

## AFTERWORD

### **“We Are Now of the View”\*: Backlash Activism, Cultural Cleansing, and the Kulturkampf to Resurrect the Old Deal**

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#### INTRODUCTION

For the ninth time in as many years, LatCritters<sup>1</sup> met in 2004

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\* Chief Justice William Rehnquist, opining for the Court in *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Variations on this phrasing recur in backlash jurisprudence, as expressed by the current appointees to the Supreme Court of the United States, to effectuate the rights reversals and legal roll-backs sketched here.

\*\* Professor of Law and Director, Center for Hispanic and Caribbean Legal Studies, University of Miami. I thank the organizers, sponsors and participants of the LatCrit IX conference, upon which this symposium is based, and in particular the symposium contributors and law review editors whose work has created a lasting record of that stupendous conference. This Afterword should be read in conjunction with its counterpart in the Villanova Law Review, which published the other half of this symposium. Additionally this Afterword and its counterpart are in part based, and build, on previous efforts to analyze critically backlash kulturkampf as an overarching sociolegal phenomenon that necessarily frames the work of contemporary legal scholars. In particular, see *Culture, “Kulturkampf” and Beyond: The Antidiscrimination Principle Under the Jurisprudence of Backlash*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 271, 273-76 (Austin Sarat ed. 2004) and Afterword—*Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality and Responsibility In Social Justice Scholarship—Or, Legal Scholars as Cultural Warriors*, 75 DENVER U. L. REV. 1409 (1998). Finally, I dedicate this Afterword to Jerome Culp—friend and warrior—who passed away in February 2004; this LatCrit conference was the first he missed, and we in turn missed him dearly. As always, all errors are mine.

<sup>1</sup> The term “LatCrit” was coined at a 1995 colloquium, held in Puerto Rico, on the relationship of critical race theory to “Latina/o” communities. From that colloquium, the annual conferences then flowed. See Francisco Valdes, Foreword - *Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 2 HARV. LATINO L. REV. 1 (1997) (introducing the papers and proceedings of the first LatCrit conference). On the emergence of a “LatCrit” subject position, see Berta Esperanza Hernandez-Truyol, *Indivisible Identities: Culture Clashes, Confused Constructs and Reality Checks*, 2 HARV. LATINO L. REV. 199, 200-05 (1997); Kevin R. Johnson & George A. Martinez, *Crossover Dreams: The Roots of LatCrit Theory in Chicana/o Studies, Activism and Scholarship*, 53 U. MIAMI L. REV. 1143 (1999); cf. Margaret E. Montoya, *LatCrit Theory: Mapping Its Intellectual and Political Foundations and Future Self-Critical*

during the Cinco de Mayo weekend not only to help recall the unjust events of that day a century and a half ago, but also to center and challenge its continuing legacies in law and society.<sup>2</sup> These legacies live on in many forms and many ways, of course,<sup>3</sup> and this year, the

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*Directions*, 53 U. MIAMI L. REV. 1119 (1999). See also Elizabeth M. Iglesias & Francisco Valdes, Afterword - *Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas*, 19 CHICANO-LATINO L. REV. 503, 568-71 (1998) (discussing the choice of "LatCrit" as partly a political decision to identify as much as possible with people of color, indigenous people, and other traditionally subordinated groups in the construction of this new discourse and praxis).

Despite our common identification as LatCrits, this jurisprudential community, like "Latinas/os" and other social groups, is formed from a collection of "different" individuals. See Sylvia A. Marotta & Jorge G. Garcia, *Latinos in the United States in 2000*, 25 HISP. J. BEHAVIORAL SCI. 13 (2003) (presenting a contemporary portrait); Luis Angel Toro, "A People Distinct from Others": *Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 TEXAS TECH. L. REV. 1219 (1995) (critiquing the ramifications of the current labeling system in the United States, which "lumps together all people who can connect themselves to some "Spanish origin or culture" together as "Hispanics"); Oscar Gonzalez, et al., *History and Public Policy: Title VII and the Use of the Hispanic Classification*, 5 LA RAZA L. J. 1 (1992) (discussing federal adoption of the "Hispanic" label and critiquing the conglomeration of the Spanish-Hispanic-Latina/o labels into a single identity category).

<sup>2</sup> See Symposium, *Understanding the Treaty of Guadalupe Hidalgo on Its 150th Anniversary*, 5 S.W.J.L. & TRADE AM. 1 (1998) (reviewing the treaty by which the United States annexed Mexican lands and persons, and the treaty's violation since then).

<sup>3</sup> During the past nine years, LatCrit scholars have produced nearly twenty law review symposia in which we explore the manifold ways in which these colonial and neocolonial legacies continue to deform law and society. The LatCrit symposia, including those not based on subsequent conferences or colloquia, include Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997) (LatCrit I); Colloquium, *International Law, Human Rights and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177 (1997) (publishing the proceedings of the first LatCrit colloquium focused on international law); Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 CHICANO-LATINO L. REV. 1 (1998) (LatCrit II); Symposium, *Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory*, 53 U. MIAMI L. REV. 575 (1999) (LatCrit III); Symposium, *Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections*, 33 U.C. DAVIS L. REV. 751 (2000) (LatCrit IV); Colloquium, *Spain, The Americas and Latino/as: International and Comparative Law in Triangular Perspective*, 9 U. MIAMI INT'L. & COMP. L. REV. 1 (2000-01) (publishing the proceedings of the first and second colloquia held in Malaga, Spain on LatCrit theory and international and comparative law); Symposium, *Class in LatCrit: Theory and Praxis in a World of Economic Inequality*, 78 DENV. U. L. REV. 467 (2001) (LatCrit V); Symposium, *Latinas/os and the Americas: Centering North-South Frameworks in LatCrit Theory*, 55 FLA. L. REV. 1 (2003), 54 RUTGERS L. REV. 803 (LatCrit VI); Symposium, *Coalitional Theory and Praxis: Social Justice Movements and LatCrit Community*, 13 LA RAZA L.J. 113 (2002), 81 U. OR. L. REV. 595 (2003) (LatCrit VII); Symposium, *City and Citizen: Operations of Power, Strategies of Resistance*, 52 CLEV. ST. L. REV. 1 (2004) (LatCrit VIII). In addition to these conference-based publications, two joint LatCrit symposia also have been published during this time. See Joint Symposium, *LatCrit Theory:*

LatCrit IX conference theme beckoned our critical collective attention toward “*Countering Kulturkampf Politics Through Critique and Justice Pedagogy*.”<sup>4</sup> With this year’s call and focus, the LatCrit IX conference invited all OutCrit scholars and friends to train attention on the retrogressively synergistic consequences of kulturkampf on law and on society.<sup>5</sup> In other words, to critically consider the consequences of reaction and retrenchment to our communities, aspirations, profession and, even, to our lives.

In response, the contributors to this symposium<sup>6</sup> have covered a wide range of issues regarding both the culture wars and the value of social justice pedagogies as an act of resistance to their ideological and political pressures.<sup>7</sup> As a set, the symposium authors have

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*Latinas/os and the Law*, 85 CAL. L. REV. 1087 (1997), 10 LA RAZA L.J. 1 (1998); Joint Symposium, *Culture, Language, Sexuality and Law: LatCrit Theory and the Construction of the Nation*, 5 MICH. J. RACE & L. 787 (2000), and 33 U. MICH. J.L. REFORM 203 (2000).

<sup>4</sup> To view the LatCrit IX Call for Papers, please visit the LatCrit website <http://www.latcrit.org>.

<sup>5</sup> OutCrit positionality is framed around the need to confront in collective and coordinated ways the mutually-reinforcing tenets and effects of two sociological macro-structures that currently operate both domestically and internationally: Euroheteropatriarchy and neoliberal globalization. Therefore, among them are the legal scholars who in recent times have pioneered the various strands of outsider critical jurisprudence—OutCrits. For further discussion of this designation, see Francisco Valdes, *Outsider Scholars, Legal Theory and OutCrit Perspective: Postsubordination Vision as Jurisprudential Method*, 49 DEPAUL L. REV. 831 (2000) (discussing the relationship between Euroheteropatriarchy and OutCrit theory and praxis). The term “outsider jurisprudence” was first used by Professor Mari J. Matsuda. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2323 (1989). LatCrit theory is one strand in outsider jurisprudence, along with critical race theory, critical race feminism, Asian American scholarship, and Queer legal theory. See generally Francisco Valdes, *Afterword - Theorizing “OutCrit” Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265 (1999) (drawing lessons for LatCrit from the experiences of other outsider efforts, principally those of RaceCrits and QueerCrits).

