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The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism

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THE COLOR OF TRADITION:
CRITICAL RACE THEORY AND POSTMODERN
CONSTITUTIONAL TRADITIONALISM

Robert L. Hayman, Jr.*

Back beyond the world and swept by these wild white faces of the awful dead, why will this Soul of the White Folk, this modern Prometheus, hang bound by his own binding, tethered by a labor of the past? I hear his mighty cry reverberating through the world, "I am white!" Well and good, O Prometheus, divine thief! The world is wide enough for two colors, two little shinings of the sun; why then devour your own vitals when I answer, "I am black"?

—W.E.B. Du Bois

Introduction

We are living in fractious times. Modernity's dominance has indeed wrought its own demise. We are unified, but only under the totality of a relentless hierarchy. We are liberated, but only from the possibility of authentic community. The divorce between who we are and who we always imagined we might be has grown so great that we are now only vaguely aware of the gap.

This, we are told, is postmodernity. It is an age of radical differentiation, spurred on by liberal theory, rendered perverse or moot by power disparities. It is an age of self-realization, the triumph of psychological humanity, instantaneously vanquished by the recognition of its own construction. It is an age of contradiction, the fully realized era of the absurd.

* Associate Professor of Law, Widener University School of Law. Portions of this effort—the brief sketches of postmodernism and Critical Race Theory—grew out of a larger project surveying contemporary jurisprudence. See ROBERT L. HAYMAN, JR. & NANCY LEVIT, JURISPRUDENCE: CONTEMPORARY READINGS, PROBLEMS AND NARRATIVES (forthcoming winter 1995 from West Publishing Co.). For their insights on that effort, many of which I have tried to express here, I am indebted to Daniel Farber, Peter Schanck, and especially to my co-author, Nancy Levit. For their helpful reviews of the immediate effort, I am grateful to my colleagues at Widener, John Culhane and Bob Lipkin, and also to Richard Delgado, whose generosity, insight, and encouragement have been especially appreciated. For their research and editorial assistance, I am grateful to Charles DiMaria, Leora Marion, and Hamel Vyas; and for their insights and indulgence, I am indebted to Katie Fallow, Erik George, Barbara Fiacco, and the editors and staff of the Harvard Civil Rights-Civil Liberties Law Review. Finally, I would like to thank my friend and colleague Alice Eakin for her invaluable assistance and continuing support.

And yet it is an age of hope. Paradoxes yield unexpected pleasures: relinquishing the progression toward totality, we find unity in our differences; surrendering the myth of our autonomy, we are free to choose our constructions. And in the absurd gap between the real and the ideal, we find a space for human action.

For legal scholars and others committed to some vision of social progress, these are passionately ambivalent times. The challenges of postmodernity are daunting and invigorating. These challenges have certainly been felt by constitutional theorists. Some have accepted the invitation to imagine the possibilities for constitutional law in a non-foundationalist, postmodern legal world. Others—partly reacting to the postmodern scene, partly constituting it—have issued a call for the renewal of foundations.

Among the latter's prospects for redemption, none figures more prominently than "tradition." The call to "tradition" has been voiced in both academic and juridical circles. But here, as elsewhere, postmodern jurisprudence is characterized by an enormous disjunction between theory and practice, between the legal academy and the judiciary. For the academy, "tradition" is evolutive, negotiable, and boundless, a (con)textual end as well as a means; for the judiciary, "tradition" is fixed and determinate, a neutral tool for fixing the meaning of some other text. And there is one additional difference: while in postmodern theory "tradition" may comprise an infinite spectrum of hues, in judicial practice, "tradition" is nearly always white.

This Article examines the "color of tradition," as it appears in postmodern constitutional theory and in judicial decisions. Part I of this Article offers a brief introduction to the most recent school of postmodern jurisprudence and suggests that Critical Race Theory, both in its form and its substance, demonstrates the possibility of difference without exclusion and pluralism without totality. Part II examines the conventional use of "tradition" as a guide to constitutional interpretation, offers a postmodern critique, and suggests a Critical Race Theory paradigm for reconceptualizing constitutional traditionalism. Part III focuses on the construction and use of "tradition" in the Supreme Court's most recent decisions dealing with race. It identifies four basic traditions that emerge from these cases and contrasts them with four counter-traditions posited by a postmodern racial critique. Part IV concludes with a description of a new "traditionalism," informed by the lessons of Critical Race Theory, that is dialogic, pluralistic, and multi-hued.

One methodological note is in order. In focusing on Critical Race Theory, this Article presents an outsider's view of outsider jurisprudence.² It makes no pretense to the contrary. Even fellow travelers—perhaps

² Although I have pursued many of the themes of Critical Race scholarship in prior efforts, see, e.g., Robert L. Hayman, Jr., Presumptions of Justice: Law, Politics and the
especially fellow travelers—need to be careful when they venture down the Critical Race path: people who are used to leading, not following, too easily lose the trail. Consequently, the reader is referred to the original work of the trailblazers to overcome whatever detours, dead ends, and wrong turns that might sidetrack this Article.³

I. Critical Race Theory and Postmodern Thought

Christened at a meeting in 1989, the “Critical Race Theory” school is the most recent and perhaps most rapidly developing⁴ postmodern⁵ jurisprudence. Postmodern jurisprudences challenge the adequacy of conventional legal thought to afford either descriptive or prescriptive insights

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³ And if it emerges that this author is hopelessly lost, please send help.
⁵ “Postmodernism” and its variations may be the most frequently used and least understood terms in contemporary jurisprudence. Postmodern theorists acknowledge the difficulty in defining the phenomenon: for some, the elusive nature of the “modern” makes the “post”-modern doubly elusive, see DAVID HARVEY, THE CONDITION OF POSTMODERNITY 7 (1989); for others, the relational nature of postmodernism to modernism counsels against the definitional endeavor. See Andreas Huyssen, Mapping the Postmodern, in FEMINISM/POSTMODERNISM 234, 236 (Linda J. Nicholson ed., 1990). Postmodern thought remains a very loose pastiche of ideas—the discourse is multi-dimensional, multi-directional, and largely unbounded. See Frederic Jameson, Postmodernism and Consumer Society, in THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE 111, 112 (Hal Foster ed., 1983). In general, however, postmodernism calls into question modernism’s central beliefs in rationality, autonomy, progress, and self-awareness. Most important for legal scholars is the growing sense that the conventional ways of thinking and talking about the law are not adequate to describe law as it is practiced and experienced. See generally ROBERT L. HAYMAN, JR. & NANCY LEVIT, JURISPRUDENCE: CONTEMPORARY READINGS, PROBLEMS AND NARRATIVES 507–14 (forthcoming winter 1995 from West Publishing Co.).
into the contemporary scene. Their challenge arises not so much because legal thought has become divorced from mainstream epistemologies, but rather because those epistemologies no longer seem adequate to convey a sense of the postmodern world. Realist epistemologies appear untenable in the face of the claims of perspectivism: the propagation of plausible beliefs disrupts the stable order of a determinable reality, abstract truths, and reliable governing laws. Meanwhile, the demise of the autonomous “self”—rendered moot or incoherent by the collapse of the objective/subjective dichotomy, and hopelessly tangled in the web of cultural construction—completes the problematization of the twin master narratives of modernity: the liberation of humanity and the unity of knowledge. In a postmodern world there may be no humanity left to be liberated and nothing from which to liberate it, except its own constructions. Unity, meanwhile, may be attainable only through the suppression of non-

6 The process is intensified by the frenetic changes of postmodern life: history disappears as time is reduced to the fragmented instant, Frederic Jameson, Postmodernism and Consumer Society, in The Anti-Aesthetic, supra note 5, at 111, 124–25, while the compression of geographical and physical space heightens differentiation within increasingly unstable boundaries, Harvey, supra note 5, at 296. In such a chaotic world, modernity’s claims to coherence seem either repressive or illusory, id. at 52; the only truths that seem legitimate are those constructed through local discursive practice, Jean-François Lyotard, The Postmodern Condition: A Report on Knowledge 66 (1984).

7 As the differentiation between “objective reality” and “subjective perspective” collapses, there is nothing left for the “subject” to signify. See Jane Tompkins, “Indians”: Textualism, Morality, and the Problem of History, in “Race,” Writing and Difference 59, 75–76 (Henry Louis Gates, Jr. ed., 1985).

8 On the Critical Race Theorists’ conception of “race” as an object of social construction rather than a subject of autonomous essence, see infra notes 29, 48–52, 159–163 and accompanying text. More generally, and more abstractly, the demise of the subject might be seen in the destruction of the autonomous self at the hands of a technocratic and bureaucratic state: the life-role now seems thoroughly constructed by an inescapable grid of commands and demands, and what few options remain seem limited to the selection of one among several well-worn and highly constricted paths. See Jameson, supra note 5, at 115. Paradoxically, among the commands extinguishing the self is the relentless call of individualism: unbridled “freedom” in this sense denies all else and, ultimately, negates itself. See Suzi Gablik, Has Modernism Failed? 32 (1984). In addition, the explosion of communication and information expedites the collapse of the distinction between private and public, between the inner self and its outer projections. Jean Baudrillard, The Ecstasy of Communication, in The Anti-Aesthetic, supra note 5, at 126, 132 (“In any case, we will have to suffer this new state of things, this forced extroversion of all interiority, this forced injection of all exteriority that the categorical imperative of communication literally signifies.”). In this view the psychological self yields to a purely communicative self, distinguished less by consciousness and more by its ephemeral position in a pervasive network of influences. See id. There may yet be an extant self in this view, but it is a self that does not amount to much. Lyotard, supra note 6, at 15. In either view, the coherent subjective self has not been killed so much as it has been exposed as a myth, created and sustained by a more congenial modernist epistemology. Jameson, supra note 5, at 115; cf. Michel Foucault, The Order of Things: An Archaeology of the Human Sciences 303–43 (Vintage 1994) (1973).

9 See Frederic Jameson, Foreword, in Lyotard, supra note 6, at ix.
conforming truths, or in useless, perhaps tyrannical, levels of abstraction.\textsuperscript{10}

Postmodernity's crisis of truth is concomitant with a crisis of justice.\textsuperscript{11} Postmodern thought problematizes both the positive\textsuperscript{12} and normative\textsuperscript{13} portions of law's project, depriving law of its conventional supports. In a postmodern world, law cannot be authentic, cannot be determinate, cannot be justified, cannot even be controlled. Law, in short, cannot be any of the things that we have been taught—by law—to view it as being.

Which may mean, ironically, that law is now ripe for reconstruction. Many, though certainly not all, postmodern legal thinkers have risked the "performative contradiction"\textsuperscript{14} and sought to remake law in a fashion consistent with postmodern tenets. Critical Race Theorists are joined by feminist legal theorists,\textsuperscript{15} new (or neo- or postmodern) pragmatists,\textsuperscript{16} and gay and lesbian scholars,\textsuperscript{17} in incorporating—and shaping—postmodern thought into affirmative projects. Informed not only by theory but also by the lived experience of modernity's (dis)illusions, dedicated not merely to deconstructive critique but as well to a reconstructive praxis, Critical Race Theorists and these other postmodern rebels\textsuperscript{18} defy both cynicism and despair in their pursuit of a postmodern justice.


\textsuperscript{11} Cf. Seyla Benhabib, Epistemologies of Postmodernism: A Rejoinder to Jean-François Lyotard, in Feminism/Postmodernism, supra note 5, at 107, 124 ("Questions of truth . . . are questions of justice as well.").


\textsuperscript{14} One of the central dilemmas of postmodern thought is, in a sense, its own impossibility. In denying the autonomy of the self, postmodern thought assumes the integrity of a vantage point that is—under its own thesis—utterly inaccessible. This paradox, this "performative contradiction," compare Benhabib, supra note 11, at 116 (critiquing Lyotard for performative contradiction), with Pierre Schlag, Normativity and the Politics of Form, 139 U. Pa. L. Rev. 801, 904 n.272 (1991) (demurring to charge of performative contradiction), is perhaps compounded by the suggestion that these selves—autonomous only as a matter of construction—should, or even could, do something to alter their postmodern condition.

\textsuperscript{15} See, e.g., Mary Joe Frug, Postmodern Legal Feminism (1992).


\textsuperscript{18} See Albert Camus, The Rebel (Anthony Bower trans., Alfred A. Knopf, Inc. 1951); see also Hayman, Re-Cognizing Inequality, supra note 2 (outlining a jurisprudence of rebellion derived from Camus' humanistic philosophy).
Critical Race Theory might be "uniquely situated" by context and content to illuminate some aspects of this struggle.\(^\text{19}\) Like other postmodern schools, Critical Race Theory is complex, nuanced, and dynamic,\(^\text{20}\) and is in constant dialogue with other contemporary movements.\(^\text{21}\) At the same time Critical Race Theory manifests a number of discrete features\(^\text{22}\) that promise to afford distinctive insights into the workings of constitutional traditionalism.

Critical Race Theorists articulate concerns that may have been ignored or marginalized by the dominant discourse, problematize concepts that seem otherwise immune from scrutiny, and suggest resolutions that are frequently at odds with the prevailing demands of convention or fashion. Thus, Critical Race Theorists focus their writings on the struggle for racial justice,\(^\text{23}\) the persistence of racial hierarchy,\(^\text{24}\) and other issues of special importance to marginalized communities.\(^\text{25}\) They challenge the efficacy of both liberal legal theory,\(^\text{26}\) and communitarian ide-

\(^{19}\) See Anthony E. Cook, *The Spiritual Movement Towards Justice*, 1992 U. ILL. L. REV. 1007, 1008; see also Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2239 (1992) ("We are gifted by an ability to imagine a different world—to offer alternative values—if only because we are not inhibited by the delusion that we are well served by the status quo.").


\(^{26}\) E.g., Derrick Bell, *Reconstruction’s Racial Realities*, 23 Rutgers L.J. 261 (1992) (describing how the Reconstruction Amendments served as a vehicle for whites to further their own policy interests by providing minimal racial remedies without impinging upon their own interests); Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2055–60 (1991) (ethos of individualism, evident in some voices of color, may condemn racial groups to pluralism’s "zero-sum game"); Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787, 801 (1992) ("First Amendment doctrine and theory have no words for the injuries of silence imposed by private actors.").
als as vehicles for racial progress, destabilize the supposedly neutral criteria of meritocracy and social order, and call for a re-examination of the very concept of "race." At a theoretical level, their proposals entail a fundamental re-thinking of personhood, community, and equality; at a doctrinal level, they may resist the tide of conventional opinion by condemning racist "speech," defending the use of racial "quotas," or rejecting the requirement that the equal protection plaintiff demonstrate discriminatory intent.

