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PERFORMING LATCRIT: Critical Race Coalitions: Key Movements that Performed the Theory

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SUMMARY: ... BCDF's local movement to increase law school diversity culminated in 1989 with the BCDF-coordinated Nationwide Law Student Strike for Diversity. ... The stories perpetuate the notion of self-correcting institutional reform, specifically that the struggle over physical space for people of color on law school facilities was primarily a matter of prevailing in the "free marketplace of ideas." ... Furthermore, meetings between CDF members and the law school administration proved fruitless. ... In the fall of 1985, the United Law Students of Color ("ULSC"), the group that reinvigorated the diversity movement at Boalt Hall, benefited from the momentum, experience, leadership and organizational models of both the UPC and the anti-apartheid movement. ULSC formed various subcommittees to address specific law school issues, including a subcommittee on Faculty Diversity. ... The diversity movement grew at Boalt, gaining political and popular support. ... BCDF widely publicized that from 1967 to 1987, there was only one tenured faculty member of color at the law school. ... At the macrolevel, other larger forces contributed to the decline of the diversity movement at Boalt and elsewhere. ... What impact did the diversity movement initiated by BCDF and the Nationwide Law Student Strike have on legal education and critical race theory in particular? In partial answer to this question, we offer the following empirical analysis of material gains attributable to diversity movement politics. ...

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In this Article, we attempt to retrieve an obscured history, central to the development of critical race theory ("CRT"). This history tells one of the many stories of student activism for diversity in higher education from the 1960s to the 1990s. In particular, we focus on a longitudinal case study, U.C. Berkeley's Boalt Coalition for Diversified Faculty ("BCDF"). BCDF's local movement to increase law school diversity culminated in 1989 with the BCDF-coordinated Nationwide Law Student Strike for Diversity.

This Article also will analyze the cross-pollination of movement and theory -- assessing both achievements and failings of parallel efforts to raise race consciousness through student-led diversity struggle and CRT's scholarly interventions on race discourse. By linking histories of communal struggle with the individual agency of the initial critical race proponents, we demonstrate how antiracist practices and antiracist theorizing are metabolically intertwined. In the course of making this linkage, we credit not only the BCDF movement, but also other local and national struggles that utilize race consciousness in defining their goals, devising their strategies, and organizing their groups. It is our hope that other local and national movement histories will be reclaimed and documented. Consistent with critical race praxis scholarship, we believe that combining these movements is beneficial and necessary to the ongoing task of sustaining linkage between theory and praxis and the [*1378] development of a diverse, race-conscious jurisprudence and legal profession.

Recent praxis literature underlines the significance of linking progressive lawyering and critical race theorizing to produce more grounded and effective litigation and scholarship. We extend this analysis by highlighting the importance of political organizing for the critical race theory project, and vice versa. n1 Such an understanding of CRT's roots has significant implications for the mutual obligations between activists in the academy and political communities.

I. Historical Significance of Diversity Movements for Critical Race Theory

A. Linking Antiracist Organizing and Antiracist Theorizing

Most accounts of the development of critical race theory as a movement emphasize the agency of individual scholars who were dissatisfied with both critical legal studies ("CLS") and traditional civil rights paradigms. These scholars happened to find themselves writing on similar themes from similar, critical perspectives at approximately the same time and place. For example, according to one of the leading anthologies on critical race theory, CRT becomes a "self-conscious entity" in 1989 when these scholars convened their first annual workshop. The editor of this anthology acknowledged the intellectual influence that CLS, feminist jurisprudence, continental social and political philosophy, and the political inspiration of the civil rights movements had on CRT. However, the editor failed to mention the role of student of color activism in CRT, despite his own personal nurturance of such movements. n2 [*1379]

The other leading text on CRT describes CRT's development and notes the importance of both the civil rights movement for "inspiration" and "direction," as well as the CLS leftist intervention into legal discourse as "elements in the conditions of [CRT's] possibility." The editors then identify two events central to the development of CRT as a movement -- a student protest at Harvard Law School in 1981 over an alternative course on race and law, and the 1987 Critical Legal Studies National Conference on race and silence. n3

The emphasis placed on the Harvard protest is suggestive and from our perspective, very useful, but incomplete. Why such protest emerged in 1981 and why there was a six-year gap between the two central events remain unexplained. How the 1981 protest played a developmental or catalytic role in the rise of CRT "as a movement" is unclear. n4 Genesis stories of the CRT movement are generally about the scholarly writings that "formed the movement." This Article strives to complete the story and counter, to an extent, the "super-agency" approach to collective action that is frequently adopted in historical accounts of the CRT movement. n5

We attempt to ground CRT in actual resistance movements not to proliferate competing genesis stories, but rather to place the birth and growth of critical race theory in a broader political con [*1380] text. By confining the origins of CRT primarily to the scholarly output of "outsider" intellectuals, existing genesis stories serve, ironically, to obfuscate historic and ongoing power relations in legal academe. The stories perpetuate the notion of self-correcting institutional reform, specifically that the struggle over physical space for people of color on law school facilities was primarily a matter of prevailing in the "free

marketplace of ideas." The implicit message is that so long as critical race theorists write and speak compellingly, legal academe will welcome them to the table. Instead, this Article retrieves a buried history of heated political contestation for space that forced momentary openings in a confident and purposive power structure. The openings, created by political confrontation, facilitated the entree of a critical mass of outsider scholars into law teaching.

B. Race-Conscious Models of Political Organizing: A Case Study (1964-1986)

There are quite a few students who have attended school at Berkeley who went South to work with the Student Nonviolent Coordination Committee, and who have been active in the civil rights movement in the Bay Area I was one of these returning students. We were greeted by an order from the Dean of Students' Office that the kind of on-campus political activity which had resulted in our taking part in the Summer Project was to be permitted no longer.

. . . This is what gave the Free Speech Movement its initial impetus. n6

-- Mario Savio, June 1965

This fight now is ours as much as it is yours. If there had been no students, we would have had no Freedom Rides. n7

-- James Farmer, National Director of CORE, addressing a free speech movement rally of over 1500 students and faculty members at U.C. Berkeley, December 20, 1964

[*1381]

We begin this genealogical tracing in 1964 with the Free Speech Movement at U.C. Berkeley. n8 The Free Speech Movement, known primarily as a student rebellion against university attempts to restrict student speech, had a definitive but largely unknown racial origin.

Upon their return from the Mississippi Freedom Summer of 1964, the U.C. administration confronted Berkeley civil rights activist students with a ruling that curtailed the substance and manner of speech on university grounds as well as fund solicitations and recruitment by civil rights and other political organizations. Led by civil rights organizations that understood the importance of northern financial and political support for the struggle in the South, nineteen organizations formed a coalition to challenge the ruling. When a police squad car summoned by the university administration attempted to arrest a member of the Congress of Racial Equality ("CORE") for violating the new regulation, hundreds of students spontaneously surrounded the squad car and prevented it from leaving for the next thirty-two hours. n9

The Free Speech Movement is significant to this inquiry because it is one of the first post-WWII campus movements to originate substantively from antiracist student organizing. n10 Although the movement was comprised largely of white students, its race consciousness roots persisted and laid the political groundwork for the earliest collective U.C. Berkeley student of color organizing effort -the Third World Strike of 1969. n11 [*1382]

The Third World Strike at U.C. Berkeley was the longest, costliest, and arguably the most institutionally significant student strike in U.C. Berkeley's history. Although one of the least known movements of the sixties, the strike was a paradigmatic moment of late-or post-civil rights activism undertaken by multiple communities of color in a historically white educational institution. n12

Berkeley students of color who would comprise the "Third World Liberation Front" ("TWLF") responded to the call by their counterparts at San Francisco State, where the coalition demanded the establishment of Ethnic, Afro-American, Asian American, Chicano, and Native American Studies. In addition, the San Francisco State students made some of the earliest demands for faculty, student, and staff affirmative action programs in California. n13 The [*1383] Third World Strike at U.C. Berkeley led to the creation of the Ethnic Studies departments and affirmative action admissions and recruitment, among other racial reforms.

In response to these and similar challenges by students of color nationwide, institutions of higher education across the country underwent dramatic changes in admissions, hiring, and curricular development policies during the next decades.

In form, the strike was also particularly noteworthy for providing a model of student of color organizing. The TWLF, which led the strike, was comprised of a coalition of student organizations representing the Afro-American Student Union, Asian American Political Alliance, Mexican American Student Confederation, and the Native American Students Association. The TWLF's leadership structure featured a steering committee with equal numbers of voting representatives from each of the member groups. Representatives made decisions by consensus whenever possible, and by majority vote when not possible. This approach to coalitional leadership and decisionmaking was often replicated by student movements in the subsequent decades. n14

After the Third World Strike victory in 1969, two issues dominated 1970s campus politics: the anti-apartheid movement and affirmative action. n15 The Soweto uprisings in 1976 brought international [*1384] attention to the human rights violations of the South African racial regime. Student organizers developed coalitions that reflected the connection between antiracist organizing at home and abroad. While predominantly white students organized for divestment of U.C. funds from South Africa, students of color generally organized resistance to racism on issues closer to home, particularly around the United States Supreme Court decision in *Regents of University of California v. Bakke* and the tenure denial of Harry Edwards, and African American professor and founder of sports sociology. n16 While students of color did score a victory with the award of tenure to Harry Edwards, the 1978 *Bakke* decision was seen as a setback that demoralized affirmative action organizers. Only later did civil rights organizations discover the "silver lining" of Justice Powell's opinion that would permit race-conscious admissions. n17

From the late seventies to the early eighties, student of color activism subsided, with most of the campus political activity focusing on antinuclear protests, Central American solidarity work, and environmental issues undertaken by predominantly white student organizations. By 1984, however, the anti-apartheid movement regained momentum. Three important factors contributed to its revival: first, the protests at the South African embassy in Washington, D.C. organized by Randall Robinson, Mary Frances Berry, and Walter Fauntroy captured the imagination of student activists across the country. Soon thereafter, students at Columbia University began a vigil outside an administration building, followed by students at U.C. Berkeley, who began a sit-in outside of Sproul Hall on the campus's main plaza. Second, Jesse Jackson's first bid for [*1385] the presidency and the Rainbow Coalition inspired and energized communities of color, including students, because that initiative prioritized the formation of student of color political constituencies on campus. And, third, U.C. Berkeley observed the twenty-year commemoration of the Free Speech Movement ("FSM") in the fall of 1984. Returning veterans of that struggle met informally with student leaders and highlighted the little-known racial origins of the movement and advocated for the renewed student activism around anti-apartheid efforts. Soon after the FSM Commemoration, an anti-apartheid coalition developed. n18

U.C. Berkeley students of color established two important political structures in 1984. Borrowing from the TWLF, one structure took the form of a "race-plus" coalition model, uniting students of color and les/bi/gay organizations, which had felt marginalized by previous progressive coalitions, interested in slating candidates for student government positions. This electoral coalition remains as the oldest campus political party to this day. We use the term "race-plus" to designate the centrality and historicity of race-based organizing that recognized a network of oppressions and embraces coalitional consciousness and solidarity with other outsider groups. Other potential bases for coalition include axes of antisubordination resistance, specifically (but of course, not exclusively) feminist projects, les/bi/gay/transgendered liberation, and progressive white identity formation. The other student structure, an individual member-based organization of progressive students of color, was known as United People of Color ("UPC"). UPC was the leading

organization in the antiapartheid movement until U.C. Regents voted to divest funds in the summer of 1986. n19

Like the early history of critical race theory in dialogue with critical legal studies, the contestation with the white Left was a [*1386] formative experience for organizers in UPC. Some of the same debates on "formality" and "informality" occurred in the political as well as the intellectual arena. n20 For example, one key conflict between the predominantly white, anti-apartheid group, Campaign Against Apartheid ("CAA") and UPC was over the decisionmaking process to be followed in coalition meetings. CAA insisted upon an informal, consensus-oriented, decisionmaking process that rejected any hierarchical leadership structure. While reasonable in theory, those who had the most time on their hands could persevere through hours of discussion and effectively exclude or limit participation by those who had competing time pressures. Unfortunately, the impact of such a process worked to the detriment of many students of color, who found they generally had less time on their hands for such open-ended meetings, and less inclination for such an exercise in consensus-by-attrition. As a result, planning meetings and political actions such as the Sproul steps protest became virtually void of student of color participation in the name of radical, consensus-oriented decisionmaking. n21

As the anti-apartheid movement wound down after important victories such as the U.C. Regents' vote to divest U.C. funds from South Africa, there was a clear and open split between CAA and [*1387] UPC. The former group was relying increasingly on tactics of confrontation and sensationalism to highlight the urgency of the struggle. CAA refused to instill any principles for direct action that would curb individual members' expression of protest, even if such methods included violence. Such a lack of discipline and noncommitment to nonviolence meant that joint activities of CAA and UPC would be unduly hazardous for UPC members. When, for example, anonymous CAA would spit or throw bricks at police from a crowd, those police would invariably seek targets, usually tall men of color from UPC, to exercise their disciplinary wrath. n22

In addition to placing students of color unnecessarily at risk under the guise of radicalism, most UPC members found such activities to be problematic because these protest tactics were not designed to build and grow the movement, but simply to defy authority. Often that authority was rather removed from the stated target of the movement, i.e., the South African apartheid regime. Like CLS's critique of rights as legitimation, the CAA's overriding substantive commitment to defying authority and insisting upon its vision of informal, nonhierarchical process grossly underappreciated and obscured dynamics of racial oppression as a lived experience. In this way, the "radical" stance of both CAA and CLS bespoke white perspectivism and privilege. n23 [*1388]

C. Converging Histories: The Race-Conscious Infrastructure for Resistance to Mainstream Legal Education (1986-91) Aqui, ayar, apartheid morira

-- 1980s UPC chant

The success of the anti-apartheid movement, measured by the end goal of divestment, validated race-conscious organizing that developed through UPC as well as the race-plus coalition model. This victory also opened up the vista of political possibilities for future student activism and cultural contestation since an organizational infrastructure was largely in place. In addition, the anti-apartheid movement established a student of color organization and a principle of self-determination because of its seasoned members with organizing skills. The linkage, well-established since the 1970s and continued in the 1980s, between apartheid abroad and at home made natural a transition from the focus on divestment to an engagement of racism closer to home. Anti-apartheid veterans focused on two areas of unfinished business from the Third World Strike agenda: curricular reform and the specific demand for an ethnic studies graduation requirement, and faculty diversity in terms of tenure denial defenses and affirmative action hiring and admissions. n24 These race-conscious movements (in both form and substance) at Berkeley and across the country became known more broadly as "diversity movements."