<sup>6</sup> The LatCrit IX symposium is a joint publication of this law review and the Villanova Law Review. Each journal is publishing different “clusters” of essays defined thematically based on the proceedings of the LatCrit IX conference. To view past symposia, visit the LatCrit website at <http://www.latcrit.org>.

<sup>7</sup> These contributions include the uses of various familiar identity axes, such as race, gender, sexuality and class, to define and wage backlash kulturkampf. See, e.g., Carla D. Pratt, *Tribal Kulturkampf: The Role of Race Ideology in Constructing Native American Identity*, 35 SETON HALL L. REV. 1241 (2005); Martha T. McCluskey, *How Equality Became Elitist: The Cultural Politics of Economics from the Court to the “Nanny Wars,”* 35 SETON HALL L. REV. 1291 (2005). Looking to the outgroup communities from which we hail and for whom we labor, the symposium contributions also examine cultural warfare, as well as oppositional practices, in various local settings. See, e.g., Anita Revilla, *Raza Womyn Mujerstoria*, 50 VILL. L. REV. 799 (2005); Victor Romero, *Rethinking Minority Coalition Building: Valuing Self-Sacrifice, Stewardship and Anti-Subordination*, 50 VILL. L. REV. 823 (2005); Antonia Darder, *Schooling and the*

brought to us this new cross-disciplinary resource of substantive and pedagogical knowledge to help comprehend and combat the ways in which this neocolonial cultural warfare seeks to degrade our identities, communities, principles and, even, our work.

This Afterword<sup>8</sup> now closes this year's conference-based LatCrit symposium with a similar focus on the sociolegal phenomenon centered in this year's theme: the causes and consequences of the backlash kulturkampf. This macro-phenomenon, which has come to dominate law and policy during the past two or so decades, has framed and informed the emergence and evolution of LatCrit theory during the past nine years, as well as that of critical outsider jurisprudence—or OutCrit—theories and efforts more generally. This macro-phenomenon also has framed and informed the emergence and evolution of backlash jurisprudence. Both of these broad jurisprudential developments—the emergence of OutCrit and backlash versions of post-liberal jurisprudence—employ the liberal legacies of latter part of the twentieth century; both use the liberal legacy of formal equality as the point of departure: backlashers insist the legacy must be rolled back while OutCrits demand it be made more socially relevant.<sup>9</sup> But these twin jurisprudential developments have not met with the same reception: the past two decades or so have witnessed backlash scholars systematically plucked from the legal academy (and other arenas) by backlash politicians to enact their opinions into Law through the judicial power of the federal government,<sup>10</sup> while outsider scholars continue to elaborate a post-

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*Empire of Capital: Unleashing the Contradictions*, 50 VILL. L. REV. 847 (2005). Looking beyond the United States, these accounts additionally include national as well as international and transnational analyses of cultural warfare in various sociolegal frameworks. See, e.g., Angel Oquendo essay; Maria Clara Dias essay; Martin Saavedra essay; Gil Gott essay; Berta Hernandez essay. And, finally, looking into our own profession—the professorate—these accounts similarly delve into the academic culture wars, and their significance to our work. See, e.g., Mary Romero essay; Imani Perry essay; Alicia Alvarez essay; Sylvia Lazos essay; Fran Ansley & Cathy Cochran essay; Natasha Martin essay; Nelson Soto essay.

<sup>8</sup> The companion to this Afterword, which appears in the portion of the LatCrit IX symposium being published by the Villanova Law Review, should be read in tandem with the analysis outlined below. See *supra* note 6; see also Francisco Valdes, Afterword—*Culture by Law: Backlash as Jurisprudence*, 50 VILL. L. REV. 1135 (2005) [hereinafter *Culture by Law*]. In addition, and as noted below, this summary sketch builds on earlier works that collectively aim to make sense of the culture wars and their jurisprudential dimensions.

<sup>9</sup> Francisco Valdes, *Culture, "Kulturkampf" and Beyond: The Antidiscrimination Principle Under the Jurisprudence of Backlash*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 271, 273-76 (Austin Sarat ed. 2004) (discussing the sociolegal legacies of Twentieth Century liberalism) [hereinafter, *Antidiscrimination*].

<sup>10</sup> Notable exemplars are Antonin Scalia and Robert Bork, plucked from the law

subordination social vision (chiefly) from within the legal academy.<sup>11</sup>

In pursuit of this basic objective and agenda, as elaborated below, backlashers presently in control of the federal courts use the very “judicial review” power that, as a jurisprudential camp, they most denounce—and in precisely the selectively “activist” ways that they denounce most loudly—to upset the legislative choices made through the “democratic” process.<sup>12</sup> At the same time, outsider scholars have continued to experiment with traditional and nontraditional methods of scholarship to elucidate a socially just society under the antisubordination principle,<sup>13</sup> thereby providing a fundamentally different policy alternative to backlash and retrenchment—an alternative that will remain available to the nation when the furies of this kulturkampf have spent themselves, and when the nation may once again resume its fitful march away from the identity-based

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faculties of the University of Chicago and Yale University, respectively, to become judicial appointees. The former remains perched on the Supreme Court while the latter was appointed to the key Court of Appeals in the nation’s capital, where he enacted his opinions into law until his attempted appointment to the Supreme Court under President Reagan was defeated. Bork’s attempted appointment and defeat were undertaken, and have been understood, as a key skirmish of the culture wars. *See generally* NORMAN VIERA & LEONARD GROSS, *SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS* (1998).

<sup>11</sup> For a collection of examples, see *CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY* 379 (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds. 2002).

<sup>12</sup> For an illustrative sketch of some examples *see generally infra* Part II; *see also infra* notes 89-91 and accompanying text.

<sup>13</sup> The antisubordination principle is generally associated with critical outsider jurisprudence, although its initial articulation originates with Owen Fiss. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 J. PHIL. & PUB. AFFAIRS 107 (1976). In both its original articulation and its OutCrit elaboration, the antisubordination principle is conceived as a jurisprudential honing of the antidiscrimination principle in order to “get at” the social problems associated with domination and subjugation. *See* Paul Brest, Foreword—*In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976) (articulating the principle and reviewing the Supreme Court’s elaboration and application of it). The antidiscrimination principle, as interpreted in the form of formal equality, was made “blind” to the social and conceptual asymmetries between domination and subjugation, and was likewise made to regard all kinds of “discrimination” as equal, and equally suspect. This construction of antidiscrimination as remedial law and policy thus failed to distinguish between remedial and invidious forms of “discrimination,” which in turn enabled notions of “reverse discrimination” that were used effectively to halt race-conscious remedial state actions tailored to similarly race-conscious acts of invidious discrimination. *See infra* Part II. Under the antidiscrimination principle as thus applied, remedies to discrimination were transmuted into discrimination; the remedy became the problem because the problem was defined as “discrimination” and the cure “antidiscrimination” whereas the actual problem was and is subordination, and the cure thus must be tailored to antisubordination. *See generally* Jerome M. Culp, Jr., et al., *Subject Unrest*, 55 STAN. L. REV. 2435 (2003) (discussing antidiscrimination and antisubordination).

structural injustices that punctuated its founding and have bedeviled it since. For the moment, however, social retrenchment through backlash jurisprudence, especially as elaborated by the five justices presently in control of the federal judicial power,<sup>14</sup> is a key part of these culture wars and their stated aims: the “take back” of civil rights and social multiculturalism by mandate of formal Law.

