Thinking Critically About Equality: Government Can Make Us Equal

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PROLOGUE

We called it “having to use the old noodle” when we were kids: needing to think real hard about something, usually about something that was real hard to think about. It was the kind of thinking that would cause your face to get all scrunched up, and if you didn’t stop or if someone didn’t stop you – it was the kind of thinking that would eventually make your head hurt. We had to use the old noodle in school of course – especially with arithmetic – but we had to use it at home with our families too, and out on the street with our friends. We had to use the old noodle the morning we heard that the principal was so mad at the kids who messed up the civil defense drill that he was “beside himself” with anger (which was hard to visualize); we had to use it hard the time our folks finally gave in to our entreaties and insisted that they loved each of us – brother and sister – the very most (it didn’t much settle the debate); and we had to use it real hard the day our baseball bat – our only baseball bat – broke in the middle of a tie game, an eventuality that, as far as we knew, had never confronted

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* Professor of Law, Widener University School of Law. Professor Hayman would like to thank AnnMarie Stergakos for her research assistance, and his folks and family for their efforts to teach him to “use the old noodle.” With great humility, he would like to dedicate his efforts on this project to the memory of Professor Martin Levit, an extraordinary role model for critical and compassionate thought.

** Professor of Law, University of Missouri-Kansas City School of Law. Professor Levit would like to thank Professor Robert R. M. Verchick for his helpful suggestions on a draft of this article. She would like to dedicate her efforts on this project to Caleb William Hayman, who has in front of him a lifetime of learning “how to use the old noodle,” and who could not have chosen a more thoughtful, loving, and nurturing set of parents to help him do so.
the big leaguers, who otherwise might have invented "wall ball" before we did (but only, of course, if they too had been willing to "use the old noodle").

The expression came directly from our families, from what they used to say when we figured something out: "that's using your old noodle," they'd tell us, often with evident pride. The "noodle" we eventually understood to be our heads, or, more specifically, our brains, which, we reckon, do look something like noodles, though we were quite unaware of that fact at the time. At the time, "using your noodle" was just one of those quasi-mysterious things our folks would say, and that we could make sense of in a practical sort of way, and use and adapt for our own kid conversations. And so as kids we "used the old noodle," at least every now and then.

There is no rule, of course, that says that only kids can use the old noodle: you don't have to stop when you grow up, even if you do have to call it something different and more distinguished, like "problem solving" or "critical thinking." The authors of this article are, for example, grown-up law teachers, which means that, whatever they call it, they are pretty much professional noodle users. Or they should be, which is the point of this article.

This brings us to our problem. Explaining his opposition to affirmative action — even to affirmative action in the very mild form of a rebuttable presumption that minority businesses are at an economic disadvantage — Supreme Court Justice Clarence Thomas offered what may well be the anti-egalitarian maxim for the new millennium: "Government cannot make us equal."1 Some folks — a lot of them, if our experience is any indication — see something quite appealing in this pithy little quote. Its attraction, however, seems to us only superficial. In fact, we are fairly certain that the proposition is quite wrong, both positively and normatively. Government can make us equal, and, under current circumstances, it should. But demonstrating the errors in the proposition — proving it wrong — is no easy matter. It will take, we think, some

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serious use of the old noodle.

Fortunately, on this score, we have had good role models: our folks, our families, our friends.

And Rodrigo.

I. INTRODUCTION

Professor Richard Delgado is one of the acknowledged founders of Critical Race Theory, one of its contemporary leading figures, and one who, through his energy and intellectual courage, has helped transform Race Theory into a powerful social movement. He is also the single most prolific law professor in the country; in some years he has published more individually than have entire faculties at schools ranked among the top twenty in the nation. His innovative contributions include the following:


making the case to strip hate speech of First Amendment protection; demonstrating the resistance of the "imperial" legal academy to outsider scholarship; championing the value of narrative scholarship as a means of challenging received wisdom; and relentlessly demonstrating the ways legal rules perpetuate racism.\(^4\)

We believe, however, that one of Delgado's greatest contributions remains unheralded. In his three books recording discussions between his fictional characters, Rodrigo Crenshaw and the Professor, Delgado endeavors to change the structures of thinking. He works to promote skeptical inquiry, to resist the norms of conventional thinking, to reverse what is viewed as normal and abnormal, to create the ability to see acts of power, and to insist relentlessly on an awareness of the human condition. What he offers is a template for "critical thinking" in two senses — not just the radicalism associated with Critical Legal Studies ("CLS") and Critical Race Theory ("CRT") of questioning received wisdom, but even more importantly, "critical thinking" in the most basic philosophical sense. He is concerned with the criteria by which we test notions of justice, fairness, and equality — in short, the criteria of knowledge and reasoning.

In this article, we develop the idea of "critical thinking" as a concept of basic philosophy and race reform. By "critical thinking," we mean both the criteria of good reasoning and

propositions that, if widely understood, would make a large percentage of the populace revise its background beliefs and world views. To operationalize this concept of critical thinking, we apply it to test Justice Thomas's assertion that "Government cannot make us equal."

II. THINKING CRITICALLY ABOUT LAW

A. The Critique of Law and the Legal System

A principal doctrinal critique offered by Critical Race Theory is its challenge to the objectivity of purportedly neutral legal rules. Neutral rules assume a level playing field and a contemporary focus. "Neutrality," says Delgado, "employs a sort of 'freeze-frame' approach, looking only at present factors, when redressing racism requires a longer view."\(^5\) Neutral rules do not seek or even admit history or context, and they thus "cannot do justice to the thickly embedded historical nature of American prejudice."\(^6\) Laws that are facially neutral thus fail to redress racism because the reasoning behind such laws is incomplete.\(^7\)

This doctrinal critique is tied to a political and structural critique of the legal system. The legislative arena will not cure

\(^5\) Delgado, The Rodrigo Chronicles, supra note 4, at 75.

\(^6\) Id. "Rules relating to ripeness, mootness, and standing mean that the court can only consider the case before it, not the broad story of dashed hopes and centuries-long mistreatment that afflicts an entire people and forms the historical and cultural background of your complaint." Delgado, The Coming Race War?, supra note 4, at 29.

\(^7\) Neutrality may provide equality of process, but it will not ensure equality of results. See Kimberle Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331 (1988).
racism. The American public, enchanted with the notion of equality of opportunity, is willing to avert its gaze from the inequality of results. Thus, the conservative stronghold in state legislatures has been able to champion procedural equality while rolling back measures that move toward real, substantive equality. Witness the passage of “English-only laws, restrictive immigration reform, and the virtual dismantling of the welfare net, Head Start, and affirmative action programs that are used to enable a few people of color to rise.”

Similar attacks have occurred in academia, such as in the undermining of “diversity programs on college campuses, minority scholarships, ethnic studies program[s], and [the number of] professors of color.”

Thinking critically about racism entails a need to evaluate whether the legal system is capable of addressing structural racism. Many of the most important answers to systemic problems of racial injustice will not, indeed cannot, be found in law because of the ways in which law works and the ways racism operates. Racism infects every feature of our lived existence, from racial differences in the provision of government services, such as education, health care, voting rights, and employment opportunities, to racial differences in the experience of private transactions, such as renting an apartment, hailing a taxi cab, or reading children’s books. Yet, racism most often stems from unconscious prejudices, not from knowingly hostile acts.

Law’s traditional mechanisms are ineffectual in eradicating

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8 DELGADO, WHEN EQUALITY ENDS, supra note 4, at 225.
9 DELGADO, THE COMING RACE WAR?, supra note 4, at 100.
systemic and structural prejudices. Law is incapable of responding to prejudices that are unconscious, unthinking, or merely negligent. Even with scrupulously fair rules, decision-makers still hold prejudices, and the law seems willing to accept traditional excuses for racism: "[t]he breach was unintentional. It was justified by a business necessity. There was another cause for the rejection." Furthermore, the legal system resolves disputes in piecemeal fashion. "It can only solve the case before it . . . . And since racism is systemic, rather than episodic, intrinsic to the culture rather than an aberration, the normal rather than the abnormal, law cannot see or redress it." The atomistic approach of case-by-case adjudication makes it seem that each individual instance of racism is discrete, isolated, and exceptional. Even worse than its inefficacy is the misplaced faith that law creates in the notion of rights litigation as a tool of race reform. Rights litigation can lead to incremental gains, but too often at the price of greater losses in the future. One such sacrifice is the way rights thinking encourages a focus on the individual litigant rather than the "group dimension" of racism. And even victories become losses, because rights, "once won, tend to be cut back."

