

## FOREWORD

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

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#### INTRODUCTION

The Ninth Annual Latina and Latino Critical Theory (LatCrit IX) Conference was held in Malvern, Pennsylvania between April 29 and May 1, 2004. This year's conference theme, "*Countering Kulturkampf Politics Through Critique and Justice Pedagogy*," brought together a wide array of scholars, academics and activists from diverse backgrounds and disciplines to reflect on the current state of affairs. Like previous LatCrit gatherings,<sup>1</sup> this year's conference sought to create an interdisciplinary and multidimensional environment where the participants could critically address the effects of the traditional conservative and current neo-conservative legal and policy oriented initiatives that have focused on the "rollback" of the New Deal and Civil Rights legacies. This "rollback" has been especially evident in the Supreme Court's increasing restrictions and narrowing<sup>2</sup> of

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

<sup>2</sup> For an alternative empirical assessment of the Burger Court, see Harold J. Spaeth, *Burger Court Review of State Court Civil Liberties Decisions*, in JUDICIAL POLITICS: READINGS FROM JUDICATURE 599-605 (Elliot E. Slotnick, ed. 1992). For an alternative empirical assessment of the Rehnquist Court, see Christopher E. Smith & Thomas R. Hensley, *Assessing the Conservatism of the Rehnquist Court*, in JUDICIAL POLITICS:

individual rights in polemical areas such as abortion,<sup>3</sup> affirmative action,<sup>4</sup> the free exercise of religion,<sup>5</sup> the rights of criminal defendants,<sup>6</sup> work-place protections for immigrants,<sup>7</sup> and bilingual education.<sup>8</sup> Participants were encouraged to offer reflections and engage in a dialogue regarding the effects of the use of *Kulturkampf* narratives on various aspects of both United States domestic and international law and policy.

The German notion of *Kulturkampf* or “culture wars” was originally adopted by Bismarck to describe his coercive policies against the Catholic clergy’s efforts to control various domestic institutions during the 1870s.<sup>9</sup> At the time, local Catholic clerics, presumably under the control of the Vatican, a foreign force, sought ideological hegemony over government institutions such as public education. As Francisco Valdes expounds in this symposium’s *Afterword*, while the notion of “cultural wars” has been present in the U.S. legal and political landscape for more than three decades, the term was not coined until the 1992 Republican National Convention when Patrick J. Buchanan used it to describe his bid for the “Soul of America.”<sup>10</sup> In 1996, Justice Antonin Scalia formally used the term *Kulturkampf* to describe his dissenting opinion in *Romer v. Evans*.<sup>11</sup> Ironically, while the original notion of *Kulturkampf* was adopted by Bismarck to describe his challenge to the efforts by non-State actors

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READINGS FROM JUDICATURE 411-418 (Elliot E. Slotnick, ed., 2d ed. 1999).

<sup>3</sup> See *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); see also *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (allowing individual states to regulate but not ban abortion services).

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

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

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

<sup>7</sup> See *Hoffman Plastic Compounds v. National Labor Relations Board*, 535 U.S. 137 (2002) (holding that undocumented workers are not entitled to back pay despite employer’s engagement in unfair labor practices). For an expanded discussion of this immigration rights see María Pabón López, *Reflections Regarding the Education of Latino/a Undocumented Children: Plyler v. Doe and Beyond*, 35 SETON HALL L. REV. 1367 (2005).

<sup>8</sup> Kevin R. Johnson & George Martínez, *Discrimination By Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227 (2000).

<sup>9</sup> ERIC HOBSBAWM, *THE AGE OF EMPIRE, 1875-1914*, at 99 (1989).

<sup>10</sup> Francisco Valdes, *Culture by Law: Backlash as Jurisprudence*, 50 VILL. L. REV. 1135 (2005).

<sup>11</sup> 517 U.S. 620 (1996).

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

This year’s conference brought scholars and activists from diverse disciplines and interests to discuss ways in which scholars, educators, students, and activists could share competing critiques of the ideological State apparatus<sup>12</sup> and further offer alternative perspectives on how to counter the impact of the *Kulturkampf* narrative. As noted above, the efforts by conservative and neo-conservative ideologues to redefine social, economic and political institutions, threatens to undermine and ultimately dismantle the institutional gains achieved during various historical social and political struggles by a wide array of progressive forces. For LatCrit scholars and activists these initiatives represent a return to conditions under which various forms of subordination flourished without restraints, and or the perpetuation of other forms of subordination and exploitation. The struggle over the foundations of the State apparatus is tantamount to a struggle for justice, democracy, and equality for traditionally subordinated groups in both the U.S. and within the sphere of influence of this empire.

In recent years the debates over *Kulturkampf* were brought to the forefront in the vicious dissenting opinions of Supreme Court Justice Antonin Scalia’s in cases such as *Romer v. Evans* and *Lawrence v. Texas*.<sup>13</sup> In both instances, Justice Scalia sought to frame challenges to State initiatives that had the effect of not only discriminating against gays, but in the case of Texas also criminalizing “homosexual conduct” as cultural wars. In Justice Scalia’s cultural battlefield the discrimination and criminalization of a gay identity was reduced and represented as discrimination and criminalization of a historically and traditionally reprehensible conduct, which in turn should be fought in the political realm through “normal democratic means.”<sup>14</sup>

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<sup>12</sup> LOUIS ALTHUSSER, *LENIN AND PHILOSOPHY AND OTHER ESSAYS* (2001).

<sup>13</sup> 539 U.S. 558 (2003).

<sup>14</sup> *Romer*, 517 U.S. at 636.

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

My main contention is that conservative and neo-conservative ideologies are premised on anti-democratic and anti-egalitarian principles that by definition undermine the democratizing and egalitarian objectives of progressive and civil rights struggles. Moreover, while it is possible to trace continuities between conservative and neo-conservative currents, there are also some clear distinctions between the two that need to be recognized.<sup>15</sup> These distinctions are important because they explain some of the nuances in the ways in which power has been exercised in order to enable increasing rollbacks on law and policy. Of course, the distinctions can also help us expose the “wolf in sheep’s clothing” that lurks in the midst of conservative and neo-conservative concessions to the challenges posed by subordinated, oppressed, and exploited subjects. These distinctions can also shed some light on some of the inequalities of power, class and status harbored by liberalism and its agents.<sup>16</sup>

The *animus* toward democracy among conservative ideologues can readily be traced to the aftermath of the French Revolution and more specifically to the anti-Jacobin writings of Edmund Burke.<sup>17</sup>

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<sup>15</sup> For a discussion of these differences, see ANNE NORTON, *LEO STRAUSS AND THE POLITICS OF AMERICAN EMPIRE* (2004); PATRICK J. BUCHANAN, *WHERE THE RIGHT WENT WRONG* (2004); SHADIA B. DRURY, *LEO STRAUSS AND THE AMERICAN RIGHT* (1999); and LEO STRAUSS, *THE STRAUSSIANS AND THE AMERICAN REGIME* (Kenneth L. Deutsch & John A. Murley, eds., 1999).

<sup>16</sup> Antonio Y. Vázquez-Arroyo, *Agonized Liberalism: The Liberal Theory of William E. Connolly*, 127 *RADICAL PHIL* 8, 16 (2004).

<sup>17</sup> EDMUND BURKE, *SELECTED WORKS OF EDMUND BURKE, VOLUME 2: REFLECTIONS ON THE REVOLUTION IN FRANCE* (Liberty Fund, Inc., 1999) (1874).