In order to accommodate previously marginalized voices, Critical Race Theorists call for a modification of jurisprudential dialogue. They stress the boundedness of legal discourse and the ways in which conventional modes of talking and listening may mute some voices and elide their messages. Accordingly, Critical Race Theorists have emphasized the

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28 See, e.g., Patricia J. Williams, Metro Broadcasting v. FCC: Regrouping in Singular Times, 104 HARV. L. REV. 525, 542-44 (1990) ("Racism inscribes culture with generalized preferences and routinized notions of propriety. It is aspirational as much as condemnation; it is an aesthetic. It empowers the mere familiarity and comfort of the status quo by labeling that status quo as 'natural.'").


30 See, e.g., Cook, supra note 19, at 1008-10.


34 E.g., Alex M. Johnson, Jr., Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties, 1992 U. ILL. L. REV. 1043.


36 Cf. Calmore, supra note 20, at 2137-38.

37 E.g., Jerome McCristal Culp, Jr., You Can Take Them to Water but You Can't Make
need for inter-disciplinary studies to expand the bounds of law talk, as well as the need for new modes of discourse—new histories, narratives, and counter-myths—to challenge the pervasive hegemony of the dominant voice.

Co-existent with the commonalities of Critical Race Theory is a pluralism of separate voices and views. Though they share recurring themes, Critical Race Theorists cannot be classified as part of an existing or emerging orthodoxy. On the contrary, the forms and substance of Critical Race Theory permit a plurality of views: there is now sufficient diversity within the general school that it is possible to speak in the plural of Critical Race Theories. Although Critical Race Theorists have not yet aligned themselves into formal camps or movements in quite the same way as, for example, Feminist Legal Theorists, at least two central points of departure (and glimpses of a third) can be identified.

The first concerns the meaning and dimension of “race.” On the one hand, advocates of the minority voice emphasize the distinctiveness, and distinct value, of the perspective gained by living the life of a racial minority in a white-dominated society. For example, Richard Delgado has described how the powerless outsider may experience the exercise of power in ways unnoticed by empowered insiders; Alex Johnson has argued that new ways of listening and evaluating are necessary for an appreciation of the new voice of color; and Jerome McCristal Culp, Jr. has called for a black theoretical scholarship to supplement the more practical black jurisprudence. On the other hand, some Critical Race Theorists reject an essentialist view of race, instead emphasizing the multi-dimensionality of the identities constructed in a postmodern world. Mari Matsuda, for example, has described the “multiple consciousness” of postmodern selfhood and argued for an accommodative jurisprudential

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40 For a survey of the distinct movements within contemporary Feminist Legal Theory, see HAYMAN & LEVIT, supra note 5, at 321–80.


42 Johnson, supra note 26.

43 Jerome McCristal Culp, Jr., Toward a Black Legal Scholarship, 1991 DUKE L.J. 39.
Angela Harris has identified the dangers of feminist essentialism. Regina Austin has identified the same essentialist dangers in the pretense to a single, coherent “black community.” Finally, John Calmore has urged a recognition of the “many dualities” of African-American life and an awareness of “all of the props of subordination, domination and oppression.”

The tension between these views is not as great as some conventional critics would have it. The “voice” theorists’ claims to distinctiveness are not undermined by the much-celebrated demise of the subject, since the politically constructed voice can be at least as distinct as the “natural” autonomous one. Similarly, the claims of the anti-essentialists to multifaceted identities can co-exist with evidence of a distinct racial voice, since their claim is simply that people do not live only the life of “race.”

More importantly, in their common understanding that “race” is politically

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44 Mari Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 WOMEN’S RTS. L. REP. 7 (1989). Professor Matsuda’s work helps bridge the gap between voice theorists and anti-essentialists. Consider one fundamental tenet of her outsider jurisprudence:

[T]hose who have experienced discrimination speak with a special voice to which we should listen. Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.


45 Harris, supra note 21, at 585.

46 Cf. Austin, supra note 31; see also Austin, Sapphire Bound!, 1989 WIS. L. REV. 539, 542–43 (warning against the pretense of a monolithic racial perspective that ignores class divisions and social and cultural diversity).

47 Calmore, supra note 20, at 2193.

48 Professor Calmore has written: “Critical Race Theory tends . . . toward very personal expression that allows our experiences and lessons, learned as people of color, to convey the knowledge that we possess in a way that is empowering to us and, it is hoped, ultimately empowering to those on whose behalf we act.” Id. at 2171; see also Jerome McCristal Culp, Jr., Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy, 41 DUKE L.J. 1095, 1097 (1992) (“The critique of law by people of color is based not on color, but on opposition to racial oppression.”); Allan C. Hutchinson, Identity Crisis: The Politics of Interpretation, 26 NEW ENG. L. REV. 1173 (1992) (“Identity’s significance is political and all the more significant for that.”).

49 As suggested, this claim is basically an empirical one and seems borne out by the persistent and substantial disjunction between the experience of white and minority Americans, reflected in opinion surveys and political elections.

50 Patricia Williams has written:

It is this perspective, the ambivalent, multivalent way of seeing that is, I think, at the heart of what is called critical theory, feminist theory, and the so-called minority critique. It has to do with a fluid positioning that sees back and forth across boundary, that acknowledges that in certain circumstances I can be black and good and black and bad, and that I can also be black and white, male and female, yin and yang, love and hate.
constructed, both groups of Critical Race Theorists radically differentiate themselves from their mainstream counterparts.

The second difference among Critical Race Theorists concerns the possibility of racial justice. On the one hand, reconstructionists write hopefully of the transformative possibilities of law, seeking redemption through the liberal pursuit of "rights" and "equality" or through a radically reconstructed society devoid of hierarchy. Patricia Williams, for example, has described the psychic value of "rights" into which an im-


51 See supra note 29.

52 A different conception of "race"—or a different pragmatic appraisal of the social constructionist understanding—may partially account for Randall Kennedy's skeptical review of the racial critique: "My central objection to the claim of racial distinctiveness . . . can best be summarized by observing that it stereotypes scholars." Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1786–87 (1989). He continued:

Although promoted in the name of an insurgent, liberatory, intellectual endeavor, race-based standing doctrine replicates deeply traditional ideas about the naturalness, essentiality, and inescapability of race—ideas that have for too long stunted American culture. Chief among these baneful notions is the belief that race is destiny—that knowing a person's race can properly lead to certain assumptions or conclusions about the worthiness of that person or her knowledge or her capacity to accomplish a certain task.

Id. at 1801.


A similar disagreement may be seen in feminist theory. Compare Harris, supra note 21, with e. christi cunningham, *Unmaddening: A Response to Professor Angela Harris*, 4 YALE J. L. & FEMINISM 155, 157 (1991) ("Multi-voicedness describes powerlessness: a condition in which definitions have been created by others and women of color have been left to combine applicable bits and pieces to create a whole.").

53 This division is roughly parallel to the chief divide within postmodern thinking generally. On one side are the poststructuralists: relentlessly skeptical, vigilantly deconstructing, their inquiry is concerned only with the internal value of language games, rhetorical tricks, and performative moves. See, e.g., *Interview with Jacques Derrida, in Criticism in Society* 8, 17 (Imre Salusinisky ed., 1987). For them there is truly no more. Essentially aesthetic in their sensibility, the legitimacy of an utterance for them is to be measured by its narrative dimensions: as performance, spectacle, as a generative source of additional narratives, as stating a difference. See *Lyotard, supra* note 6, at 64–65.
mense faith has already been invested;\textsuperscript{54} Kimberlé Crenshaw has cautioned against the Critical Legal Scholars' tendency to underestimate liberalism's practical benefits for oppressed people;\textsuperscript{55} and Charles Lawrence has written that "[t]he sustained struggle for liberation from racial oppression must be fed by a faith in ultimate victory."\textsuperscript{56} On the other hand, the "racial realists" insist on an acknowledgment of the deeply entrenched nature of racial hierarchy, a hierarchy that resists each attempt at reconstruction. Derrick Bell, for example, has concluded that "a commitment to racial equality merely perpetuates our disempowerment,"\textsuperscript{57} and Linda Greene

The other side is made up of the new (or neo- or postmodern) pragmatists: relentlessly hopeful, vigilantly reconstructing, they recognize principally the instrumental value of the language game. See, e.g., Cornel West, \textit{Race Matters} 159 (Vintage 1994) (1993). Essentially political in their sensibility, the legitimacy of an utterance for them is to be measured by its utility in achieving some social objective, an objective that they admit is wholly contingent, utterly disputable, and purely the product of construction, but an objective that somehow matters all the same. Most, perhaps all, Critical Race Theorists seem to be more closely aligned with the prophetic struggles of the new pragmatists than with the deconstructive project of the post-structuralists.

\textsuperscript{54} Patricia J. Williams, \textit{Alchemical Notes: Reconstructing Ideals from Deconstructed Rights}, 22 \textit{HARV. C.R.-C.L. L. REV.} 401, 433 (1987).

\textsuperscript{55} Professor Crenshaw has written:

Critics also disregard the transformative potential that liberalism offers. Although liberal legal ideology may indeed function to mystify, it remains receptive to some aspirations that are central to Black demands, and may also perform an important function in combating the experience of being excluded and oppressed. This receptivity to Black aspirations is crucial given the hostile social world that racism creates. The most troubling aspect of the Critical program, therefore, is that "trashing" rights consciousness may have the unintended consequence of disempowering the racially oppressed while leaving white supremacy basically untouched.


\textsuperscript{56} Lawrence, supra note 19, at 2296.

\textsuperscript{57} Derrick Bell, \textit{Racial Realism}, 24 \textit{CONN. L. REV.} 363, 377 (1992). Instead of pursuing such a deceptive goal, Professor Bell has urged that "[blacks] need a mechanism to make life bearable in a society where [they] are a permanent, subordinate class. Our empowerment lies in recognizing that Racial Realism may open the gateway to attaining a more meaningful status." \textit{Id.} at 377.

"It is time," Professor Bell has written, "to 'Get Real' about race and the persistence of racism in America." Derrick Bell, \textit{After We're Gone: Prudent Speculations on America in a Post-Racial Epoch}, 34 \textit{ST. LOUIS U. L.J.} 393 (1990). Among the disturbing realities observed by Professor Bell was the following:

On any number of occasions in American history, whites have acquiesced in—when they were not pressuring for—policy decisions that subordinated the rights of blacks in order to further some other interest . . .

Even those whites who lack wealth and power are sustained in their sense of racial superiority by policy decisions that sacrifice black rights. The subordination of blacks seems to reassure whites of an unspoken, but no less certain, property right in their "whiteness." This right is recognized by courts and society as all
has warned of the dangers of reliance on a system of justice “that excludes so much and so many from its reach.”

Again, the differences between these thinkers may not be as great as this simple schema might suggest. The reconstructionists seek to confront, not elude, the persistent reality of racial subordination, while the racial realists promise continued struggle for justice, however Sisyphean the task. Virtually all Critical Race Theorists, meanwhile, are united by some form of antisubordination theory, and all insist upon the necessity of struggle.

A latent potential for a third difference among Critical Race Theorists arises out of the contrast between theorists who would pursue separatist strategies—both in academic writing and in legal practice—and those whose work would be racially inclusive. Dissatisfaction or disillusionment with integrationist legal strategies and concerns over white co-optation or assimilation have led some theorists to advocate separatist approaches to legal problems. These concerns prompted a comparable call for separatism within the legal academy. That call has been matched by a responsive plea for inclusiveness, for work that both accepts and engages the efforts of white scholars and practitioners. One resolution, if it is needed, may be found in a pluralism of the type advocated by Patricia Williams, by Robert Williams, and by this Article: a pluralism that promises a celebra-

property rights are upheld under a government created and sustained primarily for that purpose.

*Id.* at 402.

Professor Greene has written:

I agree, in principle, with Bell’s timely philosophy. There is risk in total reliance on a system of constitutional equality that excludes so much and so many from its reach. Moreover, the adherence to, and faith in, a system of rights without an understanding of the politicalization of those rights foreshadows political immobilization and impotency. The complexities of current civil rights events underscore the need for an ideological approach and perspective that incorporates our post-*Brown* experiences into a civil rights strategy for the millennium.


* Cf. Calmore, *supra* note 20, at 2189. Professor Calmore describes common values as an “ideological commitment,” although he recognizes the many dangers inherent in the concept of “ideology.” However, because the concept of “ideology” is somewhat inhospitable to the contextualism, pluralism, and constructionism of Critical Race Theory, it seems better to speak in terms of an inclusive “theory” of antisubordination.


* The minority critiques of Critical Legal Studies prompted a response by Professor Alan Freeman. Professor Freeman argued, first, that undue emphasis on rights and other structural protections might lead to racial isolationism:
tion of difference, a dialogue that forswears dominance, and a consensus that is authentic and just.\(^62\)

Although these differences may have practical political ramifications, the presence of diversity and dialogue in the Critical Race Theory scholarship adds to its pluralistic strength. The ability to address and examine differences within a group enhances its ability to tolerate those “outside” it. The common understanding of the need for a radical restructuring of conventional thought and the shared desire for social change bind Critical

For one thing, multiracial coalitionism is not a matter of choice for any constituent group, but one of necessity. Equality of opportunity ideology and practice is not selective in its oppression, though some groups bear disproportionate pain. The civil rights fantasy that equality of opportunity, which already worked for whites (fallacy #1), could be made to work for blacks and other nonwhites as well (fallacy #2), producing parallel stratification among racial groups, remains a fantasy.


\(^{62}\) See infra notes 235–256 and accompanying text.
Race Theorists in ways that help them mediate the tensions between community and difference—an ability much needed by our legal system.

Several of the common tenets of Critical Race Theory are fundamentally postmodern. First, Critical Race Theorists reject both realist and conceptualist epistemologies and insist instead on the importance of perspective and context in assessing claims to truth. Second, Critical Race Theorists reject the contention that texts and practices have objective, neutral meanings and insist instead on their relentless deconstruction, and, perhaps, reconstruction. Third, Critical Race Theorists reject the conception of the self as innate, immutable, and autonomous, and insist instead on the re-cognition of “race” as—like all attributes of personhood—a political construction.