Some less traditional theorists have looked for

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13 "In our society, even a decision-maker with the most pristine racial conscience, one without a trace of prejudice against minorities, would still end up making decisions adverse to candidates of color. It has more to do with the cultural background against which legal criteria are applied than with any sort of overt antiminority conspiracy." DELGADO, THE RODRIGO CHRONICLES, supra note 4, at 63.
14 Id. at 53.
15 Id. at 152.
17 DELGADO, THE RODRIGO CHRONICLES, supra note 4, at 119.
communitarian or process-based solutions to legal injustice. Yet these dialogic solutions will fail to solve systemic social inequities because "[s]ociety doesn’t see – can’t see – faults in the paradigm, the very structures by which we communicate, make ourselves understood, explain, understand, and construct reality. We won’t listen to blacks, because we have assigned them low status, low credibility in the stigma-pictures we’ve made of them and still disseminate."  

Structurally, law denies the existence of racism. Law cannot reach racism through current doctrinal approaches and, with its focus on equality of opportunity, misdirects attention away from equality of results. Law ultimately becomes a force that perpetuates some of the worst myths about people of different races. The focus on equal opportunity allows the white majority to congratulate itself that racism, which it defines as inequality of opportunity, is now a thing of the past. Thus, Delgado writes: 

Since minorities and whites are now definitionally equal under the law, we can tell ourselves that that problem is solved. . . . The problem cannot be our fault, since we’ve put in place all these wonderful legal rules that mandate equal treatment. If minorities of color haven’t been able to prosper with such rules in place, then the problem must lie with them. They must be shiftless, or immoral, or not very smart.  

The commitment to equality – America’s preferred version – thus constructs a blame system that denies the very existence of racism. It is against this structural backdrop – the sharp divide between equality of opportunity and equality of results, the atomistic and piecemeal nature of rights in our adversarial system, and the recognition that dialogic solutions will be ineffectual to redress

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19 Delgado, The Rodrigo Chronicles, supra note 4, at 103.  
20 Id. at 67.
racism so long as stereotypes persist in casting minority race members as unworthy of being heard – that the jurisprudential critique begins.

B. The Jurisprudential Critique

1. The Ethereal Scholar: Critical Legal Studies

Early "critical" theorists, the Critical Legal Studies adherents, did not have a unified program, but were joined together in what Robert Gordon termed "our common disenchantment with liberal legalism."21 Their fundamental disagreement with liberal political theory was its tradition of individual rights, which focused on what rights-holders could do vis-à-vis the state. This rights-orientation misdirected individuals' attention away from each other as members of a community.22 Supposedly neutral principles of law cloaked the exercise of political power with false legitimacy.23 Law was thus "simply politics by other means."24

While Critical Legal Studies excelled at debunking liberalism, it offered little analytical attention to the plight of racial minorities.25 As Anthony Cook observes, "CLS consistently deemphasizes the individual and institutional experiences of those

who are subjugated” and fails to ask how or why the process of domination continues to occur.\textsuperscript{26} The early Critical Race theorists took the CLS challenge to neutral principles in a new direction, arguing not that neutral principles were unattainable, but that they are part of the race problem. Conservatives use purportedly neutral principles, such as the concept of formal equality, to “replicate, not remedy, white-over-black domination” because they “treat racism as an anomaly, an illness, a . . . deviation from a status quo or baseline assumed to represent equality.”\textsuperscript{27} But, as Delgado reminds us, “most racism is not a deviation.” It is ordinary, normal, and ingrained.\textsuperscript{28}

The only way Critical Race Theory will change the structures of thought is if it shoots for the right targets. Race Theory should have fewer quarrels with liberalism and more with conservatism:

The primary obstacle to racial reform today is not liberalism, much less an inadequate account of the self, but rather out-of-control, rampant, in-your-face conservatism. And the principal challenge for racial reformers – in my opinion, at least – is not to write yet another article on the phenomenology of multiple consciousness or the need for universal love but to resist the conservative juggernaut that is rapidly revising the American landscape, appointing conservative judges, enshrining antiminority attitudes and measures into the law, repealing welfare, and rolling back three decades of civil rights progress.\textsuperscript{29}

\textsuperscript{26} Anthony E. Cook, \textit{Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.}, 103 HARV. L. REV. 985, 992 (1990) ("Thus CLS’ theoretical deconstruction of liberalism fails to explain – or even ask – why subordinated individuals, those most disadvantaged by hierarchies of wealth and power, place such faith in the liberal state.").


\textsuperscript{28} \textit{Id.} at 1393-94.

\textsuperscript{29} DELGADO, \textit{WHEN EQUALITY ENDS}, \textit{supra} note 4, at 231-32.
The method by which race reform is cast as an impossible demand is conservatives’ depiction of racism as an aberration, something unusual that needs just a little fixing. If racism is viewed as the errant behavior of a few citizens, it becomes a subjective or personal pathology, beyond the reach of government or its laws. Critical Race theorists have paid careful attention to debunking the myth of racism as abnormal pathology. Racism is “systematic and ingrained.”\textsuperscript{30} It “is the ordinary state of affairs in our society. It’s the norm, not the one-time-only, easily-fixed aberration.”\textsuperscript{31} As former Representative Shirley Chisholm explains, “[r]acism is so universal in this country, so widespread and deep-seated, that it is invisible because it is so normal.”\textsuperscript{32}

If racism is an ordinary feature of experience, it will naturally go unnoticed and will be hard to resist by the uncritical observer. Furthermore, given that it generally exists below the threshold of perception, racism will be difficult to remedy. Thus, one of the most important Critical Race arguments challenges conventional ways of thinking about what is normal and not normal. We must continually resist the normalization of inequality of results.

2. Demanding Authenticity: Legal Formalism

Mainstream jurisprudence’s neutrality is bogus, a mask, a cover. In Feminist Theory, Catherine MacKinnon has been saying the same thing – that the law’s procedural regularity, its emphasis

\textsuperscript{30} Critical Race Theory: The Key Writings that Formed the Movement xiv (Kimberle Crenshaw et al. eds., 1995).

\textsuperscript{31} Delgado, When Equality Ends, supra note 4, at 64.

\textsuperscript{32} Heart Full of Grace 223 (Venice Johnson ed., 1995) (quoting Shirley Chisholm).
on 'legality,' serves to conceal and legitimate an anti-women bias.\textsuperscript{33} In addition to identifying fallacies in traditionalists' syllogistic reasoning, Critical Race theorists have demanded evidentiary accuracy. One feature of critical thinking in philosophy is its relentless insistence that theorizing comport with facts about the social condition -- and its corollary that the facts that are selected as important for purposes of theorizing is a value-laden endeavor.\textsuperscript{1} Race theorists have stressed the importance of bringing to light empirical facts about racism. They have used a variety of economic indicators and statistical measures of racial progress to demonstrate not only continuing, but also widening, racial disparities.\textsuperscript{35} Some have explained the ways in which historical racism enduringly contaminates current thinking about members of racial minorities.\textsuperscript{36} They have catalogued the violence directed against oppressed racial groups,\textsuperscript{37} and the stereotypes by which minority group members are evaluated. Also, they have documented inequities in almost every facet of the life experiences of racial minorities, from health care to car-buying,\textsuperscript{38} from inferior public education and housing to discrimination in employment,\textsuperscript{39} from exclusion from economic opportunities and professions to political powerlessness.\textsuperscript{40} In short, Critical Race theorists have

\textsuperscript{33} See Delgado, The Rodrigo Chronicles, supra note 4, at 61.
\textsuperscript{34} See Stephen W. Ball, Facts, Values, and Interpretation in Law: Jurisprudence from Perspectives in Ethics and Philosophy of Science, 38 AM. J. JURIS. 15, 30 (1993).
\textsuperscript{36} See, e.g., Robert L. Hayman, Jr., The Smart Culture: Society, Intelligence, and Law (1998).
\textsuperscript{39} See, e.g., Oppenheimer, supra note 10, at 958-77.
looked at historical records, cultural records, and evidentiary records for empirical data; each social indicator examined attests to the sweeping, systemic inequalities that racial minorities face.

