

## How Equality Became Elitist: The Cultural Politics of Economics from the Court to the “Nanny Wars”

*Martha T. McCluskey\**

### I. ECONOMICS AND CULTURE IN RIGHT-WING POLITICS

On the surface, the term “culture wars” appears to capture controversies over the “social” or “moral” order, not the economic order. But “free-market” economic ideology is a key hidden player on the right-wing team in the “culture wars.” In turn, the “culture wars” debate serves that free-market fundamentalism by deploying “morality” both to mask and to legitimate rising economic inequality and the upward redistribution of resources. By turning class into culture, and culture into class, as journalist Thomas Frank argues, Republicans made economic victimization a conservative cause in the 2004 presidential campaign.<sup>1</sup>

In the late-twentieth-century United States, the “culture wars” intensified along with the right’s power over government, media, culture, and academics. This rightward political movement advanced through two prongs, neoconservatism and neoliberalism, both of which have aimed to undo policies particularly associated with 1960s egalitarian and democratic reform movements. Neoconservatism focuses on culture—restoring traditional ideas of “morality,” “responsibility,” and “community.”<sup>2</sup> Neoliberalism focuses on economics—restoring traditional laissez-faire policies of “market efficiency” and “competitiveness.”<sup>3</sup>

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\* William J. Magavern Fellow and Professor of Law, State University of New York, University at Buffalo Law School.

<sup>1</sup> Thomas Frank, *Why They Won*, N.Y. TIMES, Nov. 5, 2004, at 31.

<sup>2</sup> PETER STEINFELS, THE NEOCONSERVATIVES: THE MEN WHO ARE CHANGING AMERICA’S POLITICS 53–63 (1979) (listing and explaining the key beliefs of neoconservatism).

<sup>3</sup> See LISA DUGGAN, THE TWILIGHT OF EQUALITY? NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY 10 (2003) (“Neoliberalism, a political label retrospectively applied to the ‘conservative’ politics of the Reagan and Thatcher regimes in the U.S. and Great Britain, rocketed to prominence as the brand name for the form of pro-corporate, ‘free market,’ anti-‘big government’ rhetoric shaping Western national policy and dominating international financial institutions since the

In the conventional view, neoconservatives are the primary opponents of the progressive side of the culture wars, with neoliberals as neutral—or even allies—on “social” questions. Although the divide between economics and culture sometimes splinters the right, this divide also creates two prongs that can work to strengthen the right’s grip on politics. By fueling the “culture wars,” the right helps deflect the problem of “class warfare” away from right-wing economic policies and onto egalitarian social policies.

From the Supreme Court to the mass media, the idea of the “culture wars” helps shift blame for elitism onto liberal attempts to disrupt traditional social hierarchies, shifting that blame away from conservative policies that widen both economic class divisions and “social” divisions based on race, gender, sexuality, disability, and religion. For example, Justice Scalia characterized the Court’s equal protection ruling in *Romer v. Evans*<sup>4</sup> as a decision to take the elite side in the “culture wars,” describing it as part of a pattern where the “lawyer class” protects its right to hand out jobs on the basis of country club membership but refuses to allow the non-elite majority to protect their “traditional sexual mores” against homosexuality.<sup>5</sup> Thomas Frank describes this construction of a cultural elite as a right-wing strategy for seducing “Middle America” into sacrificing its economic interests for illusory “cultural” power:

*Vote* to stop abortion; *receive* a rollback in capital gains taxes. *Vote* to make our country strong again; *receive* deindustrialization. *Vote* to screw those politically correct college professors; *receive* electricity deregulation. . . . *Vote* to strike a blow against elitism; *receive* a social order in which wealth is more concentrated than ever before in our lifetimes, in which workers have been stripped of power and CEOs are rewarded in a manner beyond imagining.<sup>6</sup>

In response to the often regressive impact of the “culture wars,” some opponents of right-wing politics advocate turning from culture to economics as the key to reviving progressive law and politics. Progressive legal scholarship in the United States has echoed left-wing activists’ history of frequently dividing over the relative importance of class politics versus “identity politics.”

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early 1980s.”); Enrique R. Carrasco & M. Ayhan Kose, *Income Distribution and the Bretton Woods Institutions: Promoting an Enabling Environment for Social Development*, 6 *TRANSNAT’L L. & CONTEMP. PROBS.* 1, 5 n.15 (1996) (explaining that neoliberal policies are based on an idea of growth led by the private sector, a political focus on trade liberalization, and minimal state intervention in the market).

<sup>4</sup> 517 U.S. 620 (1996).

<sup>5</sup> *Id.* at 652–53 (Scalia, J., dissenting).

<sup>6</sup> THOMAS FRANK, *WHAT’S THE MATTER WITH KANSAS: HOW CONSERVATIVES WON THE HEART OF AMERICA* 7 (2004).