In this historical context, with a close linkage to the antiracist struggle against apartheid, the diversity movement at U.C. Berkeley's Boalt Hall began. Affirmative action admissions for African American, Asian American, Latino/o, and Native American students began in the fall following the Third World Strike in 1969. The first two years of affirmative action admissions yielded twelve and eighteen percent of students of color in the incoming first year law classes of 1969 and 1970. In the fall of 1971, the percentage of [*1389] special admissions students increased to thirty-one percent of the entering class due to an unexpectedly high "show up rate" among those admitted. The Boalt admissions committee had clearly underestimated the pent-up demand for low-cost, quality legal education. According to Linda Greene, a Black Students Law Association ("BLSA") student leader at the time, this sudden change of student demographics was experienced as a "traumatic event" by Boalt faculty. The faculty had not expected such a large enrollment because there had been no commensurate increase in financial aid to support minority admittees. In response to this trauma, the faculty proposed eliminating the special admissions program altogether, this prompting the 1972 strike organized by BLSA, and joined by the La Raza Law Students Association ("LRLSA"), Asian American Law Students Association ("AALSA"), and the one Native American enrolled at the school. The strike lasted for two weeks before the faculty proposed to continue the special admissions program, but with a lowered pre-Bakke target goal of twenty-eight percent for "Third World" students. BLSA and AALSA accepted the faculty proposal, effectively ending the strike. n25

While the 1972 strike produced a successful result, its lack of organizational structure fostered disunity among students of color. As a result, groups made decisions seemingly without regard to other allied groups. Chicana/o students, who refused to end the strike after BLSA and AALSA reached agreement, continued to [*1390] press for "parity" in law school admissions with the state population percentages. LRLSA also organized a separate sit-in at the Boalt admissions office during the strike. Without any coalitional structure from 1972-78, individual groups organized as issues arose with limited success. n26 During the 1970s and early 1980s, student of color input into the Boalt admissions process was significantly curtailed, from full organizational voting rights on the admissions committee, to advisory rights for students of color organizations, to the most limited advisory rights for individual appointees from student of color organizations. n27

1. The Formation of the Coalition for a Diversified Faculty 1978 Boalt Faculty Composition 1 Asian American male 1 African American male 3 white females 37 white males

In terms of hiring, the school's affirmative action record is good. n28 -- Phillip Johnson, Chair of Boalt Hall Faculty Appointment Committee, March 1978

During this time, a significant race-based organization at Boalt emerged in fall of 1977 -- the Coalition for a Diversified Faculty ("CDF"). Like the before them, seven organizations representing the race-plus coalition issued a position paper with a number of proposals to rectify the racial problems students perceived. The faculty neither discussed nor mentioned the proposals at subsequent meetings. Furthermore, meetings between CDF members [*1391] and the law school administration proved fruitless. Dean Sanford Kadish refused to permit CDF members to address a faculty meeting to discuss the issues raised in position paper. After determining that no productive dialogue with faculty was possible, CDF called for an all-day teach-in and strike that seventy-five percent to ninety percent of Boalt students supported on March 21, 1978. n29

The 1970s CDF activity peaked with a Title VI and Title IX complaint filed with the Department of Housing, Education, and Welfare ("HEW") on April 9, 1979, alleging that Boalt's hiring policies resulted in a lack of minority and women faculty. The complaint contended that the faculty composition denied students differing perspectives on important legal issues, especially in the areas of public interest law and poverty law. To CDF's surprise, HEW officials decided to investigate the student complaint. n30 Using the standard of other elite law schools' hiring as a guide, the federal report concluded that Boalt's faculty was

no less diverse than the nondiverse faculties of top law schools across the country! Like the political activity on the main campus, antiracist organizing at Boalt Hall declined at the close of the 1970s and early 1980s. Perhaps the decline was a result of similar meta- and micro-forces such as the increasing national political and cultural conservatism, internal divisions, student turnover, and political setbacks. n31 [*1392]

2. The Reformation of CDF in the 1980s

In the fall of 1985, the United Law Students of Color ("ULSC"), the group that reinvigorated the diversity movement at Boalt Hall, benefited from the momentum, experience, leadership and organizational models of both the UPC and the anti-apartheid movement. ULSC formed various subcommittees to address specific law school issues, including a subcommittee on Faculty Diversity. Although ULSC was short-lived as an organization, the Faculty Diversity subcommittee reorganized subsequently under the name Boalt Coalition for a Diversified Faculty ("BCDF"). n32

The diversity movement grew at Boalt, gaining political and popular support. Specifically, Boalt's denial of tenure to both Marjorie Shulz in 1985 and Eleanor Swift in 1987, the two popular, white female law teachers, spurred on BCDF's efforts and propelled BCDF into focal organizational role at the law school. n33

In fall of 1987, BCDF highlighted the lack of progress over the decades in diversifying the law faculty. BCDF widely publicized that from 1967 to 1987, there was only one tenured faculty member of color at the law school. Moreover, there had been an increase over the same time period of the number of tenured (white) female faculty members from one to merely two and one-half. This appalling record graphically symbolized what was clearly a racial and gender caste system at Boalt. The following year, 1988, the school responded to the diversity demands and publicity of its straight, white, male faculty identity with an unprecedented four diversity hires out of five total hires. n34 Adding to the pressure to [*1393] diversify, Boalt faced the threat of a pending lawsuit from Eleanor Swift's tenure denial. In the fall of 1988, after Swift announced that the Title IX coordinator at U.C. Berkeley had made an unprecedented prima facie finding of sex-based discrimination in her case, the Boalt faculty abruptly voted to reverse its denial of tenure to Marge Schultz. n35

[SEE FIGURE IN ORIGINAL] [*1394]

While organizing the external struggle for diversity against the Boalt administration and faculty, an internal power struggle developed within BCDF. Students of color had generally felt resigned to the margins by the BCDF organizational structure, which was an individual membership organization open to anyone at Boalt. Outnumbered and alienated in the BCDF by a dominant majority of white liberals, who often approached the problem without an understanding of institutionalized forms of racism, student of color participation in BCDF diminished dramatically from the days of ULSC. In recognition of this internal contradiction, remaining active students of color called for a reorganization of the BCDF leadership structure, to a group-based coalitional model that would initially include members of the BLSA, LRLSA, AALSA, and Women's Law Caucus on the steering committee. n36

Critical race theory offered theoretical tools that proved useful to organizers during this time. Critical race theorists had identified twofold challenges shared by UPC and BCDF organizers: (1) to undertake a race intervention into Left (CLS) discourse, and (2) to undertake a left intervention into liberal, civil rights discourse. n37 An early theoretical intervention materialized in a Harvard Civil Rights/Civil Liberties Law Review volume devoted to "Minority Critiques of Legal Academe" published in 1987. n38 This classic volume exposed the white paternalism that too often characterized relations between the white Left and communities of color. While the CLS's critique of rights as legitimating existing legal power structures was at times powerful, it could also be experienced as disempowering and condescending. The naming by race critics of this dynamic between the white Left and people of color, even in progressive circles, legitimated the claims of minority organizers in other venues, including Boalt. The emphasis of the TWLF on self-

determination, the public split of UPC from CAA, and dominance of race-based political organizing in the 1980s are indicative of the difficulty of the white Left to respect the leadership of people of [*1395] color and the goal of communal self-empowerment. Having the analytical descriptions of similar dynamics occurring within critical legal academe, students and other organizers of color confidently asserted the necessity of political structures that would account for, and protect against, the importation of deeply ingrained racial patterns of subordination into the antiracist struggle.

Similarly, the second race crit intervention in the civil rights community inserted a more progressive politic into traditional rightsbased strategies, and was useful to diversity movements contending with liberal factions for agenda setting and strategizing. White liberals had a different orientation toward the white faculty than more disaffected students of color. Accordingly, white, liberal BCDF members advocated what was essentially a strategy of "constructive engagement" while progressives of color were ready to engage direct action in the spring of 1987. The BCDF agenda in these early days emphasized talking with faculty, surveying what kind of minority faculty they might like to hire, and making rather mild demands, which even when formally granted, could not be enforced. Such strategies and assumptions seemed to endorse the dominant view that the problem lay not with the institution, but with the minuteness and diminished quality of the minority faculty pool. Following the restructuring of BCDF to an "outsider" organization-based coalitional structure, the participation and leadership of students of color increased dramatically, as did the coalition's successes.

Under this new structure, BCDF continued its numerous educational events, often involving critical race, feminist, and critical legal scholars, organizational meetings, and presentations of demands that led eventually to a direct action strategy. Coincidentally, almost ten years to the day of the 1978 UPC strike, on March 22, 1988, BCDF called for a student strike and teach-in that over eighty percent of the Boalt student body participated in. The event culminated in twenty-eight arrests in Dean Jesse Choper's office. The following year, BCDF called for a nationwide strike of law students on April 6, 1989 that was even more successful than the previous year's strike as measured by its impact on legal education nationally. Law schools across the country observed the day of action with various activities, sending a clear message to their facul [*1396] ties to diversify. In the summer after the nationwide strike, the campus-wide administration awarded tenure to Eleanor Swift. n39

The nationwide strike of 1989 represented the crest of BCDF's resurgence. At the microlevel, tactical missteps, including a shift away from base-building through educational events to an almost exclusive focus on direct action, and the perceived success of the movement and commensurate reforms dissipated the once widespread popular support of BCDF among the student body and community. n40 At the macrolevel, other larger forces contributed to the decline of the diversity movement at Boalt and elsewhere. Specifically, the organized Right's effective strategy to delegitimize diversity movements through its "political correctness" campaign [*1397] and the United States Supreme Court's retrenchment on race jurisprudence. n41

Every generation of law students experiences a legal development during its time that shapes its disposition toward law and legal practice in a profound, possibly career-altering way. For the BCDF generation, it was *City of Richmond v. J.A. Croson Co.* n42 Not so much for what it said, but more for what it symbolized, Croson dropped like napalm onto the burgeoning diversity movement at Boalt Hall. By 1989, after years of frustrated efforts to diversify the faculty, the movement began to enjoy successes at home and national recognition of the problem of the lack of diversity in law school faculties. As police arrested students for "trespassing" on law school property in acts of civil disobedience, Croson seared the political imagination, demoralized, and debilitated. The retreat from racial remedies was evident in the Court's application of strict scrutiny for state and local classifications, i.e., affirmative action. The case symbolized retrenchment at a higher level of authority within the legal profession and the system of justice against the principles of diversity that had recently guided the movement to modest success. n43 [*1398]

Not long after Croson came *Adarand Constructors, Inc. v. Peña*,ⁿ⁴⁴ *Podberesky v. Kirwan*,ⁿ⁴⁵ and *Hopwood v. Texas*.ⁿ⁴⁶ The U.C. Regents soon voted to end affirmative action, and a majority of California voters passed Proposition 209 with no further possibility of federal judicial review. In light of these events, the Boalt administration's old slogan "our hands are tied," now seemed like a selffulfilling prophecy. These developments forced faculty who were committed to diversity at Boalt and elsewhere in California, into the difficult position of "managing the resegregation" of public education.ⁿ⁴⁷

Despite its decline and unfulfilled potential, the historic political intervention in one of the top public law schools forced into the open the informal hiring and promotion practices that tended to exclude outsiders from membership within the white, male law faculty club. Law school faculties heard the message sent by race-plus student organizing for diversity at Berkeley and elsewhere, loud and clear across the nation.

D. Outcomes

Organized political resistance challenged the structure, substance, and culture of U.S. legal education and provided a fertile ground for the proliferation of an institutional-culturalⁿ⁴⁸ resistance [*1399] to the reigning analyses of race and law. The vibrant political contestation in law schools across the country in the late 1980s and early 1990s directly impacted critical race scholars' access to top law reviews, their legitimacy and popularity, and subsequently, placement in top law schools.ⁿ⁴⁹ Prior to its spread as a form of legal scholarship, raceconsciousness had already proven itself as a viable approach to law school organizing, and thus served as an empirical reference point upon which theorists could base a race-conscious jurisprudence.

