U.N. Conference and to develop strategies and positions for lobbying efforts. It was during this period that the majority of the activism took place, including demonstrations on behalf of the Palestinians, landless peoples, and the South African Congress of Trade Unions which opposed the privatization of various quasi-public companies in the country. There was incredible camaraderie, energy, and commitment displayed throughout this conference as activists from around the world struggled to unite behind specific principles and actions that could be urged upon the formal delegations. Much was agreed upon regarding key issues such as: reparations, both for African countries and African Americans; caste and discrimination based on work and descent; persons with disabilities; education; environmentalism; gender; hate crimes; health; and HIV/AIDS. It could be expected that the networking and cooperation that occurred during this conference will lead to a more effective voice for civil society in the future work arising out of the WCAR.

Unfortunately, however, the potential influence of this gathering was undermined by the extreme split that developed over the crisis in the Middle East. Thus, as one commentator noted, "civil society at the Durban WCAR became so entangled in the ... ideological warfare over the state of Israel, that the NGO Forum Declaration and Programme of Action is now being rejected as antisemitic [sic] and racist by many Northern NGOs." Indeed, as reported on the web site of the South African Broadcasting Corporation, five of the biggest international non-governmental organizations (NGO) distanced themselves from the forum's final declaration, as did the U.N. High Commissioner for Human Rights, Mary Robinson. The reason for the dissent was the declaration's language regarding Israel, which was characterized as harsh and inflammatory. Nevertheless, many of the delegates from the NGO gathering remained during the U.N. Conference and, through lobbying and other efforts, were able to influence its final declaration.

The WCAR itself consisted of nine days of intense meetings, discussions, and speeches that culminated, as mentioned above, in the adoption by consensus of the Durban Declaration. The fact that such a document was produced at all was attributed in part by many participants to the fact that failure was unacceptable for a conference in South Africa, and also to the commitment and negotiating skills of the chairperson of the conference, Her Excellency Dr. Nkosazana Dlamini Zuma, the Foreign Minister of South Africa. The WCAR was originally scheduled to run for eight days and end on September 7, but, as the time for the closing session approached, the delegates were still deadlocked on the two most contentious issues: (1) whether to characterize past acts of slavery as crimes against humanity, and (2) what the official conference position would be on the Israeli/Palestine conflict. Minister Zuma was able to keep the delegates together for an additional day, however, and the conference ended late, but with the ultimate adoption of the Durban Declaration.

The speeches given by delegates immediately after the declaration's final approval exemplify what a difficult task it must have been to get agreement among the nations. It seemed that almost every country wanted to be heard criticizing those parts of the Durban Declaration with which it disagreed. The delegate from Canada, who spoke first, eloquently praised much of the document. Nevertheless, his main purpose seemed to be to advance the position of his country's absent neighbor and other Western nations on two key issues. First, his statement criticized the Conference for having considered the Israeli/Palestinian conflict at all and for the final position the declaration took on Israel. Second, it pressed the interpretation mentioned earlier, that any language regarding slavery should condemn only its current forms, and not retrospectively condemn the practices of the past, such as the Transatlantic Slave Trade. Then, in one of the more startling speeches I heard, the delegate from Australia rose to defend colonialism as being responsible for helping to create modern Australia. Later, the Syrian delegate criticized the failure to condemn Israel more strongly and the decision to incorporate language about the Holocaust into the Durban Declaration. Ironically, the fact that parts of the final document angered so many nations indicates that it did push them well beyond positions previously taken. Indeed, the declaration should be seen as remarkable because it contained so strong a condemnation of past and present racism and slavery, and then set forth a Programme of Action to overcome their effects.

Significantly, the United States and Israel delegations left the WCAR before its conclusion, refusing to participate further in the work of the conference or to agree to any declaration emanating from it. The United States left nominally in defense of Israel. However, according to many, equally important was the United States' discomfort with agreeing to a document containing a condemnation of the Transatlantic Slave Trade as a crime against humanity. Such an admission most certainly would
have increased the country's vulnerability to possible reparations lawsuits in this country. n23

Despite disagreement among the delegates and the walk-out by the United States and Israel, the WCAR did produce a document that commits the United Nations and participating countries to a Programme of Action both nationally and internationally that could have a significant impact in ending racism, racial discrimination, xenophobia, and related intolerance. For example, despite the protestations of countries like Canada and Australia, the declaration clearly condemns both colonialism [*750] and slavery, and acknowledges the harm they have caused. n24 Even more significantly, the Durban Declaration affirms that it is the responsibility of the former colonizing countries to help repair the damage resulting from colonialism. n25 The remainder of this Article discusses the national and international commitments in the Durban Declaration as a framework for assessing how realistic it is for a country such as South Africa to overcome the severe deprivations caused by its history of racism.

II

The Effects of Colonialism and Apartheid in South Africa

The first step in this analysis is to briefly describe the current situation in South Africa, and then to trace its roots to the country's history of colonialism and apartheid. What is perhaps most telling is that the gap between the rich and the poor is greater in South Africa than in almost any other country in the world. n26 More than fifty percent of the population lives in poverty, n27 and the unemployment rate is increasing. n28 Fuelling this crisis is the lack of resources available to provide the poor with decent education, health care, and social services. The situation has now reached crisis status as a result of the spread of HIV/AIDS that is believed to have infected twenty percent of the adult population. n29 [*751] As in other countries with similar demographics, a resulting problem is a high rate of crime and violence. n30

It is not difficult to connect this contrast of extreme wealth side by side with poverty and deprivation to South Africa's unique history of racial injustice. As a member of the South Africa Human Rights Commission has written: "At the very core of apartheid was an unequivocal commitment to white supremacy, segregation and inequality." n31 The apartheid state created a hierarchy of races with whites who made up thirteen percent of the population at the top of the pyramid, Indians and coloreds in the middle, and Africans, who were about seventy-five percent of the population, at the base. n32 Housing, health care, and social and community services were all provided on a segregated basis, n33 with the bulk of the resources and money spent on whites. There was also job segregation with many whites guaranteed work through the civil service system while Africans either were unemployed, [*752] worked in the informal sector as street vendors and the like, or, if employed, were confined to specific types of menial or arduous labor, such as minework or domestic work. n34

The formal apartheid system was instituted in South Africa in 1948, following the election in which the Afrikaner-dominatedn35 National Party came to power. Though the system did not end until 1994, apartheid-like policies were not confined to the period of National Party rule. Racial and economic segregation began early in the country's colonial period, and laws were enacted throughout its history to keep blacks in a subordinate position.

From the 17th through the 19th Century, both the Dutch and the English colonized parts of South Africa. As elsewhere, the settlers seized land and gained control of the country's wealth and resources through war. Later, the settlers maintained control through suppression of first the indigenous Khoi-San, and then the other black traditional groups such as the Xhosa, Sotho, and Zulu people. As was inevitable, the two colonial powers eventually clashed, resulting in a British victory in the Anglo-Boer36 War waged from 1899 to 1902. Thereafter the four colonies of Natal, the Cape, the Orange Free State, and Transvaal fell under British rule and were officially united on May 31, 1910, when General Louis Botha became the first Prime Minister of a united (white) South Africa. The South Africa Act of 1909, approved by the British Parliament, served as the Union of South Africa's Constitution until 1961 and provided that only whites would be able to vote, except in the Cape colony where for a few more years there would be a limited, non-racial, property-based franchise.

[*753] The legal framework for formal racial and economic segregation began with the Glen Gray Act in 1894, which forced black Africans into wage-labor by limiting their access to land and fining those who were not employed. n37 After the creation of the Union of South Africa, Parliament in 1913 passed the Natives Land Act 27 of 1913, which established scheduled "native" areas for black people only. As a result, Africans could not own eighty-seven percent of the country's land by 1936, except with permission of the government. Millions of black South Africans were ultimately moved to these areas, thus preserving the bulk of the valuable land for white agriculture, mining,
and other economic interests. During the apartheid era, other laws were enacted controlling free movement of black people and black labor and regulating the process of race classification, education, and language. n38

In 1983, a new constitution was enacted, the Republic of South Africa Constitution Act 110 of 1983, which set up a tricameral parliament with separate houses for representatives elected by white, colored, and Indian voters. n39 Africans were totally excluded from the political process. What followed was a period of increased mass protests and armed resistance that was met by attempts at greater repression in the form of repeated states of emergency. n40 Liberation efforts were supported by strict international sanctions and isolation of South Africa and its economy. [*754]

Ultimately, the government realized it was no longer tenable to maintain its despotic regime, and it began in 1989 a drawn-out process of negotiations n41 that culminated in the fully democratic elections in 1994. n42

III

National Obligations Under the WCAR Plan of Action: The South African Response

As described in the previous section, colonialism and apartheid in South Africa entrenched both racial segregation and economic injustice over three centuries before the first democratic elections in 1994. It is this type of legacy, replicated to some degree in most countries in Africa and many throughout the world, that the Durban Declaration is designed to address.

The Durban Declaration initially calls upon all states to take a wide variety of measures internally to combat racism, xenophobia, and related injustices. Among the recommended measures are those related to preventing and treating HIV/AIDS, n43 additional investment in social and public services, n44 supporting education, n45 creating jobs, n46 and eradicating poverty. n47 There also is a call to create a national legislative framework that expressly and specifically prohibits racial discrimination and provides judicial and other remedies of redress. n48

Before examining South Africa's record on these matters and the obstacles it now faces, the point must be made that, as with [*755] other developing countries, South Africa's ability to implement all but the obligation concerning a legislative framework is dependent in part upon the actions of the Western, industrialized world. Thus, it is obvious that poorer countries can amass the capital needed to successfully develop programs to eradicate poverty, support education, and create jobs only if the wealthier states meet the commitments they agreed to elsewhere in the Durban Declaration n49

Given the limitations just mentioned, South Africa has already demonstrated, for the most part, a strong commitment to meet the obligations it agreed to in the Programme of Action. To begin with, it has one of the strongest national legislative frameworks in the world with regard to promoting substantive equality, socio-economic rights, and laws that prohibit racial and other forms of discrimination. For example, there is a long and inclusive list of protected groups under the equality clause of the Bill of Rights that prohibits discrimination on the basis of race, ethnic or social origin, color, culture, language, and sexual orientation, among other groups. n50 Further, its Constitutional Court has extended this prohibition to certain persons without South African citizenship n51 and to those who suffer from HIV/AIDS n52 on the grounds that they are analogous to the listed prohibitions, and discrimination on these grounds would harm a person's dignity. Perhaps even more significantly, the constitution expressly sanctions affirmative action programs in order to achieve substantive equality and remedy the effects of past discrimination. The Constitutional Court said, in certifying the constitution, that it contemplates "laws, programmes or activities that have as their objective the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, color or creed." n53

Next, as required by the constitution, the South African Parliament has passed important implementing legislation to require affirmative action in employment by requiring employers to implement [*756] plans that include preferential treatment and numerical goals for members of disadvantaged groups. n54 Likewise, legislation has been enacted that extends the prohibition against discrimination to private individuals and businesses and that allows the government, for instance, to charge richer white communities more than poorer black ones for services such as electricity. n55

Beyond mandating the end to discrimination and redress for past injustices, the constitution and legislation also aspire to bring about socio-economic equality. Thus, the constitution establishes various socio-economic rights, including entitlements to education n56 and emergency medical treatment, n57 and the somewhat lesser rights of access to housing, n58 health care services, food, water, and social security, n59 depending on the availability of resources. The Constitutional Court has shown both
the reach and the limitation of these rights in two leading cases. In one, the court required the government to provide temporary housing for people who became homeless and were waiting for permanent housing. In the other, the court upheld the government's denial of treatment to a man needing kidney dialysis because the state argued that the cost of keeping him alive would limit its ability to provide housing, food, and water to many other people.

The South African Constitution and its implementing legislation therefore meet almost all of the requirements of the WCAR Programme of Action, and in many ways can serve as a model to the rest of the world of what constitutes a proper constitutional, legislative, and judicial framework to overcome the legacies of colonialism, apartheid, and racism. But despite this excellent beginning, the South African experience also demonstrates that, even focusing solely on matters within its own government's control, the creation of such a framework can only go so far in eradicating these past evils. Equally, if not more important, are the decisions the government makes with regard to numerous other matters.

This is no less true for South Africa, as various policy decisions have hampered the country's efforts to reach its potential. The first involves the nation's one-time decision to enter into a multi-billion dollar arms deal in 2000 that over the next five years obligates South Africa to purchase, mostly from European arms manufacturers, substantial military hardware. The purchase includes three new submarines, four corvette warships, thirty helicopters, and forty-two jet fighters and trainers. This purchase amounts to the greatest expenditure in the national budget, and is among the ANC government's most controversial decisions because it obviously takes funds away from under-resourced areas such as education and health care. Perhaps even more ominous for the long run is the way the ANC responded to the strong dissent that appeared within its own ranks. For example, Member of Parliament Pregs Govender, the ANC chairperson of the Joint Monitoring Committee on the Improvement of the Quality of Life and the Status of Women, criticized the arms deal at the first National Gender Conference held in August 2001. Immediately afterward, Minister Essop Pahad from the President's office attacked Ms. Govender's position from the same podium. Ms. Govender later resigned from Parliament.

A second example of difficulties the South African government has experienced in implementing a program to remedy the effects of colonialism and apartheid concerns its much-admired Truth and Reconciliation process. To fulfill an obligation that came from the negotiated settlement allowing for democratic elections, the new government passed a statute establishing a Truth and Reconciliation Commission (TRC) that was charged with investigating and remedying gross human rights violations that occurred during the apartheid era, and granting amnesty to perpetrators who admitted their responsibility in accord with certain strict conditions.

Pursuant to this mandate, the TRC investigated thousands of complaints of gross human rights violations between 1996 and 2000, including the airing of many stories in public hearings. In addition, amnesty was granted in twelve percent of the 7,112 applications filed.

A third and less well-known mandate under the TRC statute provided for government payment of reparations to survivors of gross human rights violations or surviving family members of persons who died as a result of such actions. In effect this provision was the quid pro quo for the granting of amnesty to perpetrators because the statute creating the TRC took away the right of survivors to sue persons who were granted amnesty for civil damages. The reparations were intended as compensation for having been traumatized physically, emotionally, and/or left destitute and without earning capability. The problem, however, is that despite the government's best intentions to adequately compensate people who suffered gross human rights violations, payments have in fact been minimal at best. As a result, there is a strong sense of betrayal and resentment amongst many of the people who came forward. From the government's standpoint, the reason is a lack of resources.

From the standpoint of assessing the ability of South Africa to fulfill its obligations under the Durban Declaration, this experience provides an example of how difficult it is to provide economic relief for the past effects of racism, colonialism, and apartheid. Thus, as part of its efforts to pay reparations, the government approached wealthy white-owned businesses that had profited under apartheid and asked them to contribute to a special fund. Likewise, the government asked other perpetrators, members of civil society, and foreign donors to contribute. Nevertheless, very little money was raised from these sources, which indicates how difficult, if not impossible, it will be to raise money for international reparations to compensate African nations for the effects of slavery and colonialism.

A much broader and potentially more devastating example of where the South African government has failed to successfully implement the Durban
Declaration relates to the HIV/AIDS pandemic. The Durban Declaration urges member States to:

Work nationally and in cooperation with other States and relevant regional and international organizations and programmes to strengthen national mechanisms to promote and protect the human rights of victims of racism, racial discrimination, xenophobia and related intolerance who are infected, or presumably infected, with pandemic diseases such as HIV/AIDS and to take concrete measures, including preventive action, appropriate access to medication and treatment, programmes of education, training and mass media dissemination, to eliminate violence, stigmatization, discrimination, unemployment and other negative consequences arising from these pandemics.\textsuperscript{n68}

Despite such pronouncements from the international community that began long before the WCAR, the ANC government has resisted recognizing that HIV develops into AIDS, which has confused the South African public and set back prevention efforts.\textsuperscript{n69} Just how many lives could have been saved if there had been an aggressive prevention campaign from the time people became aware of the full dimensions of this epidemic will never be known. What is clear is the incredibly devastating effect the high death rate from AIDS is having in all sectors of South African society.

Besides lagging behind in prevention efforts, the government also fought efforts to provide appropriate access to medication and treatment to AIDS sufferers. The most notorious of these was its vigorous opposition to a lawsuit by the citizen-based Treatment Action Committee and others to require that it dispense Nevaripine, an inexpensive medication that has demonstrated its ability to significantly lower mother-to-child transmission of HIV. Fortunately, the Constitutional Court found that the right to health care required the government to provide a comprehensive program to distribute this drug to pregnant women.\textsuperscript{n70} Nevertheless, the fact that the government's actions delayed the distribution of this drug has again undoubtedly cost lives.

On a more positive note, the ANC recently has seemed to bend to both internal and international criticism and is making antiretroviral drugs available not only to pregnant women but also to rape victims, which is a reversal of its previous policy.\textsuperscript{n71} In addition, the government announced that it is studying the possibility of enacting compulsory licensing to override patents and allow the importation of generic HIV/AIDS drugs, which is allowed by the TRIPS (Trade-Related Aspects on International Property Rights) agreement when countries have a national emergency.\textsuperscript{n72} Hopefully, this change of position has not come too late to reverse the spread of this deadly virus.

The final area to be discussed concerning the performance of South Africa in fulfilling its national obligations under the Durban Declaration is probably the most difficult to assess. It concerns the economic policies of the ANC-led government which have been criticized as not being effective in combating poverty, and blamed for increasing unemployment. While the government is clearly committed to overcoming the legacies of apartheid, they have chosen to do this through an economic policy that seeks to prevent the pullout of international capital and promote more foreign investment, policies that are seen by some as too friendly to the West.

The government is in a difficult position because of the realities of the global economy, as discussed in the next section on international obligations. Not being an economist, I do not feel comfortable expressing an opinion as to the correctness of the government's chosen path. It should be noted, however, that there are substantial criticisms that these policies are not working.\textsuperscript{n73} and they do represent a departure from earlier policy that puts greater emphasis on social development designed to directly improve living conditions for the disadvantaged.\textsuperscript{n74}

The peaceful transition from the prior regime to the democratically elected ANC-led government came with extreme limitations on the economy. White South African businesses had complete control under the apartheid system, including control of mining, agricultural, and all other sectors. As a result, government resources to address past inequities were extremely scarce in 1994. The government did make some progress, nevertheless, immediately after the first national elections, through the implementation of the Reconstruction and Development Programme (RDP).\textsuperscript{n75} The most significant gains were made in the areas of improving access to housing, water, and electricity. Universal health care up to the age of six also was introduced. Such spending put a strain on government resources, and it was feared that continued government spending would fuel inflation.

The ANC then changed its economic policies after the currency fell by twenty-five percent in 1996. It curbed spending on social programs and adopted a new conservative economic policy known as GEAR (Growth, Employment, and Redistribution) that is intended to attract foreign investment by controlling inflation. It also is designed to create a favorable climate for investment and trade by holding down wage demands and instituting deficit reduction.\textsuperscript{n76} The policy so far has been successful in controlling
inflation but private investment has decreased and unemployment increased. n77

[*763] Like the arms purchase and the earlier policies on AIDS, there has been opposition to the governments' actions on the economy within the ANC alliance. One area of considerable contention concerns the decision to begin to privatize all or a portion of state-owned utilities such as the telephone and electric companies. These privatization decisions are opposed by the Congress of South African Trade Union (COSATU), the largest federation of labor unions in the country and a key partner in the alliance, and by organizations advocating for the poor that believe that privatization will result in both the loss of jobs and also higher rates for basic services. n78 Demonstrations against privatization began during the WCAR and continue up to the present. n79

The bottom line so far is that these domestic economic policies have been unsuccessful in bringing poverty relief or in creating new jobs. Moreover, as indicated by COSATU's strenuous opposition to the privatization policy, the government-led tripartite coalition with COSATU and the Communist Party is showing some signs of unraveling. Determining who is correct in these economic judgments is beyond the scope of this article. Furthermore, it is possible that the real blame for GEAR's poor showing so far may be more a result of global economic forces than the government's policy. In that case, any blame would at a minimum have to be shared with the industrialized nations, and as indicated in the next section of this article, those nations have done little to help the economies of developing countries.

In conclusion, with regard to its internal policies and actions, South Africa is an example of a country that recognizes the evils of racism and racial discrimination and has made significant gains in combating them. Thus, it has created an exemplary constitutional, legislative, and judicial framework to promote equality, [*764] and it has made significant gains in providing basic services. It is also an excellent example of how national programs are limited by internal and global economic realities. South Africa's experience demonstrates that without a commitment from the international community to overcome colonialism, apartheid, and racism, even the most committed national governments will be unable to make adequate progress in achieving substantive equality.

IV

International Obligations Under the WCAR Program for Action: The Response of the Industrialized Nations

Recognizing that the legacy of racism and economic injustice caused by colonialism and slavery cannot be overcome by the previously disadvantaged countries alone, the Durban Declaration from the WCAR also sets forth actions that must be taken by the international community. South Africa is unusual in the developing world in that it has elements of a developed economy and significant wealth within its borders, but its government nevertheless remains dependent on the global economy. Thus, the success of its internal economic policies designed to create favorable conditions for trade and investment are restricted by the actions of the more developed nations.

As described earlier, the obligations placed on the industrialized world by the Durban Declaration derive from its recognition that economic underdevelopment and poverty are the legacies of colonialism, apartheid, and racism. n80 The WCAR documents therefore call upon the international community, particularly the former colonial powers and the developed nations of the West, to take actions to alleviate these conditions. Stated broadly in Section 158 of the Durban Declaration, the conference recognizes the "need to develop programmes for the social and economic development of developing countries, especially those on the African continent and the Diaspora, within the framework of a new partnership" in nineteen areas. n81 These areas range from the [*765] broad pronouncement of "poverty eradication" to more specific proposals such as debt relief, market access, and transfer of technology. n82

Given the fact that it is just over a year since the conference and that the events of September 11 and its aftermath have intervened, it is too early to judge just how seriously the industrialized world will honor the pledges made there. Nevertheless, it should be instructive to briefly review the performance of the West in two key areas. n83 The first is the implementation of fair trade rules and improved market access, which are seen by many as having the most potential to alleviate poverty and create jobs. n84 [*766] A representative from Oxfam earlier this year summed up why this reform is needed by explaining that: "For every dollar we give in aid, two are stolen through unfair trade." n86 In a report issued around that time by Oxfam entitled "Rigged Rules and Double Standards," the international aid organization revealed that: "More than 128 million people could be lifted out of poverty if Africa, Latin America, East Asia and South Asia each increased their share of exports by just one per cent." n87

Looking at the West's performance on fair trade and market access, there have been some positive
developments, such as the recent announcement by Prime Minister John Howard of Australia that his country will eliminate all trade tariffs and quotas currently levied against the world's fifty poorest nations. Also, at the opening of the recent World Summit on Sustainable Development, a key official of the European Union promised reform of the system of agricultural subsidies in Europe, which he acknowledged severely undercut the livelihood of farmers in the developing world. In effect, he acknowledged that tariff reduction was not enough if these subsidies remained in place.n88

On the whole, however, other than the action taken by Australia, nations have done little more than make promises. The announcement of a recent agreement reached by France and Germany during negotiations on admission of former Eastern block countries to the European Union demonstrated this. As United Press International reported, the two countries agreed to [*767] freeze European Union farm subsidy spending at 2006 levels for the years from 2007 to 2013.n89 For the developing world, this delays any meaningful change on European farm subsidies for another decade. n90

The situation in the United States regarding this issue parallels the one in Europe. Indeed, one South African publication has noted that these two world powers seem to justify their farm subsidies by arguing, in relation to each other, that "mine is smaller than yours."n91 While it may not be clear who subsidizes their farmers more, the recent extension of U.S. farm subsidies for another ten years has not been lost on South African leaders. Thus, its finance minister, Mr. Trevor Manuel, has pointed out that "the U.S. $ 300 [billion] of agricultural subsidies granted in the year 2000 is six times the total sum of [overseas development aid] granted. So we face a huge contradiction." n92 And President Mbeki pledged in May of this year, during a question period in the South African Parliament, to raise the issue of the extension of U.S. farm subsidies at the upcoming World Trade Organization meetings. It seems clear, therefore, that with regard to the issue of market access and fair trade, the major Western powers remain more responsive to the pressures of sections of their own electorate than they do to promises of reform that they make at various world gatherings such as the WCAR. And they do this despite their knowledge of how critical reform of their trade practices is to the worldwide reduction of poverty.

Unfortunately, the pattern among the wealthy nations of making promises but fulfilling them slowly at best, repeats itself with regard to the second issue to be analyzed, debt relief. The extent of the burden their foreign debt places on developing countries is revealed in the following "key point" from a journal article last year that argues strongly for immediate, meaningful relief: [*768] "World Bank figures for 1999 show that $ 128 million is transferred everyday from the sixty-two most impoverished countries to wealthy countries, and that for every dollar these countries receive in grant aid, they repay $ 13 on old debts."n93

Admittedly, as with market access, some progress has been made. Thus Prime Minister Tony Blair of Great Britain brokered a deal with the U.S. and Japan at the G8 summit in June 2002 to provide an extra $ 1 billion in debt relief for the most impoverished African countries.n94 While aid agencies hailed the deal as a breakthrough, they nevertheless said much more was needed: "It's progress, but we want to see enough debt relief to achieve the 2015 millennium development goal of halving poverty. Low-income countries in Africa need 100 per cent debt cancellation in order to move towards halving poverty,' said Henry Northover of Cafod, the Catholic development aid agency." n95 In sum, looking at both these key issues, it is hard to be optimistic about the West's resolve to support the economic development needed to overcome the legacies of colonialism, apartheid, and racism that they acknowledged at the WCAR.

Conclusion

This Article attempts to refocus attention on the accomplishments and challenges that came out of the United Nations-sponsored World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance held in September 2001. Although few people realize it as a result of intervening events, the Durban Declaration was a remarkable document. This is primarily true because, among other matters, it contained an open acknowledgement by former colonial powers and slave-holding countries that they have a responsibility to help remedy the evils of racism and economic disparity that are the direct result of their earlier actions. More specifically, the document, which was agreed to by 169 nations including all of the world's great powers except for the United States, contained a clear statement condemning slavery as a crime against humanity. Finally, it set out a series of steps that both individual countries and the international [*769] community as a whole agreed to take to undo the vast disparities that exist between the wealthy and poorer countries.

To assess just how much progress was made in Durban, this article next focused on the host nation, South Africa, to see what had been accomplished there and what remained to be done. There is hope for the situation in South Africa: in the eight years since its
first democratic elections, that country has worked hard to overcome its horrific past by enacting a constitutional, legislative, and judicial framework that calls for an end to racism and racial discrimination both socially and economically. Some progress has also been made to provide basic services to previously disadvantaged populations. South Africa has been less successful, however, in implementing the constitutional framework of socio-economic rights because of some internal strategic and policy mistakes, but even more so because of a lack of government resources.

Finally, we have seen that the actions of the Western, industrialized world are crucial if countries like South Africa are to be able to overcome the legacies of colonialism and apartheid that the developed nations helped to create. Unfortunately, the WCAR provided another instance for the United States government to demonstrate its unwillingness to cooperate with other nations in reaching compromises that serve the interests of all, rather than what it perceives as its own narrow self-interest. But beyond that, the European Union and others have joined the United States in failing to take meaningful steps to lift trade barriers, end agricultural subsidies, provide debt relief, and allow for the importation of affordable medicines to treat HIV/AIDS and other diseases.

The question remains as to what must be done to move toward the world described in the Durban Declaration. Lawyers concerned with critical race theory must continue to demonstrate the obvious links between race and economic apartheid and keep these issues on the front burner. Lawyers must work through international organizations and make the case for the United States and other Western nations to adopt the Durban Declaration agreed to at the WCAR.

FOOTNOTE-1:


n2. The Declaration and Programme of Action has a series of declarations on general issues including the following:

General Issues, ...

3. We recognize and affirm that, at the outset of the third millennium, a global fight against racism, racial discrimination, xenophobia and related intolerance and all their abhorrent and evolving forms and manifestations is a matter of priority for the international community, and that this Conference offers a unique and historic opportunity for assessing and identifying all dimensions of those devastating evils of humanity with a view to their total elimination through, inter alia, the initiation of innovative and holistic approaches and the strengthening and enhancement of practical and effective measures at the national, regional and international levels;

4. We express our solidarity with the people of Africa in their continuing struggle against racism, racial discrimination, xenophobia and related intolerance and recognize the sacrifices made by them, as well as their efforts in raising international public awareness of these inhuman tragedies.


n3. General Issues, paragraph 13 states:

We acknowledge that slavery and the slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity not only because of their abhorrent barbarism but also in terms of their magnitude, organized nature and especially their negation of the essence of the victims and further acknowledge that slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade and are among the major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, Asians and people of Asian descent and indigenous people were victims of these acts and continue to be victims of their consequences.
Id. at 10-12 (emphasis added). The position of the majority of those attending was clearly that past practices should be included within the condemnation. See, e.g., the concluding statement from the delegate from Kenya:

It is therefore fitting that it was in South Africa that the international community declared and recognized slavery and the slave trade, especially the transatlantic slave trade, to be a crime against humanity; not today, not tomorrow, but always and for all time.

Nuremberg made it clear that crimes against humanity are not time bound. It is also significant that now an apology and appropriate remedial, as per paragraph 119, are expected and in order.

Id. at 141.

n4. See the concluding statement of the delegate from Canada:

On the issue of past injustices, let there be no doubt - Canada believes that the transatlantic slave trade was morally repugnant and is a stain on the fabric of history.

With regard to the text related to this issue, Canada would like to register clearly its understanding that paragraph 10 [paragraph 13 in the final document] of the Declaration means that widespread and systematic enslavement directed against a civilian population today constitutes a crime against humanity, and if the transatlantic slave trade occurred today it would constitute a crime against humanity.

Furthermore, it is Canada's understanding with regard to paragraphs 117, 118 and 119 of the Declaration, that under international law there is no right to a remedy for historical acts that were not illegal at the time at which they occurred.

Id. at 120-21.

n5. See the concluding statement of the delegate from Belgium, who was selected to speak on behalf of the European Union and who asked to add the following comments:

The Declaration and the Programme of Action are political, not legal documents. These documents cannot impose obligations, or liability, or a right to compensation, on anyone.

Nor are they intended to do so. In particular, nothing in the Declaration or the Programme of Action can affect the general legal principle which precludes the retrospective application of international law in matters of State responsibility.

Furthermore, the European Union has joined consensus in a reference to measures to halt and reverse the lasting consequences of certain practices of the past. This should not be understood as the acceptance of any liability for these practices ...

Id. at 143-44; see also infra note 14 and accompanying text.

n6. See, for example, General Issues, paragraph 19, which provides:

We recognize the negative economic, social and cultural consequences of racism, racial discrimination, xenophobia and related intolerance, which have contributed significantly to the underdevelopment of developing countries and, in particular, of Africa and resolve to free every man, woman and child from the abject and dehumanizing conditions of extreme poverty to which more than one billion of them are currently subjected, to make the right to development a reality for everyone and to free the entire human race from want.

Durban Declaration, supra note 2, at 12.

n7. See, for example, the comments of Alberto Saldamando, General Counsel, International Indian Treaty Council, of Indigenous Chicano/Zapoteco origin, who praised the participation of representatives of many Indigenous Peoples, but who nevertheless was disappointed in the final outcome as it related to indigenous peoples:
Many Indigenous Peoples and their representatives participated not only at the WCAR in Durban but in all of the WCAR preparatory processes, as well as the NGO Forum held in conjunction with the WCAR, in the hope that there would be a serious commitment by the member States of the United Nations and civil society to end racism throughout the world. No such commitment was forthcoming.

He then points out that the WCAR misstated international standards recognizing indigenous peoples as the owners of their traditional lands, territories, and natural resources, and instead did not require compliance with international standards. Alberto Saldamando, The World Conference Against Racism: Continuing Racism Against Indigenous Peoples, Indigenous Affairs, Jan. 2002, at 43.

n8. An additional reason for the choice of South Africa is my familiarity with that country's recent history stemming from my living and teaching there from January 1996 to December 2001, with nine months in the United States during that time.

n9. Chapter II, Attendance and Organization of Work, paragraph 3, states:

The following States were represented at the Conference: Afghanistan, Albania, Algeria, Andorra, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Cote d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Mali, Malta, Mauritania, Mauritius, Mexico, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Vincent and the Grenadines, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, The former Yugoslav Republic of Macedonia, Togo, Trinidad and Tobago, Tunisia, Turkey, Tuvalu, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Viet Nam, Yemen, Yugoslavia, Zambia, Zimbabwe.

Durban Declaration, supra note 2, at 79-83.

n10. The opening section of the final declaration took note of the work of the preparatory conferences and meetings. These included the reports of the regional conferences organized at Strasbourg, Santiago, Dakar and Tehran and other input from States, as well as the reports of expert seminars, non-governmental organization regional meetings and other meetings organized in preparation for the World Conference. Id. at 6.


n13. See Saldamando, supra note 7, at 46. The language considered most objectionable appeared in paragraph 162 of the NGO Forum Declaration and Programme of Action ("We declare Israel as a racist, apartheid state in which Israel's brand of apartheid is a crime against humanity...") and paragraph 164 ("We recognize that targeted victims of Israel's brand of apartheid and ethnic cleansing methods have in particular been children, women and refugees and condemn the disproportionate numbers of children and women killed and injured in military shooting and bombing attacks.") NGO Forum Declaration, supra note 12.


n15. Resolution 3, paragraph 3, states: "[T]he representatives of States participating in the [WCAR] ... express our gratitude and our admiration for the masterly control, competence and devotion shown by Mrs. Zuma, Chairperson of our Conference, which contributed decisively to the success of our deliberations." Durban Declaration, supra note 2, at 68.

n16. Another indelible memory for me was waiting with hundreds of other delegates from the NGO Conference and other interested persons from 3:00 in the afternoon until 10:30 that night for the final session to begin. There was little to do other than chat with friends and wait anxiously to see when it would start. It was also a tense time because right up to the time the Declaration was presented, no one knew what the final language would be. The next day it was great to talk to Adjoa Aiyetoro, chair of the National Coalition for Black Reparations in America (N'COBRA). She had taken part in the NGO caucus on reparations for African Americans, and declared a "victory" as a result of the final language adopted concerning the Transatlantic Slave Trade.

n17. See the concluding statement of the delegate from Canada:

We are not satisfied with this Conference. Not enough time has been dedicated to advancing its objectives, that is, developing forward-looking, action-oriented strategies to eradicate the many forms of discrimination that exist today. Instead, too much time has been spent on an issue that does not belong here.

Canada is still here today only because we wanted to have our voice decry the attempts at this Conference to delegitimize the State of Israel and to dishonour the history and suffering of the Jewish people. We believe, and we have said in the clearest possible terms, that it was inappropriate - wrong - to address the Palestinian-Israel conflict in this forum. We have said, and will continue to say, that anything - any process, any declaration, any language - presented in any forum that does not serve to advance a negotiated peace that will bring security, dignity and respect to the people of the region is - and will be - unacceptable to Canada.

That is why the Canadian delegation registers its strongest objections and disassociates itself integrally from all text in this document directly or indirectly relating to the situation in the Middle East. We state emphatically that this text is ultra vires; it is outside the jurisdiction and mandate of this Conference.

Durban Declaration, supra note 2, at 119-20.

n18. See supra note 4.

n19. See the concluding statement of the delegate from Australia:

Australia is a country whose good governance and strong democratic traditions and institutions derive directly
from its colonial history. In relation to the
text on the past, we therefore express
serious concerns at the use of the same
language in paragraphs 11 and 116 to
condemn colonialism as is used in
paragraph 12 to condemn apartheid and
genocide.

Durban Declaration, supra note 2, at 118.
n20. See the concluding statement of the
Syrian delegate:

Although Syria wished for clearer
wording, especially on the MiddleEast... and although the Conference is not part of
a peace process for the Arab-Israeli
conflict, we should not forget that racist
practices are being carried out in the
occupied Palestinian and Arab territories.
It goes without saying that we have
documented evidence of the demolition of
houses, the use of F-16s, the uprooting of
people and trees, especially olive trees, the
transfer of people, the besieging of people,
of making people starve, and of the killing
of children: all these are racist practices
and it is obvious that Israel is carrying
them out. Of course, I know that some of
our friends and colleagues in the western
hemisphere do not like such language, but
if they do not like it, why do they attend
such a Conference in the first place?

I have only one observation on this paper
which you have presented. That
observation addresses the understanding
and the substance of the meaning of the
Holocaust. Of course, I would like to say
from the beginning that the Holocaust was
a horrible thing, regardless of where it
happened. But we must remind our
European friends who are very sensitive
about the Holocaust that the Holocaust
happened in Europe, and was committed
mostly by Europeans. To generalize it, as
though the Europeans want to distribute
their sense of guilt throughout the whole
world, is a mistake.

Let us be morally courageous enough to
tell the truth: what do they mean by, 'We
recall that the Holocaust must never be
forgotten'? It should not be forgotten by
the people who made it, who created it,
who did it. We were not party to it, we
have never been a party to it and we will
never be a party to it, and that is why we
do not accept this general term here. We
would like it to be very concise and very
specific and not to be applied to every
nation on earth.

Id. at 127.
n21. Chapter II, Attendance and
Organization of Work, paragraph 4 states:
"On Monday, 3 September 2001, the
deleagations of Israel and the United States
of America withdrew from the World
Conference against Racism, Racial
Discrimination, Xenophobia and Related
Intolerance." Id. at 83.
n22. See FoxNews.com (Sept. 4, 2001)
available at
http://www.foxnews.com/story/0,
2933,33345,00.html (last visited Mar. 11,
2003). "In a statement released in Durban
on Monday evening, U.S. Secretary of
State Colin Powell, who had remained in
Washington, denounced the draft
declaration's 'hateful language' and said he
had told the U.S. delegation to return home
from the conference." Id.

n23. The following excerpt from a
description of the content of the radio
program "Democracy NOW!" aired on
Pacifica Radio the day after the United
States withdrew from the WCAR:

Senior diplomats at the U.N. Conference
Against Racism are charging that the U.S.
withdrawal from the conference was
prompted by its fear of facing massive
reparations claims over the enslavement of
African Americans, and not, as it implied,
by friction over the Middle East.

As Israeli and the U.S. delegations packed
their bags for early flights home today, a
South African Government spokesman
said: "The general perception among all
deleagates is that the U.S. does not want to
confront the real issues of slavery and all
its manifestations."

The headline of an article yesterday in the
Durban-based Daily News read "Slavery
pay-out key to US walk-out."

Civil Rights activist Jesse Jackson also
slammed the U.S. delegation for pulling
out of the conference, saying it was a political smokescreen to evade the slavery issue. He says he will make reparations a priority when he returns to the U.S.


n24. General Issues, paragraph 14 states, "We acknowledge the suffering caused by colonialism and affirm that, wherever and whenever it occurred, it must be condemned and its reoccurrence prevented. We further regret that the effects and persistence of these structures and practices have been among the factors contributing to lasting social and economic inequalities in many parts of the world today." Durban Declaration, supra note 2, at 12.

n25. See supra note 6 and accompanying text.


n30. "Violent crime is the reason why 60% of emigrants leave SA. During the 1990s, approximately 250,000 South Africans were murdered," says the author of one study, Johann van Rooyen." S. Wagstyl, Financial Times (South Africa), July 25, 2002; see also Johann van Rooyen, The New Great Trek: The Story of South Africa's White Exodus (Unisa Press 2000).


n32. In South Africa, the apartheid government classified people into many different groups and then subdivided these into four larger race groups: white, colored, Indian and African. For instance, people were classified in their Passbooks as Xhosa, Zulu, Malay, Cape Colored, Colored, and even Other Colored. The purpose seemed to be to maintain the fiction that there are no majority groups or races in South Africa, only minority groups, and to further divide one group from another. While colored, Indian and African people were all considered black; the African group was made up of indigenous people and members of African ethnic groups such as the Zulus. The four main apartheid classifications will be used for purpose of clarity in this Article.

n33. I got a sense of just how complete the segregation under apartheid was while talking to a white woman from the United States who had married a black South African in the late 1980s. I knew that there was no place her family could legally live together since she was barred from the
black areas, as he was from the white ones; also, their children were mixed race, and therefore, were classified as "colored." I was still dumbfounded when she told me that one of her greatest fears was that if they happened to be in an auto accident, she, her husband, and her children would all be taken to different hospitals.

n34. While also the victims of institutionalized discrimination and deprivation, the two groups in the middle were allowed limited privileges in order to enlist their support in maintaining the suppression of the African majority. Thus, Indians and coloreds were provided with better schools and could go further in their education; they had greater job opportunities and could actually own small businesses in certain sectors. For a thorough and entertaining history of South Africa, including detailed descriptions of the development of each of the different cultural groups, see Allister Hadden Sparks, The Mind of South Africa (1990).

n35. The term "Afrikaner" was the one adopted by the former Dutch settlers in South Africa, who were unique amongst colonists in that they fully settled in their new country and eventually cut most ties to their native land. As their name implies, they eventually saw themselves as Africans, not Europeans. As taught to them by the local Dutch Reformed Church, they believed South Africa was ordained by God to be their home. For a more complete explanation of Afrikaner history and culture, see id.

n36. "Boers" is another term used for the Dutch Settlers.

n37. See Maisel & Greenbaum, supra note 31, at 102.

n38. See Group Areas Act 18 of 1936 and Act 41 of 1950 (controlling land ownership); Mines and Works Act 12 of 1911 (controlling labor); Native Laws Amendment Act - Black Laws Amendment Act 54 of 1952 (controlling free movement); Population Registration Act 30 of 1950 (controlling race classification); Separate Representation of Voters Act 46 of 1951 (controlling the franchise); Suppression of Communism Amendment Act 50 of 1951 (controlling organization and expression); Reservation of Separate Amenities Act 49 of 1953 (controlling public amenities); Prohibition of Mixed Marriages Act 55 of 1949 (controlling marriage and sexuality); Bantu Education Act 47 of 1953 (controlling education policy).

n39. The new tricameral Parliament was established with a (white) House of Assembly, a (colored) House of Representatives, and an (Indian) House of Delegates. Republic of South African Constitution Act (Act No. 110 of 1983), Part 6, No. 52, at 25. Whites were guaranteed control of the government because the president was selected by an eighty-eight member electoral college consisting of fifty Whites, twenty-five coloreds, and thirteen Indians, chosen by their respective houses of Parliament. Id. Part 3, No. 7(b)(3), at 4.


n41. The fact that apartheid ended through a negotiated process rather than through the triumph of a revolutionary struggle is crucial to understanding some of the key obstacles to change in South Africa today. For example, civil service workers hired by both the former white regime and its collaborators in the allegedly independent Bantustan governments, established to rule the black "Homelands," retained their positions after the transition. Thus they either are still employed, although many are useless and/or corrupt, or they have received expensive severance packages and generous pensions. The same is true for the military, judiciary, and police, all of which suffer from widespread division and distrust, and which have experienced episodes of racial conflict.

n42. For a description of the transition period, see Allister Haddon Sparks, Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Revolution (1994).
n43. See Durban Declaration, supra note 2, at 45.
n44. Id. at 27.
n45. Id. at 18.
n46. Id. at 44.
n47. Id. at 46.
n48. Id. at 55.
n49. See infra text accompanying notes 74-75.
n55. Section 7(d) of Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Among other matters, this Act prohibits "the provision or continued provision of inferior services to any racial group compared to those of another racial group." Id. However, in spite of enacting the Promotion of Equality Act in 1999, the government has not yet actually implemented this Act. The Act mandates the establishment of equality courts. Id. 16. While people who will work at these courts have started to be trained, three years later the equality courts are still not up and running. The implementation of legislation has often been slow, creating problems in the transformation of institutions, and in this case the promotion of equality.

n57. Id. 27(3).
n58. Id. 26(1).
n59. Id. 27(1).
n61. Soobramoney v. Minister of Health (KwaZulu-Natal), 1998 (1) SA 765 (CC).
n62. See Norm Dixon, Cancel Arms Spending!, Green Left Weekly, Oct. 25, 2000, at 1, available at http://www.greenleft.org.au/back/2000/425/425p26b.htm. The cost of the program was budgeted at 30 billion Rand (U.S. $4.2 billion) in February 2000, but the National Assembly's Standing Committee on Public Accounts learned that during that year the program's cost had already ballooned to 43.8 billion Rand and may end up at 60 billion Rand (U.S. $8.5 billion). The 60 billion Rand figure compares to 4 billion Rand budgeted for housing and less than 1 billion Rand for land reform or water and sanitation.


of reparations, in accordance with the recommendations of the TRC's 1998 report. Although 30 million Rand (U.S. $4.2 million) had been paid out to 10,000 victims by June 2000, the total required to fulfill the recommendations was approximately 3 billion Rand (U.S. $420 million).

n67. See A Summary of Reparation and Rehabilitation Policy, Including Proposals to be Considered by the President, at http://www.doj.gov.za/trc/reparations/summary.htm#interim (last visited May 3, 2003). A President's Fund, funded by Parliament and private contributions, has been established to pay urgent interim reparation to victims in terms of the regulations prescribed by the President. Id.

n68. Durban Declaration, supra note 2, at 26.


South Africa's President Thabo Mbeki has accused the Central Intelligence Agency of being part of a "conspiracy to promote the view that HIV causes AIDS," the Mail & Guardian reported Friday. Mbeki also thinks that the CIA is working covertly alongside the big U.S. pharmaceutical manufacturers to undermine him because, by questioning the link between HIV and AIDS, he is thought to pose a risk to the profits of drug companies making anti-retroviral treatments, the paper reported.

Id.; see also Letter from Thabo Mbeki, South African President to World Leaders (Apr. 3, 2000), available at http://www.sumeria.net/aids/mbekilte.html. Another example is a letter dated April 3, 2000, from President Mbeki to World Leaders. He wrote:

Toward the end of last year, speaking in our national parliament, I said that I had asked our Minister of Health to look into various controversies taking place among scientists on HIV-AIDS and the toxicity of a particular anti-retroviral drug. In response to this, among other things, the Minister is working to put together an international panel of scientists to discuss all these issues in as transparent a setting as possible... . It is obvious that whatever lessons we have to and may draw from the West about the grave issue of HIV-AIDS, a simple superimposition of Western experience on African reality would be absurd and illogical... . Scientists, in the name of science, are demanding that we should cooperate with them to freeze scientific discourse on HIV-AIDS at the specific point this discourse had reached in the West in 1984. People who otherwise would fight very hard to defend the critically important rights of freedom of thought and speech occupy, with regard to the HIV-AIDS issue, the frontline in the campaign of intellectual intimidation and terrorism which argues that the only freedom we have is to agree with what they decree to be established scientific truths.

Id.

n70. Minister of Health and Others v. Treatment Action Campaign and Others, 2002 (5) SA 703 (CC).


Although the government still claims to be guided by the RDP [Reconstruction and Development Program], it is widely accepted both within and outside of government that this policy was abandoned in 1996, following the adoption of the neoliberal Gear strategy, which replaced the emphasis on state-led development with a focus on market liberalisation (including the gradual removal of agricultural subsidies), the privatisation of state assets, debt reduction and stringent fiscal deficit reduction targets, and flexible labour market policies aimed at attracting foreign investment.


n75. See Peter Hawthorne, The Selling of Mbeki's New Deal, Time (Europe), June 10, 2002, available at http://www.time.com/time/europe/magazine/2002/0610/mbeki/. The percent of people in South Africa who are the poorest of the poor has dropped from 20% in 1994 to roughly 5% in 2001, indicating the commitment and success of some government policies. Id.


n77. See Nancy Singham & Dennis Brutus, South Africa at the Mercy of the Global Economy, People's Tribune, Nov. 11, 1999, available at http://www.lrna.org/league/PT/PT.1999.11/PT1999.11.9.html. Private investment in South Africa fell from 6.1% in 1996 to 3.1% in 1997 and 0.7% in 1998. Id. Eighty percent of foreign investment has been in the form of short-term portfolio investment, which is speculative capital. Id.


n79. There was a three-day general strike against privatization during the World Conference Against Racism in August 2001 timed to pressure the government to stop privatization. A two-day general strike in October 2002 to protest the government's policy of privatization of electricity, transport, telecommunications, and other state-owned industries was a failure. No more than 300,000 unionists were on strike at any time. Fred Bridgland, South African General Strike a Dismal Failure, The Scotsman, Oct. 3, 2002, available at http://www.news.scotsman.com/international.cfm?id=1095382002.

n80. See infra note 6 and accompanying text.

n81. The complete list is as follows:

Debt relief; Poverty eradication; Building or strengthening democratic institutions; Promotion of foreign direct investment; Market access; Intensifying efforts to meet the internally agreed targets for official development assistance transfer to developing countries; New information and communication technologies bridging the digital divide; Agriculture and food security; Transfer of technology; Transparent and accountable governance; Investment in health infrastructure talking HIV/AIDS, tuberculosis and malaria, including through the Global AIDS and Health Fund; Infrastructure development; Human resource development, including capacity building; Education, training and cultural development; Mutual legal assistance in the repatriation of illegally obtained and illegally transferred (stashed) funds, in accordance with national and international instruments; Illicit traffic in small arms and light weapons; Restitution of art objects, historical artifacts and documents to their countries of origin, in accordance with bilateral agreements or international instruments; Trafficking in person particularly women and children; Facilitation of the welcomed return and
 resettlement of the descendants of enslaved Africans.

Durban Declaration, supra note 2.

n82. Id.

n83. Even though the United States walked out of the WCAR and therefore did not agree to the Durban Declaration, its actions will be included in this review for several reasons. First, the United States has made promises at other international gatherings and in official government statements that it supports reforms of the type to be analyzed here. Second, it makes no sense to leave out a review of the performance of the richest and most developed nation in the world, and one that continues to have a strong influence in creating the policies of the World Bank and the IMF. And finally, there is a strong moral argument for the United States to support meaningful economic development, especially in Africa since the United States' wealth at least in part came about as a result of the enslavement of Africans.

n84. The importance of this issue can be seen, for example, in the priorities established by the new organization to improve African economic development created primarily under the leadership of President Mbeki of South Africa. Thus, as recently reported in the South African press: "What: the New Partnership for Africa's Development (Nepad) wants above all from industrial countries is improved market access, in addition to more aid. But given a choice between more aid and trade, it is trade that stands the best chance of improving African incomes." Jonathan Katzenellebogen, For Nepad, Trade Would Eclipse Aid, Business day (South Africa), Oct. 18, 2002, available at http://www.bday.co.za/bday/content/direct/1,3523,120976-0079-0,00.html. It should be noted, however, that there is not unanimous agreement in Africa on how to best pressure the West for assistance. Thus dating back to at least 1992, some African leaders have argued for direct reparations to African countries to compensate them for the harm caused by colonialism and the slave trade. See, e.g., Ali Mazrui, Global Africa: From Abolitionists to Reparationists, 37 Africa Studies Review (1994); Lord Anthony Gifford, The Legal Basis of the Claim for Reparations (Apr. 27-29, 1993) (a paper delivered at the First Pan-African Congress on Reparations, Abuja, Federal Republic of Nigeria), available at http://www.arm.arc.co.uk/legalBasis.html.

n85. Oxfam International consists of twelve non-profit development organizations around the world that together try to tackle the root causes of poverty, social injustice, and inequality. The countries that have Oxfam organizations include the United States, Canada, Great Britain, Spain, Hong Kong, and Australia. See http://www.oxfam.org/eng.


n87. Id.


n90. Thus the same UPI report states: "This cleverly crafted compromise allows opponents of the European Union's $ 40 billion-a-year Common Agricultural Policy - such as Germany, Britain and the Netherlands - to claim farm spending has been capped and supporters of the current regime to claim agricultural subsidies have been guaranteed for another decade." Id.

n91. See Ferial Haffajee & Greta Hopkins, EU, U.S. Farm Subsidies Hurt Poor Nations, WOZA, June 14, 2002, available


n95. Id.
Despite this bleak proclamation about the lack of judicial recourse for the harms of slavery and ensuing de jure and de facto racism, new lawsuits seeking reparations and redress for these injuries have recently been filed or are currently in the planning stages. This litigation should respond to the Cato court's inability to see a legal basis for slavery claims with the question, "What about unjust enrichment?" Unjust enrichment is a cause of action in restitution, applied to avoid unjust results in specific cases.

The substantive and remedial law of restitution, particularly the concepts of unjust enrichment and the remedy of constructive trust, provide particularly apt vehicles for reparations claims. The Transatlantic Slave Trade stretched its malignant web across several continents, and those unjustly enriched by slavery reside on both sides of the Atlantic. Section 1 of the 1937 Restatement of the Law of Restitution describes the core principle of unjust enrichment: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." The Restatement of Restitution addresses the privileged status to which Professor Matsuda refers in terms of unjust enrichment and unjust deprivation. Part II of the first Restatement examines the remedies of the constructive trust and the equitable lien as mechanisms for the disgorgement of unjust enrichment.

In Cato v. United States, the Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of a suit seeking damages and an apology for the enslavement of African Americans. The court held:

Discrimination and bigotry of any type is intolerable, and the enslavement of Africans by this Country is inexcusable. This Court, however, is unable to identify any legally cognizable basis upon which plaintiff's claims may proceed against the United States. While plaintiff may be justified in seeking redress for past and present injustices, it is not within the jurisdiction of this Court to grant the requested relief. The legislature, rather than the judiciary, is the appropriate forum for plaintiff's grievances.

This Article examines the role of unjust enrichment in substantive and remedial restitution as one option available to the movement that seeks to secure reparations for the descendants of the millions who were enslaved, transported from the African continent, and dispersed throughout the Americas and Europe. The reparations movement also seeks fitting remedies for the continuing depredations imposed upon people of African descent in the years that have followed the abolition of slavery. The substantive and remedial law of restitution, particularly the concepts of unjust enrichment and the remedy of constructive trust, provide particularly apt vehicles for reparations claims.

After exploring the role of reparations litigation in the ongoing international effort to redress the continuing inequality generated by the transatlantic slave trade, this Article presents the unjust enrichment claims raised in a reparations lawsuit typical of those currently underway in United States courts. An overview of unjust enrichment and its legal lineage follows. The Article then concludes after a brief examination of unjust enrichment remedies.

Reparations litigation is but one tool available to the ongoing effort to dismantle structural inequality and promote substantive social transformation. Clearly, even unjust enrichment lawsuits face an uphill
battle to survive the gate-keeping mechanisms that have been invoked in previous lawsuits to insulate the federal government from liability for slavery and other discrimination. However, even if there are insurmountable barriers to actual recovery, articulation of the restitutionary claims arising from slavery and the subsequent history of racial wrongdoing can serve important functions. Complaints and other legal documents filed in these cases will serve to illuminate the fallacy that most persons of African descent in the United States have access to equal opportunity, or to any kind of level playing field in our society as it is currently constructed. The hope is that by fully exposing the pretense of meritocracy, this nation will be compelled to engage in the process of actually providing equality.

It is also important to recognize that no matter what happens in the courts of the United States, the reparations movement is much larger than federal and state lawsuits. The Transatlantic Slave Trade stretched its malignant web across several continents, and those unjustly enriched by slavery reside on both sides of the Atlantic. The beneficiaries of slavery include corporations, governments, and the general public, as well as individual slaveholders. Slavery was a complex and multi-faceted system, and its aftermath cannot be redressed through any one avenue. The ramifications of slavery's legacy continue to influence the economies of African, Caribbean and South American nations.

Other countries have debated reparations for slavery, as have international fora such as the 1993 Pan-African Congress on Reparations and the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance.

Ultimately, African Americans must work in coalition with international reparations movements. Latina/os Critical Race Theory (LatCrit), with its focus on internationalism, comparativism, and rotating centers, provides both a forum and a paradigm for this type of effort. Furthermore, legal recognition of unjust enrichment is not limited to the Anglo-American common law system. Civil law systems that prevail throughout much of Central and Latin America recognize equivalent concepts, as do international human rights law and theory. Thus, the relevance of this discussion of restitution is not limited to reparations cases in United States courts of law.

I

Current Reparations Litigation

On March 26th, 2002, attorneys for Deadria Farmer-Paellmann filed a complaint in the U.S. District Court for the Eastern District of New York seeking recovery from three companies (Aetna Insurance, Fleetboston Financial, and CSX Rail Networks) for conspiring with other entities, persons, and institutions to commit and/or knowingly facilitate crimes against humanity, and to further illicitly profit from slave labor. Many of the substantive claims of the complaint are restitutionary, and the remedies sought by the complaint are overwhelmingly restitutionary: "Plaintiffs and the plaintiff class are slave descendants whose ancestors were forced into slavery from which the defendants unjustly profited. Plaintiffs seek an accounting, constructive trust, restitution, disgorgement, and compensatory and punitive damages arising out of Defendants' past and continued wrongful conduct." The complaint raises four questions of law and fact that go to the heart of restitution, namely, whether the defendants:

a. knowingly, intentionally, and systematically benefited from the use of enslaved laborers;
b. wrongly converted to their own use and for their own benefit the slave labor and services of the Plaintiffs' forebearers, as well as the products and profits from such slave labor;
c. knew or should have known that they were assisting and acting as accomplices in immoral and inhuman deprivation of life and liberty;
d. have been unjustly enriched by their wrongful conduct.

II

An Overview of Unjust Enrichment

Count V of the Farmer-Paellmann complaint is based upon unjust enrichment. Unjust enrichment is of growing importance in claims involving wrongs directed at an identifiable group. It has been used in Holocaust litigation and has been suggested as an independent basis for liability in claims against multinational corporations by indigenous peoples who have been displaced or harmed by environmental damage to their land but have thus far been unable to obtain judicial relief. Randall Robinson's The Debt outlines a series of successful claims under international law and, citing Dudley Thompson, observes:
Not only is there a moral debt but there is clearly established precedence in law based on the principle of unjust enrichment. In law if a party unlawfully enriches himself by wrongful acts against another, then the party so wronged is entitled to recompense. There have been some 15 cases in which the highest tribunals including the International Court at the Hague have awarded large sums as reparations based on this law.

Western systems of law have traditionally recognized the principle of unjust enrichment. A celebrated maxim of Roman Law proclaims, "By the law of nature it is fair that no one become richer by the loss and injury of another." This concept was familiar to common law attorneys through the works of legal commentators of the sixteenth and seventeenth centuries, such as Grotius and Pufendorf, and applied in early English decisions such as Moses v. MacFerlan, decided in 1760.

In 1937, the American Law Institute promulgated the first Restatement of Restitution. Prior to the Restatement, the law of restitution was "a miscellaneous assortment, (part legal, part equitable) of forms of action and remedial devices ... " The first Restatement explicitly created the legal category of restitution by linking previously unconnected doctrinal rules together using the concept of unjust enrichment. The first Restatement of Restitution is extremely influential; one cannot "describe or apply this body of law without heavy reliance on the structure outlined in 1936 by The American Law Institute." No later edition has superseded the first Restatement, and an attempt to promulgate a second Restatement of Restitution in the 1980s was abandoned, while the production of a third Restatement is underway. The Discussion Draft of the Third Restatement is incomplete and does not yet address transactions in which a benefit is obtained. This Article will focus on the first Restatement.

As noted, U.S. common law and procedure have thus far resisted any legal claims for compensation to slaves and their dependents for the deprivations of slavery. This failure of law provides the key value of pursuing actions for unjust enrichment. Claimants who cannot establish all of the elements necessary in traditional causes of action such as tort or contract "can satisfy the unjust part of the unjust enrichment standard simply by proving that pertinent activities were intuitively wrong, unfair, or unjust."  

Section 1 of the 1937 Restatement of the Law of Restitution describes the core principle of unjust enrichment: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." A person is unjustly enriched when the retention of the benefit would be unjust. The Restatement defines benefit broadly: a benefit is conferred if a person "performs services beneficial to or at the request of [another] ... or in any way adds to the other's security or advantage." The Farmer-Paellmann complaint invokes this form of unjust enrichment, for instance, in the allegation in paragraph thirty, "Defendant CSX is a Virginia corporation... . It is a successor-in-interest to numerous predecessor railroad lines that were constructed or run, at least in part, by slave labor." The complaint cites other acts of unjust enrichment:

29. [Defendant] FLEETBOSTON is the successor in interest to Providence Bank ... founded by Rhode Island businessman John Brown. Brown owned ships that embarked on several slaving voyages and Brown was prosecuted in federal court for participating in the international slave trade after it had become illegal under federal law. Upon information and belief, Providence Bank lent substantial sums to Brown, thus financing and profiting from the founder's illegal slave trading... .

31. Defendant AETNA INC. (AETNA) is a corporation... . Upon information and belief, AETNA's predecessor in interest, actually insured slave owners against the loss of their human chattel. AETNA knew the horrors of slave life as is evident in a rider through which the company declined to pay the premiums for slaves who were lynched or worked to death or who committed suicide. AETNA, therefore, unjustly profited from the institution of slavery.

It seems axiomatic that by actively using slave labor to build its facilities, a corporation wrongfully obtains a benefit through the use of duress. The Restatement requires restitution for benefits obtained through coercion, including situations where a person has conferred a benefit because of duress or undue influence. The allegations directed at Fleetboston clearly satisfy the requirement of an unjust act by noting the illegality of Brown's participation in the slave trade after the United States banned it. But how does Aetna's activity of insuring slaves, a presumably legal act that did not involve the use of coercion or duress by Aetna's predecessors, support an unjust enrichment claim against Aetna? One of the advantages of the unjust enrichment theory is that a defendant may be unjustly enriched without having committed any other civil wrong. Rather, a "defendant may enrich himself by means that we condemn as unjust but for which we would not impose tort liability.
in the absence of enrichment." n39 Where the proceeds of
insurance policies were payable to the owner of the
slave and not the slave's family, the insurers benefited
from the possibility of injury to the slave, with no
Corresponding benefit adhering to the slave. n40

[*779]

III

Constructive Trust as a Remedy in Reparations Cases

Professor Mari Matsuda has identified and refuted
some of the doctrinal objections to reparations cases,
several of which focus on the remedial ramifications of
restitution. n41 Opponents protest that reparations
would tax whites whose ancestors were not in the
United States during the era of slavery. In response,
Professor Matsuda writes: "Members of the dominant
class continue to benefit from the wrongs of the past
and the presumptions of inferiority imposed upon
victims. They may decry this legacy, and harbor no
racist thoughts of their own, but they cannot avoid
their privileged status." n42

The Restatement of Restitution addresses the
privileged status to which Professor Matsuda refers in
terms of unjust enrichment and unjust deprivation. n43
When enrichment has been obtained wrongfully, restitution seeks disgorgement of the
benefit. n44 Part II of the first Restatement examines the remedies of the constructive trust and the equitable lien as mechanisms for the disgorgement of unjust enrichment. n45 Under the theory of the constructive trust, a person unjustly enriched is bound to hold the benefit of that enrichment for the person actually entitled to receive it. The wrongdoer is likened to a trustee who holds the property solely for the benefit of the intended beneficiary, but no true trust arises. n46 With the equitable lien, while the beneficiary is not entitled to the return of the wrongfully-obtained item, he is entitled to his share of the proceeds of the property. n47 Although constructive trusts are most commonly used when wrongfully-obtained property can be specifically identified, n48 a remedy is also available in situations where precise identification is not feasible.

In some cases where the plaintiff would be entitled to enforce a constructive trust or equitable lien upon property if the property could be traced, but he is unable to trace the property, he is entitled to maintain a proceeding in equity to obtain a decree establishing a personal liability of the defendant. n49

When typical actions for damages deny recovery unless the person who has suffered an undeserved loss can prove the defendant's malfeasance and her loss

with exactitude, the judicial system maintains the
misdistribution of benefit and loss. Without regard as
to whether an unjustly enriched person is a wrongdoer
or an innocent, restitution requires disgorgement of the
unearned benefit. By foregoing a requirement of
wrongdoing, n50 restitution compares the position of
the victim and the beneficiary. One person has done
nothing wrong, but has obtained an unearned benefit.
The other has done nothing wrong and has suffered an
undeserved loss. Two people are thus in contrasting
positions through no action of their own.

[*781] Unjust enrichment remedies that afford the
ability to obtain an equitable decree can also equitably allocate the loss and gain. For example, in G & M
Motor Company v. Thompson, the trial court imposed
a constructive trust on the proceeds of a life insurance
policy purchased with embezzled money. n51 The
beneficiaries of the policy were not involved in the
embezzlement. n52 The Oklahoma Supreme Court
upheld a constructive trust on the insurance proceeds
to the total amount of the embezzled monies, interest,
and costs. n53 The court noted that "the surviving wife
is an innocent beneficiary," n54 and permitted the
policy beneficiaries to receive the remaining
proceeds. n55 The court could have imposed a
constructive trust on the full amount of the insurance
policy if it had been purchased solely with embezzled
funds, n56 or on a pro rata share of the proceeds if the
policy was purchased with co-mingled funds (a
combination of rightfully and wrongfully obtained
monies). Using a constructive trust permitted the court
to select a third option that fully compensated the party
who was wronged, yet allowed provision for the
innocent beneficiaries. Equitable restitutionary
remedies thus can provide the flexibility necessary to
address the complexities of unjust enrichment claims
in reparations litigation.

Conclusion

The ability of unjust enrichment to go beyond legal
technicalities, to focus on the essence of wrongdoing,
and to redistribute unjust gain illustrates that claims for
reparations can be well served by restitutionary law
and theory. This brief examination of unjust
enrichment, however, merely skims the surface of
restitution. Other provisions of the Restatement of
Restitution, especially section 134, or Services
Tortiously Obtained, n57 provide relatively
untested theories that have great potential in the pursuit
of reparations. Restitutionary remedies also provide
unique tools such as tracing and accounting for profits
that could potentially follow the transformation of the
labor wrongfully obtained from African slaves to the
benefits that continue to inure and enrich corporations, governments, and the general public to this day.

FOOTNOTE-1:

n1. Cato v. United States, 70 F.3d 1103 (9th Cir. 1995). The dismissal was upheld because the plaintiff could not show that the government had waived sovereign immunity. Id. at 1107. The court also cited lack of subject matter jurisdiction and justiciability limitations: "Without a concrete, personal injury that is not abstract and that is fairly traceable to the government conduct that she challenges as unconstitutional, Cato lacks standing." Id. at 1103.

n2. Id. at 1105 (quoting Judge Saundra Brown Armstrong in the dismissal of the case from the District Court for the Northern District of California) (emphasis added).


n6. See Bittker, supra note 5.


n12. See Foster, supra note 3.


n15. See, e.g., John Philip Dawson, Unjust Enrichment, A Comparative Analysis (William S. Hein & Co. 1999) (1951); Liana Fiol-Matta, Civil Law and Common Law in the Legal Method of Puerto Rico:


The notion that a state might enrich itself from the commission of crimes against humanity, from the ashes of the Holocaust is as reprehensible as it is unjust - an assault on the very foundations of international law and the international law of human rights and a foundational breach of the Nuremberg Principles.

Id.


18. Id. at 7. For accounting, constructive trust, restitution and disgorgement, see Douglas Laycock, Modern American Remedies: Cases and Materials (2d ed. 1994).


22. Robinson, supra note 5, at 221.


25. Restatement (Third) of Restitution and Unjust Enrichment (Restatement 3d), Reporter's Introductory Memorandum, at xv (Tentative Draft No. 1, Mar. 31, 2000).


27. See Restatement 3d, supra note 25.

28. Gordley, supra note 24, at 1870. See also Restatement 3d, supra note 25.

29. The third main branch of liability in restitution, the subject of Chapter 4, deals with benefits wrongfully obtained. Transactions in which a benefit is obtained by wrongdoing generally involve a form of taking without asking; the resulting transfer is nonconsensual because the defendant has neglected a duty to contract with the owner for the property or its use.

Restatement 3D 1 cmt. d. Chapter 4 has not yet been published.


31. Restatement (First) of Restitution 1 (1937) [hereinafter Restatement 1st].

32. Id. cmt. a.

33. Id. cmt. b.

34. Complaint, supra note 71, at 9.

35. Id. at 8.

36. Id. at 9.

37. Restatement 1st, supra note 31, ch. 3, Scope note.

38. Complaint, supra note 17, at 8. See also Abstract UPA Publication Papers of the American Slave Trade, at http://www.lexisnexis.com/academic/2upa/
a) Insurance policies from the slavery era have been discovered in the archives of several insurance companies, documenting insurance coverage for slaveholders for damage to or death of their slaves, issued by a predecessor insurance firm. These documents provide the first evidence of ill-gotten profits from slavery, which profits in part capitalized insurers whose successors remain in existence today.

(b) Legislation has been introduced in Congress for the past 10 years demanding an inquiry into slavery and its continuing legacies.


In most cases where a constructive trust is imposed the result is to restore to the plaintiff property of which he has been unjustly deprived and to take from the defendant property the retention of which by him would result in a corresponding enrichment of the defendant; in other words the effect is to prevent a loss to the plaintiff and a corresponding gain to the defendant, and to put each of them in the position in which he was before the defendant acquired the property.

There are some situations, however, in which a constructive trust is imposed in favor of a plaintiff who has not suffered a loss or who has not suffered a loss as great as the benefit received by the defendant. In these situations the defendant is compelled to surrender the benefit on the ground that he would be unjustly enriched if he were permitted to retain it, even though that enrichment is not at the expense or wholly at the expense of the plaintiff... So also, where the defendant makes a profit through the consciously wrongful disposition of the plaintiff's property, he can be compelled to surrender the profit to the plaintiff and not merely to restore to the plaintiff his property or its value .... So also, in certain cases where the defendant wrongfully prevents the plaintiff from acquiring property and acquires the property for himself, the defendant can be compelled to surrender the property to the plaintiff, and not merely to restore the property to the person from whom the defendant wrongfully acquired it ... .

Id.


n46. See id. 160 cmt. a.

n47. See id. 161 cmts. a, b.

n48. "A constructive trust is imposed upon a person in order to prevent his unjust enrichment. To prevent such unjust enrichment an equitable duty to convey the property to another is imposed upon him." Laycock, supra note 39, at 1280.


n51. 567 P.2d 80 (Okla. 1977).

n52. See id. at 82, 84.

n53. Id. at 83, 84.

n54. Id. at 84.

n55. Id.

n56. Where a person by the consciously wrongful disposition of the property of
another acquires other property, the person whose property is so used is ... entitled ... to the property so acquired. If the property ... becomes more valuable than the property used in acquiring it, the profit thus made by the wrongdoer cannot be retained by him; the person whose property was used in making the profit is entitled to it.

Id. at 83 (citing Restatement (First) of Restitution 160 cmt. d (1937)).

n57. Restatement 1st, supra note 31, 134.
SEVENTH ANNUAL LATCRIT CONFERENCE, LATCRIT VII, COALITION THEORY AND PRAXIS: SOCIAL JUSTICE MOVEMENTS AND LATCRIT COMMUNITY - PART II

FOCUSING THE ELECTORAL LENS: The Latina/o and APIA Vote Post-2000: What Does It Mean to Move Beyond "Black and White" Politics?

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BIO:

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SUMMARY: ... LatCrit 2002 took place at an auspicious political juncture, a year and a half after the fateful Bush v. Gore decision,n1 which broke a virtual electoral tie in favor of the Republican presidential candidate, and six months prior to the 2002 November midterm elections, in which Republicans swept into power in both houses of Congress, breaking historical trends. LatCritVII was the first time that a LatCrit conference project convened a panel that focused on voting issues, Focusing the Electoral Lens: Capturing Post-2000 Latina/o and APA Political Strength in the Redistricting Process. n2 Chaired by Professor Keith Aoki, this concurrent panel focused on three themes. First, Professor Keith Aoki and Kathay Feng discussed the importance to Asian Pacific Islander Americans (APIAs) and Latinas/os of the redistricting battles unleashed in California as a consequence of the 2000 Census. Their contribution is memorialized in the first article of this cluster, Voting Matters: APIAs, Latinas/os and Post-2000 Redistricting in California,n3 summarizing the law of redistricting as it affects minority representation, and describing the strategy that APIA and Latina/o civil rights groups used in the 2000 redistricting battles in California. ... APIAs and Latinas/os are the fastest growing racial minority groups in the country. ... Latinas/os and APIs must still register in order to vote. ... However, the Ashcroft proposal has not been taken off the table; the only "moderating influence" that the White House's concern with the Latina/o and APIA vote might have played is that the Ashcroft initiative has been downplayed. ... The manipulation of race versus ethnic ascriptions "whitens" Latinas/os and APIs. ... This positions Latinas/os and APIs outside of a racial dialogue. ... "The 2002 elections reaffirm earlier work by political scientists that where a minority candidate's race becomes salient by subtle racial cueing, the candidate will lose. ..." But this may be a na<um i>ive take on minority voter turnout, one that unnecessarily boxes the Latina/o and APIA electorate into a "no win" proposition. ...

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Voting matters very much. As Kevin Johnson remarks, the political process and electoral representation are now at the center of addressing Latina/o civil rights issues.n7 Kathay Feng, Keith Aoki, and Bryan Ikegami emphasize the importance of focusing on voting and the electoral process as part of the LatCrit scholarly and activist project stating that "meaningful political
participation beginning (but not ending) with fair representation is an absolutely necessary and crucial precondition to achieving and implementing the substantive social justice and anti-subordination agenda of LatCrit.\textsuperscript{n8} Aoki, Feng, Ikegami and Johnson make the straightforward point that the post-Civil Rights movement cannot be sustained by the courts;\textsuperscript{n9} but rather, civil rights advances must come from legislatures and local governments. The Civil Rights Revolution of the 1960s and 1970s came from the federal bench, led by the Warren Court, and revolutionized race relations in the United States with cases like Brown v. Board of Education\textsuperscript{n10} and Loving v. Virginia.\textsuperscript{n11} Research has now shown that in the 1980s President Reagan and the Republicans deliberately set about to undermine the federal bench's support of civil rights, and systematically went about ensuring that judicial appointments would reverse civil rights gains.\textsuperscript{n12} The Bush plan, after the Republican Congressional midterm electoral sweep, is to put in place conservative Article III judges as quickly as possible.\textsuperscript{n13} The impending swift senatorial approval will solidify an already conservative federal bench. \textsuperscript{n14} According to an empirical study on judicial decision making, party affiliation is the most salient factor, even more so than gender or race, in predicting what kinds of rulings a judge will make.\textsuperscript{n15} Such research suggests that judges' decisions hinge more on their political attitudes, rather than the "plain meaning" of constitutional or statutory text. \textsuperscript{n16} The only way to counter impending restrictive interpretive decisions is through legislative action; in effect, to provide the opportunity for Congress and state legislatures to veto court decisions by rewriting statutes, as Kevin Johnson notes.\textsuperscript{n17} Voting issues are also about pragmatic politics. As Feng, Aoki, and Ikegami point out, "Only when minorities are represented in local government - school boards, zoning boards, city councils - do the every day needs of minority communities become part of the local agenda."\textsuperscript{n18} The key to advancing a political anti-subordination agenda is how well Latinas/os and APIAs can make an impact at the ballot box.

My aim in this Article is to frame the challenges to LatCrit theory and activism posed by voting rights, electoral process, and minority politics.\textsuperscript{n19} In order to focus on the key challenges, I \textsuperscript{n787} pose this question: What does a LatCrit theorist mean when she proposes to move beyond the "Black-White" paradigm?\textsuperscript{n20} Part I discusses the changes in the U.S. electorate that in post-2000 have made the Latina/o and APIA vote the darling of both major parties. In the process of being perceived as an important electoral group, Latinas/os and APIAs are at times being depicted as "model minorities." Part I concludes that going beyond the \textsuperscript{n788} Black-White paradigm in this context is to deconstruct the model minority rhetoric, as APIA scholars have done in the affirmative action debate. In Part II, I discuss an important political issue to Latinas/os and APIAs that intersects with civil rights and anti-subordination analysis, the de jure denial of the voting franchise to more than ten million Latinas/os and APIAs because they are noncitizens or are citizens for the sole reason that they reside in Puerto Rico. Part II concludes that thinking beyond the Black-White paradigm in this context requires that LatCrit theorists continue to address this exclusion as both a civil rights and race issue. In Part III, I review the electoral successes of 2002. Even with Latina/o and APIAs' found electoral influence, their gains in electing representatives to Congress were slim, particularly when compared to their strong population growth of over fifty percent from 1990 to 2000. There are four structural reasons that account for continued lack of influence in congressional representation: representational politics, the politics of redistricting, campaigning in racially polarized environments, and minority voter turnout. Finally, Part IV reviews direct democracy ballot where electors in states voted on English-only initiatives, and explains why the direct democracy ballot continues to be a bellweather for racial conflict that requires attuned judicial scrutiny.