Recently, for example, some have suggested that progressive law reform efforts should turn their focus from “culture” to “economics”: promoting, for instance, universal health insurance instead of gay marriage;<sup>7</sup> class-based rather than race-based affirmative action in higher education;<sup>8</sup> or funding for public education rather than rights for students with learning disabilities.<sup>9</sup>

But others have responded to the right wing’s success in mobilizing cultural politics on behalf of elitist economic policies by resisting, rather than reinforcing, the class versus culture divide. Challenging liberal and leftist critics of “identity politics,” Lisa Duggan argues:

Neoliberalism was constructed in and through cultural and identity politics and cannot be undone by a movement without constituencies and analyses that respond directly to that fact. Nor will it be possible to build a new social movement that might be strong, creative, and diverse enough to engage the work of reinventing global politics for the new millennium as long as cultural and identity issues are separated, analytically and organizationally, from the political economy in which they are embedded.<sup>10</sup>

For years, activists and scholars focusing on the Global South have astutely and actively resisted right-wing social and economic policies by treating them as interdependent. For feminists focusing beyond North America and Europe, international finance, trade, and economic development policy have long been high on the agenda, so that questions of gender, sex, and family are questions of global economics as well as of culture and identity.<sup>11</sup> Gayatri Spivak, for example, critiques the erasure of economics from cultural politics and cultural studies, but also warns against the old economic determinism that ignores the cultural politics of economics—such as the fact that women form much of the international surplus army of labor in the contemporary global economy.<sup>12</sup> LatCrit scholarship has

<sup>7</sup> See, e.g., Judith Butler, *Can Marriage Be Saved: A Forum*, THE NATION, July 5, 2004.

<sup>8</sup> See, e.g., RICHARD KAHLENBERG, THE REMEDY: CLASS, RACE AND AFFIRMATIVE ACTION 147–52 (1996).

<sup>9</sup> See Mark Kelman & Gillian Lester, *Ideology and Entitlement*, in LEFT LEGALISM/LEFT CRITIQUE 134 (Wendy Brown & Janet Halley eds., 2002).

<sup>10</sup> DUGGAN, *supra* note 3, at 3 (emphasis omitted).

<sup>11</sup> See, e.g., PAYING THE PRICE: WOMEN AND THE POLITICS OF INTERNATIONAL ECONOMIC STRATEGY (Mariarosa Dall Costa & Giovanna F. Dalla Costa eds., 1993).

<sup>12</sup> See Gayatri Chakravorty Spivak, IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS 166–68 (1988); see also Gayatri Chakravorty Spivak, A CRITIQUE OF POSTCOLONIAL REASON: TOWARD A HISTORY OF THE VANISHING PRESENT 397–99 (1999)

been a particularly rich source of discussions of the connections between free-market economic policies and ideologies of race, gender, and nationality.<sup>13</sup> Elizabeth Iglesias, for example, views neoliberal policies as reinforcing the anti-democratic hierarchies of colonial and neocolonial market structures.<sup>14</sup>

## II. ECONOMICS AND CULTURE IN LAW

Nonetheless, the connections between neoliberalism and neoconservatism often remain obscure, partly because the divide between economic politics and cultural (or identity) politics is deeply embedded in the broader ideology of classical liberalism that grounds mainstream United States jurisprudence and policy analysis (whether politically “liberal” or “conservative”).<sup>15</sup> In this scheme, laws

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(discussing how multinational capitalism serves neocolonialism but also how liberal multiculturalism can reinforce a neocolonial and neoliberal world order that combines economic inequality with gender and racial inequality).

<sup>13</sup> See, e.g., Fran Ansley, *Borders*, 78 DENV. U. L. REV. 965 (2001) (discussing ideology of Latina/o subordination in “free trade” policies between the United States and Mexico); Enrique R. Carrasco, *Law, Hierarchy and Vulnerable Groups in Latin America: Towards a Communal Model of Development in a Neoliberal World*, 30 STAN. J. INT’L L. 221 (1994); Elizabeth M. Iglesias, *Global Markets, Racial Spaces, and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, 45 VILL. L. REV. 1037 (2000) (exploring the relationships between economic ideology and policy and racial subordination in examples involving the United States, Peru, and the World Bank); Tayyab Mahmud, *Postcolonial Imaginaries: Alternative Development or Alternatives to Development*, 9 TRANSNAT’L L. & CONTEMP. PROBS. 25 (1999) (showing that ideas about economic development inevitably implicate racial ideology); Chantal Thomas, *Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development*, 9 TRANSNAT’L L. & CONTEMP. PROBS. 1 (1999) (discussing how critical race theory’s critique of liberal legalism applies to the context of economic liberalism); Chantal Thomas, *Globalization and the Reproduction of Hierarchy*, 33 U.C. DAVIS L. REV. 1351 (2000) (discussing examples of how “free market” policies involve government shaping of markets in ways that create or perpetuate racial hierarchies); Donna E. Young, *Working Across Borders: Global Restructuring and Women’s Work*, 2001 UTAH L. REV. 1 (discussing how ideas about race and gender shape the global market in women’s domestic labor).

<sup>14</sup> See Elizabeth M. Iglesias, *Human Rights in International Economic Law: Locating Latinas/os in the Linkage Debates*, 28 U. MIAMI INTER-AM. L. REV. 361, 384 (1997); see also Elizabeth M. Iglesias & Francisco Valdes, *LatCrit at Five: Institutionalizing a Postsubordination Future*, 78 DENV. U. L. REV. 1249, 1312 n.168 (2001) (discussing “postcolonial neoliberalism” as “the inter/national [sic] economic policies and global political economy that impose ‘free’ markets on diverse societies for the benefit of corporate profits, oftentimes subjugating humans to exploitation and poverty, based on colonial and neocolonial histories and legacies”).

<sup>15</sup> DUGGAN, *supra* note 3, at 4–11. Not to be confused with “liberal” as opposed to “conservative” policies, the general political philosophy of classical liberalism imagines a public sphere separate from the market and family, with government’s authority derived from autonomous public citizens. “Liberal” and “conservative” policies represent positions along a continuum within this ideology; these positions

regulating race, gender, religion, family form or sexual orientation are primarily about the social or moral order. In contrast, laws regulating business, jobs and international finance are about the economic order.