Burke, an Irish conservative in a British Court, was concerned that democracy could empower a mob of individuals, guided by their passions, to commit a wide array of abuses.<sup>18</sup> More importantly, equality obscured not only innate or natural differences between individuals, but also empowered subjects that were not capable of overcoming their passions to govern and become agents of the State. Conservatives like Russell Kirk who identify as the heirs of the Burkean tradition, have argued that democracy has a tendency for resolving social, economic and cultural questions by political means while subordinating religious and moral solutions.<sup>19</sup> Kirk, the acknowledged Godfather of U.S. conservatism, contented that democracy allows liberals and radicals to promote “the illimitable progress of society,” while threatening to efface the natural distinctions among men from different classes and orders in society.<sup>20</sup> So called paleo-conservatives like Barry Goldwater have been more explicit:

Was it then a *Democracy* the framers created? Hardly. The system of restraints, on the face of it, was directed not only against individual tyrants, but also against a tyranny of the masses. The framers were well aware of the danger posed by self-seeking demagogues—that they might persuade a majority of the people to confer on government vast powers in return for deceptive promises of economic gain. And so they forbade such a transfer of power—first by declaring, in effect, that certain activities are outside the natural and legitimate scope of the public authority, and secondly by dispersing public authority, jealous of its own prerogatives, would have a natural incentive to resist aggression by others.<sup>21</sup>

Likewise, the intellectual father of neo-conservatives, Leo Strauss, was deeply suspicious of democracy because it permitted “less wise” individuals to act on their tyrannical passions in the polity.<sup>22</sup>

Conservative narratives also tend to defend anti-egalitarian positions premised on a wide array of arguments. While most agree that equality can only occur in the eyes of God, and some may accept

<sup>18</sup> *Id.* at 223-231.

<sup>19</sup> RUSSELL KIRK, *THE CONSERVATIVE MIND, FROM BURKE TO ELIOT* (7<sup>th</sup> ed. 2001).

<sup>20</sup> *Id.* at 8-9.

<sup>21</sup> BARRY GOLDWATER, *THE CONSCIENCE OF A CONSERVATIVE* 18-19 (1961)

<sup>22</sup> *See generally* LEO STRAUSS, *WHAT IS POLITICAL PHILOSOPHY?, AND OTHER ESSAYS* (1959). The reader may be required to engage in an esoteric reading between the lines of Strauss’ argument in order to better grasp some otherwise obscure passages meant for the masses, or more correctly written in an exoteric style. For the best discussion of the Straussian suspicion of democracy, see Nicholas Xenos, *Leo Strauss and the Rhetoric of the War on Terror*, 3 LOGOS 2 (2004).

a minimalist or narrow conception of equality in the legal realm, the conservative narrative is generally premised on the reaffirmation of natural classes and castes. To be sure, conservative thinkers like Kirk, endorsed by the *National Review*, the *Young Americans Foundation*, and a host of other right wing entities, have argued that conservative thought is premised on a:

Conviction that civilized society requires orders and classes, as against the notion of a “classless society.”... If natural distinctions are effaced among men, oligarchs will fill the vacuum.<sup>23</sup>

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

In nature, obviously, men are unequal: unequal in mind, in body, in energies, in every material circumstance. The less civilized a society, and the more generally will and appetite prevail unchecked, the less equal is the position of individuals. Equality is the product of art, not of nature; and if social leveling is carried so far as to obliterate order and class, reducing a man to “glory in belonging to the Chequer No. 71,” art will have been employed to deface God’s design for man’s real nature.<sup>24</sup>

Yet, while conservatives like Kirk were willing to accept some sort of equality in the courts of law,<sup>25</sup> others like Goldwater were also honest enough to state that “(w)e are all equal in the eyes of God but we are equal *in no other respect*.”<sup>26</sup> Furthermore, efforts to appeal to the law as an egalitarian institution in the face of various forms of social, economic, political oppression, subordination, and marginalization, were seen by Goldwater as “artificial devices for enforcing equality among unequal men (and) must be rejected if we would restore that charter and honor those laws.”<sup>27</sup> The ultimate premise of a conservative argument was a call for government non-intervention, at least when dealing with civil rights challenges. This anti-egalitarian ideology has translated into a rejection of the Fourteenth Amendment’s Equal Protection Clause, and a host of other interpretations of the Constitution that seek to address the pervasive inequalities afflicting our polity, at least when convenient and when it does not entail selecting a neo-conservative President.<sup>28</sup> The clear implications of these ideologies are the efforts to return to

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<sup>23</sup> KIRK, *supra* note 19, at 8.

<sup>24</sup> *Id.* at 58-59.

<sup>25</sup> *Id.* at 9.

<sup>26</sup> GOLDWATER, *supra* note 21, at 64.

<sup>27</sup> *Id.*

<sup>28</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

a status quo where the polity is guided and governed by the wisdom of White, Christian, heterosexual, and property owning men.

In contrast, the neo-conservative turn is much more complicated and escapes easy categorization. To be sure, while it is readily evident that neo-conservative ideologies have no qualms defending anti-democratic positions, despite the current Administration's rhetoric, egalitarian principles are sometimes tolerated despite the underlying currents of a conservative natural rights ideology. In my opinion, what distinguishes the dominant neo-conservative narrative is a willingness to subordinate conservative principles, and for that matter all principles, to a market oriented ideology. Yet, this market oriented ideology which has bathed in the currents of the neo-liberal economic wave, also departs from a more traditional New Deal/liberal willingness to use surplus resources gained in the markets for social programs, and makes these additional resources available for war and other imperialist pursuits.<sup>29</sup> In a sense, the neo-conservative narrative has been both navigating the currents of a tempestuous ocean, while also trying to channel its currents in ways that maximize profits. To this extent, it is possible to argue that the neo-conservative narrative has endorsed narrowly tailored notions of equal opportunity, often betraying conservative principles, so long as these are profitable. The continuities and tensions between the conservative and neo-conservative ideologies can be readily discerned in at least two areas of contention, namely the relationship of natural rights to democratic participation, and the relationship between narrowly tailored identities and the market.

Leo Strauss, like most conservative thinkers, affirmed the natural superiority of some men over others throughout his work.<sup>30</sup> While not all natural rights arguments are premised on the affirmation that natural distinctions among men will have an impact on their ability to participate in the polity, hence Abraham Lincoln's argument in speeches like "*A House Divided*,"<sup>31</sup> Strauss' argument did affirm that most men were less capable of understanding political issues, and could likely perpetuate various forms of tyranny, including

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<sup>29</sup> For a discussion of U.S. imperialism, see DAVID HARVEY, *THE NEW IMPERIALISM* (2003).

<sup>30</sup> See generally LEO STRAUSS, *NATURAL RIGHT AND HISTORY* (1965).

<sup>31</sup> ABRAHAM LINCOLN: *HIS SPEECHES AND HIS WRITINGS* 372-381 (Roy P. Basler, ed., 2001). Ironically, while many Straussians and neo-conservative pay lip service to Lincoln's conception of natural equality, they also affirm ideologies that perpetuate a wide variety of inequalities, such as the discrimination against gays, immigrants, and the poor. See, e.g., NEWT GINGRICH, *WINNING THE FUTURE, A 21<sup>ST</sup> CENTURY CONTRACT WITH AMERICA* XV (2005).

democratic tyranny.<sup>32</sup> In the context of law, Justice Scalia's use of the notion of natural distinctions is readily evident in the language of his dissenting opinion in *Romer*, where he writes that:

The Colorado *homosexuals*; they can be favored for many reasons – for example, because they are senior citizens or members of racial minorities. But it prohibits giving them favored status *because of their homosexual conduct* – that is, it prohibits favored status *for homosexuality*.<sup>33</sup>

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

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

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<sup>32</sup> See generally LEO STRAUSS, ON TYRANNY 42 (2000).