Factual precision is one characteristic of good reasoning; theoretical accuracy is another. One way to test the legitimacy of legal theories is to see if they comport with theories from other disciplines. Critical Race theorists have insisted that legal theories must possess external validity—that they be consistent with the generally accepted body of knowledge in disciplines other than law. One principle of scientific rationality is that theories that build on cumulative, comprehensive, and converging evidence from a variety of disciplines are more likely to be valid theories.41 Race theorists have explored disciplines outside of law to investigate the existence and impact of racism, to understand the nature of stereotyping, and to comprehend the social construction of races.42 In Delgado's hands, this thinking outside of legal theory has entailed examinations of cognitive habits or heuristics,43 and explorations of psychological tendencies and biases in interactions.44 It has also involved cross-cultural and institutional

41 See H. MARGENAU, THE NATURE OF PHYSICAL REALITY 87 (1950), quoted in Nancy Levit, Listening to Tribal Legends: An Essay on Law and the Scientific Method, 58 FORDHAM L. REV. 263, 270 (1989) ("Constructs admissible in science must be multiply connected; they may not be insular or peninsular.").

42 See, e.g., Jody Armour, Stereotypes and Prejudice: Helping Legal Decision Makers Break the Prejudice Habit, 83 CALIF. L. REV. 733 (1995); DELGADO, WHEN EQUALITY ENDS, supra note 4, at 4; HAYMAN, supra note 36, at 88-166.

43 “Jack Balkin pointed out that people will resist changing their beliefs in the face of inconsistent evidence, preserving, as long as possible, their ontological stake in the former belief.” DELGADO, WHEN EQUALITY ENDS, supra note 4, at 14.

44 “[H]umans, left to their own devices, will not choose to deal with others they regard as different. They will not hire, trade with, or in general bring them into their circles of regard.” Id. at 43.
studies of human behavior and of the complex web of economic, cultural, linguistic, and historical forces that cause racism to endure.

3. **Introspection: Critical Race Theory**

One of Richard Delgado's primary contributions to the development and expansion of Critical Race thinking is his effort to challenge the dominant paradigms within Race Theory itself. Delgado and others began to apply the skepticism with which Critical Race Theory initially viewed the dominant discourse to Race Theory itself. This included questioning racial...

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45 See id. at 48, 131 (testing whether formal or informal settings are most likely to provide procedural fairness by looking at the experiences of countries such as Canada, Great Britain, Italy and Germany, and institutions like the military or formal court proceedings).

46 Racism is so strongly supported by extramarket forces, including stereotyping and internalized, scarcely visible preconceptions. A thick web of culture, language, and institutional inertia discourages the competitive frenzy marketplace advocates place their faith in. If the market brings changes, they will come at best slowly and painfully. In the short run, minorities in the marketplace will confront a host of pseudo-economic stereotypes, including 'dull,' 'lazy,' and 'of bad character.'

Id. at 40-41.


classifications, challenging claims of neutrality and objectivity, and searching for hidden assumptions and essentialism.

In its early years, Race Theory was relatively “indifferent,” according to Juan Perea, to the plight of people of color other than blacks. Critical Race Theory was principally about the struggles of black people and the ways in which whites oppressed them. This theoretical focus on the conditions of former slaves was unsurprising since legal doctrine, particularly civil rights laws and “the equality-protecting amendments, were drafted with African-Americans in mind.” This black-white binary omitted from consideration the conditions of Latinos, Asians, other racial minority groups, and mixed-race individuals:

[T]he black-white binary conveys to everyone that there’s just one group worth worrying about. People conveniently forget that the early settlers exterminated 95 percent of the Indian population, or that many Puerto Rican, Chicano, and Indochinese families are just as poor and desperate as black ones. . . . Asians are the model minority – smart, quiet, sure to rise in a generation or two. Mexicans are happy-go-lucky cartoon characters or shady actors who sneak across the border, earn some money, and then send it to their families back home. No one today could get away with speaking of blacks in comparably disparaging terms.

As Delgado observes, “the structure of antidiscrimination law is dichotomous. It assumes you are either black or white. If

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50 DELGADO, *WHEN EQUALITY ENDS*, supra note 4, at 15.
51 *Id.* at 120.
you’re neither, you have trouble making claims or even having them understood in racial terms at all.”

The black-white paradigm created a hierarchy of races that relegated the problems of Latinos and other races to a subordinate status and excluded “other race” theorists from the racial discourse.

The black-white paradigm critique has led to a more complex understanding of the racisms that impact various communities. It was part of a broader project of self-reflectivity that developed the multiplicity of identity, examined the significance (and coherence) of borders and national boundaries, created insights into color hierarchies within races, explored conflations of ethnicity and race, and connected Race Theory to other outsider discourses. As a result of this self-critique, Critical Race Theory has become more exploratory, more attentive to the special situations and issues particular to discrete races, and perceived as less monolithic and theoretically stronger by traditionalists.

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52 Id. at 112. “[B]ecause only blacks were enslaved, and because civil rights law presupposes a black-white paradigm, the public has few qualms about treating Latinos badly.” Id. at 16.

53 See id. at 15.


III. THINKING CRITICALLY ABOUT CRITICAL THINKING

We need to confront the unfamiliar unmediated, take time to question our own presuppositions. We need to stand back and examine our own bubbles. For this, we need to seek out someone unlike us, someone who sees things with new eyes.\(^6^0\)

The impulse to think outside of the traditional paradigms of legal theory is a good one. Yet in what ways can we productively think about legal thinking without falling prey to the narrow vision problem of arriving at single normative solutions? What sorts of "critical" thinking can help legal theory?

One of the stumbling blocks of conventional legal theory is its tacit acceptance of certain constraints on thinking. For example: the inviolability of the First Amendment, the notion that empathy is a social good, and the expectation that judges will remedy social injustices. In true inquiry, ideas cannot be limited to expressions of wisdom already at hand; innovative thinking cannot begin with absolutes. As Delgado says, "[a]ll truth is paradoxical

\(^{60}\) Instead of weakening Critical Race Theory, the challenges [of LatCrit theory] seem to broaden its theoretical scope and enlarge its practical relevance, thereby strengthening its oppositional voice in mainstream jurisprudence."); Jean Stefancic, Latino and Latina Critical Theory: An Annotated Bibliography, 10 LA RAZA L.J. 423, 424 (1998) (noting that "LatCrit Theory calls attention to the way in which conventional, and even critical, approaches to race and civil rights ignore the problems and special situations of Latino people – including bilingualism, immigration reform, the binary black/white structure of existing race remedies law, and much more.").

\(^{60}\) DELGADO, THE RODRIGO CHRONICLES, supra note 4, at 103-04.
... It starts out with a question, goes underneath what is accepted."\(^{61}\)

Perhaps one of the greatest gifts of some critical thinkers is the courage of their experimentalism. For instance, Alan David Freeman suggests that civil rights litigants may have won their individual battles, but lost the war because so many people adhered to the Supreme Court’s holdings that these discrete (and surprising) instances of rights violations needed just minor remedies.\(^{62}\) Charles Lawrence challenges the received wisdom that the Equal Protection Clause is helpful to racial minorities, and urges people to think outside the confines of the equal protection box to reach pervasive unintentional discrimination.\(^{63}\)

When Richard Delgado questions what will break the relentless cycles of racism – and contemplates selective law-breaking, suppression of hate speech, and race wars – academic and popular press writers dismiss the ideas as “goofy,” “lunatic,” and “irresponsible.”\(^{64}\) In some instances, politically motivated law-breaking actually has a highly respected history: Rosa Parks’ refusal to yield her seat on the bus and the ensuing civil rights revolution, Abraham Lincoln’s insistence when suspending the writ of habeas corpus that he must ignore the Constitution in order to preserve it, and the role of the Boston Tea Party in the formation of the nation.\(^{65}\)

\(^{61}\) Id. at 144.


\(^{63}\) Lawrence, *supra* note 11.


\(^{65}\) See, e.g., *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487) (Taney, J.) (holding unconstitutional the refusal to obey a writ of habeas corpus by military authorities, who were acting at the direction of President Lincoln);
Experimentalism requires openness to the re-examination and modification of basic principles. It rejects idealistic absolutism, such as unwavering respect for the rule of law. It requires breaking out of the box of thinking conventionally.