Electoral Politics: "Not Just Black and White Anymore"

The Black-White paradigm is no longer statistically accurate. The results of the 2000 Census revealed that Latinas/os now numerically surpass African Americans and Asian Americans.\textsuperscript{n21} APIAs and Latinas/os are the fastest growing racial minority groups in the country.\textsuperscript{n22} This demographic shift in no way diminishes \textsuperscript{n789} the importance of race in electoral politics. The only change that has emerged is that the experts who carefully count votes and monitor potential voters now talk about racial politics in ways that include Latinas/os, APIAs, and Native Americans. Part A discusses why the Latina/o and APIA vote has emerged as important to national electoral strategies. This may translate into some influence at a national level. The potential influence of an emerging electorate causes politicians from both parties to covet the marginal votes that might make the difference. As Part B discusses, meaningful minority representation continues to be checked by white voters' racial consciousness. As recent elections show, white voters continue to reject minority candidates when their racial consciousness has been aroused.
A. The Shift from the Black-White Paradigm in Electoral Politics

As a result of major structural changes in United States electoral politics, electoral contests have become very close. The 2000 and 2002 contests were so close that in a parliamentary system the results would have been tied. In 2000, Bush's presidency was decided by 537 votes cast in Florida. In 2002, the Senate was decided by fewer than 70,000 votes cast in Minnesota and Missouri. This is under one-tenth of one percent of the entire voting electorate.

The controversy over the Bush vote in Florida can be understood in terms of a crisis in legitimacy. It is also the consequence of winning advantages being so miniscule that they fall within margins of statistical error. When errors can decide a winner, it becomes clear that the victory claimed by either side is accidental. What is called into question is whether the result is the evinced will of the people, or just an accidental consequence.

Fundamental structural reasons explain the shift in national electoral politics to a game of such close margins. Under the U.S. two-party system, the parties' stands on political issues has increasingly converged towards the middle. The choices are limited; the two parties' policy initiatives are difficult to distinguish. Each party's base cannot go elsewhere to find a party that would accommodate its ideology or political agenda. With the base captive, party leaders and strategists concentrate on pitching their appeals to the marginal voter. This strategy tends to obfuscate even more the differences between the parties.

Campaign finance has also played a role in this convergence. Each party's nominee must be a candidate who can raise hundreds of millions of dollars in contributions because campaign monies are the key to election victories. A 1998 study by the Center for Responsive Politics concluded that nine out of ten candidates who outspent their opponents won the election. Incumbents do well in elections because they are able to raise more money than their opponents. According to one study, 240 of the 349 House races were competitive, that is, decided by margins of less than fifty-five percent of the vote. Thirty-nine of the 435 House races were competitive.

Redistricting for the protection of incumbents is another culprit. Drawing districts has become a statistical fine art where parties can fine tune the voting electorate and make it more likely than not that a given district will elect a Democrat or Republican. Even though Davis v. Bandemer holds the promise that a plaintiff may challenge political gerrymandering if the district lines are drawn to "consistently degrade" the influence of a political minority, successful challenges have been virtually non-existent. Free to politically gerrymander, each party has been able to solidify gains, and minimize competition. As a result of artful redistricting, in the 2002 elections incumbents were winners. Only thirty-nine of the 435 House races were competitive, that is, decided by margins of less than fifty-five percent of the vote. Only forty-nine House races involved a non-incumbent, and only thirty-five of these were competitive.

Finally, geographically the country has become split in its party loyalties. The West Coast and Northeast have become Democratic, while the South is now mostly Republican. A few states, mostly in the Midwest, remain in play from election to election as "swing states." In terms of electoral votes, this geographic split means that Republicans and Democrats are virtually tied. Neither party has gotten a majority of the popular vote in the last three presidential and House elections since 1996. This has not happened since the early 1900s.

Even though electoral differences are now slimmer than ever before, in U.S. representative democracy, pluralsities control the apparatus of government. Post-2000, Republicans control both chambers of Congress and the executive branch. Republican appointments also dominate the Supreme...
Court, and impending Court replacements will be made by a Republican president committed to a conservative federal bench. n40 This level of control of government has not been seen in the United States since 1929, n41 yet it was determined by less than the majority of the popular vote. n42

However, all politicians know that their grip on electoral power is tenuous. Structurally, this was the design that the Founding Fathers followed when they put in play every seat in the House of Representatives, and one-third of the Senate seats every two years. n43 In the current environment of close electoral politics, control can shift from one party to another in one electoral cycle with what is a statistical "handful" of votes.

Accordingly, in this era of ultra-competitiveness, every vote does count. The new politics of close margins, plus the explosive demographic growth of Latinas/os and APIAs, has made them the new darlings of the major political parties. Both Democrats and Republicans covet their vote because they are now viewed as potential swing voters. n44 A recent book, The Emerging Democratic Majority, predicts that the current tie in electoral politics will be resolved in favor of Democrats, in part, because the Latina/o and APIA electorate is growing and the authors predict their vote to continue to lean Democratic, as it did in the Bush-Gore presidential contest. n45 But Republican analysts counter that this vote is very much in play, and is winnable by the right appeals. n46 Reportedly, Bush has directed the Republican National Committee to make inroads with Latina/o voters, as he views his reelection hinging on his ability to retain and increase his margin of thirty-five percent of Latina/o voters with which he won in 2000. n47 Interestingly, it is widely speculated the next U.S. Supreme Court appointment will be a Latina/o, in part because an "ethnically diverse" Supreme Court will appeal to the Latina/o electorate that President Bush believes he must capture for his reelection. n48

The geographical dispersal of Latina/o settlement, their rapid increases, and their current perceived non-allegiance have made Latinas/os the focus of national strategies, even more so than the APIA vote. Eighty percent of all Latinas/os reside in nine "swing states," which can decide a presidential election: California (31%), Florida (8%), Texas (19%), Illinois (4%), New York (8%), Arizona (4%), New Jersey (3%), New Mexico (2%), and Colorado (2%). n49 In Florida, Latinas/os represent the largest minority group, numbering close to 2.7 million or 16.8% of the total Florida population. n50 In California, Latinas/os will represent the second most significant voting block. n51 The 2000 Census shows that Latinas/os have made aggressive gains in states outside of the Treaty of Guadalupe: North Carolina (393%), Arkansas (337%), and Tennessee (278%). n52 All midwestern states at least doubled the size of the Latina/o population. n53 Southwest and western states continue to show large numerical increases, particularly in Nevada, Arizona, and Utah. n54 There is no reason not to expect these current hyper-growth rates in non-Treaty of Guadalupe states to continue, as the factors that are drawing Latina/o settlement will continue into the near future. n55

By comparison APIAs are more regionally concentrated, as eighty percent of all APIAs live in five solidly Democratic states: Hawaii (58% is APIA), along the west coast - California (12%) and Washington (7%), and on the east coast - New York (6%) and New Jersey (6%). n56 APIAs outside of Hawaii are residentially dispersed, which means that it is more difficult to identify districts where the APIA vote would dominate. n57 This difference in dispersal and residential concentration makes the APIA vote appear as less of a cohesive voting block and may explain why *APIAs are getting less attention as a potential electorate at a national level.* n58

Merchants of the minority vote have been hard at work making arguments that minorities are relevant in two-party, winner take all, electoral politics. The Tomas Rivera Policy Institute reported that Latina/o voters were growing most rapidly in Southern California with 400,000 new Latina/o voters added to the rolls since 1996. n60 The William C. Velazquez Institute argued that Latina/o voter turnout in the 2002 elections in Texas was high with eighty-nine percent voting for Tony Sanchez. n61 National Association of Latino Elected and Appointed Officials (NALEO) suggested that the Latina/o vote made a difference in the runs for Congress in New Mexico, Nevada, and Colorado. n62 The Pew Hispanic Center's recent report on the Latina/o electorate concludes that Latinas/os are "emerging as a distinct presence on the political landscape." n63 Similarly, the National Asian Pacific American Legal Consortium (NAPALC) in Washington D.C. reported high turnout rates among APIA voters in California. n64 Groups such as MALDEF, the Southwest Voter Registration Project, the Puerto Rican Legal Defense and Education Fund, and the Hispanic Coalition on Reapportionment, among many others, lobbied and litigated to shape how state representative and congressional district boundary lines were drawn, which resulted in increased opportunities for Latinos to be elected to state and federal offices in many states.

In the 2002 campaign, Republican politicians assiduously courted the Latina/o vote. n65 The
Republican party alone spent sixteen million, and both parties spent twenty million dollars in ads pitched to Latinas/os. n66 Latina/o media advertisers advised the party bosses that "feel good" messages rather than attack ads were more appropriate for the ethnic vote, and according to a study, nine out of ten ads pitched at Latinas/os in the 2002 ad campaign were positive. n67 The Republican party has been producing a TV news magazine, a half-hour program entitled Abriendo Caminos, which airs in Albuquerque, Denver, Fresno, Miami, Las Vegas, and Orlando, touting the Republican agenda and President Bush. n68 The Bush brothers campaign with Spanish snippets and pitches to their "amigos," salsa and mariachi music. n69 They visibly court Latina/o community leaders. n70 Both are personally popular within the Latina/o community, and view the Latina/o vote as key to their electoral victories. n71

[*798] Recent political events indicate even more so that the major parties see their electoral victories as tied in part to their success in wooing the Latina/o and other minorities. In the recent Trent Lott controversy, the Bush White House was given credit for catapulting Lott quickly. Why? The Washington wisdom was that it was important to Bush to continue to remake the image of Republicans as minority friendly. n72

B. Latinas/os and APIs: The Potential Electorate

Latinas/os and APIs are influential as potential electorates because of two factors: (1) Up to ten million Latinas/os and APIs will become voters within the next decade and one-half; and, (2) Their party affiliation is not yet set.

1. Crouching Jaguar, Hidden Dragon: The Soon-to-be Latina/o and APIA Voter

The Latina/o and APIA vote is being valued more than before because much of this population currently cannot vote, but will be in a position to cast a ballot within the next decade and a half. The number of potential voters that could come on-line within the next decade and a half is up to seven million. As discussed below, this calculation is based on the present number of noncitizens and the proportion who eventually naturalize. n73

Becoming a citizen and registering are prerequisites in every state to being able to vote in state and national elections. Upwards of fifty percent of Latina/o foreign-born residents who remain in the United States fifteen or more years become [*799] U.S. citizens by naturalization. n74 APIs naturalize at greater rates than Latinas/os. n75 Latinas/os, because of settlement factors such as proximity to their home countries, historically have been from one-half to two-thirds less likely to naturalize than other groups, regardless of length of time residing in the United States. n76 But recent studies indicate that this historical reluctance to naturalize is changing. The Pew Hispanic Trust's poll data reports that two-thirds of Latinas/os who are not presently eligible to vote are planning to or are currently applying for citizenship. n77 This is a rate fifty percent higher than the historical census data. Louis De Sipio reports that Latina/o immigrants are increasingly developing a psychological attachment to the United States, which spurs them to want to naturalize. n78 In a national survey, more than ninety-five percent of Latino immigrants indicated that they wanted to make the United States their home, n79 which signals naturalization rates increasing in the future. Perhaps more importantly Latinos have reacted to anti-immigration [*800] movements, like Proposition 187 and the Newt Gingrich "Contract with America," which cut back social benefits available to permanent resident aliens, by perceiving great incentives towards naturalization. n80

Based on such figures, Latinas/os and APIs are the single most important future voting block in the United States. In the next fifteen years, there are five million new potential Latina/o voters and two million potential APIA voters - if current trends hold. n81 If naturalization rates increase for Latinas/os, per a new upward trend that social scientists are reporting, then the number of future Latina/o and APIA voters could increase even more. By contrast, growth rates in the voting electorate of African Americans, white men, and white women are stable. n82

Latinas/os and APIs must still register in order to vote. Current data indicate that registration of Latinas/os and APIs has been growing. Over the last eighteen years, Latinas/os have become the fastest growing voting group in Florida. n83 Commentators view Jeb Bush's ability to win the newly registered Latina/o voter - Cuban, Puerto Rican, and Central American - as the key to his gubernatorial victory. n84 In southern California, Latinas/os are the fastest growing voting block. According to the Tomas Rivera Policy Institute, between 1994 and 1998, the Latina/o vote in Los Angeles County grew by over 100,000 votes, which amounted to an increase of nearly fifty percent in just four years. n85 Over the same period, the non-Latina/o vote grew by just ten percent. n86 In California during the last decade, Latina/o voters began the 1990s as nine percent of the voting population and grew to fourteen percent by 2000. n87

[*801] Nevertheless, Latina/o registration lags by as much as fourteen and fifteen percentage points behind the registration rates for Whites. n88 This is due
primarily to class and age demographic factors; the Latina/o population overall is more youthful, less well-off, and has a lower educational attainment than the general population. n89 These are all factors that influence voting behavior. When these factors are controlled in White and Latina/o populations, these two groups vote at the same rates. n90 Moreover, there is also evidence that "the current maze of laws and administrative procedures ... suppresses voter turnout." n91 Institutional "unfriendly" factors disproportionately affect Latinas/os, a group which overall has lower levels of educational attainment and unfamiliarity with the English language than the population at large. n92

Changing registration propensity, given class and age background, is something that the Latina/o civil rights groups have been fighting hard to change, but that still requires further efforts.n93 The Latina/o "backlash" to anti-immigration propositions in California and the anti-bilingual education initiatives in Massachusetts have spurred greater political activism. n94

Both Democrats and Republicans are trying to make inroads as these voters come on-line. Experts agree that with each electoral [*802] cycle, Latinas/os and APIs will see more campaign advertisements pitched in their own languages and through ethnic media.n95

2. Not Yet Committed to a Major Political Party

Rodolfo de la Garza and Louis DeSipio note that partisan affiliation takes years to develop.n96 Recent immigrants, those who are not yet citizens, do not consistently vote Democrat or Republican. Similar results are being documented in the APIA community. National Asian Pacific American Legal Consortium reported that in Orange County, California, the APIA vote was evenly split among Democrats and Republicans, and increasingly California APIs identify themselves as "independents." n97 Among Latinas/os who are not yet registered and those who are planning on becoming U.S. citizens, the number of independents and Republicans is greater than the number of Democrats. n98 This reflects that recent Latina/o immigrants are more conservative on religious and social issues than native-born Latinas/os, n99 making recent immigrants' positions on these issues closely aligned to Republican party policies. On the other hand, Latinas/os who have been in the United States for several generations have more secure party affiliations. Party propensity by national origin groups shows that Puerto Ricans, Dominicans, and Mexican Americans have mostly voted Democratic, while Cuban Americans have mostly voted Republican. n100

Rather than being party affiliated, the Latina/o and APIA vote is increasingly tied to issues. The Pew Hispanic Trust's poll data [*803] shows what was already common knowledge within the Latina/o community that Latinas/os base their votes on substantive policy, and that the most important issues to Latinas/os are immigration, education, the economy, and health care.n101 The NAPALC reports that APIA voters were concerned with policies that might have possible negative impacts on the immigrant community. n102 Thus, indications are that Latinas/os and APIs judge candidates by substantive political proposals and initiatives.

Immigration and language are two key policy areas that have done much to galvanize political consciousness among Latinas/os and APIs. As a group, Latinas/os favor immigration policies that would open up family reunification with Latin America and would provide amnesty to current undocumented workers.n103 APIA exit polls in the recent California elections, for example, show that although the vote went with Governor Davis this time around, APIs remain watchful of future policies regarding treatment of recent immigrants and on immigration issues generally.n104 Language issues are also very important. Latinas/os have opposed laws that would make it more difficult for children to maintain their cultural language (i.e., rapid English immersion programs), although overwhelmingly, recent immigrants indicate that they believe it is important to speak English in order to succeed in the United States. n105

C.

"Salsa" Appeal or Anti-Subordination Politics?

Does being courted translate into new direction in policy initiatives designed to better the social and economic conditions of racial and ethnic minorities? This may be a glass half-empty, half-full answer. [*804] Studies have shown that Latinas/os wield remarkably little influence on policies at the national level. Using regression analysis, political scientists Rodney Hero and Caroline Tolbert concluded that there was "little or no Latino substantive representation" on the House of Representatives individual voting patterns.n106 The tenor of the conversation has changed, however, as the major parties are incorporating initiatives calculated to stand them in good stead with the Latina/o and APIA electorate. n107 During the pre-election months of September and October 2002, Senator Orrin Hatch (Rep.-Utah) championed the DREAM bill, legislation important to Latinas/os since it would allow noncitizen
children of undocumented workers to go to college by making them eligible for in-state tuition and federal grants. n108 This bill went no further than being reported favorably out of the Senate Judiciary committee. n109 The Republican controlled Congress has not made the DREAM bill part of their 2003-04 legislative package. On the Democratic side of the ledger, 2004 Democratic Party Presidential candidate, Dick Gephardt, four weeks before the November 2002 elections, introduced an amnesty bill that would legalize the status of undocumented workers who had lived for five consecutive years and worked for two years in the United States. n110

Republicans and Democrats accuse each other of engaging in platitudes and not offering substantive policies which are likely to be sustained. For example, Gephardt's proposal was attacked as "a naked public relations stunt ... to counteract the slide in [electoral and political] influence," since he cites no authority and the data indicates the contrary. The fact alone that Proposition 187 passed in California should not be sufficient to show how specious Professor Schuck's claims are. n111 It is true that, in the past, minorities have not been able to steer substantive policy initiatives in Congress. n112 Only the future will tell whether the Republicans and Democrats will commit political capital to make substantive policy changes, such as the DREAM bill and amnesty program, that are wanted by most of the Latina/o and APIA communities and would move national politics beyond mere "salsa" appeal platitudes.

Some have suggested that the potential Latina/o and APIA electorate, which is highly sensitive to anti-immigration policies and anti-nativistic sentiments, might play a moderating influence. n113 Latina/o and APIA voters remain wary of major party candidates and their positions on immigration, because they understand that anti-nativistic sentiments stirred up by nativistic rhetoric easily spills over to hostility toward Latina/o and APIA U.S. citizens. n114 The guest worker program, which Mexico's President Vicente Fox pushed; a new amnesty program for undocumented workers, which is supported by eighty-five percent of all Latinas/os; n115 and immigration family reunification reform, which impacts "mixed" families, those with citizen and noncitizen children or parents, perhaps had a chance of being part of the Bush legislative agenda pre-9/11, but no more. Instead, anti-immigration groups have become more prominent as they link anti-DREAM initiatives to homeland security goals. n116 Mark Krikorian, Executive Director for the Center for Immigration Studies, argues that strict immigration enforcement must be part of the post-9/11 homeland security effort because "Islamic terrorists have penetrated every aspect of our immigration system." n117 The White House's concerns with reelection might be keeping at bay the more extreme anti-noncitizen and anti-immigrant proposals. There have been reports that the Bush White House reined in Ashcroft's Justice Department on an aggressive initiative inviting local law enforcement to become part of the immigration enforcement network. n118 However, the Ashcroft proposal has not been taken off the table; the only "moderating influence" that the White House's concern with the Latina/o and APIA vote might have played is that the Ashcroft initiative has been downplayed. While it is true that the major parties' perceived importance of the Latina/o and APIA vote has played some moderating influence, it is difficult to take comfort from knowing that only extreme actions have been halted while no progress has been made on so many other fronts calling for equity and justice reforms.

D. Going Beyond the Black-White Paradigm

In embarking on creating a meaningful scholarship in the electoral context, LatCrit must construct a concept of race that avoids the pitfalls of falling into Black-White bipolar analyses. Mainstream descriptions of APIA and Latina/o voters - generalizations about their characteristics as voter groups - often fall into the bipolar logic of the Black-White paradigm. These ascriptions and simplistic generalizations parallel the "model minority" pigeon-holing that Asian Americans have experienced in the context of the affirmative action debate. Following are three examples of these simplistic, racialized, generalizations.

[*807]

1. Ethnics not Racial Groups

Professor Peter Schuck, a respected immigration scholar who teaches at Yale, commented on Latina/o and APIA voting power:

Aliens and their ethnic compatriots who are citizens are concentrated in a handful of states. ... In at least some of those states, such as California, Texas, and New York, these ethnic groups, sometimes even including the disenfranchised aliens themselves, exert considerable influence upon local, state, congressional, and even presidential politics. n119

It is hard to understand on what basis Schuck asserts that Latinas/os and APIAs "exert considerable [electoral and political] influence," since he cites no authority and the data indicates the contrary. The fact alone that Proposition 187 passed in California should be sufficient to show how specious Professor Schuck's remark is. The conceptual heavy lifting for this comment comes with a deft rhetorical move, his
2. Racial Hierarchy and the White Ethnic Narrative

Michael Barone, a leading conservative columnist, recently criticized "liberal analysts ... [who] lump together Blacks, Latinos, and Asians." He explains that this occurs:

Because there is an underlying assumption that this is still a country full of white racists and that people whom we classify as being of a different race will share a common experience of racial discrimination. But this is not a racist country anymore, and the discrimination blacks and Latinos most commonly encounter is discrimination in their favor, thanks to racial quotas and preferences and to employers' preferences for hardworking Latino and high-talent Asian workers. n127

In this comment Barone flat out denies that there is any discrimination or racism in the United States, in spite of extensive social science findings to the contrary. In fact the only discrimination Barone believes is experienced in the United States is suffered by "innocent whites" who must withstand affirmative action. n128 Barone is deploying the potential electoral power that he ascribes to Latina/o and APIA voters to reinvigorate the claim of white racial innocence. Because Latinas/os and APIs may exercise some erstwhile electoral power, "this is not a racist country anymore." n129 Latinas/os and APIs are not victims of any past or current racism, but instead are empowered because Latinas/os are "hardworking" n130 (But are they smart?) and APIs are "high-talent" n131 (But are they socially clued in?). Racism exists only because "[White] liberal analysts" n132 want it to exist, not because it actually happens. Individuals suffer individual discrimination; it is a myth that "people whom we classify as being of a different race ... share a common experience of racial discrimination." n133 Under this logic, group claims regarding discrimination [810] or lack of meaningful representation under the Voting Rights Act, should be invalid.

Barone's compliment to Latinas/os and APIs as "hardworking" and "high-talent," n134 although positive, recalls stereotypes, essentializes and positions Asian Americans and Latinas/os in the ambiguous ground of not being White, yet not being Black. n135 This narrative defines race and racial identity oppositionally. Latinas/os and APIs are "ethnic" groups versus the "racial" group that African Americans undoubtedly compose. As opposed to Blacks, Latinas/os and APIs do not vote monolithically or single-mindedly as Democrats. This positions Latinas/os and APIs outside of a racial

categorizing Latinas/os and APIs as "ethnic" rather than racial groups. With this re-labeling, Professor Schuck waves off the history of Jim Crow practices that Latinas/os and APIs suffered in the very states where Professor Schuck claims their "ethnic" vote wields "considerable influence." n126 Congress extended the Voting Rights Act to Latinas/os and APIs premised on its factual findings that Jim Crow practices against Latinas/os in Texas and APIs in California were extensive, and required legal protections. n120 By classifying Latinas/os and APIs as ethnic groups, Professor Schuck instead recalls the success of the Irish "becoming White" by capturing political machinery in major urban centers, like New York and Chicago, within one generation of their settlement during the Great Immigration of 1880-1892. n121 However, Irish Americans never suffered through legalized Jim Crow, and their success in making inroads to political power in urban centers at the turn of the century cannot be replicated given modern electoral structures. n122

Professor Schuck's off-hand comment that the vote of "ethnic compatriots who are citizens" can offset noncitizen discrimination also misunderstands the complex relationship between Latina/o and APIA citizens and noncitizens. There is no identity of political interests between these two groups, and increasingly there is evidence of deep cleavages between the two. n123 Consolidating such diverse groups and homogenizing them into a monolithic coalition through rhetorical labeling is a form of essentializing that minimizes the American-ness of "ethnic compatriots," and erases the subordination of Latina/o noncitizens. Moreover, rhetorical labeling dismisses serious scholarly arguments that Latina/o and APIA noncitizens should be viewed as an insular minority. n124

The manipulation of race versus ethnic ascriptions "whitens" Latinas/os and APIs. Racial discrimination, structural subordination, and unconscious transactional stereotyping are erased. The ethnic ascription causes Latinas/os and APIs to disappear in the context of discussions about Jim Crow laws. n125 They are converted from racial minorities worthy of more exacting judicial review under the theory of Caroleen Products to just another interest group that is struggling for political power and influence and thus worthy of only rational basis scrutiny in judicial review. n126 The model minority rhetoric makes it possible for legal scholars and courts to minimize, and even ignore, Latinas/os and APIs' civil rights and anti-subordination claims.

[*809]

2. Racial Hierarchy and the White Ethnic Narrative
dialogue. As Professor Bob Chang has described, this is a "complimentary facade ... [that] works a dual harm by (1) denying the existence of present-day discrimination against Asian Americans and the present-day effects of past discrimination, and (2) legitimizing the oppression of other racial minorities and poor Whites." n136 The immigrant narrative as applied to Latinas/os and APIAs brings them inside the value system of the white ethnic narrative, the dominant cultural narrative in our country, n137 but also hides some hard truths about racial politics and political inequities.

3. Model Minorities: Stereotyping and Essentializing

Feng, Aoki, and Ikegami's contribution expressly rejects any model minority stereotyping that might be ascribed to the activist efforts of the Coalition of Asian Pacific Americans for Fair Redistricting (CAPAFR) in the 2000 California redistricting effort,n138 which they document in their Symposium contribution. Their article captures a moment when California assemblyman John Longville complimented the APIA community's efforts in [*811] California's redistricting battle, which subtly alludes to APIAs as a model minority:

I must commend you for the extraordinary job that CAPAFR has done ... there is no individual or organization that has come forward with such an extraordinarily well done amount of research and clear obvious efforts to reach out and work out problems ... I want to commend you for the extraordinary effort. ... Recognizing that lawyers will see different things, it's obvious you've done some extraordinary work. ... We greatly appreciate the work you've done.n139

CAPAFR might well have done extraordinary work in its political redistricting efforts. I am not disputing this. What I find striking about Longville's well-meaning statement is that in a 100-word compliment, Longville used the term "extraordinary" four times and "job," "work," or "effort" seven times. His choice of words conveys that CAPAFR and APIAs are extraordinarily hard workers who are conciliatory, not confrontative. These terms recall Asian American stereotypes that have in other conversations positioned them as a model minority.

Essentializing Asian Americans as helpful, hardworking, and consensus driven is a form of racial positioning. What this complimentary stereotyping leaves unsaid is that Asian Americans are more like Whites because of essentialized qualities, for Longville, "extraordinarily" well-prepared and hard working, and for Barone, "high talent." The unstated comparison might be to African Americans, whose essentialized oppositional qualities in this context might be lazy and overly confrontative. This unstated comparison works only because "everyone knows" the stereotypes that are ascribed to African Americans. Hence, essentializing and over-complimentary rhetoric does the work of whitening Asian Americans. Placing Asian Americans as a group close to Whites, however, does not necessarily mean that they are beyond or outside of the Black-White paradigm, only that by placing them in proximity to White values and the meta-White ethnic narrative of hard work and success, African Americans and other groups are less worthy (i.e., unable to succeed by the rules that apply to all and that Asian Americans have been able to do well by playing by the rules).n140

[*812] In sum, no context can escape conscious and unconscious race talk. The electoral context is no exception. These critiques point to the hard work that LatCrit faces in forming a rigorous scholarship around voting rights and electoral politics. Building a theoretical framework that moves beyond the Black-White paradigmn141 in the context of electoral process and voting rights might entail the following.

1. Reconstructing Jim Crow. As the civil rights era increasingly becomes a distant memory to young Americans, it becomes increasingly important for LatCrit scholars to document the Jim Crow practices against Latinas/os and APIAs in the electoral context.n142 As Juan Perea, Angela Harris, Richard Delgado, and Stephanie Wildman suggest in their Race and Races textbook, n143 documenting historical racist practices is a necessary project in order to find out just what is "looking to the bottom." The Black-White paradigm erases Jim Crow practices against Latinas/os and APIAs. n144 However, historical research re-establishes historical and structural racism against Latinas/os and APIAs.

2. Deconstructing the Model Minority Myth. The ephemeral potential power of the Latina/o and APIA electorate has become a new political wisdom that is working mischief at various levels. From a racial analysis perspective, LatCrit must engage in the same activism that APIA crit colleagues, Bob Chang, Lisa Ikemoto, Frank Wu, Pat Chew, and Neil Gotanda have engaged in: publicly and vigorously critiquing the model minority myth as applied to APIAs in the affirmative action context.n145 Such rhetoric legitimizes and redeployes (thus re-legitimizing for modern [*813] ears) White supremacist narratives. Latinas/os are not accustomed to being treated as a model minority. However, public commentary on the
potential Latina/o electorate needs to be debunked as part of the LatCrit project.

From a civil rights perspective, the small victories gained by Latina/o and APIA political activism are being turned into "proof" that civil rights remedies for Latinas/os and APIAs are no longer pressing or necessary. The recent Voting Rights Act case, Cano v. Davis, denied relief to the Mexican American Legal Defense and Educational Fund's (MALDEF) claim that the new California districting plan underrepresented Latinas/os. The court was persuaded that the requirements of the Voting Rights Act were not met because there has been increased representation of Latinas/os in California. The court also found that the new districts were "remarkably diverse multi-racial and multi-ethnic." The court seemed to view the small gains in Latina/o representation as evidence that further remedies under civil rights laws were not warranted. The court never referred to the higher (and more ephemeral) standard of Reynolds v. Sims whether Latinas/os were "meaningfully represented." As Johnson, Feng, Aoki, and Ikegami note, Cano v. Davis raises important and pressing issues to which LatCrit scholarship must respond.

3. What's in a name? Pan-racial identities like Latina/o and APIA are a necessary shorthand that rhetorically concentrates claims for civil rights activism, but nevertheless obscure the extent to which each individual group is "raced" or subordinated in the context of voting rights issues. A central tenet in LatCrit racial theory is its commitment to anti-essentialism. Fully exploring how class, gender, sexual orientation, and race interweave and cross-construct racialization has been a key tool to balance the essentialist tendencies.

From a civil rights perspective, lumping various Latina/o and APIA subgroups into the pan-racial identity obscures valid civil rights claims. For example, in South Florida, Central Americans and Puerto Ricans have managed to elect only one representative to the state legislature. Until this year, Latina/o representation in Florida was all Cuban American. Yet it cannot be assumed that one Latina/o national origin group will have an identity of interests with another. An overwhelming majority of Latinas/os (eighty-three percent) report that Latino-on-Latino discrimination occurs based on country of origin. As Dean Kevin Johnson notes, a key area of scholarly inquiry should be whether Latinas/os and APIAs of different origin should be classified as monolithic for purposes of Voting Rights remedies and Equal Protection claims.

II

Joining Anti-Subordination Theory and the Civil Rights Agenda: Exclusion from Political Participation

The denial of the vote in national elections to an estimated seventeen to twenty-two million Latinas/os and APIAs residing in this country is a key civil rights and anti-subordination issue. There is no exact number of how many Latinas/os and APIAs who cannot vote but yet are long-term settled residents and citizens of the United States. This is because the U.S. Census Bureau has consistently undercounted minorities and also has been unable to come up with an exact count of undocumented workers. Nevertheless, estimates have shown consistently that the number of Latinas/os and APIAs who are settled in the United States and view the United States as their home is far higher than the number who actually vote.

The first component of the estimate are the thirteen to eighteen million Latinas/os and APIAs who cannot vote because they are foreign born and have not become U.S. citizens. Census data is not broken out for these categories. However, census data do reflect the proportion of Latinas/os (12.8 million or 39% of total) and APIAs (6.7 million or 61% of total) who are foreign born. Of the total 33 million Latinas/os who reside in this country, between 29% (Census) and 42% (Pew estimate) are noncitizens, equalling between 9.5 and 14 million Latinas/os. Among the 10.9 million APIAs, the percentage of foreign born noncitizens is 33% (Census), or over 3.5 million. Noncitizens cannot vote since no state grants them the right of suffrage in state and national elections.

The second component of this number are the four million Latina/o U.S. citizens who reside in Puerto Rico and the APIA citizens who reside in American Samoa, Guam, and Northern Marianna Islands. As the result of these areas' legal status as unincorporated territories, U.S. citizens who reside there cannot vote in national elections.

This is not the sum total of persons of color in the United States who are disenfranchised because of various legal barriers. Most notably, about 600,000 residents of Washington, D.C., of which around 70%, or about 400,000, are African Americans and Latina/o who have no representation in national elections. In Adams v. Clinton, the district court concluded that only state citizens are accorded the right to representation in Congress and the right to vote for the President. In addition, in most states
undocumented are to the economy of Southern California. Associate Dean Chris Cameron has described how important the undocumented are to the economy of Southern California. A recent study commissioned by the Business Round Table concludes that immigrant labor force accounts for eight of ten new male workers entering the American labor force, and fifteen percent of the American labor force in the decade of 1990 to 2000. Without foreign born workers the U.S. economy would have faltered, and become stagnated during the boom 1990s. Some of these new workers are documented; however, estimates show that between eight to ten million are undocumented immigrants.

Foreign immigration is geographically skewed. In California, one in four residents are foreign born; in New York, one in five. In the Northeast, had it not been for immigration, industries would not have been able to fill the jobs fueled by economic growth.

The U.S. Constitution does not guarantee U.S. citizens the right to vote, neither does it bar noncitizens from voting. In Reynolds v. Sims, Chief Justice Warren emphasized that it was "state legislatures [that] are, historically, the fountainhead of representative government in this country." In Skafe v. Rorex, the Court rejected a claim that denial of the franchise to noncitizens violates the Equal Protection guarantee.

The choice to bar noncitizens from voting has been made by states. In 2003, no state permits noncitizens to vote in national or state elections; however, a handful of jurisdictions allow noncitizens to vote in local elections. Scholarly work has documented that this has not always been the case. At the turn of the century, Midwestern states like Illinois, Missouri, Wisconsin, and Nebraska granted (male) noncitizen settlers the right to vote.

The argument for the noncitizen vote is based on liberal and communitarian principles. Those who contribute to the polity and live within and form part of local communities should be treated as members of that community. Noncitizens who live and work in U.S. communities are subject to the U.S. sovereign's authority. They contribute to the government by paying taxes (sales tax, property tax, and often social security tax). The right to self-determination, which informs the Declaration of Independence, dictates that those who are subject to U.S. sovereign authority should have a voice in determining their government through the election of their representatives. The exclusion of up to thirteen million noncitizen Latinas/os and APIAs from having a voice in representative government has little justification in liberal theory or in natural rights principles. Rather, exclusion is how historically the legal system has perpetuated status inequality and subordination.

In a well-reasoned student note, April Chung has argued that the ongoing exclusion from the political sphere of so many noncitizen, local community members who work, reside, and contribute, distorts the political process and makes it unfair. The self-interested impulse of current electorates is to preserve their power by fighting off expansion to the disenfranchised because this means dilution of their own vote. As April Chung explains, "because noncitizens cannot vote, citizens' votes proportionately increase in value. Citizens then have greater power [by denying noncitizens any participation in the electoral process] to shift societal or economic burdens onto noncitizens." Professor de la Garza argues as well that granting immigrants the right to vote would empower their communities and encourage greater connection to American society. Professor Alex Aleinikoff has argued that liberal principles militate for settled immigrants being able to vote, at the very least in local elections, to enhance local communities. Professor Klaman would have courts police self-interested majoritarian actions when they entrench present majorities and do not reflect the changes in the current polis.

Associate Dean Kevin Johnson and Professor Klaman have also argued that judicial intervention on behalf of disenfranchized noncitizens is justified based on the legal process rationale presented in United States v. Carolene Products Co. Noncitizens are the classic case of a discrete and insular group because they do not have a political voice and yet are the target of legislative actions that subordinate their status or shift to them the costs of social programs enjoyed by citizens.

As Kevin Johnson notes, the theoretical arguments have remained just that, theoretical rather than prevailing through the inherent logic of American
democratic principles, as Professor Shklar predicted more optimistically (and perhaps with a much longer time frame in mind). n198 Arbitrary legal constructions of citizenship have legitimized these exclusions and obfuscated that the judgments as to who has a political voice are in part made on race, gender, and class stratifications. This has led to the current state of affairs, that among Latinas/os, three in eight, n199 and among APIAs, one in three, are silenced electorally. n200 This is an astoundingly high proportion and a major component of the Latina/o and APIA community in the United States.

B. Puerto Rico: One Hundred Years of Standing Outside the Looking Glass

Under the legal doctrine constructing the citizenship of Puerto Rico in the Insular Cases in the early 1900s,n201 Puerto Rican U.S. citizens cannot participate in the American democratic polity, but nonetheless are subject to U.S. sovereignty. As Judge Torruella explained in his concurrence to Igartua De La Rosa v. United States:

This anomalous situation arises primarily as a result of the decisions of the Supreme Court in the Insular Cases, which established as early as 1901 the plenary power of Congress over Puerto Rico under the so-called "territorial" clause of the Constitution. In a series of narrowly divided decisions, the Court held that Puerto Rico was an "unincorporated territory," ... and as a result part of the United States for some purposes and not for others. ... In Balzac v. Porto Rico, [the Supreme Court] established the inferior nature of the United States citizenship held by residents of Puerto Rico by concluding that the Constitution's protection of these new citizens was limited to those rights deemed by the Court to be "fundamental." n202

Under this line of cases, a Puerto Rican citizen cannot renounce her U.S. citizenship,n203 yet her U.S. citizenship gives her no say in national elections. n204 This doctrine has survived for more than one hundred years. n205 Congress has at various times under both Republican and Democratic administrations considered Puerto Rico's status, but the results have always been a stalemate. There are structural reasons for this. The theory of [*822] entrenchment,n206 for example, explains why Republicans have put up opposition, most often cast in the form of cultural arguments (i.e., "but Puerto Ricans speak Spanish, not English"). Republicans have tended to view Puerto Rico as a likely Democratic state, because Puerto Ricans in mainland elections have voted mostly Democratic. n207 If mainland political behavior were to hold true on the Island (this is not necessarily the case), Puerto Rico would have two Democratic Senators and would have voted Democratic in the Presidential elections, which means that the current Republican sweep would not have taken place. As well, process theory explains inaction. Puerto Ricans have no vote in Congress. Their interests are not represented in the give and take of political dealmaking. They therefore have been ignored in "one hundred years of solitude." n208

Igartua II challenged the electoral status quo in the 2000 elections based on constitutional grounds.n209 The plaintiffs and the Commonwealth of Puerto Rico, as intervenor, lost their constitutional arguments. n210 The concurring opinion, however, elicited from Judge Torruella, who was born in Puerto Rico and is a scholar of Puerto Rico's territorial relationship with the United States, set forth an eloquent argument as to why this electoral lack of voice demands redress:

In this 211th year of the United States Constitution, and 102nd year of United States presence in Puerto Rico, United States citizenship must mean more than merely the freedom to travel to and from the United States. [Federal] citizenship should not, cannot, be devalued to such a low scale. ... The national disenfranchisement of these citizens ensures that they will never be able, through the political processes, to rectify the denial of their civil rights in those very political processes. This uninterrupted condition clearly provides solid basis for [*823] judicial intervention at some point, one for which there is resounding precedent. See Brown v. Board of Education. ...

The perpetuation of this colonial condition runs against the very principles upon which this Nation was founded. Indefinite colonial rule by the United States is not something that was contemplated by the Founding Fathers nor authorizedn211 ... It is time to serve notice upon the political branches of government that it is incumbent upon them, in the first instance, to take appropriate steps to correct what amounts to an outrageous disregard for the rights of a substantial segment of its citizenry. n212

Unfortunately, at this time Judge Torruella is clearly a minority voice on the federal bench.

C. Moving Beyond the Black-White Paradigm

In the context of exclusion of around twenty million Latinas/os and APIAs from the electoral process, moving beyond the Black-White paradigm means raising consciousness. First, LatCrit scholarship should
continue to document the legalisms and racial history that give rise to such extensive exclusion. Second, LatCrit work should humanize the silencing of so many voices.

1. A "Non-starter" Conversation or a Scholarly Agenda?

It is extremely important to both the LatCrit anti-subordination project and its activist agenda to make the electoral exclusion of millions of Latinas/os and APIAs part of an active conversation within LatCrit and the legal community that LatCrit inhabits. No single action would politically empower Latinas/os and APIAs more.

Professor Sanford Levinson has written that academic constitutional theorists skirt important structural issues that are viewed as "hard-wired," because academics do not believe it is worth their time to make arguments that they believe will not eventually win out in courts.n213 As Levinson himself recognizes, ignoring "hard-wired" constitutional features is at "our peril," and "risks ... betrayal of the very principles that we like to say that the Constitution espouses." n214 The lack of electoral voice by noncitizens and Puerto Rico's political exclusion as an "unincorporated territory" are examples of "hard-wired" structural issues that mainstream academics, with notable exceptions,n215 have ignored.

The anti-subordination mission of LatCrit places LatCrit scholars at the center of discussing the "hard-wired" features that perpetuate civil rights and political subordination of millions of Latinas/os and APIAs. Still, LatCrit scholarship has not fully turned its attention to the issue of noncitizen exclusion, with the notable exception of Kevin Johnson's work.n216 This focus is important simply because of the sheer size of the excluded population - close to ten million as posited by this Article. Latinas/os and APIAs will remain a potential electoral voice unless structural issues are addressed. Judge Torruella and other LatCrit theorists have written eloquently as to why the legal doctrine of unincorporated territories, now over a century old and rooted in outdated ideas of conquest and possession of the non-civilized by those who are "civilized," should be repudiated.n217 The contributions to this Symposium by Pedro Malavet and Ediberto Roman testify that LatCrit scholarship maintains focused on Puerto Rico structural exclusion and racial constructions.n218 As well, as Pedro Malavet has encouraged, LatCrit conferences should continue to focus on Puerto Rico as part of its consciousness-raising and community building efforts.

2. Humanizing Exclusion

Associate Dean Kevin Johnson suggests that the route to political empowerment of noncitizens lies in humanizing them.n219 The term "illegal alien" makes it easy to demonize and make them the "other." Johnson proposes that LatCrit scholars use narratives to show how difficult the life of undocumented and noncitizen workers are and yet show the common human predicaments that they share with the majority citizen population.n220 Elsewhere in this Symposium, I have suggested that organizing conferences around the issue of rapid immigration into areas like the Midwest and rural South, which are not accustomed to Latina/o settlements, is an important activist and scholarly tool that humanizes the Latina/o immigrant, noncitizen, and undocumented worker.n221 Local conferences can become outreach and community building loci for the very mission that Johnson proposes. Regardless of the method, the critical point is that LatCrit's consciousness-raising efforts must also involve community building. n222

III

Latina/o and APIA Elections in 2002: A Glass Half-Full or Half-Empty?

The jury is still out as to whether the 2002 elections empowered the Latina/o and APIA community or came up short of the anticipated "Crouching Jaguar, Hidden Dragon"n223 power that minority merchants foretell. This Part (1) sums up election results, (2) asks why progress has been so slow given redistricting activism, (3) reviews the experiences in key electoral campaigns, and (4) discusses minority voter turnout.

The last Part of this section returns to the central question of this Article, what does it mean, in the context of the electoral results post 2000, to move beyond the Black-White paradigm.

A. Summing Up Election Results: Is the glass half-full or half-empty? You be the judge.

1. The Glass is Half-Full

The 2002 elections saw important electoral gains for Latina/o elected representatives. Democrat Bill Richardson, a Mexican American, was elected governor of New Mexico; the prior Latino New Mexican governor had been elected two decades ago. In California, Lieutenant Governor Cruz Bustamente was re-elected. Sylvia Garcia became the first Latina elected to serve on the Commissioner's Court in Harris County (Houston), Texas. Christine Baca became the first Latina elected to the Colorado State Board of Education.n224 In Oregon, LatCrit keynote
speaker Susan Castillo became Oregon's first Latina Superintendent of Schools. In Nevada, Republican Brian Sandoval was elected state Attorney General.

At a national level, representation in the U.S. Congress increased by four more representatives. There are now twenty-two Latinas/os in the House of Representatives. No additional APIA representative was elected to either the House or Senate, so APIA representatives in the House remains at four. One additional African American was elected to the House of Representatives, for a total of thirty-seven.

2. The Glass is Half-Empty

The 2002 elections for national office followed the historical pattern that a minority candidate cannot get elected to Congress unless the district in which she is competing is at least a majority minority. In the four 2002 races where Latinas/os were elected to the House of Representatives, the district was a majority Latina/o district. In California, the Democratic-controlled state legislature created a Latina/o majority 39th district that elected Linda Sanchez, and in a very close election, elected Dennis Cardoza in the 18th District to the House of Representatives. In Florida, the Republican-controlled state legislature carved out a seat that went to Mario Diaz-Balart, a Cuban American Republican from south Florida. Arizona created the 7th District seat that handily elected Democrat Raul Grijalva to the House.

In California, where Latinas/os and APIAs together make up the majority population, their representation in state and local government remains marginal although great improvements have been made. Only five APIAs have seats in the California state legislature. In Los Angeles, one Latina/o gained a seat to the City Assembly, but only after Voting Rights Act litigation waged by MALDEF precipitated restructuring of the representational scheme. As Feng, Aoki, and Ikegami note, some APIA communities, like Los Angeles' Koreatown, have been divided for generations and their state and national representation have been fragmented.

The demographic explosion of Latinas/os and APIAs has not translated into greater representation by Latina/o and APIA elected representatives at the national level. The 2002 gains in elected representatives were small given the forty-eight percent and fifty-eight percent growth of Latinas/os and APIAs, respectively, since the last decennial redistricting. According to a recent study compiled by Kim Geron and James Lai, the total number of Latina/o and APIA elected officials, at all levels of government stands at one percent of the nation's 513,200 elected officials.

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B. Why So Slow?: Drawing District Lines

If fair representation of minority interests requires the election of ethnic and racial representatives, then the 2002 elections presage a grim future.

Latinas/os and APIAs were better organized than in previous rounds, having gained experienced in litigating under the Voting Rights Acts and having been involved in the political redistricting battles of the 1990s. However, the net gain in electoral districts where a Latina/o or APIA can be elected remains small. While the Latina/o population grew by eighteen million since the last decennial census, there were only four more elected Latina/o representatives to Congress. APIAs, which grew by four million, did not increase their representation in Congress.

The key to electing more minority representatives to Congress (descriptive representation) lies in drawing district lines that will favor minority candidates. The key instrument to getting this done has been the Voting Rights Act.

As Feng, Aoki, and Ikegami document, the Voting Rights Act has eliminated barriers to voting, like poll taxes, monolingual ballots, and racial gerrymandering. However, even though the Voting Rights Act has been instrumental in carrying out majority minority districts, it still has not resulted in a significant increase in the election of minority candidates. The Voting Rights Act tests are difficult to meet and to show that a violation has occurred where minority voter power exists has been diluted. Increasingly, as the recent case of Cano v. Davis discussed in Part I.D. shows, the federal bench is applying logic about minority group representation that will make it even more difficult for minority groups to obtain judicial relief.

Finally the Shaw v. Reno doctrine nullifies districts that the court finds have been drawn with primarily color-consciousness motivation.

The redistricting process in state legislatures is full of political and legal landmines. The effort to draw districts that have enough members of any one minority group to meet the threshold where they can directly elect a representative and exert policy influence is tricky. Districting has to balance between concentrating enough persons of a minority group so that it is sufficiently minority and other political interests, like ensuring that incumbents are re-
elected or that Democrats/Republicans continue to hold on to electoral power, plus avoid legal restrictions, mainly the Shaw v. Reno prohibition against racial gerrymandering. Districting may set off an interracial and intergroup conflict in which one minority group vies against the other to further its claim to representation. n249

In their Symposium contribution, Feng, Aoki, and Ikegami illustrate the difficulty of this process in California. They credit a strong alliance with MALDEF and close work with state Representative Judy Chu, for CAPAFR's ability to preserve Assembly District 49, which Ms. Chu represented. They also credit state Representative George Nakano's membership in the Committee for Elections and Reapportionment as key to their advocacy efforts. n250

CAPAFR worked closely with the four APIA state representatives. This stands in sharp contrast to the sharp rebuke suffered by MALDEF at the pen of Martha Escutia, who represented the 30th District and Gloria Romero, who represented the 24th District in the state senate. In an editorial in the Los Angeles Times, Representatives Escutia and Romero accused MALDEF of playing racial politics that were divisive, being single-mindedly focused on race and not broader "American values" (presumably voting for the most qualified candidate whether white, African American or Latina/o), sponsoring a plan that undermined the districts of Latina/o representatives, and being single-mindedly focused on numbers rather than broader coalitional justice-based goals. n251 These Latina representatives had reason to be irate, since in the redistricting process they found themselves in districts where their runs for reelection would be difficult.

At the same time that civil rights groups focused on increasing minority representation must navigate the treacherous sea of minority politics, they also must fight the entrenched interests in state houses. It is increasingly clear that the primary goal in redistricting is to ensure the continuing electability of incumbents, whether White, Brown, Yellow, or Black. n252 Such a system is closed to change, whether it is to turn out entrenched, ineffective, and self-interested representatives or to open up the electoral system to increase minority representation.

C. Why So Slow?: Campaigning in Racially Polarized Environments

In The Tyranny of the Majority, Lani Guinier observes:

Where voting is racially polarized those [minorities] who support the winning candidate enjoy minimal influence as a swing vote. [Minority] voters may help determine which candidate gets elected, but the successful candidate must first be one who started out with white support. Moreover, once in office, [minority] voters' influence on that candidate's performance is [831] questionable. In a racially polarized environment, white officials are often unaware of [minority] voters' decisive impact or deliberately ignore it because of even more decisive white support. As a consequence, it is hard to imagine a racially stigmatized minority, whatever its size, exercising genuine influence in a racially polarized winner-take-all [election]. n253

According to Guinier's theory, minority candidates will win so long as they are able to keep race nonsalient during their campaigns. This is a difficult task because race is salient by the very fact that the candidate is a person of color. As LatCrit keynote speaker Susan Castillo notes, "We're beginning to emerge on the political scene, but we're still the underdogs." n254 The 2002 elections bear this out.

1. The Glass is Half-Full: Minority Candidates Win in Non-Treaty of Guadalupe States

The good news in this electoral cycle was primarily in the state races where various Latina/o candidates won statewide office with White voter support. The bad news is that Republican opponents who had reason to worry about their candidacies were easily able to racially polarize the electorate, and handily defeat their minority challenges.

a. Victories in Non-Treaty of Guadalupe States

Nationwide, thirteen additional Latina/o state lawmakers were elected in 2002, an increase to 217 of about 6500 state lawmakers. n255 Georgia elected three Latinos, Sam Zamarripa, Pedro Marin, and David Casas to the state house of representatives. Maryland elected the first Latina/o lawmakers to the House of Delegates, including Democrat Ana Sol Gutierrez from Montgomery County who focused her campaign on getting out the vote of Latino voters. n256 Massachusetts elected former state Representative Jarrett Barrios as that state's first Latino state senator, and Jeffrey Sanchez to the state house in a new state legislative district that covers Jamaica Plain, Mission Hill, and part of Brookline. n257

b. Oregon: A Predominantly White State Elects a Latina
In May 2002, LatCrit keynote speaker Susan Castillo became Oregon's new school superintendent, garnering fifty-five percent of the vote and winning in nearly every Oregon county, with especially strong support in Eugene and Portland. n258 Susan Castillo attributed her win to her positive message about public schools, a well-thought program to revitalize school financing, and image recognition due to her former career as a local television reporter. n259 Nonetheless, Castillo bucked strong odds. Oregon is only eight percent Latina/o. n260 She was outspent by her Republican opponent, $ 250,000 versus $ 175,000, a record in what is purportedly a nonpartisan race. n261 Finally, she had to neutralize racist comments made by two conservative commentators on a local radio program who questioned whether she could be a U.S. citizen "with a name like Castillo." n262 The foreigner stereotype did not stick. Instead, her hard work garnered the support of school organizations, like the state teachers union, and the image she had built as a reporter countered the racial stereotype. n263

2. The Glass is Half-Empty: Minority Candidates in Racially Polarized Environments

By contrast to these positive results, in closely watched races in Texas and California, Latina/o conteststs lost big. Minority civil rights activists were hopeful that history would be made in two races, the 2000 Los Angeles Mayoral race where long time politician, Antonio Villaraigosa, was running for mayor, and the 2002 Senate and gubernatorial Texas race where the Democratic slate offered Tony Sanchez, a Latino businessman from El Paso, and Ron Kirk, Dallas' African American mayor, a candidacy position. In both contests the minority candidates lost because the race became racially polarized. Media campaigns were able to link the minority candidates to racial stereotypes and stirred up racial feelings among white voters. When politics becomes racially polarized, minority candidates and issues almost always lose. n264

a. The "Dream Team" Goes Down

In Texas, the dream team of Tony Sanchez and Ron Kirk was trounced. Sanchez, a blue-eyed, white-skinned, Latino businessman from the border area spent $ 59 million on the campaign. n265 He lost to Governor Rick Perry by the widest margin of any Democratic candidate standing for statewide office, more than 800,000 votes for a seventeen point spread, fifty-eight percent to forty percent. n266 Ron Kirk fell to Republican John Cornyn, fifty-five percent to forty-three percent, a twelve point difference. n267 The (White) Republican sweep was so great that Texas Democrats, for the first time in four decades, lost control of the Texas House of Representatives. n268 In the ashes of defeat, the kindest commentary that could be mustered in favor of the "dream team" was that it "was a good idea but just premature." n269

The margin of seventeen points by which Sanchez lost to Rick Perry was a political trouncing. Rick Perry was a lackluster candidate, someone who had never managed to come out of George W. Bush's shadow. But Rick Perry played the race card. n270 Perry managed to racially polarize Texas voters with hard hitting ads that raised the stereotype that Sanchez's fortune was garnered through illegal activity. n271 Perry's ads featured the following narrative: "Tony Sanchez wants to run Texas like his businesses. But after Sanchez's bank was used to launder drug money, his bank failed." n272

This ad suggesting that Sanchez's savings and loan laundered money from Mexican drug lords ran repeatedly in the campaign's final days. n273 Political analysts view the defection of fifteen percent of Texas white Democrats, who might have been racially influenced by the drug dealer stereotype, to Perry as key to Sanchez's defeat. n274

Ron Kirk, the Senate candidate, denies that race played a factor in his defeat, "Texas may not be ready to elect a black, but this year America didn't like any Democrats - didn't like them black, didn't like them white ... . We did not lose this race because of racism." n275 But race did play a role, in both the White and Latina/o communities. Whites predictably reacted negatively to Sanchez when he was linked to the Latino criminal stereotype, n276 and Kirk's linkage to Sanchez turned off the white liberal support he had enjoyed in the past. While Kirk managed to pull more white Democrats than Sanchez, he was unable to attract the Latina/o vote that came out in support of Sanchez. n277 Latinos/Hispanics in Texas supported one of their own, Tony Sanchez, but were not willing to engage in coalitional politics with African American voters, perhaps because Democrats and Kirk supporters failed to do the grassroots work that makes coalitions happen. n278

[*835]*

b. Villaraigosa's 2000 Bid to Become Los Angeles' Mayor

Kevin Johnson, in his Symposium contribution, describes the failure of Antonio Villaraigosa's historic run for mayor of Los Angeles in 2000. n279 As described by Kevin Johnson, a key factor in Villaraigosa's defeat were race-baiting ads run by his Republican opponent, James Hahn, which featured the
high turnout by increasingly staunchly Republican McClellan and Carnahan. The disaffection and the Republicans of the two Senate seats up for grabs, weak African American support meant a sweep by In the close Senate contests in Missouri and Georgia, weak African American support meant a sweep by Republicans of the two Senate seats up for grabs, McClellan and Carnahan. The disaffection and the high turnout by increasingly staunchly Republican white males caused a complete turnover of the control of the Missouri and Georgia state legislature to Republicans, and a loss by Roy Barnes in his bid for reelection in the governor's race in Georgia. In California, according to Los Angeles Times exit polls, Latinos/os share of the vote dropped to ten percent, the lowest since the early 1990s. Meanwhile, the white share of the California vote went up, from sixty-four percent to seventy-six percent. As a consequence, the margin of Governor Grey Davis' victory was much closer than expected.

Democrats have only themselves to blame. Governor Roy Barnes, who boasted of his bonds to the African American community [*837] may have failed to sufficiently motivate his supporters to go vote. According to recent surveys, African American voters turned out in the election at prior levels, but failed to detect major differences between the two parties' policy positions. In Maryland, gubernatorial candidate Kathleen Kennedy Townsend did not tether her reelection to attractive minority candidates, but instead attacked her Republican opponent for choosing an African American running partner as lieutenant governor. In Missouri, Senator Jean Carnahan, who won in 2000 by a slim margin thanks to the African American vote in St. Louis, portrayed herself as a unifying and inclusive leader who won the hearts and minds of African American voters. Carnahan's campaign focused on issues like education, healthcare, and jobs, and she was supported by a strong ground game and targeted advertising that emphasized her commitment to civil rights and social justice. Her message resonated with African American voters, who had shown a strong preference for candidates who shared their values and represented their interests.

In California, Governor Gray Davis vetoed an important civil rights bill that would have offered undocumented workers greater access to drivers licenses only weeks prior to the election. Latina/o state legislators had worked hard with Davis to craft a bill, but at the last moment, Davis vetoed it, citing his concern for homeland security grounds. Latina/o state legislators questioned Davis' support of the Latina/o community. Nevertheless, during the last weeks Davis campaigned hard among Latina/o and APIA voters, attempting to reassure them that his veto was genuine due to his concern for security issues and did not [*838] undermine his support of the community. Latina/o voters, he pleaded, should consider his overall record. The minority vote in California was crucial to Davis' reelection. But minority voters remained skeptical, and his support was noticeably less enthusiastic than four years ago. Exit polls showed that APIA voters supported Davis, but remained wary of his future stance on immigration issues.
like African American voters, are currently giving Davis overwhelming negative job ratings. n300

The game of trying to appeal to the middle is fraught with danger. The cost to both parties, but particularly to Democrats, of continuing to play electoral politics as if it were a "White middle-class only" game n301 is that voter turnout becomes the equivalent of a huge snore, and voters become confused as to which party has their interests at heart.

E. Moving Beyond the Black-White Paradigm

As discussed in Parts III.A through III.D, the post-2000 elections raise a catalog of issues on what it might mean to move beyond the Black-White paradigm in the context of electoral process and minority representation.

1. (Minority) Representational Theory

Law scholars talk about the political and legislative process using three principal models, deliberative or Madisonian process theory, public choice theory, and institutionalism. n302 Theoretical [*839] work within LatCrit scholarship should focus on how each of these models explains (or do not) the underrepresentation of minority voices in the political system. This critical theory work has already begun n303 but because politics and the legal process are ever-changing, continuing critical inquiry is needed to further refine seminal work. In addition, empirical work by political scientists has brought out challenging paradoxes. Joining theory, empirical investigation and doctrinal critique should inform civil rights efforts. For example, issues that litigants must answer under Voting Rights Act claims, such as what might constitute a vote dilution claim and what it means for a minority group to have "meaningful representation," can be informed by the critical work done in representational theory and the insights that political scientists have drawn from their empirical work.

Another area of inquiry that moves the conversation beyond the Black-and-White closed circle is signaled by the sobering questions raised in the Symposium contributions. First, Kevin Johnson asks whether it is necessary to have more elected minority representatives in order for racial minorities to achieve "meaningful representation." n304 Second, Johnson, Feng, Aoki, and Ikegami trenchantly raise the specter that minority representatives might become another "cog" in the political machinery of entrenched incumbents who are consumed by self-interest and further political agendas that benefit only insiders. n305 Political scientists have raised other tough issues. Professor Lublin finds that the process of drawing district lines to assure greater minority representation, also undermines the likelihood of substantive policies that favor minority communities will be enacted. n306 Other works predict that a Latina/o and APIAs discursive representation will continue to be minimal because, at this point, there are not many more potential majority-minority districts that can be carved out. n307 Hero and Tolbert find that Latina/o influence [*840] on non-Latina/o elected U.S. Representatives was virtually nonexistent, however, on key issues important to the Latina/o community, such interests were well represented by a Democratically controlled Congress. n308 These questions and paradoxes raise issues of identity, agency, and authenticity, which have been at the center of critical race and LaCrit theory inquiry. n309 The intersection of identity theory and political process/representative theory promises insights useful to the kinds of question that courts, like in Cano v. Davis, are currently raising in Voting Rights Act litigation. n310

Finally, both Symposium contributions raise a broader question, just how much does the minority vote matter if it is a "swing vote" for major party candidates, who as Professor Lanier notes, may be "unaware of [minority voters] decisive impact or deliberately ignore it because of even more decisive white support." n311 Moreover, just how relevant can the Latina/o and APIA vote be in a two-party system that favors incumbents and neutralizes newcomers? These questions seem to be at odds with the civil rights activism of informing elected officials and the public that minority voters are playing a deciding role in elections. How does "swing voter" influence translate into progressive politics? These are difficult questions, but they should be answered since they bring into sharp focus the tension in critical inquiry and civil rights aspirations.

2. The Politics of Redistricting

a. Incumbency Protection Plans?

Prior to the elections, the Congressional Hispanic Caucus Chairman, Rep. Silvestre Reyes, believed that there was a possibility of increasing the Latina/o representation by "about six to 10 possibilities." n312 The actual net gain, post-2000 redistricting, was four. Larry Gonzalez, Washington director of NALEO, [*841] summed up this disappointing result by describing states' redistricting as "incumbent protection plans." n313 Incumbency, n314 in combination with campaign financing n315 and a two-party political system, n316 are major structural factors that militate
against major changes in the satus quo. Moving beyond "Black and White" politics means exploring these structural issues of entrenchment, as well as focusing on possible coalitions with the grassroots interests that oppose entrenchment politics and a decade ago passed term-limit initiatives in many states.

b. The Hard Work of Coalition Politics

Feng, Aoki, and Ikegami have made a significant contribution to understanding the law and politics of redistricting with their Symposium article. There are valuable lessons to be drawn for political activism that goes beyond Black and White politics. First, CAPAFR organized early and was focused on its objectives. Although not lavishly funded, they expended resources to engage in high-level conversations necessary to represent the interests of APIA voters in California. They were well-prepared with the requisite statistical studies and political experts. Second, coalitional politics was not taken for granted. Frequent meetings, working together in fashioning agendas, and acquiring skills in groups were trust-building tools necessary for CAPAFR, MALDEF, and other groups to work together. Third, CAPAFR worked closely with elected APIA officials. This contrasts sharply with the public rift between MALDEF and state Representatives Martha Escutia and Gloria Romero. In contrast, CAPAFR built a solid relationship with state Representatives Judy Chu and George Nakano which should pay off in the future.

Moving beyond Black and White politics involves understanding that coalitional politics is not theoretical, but involves hard work, trust building, and careful nursing of individual relationships. The words of Lani Guinier and Gerald Torres are helpful: "the hard work of democracy is really found in mobilizing, and engaging participation of ordinary people at the grassroots level."

c. Campaigning in Racially Polarized Environments

The most sobering lesson of post-2000 elections was how effective media campaigns in "Horton-izing" competitive minority candidates, Arturo Villaraigosa and Tony Sanchez were. Sergio Bendixen, a political consultant, maintains that Republicans have found an effective way to run against competitive Latina/o candidates, "when a Latino gets close to being able to win a contest in a state or a district or a city where the majority of voters is not Hispanic, the common attack now is drugs. ... That's a sure way to destroy their candidacy." The 2002 elections reaffirm earlier work by political scientists that where a minority candidate's race becomes salient by subtle racial cueing, the candidate will lose. The practice remains widely used, as 2002 shows, even as those who profit deny that their ads are racial.

LatCrit research has already stepped beyond the Black-White paradigm by documenting the effectiveness of race-baiting media campaigns in the context of Proposition 187. Post-2000 elections suggest that inquiry into this area should continue to be documented and studied. More specifically, racial stereotypes stuck to Arturo Villaraigosa and Tony Sanchez, but did not stick in Susan Castillo's race. Arturo Villaraigosa has been an immigrant rights activist, Chicano youth leader, and unionist. The lesson of the 2002 elections is that a Latina/o candidate with a strong civil rights activist background is "dead meat" if he or she decides to run for office. By contrast, Susan Castillo's profile as a Latina professional in a White dominated TV media came through as "White," even when nasty commentators tried to racialize her campaign. This suggests that LatCrit should develop a race theoretic explanation based on social science as to why racial baiting works in some cases and not in others.

Second, reformist scholars should pursue a project that singles out race-baiting ads for regulation. Professors Smith and Overton have drawn a stark picture of the many obstacles that minority candidacies must overcome. Free speech regulation is unpopular in mainstream academia; the case should be made for regulation of racially of r acially cued ads since the candidates must overcome. Free speech regulation is unpopular in mainstream academia; the case should be made for regulation of racially cued ads since minority candidacies have proven so effective in squashing minority candidacies.

d. Voter Turnout Doldrums

Feng, Aoki, and Ikegami maintain that APIAs and Latinas/os must "flex their political muscle ... by showing up in significant numbers at the polls." But this may be a na<<um i>>ve take on minority voter turnout, one that unnecessarily boxes the Latina/o and APIA electorate into a "no win" proposition. Lose if you turn out (because the choices are so unappealing) and lose if you do not turn out (because promises of the potential voting power of APIAs and Latinas/os did not pan out).

In California, Latinas/os and APIAs were disappointed with Gray Davis and did not go to the booths in the numbers that they had before. Gray Davis "dissed" the Latina/o and APIA electorate, and he was rewarded in kind. In Massachusetts, Latinas/os turned out to vote in record numbers because a clone of Proposition 227 was on the ballot. The initiative that Latinas/os overwhelmingly opposed won,
but breakthroughs were made in electing Latina/o state representatives. Or. L. Rev. 783 Latinas/os and APIAs seem to have a great deal of innate common sense regarding when to go vote and when not to bother. Perhaps LatCrit theory should take on the task of explaining the innate good sense of Latinas/os and APIAs, rather than repeat mainstream judgments that disembodied and remove agency from ordinary people.

IV

The Politics of Backlash: Initiatives in which the Content of Minorities' Civil Rights Are Voted on by the Majority

In introducing the LatCrit voting rights panel, Professor Keith Aoki linked initiatives and referenda within a race theoretic vision of political process. Historically, initiatives and referenda have been an important law-making mechanism that has decreased the content of, or staved off advances, in minority rights. When initiatives and referenda that address the content of civil rights of minorities are voted on by majorities, minorities lose over eighty percent of the time. Why such a dismal record? Derrick Bell famously noted that initiatives "reflect[ ] all too accurately the conservative, even intolerant, attitudes citizens display when given the chance to vote their fears and prejudices ... ." My own work has argued that the dynamics are more complex. Undeniably, initiatives put in play majority-minority dominant group dynamics, racial feelings, but also involve legitimate differences over cultural symbolism and group identity. A race centered discussion of political and electoral process cannot be complete without discussing this significant form of democracy and law-making.

A. 2002 Language Initiatives

In the November 2002 elections, Colorado and Massachusetts voters had an opportunity to vote on whether these states would continue bilingual education, or adopt the one-year English immersion plan championed by Silicon Valley millionaire Ronald Unz known in California as Proposition 227. After his California success, Mr. Unz funded a foundation that has put a version of Proposition 227, known as "English for the Children," on the ballots in Arizona, Massachusetts, and Colorado. In 2002, voters in Massachusetts enacted the initiative, while voters in Colorado defeated it. The Colorado defeat is historic because it is the first time that a language anti-minority initiative has been defeated at a statewide level. The key difference was that in Colorado the anti-proposition forces were aided by millionaire heiress, Pat Stryker, who supported the "English Plus" anti-initiative campaign with $3 million dollars. These funds financed campaign ads that argued that the Unz one-year English immersion plan would cost Colorado school districts tens of millions of dollars to implement. Colorado voters turned down the measure by a two-to-one vote, the proportion by which anti-minority language initiatives usually win.

In Massachusetts, by contrast, the one-year immersion plan won by seventy percent of the vote. The Latina/o community in Massachusetts turned out in record numbers; ninety two percent opposed the initiative. However, the Massachusetts experience followed the typical pattern of language initiatives. The non-Latino, English speaking majority overpowered a cultural and language minority, even though the minority saw the initiative as substantially undermining their civil rights and standing within the civic community.

B. Moving Beyond the Black-White Paradigm

A traditional civil rights reaction to initiatives that undermine minority civil rights is litigation. In the 1960s, successful litigation successfully neutralized anti-integration initiatives. One might argue that 1960s courts were more friendly to minorities' civil rights than post-2000 courts. However, the counterargument is that civil rights litigation has always relied on it being a long-run educative process. Initiatives are harmful, not because minorities lose (they will lose because of sheer mathematics). Anti-minority initiatives are harmful because they undermine the content of minorities' citizenship in the political and civic community and undermine their ability to participate in the to-and-fro of democratic civic life. It is this vigorous exchange that allows majorities and minorities to fashion norms and conditions of co-existence. I have argued elsewhere that the Equal Protection Clause should be understood as embodying this main guiding principle. For example, in the case of language initiatives, a majority vote reaffirming the primacy or exclusivity of English rejects multi-lingual/cultural communities by "telling" them that there is no place within the public community for their culture or language. The rejection of a minority's language and culture is seen by that group as a rejection of its place in that civic and political community. This kind of alienation harms the community as a whole and makes peaceful coexistence more difficult.
Moving beyond the Back-White paradigm in this context means adopting a civil rights litigation strategy where the case can be made that it is appropriate that courts intervene where a court finds that majorities are undermining the ability of minority groups to participate in the political process. Courts' appropriate function is to preserve a political process where minorities and majorities can co-exist. This does not mean that courts should always strike down initiatives where minority groups feel strongly and lose to the vote of a majority. Rather, the constitutional norm of Equal Protection dictates heightened court scrutiny and intervention in cases where the court has found that a minority's civic standing and ability to participate in the political process have been severely impinged.

[*847] A LatCrit perspective that moves beyond the Black-White paradigm would fully explore the complexity of intergroup conflict that develops in the context of anti-minority initiatives. Not every successful anti-minority initiative is primarily motivated by racial animus; however, it is true that racial resentment and racial hostility do almost always play some role. Racial feelings are most likely to be salient where a media campaign has stirred up stereotypes and triggered the majority's anxiety over changes in a status quo where their view dominated. Many initiatives also involve ideological disagreements. In the case of language initiatives, the ideological disagreement is over whether culturally different minorities should be able to preserve their own language or assimilate quickly, that is, the English-only, or one-language, proponents believe that to be an American requires a monolingual English speaking culture. Moving beyond the Black-White paradigm involves exploring the full complexity of sentiments that are involved, and then trying to frame these differences in a way that achieves a better understanding of racial, social, and ideological dynamics, but does not shy away from where and how racial animus animates the divisions within our political communities.

Conclusion

Kathay Feng, Keith Aoki, and Bryan Ikegami's essay sounds as a glass half-full, while Kevin Johnson's contribution sounds as a glass half-empty. Both are right. There is reason to be optimistic and pessimistic. Minorities are fighting a political structure of representation that resists change. They are confronted with paradoxes as to how best to promote their interests within a representational framework that favors the political status quo. Federal courts have promised "meaningful representation" but have been reluctant to enforce remedies. Coalition work is slow, difficult, and full of pitfalls.

A post-Civil Rights and LatCrit project must engage the unpleasant. Minorities with a distinct cultural ethos, political viewpoint, and socio-economic reality have been unable to have a [*848] meaningful voice in a two-party, winner-takes-all, political system that protects incumbents, freezes in the duopolistic power of an ossified two-party system, and over relies on money as speech. Does the avenue to meaningful minority empowerment lie in playing the merchant minority game, persuading the White political bosses that they should court minority voters, as swing voters, in specific elections? There is a role for this kind of negotiation, but the accompanying baggage is model minority rhetoric. This game must be carefully played.

Ultimately the problems of the minority community are conceptual and structural. The far reaching solutions proposed by Professor Lani Guinier in 1986 in her path-breaking work were viewed as so radical that her seminal work cost her the position of Attorney General in the Clinton White House. (We got Janet Reno instead for eight years). LatCrit provides an intellectual home base to form new far-reaching proposals that challenge mainstream academics and political pundits to rethink the very basic concepts of who votes, how they vote, and why they vote.

These are long-term projects that LatCrit adherents must take on in order that the theoretical anti-subordination "talk" lines up with the LatCrit activist "walk." But as Feng, Aoki, and Ikegami warmly note, "the process of gaining political influence is a long one, fraught with setbacks and disappointments but not without concomitant successful moments."

FOOTNOTE-1:

n1. 531 U.S. 98 (2000).
n5. My remarks were based on Sylvia R. Lazos Vargas, Judicial Review of Initiatives and Referendums in which Majorities Vote on Minorities' Democratic Citizenship, 60 Ohio St. L.J. 399, 462-73 (1999) [hereinafter Initiatives & Minorities].
n6. Id. at Appendix A.
n7. Johnson, supra note 4.
n8. See Feng, Aoki, & Ikegami, supra note 3, at 855.
n9. This point is not new, see, e.g., Girardeau A. Spann, Race Against the Court: The Supreme Court and Minorities in Contemporary America (1993) (arguing that the Supreme Court has been largely antagonistic to racial minority anti-subordination goals).
n17. See Johnson, supra note 4, at 919. However, as Johnson indicates in his own prior work, it is the rare case where Congress actually vetoes the Supreme Court's handiwork, particularly in the area of immigration law. See Kevin R. Johnson, Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement, 1993 BYU L. Rev. 1139 (1993) [hereinafter Johnson, Political Power of Noncitizens].
n18. Feng et al., supra note 3.


n21. The number of Latinas/os per the 2000 Census is 35.3 million, or thirteen percent of the total population of 281.4 million people. The number of African Americans or Blacks is 34.7 million. Bureau of Census, Census 2000 Brief: Overview of Race and Hispanic Origin, T.1 (Mar. 2001) available at http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf [hereinafter Census Hispanic Overview]. Among Blacks and African Americans are 710,353 persons who identify as being of Latina/o or Hispanic ethnic origin. Id. at T.10.


1. The decline of political parties. ...
2. The decline of partisan competition in many races. ...
3. The rise of candidate-centered campaigns run by consultants independent of the parties.
4. The increase in VRA-produced, safe, uncompetitive, ethnically homogeneous districts.
5. The increasing reliance on campaign technology that allows candidates to target their message so that it reaches only those registered voters most likely to vote and reduces outreach to communities that have not voted at high rates in the past.
6. The use of direct-democracy ballot strategies such as initiatives, referenda. ...
7. The increasing diversification of the electorate, accompanied by extended ethnic-specific voting protections, including bilingual electoral information and districting guarantees to traditionally excluded groups such as Asians, Native Americans, and Latinos.