What impact did the diversity movement initiated by BCDF and the Nationwide Law Student Strike have on legal education and critical race theory in particular? In partial answer to this question, we offer the following empirical analysis of material gains attributable to diversity movement politics. While one objective in this Article is to acknowledge student activism for these changes, we recognize that a multitude of actors including organizations and individuals worked to bring about a law faculty that is more representative of society.ⁿ⁵⁰

According to a Society of American Law Teachers ("SALT") survey conducted in 1981, thirty percent of the nation's law schools belonged to the "Zero Club" in that they had hired not even one person of color onto their faculties. Another thirty-four percent had made one token hire.ⁿ⁵¹ In other words, almost two-thirds of [*1400] law schools responding had zero or just one law faculty of color. The record for hiring women was similarly dismal. Ninety percent of law schools responding to a 1982 SALT survey recorded that they had zero to twenty percent tenured or on the tenure track female faculty. Over onethird of respondents had zero to ten percent women on the tenured or tenure-track faculty.ⁿ⁵² From the mid-1970s throughout the 1980s, faculty of color hovered around four to six percent of the full-time law teachers. As late as 1988-1989, full-time law teachers of color made up only 5.4%, with women comprising only twenty-three percent, of the total number of full-time law professors.ⁿ⁵³

The spurious "pool argument" that there was no diverse pool of qualified law school graduates from which to hire was not credible. At the time, people of color and women represented 11.8% and 42% respectively of all enrolled J.D. students, which were approximately twice the levels reported for faculty members.ⁿ⁵⁴ At some schools such as Boalt Hall (with one tenured faculty of color and 2.5 women in 1986), the disjuncture between student and faculty diversity was particularly appalling where students of color and female law students comprised twenty-five and forty percent of Boalt students respectively.ⁿ⁵⁵

In the first hiring year following the 1989 Nationwide Law Student Strike, the percentage of full-time law faculty of color shot up to a total of 8.7% in one year. Seemingly overnight, the pool appeared to have become much deeper than previously imagined. [*1401] Given the low turnover rates of faculty, this dramatic increase in the overall total pool represented a marked change of law school's hiring habits.ⁿ⁵⁶ Within two years of the nationwide strike, the percentage of people of color teaching in law schools

increased by eighty-five percent. The percentage continued to increase steadily for the next six years to a 1996-97 high of thirteen percent full-time faculty of color, a 141% increase from the 5.4% of 1988-89. n57

Table 1

Percentage of Full-Time Law Teachers of Color (1975-97)

1975- 1976	1980- 1981	1982- 1983	1986- 1987	1988- 1989	1989- 1990	1990- 1991	1992- 1993	1996- 1997
3.78%	3.8%	5.63%	5.4%	5.4%	8.7%	10.0%	11.4%	13.0%

Graph 1

Percentage of Full-Time Law Teachers of Color (1975-97)

[SEE CHART IN ORIGINAL] [*1402]

Evidence of the importance of the diversity movements to law faculty hiring is most compelling when we examine the years of entry of Latinas/os, into law teaching. Between 1966-1987, no more than four Latina/o faculty had entered law teaching in a given year, with an average of 1.27 Latinas/os entering for the period for a total of twentyeight in twenty-two years. From 1988-97, the average jumped to 8.8 Latinas/os entering law teaching per year, with a high of thirteen in 1990, the first year to reflect the impact of the nationwide strike in its hires. The number of Latina/o faculty hired in law schools in the last ten years of diversity activism, for a total of eighty-eight hires, is more than three times the twenty-eight hired in the preceding twenty-two years of affirmative inaction. The marked increase in the last ten years mirrors the decade of intense politicization by student activists on the diversity issue at Boalt and other law schools across the country. n58

Table 2

Number of Latinas/os Entering Law Teaching by Year

1966	2	1977	2	1988	6
1967	0	1978	1	1989	9
1968	0	1979	0	1990	13
1969	0	1980	2	1991	18
1970	1	1981	0	1992	10
1971	1	1982	2	1993	11
1972	0	1983	2	1994	6
1973	1	1984	4	1995	8
1974	2	1985	4	1996	5
1975	1	1986	0	1997	2
1976	2	1987	1		

[*1403]

[SEE FIGURE IN ORIGINAL]

While the simple correlation does not empirically prove that student activism "caused" the spate of diversity hires, the statistics combined with the history presents more than a striking coincidence. The

diversity movements are partly responsible for the opening of a closed hiring and promotion system in law schools that had never before been subject to such sustained public scrutiny. In the face of BCDFinstigated turbulence, Boalt's Dean lost his firm grip on the reins of power and had to give way to more liberal or moderate actors who could negotiate between protesting students, and an entrenched old guard momentarily losing its balance.

Concerned about the negative publicity generated by protests at Boalt, many law schools undertook aggressive measures to avoid Boalt's fate by incorporating at least token representation into their ranks. In this political context, critical race theory ("CRT") as a scholarly movement proliferated and achieved more national publicity and acclaim. Furthermore, newly hired law teachers of color and junior race critics supported the work of CRT by canoniz [*1404] ing the early works of those who are now considered senior race critics. To be sure, the quality of work by early race critics was impressive for its theoretical insight, methodological innovation, and analytical depth and breadth. But the student-catalyzed transformation of the institutional culture of legal education fostered, in part, the popularization and legitimation of the intellectual movement through publication in premier student-operated law journals and installation of leading race critics into top law schools.

To overlook the role of local and national student organizing in bringing about these changes is dangerous to CRT as a long-term project. Such oversight buttresses the liberal myth of self-correcting societal institutions that respond to "better argument." In this narrative, law schools diversified when exceptional candidates of color miraculously presented and proved themselves worthy. Sustained and heated political activism was merely incidental or detrimental to the process. As critical race scholars, we should be wary of histories of our inclusion that perpetuate the myth of institutional openness to racial justice.

The activism at Boalt for faculty diversity in the late 1970s and late 1980s should be understood not as episodic, but as part of a tradition of race-conscious resistance at U.C. Berkeley. This Berkeley tradition, beginning with the Free Speech Movement of 1964, valorized political self-historicization and, thereby, promoted a positive culture of coalitional activism among its student body. At Boalt Hall, the student diversity movement constituted itself as a membership organization committed to diversity in three primary spheres: faculty, student body, and curriculum. In part that focus reflected a practical strategy, which we might call "continuous diversity mobilization." To achieve this goal, a coalition model developed among student groups that required us as students to bridge lines of difference through self-education, cooperation, risk-taking, and solidarity.

The group of scholars of color and women that emerged during and out of the new era of student activism on law school campuses and racial retrenchment in the courts confronted a rapidly shifting set of political and intellectual assumptions about the significance of race. On the Left, white radicals associated with the critical legal studies movement provided practically no critique of institutional racism. Theoretically, they were oriented towards trashing the formalism dominant within the liberal legal academy. In terms of [*1405] praxis, however, this position opened up relatively little institutional space for identity politics and instead led to a politics of anarchic resistance reminiscent to our mind of white, CAA-led, anti-apartheid actions. In the middle, white liberals remained wedded to an integrationist paradigm that could afford to be indulgent of marginal demands for greater inclusion of people of color and women, so long as the basic structure of opportunity remained the same and praxis did not involve confrontation. And on the Right, white conservatives, sensing that any serious reflection upon the legitimacy of the structure of opportunity within legal or university education might signal the "fall of civilization," trumpeted the virtue of meritocracy and colorblind jurisprudence and denounced the vices of political correctness and multiculturalism. n59 Through these means, they attacked affirmative action, academic support programs, campus speech codes, and ethnic studies.

In retrospect, part of the decline of BCDF in the nineties can be traced to historical amnesia and the failure to heed the centrality of raceconsciousness forwarded by critical race theorists. The race-plus model rooted

in the Third World Strike responds to the pervasive problems of racism, white privilege, and white pa(ma)ternalism in progressive coalitions historically, by affirmatively designing a coalitional structure that does not permit marginalization of racial minority groups. This form of "affirmative action" in coalitional structures could also be applied to other subgroups that have historically faced similar marginalization. [*1406]

II. Movements and Critical Theory

This Article first considered the development of a raceconscious infrastructure for political resistance in higher education, and points of articulation with the development of CRT. In Part II, we offer some thoughts on the need to understand movement history as part of valuable subjugated knowledge, discuss possible synergism between movement politics and theory, and finally, register a warning against the dangers of sublimating movements.

A. Movement History as Subjugated Knowledge and Movement Histories

The new student [African American, other minority, women's and radical white] groups changed the atmosphere at Boalt Hall, not only because many of them tended to be militant and distrustful, but because they often did not respond to traditional law school teaching methods. . . .

The strained relationships of the 1980s were confirmed in faculty interviews.

. . . Whatever the contrasts in motivation or approach, it was generally agreed that the dozens of confrontations that had occurred over the previous twenty years had taken a heavy toll on the environment at Boalt Hall and that the warm, collegial atmosphere of earlier days had been replaced with formality, distrust and hostility.

-- Sandra Epstein, author of *Law at Berkeley: The History of Boalt Hall* n60

Since its foundation in 1882, the School of Law (Boalt Hall) has demonstrated through progressive admissions policies its commitment to diversity in legal education.

-- Cecilia V. Estolano et al., *New Directions for Diversity: Charting Law School Admissions Policy in a Post-Affirmative Action Era* n61 [*1407]

Instead of shutting down the school or protesting at the dean's office, we are doing heavy duty lifting of policy analysis.

-- Chicago Tribune article quoting *New Directions for Diversity* co-author, September 29, 1997 n62

The work of student diversity activists constitutes a form of subjugated knowledge defined by Foucault as "a whole set of knowledges that have been disqualified as inadequate to their task or insufficiently elaborated: naive knowledges, located low down on the hierarchy, beneath the required level of cognition. . . ." n63 The task of critical opposition is to disinter such knowledge in order to "establish a historical knowledge of struggles and to make use of this knowledge tactically today." Subjugated knowledge challenges unitary theories, from both the Right and the Left, that purport to offer a totalizing picture of how societies are ordered.

A recent work on "the history of Boalt Hall" shows the process by which a dominant discourse absorbs and invisibilizes the illicit knowledge produced by a movement of resistance. Sandra Epstein writes about the 1980s movements only briefly in her lengthy celebration of Boalt's past and without citing to a single member of BCDF. Instead, the story is told through the eyes of the faculty and administrators who resisted the student challenge to white, straight, male supremacy. Epstein describes "angry students" for whom "confrontation became a way of life" crafting "manifestos" and "disrupting classes." Remember that this broad-based movement garnered eighty to ninety percent student support for its nonviolent boycotts of Boalt classes and changed, at least for a time, faculty hiring policies. Epstein characterizes negatively the

U.C. Berkeley central administration's close scrutiny of Boalt's hire and tenure policies. Epstein "blames" not the law school's concerted intransigence in the face of student demands for a modicum of diversity on the Boalt faculty, nor the faculty's denials of [*1408] tenure to two women that later had to be reversed, but student protesters, who "seemed to be setting the law school agenda." n64

Perhaps a more disappointing example of the erasure and disparagement of student activism in service of the self-correcting institution narrative appears in a Boalt student-authored report, *New Directions for Diversity*. n65 In this otherwise ground-breaking, critical report on the Boalt admissions process in the wake of Proposition 209, the authors imagine an institution that they claim has demonstrated its "commitment to diversity in legal education" by virtue of the forty percent student of color enrollment in pre-Proposition 209 California. n66 The report presents a history of admissions at Boalt that fails to note the 1972 admissions strike, the 1977-79 HEW investigation, or the BCDF struggles of the 1980s and, not surprisingly, concludes by extolling Boalt's prodiversity tradition. n67 While extremely useful for its policy analysis and concrete recommendations, the report plays a dangerous game by stipulating to a sanitized institutional history, presumably in exchange for greater currency with the administration and faculty. Such a "policy not protest" approach may produce short-term gains, but at the cost of debilitating the very movement politics that make possible meaningful student input toward progressive reform policies. In other words, a "good cop/bad cop" strategy can only work if the good cop does not begin to believe that the bad cop is truly bad and expendable. n68

Generally, critical race theory scholarship seeks transformation through recovery of, and placing emphasis on, excluded and marginalized elements of the body politic. CRT participates in the production of knowledge through the creation of a counter-discourse. n69 The counter-discourse of CRT stands opposed to power [*1409] fully entrenched systems of totalizing knowledge that function through selection and exclusion of data. The system of domination that CRT opposes cannot bear having its history told. History is such dangerous territory because it cannot sustain the shopworn alibis of existing power arrangements: steady progress from barbarism to civilization, principled application of neutral rules, participatory democratic decision making, meritocratic reward systems, making the victim whole, the dignity of the individual, etc. Each alibi is contradicted by U.S. society's treatment of women, people of color, and other historically disparaged groups. These narrative alibis legitimate existing power arrangements through the purgation of history and the subjugation of illicit knowledge produced in resistance experiences.

To engage in relevant and effective oppositional theorizing, critical theorizing must be geared toward combating dangers to, and helping create the conditions of solidarity necessary for, progressive political community formation. The antagonisms and alliances lived by movements should become both the site of critical intervention and the place from which we speak as counter-discursive subjects. CRT has taken seriously the power/knowledge coupling recognized by critical theory and remembered that movements have long been a primary effect and constituent of power/knowledge configurations.

B. Between Synergism and Sublimation

We have tried to establish closer developmental linkages in this Article between contemporary race-conscious political struggles and critical race theory, suggesting how the former have been foundational to the latter. In this final section, we explore two models for relating movement histories to CRT -- "synergism" and "sublimation." CRT's next decade should adopt more synergistic modes of interacting with movements and movement histories because synergism, unlike sublimation, is congruent with CRT's commitments to community formation and social transformation. [*1410]

1. The Benefits of Synergism: Weaving Theory, Praxis, and Politics

Synergism refers generally to an interaction of agents or conditions that produces a combined effect that is greater than the sum of the individual effects. In this Article, we use the term as a metaphor. Here, the term signifies a conscious commitment to linking subjugated forms of knowledge with the scholarly practices of

CRT. We envision a mode of synergistic movement theorizing that contains both substantive and methodological commitments. Synergism represents the contestation with power by racially conscious political movements by "doing" race conscious theory whose "scientism" -- data, logic, and verifiability grows organically from political context. As outsider intellectuals, our goal and strategy articulation should become an open process, a dialogue, intersubjective and genealogically wed to the resistant discourses and practices that perform the movement.

Synergism is a vitally important possibility for a project, such as CRT, that attempts to impact the political world through discursive intervention. Such a project is necessarily collaborative, requiring information and insights gleaned from movements in order to formulate discursive strategies that must ultimately be tested in the context of actual struggle. The intersubjective nature of the CRT project reveals its political-theoretical essence. The moment that critical race theorizing loses its grounding in the political and the communal is the moment that it ceases to be an antistatist project. Subjugated knowledge preserves the history and the meaning of struggle and the context of movement politics so vital to the synergistic approach to critical theorizing. Such an ahistorical pursuit of the "theoretical" represents an abdication of political engagement and the relinquishment of the full promise of antistatist intellectual production.