Just as experimentalism refuses to accept fixed elements in the content of knowledge, it also continually re-evaluates methods of knowing. Here, Delgado urges attention to sources of information that are often overlooked and the embrace of conversational manners that will open dialogue with previously excluded groups:

> [W]hen you are having a conversation, look around you and see who has been speaking. If too many people of one sort are not talking, shut up for a while or try to draw them out... one rule would be that scholars who write about race should check up from time to time to make sure that they have standing — or at least that minorities, who have the most immediate stake in the controversy, are not shut out entirely. At least their views should be treated respectfully and not dismissed outright.  

Inquiry will not be promoted by reliance on familiar sources of knowledge, but in actively seeking out the unfamiliar and unconventional. Progress in knowing comes about not from adherence to typical patterns of dialogue, but from opening conversations, asking new questions, and critically re-evaluating

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standard epistemological methods.

A. **Reason and Truth: The Critique of Hyper-rationality**

In recent years, some traditionalists have endeavored to think about jurisprudence on a meta-theoretical level, working with foundational concepts such as reason and rationality. Unfortunately, their efforts have equated "reason" with a cramped, formalistic view of conventional thinking, and rationality with economic cost-benefit analysis.

Traditionalists insist that analytically rigorous scholarship promotes "reason" and "truth." Although this is a promising start to thinking about theorizing, these traditionalists do not explicitly define reason. They hint that their form of "reason" has the historical pedigree of Enlightenment reason, but also includes "pragmatism or practical reason." Practical reason is an elusive "grab bag [of methods] that includes anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, 'experience,' intuition, and induction." The methods of practical reason are not the methods of controlled inquiry, logic or scientific method. "At bottom we test our theories," says Posner, "by reference to our intuitions, the things we cannot help

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67 See Levit, supra note 64, at 800 ("The traditionalist meaning of reason is what the average person on the street would think about a given topic; it is a Victorian middle-class view of rationality. Rather than using the technical categories of the scientific method to discuss objectivity, reason operationally becomes what seems to be 'reasonable' to the mainstream in modern culture.").


69 See, e.g., Daniel A. Farber & Suzanna Sherry, Beyond All Reason: The Radical Assault on Truth in American Law (1997).

70 See Hayman, supra note 36, at 4; Jerome McCristal Culp, Jr., To the Bone: Race and White Privilege, 83 MINN. L. REV. 1637, 1665 (1999); Levit, supra note 64, at 800.


believing.” 73 This sort of pragmatism is not driven by inquiry, but by beliefs already on hand. 74

While traditionalists’ methods – even in revivified pragmatism – are subjective and unscientific, their standards for “reason” are equally internal, self-referential, and self-justifying. Reasonable positions for traditionalists are those based on typical or mainstream experiences. 75 Farber and Sherry, for example, rely on “widely shared judgments of merit.” 76 Nonmajoritarian thinking and experiences are expressly rejected as nonmeritorious. 77

These “common sense” methods of reasoning 78 are neither common – to all of us who are thinking about legal thinking – nor sensible. The main criterion by which these methods of reasoning are assessed is whether they reflect “our intuition” or resonate with “typical” experiences. In short, the operational definition of reasonability is circular: the typicality of experience is a valid measure of its analytic worth precisely because it is typical.

The consensus theory of reason also entails a profoundly nonscientific way of thinking. The only measure of the objectivity or truth of experiences is their typicality. Experiences that are

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73 Id. at 340.
75 See Levit, supra note 64, at 800.
76 FARBER & SHERRY, supra note 69, at 54.
77 See id. at 74 (“The storytellers fail to ask whether their stories are typical of the larger universe of law school or university hiring.”).
78 See Daniel A. Farber, The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law, 45 VAND. L. REV. 533, 536-37 (1992) (judges should decide cases “not by deductive logic, but by a less structured problem-solving process involving common sense, respect for precedent, and an appreciation of society’s needs.”).
atypical are considered *a priori* unreasonable. As we describe elsewhere,

[T]he traditionalist rejection of ‘different voices’ violates the way evidence is treated in science, history, sociology, and comparative psychology. What is ‘atypical’ in science is generally not rejected, but is accounted for by inquiry. The history of scientific reason is not one of excluding facts that do not conform to the theory.\(^79\)

Critical theorists think about reason differently. They explicitly move away from reason as typical community reactions or common sense thinking and move toward much more logically and empirically rigorous methods of analysis. Part of critical thinking as good reasoning entails using logic and syllogistic reasoning, and avoiding formal and material fallacies (fallacies of logical form and content).\(^80\) Some Critical Race theorists have noted the ways in which traditionalists have succumbed to using emotivism and *ad hominem* arguments in attacking Critical Race Theory. Richard Grenier succumbs to this by suggesting that “[a]t a swift reading of the new Crits’ scholarly texts it would appear that a black man can do no wrong, and that a white man can do no right – at least in his dealings with blacks.”\(^81\) Other Critical Race theorists have observed traditionalists’ use of confusing justifications and causal origins to minorities for their condition.\(^82\)

Another characteristic of “critical” thinking – here we mean

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\(^79\) Levit, *supra* note 64, at 801.


\(^81\) Richard Grenier, *Racial Storytelling and the O.J. Simpson Case*, WASH. TIMES, Dec. 3, 1996, at A15. The *ad hominem* fallacy “shifts an argument from the point being discussed (*ad rem*) to irrelevant personal characteristics of an opponent (*ad hominem*). Instead of addressing the issue presented by an opponent, this argument makes the opponent the issue.” ALDISERT, *supra* note 80, at 182.

\(^82\) *See* DELGADO, *THE RODRIGO CHRONICLES*, *supra* note 4, at 67 ("[I]f minorities haven’t been able to prosper with such rules [of equal treatment] in place, then the problem must lie with them. They must be shiftless, immoral, or not very smart.”).
both the thinking of Critical Race theorists and the philosophical notion of analytic thinking— is its continual questioning of “the body of received wisdoms that pass[es] as truth.”

Critical Race theorists insist on removing the constraints from “truth”:

Truth matters critical race theorists insist, but truth must be inclusive. It must embrace the lived experience of race; it must see, hear, and feel “race” in order to comprehend it; it must know the story of the past and reckon fully with the stories of the present if we are to realize the truth of a more equal future.

Critical theorists are intent on exploring what “reason” and “truth” mean. They test the equation of “good reasoning” with traditional thinking, and they insist on syllogistically sound, contextual, and exploratory inquiry. Above all, they insist on a “reason” and “truth” that are genuinely universal, and that therefore include the full experience of “race.”

B. Love and Empathy: The Critique of Sentimentality

Conservatives advance the argument in race debates that the social situation of racial minorities is improving, and that the empathetic understanding of the plight of minorities and the tolerance of differences ultimately will lead to the enfranchisement of outsiders. Critical theorists are concerned, though, that racial minorities have been looking for love in all the wrong places

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83 Id. at 192.
84 Hayman, supra note 64, at 24.
85 See Delgado & Farber, supra note 1, at 375.
because "whites have very little empathy for racial minorities." 86 Real love is elusive. Moreover, if Derrick Bell’s thesis holds, members of the white majority will only support race reforms when the interests of racial minorities happen to converge with those of whites. 87

Reliance on law, lawyers, or legal theorists to have compassion for those in underprivileged positions is dangerous. Lawyers are not trained to love. 88 A related worry is that it is much too easy to mistake sympathy or sentimentality for love. Empathy in practice often is not a true recognition of the shared elements of people’s common humanity, but is frequently a “false empathy, in which a white believes he or she is identifying with a person of color, but in fact is doing so only in a slight, superficial way.” 89 Empathy is an emotion that maintains the power hierarchy. A reliance on empathy from majority group members toward oppressed group members reinforces “the inferior political position of minority groups.” 90

In our competitive market economy, self-interest, self-absorption, and self-referential understanding often trump loving instincts. Ultimately, false empathy, says Delgado, “is worse than none at all, worse than indifference”: “It makes you overconfident, so that you can easily harm the intended beneficiary. You are apt to be paternalistic, thinking you know what the other really wants or needs. You can easily substitute your own goal for his.” 91