Id.


n28. Professor Terry Smith reports that eighty to ninety percent of campaign funds are invested in the ephemeral marginal votes. Smith, Race and Money in Politics, supra note 19, at 1488.


n30. Id. (reporting on Common Cause study).

n31. See Overton, But Some Are More Equal, supra note 19, at 1024-25 (stating that because of the financial dominance of the White donors, their contributions will form a large majority of the money received by the Brown incumbents, despite the fact that most contributions from Whites continue to go to Whites. Brown incumbents from Brown districts will face insignificant challenges from underfunded insurgents - who will usually be Browns. ... Because of this trend, little democratic dialogue about policy will take place in Brown communities.);

Jamin Raskin & John Bonifaz, Equal Protection and the Wealth Primary, 11 Yale L. & Pol'y Rev. 273, 300-01 (1993) (stating that

When citizens of modest means go to the polls, they are voting for candidates whose political seriousness has been determined by a money-gathering process which, by definition, systematically demotes their interests. ... They are part of an electoral system "arranged in a manner that will consistently degrade" their influence "on the political process as a whole.");

Smith, Race and Money in Politics, supra note 19, at 1512 (citing studies showing racial discrimination in campaign fundraising).


n34. Id. at 132.


n37. Id.

n39. See generally Guinier, Tyranny supra note 19.

n40. Johnsen, supra note 12.


n43. The key papers are Federalist No. 39, 52-77. James Madison explained that two year terms were sufficient in length for legislative business to be done, but brief enough so that Representatives would always have present the interests of the voters. The Federalist No. 52 (J. Madison). By contrast the Senate's six-year term allows Senators to provide a check against possible excesses that might spur the House to produce ill considered legislation. The Federalist No. 62 (J. Madison).

n44. See Stephen Dinan, Parties Wooed Hispanics with Record Ad Spending, Wash. Times, Nov. 22, 2002, at A4 ("Republicans and Democrats alike see Hispanics as a swing-vote population in future elections, particularly since they are such a fast-increasing segment of voters"); Tamar, Jacoby, A Voting Bloc Without a Party, N.Y. Times, Oct. 28, 2002, at A25. ("The courtship by both parties can only intensify in coming elections"); Barone, Whose Majority?, supra note 38 (stating that Latinos vote differently in different places, depending on where they came from and the politics they encountered in different parts of America. If no Latinos had voted in America, George W. Bush would have won a popular-vote plurality; but if no

n45. John B. Judis & Ruy Teixeira, The Emerging Democratic Majority (2002). Professor Terry Smith has suggested that African Americans might contemplate exit from an unsatisfactory two party system, but Supreme Court case law has undercut the possibility of such exit strategy. See Smith, A Black Party, supra note 19, at 70-72.

n46. Barone, Whose Majority?, supra note 38. "Why do liberal analysts, and many others, lump together Blacks, Latinos, and Asians - so many different peoples, with such different experiences and heritages?"

n47. Adam Segal, Hispanic Voters Leave Imprint on 2001 Elections, Johns Hopkins J. of Am. Pol. (Feb. 2002), available at http://www.wcjournal.org/hispanic voters.htm (stating "President George W. Bush's courting of the Hispanic community has increased in the year since his election. While Bush won a larger portion of the community's vote nationally in 2000 than previous Republicans including his father, re-election could hinge on greater support from this community."; Jacoby, supra note 44 (Bush carried 35% of the Latina/o vote compared to only 9% of African American voters.).


n50. Southwest Voter Registration Project, SVREP's and PRLDEF's Redistricting
n51. Jack Citrin & Benjamin Highton, How Race, Ethnicity and Immigration Shape the California Electorate, Cal. J. of the Pub. Policy Inst. of Cal. (Dec. 2002). The authors predict that Whites will continue to be the majority of the electorate, even though Latina/o population will outpace those of Whites in California. "For every Latino who casts a ballot in 2040, there will be two Whites." Jack Citrin & Benjamin Highton, When the Sleeping Giant is Awake, available at http://www.ppic.org/main/commentary.asp?I=261 (commenting on the conclusion made by Citrin & Highton in their article, How Race, Ethnicity and Immigration Shape the California Electorate).


n53. "Kansas' Latina/o population doubled from 93,670 in 1990 to 188,252 in 2000 (100%); Nebraska's Latino population grew from 36,969 to 94,425 (155%); Iowa's population grew from 32,647 to 82,473 (152%); and Missouri's Latinas/os doubled from 61,702 in 1990 to 118,592 in 2000 (92%)." Sylvia R. Lazos Vargas, The "Latina/o-ization" of the Midwest: Cambio De Colores (Change of Colors) as Agromaquilas Expand into the Heartland, 13 La Raza L.J. 343 (2002) (citing Census data).


n55. See Lazos Vargas, supra note 53 (noting that the Latina/o immigrants are arriving because of plentiful jobs and settling outside of the Treaty states because they find other states to have living conditions that they find desirable).

n56. Asian Population, supra note 22.


n67. See id. (reporting that nine out of ten ads pitched to Latinas/os were positive).

n68. See Salant, supra note 65.


n70. A recent press report, for example, ventured that Bush increasingly wanted to be seen with Latin American Presidents, like Vicente Fox, in order to improve his standing and that of the Republican party with Latino voters. Andres Oppenheimer, Bush's Latin American Trip Really aimed at US Latin Voters, Miami Herald, Mar. 22, 2002, at 5A.

n71. Maria T. Padilla, Hispanics Get Involved on Election Day, Orlando Sentinel, Nov. 13, 2002, at B1 (reporting that Gov. Jeb Bush sprinted to the finish line with sixty percent of the Hispanic vote, because he had worked "the Hispanic vote hard," and concluding that "Republicans are succeeding at wooing non-Cuban Hispanic voters."). See also Mark Schlueb and Kelly Brewington, Bush wins Hispanic support; McBride fails to woo black voters, Orlando Sentinel, Nov. 7, 2002, at A1 (reporting that Jeb Bush won in all majority Latino/a precincts in Florida, including Central Florida where Puerto Ricans, Dominicans and Central Americans dominate); see also Dinan, supra note 44.

n72. Editorial, Fire Trent Lott, N.Y. Times, Dec. 12, 2002, at A38:

No one has put more effort than George W. Bush into ending the image of the Republican Party as a whites-only haven. For all the disagreement that many African-Americans have with his policies, few can doubt Mr. Bush's commitment to a multiracial America. But unless the president wants to spend his next campaign explaining the majority leader's behavior over and over, he should urge Senate Republicans to get somebody else for the job.

n73. See discussion infra note 74 & accompanying text.

n74. According to census data, 51.2% of foreign born who have resided in the United States 15 to 19 years naturalize, and 71.1% of those who reside 20 or more years naturalize. Bureau of Census, Profile of Foreign Born Population in the United States: 2000 (Dec. 2001) at 21 Fig. 7-2, available at http://www.census.gov/prod/2002pubs/p23-206.pdf. [hereinafter Census of Foreign Born].

n75. Id. at 20.

n76. For the foreign born residing in the United States 5 to 9 years the naturalization rates for the at-large population is 13.2% as compared to 6.2% for Mexican and Central Americans; for length of residency of 10 to 14 years, the rates are 29.4% vs. 14.2%; for length of residency of 15 to 19 years, 51.2% vs. 28.9%; for length of residency of 20 years
or more, 71% vs. 47%. \textsuperscript{81} Or. L. Rev. 783

Latina/o low rates of naturalization are related to their continuing national identity with their country of origin. Because they enjoy closer proximity, Latin American foreign nationals can easily return "home" and cement their ties with their country of origin. They can thus tell themselves that their stay in the United States is temporary, while their true home (their national identity) remains with their country of origin. Alejandro Portes & Ruben B. Rumbaut, \textit{Immigrant America: A Portrait} 17-20 (1990). But see infra notes 79-82 (noting trends towards increasing naturalization).

\textsuperscript{n77.} See \textit{Latino Electorate}, supra note 63, at Chart 4.


\textsuperscript{n79.} There are currently 12.8 million Latinas/os who are foreign born and 74.3% of them are noncitizens, equalling 9.5 million noncitizen Latinas/os. See Profile of Foreign Born, supra note 74, at 24 & Fig. 9-2. If naturalization rates hold, approximately half after 7.3 years will naturalize and 4.9 million will become U.S. citizens if they remain 15 to 19 years. In the case of APIAs, there are currently 6.7 million who are foreign born, id. at 24, and 61.3% are noncitizens, id. at Fig. 9.2, equalling 4.1 million noncitizen APIAs. If naturalization rates hold, 47.1% or two million will become U.S. citizens. Id. See also infra notes 145-48 & accompanying text.

\textsuperscript{n80.} See Judis & Teixeira, supra note 45.

\textsuperscript{n81.} Id. at 330 (reporting on the National Latino Immigrant Survey conducted in 1989-90).


\textsuperscript{n83.} SVREP's and PRLDEF's Redistricting Plan, supra note 50 (reporting "[Latina/o] registration at 241.8% from '80-'96 and, from '82-'98, the Gubernatorial election cycle, Latino participation grew 251.2.").

\textsuperscript{n84.} See supra note 71.

\textsuperscript{n85.} Tomas Rivera Policy Institute, supra note 60 (reporting on TRPI/La Opinion Poll, 1/28/00). See also Citrin & Highton, supra note 51.

\textsuperscript{n86.} Tomas Rivera Policy Institute, supra note 60.

\textsuperscript{n87.} Citrin & Highton, supra note 51. This report notes that the LA Times exit poll for November 2002 reflected that Latinas/os made up only ten percent of the electorate in California in this last cycle.


\textsuperscript{n90.} De la Garza & DeSipio, supra note 26, at 1503-04 (also reporting on other studies); Citrin & Highton, supra note 51 (reporting that Latinas/os in California register at higher rates than their white counterparts given class, noncitizenship and age factors, but nevertheless in the aggregate still fall behind white registration).

\textsuperscript{n91.} Hero, supra note 88, at 63 (quoting Maria A. Calvo and Steven J. Rosenstone, \textit{Southwest Voter Research Institute, Hispanic Political Participation} (1989)).

\textsuperscript{n92.} Id. at 79; Therrien & Ramirez, supra note 89.

\textsuperscript{n93.} See de la Garza & DeSipio, supra note 26, at 1506 (reporting that fifty-six
percent of all Latina/o respondents who had been contacted by voting drives had registered but also noting that the vast majority of respondents had not been reached by registration efforts); Hero, supra note 88, at 71-78.

n94. See supra note 76-80; Cindy Rodriguez, Activists Encouraged by Turnout of Latinos, Boston Globe, Nov. 9, 2002, at A1 (reporting very high turnout in Massachusetts because of Unz-sponsored anti-bilingual education initiative).

n95. See Segal, supra note 66.

n96. De la Garza & DeSipio, supra note 26.

n97. Chow, supra note 64.

n98. Latino Electorate, supra note 63, at Chart 11. Among Latinas/os who are U.S. citizens but not registered voters, 10% report being Republican and 32% report being Independents, as compared to 31% who report being Democrats. Among Latinas/os who are planning on becoming U.S. citizens, 14% report being Republican and 35% report being Independents, as compared to 22% who report being Democrats.

n99. Id. at Chart 14. The social issues that Latinas/os were polled on were abortion, gay and lesbian relationships, having children outside of marriage, and divorce. U.S. born Latinas/os were less conservative on these issues (from ten to fifteen percentage points), but still more conservative than Whites (from five to fifteen percentage points).

n100. Id. at Chart 5 (reporting that 66% of Dominicans, 52% of Puerto Ricans and 49% of Mexican Americans were registered as Democrats, while 54% of Cuban Americans were registered as Republicans).

n101. When registered Latina/o voters were asked to name the two most important issues in determining their vote, the top issue was education (58%), followed by the economy (39%), health care (23%), and Social Security (20%). Among foreign born Latina/o voters, 68% said that education was the most important issue deciding their vote. Id at 9. See also Hero, supra note 88, at 155-72 (listing immigration, education, health, housing, and language as the key substantive policy areas impacting Latinas/os).

n102. Chow, supra note 64.

n103. Latino Electorate, supra note 63, at Chart 21 (eighty-five percent favor amnesty and sixty-eight percent favor guest worker program).

n104. Chow, supra note 64.


n106. Hero, supra note 88, at 194-206 (concluding that Latina/o influence is mainly restricted to local politics and that the more national the political environment, the less likely Latinas/os would be influential); Rodney E. Hero & Caroline J. Tolbert, Latinos and Substantive Representation in the U.S. House of Representatites: Direct, Indirect, or Nonexistent?, in Pursuing Power, supra note 78, at 265.

n107. Hero & Tolbert, supra note 106, at 268 (using voting scores published by the Southwest Voters Registration Instate to measure alignment with substantive Latina/o policy).


n111. Id.

n113. Jacoby, supra note 44.

n114. Following the enactment of Proposition 187, the Los Angeles County Commission of Human Relations (CHIRLA) indicated an increase of 23.5% in hate crimes against Latinas/os. Nancy Cervantes et al., Hate Unleashed: Los Angeles in the Aftermath of Proposition 187, 17 Chicano-Latino L. Rev. 1, 8 (1995). It concluded that:

[Proposition] 187 [has] transformed everyday life for Latinos of every status, including those born here and those whose ancestors had lived in the U.S. for generations. The climate of hostility resulted in discrimination in business establishments, increased police abuse, heightened conflict among neighbors, and an increase in hate crimes and hate speech against Latinos. ... There is abundant evidence of anti-Asian hate activity. ... 

Id. at 9. See also Kevin R. Johnson, Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" Into the Heart of Darkness, 73 Ind. L.J. 1111 (1998).

n115. See supra note 90.


n123. See Latino Electorate, supra note 63 (noting cleavages in party affiliation, attitudes toward social sigues, party affiliation, etc); David G. Gutierrez, Walls and Mirrors: Mexican Americans, Mexican Immigrants, and the Politics of Ethnicity 217 (1995) (noting fragmentation regarding support of Proposition 187).

n124. See discussion infra Pt. II.

n125. Pat Chew describes how Asian Americans "have been victims of lynching, race riots, and slavery," methods of subjugation that are widely known to have been used to oppress Blacks. Pat K. Chew, Asian Americans: The "Reticent" Minority and Their Paradoxes, 36 Wm. & Mary L. Rev. 1, 9 (1994); Carbado, supra note 20, at 1310-11.
n126. This is one way to understand Scalia's critique of the affirmative action set aside program invalidated in City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520-38 (Scalia, J., concurring in judgment); see also Sylvia R. Lazos Vargas, Deconstructing Homogeneous Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect, 72 Tulane L. Rev. 1493, 1529-30 (1998) (discussing Scalia concurrence) [hereinafter Lazos Vargas, White Ethnic Immigrant Narrative].


n128. Thomas Ross, Innocence and Affirmative Action, 43 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); Stephanie M. Wildman et al., Privilege Revealed: How Invisible Preference Undermines America (1996) (stating that ability to avoid consequences of racial power is a form of White privilege); Lazos Vargas, White Ethnic Immigrant Narrative, supra note 126, 1522-43 (describing how the White ethnic immigrant narrative is deployed in the affirmative action debate).


n130. Id.

n131. Id.

n132. Id.

n133. Id.

n134. Id.


n136. Chang, supra note 20, at 1267.

n137. Lazos Vargas, White Immigrant Narrative, supra note 126.

n138. Feng, Aoki & Ikegami, supra note 3.

n139. Id. at n.166 (quoting Feng and Ichinose).

n140. See Lazos Vargas, White Immigrant Narrative, supra note 126, at 1539-43 (discussing use of ethnic narrative in constructing white racial innocence); Ikemoto, supra note 135 (discussing racial positioning).

n141. See also Carbado, supra note 20, at 1310-11 (suggesting possible avenues for the continuing development of the critique of the Black-White paradigm).


n143. See Juan F. Perea et al., Race and Races: Cases and Resources for a Diverse America (2000).

n144. See Chew, supra note 125.

n145. See sources cited supra notes 111-12.

n146. See discussion by Johnson, supra note 4; Feng, Aoki & Ikegami, supra note 3.

n147. 211 F.Supp.2d 1208 (2002).
n148. Mexican-American Legal Defense and Educational Fund challenged two districts, Congressional District 28, located in the San Fernando Valley of Los Angeles County, and State Senate District 27, comprised of Southeast Los Angeles County and Long Beach. See discussion by Feng, Aoki & Ikegami, supra note 3, & Part III infra; Johnson, Latina/os and the Political Process, supra note 4.

n149. 211 F.Supp.2d at 1235 ("SD 27 is a district in which Latino candidates and other candidates preferred by Latino voters can win. ... An exercise of negative voting power by the white majority ... is wholly absent here.").

n150. Id. at 1230 (finding that a Shaw v. Reno claim could not be met).


n152. See discussion by Johnson, supra note 4; Feng, Aoki & Ikegami, supra note 3.

n153. See generally Iijima, supra note 20.

n154. See Padilla, supra note 71.

n155. 2002 Pew Latina/o Survey, supra note 105, at Chart 4.2. 91% of Central Americans, 96% of Colombians, 93% of Salvadorans, and 87% of Dominicans believed that Latinas/os discriminating against other Latinas/os was a problem. Three-quarters attributed discrimination to class and country of origin differences. Id. at T.4.6.

n156. See discussion by Johnson, supra note 4.

n157. Id. at 12. See also Johnson, supra note 17, at 1218-24.


n159. See de la Garza & DeSipio, supra note 26, at 1511-13 (finding that this relationship held all during the 1980s and 1990s); Citrin & Highton, supra note 51 (reporting that in California due to noncitizenship of Latinas/os "whites would comprise more than 40% of voting-age adults, but only 26% of the electorate.").

n160. See supra note 72; Census of Foreign Born, supra note 74, at 24.

n161. Census of Foreign Born, supra note 74, at T.9-1 (not including Puerto Rico).

n162. According to Census data, 39.0% of Latinas/os are foreign born, of which 74.3% are noncitizens, equaling 29.0% of the total Latina/o population who are foreign born, noncitizens. Id. at 24, T.9-1 & Fig. 9.2. See also supra note 72.

n163. According to Pew Hispanic Trust data, forty-two percent of polled Latinas/os are noncitizens who cannot vote. See Latino Electorate, supra note 63, at Chart 4. The difference between the Census and Pew data is accounted for by different methodologies. The Census data is based on a complete decennial census that has routinely undercounted minorities and undocumented. The Pew data is based on telephone surveys.

n164. According to Census data, 61.5% of APIAs are foreign born, and of these 54.3% are noncitizens, that is, 33.4% of total APIAs are foreign born, noncitizens. Census of Foreign Born, supra note 74, at 24, Fig. 9-2. See also supra note 22.

n165. See infra notes 160-64.


n169. See infra note 177 and accompanying text.

n170. There are 57,291 persons residing in American Samoa, and 37,040 are U.S. citizens. 96% of all American Samoa residents report being APIA. Accordingly, approximately 35,000 APIA U.S. citizens were denied a vote because they resided in American Samoa. See U.S. Census Bureau, Population and Housing Profile: 2000 American Samoa, available at www.census.gov/Press-Release/www/2000/amsam statelevel.pdf.

n171. See U.S. Census Bureau, Census 2000 Summary, Profile of General Demographic Characteristics: 2000, at T.DP-1, available at http://factfinder.census.gov/servlet/QTTable?ds name=DEC 2000 SF1 U&geo id=04000US11&qr name= DEC 2000 SF1 U DP1. The census reports 572,059 persons living in Washington D.C., 61.3% or 350,455 are African American and 7.9% or 44,953 are Latina/o, for an approximate 70%.


n173. Id. at 55-56.


n175. Census of Foreign Born, supra note 74, at 14.


n178. Id.

n179. According to the Bureau of the Census, the number of foreign born who are unauthorized according to their immigration status is 8,835,450. This estimate is part of a technical report reconciling the data gathered in the 2000 Census and Census estimation methods for the population of the United States prior to the 2000 decennial census. See J. Gregory Robinson, Bureau of the Census, ESCAP II, Demographic Analysis Results, at T.3-5 (2001). The Pew Foundation and the Urban Institute put the number of undocumented workers at close to eight million. Frank D. Bean, Jennifer Van Hook & Karen Woodrow-Lafield, The Pew Hispanic Center, Estimates of Numbers of Unauthorized Migrants Residing in the United States: The Total, Mexican, and Non-Mexican Central American Unauthorized Populations in Mid-2001 (Nov. 2001); B. Lindsay Lowell & Roberto Suro, The Pew Hispanic Center, How Many Undocumented: The Numbers Behind the U.S.-Mexico Migration Talks (Mar. 21, 2002).

n180. Census of Foreign Born, supra note 74 at 14.


n183. 553 P.2d 830 (Colo. 1976).

Chicago, see Ill. Ann. Stat. 122, P 34-2.1(d)(ii) (1999). Various jurisdictions in Maryland, such as Takoma Park, Chevy Chase, Somerset, Barnesville, and Martin’s Additions extend the franchise in all local elections to residents who are not U.S. citizens.

n185. See Raskin, supra note 184, at 1417–41; Minor v. Happersett, 88 U.S. 162 (1874).


n187. The documentation of this statement is one way to sum up the whole of Critical Race and LatCrit scholarship; in the context of noncitizens, see especially Johnson, supra note 17. Liberal scholars, however, have also made this their life work. See, e.g., Judith N. Shklar, American Citizenship: The Quest for Inclusion 37-38 (1991) (explaining how Americans have historically used the exclusion from citizenship and the right to vote as a way of perpetuating racist, religious bigotry and sexist policies).


n189. Michael J. Klarman, Majoritarian Judicial Review: The Entrenchment Problem, 85 Geo. L.J. 491 (1997). "The current electoral majority in a particular political community plainly possesses some incentive to resist expanding participation in ways that might threaten its majority status ..." Id. at 517. "The current majority has a self-interested motive to perpetuate the status quo." Id. at 519.

n190. Chung, supra note 188, at 175.


n192. Aleinikoff, supra note 186, at 187.

n193. Klarman, supra note 189, at 519 ("Since there is no right answer to the question of which majority is entitled to define the scope of the political community, and the present majority has self-interested reasons to resist expansion, anti-entrenchment theory counsels vesting decision making authority elsewhere.").


n194. See Johnson, supra note 17, at 1218-24.

n195. Klarman, supra note 189, at 520.

n196. 304 U.S. 144, 152 n.4 (1938) (justifying heightened scrutiny where statutes [are] directed at particular religious ... or national ... or racial minorities ...; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry).

n197. See Johnson, supra note 17, at 1222.

n198. See Shklar, supra note 187, at 38 (concluding hopefully that "after long and painful struggles the inherent political logic of American representative democracy, based on political equality, did prevail.").

n199. Of the total 36.8 million Latinas/os who reside in the United States (including Puerto Rico) between 13.5 and 18 million cannot vote because they are noncitizens, see supra notes 147-49 and accompanying text, and because they live in Puerto Rico, see supra note 152.

n200. Of the total, 11.1 million APIAs who reside in the United States and its territories, about 3.7 million cannot vote because they are noncitizens, see supra note 148 and accompanying text, and they live in territories, see supra note 164.

n202. 229 F.3d 80, 86-87 (1st Cir. 2000) (Torruella, J., concurring) (Igartua II) (citation omitted).


n204. Igartua De La Rosa v. United States, 842 F. Supp. 607, 609 (D. P.R.), aff'd, 32 F.3d 8 (1st Cir. 1994) ("Granting U.S. citizens residing in Puerto Rico the right to vote in presidential elections would require either that Puerto Rico become a state, or [the adoption of] a constitutional amendment. ..."); Igartua De La Rosa v. United States, 229 F.3d 80, 84 (1st Cir. 2000) (citizens residing in Puerto Rico do not have a right to vote in presidential elections because Puerto Rico "is not entitled under Article II to choose electors for the President.").


n206. See supra note 174 and accompanying text.

n207. See supra note 89.

n208. Gabriel Garcia Marquez, One Hundred Years of Solitude (Gregory Rabarra tran., 1970).

n209. 229 F.3d at 81. The plaintiffs argued that denial of the vote violated constitutional privileges and immunities due process, and the equal protection guarantee. A similar challenge was staged in Igartua De La Rosa v. United States, 32 F.3d 8 (1st Cir. 1994) (challenge to exclusion of Puerto Rico U.S. citizens in national elections was denied based on statutory interpretation of the Uniformed and Overseas Citizens Absentee Voting Act and the court's reading of Article II of the Constitution, providing that the President shall be elected by electors from states).

n210. The per curiam opinion held that the controversy had already been decided in Igartua I, Igartua II, 229 F.3d at 83-84.

n211. Id. at 89.

n212. Id. at 90 (citation omitted).


n214. Id.


n216. See Johnson, supra note 17.


n218. See supra note 2.

n219. See Johnson, supra note 17, at 1223-25.
n220. Id. For excellent journalistic portrayals of the immigrant experience, see Ruben Martinez, Crossing Over: A Mexican Family on the Migrant Trail (2001); Juan Gonzalez, Harvest of Empire: A History of Latinos in America (2000).

n221. Lazos Vargas, "Latina/o-ization" of the Midwest, supra note 53, at 365-66.


n223. See supra Part I.B.1.


n229. Professor David Lublin has calculated that the magical threshold required to elect an African American representative from a large district is fifty-five percent African American. Lublin, supra note 112, at 45-54, 133. As Lublin notes, this threshold does not always hold and depends on the politics and culture of each district, and for Latinas/os and APIAs in particular, the percentage in the district who are citizens and therefore eligible to vote. Id. at 51-52.

n230. Statistics of Election, supra note 228.

n231. Id.


n233. In 1987, California had among the largest party deficits at .33 - the difference between proportion of population Latina/o and number of elected state representatives - among states with high concentrations of Latinas/os, Arizona (.50), Colorado (.65), New Mexico (1.01). Hero, supra note 88, at 109.

n234. See discussion by Feng, Aoki & Ikegami, supra note 3; see also infra Part III.

n235. See discussion by Johnson, supra note 4.

n236. See Feng, Aoki & Ikegami, supra note 3, at 44.

n237. See supra note 21.

n238. Geron & Lai, supra note 57, at 48-49. According to the figures in this Article, in 2000, there were 309 APIA and 3,749 Latina/o elected officials out of a universe of 513,200 (compiled from the National Asian American Political Almanac and the Tomas Rivera Policy Institute, 1999 National Directory of Latino Elected Officials).
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n239. This is the model of minority representation adopted by Feng, Aoki, & Ikegami. See Feng, Aoki & Ikegami, supra note 3, at 892-93. But see Johnson, Latinas/os and the Political Process, supra note 4 (raising question whether it is necessary to elect Latina/os and APIAs for there to be minority representation in the political process).

n240. According to Professors de la Garza and DeSipio:

Between 1974 and 1984, there were 88 lawsuits filed in Texas by the Mexican American Legal Defense and Education Fund (MALDEF). Groups such as MALDEF, the Southwest Voter Registration Project, the Puerto Rican Legal Defense and Education Fund, and the Hispanic Coalition on Reapportionment, among many others, lobbied and litigated to shape how state representative and congressional district boundary lines were drawn, which resulted in increased opportunities for Latinos to be elected to state and federal offices in many states.

De la Garza & DeSipio, supra note 26.

n241. See supra Part III.A.1.

n242. This is the conclusion of Professor Lublin's study, that minority candidates are electable only in minority majority districts. See Lublin, supra note 112. But an increase in descriptive representation has a negative impact on substantive representation. More Republican conservatives will be electable once minorities are concentrated in majority-minority districts. Id. at 122-24. See supra note 112 and accompanying text.


n244. See Feng, Aoki & Ikegami, supra note 3, at 24-29.

n245. See discussion supra notes 134-39 and accompanying text.


n247. See supra note 226.

n248. Professor Lublin finds that the influence threshold for African Americans is forty percent. See Lublin, supra note 112, at 72. Lublin does not arrive at an influence threshold for Latinas/os, but does note how heavily threshold numbers are tied to the percent who are citizens in any given district. See id. at 48-50. See also note 226 and accompanying text.

n249. See Feng, Aoki & Ikegami, supra note 3, at 24-28; de la Garza & DeSipio, supra note 26, at 925-26.

n250. Feng, Aoki & Ikegami, supra note 3, at 898 ("The presence of Nakano and the other APIA Assembly members proved vital in enhancing the strength and voice of the APIA community.").


n253. Guinier, supra note 19, at 89.

n254. Radelat, supra note 225, at 17.

n255. Ellingwood, supra note 226.

n256. Id.

n257. Id.; Rodriguez, supra note 94.

n258. Steven Carter, Castillo Avoids Runoff, Wins State Superintendent Post, Oregonian (Portland), May 22, 2002, at E1; Radelat, supra note 225, at 17.

n259. Radelat, supra note 225, at 17.

n260. Id.

n261. Carter, supra note 258.

n262. Radelat, supra note 225, at 17.

n263. Id.
n264. See Keith Reeves, Voting Hopes or Fears?: White Voters, Black Candidates & Racial Politics in America (1997) (discussing racial cues and electoral backlash among the white electorate); Jeff Manza & Clem Brooks, Social Cleavages and Political Change: Voter Alignments and U.S. Party Coalitions (1999) (discussing "subtle racism" in the white electorate); Smith, Race and Money in Politics, supra note 19, at 1486-88. See also Lazos Vargas, Initiatives & Minorities, supra note 5 (using social science research to detail the conditions that makes it likely that white voters will be influenced by anti-minority sentiments).


n266. Id.

n267. Id.


n269. Koenig, supra note 265 (quoting Cal Jillson, a political science professor at Southern Methodist University).

n270. By this I mean that Governor Perry used racial cuing - "the articulation of racial meaning and identities in conflictual, albeit somewhat masked terms." Smith, Race and Money in Politics, supra note 19, at 1486.

n271. Cf. Robison, supra note 268 ("Racially polarized voting also was a factor in the defeat of Kirk, an African-American, in the U.S. Senate race and of Sanchez, a Hispanic, in the brawl for governor."); Koenig, supra note 265 (quoting Richard Murray, a political science professor at the University of Houston, stating that the Republican attack ads "polarized older Anglos and Republicans against Democrats. ... There was very little ticket-splitting, and there weren't any independents at the polls.").

n272. Schneider, supra note 62.

n273. Koenig, supra note 265 (quoting Bob Stein, a Rice University political science professor, stating "a Sanchez-controlled savings and loan that failed in 1988 ... required a $161 million federal bailout.").

n274. Id.

n275. Id.


n277. Koenig, supra note 265.

n278. Cf. James A. Regalado, The Political Incorporation of L.A.'s Communities of Color: A Critical Assessment, in Pursuing Power, supra note 78, at 169-85, 185. ("The real work to empower communities of color and build coalitions ... has been taking place at ... grassroots levels. ".

n279. Johnson, supra note 4, at 934.

n280. Schneider, supra note 62; see also Gregory Rodriguez, Latino Pols Face a Double Standard; When Did You Last Hear of a Case of 'White Sleaze,' L.A. Times, Nov. 24, 2002, at M1.


n283. The claim made by the Hal Netkin website is that the following message was heard by over 40,000 over 1 1/2 months before the mayoral vote:

Before voting for mayor of Los Angeles, please learn the truth about candidate Antonio Villaraigosa, and his ties with racist organizations and shocking un-American activities. Mr. Villaraigosa now claims to be a Democrat, but our website
www.mayorno.com has DOCUMENTED evidence that he was affiliated with radical anti-American groups with anti-Semitic and racist overtones. PLEASE check out the evidence for yourself at mayorno.com and make your own decision, or call 818-989-2348.


n284. Johnson, supra note 4.

n285. There has been much scholarly work on the up-to-now successful coalitional politics in Los Angeles. See, e.g., Regalado, supra note 278. As James Regalado emphasizes, those who talk about coalitions may be only optimistic and do not sufficiently focus on grassroots, community level, and non-electoral efforts. Id. at 185.

n286. Guinier & Torres, supra note 19.

n287. The turnout in rural white counties in Missouri and Georgia was greater than expected. See Murphy, supra note 29; Jim Galloway, Barnes Says He's Done with Politics, Atl. J.-Const., Nov. 13, 2002, at A1; Will Lester, GOP Seeks to Build on Voter Turnout, Ass'd Press, Dec. 6, 2002.


n289. Id.

n290. Governor Barnes and others ascribed his loss to high while conservative turnout spurred by his opponent making an issue of whether the Confederate flag should continue to be part of the symbolism of state governance. See Galloway supra note 287.


n292. Williams, supra note 291 (reporting the "tactic that backfired" when Townsend unleashed negative ads focusing on her opponent's selection of Michael Steele, a black Republican, as lieutenant governor).


n294. Around October 2002 the State Latino Caucus sent Davis a letter informing him that the Latino Caucus would not support his bid for re-election. Id.

n295. Id.

n296. Gray Davis pointed to his support for California's DREAM Act, which allows children of undocumented workers to pay instate tuition, and his appointment of Latino Carlos Moreno to the California Supreme Court. Id.

n297. According to L.A. Times exit polls, among white voters, Davis lost to Simon 43% to 46%. Davis was able to retain a substantial lead among Latino/a voters (65% to 24%), APIA voters (making up 6% of all California voters) (54% to 37%), and African Americans (making up 4% of all California voters) (79% to 10%). L.A. Times Poll, supra note 288.

n298. Schneider, supra note 62 (quoting L.A. Times estimates that 350,000 fewer Hispanics voted for Davis in 2000 than four years ago).

n299. See discussion supra note 297 and accompanying text.

n300. Michael Finnegan, The Times Poll; Davis' Job Rating Falls to All-Time Low of 27%, L.A. Times, Mar. 9, 2003, at A1 (based on telephone poll of 1300 voters).

n301. For criticism of the two party duopoly from a racial perspective, see Fuentes-Rohwer, supra note 19, at 353-55; Smith, Black Party, supra note 19.

n302. William N. Eskridge, Jr., Philip P. Frickey, & Elizabeth Garrett, Cases and

n303. See sources cited supra note 19.

n304. See Johnson, supra note 4, at 8.

n305. See Feng, Aoki & Ikegami, supra note 3, at 897; Johnson, supra note 4, at 926.

n306. See Lublin, supra note 112.

n307. Hero, supra note 88, at 89-92 (finding that the percent of Latinas/os in a non-Latina/o Representatives' district had no impact on Representative voting on bills that pertained to Latino substantive policies in the 1988 Congress); Hero & Tolbert, supra note 106, at 272-73 (using data on the 100th Congress and concluding that with respect to individual bills Latinas/os continued to have virtually no influence on Representatives, but that collectively, U.S. Congress may have substantively represented Latina/o policies).


n309. See, e.g., [Symposium contributions]; George A. Martinez, Philosophical Considerations and the Use of Narrative in Law, 30 Rutgers L.J. 683, 692 (1999).

n310. See discussion supra notes 133-38 and accompanying text.

n311. Guinier, supra note 19, at 89.

n312. House, supra note 232.

n313. Id.

n314. See supra notes 30-33 and accompanying text.

n315. See supra notes 29-31 and accompanying text.

n316. See supra notes 27-28 and accompanying text and discussion at Part IV.D.

n317. See Feng, Aoki & Ikegami, supra note 3 at 48.

n318. Id.

n319. Id.

n320. Id.

n321. See discussion supra notes 251 and accompanying text.

n322. See Feng, Aoki & Ikegami, supra note 3 at 48.

n323. Guinier & Torres, supra note 19. See also Regalado, supra note 278.

n324. The phrase refers to the Willie Horton ads that President George H.W. Bush used during his presidential race against Mike Dukakis. See generally Mayer, supra note 276; Anderson, supra note 276.

n325. Schneider, supra note 62.

n326. Smith, Race and Money in Politics, supra note 19, at 1486-88.


n328. See supra Part IV.C.2.a.

n329. See supra Part IV.C.1.b.

n330. Smith, Race and Money in Politics, supra note 19; Overton, supra note 19.


n332. See Feng, Aoki & Ikegami, supra note 3, at 901.

n333. See supra notes 296-98.

n334. See discussion supra note 264 and accompanying text.
n335. See discussion supra notes 299-300 and accompanying text.
n336. See discussion supra note 230 and accompanying text.
n337. See LatCrit VII, supra note 2.
n338. Lazos Vargas, Initiatives & Minorities, supra note 5, at 431.
n340. Lazos Vargas, Initiatives & Minorities, supra note 5, at 431.
n341. See id. at 410, 420.
n343. Hubler, supra note 342.
n344. Id.
n345. Lazos Vargas, Initiatives & Minorities, supra note 5, at 430-47.
n346. Vaishnav, supra note 342.
n347. Rodriguez, supra note 94 (reporting a turnout increase by forty-one percent from the 1998 midterm election).
n348. Lazos Vargas, Initiatives & Minorities, supra note 5, at 542-43.
n349. Id. at 444-45.
n350. Id. at 509-13.
n351. See Sylvia R. Lazos Vargas, Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity, 58 Md. L. Rev. 150 (1999) [hereinafter Lazos Vargas, Democracy & Inclusion].
n352. Lazos Vargas, Initiatives & Minorities, supra note 5, at 445 ("Language is a symbol of heritage and identity. ... For Latinos, even those who lose their ability to speak Spanish ... [the] language ... is related with affective attitudes of self-identity and self-worth.").
n353. Id. at 516-26.
n354. Id. at 511. See also Lazos Vargas, Democracy & Inclusion, supra note 351, at 160-83.
n355. Lazos Vargas, Initiatives & Minorities, supra note 5, at 517-27. The test that I have proposed is based on my reading of Romer v. Evans, 517 U.S. 620 (1996). A court should apply heightened review where the court has found that ability to participate in the political process becomes "more difficult for one group of citizens than for all others," id. at 633; the initiative singles out and stigmatizes an unpopular minority group, without any legitimate justification, id. at 635; and finally, exclusion from civil and political society occurs because of a disfavored group's status, id. at 631.
n356. Id. at 462-74.
n357. See Feng, Aoki & Ikegami, supra note 3, at 903.
SEVENTH ANNUAL LATCRIT CONFERENCE, LATCRIT VII, COALITION THEORY AND PRAXIS: SOCIAL JUSTICE MOVEMENTS AND LATCRIT COMMUNITY - PART II

FOCUSING THE ELECTORAL LENS: Voting Matters: APIAs, Latinas/os and Post-2000 Redistricting in California

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BIO:

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SUMMARY: ... And it matters more to members of ethnic and racial minority groups such as Asian Pacific Islander Americans (APIAs), Latinas/os, and African Americans who have until recently been marginalized electorally and have often been the object of political animus and overt racial discrimination. While some indicia of direct political disenfranchisement may have been on the decline after the passage of the landmark Voting Rights Act of 1965 (VRA), subtler forms of political disenfranchisement of APIAs and Latina/os remain.

One goal of this Essay is to draw attention of LatCrit scholars to the fundamental importance of securing political representation. Political access is a condition precedent to seeking transformation of virtually every issue that has been articulated by LatCrit scholars in the preceding six LatCrit Symposia. There has, however, been a curious "blind spot" in the expanding LatCrit canon regarding the promises and perils of electoral participation and representational politics.

This curious omission is mirrored by the discourse of voting rights, the so-called "Law of Democracy" in the legal academy, which, unlike LatCrit, seems fixated on the Black/White paradigm. Where are the several principles that fall into four categories that this Article will address in order: (1) the "one person, one vote" standard; (2) the Voting Rights Act of 1965 and subsequent amendments; (3) the 2000 census: multiple race categories; and (4) "traditional redistricting principles. ... In the redistricting context, minority vote dilution occurs when states minimize minority group influence in the political process by "packing" or "cracking" minority group populations. ... Coalition of Asian Pacific Americans for Fair Redistricting (CAPAFR ) and the California Democratic Party: Goals and Achievements in the Redistricting Process ... APIAs were not overlooked in the post-2000 California redistricting process. ...
Latina/os? Where are the APIAs in the scholarship analyzing cases arising under the 14th Amendment [*852] and the VRA of 1965? The invisibility in legal scholarship of both Latina/o and APIA struggles for political presence and representation is both frustrating and telling.

The developing case law is revealing as well. The Gingles v. Thornburg case,7 seminal in defining actionable voting rights cases for minorities, was written in a black-white context where racism manifested itself in extremely segregated residential and voting patterns. Demographics, political empowerment of minorities, and the law have all changed in the ensuing years. Certainly, in states such as California, where no one group is the majority population, the hole left by civil rights case law is gaping. What legal protections can the VRA afford in this new context of improving race relations but continuing institutional racism? Cano v. Davis8 seems to suggest that Latina/os are so well represented in local California politics that both a VRA section 2 vote dilution claim and a 14th Amendment Equal Protection claim lack factual support.9 The recent elections of California Assembly members George Nakano, Carol Liu, Wilma Chan, and Judy Chu might similarly preclude the success of such claims being made on behalf of APIA communities as well. Is it really that electorally rosy for Latina/os and APIAs in California, such that they have no basis to raise voting rights challenges based on legal arguments such as vote dilution and claims of being the target of intentional discrimination by the political powers that be? Or is it the case that the Courts have yet to fashion legal interpretations that account for multi-ethnic, politically-shifting populations?

This Essay seeks to spark scholarly discussion and activism regarding Latina/o and APIA electoral and political power within (and without) LatCrit. Scholars such as Professors Deborah Ramirez,10 Rachel F. Moran,11 Kevin R. Johnson,12 and Sylvia R. Lazos Vargas13 have begun touching on important issues and this Essay builds on their work by explicitly introducing electoral representation as an issue relevant to LatCrit Scholarship.

While the specific focus of this Essay is on the work of APIA activists engaged in the redistricting process in California after the 2000 census, the implications for Latina/os in states such as California, New York, New Jersey, Texas, Florida, and Illinois should be evident.

Before we begin, a few points need to be made. First, broad-based electoral policy-making may have a distinct political downside for ethnic and racial minorities. Politicians and well-funded bigots have used the proposition process to enact laws that unwind many of the Civil Rights gains of minority groups by appealing to racist fears and playing on social wedge issues. Ballot measures such as California's Proposition 187 or 209, or Colorado's Ballot Measure 2 are prime examples of this. As Derrick Bell has pointed out, the so-called "direct democracy" of referenda initiatives and ballot measures is a way for majority voters to use the anonymity of the ballot box to strike directly at perceived "gains" that members of minority communities may make in the electoral process.14 Any strategy that does not account for potential "white" backlash may need further analysis.

Second, internal solidarity and inclusive representation within an ethnic or racial minority are important preconditions to coalitions among ethnic or racial minority groups. As cooperation between [*854] the Mexican American Legal Defense and Educational Fund (MALDEF) and the array of APIA groups represented by the Coalition of Asian Pacific Americans for Fair Redistricting (CAPAFR) illustrate, activist groups must cultivate the avenues of communication and spaces for debate. Prior to being able to engage in productive coalition-building, communities of color must build an inclusive and representative process internally.15

Finally, it is important to remember we are in an era of conservative retrenchment and resistance. Activists must work with the sometimes demoralizing legal cases and precedents meted out by the increasingly conservative federal courts. Because we are living in what has been called a "post-Civil Rights" era, creativity and imagination are essential to finding ways to make the existing cases and legislation work for, rather than against, the electoral empowerment of communities of color. Just as with the U.S. Constitution, all American law is a living, evolving set of norms responding to societal changes as it is institutionally pushed and pulled by activists, legal scholars, and our communities.

If APIAs, Latina/os and other communities of color do not rise to the challenge of reshaping politics to be truly representative and inclusive at all levels of state and local government, members of those communities should be prepared to be excluded from decisions affecting the provision of the most essential of government services: decent housing, education and health care.

To what extent are state legislatures, local governments and other institutions designed to exclude undocumented immigrants from access to vital resources such as quality K-12 education? Are local zoning ordinances designed to concentrate on recent immigrants who are racial minorities in property-tax poor areas? Are state and local ordinances designed to
exclude non-English speaking members from participating in or accessing health care, education and other essential services? If so, only representatives dedicated to change the effects of those ordinances will be able to initiate fundamental transformation and change in those patterns. An important answer to all these questions lies in who is in control of the funding and drawing of the relevant ordinances and regulations. It matters who your local school board members are; who your city council members are; who your county supervisors and commissioners are; and who your state assembly and state senators are. The authors believe that meaningful political participation beginning (but not ending) with fair representation is an absolutely necessary and crucial precondition to achieving and implementing the substantive social justice and anti-subordination agenda of LatCrit.

Does voting matter? If one accepts that our American democracy depends on full electoral representation and participation at the voting booth and in the halls of power to be effective, the answer must be "yes."

With that being said, this Essay first gives some background on redistricting, then discusses earlier legislative iterations of the census with regard to Latina/os and APIA communities. The Essay then moves to a detailed discussion of CAPAFR's involvement with the post-2000 California redistricting process and assess that involvement. Finally, this Essay draws some conclusions as to APIA involvement with redistricting and its implications for Latina/o and APIA political representation in the near future.

I

Overview of Redistricting

Redistricting is an esoteric, under-appreciated process with tremendous consequences that bear heavily on all groups. In the past, some minority groups, particularly APIAs and Latina/os, have not paid enough attention to this process and experienced the after effects much too late to seek redress. The effects of lack of political representation in APIA and Latina/o communities are evident in the social, cultural, and economic marginalization of group members, both historically and presently.

This Essay's main focus is to examine the emergence of an APIA political presence from the early 1990s to post-2000. A subsidiary focus is to examine parallel struggles within the Latina/o community for a political presence in groundbreaking cases such as Garza v. County of Los Angeles that the APIA community has sought to build upon.

Over the past decade in different but related ways, Californian Latina/os and APIAs have prioritized redistricting into their respective political agendas. For Latina/os in California, the participation in the redistricting process began as much as three decades ago, and has born fruit that was undeniably evident in the 2001 statewide redistricting process. For APIAs, the sphere of influence has gone from nonexistent to the point where a California legislator was quoted as saying, "compared to the other special interest groups working on reapportionment, the Asians have their act together." This Essay does not accept uncritically this positing of APIAs as a 'voting rights model minority,' but seeks to describe the conscious strategy advanced by APIA groups in the post-2000 census redistricting process, and present redistricted maps that would not only represent the true diversity of California's population, but also a vision of electoral participation that refused to perpetuate racial wedge politics.

The following section outlines basic redistricting principles including the process itself and the bearing it has had on the APIA community in the years that lacked strong APIA participation.

A. The Census

The United States takes a census every ten years. The Census Bureau attempts to be as inclusive of all people in the United States as possible, attempting to count not only citizens but also non-citizens with temporary or permanent residency status, refugees, the homeless, and undocumented residents. One of the main purposes of the decennial Census is to provide an updated population count for purposes of determining the fair allocation of House of Representative seats to states. The U.S. Constitution stipulates that the lower house of Congress have a fixed number of seats, whose allocation generally follows the principle of one-person, one-vote. The 435 seats in the House of Representatives are divided among the fifty states based on state population. The larger the state population, the more congressional representatives they receive. Each decennial census reveals which states have gained or lost population. That relative gain or loss translates directly into a gain or loss of congressional seats. The process of reallocating these seats is known as reapportionment.

In 1964, the U.S. Supreme Court declared the same principle of population equality be applied not only to congressional but also to state legislative districts.
Reallocation of districts at the congressional level, coupled with the population changes in existing districts mandates the redrawing of district boundaries at the congressional, state, city, and local levels in order to achieve districts with the same, or close to the same, number of people. This process of redrawing district lines to ensure each district has equal population is called redistricting. n23

In the 2001 reapportionment process of the 435 congressional seats, California received an additional congressional seat for a total of fifty-three to reflect its relative increase in population over the past decade. The California legislature and the governor had to pass a new fifty-three-seat congressional district plan in which each congressional district had exactly 639,088 people, or close to that number in it.n24 California also needed to redistrict its eighty State Senate districts to achieve an ideal population of 846,791 each and its forty Assembly districts to approach 423,396 people in each.n25 All three levels of government had to be redistricted in time for the 2002 election. n26 In order to facilitate redistricting decision-making, the Census Bureau provides each state with more detailed census data, specifically, ethnicity and voting age population, broken down by census tract and census block. n27

For example, the 2000 Census released the counts for California. California's total population count was 33,871,648.n28 The Latina/o population was counted at 10,966,566 (32.4%); the APIA population was counted at 3,752,596 (11.1%); n29 and the African American population was counted at 2,263,882 (6.7%). n30

Inevitably, some persons are not counted, resulting in a census undercount. Although the exact size of the undercount has been disputed, it is generally agreed that more of this undercount lies in communities with a high proportion of poor, non-English speakers, racial and ethnic minorities, many of whom are recent immigrants.n31 Many of these recent immigrants are from Asian n32 and Latin American countries. While there are many demographic distinctions, there are many striking parallels as well.n32 Since states like California, New York, and Florida have more recent immigrants and minorities than most, they are more likely to have populations that are undercounted. n33

Adjustment of census reports to reflect the undercount resulted in a lawsuit that reached the U.S. Supreme Court. In Dep't of Commerce v. U.S. House of Representatives.n34 The Court held that the census data could not be statistically adjusted for purposes of reapportionment, but could be adjusted for purposes of redistricting and distribution of funds under federal formulas. n35

B. Voting Rights Law

In voting rights law, there are several principles that fall into four categories that this Article will address in order: (1) the "one person, one vote" standard; (2) the Voting Rights Act of 1965 and subsequent amendments; (3) the 2000 census: multiple race categories; and (4) "traditional redistricting principles."n36

1. One person, one vote

Redistricting adheres to a one-person, one-vote standard for both federal and state districts.n37 This principle, perhaps the most fundamental requirement in this process, calls for population equality among districts. n38 Congressional districts must follow a relatively strict standard allowing for only minimal variances in population between districts, whereas state and local election districts follow a considerably looser standard. n39

While there is no minimum acceptable level of deviation for congressional plans, the deviation should be nearly equal, or as equal "as is practicable."n40 The leading case on population equality of congressional districts is Karcher v. Daggett n41 that holds that deviations must be justified by a state's need to achieve a legitimate redistricting goal. n42

Currently, the largest population deviation accepted by the courts occurs in the Texas Congressional plan (0.82%). It should be noted, however, that this deviation resulted from a court-drawn plan that came on the heels of the Bush v. Veran43 Supreme Court decision. n44 Thus, the 2000 round of redistricting provided a remedy for the unconstitutional racial gerrymandering in the Houston and Dallas areas. n45

As compared to congressional reapportionment, federal law is not as strict on state legislative redistricting. While state districts must conform to the "one person, one vote" standard, its application is more flexible. A total population deviation of up to ten percent is considered acceptable without any justification.n46 Deviations below ten percent may still be challenged if shown to be unconstitutional, or the product of some arbitrary or irrational state policy. n47

California has a history of holding itself to a higher standard than other states. An example of this occurred in 1973. The California Supreme Court in Legislature v. Reineckenn48 appointed special masters to develop a redistricting plan for the California legislature and a reapportionment plan for congressional seats after the Legislature's plans failed to win the governor's
VRA, due to a 1982 Congressional amendment to the Voting Rights Act (VRA) of 1965, as Amended

This section provides an overview of the VRA, focusing specifically on sections 2 and 5. In particular, section 203, which was amended in 1992, will be assessed to determine its effects on voting rights and the redistricting process.

The VRA placed heavy emphasis on the Fifteenth Amendment, that prohibited any techniques that "[deny] or [abridge] ... the right of any citizen of the United States to vote on account of race or color." The VRA also imposed additional requirements and procedures on state redistricting. Noncompliance with VRA requirements often results in protracted litigation, which has been the focus of an important line of Supreme Court decisions over the past decade. Of particular concern to redistricting are sections 2 and 5, that seek to prevent minority vote dilution and retrogression, respectively.

Section 2 of the VRA applies to all jurisdictions. It prohibits states from imposing any standard that deprives minorities of an equal opportunity to participate in the political process (i.e. to elect candidates of their choice). In the redistricting context, minority vote dilution occurs when states minimize minority group influence in the political process by "packing" or "cracking" minority group populations. "Packing" is the overconcentration of minority group populations into one or two districts for the purpose of minimizing their sphere of legislative influence. "Cracking" occurs when minorities are dispersed among different districts so no one district has enough minorities to influence the political process.

In the decades following the initial passage of the VRA, due to a 1982 Congressional amendment to the VRA, the Supreme Court shifted its stance from the requirement of discriminatory intent to prove a section 2 violation that it took in 1980 towards a standard requiring only the proof of discriminatory effect, not intent. The current test for deciding minority vote dilution comes from the results of Thornburg v. Gingles. The Supreme Court set forth three factors, known as the Gingles test, that a minority group must prove in order to establish a section 2 violation:

- The minority group is sufficiently large and geographically concentrated to make up a majority in an single-member district.
- The group is politically cohesive, or it usually votes for the same candidates.
- In the absence of special circumstances, the white majority votes together to defeat the minority's preferred candidate.

If the minority group challenging redistricting decisions successfully establishes these circumstances, the Supreme Court in Johnson v. DeGrandy held that the next question is whether, "under the totality of circumstances," the minority group had less opportunity than other members of the electorate to participate in the electoral process and to elect representatives of their choice. Section 5 of the VRA applies only to those jurisdictions where the U.S. Department of Justice (DOJ) has found a history of discrimination in voting towards minority groups. These "covered" jurisdictions (usually a county) must submit any law that could affect voting to the DOJ for review. Required submissions include redistricting plans, changes in location of polling places, changes affecting voter registration, and changes affecting eligibility or qualifications for voting and running for office. Section 5 requires "preclearance" for redistricting plans affecting covered jurisdictions, in essence certifying that the voting law changes show no discriminatory, or retrogressive, effect.

Section 203 of the VRA requires certain jurisdictions to provide bilingual oral and written assistance in the languages of limited-English proficient communities. A recurrent problem has been English-speaking and reading ability and the availability of multilingual voting materials and multilingual pollworkers to answer questions. Many recently naturalized citizens, in particular Latinas/os and Asians, lack the ability to read English, let alone fully comprehend voting materials. This often discourages these citizens from exercising their fundamental right to vote. In 1975, Congress enacted VRA section 203, "recognizing the link between
language barriers and low voter turnout." n74 Counties or cities were required to provide assistance if the voter eligible population of a single language minority was greater than five percent of the voting-age citizen population, and the illiteracy rate of the citizens in the language minority group was higher than the national illiteracy rate. n75

Many jurisdictions with significant Latina/o populations had to comply with section 203. However, APIA communities found the five percent threshold to be too high. Thus, outside of Hawaii, in 1990 no APIA language community could qualify for section 203's protections.n76

However, due to extensive advocacy on the part of civil rights groups in 1992, Congress amended and reauthorized section 203. The amendments kept the old five percent threshold, but added a numerical benchmark that could be attained, along with the illiteracy requirement.n77 This numerical benchmark required that there be more than 10,000 voting-age citizens in a jurisdiction who belong to a single language community with limited English proficiency. As a result, APIAs, American Indians, Alaska Natives, and additional Latina/o voters were able to receive the benefits of section 203. n78 Ensuring compliance has been a slow and sometimes difficult process, but overall these communities are benefiting from the expanded scope of this section in the VRA. n79

3. The 2000 Census: Multiple Race Categories

Historically the collection of census data about APIAs has been intermittent and spotty:

The first United States decennial census in 1790 collected data on race, but no distinction was made for people of Asian descent. Data have been collected on the Chinese population since the 1860 census and on the Japanese population since the 1870 census. The racial classification was expanded in the 1910 census to obtain separate figures on other groups such as Filipinos and Koreans. However, data on these other groups were collected on an intermittent basis through the 1970 census. Asian Indians were classified as White and the Vietnamese population was included in the "Other" race category in the 1970 census.

In the 1980 census, there were six separate response categories for Asians: Asian Indian, Chinese, Filipino, Japanese, Korean, and Vietnamese. ... For Census 2000, a separate "Other Asian" response category was added with a write-in area for respondents to indicate specific Asian groups not included on the questionnaire.n80

The 2000 Census had a major change with a tremendous potential effect on redistricting.n81 For the first time, respondents could check more than one box in the category for race. n82 This created up to 126 racial and ethnic categories, a significant increase from the nine categories possible in the 1990 Census. n83

The opportunity to check more than one box in the racial category question was meant to alleviate in part problems faced by multi-racial respondents. While it may be clear-cut to some as to which race they identify with more, the concept of forcing a multi-racial person to choose only one race denied them an opportunity to self-identify. This lack of choice could have potentially strong cultural and political implications for that respondent, and, in some cases, it may even prevent them from responding. Additionally, if a person checked more than one race in the past, the Census Bureau made an arbitrary decision about which race category to which that person would be assigned.n84

By allowing census respondents to "choose," the Census Bureau theoretically receives more complete data due to a more comprehensive collection method and a potentially more compliant respondent pool. Minority group populations will likely gain numbers because multi-racial persons will not be left out by choice of the Census Bureau or themselves. Theoretically, this increase in numbers subsequently gives minority groups more influence in districts and ultimately, a better opportunity to elect candidates of their choice. The increased accuracy in the PL 94-171 data on race used by the DOJ for redistricting purposes also gives legislators a realistic picture of the districts they create, hopefully improving the redistricting process.

The PL 94-171 data used in the 1990 Census differs significantly in composition from that of the 2000 Census. The decision to allow persons to check multiple race boxes made the 1990 Census data, as it stood, incompatible with the 2000 data. The ability to compare data over time is critical to the enforcement of civil rights laws as it is to enabling any kind of demographic analysis. In order to make this new data comparable to pre-2000 Census racial categories, the government devised a method for allocating each of the multiple race responses back into a single race category.n85 On March 9, 2000, OMB issued Bulletin No. 00-02, of which part II addresses how multiple-race responses will be allocated for use in civil rights monitoring and enforcement (i.e. the census count). n86

The following eight categories represent the new groupings the DOJ uses for the PL 94-171 Data:

1. Non-Hispanic, White (and no other category)
Non-Hispanic, Black/African American (including all African American/White responses)

Non-Hispanic, Asian (including all Asian/White responses)

Non-Hispanic, American Indian/Alaska Native (including all American Indian-Alaska Native/White responses)

Non-Hispanic, Native Hawaiian or Other Pacific Islander (including all Hawaiian or Pacific Islander/White responses)

[*871] Non-Hispanic, Some Other Race (including all Some Other Race/White responses)

Non-Hispanic, Other Multiple-Race (where more than one minority race is listed)

Hispanic

Any respondent checking both a minority race box and a white race box is assigned to the minority racial category. Thus, the numbers for Black/African American, Asian, American Indian/Alaska Native, Native Hawaiian or Other Pacific Islander, and some "other race" reflect the total of the single race responses and the multiple race responses in which the minority race box and the white race box were checked. All respondents choosing more than one minority race box comprise the "Other Multiple-Race" category. For example, a respondent choosing both Black/African American and Asian will be assigned to that category. As in the past, the DOJ analyzed Hispanics as a separate group for purposes of enforcement of the VRA.

4. Traditional Redistricting Principles

The major court cases of the 1990s discussed in the next section highlight the importance of an evolving concept known as "traditional redistricting principles." These principles serve as a guide and provide a set of "requirements" that must be met by proposed redistricting plans in order to avoid legal challenges. They include:

Compactness and contiguity of districts

Respecting political subdivisions

Respecting communities of interest

Protecting incumbents

Meeting political goals

[*872] Compactness refers to the shape of the district - how tightly the lines are drawn and whether the district's edges are smooth. This requirement may come into conflict with the satisfaction of the VRA, that requires the creation of "majority-minority" districts to avoid minority vote dilution or to comply with section 5 in a covered jurisdiction. In order to draw these districts, compact shape may often be sacrificed in order to pull together enough of the minority population group to form a "majority-minority" district. However, in the Shaw v. Reno line of cases discussed in the next section, districts that lack requisite "compactness" may be vulnerable to racial gerrymandering lawsuits.

The importance of compactness is based on the idea that political representation in our system is linked to the notion that geographical communities share common interests. The perception that elected officials can better serve their constituents if they are in the same geographic region also contributes to the importance of compactness.

No one specific measurement for compactness has been established. Only Colorado and Iowa have tried prescribing particular methods to measure it. While a visual test often serves as an initial means of evaluating compactness in a district, mathematical formulas also exist to aid in this endeavor. The contiguity requirement simply means that each district is its own "land mass." With the exception of islands and bodies of water, districts should not be separated and all parts of the district should touch.

A "community of interest" is another principle frequently cited in redistricting cases. This term refers to populations with common or shared interests. What constitutes a "community of interest" varies, but the following present possible shared interests:

Income levels

Educational backgrounds

Housing patterns and living conditions (urban, suburban, rural)

Cultural and language backgrounds

Employment and economic patterns

Health and environmental conditions, and

Other issues of concern (i.e. crime, education, etc.).

The census, in conjunction with information from public redistricting hearings and general knowledge of the region, can provide adequate information to determine these "communities of interest."

States and local jurisdictions are also permitted to express and meet political goals, which may include protection of a political party or incumbent, even if these goals result in majority-minority districts.
States may do this even if they are aware of the race of the voters in the district, as in Hunt v. Cromartie n108 (where political gerrymandering was allowed because the most loyal Democrats happened to be black Democrats). n109

Ultimately, redistricting plans need to be consistent within each state and local jurisdiction. If certain "traditional redistricting principles" have been more or less adhered to in the past, then any plan that differs significantly from the "traditional" principles of the jurisdiction may be called into question. Moreover, "communities" of interest not previously supported by redistricting plans can use the state's tendency to bend "traditional redistricting principles" to advocate for compromise of those principles in their favor.

C. Latina/os and APIA Communities and the 1980s Redistricting Experience in California

Unfortunately, for many people, particularly in the Latina/o and APIA communities, redistricting has been a formal and abstract legal process far removed from their daily lives. n110 As such, people in these communities may fail to fully appreciate the importance of redistricting, let alone even understand what the process entails. n111 This lack of participation leads to redistricting [*875] that seriously disadvantages Latina/o and APIA community political representation on important issues ranging from education, housing, training programs, medical care, and immigration. n112

Disenfranchisement through redistricting takes a few identified forms. As mentioned before, legislators or redistricters can create districts that split or "crack" minority group communities, preventing them from asserting political strength arising from their numbers. n113 In other instances, where a minority group has sufficient numbers to influence or even become the majority in more than one district, legislatures may "pack" them into a single district to minimize their sphere of influence, so that there will be a "token" minority representative in the legislature, but who will always be outvoted on issues of particular interest to the relevant minority community. n114 To avoid these situations, Latina/o and APIA community members need to become more involved in the redistricting process. Civil rights advocacy groups like MALDEF and APALC can also encourage voter registration and participation by demonstrating, via outreach and education [*876] about the redistricting process, to let community members know how important and valuable their vote is. n115

Ultimately, successful involvement in redistricting can lead to the creation of districts where minority groups are able to elect representatives of their choice. Traditionally, these districts have been "majority-minority" districts, or districts whose "majority" is comprised of members of different ethnic or racial minority groups. n116

Along with African Americans, Latina/os and APIAs have traditionally not had a voice in the redistricting process. n117 While there have been and continue to be geographically dense areas of Latina/o population, prior to the 1990s, there were no areas in California with concentrated APIA populations that were large enough to constitute a majority of a district. n118 Coupled with the historically low participation of the APIA community in the political process, these conditions made legislative decisions to fragment the potential voting power of APIA communities easier. n119

The California Legislature's 1981-82 redistricting resulted in Los Angeles' Koreatown neighborhood being split between three congressional, four senatorial, three assembly, and three city council districts. n120 With the exception of the geographically small area of Little Tokyo, that remained in one congressional, senatorial, and assembly district, all other APIA communities in California were fragmented at one or more levels. n121

The Latina/o population had its vote similarly diluted by Los Angeles County Supervisoral redistricting. n122 MALDEF brought a groundbreaking lawsuit, Garza v. County of Los Angeles, n123 that forced a redrafting of the county supervisor districts. Rodolfo Acuña writes that,

In June 1990, U.S. District Judge David V. Kenyon, after a lengthy and costly trial ruled in Garza v. County of Los Angeles that the [Los Angeles County Board of] Supervisors had violated the federal Voting Rights Act by intentionally denying Latinos an equal opportunity to elect candidates of their choice to the county Board of Supervisors. ... The Garza case revealed much about Euroangelenos and their attitude toward Mexicans. Suffering from historical amnesia, many of them continued to view Latinos as foreigners and questioned the suit against the Board of Supervisors: 'Why should Mexicans have representation on the board?' Whites - and often Blacks - seemed to think that civil rights was not a Latino issue. Breaking through this historical and institutional ignorance was a major challenge. ... While judges presume discrimination against African Americans, they tend to see Chicanos and other Latinos as latecomers without a history of discrimination or civil rights struggle, and efforts to raise the history of the Chicano struggle for civil rights are often met with
hostility. ... Numbers alone do not automatically bring political strength or influence. ... [but] usually intensify nativism toward Latinos among Euroamericans.\textsuperscript{n124}

Eventually, as a result of the Garza litigation, the supervisorial districts were redrawn to create a district where the Latina/o population had a viable opportunity to elect a candidate of its choice. Gloria Molina was elected to the L.A. County's Board of Supervisors.

For the APIA community, especially in the 1980s, political change was not easily achieved through the courts. Where there were examples of electoral success, they were usually dependent on effective cross-racial coalition building. This was true in the April 1988 election of Judy Chu, a former community activist and teacher, to the Monterey Park City Council. Exit polling indicated that Chu received 88 percent of the Chinese vote and 75 percent of the Japanese American vote. But since Asian Americans made up only 35 percent of the city's electorate, success required significant support from others as well. And Chu got that support, receiving one in three European American and Latino votes.\textsuperscript{n125}

\section*{II}

1990s - Growing Pains

Despite the generally bleak picture that has been painted for effective representation in their communities, APIA participation in the 1990 redistricting process resulted in significant gains. A number of factors led to these early gains. Population increases, particularly stemming from large numbers of Southeast Asian immigrants, gave them strength in numbers that were absent as recently as the 1980s.\textsuperscript{n126} This prompted APIAs to organize together in an effort to curb redistricting plans that would dilute their voting strength.\textsuperscript{n127}

In California, the 1990 census revealed an APIA population of approximately ten percent of the total population.\textsuperscript{n128} The statewide 1991 Assembly Redistricting plan proposed by the legislature would have cut the city of Torrance into two districts, splitting in half an APIA population that had doubled from 1980 to 1990 and constituted over twenty percent of the city population. APALC and other advocacy groups collected testimony and prepared briefs to present to the California Supreme Court’s Special Masters, who were determining the boundaries of the new districts, to push for a unified City of Torrance. This turned out to be the only change accepted by the Special Masters and incorporated into the approved map. Their efforts paid off when, \textsuperscript{[*879]} in 1998, the 53rd Assembly District elected George Nakano, a Japanese American and the only APIA assemblyman from Southern California at the time.\textsuperscript{n129}

In 1990, two coalitions, one in northern California and another in Los Angeles, each called the Coalition of Asian Pacific Americans for Fair Redistricting (CAPAFR), were formed.\textsuperscript{n130} This marked the first time that the APIA community formally participated in the redistricting process. With some communication between the two regional coalitions, each engaged in providing public awareness efforts, solicited community involvement, and developed technical proposals for their respective areas.\textsuperscript{n131}

As compared to some other minority groups, the APIA (and the Latina/o) community is extremely heterogeneous, encompassing a wide variety of different cultures, languages, histories of immigration and socio-economic backgrounds.\textsuperscript{n132}

To bridge the diverse interests of different ethnic groups, different generations, and communities with different socio-economic backgrounds, and more recent immigrant communities required finesse and sensitivity on the part of APIA activists, as well as a commitment to significant and substantial outreach.\textsuperscript{[*880]} Because of the challenges faced in building a coalition of all the APIA voices, developing a unified front was not always assured, even with conscientious efforts to maintain substantive outreach. For example, the Northern California CAPAFR faced challenges in uniting all of their constituent voices under one redistricting plan proposal. Individuals emerged who lobbied their legislators about their own district agenda. This created confusion as to which CAPAFR group "truly" represented the voice of the APIA community of California.\textsuperscript{n133}

APIAs also lacked a statewide organization with advocacy experience possessing the stature and history of organizations such as MALDEF and NAACP-LDF. Unlike Latinas/os and African Americans, APIAs lacked a history of successful voting rights and redistricting litigation that would serve as a potential threat to legislators that did not address APIA needs.\textsuperscript{n134} By comparison, the Latina/o community in California had the litigation record of MALDEF and other organizations that had effectively brought several high profile redistricting court cases in the 1980s, establishing their presence as a community to be reckoned with.\textsuperscript{n135}
Finally, the APIA community was disadvantaged in the 1990s redistricting process because it could not produce a statewide redistricting proposal. Without a statewide organization, the APIA communities' interests were represented by two separate regional coalitions - a CAPAFR in the San Francisco/San Jose area [*881] and a CAPAFR in the Los Angeles area.n136 Since there was no true statewide coordination, each CAPAFR group could only present proposals for a few districts in the region. A lack of APIA representatives in the California legislature, a lack of understanding about the APIA electorate, and a lack of a statewide APIA voice made it easy for legislators to ignore APIA interests in the 1990s. Instead, legislators responded to party and incumbent interests as well as to minority groups such as MALDEF and the Black Legislative Caucus Members led by Willie Brown Jr. as the Speaker of the Assembly. n137

While CAPAFR's success was limited by its lack of a statewide proposal, CAPAFR was able to achieve a modicum of influence by working with MALDEF. CAPAFR in Southern California focused on an APIA community of interest made up of the four cities in Los Angeles' San Gabriel Valley with large and fast growing Asian American populations. APALC and MALDEF worked to hold the four cities - Monterey Park, Alhambra, Rosemead, and San Gabriel - together within the largely Latina/o 49th Assembly District.n138 Because Latinas/os constituted a large percentage of the population and APIAs had a sufficiently large and growing population, any candidate would need to make coalitions with both Latinas/os and APIAs in order to run a successful campaign. This also opened the possibility that a strong APIA candidate could emerge who had worked at building these coalitions and thus was positioned to win. That was the case in 2000, when Judy Chu won election to the California Assembly representing the 49th District.

In the end, the Democratic State Legislature and Republican Governor Pete Wilson could not agree on the redistricting plan, thereby relinquishing the task of redrawing the lines to the courts.n139 Although CAPAFR's lack of a statewide organized effort [*882] hurt them during their presentations to the state legislature, their arguments before the California Supreme Court's Special Masters enabled them to win a significant victory in the 53rd Assembly District in the South Bay of Los Angeles County.

CAPAFR of Southern California successfully argued that Torrance's APIA community, which had doubled in population from 1980 to 1990, should be kept together within a district.n140 Their testimony resulted in the only change made to the Assembly map by the Special Masters and ultimately in the election of George Nakano in 1998. Mr. Nakano was the only APIA assembly member in Southern California at the time.

Much was to be gleaned from the participation of APIAs for the first time in the redistricting process in the 1990s. First, the lack of a true statewide proposal undoubtedly hurt APIA interests when presenting to the legislature. More unity in CAPAFR, along with a larger sphere of influence, was in order for 2000-2001. Second, these additional regional intragroup coalitions needed to be inclusive enough for APIA's to present a unified voice, requiring a great deal of organization and networking across the APIA community. Finally, as suggested by CAPAFR's collaboration with MALDEF in holding together an APIA community of interest in the San Gabriel Valley of Los Angeles County, the APIA community needed to commit to a strategy that embraced building and sustaining intergroup cross-racial coalitions.n141

Groups like MALDEF and NAACP-LDF had much more experience in the redistricting process than CAPAFR, and much could be learned from working with these groups. Also, a unified proposal presenting the interests of all three groups would eliminate the possibility that individual group interests would be pitted against each other by the legislature. More importantly, a cross-racial coalition strategy would embody the larger goal of achieving voting rights through adherence to larger social justice principles. In the 2001 round of redistricting, grass-roots work addressing both intra-group and inter-group unity proved beneficial for APIA interests in the redistricting process.

III

2000-2001 - The Emergence of an APIA Political Presence

By the year 2000, the United States' in general, and California's, in particular, demographic landscape underwent important changes.n142 The growth rates of minority group populations, particularly the APIA and Latina/o communities, made California a state with no majority population.n143 Stated another way, California is now a racially pluralist state. These demographic [*884] changes, along with changes in the law and political climate, created a new environment for the 2000-2001 California redistricting process.n144 The following sections elaborate these changes, with the last section providing a closer look at the role CAPAFR and organizations like APALC
played in engaging the APIA community in a relatively successful redistricting process.

A. Demographics

The 2000 Census revealed that, at a 47.53% growth rate, the APIA community is the fastest growing ethnic community in California. According to the PL 94-171 data, APIs represent 11.81% of the total population in California. This figure of nearly twelve percent marked a significant increase from the 9.11% recorded in the 1990 Census.

Given the lessons learned from the 1990 process and the increased population in several other major cities, APALC made a commitment to build a stronger, more unified CAPAFR that would help build representation in areas beyond Los Angeles and San Francisco. For the 2000-01 redistricting campaign, APALC expanded CAPAFR to include nine regions covering seven counties in California: Sacramento, San Francisco, Alameda, Santa Clara, Los Angeles Metro, L.A. South Bay, L.A. San Gabriel Valley, Orange County, and San Diego.

The selection of these regions came at no surprise given the demographical data. Seven of the top eight largest APIA populations by county are CAPAFR counties. Four CAPAFR counties rank in the top ten for percentage increase in APIA population. Furthermore, the three non-county CAPAFR regions are a part of Los Angeles County, which has the largest APIA population in the state and nation. The following demographic data illustrates the significant increases of APIA presence in these communities.

Sacramento County. In 1990, Sacramento County had 92,131 APIAs, or about 8.85% of the total population. The 2000 Census revealed a population of 150,706, or 12.32%. The APIA population in Sacramento grew 63.58% in the ten years separating the two census counts.

San Francisco, Alameda, and Santa Clara Counties, San Francisco County had 205,686 APIAs in 1990, representing 28.41% of the county population. By 2000, the population had grown 21.11%. The 249,109 APIAs now represent 32.07% of San Francisco County.

Santa Clara County, which includes the city of Oakland, boasted one of the highest APIA growth rates of all the CAPAFR regions. The 2000 Census revealed 318,543 APIAs, an increase of 72.36% from the 184,813 APIAs in 1990.

L.A. County. In 2000, Los Angeles County boasted the largest APIA population (1,200,521, or 12.61% of L.A. County) of the nine regions. This figure reflects a 32.24% increase from the 1990 total of 907,810 (10.24% of the county). A significant portion of the increase can be attributed to the growth in L.A. County's San Gabriel Valley, another CAPAFR region. As defined by CAPAFR, the San Gabriel Valley's main APIA community of interest comprises four main cities: Alhambra, Monterey Park, Rosemead, and San Gabriel.

In 1990, the 95,980 APIAs represented 41.44% of the population in these four cities. The 2000 Census saw APIAs increase to 124,082, or 51.88%. This growth rate of 29.28% may not be the highest of the nine regions, but is important because APIAs are now a majority in these four cities and a significant population in the surrounding region. These four cities were united in 1991; the 2001 effort sought to ensure this unity and add additional communities of APIA growth.

L.A. Metro. CAPAFR's efforts in the Los Angeles Metro Area focused mainly on unifying the ethnically cohesive communities of Chinatown, Koreatown, Little Tokyo, and Philippine Town so that each would be made whole rather than being "cracked" between districts.

L.A. County South Bay. L.A. County's South Bay region, which produced California's only APIA assembly member in the 1990s, saw a relatively modest population gain of 19.62%. As CAPAFR did in the San Gabriel Valley, CAPAFR focused on four cities - Torrance, Gardena, Carson, and Long Beach - when addressing the needs of the region.

Whereas APIAs comprised 17.34% of the South Bay in 1990, they now comprised 19.34%. Further, APIAs in Torrance now comprise 30.39% of the city population, underscoring their ability to elect George Nakano in 1998.

Orange County. Orange County contains another one of the fastest growing APIA populations, featuring a ten-year growth rate of over seventy percent. The 1990 Census revealed 240,756 persons of APIA descent, or 9.99%. The 2000 Census showed that the 415,030 APIAs in Orange County now comprise 14.58%, a 72.39% rate of growth in the ten years separating the
two counts. The APIA community in San Diego saw their numbers grow 53.87% over the ten-year period.