In the mainstream view, questions of law and economics require understanding market forces that are at least partly separable from culture and ideology. The well-funded law and economics school of thought purports to emphasize free contract, distinct from ascribed status, and to evaluate policies through mathematical calculations of costs and benefits, distinct from religious or moral judgments.<sup>16</sup> The conventional wisdom assumes that questions of “economic efficiency” (at least in theory) involve objective, scientific, universal principles conducive to national and international harmonization in the interest of all.<sup>17</sup> In contrast, the conventional wisdom assumes “cultural” issues in law generally involve subjective, inevitably contested moral questions that cannot be resolved without privileging the beliefs of some people over those of others.

This mainstream view not only divides economics from cultural politics, but often helps present this divide as a hierarchy that privileges the role of law in promoting “markets” and marginalizes the role of law in producing and remedying race, gender, sexual, religious, or disability subordination. This scheme reflects and reinforces a political climate where policies promoting social *equality* get ridiculed as “political correctness,” but policies promoting economic *inequality* get taken seriously as “economic correctness” (in the pseudo-scientific guise of “efficiency”).<sup>18</sup>

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differ over how to apply classical liberalism—where to draw the lines separating state from family, for example. *See id.* at 6–7.

<sup>16</sup> *See, e.g.*, ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 3–23 (2d ed. 1997) (portraying economic analysis of law as a scientific and mathematical approach to evaluating policies).

<sup>17</sup> The idea of objective “efficiency” separate from subjective “equity” was a product of the political and historical effort to legitimate neoclassical economics as a science, but in practice the distinction between efficiency and equity can only be made based on faith or politics, not science. *See* Martha McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 *IND. L.J.* 783, 788–89 & nn.16–21 (2003) [hereinafter McCluskey, *Efficiency and Social Citizenship*].

<sup>18</sup> For a detailed analysis of how “efficiency” is a political strategy rather than a scientific concept, and that it is impossible to objectively distinguish it from its supposed opposite, “equity,” see Martha T. McCluskey, *The Illusion of Efficiency in Workers’ Compensation “Reform”*, 50 *RUTGERS L. REV.* 657, 716–50 (1998); *see also* Martha T. McCluskey, *The Politics of Economics in Welfare Reform*, in *FEMINISM CONFRONTS HOMO ECONOMICUS* (Martha A. Fineman & Terence Dougherty eds., forthcoming 2005) (analyzing how the idea of “economic correctness” shaped the welfare reform debate).

Recall *Plessy v. Ferguson*,<sup>19</sup> the infamous 1896 opinion that authorized more than a half-century of American apartheid by upholding a state law requiring railroad cars to be divided into “white” and “colored” sections.<sup>20</sup> By concluding that this racial segregation was a “social” matter,<sup>21</sup> outside of the state or market, the Supreme Court was able to dismiss the resulting racial inequality as too contingent and personal to be a serious constitutional problem. In the Court’s view, racial segregation is only a badge of inferiority if “the colored race chooses to put that construction upon it.”<sup>22</sup> At the same time, by describing the racial inequality as “social,” the Court was able to portray it as too essential and inevitable to be susceptible to legal intervention. *Plessy* depicted the racial segregation in question as driven by natural physical differences, “racial instincts,” and “general sentiment”—forces that the law is “powerless to eradicate.”<sup>23</sup> The Court assumed that “social” equality must await changes in “natural affinities” free from judicial intervention.<sup>24</sup>

A century or so later, Justice Scalia makes similar moves when he divides culture from political and economic rights in *Romer v. Evans*<sup>25</sup> and *Lawrence v. Texas*.<sup>26</sup> By describing those cases as battles in a “culture war,” Justice Scalia shifts the focus from government subordination to private preference and personal taste. For example, in his *Lawrence* dissent, Justice Scalia describes the majority’s decision to strike down Texas’ sodomy law as a product of “law-profession culture,” which is driven by a “homosexual agenda,”<sup>27</sup> and as a decision to “[take] sides in the culture war” beyond the Court’s proper role of making sure “that the democratic rules of engagement are observed.”<sup>28</sup> Like the Court’s opinion in *Plessy*, Justice Scalia’s invocation of culture makes the inequality appear too contingent but at the same time too fixed and universal to be amenable to

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<sup>19</sup> 163 U.S. 537 (1896).

<sup>20</sup> *Id.* at 552.

<sup>21</sup> *Id.* at 544, 551.

<sup>22</sup> *Id.* at 551.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See 517 U.S. 620, 636 (1996) at 636 (Scalia, J., dissenting) (characterizing Colorado’s constitutional amendment banning antidiscrimination protection for gay men or lesbians as an issue of “Kulturkampf” not prejudice).

<sup>26</sup> See 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (admonishing the Court for having departed from the role of “neutral observer” and for having “taken sides in the culture war” in its decision to strike down a Texas law criminalizing same-sex sodomy).

<sup>27</sup> *Id.* (Scalia, J., dissenting).