Not all critical theorists agree that the possibilities for true

88 See DELGADO, THE COMING RACE WAR?, supra note 4, at 27 (“We are trained not to empathize but to be technocrats, concentrating on the small, not the big, picture. We focus on motions and pleadings, not stories, much less things like injustice, love, and compassion.”).
89 Id. at 12.
empathy and recognition of common humanity are so limited.\footnote{See Nancy Levit, A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory, 61 Ohio St. L.J. 867 (2000) (suggesting that searching for common features of humanity – our shared qualities, needs, and desires – while respecting identity differences, may lead to a greater acceptance of minority group members).} But the true understanding of another’s experiences cannot be a projection,\footnote{See Delgado, The Coming Race War?, supra note 4, at 12 (“when a white empathizes with a black, it’s always a white-black that he or she has in mind – someone he would be like if he were black, but with his same wants, needs, perspectives and history, all white, of course.”).} an affectation, or a distraction (from distributive inequalities).\footnote{See Lynn Henderson, Legality and Empathy, 85 Mich. L. Rev. 1574 (1987).} We again return to what is important about critical methodology. In the empathy debates, critical theorists have insisted on going beyond the surface platitude of sentimentality to draw on the psychosocial literature and evaluate the ways empathy actually operates in interpersonal relationships.\footnote{See Richard Delgado, Rodrigo’s Eleventh Chronicle: Empathy and False Empathy, 84 Cal. L. Rev. 61, 69 (1996) (referring to the works of political philosopher Antonio Gramsci); Neal R. Feigenson, Sympathy and Legal Judgment: A Psychological Analysis, 65 Tenn. L. Rev. 1 (1997) (drawing on a range of psychological studies of sympathy and empathy); Peter Margulies, Re-Framing Empathy in Clinical Legal Education, 5 Clinical L. Rev. 605, 606 (1999), quoting David Binderet et al., Lawyers as Counselors: A Client-Centered Approach 40 (1991) (“Empathy . . . involves understanding the experiences, behaviors, and feelings of others as they experience them.”); Cynthia V. Ward, A Kinder, Gentler Liberalism? Visions of Empathy in Feminist and Communitarian Literature, 61 U. Chi. L. Rev. 929, 933-34 (1994) (citing various psychological theories regarding empathy).} This relentless insistence on knowledge, drawn from lived experiences and from scientific or empirical observation is one of the greatest values of critical theory.
C. **Hope and Resistance: The Critique of Nihilism**

It is easy to draw the wrong lessons from the racial critiques of “rationality” and “empathy.” After a superficial or disingenuous reading of such critiques, it is easy to conclude that if there is no reason and no love, then there are no foundations for justice, and no principles to guide and inspire the struggle for equality.\footnote{For a conspicuous example of this misreading, see FARBER & SHERRY, supra note 69.} Acknowledging the deeply entrenched nature of racial inequality thus only contributes to the sense that, for Critical Race theorists at least, justice and equality are painfully elusive. Indeed, when Derrick Bell argues for a “rational realism,” it is a stance informed principally by our inability to secure racial justice.\footnote{Derrick Bell, *Racial Realism*, 27 CONN. L. REV. 363 (1992).} Delgado confesses that he, like Bell, has his doubts about the capacity of legal struggles to achieve racial equality.\footnote{See, e.g., DELGADO, FAILED REvolutions 143 (1994).}

But realism is not cynicism, and doubt is not despair. Bell urges a continued struggle that is partly existential and partly spiritual, while Delgado’s own brand of “rational realism” adds an invigorated praxis to the effort. The problem, after all, is with conventional solutions to a problem that is itself deeply embedded in those conventions: a circumscribed rationality and a false empathy are surely of little avail. However, reason and love – reconstructed – may be powerful tools to correct the problem. And so too with the law. Legal conventions may only perpetuate injustice, but a reconstructed law – a truly realistic law – may bridge the gap between actuality and our aspirations.

Refusing to yield to nihilistic despair, Delgado pursues instead the reconstructive project. His efforts to make law more realistic and to realize the ideals of law seem comprised of three basic tasks.

First, we must be realistic about the problems that confront us, which means that we must reckon with the “reconstructive
paradox”: “the greater the evil, the more embedded and less visible it will be.” “The more entrenched any evil,” Delgado writes, “the more massive the social effort that will be required to dislodge it. An entrenched social evil will be invisible to many – maybe most – in the culture, simply because it is embedded, entrenched, and ordinary-seeming.”

Second, we must be realistic about the likely efficacy of conventional legal solutions to the problems. Faith in the courts may no longer be justified; the courts may no longer respond to even the most obvious racial injustices. Alternative strategies may offer more promise. Political actions like marches, picketing and lobbying, social actions of confrontation or resistance, and even deeply personal actions like storytelling or the

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100 Law can do little to bring about fundamental social change because it operates piecemeal. Courts can only adjudicate the case before them. Doctrines of stare decisis, standing mootness, and ripeness assure that. Yet, fundamental reform requires that ‘everything change at once.’ If you only change one thing, leaving everything else in place, the remaining elements simply swallow up the new decree.

Delgado, The Rodrigo Chronicles, supra note 4, at 199.
101 See Delgado, When Equality Ends, supra note 4, at 217 (“I may have fallen prey to idealism, to thinking that if one simply names and recognizes an evil, it will go away by itself.”).
102 See, e.g., Delgado, The Coming Race War?, supra note 4, at 42.
103 See, e.g., Delgado, When Equality Ends, supra note 4, at 135-36; Delgado, The Coming Race War?, supra note 4, at 44-46.
104 “Stories . . . can change consciousness, change the narrative stock by which we interpret new stories . . . engaged storytelling can change everything at once.” Delgado, The Rodrigo Chronicles, supra note 4, at 203. The debate about the storytelling movement is well-documented, with detractors claiming that narrative methods lack analytic rigor and defenders explaining the importance of including the perspectives of outsiders. See Richard Delgado,
renunciation of racial privilege all may add a necessary experiential element to the struggle for justice. They may also secure more meaningful results. That does not mean that we abandon law or litigation as a strategy for reform; it simply means that "one ought to resort to law in the way one would resort to any tool, like the yellow pages, only when it promises concrete benefits."  

Third, the law must itself be – or be made – realistic when it is used as a resort. Law can still be a powerful force, but not if it is reduced to the empty formalism of "doctrinalism" and "mechanical jurisprudence." "Formalism," Delgado writes, "always narrows the range of considerations a rule takes into account." By contrast, a fully realized law would take into account the full range of racial experience, and the full promise of racial equality.


See, e.g., DELGADO, WHEN EQUALITY ENDS, supra note 4, at 32-33.


See, e.g., DELGADO, WHEN EQUALITY ENDS, supra note 4, at 192, 200-01.

Id. at 212.

Cf. id. ("We use nonformal rules when we want to do real justice . . .").
IV. THINKING CRITICALLY ABOUT EQUALITY: A REPLY TO JUSTICE THOMAS

Now, perhaps, we can see the problems with Justice Thomas’s proposition that “Government cannot make us equal.” We begin with a certain skepticism: Why can’t it? How do we know that it cannot?

We proceed to identify the underlying premises. First, the people constituting the “us” are not equal. Second, there is a discrete force called “Government” which might try to “make” these people equal. Third, these people “cannot” be made equal; it is not achievable, at least by “Government.”

Each of these premises is fairly contestable. Let’s consider the specific questions begged by each.

With regard to the first premise holding that the people constituting the “us” are not equal, we must ask: who precisely is this “us,” and in precisely what ways are “we” not “equal”?

Regarding the second premise maintaining that there is a discrete force called “Government” which might try to “make” these people equal, we must ask: what precisely are the boundaries of this thing called “Government”?

Regarding the third premise holding that these people “cannot” be made equal, we must question precisely what it is about the inequality of these people that makes it so utterly immune to the force of Government. We must also ask exactly how we know that Government is powerless to redress it.