APIAs show strong signs of a community whose population is on the rise. With growth rates spanning from twenty-one percent to nearly eighty percent, APIA presence in California could not be ignored in the post-2000 round of redistricting. The North Carolina Twelfth District again on the same day. In Bush v. Vera, three majority-minority Congressional districts, two majority-black and one majority-Hispanic, were struck down by the Court. The Court continued this stance in 1996 with two cases decided on the same day. In Bush v. Vera, three majority-minority Congressional districts, two majority-black and one majority-Hispanic, were struck down by the Court.

Thus, District 12 became "an unnecessary remedy to a nonexistent violation." Moreover, Chief Justice Rehnquist stated for the majority that VRA section 5 liability did not exist in this situation because of a lack of geographical compactness of minority groups.

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Thus, District 12 became "an unnecessary remedy to a nonexistent violation."
Coalition of Asian Pacific Americans for Fair Redistricting (CAPAFR) and the California Democratic Party: Goals and Achievements in the Redistricting Process

A. The Political Situation of APIAs

Following the 2000 Census, California's Democratic Party controlled both the state legislature and the governor's office.203 This presented a significant challenge to any interest group, particularly racial/ethnic civil rights groups such as APALC, MALDEF and NAACP-LDF, hoping to influence the process significantly in their favor to the extent that it was not in line with party interests.204 A presumption existed among the elected leadership ranks of the legislature at the time that the 2001 redistricting would only further cement Democrats as the dominant party and incumbents as a whole in the state legislature and California Congressional delegation.205 Maeley Tom, assessing the political climate at the time, quoted Sen. President Pro Tem John L. Burton as saying, "Democratic dominance is so heavy that there may not be many more Democratic seats to create without endangering other Democrats."206 Groups such as APALC, MALDEF and NAACP-LDF faced the additional hurdle of the unsettled state of judicial pronouncements on the relevance of race as a factor in redistricting. As explained in the previous section on law and court cases in the 1990s, race may be a factor in redistricting, but not the dominant factor.207 This distinction is still being clarified in the courts, leaving a gray area that will only be cleared up by further litigation or legislation.

In the 1990s, APIs saw their population grow at a faster rate than any other racial/ethnic group over the past ten years. In spite of the difficulties presented by the political situation in 2001, APIA leaders felt their population increase and a stronger, more organized CAPAFR would put them in a better position to influence post-2000 redistricting. APALC also strategically used the emerging redistricting concept of "communities of interest" as an organizing tool for APIA communities to arbitrate their unique community characteristics and, where relevant, their shared political destiny with other APIAs or communities of color. Their advocacy efforts were also strengthened by the presence of APIA assembly members and the Asian Pacific American Legislative Staff. George Nakano, one of four APIs in the Assembly (representing the 53rd District in the South Bay), also served on the Assembly Election and Reapportionment Committee.208 The other members of the APIA Legislative Caucus included Wilma Chan (16th Assembly District), Carol Liu (44th Assembly District), and Judy Chu (49th Assembly District). This represented the largest coalition of APIs in the state legislature. As we will soon see, an expanded CAPAFR was able to effect change in a redistricting process mired by an unfavorable climate in the legislature and governor's office.

B. Lessons from Post-1990 Redistricting

Recognizing that the APIA community needed more thorough preparation for the 2000 Redistricting process, the organizing to re-start CAPAFR began early. In 1998, under the leadership of APALC, they created a widespread network of APIA communities organized around the 2000 Census.209 CAPAFR absorbed nearly every major APIA organization spanning community, civil rights, and public policy activities that were potentially interested in redistricting.210 Their efforts produced nine regional coalitions: Sacramento, San Francisco, Alameda, Santa Clara, Los Angeles Metro, Los Angeles San Gabriel Valley, Los Angeles South Bay, Orange County, and San Diego.211 The unity within the organization proved vital in validating CAPAFR's political presence in the state capitol.212 Ultimately, CAPAFR sought to overcome the major barriers that the APIA community faced in the 1991 redistricting and began developing the ability to speak with one voice on redistricting.213

C. Post-2000 Objectives

APALC took a proactive position to organize CAPAFR. As early as April 2000, APALC began meeting with community-based APIA groups in each region to set up redistricting training. In October 2000, APALC convened the first statewide meeting of representatives from each region. They met to discuss local regional priorities that would be expressed collectively in a statewide Assembly map proposal. APALC’s early start to this process enabled them to visit more than once to help refine each regional proposal. In spring and summer 2001, they assisted in the preparation and presentation of community testimony before six out of the eight Assembly Committee on Elections, Reapportionment, and Constitutional Amendments Committee regional hearings.214 Working together with the other organizations in CAPAFR, APALC set out to accomplish the following goals: (1) fair representation; (2) coalition building; and (3) political empowerment.215
1. Fair Representation

Fair representation meant organizing the APIA community in each of the nine target regions to ensure that the corresponding regional CAPAFR accurately represented the diversity in composition [*893] of the community.n216 First and foremost, APALC developed a process that sought inclusion of all community groups and members, with special attention to traditionally excluded ethnic and other groups. By committing to an inclusive process, APALC helped CAPAFR develop a more representative voice for APIAs. APALC employed the concept of "communities of interest" in trainings to allow community members to express what bound their communities together, what interests were important, and what other communities shared those interests. APALC also conducted voter research on preferences and needs (i.e. bilingual assistance). In March and November 2000, APALC conducted exit polls of APIA voting behavior in Southern California. n217 The March 2000 Exit Poll surveyed 3000 voters in fourteen cities/areas in Los Angeles and Orange Counties. n218 The November 2000 Exit Poll surveyed 5000 voters in sixteen Southern California cities/areas, representing the largest sample of voters APALC had surveyed to date. n219 These exit poll results were vital to analyzing the patterns of voting and voting challenges facing APIA voters. n220

Fair representation also meant strengthening CAPAFR's technical capacity. Because previous efforts at proposals were only regional, a significant increase in mapping and data collection was in order this time around. The APALC research and demographic team that created the maps used for the statewide redistricting network trainings, trained under the guidance of Leo Estrada, MALDEF's chief demographer and redistricting expert in the 1990s. Since APALC's staff were also trained alongside MALDEF's new redistricting staff, this also presented an excellent opportunity for intergroup networking with an experienced key player in the redistricting process.n221

2. Cross-Racial Coalition-Building

The second goal of CAPAFR, coalition building, became relatively [*894] easier to achieve due to the joint training sessions. By receiving the same training on mapping software, the maps produced by CAPAFR would be readily compatible with those of MALDEF, and vice-versa. The dramatic changes in the legal and political landscape governing redistricting warranted a more collective effort to shape the legislature's plan. Recall the attitude among legislators that this process would only further cement California Democrats and all incumbents into positions of power, thus precluding significant advance to racial/ethnic civil rights groups interested more in fair representation than Democratic Party hegemony such as APALC, MALDEF, and NAACP-LDF.n222 Thus, APALC engaged in strong efforts to strengthen ties with other redistricting stakeholders. They regularly convened meetings with groups like MALDEF, Southwest Voters, Antonio Velasquez Institute, NAACP-LDF, NAACP, the League of Women Voters, the Pat Brown Institute, Lawyers' Committee for Civil Rights, and the American Jewish Committee to share information, understand each other's concerns, and explore possible strategies for collaboration. n223

In December 2000, APALC facilitated a joint meeting with staff members and researchers from the major California civil rights organizations. Representatives from all three major civil rights organizations (APALC, MALDEF, NAACP-LDF) discussed plans for synchronizing efforts as well as providing the means for ongoing, regular meetings.n224 These meetings eventually blossomed into a collaboration on a joint redistricting handbook, entitled The Impact of Redistricting in Your Community: A Guide to Redistricting.n225

The collaboration on the redistricting handbook set the stage for a full day conference, entitled "Making Our Communities Count: United for a Fair Redistricting Process," jointly sponsored by APALC, NAPALC, NAACP-LDF, and MALDEF. This conference targeted community leaders, organizers, and interested constituents to discuss the importance of collaboration [*895] and coalition. Attendees engaged in mapping exercises, discussed the effects of changes in redistricting law and litigation strategies, and most importantly, interacted with one another.n226 The event took place May 12, 2001 in Los Angeles, with many CAPAFR regional representatives attending and taking the opportunity to meet with their counterparts from other ethnic communities. Throughout the summer, the three organizations continued working on a statewide Assembly district map. This effort culminated in the first unified Assembly proposal presented before the Assembly Committee on Elections, Reapportionment, and Constitutional Amendments on September 4, 2001. n227

3. Political Empowerment

Political empowerment, the third goal of CAPAFR in the 2001 Redistricting process, involved preparing regional CAPAFRs to present at hearings, to legislators, and to the media to ensure APIA community and coalition interests were represented in
the redistricting process. To this end, the APALC developed a strategy of training and building up regional partners in three phases: (1) developing awareness; (2) providing legal training and mapping workshops; and (3) organizing strategic planning meetings.

In spring 2000, APALC began the first phase of outreach meetings intended to pique the interest of key community organizations for the redistricting process. This initial phase consisted of an overview of the law, current political climate, and demographic changes that have spurred a new level of APIA community involvement. Its purpose was to ensure that the second phase had ample participation from a wide range of participants.

Phase two trained participants in redistricting law and terminology, eventually engaging them in map drawing exercises. Since this phase was intended to identify communities of interest, subsequent meetings were needed in each region. APALC's demographic research team presented maps with overlays of particular demographic data, from which participants discussed creating maps specific to their region. These maps merged together into a final proposal from each region.

Once the regional coalitions could coherently express their regional interests with a unified voice, APALC began Phase Three: solidifying the regional coalitions into a statewide network and engaging in both regional and statewide strategic planning. This effort culminated in the first statewide meeting in October 2000. In spring and summer 2001, APALC assisted each region in preparing and presenting cogent community testimony at six out of eight Assembly Committee on Elections, Reapportionment, and Constitutional Amendments' regional hearings.

The benefits of political empowerment extend beyond the obvious gains of a unified statewide proposal and more representation of APIA communities of interest in the redistricting plan. The regional CAPAFR's involvement in the statewide redistricting process enabled several of the groups to take on other levels of redistricting specific to their region. Sacramento, Santa Clara (San Jose), San Diego, Orange County, and Los Angeles' San Gabriel Valley organized around city or county redistricting, and several of the regional CAPAFRs testified on senate and congressional redistricting as well.

Political empowerment extends beyond the redistricting realm. As mentioned before when discussing the benefits of redistricting, communities benefit from more educated and involved constituents with a stronger ability to advocate on their behalf. Ultimately, those non-voting citizens who choose to vote as a result of this process reflect the far-reaching positive gains that redistricting can have in increasing the political participation of APIA communities.

D. Influence on the Post-2000 Redistricting Process

The preparation of APALC and other regional organizations under the umbrella of CAPAFR worked towards the toughest battle of the redistricting process: influence. While community awareness and consistent messages were vital to the APIA community, ultimately CAPAFR needed to connect their collective interests with that of state legislators on the Assembly Committee for Elections, Reapportionment, and Constitutional Amendments. As articulated to the legislature, their two main goals were "defensive" and "districts that would fairly represent [APIA] communities."

To that end, CAPAFR demonstrated political savviness by recognizing that redistricting is essentially a political insider's game. In order for CAPAFR to be considered a prominent player in the redistricting process, the organization needed a daily presence in Sacramento to compete with the other stakeholders' presence and, more importantly, to be positioned to respond immediately to changing circumstances. CAPAFR addressed this issue by hiring a professional political consultant, Maeley Tom, to provide this political presence within the state capitol at the onset of the process. Ms. Tom served as a liaison to key legislative members and staff as needed. The key benefit of Ms. Tom's work came in the form of valuable strategic and tactical advice on how to focus and shape CAPAFR's message to legislators - insight that only a seasoned political veteran could provide.

CAPAFR used the network created by both their individual efforts and that of their political consultant to strategically engage in strong advocacy and to fight for the representation of existing APIA communities. During one of the most heated debates involving Assembly District 49 (the East Los Angeles and San Gabriel Valley area represented by Judy Chu), CAPAFR testimony at hearings, their meetings with legislators, as well as their strong alliance with MALDEF were primarily responsible for a fair resolution.

CAPAFR also called in ethnic and mainstream media to help publicize these issues in order to exert additional political pressure on the decision-makers. CAPAFR's advocacy efforts were further strengthened by the presence of the Asian Legislative
Staff Caucus, led by Assemblyman George Nakano (53rd Assembly District), who also served on the Assembly Committee for Elections, Reapportionment, and Constitutional Amendments. The presence of Nakano and three other APIA Assembly members, especially during behind the scenes redistricting negotiations, proved vital in enhancing the strength and voice of the APIA community.\textsuperscript{n243}

In spite of all the strategic planning and effort, CAPAFR still faced an uphill struggle influencing the legislature, given its predisposition to redrawing districts to solidify incumbent protection. However, CAPAFR still managed to take more victories than losses.\textsuperscript{n244} CAPAFR proposed their first statewide Assembly district plan, balancing APIA community priorities with other "communities of interest," in particular, Latina/o communities compliance with the VRA, as well as "traditional redistricting principles."\textsuperscript{n245} CAPAFR also demonstrated crucial preparation at each redistricting hearing, producing maps and analysis that garnered praise from legislators and the Sacramento press corps, among others.\textsuperscript{n246} And CAPAFR presented a unified chorus of many diverse APIA community voices around a single proposal.

CAPAFR's advocacy led to the unification of many key communities of interest in the 2001 Assembly lines. The following communities of interest were kept intact:

- AD 16 (Alameda): North Oakland and its African American community were made whole and joined with Oakland\textsuperscript{n247}
- AD 22 (Silicon Valley): Cupertino, Sunnyvale, and Mountain View were unified and made whole\textsuperscript{n248}
- AD 45 (Los Angeles): Philippine Town and Chinatown, each split in two by the 1990 lines, were made whole\textsuperscript{n249}
- AD 49 (Los Angeles): Monterey Park, Alhambra, El Monte, Rosemead, San Gabriel, San Marino, and South El Monte in the west San Gabriel Valley were unified in one assembly district\textsuperscript{n250}
- AD 68 (Orange County): Little Saigon and Koreatown, each split in two by the 1990 lines, were made largely whole\textsuperscript{n251}
- AD 75 (San Diego): Mira Mesa, split in two by the 1990 lines, was made whole\textsuperscript{n252}
- AD 78 (San Diego): Paradise Hills, the eastern portion of Chula Vista, and Bonita were united in one district\textsuperscript{n253}

The 2001 Assembly district plan also incorporated many of their coalition-based proposals to build districts with a vision of many different, multiracial communities with shared interests living and working together. Assembly District 16 (Oakland) and Assembly District 49 (Los Angeles) are prime examples of such communities. Additionally, CAPAFR presence made a difference in the final lines drawn for several districts, including Districts 9, 12, and 53. APALC, the leading organization in the CAPAFR coalition, played a vital role in bringing together MALDEF Southwest Voters, NAACP-Legal Defense Fund, and the African American Redistricting Committee to share resources and ideas.\textsuperscript{n254} This effort culminated in the first unified Assembly proposal presented before the legislature on September 4, 2001.\textsuperscript{n255}

The complete summary of the proposed and adopted changes to districts in CAPAFR regions, along with detailed maps showing both the 1991 and 2001 lines, can be found in Appendix D. Ultimately, CAPAFR was unable to unite Los Angeles' Koreatown, which was frustratingly split into three Assembly districts. They also ran into political opposition by certain legislators who split San Jose's Berryessa community into four districts, including AD 20, 23, and 24.\textsuperscript{n256}

However, upon comparing CAPAFR's performance in the redistricting effort with some of the political losses endured by some Latino communities and three incumbent Assemblywomen, CAPAFR efforts are worth noting. Consider the plight of three incumbent Democratic assemblywomen. These women, each preparing to run for the state senate, found that the new lines diluted their former senate districts, leaving them with no viable district in which they could run.\textsuperscript{n258} Privately, these women Democrats admitted they made a big mistake by not being more personally involved in the process and not having major groups advocate for their interests.\textsuperscript{n259} APIAs were not overlooked in the post-2000 California redistricting process.

CAPAFR established itself as "a credible statewide network of the APIA community to the state legislature during its most personal, critical and sensitive political process,"\textsuperscript{n260} attaining a new level of political recognition for the California APIA community. In fact, during the last set of Assembly hearings held by the Senate and Assembly on Redistricting, Assemblyman John Longville, the Chairman of the Assembly Committee on Elections, Reapportionment, and Constitutional Amendments, complimented APIA community presentations and involvement:
CAPAFR saw growth and success in their organization over the past decade, holding their own in a process that all but shut them out only ten years earlier. As articulated by Maeley Tom, "the legislative experience, political relationships and respect CAPAFR has gained within the halls of the state capitol should not go to waste."n262

However, more preparation will be needed for the post-2010 round of redistricting. For one, CAPAFR must continue building and strengthening its organizational and personal ties with groups like MALDEF and NAACP-LDF in order to ensure a broader coalitional approach to advocacy in the next redistricting process. A consistent and growing relationship with MALDEF and NAACP-LDF, along with the sharing of information and mapping tools, is absolutely essential in order to avoid grim scenarios where redistricting is cast as a zero-sum game. The opportunity to speak with one voice, not merely as an APIA community but also as a part of a broadly based cross-racial coalition, was of tremendous benefit to all groups this time around and will be vital to widening their sphere of influence in the Assembly. CAPAFR should also take measures to ensure that its political strategy and technological capability to crunch data and produce electoral maps continues to be up to par. Success in the 2001 Assembly plan warrants further expansion into the other statewide redistricting processes, such as the redistricting process for U.S. Congressional, California Senate, and local districts. Most importantly, groups like CAPAFR, MALDEF and NAACP-LDF are in a position to make legislators accountable for their actions during this process by informing their respective constituencies which legislators supported or opposed their efforts.n263

However, this cannot come about until the APIA community and other communities of color, utilize their power to vote. Specifically, APIAs can only flex their political muscle and enhance the strength of CAPAFR by showing up in significant numbers at the polls.n264 CAPAFR's constituent organizations should put additional resources into voter registration efforts as well as continuing the push for further compliance with Section 203 in all covered jurisdictions. Nonetheless, CAPAFR in 2002 is in a prime position to capitalize on its newfound political presence as a statewide coalition of APIA communities and further advance the causes of the communities they serve.n265

Conclusion

This piece began with the observation that, despite their growing population, in mainstream accounts of voting rights, Latinas/os and APIAs do not appear in leading casebooks.n266 Nevertheless, there has been much significant activism in states like California, Texas, New York, Florida, and Illinois, which have undergone rapid demographic transformation in the 1990s. n267 The 2000 Census reflects the degree of this demographic transformation in California.

Dramatic legal changes in voting rights law from a line of Supreme Court cases beginning with Shaw v. Reno, radically altered the legal backdrop against which post-2000 redistricting occurred. In the post-2000 legal environment, race may not be used as a predominant factor in redistricting, particularly if "traditional redistricting principles" such as "compactness" or "continuity" are ignored. However, while race may not be a predominant factor, the Supreme Court has also refused to hold that race is categorically forbidden as a factor in redistricting decisions. This leaves legislators and racial/ethnic civil rights groups in a difficult and ambiguous position when considering or advocating for electoral representation for communities of color.

This essay focused on the experience of Latinas/os and APIAs as they pushed for electoral acknowledgement of their respective communities through the decennial redistricting process. In the 1980s and 1990s Latina/o groups like MALDEF pursued groundbreaking voting rights litigation in Garza v. County of Los Angeles, demanding representation.n268 In the 1990s, APIA groups made steps towards electoral recognition via the redistricting process, but were unable to completely surmount intragroup tensions to successfully present a single voice when articulating a redistricting agenda. However, by the 2000 redistricting process in California, APIAs were not only able to smooth out their internal splits but were also able to work in alliance with groups such as MALDEF and NAACP-LDF to present redistricting proposals for the Bay Area, Sacramento County, L.A.
County and San Diego County that were largely accepted by the California legislature in the post-2000 round of redistricting.\footnote{269}

In conclusion, hopefully this essay will spark a discussion within LatCrit scholarship about the importance of securing political power. As the situation of both Latinas/os and APIAs in California illustrates, the process of gaining political influence is a long one, fraught with setbacks and disappointments, but not without concomitant successful moments. As the U.S. demographic mix becomes more complex, it underlines the necessity of coalitions such as that undertaken by MALDEF, CAPAFR, and NAACP-LDF to create a set of common and compatible redistricting tools (such as mapping techniques and technologies and population information) to avoid turning redistricting into a zero-sum game where no one wins.\footnote{270}

However, it is not enough, and never will be enough, that former "outsiders" become "insiders" (whether African Americans, Latinas/os or APIAs) if the same old political "machine" just grinds on and on. It is important how political power is secured because that in turn has an effect on how political power is exercised. The authors would contend that CAPAFR's efforts to build an inclusive, democratic and participatory network to inform the redistricting proposals will ultimately result in people being elected to these districts who will and must be more responsive to their full constituency. It remains to be seen the degree to which, if at all, elected Latina/o or APIA politicians in a state like California, are willing to work for transformation of the system or become entrenched defenders of "business as usual."\footnote{271}

Lani Guinier and Gerald Torres write:

Voting is also a meaningless ritual when it is not tied to power in any substantial way, when it simply signifies assent to choices others have engineered or arranged. Even assuming voting's efficacy as a means of civic engagement, it is rendered empty by voters' inability to have a voice in how their votes are allocated, or by any assurance that their vote will make a difference. Hollow promises that "every vote counts," incantations of "count every vote," and stories of extraordinary elections decided by a handful of votes merely function as exceptions that prove the rule in the face of the overwhelming and lopsided reelection rates of state and federal legislatures. ...\footnote{904}

A focus on individual candidates winning individual elections ignores the evidence that democratic collective action usually begins on the ground. It is most likely to be sustained and meaningful when it is chosen by the people themselves rather than imposed on them by others acting on their behalf. ... The hard work of democracy is really found in mobilizing the interactive and engaged participation of ordinary people at the grassroots level.\footnote{272}

So, APIA and Latina/o politicians and organizers are at the cusp of a very interesting moment in a state like California. Will they be able to engage with the dominant political "machine" and transform it, or will they be transformed into mere cogs in that "machine?" Will they become tokens or pioneers? Tokens enjoy their privileged, elite, elevated and often, entrenched status, and may sometimes be accused of pulling the ladder they used up after themselves to enhance their own power. Pioneers (in the finest, not the worst, sense of the word) may find themselves initially isolated in institutions such as the California Assembly but must work to transform the terms of admission and entry so that many others may follow them. "Transformers" or "Cogs"? Tokens or Pioneers? It is perhaps too early to venture a guess, but undoubtedly whatever the answer(s) may be, it will be closely tied to the answer to the provocative question of whether voting matters.\footnote{905}

Appendix A

California 2000 Asian Pacific Islander Population by CAPAFR County, Census 2000

[SEE TABLE IN ORIGINAL]

Percent Increase in Asian Pacific Islander Population by CAPAFR County, 1990-2000

[SEE TABLE IN ORIGINAL]

Asian Pacific Islander Population by CAPAFR County, Census 1990

[SEE TABLE IN ORIGINAL]

Percent Increase in Asian Pacific Islander Population - San Gabriel Valley, 1990-2000

[SEE TABLE IN ORIGINAL]
Asian Pacific Islander Population - San Gabriel Valley, Census 1990

[SEE TABLE IN ORIGINAL]

[*908]

Appendix C

South Bay, California Asian Pacific Islander Population - South Bay, Census 2000

[SEE TABLE IN ORIGINAL]

Percent Increase in Asian Pacific Islander Population - South Bay, 1990-2000

[SEE TABLE IN ORIGINAL]

Appendix D

Appendix D consists of the attached seven maps detailing the changes within the districts in CAPAFR regions.

[SEE TABLE IN ORIGINAL] [*910]

[SEE TABLE IN ORIGINAL] [*911]

[SEE TABLE IN ORIGINAL] [*912]

[SEE TABLE IN ORIGINAL] [*913]

[SEE TABLE IN ORIGINAL] [*914]

[SEE TABLE IN ORIGINAL] [*915]

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FOOTNOTE-1:

n1. Asian Pacific Islander American (APIA) is meant to encompass Asian and Pacific Islander American groups as classified by the 2000 Census. See Jessica S. Barnes & Claudette E. Bennett, The Asian Population: 2000, 2002 U.S. Census Bureau 1 ("The term 'Asian' refers to people having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent (for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam). Asian groups are not limited to nationalities, but include ethnic terms as well.") However, using a pan-ethnic umbrella term like APIA is problematic in that it makes generalizations, and as April Chung has pointed out, "it is impossible to make any generalization about the APA population without finding a sub-group within the APA population that provides the exception... . APAs as a whole are proportionately the largest noncitizen population in the United States, but in 1990, only thirteen percent of Pacific Islanders were foreign-born." See also April Chung, Noncitizen Voting Rights and Alternatives: A Path Toward Greater Asian Pacific American and Latino Political Participation, 4 UCLA Asian Pac. Am. L.J. 163, 163 n.3 (1996); Glenn D. Magpantay, Asian American Voting Rights and Representation: A Perspective From the Northeast, 28 Fordham Urb. L.J. 739 (2001).

n2. We use the term "Latina/os" instead of the census term "Hispanic" and it is used in an pan-ethnic sense to include people from Mexico, Puerto Rico, Cuba, the Spanish-speaking countries of South and Central America and the Dominican Republic. "Latina/o" is a term specifically utilized by LatCrit scholars to expose the interdependency of categories such as race, ethnicity, nationality, and gender.


n5. Deborah Ramirez, Kevin R. Johnson, Sylvia P. Lazos Vargas, and Rachel F. Moran are notable exceptions.


n9. Id.


n16. 918 F.2d 763 (9th Cir. 1990).

n17. Maeley Tom, APIAs ... Making Gains in the Highest Stake Political Game - Redistricting 5 (2001) (quoting an anonymous legislator in the California State Assembly) (on file with author).


n20. The actual process of reapportioning seats in the U.S. House of Representatives follows a complex formula whose explanation is beyond the scope of this report. The United States has used five different formulas in its history, with the current formula known as the "method of equal proportions." The Supreme Court upheld this formula, which has been in place since 1940, in the 1992 unanimous ruling in United States Dep't of Commerce v. Montana, 503 U.S. 442 (1992). A detailed report on this formula can be found at http://www.census.gov/srd/papers/pdf/rr92-6.pdf. Simple proportion allocations do not work for two reasons. For one, no fractional seats exist in Congress, necessitating a rounding system for these somewhat ambiguous seats. More importantly, the guarantee that each state will have at least one seat in the House of Representatives is always upheld even if its share of the nation's population is 'worth' less than half a seat. Steven K. Doig, Reapportionment, Reporting Census 2000 A Guide for Journalists, available at http://cronkite.pp.asu.edu/census/apportion.htm (last modified July 25, 2000).

n21. Mexican American Legal Defense and Education Fund et al., The Impact of Redistricting in Your Community: A Guide to Redistricting 8 [hereinafter Impact of Redistricting]. See also Robert B. McKay, Reapportionment: The Law and Politics of Equal Representation 6 (1965) ("Apportionment has ordinarily been described as the allocation of legislative seats by a legislative body to a subordinate unit of government, and districting as the process of drawing the final lines by which each legislative district is bounded.").


n23. Impact of Redistricting, supra note 21, at 8.


n26. Redistricting Process Background Information, supra note 18.

n27. This is known as the Public Law (PL) 94-171 data and is the official database used for redistricting. The Census Bureau divides each state into "census tracts." In California, there are 7,049 census tracts, which are further broken down into "census blocks." California has 533,163 such blocks. For the most part, these tracts and blocks do not violate city or county boundaries. See Redistricting Process Background Information, supra note 18.


n29. Id.

n30. Id.


n32. Chung, supra note 1, at 174-75.

n33. Id.; see also Holmes, supra note 31.


n35. The adjustment of the Census data to include the undercounted is politically controversial because the adjustment would tend to increase populations in Democratic states and areas. U.S. Comm’n on Civil Rights, supra note 31.


n38. The concept of equal representation states that each voting citizen has an equal opportunity to elect the candidate of his or her choice. For example, if a situation arises where there are 100 people in one district and ten people in another, then those in the second district have a vote that weighs ten times more than those in the first district. To alleviate this problem, an equal population requirement has been applied to redistricting to ensure that each citizen's vote carries a relatively equal weight. Hence, the concept of one person, one vote arose. See Reynolds, 377 U.S. at 557-58.

n39. Two standards are used to measure population equality. "Overall population deviation" or "total population deviation" refers to the most widely used measure - the difference between populations of the most heavily and least heavily populated districts. This is expressed as a percentage of the ideal, or average, population of a district. For example, a state with perfect population equality for its 2000 residents and five districts would have districts with exactly 400 people in each. If the state's five districts had populations of 380, 390, 400, 400, and 410 respectively, it would have deviations of 0, 0, 10, 10, and 20. Thus, the overall population deviation would be 40, which can also be expressed as ten percent of the ideal population of
The second, less used measure for population equality is "average population deviation," the average of each district's deviation from the ideal. To use the above example, a state with district populations of 380, 390, 400, 400, and 410 and therefore deviations of 0, 0, 10, 10, and 20 would have an average population deviation of 8. This can also be expressed as two percent of the ideal population of 400. The courts most often use total population deviation as the benchmark to determine whether or not a deviation is too high to be constitutionally acceptable. J. Gerald Hebert et al., The Realists' Guide to Redistricting: Avoiding the Legal Pitfalls, 2000 A.B.A. Sec. Admin L. & Reg. Prac. 1-2.


n42. See id. This ruling required two questions to be answered to determine if a congressional plan complies with art. I, 2 of the U.S. Const., which has been interpreted to mean that only minimal deviations are acceptable in congressional districting plans. The first question asks if population differences among districts have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population. The second question asks whether or not a state that did not make a good-faith effort to achieve equality can prove that each significant variance among districts was necessary to achieve some legitimate goal. States making good-faith efforts draw districts with virtually no deviations. States can also enact redistricting plans under the second of Karcher's two "steps," where larger total population deviations must be justified by some legitimate goal. This ultimately raises the question of legitimacy, and which goals qualify as such. As long as a state consistently applies a legislative policy without discrimination, the following goals may justify some variance:

. Compactness
. Respecting municipal boundaries
. Respecting county boundaries if counties are small enough to represent communities of interest
. Respecting precinct boundaries
. Preserving the cores of prior districts, and
. Avoiding contests between incumbents.

A successful defense against a population inequality charge includes relating each overpopulated or underpopulated district to one of the aforementioned legitimate state policies. The courts can weigh several different factors in examining the case, including size of deviation, importance of the state's interests, consistency with which the plan reflects those interests overall, and the possibility that alternative plans can protect those interests while still retaining population equality. If the state fails to provide legitimate justification and specifically relate that justification to each district in question, the courts will likely find the plan unconstitutional. Such was the case in Karcher, where a congressional plan with a total deviation of only 0.6984% was not justified by a consistently applied legislative policy. Hebert et al., supra note 39, at 2-4.

n43. 517 U.S. 952 (1996).

n44. The actual ruling that prompted the court-drawn plan came from Vera v. Bush, 933 F. Supp. 1341, 1348 n.9 (S.D. Tex. 1996) (three-judge court). Bush v. Vera struck down three districts (the 30th District in Dallas with a black majority, the 18th District in Houston with a black majority, and the 29th District in Houston with a Hispanic majority) as unconstitutional racial gerrymanders. 517 U.S. 952 (1996).

n45. Hebert et al., supra note 39, at 5.

n46. As in the earlier example of five districts with ideally 400 people each, any plan with a total population deviation of forty persons or less (10% of 400) presumably is acceptable to the courts. To clarify, the deviations of all five districts are tallied, and that total must be less than forty (or ten percent of the ideal). Id. at 7.

n47. Id.


n49. Redistricting Process Background Information, supra note 18.

n50. Reinecke, 516 P.2d at 6.
To illustrate: in three other cases where reasonable equality of state legislative districts was called into question - *White v. Regester*, 412 U.S. 755, 756-62 (1973); *Gaffney v. Cummings*, 412 U.S. 735, 740-52 (1973); *Mahan v. Howell*, 93 U.S. 979 (1973) - the ideal size of legislative districts ranged from 46,485 to 74,645. The ideal California assembly district has a population of 249,661 - nearly three times the size of the largest ideal in the other three districts. *Reinecke*, 516 P.2d at 15-16. This affirms the fact that a one or two percent deviation means a lot more to a California district than to those in other states.

A prime example involves preservation of political subdivisions, a noteworthy goal for a state or legislative districting plan. In *Brown v. Thompson*, 462 U.S. 835 (1983), the Supreme Court upheld Wyoming's state legislative plan despite an average deviation of 16% and a total deviation of 89%. Wyoming's state constitution mandates that every county be separately represented in the legislature, prompting the Court to uphold the plan based on longstanding and consistent application of that legitimate state policy. However, this rationale did not hold up in the redistricting plan following the 1990 Census. In *Gorin v. Karpan*, 775 F. Supp. 1430 (D. Wyo. 1991) (three-judge panel), the district court struck down a plan with total deviations of 83% and 58% in the House and Senate plans, respectively. The court ruled that the state constitutional requirement of county preservation could not be elevated "to such an extreme extent over the 'one person, one vote' requirement of the Federal Constitution." The Wyoming case serves as a reminder, however, that state constitutions must be consulted to determine the constitutionality of districting plans. Hebert et al., supra note 39, at 8.

VRA, supra note 3. Section 2 of the VRA forbids any voting qualification or prerequisite to voting that denies or abridges the right of any citizen of the United States to vote on account of race or color. Section Five forbids certain state and local governments from implementing any new voting procedures (such as newly drawn districts) without first allowing the U.S. Attorney General an opportunity to object so as to ensure that any proposed changes will not lead to a retrogression in the position of racial minorities exercising their electoral franchise.

The 1965 VRA was amended in 1975 to expand protection to language minorities. Specifically, section 203 allows a community to qualify for bilingual voting assistance if they meet the following requirements:

a. (1) More than five percent of the voting-age citizens in a jurisdiction belong to a single language minority community and have limited English abilities, or (2) More than 10,000 voting-age citizens in a jurisdiction belong to a single language community and have limited English abilities (this provision was added in the 1992 Amendments to the VRA), and

b. The illiteracy rate of the citizens in the language minority is higher than the national illiteracy rate.

The 1982 Amendments to the VRA were in response to the Supreme Court case, *City of Mobile v. Bolden*, 446 U.S. 55 (1980), in which the Court held that 2 of the VRA did not authorize a remedy in vote dilution cases absent proof that the discriminatory dilution was intentional. See also Rep. of the S. Comm. on the Judiciary that "concluded that [the Bolden] ... intent test places an unacceptably difficult burden on plaintiffs [in 2 cases, and] ... diverts the judicial [inquiry] from the crucial inquiry whether minorities have equal access to the electoral process to a historical question of individual motives." See S. Rep. No. 97-417, at 16 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 193.


n59. Barber, supra note 58, at 66 ("When single-member districts are used, representation in the city or state as a whole depends on the way the population is geographically distributed and on how the district or ward lines are drawn... . Traditional techniques of gerrymandering have often determined the composition of a council or a state legislative house, either by bunching (often called "packing") partisan, ethnic, or racial groups into a district so that votes contributing to unnecessarily large majorities are wasted; or by spreading minority populations thinly across several districts so that they do not constitute a majority in any district ("cracking").


n61. See Gingles, 478 U.S. at 35 ("Congress substantially revised 2 to make clear that a violation could be proved by showing discriminatory effect alone... .")

n62. But see Holder v. Hall, 512 U.S. 874 (1994) (holding that a section 2 claim could not be maintained against an at-large method of choosing County Commissioners in the absence of intentional discrimination).

n63. 478 U.S. 30 (1986).

n64. See Campos v. City of Houston, 113 F.3d 544, 548 (5th Cir. 1997) (holding that citizen voting age population data is an appropriate measure to use in determining if an effective majority-minority district can be created); Negron v. City of Miami Beach, 113 F.3d 1563, 1569 (11th Cir. 1997); African-Am. Voting Rights Legal Def. Fund v. Villa, 54 F.3d 1345, 1348 (8th Cir. 1995) (concluding that 60% of the voting age population or 65% of the total population is reasonably sufficient to provide an effective majority); Romero v. City of Pomona, 883 F.2d 1418, 1426 (9th Cir. 1988).

n65. A recent example of racial cohesion would be the 97% of Latina/os who voted for Los Angeles mayoral candidate Antonio Villaraigosa. See Cano v. Davis, 211 F. Supp. 2d 1208 (C.D. Cal. 2002) (per curiam) ("In 1990 there were only seven Latinos in the state legislature and none in statewide office. But as 1990 closed, there [were] six in the senate alone, twenty-three total in the legislature. The State Assembly had seen it's first and second Latino speakers, and a Latino - Cruz Bustamente - was elected lieutenant governor for the first time [in the twentieth century."]). The plaintiffs in Garza made a successful showing that there was racially polarized voting in Los Angeles County. See Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990).

n66. Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Ed., 4 F.3d 1103, 1128 (3d Cir. 1993) (finding that white v. white elections are less probative on the third Gingles prong); League of United Latin Am. Citizens, Council No. 434 v. Clements, 999 F.2d 831 (5th Cir. 1993) (white v. white elections less probative); Westwego Citizens for Better Gov't v. Westwego, 872 F.2d 1201 (5th Cir. 1989) (elections with black and white candidates are most probative to show racial polarization); Citizens for a Better Gretna v. Gretna, 834 F.2d 496, 502 (5th Cir. 1987) (allowing use of exogenous
elections to make a showing for the third prong of the Gingles test); Johnson v. Hamrick, 155 F. Supp. 2d 1355, 1375 (N.D. Ga. 2001) (allowing both exogenous and endogenous elections as evidence).

n67. 512 U.S. 997, 1010 (1994) (while the three Gingles factors are necessary to prove a VRA 2 violation, they are not all that is required, if the Gingles showing is successfully made, then a court must then ask the "totality of the circumstances" to see if minority voter's power is actually diluted). The Court wrote that "Factfinders cannot rest uncritically on assumptions about the force of the Gingles factors in pointing to dilution." Id. at 1013. See also Zimmer v. McKeithan, 485 F.2d 1297 (1973), which the DeGrandy Court cited approvingly as laying out "totality of circumstances" factors listed in the S. Jud. Comm. Rep. on the 1982 Amendments to VRA 2, S. Rep. No. 97-417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07. These additional Zimmer factors are:

(1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise participate in the [political] process;

(2) the extent to which voting in the elections of the state or political subdivision is racially polarized;

(3) the extent to which the state or political subdivision has used unusually large election districts, majority voting requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

(4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

(5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

(6) whether political campaigns have been characterized by overt or subtle racial appeals;

(7) the extent to which members of the minority group have been elected to public office in the jurisdiction;

Additional factors that have had probative value are: "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority;" and "whether the policy underlying the state or political subdivision's use of such voting qualifications, prerequisite to voting, or standard, practice or procedure is tenuous." S. Rep. No. 97-417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07.

n68. Impact of Redistricting, supra note 21, at 17.

n69. In California, section 5 applies to Kings, Merced, Monterey, and Yuba counties.

n70. Impact of Redistricting, supra note 21, at 32.

n71. Preclearance can be obtained either by submission of a plan to the DOJ or by declaratory judgment in the U.S. District Court for the District of Columbia that the changes do not violate section 5. For many reasons, including expense and time, it is much easier to seek preclearance through the DOJ process than through the court system. Impact of Redistricting, supra note 21, at 33.

n72. Although not directly tied to the redistricting process, section 203 of the Voting Rights Act plays an important role in voting rights for minority group populations. Since the redistricting process requires community involvement, which is fostered by increased voter education and turnout, any measure that strengthens the voting power of a minority group ultimately influences redistricting.

n73. Chung, supra note 1, at 163 ("Most citizens with limited proficiency are only able to vote when voting materials are in their native language."). For an example of bungled bilingual ballots in New York City Elections in 2000, see Editorial, Bungled

n74. Impact of Redistricting, supra note 21, at 46.

n75. Id. at 47.


n77. Impact of Redistricting, supra note 21, at 46. See VRA, supra note 3, 203.

n78. It should be noted that section 203 of the VRA applies to Asian Americans, but not Pacific Islanders. Hence the abbreviation APIA is not appropriate in this case. Impact of Redistricting, supra note 21, at 47.

n79. The National Asian Pacific American Legal Consortium (NAPALC), with the assistance of the Asian American Legal Defense and Education Fund (AALDEF), the Asian Pacific American Legal Center (APALC), and the Asian Law Caucus (ALC), compiled a report on the status of bilingual assistance to Asian Pacific American voters under section 203. They based their findings on exit polls taken during the November 1996 election. The report was released May 18, 1997. They found that thousands of APIA voters in New York and California were fully able to exercise their right to vote. Exit polls in California revealed that sixty percent of those using oral assistance were first time voters; in New York, the figure was nearly fifty percent. Despite these promising figures, NAPALC found that jurisdictions in the two states still are not in full compliance with the law. Problems still exist in the training of election workers on the election process, section 203 requirements, and cultural sensitivity. Also, problems exist in the recruitment and placement of bilingual poll workers. Poll sites also failed to clearly indicate the availability of assistance. Translated materials need to be more easily accessible, and translators need to be more identifiable.

n80. Barnes & Bennett, supra note 1, at 2.

n81. Another change was the separation of Pacific Islanders into a category separate from Asians. In 2000, Pacific Islanders had the opportunity to check a separate box and indicate their ethnicity/national origin.

n82. Barnes & Bennett, supra note 1, at 2.

n83. This change reflects the October 30, 1997 decision by the Office of Management and Budget (OMB) to incorporate multiple-race reporting into the federal statistic system. Impact of Redistricting, supra note 21, at 36; Barnes & Bennett, supra note 1.

n84. Barnes & Bennett, supra note 1, at 3.


n87. Barnes & Bennett, supra note 1, at 2.

n88. Id.

n89. Id.

n90. Id. at 2-3.

n91. Id.


n93. On the requirement that districts preserve existing political boundaries, see Abrams v. Johnson, 521 U.S. 74, 98 (1997).

n94. On the requirement that districts encompass "communities of interest," see

n95. On protecting incumbents, see Abrams, 521 U.S. at 98.


n97. Guidance Concerning Redistricting and Retrogression, supra note 86.

n98. Miller, 515 U.S. 900. In Miller, the Justice Department withheld preclearance for Georgia's 1990 redistricting until Georgia added three majority-minority districts, white voters sued and the Court held that evidence that a legislature had used race as a predominant factor in redistricting triggered strict scrutiny under the Equal protection clause.

Using as its new test 'race as a predominant factor', the Court concluded that race was the predominant rationale behind the Miller redistricting plan. The Court then invoked strict scrutiny to ascertaint whether the plan was narrowly tailored to serve a compelling state interest. Deciding that complying with the Voting Rights Act might be a compelling state interest, the Court concluded that the plan was not narrowly tailored... [and] found the districts unconstitutional.

Bell, supra note 54, at 631; Shaw v. Hunt, 517 U.S. 899 (1996) (Shaw II). Shaw II rejected the North Carolina's proffered justifications (to ameliorate the effects of past discrimination, and to comply with sections 5 and 2 of the VRA for District 12 (first examined by the court in Shaw I) as not compelling state interests (there was no evidence to show district's shape with past discrimination, the Court disagreed with the Justice Department's interpretation of section 5 and because there was no geographically compact population, there was no potential for liability under section 2). Bush v. Vera, 517 U.S. 952 (1996). In Bush, Justice O'Connor stated that using race as a factor in redistricting does not in and of itself give rise to strict scrutiny, however, it cannot be a predominant factor. See id. She also stated that compliance with section 2 of the VRA could be a compelling state interest, however, districting would have to be narrowly tailored to survive. See id.


n100. Bush, 517 U.S. 952; Miller, 515 U.S. 900.

n101. Guidance Concerning Redistricting and Retrogression, supra note 86.


n103. Three of the most commonly used mathematical measures are known as dispersion, perimeter, and population. Dispersion method determines to what extent a district is spread out by comparing the area of the district to the area of the smallest circle that can be drawn around it. The perimeter method measures the length of a district's borders - the smoothest borders being the most compact. Population method calculates the regularity of distribution of population in and around a district by comparing the population inside the district with the population just outside of the district. Id. at 24-25.

n104. Id. at 25.

n105. On the requirement that districts encompass "communities of interest," see Miller, 515 U.S. at 915.

Drawing districts on the basis of Asian American communities of interest is not simply a legal fiction nor a proxy for race. Asian American communities of interest may be viewed as smaller subsets of the Asian American community. Race and ethnicity, along with income level, educational level, English ability, and other socio-economic characteristics, in addition to external factors and common community concerns and issues, must be used to prove that specific Asian American communities are communities of interest.

Magpantay, supra note 1, at 768.

n106. Guidance Concerning Redistricting and Retrogression, supra note 86.

n107. Id. at 26.

n109. Guidance Concerning Redistricting and Retrogression, supra note 86.

n110. Chung, supra note 1.

n111. For many APIA and Latino communities, even the concept of participation at the voting booth may be unfamiliar, let alone developing an understanding of the impact of redistricting. On traditionally low Asian American voter turnout, see Paul Ong & Don T. Nakanishi, Becoming Citizens, Becoming Voters: The Naturalization and Political Participation of Asian Pacific Immigrants, in Reframing the Immigration Debate 292 (Bill Ong Hing & Ronald Lee eds., 1996).

To understand the relatively low electoral participation of Asian Americans, one needs to take into account their sizeable foreign-born population. In 1980 the proportion of foreign-born Asian Americans was 73 percent in the United States, 67 percent in California, and 63 percent in Los Angeles County... . New immigrants face numerous obstacles that limit their electoral participation, including limited English ability, unfamiliarity with the political system, and ignorance of the political issues.


Low levels of Latino electoral participation have a tendency to be self-perpetuating. Once the perception arises that Latinos do not vote, candidates, campaigns, and parties have no reason to reach out to these communities. Without outreach, the many “new” voters in these communities are not socialized into the political system and become chronic nonvoters.


n112. Chung, supra note 1.

n113. Impact of Redistricting, supra note 21, at 18.

When single-member districts are used, representation in the city or the state as a whole depends on the way the population is geographically distributed and on how the district or ward lines are drawn... . Traditional techniques of gerrymandering have often determined the composition of a councilor or a state legislative house, either by bunching (often called "packing") partisan, ethnic, or racial groups into a district so that votes contributing to unnecessarily large majorities are wasted; or by spreading minority populations thinly across several districts so that they do not constitute a majority in any district ("cracking").

Barber, supra note 58, at 66.

n114. These two are examples of minority vote dilution. Whether a claim can be made that such dilution has occurred depends on a legal showing of a violation of section 2 of the Voting Rights Act. The three preconditions to make such a claim were outlined by the Supreme Court in Thornburg v. Gingles, 478 U.S. 30 (1986). See Impact of Redistricting, supra note 21, at 17-18.


n116. Barber, supra note 58, at 131-43; see also Magpantay, supra note 1, at 762-63.

n117. For instance, the New York City redistricting plan of the 1980s divided Chinatown between two state assembly districts. Despite objections filed by the Asian American Legal Defense and Education Fund (AALDEF) raising concerns about the Asian American community's ability to elect a candidate of
its choice, the redistricting plan was approved. Impact of Redistricting, supra note 21, at 10.


n119. Willaim Wei, The Asian American Movement (1993); Chung, supra note 1, at 271-72.


n121. See generally Saito, supra note 120.

n122. Id. at 138.

n123. Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990) (intentional discrimination may be shown if a legislative body chooses fragmentation of a minority population as an avenue to preserve incumbencies, and there is some injury to the protected group); see also Thornburg v. Gingles, 478 U.S. 30 (1986) (to show that redistricting has a racially discriminatory effect on a minority group, the group must show (1) that a majority black, Hispanic or other minority single-member district can be created, and (2) that past racial bloc voting has stopped minority voters from electing candidates); see also de la Garza & DiSipio, supra note 111.


n125. Wei, supra note 119, at 264 (citing APALC's 1988 Exit Poll); see also Bill Ong Hing, Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Society, 81 Cal. L. Rev. 863 (1993). Chu had come to prominence in Monterey Park by leading the challenge to the city's English-only sign ordinances - an issue that resonated with many immigrant communities and progressive voters.


n127. Saito, supra note 120, at 159.


n129. In New York, the 1991 Congressional redistricting held Latino and APIA voters together in District 12. Plaintiffs challenging the constitutionality of this district under Shaw v. Reno, 509 U.S. 630 (1993), brought suit in Diaz v. Silver, 978 F. Supp. 96 (E.D.N.Y. 1997). AALDEF represented Asian American voters, intervening in the suit to defend the district. They argued that Asian Americans in Manhattan's Chinatown and Brooklyn's Sunset Park constituted a community of interest based on common language, class, and lifestyle. The court accepted this argument and kept the district intact. Impact of Redistricting, supra note 21, at 12.

n130. Saito, supra note 120, at 18-20.

n131. Tom, supra note 17, at 2.

n132. For the APIA community, the language barrier presents a significant hurdle, considering the large percentage (sixty-nine percent) of the APIA population who are foreign-born. Accordingly, these first efforts resulted in some successes, which will be discussed later. However, full participation in the redistricting process eluded the APIA community for a variety of reasons. Chung, supra note 1, at 168. With certain Southeast Asian groups, new immigrants may lack literacy in both English and their native language.

For many recent immigrants, especially Southeast Asians, their focus may be more on subsistence and financial survival, causing them to overlook the importance of politics to their well-being. Dan Nakanishi, The Next Swing Vote? Asian Pacific Americans and California Politics, in Racial & Ethnic Politics in California
These groups stand in stark contrast with those ethnic groups with multiple generations in the United States, including the more established and politically organized Japanese American community and portions of the Chinese American population. Wei, supra note 119, at 241-70.

n133. See generally Chung, supra note 1.

n134. Saito, supra note 120, at 158-59 ("Historically, politicians have divided geographic concentrations of racial groups into many districts, diluting their political influence. Redistricting was a key issue for Asian Americans, who have experienced extreme fragmentation under previous plans. There was no Asian American in the 120-member state legislature between 1980 and 1992.").

n135. See Acuna, supra note 124, at 152. This litigation success cannot be underestimated. MALDEF's representation of Latino voters, using the Voting Rights Act's sections 2 and 5, created a strong incentive for legislators to negotiate.

MALDEF was established in 1968 to use advocacy and litigation for social change in education, employment, and politics based on the model established by the NAACP and its independent Legal Defense Fund .... . Some of MALDEF's major cases involving politics include victories against at large elections in the Supreme Court case White v. Register (1973), involving the Texas House of Representatives, and the Ninth Circuit Court of Appeals decision Gomez v. City of Watsonville (1988), involving city council elections. Victories against gerrymandered districts include United States and Carillo v. Los Angeles and Garza v. The County of Los Angeles in the 1980s.

Saito, supra note 120, at 138-39.

n136. Tom, supra note 17, at 2.

n137. Id.


n140. Torrance's APIA community included a large Japanese American population that was well established and had a consistent voting record that made it a cognizable community of interest. Additionally, the city of Torrance was a large South Bay interest, with a fully functioning independent City Council and school system.


Coalition failures in this period have been due to a combination of conceptual, structural and organizational problems: (1)
improperly understanding the complexity of race and class relations and issues ... inclusive of a reliance on and not going beyond building middle class membership and constituencies; (2) becoming too comfortable with critically unchallenged concepts of pluralism and multiculturalism; (3) being oblivious to the degree to which traditional theories and beliefs of representative democracy and public policy formation are not working for communities of color; (4) failures to broadly recognize and confront the degree to which anti-democratic corporatist approaches have failed those most in need of economic development and job creation; (5) failure to set clear and strategic goals, realizable objectives, and targeted activities and outcomes; and (6) being unwilling to overcome provincial outlooks and agendas.


n142. Barnes & Bennett, supra note 1, at 4.

Census 2000 showed that the United States population was 281.4 million on April 1, 2000. Of the total, 11.9 million, or 4.2 percent, reported Asian. This number included 10.2 million people, or 3.6 percent, who reported only Asian and 1.7 million people, or 0.6 percent, who reported Asian as well as one or more other races... . The Asian population exceeded the U.S. level of 4.2 percent of the total population in nine states. Five states were in the West - Hawaii (58 percent), California (12 [sic] percent), Washington (6.7 percent), Nevada (5.6 percent), and Alaska (5.2 percent); two states were in the Northeast - New Jersey and New York (both 6.2 percent); and two states were in the South - Maryland (4.5 percent) and Virginia (4.3 percent).

Id.

n143. Id.


n145. Tom, supra note 17, at 3. See also Appendix A.

n146. This figure, as well as the other demographic data in this report, refers to the Department of Justice (DOJ) measure for population data. This is the data used by the DOJ to evaluate redistricting submissions under section 5 of the Voting Rights Act. Thus, the Asian Pacific American Legal Center uses this data for its redistricting proposals. However, one might run across the figure 12.5% for percent APIAs in California. This figure is an inclusive percentage which incorporates all multi-racial APIAs, specifically those who check both an APIA and Hispanic box on the census. See Appendix A for complete demographic data on the APIA population in California for both the 1990 and 2000 Census counts.

n147. By comparison, California's white, Latino, and African American populations were 46.70%, 32.38%, and 6.70%, respectively. U.S. Census Bureau, P010: Hispanic Origin by Race - Universe: Persons, American FactFinder, available at http://factfinder.census.gov/servlet/DTTable?ds name ++ &geo id=D&mt name=DEC 1990 STF1 Po1o& lang=en (July 3, 2002).


n149. For maps of preexisting districts, proposed districts, and actual post-2000 districts, see Appendix D. See also Leon Drovin Keith, Asians Seek New Districts for Clout, San Jose Mercury News, Aug. 10, 2001, at 27A.

n150. See Appendix A.

n151. See Appendix A.

n152. See Appendix A.

n154. Census 2000, supra note 153, at 39-44; see also Appendix A.

n155. Census 2000, supra note 153, at 39-44; see also Appendix A.

n156. Census 2000, supra note 153, at 39-44; see also Appendix A.

n157. Census 2000, supra note 153, at 39-44; see also Appendix A.

n158. Census 2000, supra note 153, at 39-44; see also Appendix A.

n159. Census 2000, supra note 153, at 39-44; see also Appendix A.

n160. Census 2000, supra note 153, at 39-44; see also Appendix A.

n161. Census 2000, supra note 153, at 39-44; see also Appendix A.

n162. Census 2000, supra note 153, at 39-44; see also Appendix A.

n163. Census 2000, supra note 153, at 39-44; see also Appendix A.

n164. Census 2000, supra note 153, at 39-44; see also Appendix A.

n165. Census 2000, supra note 153, at 39-44; see also Appendix A.

n166. Census 2000, supra note 153, at 39-44; see also Appendix A.

n167. Census 2000, supra note 153, at 39-44; see also Appendix A.

n168. Census 2000, supra note 153, at 39-44; see also Appendix A.

n169. Census 2000, supra note 153, at 39-44; see also Appendix A.

n170. Census 2000, supra note 153, at 39-44; see also Appendix A.

n171. See Appendix B for a detailed table on the populations in the Los Angeles County's San Gabriel Valley.


n173. Census 2000, supra note 153, at 39-44; see also Appendix A.

n174. Census 2000, supra note 153, at 39-44; see also Appendix A.

n175. Census 2000, supra note 153, at 39-44; see also Appendix A.

n176. The 53rd Assembly District unified Torrance in the 1991 redistricting as referred to earlier when discussing CAPAFR's initial experience in the redistricting process. A detailed table on the populations in L.A. South Bay can be found in Appendix C.

n177. Census 2000, supra note 153, at 39-44; see also Appendix A.

n178. Census 2000, supra note 153, at 39-44; see also Appendix A.

n179. Census 2000, supra note 153, at 39-44; see also Appendix A.

n180. Census 2000, supra note 153, at 39-44; see also Appendix A.

n181. For demographic data from the 1990 Census, see United States Census Bureau, Age and Sex for the Asian or Pacific Islander Population: 1990, San Diego County, California, at http://factfinder.census.gov/servlet/QTTable?ts=62107703130 (last visited Feb. 4, 2003). The demographic data from the 2000 Census comes from the APALC demographic database, which uses the DOJ measure for calculating population that was alluded to earlier and will be explained further when changes in the law regarding the census are discussed. This data can be found in Appendix A.

n182. Census 2000, supra note 153, at 39-44; see also Appendix A.


n185. See id.


n187. See Shaw III, 526 U.S. 541; Shaw II, 517 U.S. 899; Shaw I, 509 U.S. 630.

n188. See Shaw III, 526 U.S. 541; Shaw II, 517 U.S. 899; Shaw I, 509 U.S. 630.


n190. Id. at 920; Adams, supra note 54, at 13.
n192. Id.

n193. Id. But cf. Easley v. Cromartie, 532 U.S. 234, 241-42 (2001) (holding that to prevail on a Shaw claim "race must not simply have been 'a motivation for the drawing of a majority minority district.'"
Bush v. Vera, 517 U.S. 952, 959 (1996) (emphasis in original), "but 'the "predominant factor" motivating the legislature's districting decision.'" Hunt v. Cromartie, 526 U.S. 541, 547 (1999) (emphasis added in Easley). "Plaintiffs must show that a facially neutral law 'is "unexplainable on grounds other than race."'" Id. at 546.).
n195. Id.

n197. Redistricting Process Background Information, supra note 18.

n199. Redistricting Process Background Information, supra note 18.


n202. Impact of Redistricting, supra note 21, at 19.


n206. See Tom, supra note 17, at 1.

n207. See id.

n208. Id.

n209. Id. at 2.


n211. Tom, supra note 17.

n212. Id.

n213. Id.


n216. Id.


n219. UCLA Asian American Studies Center, supra note 217, at 36.

n220. Feng, supra note 214, at 6.

n221. Id.

n223. Feng, supra note 214, at 2.
n224. Id. at 3.
n225. Impact of Redistricting, supra note 21. A copy of this handbook, which has been cited throughout this Essay, can be ordered at http://www.napalc.org.
n226. Id.
n228. CAPAFR Redistricting Executive Report, supra note 148, at 1.
n229. Feng, supra note 214, at 4.
n230. In Northern California, the Alameda/Contra Costa County efforts were facilitated by the East Bay Voter Education Committee, Sacramento County by a community coalition of over fifty groups known as CAPITAL, San Francisco by the Asian Law Caucus and APIA Health Forum, and Santa Clara/Silicon Valley by the Asian Law Alliance. In Southern California, APALC worked with coalitions of interested constituents in Los Angeles County's three regions, Orange County Asian Pacific Islander Community Alliance assisted Orange County, and Southwest Center for Asian Pacific Law (SCAPL) supported groups in San Diego County. Id.
n231. See maps in Appendix D.
n232. Feng, supra note 214, at 5.
n235. Chung, supra note 1.
n236. Tom, supra note 17, at 3.
n237. Id.
n238. Feng, supra note 214.
n239. Id. at 4.
n240. Id.
n241. Id.
n244. Id.
n245. CAPAFR Redistricting Executive Report, supra note 148, at 1.
n246. Ingram, supra note 233; see also Proposed and Adopted Maps in Appendix D.
n247. See Appendix D-1.
n248. See Appendix D-2.
n249. See Appendix D-3.
n250. See id.
n251. See Appendix D-4.
n252. See Appendix D-5.
n253. See id.
n254. See Impact of Redistricting, supra note 21.
n255. Id.
n258. Aurelio Rojas, Redistricting Boundary Plan Criticized: Minority and

n259. Id.

n260. Id.

n261. CAPAFR Redistricting Executive Report, supra note 148.

n262. Tom, supra note 17, at 5.

n263. Id.

n264. Id.

n265. Id.


n268. See Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990); Garza v. County of Los Angeles, 756 F. Supp. 1298 (C.D. Cal. 1990).

n269. See Proposed and Adopted Maps in Appendix D.


SEVENTH ANNUAL LATCRIT CONFERENCE, LATCRIT VII, COALITION THEORY AND PRAXIS: SOCIAL JUSTICE MOVEMENTS AND LATCRIT COMMUNITY - PART II

FOCUSING THE ELECTORAL LENS: Latinas/os and the Political Process: The Need for Critical Inquiry

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BIO:

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SUMMARY: ... Indeed, the "Cambio de Colores (Change of Colors): Latinas/os in the Midwest" panel at the 2002 LatCrit VII conference would have seemed largely irrelevant only a decade ago. ... Past voting rights litigation has benefitted Latinas/os, who historically have been locked out of the political process, particularly in the Southwest, just as African Americans have similarly gained in the South. ... As part of an initial foray into analyzing the role of Latinas/os in the electoral process, this Article analyzes a fascinating voting rights case that reveals deep fissures within the Latina/o community and, in turn, implicates deeper concerns regarding electoral representation of all Latinas/os, including noncitizens. ... Election of a minority signifies that the politician's racial group has moved toward full membership in the community and demonstrated the possibility for upward mobility and political integration. ... Are Latinas/os of different national origin groups to be classified as a monolithic group for purposes of redistricting and voting rights litigation? ... Immigration raises significant concerns regarding political representation of minority groups with sizeable immigrant components, such as Latinas/os and Asian Americans. ... Even if naturalization rates increase beyond immigration rates, low voter turnout has long plagued the Latina/o community. ... The immigrant component of the Latina/o community cannot fully participate in the political process. ...

Migration from Mexico to the United States was a fact of life in the twentieth century. It continues in the new millennium, with more than 200,000 lawful immigrants from Mexico - the largest contingent of immigrants from any nation - coming to the United States in 2001 alone.n1 An important part of the nation's labor force, n2 Mexican immigrants primarily come to the United States for jobs and to join friends and family. n3 Importantly, Mexican immigrants have settled not just in the Southwest, but live in urban and rural areas across the country.n4 Indeed, the "Cambio de Colores (Change of Colors): Latinas/os in the Midwest" panel at the 2002 LatCrit VII conference would have seemed largely irrelevant only a decade ago. n6

The fact that Latinas/os as a group will soon become the nation's largest minority group, if they are not already, has received considerable, perhaps excessive, popular attention.n7 Contributing to the changing racial demographics, the migration of persons from Asia has increased dramatically since the 1965 repeal of the discriminatory national origins quota system, with ripple effects felt in communities across the United States. n8 Put simply, immigration is literally changing the face of the nation.

Scant attention, however, has been paid to the role that Latinas/os play in the nation's political process.n9 Although a coherent body of scholarship on the law of the political process has emerged over the last decade, n10 legal scholarship on race and political representation has focused primarily on the political representation of African Americans. n11 Given the changing racial demographics, the need...
exists for inclusion of other racial groups in this analysis.

Past voting rights litigation has benefitted Latinas/os, who historically have been locked out of the political process, particularly in the Southwest, just as African Americans have similarly gained in the South. Given the rapid population transformations in the United States, we are likely to see novel voting rights litigation in the future.

Scholars and activists hoping to address Latina/o civil rights concerns, such as segregation, immigration law and enforcement, language regulation, educational equity, and labor protection, have no choice but to consider the political process. The need for political solutions to law reform is made readily apparent by the Supreme Court's 2002 ruling that the National Labor Relations Board could not award back pay to an undocumented Mexican immigrant whose employer violated federal labor law by discharging him for union organizing activities. Because the Court offered the final interpretation of federal law at issue in the case, the only likely remedy is through the political process.

LatCrit Theory can and should help fill the scholarly gap on Latina/o voting rights. As part of an initial foray into analyzing the role of Latinas/os in the electoral process, this Article analyzes a fascinating voting rights case that reveals deep fissures within the Latina/o community and, in turn, implicates deeper concerns regarding electoral representation of all Latinas/os, including noncitizens. It concludes by considering the specter of conflict and the potential for coalition between different minority groups on political issues of concern in the new millennium.

I

Cano v. Davis: Redistricting and Intra-Latina/o Conflict in California

In California, a high-profile congressional redistricting dispute - to the surprise of many - revealed a deep internal conflict between the Mexican American Legal Defense and Education Fund (MALDEF), one of the leading Latina/o civil rights advocacy organizations in the United States, and Latina/o legislators. Conflicts like this, which may be seen with increasing frequency in the future given the nation's changing racial demographics, call for LatCrit analysis.

In Cano v. Davis, MALDEF challenged the redistricting scheme proposed by the California legislature for congressional districts based on 2000 Census data. MALDEF claimed that three of the districts diluted the voting strength of Latina/o voters. Specifically, one district had arguably been designed to protect Anglo-incumbent Howard Berman, a powerful United States congressman - essentially disenfranchising Latina/o voters. MALDEF contended that the redistricting violated the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. A three-judge district court panel acknowledged that MALDEF's claims "raise challenging questions regarding the applicability of voting rights doctrines developed in a fundamentally different context than the rapidly-changing multi-racial and multi-ethnic community that is present-day Southern California." In concluding that the redistricting scheme did not violate the law, the court noted that "Latino legislators and interest groups played a significant role in the 2001 redistricting process" and that the California state legislature was over twenty-two percent Latina/o.

The court further acknowledged the recent dramatic increase in the number of Latinas/os elected to office in California - no doubt reflecting the growing Latina/o population and increased Latina/o participation in the political process. As one commentator observed:

In 1990 there were only seven Latinos in the state legislature and none in statewide office. But as 1999 closed, there [were] six in the Senate alone, 23 total in the Legislature. The state Assembly had seen it's first and second Latino speakers, and a Latino - Cruz Bustamante - was elected lieutenant governor for the first time [in the twentieth] century.

This sea change in Latina/o representation has transformed California politics. Consider, for example, that in 1994, then California Governor Pete Wilson successfully staked his reelection bid on Proposition 187, which is now widely viewed as anti-immigrant and anti-Latino and was opposed by an overwhelming majority of Latinas/os in the state. In contrast, in his 2002 reelection campaign, California Governor Gray Davis carefully sought to navigate the demands of Latina/o legislators to sign laws that would require growers to arbitrate labor disputes with farm workers and to allow certain undocumented immigrants to obtain driver's licenses. Over the last few years, efforts to woo Latina/o voters have softened the political rhetoric on immigration.

Because of growing Latina/o political power, Latina/o legislators objected publicly to MALDEF's voting rights lawsuit in the strongest of terms. Two outspoken liberal Latina California legislators wrote an op-ed for the L.A. Times with a title that minces no words: MALDEF's Lawsuit is Racially Divisive. In their view, the lawsuit promised to breed racial
animosity and disturb a carefully crafted political compromise that benefited Latina/o voters. In its defense, MALDEF claimed that Latina/o legislators were not representing all Latinas/os, but were simply protecting their own political interests. MALDEF President Antonia Hernandez stated bluntly that the legislators supported the redistricting plans "because their interests [in their own reelections] were taken care of." She further stated that "MALDEF is confident that we can demonstrate that the current districts will effectively suppress the political voice of thousands of Latinos for the next 10 years."

Cano v. Davis raises novel issues that go to the core of voting rights law. Some might even suggest that the schism among Latinas/os surrounding the legal dispute lends support to a provocative proposal for limited judicial review of redistricting schemes. One commentator, for example, has contended that although racial classifications ordinarily receive heightened scrutiny, limited judicial oversight is warranted in redistricting decisions because of the inherent difficulty of judicial review.

Given its analysis of issues of identity and power, LatCrit Theory is well situated to shed light on questions of political representation posed by cases such as Cano v. Davis. Here are just a few of the possible questions that might benefit from such analysis:

1. Does a political candidate need to be Latina/o to effectively represent the Latina/o community in the legislature?
2. Are Latinas/os of different national origin groups to be classified as a monolithic group for purposes of redistricting and voting rights litigation?

Consider the Latina/o demographics of California: as of 1990, almost thirteen percent of the Latinas/os in California were Central American. A large Central American community lives in parts of Los Angeles, now constituting a near majority of the population of South Central Los Angeles. The perspectives and interests of Central Americans, who participated heavily in the Los Angeles riots that followed the acquittal of the police officers in the 1992 beating of Rodney King, do not necessarily coincide with other Latina/o national origin groups. Persons of Mexican ancestry comprise the largest Latina/o national origin group in the greater Los Angeles area and have different perspectives and interests than Central Americans. Tensions also simmer at times within the Mexican ancestry community. These divergent interests exemplify one of the difficulties in analyzing the status of Latinas/os in the United States: the incredible diversities within the Latina/o community and the complexities of the interactions between national origin groups in different geographic parts of the country - an established topic of LatCrit inquiry.

Issues at the core of Latina/o identity are implicated in the analysis of Latina/o political representation. As with African Americans and other racial minority groups, Latinas/os have opinions that span the political spectrum. No uniform "Latina/o view" exists on any particular issue. The question of the need for Latina/o elected officials to represent Latinas/os tracks the debates over essentialism and anti-essentialism of Latinas/os identity and whether there is any core characteristic binding all Latinas/os, which has been analyzed from the inception of LatCrit Theory. In considering this question, empirical data is lacking, although preliminary study has begun of the priorities of Latina/o politicians.

Apart from the question of the ability of politicians to effectively represent the Latina/o community, the election of Latina/o politicians arguably has a positive symbolic impact on the greater Latina/o community. Election of a minority signifies that the politician's racial group has moved toward full membership in the community and demonstrated the possibility for upward mobility and political integration.

This sense of belonging is particularly important in California given the history of Latina/o exclusion from the state's political processes.

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commonalities and differences among Latinas/os with respect to electoral representation.

. Should Latina/o legislators be expected to behave differently than other legislators in desiring to create and to act in the "best interests" of the Latina/o community?

One would expect politicians generally to be concerned with their political fortunes. California has seen dramatic increases in the numbers of Latinas/os in the state legislature, which in turn has affected the redistricting of Congressional seats. Latina/o legislators, as other politicians are wont to do, presumably would seek to create districts that would benefit them politically.n42 In Cano v. Davis, MALDEF appears to have asked something more of the Latina/o politicians involved in the redistricting than that of Anglo politicians - to ensure full and few representation of the Latina/o community. If so, the question is whether this demand is appropriate and realistic. In some ways, MALDEF's attempt may be seen as expressing a deeper dissatisfaction with the political process and desiring all politicians to treat different communities fairly in redistricting plans, whatever the political exigencies.

Cano v. Davis marks a watershed in California politics and reveals the dramatic, and relatively quick, demographic and political changes that have occurred in recent years. A comparison [*926] of the case with a 1990 decision of Garza v. County of Los Angeles,n43 a major voting rights victory for Latinas/os, shows how political fortunes of Latinas/os have improved in a few years. In Garza, the court found that the redistricting of the Los Angeles County Board of Supervisors discriminated against Latinas/os in order to protect white incumbents. n44 The court addressed a vastly different political landscape for Latinas/os than that which emerged by 2000:

We agree with the district court that the supervisors' intentional splitting of the Hispanic core resulted in a situation in which Hispanics had less opportunity than did other county residents to participate in the political process and to elect legislators of their choice. We conclude, therefore, that this intentional discrimination violated both the Voting Rights Act and the Equal Protection Clause.n45

This finding was supported by the simple fact that "no Latino had been elected to the five-member Board [of Supervisors] since 1874, despite the fact that the population of Los Angeles county [sic] in 1990 was 37% Latino."n46 Soon after the court [*927] approved a new districting scheme, voters elected the first Latina, Gloria Molina, to the Los Angeles County Board of Supervisors.n47

Mainstream criticism of Garza shows the need for LatCrit voting rights analysis. For example, Professor Daniel Farber chided the court for having "constructed an [sic] 'Hispanic seat' on the five-person Los Angeles County Board of Supervisors."n48 Such criticism ignores the evidence in Garza that the Board of Supervisors had intentionally split the Latina/o population for decades to dilute Latina/o voting power, and that the court's redistricting order was designed to remedy intentional vote dilution. n49 Professor Farber further alleges that, because most persons of Mexican ancestry identify as "white" for census purposes, the "utility of redistricting" is less beneficial to Latinas/os than African Americans. n50 The elusive logic of this syllogism fails to analyze critically the meaning of Latina/o identification as "white." Professor Farber's reasoning does not account for the fact that the census does not offer a clear classification alternative for Latinas/os given that "Hispanic" is an ethnic, not a racial, category; nor does it acknowledge that Latinas/os have long felt pressured to claim a "white" identity to avoid discrimination. n51 Finally, Professor Farber claims that less residential segregation of Latinas/os than African Americans makes redistricting to equalize Latina/o [*928] electoral power problematic,n52 without mentioning that housing and school segregation has plagued Latinas/os for the entire twentieth century, especially in the Southwest. n53 Along these lines, a 1999 study of school segregation, which is directly linked to residential patterns, in the United States concludes that: "the data shows continuously increasing segregation for Latino students, who are rapidly becoming our largest minority group and have been more segregated than African Americans for several years." n54

In sum, Latinas/os historically have been locked out of the political process. Slowly but surely, as the evolution from Garza to Cano demonstrates, this is changing. However, Latinas/os have largely been on the sidelines in the scholarly analysis of race and voting rights issues. LatCrit Theory has much to offer in gaining a better understanding of electoral representation in a multiracial America.

II

Electoral Representation of All Latinas/os

Cano v. Davis touches on larger issues of political representation of Latinas/os in the United States that up until this point, have not yet been thoroughly examined. Immigration raises significant concerns
regarding political representation of minority groups with sizeable immigrant components, such as Latinas/os and Asian Americans. This is especially true in California, where a relatively large Latina/o immigrant population resides.

The political representation of immigrants in a representative democracy has long raised thorny questions. A most fundamental question is who, if anyone, represents noncitizens in the political process? Counted as persons for census purposes, immigrants currently are considered in the allocation and distribution of political and other government benefits that are based on population. All noncitizens, however, are denied the right to vote. Disenfranchisement applies to long-term lawful permanent residents who, for whatever reason, have not naturalized to become United States citizens, as well as to undocumented immigrants.

Several years ago, Professor Jamin Raskin published a well-received article calling for voting rights for lawful permanent residents (legal immigrants) in local elections. The article appears to have spawned little more than academic interest; few localities permit voting by lawful permanent residents in local elections. It is fair to conclude that the proposed extension of the franchise has not caught fire.

Importantly, the immigrant voting rights proposal was limited only to lawful permanent residents, not undocumented immigrants. Currently, several million undocumented immigrants, including many Mexicans, are denied any direct input into the political process, however long they may have spent in the United States. Thus, undocumented persons may live in the country for many years without any direct political voice.

Legislators have not given the possible expansion of the right to vote serious consideration, perhaps because of the ready availability of other more politically viable, less far-reaching strategies. Extending the franchise to noncitizens - the mere proposal of which would likely generate a firestorm of controversy - no doubt appears less appealing in contrast to the alternatives. This is especially true in a time when the liberality of securing United States citizenship has come under attack.

Naturalization campaigns are one way to increase political participation of immigrant communities. In the 1990s, the federal government affirmatively encouraged naturalization and the transformation of immigrants into citizens through the Citizenship USA program, which attempted to streamline and accelerate the naturalization process. During this time, naturalization rates, particularly of Mexican immigrants, increased dramatically. The increase, however, was not necessarily for the best of reasons. Many immigrants pursued naturalization to avoid possible deportation imposed under harsh immigration laws passed in 1996 and to ensure access to benefits that the welfare reform legislation of that same year denied them. Immigrants understandably felt under siege in an era commenced by California's Proposition 187, which was sought to deny public benefits to undocumented immigrants and facilitate their deportation. Naturalization petitions thus were submitted in record numbers out of fear, not necessarily out of a desire for political participation or to show allegiance to the United States.