<sup>28</sup> *Id.* (Scalia, J., dissenting).

constitutional redress. Justice Kennedy's majority opinions in both *Romer* and *Lawrence*, in contrast, echo Justice Harlan's dissent in *Plessy* by linking the state laws at issue to questions of broad and systemic political, legal, and market power.<sup>29</sup> Likewise, concurring in *Lawrence*, Justice O'Connor notes the impact of the criminalization of same-sex sodomy on employment, housing, and family rights.<sup>30</sup>

By turning caste into culture, the reasoning in the *Plessy* majority and in Justice Scalia's dissents serves right-wing economic as well as cultural politics. It is true that "free market" advocates' anti-government ideology may lead some to reject Justice Scalia's (and *Plessy*'s) embrace of government-imposed "culture." But those libertarians concerned with minimizing government control of economic elites likely will find plenty to celebrate and support in Justice Scalia's (if not *Plessy*'s) construction of a cultural realm that can take the blame for problematic political economies away from both government and market. Both the "free market" and cultural branches of the right wing often work together to gain from (and finance) an overarching message that construes individual freedom primarily as government deference to a romanticized idea of nineteenth-century tradition in both "culture" and "market."<sup>31</sup>

In contrast, opponents of right-wing cultural politics tend to define individual freedom as the ability to express "cultural" preferences without restraint from external authority, whether majoritarian, paternal, natural, or supernatural. But that view of cultural liberalism often appears to present a tough trade-off for progressives. Social equality seems to require *protecting* individual freedom in cultural matters. On the other hand, economic equality seems to require *restricting* individual freedom in market matters.<sup>32</sup> As a result, progressives tend to support freedom from government

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<sup>29</sup> Indeed, Justice Kennedy opened his opinion in *Romer* by quoting Justice Harlan's dissent in *Plessy*, saying that "the Constitution 'neither knows nor tolerates classes among citizens.'" *Romer*, 517 U.S. at 623 (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

<sup>30</sup> *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring).

<sup>31</sup> See, e.g., JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA 89–95 (1996) (describing how various conservative think tanks promoted welfare reform legislation); DANIEL YERGIN & JOSEPH STANISLAW, THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD 332 (1998) (quoting neoconservative Irving Kristol's remark that "around 1980, the free-market school of thought and the neoconservative school of thought fused").

<sup>32</sup> This conundrum is behind liberal jurisprudence's obsession with reconciling the post-*Lochner* constitutional rejection of economic rights with the Warren Court's constitutional embrace of other rights.

regulation in the interest of individual choice on cultural or moral issues, but to oppose what might seem to be a comparable individual freedom of choice on economic issues.

In short, that framework appears to give progressives a choice between, on the one hand, an old paternalistic order based on cultural status and coercion that includes economic protection, or, on the other hand, a new order based on contract and freedom in place of status that promotes individual economic risk and responsibility. For example, in the political and legal debate over the sodomy law challenged in *Lawrence*, progressives joined forces in the cultural wars with right-wing economic libertarians (such as the Cato Institute) to advocate for individual freedom from government regulation.<sup>33</sup> That coalition, however, risked lending strength to an ideology that makes eliminating the New Deal's economic egalitarianism the leading means to achieving greater "social" equality free from status markers of race, gender, and sexuality. The globalized free-market economy is another example of an apparent tough trade-off for progressives between cultural and economic equality. In the conventional wisdom, neoliberal free-trade policies risk greater economic inequality, but supposedly bring openness in culture, which dislodges traditional social stratification and moral regulation.<sup>34</sup> After the 2004 presidential election, some argued that Democrats can only advance progressive economic policies if they back off from supporting liberal moral policies (like gay marriage)<sup>35</sup>—recalling the earlier New Deal compromise that won economic security (for some) by acquiescing in the "social traditions"

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<sup>33</sup> See Brief of the Cato Institute as Amicus Curiae in Support of Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (U.S. 2003) (No. 02-102) (arguing that Texas' criminalization of same-sex sodomy violates constitutional privacy protections for consensual adult sexual activity), *available at* 2003 WL 152342.

<sup>34</sup> See, e.g., THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION 207-09* (1999) (providing anecdotes of how global capitalism expanded opportunities for some Middle Eastern women to escape restrictive religious, gender, and family traditions).

<sup>35</sup> See, e.g., Jonathan Freedland, *Soul Searching on the Left . . . and a softening of the right?: Democrats Can't Win Until Their Politics Are Born Again*, *GUARDIAN* (London), Nov. 6, 2004, at 24 (arguing that the Democrats will have to meet "red state" voters at least halfway on moral issues); Jesse Joynes, Letter to the Editor, *Christian Values Don't Fit with Democratic Party*, *ST. PETERSBURG TIMES* (FLA.), Nov. 6, 2004 (arguing, from his perspective as a low-income Christian "working man" who voted for Bush, that if the Democrats cannot adopt "Christian" values they should "abandon all social policy and go back to representing solely the economic interest of working people"), *available at* [http://www.sptimes.com/2004/11/06/Opinion/Christian\\_values\\_don\\_.shtml](http://www.sptimes.com/2004/11/06/Opinion/Christian_values_don_.shtml) (last modified Nov. 6, 2004).



of the old Southern Confederacy.<sup>36</sup>

But while the left agonizes over trade-offs between class politics and cultural politics, and between government intervention and personal freedom, the right works to have it both ways. The liberal idea of an inevitably tragic choice between individual freedom or government intervention is misleading, because it begs the questions of what government intervention (and on whose behalf) counts as individual freedom, and which individual rights are construed as government intervention—which in turn depend on the question of what counts as “public” and what counts as “private.” Identity and status—ideas about race and gender in particular—have long shaped the answers to those questions.

The right’s recent political successes have been facilitated by linking free-market ideology with neoconservative cultural ideas so that “individual freedom” gets associated with policies that promote both economic and social hierarchies in the popular imagination. The Olin Foundation, formed in 1977, has since “invested” \$50 million in law and economics scholarship as part of a broader “crusade” aimed at promoting “non-egalitarian” ideology, with the explicit purpose of creating cultural or moral, as well as economic change.<sup>37</sup> The rhetoric of economic libertarianism is saturated with references to cultural politics.<sup>38</sup> For instance, economic libertarians often use the phrase “the nanny state” to disparage “liberal” welfare and regulatory policies, thereby suggesting that freedom from government control is linked to the restoration of a “proper” hierarchy of gender, race, and class.<sup>39</sup> Economic libertarians and

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<sup>36</sup> See ROBERT C. LIEBERMAN, *SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE* (1998) (analyzing how New Deal social programs were structured to maintain white supremacy); Leon Wieseltier, *The Elect*, *NEW REPUBLIC*, Nov. 22, 2004, at 12 (“If this were 1960, Karl Rove would have arranged referenda on segregation.”).