<sup>33</sup> *Romer*, 517 U.S. at 644.

<sup>34</sup> *Lawrence*, 539 U.S. at 591.

<sup>35</sup> *Id.* at 542.



discourage democratic and egalitarian challenges emanating from historically and traditionally subordinated subjects and groups. Hence the narrative of *Kulturkampf*, a narrative that recasts the debates in terms of a war between competing expressions of conduct.

Neo-conservatives also part company with traditional conservatives with regards to the role of the market, and more precisely the influence of profit in legal and policy decisions. Notions such as equality and justice are ultimately subordinated to what is best for the markets. What is right and what is just is determined by what is good for business. To be sure, in *Grutter*, Justice O'Connor had no qualms in defending certain forms of narrowly tailored race based affirmative action if these were good for the markets, or in her words "(t)hese benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."<sup>36</sup> Ironically, this argument has the potential to undermine traditionally conservative positions because the markets, when they are not being manipulated by a corporation, tend to respond to consumption, not to morality. In addition, this argument readily forgoes the democratic process in the interest of encouraging profits and successful businesses in a competitive marketplace. Perhaps this is the space where neo-conservative and neo-liberal ideologies partner up.

The *Kulturkampf* narrative enables conservative and neo-conservatives to recast issues of inequality, exploitation, marginalization, and other forms of subordination as narrow cultural wars, or more precisely fits of spite.<sup>37</sup> This *Foreword* suggests that this is accomplished by employing at least two narrative strategies, namely the use of mutually contested dualities, and the representation of identity as a narrow and/or one-dimensional contested site. The dualities in question rely on the creation of artificial distinctions between binary constructions such as essential/behavioral identities, the private/public, the social/economic, etc. Additionally, those identities deemed to be "cultural," become contested sites which are subject to narrowly tailored external definitions that seek to deny the multidimensional and intersectional complexities of a broader notion of identity.

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

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<sup>36</sup> *Grutter*, 539 U.S. at 533-34.

<sup>37</sup> *Romer*, 517 U.S. at 636.

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

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

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

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<sup>38</sup> See Colloquium, *Representing Latina/o Communities: Critical Race Theory and Practice*, 9 *LA RAZA L.J.* 1 (1996); Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 *HARV. LATINO L. REV.* 1 (1997) (LatCrit I); Colloquium, *International Law, Human Rights and LatCrit Theory*, 28 *U. MIAMI INTER-AM. L. REV.* 177 (1997); Joint Symposium, *LatCrit Theory: Latinas/os and the Law*, 85 *CAL. L. REV.* 1087 (1997) and 10 *LA RAZA L.J.* 1 (1998); Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 *UCLA CHICANO LATINO L. REV.* 1 (1998) (LatCrit II); Symposium, *Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory*, 53 *U. MIAMI L. REV.* 575 (1999) (LatCrit III); Symposium, *Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections*, 33 *U.C. DAVIS L. REV.* 751 (2000) (LatCrit IV); Symposium: *Culture, Language, Sexuality and Law: LatCrit Theory and the Construction of the Nation*, 33 *MICH. J.L. REFORM* 203 (2000), 5 *MICH. J. RACE & L.* 787 (2000); Colloquium, *Spain, The Americas and Latino/as: International and Comparative Law in Triangular Perspective*, 9 *U. MIAMI INT'L & COMP. L. REV.* 1 (2000-01); Symposium, *Class in LatCrit: Theory and Praxis in a World of Economic Inequality*, 78 *DENVER U. L. REV.* (2001) (LatCrit V); Symposium, *Latinas/os and the Americas: Centering North-South Frameworks in LatCrit Theory*, 55 *FLA. L. REV.* 1 (2003) and 54 *RUTGERS L. REV.* 803 (2002) (LatCrit VI); Symposium, *Coalitional Theory and Praxis: Social Justice Movements and LatCrit Community*, 13

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

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

#### I. CONTEMPORARY RACIAL REALITIES

There are at least five ideological arguments that are shaping the contours of contemporary racial realities within the *Kulturkampf* narrative that has been driving legal and policy rollbacks in recent

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LA RAZA L. J. 113 (2002) and 81 OR. L. REV. 587 (2003) (LatCrit VII); Symposium, City & the Citizen: Operations of Power, Strategies of Resistance, 52 CLEV. ST. L. REV. 1 (2004) (LatCrit VIII).

years. These include a traditional conservative claim that we have reached the end of history, or rather the end of racism; the Clinton Race Initiative's call for a national dialogue on diversity and multiculturalism;<sup>39</sup> an essentialist conception of race; a neoconservative market oriented jurisprudence, and the War on Terrorism. The interplay of these ideologies has further restricted the parameters available for any significant legal challenge. More importantly, the new liberal orthodoxy has contributed to the depoliticization of race while legitimating a conception of culture that has enabled conservatives to recast the debates of inequality as debates of cultural diversity and tolerance. The *Kulturkampf* narrative has in turn perpetuated an artificial binary relationship between narrowly constructed notions of race and culture can in turn be used to counter one another and thus contribute to the creation of the conditions that have enabled the progressive dismantling of civil rights institutions.

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

In the realm of policy, the 1997-1998 Presidential Initiative on Race<sup>41</sup> re-defined the status of race in society in ways that that both

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<sup>39</sup> See RACE AND ETHNICITY IN THE UNITED STATES (Stephen Steinberg, ed., 2000).

<sup>40</sup> Claire Jean Kim, *Clinton's Race Initiative: Recasting the American Dilemma*, 33 POLITY 2 (Winter 2000)

<sup>41</sup> An on-line version of the text can be found at <http://clinton3.nara.gov/Initiatives/OneAmerica/pirsummary.html>.

undermined the historical gains of the civil rights movement, paving the way for significant rollbacks, and further transformed the terms of debate in ways that enabled conservative ideologues to highjack the terms of debate. Ironically, the Clinton Race Initiative would accomplish this by promoting a cultural conception of race that rejected the premises of the historical achievements of the civil rights movement. The new Liberal orthodoxy, led to the validation of a sort of mutually constitutive and essentialist conception of culture and race that reproduced additional forms of inequality and limited the possibilities to seek redress. In recasting the notion of race as form of essentialist cultural difference, the Clinton Race Initiative contributed to the dilution of the power of a race narrative in both law and policy. Whereas race and racism held a particular power of connotation, the new conception of an essentialized racial culture made it possible to redefine the race problem in the U.S. as a mere component of a diverse multicultural national identity. Thus, not only have conservative arguments sought to restrict the political impact of race, but liberals have also colluded in creating the conditions that further enable the erosion of the power racial claims can wield in society against anti-democratic and inegalitarian laws and policies.

One way to understand how the Clinton Race Initiative contributed to the creation of the conditions that have enabled conservative ideologies to re-define the contemporary legal and policy landscape is to compare it to previous Presidential initiatives. Kim's article on Clinton's Race Initiative notes that the 1997-98 Presidential initiative not only sought to redefine the nature of the race problem in this country, but also recasted the conceptualization of the goals and solution to this problem, in contrast to the recommendations set forth in Gunnar Myrdal's *American Dilemma* (1948) and the Kerner Commission Report of 1968.<sup>42</sup> To be sure, Kim further notes that the Clinton' Race Initiative, unlike Myrdal's *American Dilemma* and the Kerner Commission, argued that the nature of the race problem in the U.S. could be traced to innate racial and cultural differences and that White racism had by now ceased to be the crux of the American race problem.<sup>43</sup> In other words, while both the traditional liberal ideologies put forth by Myrdal and the Kerner Report respectively focused on individual and institutional forms of White racism as root causes of the race problem in the U.S., the new paradigm shift suggested that innate

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<sup>42</sup> Kim, *supra* note 40.