The federal government's efforts at facilitating naturalization ended abruptly in the late 1990s. The Citizenship USA program came under heated attack for allegedly being motivated by partisan political ends - namely, adding Democrats to the voting rolls. Republicans charged the Clinton administration with naturalization "abuse" as some immigrants legally ineligible for naturalization (because of, for example, criminal convictions) secured citizenship and thus, voting rights. Consequently, the enthusiasm of the federal government for naturalization efforts has waned and has been further dampened by national security concerns in the wake of September 11, 2001.

A growing Latina/o population and a high naturalization rate have increased the number of eligible Latina/o voters. Political candidates now aggressively pursue the Latina/o vote. However, different groups of Latinas/os have different amounts of political power depending on the votes that can be delivered. For example, while President Bush has been careful not to alienate voters of Mexican ancestry by embracing immigration and other policies that might be viewed as anti-Mexican, he does not face similar political constraints requiring him to immediately halt military bombing exercises in Vieques, Puerto Rico; the fact that United States citizens in Puerto Rico cannot vote in federal elections helps explain the federal government's policy choice.

Latina/o electoral representation will likely remain a problem in the foreseeable future. So long as immigration rates exceed naturalization rates, more noncitizen residents in the United States will lack the right to vote each year. Even if naturalization rates increase beyond immigration rates, low voter turnout has long plagued the Latina/o community. Organizations such as the Southwest Voter Registration Education Project have attempted to register Latina/o voters. However, mobilization strategies focused on Latinas/os may be viewed as
racially divisive - as playing the much-maligned "race card." A notable example was the march, with the waving of Mexican flags, of opponents of Proposition 187 that resulted in a backlash among Anglo voters. n72

Class issues are also submerged in the discussion over the representation of noncitizens in the electoral process. For example, many immigrants, particularly undocumented ones, tend to work in low wage jobs. n73 The poorer the group, the less likely that its members will participate in the political process. Class issues, [*933] long central to LatCrit Theory, n74 thus are relevant in analyzing the barriers to Latina/o voter participation.

In conclusion, Latinas/os face many formidable barriers to full political participation in the United States. The immigrant component of the Latina/o community cannot fully participate in the political process. Naturalization and political mobilization are the most viable remedies, as extension of the franchise to immigrants is a powerful, albeit politically problematic, alternative. These issues deserve scholarly attention and LatCrit inquiry.

III

Interracial Tension or Political Coalition?

The changing racial demographics of migration to the United States since 1965 will transform voting rights litigation and electoral reapportionment. n75 Tensions between established and emerging minority communities are almost inevitable. n76 Scholars and activists must pay attention to such tensions in order to facilitate necessary social change. LatCrit scholarship, focused on forming alliances, n77 has much to add to the study of future political coalitions between Latinas/os and other groups.

The stark division between African American and Latina/o voters in the 2001 Los Angeles mayoral election suggests that [*934] interracial conflict may often be just below the surface of many political controversies. For example, in a campaign in which Latino Antonio Villaraigoso was attacked in race-baiting television ads regarding his request that President Clinton pardon a drug offender, n78 eighty percent of Latinas/os voted for Villaraigoso while eighty percent of the African Americans supported the Anglo candidate. n79 Similarly, a few years before, in a Los Angeles suburb, middle class African Americans and others supported passage of a Los Angeles County ordinance that barred curbside job solicitation by predominantly Latina/o day laborers. n80 Liberal African American Yvonne Braithwaite Burke of the Los Angeles County Board of Supervisors supported the measure, with the backing of neighborhood activists and anti-immigrant groups. n81 Although Burke denied that race motivated the adoption of the ordinance, n82 others contended that simmering racial tensions fueled its passage. n83 Latina supervisor, Gloria Molina, proclaimed that the ordinance was "a shameful act. ... [that] will be used against people - especially people of color." n84 A court struck the law down on First Amendment grounds without addressing the racial undercurrent to its passage. n85

[*935] The changing nature of civil rights concerns in a multiracial America will complicate the building of coalitions. Immigration and immigrant rights have been, and will be, a critical civil rights issue for Latinas/os and Asian Americans. The heightened security measures adopted in the wake of the September 11, 2001 tragedy focus on noncitizens and, because most noncitizens in the United States are people of color, the measures will necessarily have disparate racial impacts. n86 For example, Congress passed a law imposing a United States citizenship requirement on employment in airport security jobs. n87 As a result, over eighty percent of the security screeners at San Francisco International Airport and about forty percent of those at Los Angeles International Airport, two cities with large Latina/o and Asian immigrant populations, faced job loss. n88 Immigration checks at airports across the country have resulted in arrests and deportations, primarily of persons of Latin American and Asian ancestry. n89 Efforts of the federal government to verify social security numbers of employees as part of the heightened security measures have spawned fear among Latina/o immigrants who worked under fraudulent documents. n90

Thus, matters typically of little concern to many United States citizens, including African Americans, may amount to serious civil rights issues for immigrants and the larger communities of which they are a part. For example, the denial of driver's licenses to undocumented Mexicans exacerbates fears of arrest and deportation, [*936] limits access to jobs, and increases immigrant vulnerability to workplace exploitation. n91 Acceptance of Mexican identifications by banks to open accounts may dramatically affect the lives of undocumented Mexicans who previously had been gouged by check cashing and wire transfer companies charging excessive fees for their services. n92 Showing little sensitivity to such issues, the Supreme Court dismissed a challenge to Alabama's English language requirement for a driver's license that disproportionately impacted minority communities. n93 Latinas/os and African Americans
may perceive themselves as having different interests on these and other issues, especially because both communities may see themselves as competing for jobs. n94

Despite perceived differences, African Americans and Latinas/os may find they have common interests on certain civil rights issues. Over time, combating racial discrimination has become more difficult to uncover and remedy. African Americans often are victimized by unconscious racism, n95 while Latinas/os and Asian Americans often suffer from similar discrimination through use of facially neutral proxies for race, such as immigration status and language proficiency. n96 Additionally, young African American and Latino men are over-represented in the criminal justice system and share common cause in removing the undue focus of race from law enforcement. n97 Finally, Latinas/os and African Americans share common problems with discrimination between their members based on relative skin color and physical appearance. n98

The potential for coalitions exists on voting rights concerns. [*937] This is particularly true in the area of political representation where issues of common concern exist. For example, the negative impact of the distribution of wealth on African Americans and Latinas/os in the electoral process warrants examination. n99 At times, African Americans and Latinas/os have worked together to challenge discriminatory voting practices. n100 With the over-representation of Latinas/os and African Americans in the prison system, disenfranchisement of felons will be an important voting rights issue for both Latinas/os and African Americans for the foreseeable future. n101 Potential conflicts in voting rights matters exist as well. n102 Such conflicts seem more prevalent when the issue, such as redistricting, is seen as a zero-sum game, with African Americans losing at the expense of Latinas/os or vice versa. n103

In considering coalition strategies with African Americans, both Asian American and Latina/o communities must determine where they fit into a political mosaic that has been forged historically [*938] by black/white conflict. In certain circumstances, possible coalitions of interest naturally exist between Asian Americans and Latinas/os on issues of immigration, immigrant discrimination, and language regulation, which do not necessarily fit into the African American civil rights agenda. n104 Representing an important example of coalition coming to fruition in a voting rights case, Asian Americans and Latinas/os cooperated in the Los Angeles County suburb of Monterey Park in a much publicized redistricting controversy. Both communities overcame tensions as the Mexican-American community saw the city change dramatically with Chinese immigration. n105 It is unclear whether this successful Asian American/Latina/o coalition will serve as a model for the future, or rather will be the exception to a rule of non-cooperation.

In sum, changing racial demographics will affect redistricting and the political process. Although potential exists for coalition between African Americans, Asian Americans, and Latinas/os, n106 collective action will require introspection and sensitivity by all involved. Far from inevitable, cooperation is unlikely if social justice is viewed as a zero-sum game.

Conclusion

LatCrit Theory has much to offer to the analysis of the role of race in the political process. Lessons of LatCrit Theory may shed much-needed light on the place of Latinas/os, Asian Americans, and African Americans in the United States. Voting rights cannot be fully understood in a multiracial America without considering [*939] the interplay and interests of all of these groups. n107

Many important questions will need to be addressed, such as the inherently difficult ones posed by Cano v. Davis. The analysis of such issues as redistricting and voting rights questions promises to be more complex with the growing Latina/o population in the United States, as well as the emerging Asian American population. To this point, the voting rights scholarship has lagged in analyzing issues of political representation affecting Latinas/os. Ensuring the representation of the entire Latina/o community in the United States should be of concern to all interested in true democracy. Moreover, to eradicate discrimination in the electoral process, the ability of African Americans, Asian Americans, and Latinas/os to overcome their differences and work together in the political process will be essential.

FOOTNOTE-1:


n3. See Maria Elena Bickerton, Note, Prospects for a Bilateral Immigration


n6. A recently published symposium on "Immigration in the Heartland" would have seemed wholly unnecessary as well. See Laura Rothstein, Introduction to the Symposium Issue on Immigration in the Heartland, 40 *Brandeis L.J.* 849 (2002).

n7. See U.S. Census Bureau, Overview of Race and Hispanic Origin: Census 2000 Brief 3, tbl.1 (Mar. 2001) (reflecting Census 2000 data showing that Hispanics comprise over 12.5 percent, nearly thirty-five million people, of total United States population, nearly as large as the African American population). For analysis of the impact of the changing racial demographics of the United States on the civil rights agenda, see Kevin R. Johnson, *The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millenium*, 49 *UCLA L. Rev.* 1481 (2002).


n12. See, e.g., White v. Regester, 412 U.S. 755 (1973); Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991); Calderon v. City of City of Los Angeles, 4 Cal. 3d 251, 481 P.2d 489, 93 Cal. Rptr. 361 (1971).


n17. Cano, 211 F. Supp. 2d at 1211 (emphasis added).

n18. Id. at 1246-47. This percentage, however, compares to a state population that is close to one-third Latina/o. See U.S. Census Bureau, Profiles of General Demographic Characteristics 2000, 2000 Census of Population and Housing 1 (May 2001) (Tbl. DP-1), available at www.census.gov/prod/cen2000/dp1/2kh00.pdf.


n20. See infra note 61 (citing authorities analyzing Proposition 187).


n22. See infra text accompanying notes 68-69.


n24. See id.

n25. See infra notes 26-27 (citing authorities).


n30. See Cano, 211 F. Supp. 2d at 1226-29.


n34. See generally Kenneth L. Karst, Belonging to America (1989) (analyzing efforts of different groups to achieve full membership in U.S. society). For evaluation of benefits to the Latina/o community of the appointment of the first Latina/o to the United States Supreme Court, see Kevin R. Johnson, On the Appointment of a Latina/o to the Supreme Court, 5 Harv. Latino L. Rev. 1 (2002) (article also published at 13 La Raza L.J. (2002)).

n35. See infra text accompanying notes 43-47.


n37. See id. at 2-25 map 2.15; David E. Lopez et al., Central Americans: At the Bottom, Struggling to Get Ahead, in Ethnic Los Angeles 279 (Roger Waldinger & Mehdi Bozorgmehr eds., 1996).


n39. See supra note 31 (citing authority).


n41. See Johnson, supra note 31, at 129-38.

n42. See Victor M. Valle & Rodolfo D. Torres, Latino Metropolis 35-36 (2000) (suggesting that this is how Latina/o officeholders operate in Los Angeles).

n43. Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991).

n44. See id. at 771.

n45. Id. at 771. Judge Kozinski concluded that the evidence showed:

[A] continuing practice of splitting the Hispanic core into two or more districts to prevent the emergence of a strong Hispanic challenger who might provide meaningful competition to the incumbent supervisors. The record is littered with telltale signs that reapportionments going back at least as far as 1959 were motivated, to no small degree, by the desire to assure that no supervisorial district would include too much of the burgeoning Hispanic population.

Id. at 778 (Kozinski, J., concurring and dissenting in part).

The district court in the case addressed issues that have been considered by LatCrit theorists, such as the definition of the Latina/o community, see Johnson, supra note 31, at 117-38, for purposes of the redistricting claim, see Garza v. County of Los Angeles, 756 F. Supp. 1298, 1325-27 (C.D. Cal.), aff'd in part, vacated in part, 918 F.2d 763 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991).

n46. J. Morgan Kousser, Shaw v. Reno and the Real World of Redistricting and


n50. Farber, supra note 48, at 925.


n52. See Farber, supra note 48, at 925.


n55. See U.S. Census Bureau, Profile of the Foreign-Born Population in the United States: 2000 at 2 (2001) (providing data showing that over ten percent of the U.S. population, and twenty-five percent of the California population, was born outside the United States).


voters, rather than all persons, in districts); Charles Wood, Losing Control of America's Future - The Census, Birthright Citizenship, and Illegal Aliens, 22 Harv. J.L. & Pub. Pol'y 465, 469-93 (1999) (contending that Congress should act to preclude the Census Bureau from including "illegal aliens" in apportionment base used in redistricting).


n59. See Raskin, supra note 58, at 1461-67 (discussing case of Takoma Park, Maryland).

n60. See Peter H. Schuck & Rogers M. Smith, Citizenship Without Consent: Illegal Aliens in the American Polity (1985) (questioning long legal tradition of bestowing citizenship by virtue of birth in United States); infra text accompanying notes 61-67 (discussing claims that Clinton administration abused the naturalization process for partisan political ends).


n65. See, e.g., Bob Barr, High Crimes and Misdemeanors: The Clinton-Gore Scandals and the Question of Impeachment, 2 Tex. Rev. L. & Pol. 2, 44-50 (1997) (contending that abuse of naturalization process was one of many grounds justifying the impeachment of President Clinton). The Justice Department's Office of the Inspector General found that the Clinton Administration had not acted for political ends in its Citizenship USA program, although some naturalization petitions were erroneously approved due to hasty processing. See IG Report Finds INS's "Citizenship USA" Program Was Flawed, But Not for Political Reasons, 77 Interpreter Releases 1198 (2000).

n66. See, e.g., Linda Kelly, Defying Membership: The Evolving Role of Immigration Jurisprudence, 67 U. Cin. L. Rev. 185, 204-08 (1998) (analyzing naturalization controversy and how Congressional reforms have significantly delayed the naturalization process); Ethan Wallison, Immigration Controversy Prompts New Plan for INS, Chi. Trib., Feb. 10, 1998, at n.10 (reporting on efforts of Clinton administration to prevent naturalization of criminal aliens through Citizenship USA program); William Branigin, Republicans Seek Probe of Immigration Program; Accelerated Naturalization Process Criticized, Wash. Post, Nov. 2, 1996, at A3 (describing claims of Republican members of Congress of abuse by Clinton administration in efforts to facilitate naturalization of immigrants).
n67. See Kelly, supra note 66, at 207-08 (analyzing various changes in naturalization process that slowed down the processing of naturalization petitions); see also Catherine Yonsoo Kim, Note, Revoking Your Citizenship: Minimizing the Likelihood of Administrative Error, 101 Colum. L. Rev. 1448 (2001) (analyzing administrative denaturalization regulations promulgated after Citizenship USA controversy).


n70. See de la Garza & DeSipio, supra note 9, at 1491-1508; Kevin R. Johnson, Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century, 8 La Raza L.J. 42, 49-56 (1995).


n72. See Johnson, Proposition 187, supra note 64, at 657.


n77. See Valdes, supra note 32, at 1094.


n79. See Johnson, supra note 7, at 1500-01. In some ways, this election may be an anomaly because the Anglo candidate's father, Kenneth Hahn, was a popular politician among African Americans in South Central Los Angeles who he had represented for many years. See Harold Meyerson, A City Hesitates at Political Change, N.Y. Times, June 8, 2001, at A25.


n81. See supra note 80 (citing authorities).


n85. See, e.g., Coalition for Humane Immigrant Rights v. Burke, CV No. 98-4863-GHK (CtX), 2000 U.S. Dist. LEXIS 16520 (C.D. Cal. Sept. 12, 2000). Avoidance of the issue of racial discrimination is common when courts address the lawfulness of measures that disparately impact Latinas/os. See Johnson, Proposition 187, supra note 64 (analyzing importance of anti-Latina/o sentiment in campaign over Proposition 187 and failure of court to address the issue of racial discrimination); Kevin R. Johnson & George A. Martinez, Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education, 33 U.C. Davis L. Rev. 1227 (2000) (analyzing how English language proficiency can serve as a proxy for race in controversy over bilingual education, although not addressed meaningfully by the court).


n91. See Johnson, supra note 7, at 1504-05.


n94. See, e.g., Vernon M. Briggs, Jr., Mass Immigration and the National Interest 5 (1992); Jack Miles, Blacks vs. Browns:


n96. See supra note 85 (citing authorities).


The events of September 11, 2001, had a transformative effect on life and society in the United States. On that day, nineteen men, whose presence within U.S. territorial borders ranged from the illegal to the mysterious, armed themselves with box-cutters and hijacked four civilian aircraft - two American Airlines and two United Airlines planes - and turned them into human-controlled jet-fueled missiles of mass destruction by flying two into the twin towers of the World Trade Center in New York City and one into the Pentagon, outside of Washington, D.C. \[n1\] The perpetrators were not state actors; rather, they were members of al Qaeda, a group that apparently worked with the Taliban, a rebel group that was seeking to take control of Afghanistan. Significantly, the Taliban was not recognized by the global community except for Saudi Arabia, the United Arab Emirates, and Pakistan, as the representative of that State. These criminals, some of whom trained as pilots in U.S. flight schools, were immediately and universally labeled as terrorists for their heinous acts.

Thousands of innocent persons, including the passengers and crews of the four aircraft, workers in the World Trade Center and \[n2\] the Pentagon, rescue workers, and bystanders, were killed or injured. The deceased included citizens of the United States as well as citizens of sixty other nations. Hundreds of millions of dollars worth of property was damaged or destroyed. With these occurrences, the United States, at present the sole surviving superpower in the twenty-first century, was transmogrified from a safe state to a besieged one - from a state where security and even invulnerability was presumed to one permeated by fright, incertitude, and anxiety.

Yet, while the popular narrative is that September 11 transfigured life as we knew it in the United States, the reaction to those events reflects historical patterns. For example, the domestic legal response to these heinous acts has been, and continues to be, to target immigrants based on their national, racial, religious, ethnic, and even political identities - specifically Muslim men of Middle Eastern descent. This targeting is much like that of the U.S. Alien and Sedition Acts which, respectively, gave the President the power to deport non-citizens deemed a threat to national security without recourse to the courts or rights of habeas corpus and made it a crime to criticize government
Similarly, the Alien Enemies Act, which authorizes the President during a declared war to detain, expel, and impose other restrictions on the freedom of any citizen (fourteen years or older) of the country with which the United States is at war, paved the way for the internment of persons of Japanese descent, including U.S. citizens, during the Second World War. Anti-immigrant sentiments also surfaced during the "Red Scare" which led Congress to pass immigration laws prohibiting entry into the United States to persons who advocated "the overthrow by force or violence of the government of the United States or of all government forms of law." During this time, it was not much of a leap from targeting immigrants for exclusion based on their political beliefs to targeting citizens during the McCarthy Era when federal, state, and local governments passed laws against communists and the House Committee on Un-American Activities compiled dossiers on thousands of U.S. citizens. Today, we see these anti-immigrant and anti-disssident patterns repeated in the responses to September 11. For example, like the Enemy Alien Act, the PATRIOT Act - the centerpiece of post-9/11 federal antiterrorism legislation - does not require a proceeding to decide whether an individual is suspicious, disloyal, or dangerous. The United States, promptly joined by the global community, labeled the events of September 11 as an act of war. Such designation elides al Qaeda's criminal acts with (possibly legally justifiable) acts of war - an identification that may carry legally problematic consequences. To explore these perhaps unintended outcomes, Part I of this Essay sets out the September 11 timeline and Part II comments on the four essays that constitute this cluster in light of those facts. Part III engages the legal issues - both domestic and international - of U.S. (and global) reactions to the attacks. In Part IV, this work concludes that the domestic and international norms that existed at the time of the September 11 assaults were sufficient to identify and punish the heinous conduct and that there was no need to pass laws that sacrificed personal liberties in order to protect the national security.

The Facts

On September 11, 2001, at 7:59 a.m., American Airlines Flight 11 left Boston's Logan International Airport en route to Los Angeles, carrying ninety-two people. At 8:45 a.m., this flight, with five hijackers on board, crashed into One World Trade Center, the north tower of New York's World Trade Center. Eighteen minutes later, United Airlines Flight 93, which at 8:01 a.m. had left New Jersey's Newark International Airport en route to San Francisco carrying forty-five people, crashed into Two World Trade Center. Around that time, police and firefighters responded to the emergency at the towers.

At 9:43 a.m., almost one hour after the first crash, American Airlines Flight 77, with five hijackers on board, crashed into the Pentagon. At that time, trading on Wall Street stopped. Fifteen minutes later, a passenger aboard United Airlines Flight 175, which had left Boston en route to Los Angeles carrying sixty-five people, placed a call to an emergency dispatcher in Pennsylvania saying, "We are being hijacked, we are being hijacked!" At 10:10 a.m., this flight, with five hijackers on board, crashed eighty miles southeast of Pittsburgh with its assumed target somewhere in Washington, D.C. At that time, President Bush was en route to Louisiana and put America's military on high alert status.

President George W. Bush's first remarks to the nation called the crashes an "apparent terrorist attack on our country." He later called the attacks an act of war.

Shortly after the crash into the Pentagon, the Federal Aviation Administration barred aircraft takeoffs across the United States and instructed international flights in progress to land in Canada. Reagan Airport in Washington, D.C., did not reopen until October 4.

By midmorning, government buildings across the nation were evacuated, the United Nations closed, and the Securities and Exchange Commission closed all U.S. financial markets for the day. New York's Mayor Rudolph Giuliani evacuated lower Manhattan. By that afternoon, the U.S. military was on high alert worldwide and the Navy had dispatched missile destroyers and other equipment to New York and Washington.

During the evening of September 11, Four, Five, Six and Seven World Trade Center and the Pedestrian Bridge collapsed. An estimated 6333 people were missing and, eventually, almost 3000 were declared dead, including approximately 300 firefighters, 40 police officers, and foreign citizens from 65 countries.

Global response to the attacks was fast. For example, on September 12, the North Atlantic Treaty Organization (NATO) invoked Article 5 of its founding treaty, a mutual defense clause stating that an armed attack against any of the allied nations in Europe or North America shall be considered an attack against all of them. The day after the attack, many governments of the world, including President Vladimir Putin of Russia, German Chancellor Gerhard Schröder, French President Jacques Chirac,
British Prime Minister Tony Blair, Italian Prime Minister Silvio Berlusconi, and the European Union's Security Chief Javier Solana, expressed both solidarity with the United States and support against terrorism.

Given such positive response, the Bush administration began an effort to form a coalition against terrorism. This endeavor received overwhelming support including some from such surprising sources as Pakistan's ruler General Pervez Musharraf, Saudi Arabia's King Fahd, North Korea, Egypt's President Hosni Mubarak, and President Nursultan Nazarbayev of Kazakhstan. Moreover, the States that had recognized the Taliban as Afghanistan's government quickly severed their ties, ending recognition.

China, at first, offered mixed support. It pledged to join the United States in a global war against terrorism, but was restrained by its opposition to intervention in the affairs of other nations and the ties it has with countries the United States has named as "state sponsors of terrorism." But by the end of September, the Chinese government expressed strong support for the U.S. war on terrorism and even for limited military strikes. The fruits of international cooperation were evident by this time, when arrests of those with suspected terrorist links were made in nations including the Netherlands, Spain, Belgium, the United Kingdom, and the United Arab Emirates.

However, cooperation did not come without a price. Many Middle-Eastern countries wanted the United States to become more deeply involved in ending violence in the region. Pakistan wanted an agreement to end an eleven-year sanction, restore the flow of American arms, and reduce a punishing debt load in exchange for use of its bases or rights to fly in its air space. Russia had grievances over NATO expansion towards its borders and criticism of its military campaign in Chechnya. The United States, in order to obtain its support, agreed to ignore Russia's massive human rights violations in Chechnya, including its armed incursions into territory that sought to be independent.

On September 14, Congress, by joint resolution, authorized the President to:

use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.
would be against bin Laden and perhaps the Taliban, but not Afghans or the Islamic faith.\textsuperscript{n23}

On October 7, the war against terrorism took a significant turn when U.S. military forces launched Operation Enduring Freedom against Kabul, Afghanistan, consisting of U.S.-led air strikes in which the British also participated, which targeted forces associated with both al-Qaeda and the Taliban leadership under Mullah Muhammad Omar. The next day, the United States informed the U.N. Security Council that inquiry into the terrorist attacks could lead beyond Afghanistan and later elaborated that U.S. officials believed terrorists tied to Osama bin Laden were based in the Asian countries of the Philippines, Indonesia, and Malaysia, and those countries were likely targets of future covert and overt U.S. actions.

On the second day of the attacks, the Philippine government gave the United States full support for its air strikes on Afghanistan, granting U.S. fighter jets and warships full access to all ports in the Philippines and allowing U.S. troops and weapons to remain \textsuperscript{[*949]} in the Philippines for as long as needed.\textsuperscript{n24} Also on the second day of the attacks, Spain, Italy, Germany, and France pledged to send troops if necessary, and NATO agreed to send five AWACS (Airborn Warning and Control System) early warning planes and crews to the United States to free up American surveillance aircraft for use in the campaign. The fifteen foreign ministers of the European Union again declared their support, as did leaders in Hungary, Poland, and Slovakia. Later, China pledged support in the war against terrorism and Asian leaders at the annual Asia Pacific Economic Cooperation (APEC) summit signed a statement against terrorism. After the attacks began, Iran and Iraq issued statements condemning the U.S. and British military strikes in Afghanistan.

Other domestic and international measures taken in response to the terrorist attacks are noteworthy. On October 26, President Bush signed into law the USA PATRIOT Act,\textsuperscript{n25} legislation that grants the Attorney General unprecedented powers, including the ability to detain non-citizens "if the Attorney General has reasonable grounds to believe" they are "engaged in any ... activity that endangers the national security of the United States" \textsuperscript{n26} and to deport or refuse entry to persons who "endorse or espouse terrorist activity," who persuade others to support terrorist activity or a terrorist organization, or raise money for a terrorist group.\textsuperscript{n27} Several days later, the Department of Justice issued an interim rule allowing prison authorities to monitor communications between inmates and their counsel in instances in which the Attorney General certifies that there is "reasonable suspicion" that the inmate is using such communications to facilitate acts of violence or terrorism.\textsuperscript{n28} Domestically, airport security was tightened and municipalities were put on highest alert. In late October, the United States released a "most wanted" list of twenty-two suspected terrorists, including Osama bin Laden and some of his top allies, whom President Bush called "the leaders, key supporters, planners and strategists."\textsuperscript{n29}

\textsuperscript{[*950]} In November, Attorney General John Ashcroft announced that in order to identify potential terrorists, the United States would require non-citizen young men from Arab and Muslim nations to register with the government.\textsuperscript{n30} The process requires men over the age of sixteen from twenty-two nations to be interviewed, photographed, and fingerprinted.\textsuperscript{n31} Their information is checked against databases maintained by the FBI and other U.S. government entities.\textsuperscript{n32} The program is not applicable to permanent residents, those who obtained asylum before November 6, 2002, or diplomats and their families.

On November 13, President Bush issued a military order on the trial of terrorists by military commission\textsuperscript{n33} which has been interpreted effectively to suspend the writ of habeas corpus. The same day President Bush issued the military order, the Taliban withdrew from Kabul and Afghan opposition fighters took over the city. The following day, the U.N. Security Council unanimously adopted Resolution 1378 and "affirm[ed] that the United Nations should play a central role in supporting the efforts of the Afghan people to establish urgently such a new and transitional administration leading to the formation of a new government."\textsuperscript{n34}

Numerous cases related to the attacks are now pending. On December 11, 2001, the Justice Department announced the indictment of Zacarias Moussaoui - the suspected twentieth hijacker - charging him with conspiring with Osama bin Laden and al-Qaeda to commit acts of terrorism "transcending national boundaries" among other offenses, including the commission of the terrorist acts that were perpetrated on September 11.\textsuperscript{n35}

On January 15, 2002, the Justice Department announced the filing of criminal charges against John Walker Lindh, a U.S. citizen who was taken prisoner while fighting with the Taliban forces. Lindh, called the "American Taliban," was charged with conspiracy to kill members of the U.S. military in Afghanistan and with providing material supportive resources to foreign terrorist organizations, including al-Qaeda. He pleaded guilty to supplying services to the Taliban and to a criminal charge of carrying an explosive during the
commission of a felony. On October 4, 2002, he was sentenced to twenty years in prison.\footnote{81 Or. L. Rev. 941}

In June, Attorney General John Ashcroft announced that another U.S. citizen was in custody for being involved in planning terrorist attacks. Jose Padilla, now known as Abdulla Al-Muhajir, was arrested in Chicago for having a "dirty bomb" that he planned to explode in the United States. Ashcroft announced that Al-Muhajir would be transferred to military authorities to be held as an enemy combatant. On December 4, 2002, Judge Mukasey of the Southern District of New York denied the government's motion to dismiss a habeas petition filed by Al-Muhajir's counsel. The District Court ruled that it has jurisdiction to hear the case and that the prisoner could consult with counsel while pursuing habeas relief. The court also noted that the President could lawfully order the prisoner's detention as an enemy combatant even if the prisoner holds U.S. citizenship and that the standard for lawful detention in this case would be the existence of "some evidence" to justify such detention.\footnote{\footnote{[952]}}

On January 11, 2002, the United States transferred the first group of captives from Afghanistan to the U.S. naval base in Guantanamo Bay, Cuba. Pictures of the transferred Taliban-al Qaeda captives in shackles, either hooded or wearing black-out goggles, and prison jumpsuits, and sometimes brought to their knees, generated protests from around the world and from within the United States as well. One source of contention was the treatment of the captives. Another source of contention was President Bush's announcement on the status of the prisoners who include over 150 citizens of over twenty states including three from Great Britain and one from Australia.\footnote{[953]} President Bush, ignoring established procedure, unilaterally declared that the Third Geneva Convention would apply to the Taliban but not to the al Qaeda detainees. Moreover, the President declared that neither group would be granted prisoner of war status, designating the captives instead as "unlawful combatants" - a classification unknown in the international humanitarian law field.\footnote{[954]} The United States ignored the global demands for the captives to be treated according to accepted international norms, but said that it would treat the captives humanely.

In March, 2002, the Department of Defense announced the guidelines for the military commissions created to try suspected terrorists. Following this announcement, Defense Secretary Donald Rumsfeld, tracking the guidelines, asserted that the United States was entitled to hold the detainees without trial, even after acquittal - until the end of the war against terrorism, as is a standard with enemy combatants captured during the course of a war.

Not surprisingly, numerous challenges to U.S. practices and policies with respect to the captives have been lodged. In August, Judge Gladys Kessler of the District of Columbia ordered the U.S. government to release the names of all the people detained in the United States during the anti-terrorism investigation, saying that it is the judiciary's duty "to ensure that our Government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship."\footnote{[955]} Later that month, Judge Robert D. Doumar of Virginia ordered the U.S. government to provide evidence in support of the designation of U.S.-born Yaser Hamdi, who had been picked up by United States forces in Afghanistan and is being held in a navy brig in Virginia, as an unlawful enemy combatant.\footnote{[956]} The circuit court reversed that order, however, ruling that the declaration by a special advisor setting forth the circumstances of Hamdi's capture was alone sufficient to justify his detention, noting that his U.S. citizenship did not preclude his detention as an enemy combatant captured "during a combat operation undertaken in a foreign country and a determination by the executive that [he] was allied with enemy forces."\footnote{[957]} Also in August, the Sixth Circuit Court of Appeals ruled that the deportation hearings for people detained during the anti-terrorism investigation had to be open to the public.\footnote{[958]} However, in October, the Third Circuit held that newspapers do not have a right of access to cases designated as "special interest" cases by the Attorney General due to national security concerns.\footnote{[959]}

One case in U.S. courts that is noteworthy particularly in light of the Ali Abbasi case discussed below is Rasul v. Bush.\footnote{[960]} This case involved a challenge by two British, one Australian, and twelve Kuwaiti nationals who were captured in Afghanistan to their Guantanamo detention.\footnote{[961]} The court dismissed the detainees' petition for habeas corpus, ruling that foreigners held by the United States outside of its sovereign territory could not seek habeas relief in U.S. courts.\footnote{[962]}

Two foreign cases are worthy of mention. In Germany, prosecutors charged Moroccan-born Mounir El-Motassedeq with supporting the work of the al Qaeda cell in Hamburg that planned the September 11 attacks.\footnote{[963]} Prosecutors claim that El-Motassedeq managed the bank account of some of the al Qaeda members taking flight school lessons in the United States.

In Britain, the family of a British national, Feroz Ali Abbasi, who was captured by U.S. forces in Afghanistan and was transported to Guantanamo Bay, initiated proceedings based on the claim that one of his
human rights, the right not to be arbitrarily detained, is being violated. At the time of hearing in the England and Wales Court of Appeal, Abbasi had been a captive in Guantanamo "for eight months without access to a court or any other form of tribunal or even a lawyer." The English court, while refusing to examine whether a foreign state, in this instance the United States, was in breach of treaty obligations or in breach of public international law, concluded that "in apparent contravention of fundamental principles recognized by both jurisdictions and by international law, Mr. Abbasi is at present arbitrarily detained in a 'legal black-hole'". Finally, it is noteworthy that the Inter-American Commission on Human Rights, an organ of the Organization of American States of which the United States is a member, by letter dated March 12, 2002, requested that the United States "take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent Tribunal." The United States responded by claiming that "the legal status of the detainees is clear, that the Commission does not have jurisdictional competence to apply international humanitarian law, that the precautionary measures are neither necessary nor appropriate in this case, and that the Commission lacks authority to request precautionary measures of the United States." In reply, the Commission reasserted its authority to request precautionary measures citing to Article 5 of the Third Geneva Convention and Article XVIII of the American Declaration. The Commission claimed the right of human rights supervisory bodies such as this Commission [to] raise doubts concerning the status of persons detained in the course of an armed conflict, as it has in the present matter, and require that such [a] status be clarified to the extent that such clarification is essential to determine whether their human rights are being respected. In light of the principle of efficacy, it is not sufficient for a detaining power to simply assert its view as to the status of a detainee to the exclusion of any proper or effectual procedure for verifying that status.

This overview of the events of September 11 and the series of domestic and international responses thereto - legal, military, and political - intertwine the global and the local, effectively globalizing terror. Foreign forces united to effect a military strike against the Taliban and al Qaeda in Afghanistan. Captives from numerous countries are held by the U.S. military on a base in Cuba. Assets have been frozen in financial institutions around the world. The global and local lines are blurred or trespassed, depending on one's point of view, by collective enforcement against terror as well as by unilateral actions that, while seeking to bring justice against terrorism within one state's borders, threaten the (international) human and (domestic) civil rights and liberties of citizens and non-citizens alike, both at home and abroad.

II

National Security Versus Individual Liberties - The Essays

This section's four authors grapple with the tensions caused by the September 11 events, particularly with respect to the opposing demands, on the one hand, to protect the nation's and its peoples' national security interests in the fight against terrorism and, on the other hand, to protect the individual rights and liberties of those apprehended and detained as suspects who may have committed or supported the commission of terrorist acts.

[*955] Raquel Aldana-Pindell, in her piece entitled The 9/11 "National Security Cases": Three Principles Guiding Judges' Decision Making, focuses on the "three factual or legal distinctions that have (or should have) guided the outcome in the post-September 11 litigation." Her first assertion is that, historically, "the scope of judicial deference to the executive has depended on whether the courts have considered the president's actions to implicate greater concerns with national security than domestic affairs." This national security/domestic concerns dichotomy that she sets up is grounded in the U.S. Supreme Court decisions in United States v. Curtiss-Wright Corp. and Youngstown Sheet & Tube Co. v. Sawyer. Aldana-Pindell posits that "this precedent holds that the president's national security inherent powers are greater the more his actions affect national security affairs (Curtiss-Wright) and less the more his actions affect domestic affairs (Youngstown)." Significantly, however, she realistically recognizes that it is increasingly difficult to designate any action in the September 11 events as purely domestic or purely national security and that this creates difficulty for the courts in ascertaining which precedent governs and results in the "mixed" judicial response to the executive actions. The split in the circuits concerning the legal validity of the Creppy Directive authorizing secret immigration hearings confirms this difficulty.

The second principle that Aldana-Pindell proposes is that:
Courts have not deferred to the executive, even in cases that implicate national security, when the president is exercising a power the Constitution clearly reserves for Congress. In the post-September 11 litigation, this issue has arisen in the president's decision to bar those detained as "enemy combatants" from pursuing habeas petitions and to prescribe federal court jurisdiction over the military tribunals.\textsuperscript{n61}

Although the courts have not directly addressed whether the president has congressional approval to deny judicial review, the author argues that "the president has acted unilaterally to do so and, therefore, that courts have incorrectly ignored significant \textsuperscript{[*957]} separation of powers concerns."\textsuperscript{n62} Lastly, the author notes that in some post-September 11 cases the judiciary has respected the claimants' Bill of Rights concerns, although courts in the past have ignored some concerns over such individual liberties. However, she reconciles these ostensible tensions by noting that, one, courts often distinguish between substantive and procedural individual rights in deferring to the political branches in national security matters and, two, that courts have sometimes limited the president's discretion in keeping national security secrets to guarantee the public's ability to hold the government accountable to the rule of law. \textsuperscript{n63}

Aldana-Pindell discusses the numerous cases pending in courts and ultimately suggests that the national security/domestic dichotomy explains the different approaches courts have taken to detainees abroad - at Camp Xray in Guantanamo Bay - as contrasted to those who are held within the United States. She suggests that the inherent national security powers allow the executive to detain "enemy combatants" and thus courts will tend to defer to the executive on these matters. Yet, the constitutional question of whether the enemy combatants, even if properly detained, may be denied the right to judicial review, including habeas petitions, has been answered as to allow United States unilateral actions. The author, however, challenges this outcome on grounds of separation of powers as well as on international law.

Natsu Taylor Saito's piece, Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent in the United States,\textsuperscript{n64} also challenges the national security versus individual liberties dichotomy that Aldana-Pindell suggests. In this work, however, Saito sets out the history of the U.S. government acting not only against non-citizens but also against U.S. citizens when they participate in unpopular causes. She describes the targeted populations as ranging from war resisters to labor activists, from indigenous people to non-citizens, from civil rights activists to other subversives. Specifically, she focuses on the activities of COINTELPRO, which employs tactics of surveillance and infiltration, \textsuperscript{[*958]} dissemination of false information, creation of intra- and inter-group conflict, abuse of the criminal justice system, and collaboration in assaults and assassinations to discredit unpopular peoples and causes. Significantly, she details the specific targeting of communist and socialist organizations, the civil right movement, the Klan and other white hate groups, the new left and the anti-war movement, black national organizations and the Black Panther Party, and the American Indian movement to show the breadth of the government's activities over what it deems unpopular causes.

Saito then analyzes more recent anti-terrorist legislation and governmental policy as well as the USA PATRIOT Act of 2001 to suggest that these initiatives simply reflect the continuation of these historically undesirable governmental intrusions into people's lives. Specifically, she points to the enhanced surveillance powers, the criminalization of protest, the enhanced restrictions on immigrants, and enhanced funding and interagency communication to show that individual liberties and rights are being sacrificed in the war against terrorism without any concomitant assurances for greater security.

In conclusion, she interrogates "how much 'liberty' are we willing to sacrifice for the sake of 'security'?"\textsuperscript{n65} She suggests that her historical review urges a more skeptical and critical analysis about the government's intentions in its denial of liberties with the goal of increasing national security. She exhorts that "the federal government has consistently used its powers, legally and illegally, to suppress social and political movements which it sees as threatening the status quo. It is in this context that we must examine the expanded powers currently being exercised by the executive branch and legitimizied by Congress." \textsuperscript{n66}

She adds, much like Aldana-Pindell suggests, that "the current expansion of executive powers and the concomitant restrictions on civil rights are not simply a response to a national emergency sparked by recent acts of terrorism, but a move toward legitimating powers that have a long history of being used consciously and deliberately to suppress political dissent."\textsuperscript{n67}

Recognizing that the United States is the sole global superpower - political, economic, and military - she urges that such \textsuperscript{[*959]} status carries with it a responsibility to ensure that all people realize fundamental human rights - rights that she implies are being denied by the initiatives enacted pursuant to the
existing war against terrorism. She concludes as follows:

To the extent that governmental practices violate the Constitution and basic principles of international law, the fact that they are being "legalized" by Congress cannot give us comfort. Again, this was one of the basic principles articulated by no less than Supreme Court Justice Robert Jackson at the Nuremberg Tribunals - the existence of national laws legitimizing particular practices does not render those practices lawful in the larger sense of the term.\textsuperscript{68}

The other two papers focus more on the consequences of the war against terrorism for local communities. Peggy Nagae, in Justice and Equity for Whom? A Personal Journey and Local Perspective on Community Justice and Struggles for Dignity,\textsuperscript{69} recounts the evolution of her understanding of Korematsu v. United States \textsuperscript{70} to admonish against the current trends. In Korematsu, the Supreme Court, while finding that distinctions between citizens solely because of their ancestry or by their nature are odious to a free people, nevertheless concluded that military necessity rendered both the exclusion of Japanese and the internment of Japanese Americans constitutionally permissible.\textsuperscript{71} This case both challenged her sense of justice and sparked a desire to pursue justice and equity for all. As a Japanese American, she decided to attend law school and dedicate her life to such pursuits, joining civil rights organizations that focus on the protection of civil rights and liberties as well as being an advocate. Specifically, she represented one of the claimants in the reopening of the cases of Japanese American incarceration and was successful in having her client's conviction erased.

Her concerns with the post-September 11 events are grounded in this personal history. She sees that, like with the Korematsu "military necessity internment," today national security is being used as a basis to target persons on the basis of race.

Today the term "military necessity" has given way to "national security," but the impact is the same; just as it was four decades ago, race is still used as an indicator of loyalty (now called patriotism) and is still justified because of stereotypes and prejudices that lead to discrimination. As happened with Japanese Americans in World War II, the current government has arrested and detained more than a thousand "suspected" terrorists and has imprisoned U.S. citizens indefinitely without bail, criminal charges, or access to attorneys. In addition, the government has proposed the creation of detention camps for U.S. citizens deemed "enemy combatants," without judicial review. The government believes that, in the name of safety, racial profiling is justified now as it was then.\textsuperscript{72}

The author condemns these actions noting that now, like in Korematsu's experience, "in times of war, distress, and military necessity ... we need to be the most vigilant about protecting rights and abhorring racial profiling."\textsuperscript{73}

Like Nagae's work, Steven Bender's Sight, Sound, and Stereotype: The War on Terrorism and Its Consequences for Latinas/os\textsuperscript{74} looks at the post-September 11 consequences of "hate crimes, discrimination, and profiling directed at Arab Americans, Arabs, and Muslims in the United States."\textsuperscript{75} He then links this anti-Arab/Muslim backlash to the discriminations that Latinas/os and other subordinated groups suffer within the United States. Like Saito, Bender engages in a historical analysis. His analysis, however, concerns the position of Latinas/os within U.S. society and culture and notes that they, like Arab immigrants are now, have been the subject of negative sentiments.

Given [the] societal construction of Latinas/os as violent, foreign, criminal-minded, disloyal, and as overrunning the border, there are numerous grounds by which Americans might similarly construct Latinas/os as a terrorist threat. Because undocumented immigrants are now seen as a national security threat, as would-be terrorists, the longstanding association of Latinas/os with "illegal aliens" may cause Americans to view Latinas/os with suspicion.\textsuperscript{76}

Significantly, Bender notes that the leap to such a terrorist labeling is not a huge one in light of "the societal association of Latinas/os with drugs [which] could shape a conception of Latinas/\textsuperscript{961} os as 'narco-terrorists'."\textsuperscript{77} Furthermore, he analogizes the current war on terrorism to President Richard Nixon's war on drugs which resulted in the deployment of some agents at the Mexican border as part of the initiative to curtail drug smuggling, a position that President Reagan followed by issuing a security directive that classified drugs as a national security threat.\textsuperscript{78} Bender proceeds to provide examples of instances in the Latinas/os history in the United States that could support the linkage of terrorism with the Latina/o identity, including the Mexican and Puerto Rican struggles for independence and self-determination.

In the wake of September 11, Latinas/os were also directly affected by the anti-immigrant sentiments that
emerged, with many in the majority questioning the patriotism of Latinas/os, particularly the undocumented immigrants. Bender notes that this questioning of patriotism was reflected in Congress' imposition of a citizenship requirement on airport screeners which resulted in many Latinas/os losing their jobs. However, the consequences do not stop at non-citizen Latinas/os, because the racial profiling that has been embraced by the government and the country can then extend to citizens who are Latinas/os. Bender notes that racial profiling has been in use by the government to target Latinas/os in immigrant enforcement and the war against drugs. With the current climate, it can be extended in unpredictable ways.

Finally, Bender also looks at the possible assimilation pressures that may result from the post-September 11 events, including hostility against Spanish language speakers which would simply build on the English-only movement that has been in play for some time. Bender concludes by urging that the post-September 11 society not be one imbued with anti-immigrant sentiments, which have "forged a narrow Eurocentric vision of nationhood based on commonalities of history and heritage that viewed immigrants as disruptive anti-nation forces." To the contrary, he adds his voice to the faint chorus of those seeking to articulate a new expansive vision of nationhood - one of cultural diversity. ... Consistent with such a vision, Americans must forge a humanist unity marked by the respect of different cultures and their contribution to America, a recognition of human rights, and an acknowledgment of the invigorating effects of immigration. This multicultural vision of nationhood would regard racial profiling with great suspicion, would consider the human consequences of militarizing and securing borders on immigrants drawn to the United States by employment opportunities rather than by evil intent, and would resist the pressures of assimilation that purport to pronounce one culture and language as superior and the rest as anti-American and subversive.

These essays demonstrate how the national norms that have historically existed and those that have been enacted specifically in response to September 11 can constitute a misuse or abuse of governmental power that can target "others" and deny them constitutional rights. However, in seeking how to balance the need to protect a population in a society with the protection of individual liberties, international norms may be of great assistance. Thus, in the following section, this Essay will look at international protections that may be useful in the analysis in this war against terrorism.

III

Post-9/11 Legal Issues

In the wake of the September 11 tragedy, both the United States and the international legal community were quick to act. In this section, first the domestic response and then the international concerns with respect to these events are presented. The first part on domestic initiatives looks at three separate undertakings: immigration detentions, the USA PATRIOT Act, and ethnic profiling. The section on the international issues analyzes the definitions of war and terrorism, the applicability of the laws of armed conflict to the "War on Terrorism," the U.S. designation of the status of the terrorists in the context of international law, and the legality of the military commissions created by President Bush to try enemy combatants. To be sure, as Aldana-Pindell noted in her work, the difficulty of creating demarcations between executive actions taken in the domestic interest as juxtaposed to executive actions taken to protect national security, given the nature of the September 11 events, makes it impossible to create a clear divide between local and global acts. Indeed, virtually every action and response can be said to have a "glocal" character - partly global and partly local. Thus, this section's separation into parts A and B - domestic and international considerations, respectively - is a planned organizational artifice. A perfect example of this is the U.S. executive order creating military commissions with which this section deals in the international section because of its close nexus to the international legal status of the detainees.

A. Domestic Initiatives

One of the initial responses to the September 11 attacks was the U.S. government's effort to detain non-citizens as a preventive measure. Although the actual number of persons detained is unknown, it is likely to be over 1000. Notwithstanding these numbers, however, only one person - Zaccarias Moussaoui - has been charged with any criminal offense. Significantly, he was arrested before September 11. Moreover, the government has only claimed that ten or eleven of the detainees might be members of al Qaeda. Persons held in these secret detentions are mostly charged with immigration offenses, although some are held on federal criminal charges and a small number are being held as material witnesses. The government has refused to provide the identity of or charges against
the persons held in connection with the September 11 investigation. n88

Until the Sixth Circuit ruled that secret proceedings are in violation of First Amendment rights of the public and the press to observe trials, immigration detainees were tried in proceedings that were closed to the public pursuant to the Creppy Directive.n89 Some still are, however, as the circuits are now split with the Third Circuit's October ruling that newspapers lack a First Amendment right of access to deportation proceedings that the Attorney General determines present significant national security concerns.n90

Significantly, many of those detained have been held for extended periods of time without charges. Existing rules have been amended to extend the time available to file charges and, in times of emergency, for a "reasonable" period without being charged.n91 One commentator notes "that 317 detainees were held for more than 48 hours before being charged, 36 detainees were held for more than four weeks without charges, and nine were held for more than 50 days without charges." n92 This reality reinforces the concerns expressed by Saito n93 and Aldana-Pindell n94 concerning the abrogation of personal liberties for the sake of national security.

Congress enacted the second initiative, the USA PATRIOT Act, only six weeks after the September 11 events. This law grants broad powers to the Attorney General to detain individuals suspected of aiding terrorism.n95 The Act has been criticized because of its vague definition of terrorism, the absence of a close nexus between the activities that can result in detention and the commission of a crime, and the absence of judicial oversight of detentions. n96 The PATRIOT Act also enlarges the information gathering and sharing abilities of law enforcement and intelligence agencies. It allows "wiretaps and physical searches without probable cause in criminal investigations so long as 'a significant purpose' of the intrusion is to collect foreign intelligence." n97

The PATRIOT Act also gives the Attorney General the ability to detain non-citizens without a hearing and without a showing that they pose a threat to national security; rather, the Attorney General only needs to certify that he has "reasonable grounds to believe" that the alien is "described" in any of a number of anti-terrorism provisions of the Immigration and Naturalization Act.n98 for such non-citizen to be subject to indefinite mandatory detention. n99 It is not surprising that with these unprecedented powers, Attorney General Ashcroft, in the same month as the USA PATRIOT Act was passed, unilaterally announced that the Justice Department would eavesdrop on conversations between defendants and their lawyers in order to protect the country from the terrorist threat. n100

The third and last initiative considered here is one both Bendern101 and Saito n102 addressed - ethnic profiling. In November following the attacks, the Justice Department announced that it was singling out immigrant men over the age of sixteen and from over twenty nations - mostly Arab or Muslim states - in order to continue with the war against terrorism. n103 Given the recent outcry against racial profiling, this practice has been challenged as violating the equal protection clause, because it is likely to be "a terribly inaccurate proxy" for terrorism, and because "the use of ethnic stereotypes, far from being 'necessary' for effective law enforcement, is likely to be ineffective." n104

In closing, it is significant to note that domestic laws protect basic rights being eroded by these initiatives. Rights at risk include political freedoms and liberties, due process, and equal protection of the laws - rights that are not limited to citizens but rather, according to the Constitution, apply to all "persons" subject to U.S. law.n105

B. International Concerns

That the war against terrorism implicates international norms is immediately apparent by the name itself. The notion of war is defined as "a condition of armed hostility between States"n106 or "a state or condition of governments contending by force."n107 In this regard, an act of war "involves the threat or use of force of some kind by one state against another." n108 Thus, whether a particular threat or use of force constitutes an act of war will depend upon how the parties choose to characterize it. It is this subjectivity that has given the United States the window to call these attacks "acts of war" notwithstanding the absence of state parties. This is significant because the United States itself has noted that "war may be defined as a legal condition of armed hostility between states." n109 In this context, an "act of war" means any act occurring in the course of (a) a declared war; (b) armed conflict whether or not war has been declared between two or more nations; or (c) armed conflict between military forces of any origin.[n] n110

In international law, jus ad bellum is the law that defines the legitimate reasons for which a state may engage in war which renders legal the use of force under international law.n111 In modern times, Articles 2 and 51 of the U.N. Charter set out the norms of jus ad bellum. On the other hand, jus in bello encompasses norms that govern conduct once force has been used,
regardless of whether the recourse to force was lawful, and regulates how wars are fought notwithstanding why or how they started. n112 Both customary law n113 and treaty law n114 govern jus in [*967] bello.

Interestingly, the term "war" is not used in the U.N. Charter, although it had been used in the League of Nations Covenant and in the Kellogg-Briand Pact of 1928.n115 Rather, the U.N. Charter uses the term "force" rather than the term "war." n116 Significantly, the language of Art. 2(4) is both specific - with respect to the actors to whom it applies - and ambiguous with respect to the meaning of force. n117 By its terms, the article applies only to members of the United Nations, which can only be states. n118 The use of force also must be against a state. n119 On the other hand, the word "force" as used in the Charter could include not only physical and military force, but also other types of coercion - such as economic, political, or psychological force. n120 Thus, the U.N. Charter by Art. 2(4) obligates states to settle all disputes by peaceful means and to refrain from use or threat of force in conducting international relations. Article 51 of the U.N. Charter articulates one exception to the prohibition of the use of force: self defense when an armed attack occurs. n121 There is one other [*968] exception to the prohibition of the threat or use of force - armed action that is authorized by the United Nations Security Council as an enforcement measure. n122 A possible exception, currently being debated, is the use of force for humanitarian interventions in cases of large scale atrocities or acute deprivation of rights. n123

Before considering the rules of war that may apply to the war against terrorism, it is important to examine the concept of terrorism itself. There is no universally accepted definition of terrorism, although common threads in the various definitions include the use of violence for a political or social aim, a desire to intimidate, and a targeting of civilian and other noncombatant populations n124 - elements that are reflected in both domestic and international definitions of terrorism. In the United States, international terrorism is defined as:

Activities that - (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States ... ; (B) appear to be intended - (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, ... , and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of ... the locale in which their perpetrators operate or seek asylum.n125

In the international realm, there is no precise, agreed-upon definition [*969] of terrorism, although there are at least nineteen conventions - treaties both on international humanitarian law and establishing international crimes, both international n126 and regional n127 in scope - and declarations n128 that address the concept of and prohibit terrorism. For example, the Fourth Geneva Convention of 1949 and its two additional protocols of 1977 banned terrorism during international and internal armed conflict, meaning they ban attacks directed against civilians. n129 Significantly, although commonly terrorism is understood to address acts by groups that are not part of a state, terrorist acts can include those that are carried out by or sponsored by a state either directly or indirectly, or implicitly sanctioned by a state. n130 However, one of the difficulties experienced in defining terrorism "reflects in part the hackneyed saying that one person's terrorist is another's freedom fighter." n131

If indeed this current "war against terrorism" is a war, then it raises the issue of whether the laws of armed conflict are, or can be, applicable to such a conflict. As one commentator has noted, this designation poses a challenge to the traditional application of armed conflict as the actions of September 11 represent:

[*970]

Something of a hybrid between war and crime. The scale and scope of the assault of September 11 were clearly on the level of an act of war, but in traditional legal thinking, armed conflict has generally been seen as taking place only between states or (in the case of civil wars) between groups in control of part of a country's territory. Terrorists, by contrast, have tended to be seen as criminals, to be pursued through law-enforcement means and subjected to trial if captured.n132

This reality raises the question of whether the September 11 attacks could be an act of war since al Qaeda, who is responsible for the attack, is not a state actor and bin Laden is not, and has never been, the leader of a member state or an insurgent n133 or belligerent, n134 although it may be questionable whether the Taliban had such status. Thus, some maintain that "any conflict between the United States and al Qaeda as such cannot amount to war or trigger application of the laws of war." n135 If the September 11 attacks could not attain the level of armed conflict,
While there can be debate as to whether the September 11 attacks constituted armed conflict, there can be no doubt that the October 7 use of military force against the Taliban in Afghanistan internationalized the up- until-then internal armed conflict between the Taliban and the Northern Alliance. The laws of war would apply to the conflict between the Taliban and the Northern Alliance as well as to the internationalized conflict between the United States and the Taliban.

During detention, "persons shall ... be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by [applicable norms]." n144 Detainees must be released upon the end of hostilities but always "at the earliest date consistent with the security of the state or occupying power. ..." n145 Based on customary human rights law, every detainee has a right to obtain judicial review about the circumstances and conditions of their detention.

Charles Allen, Deputy General Counsel for International Affairs at the United States Department of Defense, confirmed that "fundamental principles of the law of armed conflict have proven themselves to be applicable to this conflict." n146 He noted that:

The authority to detain enemy combatants during hostilities is well settled under international law and certainly under the U.S. Constitution, and ... we don't foresee the end of the conflict at a particular date. But it is absolutely lawful to detain these enemy combatants until the end of the hostilities; therefore, it is by no means an indefinite detention in the sense that one might attribute to the lawless countries that have no process attaching to the detention of persons in their control.n147

Having designated the detainees as enemy combatants, n148 Allen defines the enemy as "al-Qaeda and ... other international terrorists and their supporters." n149 He then invokes the right to self defense:

The world agrees that the U.S. was attacked and is in armed conflict with that stated enemy. Therefore, in exercising our right of self-defence [sic], we can target members of that enemy force and we certainly can detain such persons in accordance with the laws of armed conflict.n150

Moreover, he specified that:

The regime of law that applies is the customary law of armed conflict. The determination has been made that al Qaeda is by no means a state party to the Geneva Conventions. It's a foreign terrorist group, and clearly its members are not entitled to prisoner of war status under the Geneva Conventions. With regard to the Taliban, even though the United States did not recognize the Taliban as the legitimate Afghan government, Afghanistan is a party to the Geneva Conventions and was determined by the President to be covered by the Conventions. But under the terms of the Conventions the Taliban do not qualify as prisoners of war. Having said that, we apply existing law of armed conflict and treat the detainees - al Qaeda and Taliban alike - humanely and in a manner consistent with the principles of the Geneva Conventions, which

[*974]
we believe are part of the international law of armed conflict.n151

The distinction between a prisoner of war and an unlawful combatant is being intensely debated precisely because the outcome signifies whether an individual would be entitled to the protections of the Geneva Conventions - a prisoner of war is entitled to protections, while an unlawful combatant - one who was not following the rules of war - does not. Some insist that al Qaeda fighters do not qualify as prisoners of war under any circumstances because they do not meet the standard set forth by the Geneva Conventions for prisoner of war status for irregular militias.n152 On the other hand, while conceding that the question of whether Taliban members qualify for prisoner of war status "is more difficult," some similarly conclude that the Taliban do not qualify because of their failure to wear a distinctive sign and to "carry arms openly." n153

The U.S. designation of detained individuals as "enemy combatants" and the claim that they may be detained indefinitely without right of judicial review with respect to their detention raises legal issues. The designation is not a term of art known in international law. Rather, it appeared in a U.S. Supreme Court decision of 1942, Ex parte Quirin,n154 a case in which German soldiers came into the country, hid their uniforms, and planned sabotage before being apprehended. They were arrested and tried for crimes of war in the U.S. courts and were convicted and sentenced. n155 The Court, which did not depart from the international legal principles set out earlier in this Essay, specifically stated:

By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.n156

Thus, with respect to the detainees, the United States has unilaterally [976] decreed that they are not being held as prisoners of war but instead as so-called unlawful combatants. The reasons for concluding that they are not POWs differ, but what is indisputable is that, having made these unilateral designations, the United States has failed to hold hearings to determine the legal status of the detainees as required by Article 5 of the Third Geneva Conventionn157 - a decision harshly criticized by the international community. It is precisely because it is not always clear what status designation a person captured during armed conflict deserves, and because there are different levels of protections for prisoners of war and for those captured who do not qualify for such status, that Article 5 of the Third Geneva Convention specifically provides that:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.n158

Thus, it appears that the U.S. unilateral declaration of status of the prisoners is inappropriate based on existing law.

In addition, because the detainees are being held in Guantanamo Bay, Cuba, which at least one court has now determined is outside U.S. sovereign territory, they are beyond the reach of the U.S. Constitution.n159 This decision has been criticized as a "peculiar reading of the [habeas corpus] statute." n160 One commentator argues that:

The district court seemed to strain against the ordinary meaning of the word "jurisdiction" and added a word that Congress had not chosen, i.e., the word "territorial," as a limitation of "jurisdiction" or power. ... The statutory language simply cannot support such a perverse reading. Indeed, the statute focuses on "jurisdiction" of courts, not territory or sovereignty of the United States, and the district court seemed to confuse the meaning of the statute with issues concerning the reach of the Constitution. As noted, the statute expressly reaches violations of laws other than the Constitution. ... What the court failed to address is that sovereignty is a form of lawful governmental [977] power and that wherever the United States detains individuals, it is exercising a form of sovereign power. Additionally, Guantanamo Bay is under the sovereign power and a form of territorial jurisdiction of the United States: under a treaty with Cuba that confers "complete jurisdiction and control over and within such areas" - and, thus, sovereignty - as an occupying power. ... In any event, the statute's word "jurisdiction" is met by the treaty (i.e., the United States has "complete jurisdiction and control" and is fully exercising it) as well as by the status of the United States as occupying power with jurisdiction and control.n161
Having addressed the status of the detainees, the legality of their indefinite detention, and the applicability of the laws of war to the detainees, this section now reviews President Bush's November 13, 2001, military order creating military commissions to try foreign nationals "for violations of the laws of war and other applicable laws" that were related to acts of international terrorism. n162 The Order covers acts that have "adverse effects on the United States, its citizens, national security, foreign policy, or economy," n163 has no time limit, n164 and originally contemplated that under the "order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts" would not apply. n165

As with other actions taken pursuant to the September 11 attacks, the legality of the military commissions is hotly debated. One commentator has noted that the "order reaches far beyond the congressional authorization given the President" in the wake of September 11 to prevent future acts of international terrorism against the United States, n166 and that "in its present form and without appropriate congressional intervention, the Military Order will create military commissions that involve unavoidable violations of international law and raise serious constitutional challenges." n167 One issue with respect to the military commissions is that the President's power as commander-in-chief to set up such commissions is only applicable during "war within a war [*978] zone or relevant occupied territory and apparently ends when peace is finalized." n168 Thus, while there is a war in Afghanistan, the United States would be able to set up military commissions to try persons accused of war crimes and, if it were an occupying power in Afghanistan, it could set up a military commission in the occupied territory to try individuals for terrorism in violation of international law, genocide, other crimes against humanity, and aircraft sabotage in addition to war crimes. However, outside of the occupied territory, military commissions can only be constituted in an actual war zone and can only prosecute war crimes. n169

Moreover, military commissions need to follow procedures as required by treaty and customary norms which guarantee due process of law, including the right of "all persons" to be treated as "equal before the courts and tribunals ... entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law," n170 "the right to be presumed innocent until proved guilty according to law," n171 the right "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him," n172 the right "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing," n173 the right "to be tried without undue delay," n174 the right To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any such case where the interests of justice so require, and without payment by him in such case if he does not have sufficient means to pay for it, n175 the right "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses [*979] against him," n176 the right "to have free assistance of an interpreter if he cannot understand or speak the language used in court," n177 and the right "not to be compelled to testify against himself or confess guilt." n178

In addition, "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." n179 Plainly, the November 13 Military Order which provides only for review by the President or Secretary of State does not comport with this right of review. Moreover, given that the Military Order is addressed only to foreign nationals, it also violates the nondiscrimination provisions of international norms. n180

Two other challenges to the Military Order interrogate the President's authority, without approval by Congress, to suspend habeas corpus n181 and to "set up a military commission outside of occupied territory or an actual war zone during an armed conflict." n182 Moreover, these infirmities with the Military Order are continued by the Department of Defense Ad Hoc Procedures implemented by order of March 21, 2002. n183 For example, the Department of Defense rules continue the discrimination on the basis of national or social origin, deny equal protection, and deny justice to foreigners. n184 However, it is the position of the United States that:

The law of armed conflict makes no provision for judicial review of the detention of enemy combatants who are detained during hostilities solely to take them out of the fight. There is a recognition in the law of armed conflict that during hostilities, the military through its operations and intelligence-gathering has an unparalleled vantage point to learn about the enemy
and make judgments as to whether those seized during a conflict are friend or foe.\textsuperscript{n185}

Moreover, a U.S. representative specifically notes the Supreme Court's finding in \textit{Ex parte Quirin} to support trying the captive in a military tribunal.\textsuperscript{n186}

To be sure, there is constitutional authority for the creation of military commissions.\textsuperscript{n187} Indeed, Congress provided for military commissions in Article 21 of the Uniform Code of Military Justice.\textsuperscript{n188} Rather, the issue with respect to President Bush's military order is whether, under the sole power as commander-in-chief, had the authority to establish such commission or whether the September 18, 2001, Congressional Joint Resolution authorized the creation of such commission. While some argue that the "all necessary and appropriate force" language authorizes the President's military order,\textsuperscript{n190} others argue that the military order is beyond the purview of the Joint Resolution.\textsuperscript{n191} In all cases, there seems to be agreement that the lack of judicial review is problematic.\textsuperscript{n192}

\textbf{Conclusion}

The heinous attacks of September 11 have resulted, perhaps unnecessarily, in the adoption of a flurry of problematic domestic norms that target persons based on race or ethnicity, treat nationals and non-nationals differently, and unduly intrude into constitutionally protected rights. As this Essay has shown, the domestic legislation also potentially conflicts with established international norms.

Significantly, it appears that these legislative and executive activities are not only intrusive but perhaps also unnecessary because existing United States and international norms already address the heinous conduct. First, considering that al Qaeda and the Taliban are non-state actors, they could be held for violations such as piracy, war crimes, violations against the law of nations, violations of human rights, and other acts of hostility.\textsuperscript{n193} For example, those acting outside of the United States in connection with the September 11 attacks could be prosecuted by the United States under the U.S. Antiterrorism Act.\textsuperscript{n194} Similarly, civil lawsuits are possible against non-state actors under the Antiterrorism Act which allows remedies to be brought by "nationals of the United States injured in his or her person, property, or business by reason of an act of international terrorism ... and shall recover treble the damages he or she sustains and the cost of the suit, including attorney's fees."\textsuperscript{n195} Foreign plaintiffs could sue non-state actors under the Alien Tort Claims Act which allows a non-national to sue in the courts of the United States for a tort committed in violation of the law of nations. It is also possible that U.S. plaintiffs and foreign plaintiffs may have recourse under the Torture Victim Protection Act.\textsuperscript{n197} Because international terrorism and crimes against humanity are international wrongs over which there exists universal jurisdiction,\textsuperscript{n198} the United States could rightfully prosecute perpetrators for such crimes.

Beyond existing domestic legislation, ample international bases for prosecutions also exist. For example, the United States could prosecute both state and non-state actors under legislation implementing the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.\textsuperscript{n199} The enabling law is applicable to anyone who "willfully ... destroys, disables, or wrecks any aircraft in the special aircraft jurisdiction of the United States ... [and to whomever] performs an act of violence against or incapacitates any individual on any such aircraft."\textsuperscript{n200} There are also other conventions and declarations pursuant to which the wrongdoing could be held accountable for their terrorist acts including the International Convention Against the Taking of Hostages,\textsuperscript{n201} the Geneva Conventions fully discussed in the Essay, the Declaration on Measures to Eliminate International Terrorism,\textsuperscript{n202} and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism.\textsuperscript{n203} Finally, the laws of war as they currently exist are amply sufficient to prosecute the wrongdoers for the crimes committed against the United States and its populations.\textsuperscript{n204} Thus, given the broad and detailed protections under existing domestic and international law, there is no need for the United States to trample on the rights of citizens and non-citizens, immigrants, or detainees in pursuit of justice against these heinous attacks.

\textbf{FOOTNOTE-1:}

\textsuperscript{n1} Although the hijacking of the fourth plane was successful, passengers thwarted the hijackers' efforts and that plane crashed in Pennsylvania without taking casualties beyond the persons aboard. Berta Esperanza Hernandez-Truyol & Christy Gleason, \textit{Introduction, in Moral Imperialism: A Critical Anthology} 1 (Berta Esperanza Hernandez-Truyol ed., 2002).

\textsuperscript{n2} Id.

\textsuperscript{n3} The Alien Act (July 6, 1798), reprinted in \textit{An Act Respecting Alien Enemies}, at \url{http://www.yale.edu/lawweb/avalon/statute/s/alien.htm} (last visited Jan. 10, 2003);


n7. Cole, supra note 5, at 996; Muller, supra note 5.


n10. The five hijackers were Abdulaziz Alomari, Satam al Suqami, Waleed M. Alshehri, Wail Alshehri, and Mohammed Atta, the mastermind of the attacks who was thought to have piloted the plane. This tower collapsed at 10:28 a.m.

n11. There were four hijackers onboard this flight: Saeed Alghamdi, Ahmed Al Haznawi, Ahmed Alnami, and Ziad Jarrahi. This tower collapsed at 9:55 a.m.

n12. The five hijackers were Khalid al-Midhar, Majed Moqed, Nawaf Alhamzi, Salem Alhamzi, and Hani Hanjour. This plane was carrying sixty-four people from Washington Dulles to Los Angeles.

n13. The five hijackers were Marwan al-Shehhi, Fayez Banihammad, Ahmed Alghamdi, Hamza Alghamdi, and Mohand Alshehri.


n15. North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246 (1949). While the political consensus is important, the NATO alliance has little to offer the U.S. militarily. Specifically, Article 5 provides as follows:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all, and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.


"Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security." North Atlantic Treaty, supra, at art. 5.


n20. Following September 11, President Bush issued an executive order in which he declared a national emergency and authorized the Secretary of the Treasury to freeze assets of entities that "assist in, sponsor, or provide financial, material or technological support for, or financial or other services to or in support of, such acts of terrorism." Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001), at http://www.treas.gov/offices/enforcement/ofac/sanctions/terrorism.html (last visited Jan. 8, 2003). The Seventh Circuit has now found that the government acted within legal bounds in freezing the assets of Global Relief Foundation, Inc. (GRF) - a U.S. charity which is an Illinois corporation - that is being investigated for terrorist links although the court did not inquire into whether the charity in fact had links to terrorism. Specifically, in affirming the District Court's denial of GRF's request for an injunction, the court concluded that the freezing of assets violated neither the Constitution nor the International Emergency Economic Powers Act. Global Relief Found., Inc. v. O'Neill, 315 F.3d 748 (7th Cir. 2002).

with the rebellion in the southern states, to be tried by a military commission so long as the civilian courts were open and martial law had not been declared. In contrast, Quirin upheld trial by military commission of German soldiers who had landed in the United States, discarded their uniforms, and sought to sabotage war facilities. They were charged with violating the laws of war.

The resolution expresses support for the Secretary-General’s special representative in Afghanistan, Lakhdar Brahimi, in the accomplishment of his mandate which included overall authority for the humanitarian, human rights, and political endeavors of the United Nations in Afghanistan.


n39. The prisoner of war status would require certain treatment under the Geneva Conventions and would also impede trial in the military tribunals set up by President Bush. See infra notes 139, 151-53, and accompanying text. One obstacle to designating these captives "prisoners of war" is that such status requires the captive to have been acting on behalf of a state, whereas the captives, as well as the actors in the September 11 attacks, were acting on behalf of the Taliban or al Qaeda, neither of which is a recognized state.

n40. Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice, 215 F. Supp. 2d 94, 96 (D.D.C. 2002) (ruling that Department had to disclose names of detainees under Freedom of Information Act; Department did not have to disclose date and location of arrest, detention and release; Department could not withhold the identity of counsel representing detainees; Department did not properly respond to request regarding detainees or immigration proceedings).


n42. Hamdi v. Rumsfeld, 316 F.3d 450, 465 (4th Cir. 2003); see also Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002) (reversing and remanding district court order mandating government to allow counsel unmonitored access to detainee because order failed to give proper deference to Executive and Congressional decisions concerning foreign policy, national security or military affairs and because the order failed to address status as enemy combatant); Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002) (reversing district court ruling that public defender and private citizen had standing to file next of friend habeas petition on behalf of detainee with status of enemy combatant).

n43. Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) (ruling that there is a First Amendment right of access to deportation cases and the directive requiring secret hearings infringes on that right).

n44. N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002).


n46. The action by the twelve Kuwaiti detainees and their family members, Odah v. United States, No. A. 02-828 (D.D.C. 2002), was brought separately but is decided together with Rasul, 215 F. Supp. 2d 55.

n47. Rasul, 215 F. Supp. 2d at 72-73.

n48. Susan Schmidt & Dan Eggen, Suspected Planner of 9/11 Attacks Captured in Pakistan After Gunfight; Two Other Al Qaeda Members Killed, Several


n50. Id. P 1.

n51. Id. P 64.

n52. Id. P 21 (quoting Commission letter).

n53. Id. (quoting U.S. letter of April 11, 2002).

n54. Id. (quoting Commission letter of July 23, 2002).


n56. Id.

n57. 299 U.S. 304 (1936).

n58. 343 U.S. 579 (1952).

n59. Aldana-Pindell, supra note 55, at 996.

n60. Id.

n61. Id. at 997.

n62. Id.

n63. Id. at 999.


n65. Id. at 1128.

n66. Id.

n67. Id.

n68. Id. at 1130.


n70. 323 U.S. 214 (1944).

n71. Nagae, supra note 69, at 1135.

n72. Id. at 1136.

n73. Id. at 1150 (citing Judge Marilyn Hall Patel's opinion vacating Korematsu's conviction, Korematsu v. United States, 584 F.Supp. 1406, 1416 (N.D. Cal. 1984)).

n74. Steven Bender, Sight, Sound, and Stereotype: The War on Terrorism and Its Consequences for Latinas/os, 81 Or. L. Rev. 1153 (2003).

n75. Id.

n76. Id. at 1154 (citation omitted).

n77. Id. at 1155 (citations omitted).

n78. Id.

n79. Id.

n80. Id. at 1162.

n81. See also Cole, supra note 5, at 959 (discussing how infringements on rights of non-citizens can become the pathway to the infringement on rights of citizens); and as the most recent decision in Hamdi makes evident. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003).

n82. Bender, supra note 74, at 1177.

n83. Id. at 1177-78.

n84. Aldana-Pindell, supra note 55.

n85. See Cole, supra note 5, at 960 (noting that in November 2001 the government ceased informing the public about the number of detainees).


n87. See Cole, supra note 5.

n88. Id. at 961.

n89. Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002).

n90. N. Jersey Media Group v. Ashcroft, 308 F.3d 198 (3d Cir. 2002).


n92. Cole, supra note 5, at 962.

n93. Saito, supra note 64.

n94. Aldana-Pindell, supra note 55.

n95. USA PATRIOT Act, supra note 8.

n96. For a review of significant PATRIOT Act provisions, as well as some of the

n97. Cole, supra note 5, at 974.

n98. USA PATRIOT Act, supra note 8, 412(a)(3).

n99. Id.; see also Cole, supra note 5, at 971.

n100. See Broder & Sachs, supra note 32.

n101. Bender, supra note 74.

n102. Saito, supra note 64.

n103. See Broder & Sachs, supra note 32.

n104. Cole, supra note 5, at 976.

n105. See U.S. Const. amend. I, IV & V.


n107. Ackerman, supra note 106 (quoting Hyde, supra note 106, at 1686 n.1. (citing Grotius, one of the original theorists of international law)).

n108. Id.

n109. Dep't of the Army, supra note 106.


n112. Duffy, supra note 111.

n113. Steven Ratner, New Democracies, Old Atrocities: An Inquiry in International Law, 87 Geo. L.J. 707, 715 (1999) ("Customary law recognizes ... individual accountability for certain acts ... at least [as] insofar as it accepts the right of all states to criminalize them and prosecute anyone committing them (universal jurisdiction."); Duffy, supra note 111, 1, at 36-37.


n116. See, e.g., U.N. Charter art. 2(4).

n117. "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in
any other manner inconsistent with the Purposes of the United Nations." Id. By its terms, this Article applies only to members which are states. See id.

n118. Id.

n119. See U.N. Charter art. 3 (addressing original members) and art. 4(1) (addressing states to whom membership in the United Nations is open).

n120. Efforts made to give Art. 2(4) of the U.N. Charter this wider definition with respect to the prohibition on the use of force has been strongly resisted by Western states. See generally Schachter, supra note 115, at 1624.

n121. U.N. Charter art. 51:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security (emphasis added).