The anti-egalitarian maxim assumes some answers to these questions that are more than simply contestable — they are often demonstrably wrong as matters either of fact or logic.
A. *Premise One: The People Constituting the "Us" Are Not Equal*

1. *Who Precisely Is This "Us"?*

The critical question here is whether Justice Thomas intends to suggest that racial groups are not "equal." It is possible of course to read his text in race-neutral terms: the "us" might refer to the aggregate of individuals, not categorized by race. In this case, Justice Thomas is simply making the case that individuals, regardless of their race, are not "equal." However, Justice Thomas offered his maxim to explain his opposition to race-based affirmative action; if his opposition is to race-directed measures (efforts to equalize the races), then he cannot logically make his case by declaiming a race-neutral proposition (individuals can be made equal). The result would be a non sequitur: because individuals – within and among races – are inevitably unequal, the races – the average or cumulative measure of individuals as categorized by race – are inevitably unequal.111 We do not think Justice Thomas would make such an obvious error in logic. On the contrary, in the context in which the statement was made, we think it is fairly clear that the groups demarcated by "us" are at least in part racial ones: "we" – as racial groups – are not equal.112

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111 The illogic of the argument is illustrated by imagining a law school with three sections of a constitutional law course. Each section takes a final examination. Individual variation on exam performance and the resultant grades within each section of the course is almost inevitable: some students will get As, some Bs, and so on. Nevertheless, that circumstance would not preclude the possibility that the average exam performance and the resulting median grades among the sections would be more or less equal. Indeed, absent confounding variables (such as deliberate attempts to "track" students, differences in the quality of instruction, or the difficulty of the examination), we would expect them to be equal, and might even impose a mandatory curve to normalize grades from section to section precisely to ensure this result.

112 It is possible to read Justice Thomas somewhat more narrowly, as speaking only of, and to, black Americans. Under this reading, Justice Thomas is urging "us" black Americans to be more self-reliant. As to the political virtues of that
2. In Precisely What Ways Are "We" Not "Equal"?

In context, we would assume that the inequalities to which Justice Thomas refers are social and economic. The challenged program, after all, was targeting social and economic disadvantage. And there is little denying that, by virtually every significant social and economic measure, the races are not equal.\textsuperscript{113} Accordingly, if Justice Thomas’s premise is that the races are, in social and economic terms, not equal, then we find nothing objectionable about it.

But it is possible – indeed, as our subsequent analysis will indicate, it is almost certain – that Justice Thomas views the inequalities as running somewhat deeper: perhaps the social and economic disparities are the consequences of some underlying racial inequality. What would be the cause of these effects? One possibility is an inequality in educational achievement, and, indeed, there is considerable evidence of race-based achievement gaps. Accordingly, if Justice Thomas’s premise is that the races are not equal in terms of educational achievement, then again we find nothing objectionable about it.

But perhaps Justice Thomas believes that the inequality runs deeper still, that we are yet one step removed from the principal cause. Perhaps the disparities in achievement are in turn manifestations of an underlying racial inequality. What would be

\textsuperscript{113} See, e.g., Peter R. Breggin & Ginger Ross Breggin, The War Against Children of Color (1994); Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal (1992); Cornel West, Race Matters (1993).
the cause of these effects? Broadly speaking, we can conceive of two possible causes.

First, the disparities in educational achievement may be the result of racial disparities in educational opportunity. Indeed, there is ample evidence of such inequality: disparities in school funding, curricula, and course placement all correlate with race. These disparities, coupled with the persistence of racial animus and the concomitant advantages or disadvantages of economic class, tend inexorably to enhance educational opportunities for some groups while depressing them for others.114 Accordingly, if Justice Thomas’s premise is that the races are, in terms of educational opportunity, not equal, then once again we find nothing objectionable about it.

Alternatively, the disparities in educational achievement may be the result of racial disparities in intelligence. Put simply, some groups are smarter than others. The difficulty with this proposition is that it is either tautological or wrong. If “intelligence” is defined as the demonstrated ability to succeed in the culture, and if the conventional social and economic indicators are accepted as evidence of cultural success, then, by definition, the groups that are faring comparatively well are exhibiting relatively more “intelligence.” This will be particularly true of groups demarcated by “race,” inasmuch as “race” and “intelligence” have been constructed in substantial part concomitantly. If this is indeed the understanding, then the proposition that some racial groups are smarter than others is on its face unobjectionable,115 though it is also singularly unenlightening. On the other hand, we may attempt to define “intelligence” in less

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115 Yet, this would be unobjectionable only on its face. Given the instrumental nature of the “intelligence” construct, it is important to consider not only what we mean when we say that some groups are smarter than others, but also why we feel compelled to say it.
instrumental and less contingent terms. If we mean to suggest that “intelligence” is an innate capacity for the performance of essential human functions, then the problem is simply empirical: there is no credible evidence to support the existence of inborn racial differences in “intelligence,” and there is a great deal of credible evidence from psychometric studies, genetic theory, and anthropological practice establishing the contrary. Accordingly, if the suggestion is that some racial groups are inherently more intelligent than others, then it is objectionable on two grounds. First, the proposition is demonstrably wrong as a positive matter. Second, it is reckless – unconscionably so – to assert it in light of our history and in the face of all the proof to the contrary.

B. Premise Two: There Is a Discrete Force Called “Government” Which Might Try To “Make” These People Equal

What Precisely Are the Boundaries of This Thing Called “Government”?

It is in one sense unremarkable that the anti-egalitarian maxim should focus on the powers – or the powerlessness – of “Government” to “make us equal.” The question that provoked it, after all, concerned the constitutionality of a federal governmental effort. But this sweeping proclamation of governmental impotence invites an inquiry into its conception of governmental power: what is the relationship between this “Government” that is so helpless when confronted with inequality, and the society that is plagued with those inequalities?

It is possible, first, that the term “Government” is employed

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116 See generally HAYMAN, supra note 36, at 258-305. See also infra text accompanying note 130.
here somewhat loosely, and that it is either a euphemism for “society” or “culture”, or is meant to fairly embrace those phenomena within a broadly conceived realm of the “political.” This seems to us a rather unlikely reading of the text, but we will note that it would render the proposition at least a bit oxymoronic: social phenomena, including social disadvantages, are, after all, products of social forces. That inherent contradiction could be avoided only by embracing the view that the inequalities confronting this society are not social, cultural, or political phenomena at all, but rather are pre-social, pre-cultural, and pre-political. In other words, the inequality is innate, and the order it produces natural. We have briefly noted this possibility above and will discuss it at some length shortly; for now, we reiterate our view that such a contention is both positively and normatively wrong.

The second possibility is that the term “Government” is employed here somewhat more restrictively and is meant to distinguish the official power of the state, on the one hand, from “society” or “culture” on the other. It is intended, in other words, to signify the “public” realm, as distinct from the “private.”

The “public/private dichotomy” is one of the great fictions of American law, and, like any legal fiction, it has come to suffer its share of abuse. We briefly note our concurrence with some of these criticisms: the dichotomy has rather embarrassing origins, it has very little theoretical integrity, it is remarkably manipulable, and the doctrine it has spawned is largely either confused or erroneous. In this instance, three additional

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118 A public realm that does not represent the private realm would seem to be illegitimate; a public realm that did not at least influence the private realm would seem to be unacceptably ineffective.
120 For an example of the former, consider the suggestion that “[t]he Constitution cannot control [racial] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly
objections are worth particular attention: the public/private dichotomy is inauthentic, ahistorical, and inconsistent with our understanding of the economics of private behavior.

First, the dichotomy is quite removed from human experience. In today’s world — whether it is modern, postmodern, or otherwise — people do not live in separate realms of public and private. More specifically, the world of “race” that we inhabit, as well as the world of racial inequality, cannot be neatly cabined into these distinct realms. Racial disparities in under-employment and un-employment are neither distinctively “private” nor “public.” They are both. This is also true with racial disparities in access to health care and higher education, and with racial disparities in criminal arrests, criminal sentencing, and criminal victimization. So too for all racial inequity. Hardly anyone who has knowingly lived the life of “race” would suggest otherwise. As Delgado writes, “[w]e know, indeed we live, the bogus public-private distinction.”

Second, the dichotomy is thoroughly embarrassed by the historical record, and in ways that would shame any interpreter ostensibly committed to the “original meaning” of the Constitution’s equality guarantee. The record before the Thirty-Ninth Congress was replete with instances not merely of official and formal acts of discrimination against freedmen, but of official...

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or indirectly, give them effect.” Palmore v. Sidoti, 466 U.S. 429, 433 (1984). For an example of the latter, see any opinion relying on the distinction between de jure and de facto segregation.