The imperatives of synergism operate on two levels. First, we must be accountable in our work to the people, goals, and ideas of movements in a concrete and direct way. As academics, we must acknowledge the difficulty of maintaining the immediate connection to "movement politics." To the extent that we are to perform as "disenchanted intellectuals,"ⁿ⁷⁰ it should be mainly through dis [***1411**] enchantment with ourselves! Furthermore, we should remain audacious in our demands to power and in speaking simple truths to power. However, we should not have the arrogance to tell communities in struggle how to dream, imagine their empowerment, or narrate their political identity, especially insofar as we remain in the gilded cage of academe. We cannot presume that their voices speak through us. We have to achieve a certain humility and accountability vis-a-vis those who live the struggle outside of academe.

Second, and concomitantly, we must strive to overcome the tendency to construct with our work an intertextual universe that is, at best, in a "virtual" relation to struggle. The intersubjectivity, not intertextuality of the synergistic approach, insures that our work will grow under more congenial "relations of production." The utter alienation of purely intertextual scholarship from political struggle is an outgrowth of the legitimating function played by professionalized intellectuals working within academe's "social structures of accumulation."ⁿ⁷¹

Much of the first wave of CRT scholarship represents the synergistic approach in its relationship to antiracist organizing. In fact, [***1412**] many CRT founders wrote about movements or with movements in mind, intervening through their writings to produce new understandings of old problems in order to generate better theory. To name just a few examples, Derrick Bell directly confronted civil rights lawyers' conflict of interest in representing their clients in the movement for school desegregation. Mari Matsuda grounded her call for a jurisprudential methodology that would "look to the bottom" by analyzing the Japanese American redress and reparations movement. Matsuda, Charles Lawrence, Richard Delgado, and Kimberle Crenshaw addressed the problem of "balancing" hate speech against First Amendment rights.ⁿ⁷² Based on his years of organizing, especially in the Chicano community, Gerald Lopez developed a new orientation toward "rebellious" community lawyering that emphasized collaboration and empowerment, rather than the paternalistic, noblesse oblige model of civil rights lawyers.ⁿ⁷³ As a final example, Angela Harris critiqued feminist legal theory as falsely universal based in part on experiences of women of color.ⁿ⁷⁴

Recent degeneration of equality jurisprudence and long-standing political rhetorical attacks on the diversity ethic cry out for a close, critical association between antistatist theory and practice. Rightwing political rhetorical strategies, such as the political correctness attack on diversity activists,

underscore the need for oppositionist intellectuals to thematize and make tactical use of movement history to sustain and nurture progressive change. Movements are forged against both structural and material limitations with which legal scholars typically do not contend. But scholars must remain cognizant of these "little histories" of [*1413] resistance, and so themselves resist essentializing the "History" of social change.

2. The Dangers of Sublimation: Before and After Postmodernism

To sublimate is to divert the expression of an instinctual or impulsive desire in its primitive form to one that is considered more socially or culturally acceptable. Sublimation in its psychoanalytic use has a structural form in which a primary realm (primitive desire) is subordinated to a secondary realm (socially acceptable behavior). By analogy, sublimation may characterize a particular structuring of the relationship between CRT and movement history. Knowledge and retellings of activist histories in one's work are often viewed within critical intellectual circles as the crude expression of desire, a faux pas to be suppressed or forgiven. n75 We offer the current fascination with anti-essentialist theorizing as an example of sublimation and the resulting danger of progressives politically capitulating to conservative agendas.

Sublimation took shape in CRT through the "postmodern turn" and the adoption of anti-essentialism as a primary intellectual stance and dominant cultural norm. Scholars hoped that this postmodern turn would lead to empowerment of people of color by restoring an autonomy of self-definition, which had been historically denied. For example, Angela Harris recounts how African American women too often were absorbed, invisibilized and marginalized within predominating white, straight, middle-class feminist movements. n76 One of the most significant outcomes of the postmodern turn for race critics was that "race," as it had been understood historically had been put under erasure. Critics on the Right and Left questioned the coherence of the race concept, the assumption of its immutability, and the fiction of its transparency. Scholars retooled race variously as a social construction, a dangerous trope, a performance, in contrast to outdated and discredited [*1414] notions of race as a biological fact of difference among groups. The retooling resulted in overturned essentialisms and unmasked incoherent group classifications as a stratagem of oppressive power. Implicit in this turn was a deconstructive and restorative promise; it would reveal the discursive and actual violence of modernist racial practices and open up genuine space for the flourishing of the diverse, the multicultural, and coalitional possibilities for autonomously defined identities. n77

We understand the rise of anti-essentialism as a dominant theory and culture within CRT in a particular political context. At about the same time that the diversity movement peaked around 1990, a substantial segment of the academic Left was in the midst of the postmodern turn. This turn took place across disciplines, including, but by no means primarily, within the legal academy. While the turn seemed mainly to affect the scholarly and methodological approaches of left-leaning academics, its anti-essentialism resonated as well with certain aspects of the Right's attack on race consciousness. n78

In response to the effectiveness and rapid growth of diversity movements on college campuses in the late 1980s, right-wing publicity machines and the media at large seized upon highly sensationalized, often fabricated or misrepresented, incidents of alleged abuses by diversity activists. Following what would be the peak of the diversity movements in the spring of 1990, the New York Times published a pivotal article entitled, *The Rising Hegemony of the Politically Correct* in fall of 1990. This article made using the term "political correctness" ("PC") popular and the articulation of sexuality, gender, and racial justice demands taboo. n79 The recasting of diversity activism as PC undermined the moral claims of such movements and allowed conservatives and institutions to rebut the ample data and the obviousness of race and gender exclusion. § [*1415] TP The charge of PC repression was incendiary, unfair, and utterly effective with no semblance of "equal time" given to student activists to respond to the slander through the mass media. Conservative intellectuals, not critical theorists, practiced synergistic theorizing at this time by assisting the right-wing movements' recapture of the moral high ground on race politics. Aided by the crusading

disparagement of "identity politics" by academics on the Left, conservatives generally made it difficult and unpopular, worse yet "un-chic," to respond to charges of "political correctness" with a forthright defense of race-conscious politics and law. n80

In this political context, the postmodern turn in academe did not help diversity movement politics that faced formidable administrative aggression, targeting student leaders for arrest and prosecution, and political/judicial retrenchment on race and rights. n81 A more intersubjective relationship between theorists and movements may have provided insights into the diversity movement's actual strengths and weaknesses. Such insights, presumably, would have preempted CRT's internalization of myths and caricatures generated by the white Left and Right about student of color orga [*1416] nizing. A synergistic approach to critical race theorizing might have avoided two key misunderstandings embedded in the anti-essentialist ethic.

a. Underestimating Structures of Power and the Power of Structure in Movement Politics

Anti-essentialist theorists have based their conclusions in part on the experiences of the marginalized. n82 As stated previously, Angela Harris has critiqued mainstream feminist movements for their invisibilization and marginalization of African American women. In this sense, insights drawn from movement experiences are consistent with our synergistic approach as well as our experiences within and antiessentialist critiques of leftist, women's, and GLBT organizations. But what starts as a bold critique of racism or other forms of exclusion within a larger progressive movement ends in Harris' troubling call to reject "shared victimization" in favor of more "positive," relational, contingent identities. n83

Thus, anti-essentialism calls for the deconstruction of falsely universalistic group identities that obscure minority group particularities. Yet once set in motion, anti-essentialism unmodified has no limiting principles to prevent minority groups from being deconstructed until all that remains are disunited and atomized individuals themselves. These individuals are understood as unstable constructs, who attain identities only through a process of perpetual reperformance. The anti-essentialist critique has placed in question the viability of communities, valorizing instead "coalitions" of individuals. The theoretical anti-essentialist grounding of such a coalition of individuals purports to offer a more advanced and more accurate account of both the political subject and politics. However, in light of our study, this proposition deserves to be [*1417] approached with skepticism. n84 For example, we cannot figure out what political organizing structures anti-essentialists propose as the alternative to group based political formations. How are they to be built under the formulation of a contingent, temporary, and relational identity? Upon what foundation can difference and creativity will political formations? How will such a program be effective in challenging established structures of subordination that are powerful and organizationally structured -- the reality of Euroheteropatriarchy?

Many critical anti-essentialist theorists tend to underestimate the power and force of racism and other forms of supremacy as formidable political structures. Focusing primarily on the realms of ideologies and cultures of racism, these anti-essentialists seek to combat racial oppression with conceptual reframings, counter-discourses, paradigmatic shifts, creative performances, and cultural contestations. Unmodified anti-essentialists tend to ignore the entrenched political institutions and structures of racism that require more strategic confrontation, disciplined organization, and coordinated follow-through. Accordingly, such theorists also generally underestimate the need for political unity and particular group-based, "essentialist" structures of political organization to respond to such structures of oppression. Sublimationist approaches miss an important insight that is well understood by activist intellectuals: successful multiracial coalitions and movements that respond to daunting forces of oppression are as fragile and fleeting as they are effective and deeply satisfying.

Had critical race theorists challenged, rather than embraced the "identity politics" critique, perhaps their lively public defense of "identity" or race-based politics might have sustained the movement. Critical theorists needed to do more to study, understand, promote and nurture successful movements and

coalitions. Unfortunately, some race critics lost their transgressive voice. Movement [*1418] politics fell victim to sublimation through the rush to unmodified anti-essentialist theorizing.

To avoid political quietism, a theory of anti-essentialism must paradoxically combine with a provisionally universalistic structure for political organizing that unites contingent, transitory, and relationally defined individuals on the basis of interests rather than putative fixed group identities. But the proposed alternative of "getting beyond identity politics" and moving toward "radical and plural democracies" based on "interests," as a step up in the evolution of political group formations, begs the question of an historic and ongoing dynamic of racism within progressive political movements. This movement form of racism often expresses itself in the inability of white activists to respect or accept the autonomy of people of color, even when organizing around issues of racism, such as agenda setting, political strategizing, or leadership development.

We suggest that the essentialism/anti-essentialism debate represents a false dichotomy that reflects not so much a theoretical problem, but a political one. This problem is correctly identified by Angela Harris in her critique of feminist jurisprudence: "In feminist legal theory, as in the dominant culture, it is mostly white, straight, and socio-economically privileged people who claim to speak for all of us." Rather than championing creative individualism and attacking group-based political formations that have produced some relief from hegemony, we should insist on political accountability from the unrepresentative group that is speaking for all of us. Such an approach would have challenged, rather than capitulated to the attack on group identities through the Right's political correctness campaign and the Left's critique of identity. n85 [*1419]

The anti-essentialist critique misdiagnoses the classic tension within progressive movements -- solidarity v. accountability. The sublimation of the political problem of accountability into the more socially acceptable theoretical expression of anti-essentialism within legal academe does a disservice to solidarity. Unmodified antiessentialists remain wary of political solidarity by equating it with the flattening of difference. Because a movement's political survival is not the immediate concern of theorists, even to critical race theorists, the importance of solidarity falls by the conceptual wayside.

In demanding accountability we should not lose sight of movement ethics and the long-term goals of antisubordination and community formation. What this may mean, in light of the long history of factionalism within radical movements, is that scholars must adopt protocols for debate and disagreement to help avoid the spiral of sectarianism that led to the decline of many of the promising movements of the 1960s and 1970s. The importance of both solidarity and accountability demands that the racial critique of feminism be communicated, but in a way that makes greater political unity more, rather than less likely. We believe that closer work with movements will heighten our appreciation for both the dialectical advantages of the accountability/solidarity tension as well as the formidable structures of power we confront.

b. Overestimating Regression in Race-Based Movements

Another danger of the sublimationist treatment of movements is the overestimation of both the extent and scope of regressiveness within race-plus organizational models. By virtue of its distanciation, the antiessentialist focus of CRT tended, ironically, to essentialize racial political formations as crudely nationalistic, sexist, and homophobic. Detachment from such movements prevented theorists from appreciating the wide range of race-based political organizing, from progressivecoalitional to chauvinist-nationalist forms.

Anti-essentialist rhetoric is a useful critique when the categories within which progressive politics takes place have become too rigid to ground useful coalitions. But anti-essentialist rhetoric represents a platitude already evident to and internalized by conscientious [*1420] essentialists. For only by recognizing, addressing, and transforming differences into political solidarities could one hope to go forward with a

successful movement. In light of the twin hazards of the political correctness charge and the identity politics critique, the fascination with anti-essentialism was a luxury available only to those who did not have to deal with the increasing difficulties of race-plus political organizing and coalition building in the face of 1990s backlash. Race-plus organizers, operating under the principle of "conscientious essentialism," already learned and applied the lessons of anti-essentialism and "strategic essentialism" as suggested by the movement slogan, "unified, but not uniform."

As we have seen, the coalitions that formed within the Boalt student diversity movement were based upon autonomously chosen racial or gender affiliations that nevertheless represented essentialist notions of community. To take one example, not every Black law student identified with or belonged to the BLSA, but every member was Black. Although BLSA students may have seen themselves as a coalition rather than as a community, it was an essentialist coalition. Moreover, this conscientious essentialism was not a deficit in the context of the diversity struggle. On the contrary, conscientious race and gender essentialisms were indispensable to the credibility of the diversity movement and its demands. A diversity movement in which principles and practice are not structurally bound together would either fail to mobilize change or bring change that disserves the interests of the diverse communities it purports to represent.

Critical race anti-essentialists could have learned from movements to distinguish between those conscientiously (or strategically) essentialist political groupings that formed precisely as a response to anti-essentialist critiques of existing movements and those crudely essentialist political groupings whose narrow nationalisms or (hetero)sexisms subverted progressive political formations. Through greater interaction, CRT scholars would have known that diversity movements at the time were largely led by students of color, and women's and gay/lesbian/bisexual groups that performed qualified antiessentialism out of political necessity. This knowledge through interaction might have curbed scholarly skeptical tendencies to overestimate regression in race-based movements. [*1421]

C. Some Demographic Musings on the Synergism/Sublimation Divide

We recognize that neat categorizations of first and second wave CRT do not give a complete picture, yet there are analytical distinctions of value to be explored by dichotomizing between recent and established race crits. What follows is an impressionistically drawn and somewhat superficial set of hypotheses regarding a possible generational/demographic explanation of the synergism/sublimation divide identified above. We undertake a generous reading of the first wave CRT scholars and a critical reading of the second wave because we belong to the second wave and feel it is important, as method, to start with self-critique in the hopes of reconciling tensions between the two generations of CRT.