Significantly, Article 51 allows the exercise of "the inherent right of individual or collective self defense if an armed attack occurs against a Member of the United Nations." Id. It is noteworthy that while the self-defense right is triggered by an armed attack on a member, the armed attack does not have to be carried out by a member, thus opening the door for the self defense claim made by the United States pursuant to the September 11 attacks.

n122. See, e.g., U.N. Charter arts. 39 & 42.

n123. See Duffy, supra note 111, at 4-5.


n127. See, e.g., International Instruments, supra note 126, pt. II (listing seven instruments related to suppression of terrorism).

n128. See id. pt. III.

n129. See Convention IV, supra note 114; Protocol I, supra note 114; Protocol II, supra note 114.

n130. See International Instruments, supra note 126, at 230 (Declaration on Measures to Eliminate International Terrorism, G.A. Res. 49/60 (Dec. 9, 1944) [hereinafter G.A. Res. 49/60] ("Deeply disturbed by the world-wide persistence of acts of international terrorism in all its forms and manifestations, including those in which States are directly or indirectly involved, which endanger or take innocent lives, have a deleterious effect on international relations and may jeopardize the security of states"); id. at 237 (Declaration to Supplement the 1964 Declaration on Measures to Eliminate International Terrorism, G.A. Res. 51/210 (Dec. 17, 1966) [hereinafter G.A. Res. 51/210](same)).

n131. Duffy, supra note 111, at 33 (citing Special Rapporteur on Terrorism and
Human Rights report of June 27, 2001); see also Mkhondo, supra note 124 ("One obvious difficulty with using the term within IHL is that, as has often been pointed out, one man's terrorist is another man's freedom fighter.").


n133. Insurgency is the lowest level of warfare or armed conflict to which the laws of war apply. For it to exist, the insurgent group would have to resemble a government, an organized military force, have control of significant portions of territory that they hold as their own, and a stable population or base of support within a broader population. See generally Jordan J. Paust, There Is No Need to Revise the Laws of War in Light of September 11th, The American Society of Int'l Law Task Force on Terrorism, Nov. 2002, at http://www.asil.org/taskforce/paust.pdf (last visited Jan. 2, 2003); see also Convention I, supra note 114, art. 3. Protocol II of the Geneva Conventions provides for applying the law of war to conflicts between the states' "armed forces and dissident armed forces or other organized armed groups which come under responsible command, exercise such control over part of its territory as to enable them to carry out sustained and concerted military operations and to implement this protocol." Protocol II, supra note 114.

n134. Belligerent status is based upon the same criteria for insurgency plus the outside recognition by one or more states as a belligerent or as a state. Jordan J. Paust et al., International Criminal Law 809, 812-13, 815-16, 819, 831-32 (2d ed. 2002). Belligerent status provides a rebel group legal standing similar to that accorded a government in bringing the law of international armed conflict in to play for both sides. Ewen Allison & Robert K. Goldman, Belligerent Status, Crimes of War: The Book, available at http://www.crimesofwar.org/thebook/book.html (last visited Jan. 2, 2003) ("A rebel group gained 'belligerent status' when all of the following had occurred: it controlled territory in the State against which it was rebelling; it declared independence, if its goal was secession; it had well-organized armed forces; it began hostilities against the government; and, importantly, the government recognized it as a belligerent").

n135. Paust, supra note 133, at 2; see also Pan American Airways, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1013-15 (2d Cir. 1974) (United States could not have been at war with the Popular Front for the Liberation of Palestine which had engaged in terrorists acts as a nonstate, nonbelligerent, noninsurgent actor).


During an armed conflict, only 'combatants' are permitted to 'take a direct part in hostilities.' Noncombatants who do so commit a war crime and lose any protected status that they might have - that is, they are not entitled to be treated as prisoners of war, and any attacks on people or property may be prosecuted as common crime. Combatants ... cannot be punished for their hostile acts and if captured can only be held as POWs until the end of hostilities.

Id.

n137. See Paust, supra note 133, at 3.


With regard to the global war on terrorism, wherever it may reach, the law of armed conflict certainly does apply, not only in the sense that we've been focusing on (concerning the treatment of detainees), but also in the sense of the principle of
distinction, in the sense of targeting decisions, and in the sense of how those who are removed from the combat are treated.

Id.

n139. Dworkin, supra note 132 (quoting British military historian Sir Michael Howard's 2001 speech).

n140. See generally id.; Georges Abi-Saab, There Is No Need to Reinvent the Law, Crimes of War Project, available at http://www.crimesofwar.org/sept-mag/sept-abi-printer.html (last visited Jan. 3, 2003); Paust, supra note 133, at 3-4 (Noting that

with respect to the September 11th attacks as such, any attempt to expand the concept of war beyond the present minimal levels of belligerency and insurgency would be extremely dangerous because certain forms of nonstate actor violence and targetings that otherwise remain criminal could become legitimate. Two such targetings would have been the September 11th attack on the Pentagon, a legitimate military target during armed conflict or war (except for the means used, an airliner with passengers and crew), and the previous attack on the U.S.S. Cole, another legitimate military target during armed conflict or war. Similarly, a radical extension of the status of war and the laws of war to terroristic attacks by groups like al Qaeda (and there are or predictably will be many such groups engaged in social violence) would legitimize al Qaeda attacks on the President (as Commander-in-Chief) and various U.S. "military personnel and facilities" in the U.S. and abroad - attacks of special concern to President Bush, as noted in his November 13th Military Order. Applying the status of war and the laws of war to armed violence below the level of an insurgency can have the unwanted consequence of legitimizing various other combatant acts and immunizing them from prosecution.)

Jordan J. Paust, Antiterrorism Military Commissions: The Ad Hoc DOD Rules of


the United States cannot be at 'war' with al Qaeda ... [because the] threshold of 'armed conflict' under common article 2 of the Geneva Conventions, which triggers application of the detaining power's competence under article 5 of the Geneva Civilian Convention to intern certain persons, cannot be met if the United States is merely fighting members of al Qaeda. Other problems with those seeking prosecution include the fact that (1) mere membership in an organization (like al Qaeda) is not a crime; (2) acts of warfare engaged in by members of the armed forces of a party to an international armed conflict (begun on October 7, 2001, in Afghanistan) are entitled to immunity from prosecution if their acts are not otherwise violative of international law and, thus, lawful combat training and actions of members of the armed forces of the Taliban (and perhaps members of al Qaeda units attached to the armed forces of the Taliban) during the armed conflict are privileged belligerent acts entitled to combat immunity and cannot properly be criminal, elements of domestic crime, or acts of an alleged conspiracy; and (3) al Qaeda attacks on the United States on September 11th (before the international armed conflict in Afghanistan began) cannot be privileged belligerent acts, but also cannot be prosecuted as war crimes because the United States and al Qaeda cannot be "at war" under international law.) (citations omitted).

n141. See Paust, supra note 133, at 6.

Enemy combatants are privileged to engage in lawful acts of war such as the targeting of military personnel and other legitimate military targets. Such acts are privileged belligerent acts or acts entitled to combat immunity if they are not otherwise violative of the laws of war or other international laws (e.g., those proscribing aircraft sabotage, aircraft hijacking, genocide or other crimes against humanity). Violations of the laws of war
are war crimes, are not entitled to immunity, and are thus prosecutable.

Id.

n142. Convention IV, supra note 114, art. 5.

n143. Id. art. 6.

n144. Id. art. 5.

n145. Id.

n146. Dworkin, supra note 138.

n147. Id.

n148. Id. Enemy combatant is defined as:

an individual who, under the laws and customs of war, may be detained for the duration of an armed conflict. In the current conflict with al Qaida and the Taliban, for example, the term includes a member, agent, or associate of al Qaida or the Taliban. ... The authority to detain enemy combatants applies not just to armed soldiers engaged in battlefield combat, but extends to all belligerents, including any individuals who act in concert with enemy forces and aim to further their cause. An individual cannot immunize himself from treatment as an enemy combatant by attempting to extend the battle beyond the traditional battlefield.

Id.

n149. Id.

n150. Id.

n151. Id.

n152. Michael C. Dorf, What Is an "Unlawful Combatant" and Why It Matters: The Status of Detained Al Qaeda and Taliban Fighters, FindLaw, Legal Commentary, Jan. 23, 2002, at http://writ.news.findlaw.com/dorf/20020123.html (citing Art. IV of the Geneva Conventions (noting that the criteria are "(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; [and] (d) that of conducting their operations in accordance with the laws and customs of war" and that "[a]l Qaeda does not satisfy these conditions.").

n153. Id.

n154. 317 U.S. 1, 31 (1942).

n155. See id.

n156. Id. at 30-31 (citations omitted).

n157. Convention III, supra note 114, art. 5.

n158. Id.


n160. Paust, supra note 140, at 691-92.

n161. Id. at 691-92 (citations omitted).


n163. Id. 2(a)(1)(ii).

n164. See generally id.

n165. Id. l(f).


n167. Id. at 2.

n168. Id. at 5.

n169. Id. at 9 (citation omitted).

n170. Int'l Covenant on Civil and Political Rights, Mar. 23, 1976, art. 14(1), 999 U.N.T.S. 171 [hereinafter ICCPR]. Significantly, "the press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security." Id.

n171. Id. at 14(2).

n172. Id. art. 14(3)(a).

n173. Id. art. 14(3)(b).

n174. Id. art. 14(3)(c).

n175. Id. art. 14(3)(d).

n176. Id. art. 14(3)(e).

n177. Id. art. 14(3)(f).
Each State Party ... undertake[] to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

See also id. art. 26 providing that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

Under the DOD Order, civilians may not be tried in civilian courts, the accused have been detained for months without charges, detainees do not enjoy the right to be brought promptly before a judge or to file habeas corpus petitions, defense attorneys will lack access to some witnesses, accused will not be able to cross-examine all witnesses against them, portions of trials can be held in secret, and accused lack the right of appeal to an independent and impartial tribunal.

Id. It should be noted, however, that during international armed conflicts there may be indefinite detentions without trial, which can last for the duration of the conflict. See supra notes 142-48 and accompanying text. Indeed, Article 118 of the Third Geneva Convention of 1949 specifically states that prisoners "shall be released and repatriated without delay after the cessation of active hostilities." Convention III, supra note 114, art. 118. This obligation is reiterated in the 1977 First Additional Protocol which notes that "unjustifiable delay in the repatriation of prisoners of war or civilians" constitutes a grave breach over which there is universal jurisdiction. Protocol I, supra note 114, art. 85(4)b. Nonetheless, a belligerent is allowed to ensure that the enemy has ceased fighting and does not intend to resume the conflict before releasing the captives. Charles Allen, Deputy General Counsel for International Affairs of the U.S. Department of Defense, confirms the claim to authority to detain enemy combatants during hostilities although he does not "foresee the end of the conflict at a particular date." Dworkin, supra note 138. In fact, Allen notes that releasing the captives before the end of the hostilities "would probably result in that person rejoining the battle against the United States. That's the underlying basis for being able to detain enemy combatants during armed conflict." Id.
offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals").


to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.

Id.

n190. ABA Task Force, supra note 187, at 6.

n191. Paust, supra note 166.


n198. Restatement (Third) of the Foreign Relations Law of the United States 404 (1987) ("A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism. ... ").

n199. Convention for the Suppression of Unlawful Acts Against the Safety of Civil
As we enter the third millennium of this particular era of human history, the picture is not pretty. Untold numbers of children die of malnutrition and preventable diseases every day; millions of all ages are killed in ongoing wars, most of them waged by states against the peoples whose lands they are occupying. It is estimated that within this generation alone, 250 languages and their attendant cultures, knowledge, and world views will disappear, along with hundreds of plant and animal species. Vast swaths of land have been rendered uninhabitable by the relentless quest for "progress." Every day the newspapers report impending environmental disasters, the spread of AIDS, slavery and child labor, racial and religious repression, and the disappearance, torture, and murder of political dissidents around the world.

As the world's unrivaled military, economic, and political superpower, the United States plays a significant role, direct and indirect, in the perpetuation of much of this human misery. Even so, within the United States, which has only 5% of the world's population but consumes 25 or 30% of its resources, the top 1% of the population controls nearly 40% of the country's wealth, and those at the bottom face malnutrition, infant mortality, and unemployment rates equal to those of many "third world" countries. Despite the best efforts of Hollywood, the "news" media, and most elected officials to convince us otherwise, the reality is that we have the poorest public education and health care in the industrialized world, and the second highest per capita incarceration rate anywhere.
know their sons have a one-in-three chance of ending up in prison. n12 Reservation-based American Indian parents know their children face the country's highest infant mortality and teenage suicide rates, 60 to 90% unemployment rates, and, statistically, can expect to live only into their mid-to late-forties. n13 Every night, hundreds of homeless people sleep on the streets of every major American city. n14

All of this seems to be quite acceptable to those who have the most influence. Information about all of these situations is widely available and, in most cases, we know what could be done to solve or ameliorate these problems. n15 What stands in the way of their resolution is not lack of awareness or resources, but the priorities of those in power and those who keep them there. n16

For many who benefit - or believe they benefit - from the status quo, living in denial is apparently a viable option. A mind-boggling number of Americans seem to accept that if "those people" would just act more like "us," they, too, would soon be enjoying the "good life." Others find that we must struggle against such policies and practices; sometimes because our very lives or the lives of our children depend on it, sometimes simply to retain our humanity. Such struggles take many forms, but all require the freedom to articulate the problems and potential solutions and the ability to organize socially and politically. Fortunately, such freedoms have not only been acknowledged historically, but are clearly articulated in the U.S. Constitution and are spelled out in more detail in universally recognized international law. n18

When the government that purports to represent us engages in genocide, war crimes, or other actions calculated to perpetuate the systematic oppression of large groups of people, n19 we not only have the right to challenge such actions, but the legal responsibility to do so. This was the primary message of the Nuremberg and Tokyo Tribunals - when a government engages in basic violations of the most fundamental human rights, it is the citizens' obligation under international law to stop those violations. The fact that the government's domestic law may deem such policies or practices legal - or resistance to them illegal - does not change this fundamental principle. n20

[*1057] It is in this context that we must assess recent "antiterrorism" legislation such as the so-called "USA PATRIOT" Act. n21 We are told that such laws impose some restrictions on our liberties but are necessary for our security. n22 In this Essay, I hope to demonstrate that such legislation needs to be understood in the context of the United States' long history of using both the law and law enforcement agencies to repress individuals and organizations who struggle for social justice. Such repression has affected all who dissent politically in order to change the status quo and force the government to respect fundamental human rights. n23

The current policies of the U.S. government threaten to silence all who dissent, regardless of the issues or the tactics chosen. The harm embodied in the current legislation and the broad powers it gives the executive branch is not merely the silencing of political opinion. As such, the question is not whether we will be allowed to put our opinions out into some abstract "marketplace of ideas," but whether we will allow the government of the United States, in the name of "our security," to crush struggles for the most basic of human rights. If we allow ourselves to be distracted into a debate about which liberties we are willing to sacrifice for the sake of more security, we will sacrifice both the liberty and the security of those who take political positions, or represent social movements, not approved of by those in power.

I

Security or Silencing?

In the twenty-first century, only nations that share a commitment to protecting basic human rights and guaranteeing political and economic freedom will be able to unleash the potential of their people and assure their future prosperity. People everywhere want to be able to speak freely; choose who will govern them ... and enjoy the benefits of their labor. These values of freedom are right and true for every person, in every society - and the duty of protecting these values against their enemies is the common calling of freedom-loving people across the globe and across the ages.

- George W. Bush, September 17, 2002

In March 2002, the American Civil Liberties Union (ACLU) Foundation of Colorado held a press conference in which it revealed that the Denver Police Department was monitoring the peaceful protest activities of Denver-area residents and keeping files on the First Amendment-protected expressive, lawful activities of advocacy organizations. n25 In support of its allegations, the ACLU released excerpts from computerized police files which catalogued the physical characteristics, names, addresses, phone numbers, vehicles, and activities of persons involved in peaceful organizational activities and demonstrations, as well as information about their spouses and associates. n26
Groups such as End the Politics of Cruelty and the American Friends Service Committee - a Nobel Peace Prize-winning Quaker organization - were labeled "Criminal Extremist" without any reference to criminal activity. Individuals were named for having attended meetings or simply being a phone contact for others in the file. Antonia Anthony was identified not as the Franciscan nun that she is, but as an "active protestor" with the Chiapas Coalition which, in turn, was falsely described as a "group dedicated to [the] overthrow of [the] Mexican government."n27 Subsequently, the Denver police admitted to having over 3400 such "spy files," most of them compiled since 1999 but containing information dating back to 1972.n28 Subsequent disclosures [*1059] reveal that such information, and misinformation, has been disseminated to numerous other law enforcement agencies.n29

In the meantime, on October 23, 2001, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Actn30 was introduced in Congress. Within three days, the Act, which contains 158 separate sections dramatically expanding the government's law enforcement and intelligence gathering powers, was passed by both the House and the Senate and signed into law by President George W. Bush. n31

Among other things, the USA PATRIOT Act (hereinafter the "2001 Act") greatly expands the surveillance authority of federal agencies; further limits the rights of immigrants; blurs the line between criminal and intelligence investigations; and creates a new and very broadly defined crime of "domestic terrorism."n32

Passed in the wake of the September 11 attacks on the World Trade Center and the Pentagon, Attorney General John Ashcroft and other officials assure us that the 2001 Act embodies a necessary trade off of some individual liberties for the collective security of the nation.n33 In this construction, the "liberties" being curtailed are generally thought of as the rights of speech, association, and the press articulated in the First Amendment, n34 and the freedom from unreasonable search and seizure and the right to privacy protected by the Fourth Amendment. n35

"Security" in this context implies the protection of persons and property from physical assault, but it is also extended to a broader notion of protecting the institutions which embody American "democracy." In essence, the administration is making a broader version of the argument Abraham Lincoln made when suspending the constitutionally guaranteed writ of habeas corpus: "Are all the [*1060] laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?"n36

While the 2001 Act has been vociferously criticized by many civil liberties advocates, the basic framing of the question as one of balancing liberty against security interests has not been effectively challenged. Instead, the debate has focused on where the line should be drawn, legally and politically, with most critics of the 2001 Act arguing that liberties are being unconstitutionally curtailed but not challenging the underlying premise that the goal is increased security. This is a very dangerous and misleading construction. Historically, the liberties at issue have been systematically sacrificed not to ensure the security of the general public, but to suppress political movements and sectors of the population which are viewed as threats to the status quo. What has been sacrificed is not just people's ability to speak openly or be free from surveillance but, in many cases, their very lives and freedom.

It has been well-documented by the Senate Select Committee on Intelligence, as well as by hundreds of thousands of documents released under the Freedom of Information Act (FOIA)n37 that the Federal Bureau of Investigation (FBI), the Central Intelligence Agency (CIA), the National Security Administration (NSA), and dozens of other federal, state, and local agencies have engaged in illegal and unconstitutional actions against U.S. citizen and noncitizen residents in an effort to silence political dissent. The FBI's COINTELPRO operations (1956-1971) are perhaps the best known, but these represent just one dimension of the ongoing political repression which has involved not just illegal surveillance and infiltration, but tactics designed to "disrupt and destroy" organizations, ranging from the manufacture of conflict among individuals and groups to the deliberate framing of people for crimes they did not commit, and - when all else failed - the outright murder of activists. n38 As the Denver "spy [*1061] files" indicate, groups that engage in lawful political dissent are still being actively and illegally targeted by those entrusted with upholding the law and the Constitution.

When we look at the 2001 Act in the context of the federal government's actual use of its law enforcement and intelligence gathering powers, we see that these expanded powers have long been sought - and frequently used, even when illegal - by the executive branch. People engaged in political dissent that is supposed to be protected by the First Amendment, and communities of color generally, have not been made more "secure" in any sense of the term, but have been subjected to physical attacks on their persons and property by the very agencies that are now being given
expanded powers under the 2001 Act. As Robert Justin Goldstein says in his seminal work, Political Repression in Modern America From 1870 to 1976:

The holders of certain ideas in the United States have been systematically and gravely discriminated against and subjected to extraordinary treatment by governmental authorities, such as physical assaults, denials of freedom of speech and assembly, political deportations and firings, dubious and discriminatory arrests, intense police surveillance, and illegal burglaries, wiretaps and interception of mail.

Goldstein goes on to point out that governments can carry out politically repressive activities following "legal" procedures or by utilizing means that are illegal under the country's laws. It goes without saying that it is easier and more convenient for governments to use means that are at least facially lawful. The 2001 Act is most accurately seen as the latest step in the U.S. government's ongoing effort to legitimize unconstitutional practices by using the current "war on terror," perceived and promoted as a national security crisis, to obtain their legislative sanction. Legislation does not, of course, make such practices "lawful" in the deeper sense of the term. Actions which contravene the Constitution and fundamental principles of international human rights law - even if sanctioned by the executive, the legislature, or the judiciary - violate the rule of law and undermine the legitimacy of the governing power.

The actual history of federal "law enforcement" and "intelligence" agencies reveals a deeply disturbing pattern of the use of the armed might and financial resources of the state to destroy individuals and organizations deemed politically undesirable. We must assess the 2001 Act in light of this history - the concrete use of just such powers by the very agencies now being given broader prerogative - and in light of the fundamental principles of constitutional and international law that give the government the right to act at all. The question is not whether we are willing to have our shoes x-rayed at the airport to prevent planes from being hijacked. It is whether we are willing to give carte blanche to agencies which, according to their own records, have used every means at their disposal to silence us.

The United States' use of the "law" to suppress political dissent is a complex one that dates back to the beginning of the republic. In this Essay, I present only a brief sketch of a few aspects of that history that highlight the need to examine the 2001 Act in a much more critical framework than the choice of "liberty vs. security." This is a history that involves the military as well as federal, state, and local law enforcement and intelligence agencies, but for the sake of simplicity I focus primarily on the FBI. Part II presents a brief overview of the early history of the suppression of political dissent and movements for social change in this country. Part III outlines the emergence of the FBI's role in this process, and Part IV looks in more detail at its COINTELPRO (COunter INTELligence PROgram) operations. Part V briefly outlines the "antiterrorist" legislation of the recent decades as the more immediate context for the specific provisions of the 2001 USA PATRIOT Act which is discussed in Part VI. Part VII concludes that if this is, in fact, to be a democracy, it is our responsibility to ensure that the law is used to protect, not repress, those who exercise their rights to political dissent embodied in the Constitution and in international human rights law.

II

Suppressing Movements for Social Change: A Brief Overview

It is extremely dangerous to exercise the constitutional right of free speech in a country fighting to make the world safe for democracy.

- Eugene Debs

A. National Security and the Rule of Law

A government's right to protect the national security, i.e., to protect the state from both internal and external threats to its existence, is generally accepted as a given. However, the right to take otherwise repressive measures exists only to the extent that the threat is real, the state is exercising a legitimate sovereignty, and the government acts in accordance with the rule of law.

In the international community, "states" only exist as sovereign entities by virtue of mutual recognition. Recognition as a sovereign state under international law requires legitimate control over the territory occupied by the state and the peoples who reside in that territory. As the white minority regime in Rhodesia discovered in 1965, simply controlling a geographic area and its population and proclaiming itself a state is not sufficient. One of the fundamental principles of international law is that a state's sovereignty does not extend to the unlawfully occupied territory of another state or nation, and the latter state or nation has the right to struggle for self-determination. States, of course, often continue to exist despite changes of government. To be
legitimate, the government must comply with the rule of law as embodied in both international law and the state's domestic legal structures.

The rule of law has both substantive and procedural dimensions. At a minimum, it substantively requires a state's legal system to incorporate the most fundamental principles of international law; it procedurally requires that the law be known by the people and is applied predictably and equitably. Thus, for the United States to legitimately act in the name of "national security," the country must be lawfully sovereign over the territory, resources, and peoples that it claims; the U.S. government must be complying with the rule of law, both the international law that creates the sovereign state and the U.S. Constitution that provides for the existence and legitimacy of its government; and it must be responding to a real threat.

B. Early Suppression of Struggles for Justice

As we begin to analyze the American government's use of its law enforcement powers, we must keep in mind the distinction between threats to a lawful state or government, i.e., legitimate threats to the national security, and threats to the status quo. Although the United States has proclaimed itself to be a "freedom-loving" democracy since the beginning of the republic, we have consistently seen "national security" invoked to suppress legitimate movements for social and political change. If the United States is asserting control of land, resources, or peoples over which it does not have legitimate jurisdiction, as in the case of many American Indian nations and external colonies such as Puerto Rico, those who seek to challenge this control may not appropriately be deemed threats to the national security. Likewise, [*1065] if the United States government is denying basic human rights to people within its jurisdiction, it cannot legitimately claim to be protecting the national interest when it represses protest against such policies. Furthermore, if people are exercising their lawful right to effect democratic change, their actions are not appropriately characterized as threats to the national security.

Nonetheless, since the founding of the republic, we have seen state power used to repress movements for social, racial, and economic justice, as well as movements for self-determination. The Constitution protected the institution of slavery in numerous ways, including a ban on the prohibition of the slave trade before 1808,n47 the requirement that non-slaveholding states return fugitive slaves,n48 and the increased proportional representation given to slaveholders by the "three-fifths" clause. n49 In addition, one of the reasons Congress was given the power of "calling forth the Militia" to "suppress Insurrections" was to enlist the power of the federal government in crushing slave rebellions. n50

Few Americans would now contest the right of the people, both those who were enslaved and those who were not, to speak out against slavery and to organize to change the government's policy of support for the institution. Nevertheless, many jurisdictions considered it seditious to advocate the abolition of slavery and in certain periods the Postmaster General refused to allow abolitionist literature to be sent through the mail.n51 Despite the First Amendment's explicit protection of the right of the people "to petition the Government for a redress of grievances," n52 the House of Representative enacted a "gag rule" under which it allowed [*1066] no discussion of the slavery question.n53

With rationalizations remarkably similar to those being used by Israel today in "defending" Jewish settlements in Palestinian territories,n54 the United States consistently invoked the security of the nation, and of Euroamerican settlers in particular, to engage in "Indian wars," a term which disguised the fact that the military was being used to crush the efforts of American Indian nations to enforce existing treaties and protect their national security.n55 The U.S. government's own Indian Claims Commission, established in 1946 to "quiet title" to lands expropriated from Indian nations, reluctantly concluded in the 1970s that the United States still does not have good title to at least one-third of what it claims as its territory.n56 This acknowledgment should serve to make us much more critical of the government's attempts to justify the "Indian wars" and its use of force to suppress contemporary struggles for the recognition of American Indian sovereignty. It should also make us question attempts to automatically correlate the loss of American life with a threat to the "national security." If lives are lost as a result of illegitimate governmental activity, it is the government's actions rather than the loss of life, tragic though it may be, which should be seen as threatening the nation's security.

A consistently emerging theme in the suppression of political dissent is that those who disagree with government policy are labeled "un-American" and, whenever possible, portrayed as agents of foreign powers. The Federalists who enacted the 1798 Alien and Sedition Actsn57 claimed the acts were necessary because [*1067] of the increase in U.S.-French hostility. They accused the Jeffersonians of being agents of France who were trying to bring the French Revolution's "Reign of Terror" to the United States.n58 As it turned out, only Republicans were prosecuted under the Sedition Act, and they were
clearly prosecuted for political - not security - reasons. For example, Congressman Matthew Lyon received a four month prison sentence for describing President John Adams as "swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice." n59

As noted below, in attacking movements for social justice, the government has often justified its actions on the ground that these were actually movements for anarchy or communism, "alien" ideologies promoted by foreign powers.n60 Not surprisingly, the linking of political protest to "sedition" has been most common in attempts to suppress antiwar activists. n61 Some interesting parallels to the impending war in Iraq, which the Bush administration insists the United States must pursue to protect its national interest, can be seen in the United States' efforts to conquer the Philippines.

In the late 1800s, after the United States had consolidated its control over the "lower 48" contiguous states, there was a great deal of political debate over explicitly imperialist expansion, particularly the acquisition of "territories" such as Hawaii, Puerto Rico, and the Philippines.n62 The conquest of the Philippines, referred [*1068] to in 1902 by President Roosevelt as the most glorious war in the nation's history,n63 involved a particularly brutal four year campaign during which U.S. troops burned hundreds of villages to the ground, killed perhaps one million Filipinos, herded thousands into concentration camps, and engaged in systematic raping, looting, and torture. n64 The Philadelphia Ledger reported:

> Our men have been relentless; have killed to exterminate men, women, children, prisoners and captives, active insurgents and suspected people, from lads of ten and up, an idea prevailing that the Filipino, as such, was little better than a dog. ... Our soldiers have pumped salt water into men to "make them talk," have taken prisoner people who held up their hands and peacefully surrendered, and an hour later ... stood them on a bridge and shot them down one by one ...

n65

According to the correspondent reporting such facts, these tactics were "necessary and long overdue," for the enemy was not a "civilized" people.n66 Filipinos were routinely referred to as "savages" and "niggers," n67 and the fighting as "Indian warfare." n68

It is interesting to note in the context of the current "war on terrorism" and the impending war in Iraq, that U.S. officials consistently maintained that the war in the Philippines was being fought to bring freedom and civilization to the Filipinos.n69 Filipino [*1069] resistance was portrayed as violating the rules of "civilized warfare," thereby preventing the Americans from comporting with the laws of war.n70 Just as U.S. officials recently denounced Iraq's invitations to conduct fact-finding missions as merely a stalling tactic, n71 Filipino peace proposals were dismissed as "merely a trick" to "gain time." n72 General Douglas MacArthur decreed that captured Filipino guerrillas would not be treated as soldiers, but as "criminals" and "murderers" and summarily executed, n73 much as the Bush administration has said that the "unlawful combatants" captured in Afghanistan and held at Guantanamo Naval Base need not be accorded prisoner of war status. n74

In a move which calls to mind provisions of the USA PATRIOT Act,n75 General MacArthur had a lawyer on the Philippine Commission draft "Treason Laws" under which treason was defined "as joining any secret political organization or even as 'the advocacy of independence or separation of the islands from the United States by forcible or peaceful means.'" n76 Press critical of the war in the Philippines was routinely censored n77 and those who opposed the war were dismissed as "liars and traitors." n78 As discussed in the following section, those who protested the United States' involvement in World War I were similarly considered treasonous or seditious and subjected to harsh repression.

As these few vignettes illustrate, in the early history of the [*1070] United States, social movements which challenged the status quo were labeled seditious. The threat they were said to pose to the national security was used to justify denying First Amendment rights to freedoms of speech and press, to peaceably assemble, and to petition for redress of grievances. The criminal justice system was used to convict organizers engaged in constitutionally protected activity and to crush otherwise popular and effective movements for social change. While done in the name of "law enforcement," such actions were, in fact, undermining the rule of law.

As the United States entered the twentieth century, it was against this general background that its use of federal law enforcement powers to suppress dissent was more effectively institutionalized within the Department of Justice and, more particularly, in what was to become the Federal Bureau of Investigation.

III

The Federal Bureau of Investigation:
Origins and Early Activities
Your FBI is respected by the good citizens of America as much as it is feared, hated and vilified by the scum of the underworld, Communists, goose-stepping bundsmen, their fellow travelers, mouthpieces, and stooges.

- J. Edgar Hoover, 1940

The Department of Justice (DOJ) was formed in 1870, and the following year Congress appropriated $50,000 for the DOJ to engage in "the detection and prosecution of those guilty of violating Federal Law." In 1906, Attorney General Bonaparte established the Bureau of Investigation within the Justice Department, despite the fact that, initially, "congressional authorization was withheld because of the widely held view that the establishment of such an agency would lead to 'a general system of espionage' and would be 'contradictory to the democratic principles of government.'" In 1910, the Bureau's functions were described to Congress as the enforcement of:

The national banking laws, antitrust laws, peonage laws, the bucket-shop law, the laws relating to fraudulent bankruptcies, the impersonation of government officials with intent to defraud, thefts and murders committed on government reservations, offenses committed against government property, and those committed by federal court officials and employees, Chinese smuggling, customs frauds, internal revenue frauds, post office frauds, violations of the neutrality laws ... land frauds and immigration and naturalization cases.

However, it soon took on much broader functions which demonstrated that Congress' initial reservations were well-founded.

During World War I, the Bureau received added funding and personnel to investigate sabotage and violations of the Neutrality Act, and in 1917 the Justice Department tried to convince President Woodrow Wilson to allow military courts martial to try civilians accused of interfering with the war effort. This failed, but Wilson did sign the Espionage Act which made it a crime to "willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language" about the United States. It also criminalized any interference with the war effort and allowed the post office to exclude from the mails any material advocating "treason, insurrection or resistance to any law of the U.S." The 1918 Sedition Act prohibited essentially all criticism of the war or the government. While these laws did nothing appreciable to stop sedition, they did effectively prevent those opposing the war from exercising their First Amendment rights. Goldstein says:

Altogether, over twenty-one hundred [persons] were indicted under the Espionage and Sedition laws, invariably for statements of opposition to the war rather than for any overt acts, and over one thousand persons were convicted. Over one hundred persons were sentenced to jail terms of ten years or more. Not a single person was ever convicted for actual spy activities.

This has become a consistent pattern in the enforcement of "national security" laws.

In June 1918, populist-socialist leader Eugene Debs was sentenced to ten years in federal prison for violating the Espionage Act by making an antiwar speech in which he said, "You need to know that you are fit for something better than slavery and cannon fodder." Charles Schenck was also convicted for printing and distributing pamphlets opposing the draft. In 1919, a unanimous Supreme Court upheld his conviction, stating that the government may restrict speech without violating the First Amendment when there is a "clear and present" danger that the speech could bring about the "substantive evils" at issue.

Anarchist leaders Emma Goldman and Alexander Berkman were also sentenced to ten years for violating the Espionage Act by publicly expressing opposition to the draft. Goldman and Berkman were deported in 1919 under the newly amended immigration laws. These amendments made noncitizens who were members of organizations which advocated the unlawful destruction of property or the overthrow of the government by force or violence deportable. The law did not require any individualized showing of action or even belief, thus incorporating the principle of guilt by association in a manner recently replicated by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act.

During World War I, there was a dramatic increase in federal intelligence gathering operations. Military intelligence jumped from two officers in 1917 to 1300 officers and civilian employees by 1919. There were similar increases in the intelligence divisions of the Justice Department, as well as the Post Office and the Treasury Department. At the same time the Justice Department's Bureau of Investigation entered into an agreement with the American Protective League (APL), a prominent vigilante organization that soon numbered 350,000 members, which allowed these private citizens to "assist" the Bureau.
APL "quickly became a largely out-of-control quasi-governmental, quasi-vigilante agency which established a massive spy network across the land," making illegal arrests and detentions, instigating attacks on activists, and infiltrating, burglarizing, wiretapping and opening the mail of organizations they considered detrimental to United States' interests. n97

During the early 1900s, this combination of federal agents and APL members was instrumental in conducting large scale raids and vigilante actions - including outright lynchings - against members of the Industrial Workers of the World (IWW or "Wobblies") across the country. The raids, acknowledged to have been carried out "largely as a preventative matter to prevent possible violence," n98 were followed by pre-indictment detentions of up to two years, mass trials in which the defendants were sometimes not even identified by name, and the imposition of lengthy prison sentences. These tactics succeeded in crushing the nation's most powerful union movement of that era. n99

The Justice Department's involvement in quashing "subversive" activities increased in the aftermath of World War I. In 1919, there was a series of bombings around the country, including [*1074] one on the residence of Attorney General A. Mitchell Palmer. Those responsible were never identified, but anarchist leaflets were found scattered around each site and Palmer reacted by declaring war on radicals and subversives. n100 Palmer created a General Intelligence Division (GID) within the Bureau of Investigation to spearhead this effort, headed by Assistant Attorney General Garvan and his twenty-four year old assistant, J. Edgar Hoover. Within three and one-half months, the GID had compiled personal files on 60,000 individuals, a number which soon grew to 200,000. n101

Palmer lobbied Congress for peacetime sedition legislation and when that failed he relied on the 1918 Alien Act - again conflating "troublemakers" with "foreigners" - to conduct numerous raids on legal organizations such as the Communist and Communist Labor parties. On January 2, 1920, the Bureau conducted massive "Red raids" (later known as the "Palmer Raids") in thirty-three cities, arresting and holding 10,000 people, both citizens and noncitizens, as "criminal anarchists." n102 Using tactics similar to those we have seen with respect to the 1200-plus post-September 11 detainees, n103 hundreds were held for months in harsh and squalid conditions, and denied contact with their families, friends, and lawyers. n104 When the excesses came to light, Attorney General Palmer declared that the Fourth Amendment did not apply to aliens and boldly stated: "I apologize for nothing that the Department of Justice has done in this matter. I glory in it." n105 According to Sanford Unger, one of the legacies of the Palmer Raids was that "they demonstrated that the use of methods that stretched and went beyond the law were a great help and an efficient tool in undermining 'subversives.'" n106

By 1924, Hoover was in charge of the Bureau, which was soon renamed the Federal Bureau of Investigation. n107 He proclaimed [*1075] that "the bureau must be divorced from politics" and, most interestingly, stated: "It is, of course, to be remembered that the activities of Communists and other ultra-radicals have not up to the present time constituted a violation of federal statutes ... and consequently, the Department of Justice, theoretically, has no right to investigate such activities. ..." n108 However, this was exactly what Hoover proceeded to do with unprecedented vigor. He gave priority to what became the Files and Communications Division, which by 1975 had 6.5 million "Active Investigation" files, an undisclosed but higher number of other files, and a "General Index" containing about 58 million cards. In 1930, Hoover obtained permission to collect fingerprints, and by 1974 the Division of Identification and Information (DII) had on file the prints of about 159 million Americans and was adding 3000 sets each day. n109

One of the Bureau's early targets was the Universal Negro Improvement Association (UNIA), the largest and most vibrant organization of African Americans ever to exist in this country, n110 which Hoover succeeded in destroying through "a campaign against Marcus Garvey which resulted in his frameup on false charges, and ultimately his deportation as an 'undesirable alien.'" n111 In the meantime, as noted by Ward Churchill and Jim Vander Wall, "the DII kept tabs and accumulated increasing amounts of sensitive information on all manner of socialists, communists, union organizers, black activists, anarchists and other 'ultra-radicals' as they painstakingly rebuilt their shattered movements." n112

In 1936 Hoover obtained the President's explicit authorization to resume investigation of "subversive activities" in the country. n113

By 1938, the FBI had launched significant and tacitly illegal ... investigations of supposed subversion in [numerous] industries, as well as various educational institutions, organized labor, [*1076] assorted youth groups, black organizations, governmental affairs and the armed forces. ... More explicit illegality was involved in the methods of intelligence-gathering themselves; wiretapping ... , bugging, mail
tampering/opening and breaking-and-entering were a few of the expedients routinely applied by agents, whose investigative output was promptly summarized and transmitted "upstairs" to the White House.n114

By January 1940, Hoover revived the General Intelligence Division, announcing his intent to create an alphabetical and geographical "general index" which would allow the Bureau to locate anyone it wanted to investigate for "national security" purposes at any time.n115

Shortly thereafter, Congress passed the Smith Act which made it a crime to "knowingly or willfully advocate, abet, advise or teach the duty, necessity, desirability or propriety of overthrowing or destroying any government in the United States by force or violence, or by assassination of any officer of such government."n116 This law extended the prohibitions on speech found in previous sedition laws to peacetime, illustrating the government's intent to restrict freedom of expression in the name of national security without limiting the scope or duration of the restrictions and without demonstrating that the speech was likely to result in any concrete action.

In Dennis v. United States,n117 the Supreme Court upheld the convictions of eleven leaders of the Communist Party under the Smith Act, using a test of whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." Even though the Party had not used force or violence, the Court justified the convictions on the ground that the Party (or the "conspiracy," as the Court referred to it) was highly organized, and because its leaders, who could not be shown to be foreign agents, were "ideologically attuned" to countries with whom the United States had "touch-and-go" relations. n118 Again, we see a similar stretching of the national security rationale being invoked in the "if you're not with us you're against us" rhetoric of the current war on terrorism.n119

During World War II, the U.S. government imprisoned all persons of Japanese descent then living on the west coast, over 70,000 of whom were U.S. citizens, without any semblance of due process. Despite the fact that there was no evidence of sabotage or espionage by Japanese Americans, this was upheld by the Supreme Court as justified by "military necessity," a claim asserted by the military on the grounds that it had no way of distinguishing the "loyal" from the "disloyal."n120

In 1947, as the United States moved from World War II into the Cold War, President Truman issued Executive Order 9835, authorizing the Justice Department to seek out "infiltration of disloyal persons" within the U.S. government, again demonstrating that such measures were not to be limited to periods of actual warfare.n121 The Order required the DOJ to create a list of organizations which were "totalitarian, fascist, communist or subversive ... or seeking to alter the government of the United States by unconstitutional means," n122 a measure similar to that authorized by the 1996 Antiterrorism and Effective Death Penalty Act n123 and expanded by the 2001 Act. n124 By 1954, the Justice Department had created a list of hundreds of organizations, and "sympathetic association" as well as membership was considered evidence of disloyalty. n125

The Internal Security Act of 1950, also known as the McCarran Act, required all members of "Communist-front" organizations[*1078] to register with the federal government, and adopted a proposal - which was not rescinded until 1968 - that special "detention centers" be established for incarcerating those so registered, without trial, any time the president chose to declare an "internal security emergency."n126 Between 1945 and 1957, the House Un-American Activities Committee (HUAC) subpoenaed thousands of Americans for hundreds of public hearings and required them to testify about their associations with the Communist Party and their knowledge of the political activities of their friends, neighbors and co-workers. Those who refused to testify were jailed for contempt. n127 Although Hoover personally disliked Joseph McCarthy, he worked closely with HUAC and the McCarthyites until 1954.

During this period, the FBI placed hundreds of informants within social and labor organizations and conducted "security investigations" of approximately 6.6 million Americans.n128 The stage was set for the next step: the COINTELPRO operations.

IV

COINTELPRO: "Abhorrent in a Free Society"n129

Many of the techniques used [by the FBI in its COINTELPRO operations] would be intolerable in a democratic society even if all of the targets had been involved in violent activity, but COINTELPRO went far beyond that. The unexpressed [*1079] major premise of the programs was that a law enforcement agency has the duty to do whatever is necessary to combat perceived threats to the existing social and political order.

- Final Report of the Senate Select Committee
Properly used, the term "counterintelligence" refers to efforts to combat the "intelligence" or spying activities of foreign powers. Officially, "the FBI's counterintelligence functions have always been administratively lodged in its Counterintelligence Division (CID) and [were] legally restricted to 'hostile foreign governments, foreign organizations and individuals connected with them.'" Nonetheless, since first receiving President Truman's 1936 mandate to investigate subversive activities, Hoover had initiated domestic counterintelligence programs within the Bureau. Some were officially named "COINTELPROs" (COunter INTELligence PROgrams) and others were not, but the term has come to refer to a broad range of FBI programs, generally illegal, intended to repress political dissent.

Even if one looks only at FBI actions between 1956 and 1971, the period of officially acknowledged COINTELPRO operations, the scope of the operations and their sheer volume is overwhelming. This section will present a brief summary of how the program was exposed, the kinds of tactics used and the movements that were the primary targets, giving a few illustrative examples. While constituting a particularly intense period of governmental repression of political dissent, the COINTELPRO era represents not an aberration but the logical outgrowth of the previous use of law enforcement agencies to suppress movements for social change, a process that is still at work in the laws and policies being enacted in the name of countering terrorism.

A. COINTELPRO Exposed

In 1976, the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities (known as the "Church Committee" because it was chaired by Senator Frank Church), characterized the FBI's COINTELPRO operations as "a secret war against those citizens it considers threats to the established order." To quote the Committee's Final Report, "in these programs the Bureau went beyond the collection of intelligence to secret actions designed to 'disrupt' and 'neutralize' target groups and individuals. The techniques were adopted wholesale from wartime counterintelligence, and ranged from the trivial ... to the degrading ... and the dangerous." The Committee noted that from 1956, when the FBI officially labeled its anti-communist efforts as a "COINTELPRO," to 1971, when the program was officially terminated, the FBI approved more than 2000 COINTELPRO actions as part of "a sophisticated vigilante operation aimed squarely at preventing the exercise of First Amendment rights of speech and association, on the theory that preventing the growth of dangerous groups and the propagation of dangerous ideas would protect the national security and deter violence." Despite a very constricted review which was abruptly terminated in mid-stream, the Church Committee hearings and its four-volume Final Report provide more than enough evidence to show that the FBI, the Central Intelligence Agency, the National Security Agency, the Defense Intelligence Agency, Army Intelligence, and numerous other federal agencies engaged in thousands of illegal and unconstitutional operations spanning several decades with the explicit intention of destroying social and political movements they considered a threat to the status quo.

There is much that we do not know about COINTELPRO and similar operations. Nonetheless, what we do know is more than sufficient to cause alarm. The following sections focus on what is known about FBI COINTELPROs, but it is important to remember that the Bureau was but one of perhaps dozens of federal agencies engaging in such practices.

B. The Tactics Employed

The illegal practices employed by the FBI in its COINTELPRO operations are far too numerous to list specifically, but they fall into several basic categories: surveillance and infiltration, dissemination of false information, creation of group conflict, abuse of the criminal justice system, and collaboration in assaults and assassinations.

1. Surveillance and Infiltration

One category of operations involves the acquisition of information through illegal means, including mail interception, wiretaps, bugs, live "tails," break-ins and burglaries, and the use of informants. The FBI has acknowledged that between 1960 and 1974 it illegally utilized over 2300 wiretaps, 697 bugs, and 57,000 mail openings. It is worth noting that this kind of "intelligence gathering" is the activity most commonly associated with COINTELPRO - and is also the most hotly debated aspect of the 2001 Act's expansion of executive power - but is, in fact, the least...
egregious of the practices involved. Perhaps more significant[*1082] than the resulting violations of privacy is the fact that these tactics were not utilized simply for the purpose of acquiring information, but were explicitly intended to induce "paranoia" in movements for social change. As Hoover stated, he wanted his targets to believe that there was "an FBI agent behind every mailbox."n143 In other words, the executive branch of the federal government was engaging in such activities precisely because of the chilling effect they would have on speech and associational activities protected by the First Amendment.

2. Dissemination of False Information

A second level of tactics employed in COINTELPRO operations encompasses the dissemination of information known to be false. One version, sometimes called "gray propaganda," was the systematic release of disinformation (i.e., false and misleading information) designed to discredit organizations in the eyes of the public and to foster tensions between groups.n144 The Church Committee's Final Report notes that the Bureau used "confidential sources," i.e., unpaid informants and "friendly" media sources "who could be relied upon not to reveal the Bureau's interests" to leak derogatory information about individuals and to publish unfavorable articles and fabricated "documentaries" about targeted groups. n145 Among such groups were the Nation of Islam, the Poor People's Campaign, the Institute for Policy Studies, the Southern Students Organizing Committee, and the anti-war National Mobilization Committee. n146

Another form of disinformation, known as "black propaganda," involved the fabrication of leaflets and other publications purporting to come from targeted individuals and organizations. Thus, for example, the FBI had an infiltrator in the Sacramento chapter of the Black Panther Party (BPP) produce a coloring book for children which promoted racism and violence. Although the Panther leadership immediately ordered it destroyed, the Bureau mailed copies to companies which had been contributing food to the Panthers' Breakfast for Children program to get them to withdraw their support.n147 Such [*1083]fabrications did much to promote the image of the BPP as violent "cop-killers," an impression still widely held by the American public.n148

In another example, FBI artists, imitating the drawing styles used by the BPP and a Black cultural nationalist organization known as the United Slaves (US), created a series of leaflets in which each organization appeared to be advocating the elimination of the other's leadership.n149 The FBI's intent can be seen in this excerpt from a 1969 report on its San Diego operations:

In view of the recent killing of BPP member Sylvester Bell, a new cartoon is being considered in the hopes that it will assist in the continuance of the rift between BPP and US. This cartoon, or series of cartoons, will be similar in nature to those formerly approved by the Bureau and will be forwarded to the Bureau for evaluation and approval immediately upon their completion.n150

3. Creation of Intra-and Inter-Group Conflict

This brings us to the third level of COINTELPRO operations, the FBI's destruction of targeted organizations both by creating internal dissension and by setting up groups to attack each other. As reported by the Church Committee:

Approximately 28% of the Bureau's COINTELPRO efforts were designed to weaken groups by setting members against each other, or to separate groups which might otherwise be allies, and convert them into mutual enemies. The techniques used included anonymous mailings (reprints, Bureau-authored articles and letters) to group members criticizing a leader or an allied group; using informants to raise controversial issues; forming a "notional" - a Bureau-run splinter group - to draw away membership from the target organization; encouraging hostility up to and including gang warfare, between rival groups; and the "snitch jacket."n151

Thanks in part to such efforts, the Bureau managed to escalate US-BPP tensions to the point that two US members, widely believed to be informants, shot and killed BPP members Jon Huggins and Bunchy Carter at a meeting on the campus of the University of California at Los Angeles in January 1969.n152 Fabricated correspondence was also a favored tactic, as illustrated by Hoover's authorization of an anonymous letter directed to Dr. Martin Luther King, Jr. - accompanied by a tape compiled from bugs of his Washington, D.C. hotel room - suggesting that he commit suicide to avoid the disgrace of the exposure of alleged sexual misconduct.n153 Nearly one hundred instances of fabricated correspondence between BPP leaders Huey Newton and Eldridge Cleaver were instrumental in creating intra-party violence and ensuring the 1971 split within the Party. n154
Because of its success in actually infiltrating organizations, the FBI was able to further disrupt their functioning by creating suspicions about legitimate leaders. In a practice known as "bad-jacketing" or "snitch-jacketing," the Bureau spread rumors and manufactured evidence that key members were informers or were otherwise undermining the organization by subverting its activities or stealing its funds. This tactic succeeded not only in discrediting many activists, but also resulted in the murders of some who were falsely accused of betraying others within the organization.n155

4. Abuse of the Criminal Justice System

A fourth level of COINTELPRO operations involved the deliberate misuse of the criminal justice system. Working with local police departments, the FBI had activists repeatedly arrested, not because it anticipated convictions, "but to simply harass, increase paranoia, tie up activists in a series of pre-arraignment incarcerations [*1085] and preliminary courtroom procedures, and deplete their resources through the postings of numerous bail bonds (as well as the retention of attorneys)."n156 Using this tactic, the Revolutionary Action Movement in Philadelphia was effectively destroyed despite the fact that no criminal convictions were ever obtained against members of this group. n157 Similarly, the government made 562 arrests in the wake of the 1973 occupation of Wounded Knee by members of the American Indian Movement (AIM). Even though these massive arrests only resulted in a total of fifteen convictions, they succeeded in depleting AIM’s resources and keeping its leaders tied up in court for years. n158

Virtually all of the Bureau's surveillance and infiltration revealed that the targeted groups were engaging in entirely lawful activity.n159 Rather than turning its focus elsewhere, one of its responses was to place within groups agents provocateur who advocated violence or illegal activities which, if carried out, would then be used as an excuse to crush the organizations. n160 Another response was to make it appear that the groups were engaging in illegal conduct by obtaining convictions in questionable cases by using fabricated evidence or perjured testimony and by explicitly framing people for crimes they had not committed.

Prominent cases in which the FBI used perjured testimony and falsified evidence to convict activists include that of New York Black Panther Dhoruba bin Wahad (Richard Moore), whose murder conviction was overturned in 1993 after he had spent twenty years wrongfully incarcerated,n161 and AIM activist Leonard Peltier, who is still incarcerated after twenty-seven years, [*1086] despite the acknowledgment that his conviction for the 1975 deaths of two FBI agents on the Pine Ridge Reservation was obtained with the use of perjured testimony and falsified ballistics evidencen162 and despite worldwide recognition of his status as a political prisoner. n163

The best known case may be that of Los Angeles BPP leader Geronimo ji Jaga (Pratt), who was the subject of constant surveillance and numerous failed attempts to convict him of various crimes. Finally, in 1972, the government succeeded in convicting him of the 1968 "tennis court" murder of a woman in Santa Monica on the basis of the perjured testimony of an FBI informant, and despite the fact that the FBI, thanks to its surveillance, knew that Pratt had been 350 miles away at a BPP meeting in Oakland at the time of the murder.n164

In these cases, which were by no means aberrational but rather an explicit part of the government's strategy to eliminate the leadership of movements it did not sanction, the Department of Justice - the nation's highest law enforcement agency - was turning the criminal justice system on its head. It was not enforcing the law but was deliberately engaging in illegal practices, misusing criminal laws and the courts to imprison activists, not because they had engaged in criminal conduct but because of their political beliefs, actions and associations.

5. Collaboration in Assaults and Assassinations

A fifth level of COINTELPRO operations involves the government's participation in direct physical assaults and assassinations. [*1087] This is, of course, the hardest area to document, but as Churchill and Vander Wall note, while the Bureau has "almost always used surrogates to perform such functions, [it] can repeatedly be demonstrated as having provided the basic intelligence, logistics or other ingredients requisite to 'successful' operations in this regard."n165

The most infamous of these is probably the 1969 murder of Chicago Black Panthers Fred Hampton and Mark Clark. At the time, twenty-one year old Hampton was widely recognized as one of the most charismatic leaders emerging in the black community and, despite his characterization by the government as a "black nationalist," it was his success in cross-racial coalition building that the FBI found most threatening.n166

The prominent role played by FBI informant William O'Neal, who was by then in charge of security for the Chicago BPP chapter, and the FBI's collaboration with local police which culminated in a pre-dawn assault on Hampton's apartment is well documented.n167 Despite evidence that hundreds of shots were fired into the
apartment, killing Hampton and Clark and wounding several others, including Hampton's pregnant fiancee, with only one shot fired in response, all government officials were cleared of criminal charges. Nearly fifteen years later there was a civil finding of a government conspiracy to deny the victims' civil rights and a $1.85 million settlement, but the FBI had long since accomplished its purpose of destroying the Black Panther Party in Illinois.

In the meantime, as part of its concerted program to destroy the American Indian Movement, the FBI provided direct support to the self-proclaimed "Guardians of the Oglala Nation" or "GOONS" on the Pine Ridge Reservation in South Dakota who have been implicated in the "unsolved" deaths of at least seventy individuals associated with AIM between 1972 and 1976. Particularly chilling is the fate of the family of John Trudell, AIM's last national chairman:

In February 1979, Trudell led a march in Washington, D.C. to draw attention to the difficulties the Indians were having. Although he had received a warning against speaking out, he delivered an address from the steps of the FBI building on the subject of the agency's harassment of Indians... Less than 12 hours later, Trudell's wife, Tina, his three children [ages five, three and one], and his wife's mother were burned alive in the family home in Duck Valley, Nevada - the apparent work of an arsonist.

As noted above, what is at stake in allowing the government unrestrained powers is not merely an abstract notion of First Amendment freedoms but, in many cases, the very survival of those who protest.

C. The Groups Targeted

Literally hundreds of organizations, most of them related only by a desire to effect social or political change through constitutionally protected means, were the targets of various COINTELPROs. The Church Committee identified five overarching categories of targets: the Communist Party USA, the Socialist Workers Party, "White Hate Groups," "Black Nationalist Hate Groups," and the "New Left." As the Final Report noted, these were "labels without meaning" as the categories included an extremely wide range of often unrelated organizations. Thus, all of the predominantly black organizations targeted, including Martin Luther King, Jr.'s Southern Christian Leadership Conference (SCLC) and numerous Black Student Unions, were "Black Nationalist Hate Groups," while the Communist Party USA heading covered the National Committee to Abolish the House Un-American Activities Committee and numerous civil rights leaders. The "New Left," which the Bureau could only define as "more or less an attitude," encompassed targets from the Students for a Democratic Society (SDS) to anyone involved in protesting the war in Vietnam. This section provides a few examples of how these organizations were targeted.

1. Communist and Socialist Organizations

Throughout the 1940s and 1950s, COINTELPRO-type operations were directed almost exclusively at the Socialist Workers Party (SWP), the Communist Party USA (CPUSA), and groups believed to be affiliated with them. As previously noted, groups identified as "communist" have been targeted by the government since the 1870s, and the FBI, or its predecessors, had been trying to crush the CPUSA since its emergence in 1919. The FBI's first formal COINTELPRO, initiated in 1956, was directed at the CPUSA, a lawfully constituted organization which had not been shown to have engaged in any criminal activity. The Bureau specifically instructed agents and infiltrators to generate "acrimonious debates," "increase factionalism," and generate "disillusionment and defection." Apparently it was quite successful. Goldstein says: "Although the precise results of FBI efforts cannot be determined, between 1957 and 1959, what was left of the CP was virtually destroyed by factional infighting."

Nonetheless, "even as the CP collapsed into a tiny sect of a few thousand members, FBI COINTELPRO activities increased and expanded" to the point where by the mid-1960s the FBI was attempting to engineer the assassination of "key communist leaders" by creating a conflict between the CP and organized crime. The FBI undertook 1,388 separate actions against the CPUSA between 1956 and 1971.

In 1973, following public disclosure of COINTELPRO, the Socialist Workers Party and its youth organization, the Young Socialist Alliance (YSA), sued the government for illegally subjecting them to infiltration, disruption, and harassment in violation of their constitutional rights. After fifteen years of litigation, the SWP and YSA were awarded $264,000 in damages. The suit documented FBI surveillance that began in 1936 and included fifty-seven operations conducted by the FBI. These included poison-pen letters, malicious articles planted in the press, instances of harassment and victimization, covert attempts to get SWP members fired from their jobs, and efforts to disrupt
collaboration between the SWP and civil rights and anti-Vietnam war groups.

Judge Griesa's opinion for the Southern District of New York notes that between 1943 and 1963 the FBI illegally engaged in 20,000 days of wiretaps, 12,000 days of listening "bugs," and 208 burglaries of office and homes, and that between 1960 and 1976 it employed about 300 member informants (constituting, at any given time, from two to eleven percent of the membership) and 1000 non-member informants. n183 Griesa concludes:

Presumably the principal purpose of an FBI informant in a domestic security investigation would be to gather information about planned or actual espionage, violence, terrorism or other illegal activities designed to subvert the governmental structure of the United States. In the case of the SWP, however, there is no evidence that any FBI informant ever reported an instance of planned or actual espionage, violence, terrorism or efforts to subvert the governmental structure of the United States. Over the course of approximately 30 years, there is no indication that any informant ever observed any violation of federal law or gave information leading to a single arrest for any federal law violation. What the informant activity yielded by way of information was thousands of reports recording peaceful, lawful activity by the SWP and YSA. n184

2. The Civil Rights Movement

By the early 1960s, J. Edgar Hoover began expanding COINTELPRO operations to the civil rights movement, adding Dr. Martin Luther King, Jr. to the Atlanta field office's pick-up list of persons who would be interned under the Detention Act in [*1091] the event of a national emergency. n185 Despite the fact that the Atlanta office had submitted a thirty-seven-page report confirming that neither King nor the SCLC were under any kind of communist influence, Hoover rationalized the operation with the assertion that King associated with "known Communists." n186

Shortly after King's "I Have a Dream" speech, William Sullivan, who was responsible for COINTELPRO nationally, stated in an internal FBI memorandum, "We must mark [King] ... as the most dangerous Negro in the future of this Nation from the standpoint of communism, the Negro, and national security." ..." n187

Acknowledging the FBI's intent to use illegal methods, he continued, "it may be unrealistic to limit [our actions against King] to legalistic proofs that would stand up in court or before Congressional Committees." n188 When the Bureau failed to convince King to commit suicide, it stepped up the campaign to discredit King and the SCLC, an effort that continued even after King's death. n189 Numerous other civil rights organizations such as the Student Nonviolent Coordinating Committee (SNCC), the Congress of Racial Equality (CORE), the Mississippi Democratic Freedom Party, and various church and student organizations were similarly targeted. n190

3. The Ku Klux Klan and "White Hate" Groups

Prior to the murders of three young northern "freedom riders" in Mississippi in the summer of 1963, the FBI's investigation of "racial matters" focused not on the Ku Klux Klan or other white supremacist organizations, but on subverting civil rights groups and their relationships with predominantly white "new left" organizations. The Bureau routinely fed information to police departments enforcing the apartheid regime in the South, with full knowledge that the police often transmitted the information directly to the Klan and related organizations. n191 While the FBI [*1092] had informants in the Klan, it did not use the intelligence it gathered to prevent violence against civil rights workers.

According to Kenneth O'Reilly, the FBI had been aware of plans to attack two buses of freedom riders arriving in Alabama in the spring of 1961 for weeks, but simply looked on, doing nothing to intervene, when the first bus was destroyed and riders on the second were attacked with bats, chains, and lead pipes. n192 Indeed, the FBI had given the Birmingham police "details regarding the Freedom Riders' schedule, knowing full well that at least one law enforcement officer relayed everything to the Klan." n193

An internal report indicates that the Bureau was aware that during the Freedom Summer of 1963 at least thirty-five SNCC workers were murdered and about 1000 arrested while engaging in constitutionally protected activities, primarily a joint SNCC-CORE voter registration drive intended to support the Mississippi Freedom Democratic Party. n194 Moreover, informants had told the FBI that a Mississippi Klan leader had told his followers, who included a significant number of law enforcement officers, to "catch [activists] outside the law, then under Mississippi law you can kill them." n195

Nonetheless, the Bureau did not act on reports that civil rights activists James Cheney, Andrew Goodman, and Michael Schwerner - two of whom the FBI was monitoring as "subversives" - were missing until the Justice Department came under intense pressure as a result of widespread publicity about the
disappearances. Responding to the public outcry, President Lyndon Johnson himself began pressuring the Bureau to solve the case, and the FBI eventually sent 258 agents to Mississippi. Even then, they found the bodies only after giving a Klan participant $30,000 and immunity from prosecution. Twelve of the participants in the murders went free and the remaining only served short sentences for conspiracy to violate civil rights, not for murder. What is particularly interesting is the FBI's strategy afterwards. Their "sit by and watch" approach having been nationally exposed, they seem to have developed a strategy to control the Klan, but not necessarily to render it ineffective.

4. The "New Left" and the Antiwar Movement

Between 1968 and 1971 "New Left" COINTELPROs targeted a wide range of primarily white activist organizations, from Students for a Democratic Society to the Institute for Policy Studies, the Peace and Freedom Party, and "a broad range of anti-war, anti-racist, student, GI, veteran, feminist, lesbian, gay, environmental, Marxist, and anarchist groups, as well as the network of food co-ops, health clinics, child care centers, schools, bookstores, newspapers, community centers, street theaters, rock groups, and communes that formed the infrastructure of the counter-culture." Given the government's long history of suppressing anti-war activists, it is not surprising that opponents of the war in Vietnam were a primary target. A series of COINTELPRO operations were conducted with the aim of causing splits within anti-war organizations and among coalitions of such organizations. College campuses, and even high schools, were a primary focus of FBI operations, with informants placed in classrooms and student organizations. Their tactics included false media reports, fabricated correspondence, the widespread use of informants and infiltrators, and "snitch-jacketing." Government agents also actively subverted the logistics, such as the housing, transportation, and meeting places of anti-war activities.

5. "Black Nationalist" Organizations and the Black Panther Party

The FBI has, of course, a long history of suppressing the efforts of African Americans to obtain racial justice, from its destruction of Marcus Garvey's UNIA to the undermining of civil rights groups discussed above. Not surprisingly, the most intense of its official COINTELPRO operations were directed at "Black Nationalist" groups, a classification which appeared to include any predominantly African American organization. According to a 1967 memorandum from J. Edgar Hoover, "The purpose of this new counterintelligence endeavor is to expose, disrupt, misdirect, discredit, or otherwise neutralize the activities of black nationalists, hate-type organizations and groupings, their leadership, spokesmen, membership, and supporters, and to counter their propensity for violence and civil disorder." One of the program's explicitly stated goals was to "prevent the rise of a 'messiah' who could unify the movement for Black liberation. According to Hoover, "Malcolm X might have been such a 'messiah;' ... Martin Luther King, Stokely Carmichael and Elijah Muhammed all aspire to this position." Another primary goal was to "prevent militant black nationalist groups and leaders from gaining respectability. ..." Hoover instructed his agents:

You must discredit these groups and individuals to, first, the responsible Negro community. Second, they must be discredited to the white community, both the responsible community and to "liberals" who have vestiges of sympathy for militant black nationalist simply because they are Negroes. Third, these groups must be discredited in the eyes of Negro radicals, the followers of the movement.

All predominantly Black activist organizations were targeted, from King's adamantly nonviolent SCLC to the Nation of Islam. However, by 1968 the Bureau had decided that the Black Panther Party (BPP) was most likely to serve as an effective catalyst for black liberation movements and declared the BPP to be "the greatest [single] threat to the internal security of the country." Field offices were instructed to submit proposals for "imaginative and hard-hitting counterintelligence measures aimed at crippling the BPP." The Bureau has acknowledged conducting 295 official COINTELPROs against Black activist organizations. Of these, 233 operations, most of which took place in 1969, directly targeted the Black Panther Party. However, as Kenneth O'Reilly says, "It is impossible to say how many COINTELPRO actions the FBI implemented against the Panthers and other targets simply by counting the incidents listed in the COINTELPRO-Black Hate Group file. The Bureau recorded COINTELPRO-type actions in thousands of other files." We do know that ultimately:
The assault left at least twenty-eight Panthers dead, scores of others imprisoned after dubious convictions, and hundreds more suffering permanent physical or psychological damage. The Party was simultaneously infiltrated at every level by agents provocateurs, all of them harnessed to the task of disrupting its internal functioning. Completing the package was a torrent of disinformation planted in the media to discredit the Panthers before the public, both personally and organizationally, thus isolating them from potential support.

Ward Churchill concludes that "although an entity bearing its name remained in Oakland, California, for another decade ... the Black Panther Party in the sense that it was originally conceived [*1096] was effectively destroyed by the end of 1971."n216 Among the other things destroyed by COINTELPRO were the BPP newspaper, schools, breakfast for children programs, sickle cell anemia and other health care programs, and programs for free clothing, shoes, housing, transportation to prisons and hospitals, and child care. n217 This further illustrates that it was not criminal activity but challenges to the status quo that were perceived as threats by the government.

6. The American Indian Movement

Soon after Hoover announced the termination of COINTELPRO in 1971, the FBI was launching a massive operation against American Indian organizations which moved from "counterintelligence" actions to the use of tactics which are probably more accurately described as "counterinsurgency warfare." Their primary target was the American Indian Movement (AIM), founded in Minneapolis in 1968. In many respects, AIM emulated the Black Panther Party with street patrols intended to counter police brutality by "policing the police" and the establishment of alternative schools and media, legal and health clinics, free food programs, and services to assist with housing and employment.n218 More threatening to the federal government, however, was AIM's emerging focus on reasserting American Indian sovereignty and its success in linking the poverty and despair of Indian communities directly to federal policies. n219

AIM leaders organized the 1972 "Trail of Broken Treaties" march across the country to Washington, D.C., where they occupied the Bureau of Indian Affairs (BIA) office and obtained classified documents which showed, among other things, that American Indians were receiving only about ten percent of the market value of mineral and land leases - and even that money [*1097] was not accounted for - and uncovering a secret Indian Health Services program which had resulted in the sterilization of forty percent of American Indian women of childbearing age.n220

Many of the subsequent FBI operations centered on the Pine Ridge Reservation, where federal agents had installed a tribal president who was willing to turn over a large, mineral-rich portion of the reservation to the government.n221 There, in 1973, the FBI led a paramilitary invasion against AIM activists gathered for a symbolic protest at Wounded Knee, the site of the 1890 massacre. n222 During their 71-day siege the government deployed over 100 FBI agents, nearly 300 federal marshals, 250 BIA police, Army warfare experts, and local vigilantes known as the GOONS (Guardians of the Oglala Nation). n223 In their attempt to remove the activists, government forces fired approximately 500,000 rounds of ammunition into the area. n224 The government followed up with the hundreds of bogus criminal charges intended to keep AIM leaders tied up in court and to deplete the organization's funds. n225

From 1973 to 1976 the GOONS, often using arms supplied them by the FBI,n226 murdered at least sixty-nine AIM members and supporters on the Pine Ridge Reservation and assaulted another 340. The FBI, which exercised criminal jurisdiction on the reservation, was too "short of manpower" to investigate these murders.n227 In 1975 it was revealed that AIM's national security chief, Doug Durham, was an undercover FBI operative. Among other things, Durham had been AIM's liaison with the Wounded Knee legal defense team and had authored the AIM documents consistently cited by the FBI to demonstrate the group's alleged tendencies toward violence. n228

[*1098] On June 23, 1975, the Church Committee announced that it would hold hearings on the FBI operations targeting the American Indian Movement. Three days later, two FBI agents were killed in a firefight on Pine Ridge,n229 triggering, in the words of the Chair of the U.S. Civil Rights Commission, "a full-scale military-type invasion of the reservation" n230 and allowing the Church Committee to "postpone" the hearings indefinitely.

D. Assessing COINTELPRO: Is It Over?

Even the Church Committee's carefully worded Final Report acknowledged:

In the course of COINTELPRO's fifteen-year history, a number of individual actions may have violated specific criminal statutes; a number of individual actions involved risk of serious bodily injury or death to the targets ... ; and a number of actions, while not
illegal or dangerous, can only be described as "abhorrent in a free society."n231

Given the massive documentation of illegal and unconstitutional activities conducted by the United States' highest law enforcement agency against its own citizens, the paucity of legal analysis of these activities is quite stunning.n232 There is a tendency to dismiss the COINTELPRO era as "an awkward period in the history of the FBI" n233 rather than recognizing, as the Church Committee did, that it was, in fact, a war against social and political dissent in the United States. n234

By 1989, a federal district court was already discounting COINTELPRO activities as "relatively ancient governmental [*1099] misconduct" irrelevant to indictments being brought against white activists in the "Resistance Conspiracy" case.n235 Can we safely relegate this era to history, perhaps acknowledging that, as Senator Church put it, it was "one of the sordid episodes in the history of American law enforcement," n236 but accepting it as an aberration generated by the FBI's zeal for protecting the national security? There are a number of reasons why such an approach, while perhaps comforting to some, is not warranted.

First, we must look at the "excesses" of the COINTELPRO era in light of the earlier history of the FBI and its predecessor organizations. While the earlier efforts to suppress political dissent were not nearly as well funded or efficiently organized, this country has a consistent history of using its police powers - federal, state, local and private - not to enforce the law and uphold the Constitution, but to crush what are perceived as threats to the status quo. The purposes of COINTELPRO, as articulated by the Church Committee, illustrate that it was the logical extension of this history:

"Protecting national security and preventing violence are the purposes advanced by the Bureau for COINTELPRO. There is another purpose for COINTELPRO which is not explicit but which offers the only explanation for those actions which had no conceivable rational relationship to either national security or violent activity. The unexpressed major premise ... is that the Bureau has a role in maintaining the existing social order, and that its efforts should be aimed toward combating those who threaten that order.n237"

Second, we must remember that information about COINTELPRO was only made available to the American public because a group of citizens burglarized the FBI's Media, Pennsylvania office and stole files which were subsequently published in the press - an activity that would today probably be classified [*1100] as "domestic terrorism" under the 2001 Actn238 - and because the Watergate scandal, not the crushing of the political movements in question, spurred the Senate to convene the Church Committee hearings. n239 Almost all of the additional documentation of COINTELPRO abuses has been obtained by piecing together censored files released under the Freedom of Information Act, n240 an avenue dramatically curtailed by Attorney General Ashcroft in October 2001. n241 There is no reliable way for the American public to know what programs are continuing or may be instituted in the future.

Third, what we do know about the FBI's activities from 1956 to 1976, generally believed to be the height of COINTELPRO-type operations, is far from complete. The Church Committee's findings are based on the depositions of select Bureau agents and targets, and the review of only about 20,000 of the millions of pages of documents generated by the Bureau.n242 It could not, of course, review files that were withheld or destroyed or operations that were not documented. n243 More significantly, the Church Committee "temporarily" suspended its investigation before reaching scheduled hearings on some of the FBI's most intense operations, notably those targeting the American Indian Movement and the movements for Puerto Rican independence, just as the repression of these groups was reaching its zenith. n244 [*1101] Twenty-six years later the hearings have not been resumed.n245

Fourth, what has been done about the abuses that were exposed? One of the fundamental principles of American law, and of the rule of law more generally, is that there is a remedy for legally acknowledged wrongs. Despite the thousands of instances of illegal conduct on the part of the government that were documented by both Senate and House committees, no changes were made in the law and no government official has spent a day in jail as a result.n246 A handful of victims or their surviving families have managed to obtain civil judgments or settlements for damages, but these cases are by far the exception. n247

No one disputes that governmental agencies at the highest level engaged in long-term, systematic and deliberate violation of the laws and the Constitution. Yet the legislature which enacts the laws, the executive which is charged by the Constitution with "faithfully Executing the laws," and the judiciary whose responsibility it is to see that the laws are enforced have all looked the other way and, by doing so, have implicitly sanctioned this undermining of the rule of
law. All of this confirms the accuracy of FBI Director Kelley's testimony to the Church Committee that "the FBI employees involved in these programs did what they felt was expected of them by the President, the Attorney General, [^1102] the Congress, and the people of the United States."[^248]

Fifth, despite the barriers to public access to such information, there is on-going evidence that COINTELPRO-type operations continue. On April 27, 1971, in response to the release of classified information obtained in a break-in of the Media, Pennsylvania, FBI office, Hoover officially terminated all COINTELPROs for "security reasons."[^249] The FBI "termination" memo provided, however, that "in exceptional circumstances where it is considered counter-intelligence action is warranted, recommendations should be submitted to the Bureau under the individual case caption to which it pertains."[^250]

Despite the Bureau's initial contention that there was no post-1971 COINTELPRO activity, the Church Committee documented several post-1971 COINTELPRO-type operations,[^251] and noted that it had not been able to determine with any greater precision the extent to which COINTELPRO may be continuing, because any proposals to initiate COINTELPRO-type action would be filed under the individual case caption. The Bureau by then had over 500,000 case files, and each one would have to be searched.[^252] In fact, the number of illegal bugs and wiretaps utilized by the Bureau in the three years after 1971 increased significantly.[^253]

In the meantime, evidence of on-going operations continues to surface. During the 1980s the FBI and CIA used classic COINTELPRO tactics against organizations opposed to U.S. policy in Latin America. Operating under classified "Foreign Intelligence/Terrorism" guidelines promulgated by the Reagan administration,[^254] the government targeted the nonviolent Committee In Solidarity with the People of El Salvador (CISPES) and groups involved in the "Sanctuary" movement.[^255] When their own field reports consistently confirmed that the activities of CISPES and other Latin America solidarity organizations were "legitimate" and "respectable," the FBI took the position that CISPES's overt activities were "designed to cover a sinister covert program of which most CISPES members were unaware," and that it must be a "front group" for more dangerous organizations.[^256] Using this rationale, the FBI extended its operations to encompass hundreds of other groups, including Amnesty International, Clergy and Laity Concerned, the U.S. Catholic Conference and the Maryknoll Sisters, utilizing its standard tactics of infiltrators and agents provocateur, disinformation, black bag jobs, telephone monitoring, and conspicuous surveillance designed to induce paranoia.[^257]

Ultimately, in this context the FBI gathered information on the political activities of approximately 2,375 individuals and 1,330 organizations, and initiated 178 related investigations that appear to have been based on political ideology rather than on suspicion of criminal activity. Yet this massive government intrusion into the lives of thousands of lawful political activists failed to yield a single criminal charge, let alone a criminal conviction.[^258]

Using the rubric of "counter-terrorism" rather than "anti-communism," the FBI has continued to conduct numerous operations against anti-war and anti-nuclear groups such as the pacifist organization Silo Plowshares;[^259] environmental activists such as Earth First!;[^260] supporters of the Puerto Rican independence movement, including the coordinator of the National Lawyers Guild's anti-repression task force;[^261] and perhaps black elected officials in general.[^262] As Brian Glick states:

The targets [of ongoing domestic covert action] ... include virtually all who fight for peace and social justice in the United States - from AIM, Puerto Rican independentistas and the Coalition for a New South, to environmentalists, pacifists, trade unionists, homeless and seniors, feminists, gay and lesbian activists, radical clergy and teachers, publishers of dissident literature, prison reformers, progressive attorneys, civil rights and anti-poverty workers, and on and on.[^263]

Finally, the best evidence that COINTELPRO-type operations, and the more general repression of political dissent that they represent, cannot be relegated to history may be the consistent efforts of the executive branch to roll back the minimal reforms mandated by Congress in the wake of the Church Committee investigations, to further shield their activities from public scrutiny, and to legalize many of the tactics routinely employed by the FBI in its efforts to suppress dissent, before, during and after the COINTELPRO era.[^264] These efforts are discussed in Part V.