Thus, as recent sociolegal experience teaches—and as the LatCrit IX conference theme suggests—the recent history of social and legal backlash spanning the past several decades sketched below, during which claims of judicial activism have surfaced persistently, provides a rich backdrop to a national assessment of law, democracy, equality and justice in the United States.<sup>15</sup> The culture wars that have framed our jurisprudential endeavors and experiments provide a potentially rich source of insight to understand how and why our efforts (as well as those of the backlashes) have succeeded (or not), and to assess what may or should come next. As the conference theme notes, as the symposium contributors illustrate, and as this Afterword seeks to emphasize, the intersection of cultural warfare, critical scholarship and social justice education constitutes a timely—and perhaps increasingly so—site of investigation and action for *any* critical scholar of *any* stripe concerned with the use of law and policy to re/engineer social and material realities.<sup>16</sup>

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<sup>14</sup> Backlash jurisprudence, as the summary of some key highlights in Part II shows, reaches both into substantive and procedural fields of law to accomplish social retrenchment across wide bands of constitutional law, oftentimes in the name of tradition, democracy and federalism. The jurisprudential hard core of the “backlash bloc” leading this campaign of redirection from the Supreme Court consists of Antonin Scalia and Clarence Thomas, with the usually reliable complicity of William Rehnquist in firm control of the institutional powers and prerogatives of the Chief Justice. This bloc is completed by its two vacillating members, Sandra Day O’Connor and Anthony Kennedy, whose support is crucial to the operation of the bloc—and because their support vacillates, the bloc is unable to operate with the success and efficiency that the appointing executives had hoped to accomplish with each of these appointments. Nonetheless, each and every member of this bloc was appointed to power expressly as part of the backlashes’ roll-back agenda. When vacillating members of the bloc deviate from the script, they are excoriated by the other members for doing so. *See, e.g., Casey v. Planned Parenthood*, 505 U.S. 833, 944 (1992) (Scalia, J. dissenting). As their fifty-some 5-4 backlash opinions in the last decade of the twentieth century aptly illustrate, this quintet operates as a bloc often enough to single-handedly enact a constitutional “counter-revolution” congruent with the social and ideological agenda of the backlash politicians who installed them into power. For an illustrative sketch, *see infra* Part II.

<sup>15</sup> Indeed, in some ways the culture wars are a contestation precisely over the social and legal conceptions of these big-picture concepts. *See generally infra* note 17 and sources cited therein.

<sup>16</sup> Both outsider and backlash jurisprudence underscore the interactivity of Law and Society. Outsider jurisprudence focuses on social transformation through legal

Part I opens the Afterword with an overview of the culture wars' origins, as they built momentum in the second half of the last century in reaction to the social effects of New Deal and Civil Rights lawmaking legacies, and then outlines the three broad lines or prongs of attack through which the neocolonial social ideologies and identity-inflected cultural imperatives of this reactionary roll-back campaign have been largely pursued. Part II then provides a capsule critical sketch of some key rulings in recent culture war cases spanning various doctrinal categories, which jointly illustrate some of the substantive legal domains and key or recurrent interpretative techniques most salient in backlash jurisprudence. Part III concludes the Afterword and symposium with brief notes on the individual interventions, institutional reforms and collective insurrections that LatCrit and other OutCrit scholars do and should employ to combat this ongoing surge of reaction and retrenchment, both in the short and longer term, through critical scholarship, social justice pedagogies and other forms of antistatist praxis. This Afterword, in sum, aims to center the patterns and agendas of backlash kulturkampf, both in law and in society, in order to raise awareness and resistance of the interconnections that make this phenomenon extraordinary.<sup>17</sup>

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reformation while backlash jurisprudence engineers social retrenchment through legal retrenchment. The two are socially conscious, outcome-conscious. Both are concerned about the uses of law to construct culture, and the uses of culture to promulgate Law. See Valdes, *Antidiscrimination*, *supra* note 5.

<sup>17</sup> In the form of this Afterword, this mapping of origins, law and resistance is but a rough sketch—a sketch of illustrative highlights regarding the substance and method of backlash jurisprudence, and of its consequences, as part and parcel of the backlash kulturkampf sweeping through the United States today. This sketch builds on earlier efforts to articulate this phenomenon, and to underscore its relevance to the principles and projects that LatCrit and other OutCrit scholars do or should undertake. This Afterword is part of a larger work-in-progress elucidating backlash jurisprudence as part and parcel of the culture wars, which in turn builds on previous efforts. See Francisco Valdes, *Culture, "Kulturkampf" and Beyond: The Antidiscrimination Principle Under the Jurisprudence of Backlash*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 271 (Austin Sarat ed. 2004), (focusing broadly on three theoretical perspectives—backlash jurisprudence, liberal legalisms and critical outsider jurisprudence—to compare their approaches to equality law and policy); Francisco Valdes, *Warts, Anomalies and All: Four Score of Liberty, Privacy and Equality*, 65 *OHIO ST. L.J.* 1341 (2005) (focusing specifically on *Lawrence v. Texas* and generally on liberty-privacy as a central doctrinal terrain of social and legal retrenchment) [hereinafter *Four Score*]; Francisco Valdes, *Afterword—Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality and Responsibility in Social Justice Scholarship—Or, Legal Scholars as Cultural Warriors*, 75 *DENVER U. L. REV.* 1409 (1998) (focusing on the implications of cultural warfare for sexual orientation scholarship specifically, and for all OutCrit scholars generally) [hereinafter *Beyond Sexual Orientation*]. These works, in turn, inform and are informed by related concerns or issues that form part of my larger scholarly agenda. See Francisco Valdes, *Outsider*

It bears note at the outset that this Afterward proceeds from a critical appreciation of the alternative accounts proffered elsewhere to help explain the jurisprudential maneuvers and outcomes of the culture war rulings issued by backlash judges.<sup>18</sup> Those accounts and the one presented below diverge in sometimes marked ways because they emphasize the familiar aspects of legal indeterminacy and judicial discretion, whereas the account unfolded here aligns more closely with the recent research into the behavior of individuals appointed to be judges—research that examines whether those behaviors produce patterns of consistency between their personal ideological preferences, as manifested in pre-appointment statements or actions, and their post-appointment adjudicatory acts. This research, which has given rise to the “attitudinal model” for analyzing and gauging the influence of personal predilection in formally judicial acts, has documented a clear and stunning consistency in the convergence of political ideology and adjudicatory outcome—a convergence that effectively portrays a near-complete collapse of the idealized distinction between law or principle and politics or ideology.<sup>19</sup> This attitudinal model challenges the fictions maintained

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*Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education* 10 ASIAN L.J. 65 (2003) [hereinafter *Critical Legal Education*]; Francisco Valdes, *Identity Maneuvers in Law and Society: Vignettes of a Euro-American Heteropatriarchy*, 71 UMKC L. REV. 377 (2002); Francisco Valdes, *Insisting on Critical Theory in Legal Education: Making Do While Making Waves*, 12 LA RAZA L. J. 137 (2001); Francisco Valdes, *Race, Ethnicity and Hispanismo in Triangular Perspective: The “Essential Latina/o” and LatCrit Theory*, 48 UCLA L. REV. 305 (2000); Francisco Valdes, *Outsider Scholars, Legal Theory and OutCrit Perspective: Postsubordination Vision as Jurisprudential Method*, 49 DEPAUL L. REV. 101 (2000); Francisco Valdes, *Afterword—Theorizing “OutCrit” Theories: Coalitional Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits, LatCrits*, 53 U. MIAMI L. REV. 1265 (1999); 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. 1193 (1997); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN’S STUD. 25 (1995). In time, this work should produce a book, FRANCISCO VALDES, JUDGING THE PLEASURE OF JUDGING: DEMOCRACY, LAW AND SOCIAL ENGINEERING.

<sup>18</sup> For a prominent and thoughtful recent example written in the context of liberty-privacy, see Laurence Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare not Speak its Name*, 117 HARV. L. REV. 1893 (2004); see also Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992).

<sup>19</sup> For a more substantive description of this “attitudinal model” for the analysis of judicial opinions, see generally Valdes, *Antidiscrimination*, *supra* note 9, at 275, and sources cited therein. The basic conclusions of this field were more recently corroborated by a study of the cases argued during the 2002 Supreme Court Term. Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004).



under the “legal model” of analyzing the behavior of judicial appointees, and thereby corroborates the conclusions drawn from the illustrative survey of backlash rulings undertaken here.<sup>20</sup>

But this Afterword does not proceed from, nor try to assert, a simple complaint of politicized judicial appointees acting in politically calculated ways; this complaint, though serious enough to occupy the nation since the founding, also has a venerable history that stretches back to 1800 and the first factional transfer of federal political power after the Constitution’s adoption, when the Adams administration and the Federalist Party handed over the reins of the executive and legislative branches to Jefferson and his supporters but tried, before the inauguration of their victorious opponents, to wield their lame duck powers to seize long-term control of the judicial branch. That original “court packing scheme” produced a series of political machinations in which Congress and the President used their powers to rescind Federalist legislation creating new judicial

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<sup>20</sup> In like vein, this Afterword also proceeds from a wry recognition of the dangers that may accompany a too-frank exposé of the human-civil rights subversion launched and orchestrated from the Supreme Court bench by kulturkampf appointees installed into those positions during the past decade or two precisely (and explicitly) for this reactive purpose. *See generally* Owen Fiss, *Another Equality*, ISSUES L. SCHOLARSHIP, at <http://www.bepress.com/ils/iss2/art20>. In this essay, Fiss critiques the use of narrative by critical race and other OutCrit theorists “as a substitute for the reasoned argument traditionally associated with the law. Narrativity as OutCrit method, Fiss believes, “is a way of subverting the authority of the Court [but] . . . we should criticize the Court for what it says, not subvert its authority in a deliberate or flagrant way or mock its commitment to public reasons by responding to its decisions with stories. The Third Reconstruction will need the Court,” he concludes. *Id.* at 24. In this Afterword, narrativity is not the focus; rather the focus is on a substantive critique of the strategic maneuvers that pervade “what the Court says” and, more specifically, what the backlash bloc says in the name of the Court. In my view, the content of the opinions issued by this bloc in the name of the Court mock that institution’s historic aspiration or “commitment to public reason” in increasingly flagrant ways that have prompted increasingly widespread recognition that the ideal of the Rule of Law in the United States has thereby been put into serious question. *See, e.g., infra* note 25 and sources cited therein.