<sup>43</sup> *Id.* at 187.

cultural/racial differences were the source of the problem. Hence, this argument tacitly endorsed the use of the notion of cultural wars as a way to understand the race problem in the U.S.

Moreover, while the Myrdal report proposed that the goal of the nation should be to foster assimilation, and the Kerner report endorsed integration, the Clinton initiative envisioned a national unity with a multicultural or diverse gloss.<sup>44</sup> In contrast, Kim further notes, while Myrdal proposed an educational approach to solving the problem, and the Kerner Report invoked the allocation of material resources to create social programs to counter the effects of institutionalized racism, the Clinton initiative called for more dialogue.<sup>45</sup> Once the problem, goals, and solution were framed in these terms, it was not difficult for conservatives use both the language and narrative to redefine the scope of alternatives in the realm of public policy and to justify rollbacks in public programs. Likewise, the Clinton Race Initiative contributed to narrowing the available institutional options for redress, and to some degree it also redefined the liberal parameters for what forms of resistance would be tolerated. In my opinion, this liberal pandering to right-wing ideologues provided a readily accessible language and narrative of diversity that enabled conservatives to claim a seat at the table as equal members. Of course, the implication is that the unequal relations of power exercised by conservatives can be obscure, dismissed, excluded for purposes of a dialogue. In turn, conservatives not only can claim an equal voice and status to that of subordinated groups, but they can also shift the focus away from the current stratification of power and simply claim that their agenda has equal validity in any discussion of the solution of the race problem regardless of how unjust and antithetical their positions may be to the pursuit of democratic and egalitarian solutions.

Conservatives have appropriated this language in order to engage in an assault of academic institutions through a call for intellectual diversity.<sup>46</sup> This assault has been predicated on the public policing of so called un-American professors and curricula by mainstream conservative and neo-conservative ideologues such as David Horowitz,<sup>47</sup> Daniel Pipes *Campus Watch*,<sup>48</sup> or more recently with

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<sup>44</sup> *Id.* at 192.

<sup>45</sup> *Id.*

<sup>46</sup> For example, see the Students for Academic Freedom Homepage, at <http://www.studentsforacademicfreedom.org>.

<sup>47</sup> See David Horowitz, *The Campus Blacklist*, FRONTPAGEMAGAZINE.COM, April 18, 2003, at <http://www.frontpagemag.com/articles/ReadArticle.asp?ID=7357> (denouncing institutions of higher education as liberal enclaves).

Ann Coulter's call for a new McCarthyism against liberals in this year's Conservative Political Action Conference (CPAC). This call for intellectual diversity not only invokes the language of persecution and oppression to describe the status of conservative ideologues, but also obscures the status of conservatives in society at large by creating an artificial separation between institutions of higher education and society, at least when convenient. What is especially misleading about this conservative crusade is that conservative thought is in many ways antithetical to intellectual pursuits. In fact, this is the key problem implicit in this Trojan Horse,<sup>49</sup> namely the intolerance towards new forms of knowledge. To be sure, most conservatives are clear that all social, political, and economic problems are at heart moral and religious problems, thus the solution to our contemporary problems can ultimately be found in the moral and religious texts. The intellectual pursuit, in contrast, does not discard new alternatives, new ways of thinking or making sense of problems, which has led to questioning foundational myths and narratives that undermine conservative ideologies.

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

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

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<sup>48</sup> See the Campus Watch Homepage at <http://www.campus-watch.org/>, which monitors faculty identified with the Middle East.

<sup>49</sup> Stanley Fish, *Intellectual Diversity: The Trojan Horse of a Dark Design*, THE CHRONICLE OF HIGHER EDUCATION, Feb. 13, 2004, at <http://chronicle.com/free/v50/i23/23b01301.htm>.

some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.<sup>50</sup>

Professors Jaquelyn L. Bridgeman<sup>51</sup> and Aya Gruber's<sup>52</sup> essays invoke the need engage in a dialogue with conservatives and to take conservative arguments seriously. However, while Bridgeman and Gruber<sup>53</sup> are clear that there may be conservatives that are unwilling to participate in a dialogue, they both see value in understanding the nuanced positions of particular conservative voices. In the case of Bridgeman, her argument suggests that it may be important for a narrative of the Black community to understand the distinct voice of Black conservatives in order to understand complexities that escape the assimilationist/integrationist paradigm.<sup>54</sup> It follows that we should strive to understand the distinct and particular complexities of conservative ideologies that are emerging from traditionally subordinated communities as a way to understand the complexities of new relationships of power. Frankly, while I am not as optimistic as Professors Bridgeman and Gruber on the benefits of having a dialogue with conservatives, namely because I am convinced that what made changes possible in the realm of civil rights and race relations was not dialogue or an attitude adjustment, but rather the force of law and the State more generally.<sup>55</sup> I do think that this argument can help us explain the emergence of ideological alliances between historically liberal and civil rights oriented activist groups and right-wing ideologues in the current political environment. This has certainly been the case in the polemic surrounding the nomination of Alberto Gonzales to the post of U.S. Attorney General, and his endorsement by the *National Council of La Raza* (NCLR)<sup>56</sup> and the League of United Latin American Citizens (LULAC).

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<sup>50</sup> *Lawrence*, 539 U.S. at 602.

<sup>51</sup> Jacquelyn L. Bridgeman, *Defining Ourselves for Ourselves*, 35 SETON HALL L. REV. 1261 (2005).

<sup>52</sup> Aya Gruber, *Navigating Diverse Identities: Building Coalitions Through Redistribution of Academic Capital, an Exercise in Praxis*, 35 SETON HALL L. REV. 1201 (2005).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Adolph Reed, Jr., *Yackety-Yak About Race*, in RACE AND ETHNICITY IN THE UNITED STATES 61 (Stephen Steinberg, ed., 2000).

<sup>56</sup> I should probably note that while the NCLR has a long standing reputation for supporting an activist civil rights agenda, this does not mean that this organization has been embracing a critical or progressive agenda. Like most liberal institutions, the members of the NCLR have also reproduced a number of inter-group forms of subordination. See generally Margaret E. Montoya, *Introduction: LatCrit Theory: Mapping Its Intellectual and Political Foundations and Future Self-Critical Directions*, 53 U.



I think that the most recent ongoing controversy over Ward Churchill's writings epitomizes how race is weaved into this debate on intellectual diversity.<sup>57</sup> Conservative pundits have also taken pot shots at Ward Churchill's use of the metaphor of Karl Adolf Eichmann<sup>58</sup> to represent greedy Wall Street capitalists who keep the genocidal State apparatus well financed, while simultaneously profiting from war. Conservative ideologues have resorted to questioning whether Churchill is an authentic Native American rather than addressed the substance of his argument and confronted the implications for a nationalist narrative of identity.<sup>59</sup> This question of authenticity is especially important because it has been framed in the context of an essentialist narrative of race premised on a White supremacist notion of membership defined by rules of hypo-descent or blood quantum. The irony of this ongoing debacle, is that conservative ideologues have been unwilling to exercise intellectual responsibility to confront Churchill's argument. The *Kulturkampf* narrative has reframed Churchill's political challenge to the realm of academic cultural wars, and has sought to discredit this argument by appealing to an essentialist narrative of racial authenticity that can presumably be used to dismiss Churchill's ability to offer the critique in the first place.