V

"Antiterrorist" Legislation and Governmental Policy, 1975-1996
The American people need to be assured that never again will an agency of the government be permitted to conduct a secret war against those citizens it considers threats to the established order. Only a combination of legislative prohibition and Departmental control can guarantee that COINTELPRO will not happen again.

- Church Committee, Final Report n265 [*1105]

Despite the Church Committee's conclusion that dozens of governmental law enforcement and intelligence agencies had engaged in massive abuses of the constitutional rights of U.S. citizens and residents, very little happened as a result. The hearings were suspended in mid-stream and never reopened, no individuals were sent to prison on criminal charges, no laws were passed proscribing such activities, and no provision was made to rectify on-going wrongs or to compensate the victims. The Carter administration imposed some very limited internal constraints on "domestic security" investigations but, as we will see, even these were soon rolled back.

As a result of the Church Committee's findings, as well as investigations by a select committee in the House of Representatives and a General Accounting Office review of FBI domestic intelligence policies requested by the House Judiciary Committee, n266 the Department of Justice issued its first set of public guidelines for FBI domestic security investigations in 1976. Known as the "Levi guidelines," after then-Attorney General Edward Levi, they prohibited investigations or operations designed to disrupt organizations based solely on unpopular speech. n267 They also limited the basis on which investigations would be authorized.

Under the Levi guidelines, the FBI could initiate a "preliminary" investigation on the basis of any allegation or information that a group or individual "may be engaged in [unlawful] activities" which "involve or will involve the use of force or violence." These were authorized to determine whether the factual basis existed for launching a "full" investigation, and the Bureau was to be limited to public, law enforcement, or pre-existing sources of information. More intrusive "limited" investigations, including physical surveillance and personal interviews were authorized if the preliminary investigation proved inadequate to determine whether a full investigation was warranted. "Full" investigations were authorized on the - still very broad - basis of "specific and articulable facts giving reason to believe that an individual or a group is or may be engaged in [unlawful] activities which involve the use of force or violence." n268 Reportedly, the number of domestic ["1106] security investigations being conducted by the FBI dropped from 4868 in March 1976 to 26 in December 1981. n269

Even this requirement of a very tentative connection to criminal activity was resisted. Senator Denton, chair of the Senate Judiciary Committee's Subcommittee on Security and Terrorism, insisted that "the support groups that produce propaganda, disinformation, or 'legal assistance' may be even more dangerous than those who actually throw the bombs." n270 Another member of the subcommittee, Senator East, said that the "conduct of subversion itself consists in large measure in the utilization of legal activities to undermine ... legally established institutions." n271

The scant protection provided by the Levi guidelines did not last long. In 1981, President Ronald Reagan issued Executive Order (EO) 12333 reauthorizing many of the techniques prohibited by the guidelines. In 1983, Reagan issued EO 12345 which claimed to give the Bureau and other intelligence agencies "legal authority" to withhold information about their use of counterintelligence methods. n272 In the meantime, he pardoned W. Mark Felt and Edward S. Miller, the only FBI officials ever convicted on COINTELPRO-related charges, before they spent a day in jail or even had to bother appealing their sentences. n273

By 1982, FBI Director William Webster had declared that the Levi guidelines were "no longer adequate to guide us in dealing with the kinds of terrorist groups that we are confronted with today," n274 and they were replaced in 1983 by Attorney General William French Smith. The new "Smith guidelines" eliminated the "preliminary" and "limited" stages altogether and removed the "specific and articulable facts" requirement from full investigations. The new standard authorized investigations whenever "facts or circumstances reasonably indicate that two or more persons are engaged in an enterprise for the purpose of furthering political or social goals wholly or in part through activities that involve force or violence." n275 The Smith guidelines extended the [*1107] "enterprise concept" from investigations of organized crime to groups that do not engage in criminal activity but are believed to "knowingly support" the criminal objectives of other groups and allowed the Bureau to continue to monitor groups that were inactive.

In 1969, the Supreme Court had restricted Schenck and Dennis, the cases upholding convictions under the Smith Act, n276 by stating in Brandenburg v. Ohio that the First Amendment did not allow the government to "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." n277 However, the Smith guidelines turned this standard upside down...
by declaring that investigations of groups that advocated criminal activity were warranted "unless it is apparent ... that there is no prospect of harm." n278 According to Attorney General Smith, the targets' constitutional rights were protected by the guidelines' caveat that investigations could not be "based solely on activities protected by the First Amendment." n279

Further illustration of the fact that the measures of the COINTELPRO era were not aberrational but part of a more general effort to suppress political dissent can be seen in the implementation of the 1984 Bail Reform Act, n280 which dramatically expanded the use of preventive detention. While purportedly designed to keep "drug kingpins, violent offenders and other obvious threats to the community" incarcerated while awaiting trial, it "provided the FBI with a weapon far superior to the strategy of pretext arrests" in detaining political targets such as the Puerto Rican independentistas, Resistance Conspiracy defendants, and IRA asylum seekers. n281

In the meantime, Congress had passed the Foreign Intelligence Surveillance Act (FISA) in 1978, n282 which established a secret [*1108*] Foreign Intelligence Surveillance Court (FISC) composed of seven federal appellate court judges serving rotating terms whose purpose was to review warrants for surveillance in cases targeting a "foreign power" or the "agent of a foreign power." FISA significantly reduced the showing required for warrants, initially for surveillance and later for physical searches as well. n283 The safeguard was presumably that these warrants were to be issued only in cases primarily involving foreign intelligence, and subject to the limitation that no U.S. person, meaning a citizen or permanent resident, could be targeted "solely on the basis of activities protected by the First Amendment." n284 Despite the passage of this Act, the executive branch has consistently maintained that, as a constitutional matter, the President does not need congressional or judicial approval to engage in warrantless searches. n285

Following the 1993 bombing of the World Trade Center, the Clinton administration considered a proposal to rewrite the Smith guidelines to permit the FBI to infiltrate domestic groups without any evidence that the targeted organization was planning to commit criminal acts. n286 Instead, in 1995 FBI Director Louis Freeh and Deputy Attorney General Jamie Gorelick told the House Judiciary Committee Subcommittee on Crime that the administration had decided to "reinterpret" the guidelines to allow wide-ranging investigations of "domestic terrorism" groups if they "advocated violence or force with respect to achieving any political or social objectives." Instead of requiring a finding of an "imminent violation" of law, an investigation would be authorized if the Bureau "detected any potential conduct" that "might violate federal law," n287 clearly disregarding the Smith guidelines' requirement that the government at least take into consideration the magnitude of the threat, its likelihood and immediacy, and [*1109*] the danger to individual freedoms posed by the investigation. n288

The past decade has seen a dramatic increase in the legalization of many of the tactics used by the FBI and other intelligence agencies during the COINTELPRO era. In 1994, Congress passed the Omnibus Crime Bill n289 which gave the FBI an additional $ 25 million per year for its "counterterrorism" budget and another $ 25 million per year for training state and local SWAT teams, created an Economic Terrorism Task Force and authorized the death penalty for numerous new categories of "terrorist activity." n290 Even though the FBI had reported only two incidents of international terrorism in the United States between 1984 and 1996, Congress nonetheless passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) whose "sweeping provisions served to license almost the full range of repressive techniques which had been quietly continued after COINTELPRO was supposedly terminated." n291 The Act defines "national security" as encompassing "the national defense, foreign relations, or economic interests of the United States" and gives the secretary of state broad authority to designate groups as "engaging in terrorist activity" if they threaten "the security of United States nationals or the national security of the United States." n292 Groups so designated can seek judicial review, but the government can prevent them from seeing the evidence by presenting it to the judge in camera, and the judge is to review the decision under the highly deferential "arbitrary and capricious" standard of the Administrative Procedure Act. n293

Under the 1996 Act, it is a felony to provide any form of material support to designated organizations even if the support goes [*1110*] directly to an entirely lawful activity of the group. n294 Noncitizens can be deported on the basis of secret evidence for belonging to organizations deemed "terrorist," without any showing of personal involvement in terrorist or criminal activity; in other words, for engaging in what would otherwise be associations protected by the First Amendment. n295 According to David Cole and James Dempsey, AEDPA was:

One of the worst assaults on the Constitution in decades. It resurrected guilt by association as a principle of criminal and immigration law. It created a special court to use secret evidence to deport
foreigners labeled as "terrorists." It made support for the peaceful humanitarian and political activities of selected foreign groups a crime. And it repealed a short-lived law forbidding the FBI from investigating First Amendment activities, opening the door once again to politically focused FBI investigations.

Again, we see the national security being invoked to enact laws and permit executive actions which target individuals and organizations engaged in activities which may challenge the status quo, but are otherwise lawful and constitutionally protected. Although much of the congressional debate surrounding this bill focused on the 1993 World Trade Center bombing and the 1995 bombing of the federal building in Oklahoma City, the measures requested by the Clinton administration were not a response to new developments in terrorism, but changes that had long been on the executive branch's "wish list."

For instance, the first Bush administration's proposals to allow secret evidence in deportation hearings had been twice rejected by Congress. The Immigration and Naturalization Service (INS), undeterred by lack of congressional approval and even by numerous federal court decisions rejecting the practice, continued to deport people on the basis of secret evidence.

In 1984, the Reagan administration had tried unsuccessfully to get Congress to criminalize "support" for terrorism and the first Bush administration also made similar proposals. Ten years later, the Clinton administration succeeded by including a narrower version of the ban in the Omnibus Crime Bill, but it was accompanied by the Edwards amendment precluding investigations based solely on First Amendment-protected activities.

Just as the Oklahoma City and 1993 World Trade Center bombings served as the catalyst to obtain changes in the law that the executive branch had long wanted, the September 11 attacks on the World Trade Center and the Pentagon were seized upon as the opportunity to pass even more restrictive legislation. As illustrated by the speed with which Attorney General John Ashcroft introduced the enormous package of far-reaching changes that constitute the USA PATRIOT Act, these were not carefully considered responses to a new political development but the utilization of a prime opportunity to roll out the next phase of the government's wish list of repressive measures. Some of the "highlights" of the 2001 Act are considered in the following Part VI.

VI

The "USA PATRIOT" Act of 2001

We have witnessed the Bush administration amass enormous new powers in the months since September 11. And we have witnessed the administration, in an effort to maintain a free hand in the exercise of its new powers, employ strategies that are calculated to silence dissent. First, it has questioned the patriotism of those who oppose its policies, thereby fostering a climate of intolerance of dissent. Second, it has sought to discourage political activism by imposing guilt by association. Third, it has restricted access to government information, which has stymied the press, the public, and even Congress in their efforts to hold the executive accountable for its actions.

- Nancy Chang, Silencing Political Dissentn300

A. The Flurry of Post-September 11 Activity

The Bush administration has been extraordinarily busy since September 11. President Bush immediately declared war on terrorism, sent enough bombs and troops to Afghanistan to force its government from power, and is currently threatening an invasion of Iraq. The U.S. military has brought several hundred captured "combatants" to Guantanamo Naval Base in Cuba, where they have been held in outdoor cages and interrogated, much to the consternation of international human rights organizations.

President Bush has issued a Military Order authorizing the creation of military tribunals to prosecute a very broad range of noncitizens suspected of terrorism and sentence them to death. U.S. citizens thought to be involved in terrorist plots have been removed from the criminal justice system and are being held by military authorities. Attorney General John Ashcroft has recently stated that the government is considering plans to reinstitute "detention centers" for U.S. citizens deemed threats to the national security.

Since September 11, 2001, the Department of Justice has arrested approximately 2000 immigrants and held them indefinitely without charge, often preventing them from contacting family, friends or lawyers, and refusing to release information about who or even how many people are being held. In the fall of 2001, the Justice Department identified 5000 noncitizens based on their age, gender, and country of origin, and "invited" them to submit to interviews with the INS and the FBI, subsequently acknowledging its intent to expedite removal proceedings if the interviews revealed any immigration violations.
National Security Entry-Exit Registration System has been implemented for nationals of certain countries, requiring them to be registered and fingerprinted, and to periodically report where they are living, what they are doing and when they leave the country. n310 Ashcroft has also announced that the Department of Justice will monitor conversations between attorneys and clients in custody. n311

The executive branch has simply assumed the authority to engage [*1114] in these actions.n312 In addition, it has convinced Congress to fund these activities and to expand the scope of its law enforcement and intelligence capabilities. As a result, Congress has appropriated billions of dollars for the above-mentioned actions and passed dozens of bills in the wake of September 11. n313 The most significant, by far, is the so-called "USA PATRIOT" or 2001 Act. n314 According to David Cole and James Dempsey:

The bill was never the subject of a Committee debate or mark-up in the Senate ... . After three weeks of behind-the-scenes discussions between a few Senators and the Administration, a bill was introduced in the Senate on October 5 that included essentially all of the Administration's proposals. That bill passed ... on October 11, following a brief debate that made it clear that even supporters of the legislation had not read it and did not understand its provisions. The next day, a slightly different bill was introduced in the House ... and passed the same day under a procedure barring the offering of any amendments. It is virtually certain that not a single member of the House read the bill for which he or she voted.n315

After the attorney general "exerted extraordinary pressure, essentially threatening Congress that the blood of the victims of future terrorist attacks would be on its hands if it did not swiftly enact the Administration's proposals,"n316 the final version was introduced on October 23, passed by the House on October 24 and by the Senate on October 25, and signed into law by President George W. Bush on October 26, 2001. n317

The Act dramatically extends the government's law enforcement [*1115] and intelligence gathering powers. Although some of the provisions of the act are subject to a four-year sunset provision, acts begun or investigations initiated before the sunset date are not affected, and these provisions can always be extended by Congress.n318 If one substitutes "counterintelligence" for its many references to "counterterrorism," and reads the Act in light of the history of the FBI, it becomes clear that the 2001 Act is attempting to legalize many of the repressive practices that the FBI and other intelligence agencies have been engaging in for decades. This Part VI will highlight provisions of the 2001 Act that are most disturbing in light of the history of the systematic abuse of power and law engaged in by the very agencies now being given more authority and more funding.

B. Enhanced Surveillance Powers

According to Nancy Chang of the Center for Constitutional Rights, in passing the 2001 Act, "Congress granted the Bush administration its longstanding wish list of enhanced surveillance tools, coupled with the right to use these tools with only minimal judicial and congressional oversight."n319 Title II, "Enhanced Surveillance Procedures," defines "foreign intelligence information" very broadly to include not only information relating to attacks or sabotage by foreign powers or their agents, but "information, whether or not concerning a United States person [i.e., a U.S. citizen or permanent resident], with respect to a foreign power or foreign territory that relates to (i) the national defense or the security of the United States; or (ii) the conduct of the foreign affairs of the United States." Under this definition, it appears that any U.S. citizen's opinion on any matter of U.S. foreign policy, regardless of how abstract or even inane, is "foreign intelligence information." Any foreign intelligence information obtained in a criminal investigation, as well as any obtained by a grand jury may be disclosed "to any Federal law enforcement, intelligence, protective, immigration, national defense, or national [*1116] security officials" to assist in the performance of their official duties.n320

The Act extends the scope and duration of FISA-authorized surveillance and physical searches, allowing for warrants that cover multiple individuals and locations that extend beyond the reach of the issuing court's jurisdiction.n321 It is now much easier to obtain records from third parties such as telephone or utility companies, banks and credit card companies, n322 and even public libraries. n323 Although the Act makes it easier to get court orders for access to such information, many companies report being pressured to "turn over customer records voluntarily, in the absence of either a court order or a subpoena, 'with the idea that it is unpatriotic if the companies insist too much on legal subpoenas first.'" n324

Section 215 allows an FBI agent to apply for a court order requiring the production of "any tangible things" simply by certifying that they are wanted for an
investigation "to protect against international terrorism or clandestine intelligence activities." n325 Evidence need not be presented, and the judge has no discretion; if the application is sufficient on its face, he or she must issue the order. n326 This section removes the former FISA requirements that the government specify that "there are specific and articulable facts" for believing that the material sought pertains to a "foreign power or an agent of a foreign power," n327 and the government does not need even reasonable suspicion that the person subject to the warrant be involved in any criminal activity. n328

Section 216 provides that upon certification by a government [*1117] attorney that the information sought is "relevant" to any criminal investigation, courts must order the installation of a pen register and a trap-and-trace device which will allow the government to obtain "dialing, routing, addressing and signaling" information on telephone and internet lines. n329 While interception of the content of the communications is not authorized, there are no safeguards to this effect. In short, we must rely on the good faith of the government in this regard. Chang notes that this section:

Authorizes the government to install its new Carnivore, or DCS1000, system, a formidable tracking device that is capable of intercepting all forms of Internet activity, including e-mail messages, Web page activity, and Internet telephone communications. Once installed on an Internet service provider (ISP), Carnivore devours all of the communications flowing through the ISP's network - not just those of the target of the surveillance but those of all users - tracking not just information but content as well. n330

FISA previously allowed orders for wiretaps and physical searches to be issued without a showing of probable cause where the government asserted that the gathering of "foreign intelligence information" was "the purpose" of the investigation. n331 In addition to expanding the definition of "foreign intelligence information," n332 the 2001 Act now allows such warrants to be issued in criminal investigations as long as the gathering of "foreign intelligence information" is also a "significant" purpose of the surveillance. n333

Section 213, which is not limited to terrorism investigations but extends to all criminal investigations, authorizes "sneak-and-peak searches," known in COINTELPRO days as "black bag jobs," i.e., searches conducted without notice of the warrant until [*1118] after the search has been completed. This means, among other things, that the target of the warrant cannot point out deficiencies in it or monitor whether the search is being conducted in accordance with the warrant. n334 After-the-fact notification may be delayed "for a reasonable [and undefined] period" in searches where notification "may have an adverse result," n335 and in the case of seizures if "reasonably necessary." This could mean that a person or organization subjected to a covert search or seizure may never be informed about it, or may learn about it only when evidence obtained is used against them in court.

C. The Blurring of Criminal and Intelligence Investigations

A major concern with the 2001 Act is not simply that the government can obtain more information on individuals and organizations, but the expanded uses to which it can put this information. It has generally been presumed that the relaxed standards for warrants available under FISA are constitutionally acceptable because the purpose of the authorized surveillance was foreign intelligence information, not information intended for use in criminal prosecutions. n336 Now, however, U.S. persons can be targeted on the basis - although not solely on the basis - of First Amendment-protected activities and subjected to extensive, and perhaps secret, surveillance and searches because they are involved in activities that, under the broadened definition of "foreign intelligence information," relate to U.S. foreign policy or national security. Although the courts may yet find this to be unconstitutional, the Act appears to allow the use of the information thus obtained in criminal prosecutions.

The line between criminal and intelligence investigations is further blurred by provisions that allow for the extensive sharing of information. Section 203 of the Act authorizes the FBI, CIA, INS, and a number of other federal agencies to share information that "involves" foreign intelligence or counterintelligence. Telephone [*1119] or internet conversations that have been intercepted by one agency can be disclosed to others, as can foreign intelligence information obtained in the course of a criminal investigation. n337

A dramatic extension of the law comes in Section 203(a) which allows information obtained by federal grand juries to be shared with these agencies, without judicial oversight and without any requirement that the information relate to terrorist activities. n338 Courts exercise no supervision over the issuance of grand jury subpoenas. Grand juries have an almost unlimited ability to subpoena witnesses and records, and are "generally 'unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.'" n339 Witnesses can exercise their
Fifth Amendment right not to incriminate themselves through their own testimony, but neither the Fourth nor the Fifth Amendment prevents the compelled disclosure of records. Thus, witnesses who have no right to a lawyer can be compelled - under threat of going to jail for civil or criminal contempt - to produce any records and to testify about highly personal matters or about the criminal conduct of others. n341

D. The Criminalization of Protest

The 2001 Act has also made some very significant substantive changes in the criminal law. As noted above, in the late 1940s the Justice Department created a list of "subversive" organizations and considered not only membership but "sympathetic association" with such organizations as evidence of disloyalty.n342 The 1996 Antiterrorism and Effective Death Penalty Act authorized the secretary of state to create a list of "foreign terrorist organizations" and made it a felony to provide material aid to such organizations. n343 The 2001 Act expands on the 1996 Act by authorizing the creation of a separate "terrorist exclusion list" and by defining as "terrorist" a broad range of organizations not on any official list.n344 The penalty for providing material support to designated organizations has been increased to fifteen years imprisonment. n345

The provision of the 2001 Act that may, in the long run, prove most effective in suppressing political dissent is its creation of a new crime of "domestic terrorism." As codified in Section 802, this new and very broadly defined crime encompasses activities which (1) "involve acts dangerous to human life that are [(2)] a violation of the criminal laws of the United States or of any State;" and which (3) appear intended to (a) "intimidate or coerce a civilian population," (b) "influence the policy of a government by intimidation or coercion;" or (c) "affect the conduct of a government by mass destruction, assassination, or kidnapping;" and which (4) "occur primarily within the territorial jurisdiction of the United States."

Many forms of social and political protest in the United States can now be classified as "domestic terrorism." Any serious social protest - such as demonstrations against the World Trade Organization, police brutality, or the war in Iraq - is, by definition, intended to influence government policy and could easily be interpreted as involving "coercion." Such protests could qualify as acts of domestic terrorism if a law is broken (say, failure to obey a police officer's order) and life is endangered (perhaps by blocking an intersection).

Many unjust laws - such as the South's segregation laws--have historically been challenged by civil disobedience, and those who engage in such actions have been prepared to pay the price of a possible conviction under the law being challenged. Many protesters who fully intend to comply with the law know they run the risk of being charged with "disorderly conduct" or other misdemeanors which carry relatively minor criminal penalties. Now, those who protest, and those who provide them with "material support"n347 (say, food or a place to stay), must at least be cognizant that they could face felony charges and long prison terms. As Nancy Chang notes: "Because this crime is couched in such vague and expansive terms, it is likely to be read by federal law enforcement agencies as licensing the investigation and surveillance [**1121**] of political activists and organizations that protest government policies, and by prosecutors as licensing the criminalization of legitimate political dissent."

E. Further Restrictions on Immigrants

As we have seen from the early application of the Alien Actn349 to the provisions of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), n350 immigrants often bear the brunt of laws and law enforcement policies designed to quash political dissent. The 2001 Act both broadens the definition of who is deportable under the Immigration and Nationality Act (INA) and gives the attorney general expanded powers to indefinitely detain noncitizens.

Section 411 of the 2001 Act makes "terrorist activity" a deportable offense. Although the government has generally defined "terrorism" as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience,"n351 under the INA as now amended it can include any crime involving a weapon or other dangerous device "other than for mere personal monetary gain." n352 Thus, participation in a street fight could make a permanent resident, quite possibly someone who has lived in the United States since childhood, deportable as a terrorist. While this may seem far-fetched, there have been numerous deportations and attempted deportations under the 1996 laws, IIRIRA and AEDPA, on the basis of comparably minor incidents. n353

[*1122*] "Engaging in terrorist activity" now encompasses soliciting members or funds, or providing material support to a "terrorist" organization, even if the activity is undertaken solely to support lawful, humanitarian activities of the organization, and even if the associational activities would otherwise be
protected by the First Amendment. As David Cole and James Dempsey note:

Under the immigration law that existed before September 11, aliens were deportable for engaging in or supporting terrorist activity. The PATRIOT Act makes aliens deportable for wholly innocent associational activity with a "terrorist organization," irrespective of any nexus between the alien's associational conduct and any act of violence, much less terrorism.

The noncitizen subject to deportation bears the nearly impossible burden of showing "that he did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity." The "terrorist organizations" now include not only those that have been designated as "foreign terrorist organizations" by the State Department pursuant to AEDPA and groups on the secretary of state's new "terrorist exclusion list," but also groups which have never been officially identified as terrorist, but are comprised of "two or more individuals, whether organized or not" who engage in certain activities, including the use or threat of violence. This definition "potentially encompasses every organization that has ever been involved in a civil war or a crime of violence, from a pro-life group that once threatened workers at an abortion clinic, to the African National Congress, the Irish Republican Army, or the Northern Alliance in Afghanistan." Upon the attorney general's certification that he or she has "reasonable grounds to believe" that an immigrant is engaged in terrorism activities, as broadly defined above, or in other activities threatening to the national security, Section 412 provides that the INS can detain that person for up to seven days without charge. If someone so certified is charged with any immigration violation, no matter how minor, Section 412 mandates that he or she be held indefinitely, without the possibility of release on bond, until deportation. Although the attorney general is to review the certification every six months, there is no requirement that the immigrant be shown the evidence on which it is based, or be given a hearing to contest the evidence. The immigrant's only remedy is to seek a writ of habeas corpus in federal district court.

Even when such a person is eligible for political asylum or other relief from removal - i.e., has a statutory right to remain in the country - Section 412 makes no provision for release. As Cole and Dempsey point out, the INS already had the authority to detain someone in deportation proceedings who presented a risk of flight or a threat to national security. "Thus, what the new legislation adds is the authority to detain aliens who do not pose a current danger or flight risk, and who are not removable because they are entitled to asylum or some other form of relief."

F. Enhanced Funding and Inter-Agency Communication

Title I, "Enhancing Domestic Security Against Terrorism," creates a separate "counterterrorism fund" which, among other things, will "reimburse any Department of Justice component for any costs incurred in connection with ... providing support to counter, investigate, or prosecute domestic or international terrorism." The Technical Support Center established by the 1996 AEDPA "to help meet the demands for activities to combat terrorism and support and enhance the technical support and tactical operations of the FBI" is given an additional $200 million for each of the next three years, and the director of the Secret Service is instructed to develop a national network of electronic crime task forces to prevent, detect, and investigate various forms of electronic crimes.

In addition, Section 701 provides an additional $50 million in 2002 and $100 million in 2003 for expanding the Regional Information Sharing System (RISS) that was created by the Omnibus Crime Control and Safe Streets Act of 1968, an intranet system which can be accessed by 5600 federal, state, and local law enforcement agencies. Nancy Chang spells out some of the potential problems:

By allowing information about individuals suspected of the new crime of domestic terrorism to be shared with thousands of law enforcement agencies, RISS places at risk of harm political activists who engage in, associate with those who engage in, or are suspected of engaging in civil disobedience. Information concerning activists that is personally sensitive or simply irrelevant to any legitimate law enforcement purpose, as well as erroneous or outdated information, can easily find its way into an RISS database. Once posted, this information can quickly be circulated to thousands of law enforcement offices, some of which may share the information with governmental and private organizations. The potential for arrest based on false charges, invasion of one's privacy, damage to reputation, loss of employment, or other injuries resulting from the misuse of posted information is extremely high.
G. Are We More Secure?

According to the Bush administration, all of the measures described in this Part VI have been taken "for our security." However, as of August 2002, the government had brought only one criminal indictment on charges related to terrorism, and that was against Zacarious Moussaoui, who is alleged to have been the "twentieth hijacker" and was already in custody on September 11.n371 According to the Justice Department's six-month report to [*1125] Congress on the implementation of Section 412 of the 2001 Act which mandates the detention of alien terrorists, not a single noncitizen had been certified as a terrorist.n372 Thousands of people have been secretly detained without charge, and thousands more deported on technical immigration violations. This has had a devastating effect on Arab American and South Asian communities in the United States, but has not had any demonstrable effect on reducing criminal activity in the country. n373

What is demonstrable is that the scenario described above by Nancy Chang is taking place.n374 The government's ability to gather information on the constitutionally protected activities of law-abiding Americans has surged dramatically. The very minimal restraints put on the FBI and other law enforcement and intelligence agencies in the wake of the exposure of COINTELPRO-type activities have disappeared altogether. n375 In addition to the changes wrought by the 2001 Act itself, the lack of minimal restraints can be seen in Attorney General Ashcroft's recent revisions of the Smith guidelines for domestic intelligence gathering described in Part V. n376

The new Ashcroft guidelines, issued on May 30, 2002, authorize a full investigation when facts or circumstances "reasonably indicate that a federal crime has been, is being, or will be committed."n377 "Terrorism enterprise investigations" are authorized [*1126] when the FBI has a reasonable indication that "two or more persons are engaged in an enterprise for the purpose of ... furthering political or social goals wholly or in part through activities that involve force or violence and a violation of federal criminal law" or for the purpose of engaging in terrorism, including the newly created crime of "domestic terrorism."n378 Full investigations may also be initiated where facts or circumstances reasonably indicate that a group has engaged in or intends to engage in acts involving force or violence or covered criminal conduct, including "domestic terrorism," in a political demonstration. n379 Once an investigation begins, the guidelines specifically authorize agents to collect information on the group's membership, funding, geographic reach, and "past and future activities and goals. ..." n380

Where there is no reasonable indication of criminal activity, a preliminary investigation may now be undertaken if there is information or an allegation which indicates the "possibility of criminal activity" and an FBI supervisor believes it warrants further scrutiny.n381 All of the techniques of a full investigation, including confidential informants, undercover operations, and searches and seizures, n382 may be utilized except for the opening of mail and nonconsensual electronic surveillance. n383

Even when there is no basis for any kind of investigation, the Ashcroft guidelines instruct Bureau agents to "proactively draw on available sources of information to identify terrorist threats and activities," including nonprofit and commercial data search services, information volunteered by private entities, regardless of whether it was legally obtained, and the surveillance of publicly accessible places and events.n384 As Nancy Chang notes, these guidelines are[*1127] likely to lead to intrusive intelligence gathering on those who engage in non-violent civil disobedience or in lawful but confrontational political activities, as well as those who attract the attention of the FBI as it trolls through private databases, attends churches and mosques, and surfs the Web. With the advent of electronic record-keeping, the FBI is likely to maintain far more dossiers on law-abiding individuals and to disseminate the dossiers far more widely than during the COINTELPRO era.n385

Does placing this information in the hands of law enforcement make us more secure? Four medical students traveling to Florida to begin their internships were turned in by a woman who thought she overheard a "suspicious" conversation. The interstate highway was shut down, the students stopped, searched and held in custody for several days and their car torn apart. No evidence of criminal or terrorist activity was found and the only tangible result appears to be that the students may have lost their internships and, quite possibly, their careers as doctors. Nonetheless, law enforcement officials' response was that "no harm was done" and the woman's actions were roundly praised by the media.n386

Although only a small portion of the "spy files" kept by the Denver Police Department have been released, they contain no evidence of any criminal activity
engaged in by those identified as "criminal extremists," or prevented as a result of the compilation of vast amounts of personal data. On the contrary, some of the files state that the Denver police had been notified by the FBI of a very specific plan to assassinate two leaders of the Colorado chapter of the American Indian Movement, but apparently nothing was done to prevent the attack. Those planning the attack were not arrested or prosecuted, and the targets were not even notified so that they could take appropriate security precautions.

Given the lack of tangible evidence of criminal activity produced by the post-September 11 governmental measures, the long and well-documented history of the use of comparable measures to suppress movements for social change, and the chilling effect on First Amendment activities already evident as a result of recently heightened surveillance programs, it seems reasonable to conclude that people who live in America are not more secure but, in fact, more vulnerable to violations of their constitutionally protected rights. If anything is more secure as a result of these measures it is the status quo. Those who currently exercise political, economic, and military power will be more firmly entrenched and the nation's resources will continue to be used to further their interests.

VII

Using "Law" to Subvert the Rule of Law

As long as we continue to go to work or pay our taxes or otherwise conduct business as usual, we contribute to the continued functioning of the various social systems to which we belong. ... Perhaps, however, our sense of that complicity will awaken us from the everydayness in which we routinely slumber away our lives. Perhaps it will stir us to recognize that something extraordinary is afoot, demanding that we behave in ways beyond the ordinary.

- Douglas V. Porpora, How Holocausts Happenn389

Since September 11, 2001 the administration has consistently told the American public that the government needs expanded powers in order to ensure our security, and Congress has willingly complied by passing legislation that dramatically restricts rights guaranteed to the people under the Constitution. Although many of the executive's actions, such as the "disappearing" and indefinite detention of over 1200 immigrants and the Executive Order authorizing military tribunals, as well as the new legislation, have been criticized by advocates of civil rights and civil liberties, the debate has remained within the framework presented by the government, i.e., how much "liberty" are we willing to sacrifice for the sake of "security"?

In this Essay I have presented a cursory sketch of the history of the United States government's use of its law enforcement powers in the hope that it will prompt us to look more critically at our assumptions about the government's use of power to make us more secure. In addition to whatever else the federal government may or may not have been doing, it has consistently used its powers, legally and illegally, to suppress social and political movements which it deems threatening to the status quo. It is in this context that we must examine the expanded powers currently being exercised by the executive branch and legitimized by Congress.

Chief Justice Rehnquist, in his recent book, All the Laws but One: Civil Liberties in Wartime, examines President Abraham Lincoln's suspension of the writ of habeas corpus during the Civil War and briefly discusses the internment of Japanese Americans during World War II. He concludes that it is not likely or desirable for civil liberties to be "as favored" in wartime, as the laws will necessarily "speak with a somewhat different voice." In essence, his message seems to be that while the government occasionally makes mistakes during times of national emergency, we need not worry about losing our civil liberties because, when the emergency is over, things will return to "normal."

This is a message often repeated in discussions about curtailing civil liberties today. Chief Justice Rehnquist may well be right that things will return to normal. However, the question remains whether the norm is acceptable. As I have tried to point out, the current expansion of executive powers and the concomitant restrictions on civil rights are not simply a response to a national emergency sparked by recent acts of terrorism, but a move toward legitimating powers that have a long history of being used consciously and deliberately to suppress political dissent.

In the name of "national security," governmental agencies have a consistent history of knowingly violating fundamental rights guaranteed by the Constitution. As on-going revelations about the Denver "spy files" illustrate, these are not practices that can be safely relegated to the past. Nor are they limited to a "chilling effect" on freedom of expression. The federal government has subjected the American people, those it is charged with protecting, to false and deliberately misleading propaganda, wrongful arrests and arbitrary detentions, physical assaults and assassinations, and the crushing of law-abiding
organizations. What has been "disrupted and destroyed" in the process are not only the targeted individuals, organizations and movements, but the core values the government claims to be protecting: freedom, democracy and the rule of law.

As I indicated in the Preface, there is much about the status quo that desperately needs to be changed. There is nothing acceptable about the fact that the planet's ecology is in rapid disintegration or that the conditions of life are so bleak that in some indigenous communities seventy percent of all children deliberately obliterate their consciousness by inhaling gasoline fumes. Every day the news brings us evidence of widespread violations of human rights, both at home and around the world. The United States, as the world's only political, economic, and military superpower, bears much of the responsibility for these conditions, and the American people have the right - and obligation - to influence governmental policies and make the structural changes necessary to realize fundamental human rights.

Bringing about such changes requires the ability to express political opinions, criticize policies, and organize movements for social change. For that very reason, these are rights built into the Constitution and firmly established in international law. To the extent that governmental practices violate the Constitution and basic principles of international law, the fact that they are being "legalized" by Congress cannot give us comfort. Again, this was one of the basic principles articulated by Supreme Court Justice Robert Jackson at the Nuremberg Tribunals, that the existence of national laws legitimizing particular practices does not render those practices lawful in the larger sense of the term. The ability to influence the policies and practices of the government that is acting in our name is the essence of democracy. It is our responsibility, particularly the responsibility of lawyers and legal scholars, to ensure that this is, in fact, a democracy.

FOOTNOTE-1:


n2. See Bernard Neitschmann, The Fourth World: Nations Versus States, in Reordering the World: Geopolitical Perspectives on the Twenty-first Century 225-42 (George J. Demko & William B. Wood eds., 1994) (noting that less than 200 international states occupy, suppress, and exploit more than 5000 nations and peoples, and that since World War II, state-nation conflicts have produced the most numerous and longest wars, as well as the greatest number of civilian casualties and refugees).


n4. See Joby Warrick, Mass Extinction Underway, Majority of Biologists Say, Wash. Post, Apr. 21, 1998, at A4 (noting that at least one in eight plant species is threatened with extinction, and that nearly all biologists polled attributed the losses to human activity); see also The Turning Point Project, Extinction Crisis, available at www.turnpoint.org/extinction.pdf (last visited Feb. 11, 2003) (noting that species are dying at 10,000 times their natural extinction rate).


n7. Edward N. Wolff, Top Heavy: A Study of the Increasing Inequality of Wealth in America 7 (1995) (also noting that disparities in both income and wealth have increased since the late 1970s); see also William Lucy, Time to Fight - Again, AFSCME Publications, Jan./Feb. 1997 (noting that the top 10% controls nearly 70% of the wealth), at www.afscme.org/publications/public employee/1997/pej9702.htm.

n8. See infra text accompanying notes 9 and 13.


n10. This means that the United States, with 5% of the world's population, accounts for 25% of its prisoners. See Anger Grows at U.S. Jail Population, BBC News, Feb. 15, 2000, available at news.bbc.co.uk/1/hi/world/americans/643363.stm.


n14. See Paul Shepard, 'State of Cities' Study Released, Associated Press, June 19, 1998 (quoting Andrew Cuomo, U.S. Secretary of Housing and Urban Development, saying that "an estimated 600,000 Americans still sleep on our streets every night").

n15. Advocacy groups and experts in each of these areas are consistently producing reports detailing workable solutions. Thus, for example, ninety percent of the diseases in developing countries result from a lack of clean water. Roger Segelken, Mass Starvation, Disease Will Be the Inevitable Results of Population Growth, Cornell News, Feb. 9, 1996, available at www.news.cornell.edu/releases/Feb96/aaa.png. Deaths caused by malnutrition result not from an inadequate global supply of food but from its unequal distribution. Food and Agriculture Organization of the United Nations, Mapping of the Food Supply Gap 1998, available at http://www.fao.org (last visited Apr. 18, 2003).

It has been well established that money is most effectively spent on preventive health care, but less than two percent of the American health care dollar is so directed. See Milne, Testimony, supra note 9 (noting that half the annual deaths in the United States are preventable). Similarly, studies show that money spent on education cuts the fiscal as well as social costs of incarceration, but education budgets continue to be cut and prison funding expanded. See Use Our Resources Wisely, Columbus Ledger-Enquirer, Oct. 5, 2002 (noting that between 1980 and 1995, the U.S. education budget dropped from $27 billion to $16 billion while the prison budget grew from $8 billion to $20 billion), available at 2002 WL 1835826.

n16. See, for example, the statement of then U.N. Ambassador, soon to be Secretary of State Madeline Albright, who responded to U.N. reports that U.S.-imposed sanctions on Iraq had by 1996 already caused the deaths of 500,000 Iraqi children by stating, "this is a very hard choice, but ... we think the price is worth it." 60 Minutes: Punishing Saddam (CBS television broadcast May 12, 1996). See also Arundhati Roy, The Algebra of Infinite Justice, The Guardian, Sept. 29, 2001, available at 2001 WL 28346627 (quoting Albright).

n17. See U.S. Const. amends. I, IV, V, VI, VIII, XIII, XIV, XV.


This law is found not only in such treaties, but also in customary international law which is recognized as binding on the United States. See, e.g., Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (enforcing the prohibition of torture found in customary law); Forti v. Suarez-Mason, 694 F. Supp. 707 (N.D. Cal. 1988) (recognizing the causing of disappearance as a violation of customary international law); see generally Louis Henkin, The Age of Rights (1990).

n20. It is the fundamental duty of the citizen to resist and to restrain the violence of the State. Those who choose to disregard this responsibility can justly be accused of complicity in war crimes, which is itself designated as "a crime under international law" in the Principles of the Charter of Nuremberg.


n23. See infra Parts II-IV.


n27. Id. In fact, the Chiapas Coalition's purpose is to support the legitimate struggles of indigenous peoples in Mexico.


n29. See, e.g., files released on the American Indian Movement indicating that (mis)information had been disseminated to at least a dozen other agencies (copy on file with author).

n30. See supra note 21.

n31. This history of the bill can be found at http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR03162:<at><at><at>L&summ2& (last visited Feb. 10, 2003).

n32. See infra Part VI.

n33. See sources cited supra note 22.

n34. See U.S. Const. amend. I.

n35. See U.S. Const. amend. IV. The inclusion of privacy rights was articulated in Katz v. United States, 389 U.S. 347 (1967) (holding that the Fourth Amendment protects persons and their privacy interests, not simply places and things).

n36. Abraham Lincoln, Message to Congress, July 4, 1861, quoted in William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime (1998). This action was subsequently held to be unconstitutional in Ex parte Milligan, 71 U.S. 2 (1866).


n38. See infra Part IV.B.

n40. Id. at xxx.

n41. To note only the most glaring example in modern history, we have no trouble recognizing that the myriad of laws enacted by the German government in the 1930s and 1940s did not mean that its repressive measures comported with the rule of law. See generally David Dyzenhaus, Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar (1997); Matthew Lippman, Law, Lawyers, and Legality in the Third Reich: The Perversion of Principle and Professionalism, 11 Temp. Int'l & Com. L.J. 199 (1997) (discussing the role of lawyers in the repressive legal regime of Nazi Germany); Eli Nathans, Legal Order as Motive and Mask: Franz Schlegelberger and the Nazi Administration of Justice, 18 Law & Hist. Rev. 281 (2000) (using Schlegelberger, state secretary of the Reich Ministry of Justice, as a case study of why legal administrators participated in the Nazi regime).

n42. Such "security" measures need to be challenged on the ground that they do not enhance security and because they contribute to the mindless acceptance of the regulation of everyday life by the state. Nonetheless, they are not the primary problem with the enhanced powers being given to law enforcement agencies.


n44. U.S. Secretary of State James Baker, in a 1991 address to the Conference on Security and Cooperation in Europe, stated that criteria to be considered in the recognition of new states included support for democracy and the rule of law, the safeguarding of human rights, and respect for international law and obligations. Testimony of Ralph Johnson, Deputy Assistant Secretary of State for European and Canadian Affairs (Oct. 17, 1991) 2 Foreign Pol'y Bull. 39, 42 (Nov./Dec. 1991), quoted in Louis Henkin et al., International Law: Cases and Materials 250 (3d ed. 1993).


n46. See James Crawford, The Creation of States in International Law 105 (1979) ("Where a particular territory is a self-determination unit as defined, no government will be recognized which comes into existence and seeks to control the territory as a State in violation of self-determination."); see also Restatement (Third) of the Foreign Relations Law of the United States 201 Comment b (noting that a state does not cease to be a state because it is occupied by a foreign power).

n47. U.S. Const. art. I, 9, cl. 1. This is one of the few provisions of the Constitution that cannot be amended. See U.S. Const. art. V.

n48. U.S. Const. art. IV, 2, cl. 3.

n49. U.S. Const. art. I, 2, cl. 3. Contrary to popular understanding, this did not mean that enslaved Africans were considered "three-fifths" of a person. As articulated by the Supreme Court in Scott v. Sandford, 60 U.S. 393 (1856), they were not considered persons at all. This clause simply meant that citizens of the slaveholding states had more congressional representation than those of non-slaveholding states.


n51. See Michael Kent Curtis, The Crisis Over The Impending Crisis: Free Speech,

n52. U.S. Const. amend. I.


n54. For a history of such justifications and the violations of international law embodied in the occupation, see generally Avi Shlaim, The Iron Wall: Israel and the Arab World (2000); Noam Chomsky, Fateful Triangle: The United States, Israel & the Palestinians (1999).


n59. Chang, supra note 25, at 22.

n60. This was also true of the suppression of the labor movement in the late nineteenth and early twentieth centuries. Union organizers were labeled "communists" and "anarchists," labor unrest was blamed on immigrants, and informants and agents provocateur were frequently used to create incidents which gave government troops and the private vigilante forces they collaborated with an excuse to crush peaceful demonstrations for better wages and working conditions. See generally Goldstein, supra note 39, at 3-101; Howard Zinn, A People's History of the United States, 1492-Present 206-89 (Cynthia Merman & Roslyn Zinn eds., 1995).

n61. For a comprehensive survey of the repression of dissent during wartime, from the 1790s to the 1980s, see generally Michael Linfield, Freedom Under Fire: U.S. Civil Liberties in Times of War (1990).

n62. See generally Christina Duffy Burnett & Burke Marshall, Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented, in Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution 4 (Christina Duffy Burnett & Burke Marshall eds., 2001); see also Zinn, supra note 60, at 290-92.


n64. See The Philippines Reader: A History of Colonialism, Neocolonialism, Dictatorship, and Resistance 5-33 (Daniel B. Schirmer & Stephen Rosskamm Shalom eds., 1987) (the estimate of one million Filipinos is discussed at 19) [hereinafter The Philippines Reader]; see generally Miller, supra note 63.

n65. Miller, supra note 63, at 211.

n66. Id.

n67. The Philippines Reader, supra note 64, at 10.

n68. This was no loose analogy, for General "Howlin' Jake" Smith who gave the orders to "kill and burn, kill and burn" and, when asked about the children, replied "everything [sic] over ten," id. at 17, was a veteran of the 1890 Wounded Knee massacre, Miller, supra note 63, at 219, in which dozens of U.S. soldiers were given the army's medal of honor for murdering approximately 300 Lakota men, women and children in cold blood. Mario Gonzales & Elizabeth Cook-Lynne, Politics of Hallowed Ground: Wounded

n69. The Salt Lake City Tribune editorialized:

The struggle must continue til the misguided creatures there shall have their eyes bathed in enough blood to cause their vision to be cleared, and to understand that ... those whom they are now holding as enemies have no purpose toward them except to consecrate to liberty and to open for them a way to happiness.

Miller, supra note 63, at 74 (quoting 18 Literary Digest 387 (1899)). As early as 1899, General Shafter predicted, "It may be necessary to kill half of the Filipinos in order that the remaining half of the population may be advanced to a higher plane of life than their present semi-barbarous state affords." The Philippines Reader, supra note 64, at 11.

n70. Miller, supra note 63, at 77.


n72. Miller, supra note 63, at 73.

n73. Id. at 163.


n75. See infra Part VI.

n76. Miller, supra note 63, at 166.

n77. Id. at 83-87.

n78. Id. at 156.


n80. Id. at 17 (citing United States Congress, Appropriations to the Budget of the United States of America, 1872, Section VII (1871) at 31). Until Congress forbade the practice, the DOJ employed the private Pinkerton Detective Agency, long used by industrialists to crush labor movements, to do its investigative work. Sanford J. Unger, FBI 39 (1976); Goldstein, supra note 39, at 29.

n81. Unger, supra note 80, at 40.


n83. Unger, supra note 80, at 40. Congress immediately added the "Mann Act" designed to deter interstate prostitution. Id.

n84. Espionage Act of 1917, ch. 30, 40 Stat. 217 (1918); see also Unger, supra note 80, at 41-42.

n85. Chang, supra note 25, at 23.


n88. Goldstein, supra note 39, at 113; see also Linfield, supra note 61, at 33-67.

n89. See infra Part IV.


n91. Schenck v. United States, 249 U.S. 47, 52 (1919). As Nancy Chang points out, this case is best known for Justice Holmes' analogy to falsely "shouting fire in a crowded theatre," but the actions in question were better described by Howard Zinn as "shouting, not falsely, but truly, to people about to buy tickets and enter a theater, that there was a fire raging inside." Chang, supra note 25, at 23-24 (quoting Howard Zinn, A People's History of the United States: 1492 to Present 366 (1999)).

n93. Goldstein, supra note 39, at 110.


n95. Goldstein, supra note 39, at 110.

n96. Churchill & Vander Wall, Agents, supra note 79, at 18; Goldstein, supra note 39, at 111.

n97. Goldstein, supra note 39, at 111.

n98. Id. at 117 (quoting a statement of the U.S. attorney for Kansas to a Justice Department official).

n99. Churchill & Vander Wall, Agents, supra note 79, at 19; Goldstein, supra note 39, at 117-18. At the same time, the Justice Department and APL "volunteers" conducted "slacker raids" in which an estimated 400,000 men were seized and detained for not carrying draft cards. Id. at 111-12. Less than one in two hundred of those arrested were actually draft resisters. Unger, supra note 80, at 42.

n100. Unger, supra note 80, at 43; Churchill & Vander Wall, Agents, supra note 79, at 20-22.

n101. Unger, supra note 80, at 43.

n102. Id. at 43-44.

n103. See infra text accompanying note 308.

n104. Churchill & Vander Wall, Agents, supra note 79, at 22-23. One detainee, Andrea Salsedo, after being held in isolation for two months in a New York Bureau office, was found on the pavement below the building. According to Bureau agents, he had jumped fourteen floors to his death. Id.

n105. Unger, supra note 80, at 44.

n106. Id. at 45.

n107. Id. at 54-55.

n108. Id. at 48-49.


n112. Id.

n113. Id.

n114. Id. at 29 (citations omitted). See also Frank J. Donner, The Age of Surveillance: The Aims and Methods of America's Political Intelligence System 30-78 (1981).

n115. Unger, supra note 80, at 103.

n116. Alien Registration (Smith) Act of 1940, ch. 439, 54 Stat. 670 (1940) (Smith Act is Title I of Alien Registration Act); see Churchill & Vander Wall, Agents, supra note 79, at 29; Linfield, supra note 61, at 75-79.


n118. Id. at 510.


n121. Churchill & Vander Wall, Agents, supra note 79, at 32.

n122. Id. Again, we see parallels in recent legislation which authorizes the creation of lists of "terrorist" organizations. See infra text accompanying notes 291-92, 354-59.

n123. See infra text accompanying notes 291-92.

n124. See infra text accompanying notes 354-59.

n125. Id. This, too, is similar to the "guilt by association" provisions of AEDPA. See infra text accompanying note 295.


n128. Churchill & Vander Wall, Agents, supra note 79, at 36.


n130. Id. at 3.

n131. Churchill & Vander Wall, Agents, supra note 79, at 37.

n132. Id. at 37-38.

n133. As the Senate report on COINTELPRO noted, "Counterintelligence program" is a "misnomer for domestic covert action." Senate Select Comm., Final Report, supra note 129, at 4.

n134. Id. at 77.

n135. Id. at 3; see generally Brian Glick, War at Home: Covert Action Against U.S. Activists and What We Can Do About It (1989); Nelson Blackstock, COINTELPRO: The FBI's Secret War on Political Freedom (Cathy Perkus ed., 1975).

n136. Senate Select Comm., Final Report, supra note 129, at 3. The Report also notes that COINTELPRO began "in part because of frustration with Supreme Court rulings limiting the Government's power to proceed overtly against dissident groups." Id.

n137. See Peter Matthiessen, In the Spirit of Crazy Horse, 125-26 (1991).

n138. Senate Select Comm., Final Report, supra note 129.

n139. This categorization is based on the cogent summary of the kinds of illegal practices employed by the FBI in its COINTELPRO-type operations compiled by Ward Churchill and Jim Vander Wall in Churchill & Vander Wall, Agents, supra note 79, at 39-53, and by Ward Churchill, 'To Disrupt, Discredit and Destroy': The FBI's Secret War Against the Black Panther Party, in Liberation, Imagination and the Black Panther Party 78-117 (Kathleen Cleaver & George Katsiaficas eds., 2001) [hereinafter Churchill, To Disrupt].

n140. Churchill & Vander Wall, Agents, supra note 79, at 39. See generally Clifford S. Zimmerman, Toward a New Vision of Informants: A History of Abuses and


n142. See infra Part VI.A-B.


n144. Id. at 43-44.


n146. Id.

n147. Churchill & Vander Wall, COINTELPRO, supra note 141, at 159.

n148. Thus, when Jamil al-Amin, formerly known as H. Rap Brown, was accused of killing a deputy sheriff in 2000, he was not referred to as a Muslim community leader, which he had been for twenty years, but as a former Black Panther, which he had been for only a few months. See, e.g., Police Hunt for Ex-Black Panther Accused of Killing, Wounding Cops, Chi. Trib., Mar. 18, 2000 at 3; Lyda Longa, Officers Vow to Find Former Black Panther, Atlanta J. & Atlanta Const., Mar. 18, 2000, at A1.

n149. Churchill & Vander Wall, Agents, supra note 79, at 42-43; some of the leaflets and related FBI memoranda are reproduced in Churchill & Vander Wall, COINTELPRO, supra note 141, at 130-33.

n150. Excerpt is reproduced in Churchill & Vander Wall, COINTELPRO, supra note 141, at 141, at 133.

n151. Senate Select Comm., Final Report, supra note 129, at 40. See infra text accompanying note 155 (discussing "snitch jackets").

n152. Churchill & Vander Wall, Agents, supra note 79, at 42-43.

n153. Id. at 55, 57; Senate Select Comm., Final Report, supra note 129, at 82.

n154. Churchill & Vander Wall, Agents, supra note 79, at 40-42.

n155. Id. at 49-51 (noting FBI infiltrator Thomas E. Mosher's explanation to the Senate Internal Security Committee of how Black Panther Party leader Fred Bennet was successfully bad-jacketed, leading to his assassination by Jimmie Carr, who was in turn bad-jacketed and subsequently killed). See also Senate Select Comm., Final Report, supra note 129, at 46-49.

n156. Churchill & Vander Wall, Agents, supra note 79, at 44.

n157. Id. at 47; see also Airtel of Mar. 4, 1968, reproduced in Churchill & Vander Wall, COINTELPRO, supra note 141, at 109 (stating that in response to RAM activity in the summer of 1967, the Philadelphia FBI office "alerted local police, who then put RAM leaders under close scrutiny. They were arrested on every possible charge until they could no longer make bail. As a result, RAM leaders spent most of the summer in jail and no violence traceable to RAM took place.").


n159. See, e.g., infra text accompanying note 184 (noting the conclusions of the judge in the SWP case).


n163. Leonard Peltier's clemency petition to President Clinton was accompanied by letters of support from, among many others, Amnesty International, Archbishop...

n164. See generally Jack Olsen, Last Man Standing: The Tragedy and Triumph of Geronimo Pratt (2000); see also Churchill & Vander Wall, Agents, supra note 79, at 77-94. After being wrongly imprisoned for twenty-seven years, including eight years in solitary confinement, Pratt's conviction was overturned, and he subsequently received out-of-court settlements of $1.75 million from the FBI and $2.75 million from the City of Los Angeles. Olsen, supra, at 487.

n165. Churchill & Vander Wall, Agents, supra note 79, at 53.


n168. For an excellent summary of this attack, see Roy Wilkins & Ramsey Clark, Search and Destroy: A Report by the Commission of Inquiry into the Black Panthers and the Police (1973).

n169. Hampton, 660 F.2d at 600.

n170. Churchill & Vander Wall, Agents, supra note 79, at 77; Goldstein, supra note 39, at xvi.


n174. Id. at 4-5.


n176. Churchill & Vander Wall, Agents, supra note 79, at 37.

n177. Churchill & Vander Wall, COINTELPRO, supra note 141, at 47.

n178. Goldstein, supra note 39, at 408.

n179. Id.


n181. Churchill & Vander Wall, COINTELPRO, supra note 141, at 47.

n182. FBI on Trial: The victory in the Socialist Workers Party Suit Against Government Spying 6-7 (Margaret Jayko ed., 1988).


n184. Id. at 1380 (emphasis added).

n185. Churchill & Vander Wall, Agents, supra note 79, at 54.

n186. Id.; see generally David J. Garrow, The FBI and Martin Luther King, Jr. (1981).


n188. Id. at 97.
n189. Id. at 97-98.
n190. Id. at 170-71.
n191. Id. at 166-70. For an overview of this period in Mississippi history based on documents finally released to the public in 1998, see generally Yasuhiro Katagiri, The Mississippi State Sovereignty Commission: Civil Rights and States' Rights (2001).
n193. Id. at 86.
n194. Churchill & Vander Wall, COINTELPRO, supra note 141, at 168 (citing FBI monograph no. 1386, Student Nonviolent Coordinating Committee (FBI File No. 100-43190)).
n195. Id. (quoting a report of the Atlanta field office which noted the comment had been made in early 1963).
n196. Id. at 168-69.
n197. Id.
n198. Id. at 169.
n199. Id.
n200. Sullivan states that in 1964 he instructed the special agent in charge in Mississippi to merge separate Mississippi klans into one in order to "control it and if necessary destroy it." Sullivan, supra note 175, at 129-30. By late 1965 the FBI "operated nearly 2,000 informants, 20 percent of overall Klan and other white hate group membership, including a grand dragon. ..." O'Reilly, supra note 192, at 217. Nonetheless, from 1964-1970 Mississippi averaged 250 acts of White Hate violence per year. Id. at 223. During the period Sullivan claims FBI "control" of the Mississippi klan, the Mississippi Knights alone bombed a synagogue and burned twenty-six churches. Wyn Craig Wade, The Fiery Cross: The Ku Klux Klan in America 343 (1987).
n201. Glick, supra note 135, at 12.
n202. See supra Parts II.B., III.
n203. See Blackstock, supra note 135, at 111-36 (reproducing a series of FBI memoranda describing these operations).
n204. See generally Glick, supra note 135.
n205. Id.
n206. See supra Parts III, IV.C.2.
n207. Memorandum of Aug. 25, 1967, Counterintelligence Program; Black Nationalist-Hate Groups; Internal Security, reprinted in Churchill & Vander Wall, COINTELPRO, supra note 141, at 92. In the world of actual counterintelligence directed at foreign espionage, the sphere from which the Bureau was taking its tactics, to "neutralize" is not just to render ineffective but to eliminate. See, e.g., id. at 102, 104 (reproducing FBI documents taking credit for the assassination of Malcolm X and proposing to provoke the murder of comedian Dick Gregory). On the origin of "counterintelligence" activity as directed at foreign espionage, see Unger, supra note 80, at 96-118.
n209. Id.
n210. Id. at 110-11.
n212. Senate Select Comm., Final Report, supra note 129, at 22.
n213. Churchill, To Disrupt, supra note 139, at 82.
n214. O'Reilly, supra note 192, at 291.
n215. Churchill, To Disrupt, supra note 139, at 78 (citations omitted).
n216. Id.

(Philip S. Foner ed., 1970), and excellent collections of contemporary analyses can be found in Liberation, Imagination and the Black Panther Party, supra note 139 and Jones & Jeffries, supra.


n220. Id. See also Ward Churchill, The Bloody Wake of Alcatraz: Political Repression of the American Indian Movement During the 1970s, in American Indian Activism: Alcatraz to the Longest Walk 242-84 (Troy Johnson et al., eds. 1997). The effort to force the government to account for at least $10 billion of "missing" Indian trust fund monies continues to this day. See Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001) (holding that the Interior Dept. had breached its fiduciary duty and must conduct an accurate accounting).

n221. Churchill & Vander Wall, Agents, supra note 79, at 135-41.

n222. Id. at 141-170.

n223. See Churchill, Civil Rights, supra note 218; Glick, supra note 135, at 22.

n224. See Churchill, Civil Rights, supra note 218.

n225. See supra text accompanying note 158. See generally Sayer, supra note 158.

n226. See Churchill, Civil Rights, supra note 218.

n227. Id.

n228. See Glick, supra note 135, at 22.

n229. Bob Robideaux, Dino Butler and Leonard Peltier were charged with the agents' deaths. (No one has ever been charged with the death of AIM activist Joe Killsright Stuntz). After a jury acquitted Butler and Robideaux, Peltier was extradited from Canada on the basis of perjured affidavits, his case transferred to a judge more sympathetic to the government, and he was convicted on the basis of perjured testimony and falsified evidence. See Amnesty International, Proposal for a Commission of Inquiry into the Effect of Domestic Intelligence Activities on Criminal Trials in the United States of America 41-46 (1981); see generally Messerschmidt, supra note 162; Matthiessen, supra note 137.


n232. A September 2002 Westlaw search of law review articles written since 1975 referencing "COINTELPRO" yielded seventy-two articles. The vast majority mentioned it only in passing; a few discussed COINTELPROs against particular organizations; and none discussed the overall phenomenon in any detail.

n233. Campbell v. Dep't of Justice, 164 F.3d 20, 26 (D.C. Cir. 1998).

n234. See supra text accompanying note 134.


n236. Churchill & Vander Wall, Agents, supra note 79, at 62.


n238. See infra text accompanying notes 345-47.

n240. See generally Churchill & Vander Wall, COINTELPRO, supra note 141. There are significant limitations on what the government is obliged to disclose under FOIA, but it is worth noting in addition that the D.C. Circuit has said that documents can be exempted from disclosure as investigatory records even if they were unlawfully obtained. Pratt v. Webster, 673 F.2d 408 (D.C. Cir. 1982).


n242. Senate Select Comm., Final Report, supra note 129.

n243. The FBI withheld information from Congress about its involvement in the 1969 assassinations of Fred Hampton and Mark Clark, and its failure to disclose exculpatory evidence in the murder trials of Black Panther leaders Geronimo Pratt and Dhoruba bin Wahad (Richard Moore). Churchill & Vander Wall, COINTELPRO, supra note 141, at 303. Both Pratt and bin Wahad have since been released - after being incarcerated for twenty-seven and nineteen years, respectively - on the basis of evidence that they were framed. See supra text accompanying notes 161, 164.

n244. Churchill & Vander Wall, Agents, supra note 79, at 119-34, 366-70; see also supra Part IV.C.5-6.

n245. In the summer of 2001, Congresswoman Cynthia McKinney (D-Ga.) had begun introducing legislation to reopen investigations into COINTELPRO and related governmental misconduct, but the events of September 11 ensured that the legislation would not be considered (draft legislation on file with author).

n246. The only two officials convicted of COINTELPRO-related wrongdoing were pardoned by President Reagan before they had even exhausted their appeals. See infra text accompanying note 273.

n247. Individual damages were recovered by Fred Hampton's family and by Geronimo Pratt and Dhoruba bin Wahad, see supra text accompanying notes 161, 164. The SWP recovered nominal damages on behalf of the organization, see supra text accompanying note 182. In Hobson v. Brennan, 646 F. Supp. 884 (D.D.C. 1986), the court awarded $29,000 in compensatory damages and allowed punitive damages for persons targeted by anti-war and civil rights COINTELPROs.

But more commonly suits have been unsuccessful. See Smith v. Black Panther Party, 458 U.S. 1118 (1982) (mem. opin. dismissing BPP complaint); Bissonette v. Haig, 776 F.2d 1384 (8th Cir. 1985) (holding that claim by residents of Pine Ridge Reservation for unlawful seizure and confinement by military and federal officials was insufficient to state cause of action); Obadele v. Kelley, 1988 WL 40282, at 4, 16 (D.D.C. Apr. 26, 1988) (dismissing claims brought by Republic of New Afrika for being time-barred, lacking jurisdiction, failing to state a claim, and/or being related to a criminal conviction); United Klans of America v. McGovern, 621 F.2d 152 (5th Cir. 1980) (suit for damages for COINTELPRO operations barred by statute of limitations).


n249. Id. at 3 n.1.

n250. Id. at 13. See also Fed. Election Comm'n v. Hall-Tyner Election Campaign Comm'n, 678 F.2d 416 (2d Cir. 1982) (holding that the CPUSA did not have to disclose contributors' names as that would have a chilling effect on them). The court noted that even though the CPUSA COINTELPRO was terminated in 1971, "the record in this case includes an affidavit by the Assistant Director of the Intelligence Division of the FBI stating that the Communist Party of the United States remains under active investigation by the FBI." Id. at 423.

n251. Senate Select Comm., Final Report, supra note 129, at 13-14, noting three operations it had uncovered and the subsequent disclosure of five additional ones.
n252. Id. at 13.
n253. Churchill & Vander Wall, COINTELPRO, supra note 141, at 304.
n254. FBI on Trial, supra note 182, at 15.
n256. Churchill & Vander Wall, Agents, supra note 79, at 373-74.
n257. Churchill & Vander Wall, COINTELPRO, supra note 141, at 306; Churchill & Vander Wall, Agents, supra note 79, at 370-76.
n258. Chang, supra note 25, at 36; see also Don Edwards, Reordering the Priorities of the FBI in Light of the End of the Cold War, 65 St. John's L. Rev. 59 (1991).
n259. Churchill & Vander Wall, COINTELPRO, supra note 141, at xlviii.
n260. Brian Glick, Preface to The Face of COINTELPRO, in Churchill & Vander Wall, COINTELPRO supra note 141, at xiv (noting that Earth First! leaders were convicted on the basis of the testimony of an FBI infiltrator) [hereinafter Glick, Preface].
n261. Id. at xv.
n263. Glick, Preface, supra note 260, at xiv.
n264. For a summary of how COINTELPRO-type activities have been incorporated into "routine" law enforcement practice, and an analysis which extends to the more recent FBI operations in Ruby Ridge, Tennessee and Waco, Texas, see Ward Churchill, Preface to the Second Edition, in Churchill & Vander Wall, COINTELPRO, supra note 141 at xxiii-lxxviii. See also Tony Poveda, Lawlessness and Reform: The FBI in Transition 167-82 (1990) (concluding that the "new," i.e., post-Hoover, FBI is less autonomous but potentially more dangerous because its priorities are more aligned with those of the incumbent administration, and it has vastly increased technological capacities).
n265. Senate Select Comm., Final Report, supra note 129, at 77.
n266. Stone, supra note 82, at 275.
n268. Stone, supra note 82, at 276.
n269. Id. at 277.
n270. Id. (citing Hearings Before the Subcomm. on Security and Terrorism of the Comm. of the Judiciary of the United States Senate on The Domestic Security Investigation Guidelines, 97th Cong., 2d Sess. 4 (1982)) [hereinafter Hearings].
n271. Id. (citing Hearings, supra note 270 at 35-41).
272. Churchill & Vander Wall, COINTELPRO, supra note 141, at xlviii.
n273. Id. at il.
n274. Stone, supra note 82, at 278.
n275. Id. at 278-79.
n276. See supra text accompanying notes 117-19.
n278. Stone, supra note 82, at 279.
n279. Id. at 281 (emphasis added). The Seventh Circuit Court of Appeals, in an opinion written by Judge Richard Posner, affirmed this interpretation, declaring in Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1015-17 (7th Cir. 1984), that Brandenburg applied only to criminal punishment and not to investigations. For a critique of this opinion, see Stone, supra note 82, at 283-86.
281. Churchill & Vander Wall, COINTELPRO, supra note 141, at il.


n286. Id. at 107.

n287. Id. at 107-08.

n288. Id. at 108.


n291. Id. at li. See also David B. Kopel & Joseph Olson, Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation, 21 Okla. City U. L. Rev. 247 (1996) (noting the dangers of the anti-terrorism bills which were subsequently enacted as AEDPA); Michael J. Whidden, Note, Unequal Justice: Arabs in America and United States Antiterrorism Legislation, 69 Fordham L. Rev. 2825 (2001) (noting the discriminatory application of AEDPA).


n297. Id. at 108.

n298. Id. at 109.

n299. Id. at 108-09.

n300. Chang, supra note 25, at 92-93.


n302. See Babak Behnam, Kabul Topples with Barely a Push: Marching into the Afghan Capital, MSNBC News (Nov. 13, 2001), available at http://www.msnbc.com/news/656949.asp. Although none of the hijackers were Afghans, the U.S. government says it attacked Afghanistan because its fundamentalist Taliban government was "harboring" Osama bin Laden and al Qaeda training camps.


n305. Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57831-36 (2002). The Order applies to any noncitizen the president "has reason to believe" is or was a member of al Qaeda, someone involved in "acts of international terrorism," broadly defined, or someone who "knowingly harbored" someone in either of these categories. In addition to identifying those to be tried by the military tribunals, the president has the power to create the rules for the tribunals and change them at will, appoint judges, prosecutors and defense lawyers, decide the sentence and all appeals, and conduct the entire process in secret. See Neal K. Katyal & Laurence H. Tribe, Waging War, Deciding Guilt: Trying the Military Tribunals, 111 Yale L.J. 1259 (2002) (arguing that the Order establishing military tribunals is "flatly unconstitutional"); see generally Barbara Olshansky, Secret Trials and Executions; Military Tribunals and the Threat to Democracy (2002); David Cole, Enemy Aliens, 54 Stan. L. Rev. 953 (2002).


n312. The executive seems to presume that such powers can be exercised on the basis of its Constitutional responsibility for foreign affairs and military matters. U.S. Const. art. II. See Melissa K. Mathews, Restoring the Imperial Presidency: An Examination of President Bush's New Emergency Powers, 23 Hamline J. Pub. L. & Pol'y 455 (2002) (criticizing President Bush's actions as violating constitutionally mandated separation of powers); Philip B. Heymann, Civil Liberties and Human Rights in the Aftermath of September 11,
(focusing on powers available to law enforcement and intelligence agencies, rather than the new statutory powers conferred by the 2001 Act).


n316. Id.

n317. The history of this bill can be found at http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR03162:<at><at><at>L&summ2&.


n319. Chang, supra note 25, at 48. See also Evans, supra note 314 (noting the potential for increased surveillance powers to undermine the Fourth Amendment); Sharon H. Rackow, Comment, How the USA PATRIOT Act Will Permit Governmental Infringement Upon the Privacy of Americans in the Name of "Intelligence" Investigations, 150 U. Pa. L. Rev. 1651 (2002) (noting that the new powers given to the executive are unnecessary, violate civil liberties, and go beyond the stated goal of fighting terrorism).


n321. Id. sec. 207; see also Chang, supra note 25, at 49. While other federal judges are also authorized to issue such warrants, the Act expands the FISA Court from seven to eleven judges. Id. sec. 208.


n323. See Mark Sommer, Big Brother at the Library: FBI's Right to Data Raises Privacy Issues, Buff. News, Nov. 11, 2002, at A1; see also Chang, supra note 25, at 50.

n324. Chang, supra note 25, at 49-50 (quoting Ohio State University law professor Peter Swire).

n325. USA PATRIOT Act, sec. 215.

n326. Id.


n328. Chang, supra note 25, at 53.

n329. USA PATRIOT Act, sec. 216(b).


n332. See supra text accompanying note 317.

n333. USA PATRIOT Act, sec. 218. As Chang notes, FISA was passed after the Supreme Court held in United States v. United States Dist. Court for the Eastern Dist. of Mich., 407 U.S. 297 (1972), that the executive was not exempt from the Fourth Amendment's probable cause and warrant requirements in cases of domestic surveillance (in this case, District Judge Damon J. Keith was among the respondents, and the case is commonly referred to by his last name). In light of Keith, the presumed constitutional validity of FISA rests on the fact that its relaxed warrant requirements apply to foreign intelligence. Chang, supra note 25, at 57-58. See also United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980); United States v. Johnson, 952 F.2d 565 (1st Cir. 1991) (both holding that FISA could not be used to circumvent Fourth Amendment requirements in criminal cases).

n334. Chang, supra note 25, at 51-52. As Chang points out, such searches violate the common law "knock and announce" requirement and Rule 41(d) of the Federal Rules of Criminal Procedure which requires officers conducting searches to
give subjects a copy of the warrant and a receipt for property taken. Id. at 51.

n335. "Adverse result" is broadly defined to include "endangering the life or physical safety of an individual; flight from prosecution; destruction of or tampering with evidence; intimidation of potential witnesses; or otherwise seriously jeopardizing an investigation or unduly delaying a trial." 18 U.S.C. 2705(a)(2) (2003).

n336. See Banks & Bowman, supra note 267, at 5-10, 90-92.

n337. USA PATRIOT Act, sec. 203(b)(i), (d)(1).


n339. Chang, supra note 25, at 60 (quoting In re Schofield, 486 F.2d 85, 90 (3rd Cir. 1973)).


n342. See supra text accompanying notes 121-25.

n343. See supra text accompanying note 291-93.

n344. USA PATRIOT Act, sec. 805; see also infra text accompanying notes 355-59.

n345. USA PATRIOT Act, sec. 810(d).

n346. USA PATRIOT Act, sec. 802(a).

n347. See USA PATRIOT Act, sec. 805.

n348. Chang, supra note 25, at 44. She goes on to note:

Experience has taught us that when prosecutors are entrusted with the discretion to file trumped-up charges for minor crimes, politically motivated prosecutions and the exertion of undue pressure on activists who have been arrested to turn state's witness against their associates, or to serve as confidential informants for the government, are not far behind.

Id. at 113.

n349. See supra text accompanying notes 57-59, 92-93.

n350. See supra text accompanying notes 94, 298.


n354. USA PATRIOT Act, sec. 411(a).


n356. USA PATRIOT Act, sec. 411(a).

n357. See supra text accompanying notes 290-92. The criteria for such designation are found at 8 U.S.C. 1189(a)(1)(A)-(C) (2003), and the list is published periodically in the Federal Register. See, e.g., Designation of Foreign Terrorist Organizations, 67 Fed. Reg. 14761 (Mar. 27, 2002).


n361. USA PATRIOT Act, sec. 412. Of course, the seven day limit seems rather meaningless at this point since the Justice Department has been indefinitely detaining hundreds of immigrants without charge for many months. See supra text accompanying note 308.
n362. USA PATRIOT Act, sec. 412.
n363. USA PATRIOT Act, sec. 412(a).
n365. USA PATRIOT Act, sec. 101(a)(1).
n366. USA PATRIOT Act, sec. 103.
n367. USA PATRIOT Act, sec. 105.
n373. While this is portrayed as making significant inroads against "illegal immigration," in fact it is estimated that there are about 300,000 people currently in the country who are similarly in violation of the terms of their visas. Cole, supra note 305, at 975. Thus, this is more accurately described as a program selectively targeting a very small sector of that group based on national origin, race or ethnicity, age and gender, not as a move against illegal immigration in general.
n375. According to Nat Hentoff:

A new addition to John Ashcroft's war on both terrorism and our Constitution is his plan - under the expanded surveillance powers in the USA Patriot Act - to reintroduce a current version of COINTELPRO. ... On a Dec. 2 episode of ABC's "This Week," Attorney General John Ashcroft not only did not deny the advent of a new COINTELPRO, but stoutly maintained that he will pursue whatever has to be done in the war against terrorism. He doesn't need congressional approval for this assault on the First and Fourth Amendments.

n376. See supra text accompanying notes 274-79.
n378. Attorney General's Guidelines, supra note 377, at 15. These investigations can be authorized for up to a year by the special agent in charge of a field office. Id. at 17. See supra text accompanying notes 346-48.
n380. Id. at 17.
n381. Id. at 1.
n382. Id. at 18-20.
n383. Id. at 9.
n384. Id. at 21-22.
n385. Chang, supra note 25, at 119.
n386. Associated Press, Florida Terror Suspects Paid Toll (Sept. 20, 2002), available at 2002 WL 100407327 (noting that videotape showed the medical students who were allegedly detained for failure to
pay a toll had paid it); 3 Medical Students Get New Posts for Training; E-Mail Threats Behind Change, S. Fla. Sun-Sentinel (Fort Lauderdale), Sept. 18, 2002, at 3B, available at 2002 WL 100400628 (noting that Gov. Jeb Bush called the woman to thank her for the tip); Big Mouths Result in Big Trouble; 3 Held, Released in Threat Probe, Houston Chron., Sept. 14, 2002, at 1, available at 2002 WL 23223309 (noting that of the three students stopped, one was a U.S.-born citizen and another a naturalized U.S. citizen); Florida Hospital May Still Host 3 Held in False Alarm, L.A. Times, Sept. 23, 2002, at A12, available at 2002 WL 2505671 (noting that the hospital the students were to train at turned them away after the incident).


n388. Id. Those identified as planning the attack have been linked to federal activity, see Faith Attaguile, "Why Do You Think We Call It Struggle?" An Essay on the Subversion of the American Indian Movement (on file with author), bringing to mind the inter-organizational conflict promoted by the FBI in its COINTELPRO operations with the hope of causing activists to kill each other. See, e.g., supra text accompanying notes 149-52 (describing confrontations between the United Slaves (US) organization and the Black Panther Party).

n389. Porpora, supra note 19, at 185-86.

n390. See generally Rehnquist, supra note 36.

n391. Id. at 224-25.

n392. See supra Preface.


n394. See supra Preface. As international legal scholar Richard Falk says:

In post-Nuremberg settings, a government that flagrantly violates international law is engaged in criminal behavior even on a domestic plane, and as far as internal law is concerned, its policies are not entitled to respect. To disobey is no longer ... to engage in "civil disobedience." ... To resist reasonably a violation of international law is a matter of legal right, possibly even of legal duty if knowledge and a capacity for action exists.