Much of the first wave of CRT scholarship adopted a synergistic approach that incorporated and reflected movement sensibilities into the analysis of legal issues and problems. The second wave of CRT scholarship by contrast, is marked, to an extent, by a dominant ethic of anti-essentialism. This ethic seeks to break apart the whole for closer inspection of the constituent parts. While many second wave race crits draw from movement dynamics, they may favor their role as "disenchanted intellectuals" with the more mediated relationship to political engagement that such a metier implies.

Does the synergism/sublimation divide correlate with generational and demographic differences? Racial demographics of second wave race crits differ markedly from those of the predominantly African American first wave of CRT, which reflects the broad pattern of law school hiring. In 1986-87, for example, faculty of color comprised but 5.4% of total law school faculty nationwide, of which African Americans constituted approximately seventy percent. n86 Up until the decade from 1987-97, law schools employed mostly white men, with only token hires of white females and African Americans. n87 Latina/o and Asian Pacific American ("APA") percentages during this era averaged less than one percent each of the overall law faculty. n88 Native American hiring was and continues to be infinitesimal. n89 [*1422]

To illustrate these changes using the Michael Olivas's data on Latina/o hiring in the last three decades, law schools hired eighty percent of all Latinas/os (88 out of 110 total) in the last ten years (1988-1997).ⁿ⁹⁰ According to another study, approximately seventy percent (11 out of 16 total) of American Indian law faculty entered in the last decade.ⁿ⁹¹ And roughly half of the current APA law professors entered law teaching since 1986.ⁿ⁹² Women of color increased even more dramatically of late. For one striking example, ninety-four percent of all APA women law faculty started teaching since 1980. As a result of changing demographics and politics, second wave critics were significantly more diverse along the lines of race, gender, and sexuality. Unsurprisingly, this second wave is interested in exploring the subcomponents in the category of race, a category that had been constructed by liberal whites as almost exclusively "Black and white," and as default male and heterosexual. The clash of demographics with the extremely narrow historic construction of race by the legal academy was an important condition of possibility for the postmodern/antiessentialist endeavors of second wave race critics.

In addition, CRT's founders and first wave for the most part fall within the "baby boomer" generation, born roughly between 1945 and 1962. The second wave race critics, mostly born after 1962, largely entered legal academe after 1990. The intellectual "coming of age" for these two generations differs significantly. The second wave was schooled at the height of the postmodern turn and viewed political skepticism as a progressive intervention. To this [*1423] second wave, group identity took the mantle of cultural performance in order to avoid irrelevance as passe "modernist" form. By contrast, the first wave's instruction was taken in structurally-oriented, race, class, or genderbased theorizing that was much more receptive to community organizing in addressing institutions and systems of power.

Moreover, important changes in the social environment affected junior race critics as scholars. For the early founders, CRT was a dangerous activity, one that could result in further marginalization and outright exclusion, based on the experience of their CLS counterparts who were being denied or fighting bitter battles to gain tenure. Only after an impressive initial body of scholarship emerged did critical race theorizing achieve a measure of safety and success for its practitioners. Second wave race critics benefited from the elevated status and newfound theoretical ascendancy of CRT. Accordingly, they faced pressures and rewards when entering the "race for theory," not necessarily a race that is conducive to the synergistic ethos we described above.ⁿ⁹³

As a final consideration, the founders and first wave scholars came of age during an era of social protest and race-based contestation/resistance, with the civil rights movement, the Black Power movement, the Black Panther Party, La Raza Unida Party, the Brown Berets, the American Indian Movement, I Wor Kuen, Line of March, and other radical, nation-based political organizations. Many of CRT's first wave participated in these or other race-based formations, internalizing the various positive lessons and ethics of the movement, such as unity, solidarity, audaciousness, self-determination, critique and self-critique, and coalition.ⁿ⁹⁴ However, they also experienced the movement's negative excesses and weaknesses: sexism, ethnocentrism, homophobia, fratricide, sectarianism, [*1424] vanguardism. The power of institutions such as the media, entertainment industry, and universities to disparage, invisibilize, and defame such movements combined with movement instilled traits of modesty and self critique to result in a one sided, negative characterization that even its participants are hesitant to rebut publicly. In order to balance these possible generational differences, greater interaction between early and later race critics is needed. Senior race critics who have engaged newer arrivals to the CRT project, are supportive as well as gracious in the face of various explicit and implicit criticisms of first wave CRT's "Black-white" paradigmaticism, heterosexism, and elitism. And in fact, many of these criticisms do not apply with the same force to those engaging with the second generation of CRT. Two unfortunate consequences should be noted: first, there has been a lack of open engagement with some that could benefit from the second wave demands for accountability. Second, junior critics, who could learn important lessons from those whose struggles paved the way, pass over the political histories and wisdom of those who allowed themselves to be critiqued. The

alienation and distance between much of the first and subsequent waves of CRT has produced a regrettable chasm and loss of historical memory so vital to the regeneration of community race-based resistance.

Race critics should reclaim not only the fragilities of our movements, but also their magical and sublime qualities. Black freedom struggles should be not be seen primarily as examples of outdated "Black-white" dichotomization, or chauvinist nationalism that epitomizes all that is wrong with traditional race theorizing. Rather, the commitment, courage, sacrifice, and strategic brilliance of its many participants should be unromantically retrieved to inspire and inform contemporary resistance movements and oppositional theorizing. At the same time, we should continue to strengthen the movement, in academic sites and beyond, by ensuring that our priority of solidarity among oppressed communities does not obscure the necessity of accountability for greater intergroup justice. First wave race critics can disabuse junior race critics of hegemonic notions that radical, race-based movements were somehow more sexist, classist, and homophobic, than society-at-large. Moreover, through the sharing of subjugated knowledge and repressed [*1425] movement histories, we should understand how even imperfect movements have forwarded the struggle we inherit today, just as our flawed efforts will nevertheless provide a basis for future resistance. Through such an understanding of our fragility and ability to prevail against overwhelming odds, CRT might inculcate a greater appreciation for an intersubjective method that will promote greater expression of the "political" in our search for the "theoretical."

Conclusion

The goal in this Article is to ground CRT in the history of resistance movements in order both to reveal the political context of CRT's emergence and to raise for further reflection the strengths and weaknesses of the historical cross-pollination between praxis and theory. We sought to do so not simply to add one more legend to the genesis stories that are told about a successful and powerful institutional innovation. Rather, we suggest ways in which CRT-identified scholars might act collectively to contend with the continuing and coming storm of backlash and retrenchment against racial and social justice in which we are already significantly engulfed.

Antiracist organizing shares some of the same frustrations of antiracist theorizing, but the strengths and weaknesses of the former are different from those of the latter. One of the great strengths of antiracist organizing within the student diversity movement at Boalt was its adoption of organizational methods forged in the practical, everyday concerns of political struggle. In particular, the approaches of prior successful student of color movements led to an organizational coalition model linked to membership organizations made up of individuals from a range of people of color and women's groups. This structure of raceplus organizing enabled students of color to contend with the entrenched power structure of legal education for significant institutional changes.

The strength of antiracist theorizing is in its ability to fulfill its critical discursive function. As we have argued, when oriented toward movements, that function should entail looking for the main dangers to antiracist organizing and showing the ways in which such dangers may be avoided or undermined. However, to maintain merely a distanced stance as critic of movements places the critical race theorist in the paternalistic position as a judge, issuing [*1426] verdicts on formations, agendas, and strategies that reflect a one-way gaze. Instead, we propose a more intersubjective methodology for CRT's interaction with movements in the third wave of scholarship -- one that seeks to provide a research/theory arm to contest and open up structures of power for communities in struggle, and to acknowledge a two-way relationship between intellectual activists and activist intellectuals. Looking forward to the second decade of CRT, our synergistic approach to CRT work links theory with the lived experience of the subordinated and political resistance. Concretely, this approach may entail replacing the dominant culture of anti-essentialism in CRT, reclaiming the moral high ground for identity-based political organizing, and reaffirming the centrality of collective agency in the creation of political and counter-epistemic space. This approach may require rejecting the primacy of postmodernism's radical antifoundationalism in favor of a theorizing perspective

rooted in the history of community-based antistatization struggles. Finally, this approach may necessitate rethinking and reworking the norms of access to administrative and legal interpretive power, while possibly revaluing, in light of developments, prior discursive interventions or noninterventions. In the context of student diversity struggles, the practical turn for CRT scholars could mean continuous diversity mobilization through shared power and strategies for developing race-plus coalitions.

In closing, we raise some questions for the future of CRT as an organization. We see CRT in its current form of workshops and conferences as an individual membership organization of progressives of color, not a coalition. In the future, this political formation may be superseded in favor of other forms of organization. Hopefully, the historical movement lessons of the significance of political structure, as well as the ongoing salience of racial paternalism in progressive movements is heeded. If so, CRT should approach the call to open itself up to become a membership organization of progressives with caution. Under such a model, how will members respect leadership development, agenda setting, and strategic decisionmaking of people of color -especially women of color, gay/lesbian/bisexual/transgendered people of color, among other multiply identified peoples? Is a race-plus coalitional structure in order? To further develop CRT, might we encourage the establishment of LatCrit, APA Crit, and other racial subgroupings [*1427] that will interact on an egalitarian basis with other established law crits, i.e., fem crits, CLS, and New Approaches to International Law ("NAIL"), to name a few? Should we take seriously the challenge of collective political engagement, synergistic theorizing and intersubjective methodology? CRT in its next decade may very well need to address these organizational-structural questions.

FOOTNOTE-1:

n1 See Eric Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, [95 Mich. L. Rev. 821, 869, 874 \(1997\)](#) (observing that disjuncture between "high theory" generated by critical race theorists and "frontline practice" exercised by progressive lawyers tends to result in abstracted theories that are untested and untestable through either practical experience or material gain for those who are racially subordinated). While Yamamoto does integrate the role of community activists into his formulation of critical race praxis, throughout the article, and in the title, he emphasizes the interaction between legal race theory and political lawyering. See [id. at 830-39](#).

n2 Richard Delgado, editor of one of the first two leading anthologies on Critical Race Theory ("CRT"), begins his genesis story in the mid-1970s with an acknowledgment of the "early work of Derrick Bell and Alan Freeman" -- both legal scholars writing on race. Professor Delgado notably identifies the American civil rights movement and other nationalist movements as providing "inspiration" to CRT. He further acknowledges CRT's intellectual debt to Critical Legal Studies ("CLS"), feminism and continental social and political philosophy. See *Critical Race Theory: The Cutting Edge* at xiii-xiv (Richard Delgado ed., 1995) [hereinafter *Cutting Edge*]; see also Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, [82 Cal. L. Rev. 741, 741 \(1994\)](#) (identifying July 1989, at first annual CRT Workshop, as the birth date and birthplace of CRT).

Indeed, Richard Delgado was one of a handful of early faculty supporters of the 1980s-1990s student movement for diversity. He supported the Boalt Coalition for a Diversified Faculty by speaking at our educational events and rejecting forcefully the standard rationalizations offered by the administration for its failure to diversify. Most recently, he performed the same function for a national group of students organizing to maintain diversity in legal education in the wake of Hopwood and Proposition 209.

n3 See *Critical Race Theory: The Key Writings that Formed the Movement* xiv, xix (Kimberle Crenshaw et al. eds., 1995) [hereinafter *Key Writings*].

n4 One first wave race critic provided a useful counterpoint to other versions by acknowledging that the material gains won by student-led diversity movements directly affected CRT's existence. Professor Matsuda identified as part of the CRT genesis the "resurgence of student activism," including "sit-ins, rallies, and guerrilla actions" at Boalt, Stanford, Harvard and Columbia that resulted in "affirmative action hiring" and race-themed conferences. See Mari Matsuda, *Where Is Your Body?* 50 (1996).

n5 We are also concerned that the Crenshaw et al. version overemphasizes the Harvard-centricity of CRT with the foundational attention focused upon Harvard's 1981 Alternative Course protest, and the Harvard-based CLS movement generally. See generally *Key Writings*, supra note 3, at xx-xii.

n6 Mario Savio, *Berkeley Fall: The Berkeley Student Rebellion of 1964*, in *The Free Speech Movement and the Negro Revolution* 15 (News & Letters, Detroit, MI 1965) [hereinafter *The Free Speech Movement*].

n7 *Id.* at 7.

n8 One could go back even further to the House on UnAmerican Activities Committee ("HUAC") hearings conducted in San Francisco in 1960 that were protested by U.C. Berkeley students. However the racial origins of that protest were more nebulous. While there was chronological overlap between the HUAC protest and civil rights struggles in the South, the linkages between participants were much more tenuous. See Raya Dunayevskaya, *FSM and the Negro Revolution*, in *The Free Speech Movement*, supra note 6, at 21, 22. We start with the Free Speech Movement as one of the earliest, defining moments of mass antiracist student protest.

n9 The 19 organizations spanned a wide range of the political spectrum, and included Student Nonviolent Coordinating Committee, Congress of Racial Equality, Young Socialists of America, Students for a Democratic Society, the DuBois Clubs, the Young Democrats, the Young Republicans, and Students for Goldwater. These organizations were among the first warned by the administration of their violations of the new regulations, followed by suspensions of eight students from coalition groups. See *id.* at 23-24.

n10 Only later was the movement abstracted from its origins to become the signifier of a contested and redeemed freedom of expression.

n11 See Eugene Walker, *Mississippi Freedom Summer*, in *The Free Speech Movement*, supra note 6, at 12 (noting that leadership of Free Speech Movement "were those who had been part of the Mississippi Freedom Summer Project"). It is interesting to note that the abstraction of the racial focus of the FSM was foreseen and resisted by its leaders, who, like later critical race theorists, had a power-based critique of liberals' understanding of free speech:

The liberal University of California administration would have relished the opportunity to show off in the national academic community a public university enjoying complete political and academic freedom and academic excellence. And if student politics had been restricted either to precinct work for the Democrats and Republicans, or to advocacy (by public meetings and distribution of literature) of various forms of wholesale societal change, then I don't believe there would have been the crisis there was. . . . The corporations represented on the Board of Regents welcomed Young Democrats and Young Republicans as eager apprentices, and sectarian "revolutionary" can be tolerated because it is harmless. The radical student activists,

however, are a mean threat to privilege. Because the students were advocating consequential actions (because their advocacy was consequential): the changing of hiring practices of particular establishments, the ending of certain forms of discrimination by concrete acts - because of these radical acts, the administration's restrictive ruling was necessary.