However, Critical Race Theorists share one additional commitment that in a sense defies postmodernity. Observers of the postmodern legal scene have noted the extraordinary disjunction between law as it is theorized in the academy and law as it is practiced by judges and lawyers. This divorce is keenly felt in constitutional law, where the academy and judiciary co-exist in mutual disregard, even disdain. In the postmodern world of constitutional law, theory seems nearly irrelevant. One can of course theorize as to why this may be the case, but whether one can actually do something about it remains one of postmodernism’s more vexing questions. In response to the vexing questions of postmodernism, Critical Race Theorists have risked an affirmative response, which may well threaten the postmodern disjunction between theory and practice in its insistence on the realization of a postmodernized justice. Thus a fourth tenet of Critical Race Theory emerges, one that may not be postmodern at all: Critical Race Theorists insist that justice cannot be merely theoretical, but must be informed by and realized in lived experiences; and while the struggle for racial justice may offer no prospects for immediate or ultimate success, there is no useful alternative to trying.

II. Critical Race Theory and Constitutional Traditionalism

Amid the calls to context and prophecies of reconstruction, a familiar voice beckons back to tradition. Superficially, the voice seems reactionary, offering to redeem traditional values from the onslaught of pluralism. But the resurgence of pragmatism has lent an apparent intellectual authority

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63 See Schlag, supra note 14.
65 Cf. Edward W. Said, Opponents, Audiences, Constituencies and Community, in THE ANTI-AESTHETIC, supra note 5, at 135, 142 (describing the less-than-pragmatic work of academic theorists as involving “three thousand advanced critics reading each other to everyone else’s unconcern.”).
to some form of constitutional traditionalism, the resurgence has even supported the claim that Justice Antonin Scalia is the Supreme Court’s first postmodern constitutional pragmatist.

Perhaps. But such a claim, if true, proves either the contention of some scholars that it is impossible to be a practicing postmodernist, or the contention of others that postmodernist thought is simply premodern stasis or Protagorean skepticism. Either way, what Justice Scalia’s traditionalism—and the conventional constitutional traditionalism embraced by the majority of the modern judiciary—clearly does not represent is a movement toward acceptance of that strain of postmodern thought that is manifest in the work of many postmodern feminists, post-structuralists, new pragmatists, and, most notably here, Critical Race Theorists. In contrast to these theorists, conventional traditionalism remains completely foundationalist, indifferent to context, and blissfully ignorant of its own construction.

If there is one group of legal scholars that defies meaningful generalization, it is certainly pragmatists. See J.M. Balkin, The Top Ten Reasons To Be a Legal Pragmatist, 8 Const. Commentary 351 (1991) (a pragmatist can also be “(a) a civic republican, (b) a feminist, (c) a deconstructionist, (d) a case-cruncher, (e) a crit, (f) a law-and-economics type, or (g) anything else”). On the question of “tradition,” scholars associated with legal pragmatism use a variety of conceptions and advance a number of positions. Suffice it to say that the pragmatic conception of law is generally rooted in some Wittgensteinian vision of law as “practice”—as convention setting and re-setting through the experience of living in law—and that the role of “tradition” in this conception is easily presumed to be less dynamic than the Deweyan conception of a means-ends continuum might suggest. See generally Thomas C. Grey, Holmes and Legal Pragmatism, 41 Stan. L. Rev. 787 (1989). Moreover, the pragmatic’s emphasis on community and consensus leads some postmodern critics to suggest that its “traditions” are dangerously reified and homogenized. See, e.g., Iris Marion Young, Justice and the Politics of Difference (1990). But see Guyora Binder, What’s Left?, 69 Tex. L. Rev. 1985 (1991). On the other hand, the “prophetic” strand of pragmatic thought seems to challenge conventional deference to “tradition” in a most unambiguous way, see Cornel West, The Limits of Neopragmatism, 63 S. Cal. L. Rev. 1747 (1990); but it has generated controversies of its own. Cf. Robert J. Lipkin, Pragmatism—The Unfinished Revolution: Doctrinaire and Reflective Pragmatism in Rorty’s Social Thought, 67 Tul. L. Rev. 1561 (1993). Compare Lynn A. Baker, “Just Do It”: Pragmatism and Progressive Social Change, 78 Va. L. Rev. 697 (1992) with Richard Rorty, What Can You Expect from Anti-Foundationalist Philosophers?: A Reply to Lynn Baker, 78 Va. L. Rev. 719 (1992).


Professor Chow has suggested that modern legal pragmatists include both “critical pragmatists” and “prudential pragmatists.” Professor Chow includes Critical Race Theorists and feminists among the critical pragmatists; among the prudential pragmatists he includes Justice Antonin Scalia. Chow, supra note 67, at 777–80. Critical pragmatists
The traditionalist’s belief in the fundamental nature of tradition cannot eradicate the fact that this doctrine has proven to be problematic on its own conventional terms. A recurring issue in constitutional cases as well as in academic literature concerns the size of tradition, or the level of generality at which it is to be described and the number of practices it thereby can be said to embrace. This issue now dominates “substantive” due process jurisprudence and has been the subject of one of the most famous footnote battles in modern constitutional history, a battle in which Justice Scalia declared himself the winner by proclaiming, that “[t]hough [Justice Brennan] has no basis for the level of generality [he] would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.” Whether Justice Scalia’s approach has any methodological integrity, except as the almost tautological vindication of legislative practice, and the extent to which its theoretical underpinnings are consistent with the constitutional role of the judiciary remain open questions both on the Court and in the academy.

deconstruct law with a radical critique of its foundationalist bases, while prudential pragmatists attempt to reconstruct law with a “cautious, conservative respect for tradition and inherited culture.” Id. 67 at 759. Both groups, he notes, reject the epistemological requirement of correspondence between a contested belief and its underlying essential reality. Instead, their epistemology focuses on the coherence of a contested belief with other established beliefs and appreciates the pluralistic and relativistic nature of knowledge. Id. at 777–80.

Normatively, the groups divide: Professor Chow suggests that critical pragmatists favor natural law as the basis for legal norms, while prudential pragmatists favor positive law. Id. at 814–15. Both bases, Professor Chow indicates, can be conceived of in non-foundationalist terms by emphasizing the significance of cultural construction and contingency. Id.

It is only this last claim that this Article contests. It is difficult to see how the conservative respect for positive traditions is anything other than foundationalist, even if it is accompanied by the quite unremarkable recognition that traditions are culturally constructed. When no better reason is offered—or needed—for following “tradition” other than the declaration that it is, “tradition” seems to be a foundation just as surely as any metaphysical principle.

Michael H. v. Gerald D., 491 U.S. 110 n.6 (1989). In Michael H., the Court found no due process protection for the biological father of a child born to a woman who was married to another man. The question, according to Justice Brennan’s dissenting opinion, was whether cognizable traditions supported the existence of the parental rights of a natural father, a question Brennan answered affirmatively. For Justice Scalia, the question was whether tradition supported the existence of rights “of the natural father of a child adulterously conceived,” a question Scalia easily answered in the negative. Scalia’s plurality opinion was joined by Chief Justice Rehnquist and by Justices O’Connor and Kennedy; the latter two refused to join the footnote setting forth Scalia’s “most specific level” thesis.

Virtually every work on due process—both judicial opinions and academic writings—confronts this issue at some point. Probably the leading conventional academic treatment is Laurence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. CHI. L. REV. 1057 (1990); from the critical perspective, the leading work is likely J.M. Balkin, Tradition, Betrayal, and the Politics of Deconstruction, 11 CARDOZO
In many ways, however, the argument over the level of generality may be misleading: it frames the debate in epistemological terms, when the critical issue is quite likely metaphysical. The difficulty, in other words, is not so much that we cannot achieve a consensus on the appropriate cognitive process for identifying tradition, but rather that we cannot achieve a consensus on the necessary premise, i.e., that there is a tradition waiting out there to be identified. Indeed, the deconstruction of "tradition" problematizes this metaphysical premise: inasmuch as every "tradition" harbors the trace of a "counter-tradition," the notion that any given "tradition" may be reduced to an objective, determinate reality is undermined.

Moreover, "tradition" proves to be unstable both over space (within and among cultures) and over time: shifting political valences produce a "semantic drift" through which a "tradition" may periodically come to re-express its embedded opposite. The tradition of "color-blindedness" is one of the more obvious relevant examples; the traditions (dis)favoring "civil rights" and "quotas" might also be cited, as well as those surrounding "equal opportunity," "affirmative action," and "school busing," to name a few. The problem with all of these "traditions" is not merely that they are unknowable; it is that, as coherent entities, they simply do not exist. Because the subjectivist strand of critical legal thought sometimes obscures this point, treating problems of indeterminacy not as metaphysical dilemmas but as the products of choice or false consciousness,

L. Rev. 1613 (1990). Among the cases, the issue is clearly presented in Bowers v. Hardwick, 478 U.S. 186 (1986), a case about a right to "homosexual sodomy" according to a majority of the Court, about a right "to be let alone" according to the dissenters, and about "sodomy" simpliciter by the terms of the challenged statute. Of course, it might also have been a case about human intimacy—perhaps love—and was, in one compelling view, very definitely a case about homophobic violence. See Kendall Thomas, Beyond the Privacy Principle, 92 Colum. L. Rev. 1431 (1992).


74 See Balkin, supra note 72.


76 See infra notes 171-188 and accompanying text.


78 The last entails a particular irony: school buses, for many years exclusively reserved for white school children, are now threats to their educational welfare. Compare Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality 4, 8 (1975) (noting that the Clarendon County Schools, one object of the consolidated Brown action, offered 30 buses for its 2375 white students and none for its 6531 Black students) with William B. Reynolds, Individualism vs. Group Rights: The Legacy of Brown, 93 Yale L.J. 995, 1002 (1984) ("The damage done to public education wrought by mandatory busing is evident in city after city . . . .").
it is left to Critical Race Theorists and other postmodern thinkers to complete the critique.\textsuperscript{79}

\textbf{A. Conventional Traditionalism and the Postmodern Critique}

Conventional "traditionalism"—reliance on the peculiar traditions of a dominant group to fix the meaning of constitutional text or, alternatively, on the peculiar dominant perceptions of a tradition to fix that meaning—has created an intolerable tension between constitutional democratic ideals and practical realities in the Supreme Court’s constitutional jurisprudence. The Court’s effort to define unifying traditions has systematically excluded the voices, perspectives, and counter-traditions of cultural minorities, leaving them at the mercy of the past practices, and embedded habits of majoritarian forces. A commitment to justice in a pluralistic society requires something more.

Postmodern thought counsels against the search for unity, pursuing instead the invigorating processes of discovery and creation. Thus the postmodern scientist celebrates the proliferation of inassimilable theories;\textsuperscript{80} the postmodern social scientist welcomes plural truths and divergent rationalities;\textsuperscript{81} the postmodern historian reconstructs new histories;\textsuperscript{82} the postmodern (anti)philosopher thrives on the incommensurable.\textsuperscript{83} Virtually all postmodern scientists discourage the dissemination of their various findings as "true" beyond the contexts that generate them, inviting consideration instead "of the limitations of the local language (what does it exclude?), the potentials inherent in alternative perspectives, and the sociocultural ramifications of both the research and the manner in which it is framed."\textsuperscript{84}

In a similar vein, the postmodern constitutionalist rejects the call for a unifying tradition, a tradition that, in totalizing, necessarily excludes.

\textsuperscript{79} Cf. Leiter, supra note 73, at 190. While Professor Leiter treats the influence of race and gender as primarily epistemological, I assume he would accept the near-tautological assertion that for "tradition" and other race- or gender-dependent constructs, the influence is indeed a matter of metaphysics.


\textsuperscript{83} See Lyotard, supra note 6.

This is not merely because the drive to totality is, like most of modernity’s project, seriously misleading; it is because it is murderously oppressive, a coerced exclusion or assimilation that amounts to an interpretive form of “cultural genocide.”\textsuperscript{85} Robert Williams has appealed to international norms to relieve Native Americans from the effects of this totalizing law:

That Tribal Nations have not forgotten the history of conquest justified by European-derived legal discourse explains why indigenous groups now seek to radically redefine contemporary conceptions of their rights and status in domestic and international legal forums. Pushed to the brink of extinction by the premises inherent in the European’s vision of the world, contemporary tribalism recognizes the compelling necessity of articulating and defining its own vision within the global community. Only then, in the free play by which a shared global discourse might evolve, can tribalism’s Americanized vision be fairly considered as something other than an anachronistic inconvenience to Modernity’s relentless consumptionism.\textsuperscript{86}

By way of illustrating the totalizing effects of an exclusive tradition, consider the manner in which the insistence on a single (white) perspective colors the following exchange. In a 1987 article in the \textit{Stanford Law Review}, Professor Charles Lawrence III described his feelings when, as the only black student in a New York City kindergarten classroom, his teacher shared with the class the illustrated book \textit{Little Black Sambo}. Professor Lawrence remarked, “I am certain that my kindergarten teacher was not intentionally racist,” explaining “[w]e were all victims of our culture’s racism.”\textsuperscript{87} Several years later, one reviewer objected to Professor Lawrence’s interpretation: “The theme of \textit{Little Black Sambo} is not racist . . . . Any racist association with the story is merely an historic and linguistic accident.”\textsuperscript{88} The distinction implicit in this comment—between what is genuinely racist and what is racist only by “historic and linguistic accident”—would doubtless be of small comfort to a schoolchild, assuming the distinction has any integrity or resonance at all. But that the schoolchild’s perspective is not terribly important is made explicit: “It seems to me,” the reviewer concluded, “that Professor Lawrence has failed to distinguish between what he sees in a work of literature and what it means to others.”\textsuperscript{89} To be sure, someone is failing to make that distinc-

\begin{footnotesize}
\begin{enumerate}
\item Williams, \textit{supra} note 4, at 297–98.
\item Lawrence, \textit{supra} note 35, at 318.
\item Cohen, \textit{supra} note 52, at 318–19.
\item Id. at 320.
\end{enumerate}
\end{footnotesize}
tion, but it is not at all clear that the fault lies with Professor Lawrence . . . except, of course, as a matter of tradition.