In my view, the benefits of the exposé—critical awareness, consciousness-raising and active resistance—outweigh the fear of the dangers—erosion of the federal judiciary’s institutional legitimacy in the longer term; indeed, in my view, the feared dangers are due more to the increasingly blatant (and thus difficult to ignore or obscure) gyrations of backlash judges to reach their preferred results than to the public’s observation of them. Nonetheless, in recognition of the feared nihilism—and because to do so is descriptively and conceptually accurate as well—this Afterword attempts throughout the analysis presented below to accentuate the distinction between the federal judiciary as an institution and the individuals who currently wield its awesome powers to wage backlash kulturkampf in the guise of constitutional adjudication and interpretation—especially the literal handful of individuals who form the backlash bloc on the current Supreme Court. *See supra* note 14.

officers and refused to deliver commissions that the Federalists had been unable to finalize prior to the expiration of their terms in power.<sup>21</sup> Since then, the power wielded by federal judicial appointees has been controversial, perhaps most so during the period of mounting activism leading up to the mid-1930s, when a bare majority of the Supreme Court exercised the judicial review power time and again to trump New Deal lawmaking. With this conspicuous history as background, it would be too simple to complain at this late stage of political judicial appointees and politicized judicial opinions. Indeed, the point that all judges—“liberal” as well as backlash—perform their official duties under the influence of political ideology is amply demonstrated by the findings of attitudinal research, and is herewith conceded.<sup>22</sup>

Thus, the critique or complaint leveled here goes beyond that basic complaint; the critique presented below measures backlash jurisprudence first and foremost against the rhetoric and principles that its adherents noisily espouse, and purport to apply in critical judgment of others, to justify the righteousness of their zealous endeavors to undo the law and policy legacies they so strongly despise. This critique is based not on the observation that federal judges of all ideological stripes can and do “make law” influenced by their cultural and political sense of the world, but on the observation that backlash jurisprudence fails, spectacularly, to approximate a principled body of law *on its own terms*—and, more importantly, to the potentially enduring detriment not only of the vulnerable social groups it targets directly but also of the nation as a whole in its unfinished repudiation of the various identity-rooted viruses of domination and oppression embedded in the original constitutional compromises regarding race, gender, property and other still-entrenched markers of social stratification.<sup>23</sup> This critique is not a

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<sup>21</sup> Those machinations, of course, produced the famous case of *Marbury v. Madison*, 5 U.S. 107 (1803), in which the Federalist judges, led by the newly-appointed Chief Justice John Marshall, declared for themselves the power to review the constitutionality of federal legislative and executive acts—and invalidated the Federalist legislation creating the commissions in controversy. For background, see JAMES E. SIMON, *WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL AND THE EPIC STRUGGLE TO CREATE A UNITED STATES* (2002) (elaborating a comprehensive analysis of the life-long animosities and conflicts between these two members of the founding generation, and how their relationship represented a microcosm of the political struggles that framed the founding).

<sup>22</sup> See *supra* note 19 and sources cited therein.

<sup>23</sup> These viruses are encapsulated in various formative exclusions, which limited individuals’ opportunity to participate or compete in the new nation’s political and economic development, to white propertied men, and in particular in the constitutional compromise over race-based slavery—a compromise that enshrined

generalized lament over the impossibility of neutral principles or judicial legitimacy writ large but rather a more specific charge of intellectual dishonesty to occlude power abuses in the launching and waging of a ferocious “counter-revolution” in the name of the nation’s Constitution and from the nation’s highest court of law,<sup>24</sup> abuses that, from various perspectives, have subverted not only the perception and reality of Rule of Law within the United States in substantive terms but that also have undermined the collective capacity of a diverse nation to sustain trust and confidence in its judicial institutions.<sup>25</sup>

#### I. BACKLASH, JURISPRUDENCE AND KULTURKAMPF: BACKGROUND AND CONTEXT

While the term “kulturkampf” may (and does) refer to various periods in different social and political settings,<sup>26</sup> in the United States at the turn of the millennium the term had come to signify the national coordination of political efforts to retrench civil rights and New Deal legacies in both social and legal terms.<sup>27</sup> These

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federal protection of human chattel as the supreme law of the land in at least two textual ways: (1) the constitution forbids the federal government from freeing enslaved humans or interfering with their status as property until 1808, thus permitting social, political and economic entrenchment during this period, and it requires all free states to extradite escaped slaves back to their “masters” in the slave states. *See generally* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987) (reflecting on the original identity-based constitutional exclusions and their enduring consequences).

<sup>24</sup> Kenneth L. Karst, *Religion, Sex, and Politics: Cultural Counterrevolution in Constitutional Perspective*, 24 U.C. DAVIS L. REV. 677 (1991) (elaborating a relatively early analysis of the phenomena now known as backlash kulturkampf and jurisprudence); *see also* Owen Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 5 (1979) (noting that the nation was and is “in the midst of a counter-revolution; not because we are at the verge of a new discovery, but because the discovery of an earlier era is now in jeopardy”).

<sup>25</sup> This self-inflicted damage is exemplified by the public acknowledgement of the current Court’s most senior Republican appointee, John Paul Stevens, who frankly conceded in the aftermath of the 5-4 halt to vote-counting in 2000 that the bloc’s action in *Bush v. Gore* had seriously shaken “the nation’s confidence in the judge as an impartial guardian of the rule of law.” 531 U.S. 98, 129 (2000). To repeat, this dangerous loss of trust results from the judges’ hypocrisy, and not from a frank acknowledgement or critical expose of it.

<sup>26</sup> Culture wars and kulturkampf are associated with German politics, both during the Bismarckian struggle to assert secular state authority over Catholic dogma in the form of public policy and during the efforts of the Nazi Party to reform German culture in line with their racist ideology. *See generally* RICHARD J. EVANS, *THE COMING OF THE THIRD REICH* 118-53 (2003) (focusing on the culture wars waged in Germany as part of the Nazi rise to power).

<sup>27</sup> *See* Valdes, *Beyond Sexual Orientation*, *supra* note 17, at 1427, n. 70 (defining the term and describing the phenomenon).

orchestrated efforts span multiple categories of identity and policy but, in addition to race and ethnicity, they have focused inordinately on sex, gender and sexuality (and, concomitantly, on religion and “morality”).<sup>28</sup> Thus, it is no coincidence that, twice now, and both times in sexual regulation cases, the high Court’s chief wit, Antonin Scalia, has invoked the notion of “kulturkampf” to deride the Court’s decisions protecting a vulnerable group from majoritarian subordination. Dissenting from *Romer v. Evans*,<sup>29</sup> and again from *Lawrence v. Texas*,<sup>30</sup> he ridicules the majority’s analysis and holding as mere participation in the “culture wars” sweeping the United States during the last quarter or so of the Twentieth Century. In doing so, Scalia reminds us all of the times in which we live—the context in which these cases have been litigated and adjudicated, and the zeitgeist under which LatCrit and other genres of critical outsider jurisprudence came to be.