<sup>37</sup> See WILLIAM E. SIMON, *A TIME FOR REFLECTION* 266–67, 272 (2004) (former longtime president of Olin Foundation describing its founding and its focus on law and economics as a vehicle for conservative change); WILLIAM E. SIMON, *A TIME FOR ACTION* 132 (1980) (explaining that economic issues are first and foremost moral-political issues); WILLIAM E. SIMON, *A TIME FOR TRUTH* 231 (1978) (explaining author’s philanthropic strategy, implemented in the Olin Foundation, to redirect wealthy capital owners’ money from general support for academic institutions toward scholarship specifically legitimating anti-egalitarian policies).

<sup>38</sup> See GEORGE LAKOFF, *MORAL POLITICS: WHAT CONSERVATIVES KNOW THAT LIBERALS DON’T* (1996) (describing how economic conservatism relies on rhetoric of a “strict father,” as opposed to the liberal “nurturing parent”).

<sup>39</sup> See, e.g., Myriam Marquez, *Florida Democrats Stuck with Kerry*, *ORLANDO SENTINEL*, Mar. 4, 2004, at A21 (criticizing presidential candidate John Kerry for advancing “nanny state” policies); Martha T. McCluskey, *Subsidized Lives and the Ideology of Efficiency*, 8 *AM. U. J. GENDER SOC. POL’Y & L.* 115, 150 (2000) (citing and criticizing use of the “nanny state slur”); WILLIAM E. SIMON, *A TIME FOR ACTION*, *supra* note 37, at

social conservatives work together through lavishly funded think tanks and law firms to challenge the welfare and regulatory states as government “intervention” that detracts from both personal and political strength.<sup>40</sup> For example, moral and economic arguments worked together to promote welfare reform as a problem of a “cycle of dependency” needing the solution of more “personal responsibility.”<sup>41</sup>

But when neoconservative cultural arguments threaten progressive economic policies, advocates of progressive policies do not need to make a tough trade-off between culture and class. Progressives can do more to reframe the debate about the “culture wars,” so that “social” inequality and “moral” questions no longer appear separate from the political economy, and so that economic equality no longer appears antithetical to cultural freedom.

### III. ECONOMICS AND CULTURE IN POPULAR CULTURE

Within a dominant ideological framework that divides the “social” and “political” from the “economic,” increased media attention to America’s economic inequality may nonetheless work to reinforce both neoconservative and neoliberal ideas and policies. As one example that might serve as a cautionary tale about the problems with this new focus on class conflict over cultural conflict, consider the cover story of the *Atlantic Monthly*’s March 2004 issue, *How Serfdom Saved the Women’s Movement: Dispatches from the Nanny Wars*.<sup>42</sup>

Author Caitlin Flanagan, who opens the essay with her own experience as a new mother balancing a baby and a writing career, discusses the limits of feminist efforts to reform the gendered structure of work and family. She summarizes writer Naomi Wolf’s approach to feminist motherhood: “She had wanted a revolution; what she got was a Venezuelan.”<sup>43</sup> Empathizing with Wolf, the author dismisses feminist debates about the gender politics of housework as

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22 (Olin Foundation leader outlining his political and philanthropic project of challenging “‘big mother’ down in Washington” who treats Americans like “self-indulgent infants who need a federal nanny to look after us at every waking moment”).

<sup>40</sup> STEFANCIC & DELGADO, *supra* note 31, at 83–95 (discussing how conservative support for restrictive welfare reform drew on both economic libertarian and corporate interests, as well as on cultural and religious conservatives, to demonize welfare and welfare recipients).

<sup>41</sup> See McCluskey, *Efficiency and Social Citizenship*, *supra* note 17, at 807–32.

<sup>42</sup> Caitlin Flanagan, *How Serfdom Saved the Women’s Movement: Dispatches from the Nanny Wars*, ATLANTIC MONTHLY, Mar. 2004, at 109.

<sup>43</sup> *Id.* at 126 (discussing NAOMI WOLF, MISCONCEPTIONS: TRUTH, LIES, AND THE UNEXPECTED ON THE JOURNEY TO MOTHERHOOD (2003)).

outdated and silly.<sup>44</sup> After all, Flanagan explains, neither she nor her husband have ever changed their own bedsheets.<sup>45</sup> In the author's view, ivory-tower feminist theory urges privileged young women to challenge the prevailing gender order,<sup>46</sup> but feminists in the real world instead ease the burdens of women's inequality by accepting and exacerbating class and race inequality.<sup>47</sup> The essay describes this development in feminism as a divine economic intervention. Like "magic" from a "fairy godmother," the "forces of global capitalism" delivered to the doors of affluent white American families an abundant supply of immigrant women of color eager to change diapers and clean toilets for low wages.<sup>48</sup>

The lesson of this *Atlantic Monthly* story is that feminists should give up their "fixation" with "ending the mommy wars" and promoting "work-life balance" in favor of attention to what the author suggests is the more "real and heart-rending struggle of poor women and children."<sup>49</sup> As the author explains it, professional-class mothers have no serious material complaints about gender oppression—since "we" can turn to the plentiful supply of immigrant Latina nannies and maids to do what she calls the "shit work" at "our" convenience and under "our" control.<sup>50</sup> Instead, the problems of "feminist working mothers" are simply a matter of inevitable tragic trade-offs between different choices for personal fulfillment: kids or career; and the moral angst of using race and class privilege to make that choice a bit less vexing.<sup>51</sup>

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<sup>44</sup> See *id.* at 113 ("[B]ecause of these petty, almost laughably low concerns—the unmade beds, the children with their endless questions, the crumbs and jelly on the counter, the tendency of a good fight over housework to stop the talking and the kissing and the, well, you know—one of the most profound cultural revolutions in American history came perilously close to running aground.").