All of the contributors to this cluster are also addressing the question of Coloniality of Power,<sup>60</sup> or rather the ways in which narratives of communal identity reproduce similar ideologies of subordination which the members of these communities have in turn experienced. Stated differently, the contributors to this cluster caution that the norms of community membership need not reproduce narrowly tailored conceptions of authenticity or identity.

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MIAMI L. REV. 1119 (1999). For an additional and related reflection, see Anita Tijerina Revilla, *Raza Womyn Mujerstoria*, 50 VILL. L. REV. 799.

<sup>57</sup> See Ward Churchill, *Some People Push Back: Reflections on the Justice of Roosting Chickens*, DARK NIGHT PRESS, Sept. 11, 2001, at <http://www.darknightpress.org/index.php?i=news&c=recent&view=9&long=1> (last visited Jan. 2, 2006); WARD CHURCHILL, ON THE JUSTICE OF ROOSTING CHICKENS: SOME REFLECTIONS ON THE CONSEQUENCES OF U.S. IMPERIAL ARROGANCE AND CRIMINALITY 5-37 (2003).

<sup>58</sup> See generally HANNAH ARENDT, EICHMANM IN JERUSALEM, A REPORT ON THE BANALITY OF EVIL (1994).

<sup>59</sup> See, e.g., Ann Coulter, *Not Crazy Horse, Just Crazy*, ANNCOULTER.COM, Feb. 17, 2005, at <http://www.anncoulter.com/cgi-local/article.cgi?article=42> (last visited Jan. 2, 2006); Ann Coulter, *The Little Injun That Could*, ANNCOULTER.COM, Feb. 9, 2005, at <http://www.anncoulter.com/cgi-local/article.cgi?article=41> (last visited Jan. 2, 2006).

<sup>60</sup> Walter D. Mignolo, *Coloniality of Power and Subalternity*, in THE LATIN AMERICAN SUBALTERN STUDIES READER (Ileana Rodriguez, ed., Duke University Press 2001).

They in fact call for a notion of identity/culture which can accommodate the multidimensional and intersectional aspects of the subject's identity, and in turn expand the collective conception of group identity. Professor Carla D. Pratt's essay discusses how the Seminole nation has reproduced traditionally exclusionary and inegalitarian racial policies, premised on a standard of hypo-descent, which have resulted in the exclusion of the Dosar-Barkus and Brunner bands of Black Seminoles.<sup>61</sup> Pratt makes a case for a cultural conception of kinship which can accommodate other aspects of a Native American membership, such as genealogy, historical relationships, and other forms of communal membership that may be excluded by an otherwise narrow and essentialist conception of racial identity. Culture, in the context used by the contributors suggests the possibility of conceiving a sense of common ground that challenges narrow the artificial, narrow, and binary opposition between an essentialist conception of race and conduct that the *Kulturkampf* narrative propounds.<sup>62</sup>

In the realm of law, while conservatives like Justice Scalia concede that some people "can be favored for many reasons—for example, because they are senior citizens or members of racial minorities,"<sup>63</sup> this status can not be extended to members of traditionally subordinated groups, such as "homosexuals" whose identity can be represented as a form of conduct.<sup>64</sup> Of course, as I noted before, according to Justice Scalia, *homosexual conduct* is an expression of a conception of culture that is tantamount to conduct. It follows, that any effort to challenge the anti-democratic, inegalitarian and exclusionary laws and policies adopted in this country need to be understood as a further expression of cultural wars. This *Kulturkampf* narrative can only concede to extending equal protection to racial minorities because these subjects can not change their race, and despite what other conservatives may claim, there are some remnants of racism still pervading in our society. Perhaps this ideology is an expression of a natural rights/law narratology that is unable to come to terms with identities that are different than the base model, the White property-owning male of the Eighteenth century.

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<sup>61</sup> Carla D. Pratt, *Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity*, 35 SETON HALL L. REV. 1241 (2005).

<sup>62</sup> For an alternative perspective of this argument, see RAJAGOPALAN RADHAKRISHNAN, *DIASPORIC MEDITATIONS, BETWEEN HOME AND LOCATION* 89 (1996).

<sup>63</sup> *Romer*, 517 U.S. at 644.

<sup>64</sup> *Id.*

A fourth ideological current shaping the contemporary legal narrative of race subordinates questions of equal protection of the law to the exigencies of the market. This is a perspective that is readily consistent with a neo-conservative argument. Perhaps the most revealing expression of this argument can be discerned from Justice O'Connor's opinion in *Grutter*, where she reasoned that so long as racial classifications are narrowly tailored, it may be possible to establish a compelling state interest that may justify the use of these classifications when considering the equal protection clause.<sup>65</sup> As I suggested above, Justice O'Connor alludes to an *amicus brief* submitted on behalf of a group of business men. It is readily evident that the ideological basis for this argument is premised on a conception of the courts as neutral arbiters that should only interfere in extreme situations for fear of destabilizing the market. This argument, however, undermines the traditional conservative ideology that suggests that with enough time, the natural forces shaping the market will take care of the problem of racism. Stated differently, this tension highlights a clear double standard in the conservative ideology, one that is premised on narrowly tailored constructions of race and court interventions in regulating social relations with an economic impact, which simultaneously acknowledges the inability of conservative logic to describe the current state of racial relations in the U.S.

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

A final argument that I want to offer is that the current relationship between race and the cultural wars rhetoric has been shaped by some of the ideological underpinnings of the neo-

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<sup>65</sup> *Grutter*, 539 U.S. at 331.

conservative agenda, which has partly conceptualized the solution to the War on Terror in cultural terms. To be sure, as Nick Xenos notes in his discussion of the philosophical underpinnings of the neo-conservative argument:

One key concept of Straussian analysis, they noted, was “regime,” a term of art used to translate Aristotle’s usage of *politeia*. Regime signifies more than a particular governmental form; it refers to the cultural substance of that form. In Strauss’s view (as well as Tocqueville’s, they think), “the regime shapes human political action in so fundamental a way that the very souls appear different.”<sup>66</sup>

To be sure, the notion of “regime change” is at heart a notion premised on the uprooting of a culture and the imposition of new political culture. In order to achieve this, however, the Bush Administration has employed various forms of violence through the imperialist occupation of places like Iraq.<sup>67</sup> The problem, of course, is that neo-conservatives have been employing a series of double standards in their implementation of regime change. For example, while the current neo-conservative Bush Administration has been defending the international spread of democracy and human dignity<sup>68</sup> it has simultaneously adopted violent policies that endorse the torture<sup>69</sup> and abuse of, often innocent, individuals.<sup>70</sup> This administration has partly been able to negotiate these double standards by manipulating cultural narratives of violence and identity.

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

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<sup>66</sup> Nick Xenos, *The Imperial Leo Strauss*, 1 *DISONANTE* 59, 61 (2005).

<sup>67</sup> See generally The Project for a New American Century, at <http://www.newamericancentury.org> (last visited Jan. 2, 2006).

<sup>68</sup> See the text and language of the National Security Strategy of the United States at <http://www.whitehouse.gov/nsc/nss.html> (last visited Jan. 2, 2006).

<sup>69</sup> See, e.g., Jane Mayer, *Outsourcing Torture, The Secret History of America’s “Extraordinary Rendition” Program*, *THE NEW YORKER*, Feb. 14, 2005, at 106-23.