As with backlash jurisprudence and outsider jurisprudence, the stirrings of today’s “culture wars” go back to the 1970s and 1980s, to the times when the liberal antidiscrimination initiatives of earlier decades were increasingly contested from all sides.<sup>31</sup> But the moment of its official declaration occurred in 1992, from the podium of the Republican National Convention, when presidential contender Patrick Buchanan declared “cultural war” for the “soul of America.”<sup>32</sup> Since then, the invocation of “cultural war” to explain and motivate political action has take place repeatedly.<sup>33</sup> By the turn of the

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<sup>28</sup> Illustrating this point, news accounts following the 2004 electoral cycle reported that “abortion has become a prime target” of “Democratic strategists and lawmakers quietly” as they “discuss how to straddle the nation’s Red-Blue divide” and that they have concluded that the “issue and the message need to be completely rethought” because “along with gay marriage, abortion is at the epicenter of the culture wars, another example used by Republicans to highlight the Democrats’ supposed moral relativism.” Debra Rosenberg, *Anxiety Over Abortion: Pro-Choice Democrats Eye a More Restrictive Approach to Abortion as One Way to Gain Ground at the Polls*, NEWSWEEK, Dec. 20, 2004, at 38 (also reporting that the conclusions of this reassessment were espoused and endorsed by that year’s party standard-bearer, John Kerry). Whether or not this particular conclusion is sound, it serves to illustrate how sex and sexuality, along with race, nationality and ethnicity, have been positioned at the “epicenter” of backlash kulturkampf.

<sup>29</sup> 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

<sup>30</sup> 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).

<sup>31</sup> See Valdes, *Antidiscrimination*, *supra* note 9 at 276-82 (comparing and contrasting these two jurisprudential camps and their positions vis a vis the culture wars).

<sup>32</sup> See *infra* note 68.

<sup>33</sup> The term’s usage in law and society thus marks and reflect the mounting pursuit and awareness of the backlash agenda that animates this cultural warfare: in 1980, the term was used in public newspapers, magazines and related media 4 times;

century, in the year 2000, the term had been used 1,902 times in the public media, including in the tense context of resolving the November 2000 presidential election.<sup>34</sup> This kulturkampf of backlash is not, however, a simple case of rough-and-tumble politics as usual, wherein self-interested “factions” are expected to jockey for social and economic goods. Rather, this multi-year phenomenon is a concerted and multi-pronged campaign for the “soul” of the nation in which the named and targeted “enemy” consistently has been one or more of the nation’s historically marginalized and now-still-vulnerable social groups: racial and ethnic minorities, women of the “feminist” type, poor persons of all colors, consumers, environmentalists, workers, Queer communities and sexual minorities, immigrants from the South and East, including the Middle East, and other Others. In effect, this targeting amounts to a kind of “cultural cleansing” that, in the name of “history and tradition”, will leave the purified society looking and feeling like the 1780s as much as politically and physically possible.<sup>35</sup>

Plainly, this kulturkampf of retrenchment seriously and detrimentally affects many if not all outgroups.<sup>36</sup> But, just as plainly, the culture wars find “different” groups positioned “differently” vis a vis the formal and actual retrenchment of rights through backlash.<sup>37</sup>

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in 1990, 76 times; and in 1992—the year of formal declaration—575 times. See Valdes, *Antidiscrimination*, *supra* note 9, at 283.

<sup>34</sup> For example, in defending the 2000 nomination of John Ashcroft—a prominent but recently defeated backlash politician from Missouri—to take over the federal Justice Department and become the nation’s chief federal law enforcement officer, a backlash-identified talk show host based in the nation’s capital declared, “This is culture war—two mutually exclusive world views continue to fight for preeminence in our culture.” James Kuhnhenh & Ron Hutcheson, *Ashcroft is Next Political Flash Point; Partisan Lines are Clearly Drawn*, MIA. HERALD, Jan. 11, 2001 at 1A.

<sup>35</sup> The re-segregation of higher public education provides a pointed example. See *generally infra* notes 107-108 and sources cited therein.

<sup>36</sup> As *Bowers v. Hardwick* indicates, for instance, backlash jurisprudence began taking hold just as sexual minorities—specifically lesbians, gay men, bisexuals and transsexuals—began to claim formal equality and antidiscrimination rights under existing laws or precedents. See Valdes, *Culture by Law*, *supra* note 8. In effect, then, the historical moment for the surge of backlash kulturkampf and retrenchment occurred at roughly the same time as sexual minorities began seeking vindication of antidiscrimination rights in federal courts within the broader context of “civil rights.” Thus, for racial/ethnic minorities, backlash kulturkampf endeavors to roll back affirmative action programs and for sexual minorities the aim is to preclude the attachment of formal equality altogether. While immigrants, women, racial/ethnic minorities, native Americans, the disabled, the poor, sexual minorities all feel the sting of retrenchment, they feel it “differently.”

<sup>37</sup> Consequently, the social, cultural, political and legal dynamics of backlash kulturkampf implicate the “sameness-difference” concerns and discourse associated with various strands of critical outsider jurisprudence. See, e.g., MARTHA MINOW,

MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990); see also Regina Austin, *Black Women, Sisterhood, and the Difference/Deviance Divide*, 26 NEW ENG. L. REV. 877 (1992); Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. OF GENDER & L. 1 (1992); Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L. J. 296. The collective effort to mint concepts like antiessentialism, multiplicity, intersectionality, cosynthesis, wholism, interconnectivity, multidimensionality and the like also reflects a similar grappling with issues of sameness and difference in various genres of contemporary critical legal theory. See, e.g., Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989); see also Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139. Various RaceCrit and LatCrit scholars have continued to develop concepts and tools of critical legal theory to build on these foundational concepts, striving progressively to better capture the dynamics of "identity politics" in law and society. See, e.g., e. christi cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441 (1998) (on wholism); Berta Hernandez-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1991) (on multidimensionality); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 U. CONN. L. REV. 561 (1997) (on multidimensionality); Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257 (1997) (on cosynthesis); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25 (1995) (on interconnectivity); see generally Charles R. Lawrence III, Foreword—*Race, Multiculturalism and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 834-35 (1995) (urging greater efforts along these lines to promote multifaceted projects of social transformation).

This concern has prompted a rich and continuing exploration of coalitional theory and praxis as antistatist method. See, e.g., Kevin Johnson, *The Struggle for Civil Rights: The Need for, and Impediments to, Political Coalitions Among and Within Minority Groups*, 63 LA. L. REV. 759 (2003) (discussing the important role of coalitions in civil rights struggles); Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101 (1997) (focusing on the challenges facing LatCrit theory regarding coalitional work); George A. Martinez, *African-Americans, Latinos and the Construction of Race: Toward an Epistemic Coalition*, 19 CHICANO-LATINO L. REV. 213 (1998) (urging Latinas/os, Blacks and other groups of color to coalesce around "race" and our collective, cumulative knowledge of white supremacy); Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991) (urging antistatist analyses to "ask the other question" as a means of theorizing across single-axis group boundaries); Ediberto Roman, *Common Ground: Perspectives on Latina-Latino Diversities*, 2 HARV. LATINO L. REV. 483, (1997) (elaborating commonalities upon which Latinas/os may build a sense of constructive collectivity and urging Latinas/os to focus on our similarities rather than our differences as a way of promoting intra-group justice and solidarity); Julie A. Su & Eric K. Yamamoto, *Critical Coalitions: Theory and Praxis, in CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY* 379 (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds. 2002); Eric K. Yamamoto, *Conflict and Complicity: Justice Among Communities of Color*, 2 HARV. LATINO L. REV. 495 (1997) (analyzing inter-group grievances and relations among groups of color).

These differentials mean that the aspects or techniques of cultural warfare have been tailored for and directed at “different” groups in group-specific ways—in ways that account for each group’s standing in relationship both to formal law and to social reality.<sup>38</sup> But the overarching pattern of backlash jurisprudence as part and parcel of these culture wars has been the pursuit of a self-subscribed “anti-anti-discrimination agenda” under the guise of principled adjudication.<sup>39</sup>

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<sup>38</sup> As sketched below, backlash activism has included the aggressive review of precedent to narrow their civil rights reach; the heightening of procedural rules to block civil rights claims on technical grounds; the strict interpretation of legislative initiatives on behalf of civil rights communities under both principal instruments for doing so—the Commerce Clause and Section 5 of the Fourteenth Amendment; and, finally, a proactive and unilateral reinterpretation of the Tenth and Eleventh amendments to expand “states rights” affirmatively under “fundamental postulates” based on the personal views and preferences mainly of five judges. Under backlash jurisprudence, burdens of evidence and/or rules of procedure are invoked, and then deployed to shield discrimination from viable claims. Similarly, precedent is critiqued, ignored and rejected—or manipulated through “creative” distinction—while legislation is cabined. See *infra* Part II; see also Kevin M. Clermont, Theodore Eisenberg and Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMPLOYEE RTS. & EMP. POL’Y J. 547 (2003) (focusing on judicial bias against plaintiffs in employment discrimination cases); Kevin M. Clermont and Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ From Negotiable Instruments*, 2002 U. ILL. L. REV. 947 (same); William B. Gould, IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TULANE L. REV. 1485 (1990) (focusing on retrenchment in that key term of the Supreme Court); Charles R. Lawrence, III, “Justice” or “Just Us”: *Racism and the Role of Ideology*, 35 STAN. L. REV. 831 (1983) (focusing on race and White Supremacy); Nancy Levit, *The Caseload Conundrum, Constitutional Restraints and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321 (1989) (critiquing the interposition of jurisdictional and prudential barriers to deflect civil rights actions); Robert P. Smith, *Explaining Judicial Lawgivers*, 11 FLA. ST. U. L. REV. 153 (1983) (surveying techniques of judicial manipulation of facts and doctrine); Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677 (1984) (critiquing the heightened rules of pleading that various federal judges had erected to rebuff civil rights claimants). These and similar practices have prompted various scholars to question the principled nature of their opinions.