<sup>45</sup> *Id.* at 111 (dismissing Alix Kates Shulman's 1970 essay on the marital division of household labor and adding that she and her husband also delegate to a nanny chores like scrubbing the bathtubs, dusting the bookcase, mopping the floors, and washing her sons' laundry).

<sup>46</sup> See *id.* at 126 (describing Naomi Wolf's questioning of "a foreordained hierarchy of class and gender" and her ideal of egalitarian parenthood as unrealistic dreams "formed while tripping across green New Haven quadrangles on her way to feminist-theory classes").

<sup>47</sup> See *id.* at 114 (describing the politics of racial and economic justice as personal moral "equivocations" that "simply evaporated").

<sup>48</sup> *Id.* at 113.

<sup>49</sup> *Id.* at 128.

<sup>50</sup> See *id.* at 126–27 (describing the author's own disillusionment at finding out motherhood and homemaking involved more than "lying on the couch reading and drinking coffee and talking on the telephone" before she found a nanny to restore her leisure).

<sup>51</sup> See *id.* at 128 (insisting that "an upper-middle-class woman" must suffer "agony")

However, this argument for turning moral or political concern from gender to class does not aim to get Naomi Wolf and similarly affluent white American women to follow or support their Latina sisters in revolution, or even in Venezuelan-style economic reforms.<sup>52</sup> To the contrary, the author criticizes feminist efforts to unite women across class lines as elitist fantasies: American mothers, she claims, want personal domestic servants, not universal public day care.<sup>53</sup> The author concludes that feminists should simply focus on getting affluent women to make the current status hierarchy work better by complying with the minimal legal rules for household help. Her solution? Pay those Social Security taxes, ladies!<sup>54</sup>

In contrast to Mary Romero's careful analysis of the complex interdependence of race, class, and gender oppression in the nanny trade,<sup>55</sup> Flanagan's essay frames the problem as liberalism's traditional trade-off between cultural politics and class politics. It presents gender equality as the reason for nannies' economic oppression (and mostly drops race out of the picture). In Flanagan's view, the movement of privileged women into the professional workplace, made possible by feminism, created the demand for low-wage domestic servants. With women's freedom to work outside the home

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and "anguish" if she is separated from her child and denied the chance to go to "Mommy and Me" classes," due to that mother's selfish and spoiled inability to accept that she cannot have it all).

<sup>52</sup> Venezuela, in particular, is currently an important site of political struggle between the free-market (neoliberal) economic approach promoted by the United States and a more progressive approach favoring increased funding for education, health, public utilities, housing, and agricultural development. See Silene Ramirez, *Venezuela Spurns IMF, Says Its Recipes Not Needed*, REUTERS, Apr. 25, 2004, available at [www.arena.org.nz/venimf.htm](http://www.arena.org.nz/venimf.htm); Brian Ellsworth, *The Oil Company as Social Worker*, N.Y. TIMES, Mar. 11, 2004, at W1 (describing how the Venezuelan government is using oil profits to fund programs benefiting the nation's impoverished majority contrary to the advice of the private multinational oil industry); see also Duncan Campbell, *Famous Names Speak Up for Chavez in Venezuela Poll*, GUARDIAN (London), Aug. 5, 2004, at 17 (reporting on statement of support from writers, academics, politicians, and artists around the world on behalf of Venezuelan President Hugo Chavez and his policies).

<sup>53</sup> See Flanagan, *supra* note 42, at 124–25 (asserting, "get a bunch of professional-class mothers together, and they will freely admit that day care sucks; get a nanny," and citing an advice book focusing on elite business school graduates).

<sup>54</sup> See *id.* at 128 (giving author's solution to "upper-middle-class working mothers[]" guilt); *id.* at 122–23 (criticizing arguments that Zoe Baird's failure to pay her nanny's Social Security taxes should not have been a barrier to Baird's appointment as Attorney General).

<sup>55</sup> See generally MARY ROMERO, MAID IN THE USA (2002); Mary Romero, *Nanny Diaries and Other Stories: Imagining Immigrant Women's Labor in the Social Reproduction of American Families*, 52 DEPAUL L. REV. 809 (2003); Mary Romero, *Unraveling Privilege: Workers' Children and the Hidden Costs of Paid Childcare*, 76 CHI.- KENT L. REV. 1651 (2001).

comes women's freedom to exploit workers and to be exploited as workers. The answer to this tough trade-off, the essay concludes, is to adjust the trade-off slightly: affluent working mothers should stop demanding even more independence and freedom from the costs of kids and family, and should instead support an expanded vision of domestic paternalism that includes better treatment of dependent servants.