121 Delgado, supra note 25, at 311.

failures to prevent or remedy "private" acts of oppression. Such official failures were perpetrated under the watch of indifferent state officials — or with their acquiescence or active support.\textsuperscript{123} Section One of the Fourteenth Amendment thus commands that no state shall "deny the equal protection of the law," and "when the equal protection is withheld, when it is not afforded, it is denied."\textsuperscript{124} As a necessary consequence, the Equal Protection Clause gave the states an affirmative duty not merely to refrain from unequal treatment, but to provide "equal protection." Thus, "[a] State denies equal protection where it fails to give it. Denying includes inaction as well as action. A State denies protection as effectively by not executing as by not making laws."\textsuperscript{125} That is, when the states, for whatever reason, regularly fail to protect discrete classes of citizens from "private" acts of oppression or

\textsuperscript{123} See, e.g., Report on the Condition of the South, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1866) (describing orchestrated schemes to establish \textit{de facto} slavery); Report of the Joint Committee on Reconstruction 39th Cong., 1st Sess. (1866) (testimony on acts of oppression and official failures to respond); Report by the Commissioner of the Freedmen's Bureau, of all Orders Issued by Him or any Assistant Commissioner, H.R. Exec. Doc. No. 70, 39th Cong., 1st Sess. (1866) (describing acts of violence and oppression and failure of state governments to secure persons and property); Memphis Riots and Massacres, H. Rep. No. 101, 39th Cong., 1st Sess. (1866) (describing the complicity of or acquiescence of city and county officials in the massacre of black Americans).


\textsuperscript{125} \textit{Id.} at 501 (statement of Sen. Frelighuysen); accord \textit{id.} at App. 182 (statement of Rep. Mercur) (noting that deny means "to refuse, or to persistently neglect or omit to give" equal protection); \textit{id.} at App. 314 (statement of Rep. Burchard) ("If the law-making power neglects to provide the necessary statute, or the judicial authorities wrongfully enforce the law so as to neutralize its beneficial provisions, or the executive allows it to be defied and disregarded, has not the State denied the enjoyment of that right?"); \textit{id.} at App. 80 (statement of Rep. Perry) ("The command is that no State shall fail to afford or withhold the equal protection of the laws."); \textit{id.} at 334 (statement of Rep. Hoar) ("It is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection."); \textit{id.} at 368 (statement of Rep. Sheldon) (noting that the clause embraces cases where state "refuses or neglects to discharge" its duty); \textit{id.} at 459 (statement of Rep. Coburn) ("Affirmative action or legislation is not the only method of a denial of protection by the State.").
discrimination, they fail to provide the "equal protection of the laws."\textsuperscript{126}

Of course, opponents of equality have long insisted otherwise. The Democrats opposed every Reconstruction measure on the grounds that it was a futile and unnatural attempt to force "social equality."\textsuperscript{127} Their view, defeated at every turn in the Reconstruction congresses, would nonetheless find an unholy vindication in Justice Brown’s opinion for the Court in \textit{Plessy v. Ferguson}: "[L]egislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences . . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."\textsuperscript{128} For the next half-century, opponents of equality proclaimed government’s impotence with the cry "no social equality," but the pretense eventually wore thin. In 1944, Gunnar Myrdal’s \textit{American

\textsuperscript{126} See \textit{id.} at App. 251 (statement of Sen. Morton) ("If a State fails to secure to a certain class of people the equal protection of the laws, it is exactly equivalent to denying such protection. Whether that failure is wilful or the result of inability can make no difference . . . "); accord \textit{id.} at 321 (statement of Rep. Stoughton) ("When the State courts are notoriously powerless to protect life, person, and property, and when violence and lawlessness are universally prevalent, the denial of the equal protection of the laws is too clear to admit of question or controversy."); \textit{id.} at 375 (statement of Rep. Lowe) ("It is said that the States are not doing the objectionable acts. This argument is more specious than real. Constitutions and laws are made for practical operation and effect . . . .What practical security would this provision give if it could do no more than to abrogate and nullify the overt acts and legislations of a State?"); 43 Cong. Rec. 1, 412 (statement of Rep. Lawrence) ("If a State permits inequality in rights to be created or meted out by citizens or corporations enjoying its protection it denies the equal protection of the laws. What the State permits by its sanction, having the power to prohibit, it does in effect itself.").

\textsuperscript{127} See \textit{HAYMAN, supra} note 36, at 64-69, 325-48.

\textsuperscript{128} 163 U.S. 537, 551-52 (1896).
Dilemma exposed the fiction of an unattainable "social equality." "[T]he term," he noted, "is kept vague and elusive, and the theory loose and ambiguous . . . . The very lack of precision allows the notion of 'social equality' to rationalize the rather illogical and wavering system of color caste in America." 129 It is only fitting, then, that in that same year, W.E.B. Du Bois called for nothing less than "full economic, political, and social equality." 130

This leads to our final objection. A significant corollary of the devotion to the public/private dichotomy is the commitment to a free market. In the past generation, a number of legal economists have endeavored to demonstrate the superiority of market, as opposed to governmental, solutions to the problems of inequality. Their arguments rely on the dichotomy both normatively, as expressed in the privileged status they confer on individual liberty, and positively, as expressed in the contention that governmental solutions are inefficient. The normative component is not immediately material to our critique, but the positive component clearly is. That component leads us to question whether economists have in fact demonstrated that there is a realm of private life that exists outside the effective reach of the state. It also prompts us to ask if we find in that realm the chief determinants of racial inequality.

The free marketers insist that the unregulated market will ultimately yield the most efficient results. Racial inequalities thus represent the superiority of certain groups to others — the triumph of the economically fittest — or the aberrant effects of some isolated market distortion, such as a race-based distortion, force, fraud, or anti-competitive collusion. 131 But Delgado and other critics have demonstrated the fundamental error of free market arguments: racial discrimination does not occasionally distort the

129 GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 583-86 (1944).
market, rather it defines it. A people long conditioned to express racial preferences will ultimately value racial homogeneity. For them, racial discrimination is not irrational because racial exclusiveness becomes either a utility that informs their efficiency analysis or a tax that they impose on their racial victims. Meanwhile, those who are no longer willing to purchase racial exclusiveness may nonetheless perpetuate it through their embrace—willful or unwitting—of racial stereotypes. Their transactions are thus plagued by imperfect information, while the stereotyped races bear the efficiency costs. Even those possessing perfect information about the races or individuals within races may unconsciously perpetuate racial bias by assuming the race-neutrality of market criteria, when in fact, those criteria—of aptitude, ability, or merit—have been forged in an economy characterized for centuries by a pervasive scheme of racial advantage and disadvantage. Significantly, all of these “market distortions”—the utility of racism, the perpetuation of racial stereotypes, the racial advantages in satisfying market criteria—are substantially the products of state action. As the history of official racial discrimination attests, our market has never been, in racial terms, a “free” one.

In truth, then, there is little warrant for the view that the world of “Government”—the public—is so far removed from the world of society—the “private”—that “Government” is simply powerless to effect social change. The state is not that isolated;

132 See, e.g., DELGADO, WHEN EQUALITY ENDS, supra note 4, at 40-41.
133 See, e.g., id. at 30, 42-44.
135 See, e.g., Hayman & Levit, supra note 104, at 402-05.
society is not that insular. More than a rhetorical dichotomy is needed to prove that Government cannot achieve racial equality, even economic or "social equality."

C. Premise Three: These People "Cannot" Be Made Equal — It Is Not Achievable — At Least Not by "Government"

I. Precisely What Is It About the Inequality of These People that Ensures that It "Cannot" Be Overcome by the Force of Government?

The choice of helping verbs in the articulation of this maxim seems to us quite instructive. Note that the maxim might have read, "Government may not make us equal," in which case it might fairly be read as an acknowledgment of some restrictive normative standard (perhaps of a doctrinal nature). Using somewhat stronger language, it might have otherwise read, "Government shall not" or "Government should not" make us equal, in which case the restriction would assume the character of a moral or political imperative. Finally, the maxim might have read, "Government might not make us equal," in which case it might be fairly read as a tentative hypothesis or a somewhat qualified observation. But instead we are advised that Government "cannot" make us equal. The maxim thus purports to be descriptive, and the futile relationship it describes — that Government is powerless, and the equality it seeks is unattainable — admits of no contingencies, conditions, or exceptions.

But how could this be? What is it about this inequality that would render it absolutely immune from governmental action? There are, in theory, two possibilities. The first rests in the devotion to the idea of a social realm thoroughly insulated from the state — the public/private dichotomy. The second rests in the commitment to theories of innate racial superiority or inferiority — the "natural order."