<sup>39</sup> Jeb Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002) (evaluating the current judges’ manipulation or disregard of precedent and canons of interpretation in pursuit of their anti-anti-discrimination political agenda). Many scholars have drawn similar observations in recent years. See, e.g., Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996); Kimberlé W. Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Fiss, *supra* note 13; Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Karst, *supra* note 24; Stephanie M. Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265 (1984); see also Valdes, *Antidiscrimination*, *supra* note 9, at 283-86 and sources cited therein.

In broad historical perspective, then, the ultimate objective of backlash kulturkampf has been to shift the normative trajectory of sociolegal development

As outlined below, a bare majority of the current appointees increasingly has inscribed backlash jurisprudence onto the constitutional heritage of the nation, oftentimes with sweeping pronouncements issued in their sharply-divided 5-4 opinions, scrambling existing jurisprudential patterns, over the spirited objections of the dissenters, to impose social regression regarding civil and human rights along the familiar neocolonial fault lines of power, property, opportunity and identity; indeed, backlash activism has reached such a “fever pitch” in recent years that the regular updating of a leading treatise on constitutional law has been suspended, for the first time since 1978, “because so many precedents that had once seemed settled now appear at risk of being overruled” single-handedly by this willful quintet.<sup>40</sup>

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away from antidisubordination lawmaking, toward which it had been unfolding since the New Deal and Civil Rights eras during the mid-twentieth century, and back to “history and tradition” as a virtually insurmountable block to civil and human rights progress in general. In this broader historical context, the brief federal experiment with “affirmative action”—especially the momentary flirtation with “quotas”—during the 1970s and 1980s marked the limits of the Law’s progression from antidiscrimination to antidisubordination. See *supra* note 13 and sources cited therein. Therefore, various OutCrit scholars have explored the aspirations and limitations of affirmative action as one key (though fragile) remedy for past and present forms of invidious, structural supremacies based on race, sex and other identity axes, including the enduring effects of entrenched supremacies within the nation’s legal academy. See, e.g., Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996); see also Marina Angel, *The Glass Ceiling of Women in Legal Education: Contract Positions and the Death of Tenure*, 50 J. LEGAL EDUC. 1 (2000); Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988); Richard Delgado, *Minority Law Professors’ Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349 (1989); Richard Delgado, *Affirmative Action as Majoritarian Device: Or, Do You Really Want to be a Role Model?*, 89 MICH. L. REV. 1222 (1991); Sumi Cho & Robert Westley, *Historicizing Critical Race Theory’s Cutting Edge: Key Movements that Performed the Theory*, in CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY 32 (Francisco Valdes, Jerome McCristal Culp, Jr. & Angela P. Harris eds., 2002); Cheryl I. Harris, *Law Professors of Color and the Academy: Of Poets and Kings*, 68 CHI.-KENT L. REV. 331 (1992); William C. Kidder, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom’s Rhetorical Acts*, 7 ASIAN L.J. 29 (2000); Charles R. Lawrence III, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. REV. 429 (1986); Rachel F. Moran, *Commentary: The Implications of Being a Society of One*, 20 U.S.F. L. REV. 503 (1986); Richard K. Neumann, Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313 (2000). See generally James E. Jones, Jr., *Origins of Affirmative Action*, 21 U.C. DAVIS L. REV. 383 (1988) (providing a first-hand insider’s account of the origins of federal affirmative action policies).

<sup>40</sup> See Jeffrey Toobin, *Breyer’s Big Idea*, THE NEW YORKER, Oct. 31, 2005, at 36 (reporting the suspension and quoting the treatise editor); see also *infra* Part II (summarizing some of the culture war cases and backlash activist techniques). For additional analyses of backlash kulturkampf in law and society, see generally Kevin R.



A. *The Culture Wars in Law and Society: Overview, Origins and Imperatives*

The origins of the current culture wars within the United States may be proximately traced to the “silent majority” and (later) “moral majority” rhetoric made prominent by Richard Nixon in national electoral politics as the 1968 Republican candidate for the presidency,<sup>41</sup> a tactic that built on and sought to exploit for rank political gain preceding fulminations over “liberal activist judges” who in those years were dismantling apartheid and other entrenched forms of structural stratification based on “traditional” supremacist identity politics in this country.<sup>42</sup> The antidote for such judicial

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Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 650-58 (1995) (analyzing the racial rhetoric and politics of Proposition 187); Nicolas Espiritu, *(E)Racing Youth: The Racialized Construction of California's Proposition 21 and the Development of Alternate Contestations*, 52 CLEV. ST. L. REV. 189 (2005) (focusing on cultural warfare against youth of color in California through the use of the proposition system in that state); Ruben J. Garcia, Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118 (1995) (deconstruction the racialized political dynamics of that early Proposition); see generally Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class*, 42 UCLA L. REV. 1509 (1995) (analyzing the identity politics and social consequences of recent legal “reforms”).

<sup>41</sup> “The term ‘silent majority’ so delighted the president that after he wrote it in a November 1 draft [of a major televised speech] at 4:00 a.m., he called [White House Chief of Staff] Haldeman to announce, ‘the baby’s been born.’ The peroration was widely thought to have been a deliberate attempt to polarize by dividing the nation into tiny minorities of noisy protesters deliberately obstructing peace and a large majority of quiet patriots.” CAROL GELDERMAN, *ALL THE PRESIDENTS’ WORDS: THE BULLY PULPIT AND THE CREATION OF THE VIRTUAL PRESIDENCY* 84 (1997); see also Douglas Anderson, *Nixon, Agnew and the ‘Silent Majority’: A Case Study in the Rhetoric of Polarization* 35 WEST. SPEECH 243 (1971) (elaborating a rhetorical study of Nixon’s politicking); see generally STEPHEN E. AMBROSE, *NIXON: THE TRIUMPH OF A POLITICIAN 1962-1972*, 310-14 (1989) (providing a general political biography of that decade, including the rhetoric and politics of his Silent Majority Speech in 1969). Nixon’s politics and rhetorics of course were also part of his long-running denunciation of the mass media, which he viewed as an abiding “enemy” of his political ambitions and agenda, a view carried forward by his culture war successors, including perhaps most notably, Ronald Reagan. See, e.g., WALTER PORTER, *ASSAULT ON THE MEDIA: THE NIXON YEARS* (1976); JOSEPH C. SPEAR, *PRESIDENTS AND THE PRESS: THE NIXON LEGACY* (1984). This “assault” included a structural consolidation of the national media, prompted through regulatory actions of federal backlash appointees under Nixon, Reagan and similar politicians, which has led to a silencing of opposition to backlash politics. See, e.g., *infra* note 78 and sources cited therein on media regulatory changes and their anti-democratic character.

<sup>42</sup> This era of “liberal activist judges” is depicted as beginning in the 1960s under Chief Justice Earl Warren, and is portrayed as the complaint of backslashers, who “promise that their replacements will not be so free-wheeling.” Sullivan, *supra* note 18, at 293. For historical accounts, see LUCAS A. POWE, *THE WARREN COURT AND AMERICAN POLITICS* (2000); J. HARVIE WILKINSON, III, *FROM BROWN TO BAKKE: THE*

overreaching, politicians like Nixon argued, was the appointment of

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SUPREME COURT AND SCHOOL INTEGRATION, 1954-1978 (1979). For a remarkable insider's account of the appointment to the Court of its current Chief Justice, and the ideological purposes behind his appointment in the context of the gathering culture wars, see JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* (2002); DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* (1992).