SEVENTH ANNUAL LATCRIT CONFERENCE,
LATCRIT VII, COALITION THEORY AND
PRAXIS: SOCIAL JUSTICE MOVEMENTS AND
LATCRIT COMMUNITY - PART II

LATCRITICAL PERSPECTIVES: INDIVIDUAL
LIBERTIES, STATE SECURITY, AND THE WAR
ON TERRORISM: Justice and Equity for Whom? A
Personal Journey and Local Perspective on
Community Justice and Struggles for Dignity

PEGGY NAGAE*

*BIO: Peggy A. Nagae is the principal of Peggy Nagae Consulting. She served as the lead attorney on the Yasui v. United States coram nobis case, was appointed by President Clinton to the Civil Liberties Public Education Fund Board (1996-1998), and held the position of Assistant Dean for Academic Affairs at the University of Oregon School of Law (1982-1987). She currently serves on the board of the National Asian Pacific American Legal Consortium, as co-chair of the Leadership Advisory Committee, National Asian Pacific American Bar Association and was appointed by Oregon Governor John A. Kitzhaber, M.D. to the Law Enforcement Contacts Policy and Data Review Committee on January 17, 2002.

SUMMARY: ... They certainly were on my mind my senior year in college, when I considered writing my thesis on the legal cases connected with the incarceration of Japanese Americans during World War II. It certainly was on my mind my senior year in college, when I considered writing my thesis on the legal cases connected with the incarceration of Japanese Americans during World War II. The issue had personal relevance for me. After all, my parents, grandparents, aunts, uncles, and other relatives all had been rounded up and put into "those camps." I knew that legal cases had challenged the constitutionality of the evacuation and incarceration of Japanese Americans and failed. But my thesis advisor asked, "After you describe the legal decisions as racist, then what will you say?" I didn't have an answer, so I pursued another thesis subject altogether. That was 1972.

Starting Down the Path
It was what I viewed as discriminatory practices at a Lake Placid, New York resort where I worked for several months in college that prompted me to get a law degree. With another female co-worker, I tried to convince the waitresses to threaten to strike because of inequitable treatment by the maître d', which led to gross differences in pay. But when challenged, the maître d' said two things to me: "You don't have a union and we can fire the lot of you tomorrow, and we can do this because our board of directors is composed of eleven lawyers in New York City." Not surprisingly, the other waitresses were unwilling to strike, and I left within a few weeks because I was unwilling to work in such an environment.

I didn't know about the law. I had been raised on a berry and vegetable farm in Boring, Oregon. My siblings and I grew up poor, without indoor plumbing. Some winters we ate government surplus food. I had never met a lawyer, never traveled east of Boise, Idaho until I was nineteen, and went to college on my mother's advice. She told all four of us kids to get our education and get off the farm. So off I went, first to Oregon State University and then to Vassar College. Thank goodness I didn't listen to my high school guidance counselor! Even though I was valedictorian of my class, he suggested I live at home and go to the local community college - his vision of my future. I knew very little else. Had it not been for my older brother Jerry, I never would have found Vassar or even imagined myself going to a Seven Sisters college.

I decided to attend law school because I wanted to have the same power that the board of directors from the New York resort wielded, but I wanted to use it to change things - to pursue justice and fight for others who did not have the education or knowledge to fight for themselves.

In my third-year Constitutional law class we read Korematsu v. United States, which tested the constitutionality of the military exclusion order as it related to U.S. citizens. Fred Korematsu, a U.S. citizen, was arrested for refusing to comply with the military order excluding all persons of Japanese ancestry (including U.S. citizens of Japanese descent) from continuing to live in certain areas on the West Coast. Korematsu, a U.S. citizen by birth, refused to leave California and was arrested and convicted of violating Public Law 503 (which criminalized violations of military orders authorized under Executive Order 9066, the executive order that conferred upon the Secretary of War the authority to designate military areas from which persons can be excluded). His case landed in the U.S. Supreme Court and spawned the strict scrutiny doctrine under the Fourteenth Amendment. Unfortunately the Supreme Court found the military's action constitutional based upon military necessity. In Hirabayashi, the Supreme Court said that "distinctions between citizens solely because of their ancestry are by their nature odious to a free people." The Court went on to find in Korematsu that such restrictions are immediately suspect, and any governmental discrimination based on race would be subjected to the highest levels of scrutiny. The Court then upheld the government's claims of the "military necessity" in the exclusion of Japanese Americans, based largely on the report of Lieutenant General John L. DeWitt, the head of the Western Defense Command, which included eight western states that had been declared a "theater of operation." As a result, the Court found that the race-based curfew and exclusion of Japanese Americans was constitutionally permissible.

I remember thinking that doing anything to right Korematsu and cases like it, would make my three years of law school torture worthwhile. But what could I do? The cases had gone to the highest court in the land and been upheld. The next court was a celestial one, and I wasn't ready to argue before that one yet.

So there was little to do except fume at the injustice, both of the Supreme Court decision itself and how the case had been presented in class - as just another dry, boring opinion of no great consequence to anyone. The professor's lackluster presentation and my classmate's inability to comprehend the magnitude of the injustice added insult to injuries I had already felt in my life: the cloud of having been raised by people the government considered disloyal, of thinking my parents must have done something wrong or they would not have been incarcerated, of being asked, "What are you?" for most of my life, so that I realized that most people thought of me as foreign. I wanted to be White because, when I was growing up, it symbolized beauty, power, and authority.

It was only after college when I was teaching English in Japan that I had an epiphany about my identity: I am Japanese American, and both of those descriptors - Japanese and American - are important. Given that identity, I realized I would be in the minority no matter where I lived. Whether I chose to feel good about that or not, it was a fact nonetheless.

II

A Mission of Justice and Equity

Once I realized I did have a choice about embracing my heritage, I made mine and came back to the states with renewed purpose and focus. I was a Japanese
American and my mission was about justice and equity. I went to the Northwestern School of Law at Lewis and Clark College and became politically active and involved, helping to start the Minority Law Students Association. With several African American students, I fought to reinstate students of color who, with little financial or academic support in their first year, didn't make it to their second. My political awareness and activities, and my increased confidence in my Japanese American identity, fueled my resentment about the injustice of Korematsu and my anger at my professor and fellow law students who had very little interest in a dusty case from World War II.

After graduation I became involved in the JACL, a national civil rights organization started by people of my parents' generation (the Nisei, or second generation - the first generation born in the United States). I was appointed to the National Redress Committee, which sought reparations for the Japanese Americans who had been incarcerated during World War II. What began as a community effort soon grew into a national movement by the Japanese American community and other civil rights groups. It was an exciting time for those of us in the trenches, organizing within local communities for compensation and more: for restoration of an entire community's dignity.

The incarceration had been a case of mass racial profiling, buttressed by the military, condoned by the executive branch, and largely unfettered by the judiciary. It was completely wrong, but at the time few people stepped forward and there was little resistance, even within the Japanese American community. In fact, during the war the JACL stated that Japanese Americans should willingly submit to incarceration, to show their loyalty. The organization was steadfastly against any formal legal challenges such as those fostered by Messrs. Korematsu, Yasui, and Hirabayashi.

Some forty years later, though, the JACL was moving forward (although timidly at first) to address these wrongs, and I found myself in the middle of several controversies regarding individual payments versus funds entrusted for the entire community. After battling that issue and seeing a resolution pass the JACL national convention in 1978, my time on the National Redress Committee was over. I went back to local politics and projects in Oregon.

III

Reopening Cases of Japanese American Incarceration

In 1982, I received several calls regarding the reopening of the Japanese American incarceration cases. One came from Minoru Yasui, a Japanese American who had been imprisoned during World War II, and another came from Dale Minami, one of several young Japanese American and other ethnic American lawyers in California, Oregon, and Washington who together were reopening the Japanese American incarceration cases based on newly discovered evidence. Dale Minami became the lead attorney for Fred Korematsu, whose original case I had studied in law school, and I came to represent Mr. Yasui.

In March 1942, Minoru Yasui, the first Japanese American admitted to law practice in Oregon, faced a dilemma: General DeWitt of the Western Defense had imposed a curfew on everyone of Japanese ancestry under President Roosevelt's Executive Order No. 9066. Mr. Yasui believed the order to be unconstitutional and chose to test the entire internment program by seeking his own arrest and surrendering his liberty, so that the constitutionality of the wartime program could be litigated. He walked into the Portland police department, showed them his papers, and was arrested. Thereafter, he spent nine months in solitary confinement as his case went through the court system.

Mr. Yasui had intentionally placed his trust in the courts, believing the justice denied him by the executive and legislative branches would be restored by the judiciary. However, he was mistaken. Convicted by the District Court of Oregon on November 16, 1942, for violating a military curfew, he appealed his case, first to the Ninth Circuit Court of Appeals, where the court declined to rule, and then to the United States Supreme Court.

In the early 1980s, evidence discovered by Professor Peter Irons, Aiko Herzig-Yoshinaga, and others revealed that during the prosecution of Mr. Yasui's case, as well as those of Mr. Hirabayashi and Mr. Korematsu, military officials and government prosecutors deliberately and intentionally committed misconduct and fraud. In their respective petitions for writ of error coram nobis, Messrs. Korematsu, Hirabayashi, and Yasui argued that the government altered, destroyed, and suppressed material evidence proving that the curfew and internment were factually unsupportable. General DeWitt's decision to impose a military curfew was not based upon military necessity, but rather on racial discrimination. General DeWitt even wrote that people of Japanese ancestry were inherently disloyal and that one could not tell the "sheep from the goats."

In addition, government attorneys failed to inform the Supreme Court about an Office of Naval Intelligence report finding that Japanese Americans were not a
danger to the United States, or about Federal Bureau of Investigation and Federal Communications Commission investigatory reports that refuted claims of Japanese espionage, sabotage, and disloyalty.

On February 1, 1983, Mr. Yasui filed a Petition for Writ of Error Coram Nobis, presenting the government's fraud upon the Court and seeking redress for his conviction, not only for himself but also for the thousands of other Japanese Americans who had been incarcerated. On January 16, 1984, in a hearing held before the Honorable Robert C. Belloni, the government agreed that Mr. Yasui's conviction should be vacated. However, the government also argued that there was no "case or controversy" and that, because Mr. Yasui had suffered no lasting consequences, there was no need for a hearing, and therefore Mr. Yasui's petition should be dismissed. Mr. Yasui argued that the court had a duty to "protect the public interest" by examining the constitutional aspects of the petition.

The court rendered its opinion on January 26, stating as follows:

The two requests reach the same result. The only difference is that petitioner asks me to make findings of governmental acts of misconduct that deprived him of his Fifth Amendment rights. ... I decline to make such findings forty years after the events took place. There is no case nor controversy since both sides are asking for the same relief but for different reasons. The Petitioner would have the court engage in fact finding which would have no legal consequences. Courts should not engage in that kind of activity.

Thrilled about the vacating of the conviction but unsatisfied by the court's lack of an evidentiary hearing, Mr. Yasui appealed his case to the Ninth Circuit Court of Appeals, requesting a substantive proceeding. On November 12, 1986, before the appellate court could review the substance of the appeal, Mr. Yasui passed away. Shortly thereafter, the government moved to dismiss the pending appeal as moot, which the Ninth Circuit granted on March 23, 1987. The dismissal was appealed by Minoru Yasui and True S. Yasui, his wife, to the United States Supreme Court, requesting a petition for Writ of Certiorari to review the Ninth Circuit's March 23 judgment and order of dismissal. Unfortunately, the High Court also found the case to be moot.

Minoru Yasui's long journey for justice came to an end without court findings of governmental misconduct, but Yasui did experience the victory of seeing his conviction erased.

IV

Who Is Subject to Racial Profiling Today?

I chose to be the lead attorney on the Yasui case because I did not want what happened to my relatives to happen to any other group of people. Although that was my intention, I didn't really believe that such a miscarriage would happen again - that is, racial profiling to such a degree that U.S. citizens would be denied due process and equal protection, or the threat of mass incarceration.

Such racial profiling and mass incarceration did not occur after the bombing of the federal building in Oklahoma City. The government did not round up thousands of young White men who fit Timothy McVeigh's description. Masses of White men did not declare that they wouldn't mind having their civil rights violated if it made other people feel safer. There were no polls about whether racial profiling of young White men should be conducted for national security reasons. No one said that in times of crisis, some people's rights must fall by the wayside.

Why not? Why not then, after such a disaster and so many deaths? Why not White men? Why instead has there been profiling throughout the decades of immigrants from Asia, countries south of the U.S. border, the Middle East, and other parts of the world? Why weren't young White men detained for security reasons, and why weren't thousands of them considered criminal suspects?

Japanese Americans were subjected to racial profiling during World War II because they were thought to be disloyal and unpatriotic by virtue of their race. General Dewitt stated their racial affinities were not severed by migration - that, even though many second and third-generation Japanese had been born on U.S. soil, held U.S. citizenship, and had become Americanized, Japanese Americans were an enemy race.

Perhaps due to the advent of Congressional action for redress, Japanese Americans today are not, once again, subjected to the treatment they endured during World War II. Instead, other more disenfranchised groups have become the targets of racial profiling. For example, Arabs, Arab Americans and other citizens and immigrants have been profiled for more than a decade. An ABC News poll conducted in 1991 found that 'majorities of Americans saw Arabs as 'terrorists' (fifty-nine percent), 'violent' (fifty-eight percent) and 'religious fanatics' (fifty-six percent). And a Gallup poll conducted two years later found that two-thirds of Americans believed there were 'too many Arab immigrants in the United States.'
Shortly after September 11, sentiments ran high, with a Newsweek poll finding that thirty-two percent of Americans favored putting Arabs under special surveillance like that of Japanese Americans during World War II. In other words, roughly one-third of Americans feel that Arabs pose some hidden threat. This form of racial profiling is national but can also be felt locally in Oregon.

In a January 2002 telephone poll of 800 Oregon adults, seventeen percent said that Oregon police "often" or "always" make traffic stops on the basis of a motorist's race. Another thirty-nine percent said that the police "sometimes" do this. More than fifty percent of those polled, then, believe that the police sometimes, often, or always make traffic stops based on race, rather than on probable cause for having committed a crime. In the wake of September 11, the survey also suggested that Oregonians are ambivalent about whether racial profiling is always a bad thing.

When people answered those questions, do you think they were contemplating young White men and women being stopped as possible suspects? Or is it easy to give away someone else's rights when you think such curtailment will not impinge on you? A California Supreme Court justice once said the problem with civil liberties is that the middle class has little experience with their homes or cars being unlawfully searched, or the feelings that accompany having their property unlawfully seized. If such acts were to occur more frequently, the middle class would be more mindful of protecting everyone's civil liberties.

Why do we allow and even encourage racial profiling? Data released by the Portland police in August 2001, which include police stops up to June 30 of that year, found the following in Portland:

- Citywide, African Americans were about 2.7 times as likely to be stopped by police as Whites were.
- Once stopped, African Americans faced the same probability of being charged with a traffic or criminal offense as Whites.
- The greatest disparities were in the Central Precinct, which covers most of the west side of Portland and downtown:
  - African Americans were five times more likely than Whites to be stopped.
  - Hispanics were slightly more likely than Whites to be stopped.
  - Asian Americans were less likely than Whites to be pulled over.
  - Native Americans were stopped in proportion to their percentage within the general population.

Making Choices About Racial Profiling

A. Police Department Data Collection

Fortunately, at least a few states are reexamining practices that might constitute or lead to racial profiling. In Oregon, seven law enforcement agencies have begun voluntarily collecting information during traffic stops to help determine whether officers commit racial profiling. In addition, "Oregon was the first state in the nation where law enforcement agencies and their union representatives adopted resolutions denouncing 'racial profiling' practices."

So far, most of the data have been collected in the city of Hillsboro. Out of 23,532 traffic stops between May 2, 2000, and January 31, 2002, twenty-six percent involved Latinos, who make up nineteen percent of Hillsboro's population. Searches were conducted during seven percent of the stops involving Latinos, compared to four percent of stops involving Whites. Yet in only seven percent of those searches involving Latinos did officers find contraband, while they found contraband in ten percent of their searches involving Whites.

While many people believe that cases of racial profiling by police occur only as a result of unconscious or subconscious, rather than intentional decisions, others would disagree. Regardless, the data show that higher percentages of Blacks and Latinos are stopped than are Whites, while - at least in Hillsboro - lower percentages of contraband are found on Latinos than on Whites. This latter statistic is not what many expect. Also, as Oregon Governor John Kitzhaber stated, "Law enforcement can't protect the public if the public doesn't believe law enforcement is treating everyone fairly."

B. Law Enforcement Contacts Policy and Data Review Committee

In January 2002 Oregon Governor John Kitzhaber appointed eleven members to a new Law Enforcement Contacts Policy and Data Review Committee
Fellow at Legal Aid in Portland, an attorney for the conditions. As a Reginald Heber Smith Community safety in law enforcement encounters and living struggling for political empowerment and dignity and "the other," the subordinated groups who are [*1148] my career working to build better relationships understanding of diversity. I have spent a majority of and develop communities, cultural competency, and an professional who has worked to reverse racial profiling has been subjected to mass racial profiling and as a I come to this work as a member of a community that together to increase public safety and the public's trust and confidence in law enforcement, publicizing successful efforts to reduce discrimination based on race, color, or national origin during law enforcement stops, and helping communities and law enforcement agencies that want to involve individuals in advancing the goal of data collection.

I come to this work as a member of a community that has been subjected to mass racial profiling and as a professional who has worked to reverse racial profiling and develop communities, cultural competency, and an understanding of diversity. I have spent a majority of my career working to build better relationships [*1148] among seemingly opposite and opposing sides. I have especially been a voice for understanding "the other," the subordinated groups who are struggling for political empowerment and dignity and safety in law enforcement encounters and living conditions. As a Reginald Heber Smith Community Fellow at Legal Aid in Portland, an attorney for the Urban Indian Council Indigent Criminal Defense Unit, a community activist, and a cross-racial coalition builder, my constituency is communities of color in Oregon.

Yet even with this experience, it has been exceedingly difficult to build relationships among all committee members, to dialogue about the frustrations that communities of color have experienced, and to have others appreciate the slow and frustrating process of building trust between racially diverse communities and law enforcement. A single conference or training will not build that foundation of trust, especially when Oregon has a history as a White homeland. n46 For many communities in Oregon, a one-time activity instead of thoughtful processes and a long-term commitment is just more of the same. In fact, "doing something to them," rather than being equitable partners, has for many communities been the rule rather than the exception, and it gives short shrift to important community needs.

The jury is still out on whether the subcommittee's work will rise to the challenge of Oregon's history and whether we will muster the imagination and creativity that are needed to reach our goals. The benefits of our work, when they are achieved, will be at the level of the human heart as well as the head.

C. Asian Pacific American Network of Oregon

I also have been involved recently with the Asian Pacific American Network of Oregon (APANO), helping organize and moderate a forum for political candidates in Oregon. APANO is a coalition of Asian Pacific groups that work on social justice, [*1149] immigrant rights, and other issues faced by Asian and Pacific Islander communities in Oregon. Led by Thach Nguyen, a Vietnamese American and resident of Portland, APANO sponsored its second-ever political candidate forum for the Asian Pacific American community in April 2002. More than 120 people from the Hmong, Cambodian, Lao, Mien, Japanese, Chinese, Filipino, Caucasian/European American, and Korean communities attended, as did candidates in five political races in Oregon's May 2002 election, including candidates for governor, the Portland city council, and president of the metropolitan Portland regional government. (Future candidates would do well to attend upcoming APANO forums; in the last election, turnout of registered Asian/Pacific Island voters topped eighty percent, the highest of any community of color). n47

The forum clearly shows that changes in attitudes are afoot. Some candidates brought materials translated into Asian languages, and all faced questions on such
Race in the Face of "National Security"

Today the term "military necessity" has given way to "national security," but the impact is the same: just as it was four decades ago, race is still used as an indicator of loyalty (now called patriotism) and is still justified because of stereotypes and prejudices that lead to discrimination.

As happened with Japanese Americans in World War II, the current government has arrested and detained more than a thousand "suspected" terrorists and has imprisoned U.S. citizens indefinitely without bail, without having filed criminal charges, and without providing access to attorneys. In addition, the government has proposed the creation of detention camps for U.S. citizens deemed "enemy combatants," without judicial review. The government believes that, in the name of safety, racial profiling is justified now as it was then. In the name of safety, Congress passed the USA Patriot Act in 2001, just weeks after the September 11 tragedy.

Scrutiny of the government is fundamental to the preservation of civil liberties, as is federal legislation against racial profiling. Here in Oregon, the state legislature and governor saw fit to take such steps, and working with organizations such as APANO ensures that immigrant justice and the dignity of communities of color will remain front-burner issues for government officials and political leaders alike.

Can Yasui v. United States happen again? Yes, in a minute. What would cause it to happen again? According to Dr. Roger Daniels, the Charles Phelps Taft Professor of History at the University of Cincinnati, it would be the erosion of civil liberties by legislation and fiat disguised as fighting terrorism.

What would stop Yasui v. United States from happening again? Ordinary people who are willing to take extraordinary steps and who dare to fight for the democratic principles and constitution that once made this country stand out among the world's nations - people like Minoru Yasui, who fought for more than forty years to right wrongs. He was an ordinary person who took extraordinary action. His was a struggle for dignity and respect, as well as for the legal protection afforded by the U.S. Constitution. When we first started the case, he said, "I don't know if we're going to win, but we're going to give 'em hell!" After his death, those words rang in my ears as we continued the battle. At times, when my life seemed hard and I was feeling sorry for myself, I needed only to remember Minoru's struggles and my troubles would diminish. Working with him - admiring him - I often wondered whether I had the courage to put my liberty and professional status on the line for justice, the way he did.
I still have not answered that question fully. But I do have answers for the young waitress I used to be in Lake Placid, New York; the senior college student who wanted to write her thesis on the Japanese American wartime cases; and that third-year law student angered by the Korematsu decision and her professor and classmates' reactions. I would tell her "You're on the right track. Activism for justice and equity is your calling in this lifetime; it is your mission to fulfill. You can be a prophet for justice. Just keep going."

FOOTNOTE-1:


n2. Pay was just one of the inequities. Others included segregation of African American employees in their "own" dining hall, while the rest of us ate in another one. The housing for African American employees was called "colored people's quarters." African Americans cleaned the rooms and worked in the kitchen, but only one, who was very fair-skinned, served guests in the dining room.


n5. Korematsu, 323 U.S. at 216.

n6. Id. at 227.

n7. The initial version of General DeWitt's Final Report is significant because it demonstrated that the decision to incarcerate Japanese Americans was based on racial and cultural prejudice, rather than military considerations. In particular, the report concluded:

It was impossible to establish the identity of the loyal and the disloyal [Japanese Americans] with any degree of safety. It was not [that] there was insufficient time in which to make such a determination; it was simply a matter of facing the realities that a positive determination could not be made, that an exact separation of the "sheep from the goats" was unfeasible.


The report also included unsubstantiated allegations of espionage and sabatoge. Id. However, Dewitt failed to include information from the FBI, Federal Communications Commission (FCC), and Office of Naval Intelligence (ONI) refuting these allegations. See Kenji Murase, Ph.D., Coram Nobis Timeline, 11 Nikkei Heritage 12 (1999); Korematsu, 323 U.S. 214. See also Hirabayashi, 320 U.S. 81; Yasui v. United States, 320 U.S. 115 (1943).


n9. In all three cases, Fred Korematsu, Gordon Hirabayashi and Minoru Yasui challenged military curfew and exclusion orders directed at all persons of Japanese ancestry. Korematsu resided in San Leandro at the time, Hirabayashi was a student at the University of Washington in Seattle, and Yasui had returned to his home state of Oregon at the outbreak of the war. All three were convicted at the federal district court level and all three convictions were upheld by the High Court, which affirmed the constitutionality of the military order. See Korematsu, 323 U.S. 214; Hirabayashi, 320 U.S. 81; Yasui, 320 U.S. 115.

States, 584 F. Supp. 1406, 1416 (N.D. Cal. 1994) (quoting United States Comm'n on Wartime Relocation and Internment of Civilians, Personal Justice Denied, 18 (1997)). Personal Justice Denied was originally published in two volumes by the U.S. Government Printing Office in 1982 and 1983. The present volume was first published by The Civil Liberties Public Education Fund and the University of Washington Press in 1997. "As a result, a grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II."

Korematsu, 584 F. Supp. at 1416.

n11. As Dale recalls the events, I was the only Japanese American lawyer he knew in Oregon!


WHEREAS the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises, and national defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U.S.C., Title 50, Sec. 104) [footnote omitted]:

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded there from, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, [footnote omitted] and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, [footnote omitted] prescribing regulations for the conduct and control of alien enemies, except as such duty and
responsibility is superseded by the designation of military areas hereunder.

Id.


n14. Shizue Seigel, "It was Bigger Than All of Us" ... : The Behind-the-Scenes Story of the Coram Nobis Team, 11 Nikkei Heritage 6-7 (1999).


n17. The cases of Fred Korematsu and Gordon Hirabayashi were also reopened. Rod Kawakami et al., East Wind: The Corum Nobis Cases, 135 Pac. Citizen 9 (Oct. 18-31, 2002). The idea for reopening these World War II cases was suggested in the late '70s and early '80s by two Nisei attorneys, Frank Chuman and William Marutani. They proposed an obscure legal procedure - writ of error coram nobis - to re-litigate the wartime cases, but the problem was that no evidence indicating governmental misconduct was available at the time. It was not until Peter Irons and Aiko Herzig-Yoshinaga uncovered documents that showed governmental fraud in the original wartime cases before the United States Supreme Court that these cases were reopened in 1983. See id.


n19. Id.


n24. Racial profiling is a more recent term first used in connection with law enforcement activities in stopping drivers for no other discernible reason than the driver's race. See Paula Daniels, National Asian Pacific American Bar Association (NAPABA) Position Paper: Recommendations for Oversight of the USA Patriot Act and for Federal Racial Profiling Legislation 6 (2002), available at http://www.napaba.org/uploads/napaba/RPPaperFinal.pdf. NAPABA defines racial profiling as "law enforcement initiated action that relies on the race, ethnicity or national origin of an individual rather than the behavior of the individual or information that leads the agency to a particular individual who has been identified as being, or having been, engaged in criminal activity." Id. at 7, n.21 (citing Northeastern University School of Law Professor Deborah Ramirez).


n27. Professor Saito wrote that just as Asian Americans have been 'raced' as foreign, and from there as presumptively disloyal, Arab Americans and Muslims have been 'raced' as 'terrorists': foreign, disloyal and imminent threatening. Although Arabs trace their roots to the Middle East and claim many different religious backgrounds, and Muslims come from all over the world and adhere to Islam, these distinctions are blurred and negative images about either Arabs or Muslims are often attributed to both.
Saito, supra note 25, at 5 (footnotes omitted); Daniels, supra note 24, at 8. "As Ibrahim Hooper of the Council on American-Islamic Relations notes, 'The common stereotypes are that we're all Arabs, we're all violent and we're all conducting a holy war.'" Daniels, supra note 24, at 9.

n28. No federal laws prohibit the use of racial profiling by federal law enforcement agencies. Daniels, supra note 24, at 9.


n30. Id.

n31. Id.

n32. Id.

n33. Id.

n34. See Wright, supra note 29.


n37. The seven agencies include the police departments of Hillsboro, Portland, Corvallis, Salem, Marion County and Eugene, and the Oregon State Police. See Law Enforcement Contacts Policy and Data Review Committee, A Brief Retrospective (Feb. 5, 2002). For more specific information of the Committee, see generally Law Enforcement Contacts Policy and Data Review Committee, Meeting Minutes (Feb. 5, 2002).

n38. A Brief Retrospective, supra note 37.

n39. Wright, supra note 29.

n40. Id.

n41. Id.

n42. Id.


n44. Id.

n45. Final Report, supra note 7. See also Daniels, supra note 24, at 2.

n46. Oregon passed its first exclusionary law in 1844. The law made it illegal for African Americans to come into or reside within the limits of the Oregon Territory. See generally Cathy Ingalls, Shedding Light on Black History, Albany Democrat-Herald (Albany, OR), Mar. 31, 2003, available at http://mvonline.com/dhonline/dh_0526-24.html. The original Oregon Constitution (1857) made it illegal for people of color not only to live in the state, but to hold real estate, use the court system, engage in business requiring contracts, or to vote. For a copy of the original 1857 Oregon Constitution, see http://bluebook.state.or.us/state/constitution/ORConstitution/OriginalHeading.htm.

n47. Interview with Thach Nguyen, Immigrant and Refugee Community Organization, in Portland, Or. (Apr. 30, 2002).


n52. Id. at 1416.
n53. In Oregon, the Asian/Pacific Islander community has the highest percentage of possible registered voters of any community of color: 82.5%. Interview with Thach Nguyen, Immigrant and Refugee Community Organization, in Portland, Or. (Apr. 30, 2002).

n54. Martha Nakagawa, As September 11 Anniversary Approaches, Groups Debate Whether it Should be a National Holiday, 131 Pac. Citizen 1-2 (Aug. 16-Sept. 5, 2002). Dr. Roger Daniels is a pioneer scholar on Japanese American history who served in the merchant marines during World War II.
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BIO:

* Professor of Law, University of Oregon School of Law. In writing this article, I benefitted from presentations at the University of California at Davis School of Law, and Golden Gate University School of Law. I also presented my paper as part of the LatCrit VII concurrent program: Post 9-11 Borderlands/Fronteras: Immigration, Terrorism, and Democracy. Parts of this article will be republished in a forthcoming book, Greasers and Gringos: Latinos, Law, and the American Imagination, to be published in 2003 by New York University Press.

Summary: ... In the days and weeks following the September 11 terrorist attacks, reports emerged of hate crimes, discrimination, and profiling directed at Arab Americans, Arabs, and Muslims in the United States. Although aware that the primary targets of the public and private response against terrorism were those of Arab or Muslim appearance, I realized that the backlash within the United States also affected Latinas/os and certain other subordinated groups. This Article grew out of my concern that while Latinas/os at first might be deemed "safe" by the American public, their negative societal construction made their targeting inevitable as the fervent, amorphous war on terrorism took shape. Below I detail perceptions of Latinas/os in society's imagination that might be relied upon to justify their inclusion in the war on terrorism. After reviewing the potential negative consequences for Latinas/os of government and private action against terrorism, I assess the opportunities for positive transformation of our societal values in the quest to define nationhood after September 11.

I

Constructing Latinas/os as a Terrorist Threat

Even before September 11, the dominant view of Arab Americans, and of Muslims, was that they were violent terrorists, disloyal to the United States, and waging a holy war against America and other enemies. Prior terrorist attacks had galvanized public opinion against Arabs and Arab Americans as a whole - in a 1991 poll conducted during the Gulf War, fifty-nine percent of Americans associated Arabs with terrorists, fifty-eight percent with violence, and two-thirds felt there were too many Arab immigrants. Latinas/os too are not immune from these negative sentiments. Given their societal construction as violent, foreign, criminally inclined, as drug smugglers and drug users, and as predominantly non-citizen and even "illegal," our citizenry might be inclined to direct their eyes toward those of a stereotypical Latina/o appearance. ...
Because undocumented immigrants are now seen as a national security threat, as would-be terrorists, the longstanding association of Latinas/os with "illegal aliens" may cause Americans to view Latinas/os with suspicion. Even if not viewed as terrorists themselves, Latina/o immigrants have been called into question for their supposed willingness to aid terrorists in anti-American plots. Consider the remarks of the head of a Utah anti-undocumented immigrant group applauding the pre-Winter Olympics sweep of undocumented airport workers in Salt Lake City, most of them Latina/o:

This may be stereotyping, but, if you go to an illegal Mexican [*1155*] working at the airport, and he has access to airplanes, or he's manning a baggage check or whatever, and an Arab terrorist walks up to him and says, "I'll give you $ 10,000 if you plant a 9-millimeter on the airplane for me," well, here's an individual who's never stood up, held his hand over his heart and said, "I pledge allegiance to the flag and to the country for which it stands." You think that Mexican is going to head south with the 10 grand? You betcha.n7

Other avenues exist toward a societal profiling of Latinas/os as a security or terrorist threat. Fueled by television and cinema, the societal association of Latinas/os with drugsn8 could shape a conception of Latinas/os as "narco-terrorists."n9 Following the September 11 terrorist attacks, drug producing and drug smuggling operations have come to be viewed as terrorist organizations. In February 2002, the Office of National Drug Control Policy announced its initiative to educate Americans on the link between illicit drugs and international terrorism. Pursuant to this campaign, two commercials debuted during the 2002 Super Bowl warning drug users that they were financing terrorists. According to Congressman Mark Souder (R-IL), "Americans who buy and sell illegal narcotics are lending a helping hand to people like those who attacked America on September 11."n10 In order to justify military intervention and policing measures in the national and international war on drugs, government officials need only point to the funding of al-Qaeda terrorist campaigns with proceeds from heroin produced in Afghanistan, a world leader in opium production.

As a Presidential candidate, Richard Nixon announced that he would wage a "war" on drugs. As President he deployed customs agents at the Mexican border as part of Operation Intercept to curtail drug smuggling. In 1986, President Ronald Reagan issued a security directive classifying drugs, for the first time, as a national security threat.n11 But Latinas/os in Texas remember the [*1156*] tragic consequence of militarizing enforcement against drugs, especially when it involves placing military troops along the U.S.-Mexico border. In May, 1997, a camouflaged squad of U.S. Marines patrolling near the Rio Grande on an anti-drug assignment shot and killed teenager Ezequiel Hernandez who was tending goats on horseback as part of a church project. Ezequiel, who hoped to become a park ranger, carried an old pump-action .22 rifle to fend off rattlesnakes and predators. Although the Marines claimed that Ezequiel fired at them and they acted in self-defense, Ezequiel was shot in the side, an angle inconsistent with this account. More chilling still, while the Marines waited twenty-two minutes before rendering first aid or calling for emergency help, young Ezequiel bled to death.n12 As a consequence of the shooting, then Defense Secretary William Cohen ordered the disarmament of all federal troops engaged in anti-drug missions at the border. Though it may be forgotten in the haste to fight terrorism, Ezequiel's death provides "smoking gun" evidence of the folly of militarizing the Mexican border.

In addition to their societal association with drug trafficking, Mexican Americansn13 have been linked to terrorism by at least two other avenues - a revisioning of their longstanding bandido construction, and their supposed affinity with the villainized image of suicide bombers that has come to define America's view of Palestinians. Within days after September 11, the media began to suggest the parallels between the hunt launched in Afghanistan for Osama bin Laden and the major military mission initiated in 1916 to hunt Mexican General Francisco "Pancho" Villa in Northern Mexico. A former ally of the United States, as was bin Laden, Villa attacked a New Mexico town in early 1916 [*1157*] killing seventeen Americans14 while stealing horses and guns. Villa's motivation for the raid remains unclear. Most suggest that a change in United States' policy which had previously supported Villa's endeavors in Mexico with guns and arms led him to attack the town that had formerly supplied him with weapons. A few even suggest that the United States government orchestrated the raid by payment to Villa hoping to spark military enlistment and patriotism toward American involvement in World War I. Whatever the raid's motivation, President Woodrow Wilson responded by mobilizing as many as 150,000 troops, and sending battalions into Mexico with horses, tanks, trucks, and open-cockpit planes in a failed effort to find Villa in the hill country of Chihuahua, Mexico. n15 Post-September 11 comparisons between Villa and bin Laden were drawn not merely for the similarities in an unfruitful search by the American military, but also for the terrorist identity of both men.
For example, a relative of one of the dead in New Mexico suggested that while Villa was considered a "bandit" back then, "by today's terms, he was a terrorist." n16 Emerging from the physical, cultural, political, and economic displacement of Mexicans in the U.S.-Mexico war and thereafter, the real-life bandidos at the time have now been revisited by some as bin Laden-like terrorists.

In the 1970s, the Brown Berets, a paramilitary group of Chicanas and Chicanos dressed in army fatigues and brown berets, modeled after the Black Panthers, helped create a stereotype of Chicanas/os as violent activists.n17 Today, some American vigilantes frustrated with the government's inability to bring bin Laden to justice have resurrected this image of the violent Chicana/o to construct Mexican Americans and other Latinas/os as a more accessible terrorist enemy on American soil. College campus MEChA organizations, comprised mostly of Chicana/o students, but also of other Latinas/os, have been targeted by hate speech that compares their organizations to al-Qaeda. Ostensibly, these vigilantes point to the supposed Chicana/o mission to reclaim Aztlan from 1969, an activist Chicana/o manifesto, which provides in part:

In the spirit of a new people that is conscious not only of the proud historical heritage but also of the brutal "gringo" invasion of our territories, we, the Chicano inhabitants and civilizers of the northern land of Aztlan from whence came our forefathers, reclaiming the land of their birth and consecrating the determination of our people of the sun, declare that the call of our blood is our power, our responsibility, and our inevitable destiny .... .

Brotherhood unites us, and love for our brothers makes us a people whose time has come and who struggles against the foreigner "gabacho" who exploits our riches and destroys our culture .... n18

A hate e-mail sent to a West Coast campus MEChA organization quoted part of this Plan de Aztlan in contending that MEChA is a "terrorist organization" of "evil terrorists ... no better than Osama Bin Laden" seeking to "destroy the country."n19 In April 2002, I was interviewed by a conservative talk radio show host in Portland, Oregon who strove to construct Chicana/o college students as terrorist operatives. He drew a connection between the struggles of Palestinians for land and nationhood in the West Bank and the supposed Chicana/o mission to reclaim Aztlan, enabling him to transfer his construction of all Palestinians as suicide bombers to Chicanas/os and other Latinas/os by asking me the absurd question: "When will the suicide bombings start in Aztlan?"

After September 11, not only Mexican "bandidos" but also urban Latina/o "gangbangers" are being revisioned as terrorists. This threatening image has roots that extend to media and societal conceptions in 1940s Los Angeles of Mexican American youth known as "Pachucos" who were vilified in local newspapers as a foreign-sourced threat during World War II, leading to the so-called Zoot Suit Riots in which off-duty Anglo servicemen, and Anglo civilians, stormed barrio neighborhoods to assault these Latino youth. The recent arrest of Puerto Rican Abdullah al Muhajir, formerly Jose Padilla, once a gang member [*1159] in Chicago, has come to represent the association of Latino gang members with terrorist operatives. Padilla has been held in military prison as an "enemy combatant" while being interrogated for his role in planning a potential "dirty bomb" attack.n20 A former FBI deputy director of counterterrorism made the leaps from Latina/o ethnicity to Latina/o gang membership to terrorism seem like baby steps in contending "if you look at Padilla's background - Puerto Rican, gang member, time in prison, a convert to Islam - what you see is a potential resource for al-Qaeda." n21 Because the public views Latinas/os of all origins, particularly Mexican Americans and Puerto Ricans, as gang members, this association of gangbangers and terrorists provides yet another societal linkage between Latinas/os and terrorism.

The history of struggle for Puerto Rican self-determination presents another possibility for constructing Puerto Ricans as terrorists. Particularly in the 1950s, and again in the 1970s and early 1980s, media coverage of violence in the United States by pro-independence supporters prompted stereotypes of Puerto Ricans as revolutionary-minded and as terrorists. Among the notorious incidents was the attempted assassination of President Truman in 1950 by Oscar Collazo and Griselio Torresola, two activists in the Puerto Rican Nationalist Party seeking independence from United States colonialism. While attempting to enter the Blair House in Washington D.C. where President Truman was staying, Collazo and Torresola killed one White House guard and wounded two others. Guards killed Torresola and injured Collazo. Truman ultimately commuted Collazo's death sentence to one of life imprisonment, and President Carter freed Collazo in 1979.

In 1954, four Puerto Rican Nationalists entered the public gallery [*1160] overlooking the floor of the U.S. House of Representatives. One of them, Dolores Lolita Lebron, shouted "Free Puerto Rico," and began
shooting with her companions onto the House floor. Together, they wounded five Congressmen before being overpowered. They were sentenced to fifty years imprisonment. Also charged and convicted were several Puerto Ricans alleged to have engaged in seditious conspiracy in planning the attack. In the 1970s, the Puerto Rican nationalist group Fuerzas Armadas de Liberacion Nacional - Armed Forces of National Liberation (FALN) claimed credit for several bombings in Chicago, New York, and Puerto Rico, including the so-called Fraunces Tavern Bombing which killed four people and injured over fifty in a historic New York tavern. Those convicted for the bombing campaign ultimately were given clemency by President Clinton in 1999.

Despite the gravity of the real-life violence in the 1950s through the 1970s, what went unpublicized was the counter-record of political violence and persecution carried out against pro-independence activists in Puerto Rico by Puerto Rican authorities and United States intelligence agencies such as the FBI. Indeed, from 1948 until 1957, Puerto Rican law criminalized the mere advocacy of independence. These longrunning government efforts to sabotage the nationalist movement, highlighted by the bloody Ponce Massacre in 1937, have been well documented by Pedro Malavet.

II

The War on Terrorism and Its Consequences for Latinas/os

Although primarily impacting Arab Americans, Arabs, and Muslims the war on terrorism has harmed Latinas/os as well as certain other subordinated groups. Its consequences reach both undocumented and documented Latina/o immigrants, and beyond to Latina/o citizens.

A. Non-Citizen Latinas/os: Baggage and Borders

Some ramifications of the war on terrorism have affected non-citizen Latinas/os, the documented and undocumented alike. Because other commentators have addressed the undermining of civil rights protections of immigrants accomplished by the USA PATRIOT Act, I will address different consequences here.

Following the terrorist events of September 11, many called into question the patriotism of Latinas/os, especially of undocumented immigrants. In San Francisco and elsewhere, local authorities began to crack down on day laborers waiting for employment, most of them non-citizen Latinas/os. In early 2002, federal officials carried out Operation Tarmac, an immigration enforcement sweep aimed at undocumented (Latina/o) airport workers with access to restricted areas such as airplanes, runways, and flight meal kitchens. As quoted above, the head of a Utah anti-immigrant group justified this federal round-up of undocumented workers at Salt Lake City's airport by answering whether "illegal" Mexican airport employees would take money from "Arab" terrorists to plant weapons on planes and then "head south" with their ill-gotten gains - "You betcha." Doubting the patriotism of even documented but noncitizen Latinas/os and other immigrants, in the post-September 11 federal takeover of airport security, Congress imposed a citizenship requirement on airport screeners, a substantial number of which are non-citizen Latinas/os. In the months ahead, we can expect to hear increased calls for such citizenship requirements in the transportation industry as well as in other vulnerable industries.

Launched in October 1994 by the Clinton Administration, the stepped-up border enforcement program known primarily as Operation Gatekeeper has led to the deaths of countless Latina/o immigrants steered away from border crossings near urban centers to remote treacherous areas. America's response to the terrorist events of September 11 will only increase the migrant carnage. Back in 1993, in setting the stage for Operation Gatekeeper's increase in border enforcement manpower, technology, and infrastructure, President Clinton had remarked at a press conference about the need to enhance border patrols to protect against terrorism:

The simple fact is that we must not, and we will not, surrender our borders to those lazy Mexicans who wish to exploit our history of compassion and justice. We cannot tolerate those who traffic in human cargo, nor can we allow our people to be endangered by those who would enter our country to terrorize Americans ....

Today, we send a strong and clear message. We will make it tougher for illegal aliens to get into our country.

Despite the horrible toll resulting from border build-up, public opinion shortly before the September 11 tragedy nonetheless called for increased measures to hamper entry of Mexicans and other Latinas/os. A Time/CNN poll in May, 2001 determined that fifty-three percent of those sampled felt it should be made harder for people to cross the Mexican border into the
As public sentiment after September 11 builds toward establishing even tougher immigration restrictions at the Canadian and Mexican borders, migrating workers from Mexico and Central America will face a more perilous gauntlet in their efforts to reach jobs in the United States. Even prior to the terrorist attacks, President Bush supported increasing the number of Border Patrol agents. After the attacks, Bush called for doubling the funding for national security including border enforcement.\textsuperscript{n38}

Shortly before September 11, the Fox and Bush administrations were engaged in promising negotiations addressing the status of the estimated three or four million undocumented immigrants in the United States from Mexico. Mexico pushed for amnesty to legalize these immigrants, while Bush seemed to prefer a temporary "guest worker" program.\textsuperscript{n39} Negotiations between the governments broke down after September 11 as the economy slowed and U.S. priorities shifted toward heightened border security and against facilitating immigration. Indeed, September 11 reinvigorated anti-immigrant voices and has led to proposals in Congress to reduce immigration levels.\textsuperscript{n40}

\textbf{B. Consequences Reaching Citizen Latinas/os}

\textbf{1. Racial Profiling}

For Arab Americans, their media and societal construction as terrorists has led to racial profiling, particularly in the transportation industry. A nationwide poll taken shortly after September 11 confirmed that thirty-five percent of respondents had less trust of Arab Americans after the attacks.\textsuperscript{n41} Translating to legal policy, over half surveyed favored less trust of Arab Americans after the attacks.\textsuperscript{n41} Confirming that thirty-five percent of respondents had nationwide poll taken shortly after September 11 reinvigorated anti-immigrant voices and has led to proposals in Congress to reduce immigration levels.\textsuperscript{n40}

Racial profiling aimed at Latinas/os and African Americans \textsuperscript{[*1165]} has long been used by some law enforcement officials in immigration enforcement, the war on drugs, and in traffic stops. Before September 11, political progress was evident in the campaign against racial profiling in police traffic stops. Community groups were negotiating with local police and, at the national level, President Bush and Attorney General Ashcroft had publicly condemned racial profiling in traffic stops.\textsuperscript{n46} The shift in public and government sentiment after September 11 toward profiling of Arabs and Muslims in anti-terrorist agendas halted the momentum against racial profiling in contexts such as traffic stops. Capturing popular sentiment, a law professor with whom I had previously debated the propriety of profiling stated matter of factly to me that the events of September 11 ratify racial profiling.

Alarmingly, use of racial profiling in aid of border security, immigration enforcement, and the war on drugs seems consistent with the newly established prerogatives of the war on terrorism. At the local law enforcement level, community groups resisting profiling in traffic stops must now contend with the bolstered reputation of law enforcement officials as national heroes in the post September 11 political climate. Further, in Florida, the Justice Department reached agreement with state officials to train state law enforcement officials in immigration enforcement, the war on drugs, and in traffic stops. Before September 11, political progress was evident in the campaign against racial profiling in police traffic stops. Community groups were negotiating with local police and, at the national level, President Bush and Attorney General Ashcroft had publicly condemned racial profiling in traffic stops.\textsuperscript{n46} The shift in public and government sentiment after September 11 toward profiling of Arabs and Muslims in anti-terrorist agendas halted the momentum against racial profiling in contexts such as traffic stops. Capturing popular sentiment, a law professor with whom I had previously debated the propriety of profiling stated matter of factly to me that the events of September 11 ratify racial profiling.

\textbf{2. Assimilation Pressures}

Along with other LatCrit scholars,\textsuperscript{n48} I have written extensively about the modern English language movement that focused first on the adoption of Official English and English-Only laws by \textsuperscript{[*1166]} federal, state, and local government, and more recently on initiatives eradicating bilingual education. Despite some success at the state and local levels, national Official English/English-Only legislation has not been enacted, although in 1996 such legislation did pass the
The terrorist events of September 11 may both increase the pressure on Latinas/os to assimilate, as well as transform what assimilation should entail. Those events and the ensuing military response have led Americans to emphasize unity in culture and values, and to look with greater suspicion on immigrants and others considered to be foreigners. Under this invigorated assimilationist regime, Latinas/os can expect increased hostility against the Spanish language as a marker of foreignness. In the case of language, post-September 11 prerogatives to ensure national security and to detect terrorist plots are linked to justifications employed in the past to explain private language vigilantism. Tavern-owners, for example, have defended against legal challenges to their English language policies for customers by claiming that they were keeping peace in the bar by detecting "fighting words" - as one put it, "If they're speaking Spanish, how is my bartender going to know if they're cussing." A similar justification led a Washington state trial judge to conclude a tavern owner had unlawfully enforced an English-Only policy against her customers to ensure the safety of her property and others in the bar. As one tavern customer maintained: "They start speaking their own language and we don't know what they're saying. They could be insulting us, making fun of our [ employers'] wives or figuring out a way to rob the place." With the judge's finding of a non-discriminatory purpose, the tavern owner was insulated from liability under civil rights laws that require proof of purposeful discrimination. This fear of conspiracies crafted in Spanish was even reflected in the 2001 blockbuster film Training Day, when undercover narcotics officer Denzel Washington warned his new partner that an ignorance of "Español" would get him killed: "These Latino motherfuckers out here are plotting all kinds of shit behind your back." Employers too have relied on similar justifications (such as protection against conspiracies for theft) in imposing workplace English-Only policies on their employees.

No doubt the September 11 events will further legitimize these private language policies. Should a tavern owner be sued for its English language policy applicable to its customers, the owner might claim that it was trying to facilitate the role of its employees and English-speaking customers to detect the makings of terrorist plots. Similarly, an airline or other transit service might adopt an English language requirement for domestic travel to aid its passengers in detecting and preventing terrorist plans, as well as to ease the discomfort of some travelers who might view non-English speakers as dangerous foreigners conspiring toward disaster. Employers in the transportation or transportation-related industries, such as airline food caterers, as well as other vulnerable industries, such as power plant or chemical facilities, might too demand English from their employees in the interest of ensuring workplace security and safety.

In challenges to these rules under Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, color, sex, religion, and national origin, employers will suggest a legitimate business necessity to justify their policy. Although the standards for survival of employer English language policies under Title VII disparate impact scrutiny are still emerging, it seems apparent that language policies intended to ensure workplace safety for employees and customers are less likely to be invalidated than those not claiming a safety justification. For example, a compliance manual used by Equal Employment Opportunity Commission (EEOC) investigators suggests that a rule requiring all workers on an oil-rig deck to speak English to enable them to communicate quickly and respond effectively to emergencies would potentially be lawful.

By contrast, the EEOC has viewed customer preference rationales as suspect and potentially illegitimate, at least where the employees are not speaking directly to the customer. The courts have upheld English language policies addressing direct communication with customers. The most notable decision involved the termination of a Latino disc jockey from a popular Southern California radio station after he refused to stop mixing Spanish into his radio broadcasts. A consultant for the radio station found the jockey's bilingual format hurt ratings among Anglo listeners by confusing them about the station's programming. But a tougher question is presented when language policies govern conversation between employees that customers or other employees might overhear. The EEOC manual suggests it would possibly be impermissible for a retailer to require English at all times because its customers object to overhearing its employees speaking Spanish. Employers have sought to justify such rules in stressful environments such as hospitals and nursing homes where hearing an unfamiliar language allegedly would intimidate an ailing patient. Thus, the employer tries to portray customer
precepts. As early as 1990, a national survey had found that sixty-one percent of Whites believed Hispanics were less patriotic than Whites.n66 Despite the recurrent questioning of Latina/o patriotism, Latinas/os have a distinguished war record in World War II and Vietnam. Gil Carrasco has described the loyalty of Latino soldiers fighting for the United States in World War II:

Throughout the course of World War II, no Latino soldier was ever charged with desertion, treason, or cowardice. The bravery of Latino troops was recognized in the many medals awarded to Mexican Americans, including the Congressional Medal of Honor (the United States' highest honor), the Silver Star, the Bronze Star, and the Distinguished Service Cross. ... Because Mexican Americans seem to have gravitated to the most dangerous sections of the armed forces, they were overrepresented [*1171] on military casualty lists.n67

As many as one-half million Latinas/os served in World War II, including 53,000 Latinas/os from Puerto Rico.n68 Although Latinas/os served in the Vietnam War in disproportionate numbers, one writer was struck by their invisibility "in the histories, oral histories, and literary anthologies of the Viet Nam War era."n69 Perhaps this omission led then Presidential candidate Pat Buchanan to ask the astounding question in 1995, while questioning the inclusion of Latinas/os in affirmative action programs, of how the federal government could justify "favoring sons of Hispanics over sons of white America who fought in World War II or Vietnam?"n70 At the same time that Latinas/os were dying abroad in Vietnam, some Latinas/os, particularly Chicanas/os in Southern California, were rallying against the Vietnam War and the injustices they perceived, particularly that soldiers of color were being placed on the front lines and that the casualty rate for Mexican Americans in Vietnam was over fifty percent higher than their proportion to the total population in the United States.n71 Anti-war protest in East Los Angeles even led to a police [*1172] riot in 1970 which killed Ruben Salazar, a Los Angeles Times reporter writing about police brutality in the Chicana/o community.n72

The presence of Latino soldiers on the front lines while the Latina/o community back home both protested and supported the war reflected the diversity of the Latina/o experience and the complex dynamics among Latinas/os with regard to assimilative pressures in American society. Some Latinas/os, well represented by conservatives Richard Rodriguez and Linda Chavez, advocate that Latinas/os should abandon their preference, or even prejudice, as a safety issue.n63 Presumably, in the aftermath of September 11, some employers might ground their customer preference policies in terms of workplace, customer, and even societal safety through the detection of terrorist plots.

As a consequence of the terrorist attacks, decreased tolerance for Third World traditions and practices in the United States, particularly religious practices, may foretell disapproval and distrust among Anglos of non-"traditional" Latina/o religions such as Santeria, and religious observances such as Dia de los Muertos, that may be regarded as capable of galvanizing "foreigners" to engage in anti-American acts. The Mexican holiday Cinco de Mayo, however, now commodified by the American liquor and tavern industries into a Mardi Gras-like celebration of alcohol, is unlikely to be seen as a threat to patriotism.

Reliance on appearance to identify those persons with the will to commit anti-American acts suggests a centripetal force toward homogeneity in dress among Latinas/os and others desiring to avoid profiling as anti-American. Mere baggy pant attire and "Pachuco" haircuts were enough to prompt attack from Anglo servicemen and civilians in the Zoot Suit Riots in 1940s Los Angeles. In the unsuccessful political campaign against California's Proposition 187, Californians reacted negatively toward media coverage of rallies showing Latinas/os carrying Mexican flags. [*1170] After September 11, Arab Americans especially understand the currency of the American flag, as many Arab American merchants felt compelled to fly the American flag out of fear for their economic and physical well-being.

In schools, the terrorist events and specter of war will increase pressures on curriculum and on teachers to create a unifying cultural bond among students, not only as to language but also by suppressing curriculum and historical lessons that could detract from the view of America and Americans as culturally and morally superior to enemies of the state. The risk of heightened subversion of history in public schools was brought home by the Pentagon proposal in February 2002 to deliberately plant false stories to influence foreign perceptions of the United States in the interest of the war on terrorism.n64 By early 2002, U.S. Supreme Court Justice Anthony Kennedy and the American Bar Association had launched a school curricular initiative, called "Dialogue on Freedom," under which lawyers and judges will visit high schools to instruct on core democratic values. Moved by his perception of a lack of moral outrage over the terrorist events by some high school students, Kennedy created the program to teach "fundamental values and universal moral precepts." n65
culture and embrace an Anglo vision of assimilation and acculturation that includes a no-compromise adoption of English, in essence jumping into the assimilation pool feet first. From this dark side of the assimilationist ideal come incidents such as the Latino in Arizona who within one week of September 11 shot and killed a bearded Sikh from India who wore a turban, shouting as he was arrested, "I stand for America all the way." Other Latinas/os, particularly some activist Chicanas/os, want no part of the assimilation pool, preferring to plant their feet in a separatist vision of Aztlan, an independent Puerto Rico, or another sovereign nation dismissive of Americanization. Chicano activist Corky Gonzales penned the anthem for this anti-assimilationist view in his poem, I Am Joaquin, in which he refuses to be "absorbed." Yet, as Laura Padilla has observed, "neither of these extreme views of assimilation represent the views of most Latinos." Rather, most Latinas/os hold a more practical attitude toward assimilation that keeps both cultures afloat. Their attitude is reflected by a 1998 national survey concluding that Latinas/os overwhelmingly favor bilingual education programs designed to facilitate the learning of both Spanish and English.

3. The Eyes and Ears of Alert Citizens

Vigilante violence directed at Latinas/os has a long history in the United States. A Texas historian has recounted the scores of Lynchings and mutilations of Mexicans in Texas in the 1800s. In the 1850s, many Mexicans were whipped, branded, or hung by vigilantes who enforced laws in the California gold rush days. One vigilante at the time proffered that "To shoot these Greasers ain't the best way. Give 'em a fair trial, and rope 'em up with all the majesty of the law. That's the cure." These attitudes of indifference toward Latina/o life have survived into the present day, with "wetbacks" and "illegals," or those perceived to be undocumented, as the primary targets of violence and threats of violence. In the mid-1990s, vigilante groups in California began to police the San Diego airport as the "Airport Posse" to search for and to intimidate any arriving undocumented immigrants. Wearing blue and yellow T-shirts with the words "U.S. Citizen Patrol" and a Border Patrol-like logo, these vigilantes patrolled the airport taking notes, reminding airport personnel to enforce the FAA rule requiring proper photo identification, and inspecting and subjecting those with a Latina/o appearance to scrutiny as if they were a prison chain-gang. The Border Patrol and the INS took no official position against the patrolling, with one INS spokesperson suggesting "[They're] exercising their constitutional right to be at the airport, just like the guy playing his tambourine." In the earlier but similarly minded "Light Up the Border" campaign, vigilantes in Southern California would gather by the hundreds in 1989 and 1990 to shine their car headlights at the border toward Tijuana to deter night crossings - eventually they were met by counter-demonstrators holding up mirrors and reflective foil.

Since 1994, federal border enforcement policies have directed migrants away from urban centers and freeways in Southern California and toward the sparsely populated California and Arizona deserts. This increased foot traffic led ranchers in Arizona to arm themselves and to initiate vigilante patrols - first as property owners ostensibly to protect against property damage, later as activists to draw attention to what they regarded as a foreign invasion and a threat to national security. A leaflet surfaced in April 2000 that invited volunteers to park their recreational vehicles on Arizona border ranches and to help patrol them as part of the "American Way Team" while "enjoying the great southwestern desert at the same time." In late 2000, volunteers in Texas formed the organization Ranch Rescue and solicited for "volunteers from all over the USA" to help protect border ranches from trespassing immigrants.

The most prominent Arizona vigilante ranchers are brothers Roger and Donald Barnett who patrolled a 22,000 acre ranch with binoculars, an M-16 automatic rifle, and a tracking dog. In 2000, they boasted of capturing as many as 170 "illegals" in one day and turning them over to federal authorities. As Roger Barnett described his quarry:

They move across the desert like a centipede, 40 or 50 people at a time ... You always get one or two [of those caught] that are defiant ... One fellow tried to get up and walk away, saying we're not Immigration. So I slammed him back down and took his photo. "Why'd you do that?," the illegal says, all surprised. "Because we want you to go home with a before picture and an after picture - that is, after we beat the shit outta you." You can bet he started behavin' then.

Although Latina/o immigrants have been the primary targets of vigilante violence directed at Latinas/os, this violence reaches all corners of Latina/o life in the United States. In early 2002, for example, dozens of Latina/o lawyers along with activists and community groups throughout the United States, received a hate letter ending with, "And by the way, watch out for the white powder stuff in this envelope." Each envelope contained white powdery granules that tested negative for anthrax.
The government's response to the terrorist events of September 11 will only aggravate the public's inclination to assume its role as vigilantes, enforcing media-fueled conceptions of legal obligations and the public good. Unfortunately, this vigilante climate will ensnare many innocent parties, including Latinas/os. Because undocumented immigrants are portrayed as a national security threat, as would-be terrorists, it is likely that the public will see its role as extending to the enforcement of open-ended anti-immigrant agendas. In this frenzied public and private hunt for would-be terrorists and those who might aid them, vigilant ranchers in the Southwest, rather than being criticized for abusing the human rights of vulnerable immigrants, might be valorized as heroes helping to control border "security breaches." Citizens employing profiling to harass those with Latina/o appearances by seeking to confirm their citizenship might be seen as carrying out the vital function of ensuring that those present in the United States who appear to be foreigners are not interlopers with terrorist agendas. In President Bush's 2002 State of the Union Address, he called upon the "eyes and ears of alert citizens" to help defend against terrorism. Bush gave the example of the airline crew and passengers who subdued the so-called shoe bomber. Such requests for airline passengers to assist in detecting and preventing terrorist plots serve to deputize the public in law enforcement practices. Will the events of September 11 revive the Airport Posse patrols, with Latinas/os among their primary targets?

Further, consider the implications of Bush's call for citizens to look and listen alertly. Harbor ing false conceptions of Latinas/os as unpatriotic, as criminally inclined, as drug smugglers and drug users, and as predominantly non-citizen and even "illegal," our citizenry might be inclined to direct their eyes toward those of a stereotypical Latina/o appearance. At the same time, their ears may be alerted to the speaking of Spanish as the mark of a secretive terrorist plot (or at least as indicating a scheme to "rob the place"). Already the subject of public suspicion and of doubt over their patriotism, Latinas/os can expect greater scrutiny in not just the eyes and ears, but in the minds of the American citizenry.

III

Reimagining Nationhood in the Wake of September 11

In the chaos following the September 11 tragedies, Americans sought desperate comfort in the idea of nationhood, if only as defined by unity against a common enemy. It seems evident that even before September 11 we were struggling with articulating a common vision of what it means to be American. For some, anti-immigrant sentiments in the 1990s forged a narrow Eurocentric vision of nationhood based on commonalities of history and heritage that viewed immigrants as disruptive anti-nation forces. September 11 bolstered proponents of this ancestral unity. By contrast to homegrown terrorism by such operatives as Timothy McVeigh, these latest atrocities could be blamed on immigrants, on foreigners, on "Others" - on those who speak different languages, practice different religions, and adhere to different traditions, customs, and mores than those an ancestral vision would countenance. Under this homogenous conception of nationhood, the racial profiling of nation-threats, the strengthening of assimilative pressures, and the militarizing of borders all appear natural policies toward ensuring ancestral and cultural unity.

Here, I add my voice to the faint chorus of those seeking to articulate a new expansive vision of nationhood - one of cultural diversity. As Bill Ong Hing has described it, this multicultural definition of America and Americans must "embrace differences rather than attack them. It must respect diversity rather than disregard it. It must appeal to a sense of unity that incorporates multiculturalism rather than the illusion of Eurocentric unity ... ". Consistent with such a vision, Americans must forge a humanistic unity marked by the respect of different cultures and their contribution to America, a recognition of human rights, and an acknowledgment of the invigorating effects of immigration. This multicultural vision of nationhood would regard racial profiling with great suspicion, would consider the human consequences of militarizing and securing borders on immigrants drawn to the United States by employment opportunities rather than by evil intent, and would resist the pressures of assimilation that purport to pronounce one culture and language as superior and the rest as anti-American and subversive.

In a nation valuing multiculturalism and human rights, the constitutional rights of due process and freedom from unreasonable search and seizure would not so readily be tossed onto the bonfire of rights flaring since September 11. In this post-September 11 climate of intolerance and self-censorship in which those questioning the wisdom of the war on terrorism and the military campaign against Iraq are regarded as terrorists themselves, the protections of the First Amendment seem distant. By contrast, a nation valuing cultural diversity would view hate speech directed at subordinated groups as unacceptable in a multicultural society - indeed, as domestic terrorism striking at the core of America's multicultural soul.
While reimagining nationhood, we must look beyond our national borders. Latina/o commentators Patrisia Gonzales and Roberto Rodriguez have reminded us that we hold the "opportunity not simply to ask what it means to be an American and what kind of nation we want to live in."\textsuperscript{n97} As well, we "face a historic opening to explore what it means to be human and what kind of world we want to live in."\textsuperscript{n98} Best wishes for peace.

**FOOTNOTE-1:**


\textsuperscript{n2} See Volpp, supra note 1, at 1584 n.30 (suggesting any post-September 11 passage of Latinas/os and certain other subordinated groups as "Americans" will be a momentary phenomenon).

\textsuperscript{n3} Earlier, the longrunning Cold War impeded activism by Latina/o farmworkers, whose leaders were branded Communists. Similarly, the war on terrorism can be used to justify keeping subordinated groups in their place.


\textsuperscript{n6} See generally Steven W. Bender, Greasers and Gringos: Latinos, Law, and the American Imagination (forthcoming 2003).

\textsuperscript{n7} Kim Murphy, Olympic Hospitality an Irony for Utah Latinos, L.A. Times, Feb. 8, 2002, at A1 (quoting a statement made by Ken Thompson).

\textsuperscript{n8} See generally Bender, supra note 6, at ch. 4.

\textsuperscript{n9} Professor Carmen Gonzalez, Remarks at LatCrit VII Plenary Session "Political Violence, 'Terrorism,' and the Criminalization of the Other" (May 3, 2002) (suggesting the term "narco-terrorists").


\textsuperscript{n11} Peter Andreas, Border Games: Policing the U.S.-Mexico Divide 43 (2000); see generally Frank Rudy Cooper, The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu, 47 Vill. L. Rev. 851 (2002).

\textsuperscript{n12} Nick Gillespie, Poor Results, Risky Tactics, A Good Time to Re-evaluate Border Policy, Arizona Republic, June 30, 1997, at B5; Marines Delayed Calling Medical Aid in Border Shooting, Texas Ranger Says, Arizona Republic, June 21, 1997, at A4. The Marine who fired the fatal shot was investigated by a local grand jury and the Justice Department but not charged; a lawsuit by Ezequiel's family resulted in a substantial settlement from the federal government.

\textsuperscript{n13} The most vivid small screen depiction to date of Mexicans and Mexican Americans as drug dealers is the 2003 NBC miniseries Kingpin. American media also constructs Puerto Ricans, Cuban Americans, and Latinas/os of other origins as drug dealers and drug users. See generally Bender, supra note 6, at ch. 4 (describing films depicting drug dealers of Mexican, Puerto Rican, Cuban, Colombian, and Dominican backgrounds).

\textsuperscript{n14} News reports on the number of Americans killed in the raid on Columbus
differ; some put the number as seventeen, others eighteen. The Mexican government later compensated the families of the victims.


n19. E-mail from MerchantBen<at>aol.com to University of Oregon MEChA (June 17, 2002) (on file with author).


n21. Stewart M. Powell, Terror Recruits in U.S. a Danger, Times Union (Albany), June 15, 2002, at A1. Many Latinas/os, such as myself, cringe at the news of a suspected Latino serial killer or child killer, mindful that a single individual can influence public conceptions of Latinas/os on the basis of their ethnicity. Cf. Leti Volpp, Blaming Culture for Bad Behavior, 12 Yale J.L. & Human. 89 (2000) (suggesting that undesirable behavior when undertaken by a white person is viewed as an individual bad act but when performed by a person of color is reflective of a racialized culture).


n23. Id. See also Ronald Fernandez, Los Macheteros: The Wells Fargo Robbery and the Violent Struggle for Puerto Rican Independence (1987) (detailing the history of another independence group employing violence, Los Macheteros, considered a terrorist organization by the FBI).


n28. Apart from the consequences that I address below, arguably the most compelling short-term effect of the September 11 attacks and the consequent war on terrorism has been the economic impact on subordinated groups. Even second-generation Latinas/os have been hit hard by the economic recession's effect on manufacturing and retail trade, which accounts for forty percent of Latina/o employment. Latina/os are also heavily employed in the ailing transportation and hospitality industries. In economic recessions, negative sentiments tend to emerge toward societal groups such as Blacks and Latinas/os who are thought to be unduly reliant on welfare and social services. Further, an open-ended war on terrorism may have long-term consequences in diverting government revenue otherwise available for social programs, thus building momentum toward mean-spirited welfare reform proposals.


n30. Murphy, supra note 7.


n33. Consistent with the attention focused on non-citizens as terrorist threats, there has been a surge in applications for U.S. citizenship after September 11. Jonathan Peterson, In Tragedy, an Emotional Surge in Citizenship Hopes, L.A. Times, July 24, 2002, at A1 (reporting a 65% increase in national requests for citizenship following September 11, with an increase exceeding 100% in Los Angeles). Related to citizenship requirements for employment are legislative efforts underway in several states (including Oregon) to target undocumented and even documented but noncitizen individuals seeking a driver's license. See generally Sylvia R. Lazos Vargas, Missouri, The "War on Terrorism," and Immigrants: Legal Challenges Post 9/11, 67 Mo. L. Rev. 775 (2002) (examining such proposals).

n34. Operation Gatekeeper is the reference to border build-up near San Diego; border build-up goes by different names in other urban areas, such as Operation Hold the Line in the El Paso region.

n35. See generally Bender, supra note 6, at ch. 8.


n41. Pat Doyle, Ethnic Profiling Revisited, Star-Trib. (Minneapolis-St. Paul), Sept. 30, 2001, at 1A.

n42. Thomas W. Joo, Presumed Disloyal: Wen Ho Lee, The War on Terrorism and the Construction of Race (manuscript at 32, on file with author).


n45. Marlon Vaughn, Parent: Hispanic Daughter Has Been Subject of Taunts, Flint J. (Michigan), Sept. 15, 2001, at A5; see also Diane Dietz, Suspicion Makes for Fearful Patriots, Register Guard (Eugene, Or.), Mar. 5, 2003, at D1 (reporting that most victims in Lane County of verbal and physical attacks directed at Muslims and Arab Americans since September 11 are Hispanic).

n46. Akram & Johnson, supra note 1, at 351.


n51. Kathleen Monje, Suit Accuses Tavern of Bias Against Spanish-Speakers, Oregonian (Portland), Oct. 12, 1990, at D1 (describing lawsuit against an Oregon tavern with an English-Only policy for customers); see generally Bender, supra note 6, ch. 6.


n53. Aimee Green, Yakima Tavern Owner Wins Case - but Judge Ruled that English-Only Sign is Insensitive, Seattle Times, Jan. 16, 1997, at B3.


n59. Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1408 (9th Cir. 1987) (upholding summary judgment against disc jockey who failed to produce sufficient evidence that station's English-Only policy was racially motivated or that he was discharged on the basis of discriminatory employment criteria).

n60. In Title VII disparate impact claims, the plaintiff must establish that the policy in question causes a discriminatory impact; once established, the employer must prove the challenged practice is consistent with a legitimate business necessity. Even if so proven, the plaintiff might still prevail by demonstrating a less discriminatory alternative exists. Most English-Only workplace policy challenges run aground at the first stage of the disparate impact analysis. Particularly troubling, some federal courts have taken the position that bilingual employees are not impacted by English-Only rules, as they can simply switch their language as required. E.g., Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980). Gloor involved a challenge by a bilingual lumber store employee who was fired for violating the employer's English-Only policy when he responded in Spanish to a question in English from another Latino employee about an item a customer had requested. Although the EEOC by administrative guideline has determined that English-Only rules have a per se discriminatory impact on language minorities, the Ninth Circuit Court of Appeals has refused to apply the guidelines, forcing the plaintiff to establish disparate impact in order to compel the employer to come forward with a showing of a legitimate business purpose. Garcia v. Spun Steak Co., 998 F.2d 1480, 1486 (9th Cir. 1993); Colon, supra note 57, at 233-34.
n61. Davis, supra note 58.


n63. Stuart Silverstein, Decision Won't Speak to All Firms, L.A. Times, June 21, 1994, at D2 (noting English language policies are common at hospitals in urban areas with large immigrant populations).

n64. Greg Jaffe, Rumsfeld Closes Pentagon Office Amid Concerns, Wall St. J., Feb. 27, 2002, at A4 (attributing office closure to news reports contending the office was designed to spread disinformation, which Rumsfeld claimed were inaccurate).


n67. See Gilbert Paul Carrasco, Latinos in the United States: Invitation and Exile, in Immigrants Out! The New Nativism and the Anti-Immigrant Impulse in the United States 195-96 (Juan F. Perea ed., 1997) (noting the irony that upon returning home, Mexican American soldiers from WWII faced discrimination - describing a Texas funeral parlor's refusal to bury a decorated Mexican American soldier, and a restaurant owner's refusal to serve a one-time sergeant who was Mexican American).

Apart from loyalty in military service, Americans saw Latina/o vocalists Enrique Iglesias and Gloria Estefan among those performing in the NBC special, Concert for America, broadcast September 11, 2002. New York City police officer Daniel Rodriguez, having sung The Star Spangled Banner at Yankee Stadium during the memorial service for attack victims, has since recorded a CD, The Spirit of America, containing the tenor's recordings of God Bless America, The Star Spangled Banner, and other patriotic favorites.

n68. Luis Reyes and Peter Rubie, Hispanics in Hollywood: A Celebration of 100 Years in Film and Television 20 (2000).


n70. Mariscal, supra note 69, at xii (quoting a column by Buchanan in the Washington Times, Jan. 23, 1995). Buchanan's remarks may also reflect his inaccurate perception of Latinas/os as undocumented immigrants without roots in the United States.


n72. Mariscal, supra note 69, at 187.

n73. Shootings Examined as Possible Backlash, Fort Worth Star-Telegram, Sept. 17, 2001, at 1.


n79. Id. at 71.

n80. See generally, Bender, supra note 6, at ch. 8.

n81. Tony Perry, Citizens on the Lookout for Illegal Migrants, L.A. Times, May 19,


n83. See generally, Bender, supra note 6, at ch. 8.

n84. Id.


n88. Id.

n89. Id.


n91. Id. The Sacramento office of MALDEF provided me with a copy of this letter, which is signed by Vashudey Chauhan, an apparent forgery of a signature of someone who is not a suspect. Touching on most every negative conception of Latinas/os, the hate letter provides in relevant part:

You stupid, fucking, spic turds...

I am so sick of Hispanics - spics for short - complaining about being discriminated against, when in fact you owe all of what you have to the generosity and capable leadership of the white population at large. If it weren't for affirmative action, you would probably all still be bean pickers and prostitutes. Every time you try to do something on your own, you fuck up. Take bilingual education, for example. Now we are going to have to admit a whole generation of spics into college who will be even stupider than they would have been otherwise...

Since you grease balls still can't run your own countries effectively, like rats escaping a sinking ship, we get more and more of your wet back asses to care for. If that isn't bad enough, your whore-women can't keep from getting knocked up and producing more mongrel-spics that the rest of us have to provide welfare for.

I never had anything given to me for nothing, and I am college educated and own my own house that is big enough to hold an entire barrio of useless drug pushers.

Letter to MALDEF (actual identity of author unknown), Apr. 5, 2002 (on file with author).

n92. The founder of one border vigilante organization, Civil Homeland Defense, warned in March 2003 at the onset of war in Iraq that its armed border militia would substitute for the "void in national security" left by reassignment of Border Patrol agents to wartime prerogatives. Founder Chris Simcox declared a "message to the world" of "Do not attempt to cross the border illegally; you will be considered an enemy of the state; if aggressors attempt to forcefully enter our country they will be repelled with force if necessary!" E-mail from Chris Simcox to LARED-L<at>list serve.cyberlatina.net (Mar. 20, 2003) (on file with Oregon Law Review).


n98. Id.