The Free Speech Movement, *supra* note 6, at 16; see also *id.* at 18 (observing that Free Speech Movement "gained its initial impetus from the very different involvements of what are mostly middle-class students in the struggles of Negro people").

n12 The San Francisco State Third World Strike triggered other similar protests across the country. See *Campus Protests Rock California*, *Nation*, *Daily Californian*, Jan. 10, 1969, at 1 (reporting on Black/Third World student unrest at Brandeis University in Massachusetts, and San Jose State College and San Fernando Valley State College in California); *Unresolved Demands Spark U.S. Protests: One Week of Student Strike*, *Daily Californian*, Jan. 13, 1969, at 1, 4 [hereinafter *Unresolved Demands Spark U.S. Protests*] (updating reports on Brandeis and San Fernando Valley student strikes, and reporting on further actions taken by students of color at Swarthmore College, Queens College in New York and Northwestern University in Illinois).

n13 The San Francisco State Third World Strike began in the fall of 1968, prompted in part by the firing of an African American professor and Black Panther, George Murray. A coalition of African American, Asian American, Chicano, and Native American student organizations comprised the Third World Liberation Front that organized the strike. San Francisco State strikers challenged their Berkeley counterparts to demand similar changes in higher education. Prior to the strike, a 1966 survey of the racial composition of the undergraduate student body at U.C. Berkeley revealed that African Americans, Chicanos and Native Americans together comprised a mere 1.5% of the student population, while constituting 24% of the California State population. See Matthew Dennis, *Defeat in Victory, Victory in Defeat: The Third World Liberation Front Strike of 1969*, at 1-2 (June 1987) (unpublished manuscript, on file with authors) (noting that of over 26,000 students, 1% or 226 were Black, 0.36% or 76 were Chicano, and 0.28% or 61 were Native American); see also Phil Semas, *San Francisco State Strike Dies: White Strikers Return to Class*, *Daily Californian*, Mar. 14, 1969, at 1, 8 (reporting on partial victories of strike, including establishment of Black Studies department and school of ethnic Studies, and increased minority student admissions); *Unresolved Demands Spark U.S. Protests*, *supra* note 12 (covering agreement by San Fernando Valley State College to establish two ethnic studies departments and to make greater efforts to hire faculty of color).

n14 See, e.g., *infra* notes 18-19 and accompanying text.

n15 These two issues were linked in student protests by organizers from each movement. For example, one May 18, 1977 *Daily Californian* newspaper ad for an anti-apartheid rally read:

Victory to the People of South Africa!

US, UC Out Now

Defeat the Bakke Decision

Similarly, in a 1977 sit-in at which 56 members of Campuses United Against Apartheid were arrested, the two demands of protesters were: (1) U.C. and U.S. out of South Africa, and (2) defeat Bakke. See *Cops Arrest 56 at Sproul Sit-In*, *Daily Californian*, June 3, 1977.

n16 The 1970s anti-apartheid coalition included primarily the white student Left (i.e., Campuses United Against Apartheid, Students for Economic and Racial Justice, the Revolutionary Student Brigade, the Council for Economic Democracy, and the Young Socialists Alliance), and secondarily organizations of students of color (United Students

Against the Bakke Decision, the Third World Coalition, the Pan Africanist Student Board, and the Ethnic Studies Fee Committee). See Sumi Cho, *A History and Analysis of the Anti-Apartheid Movement at U.C. Berkeley* 4-11 (Dec. 1986) (unpublished manuscript, on file with authors); see also *Blacks Lack Campus Unity*, *Daily Californian*, May 3, 1978 (quoting Erica Huggins of Black Panther Party stating, "I am ashamed white students are organizing a movement which should be full of blacks."). The article later quotes the president of the Black Law Students Association who explained that Black students had to combat the paternalistic assumption that they were at U.C. Berkeley simply out the generosity of liberals, thus they had to work harder to "prove" themselves and consequently did not have extra time to invest in outside activities.

n17 However, the upside of Bakke would be quietly enacted not by activists, but by administrators in admissions offices.

n18 See Manning Marable, *Race, Reform and Rebellion: The Second Reconstruction in Black America, 1945-1990*, at 214 (1991) (providing information on South African embassy protests); see also Manning Marable, *Black American Politics: from the Washington Marches to Jesse Jackson* 247-305 (1985) (discussing Jesse Jackson's first presidential bid).

n19 The race-plus electoral coalition known as Cal Students for Equal Rights and Valid Education ("Cal-SERVE") included African Students Association, Asian Student Union, Inter-Tribal Council, Lesbian Gay Bisexual Alliance, and Movements Estudeaptil Chicanos de Aztlen ("MECha"). UPC organized the key events in the anti-apartheid movement of the 1980s, including a ten-hour sit-in and the "largest number of students arrested at any one protest since the 'early 1970s,'" the student-faculty meetings with the U.C. Regents, and the Bishop Tutu visit to the Greek Theater. See Chris Krueger, *UC Police Make 138 Arrests at Sproul Divestment Protest*, *Daily Californian*, Nov. 7, 1985, at 1, 5.

n20 See Key Writings, *supra* note 3, at xxii-xxvii (providing thorough summary of CRT's contestation with CLS). The formality/informality debate is perhaps best captured by the mini-story told by race crit Patricia Williams recounting the experience of looking for a New York apartment with Peter Gabel, a CLS scholar. Gabel quickly located an apartment and sealed the deal with a "\$ 900 dollar deposit, in cash, with no lease, no exchange of keys, and no receipt." Patricia Williams, *Reconstructing Ideals from Deconstructed Rights*, in *Cutting Edge*, *supra* note 2, at 86-87. In contrast, Williams signed a "detailed, lengthily negotiated, finely printed lease." See *id.* Commenting on their vastly differing approaches to apartment-hunting, Williams observed:

Peter, I speculate, would say that a lease or any other formal mechanism would introduce distrust into his relationships and that he would suffer alienation, leading to the commodification of his being and the degradation of his person to property. In contrast, the lack of a formal relation to the other would leave me estranged. . . .

. . . .

Peter's language of . . . informality, of solidarity, of overcoming distance -- sounded dangerously like the language of oppression to someone like me who was looking for freedom through the establishment of identity, the form-ation of an autonomous social self. To Peter, I am sure, my insistence on the protective distance which rights provide seemed abstract and alienated.

Id. at 87-88.

n21 See Melissa Crabbe, *Anti-Apartheid Forces Join but Cultures, Tactics Differ*, *Daily Californian*, Apr. 29, 1986, at 11 (chronicling different decisionmaking processes between UPC and CAA).

n22 See *id.* at 1, 6, 11 (detailing open split on tactics between UPC and CAA). One U.C. official stated his opinion that CAA believes that "they have to create a situation where confrontation will occur so they can get media attention The feeling is that legitimate protest, which does not disrupt, will not get sufficient attention, therefore it is not effective." *Id.* at 11. CAA leader, Andrea Pritchett, commenting on CAA's lack of direct action principles, stated, "the fact that we don't have a rigid program is good because it allows us to be influenced by other political views, but it's also a problem because in dealing with a situation like a riot, we don't have a unified position." *Id.* Organizational leaders agreed that there was an increased vulnerability for men of color during protests. See *id.* ("Third World students receive the brunt of police violence in any demonstration.").

n23 In rebuttal to the CAA charge of conservatism, UPC member Patricia Vattuone commented on the differing agendas and perspectives of the two groups: "We've been labeled less militant, and that's a problem We're not about rebelling against our parents and the institutions -- those aren't the issues." *Id.*; see also Pedro Noguera, *Fighting Racism Doesn't End with Your Diplomas*, *Daily Californian*, May 15, 1986, at 4-5 ("We're trying to win our people over not just to struggle for divestment. We're trying to win them over for life, because we want them to be in this struggle after they graduate from school. . . . For those of you who would say that we are conservative for taking this on as our task, I challenge you. I ask what will you be doing in 10 years?"); Statement of Purpose by UPC, *Daily Californian*, Apr. 29, 1986, at 6 ("We do not view this movement as a struggle against authority. For us, the anti-apartheid movement, like the . . . tutorial program run by students in the Berkeley elementary schools or our efforts to improve affirmative action on the campus, are all related to the overall purpose of our organization: to work for and support the liberation of our people and all people.").

n24 See Crabbe, *supra* note 21, at 6, 11 (noting that UPC agenda items and demands for improved graduate affirmative action and institution of Ethnic Studies graduation requirement were adopted by other anti-apartheid groups for the sake of unity); Keith Palchikoff, *Celebration and Rally: Activists Laud Divestment, Call for Action*, *Daily Californian*, Sept. 4, 1986 (observing that "besides celebrating the July divestment vote, the [anti-apartheid] activists also called upon the crowd to support the institution of a required ethnic studies course"); *After Divestment, What's Next? Ethnic Studies!!!!*, UPC Flyer (undated) (on file with authors); see also *infra* note 32 (discussing flyer which describes linkage of U.C. support of apartheid in South Africa and United States).

n25 A 1969 *Daily Californian* article reported on an illegal rally staged by Boalt students to protest the administration's ban on rallies during the Third World Strike, and observed that "law students are becoming actively involved in campus politics for the first time." Mathis Chazanov, *Boalt Students Stage Rally, Protest Administration Ban*, *Daily Californian*, Feb. 29, 1969, at 1, 16; see also Telephone Interview with Linda Greene, Professor of Law, University of Wisconsin (Nov. 1997) (transcript on file with authors) (supplementing information on 1972 Boalt strike with first-hand knowledge gained as strike participant and former BLSA President and founding CRT workshop member); Interview with Gerald Horne, in Flushing, N.Y. (Oct. 11, 1997) (notes on file with authors) (providing supplemental information on 1972 Boalt strike from personal experience as strike participant). The 1972 Boalt strike received a great deal of coverage. See, e.g., *Black Students OK Boalt Offer*, *Daily Californian*, Apr. 28, 1972, at 1; *Boalt Faculty Response*, *Daily Californian*, Apr. 27, 1972, at 1; Ed Coyne, *Chicano Law Students End Boalt Hall Sit-In*, *Daily Californian*, Apr. 21, 1972, at 1, 16; Hazel Harper, *Black*

Students Confront Faculty, *Daily Californian*, Apr. 25, 1972, at 1, 12; Hazel Harper, Black Students Strike at Boalt, *Daily Californian*, Apr. 20, 1972, at 1, 16; Hazel Harper, Boalt Decision, *Daily Californian*, Apr. 25, 1972, at 1, 16; Hazel Harper, Boycott Continues at Boalt, *Daily Californian*, May 2, 1972, at 12; Hazel Harper, Third World Cutbacks at Boalt Hall Black Law Student Association Protests, *Daily Californian*, Apr. 19, 1972, at 1, 16; Jeanette Harrison & Robert Joffe, Boalt Hall Blacks, Asians Vote to End Strike, *Daily Californian*, May 1, 1972, at 1, 12; Negotiations at Boalt, *Daily Californian*, Apr. 21, 1972, at 12; Open Challenge to Boalt Faculty, *Daily Californian*, Apr. 20, 1972, at 7.

n26 In 1975, for example, Asian American students protested the admissions committee recommendation of full elimination for Japanese Americans and the 50% cutback for Chinese Americans in special admissions policy absent any study. Despite AALSA's impressive organizing efforts, the policy was implemented.

n27 See Coyne, *supra* note 25, at 1, 16; Jaime Gallardo & Gonzalo Rucobo, Chicano Response to the Sullivan Memorandum, *Daily Californian*, May 5, 1972, at 7; Harrison & Joffe, *supra* note 25, at 1, 12; Chicano Boycott Still on at Boalt, *Daily Californian*, May 5, 1972, at 12; see also Sandra Epstein, *Law at Berkeley: The History of Boalt Hall* 278, 281 (1997) (discussing AALSA protest and declining student input into admissions decisions).

n28 See Grant Mercer, Boalt Hall Students Plan Strike, Teach-In for Today, *Daily Californian*, Mar. 21, 1978, at 1 (quoting Johnson).

n29 The seven organizations comprising the coalition included the Asian American Law Students Association, the Black American Law Students Association, the Boalt Hall Students Association, La Raza Law Students Association, the National Lawyers Guild, the Native American Law Students Association, and the Women's Association. See *Diversified Faculty Issue Intensifies, Suspended Sentence*, Apr. 1979, at 1, 3 [hereinafter *Diversified Faculty Issue*] (on file with authors); see also Tom Pecoraro, Boalt's Minority Recruitment Effort Lagging, *Daily Californian*, Feb. 28, 1978, at 3. The 1978 strike received much coverage. See, e.g., *Diversified Faculty Issue*, *supra*, at 1, 3; Barbara Franklin & Grant Mercer, Boalt Hall Hit by Sit-In, Strike, *Daily Californian*, Mar. 22, 1978, at 1, 12; Mercer, *supra* note 28, at 1. Dean Kadish refused to begin the "official" February 1978 faculty meeting before Coalition for a Diversified Faculty ("CDF") members spoke in order to avoid "setting a precedent" for student participation and input. See *Diversified Faculty Issue*, *supra*, at 1. For a record of CDF's activities for 1977-1978, closing the year with the March 21, 1978 strike, see *id.* at 3, 8.