<sup>70</sup> MARK DANNER, *TORTURE AND TRUTH, AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* (2004); SEYMOUR M. HERSH, *CHAIN OF COMMAND, THE ROAD FROM 9/11 TO ABU GHRAIB* (2004); DAVID COLEM, *ENEMY ALIENS, DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003).

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

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

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

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<sup>71</sup> See the host of available reports on abuses in U.S. facilities as documented by the Department of Justice Office of Inspector General at <http://www.usdoj.gov/oig/special/index.htm> (last visited Jan. 2, 2006).

identify with subordinated narratives of community to question how they are reproducing the hegemonic discourse of the right.

## II. KULTURKAMPF

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

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

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<sup>72</sup> See Francisco Valdes, *Piercing Webs of Power: Identity, Resistance and Hope in LatCrit Theory and Praxis*, 33 U.C. DAVIS L. REV. 1 (2000).

<sup>73</sup> STANLEY FISH, *THE TROUBLE WITH PRINCIPLE* 56 (1999).

<sup>74</sup> WENDY BROWN, *POLITICS OUT OF HISTORY* 133 (2001).

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

In an interesting critique of the efforts of American Legal Realists to "get rid of the machinery of the legal culture-with its terms of art, constructed entities, and artificial rules," in order to get closer to reality, Stanley Fish contends that "if you were to get rid of the machinery of legal culture (or of the literary culture, or of the anthropological culture) you would not be improving law, you would be replacing law with the machinery of some other discipline, with *its* specialized vocabulary, normative distinctions, taxonomies, articulations, etc."<sup>75</sup> Like American Legal Realists, it is possible to argue that critical legal scholars from a wide array of perspectives have also been vying for a interpretive position of primacy in the legal academy and of course situating themselves in positions of influence over law students and other actors. What is interesting about LatCrit is its ability to embrace a cultural critique that is open to a wide array of disciplinary influences, as well as perspectives from outside of the legal academy. More than trying to provide an alternative "machinery" or vocabulary, LatCrit has consistently provided an intellectually oriented space that encourages democratic participation. Speaking as an outsider to the legal academy, yet spending significant time in penumbras of LatCrit, my sense has been that LatCrit has provided a democratic forum to expose critiques, ideas, and more generally resources that can be used to challenge hegemonic ideologies from competing perspectives. To be sure, while there is a clear critical agenda, there is a simultaneous transparency and openness that invites scholars to offer competing perspectives, and in turn LatCrit disseminates these throughout the legal academy.

Sylvia R. Lazos Vargas' contribution provides a genealogy of the cultural debates among critical legal scholars that demarcates the contours of the polemics shaping the contentious battles among scholars and camps in the legal academy.<sup>76</sup> This essay provides a clear

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<sup>75</sup> STANLEY FISH, PROFESSIONAL CORRECTNESS, LITERARY STUDIES AND POLITICAL CHANGE 71-72 (1995).

<sup>76</sup> Sylvia R. Lazos Vargas, *'Kulturkampf' or 'fits of spite'?: Taking the Academic Culture*

and concise discussion of the issues, positions, and stances that have defined legal scholars' allegiances to particular initiatives within the legal academy and their disaffections. As an outsider to these debates, I am reluctant to comment on the effect or impact of these camps in the legal academy and more particularly on students,<sup>77</sup> however, it is readily evident to me that LatCrit publications and projects are providing a continuing body of knowledge that offers law students and other scholars and activists a host of interdisciplinary resources.

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

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

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*Wars Seriously*, 35 SETON HALL L. REV. 1309 (2005).

<sup>77</sup> See generally Francisco Valdes, *Barely at the Margins: Race and Ethnicity in Legal Education—A Curricular Survey With LatCritical Commentary*, 13 LA RAZA L. J. 119 (2002) (exploring the impact of LatCrit Theory in the curricula of the legal academy in the U.S.); Margaret E. Montoya, *Introduction: LatCrit Theory: Mapping Its Intellectual and Political Foundations and Future Self-Critical Directions*, 53 U. MIAMI L. REV. 1119 (1999); Francisco Valdes, *Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087 (1997); Kevin R. Johnson & George A. Martínez, *Crossover Dreams: The Roots of LatCrit Theory in Chicana/o Studies Activism and Scholarship*, 53 U. MIAMI L. REV. 1143 (1999).



constructions of culture, in this case “the” South Asian culture, as well as internal or self-referential efforts to project a sense of community that denies the fractured histories and contingent identities of South Asians living in the U.S. More importantly, his argument demonstrates some of the ways in which a communal narrative, that in turn is defined by narrow and unifying conception of culture, reproduces various forms of subordination and marginalization. This ideological narrative in turn has not only perpetuated a more expansive subordination of Muslim, but also “retards the building of coalitions”<sup>78</sup> between subordinated and progressive forces.”

Professor Mahmud’s critique exposes some of the ways in which conservative narratives of national identity and security are being employed to in the effort to construct a unifying narrative of a South Asian Muslim community, and further reproduced through a process of Coloniality of Power. At a time when the contours of a cultural wars narrative are being defined by the War on Terror vis-à-vis stereotypical narratives of the Muslim or Arab terrorist, these ideological practices obscure the contingent identities and ideologies of South Asians. This is especially dangerous because the current *Kulturkampf* narrative of the U.S. has been employing a nationalist conception of culture that is self referential and simultaneously dependent on the reproduction of Muslim or Arab cultural threat. In a sense, this *Kulturkampf* has embraced a *Kulturnation* definition of the self that depends on a representation of an imaginary unity that seeks to affirm itself through the invocation of a shared sense of history, culture, language, tradition, ancestry, and civilization.<sup>79</sup> This *Kulturnation* affirms its identity in the rejection of the represented Muslim or Arab threat, and despite the strategic use of conservative Muslims, at the end of the day does not recognize Muslims as legitimate members. More importantly, as noted above, these conservative narratives undermine the possibility for critical solidarity at both a local and global level.<sup>80</sup>

Professor Martha T. McCluskey’s essay addresses the economic foundations of the reigning neo-conservative ideology and the impact on *Kulturkampf* debates.<sup>81</sup> This argument exposes some of the ways in

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<sup>78</sup> See also Victor Romero, *Rethinking Minority Coalition Building: Valuing Self-Sacrifice, Stewardship, and Anti-Subordination*, 50 VILL. L. REV. 823 (2005).

<sup>79</sup> I am borrowing this term from Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, in MULTICULTURALISM, EXAMINING THE POLITICS OF RECOGNITION 146 (Amy Gutmann, ed., 1994).

<sup>80</sup> See SUSAN BUCK-MORSS, THINKING PAST TERROR, ISLAMISM AND CRITICAL THEORY ON THE LEFT (2003).

<sup>81</sup> Martha T. McCluskey, *The Politics of Class in the “Nanny Wars”: Where is*

which economic questions are either subordinated to social concerns, or are outright excluded from the debate. Her essay discusses some of “the connections between neo-liberalism and neo-conservatism (which) often remain obscure partly because the divide between economic politics and cultural (or identity) politics is deeply embedded in the liberal ideology that grounds mainstream U.S. jurisprudence and policy analysis.”<sup>82</sup> These artificial divisions between the social, economic, and the political, contribute to creating the conditions that enable conservative and neo-conservative ideologues to both focus on particular issues, displacing a more holistic approach, and/or to create artificial dualities that allow for the counterpoising and subordination of issues.