For now-classic expositions of this backlash portrayal, see ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) and RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977); see also Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). This campaign of course evokes historical and legitimate concerns over abuses of power, including judicial abuses. For noted examples, see ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962), and Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); see also MARTIN SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* (1964). The gathering of the culture wars, as expressed in these early expositions of jurisprudential reaction, engendered a lively exchange over the legitimacy of the doctrinal and policy legacies under backlash attack. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Thomas C. Grey, *Do We have a Written Constitution?*, 27 STAN. L. REV. 703 (1975); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

Given the nature of the backslashers' rhetoric when set against this larger backdrop, their current and ongoing campaign to recapture and control the federal judiciary has received widespread scholarly attention, some critical and some descriptive. E.g., DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 56-86 (2000); RICHARD L. PACELLE, JR. *THE TRANSFORMATION OF THE SUPREME COURT'S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION* (1991); MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER* (1991); HERMAN SCHWARTZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* (1988); Valdes, *Antidiscrimination*, supra note 9, at 287-91 (providing an extensive bibliography on the general topic).

This backlash attack on precedent and legislation from the New Deal and Civil Rights eras, and the obsession with perceived or actual instances of judicial will that it has engendered, also has erupted onto the pages of the law reports. This phenomenon is captured in the opinions issued in *Dronenbrug v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984), *reh' en banc denied* 746 F.2d 1579 (1984). The appellate panel in that case was dominated by two of the most virulent backlash judges in the federal judiciary, if not the whole country—Antonin Scalia and Robert Bork—and the panel's opinion was composed by the latter. The dissenting opinion to the denial of rehearing en banc filed by Circuit Judges Robinson, Wald, Mikva and Edwards, and the responding "statements" filed by Judges Ginsburg, Bork, Scalia and Starr, make for a fascinating mini-seminar in the role of courts in the United States as a formally "democratic" nation committed to the Rule of Law with much current relevance: two of those judges currently sit on the Supreme Court—Scalia and Ginsburg. The panel opinion penned by Bork is a textbook example of backlash activism specifically in the area of liberty-privacy and sexual orientation; it displays the effort to roll back precedent, in part by straining "to confine those decisions to their facts." 746 F.2d at 1580 (Robinson, III, C.J., Wald, J., Mikva J., and Edwards, J. dissenting from denial of rehearing en banc.)

“strict constructionist” judges who would simply “follow the law” rather than “legislate from the bench.”<sup>43</sup> The social consequences of

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<sup>43</sup> See RICHARD HODDER-WILLIAMS, *THE POLITICS OF THE U.S. SUPREME COURT* 33-45 (1980) (on the politics of the Nixon nominations to the Supreme Court); LAURENCE TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* 41-49 (1985) (on the “myth of the strict constructionist”). The same rhetoric and campaign continues to this day, as the daily news reports demonstrate. *E.g.*, Elizabeth Bumiller, *Bush Vows to Seek Conservative Judges*, N.Y. TIMES, March 29, 2002, at A1; Robert A. Carp, Kenneth L. Manning & Ronald Stidham, *The Decision-Making Behavior of George W. Bush’s Judicial Appointees: Far-Right, Conservative or Moderate?* 88 JUDICATURE 20 (2004) (reporting that overall voting patterns indicate that the most recent appointees “are among the most conservative on record”).

This “strict construction” sloganeering, oftentimes accompanied by assertions of “states’ rights,” employs the rhetorical strategies developed over history by political factions that feared the federal government’s powers could interfere with local power arrangements, beginning with the antifederalists of the eighteenth century and continued by the Jeffersonians during the period of Alexander Hamilton’s influence in the George Washington administrations, which they bitterly opposed. Ironically, key founders like Jefferson and Madison became opposed to the federal government that they had helped to establish, but only until they themselves were elected President of that government, at which time they no longer cared to be bound by a “strict construction” of the powers they then wielded. This strategic pose and rhetoric later were thematized in the nineteenth century by southern interests intent on preserving and expanding slave territories in the United States. This same line was continued during the post-Civil War Jim Crow era and into the twentieth century, by the Ku Klux Klan and “segregationists” who vowed to maintain the North American system of de jure apartheid that, in legal terms, represented their notion of federal “strict construction” and expansive “states rights.” This historical continuity eventually produced the famous clashes between federal troops and state militias during the integration of southern schools following *Brown v. Board of Education*, 347 U.S. 483 (1954). In *Cooper v. Aaron*, 358 U.S. 1 (1958), the Supreme Court found it necessary to re-assert the power of judicial review claimed and exercised by the judges since *Madison v. Marbury* in 1802 in the effort to curb these twin assertions as a matter of law.

Notably, *Marbury*’s renowned author, John Marshall, had forcefully rejected the strict construction argument during those formative years, as exemplified by *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). In *McCulloch*, the Supreme Court upheld federal legislation chartering a federal bank even though the text of the Constitution does not expressly enumerate the power to charter corporations among those vested in the federal legislature. In a unanimous opinion authored by John Marshall, the Court juxtaposed two basic approaches to constitutional interpretation: the “just” or “sound” approach versus the “narrow” or “strict” approach. Opting for the former, those judges reasoned that the former would entail a “baneful influence” on the nation due to the “absolute impracticality of maintaining it without rendering the government incompetent to its great objects.” *Id.* at 417-18. This rendering has been precisely the goal of every advocate who interposed these arguments in North American constitutional history, and it likewise is the goal of cultural warfare and backlash activism: disabling the government from its capacity to reform entrenched social hierarchies established in part by force of law in eras of formal subordination based on race, ethnicity, gender, sexual orientation and other forms of social stratification, and that now are structurally entrenched culturally and materially in law and society. Historically dominant groups now waging

this political argument, of course, were clear: existing structures of subordination emplaced *de jure* through nominal democracy oftentimes in the form of state law and federal policy during prior eras of formal inequality, such as structures or norms that favor men over women or whites over nonwhites based largely on sex, race and ethnicity, would be freed of any politically independent scrutiny, and remain a seemingly “natural” or “traditional”—and therefore supposedly unassailable—fixture of North American “culture” and society. Indeed, the foreseeable social consequences of Nixon’s “silent/moral majority” and “strict construction” rhetoric were clear enough that this identity-inflected political argument was directed chiefly at populations in the southern states of the former Confederacy, where they were deemed to be most politically popular, as part of the so-called “southern strategy” that successfully handed the presidency to the Republicans in 1969, and for most of the elections since then, thus breaking the liberal sway begun in 1932 with Franklin Roosevelt’s first landslide.<sup>44</sup> From the beginning of this reaction to that legacy and its aftermath, a principal strategy of the gathering culture wars was to recapture the federal judiciary and cabin the federal judicial review power as a tool of social transformation—and to reclaim that power as a tool of social stratification.<sup>45</sup>

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backlash kulturkampf calculate, correctly, that their privilege and dominance vis a vis historically subordinated groups is best preserved, and perhaps amplified, by disabling the possibility of federal power to reform historic injustices that have enriched and empowered them. *See infra* Part II; *see also supra* note 17 and sources cited therein.

<sup>44</sup> *See* KEVIN P. PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY* (1969) (laying out the principal contemporary account of this “southern strategy” and its ideological purposes); A. JAMES REICHLEY, *CONSERVATIVES IN AN AGE OF CHANGE: THE NIXON AND FORD ADMINISTRATIONS*, 174-204 and 407-20 (1981) (providing a substantive analysis of the strategy and policy choices or issues used to help implement it); TERREL L. RHODES, *REPUBLICANS IN THE SOUTH: VOTING FOR THE STATE HOUSE, VOTING FOR THE WHITE HOUSE*, 19-39 (2000) (documenting the actual impact of this strategy on voting patterns since then to conclude that in “presidential elections in the latter third of the twentieth century, the South became increasingly susceptible to Republican incursions” and that Nixon’s 1972 re-election “is a useful starting point for an examination of contemporary Republican strength in the South” due, in great measure, to his southern strategy)

<sup>45</sup> This recapture and redirection of the federal judicial power has been managed on two levels: public and legal, or political and jurisprudential. In public or political spheres or contexts, backlashing judges and politicians seek to exaggerate the breadth of the precedents they wish to overturn, portraying them as merely illegitimate handiwork of self-indulgent judges bent on “legislating from the bench” a mass destruction of liberty and justice. In this way, neocolonial elites help to fan the politics of fear and control that fuel backlash and provide foot soldiers for the electoral dimensions of today’s kulturkampf. *See, e.g., Sullivan, supra* note 18, at 293

Consequently, in the tumultuous decades since the 1970s and 80s, much of the impetus for the dismantlement of antidiscrimination legislation and precedent has come from the highest levels of the federal bench. Over time, this backlash campaign of redirection has generated an environment of obsessive attention to the roles, powers and actions of federal judicial appointees, which both informs mainstream public discourses and increasingly pervades legal culture.<sup>46</sup> Indeed, “constitutional theory

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(“[T]he conservative caricature of the liberal Justices pictures them just making up whatever law suited their sense of justice. The conservative promise is that their replacements will not be so free-wheeling.”). In this way, they play the kind of “wedge politics” that propelled into legislative and executive office the politicians who thereby have taken control of the federal government during the past two or so decades of cultural warfare—politicians like Richard Nixon, Ronald Reagan and George Bush—and who then used these public positions to help install into power today’s judges precisely so they would engineer this redirection of the federal judicial power. See *supra* notes 41-43 and sources cited therein. Oftentimes, “wedge politics” are “identity politics” that seek to pit majority-identified social groups against the nation’s historically marginalized minorities, as exemplified by the uses of race, nationality, ethnicity, sex and sexuality to fuel a politics of fear and control that help to animate the backlash factions. See Valdes, *Beyond Sexual Orientation*, *supra* note 17, at 1427, n.73 (discussing identity-inflected wedge issues and their uses to incite backlash politics).