n30 But the investigation was discredited when the Boalt administration discovered that a Department of Labor investigator had monitored three law classes without their knowledge or permission. Seriously undermined by the controversy, the investigation failed to confirm the students' charges.

n31 Several authorities discuss the HEW probe. See Epstein, *supra* note 27, at 282-83; Sue Feldman, Agent Secretly Attends Boalt, *Daily Californian*, Jan. 25, 1980, at 1, 22; Sue Feldman, Boalt Hiring to Be Probed by HEW, *Daily Californian*, Sept. 26, 1979, at 1; see also Mike Casey, Groups Seek to Unify Berkeley Left, *Daily Californian*, Dec. 4, 1979, at 1 (discussing internal divisions within Berkeley Left).

n32 See Founding Meeting, ULSC Flyer (Nov. 19, 1985) (on file with authors) (advertising first meeting of United Law Students of Color to discuss "minority and women faculty, divestment, racism in the classroom, and affirmative action"). As a result of the formation of ULSC and its connection to the campus wide anti-apartheid movement, Boalt students sponsored a strike on April 7, 1986 to "protest U.C. support of apartheid in South Africa and at

home," noting the "fruits of U.C. philosophy" to include "\$ 2.5 billion in U.C. investments in South Africa, exactly 2 tenured Boalt minority faculty, and only 9.7% graduate students of color at U.C. Berkeley." See Boalt Strike Flyer (Apr. 7, 1986) (on file with authors). Neither of the co-authors recalls any consciousness of a previous CDF at the reformation of BCDF in the 1980s.

n33 See Dan Ashby, Marjorie Shultz: First Woman Granted Tenure at Boalt in the 1980s, Berkeley Graduate, Oct. 1989, at 18-20 [hereinafter Ashby, Marjorie Shultz] (discussing denial of tenure to Marjorie Shultz); Dan Ashby, Eleanor Swift Becomes the Second Woman in the 1980s to Be Granted Tenure at Boalt, Berkeley Graduate, Oct. 1989, at 14-17 [hereinafter Ashby, Eleanor Swift] (providing information on Eleanor Swift's tenure denial).

n34 The fall 1988 hiring included Boalt's first critical race theorist, Angela Harris, as well as feminist scholar Reva Siegel, outspoken BCDF ally, Bryan Ford, and the first Latino male hired at Boalt, Dan Rodriguez. This set of hires represented the most heterogeneous in Boalt's history.

n35 The information for the 1967 and 1987 faculty data was provided by the Boalt administration. For information on the Swift press conference, see Ashby, Marjorie Shultz, supra note 34, at 18-19, and Letter from Marjorie Shultz to Sumi Cho (Sept. 1989) (on file with authors).

n36 As two of the few students of color still involved with BCDF, the authors intervened to propose a race-plus coalitional structure to BCDF that was passed by the membership. Cho and Westley served as two of the four original steering committee members of the newly structured BCDF as members of the Asian American Law Students Association and the Black Law Students Association, along with Renee Saucedo of La Raza Law Students Association, and Juliet Davison of the Boalt Hall Women's Association.

n37 See Key Writings, supra note 3, at xix.

n38 See generally 22 Harv. C.R.-C.L. L. Rev. 301 (1987).

n39 See Sandy Louey, Boalt Professor Wins Discrimination Fight, Daily Californian, Aug. 28, 1989 (reporting on independent panel's unanimous finding of sex discrimination and U.C. Berkeley Chancellor Heyman's subsequent offer of tenure to Professor Swift); see also Ashby, Eleanor Swift, supra note 34, at 14. In exchange for the chance to have her case reviewed by an independent committee outside of the law school, Professor Swift agreed to drop her gender discrimination lawsuit against the university.

The 1988 strike received much local media coverage. See Roland De Wolk, Students Protest Shortage of Minorities and Women on Boalt Hall Faculty; 28 Arrests, Oakland Trib., Mar. 23, 1988, at B1; Ellen Goodwin, 28 Cited in Six-Hour Sit-In Protesting Bias in Hiring, San Jose Mercury News, Mar. 23, 1988, at 1B. The authors credit BCDF co chair Renee Saucedo for conceiving of and coordinating the Nationwide Law Student Strike of 1989. There was some concern among the BCDF leadership that expanding the movement to a national level was premature and threatened to destabilize the local movement. Sumi Cho, one of the authors, felt that BCDF should solidify its base and ally more closely with the campus wide movement for diversity before "going national." In retrospect, both positions seemed legitimate. The nationwide strike forced a sea change in law school hiring culture, discussed below. On the other hand, the very next year, the second nationwide strike threatened to be a failure at Boalt were it not for the strength of the campus wide diversity movement through the United Front. Whether BCDF could have withstood the conservative onslaught of the early 1990s through a more focused local campaign is unclear.

n40 One of these missteps involved a letter from BCDF leaders to an academic couple being hastily recruited by the Boalt faculty for tenure track positions. BCDF charged that the waiver of standard search procedures was designed to eliminate student input in the name of affirmative action recruitment (of a white female candidate and her white husband). Further, students felt that the "target of opportunity" ("TOP") affirmative action positions, used to convey additional funds to departments fielding diversity candidates, were being misused, as the female candidate was being hired in the "regular" position, with her spouse being hired through TOP funds. In light of this history, BCDF and other student leaders wrote to the candidates who were extended offers and asked them not to accept based on the need for greater racial diversity and for the process-based failures in their hiring. The letter to the candidates created an uproar from Boalt faculty and from a considerable segment of the student body. BCDF strategy seemed to emphasize increasingly ill-conceived direct actions with no clear link to attainable demands, and commensurate defense of those arrested. Ironically, BCDF's major successes (in reversing two tenure denials and winning four of five diversity hires in one year) led to a perception among many students that the administration was now in good faith willing to diversify the faculty, or that the faculty had been adequately diversified.

n41 The conservative "political correctness" campaign proliferated rapidly after a New York Times magazine article in the winter of 1990. See Richard Bernstein, *The Rising Hegemony of the Politically Correct*, N.Y. Times, Oct. 28, 1990. NEXIS citations in "arcnews/curnews" reveal only 70 total citations in articles to "political correctness" for all of 1990. One year later, after the Bernstein article, NEXIS records over 1500 citations, with a steady increase to over 7000 citations by 1994. See Sumi Cho, *Essential Politics*, [2 Harv. Latino L. Rev. 433, 450 nn.33 & 36 \(1997\)](#).

n42 [488 U.S. 469 \(1989\)](#).

n43 Prior to 1989, it could be said by diversity activists that no controlling legal authority had determined that publicly sponsored raceconscious remedies were illegal in an educational or academic setting. In 1989, *Croson* held that local racial set-asides in public construction contracts were subject to strict scrutiny. See [Croson, 488 U.S. at 490-91](#). The narrative of *Croson* which viewed the case as one about a majority minority black-white coalition seeking to ensure relatively modest but meaningful minority participation in a lucrative publicly funded enterprise only saw the light of day in Justice Marshall's exasperated dissenting opinion. See [id. at 528-61](#) (Marshall, J. dissenting). The majority, by contrast, only saw "reverse discrimination." See [id. at 491](#). What *Croson* seemed to say to diversity activists in particular was that our generation could not rely on the high Court to support our politics in the way that a previous generation of civil rights activists could. In the language of Justice O'Connor's opinion, our politics would be viewed as "racial politics," and that was a bad thing as well as constitutionally forbidden to the state. See [id. at 493-95](#). For BCDF members, the message of *Croson* was even clearer: time had run out on judicial tolerance of result-oriented diversity politics.

n44 [515 U.S. 200, 227 \(1995\)](#) (holding that all racial classifications imposed by government actors are subject to strict scrutiny analysis).

n45 [38 F.3d 147, 160 \(4th Cir. 1994\)](#), amended and reh'g denied, [46 F.3d 5 \(4th Cir. 1994\)](#), cert. denied, [514 U.S. 1128 \(1995\)](#) (holding that Black-only scholarship program was not narrowly tailored to asserted goal of remedying present effects of past discrimination).

n46 [78 F.3d 932, 944 \(5th Cir. 1996\)](#), reh'g denied, [84 F.3d 720 \(5th Cir. 1996\)](#), cert. denied sub nom. [Texas v. Hopwood, 518 U.S. 1033 \(1996\)](#) (holding racial preferences in state university law school's admission program violates equal protection).

n47 On June 26, 1997, it was revealed that not one of the 14 Black students admitted to Boalt Hall under the new policies adopted after passage of the anti-affirmative action measure had decided to enroll. See Amy Wallace, *UC Law School Class May Have Only 1 Black*, L.A. Times, June 27, 1997, at A1 (discussing resegregation); see also Derrick A. Bell, Jr., *Race, Racism and American Law* 381-389 (2d ed. 1980) (chronicling varieties of massive resistance pursued by southerners opposed to desegregation facilitated by Supreme Court's "all deliberate speed" order in *Brown v. Board of Education II*).

n48 We use the term "institutional-cultural" to draw on "new institutionalist" forms of analyses from the social sciences. These approaches emphasize the importance of social institutions as both constraining action and constituting actors and interests. "Institutioncultural" struggle by CRT and student activists was thus at once struggle against the institutional constraints of deracialized modes of pedagogy and legal analysis and struggle for a constituting culture wherein radical subjects of color could flourish. See generally *The New Institutionalism in Organizational Analysis* (Paul J. Dimaggio & Walter L. Powell eds., 1991); *Institutional Structure: Constituting State, Society, and the Individual* (George M. Thomas et al. eds., 1987). The authors thank Gil Gott for bringing this body of literature to their attention.

n49 See, e.g., Matsuda, *supra* note 4, at 74 ("In April 1988, law students across the country held a national day of protest. They sat in to demand changes in hiring practices That same year, I got a call inviting me to teach as a visitor at Stanford Law School.") Although Professor Matsuda had the wrong year for the first nationwide strike, which was 1989 instead of 1988, the first (Boalt-only) law student strike called by the Boalt Coalition for a Diversified Faculty did occur in April of 1988 and received considerable local, regional, and national publicity.

n50 As merely a partial listing, some of these actors include the Society of American Law Teachers and their members' surveys and reports that provided a wealth of information on the exclusionary effects of the closed system of hiring. In particular, the work of David Chambers, Charles Lawrence, and Richard Chused deserve special mention. Michael Olivas's "dirty dozen" list, an annual data compilation and resource base, and patient prodding/scolding, prompted Latina/o hiring at many schools. The AALS Minority section, formed in the early 1970s, turned its attention early and often to the issue of minority hiring, issuing reports and sponsoring recruitment conferences for prospective candidates. We believe a serious study of these diversity efforts by faculty and other constituencies would complement our study of student diversity activism.

n51 See David Chambers, *SALT Survey: Minority Group Persons in Law School Teaching*, *SALT Newsl.* (Society of American Law Teachers, Washington, D.C.), Nov. 1982, at 5 [hereinafter Chambers, *Minority Group Persons*]; see also David Chambers, *SALT Survey: Women in Law School Teaching*, *SALT Newsl.* (Society of American Law Teachers, Washington, D.C.), July 1983, at 1, 3 [hereinafter Chambers, *Women in Law*]. The research of the liberal-progressive SALT, the largest membership organization of law faculty, produced some of the most useful research for the diversity movement, beginning with the Chambers survey. Charles Lawrence analyzed the Chambers survey in a law review article calling for voluntary affirmative action hiring in light of the dismal statistics unearthed. See Charles R. Lawrence, III, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 *U.S.F. L. Rev.* 429, 437-38 (1986). In 1988, Richard Chused conducted a follow-up report to Chambers' on hiring and retention of women and minority law faculty. See generally Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, [137 U. Pa. L. Rev. 537 \(1988\)](#).

n52 See Chambers, *Women in Law*, *supra* note 51, at 6.

n53 See Telephone Interview with Richard White, Statistician, AALS (Nov. 14, 1997) (transcript on file with authors).

n54 American Bar Ass'n, Approved Law Schools, 1998 Edition: Statistical Information on American Bar Association Approved Law Schools 451 (1997).

n55 See Sumi K. Cho, Multiple Consciousness and the Diversity Dilemma, [68 U. Colo. L. Rev. 1035, 1052 n.63 \(1997\)](#) (citing memorandum confirming Boalt's faculty statistics from Nola Yee, Coordinator, Publications and Communications, Boalt Hall School of Law).

n56 To illustrate, there were 273 full-time law faculty of color in 1988-1989 out of 5075 total. See Telephone Interview with Richard White, *supra* note 54. The following year, there were 451 out of 5202 -- a total increase of 178 additional faculty of color. See *id.* The 65% increase in the number of law faculty of color occurred in a year of nominal increase in overall faculty size, which grew at a rate of only 2.5%. See *id.* In 1990-1991, the percentage of full-time faculty of color increased to 10% or 662 of 6638 total law faculty. See *id.*

n57 See *id.*

n58 See Michael Olivas, The Education of Latino Lawyers: An Essay on Crop Cultivation, 14 Chicano-Latino L. Rev. 117, 130 (1994). This information was updated in a handout for a panel discussion at the LatCrit III conference, May 7, 1998. This set of data is not kept by any organization such as the American Bar Association of the Association of American Law Schools. Rather the labor-intensive statistical research is conducted each year by Michael Olivas, a senior Latino law professor, an early and ongoing advocate for Latina/o hiring in law teaching.