While the argument that “class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness to command extraordinary protection from the majoritarian political process” is not new, the narrative employed by conservatives to continue to subordinate economic challenges is new.<sup>83</sup> The *Kulturkampf* narrative refines the artificial separations between the economic, the social and the political arena, by employing the language of culture/conduct as the analytic framework from which to evaluate questions of equality and justice. The *Kulturkampf* claim enables legal actors to reframe issues with concrete material implications as social questions while ignoring the economic aspects of a problem. Of course, this is easier to accomplish when problems of class identity are reduced to issues of behavior or conduct.<sup>84</sup> McCluskey’s argument explains some of the ways in which *Kulturkampf* arguments obscure the “intersection of class and other social processes, most notably cultural processes.”<sup>85</sup> The effect of the conservative argument, is of course, to discard the possibility of understanding class as an identity.

Since its inception almost a decade ago, LatCrit has been fostering transnational relationships among critical scholars and activists that seek to build progressive coalitions to address issues of injustice.<sup>86</sup> Roque Martin Saavedra’s essay is not only representative

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*Neoliberalism in the Kulturkampf?*, 35 SETON HALL L. REV. 1291 (2005).

<sup>82</sup> *Id.*

<sup>83</sup> San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

<sup>84</sup> *Id.*

<sup>85</sup> Jack L. Amariglio et al., *Class, Power, and Culture, in MARXISM AND THE INTERPRETATION OF CULTURE* 491 (Cary Nelson & Lawrence Grossberg, eds., 1988).

<sup>86</sup> See, e.g., *Law, Culture, and Society: LatCrit Theory and Transdisciplinary Approaches*, 16 FLA. J. INT’L L. 3 (2004).

of this effort, but also explores some of the ways in which questions addressed in LatCrit forums can be used in other contexts outside of the U.S. to reflect on local polemics and problems. In his essay Professor Saavedra uses the notion of *Kulturkampf* as a discursive device<sup>87</sup> to reflect on the historical relationship between gays and lesbians and the Argentinean nation-state.<sup>88</sup> Like other essays in this symposium, Saavedra exposes the historical use of artificial dualities, such as the public/private conception of the individual and his relationship to the nation-state to reproduce the conditions of oppression and subordination among individuals that identify with and LGBT identity. For example, Saavedra points out that while gays and lesbians used the narrative of the private space as a strategy for survival during the 1970s and 1980s, during the 1990s, the notion of the private space has perpetuated the invisibility of gays and lesbians in an Argentinean heterosexual society that has become a bit more tolerant of sexual minorities.<sup>89</sup> Of course, I say a bit more tolerant, for tolerance is not tantamount to recognition of membership and equality. As Saavedra clearly points out, sexual minorities are still treated as outsiders<sup>90</sup> within the Argentinean Nation-State. To be sure, Saavedra's argument reveals the contingent and narrow character of liberal narratives of tolerance and emancipation. This essay also challenges the reader to contemplate some of the ways in which cultural wars over the definition of private/public spaces can shape the contours of new technologies of power in both the law and the political arena.

Moreover, Saavedra also warns the reader that mimicking First World solutions in a Third World context can create new forms of subordination.<sup>91</sup> One example that can be discerned from his essay is the fact that the Argentinean nation-state employ different forms of repression to subordinate sexual minorities, and public affirmations of identity could result in the subject's execution. Saavedra concludes his post-modern critique with a further exploration of the limits of transformative politics within a 19<sup>th</sup> century constitutional/legal framework.<sup>92</sup> While Saavedra is clearly skeptical

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<sup>87</sup> For another example see Hugo Rojas, *Stop Cultural Exclusions (In Chile)!: Reflections on the Principle of Multiculturalism*, 55 FLA. L. REV. 121 (2003).

<sup>88</sup> See also Guadalupe Salomon, *Political Articulations of Gay, Lesbian, Transgendered and Bisexuality Movements in Argentina, 1969-2004*, 50 VILL. L. REV. \_\_\_\_ (forthcoming 2005).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

of the possibilities of any radical transformation within the modern/liberal nation-state, he does invoke the need to embrace a less dogmatic interpretation of the law. This could mean reading the law as a living document, and striving to move beyond originalist and narrowly tailored interpretation of the law. In a sense, *Kulturkampf* can lead us to read the law as a contested terrain with some, albeit limited, possibilities for social and political transformation.

### III. IMMIGRATION STATUS

The current *Kulturkampf* narrative has been premised on the artificial creation of narratives that are in turn counterposed to one another. For example, current conservative and Nativist narratives ascribe a cultural context to such dualities as the citizen and the alien, the nation and the foreigner,<sup>93</sup> and more generally the legal and the illegal. What is distinct about the current *Kulturkampf* narrative on immigration is the appeal to the anxieties of citizens in relationship to the current War on Terrorism. This narrative has also relied on the insinuation of connections between that which is perceived as pertaining to an immigrant, or rather and “illegal alien” culture and foreign terrorists who are presumably trying to enter our nations through our unguarded gates.<sup>94</sup> The reliance on a cultural context also appeals to an essentialist and potentially un-reconcilable status of difference.<sup>95</sup> Thus the “illegal alien” is represented as a dangerous individual that threatens “our national way of life,” our “values,” and “freedom.”

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

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<sup>93</sup> See, e.g., BONNIE HONIG, *DEMOCRACY AND THE FOREIGNER* (2001).

<sup>94</sup> See, e.g., OTIS L. GRAHAM JR., *UNGUARDED GATES, A HISTORY OF AMERICA’S IMMIGRATION CRISIS* (2004).

<sup>95</sup> For an alternative argument see Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and LatCrit Theory*, 55 FLA. L. REV. 539 (2003).

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

The basic premise of the conservative argument is that immigration has been a key cause of the balkanization of the United States, and by extension weakening the national unity in ways that make the country vulnerable to an irreversible fragmentation. The effects of this fragmentation are the erosion of a mythological American past<sup>96</sup> and culture, the expansion of liberal policies that legitimate foreign cultural ideologies, and could potentially open the gates to terrorist attacks. These ideological claims are readily evident in the pages of conservative pundits like Patrick J. Buchanan's *The Death of the West* where he contends that:

America has undergone a cultural and social revolution. We are not the same country that we were in 1970 or even in 1980. We are not the same people. After the 2000 election, pollster William McInturf told the *Washington Post*: "We have two massive colliding forces. One is rural, Christian, religiously conservative. [The other] is socially tolerant, pro-choice, secular, living in New England and the Pacific Coast...While the awful events of September 11 created a national unity unseen since Pearl Harbor—behind President Bush and his resolve to punish the perpetrators of the massacres of three thousand Americans—they also expose a new divide. The chasm in our country is not one of income, ideology, or faith, but of ethnicity and loyalty. Suddenly, we awoke to the realization that among our thirty-one million foreign-born, a third are here illegally, tens of thousands are loyal to regimes which we could be at war, and some are trained terrorists sent here to murder Americans."<sup>97</sup>

For Buchanan, Americans that are unable to trace their ancestors to Europe<sup>98</sup> are representative of the foreign enemy that "is inside the gates" and threatens the "American people" in "their own country."<sup>99</sup> This of course was clear to all loyal Anglo-Americans who were willing to see it in those days after September 11, 2001.

More recently this argument has been re-packaged with an academic veneer by Professor Samuel P. Huntington in his most recent book titled *Who We Are?*<sup>100</sup> Like Buchanan before him,

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<sup>96</sup> Stephen Steinberg, *THE ETHNIC MYTH, RACE, ETHNICITY, AND CLASS IN AMERICA* (1989).

<sup>97</sup> PATRICK J. BUCHANAN, *THE DEATH OF THE WEST, HOW DYING POPULATIONS AND IMMIGRANT INVASIONS IMPERIL OUR COUNTRY AND CIVILIZATION* 1-2 (2000).