As to the first possibility, the notion would be that the inequality resides in the realm of the private, where only private action — not state action — can remedy it. We have already seen
some of the conceptual problems with this notion, and if they alone
do not demonstrate that the public/private dichotomy fails to offer
an authentic description of our condition, they are at least
sufficient to counsel a healthy skepticism. Some evidence is
needed to support the dichotomy, and none, as we will see, seems
available.

As to the second, the notion would be that the inequality
resides in the natural make-up of the racial groups: it is hence
innate, inherent, and inevitable. This notion of a race-based
“natural order” has been with us literally from the beginning of the
Republic. Indeed, it likely originated as an attempt to reconcile the
avowed political principles of the revolutionary generation with the
reality of chattel slavery.¹³⁶ A “scientized” hierarchy of race took
hold sometime in the second quarter of the nineteenth century. It
was used in several fashions: to justify slavery in the antebellum
era; to oppose civil rights during Reconstruction; to enact Jim
Crow legislation through the middle of the twentieth century; and
to restrict immigration and naturalization throughout the twentieth
century.¹³⁷ Its most notable – and insidious – feature has been its
commitment to a natural hierarchy of intellect, a commitment that
has substantially shaped the development of intelligence testing in
America: the first IQ tests were normalized in accordance with the
pre-conceived racial order, and these tests have provided the
operative standard for each subsequent generation of
instruments.¹³⁸ Of course, the presumed intellectual hierarchy has
shaped more than psychometrics. It also profoundly influenced

¹³⁶ See EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM 115
(1975); ALDEN T. VAUGHN, ROOTS OF AMERICAN RACISM: ESSAYS ON THE
¹³⁷ See HAYMAN, supra note 36, at 221-36.
¹³⁸ See id. at 245-51; 285-92.
governmental policy at both the federal and state levels, particularly with respect to immigration and education. And as recent works like *The Bell Curve* make clear, there are those who believe that the natural intellectual order should continue to guide official policy.139

But we do not mean to judge the proposition solely by the company it has kept; the more damning verdict has come from science itself. We reiterate that the notion that there is an intellectual hierarchy naturally ordered by race is unsupported by the evidence. The notion has been thoroughly discredited in every scientific discipline save psychology,140 where a noisy band of “psychometricians” continue to spew their racist babble to the general embarrassment of serious psychologists.141

In short, there is, as a conceptual matter, simply no reason to suspect that racial inequality is beyond remedy by governmental action. And, indeed, the evidence from the historical record thoroughly embarrasses the claim.

2. *Exactly How Do We Know that Government Is Powerless to Redress This Inequality?*

The races are, in America, unequal. However, that does not mean that racial inequality is inevitable, that inequality inheres in race. Delgado and other critical theorists have warned against this


essentialist error: that because Group A exhibits characteristic X, group A must be X, innately, inherently, and inevitably. They have consistently reminded us of the contingent nature of race, of the ways in which its salient characteristics are constructed, and of the ways in which it may be reconstructed. Race is made. Race can be re-made. As the foregoing analysis suggests, it can be re-made – and made equal – by Government.

To prove the contrary, to establish that inequality truly does inhere in race and is beyond governmental remedy, defenders of the anti-egalitarian maxim must demonstrate the real-world inefficacy of egalitarian efforts. Their proof must satisfy two conditions. First, it must demonstrate relevant and persistent governmental action directed at racial inequality. Second, it must establish more-or-less constant levels of inequality in spite of this action.

Neither condition is satisfied. Regarding the first condition, history belies the suggestion that our governments have truly pursued equality in a persistent and appropriate fashion. Indeed, one of the most compelling claims advanced by race theorists is directed at this somewhat comforting myth. The sad truth is that

our efforts to achieve equality have been tentative, spasmodic, and paled by opposition and ambivalence: we promised "legal equality" but not "social equality," "equal opportunity" but not "equal outcomes"; we desegregated our schools "with all deliberate speed," but only if the segregation was *de jure* and not *de facto*. The First Reconstruction was opposed with rhetoric and violence; it lasted just over a decade and was largely undone within a generation. The Second Reconstruction followed a similar course, and the fate of its gains now hangs in the balance.

And yes, there *have been* gains. Advancements in law – governmental initiatives – have indeed produced social and economic gains – greater equality in the real world. Consider the effects of the Second Reconstruction. The percentage of white Americans between the ages of twenty-five and twenty-nine who had completed at least twelve years of education increased from 40% in 1940 to 65% in 1965 to 86% in 1987. The percentage of black Americans in the same category increased from only 12% in 1940 to 50% in 1965 to 83% in 1987, nearly at parity with whites. Meanwhile, the percentage of Latinos in that category increased from just 6% in 1940 to 52% in 1965 to 60% in 1987. Within the schools, the racial achievement gap, as measured by standardized achievement tests, has narrowed substantially: the math gap between black and white students was reduced 25 to 40% during the seventies and eighties alone, the science gap was reduced 15 to 25%, and the reading gap was reduced by half. The math gap between Latino and white students was reduced between 33 and 45%. Regional analyses suggest that the achievement gap has seen particularly significant reduction in the Southeast, due in part to desegregation.144 Meanwhile, a national study designed to proportionally reflect all mediating factors concluded that "desegregation, net of all other status characteristics, is positively associated with racial tolerance for both whites and blacks." Furthermore, a review of longitudinal studies noted that the studies, without exception, revealed that school desegregation

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leads to increased desegregation in later life, a phenomenon that frequently translated into significant economic advantages for minority adults.\textsuperscript{145} Moreover, a survey of racial attitudes over the past half century found "a great normative shift" in the conception of appropriate relations between the races: by century's end, for example, white Americans voiced near unanimous condemnation of overt racial discrimination and segregation, a result simply unthinkable before the civil rights era.\textsuperscript{146}

The case, of course, should not be overstated: Government has not made us equal. But there is every reason to believe that it \textit{can}, and the evidence from its modest initiatives strongly supports that belief.

V. CONCLUSION

There are more than 340,000 people living in shantytowns along the Texas border. The impoverished residents of the \textit{colonias} live in conditions that Delgado describes as "deplorable," "unspeakable" and "dreadful."\textsuperscript{147} Others too have described the plight of these \textit{colonistas}; the descriptions, Delgado notes, are enlivened by tragic detail, and enriched with real compassion. But the discussion of governmental remedies for conditions in the \textit{colonias} are not so alive or rich; they are marked by an utter failure


\textsuperscript{146} See HOWARD SCHUMAN ET AL., \textit{RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS} 312 (1997).

\textsuperscript{147} DELGADO, \textit{WHEN EQUALITY ENDS}, supra note 4, at 58-59.
of will and imagination. When it is time to consider governmental remedies, the shameful details fade into the margins; the compelling stories can barely be heard. Here, reason yields to stubborn convention, empathy to brutal indifference. Truth is reduced to a simple-minded maxim: "Government cannot make us equal."

But Delgado’s Rodrigo demands more. Government, he insists, "must be activist." It must relieve the suffering of the colonistas; it must guarantee them their place in the community. In the absence of governmental intervention, Rodrigo notes,

> [W]e would inevitably see a ratcheting-down in which we tolerate worse and worse conditions for those we see as different from ourselves. And those conditions, in turn, will simply confirm to us that the residents are indeed a different order of humanity, in a self-reinforcing spiral. In time, ghetto, barrio, or colonia conditions will seem natural and just, "the way things are."  

"That’s why," Rodrigo insists, "we need governmental enforcement, formally administered, under universal conditions." Government, properly charged with "redressing historical wrongs," must not forsake its responsibility; Government, "which could and should side with the underdog," must not simply look the other way. There is room, of course, for "private" assistance, and solidarity with the colonistas is part of the remedy. But only part. "We stand shoulder to shoulder with them, offering hope and resistance," Rodrigo says, "at the same time that we insist that Government do its duty."

Government, Rodrigo knows, can make us equal: indeed, only Government can.

Government, Rodrigo knows, can make us equal: it needs

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148 See id. at 58-61, 64.
149 Id. at 66.
150 Id.
151 Id. at 67.
152 Id. at 73.
Government, Rodrigo knows, can make us equal: if it chooses to.

Government, Rodrigo knows, can make us equal: it must.
Justice Thomas, we think, can see this as well if he looks critically at the evidence, listens attentively to the stories, and is faithful to the aspirations he is charged with making real. Above all, he has to use the old noodle: he must think critically about equality to see that Government can make us equal – if only it is allowed the chance.