n59 At least since publication of the influential work on racial formation by Michael Omi & Howard Winant, race has increasingly been viewed in intellectual academic circles as a social construction that is neither biological nor static, but rather in the process of change over time and subject to certain hegemonic paradigms of analysis. See Michael Omi & Howard Winant, *Racial Formation in the United States* (1986); see also Anthony Appiah, The Uncompleted Argument: Du Bois and the Illusion of Race, in "Race," Writing, and Difference 21 (Henry Louis Gates, Jr. ed., 1985); Mark Tushnet, An Essay on Rights, [62 Tex. L. Rev. 1363, 1394-1402 \(1984\)](#) (providing example of "trashing"); Robert Westley, White Normativity and the Racial Rhetoric of Equal Protection, in *Existence in Black: An Anthology of Black Existential Philosophy* 91 (Lewis R. Gordon ed., 1997) (exploring usurpation of social construction thesis to serve ends of white supremacy through color-blind jurisprudence). But cf. Kimberle Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, in *Key Writings*, *supra* note 3, at 110 (critiquing CLS trashing of ideology "as the only path that might lead to a liberated future" for those who are racially oppressed). In the early 1990s, there was a media frenzy over political correctness. See Cho, *supra* note 41; see also Dinesh D'Souza, *Illiberal Education* (1991) (lamenting rise of campus movements in late 1980s that urged affirmative action faculty hiring and student admission, ethnic studies requirements, hate speech codes, and gay and lesbian studies).

n60 Epstein, *supra* note 27, at 276, 322. Epstein's sources on this period of heated contestation never cite to a student, but are confirmed by "faculty interviews," "one emeritus professor," as well as various deans. See *id.* at 322.

n61 Cecilia V. Estolano et al., *New Directions for Diversity: Charting Law School Admissions Policy in a PostAffirmative Action Era* 7-8 (1997).

n62 V. Dion Haynes, Lone Black in Law Class Fights End of Preferences, *Chi. Trib.*, Sept. 29, 1997, at C1.

n63 Michel Foucault, *Two Lectures*, in *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, at 82-83 (Colin Gordon ed., 1980).

n64 See Epstein, *supra* note 27, at 283, 322-23 (discussing "angry students" and "law school agenda"). Epstein does note that the class boycott strategy was developed at Boalt and followed elsewhere, but the context is not one of ringing endorsement of the movement.

n65 See generally Estolano et al., *supra* note 61.

n66 See *id.* at 7.

n67 See *id.* at 6-17.

n68 See *supra* notes 61, 65-67 and accompanying text (discussing New Directions for Diversity authors' erasure and disparagement of Boalt student activism). We acknowledge our own role in this historical movement amnesia and seek to correct it in part through this Article.

n69 We use the term "counter-discourse" in the sense suggested by Nancy Fraser: "members of subordinated social groups have found it advantageous to constitute alternative publics . . . parallel discursive arenas where members of subordinated social groups invent and circulate counterdiscourses." Nancy Fraser, *Politics, Culture, and the Public Sphere: Toward a Postmodern Conception*, in *Social Postmodernism: Beyond Identity politics* 287, 291 (Linda Nicholson & Steven Seidman eds., 1995). A counter-discourse, then, interprets social reality in a manner opposed to subordination. See *id.*

n70 Angela Harris coined the term "disenchanted intellectual" to refer to the contemporary critical theorist. See Harris, *supra* note 2, at 778.

n71 Radical economists refer to the set of mutually reinforcing social and economic institutions as the "social structure of accumulation" ("SSA"). See John Miller & Chris Tilly, *The U.S. Economy: Post-Prosperity Capitalism?* 23 *Crossroads* 1, 2 (July/Aug. 1992) ("Successful accumulation requires a set of mutually reinforcing . . . institutions -- rules of the economic game, implicit and explicit agreements, and the organizations that carry them out, including government agencies, business groupings, and popular organizations."). Such structures are fluid, have a limited lifetime, and are constantly being disassembled and reconstructed. For example, the post-World War II SSA involved three main components: (1) a "capital-labor accord" which offered labor stability to key economic sectors by offering "productivity plus" pay formulas in exchange for "no-strike" provisions in bargaining agreements; (2) a "capital-citizen" accord that provided the safety net of New Deal programs in exchange for social stability, and; (3) a Pax Americana accord which relegated the U.S. to the dominant role in the world (capitalist) economy with its attendant role as global policeman. These three "pillars" permitting smooth accumulation of capital remained solidly in place until the early 1970s. Each pillar began to "crack" at this time, leading to the disruption in the social structures of accumulation and economic instability. See *id.* at 2-3; see also David M. Gordon et al., *Power, Accumulation, and Crisis: The Rise and Demise of the Postwar Social Structure of Accumulation*, in *Radical Political Economy: Explorations in Alternative Economic Analysis* 226 (Victor D. Lippit ed., 1996).

The professional intelligentsia, especially in a field like law, may have their own particular labor-capital/capital-citizen accords. Because of their generous remuneration (relative to other academics) and elevated social status, law professors -- even antisubordinationist law professors -- may feel obliged to honor the implicit agreement of "collegial discourse," at times a euphemism for the normalization of nonresistance to oppressive forces. The corporate academic institution, in exchange for its inclusion of the subaltern, can head off attacks of

exclusionary practices from outside critics, and thus guarantee its smooth accumulation process.

n72 See Mari J. Matsuda et al., *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (1993) (addressing hostility that students of color often faced in campus environments).

n73 See generally Gerald Lopez, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (1992); Mari J. Matsuda et al., *supra* note 72; Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *Yale L.J.* 470 (1976); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *Harv. C.R.-C.L. L. Rev.* 323 (1987).

n74 We believe Harris's critical insights in *Race and Essentialism* were based on contestation of racism within the women's movement and certainly had potential to be synergistic, but ultimately ignored the larger political dynamic and danger of the Right and segments of the Left essentializing race-based movements as we shall discuss below. See generally Angela Harris, *Race and Essentialism in Feminist Legal Theory*, [42 *Stan. L. Rev.* 581 \(1990\)](#). We view much of the later Harris work as an eloquent corrective to her earlier sublimationist work. See generally Harris, *supra* note 2. Although somewhere between the first and second generations, Eric Yamamoto's work deserves mention here. See generally Yamamoto, *supra* note 1 (discussing critical race praxis).

n75 See Webster's Ninth New Collegiate Dictionary 1174 (9th ed. 1988) (defining sublimation). On sublimation in its psychoanalytic use, Freud developed the controversial sublimation thesis, and we should point out that our appropriation of the term in no way is an endorsement of its application in psychoanalytic theory. Rather, as the text states, our use is a kind of structural analogy. See Sigmund Freud, *Introductory Lectures on Psychoanalysis* 23, 345-46 (James Strachey ed. & trans., 1966).

n76 Harris, *supra* note 74, at 585-90.

n77 See Ian F. Haney Lopez, *White by Law: The Legal Construction of Race* (1996) (explaining race as sociological construction); Robert Chang, *The End of Innocence or Politics After the Fall of the Essentialist Subject*, [45 *Am. U. L. Rev.* 687 \(1996\)](#) (advocating for shift away from identity politics to political identities); Diana Fuss, "Race" Under Erasure? Poststructuralist Afro-American Literary Theory, in *Essentially Speaking* 73 (1989) (discussing erasure); Harris, *supra* note 2, at 745-58 (elaborating on deconstructive and restorative promise of postmodernism); Cheryl I. Harris, *Whiteness as Property*, in *Key Writings*, *supra* note 3, at 276 (discussing essentialism's pitfalls).

n78 See [City of Richmond v. J.A. Croson Co.](#), [488 U.S. 469 \(1989\)](#) (Scalia, J., concurring).

n79 See Cho, *supra* note 42, at 450-51 nn.33-37 and accompanying text (discussing rapid proliferation of discourse of political correctness).

n80 See generally Richard Delgado & Jean Stefancic, *No Mercy* (1996) (discussing rise of right-wing think tanks and their role in constructing regressive civil rights discourse); see also Cho, *supra* note 42, at 443-53 (analyzing simultaneous rise and popularization of attacks on "identity politics" and "political correctness" by academic Left and political Right).

n81 To be sure, the postmodern turn opened up progressive space, at least within the academy, for alternative approaches to analysis beyond dualistic paradigms. In particular, the postmodern turn has opened up racial discourses within the white-over-Black dichotomy, with the establishment of "LatCrit" theory, and the proliferation of Asian Pacific American and Native

American scholarship. See, e.g., Symposium, Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory, [19 Chicano-Latino L. Rev. 1 \(1997\)](#); Colloquium, International Law, Human Rights, and LatCrit Theory, [28 U. Miami Inter-Am. L. Rev. 177 \(1997\)](#); Symposium, LatCrit Theory: Latinas/os and the Law, [85 Cal. L. Rev. 1087 \(1997\)](#); Symposium, LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship, [2 Harv. Latino L. Rev. 1 \(1997\)](#); Colloquium, Representing Latina/o Communities: Critical Race Theory and Practice, 9 La Raza L.J. 1 (1996). Race and gender antiessentialism, supported by the radical antifoundationalism of the postmodern turn, has had the welcome effect of disarming those on the Left that believed that coalition or movement politics necessarily took account of race and gender identity. Indeed, the failure to take account of identity had fatally flawed earlier student diversity movements.

It is more than ironic that at the historical moment that people of color began entering the halls of higher learning in appreciable numbers, and making demands for greater inclusion, we are asked to check our identities at the door, when our identities were the excuse for denying us entrance in the first place. Up until this moment, it was the almost exclusive prerogative of white power both to subordinate and exclude people of color and women, and then tell us in a basically white communication how it was done. See, e.g., Richard Delgado, The Imperial Scholar: Reflections on a Review of Civil Rights Literature, in Key Writings, *supra* note 3, at 46 (decrying dominance of white male authors in leading law reviews writing about civil rights and only citing one another).

n82 There are many excellent anti-essentialist critiques of allegedly universalistic movements. See generally Elvia R. Arriola, Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory, 9 Berkeley Women's L.J. 103 (1994); Pat Cain, Feminist Jurisprudence: Grounding the Theories, 4 Berkeley Women's L.J. 191 (1989-90); Harris, *supra* note 75; Darren Lenard Hutchinson, Out yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse, [29 Conn. L. Rev. 561 \(1997\)](#); Peter Kwan, Intersections of Race, Ethnicity, Class, Gender, and Sexual Orientation: Jeffrey Dahmer and the CoSynthesis of Categories, [48 Hast. L.J. 1257 \(1997\)](#); Francisco Valdes, Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of "Sexual Orientation," [48 Hastings L.J. 1293 \(1997\)](#).

n83 See Harris, *supra* note 75, at 612 (asserting black women can help feminist movement "move beyond its fascination with essentialism" through "creative action," not "shared victimization").

n84 This thought is counterintuitive for some feminists who have found the basis of a political community built around women to be the common situation of women. See Kate Soper, Feminism, Humanism and Postmodernism, in 55 Radical Philosophy 11 (1990) (asserting that feminist politics implies movement based on solidarity and sisterhood of women and doubting whether there can be specifically feminist politics under antifoundationalist assumptions of postmodernism). Also left nonplussed are racialized group members that experience race as belonging to a racially defined community with common interests and perspectives.

n85 One of the main dangers to theory and movements posed by anti-essentialism is its potential to promote an abstract and endless expedition into the misrecognition of individual particularity. We believe that an autonomous theory of anti-essentialism with no limiting principles plays too easily into the hands of the enemies of progressive politics. Such rhetoric is simply beside the point in a political arena where those opposed to inclusive change are themselves virulently essentialist. Even if such insights of difference are true, or are truisms, i.e., "we are all unique individuals," such a theoretical stance places a normative priority on

radical and skeptical antifoundationalism that emphasizes individual prerogative at the expense of community political empowerment and group solidarity. In the highly essentialized world of contestatory diversity politics, the misplaced priority of escaping such group confinement reveals itself to be a scramble in a cage. It is not that conscious interventions are incapable of changing the meaning-content of categories in order to respond to new circumstances and create new opportunities. But what the elasticity of meaning-content cannot do is alter fundamentally the referential force of the categories themselves or normalize passage out of one category into another. The recruitment to essentialized racial and gender categories continues apace in spite of antifoundationalist longings.

n86 See Chused, *supra* note 51, at 538.

n87 See *id.*

n88 See *id.*

n89 See *id.*

n90 See Olivas, *supra* note 58 (providing data on Latina/o law faculty).

n91 See G. William Rice, *There and Back Again -- An Indian Hobbit's Holiday "Indians Teaching Indian Law,"* [26 N.M. L. Rev. 169, 182 \(1996\)](#). Professor Rice's data covers through the 1994-95 academic year. One tenured respondent to his survey did not provide the number of years in law teaching, so we excluded that response to the data reported in this paragraph. We updated the Rice study using AALS data on hiring for 1995-96 and 1996-97. This was a rather easy task as there were no successful American Indian/Alaska Native law teaching candidates reported in those two years.

n92 See Pat K. Chew, *Asian Americans in the Legal Academy: An Empirical and Narrative Profile,* [3 Asian L.J. 7, 18, 32 \(1996\)](#) (reporting that 40% of all APA law professors entered since 1986, and that 94% of APA women entered legal academy since 1980). Since Professor Chew's data covered up to the 1992-93 academic year, we again supplemented her data with more recent AALS data. If 40% of the 61 identifiably APA law faculty between 1986-92 were recent entries, that would be about 24 faculty. In the years 1993-97, there have been 23 additional APA hires, bringing the current ratio of recent entries to 47 (24 from 1986-92 plus 23 from 1992-97) out of 84 (61 total in 1992 plus 23 additional since), which is about 56%. However, because we do not have the number of APAs leaving the academy between 1992-97, our 50% updated figure is a rough, though somewhat reliable estimate.

n93 While there have been high profile attacks on CRT scholarship of late, those criticisms in major media outlets may actually testify to the institutionalization of CRT as a significant force in legal scholarship.

n94 As a result, we believe first wave race crits are more likely than the second to have a greater appreciation for the 1980s diversity movements that brought about vast changes in legal academe. Second wave CRT scholars who would benefit most from these movements may be least aware of the sea change in law school culture under which the first wave was hired, tenured, or not tenured. The sharply increased success rates of people of color seeking teaching positions since the Nationwide Strike for Diversity in 1989 represent a clear break in the business as usual approach to pre-1989 hiring. But this clear break is invisible to recent hires, who may attribute their entry to the magnanimity of the legal academy, their own racial exceptionalism and/or unexplainable luck. Under any of these attributions, the significance of the political is obscured.