But a closer reading of the story shows that the economic inequality it confronts is linked to continued political pressure for gender *inequality*, not only to demands for gender equality. It is not just feminist pressure for women to be equal economic actors in the workplace that fuels affluent women's demand for nannies, but also traditional gender, race, sex, and class-based ideas about domesticity and motherhood. The essay mentions two primary reasons affluent women reject professional day-care centers in favor of in-home nannies. First, nannies enhance affluent women's domestic authority in a way that maintains gendered separate spheres—the child is in the home, and the hired caregiver is like family.<sup>56</sup> Second, affluent women need nannies because their 24/7 professional jobs require that they hire caregivers who are also available to work long, unpredictable hours.<sup>57</sup>

Although the story claims that “serfdom saved the women's movement,”<sup>58</sup> it could also be read to support the conclusion that this domestic “serfdom” saved the patriarchy. Flanagan's story carefully excludes husbands and fathers from the picture she paints of child care and housework in the homes of the affluent, married, white women with whom she identifies, and she embraces without discussion the assumption that domesticity and parenthood are distinctly female responsibilities, passions, and agonies. Moreover, she identifies the feminist movement with white, professional, American women, erasing from view any consideration of, for example, feminist organizing by Latin American women who seek alternatives to migrant domestic labor.

Finally, Flanagan readily buries the evidence of racial hierarchy in the nanny trade under the rubric of economic class, which she in turn distances from more recent political struggles by using the perhaps quaint-sounding term of “serfdom.” If she had more boldly

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<sup>56</sup> See Flanagan, *supra* note 42, at 109.

<sup>57</sup> *Id.* at 124 (citing advice book for professional women noting that the need to spend time transporting a child to and from day care could be obviated by having an in-home nanny).

<sup>58</sup> *Id.* at 109.

concluded that not “serfdom” but “racism” or “white supremacy” saved the women’s movement, perhaps the essay would appear less cute and comfortable in its acquiescence in a hierarchical status quo. Although she notes that the nanny trade consists largely of white-skinned women hiring dark-skinned women, Flanagan fails to discuss whether affluent white Americans choose immigrant nannies over day care not just to conserve time, money, and sentimental attachment to at-home motherhood, but also to maintain and enhance a racialized division of domesticity, work, and power. As the ideology of affluent American womanhood changed to center on mother–child bonding in the late twentieth century,<sup>59</sup> and as domestic civil rights laws increased the economic power of some black American workers, American families largely replaced African American domestic servants with Latina women.<sup>60</sup> Studies of the nanny trade report a recent tendency among white affluent Americans to romanticize the maternal qualities of Latina immigrant women and to identify them with a simple, loving, and docile peasant culture.<sup>61</sup>

When Flanagan reports that “you can take your pick” of nannies available to immediately start caring for your child, she notes that the current casualness with which nannies are traded among affluent families reflects “slaveholding traditions.”<sup>62</sup> She discusses this commodification as a gender problem devoid of racial ideology. She worries that the nanny trade threatens the affluent woman’s identity as a mother (even as it reinforces it) because the mother risks selling part of her baby’s love when she buys a nanny’s care.<sup>63</sup> Dorothy Roberts, however, explains that the ideology of American

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<sup>59</sup> See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 36 (2000) (noting how both unpaid mothers and paid domestic servants in the 1930s and 1940s focused their work on maintaining the home rather than on entertaining or educating children).

<sup>60</sup> See Barbara Ehrenreich & Arlie Russel Hochschild, *Introduction* to GLOBAL WOMAN: NANNIES, MAIDS AND SEX WORKERS IN THE NEW ECONOMY 1, 6 (Barbara Ehrenreich & Arlie Russel Hochschild eds., 2002) (reporting that sixty percent of domestics were African Americans in the 1940s but that a majority now are Latina and many are foreign-born).

<sup>61</sup> See Arlie Russell Hochschild, *Love and Gold*, in GLOBAL WOMEN, *supra* note 60, at 15, 23–25 (showing that this maternalism is not a natural cultural trait of certain immigrant groups, but is constructed in response to the demands of affluent American families); see also RHACEL SALAZAR PARRENAS, SERVANTS OF GLOBALIZATION: WOMEN, MIGRATION AND DOMESTIC WORK 177–79 (2001) (discussing the intersection of race and class differences in the demand for black, Filipina, and Latina domestic labor).

<sup>62</sup> Flanagan, *supra* note 42, at 127.

<sup>63</sup> *Id.* at 127–28.

motherhood has long relied on and reproduced a racial division of labor in which “menial” mothering work is identified with dark-skinned women and “spiritual” mothering with white women.<sup>64</sup> Flanagan describes her own decision to enlist a nanny to fulfill her dreamy ideal of at-home mothering as a crisis of her own sense of entitlement to be free from what she considers menial work.<sup>65</sup> “Wasn’t I designed for more important things than putting away Lego blocks and loading the dishwasher? I was. It was time. *Cherchez la femme.*”<sup>66</sup> The story is softened with self-deprecating irony that makes it easier for Flanagan to trivialize the question of whether the sense of privilege that incited her nanny search was simply a “feminist-type, really cheesed-off kind of funk” or also a feeling of white racial entitlement.<sup>67</sup>

The essay’s misleading focus on *gender equality* as the central cause of nannies’ *economic inequality* ironically undermines its call for more attention to class oppression. This “nanny wars” essay turns economic equality from a public policy issue into a personal moral problem. The author presents affluent women’s demand for more child-care support from employers or the government as selfish whining or foolish idealism driven by elite academic culture or individual character, divorced from politics or economics. Following this premise, the author concludes that the solution to the child care problem is not subsidized day care but a little more self-sacrifice, empathy, and charity from affluent women toward the less privileged “others” whose domestic services they employ. That answer, however, reinforces the economic and racial inequality it claims to redress by affirming affluent white women’s entitlement to exercise their benevolent authority as the best way to ease the inevitable burdens on struggling subordinate “others.” The essay ignores the question of whether the specific small step it proposes—increased compliance with Social Security tax laws—requires going beyond the moral sentiments of privileged women to include structural or public measures such as stronger government enforcement of tax and labor regulations or reforms in immigration laws that would give migrating workers more bargaining power over job benefits.