<sup>98</sup> *Id.* at 3.

<sup>99</sup> *Id.* at 2.

<sup>100</sup> SAMUEL P. HUNTINGTON, *WHO WE ARE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY* (2004).

Huntington is not only concerned with rescuing a White Anglo-Saxon Protestant<sup>101</sup> core national culture, but also with the cultural political and legal institutions that have defined the supposed core identity of the United States.<sup>102</sup> One of his central anxieties can be discerned from his fear that immigrants who reject assimilation may somehow transform the U.S. political and legal institutions in ways that reject the core Anglo-American creed. The end result, of course, is the inevitable fragmentation of the nation, and the potential for a civil war, or at the very least a cultural war. Ironically, Huntington's argument, like most conservative ideologies, is unable to recognize the U.S. cultural character of critical movements and initiatives, but rather echoes traditional exclusionary and inegalitarian ideologies of patriotic exceptionalism.<sup>103</sup>

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

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<sup>101</sup> It should be noted that Buchanan is a practicing Catholic.

<sup>102</sup> HUNTINGTON, *supra* note 100, at 60.

<sup>103</sup> For example, see President Bush's 2002 State of the Union Address where he invokes a new cultural conception of a new American ethic and creed. *President Delivers State of the Union Address*, WHITEHOUSE.GOV, Jan. 29, 2002, at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> (last visited Jan. 2, 2006).

the problem of urban neglect and marginalization, the conservative narrative looks for the immigrant scapegoat.

The arguments in this essay also challenge the conservative re-appropriation of the liberal notion of the private/public distinction by demonstrating how an immigrant and global communities can enrich the local city landscapes in new, innovative, and creative ways. I find Flores' essay especially interesting because while it recognizes the impact of the "criminal stigma" attached to immigrant communities, it also presents a critical example of public immigrant communities that are enhancing and revitalizing cities marginalized sectors of cities like New York and Los Angeles. Of course, in order to appreciate this Flores' contribution, one has to be willing to accept that a U.S. national terrain can and should accommodate more global and to some degree cosmopolitan cultural expressions. I find that Flores' essay resonates with Randolph S. Bourne's critique of Nativism in the U.S. at the outset of World War I and his argument that perhaps there is no American culture, but rather the U.S. should be understood as a sort of "federation of cultures."<sup>104</sup>

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

America's immigration system is also outdated — unsuited to the needs of our economy and to the values of our country. We should not be content with laws that punish hardworking people who want only to provide for their families, and deny businesses willing workers, and invite chaos at our border. It is time for an immigration policy that permits temporary guest workers to fill jobs Americans will not take, that rejects amnesty, that tells us who is entering and leaving our country, and that closes the border to drug dealers and terrorists.<sup>105</sup>

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

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<sup>104</sup> For an interesting historical example, see Randolph S. Bourne, *Transnational America, in WAR AND THE INTELLECTUALS: COLLECTED ESSAYS, 1915-1919*, at 117 (Carl Reseck, ed., 1999).

<sup>105</sup> See 2005 State of the Union Address, WHITEHOUSE.GOV, Feb. 2, 2005, at <http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html> (last visited Jan. 2, 2006).

of the immigrant worker, one that would recognize the cultural contributions of the immigrant, could perhaps threaten the Anglo-American Nativism pushing for the closure of the U.S.-Mexico border.<sup>106</sup>

This policy initiative also opens the door for an interrogation of current educational policies towards immigrants and the social, economic and political implications of these for both immigrant communities and society at large. María Pabón López's discussion of *Plyler v. Doe*<sup>107</sup> explores the continuing "struggle for educational fairness and opportunity for Latino/a children" amidst the cultural battles shaping the contours of the status of non-citizen immigrants.<sup>108</sup> As Pabón López notes, *Plyler* authorizes access to K-12 education for undocumented children despite the increasing restrictions on undocumented immigrant rights and the dismantling of other educational programs such as bilingual education.<sup>109</sup> The irony of this situation is that despite the Court's progressive position in *Plyler*, which extends the protections of the 14<sup>th</sup> Amendment's Equal Protection Clause to undocumented persons, is that a better educated work force of immigrant guest workers is more likely to acquire the necessary skills to perform better in an ever changing work place. Moreover, as Pabón López suggests, this may open the possibility for an immigrant to work legally in the U.S.<sup>110</sup>

Yet, as Pabón López warns, there is also "the very endurance of *Plyler* as precedent may itself then perpetuate the 'silent covenant' of the 'shadow population' of the undocumented, who have the right to be educated, at least in the K-12 arena, but are unable to work and become full members of our society, and thus achieve a sense of belonging in this country."<sup>111</sup> What I find especially intriguing about Pabón López discussion is that it is readily evident that neo-conservative narratives are willing to accommodate the needs of some undocumented workers, so long as the profits outweigh the costs, and regardless of whether conservative values and Nativist ideologies are undermined in the process. Again, President Bush's initiative reflects the kind of narrow argument that navigates between accepting the presence of immigrant/guest workers, and enforcing new

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<sup>106</sup> IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-AMERICAN IMPULSE IN THE UNITED STATES (Juan F. Perea, ed., 1997).

<sup>107</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>108</sup> María Pabón López, *Reflections Regarding the Education of Latino/a Children: Plyler v. Doe and Beyond*, 35 SETON HALL L. REV. 1367 (2005).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*



technologies of surveillance that can be used to regulate the behavior of guest workers with the threat of expedient deportation. My sense is that the egalitarian principles of *Plyler* are tolerated so long as they can be used to contribute to enabling the undocumented working population to be profitable in a market oriented society.<sup>112</sup>

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

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

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

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<sup>112</sup> See e.g., Mary Romero, *Immigration, the Servant Problem, and the Legacy of the Domestic Labor Debate: "Where Can You Find Good Help These Days!?"*, 53 U. MIAMI L. REV. 1045 (1999).

<sup>113</sup> See generally THOMAS A. ALENIKOFF, ET AL., *IMMIGRATION AND CITIZENSHIP, PROCESS AND POLICY*, (4th ed. 1998).

<sup>114</sup> Mary Romero & Marwah Serag, *Violation of Civil Rights Resulting From INS and Local Police's Use of Race, Culture and Class Profiling: The Case of Chandler Roundup in Arizona*, 52 CLEV. ST. L. REV. 75 (2005).

affirm a continued conviction for democracy and equality in the face of a political environment that undermines these principles in the name of *Kulturkampf* and the War on Terrorism. The LatCrit project aims to create an intellectual environment that not only nurtures critical and progressive exchanges, but also strives to create the conditions that will enable scholars and activists to engage in social, political, legal, and economic change.

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

One of the underlying threads among the essays in this symposium has been a cautionary warning to subordinated groups to become aware of the ways in which their collective self-defining narratives reproduce and perpetuate conservative ideologies. Most of the contributions to this symposium have explored the ways in which subordinating practices within communities with traditionally marginalized members and ultimately preventing coalition building. More importantly, the reproduction of conservative narratives within among subordinated populations forestalls the possibilities of organizing effective challenges to the anti-democratic and inegalitarian forces shaping the contours of the ideological State apparatus. In response, most of the contributions included in this symposium, argue for more encompassing and expansive conceptions of culture and identity. To be sure, most of the essays call for more complex legal and political conceptions of culture and identity that consider multidimensional and intersectional aspects of subjectivity. In a sense, there is a calling for broader conceptions of culture that

can accommodate contingent identities in ways that undermine conservative narratives of subjectivity.