Even “good traditions” can exclude. When the demand for uniformity precludes the consideration of context and perspective, those traditions that once promised liberation from oppression can become its instruments. Nearly a century ago, the first Justice Harlan proclaimed the Constitution “color-blind” in his famous dissent in *Plessy v. Ferguson*.\(^90\) Taken in context, appearing, as it did, in the same paragraph as the otherwise oxymoronic declaration that “the humblest is the peer of the most powerful,” Justice Harlan’s proclamation was nothing short of an act of existential rebellion: a recognition of the reality of racial subordination and a refusal to accept it.\(^91\) But the meanings of tradition’s signs are unstable, and with the shift in cultural valences, “color-blindness” has become the guardian of the status quo:

When segregation was eradicated from the American lexicon, its omission led many to actually believe that racism therefore no longer existed. Race-neutrality in law was the presumed antidote for race bias in real life. With the entrenchment of the notion of race-neutrality came attacks on the concept of affirmative action and the rise of reverse discrimination suits. Blacks, for so many generations deprived of jobs based on the color of our skin, are now told that we ought to find it demeaning to be hired based

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\(^90\) 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

\(^91\) The paragraph reads:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

*Id.* at 559. “Every one knows,” Justice Harlan explained, that the purpose of the segregation law was subordination; “the purpose was . . . not so much to exclude white persons . . . as to exclude colored people.” *Id.* at 557. “The thin disguise of ‘equal’ accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.” *Id.* at 562. On the meaning of this opinion, see T. Alexander Aleinikoff, *Re-Reading Justice Harlan’s Dissent in Plessy v. Ferguson: Freedom, Antiracism, and Citizenship*, 1992 ILL. L. REV. 961; Hayman, *Re-Cognizing Inequality*, supra note 2, at 47.
on the color of our skin. Such is the silliness of simplistic either-or inversions as remedies to complex problems.\textsuperscript{92}

Conventional traditionalism, in short, excludes too many truths. In its indifference to context, it distorts; in its indifference to perspective, it is biased. In its pretense that the dominant tradition is the one tradition, it oppresses; and in its blindness to its own role in the construction of differences, it enlarges the spaces that separate us.

These objections are, in a sense, consequentialist, and ignore what might be acceptable justifications for the conventional conception of "tradition." Four more-or-less conventional justifications might be imagined. The first, essentially metaphysical, is the claim that "tradition" is a first-order principle. As with all foundationalist positions, this claim depends for its success on some combination of faith and power, and as this Article might suggest, faith is not warranted. A second defense is that "tradition" has been, traditionally, a first-order principle. This claim remains foundationalist, both in form and content; it simply necessitates an additional level of faith (or power). The third justification is efficiency: reliance on a stable convention both expedites the decision process and ensures predictable outcomes to interested observers. Methodologically, this claim ignores potential issues of incommensurability, of inter-subjective ordinal comparisons, unless there is a prior determination that "tradition" is the only value in the calculus. Moreover, it assumes that "tradition" possesses a coherent, determinate, objective meaning that, even in its conventional forms, it clearly lacks. Finally, the fourth justification is the argument from democracy. But this claim equates democracy with simple majoritarianism, a cramped conception of democracy that finds no warrant in history or theory—in short, not our "traditional" conception.

Of course, it is also possible that this talk of "tradition" is being taken far too seriously, that tradition's advocates know full well its failings as a substantive principle and use the term only strategically, i.e., to "obscure rather than to clarify" the issues it purportedly resolves.\textsuperscript{93} But even so, the suggested response—the call to consider all traditions, the call to engage counter-traditions—remains the same: "in this game of power," Robert S. Chang notes, "there is no 'objective' standard for disqualification; one 'wins' by being more persuasive."\textsuperscript{94}

\textsuperscript{92} Williams, \textit{supra} note 50, at 2141 (emphasis in original).
\textsuperscript{93} Paul F. Campos, \textit{Advocacy and Scholarship}, 81 CAL. L. REV. 817, 847 (1993).
B. A Postmodernized Tradition

Some of the claims on behalf of tradition may be rehabilitated if the processes of legal decision-making, and the “traditions” they entail, are simply re-conceptualized; if they are, in a sense, postmodernized. What emerges is a postmodern conception of “tradition,” re-conceived less as a stable, unitary principle, and more as an evolutive, dialogic practice.

The observation of the second Justice Harlan that “tradition is a living thing” is now a mainstay of contemporary philosophy. Tradition, according to Gadamer, “is not simply a permanent precondition; rather, we produce it ourselves inasmuch as we understand, participate in the evolution of tradition, and hence further determine it ourselves.” Following Hannah Arendt, David Luban argues that conventional legal traditionalism ignores this participatory element, underestimating the human capacity for action, for creativity, initiative, and innovation. And, of course, the judiciary is an inevitable and integral participant in these processes, simultaneously shaping, and being shaped by, the “traditions” it engages—sometimes respectfully, and sometimes not. One of our more notable cultural and judicial traditions, after all, is certainly our tradition of breaking with tradition.

Although they differ, often vitally, postmodern legal scholars are in general agreement that law is practice. Law is what we do, whether it is through language game, hermeneutical inquiry, deconstruction, or the struggle to build and sustain grand, and not-so-grand, theory. The traditions to which we look for guidance in the process of understanding or creating law—these are, truly, the same—are traditions that we create, and re-create upon each engagement. Traditions constrain us, certainly, both in the sense that they are deeply internalized and in the sense that we pledge to follow their external signs. But their meanings are too unstable for those signs to be definitive, and we are—individually and collectively—too conflicted for the internal constraints to be dispositive. With

95 See generally Martin Krygier, Law as Tradition, 5 LAW & PHIL. 237, 251 (1986) (noting that “the familiar post-Enlightenment antinomies—tradition and change; tradition and progress; tradition and modernity—rest on a deep misunderstanding of the nature and behaviour of traditions. For whatever else leads to change in law, and there are, of course, many sources both internal and external, the very traditionality of law ensures that it must change.”)


insight, we see many meanings of tradition and many traditions from which to choose. Tradition, postmodernized, is literally pluralized.

Such a postmodern reconception of tradition can thereby save contemporary interpretive theory from one of its more troubling dilemmas. The claim that the process of interpretation is inevitably constrained by the shared values of an interpretive community has always been somewhat embarrassed by the undeniable existence of a lack of consensus. Within the interpretive community of judges, the result is that the differences between, for example, Justices Brown and Harlan in Plessy v. Ferguson, or Justices Scalia and Marshall in City of Richmond v. Croson, must either be attributed to their memberships in different interpretive communities, or simply dismissed as insignificant or anomalous. In either event, the interpretive account ceases to have much value for the lawyer.

Recognizing that "our" legal traditions are plural in a sense loosens the constraints of the interpretive community, and admits the possibility of a range of plausible interpretations. This is not so much because the autonomous judge is freed from the bondage of judging, but rather more because the reconception of judging is both less essentialist and more pluralist. The judge still judges, but we recognize now her broader cultural situatedness and implore her to strive for the same recognition. Called to "context" in this fashion, we see the many traditions that make our

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99 This formulation is most closely identified with the works of Stanley Fish. See, e.g., Stanley Fish, Fish v. Fiss, 36 Stan. L. Rev. 1325 (1984). But many other contemporary theorists, including some who might sharply disagree with Professor Fish’s formulation, would share the view that meaning is culturally situated and the processes for meaning’s construction culturally prescribed. Without denying their vital differences, such a view seems fairly attributable to the advocates of Gadamer’s hermeneutic philosophy, see, e.g., Francis J. Mootz III, The New Legal Hermeneutics (book review) 47 Vand. L. Rev. 115 (1994); see also J.M. Balkin, Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence, 103 Yale L.J. 105 (1993); to the advocates of Derridean deconstruction, see, e.g., Allan C. Hutchinson, Identity Crisis: The Politics of Interpretation, 26 New Eng. L. Rev. 1173 (1992); Pierre Schlag, The Problem of the Subject, 69 Tex. L. Rev. 1627 (1991); and to the proponents of Wittgenstein’s theory of language as a form of life. See, e.g., Dennis M. Patterson, Law’s Pragmatism: Law as Practice & Narrative, 76 Va. L. Rev. 937 (1990); Margaret Jane Radin, Reconsidering the Rule of Law, 69 B.U. L. Rev. 781 (1989); Joan C. Williams, Culture and Certainty: Legal History and the Reconstructive Project, 76 Va. L. Rev. 713 (1990).

100 As Dennis Patterson writes, “no account of disagreement can be plausible if the community is lost in the course of the explanation.” Dennis Patterson, The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory, 72 Tex. L. Rev. 1 (1993).

101 Cf. Mootz, supra note 99, at 139–40 (“Contemporary hermeneutics counsels participants in a tradition to put themselves at risk before the tradition, which results, of course, in also putting the tradition at risk before their prejudiced horizons.”).

102 Cf. Minow & Spelman, supra note 16, at 1600, 1605 (urging a need to recognize “[t]he patterns of differences that have been used historically to distinguish among people, among places, and among problems” and to consider “the societal structures of power that extend far beyond the particularities of a given situation.”); see also Cornel West interviewed by bell hooks, in Hooks & West, supra note 61, at 49 (“A race-transcending prophet is
judge: legal and judicial, to be sure, but also the traditions of class, gender, ability, sexual orientation, and, of course, race. By ceasing to insist that she do the impossible, that is, to escape her “personal” traditions and be only a judge—we may ask instead that she consider the utterly plausible—that she consider the value of the many traditions that shape us, with all their idiosyncracies, in all their hues.

What remains then is to redefine the “we” whose traditions will provide our new source of authority or, rather, to decline to undertake that limiting project. If we recognize that, in a postmodern age, traditions evolve as rapidly over space as over time, and merely add the normative premise that no tradition should be a priori privileged over another, we get some sense of a postmodernized tradition, a tradition that avoids both the intolerance of modernism and the uncritical stasis of premodernism. Again, Critical Race Theory helps lead the way. In heightening our awareness of the symbiosis of formal power and cultural tradition, Critical Race Theory counsels a particular need for sensitivity to the counter-traditions of oppressed groups. In short, it teaches that postmodern traditionalism must be not merely plural, but truly pluralistic.

III. Constitutional “Traditions” and Race

The use of tradition in “race” cases has received curiously little attention from scholars, perhaps because these cases do not arise in contexts in which “tradition” provides an explicit methodological core. But, as the following brief survey of cases is designed to demonstrate, “tradition” informs a very wide range of constitutional decisions, including those involving race. Considered as a whole, four constitutional traditions emerge from the “race” cases of the past decade. First, the Court has posited a tradition favoring “color-blindness” and disfavoring racial quo-

someone who never forgets about the significance of race but refuses to be confined to race."

103 As Professor Espinoza writes:

Minority scholars battle with their own socialized self-perceptions, constructed at an early age and reinforced in the institution. It is painful to feel excluded and disturbing to perceive the world differently from those whose discourse dominates. It is difficult not to internalize the sense of otherness as a personal failing. A careful accommodation is reached between expectations understood and realities made possible. The knowledge that we may depart from expectations is the first triumph. The prerequisite to this victory, however, is the identification of those expectations and the social construct they represent. Critical Race Scholarship is one vehicle through which minorities in the law understand and reconcile the world as predicted, the world as experienced, and the world as dreamed.

tas, racial preferences, and racial gerrymands. Second, the Court has posited a tradition favoring judicial deference to other public actors in "race" matters, consistent with the "traditional" principles of federalism and the separation of powers. Third, the Court has posited a tradition favoring deference to private choices and to free markets to produce the optimal allocations of "racial" resources. Fourth, and finally, the Court has posited a tradition favoring deference to the neutral schemes of meritocracy in distributing just desserts to "racial" actors. In the "race" cases, these appeals to tradition are particularly pernicious: indeed, it proves too easy to be blinded by the all-pervasive whiteness of conventional constitutional traditionalism. Before elaborating, locating, and critiquing these traditions, it may be helpful to review some of the leading and representative Supreme Court decisions.

A. The "Affirmative Action" Cases

After a few palsied efforts from a highly fractured Court, the Supreme Court's "affirmative action" jurisprudence began to assume some focus in 1986, with the decision in Wygant v. Jackson Board of Education. In Wygant, the Court invalidated a layoff provision in a teachers' union collective bargaining agreement; that provision prohibited the disproportionate layoff of minority teachers—disproportionate, that is, to their composition of the teaching force—regardless of the dictates of a strict seniority system. Writing for the Court, Justice Powell insisted that race-specific preferences were permitted only to remedy prior official acts of discrimination: the school board's claim that it was remedying "societal discrimination" was too "amorphous" and its attempts to ensure minority "role models" too "indefinite" to justify provisions that "work against innocent people . . . [and] that are ageless in their reach into the past, and timeless in their ability to affect the future." Justice Powell pointed to the availability of a "less intrusive means . . . such as hiring goals" to minimize the "burden to be borne by innocent individuals." Justice Marshall responded by querying how those hiring goals could be met without layoff protection in a school system with a documented

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106 Id.
107 Justice Powell's opinion was joined, to varying degrees, by Chief Justice Burger and by Justices Rehnquist and O'Connor. Justice White concurred in the judgment. Justice Marshall's dissenting opinion was joined by Justices Brennan and Blackmun; Justice Stevens wrote a separate dissent.
108 Wygant, 476 U.S. at 276.
109 Id. at 283–84.
110 Id. at 282.
history of racial discrimination in teacher hiring—accounting for the seniority advantages of white teachers—and with current fiscal needs for layoffs.\footnote{See id. at 295–312 (Marshall, J., dissenting).}

The Court refused to act when faced with another community with a history of racial discrimination in \textit{City of Richmond v. Croson}.\footnote{488 U.S. 469 (1989).} Black citizens of Richmond, Virginia comprised half the city’s population, but black contractors received less than one percent of the city’s subcontracts. The city responded by setting aside thirty percent of the dollar amount of the city’s subcontracts for minorities. The response was designed to ameliorate the effects of past and present racial discrimination in the contracting industry. Strictly scrutinizing the city’s evidence—some statistical, some testimonial, some borrowed from Congressional findings—one precious piece at a time, the Court, per Justice O’Connor,\footnote{Justice O’Connor’s opinion was joined, in various parts, by Chief Justice Rehnquist and Justices White, Stevens, Kennedy, and Scalia. Justices Stevens, Kennedy, and Scalia each wrote separate concurrences. Justice Marshall dissented, joined by Justices Brennan and Blackmun; Justice Blackmun wrote a separate dissent, joined by Justice Brennan.} found insufficient support for the “amorphous claim” that racial discrimination was at the root of the disparities, and dismissed the probability evidence of lost minority opportunities as “sheer speculation.”\footnote{Croson, 488 U.S. at 499.} Warning repeatedly of the dangers of race-conscious action,\footnote{See, e.g., id. at 493–94 (classifications based on race “may in fact promote notions of racial inferiority and lead to a politics of racial hostility”); id. at 505–06 (“The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.”).} Justice O’Connor concluded that the “sorry history” of racial discrimination cannot justify the use of a “rigid racial quota.”\footnote{Id. at 499.} Justice Scalia concurred, offering that “[t]he difficulty of overcoming the effects of past discrimination is as nothing compared to the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin.”\footnote{Id. at 520 (Scalia, J., concurring).}