By criticizing the “nanny wars” as a cultural battle apart from economic and political conflicts, the essay takes the heat off class

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<sup>64</sup> See generally Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51 (1997).

<sup>65</sup> Flanagan, *supra* note 42, at 126.

<sup>66</sup> *Id.* at 127.

<sup>67</sup> *Id.*

politics. Its discussion of class obscures from view the self-interested actions of fathers, wealthy capital owners, shareholders and directors of global corporations, or politicians who shape international financial institutions, putting off the table any possibility of their moral obligations and responsibility to sacrifice some gains for the well-being of others. Affluent mothers—along with the feminist academics or writers who try to influence them—are the only moral agents in the story. Employers' demands for more profit or for workers available eighty hours a week, for instance, are taken for granted as natural forces, not selfish interests.

The *Atlantic Monthly* essay depicts the nanny's economic disadvantages as natural, inherent in her status as a racialized other who appears to have no right or power to make her own demands for better choices about balancing work and family. Instead, the nanny seems to be a commodity passively imported by the international economy to save the affluent American family. And conversely, the author's fairy godmother explanation of how affluent white, heterosexual, American families got "their" nannies seems to ground those families' race and class privileges in divine right. By depicting this economic inequality as a force beyond the reach of human politics, this narrative makes affluent Americans' moral obligations seem limited to personal decisions to obey the tax laws, rather than public actions to oppose the neoliberal policies of structural adjustment and privatization that impoverish so many Latin American women.<sup>68</sup> And by suggesting that economic disadvantage is a mysterious attribute of racialized others, rather than a government strategy that enriches wealthy capital owners at the expense of most workers, this narrative helps prevent affluent American women from considering how neoliberal policies can also put them at risk. After all, some of their nannies were also formerly middle-class mothers and wives with professional careers.<sup>69</sup>

Flanagan's essay fills an important gap in mainstream media discussions of feminism by highlighting the class and race bias of many well-publicized commentators on motherhood. But by

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<sup>68</sup> On neoliberal structural adjustment policies as a source of international poverty, see MICHEL CHOSSUDOVSKY, *THE GLOBALISATION OF POVERTY: IMPACTS OF IMF AND WORLD BANK REFORMS* (1997). On the impact of neoliberal economic policies on women, see *THE STRATEGIC SILENCE: GENDER AND ECONOMIC POLICY* (Isabella Bakker ed., 1994); CHRISTA WICHTERICH, *THE GLOBALIZED WOMAN: REPORTS FROM A FUTURE OF INEQUALITY* 97–128 (2000).

<sup>69</sup> See Hochschild, *supra* note 61, at 16–18 (noting that Filipina women working as nannies in the United States tend to have professional training and job experience in fields such as nursing, teaching, and administration).



opposing class oppression to gender politics, the essay joins these writers in taking broader questions of political economy out of gender politics. Flanagan reinforces neoliberal economic ideology by making class inequality appear to be primarily a matter of culture, rather than of law and policy. Why is it that mainstream American popular media represents feminists as affluent white professionals who talk about the joys (or angst) of motherhood, instead of the evils of the International Monetary Fund (IMF); and that the prevailing images of Latinas portray them as domestic servants who don't talk much about either gender equity or the IMF?<sup>70</sup> Neoliberal policies promoting increasingly concentrated corporate control of the media are part of the explanation.<sup>71</sup>

#### IV. INTEGRATING ECONOMICS, POLITICS, AND CULTURE

The *Atlantic Monthly* essay, like much legal scholarship, treats the problem of economic inequality as a problem separate from the central mission of state and market. Ironically, the failure to challenge the liberal tradition dividing economics from culture and from the state helps to make class differences appear to be a problem of "culture." The market's presumed freedom from traditional status hierarchy or state-enforced moral prescriptions helps make economic inequality appear to be a problem of private preferences or personal character—and therefore relegated to "culture." Mainstream law and policy analysis wrongly treats economic inequality as a question of "redistribution," a moral question distinct from questions of economic efficiency or basic political rights.<sup>72</sup> The "Nanny Wars" essay reflects this framework by addressing economic class as a problem of personal charity or morality by the affluent toward those on the losing end of the global market's "magic."

To transform the class politics of the nanny wars in particular, or the cultural wars more generally, advocates of progressive economic policy will need to go further to challenge the economic and cultural ideologies that work in concert to present the privileges of current market winners as generally the result of neutral public policy,

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<sup>70</sup> See Melissa Block & Joel Rose, *New Report Says Characters on Prime Time Television Shows Remain Markedly Less Diverse Than the Nation as a Whole* (NPR radio broadcast, Apr. 21, 2004) (reporting on study by advocacy group, Children Now, finding that Latino and Latina characters on television are four times more likely than characters of other races to be portrayed as domestic workers).

<sup>71</sup> See C. EDWIN BAKER, *MEDIA, MARKETS AND DEMOCRACY* (2002) (analyzing impact of media deregulation and free trade on democracy and diversity).

<sup>72</sup> See McCluskey, *Efficiency and Social Citizenship*, *supra* note 17, at 787–88 (criticizing the distinction between efficiency and redistribution).

virtuous morality, and divine justice. Perhaps a progressive politics that integrates class and culture could strive to turn around the “nanny state” epithet, making the idea of “nannies” gaining real power in state, market, and family not ridiculous or dangerous but essential to democracy, freedom, and justice.