In \textit{Metro Broadcasting, Inc. v. F.C.C.},\footnote{497 U.S. 547 (1990).} the Court\footnote{Justice Brennan wrote the opinion—his last—joined by Justices White, Marshall, Blackmun, and Stevens, the last of whom also wrote a separate concurrence. Justice O’Connor’s dissent was joined by Chief Justice Rehnquist and by Justices Kennedy and Scalia; Justice Kennedy wrote a separate dissent, joined by Justice Scalia.} sustained certain minority preference policies of the Federal Communications Commission relating to broadcast licensing. Utilizing an intermediate level of review in deference to the federal actor, the Court held that the preferences were
substantially related to the important interest in promoting broadcast diversity. That interest, Justice O'Connor wrote in dissent, is "simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications."\(^{120}\) And Justice Kennedy, joined by Justice Scalia, derided the "demeaning notion that defined racial groups ascribe to certain 'minority views'"\(^{121}\) and wondered aloud whether the "tolerance and decency to which our people aspire will let the disfavored rise above hostility and the favored escape condescension."\(^{122}\)

**B. The Desegregation Cases**

The path of segregation cases that began with *Plessy v. Ferguson*\(^ {123}\) has of late looked eerily like a circular one. The revolution wrought in 1954 by *Brown v. Board of Education*,\(^ {124}\) a revolution confirmed in 1958 in *Cooper v. Aaron*\(^ {125}\) and extended a decade later in *Green v. New Kent County School Board*,\(^ {126}\) began to unravel with the schizophrenic dicta of 1971's *Swann v. Charlotte-Mecklenburg Board of Education*\(^ {127}\) and was substantially undone by the severe practical constraints imposed by 1974's *Milliken v. Bradley*.\(^ {128}\) And now, after a generation-long hiatus, the Court's return to desegregation cases in *Board of Education v. Dowell*,\(^ {129}\) *Freeman v. Pitts*,\(^ {130}\) and *United States v. Fordice*\(^ {131}\) appears to complete a counter-revolution: *Plessy’s* "traditions of the people"\(^ {132}\)—the traditions of racial separateness, of racial hierarchy—once again appear to be

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120 *Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J., dissenting).
121 *Id.* at 636 (Kennedy, J., dissenting).
122 *Id.* at 637.
123 163 U.S. 537 (1896).
125 358 U.S. 1, 17 (1958) ("[T]he constitutional rights of children . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'").
126 391 U.S. 430 (1968) (invalidating "freedom of choice" plan that did not realistically promise to convert a dual system of segregation to a desegregated system).
127 402 U.S. 1 (1971). The inherent tension in the language of *Swann* is evidently the consequence of a fractured Court struggling to maintain unanimity in desegregation cases. *See generally Bernard Schwartz, Swann's Way* (1986) noting that the opinion went through no less than six drafts and reflects the individual and often contrasting views of Justices Black, Brennan, Douglas, Marshall, and Stewart, as well as the nominal author, Chief Justice Burger.
128 418 U.S. 717, 745 (1974) (limiting interdistrict remedies to constitutional violations with interdistrict effects and concluding that "[t]he constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district." *Id.* at 764).
132 "In determining the question of reasonableness," Justice Brown wrote for the Court in *Plessy*, the Louisiana legislature "is at liberty to act with reference to the established
In Dowell, Chief Justice Rehnquist, writing for the Court, insisted that a federal district court should terminate its supervisory jurisdiction over a desegregating school district where the school board “had complied in good faith with the desegregation decree since it was entered, and the vestiges of past discrimination had been eliminated to the extent practicable.” Noting that desegregation orders “are not intended to operate in perpetuity,” the Chief Justice concluded that educational systems should not be condemned “to judicial tutelage for the indefinite future” but rather properly belonged under “local control.”

In Freeman, the Court, per Justice Kennedy, observed that the de jure/de facto distinction applied with equal force to desegregation and to resegregation cases: “Where resegregation is a product not of state action but of private choices, it does not have constitutional implications.” The question in such cases, Justice Kennedy advised, is whether any current racial imbalances in the schools “have a causal link” or bear a “real and substantial relation” to the prior de jure violation. The burden remained on the school board to rebut the presumption of such a nexus, but the board’s “good faith” could be offered to satisfy that burden. Justice Scalia’s concurrence questioned both the propriety of imposing an affirmative duty to integrate and the wisdom of the allocation of the burden of proof. He concluded:

We must soon revert to the ordinary principles of our law, of our democratic heritage, and of our educational tradition: that plaintiffs alleging Equal Protection violations must prove intent and causation and not merely the existence of racial disparity; that public schooling, even in the South, should be controlled by

usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.” 163 U.S. at 550. Justice Brown hardly needed to clarify whose comfort was promoted, whose peace and good order preserved by the “traditions of the people.”

For a survey of the desegregation cases and a critique of Dowell and Freeman, see Hayman & Levit, supra note 5.

The opinion was joined by Justices White, O’Connor, Scalia, and Kennedy. Justice Marshall, joined by Justices Blackmun and Stevens, dissented. Justice Souter did not participate in the case.

Dowell, 498 U.S. at 249, 250.
Id. at 248.
Id. at 249.
Id. at 248.

Justice Kennedy’s opinion was joined by Chief Justice Rehnquist and by Justices White, Scalia, and Souter. Justices Scalia and Souter wrote separate and quite opposed concurrences. Justice Blackmun wrote an opinion concurring in the judgment, joined by Justices Stevens and O’Connor. Justice Thomas did not participate in the case.

Id.
Id. at 1448–50.
locally elected authorities acting in conjunction with parents; and that it is “desirable” to permit pupils to attend “schools nearest their homes.”

Finally, in United States v. Fordice, the Court, per Justice White, held that desegregation doctrine applied in the context of higher education: racial imbalances in post-secondary public educational systems were subject to remediation where the state “perpetuates policies and practices traceable to its prior [dual] system that continue to have segregative effects.” Dissenting in part, Justice Scalia again posited the distinction between the negative duty not to segregate and the affirmative duty to integrate; reviving the Parker doctrine, he insisted that the Court’s decisions “immediately following Brown” require only that the states “eliminate discriminatory obstacles to admission.” Justice Scalia also professed concern about the fate of historically black institutions under the Court’s desegregation standard; would it violate equal protection, he wondered, to offer in such schools “a so-called Afrocentric curriculum” or even to afford such schools funding on a par with predominately white institutions, equal funding, he contended, being “part and parcel of the prior dual system.”

C. Cases Colored by Race

Race, of course, has figured prominently in many other constitutional cases within the past decade. In McCleskey v. Kemp, the Court sustained the “basic principle” that the equal protection plaintiff must prove purposeful discrimination, a “basic principle” discovered by the Supreme Court in Fordice, 112 S.Ct. at 2749 (Scalia, J. dissenting).

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143 Id. at 1454 (Scalia, J., concurring) (citations omitted).
145 Justice White’s opinion was joined by Chief Justice Rehnquist and by Justices Blackmun, Stevens, O’Connor, Kennedy, Souter, and Thomas. Justices O’Connor and Thomas filed separate concurrences; Justice Scalia filed an opinion concurring in the judgment in part and dissenting in part.
147 The doctrine, named for federal judge John Parker, who offered its clearest articulation, essentially insisted that the Constitution, and Brown v. Board of Education, did not require integration, but merely forbade forced segregation. See generally Kluger, supra note 78, at 751-52. In the abstract, the doctrine is almost obviously correct; in the context of entrenched racial segregation, it becomes a device for perpetuating segregation under the pretense of “private choice.” See Robert L. Hayman, Jr. & Nancy Levit, supra note 2, at 627. The Supreme Court unanimously rejected the Parker doctrine in Green v. County School Board, 391 U.S. 430 (1968).
148 Fordice, 112 S.Ct. at 2749 (Scalia, J. dissenting).
149 Id. at 2752.
151 McCleskey, 481 U.S. at 292.
Court barely a decade earlier.\textsuperscript{152} The \textit{McCleskey} Court rejected a statistical challenge to racial disparities in capital sentencing,\textsuperscript{153} urging respect for the "traditionally ‘wide’" scope of prosecutorial discretion,\textsuperscript{154} and insisting that the appropriate forum for relief from structural inequities was not the federal judiciary, but the state legislature.\textsuperscript{155}

In \textit{Employment Division v. Smith},\textsuperscript{156} a case with racial implications too often neglected by many,\textsuperscript{157} Justice Scalia\textsuperscript{158} rejected a free exercise challenge to a prohibition against the sacramental use of peyote in cere-

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\textsuperscript{152} See Washington v. Davis, 426 U.S. 229, 239–42 (1976) (requiring proof of purposeful discrimination, not simply disproportionate impact, as the predicate to equal protection scrutiny). Not much foreshadowed this discovery: indeed, just five years prior, a majority of the Court had rejected the claim that discriminatory intent could be used as the basis for a challenge to an action with uniform effects, Palmer v. Thompson, 403 U.S. 217 (1971); and at the time of the \textit{Washington v. Davis} decision, most of the circuit courts considering the issue had held that disparate impact sufficed to prove racial discrimination. \textit{See} Washington v. Davis, 426 U.S. at 244 n.12.

\textsuperscript{153} Attorneys for Warren McCleskey, a black man convicted of killing a white police officer, presented the Supreme Court with a statistical analysis of the Georgia death sentencing scheme. The evidence indicated that black defendants accused of killing white victims were over four times more likely to be sentenced to death than white defendants accused of killing black victims. The attorneys also argued that Georgia has a well-documented history of judicially recognized racial discrimination and, indeed, it formally maintained racially distinct punishment schemes for much of its history. \textit{McCleskey}, 481 U.S. at 297–99.

The Supreme Court ruled that the evidence did not establish a prima facie case of racial discrimination for equal protection purposes. Justice Powell, writing for the Court, insisted that the plaintiff prove individualized purposeful discrimination. As the author of the Georgia study subsequently noted, proof of individual purposeful discrimination is a requirement that statistical probability data can never satisfy. \textit{David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., Equal Justice and the Death Penalty: A Legal and Empirical Analysis} 370–80 (1991). To the extent that the plaintiff may claim that the state discriminates in maintaining a scheme of unequal punishment, Justice Powell insisted on proof that the scheme was maintained—here by the Georgia legislature—because of its discriminatory effect, not merely in ignorance of or indifference to such inequality. \textit{McCleskey}, 481 U.S. at 298.

Justice Powell noted that the claim in \textit{McCleskey} “throws into serious question the principles that underlie our entire criminal justice system.” 481 U.S. at 315. He observed that acceptance of the claim would open the door to widespread claims of bias in criminal sentencing. “Taken on its face,” Justice Brennan wrote in dissent, “such a statement seems to suggest a fear of too much justice.” \textit{Id.} at 339 (Brennan, J., dissenting).

Throughout his stay on death row, Warren McCleskey maintained that he was not guilty of the crime for which he had been sentenced to death. McCleskey died in the electric chair early in the morning of September 25, 1991. Outside the prison walls, a man dressed in the full regalia of the Ku Klux Klan held a sign reading, “We Support the Death Penalty.” \textit{Warren McCleskey’s Long Road to the Death Chamber; Amnesty Action}, p. 3, (Nov./Dec. 1991).

\textsuperscript{154} \textit{McCleskey}, 481 U.S. at 296.

\textsuperscript{155} \textit{Id.} at 319.

\textsuperscript{156} 494 U.S. 872 (1990).

\textsuperscript{157} Myself included: I am indebted to David Carroll and Charles DiMaria for indicating what should have been obvious.

\textsuperscript{158} Justice Scalia’s opinion for the Court was joined by Chief Justice Rehnquist and by Justices White, Stevens, and Kennedy. Justice O’Connor concurred in the judgment; Justice Blackmun dissented, joined by Justices Brennan and Marshall.
\end{footnotesize}
monies of the Native American Church. Justice Scalia insisted that the First Amendment was not implicated by a “neutral law of general applicability”; he concluded, were best presented to the legislature. “It may fairly be said,” he acknowledged, “that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself . . . .”

In \textit{R.A.V. v. City of St. Paul}, Justice Scalia\footnote{161} invalidated a disorderly conduct ordinance that prohibited, inter alia, a cross-burning designed to arouse “anger, alarm, or resentment . . . on the basis of race.” Justice Scalia found no justification for the content-based distinction manifest in the statute. The city, he observed, had “not singled out an especially offensive mode of expression.”\footnote{163} He concluded by agreeing that cross-burning was “reprehensible,” but the city had “sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.”\footnote{165}

Finally, in \textit{Shaw v. Reno}, the Court\footnote{166} held that “extremely irregular” electoral districts may in fact be unconstitutional racial gerrymanders. Departures from “traditional districting principles”\footnote{168} may give rise to a

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  \item \textit{Smith}, 494 U.S. at 879.
  \item \textit{Id.} at 890. Ironically, Congress responded by creating a federal statutory right to the accommodations required by pre-\textit{Smith} jurisprudence, Religious Freedom Restoration Act, Pub. L. 103-141, 107 Stat. 1488 (1993), which either proves that Justice Scalia was right about the political process or wrong about the importance of the rights.
  \item 112 S. Ct. 2538 (1992).
  \item Justice Scalia’s opinion for the Court was joined by Chief Justice Rehnquist and Justices Kennedy, Souter, and Thomas. Justices White, Blackmun, Stevens, and O’Connor joined various parts of concurrences, all of which sharply disagreed with Scalia’s methodology. The Court achieved unanimity the second time it considered a hate crimes statute, but only through an opinion that appears utterly irreconcilable with the Court’s initial effort. \textit{Compare id. with Wisconsin v. Mitchell}, 113 S. Ct. 2194 (1993).
  \item \textit{R.A.V.}, 112 S. Ct. at 2547.
  \item \textit{Id.} at 2549.
  \item \textit{Id.} at 2550.
  \item 113 S. Ct. 2816 (1993).
  \item Justice O’Connor’s opinion for the Court was joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas. Justices White, Blackmun, Stevens, and Souter dissented.
  \item \textit{Shaw}, 113 S. Ct. at 2824. The instability of “traditions” is well illustrated by \textit{Shaw v. Reno} and its paean to the “traditional principles of electoral districting.” The gerrymandered district in \textit{Shaw} was, according to a majority of the Court, premised on the unacceptable assumptions that black voters were essentially black and that manipulation of the electoral district was permitted to increase black electoral power. But, of course, such essentialism and manipulation are precisely the “traditional principles of electoral districting”: “we are left,” Professors Aleinikoff and Issacharoff write, “with the gnawing impression that the rules of the game were changed only when minorities started to figure out how to play.” T. Alexander Aleinikoff & Samuel Issacharoff, \textit{Race and Redistricting: Drawing Constitutional Lines after Shaw v. Reno}, 92 Mich. L. Rev. 588, 639 (1993).
\end{itemize}
suspicion of race-conscious manipulation of the districting process,\(^{169}\) manipulations, however “benign” their motives, that are rooted in “impermissible racial stereotypes” about voting habits.\(^{170}\)

**D. Traditions and Counter-Traditions**

Embedded within each of these opinions is some conception of one of “our” traditions. These traditions are sometimes narrowly derived from the corpus and history of the law, sometimes more generally ascribed to the broader culture. They are presented as objective, neutral, and all-embracing; they are purportedly determinate and rhetorically determinative. Moreover, they are normatively appealing: our traditions are not only what make us, they are what make us good.

But not all of these traditions will well serve all the people all the time. Traditions nearly always exclude; traditions very often suppress; traditions sometimes subordinate. This is particularly true of our traditions relating to race, which, perhaps more than most, have neatly divided us into a traditional majority and minority, encouraged each to develop its own traditions, and unfailingly incorporated the majoritarian traditions into meritocratic schemes that deepen the division and rigidify the hierarchy.

The claim here is not that “tradition” has no place in constitutional analysis, but only that the term is in need of some critical assessment and more meaningful explication. The caution, in short, is against the non-reflexive reliance on tradition, against the assumption that there is but one “tradition,” and that it is unfailingly good.\(^{171}\) Thus, Critical Race Theory counsels an awareness of the possibility that traditions may not be universal, or at least not universally beneficial. It suggests a need to consider counter-traditions, diverse perspectives, and the possibility of reconstructed pluralistic traditions. To illustrate, following are the four dominant traditions that emerge from the survey of race cases, coupled in each instance with a racial critique and proposed counter-tradition.

1. **The Tradition Favoring Color-Blindness and a Counter-Tradition of Acute Race-Consciousness**

The tradition favoring color-blindness finds doctrinal expression in the contention that racial classifications are inherently and uniformly

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\(^{169}\) Shaw, 113 S. Ct. at 2824–27.

\(^{170}\) Id. at 2827.

\(^{171}\) See Richard Delgado & Jean Stefancic, *Imposition*, 35 WM. & MARY L. REV. 1025, 1052 (1994) (cautioning against “the quite natural tendency to believe that one’s own way of seeing and doing things is natural and universal”).
suspect; and that, as a consequence, racial quotas, racial preferences, and racial gerrymands are presumptively unconstitutional. This central understanding informs virtually every constitutional decision involving race.

The commitment to color-blindness has both a normative and a positive dimension. The first is manifest in an almost obsessive desire to exclude "race" from public discourse, as if, through our willful ignorance, we could make it simply vanish. But this view entails a series of assumptions that should not go unchallenged. One, more or less empirical, is that race will matter less if we consciously refuse to talk about it. Nothing in our history or contemporary reality suggests that the results of the coerced silence approach to public discourse—imposed here quite asymmetrically—will be anything less than perverse.

Another is the implicit assumption, made explicit in Justice Scalia's Croson concurrence, that "race" inherently devolves into questions of better or worse, that we cannot "classify" without "judging." But this is so only if, first, we are wedded to outmoded, linear, biological conceptions of "race" and, second, we refuse to accept the possibility that, even under a linear conception, the differentiating axis of "race" can be horizontal rather than vertical, that "race" can be categorically sequenced without being hierarchically ordered. Finally, the normative commitment assumes, quite explicitly, that the costs of race talk outweigh its benefits; thus Croson, observe T. Alexander Aleinikoff and Samuel Issacharoff, ultimately manifests a program of "equality" "dedicated to the pursuit of social peace rather than social justice." But, perhaps, no justice, no peace.

The positive dimension of the commitment to color-blindness entails a literal inability or unwillingness to see color and its effects. For example, Croson manifests what Patricia Williams has described as a "lawyerly language game of exclusion and omission," in which the city's evidence of racial discrimination is disaggregated and dismissed. Thus "race, no matter how uniform and exclusive, could not be called exclusionary in the absence of proof that people of color even want to be recipients of municipal contracts." This forced separation of individual choice

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172 This is true both in the sense that "race" is singled out as the forbidden subject, perversely increasing, perhaps, our "race-consciousness" see David A. Strauss, The Myth of Colorblindness, 1986 S. CT. REV. 99, and in the sense that the racial perspective preserved is, by default, white. See, e.g., Derrick Bell, Faces at the Bottom of the Well, supra note 39, at 109–26 (offering the "Rules of Racial Standing," which combine to preserve the hegemony of the white perspective).


174 Aleinikoff & Issacharoff, supra note 167, at 600.

175 Williams, supra note 50, at 2130.

176 Id. at 2139 (emphasis in original).
from social constraint is echoed in the opinion’s repetitive invocation of the standard dichotomies: public versus private, state versus federal, past versus present, fact versus opinion. "Societal discrimination" is converted into an amorphous claim by this relentless disaggregation of experience, leaving a fragmented landscape in which “racial power has been mediated out.”

What emerges is an almost congenital blindness to the reality of racial hierarchy: “[w]hite folks,” writes Richard Delgado, “never see their own racial and class advantage.” Buttressed by the metaphysical pretenses of equal opportunity, white justice re-creates a world in which economic disparities reflect not racism, but differences in “special qualifications” and in “entrepreneurial choices.” In this whitewashed tradition, the oppression and privileges of race are consigned to a distant place and time, yielding a myth of innocence and neutrality, “the product of the blissful, self-serving ignorance that comes from never having been on the wrong side of a hiring decision because of race or gender.” “African-Americans, however, experience this pervasive whiteness not as neutral, but as acutely race-conscious.”

Not everyone wants to ignore race; not everyone can. Thus, Critical Race Theorists have described a counter-tradition: one marked, descriptively, by a recognition of the historical and contemporary facts of “race”-ism, and, prescriptively, by a commitment to the re-cognition of “race” in non-hierarchical terms.

Regarding the former, Critical Race Theorists acknowledge the abstract appeal of color-blindness. But, as Kimberlé Crenshaw observes, “This belief in color-blindness and equal process . . . would make no sense at all in a society in which identifiable groups had actually been treated differently historically and in which the effects of this difference in treatment continued into the present.” And that, of course, is precisely the society we have constructed: a society which continues to differentiate our lives along racial lines today. As Richard Delgado writes:

One structural feature of human experience separates people of color from our white friends, accounting in large part for our differing perceptions in matters of race. This structural feature, which dwarfs almost everything else, is simply stated: white

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178 Delgado, supra note 39, at 749.
179 See Freeman, supra note 61, at 354–85.
181 Id.
182 Crenshaw, supra note 55, at 1345.
people rarely see acts of blatant or subtle racism, while minority
people experience them all the time.183

So omnipresent, so all-pervasive is the life lived in "race" that evidentiary
artifacts cannot do it justice, certainly not as they are distorted in Croson:
"Noninterpretive devices, extrinsic sources and intuitive means of reading
may be the only ways to include the reality of the unwritten, unnamed,
noncontext of race."184

Prescriptively, Critical Race Theorists insist that "race" cannot be
denied, but can be re-cognized. Rejecting the untenable conception of
"race" as a natural, inherent, immutable characteristic, they focus instead
on the cultural processes of creating "race," asserting what is now almost
axiomatic in contemporary thought, that "race," like all attributes of self­
hood, is a social construct.185 Moreover, given the unique role of "race"
in the constructions and reconstructions of our official traditions, it is
perhaps more accurate to speak of "race" as Cornel West does, as a
"political and ethical" construct.186

To say that "race" is politically constructed, however, is to assert,
rather than to deny, its real salience.187 Only when "race" is divorced from
its political meaning does "racism" fade from consciousness. Oppression
and privilege become distant memories; equality—formal, symmetrical,
elegant, and empty—becomes, somehow, real.188 By focusing on the proc­
ess of constructing race—the processes today of racism—Critical Race
Theorists reveal the prospects for a re-constructed race for a new "race"­
ism for differences that are not hierarchical, for a world in which we can
indeed "classify" yet not "judge."189

183 Delgado, Critical Legal Studies, supra note 74, at 407.
184 Williams, supra note 50, at 2139.
185 See supra note 29.
186 WEST, supra note 53, at 26.
187 Cf. Jerome McCristal Culp, Jr., Notes from California: Rodney King and the Race
Question, 70 DENV. U. L. REV. 199, 200 (1993) (contending that "we cannot all get along
without dealing with the race question, i.e., how we should alter the legal and social world
because of race.").
188 See Crenshaw & Peller, supra note 176, at 290; see also Gotanda, supra note 85,
at 36–52 (observing the ways in which the Supreme Court’s constructions of race are
"unconnected" to the historical realities of racial oppression and privilege).
189 Like metaphysical rebels, Critical Race Theorists seek "to occupy the space
demarcated by 'race,' to fill it, for the time being, with real experiential meaning, in
anticipation of the day—not yet come—when its boundaries are not merely indeterminate,
but, in the context of 'equality,' utterly meaningless." Hayman, Re-Cognizing Inequality,
supra note 2, at 66.
2. *The Tradition Favoring Judicial Deference to Other Public Actors and a Counter-Tradition of Reliance on Constitutional Democracy*

At some point in nearly every "race" case, the Court (or its dissenters) is likely to advise that the complaints of racial inequity are either (a) better addressed to the political branches; (b) matters of state or local concern, or matters of federal concern, but certainly not the business of whichever government has foolishly addressed the racial issue in the immediate case; or (c) best left to the discretion of whichever public official has exercised it in a racially discriminatory matter. Thus the opinions include paens to local school board authority,\(^{190}\) to state legislative processes,\(^{191}\) to congressional expertise,\(^{192}\) to prosecutorial discretion,\(^{193}\) in short, to the unique competence of every public institution in America except the federal courts.

Taking these claims of deference seriously—no easy matter, given their erratic deployment\(^{194}\)—a rather substantial theoretical objection arises: such willful deference to the majoritarian branches is in fact difficult to reconcile with the judicial role in a liberal democracy. At best, it represents an abdication of the judiciary’s responsibility to enforce such fundamentally democratic constitutional norms as broadmindedness, tolerance, and respect for individual differences, norms that European tribunals, by contrast, regularly recognize as the hallmarks of constitutional democracies.\(^{195}\) At worst, exalting this majoritarian “tradition” as the apotheosis of constitutional value may reinforce and even heighten the alienation of minority litigants. Presumably, the constitutional responsibility of the judiciary embraces a "duty of suspicion" owed to minority groups confronted by majoritarian pressures,\(^{196}\) particularly given the historical fact

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\(^{193}\) *See* McCleskey, 481 U.S. at 296–97.

\(^{194}\) The congressional expertise recognized in *Croson* was not much respected in *Metro Broadcasting*; the local control so important in the desegregation cases did not much matter in *Wygant, Croson*, or *R.A.V.*


\(^{196}\) *See* Richard Delgado & Jean Stefancic, *Scorn*, 35 WM. & MARY L. REV. 1061,
of legislative domination by what may well be "a hostile, permanent majority." Historically, this has indeed been the role of the federal judiciary; it was the Supreme Court, not an indifferent Congress, not a hostile executive, that led the way in the Second Reconstruction, confronting and overcoming the obstructionist claims to "state's rights" and "local control," and rejecting racially segregated "neighborhood schools," schools for which equal funding was not, Justice Scalia's revisionism notwithstanding, "part and parcel." It is only by virtue of a "stunning reversal" of cultural valences that minority groups challenging majoritarian traditions find today that it is they who are the objects of judicial suspicion and scorn.

As Critical Race Theorists make clear, racial minorities have done more than merely profess their faith in constitutional democracy: they have lived this faith, and sometimes died for it. As Patricia Williams writes:

1063 (1994). This is, after all, the theoretical and rhetorical genesis of the "suspect classification." See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). Guinier, supra note 25, at 1102.


199 See Delgado & Stefancic, supra note 195. The cramped conception of democracy manifest in the Court's new "tradition" is evident as well in Lino Graglia's insistence that Brown v. Board of Education was a godsend to constitutional law professors, who adore "judicial policy-making" because they are "more committed to advancing a liberal agenda than to democracy." Lino A. Graglia, Do Judges Have a Policy-Making Role in the American Style of Government?, 17 Harv. J.L. & Pub. Pol'y 120, 124 (1994). Surely, too, it is only under the influence of this majoritarian tradition that Professor Graglia could perceive the school desegregation effort as "perhaps the boldest and most expensive social experiment in the nation's history." Id. at 121. One might have thought, after all, that the institution of chattel slavery and the compulsory segregation of the "races" were, by many measures, bolder and more costly. Revealingly, Professor Graglia describes desegregation as "the exclusion of children from their neighborhood schools and their transportation to more distant schools," id.; the losses, in such a view, are universal, and the gains nonexistent.

To say that blacks never fully believed in rights is true; yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before. We held onto them, put the hope of them into our wombs, and mothered them—not just the notion of them. We nurtured rights and gave rights life. And this was not the dry process of reification, from which life is drained and reality fades as the cement of conceptual determinism hardens round—but its opposite. This was the resurrection of life from 400 year-old ashes; the parthenogenesis of unfertilized hope.\footnote{Informed by the history and reality of the struggle against racial suppression, the Court's rejection of constitutional rights and newfound tradition of constitutional deference seems like a bad memory reborn.}

3. The Tradition Favoring Private Choice and Free Markets and a Counter-Tradition of Struggle Against Coercion and Constraint

The Court's tradition favoring deference to other public actors is matched—or perhaps exceeded\footnote{Williams, supra note 54, at 430.}—by a tradition of deference to private actors. Thus the Court clings tenaciously to the de jure/de facto distinction in the desegregation cases,\footnote{It is possible to view those cases in which the Court rejected the actions of other public actors as attempts to vindicate private markets: the local economy in \textit{Croson}, the marketplace of ideas in \textit{R.A.V.}, and something of a conflation of economic and speech concerns in \textit{Metro Broadcasting}. The one case that does not fit easily within this framework is \textit{Smith}, but it is also the only case in which the political marketplace was responding to the needs of a cultural majority rather than a cultural minority. On the modern Court's preference for the market, see Cass R. Sunstein, \textit{Lochner's Legacy}, 87 \textit{COLUM. L. REV.} 873 (1987). Of course, the Court is not alone in favoring market solutions to the "distortions" caused by discrimination. See, e.g., Richard A. Epstein, \textit{Forbidden Grounds: The Case Against Employment Discrimination Laws} (1992). But see Ian Ayres, \textit{Fair Driving: Gender and Race Discrimination in Retail Car Negotiations}, 104 \textit{HARV. L. REV.} 817 (1991); David A. Strauss, \textit{The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards}, 79 \textit{GEOP. L. REV.} 1619 (1991) (suggesting that, in some contexts at least, racial discrimination is a product of—not a distortion of—market forces).} emphasizes the role of entrepreneurial choices in local markets,\footnote{See Freeman v. Pitts, 112 S. Ct. 1430, 1443, 1448 (1992); Board of Educ. v. Dowell, 498 U.S. 237, 250 (1991).} and extols the virtues of the marketplace of ideas,
however hateful they may be in form or substance. Even the doctrinal requirement of discriminatory "intent" belies the critical emphasis on autonomy, as if the only racist acts of constitutional import are those that are somehow "chosen."

The response of Critical Race Theorists to the advocates of private choice and free markets is not unlike the response of other critical theorists: it is simply to observe that there are no purely private choices and no truly free markets. Here, the racial critique joins the critical challenge to the public/private dichotomy, a dichotomy with a dubious historical pedigree, a troubled tradition, and virtually no theoretical integrity. But the racial critique adds an important experiential element to this challenge: as Richard Delgado writes, "[w]e know, indeed we live, the bogus public-private distinction."


206 Cf. McCleskey v. Kemp, 481 U.S. 279, 297–98 (1987) (for his claim to prevail, "McCleskey would have to prove that the Georgia legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect." (emphasis in original)).

207 The dichotomy was constitutionalized as the "state action" requirement by Justice Bradley's opinion in The Civil Rights Cases, 109 U.S. 3 (1883), invalidating the Civil Rights Act of 1875. That decision appears to have been something of an epilogue to the Compromise of 1877, the agreement between Republicans and Southern Democrats that settled the disputed presidential election of 1876 by giving Republican Rutherford B. Hayes the White House in return for the withdrawal of the federal garrison from the South—the end, in effect, of Reconstruction. See C. Vann Woodward, Reunion and Reaction: The Compromise of 1877 and the End of Reconstruction 150–62 (1951).

By 1883, the Reconstruction civil rights laws were mostly dead-letter, and the Civil Rights Act of 1875 in particular was rarely enforced. See John Hope Franklin, The Enforcement of the Civil Rights Act of 1875, in Race and History 116 (1989). Since, the Act, which proscribed racial discrimination in hotels, theaters, and other public accommodations, it was resented throughout the South; and responsibility fell to the Court to uphold the spirit of the Compromise. Justice Bradley, who had cast the deciding, controversial vote on the 1876 Electoral Commission, was assigned the task of drafting the Civil Rights Cases opinion by Chief Justice Waite. Chief Justice Morris Waite was in regular correspondence with Hayes during the summer of 1882, the Chief Justice wrote "I agree with you entirely as to the necessity of keeping public sentiment at the south in our favor." John A. Scott, Justice Bradley's Evolving Concept of the Fourteenth Amendment from the Slaughterhouse Cases to the Civil Rights Cases, 25 Rutgers L. Rev. 552, 568 (1971). Bradley dutifully invalidated the law, using sweeping language to separate the public and private spheres, language utterly irreconcilable both with Bradley’s earlier opinions, see id., and with his later jurisprudential writings. See, e.g., Joseph P. Bradley, Miscellaneous Writings 240–45 (Charles Bradley ed., 1901) (concluding that "society and law are so intimately connected that the hypothesis of one is the hypothesis of the other.")


This last proposition is simply illustrated. The black schoolchildren of Oklahoma City do not choose to attend segregated schools; the black citizens of Richmond, Virginia do not choose a contracting scheme that gives their white counterparts seventy-five contracts for their every one; and the black families of St. Paul, Minnesota do not choose to engage in dialogue with groups of white teenage cross-burners. The world too often is not the world subordinated people choose to live in, but it is instead the world chosen for them.

Viewed through the lens of experience, the claim that entrepreneurial choices may account for the statistical disparities in *Croson* begins to look at least a bit naive. To be sure, the black citizens of Richmond may not be following their white counterparts into the contracting industry “in lockstep proportion”211 to their numbers in the population at large. They may be “choosing” not to join the appropriate trade associations, “choosing” not to start contracting businesses; “choosing” not to bid on city contracts.

But the nature of desire and aspiration as well as the intent to discriminate are quite a bit more complicated than that, regulated as they are by the hidden and perpetuated injuries of racist words. The black power movement notwithstanding, I think many, many people of color still find it extremely difficult to admit, much less prove, our desire to be included in alien and hostile organizations and institutions, even where those institutions also represent economic opportunity. I think, moreover, that even where that desire to be included is acknowledged, the schematic leads to a simultaneous act of race-abdication and self-denial.212

In this light, governmental expressions of support for minority entrepreneurs do not seem to be “demeaning” expressions of racial essentialism at all. As Patricia Williams writes,

What *is* truly demeaning in this era of double-speak-no-evil is going on interviews and not getting hired because someone doesn’t think *we’ll* be comfortable. It is demeaning not to be promoted because we’re judged ‘too weak,’ then putting in a lot of energy the next time and getting fired because we’re ‘too strong.’ It is demeaning to be told what we find demeaning.213

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211 *Croson*, 488 U.S. at 507.
212 Williams, *supra* note 50, at 2139.
213 *Id.* at 2141 (emphasis in original).
The controversy over the regulation of racist or other hate speech affords another illustration of the experienced inadequacies of a tradition that invokes the private free market. In weighing the competing interests, Charles Lawrence notes, the balance is impossibly skewed: "First Amendment doctrine and theory have no words for the injuries of silence imposed by private actors." And, as Robin Barnes notes, assaultive speech does not invite competition in the marketplace of ideas, particularly from subordinated minority groups: "Expressions of violent hatred cannot be answered under the more speech paradigm because speech is not the goal: terrorism is the stated objective, an intentional silencing of the victim. Therefore, the slippery slope of runaway censorship is much less to be feared than the slippery slope of runaway violence . . . ."

Similar criticisms may be leveled against the doctrinal requirement that discrimination be "purposeful." The doctrinal requirement that discrimination be "purposeful" mirrors the destructive/futile search for an individual with the true freedom to act in a truly free market. Quite aside from its failings either as an evidentiary requirement or as a policy tool, the intent requirement depicts a world far removed from the world in which the victims of racial discrimination live. Its focus on the state of mind of the discriminatory actor is, first, quite irrelevant to the experience of discrimination—and, as a consequence, to the fact of inequality—and, second, quite difficult to square with contemporary (and not

\[214\] It also exposes many of the tensions between Critical Race Theorists and their counterparts from across the jurisprudential spectrum. The commitment to free speech unites liberal individual rights advocates and conservative devotees of the free market; left almost alone on the other side of the debate are Critical Race Theorists. One side maintains that suppression of speech is either inherently bad or instrumentally counter-productive; the other maintains that the harms inflicted by the speech at issue outweigh its marginal contributions to public discourse. The literature on the subject is vast. See, e.g., Mari J. Matsuda et al., Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment (1993); Hate Speech and the First Amendment: On A Collision Course? Symposium, 37 Vill. L. Rev. 723–819 (1992); Hate Speech After R.A.V.: More Conflict Between Free Speech and Equality? Symposium, 18 WM. MITCHELL L. REV. 889 (1992); Barnes supra note 33; Susan Gellman, Sticks and Stones Can Put You in Jail But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws, 39 UCLA L. REV. 333 (1991); Lawrence supra note 33; Matsuda supra note 33; Burt Neuborne, Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech, 27 HARV. C.R.-C.L. L. REV. 371 (1992).

\[215\] Lawrence, supra note 26, at 801.

\[216\] Barnes, supra note 33, at 987.

\[217\] The psychological issues are problematic enough with a single discriminating actor, but when confronted with the actions of bureaucratic institutions, the search for an anthropomorphic intent borders on the absurd. See Hayman, Re-Cognizing Inequality, supra note 2, at 56.

merely postmodern) understandings of human behavior. As Professor Lawrence notes:

Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmakers’ beliefs, desires, and wishes . . . . We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.219

Moreover, the very concept of an autonomous intent may be culturally dependent. Robert S. Chang notes that the “individual autonomous self may not reflect the reality of all Asian-Americans and the cultures from which they come. Many Asian philosophies and cultures have at their center the concept of no-self. And at least one Asian language does not have a word for ‘I’ that corresponds to ‘I’ in English.”220

4. The Tradition Favoring Meritocracy and a Counter-Tradition of Counter-Culture

Closely linked to the tradition of deference to markets is the tradition of deference to meritocracy. As a positive matter, this tradition assumes that the criteria of merit are neutral and objective and that the processes of assessment are open and reliable; normatively, it assumes that the winners and losers in meritocratic schemes are getting only their just desserts. Some manifestations of this tradition are obvious and explicit: white teachers in Jackson do not deserve to be laid off because, after all, they have seniority; minority teachers do not.221 White contractors in Richmond deserve contracts because, after all, they have “special qualifications;” minority contractors do not.222 Others are more subtle: white parents deserve to send their children to white suburban schools because, after all, they live in the suburbs; minority parents do not.223 Others are simply incredible: white criminal defendants accused of killing black victims are presumably guilty of crimes that are four times less reprehen-

219 Lawrence, supra note 35, at 322.
220 Chang, supra note 94, at 1266.
222 See City of Richmond v. Croson, 488 U.S. at 501–02.
223 See Freeman v. Pitts, 112 S. Ct. at 1447–48; id. at 1454 (Souter, J., concurring).
sible than comparable crimes involving black defendants and white victims.\textsuperscript{224}

In our segregated, stratified, polarized society of at least "two nations,"\textsuperscript{225} and perhaps even more, the pretense to a just meritocratic scheme is nearly impossible to maintain. We have too many cultures now to permit claims to objectivity and neutrality; too long a history of bias to permit claims to openness and reliability; and too entrenched a system of regular winners and losers to permit a claim to justice.

Of these propositions, the first seems particularly troubling to white America. One senses that white Americans feel considerable ambivalence about the claims of African Americans to a distinct culture, more than they feel with regard to similar claims by, say, Native Americans, Asian Americans, or Latinos. Perhaps this is a reflection of a certain historical reality: white and African Americans arrived on this continent roughly contemporaneously, and their histories have been inextricably intertwined ever since. Perhaps it reflects a certain sociological truth: the two groups have shared so much over the decades that it is very nearly impossible to imagine what either culture would look like without the reciprocal influences of the other. Finally, perhaps, it reflects a certain psychological need: in light of their shared history and vigorous interactions, the persistence of distinct cultures may be, for white Americans, a reminder that the two races were, by white mandate, generally separate, and never equal.

But the ambivalence of white Americans cannot elide the cultural truth: "African Americans—like Native Americans—can claim that they have their own culture, language, and religions, each a product of his subordinated position in American society."\textsuperscript{226} Indeed, "[g]iven the history

\textsuperscript{224} Cf. McCleskey v. Kemp, 481 U.S. at 297 (contending that the evidence of racial disparities in sentencing does not warrant a rebuttal "because a legitimate and unchallenged explanation for the [sentencing] decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty").

\textsuperscript{225} See ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992).


Henry Louis Gates, Jr. recalls his first years in an integrated school:

School—the elementary school at the top of Kenny House Hill and the high school over in the Orchard—was a fairly constant clash of cultures, especially for the older kids, who had had a segregated education all those years and had lived rigidly segregated lives for so very long. Cultural clashes, like the time that Mr. Staggers, the principal, asked Arthur Galloway what he had done to his hair, and Audie said he had gotten a process. And Mr. Staggers asked him what a process was. And Audie told him the truth, explaining about a mixture of mashed potatoes, eggs, and lye, and how you smear it on your hair with a paintbrush, and how it burns the kink right out. And Mr. Staggers interrupted Audie, accused him of lying, and took him to the office to impose corporal punishment on his
and continued existence of segregation in American society, the African American community constitutes a separate and distinct community with a unique nomos." 227

The recognition that minority cultures are partially rooted in the histories of imposed oppression made for them in this country embarrasses even the weak normative claims to white innocence and to white cultural supremacy. As to the former, Wygant's "innocent" white benefactors of a seniority system for layoffs begin to look like better candidates to shoulder the "burden" of the movement toward racial equality when their seniority is seen for what it is: the cumulative result of a living tradition of racial discrimination in employment. 228 At the same time, the minority recipients of a layoff "preference" become less attractive candidates to retain their burden as the victims of "amorphous" societal discrimination in light of the more definite shape of an experiential truth. No one, in this scheme, "deserves" her fate—no more, at least, than she deserves the "race" that has been made for her.

Viewed through the prism of racial experience, statistical disparities begin to look less like the just results of a "legitimate" cultural meritocracy and more like the predictable results of deeply entrenched biases. As Kimberlé Crenshaw writes:

Arguments that differences in economic status cannot be redressed, or are legitimate because they reflect cultural rather than racial inferiority, would have to be rejected; cultural disadvantages themselves would be seen as the consequence of historic discrimination. One could not look at outcomes as a fair measure of merit since one would recognize that everyone had not been given an equal start. Because it would be apparent that institutions had embraced discriminatory policies in order to produce disparate results, it would be necessary to rely on results to

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227 Johnson, supra note 225, at 1420. The same, of course, is substantially true for other racial minority groups. See, e.g., Bill Ong Hing, Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society, 81 CAL. L. REV. 863, 900 (1993) ("Since people of color generally lack control over mainstream institutions, they ought to be allowed to maintain an environment where they can function autonomously.").

228 White Americans average roughly double the income of black Americans and are over twice as likely to live in a family with an income in excess of $50,000; black
indicate whether these discriminatory policies have been successfully dismantled.\textsuperscript{229}

Problematized this way, the supposedly neutral criteria of meritocracy look no more fair and equal than their statistically disparate products. The "standard" measures of aptitude and achievement used to justify the radical inequities in educational and employment outcomes prove to be neutral and objective only in the sense that they are standardized by reference to non-specific norms. But people do not live non-specific lives, and standard measures cannot adequately account for the advantages and disadvantages they possess relative to the norm.\textsuperscript{230} Like the "special qualifications" possessed—or not—by Richmond contractors, or the seniority possessed—or not—by the Jackson teachers, the criteria of merit are exposed as mere artifacts, manufactured by one culture to the continuing disadvantage ("intentional" or not) of nearly all the rest.\textsuperscript{231} Meritocracy is not the cure for racial inequality; it is "part and parcel" of the problem.\textsuperscript{232} The inevitable result is the conflation of cultural and economic differentiation, and the formation among minority groups of an "informal economy" that is, according to Regina Austin, "really the illegitimate offspring of legal regulation."\textsuperscript{233}

Americans are unemployed at over twice the rate of white Americans and are roughly three times more likely to live in poverty. \textit{See} Hayman & Levit, supra note 2, at 678–79. The economic disparities appear to represent something beyond a recurring and remarkable set of coincidences. \textit{See}, e.g., Francine D. Blau & Marianne A. Ferber, \textit{Discrimination: Empirical Evidence from the United States}, 77 AM. ECON. REV. 316, 319 (1987) (surveying empirical studies and concluding that "even when fairly refined measures of productivity-related characteristics are held constant, blacks and women earn less than whites and men").

\textsuperscript{229} Crenshaw, supra note 55, at 1345.

\textsuperscript{230} On the relationship between constructions of race and academic achievement, see Hayman & Levit, supra note 2, at 686–709.

\textsuperscript{231} The Rodney King case may afford another example of the pervasive effects of color on purportedly neutral standards. As Deborah Waire Post notes, the standard of reasonableness adopted by the jurors in the first trial "was a standard of reasonableness that takes race into account unilaterally. The standard of reasonableness they employed was one which does not acknowledge the reasonableness of the attempt by a black man to escape the police when they give chase, but does acknowledge the justifiability of the fear that white cops have of black men." Deborah W. Post, \textit{Race, Riots and the Rule of Law}, 70 DENV. U. L. REV. 237, 255 (1993).

\textsuperscript{232} There may in fact be a link between the meritocratic \textit{ethos} and negative racial attitudes and behavior. \textit{See} Hayman & Levit, supra note 2, at 668–73.

\textsuperscript{233} "The laws of the dominant society," Professor Austin writes, "are not intended to distinguish between members of 'the black community' who are truly deserving of ostracism and those who are not yet beyond help or hope." Austin, supra note 31, at 1815. To fill the void, Professor Austin has called for "a politics of identification" that would:

seek to stifle attempts to criminalize or restrict behavior merely because it competes with enterprises in the formal economy. At the same time, it would push for criminalization or regulation where informal activity destroys communal life or exploits a part of the population that cannot be protected informally. It would
The result, in short, is a postmodern paradox: tradition, in its demand for totality and uniformity, serves ultimately to broaden and deepen the cultural gap, to increase the space between us.

IV. Toward a Pluralist Constitutional Traditionalism

On some accounts of postmodern law, theory and practice are separated, each entailing distinct responsibilities. Richard Rorty has suggested that “the moral tasks of a liberal democracy are divided between the agents of love and the agents of justice,” that liberal democracy employs both “connoisseurs of diversity and guardians of universality.” If this theory is correct, then the divorce between theory and practice that characterizes the postmodern constitutional scene is not especially problematic. It may simply be that in the liberal legal scheme, academics and judges perform different roles, and pursue different visions. The view has a certain descriptive resonance. As a prescription for constitutionalism, however, it seems wrong. Here, perhaps, we may join Robin West in embracing the “progressive constitutional faith” of Critical Race Theorists. We may join them in the struggle to construct constitutional traditions that are both universal and diverse, that encompass both love and justice, that recognize, along with Dr. King, that “justice is really love in calculation.”

Robert Williams has offered a vision of an Americanized scholarship that “seeks to demonstrate that the white man’s legal vision of the Indian obscures more diverse constructions and interpretations of a vision of life which might permit both peoples to pursue their separate paths in peace and without resort to power.” “Thus,” Williams concludes, “as in the tradition of all Indian gift-giving, the ultimate goal of an Americanized scholarship is to enrich both the receiver and the giver of the gift—to seek to legalize both informal activity that must be controlled to ensure its integrity and informal activity that needs the imprimatur of legitimacy in order to attract greater investment or to enter broader markets. Basically, then, a politics of identification requires that its legal adherents work the line between the legal and the illegal, the formal and the informal, the socially (within “the community”) acceptable and the socially despised, and the merely different and the truly deviant.

Id. at 1816–17. Cf. Regina Austin, “An Honest Living”: Street Vendors, Municipal Regulation, and the Black Public Sphere, 103 YALE L.J. 2119, 2119 (1994) (“I, like many blacks, believe that an oppressed people should not be too law abiding, especially where economics is concerned. The economic system that has exploited us is not likely to be effectively exploited by us if we pay too much attention to the law.”).

236 Martin Luther King, Jr., quoted in Garrow, supra note 199, at 24.
237 Williams, supra note 4, at 225–26.
Williams describes the Indian tradition of the Gus-Wen-Tah, a tradition that is, in at least several senses, the American tradition:

When the Haudenosaunee first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Tah, or Two Row Wampum. There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect. These two rows will symbolize two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.\(^239\)

Considering the same issue, but differently, Patricia Williams has offered the following recollection:

One summer when I was about six, my family drove to Maine. The highway was very straight and hot and shimmered darkly in the sun. My sister and I sat in the back seat of the Studebaker and argued about what color the road was. I said black. My sister said purple. After I had successfully harangued her into admitting that it was indeed black, my father gently pointed out that my sister still saw it as purple. I was unimpressed with the relevance of that at the time, but with the passage of years, and much more observation, I have come to see endless overheated

\(^{238}\) Id. at 226.

\(^{239}\) Id. at 291 (citing Indian Self-Government in Canada, Report of the Special Committee, (back cover) (1983)). As Professor Williams explained:

The vision signified by the Gus-Wen-Tah has been articulated throughout the corpus of American Indian legal and political thought and discourse. Even the wise grandfather who spoke to Commissioner-designate Dillon Myer of an American way of life was espousing a simple, basic principle. At the core of an Americanized vision of law is the idea that freedom requires different peoples to respect each other's vision of how their respective vessels should be steered.

Id. at 291–93.
highways as slightly more purley than black. My sister and I will probably argue about the hue of life’s roads forever. But, the lesson I learned from listening to her wild perceptions is that it really is possible to see things—even the most concrete things—simultaneously yet differently; and that seeing simultaneously yet differently is more easily done by two people than one; but that one person can get the hang of it with lots of time and effort.240

Using alternative and personal narratives to suggest the very real possibility of plural truths, of diverse traditions, of seeing things “simultaneously yet differently,” Robert Williams and Patricia Williams describe the ways in which our narrow conceptions of legal “tradition” have been impoverished and offer a prospect for its enrichment. The challenge should be welcomed. Just as contemporary hermeneutics “suggests that it is possible to view law as politics without succumbing to nihilism, and that it is possible to accept deconstructive critique within legal practice without abandoning all notions of truth,”241 so too Critical Race Theory suggests that we can accept the problematization of tradition without yielding either to cynicism or despair.

By re-conceptualizing tradition, we invite a renewed, re-vitalized dialogue about its meanings. Competing traditions are articulated, problematized, but all are valued. What ensues is a dialogue that is explicitly normative,242 but neither in the tyrannical airs of abstract theory243 nor in the desiccated forms feared by postmodern critics of normativity.244 It is a normative dialogue directed at achieving an authentic consensus, what Richard Rorty describes as “free and open encounters between human

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240 Williams, supra note 54, at 410–11.
241 Mootz, supra note 99, at 118.
242 Charles Lawrence writes:

In short, it would not be a bad thing for judges to base constitutional decisions on their own sense of what values best reflect our cultural tradition, so long as the conflicting perspectives competing to define those values are made explicit. The search to define those values could then serve a clarifying, rather than a mystifying, role. It should be equally clear that the role of judges as interpreters differs from that of ordinary folks only by virtue of their responsibility to articulate their latest understanding of what we share. Thus, the normative debate would always continue.

Lawrence, supra note 35, at 386.
244 See Schlag, supra note 14.
beings, encounters culminating either in intersubjective agreement or in reciprocal tolerance." \(^{245}\)

As Rorty’s critics have pointed out, \(^{246}\) and as Rorty himself acknowledges, \(^{247}\) we remain somewhat removed from this Habermasian ideal speech situation. \(^{248}\) The fact remains that the encounters will not be “free and open,” the agreement “intersubjective,” or the tolerance “reciprocal,” if the dialogues continue to take place in a context of hierarchy in which one set of traditions is privileged and the remainder rendered moot. “The difficulty when you are not ‘tradition,’” Jerome McCristal Culp writes, “is that the strategies of racial subordination will be used to silence and limit the debate.” \(^{249}\) In such a context, the very attempt to interrogate “tradition” may seem “shrill and out of sync,” \(^{250}\) a demand for “special status” that is “excessive, tiresome, or frightening.” \(^{251}\)

Only an explicit willingness to accommodate a diversity of perspectives and to engage the full range of traditions will permit the movement toward a plural constitutional justice. Lani Guinier’s mandate for political equality seems appropriate as well for the instant task: any meaningful project “must address concerns of qualitative fairness involving equal recognition and just results.” \(^{252}\) By agreeing to problematize tradition, and by opening the dialogue to competing traditions, participants in the constitutional dialogue take a first, giant step toward “equal recognition.” “Just results” may then follow.

It is, from one perspective, a radical challenge. Richard Epstein’s critique of contemporary interpretive theory might easily be directed against this re-vision of constitutional traditionalism. (Post)modern theory, Epstein offers, provides not a “tool for constitutional interpretation,” but instead “an agenda for a constitutional convention.” \(^{253}\) Precisely—or at least so in this sense: pluralistic traditionalism contemplates the arbitration of meaning not through the solitary processes of discernment, deliberation, and pronouncement, but through the dialogic engagement of plausible alternatives and the struggle for an authentic consensus. In this latter process, constitu-

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\(^{246}\) See, e.g., Baker, *supra* note 66.

\(^{247}\) Richard Rorty, *supra* note 66.


\(^{250}\) *Id.* at 218–19.

\(^{251}\) Delgado & Stefancic, *supra* note 171.

\(^{252}\) Guinier, *supra* note 25, at 1135.

tional text may be subject to reconstruction as well as construction; it is indeed a convention of sorts, open to those excluded from the initial effort.

On its face, the addition of new voices to the "traditional" constitutional scene threatens to bring cacophony, to destroy the delicate harmony that makes us "one" people and not many. In exposing the pretense of unity perpetuated by the myth of the unifying tradition, however, the groundwork may be laid for a new, genuine unity, one premised not on subordination, but on the mutual respect implicit in the ideals of our constitutional democracy. The realities of our differences are not obstacles to this vision. As the Honorable Cruz Reynoso writes:

It seems to me that we have the political foundation and the ideals of our Constitution to help us meet those realities. Those ideals will help us craft a country in which we consider ourselves as one people, while continuing to enjoy the strength which comes from different religions, races, languages, and ethnicities.

Undeniably, pluralization, or postmodernization, of "tradition" comes at a certain cost. The price, of course, is the comfortable, self-assured determinacy afforded by homogeneity. But this determinacy was always illusory, the homogeneity only hegemony, and it is difficult, from any perspective, to justify exclusion in the service of such dubious ends. What is more, the forcible homogenization of the unitary tradition exacts its own spiritual costs; it steals from us the excitement of discovery; it cheats us of the joys of sharing; it robs us of wonder. As Camus wrote:

But, after all, nothing is true that forces one to exclude. Isolated beauty ends up simpering; solitary justice ends up oppressing. Whoever aims to serve one exclusive of the other serves no one,


not even himself, and eventually serves injustice twice. A day comes when, thanks to rigidity, nothing causes wonder any more, everything is known, and life is spent in beginning over again. These are the days of exile, of desiccated life, of dead souls.\textsuperscript{259}

A pluralized tradition invites discovery, does not foreclose it; it invigorates justice, does not deaden it. It still guides, but in different directions, simultaneously.

Consider the desegregation cases: contextualized, the tradition of the neighborhood school is inseparable from the tradition of racial segregation; problematized, the tradition of individual autonomy rests in uneasy opposition to a tradition of commitment to equity; pluralized, the tradition of local control is steeped in coercion and violence in its worst moments and a palsyng ambivalence in its best. No jurisprudential method, no mechanical test, guarantees the outcome in a genuine dialogic engagement of these conflicting values. But the dialogue is vital.

When and whether the dialogue achieves an "ultimate" or "final" closure is difficult to predict. The day may be a long time in coming; it may, for conceptual or practical reasons, never arrive. Disputes, of course, must be resolved; cases must be decided; schools must be desegregated, or not. But gone will be the pretense that our single inviolable tradition compelled the result; in its place is the honest commitment to listen and learn. What will be left is dialogue—all the way down. If it is honest, if it is purposeful, then it will also be enough: "The struggle itself toward the heights is enough to fill a man's heart."\textsuperscript{260}

Conclusion

"The only helpful way to teach about difference," writes Judy Scales-Trent, "is to teach about sameness at the same time."\textsuperscript{261} It is important, then, to keep in mind those traditions that we clearly share: our traditions of hope, of faith, of inquiry, of struggle. We may ride in different vessels—one a canoe, the other a ship—but we ride the same river, and in that very real sense, we are all in the same boat.

Our task on this journey is to be true to our traditions. We must ensure that hope does not yield to despair, faith to cynicism, inquiry to self-satisfaction, or struggle to indifference. What is at stake is too large. Camus wrote:


\textsuperscript{260} Albert Camus, \textit{The Myth of Sisyphus, in Camus, supra} note 259, at 88, 123.

Our brothers are breathing under the same sky as we; justice is a living thing. Now is born that strange joy which helps one live and die, and which we shall never again postpone to a later time. On the sorrowing earth it is the unresting thorn, the bitter brew, the harsh wind of the sea, the old and the new dawn. With this joy, through long struggle, we shall remake the soul of our time . . . .

The struggle yields more than maddening uncertainty. Deconstructed traditions, like rights, may yield reconstructed ideals. Two come to mind: a genuinely universalized comprehension and an all-embracing compassion. From where will they come? Perhaps, after dialogue, we will choose our ideals. We can make them part of a new, multi-colored tradition.

\(^{262}\) Camus, supra note 18, at 306.

\(^{263}\) Cf. Williams, supra note 54.

\(^{264}\) "If there is one thing one can always yearn for and sometimes attain, it is human love." Albert Camus, The Plague 279 (Stuart Gilbert trans., Vintage 1972) (1947).