In legal or jurisprudential venues or contexts, on the other hand, backlashing judges and politicians seek to constrict the significance of targeted precedents, sometimes explaining away or narrowing their holdings and distinguishing or mischaracterizing their facts—or simply insisting that those precedents did not mean what they said. A classic example is the backlash attempt, beginning with *Bowers v. Hardwick*’s 5-4 ruling in 1986, to baldly re-characterize the body of liberty-privacy precedents since the 1923 ruling in *Meyer v. Nebraska*. Thus, the ongoing backlash effort to cast that long line of cases as “flattened-out collections of private acts” rather than a “continuous stream of rulings about human freedom” is paradigmatic of this tactic. See Tribe, *supra* note 18, at 1932-38. For a detailed discussion, see Valdes, *Four Score*, *supra* note 17. This disingenuous manipulation of information and position in popular versus legal venues—so transparently calculated to suit the politics of varied settings and audiences and to promote always the agendas of backlash in and through them—has succeeded in making reaction and retrenchment the dominant feature of today’s sociolegal zeitgeist, at least for this historical moment.

<sup>46</sup> Ironically, or perhaps predictably, this campaign of recapture and redirection has prompted advocates seeking to vindicate civil rights claims to plea before alternative venues, both political and juridical; indeed, in a remarkable modern-day display of original theories of North American federalism in action, the past two decades have witnessed state courts granting the relief that federal judges increasingly dismiss with disdain. In the original theory of vertical federalism, a touted virtue was that aggrieved citizens would be able to shift loyalties, and to seek alternative forms of redress from, their state or national governments: when one (or the other) is hostile to a class of the populace, the theory goes, vertical federalism allows the possibility that the those groups or persons will be vindicated by the alternative sovereign. James Madison provided the quintessential articulation of this theory in Federalist No. 10 and No. 51 (presenting the conceptual framework for and reasoning behind the “compound republic of America” and specifying its beneficial distinctions as compared to a direct democracy or a monarchy). And,

in the past several decades has been obsessed with the question of how to constrain judges exercise of will.<sup>47</sup> From a backlash perspective, the focus of the obsession is on constraining perceived or actual exercises of judicial power—whether willful or not—that may further the “liberal” social changes associated with New Deal and/or Civil Rights lawmaking, and accompanied with very little attention to exercises of will that accomplish their retrenchment.<sup>48</sup>

But backslashers’ ab/use of the federal judicial power to delegitimize social justice claims—in particular those grounded in New Deal and Civil Rights sources of law and policy—and the obsessive attention they have drawn to the notion of “judicial legislation” in turn have drawn increasingly sharp critiques of backlash jurisprudence, including serious questions about a new wave of “judicial activism” in the construction of social and legal retrenchment—a new wave that in conceptual, doctrinal and political terms harkens back to tense times in the history of American law.<sup>49</sup> Those times go back to the very origins—and eventual establishment in the late 1930s despite “activist” judicial opposition—of the “liberal” legacy that backslashers strive now to roll back.<sup>50</sup> That confrontation

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indeed, during the past two decades of intensifying cultural warfare against traditionally subordinated groups, the state courts of jurisdictions as diverse as Vermont and Hawaii or Massachusetts and Alaska have recognized social justice claims that the newly stacked federal courts have made haste to rebuff in ringing terms. See, e.g., Valdes, *Beyond Sexual Orientation*, *supra* note 17, at 1435-38 and sources cited therein on cultural warfare and prong one in some of these states; see also DAVID MOATS, *CIVIL WARS: A BATTLE FOR GAY MARRIAGE* (2004) (focusing on Vermont specifically). Thus, even while federal tribunals are turned against the nation’s most vulnerable and disadvantaged groups and persons, state tribunals have provided them safe harbors from time to time, and this divergence also helps to bring the questionable nature of backlash jurisprudential moves or assertions into sharper relief. For example, in 1986, Kentucky’s Supreme Court invalidated that state’s sodomy statute. See Special Feature, *Commonwealth v. Wasson: Invalidating Kentucky’s Sodomy Statute*, 81 KY. L. J. 423 (1992-93). See generally Shirley S. Abrahamson, *Divided We Stand: State Constitutions in a More Perfect Union*, 18 HASTINGS CONST. L.Q. 723 (1991) and Paula A. Brantner, Note, *Removing Bricks from a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws*, 19 HASTINGS CONST. L.Q. 495 (1992) (both on state constitutions and judiciaries as alternative venues for the vindication of social justice claims to a hostile federal judiciary).

<sup>47</sup> Sullivan, *supra* note 18, at 293.

<sup>48</sup> For an illustrative sketch of some examples, see *infra* Part II.

<sup>49</sup> See *infra* note 52 and accompanying text on the famous 1930s confrontation between the Court and the President.

<sup>50</sup> That era’s willfulness, sometimes denominated “Lochnerism” because of the notorious ruling in *Lochner v. New York*, 198 U.S. 45 (1905), that exemplified it “hovers like a specter to be continually banished.” Sullivan, *supra* note 18, at 293. From an OutCritical perspective, today’s five-person majority does seem bent on replaying that a kind of willfulness whenever it “suits their sense of justice.” *Id.* Yet the political context in which they act is diametrically different, a difference that

severely discredited the Court institutionally before it finally allowed the New Deal to be legislated, after several landslide elections, thus clearing the stage for the succeeding “liberal” era of executive and legislative social programs that backlash jurisprudence currently strives to dismantle through the culture wars.<sup>51</sup> Since 1937’s “switch in time,” that multi-year effort of willful judges in control of the Supreme Court’s judicial review power to thwart state and federal New Deal initiatives in the name of the Constitution has become widely recognized as the paradigmatic example of “judicial activism” and unprincipled constitutional adjudication—an example definitively disavowed by successive judges since then<sup>52</sup> but that “hovers like a spectre to be continually banished.”<sup>53</sup>

Nonetheless, backlash jurisprudence today seems determined to engineer by law a resurrection of the pre-1937 ideology advocated by those activist judges—at least in effect, if not by design. Not coincidentally, for example, the 1930s activists had valorized the same kinds of federalism claims based on “states’ rights” and property rights, and had demonized federal power to prevent local abuses of child laborers, consumers, women and other politically or economically vulnerable persons and groups, as do today’s backlash activists<sup>54</sup>—a choice of “values” and interpretations that historically

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permits today’s willfulness to go unchecked if not affirmatively applauded and politically rewarded. *See infra* note 57 and accompanying text.

<sup>51</sup> For an overview of that era and its legacies in constitutional terms, see G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2001) (elaborating an analysis that seeks to revise conventional understandings of that period and reactions to it since then). Since the 1930s, a “collective canonization and demonization” of federal judges as a class, and of particular individuals has taken hold based on “ideological labels” that, in turn, have become kulturkampf buzzwords. *Id.* at 209. During the past several decades of cultural warfare, this strategic process of ideological canonization and demonization also has helped to produce the “obsession” over exercises of “will” that abuse the federal judicial power and that “hovers like a spectre to be continually banished.” *See Sullivan, supra* note 18 at 293. Ironically, or cynically, backlash judges routinely make full use of the potential for judicial activism under judicial review. Despite their longstanding condemnations of the practice—a condemnation that is a professed bedrock of backlash jurisprudence—they wield that very power as actively as any judge ever did. *See infra* Part II and *supra* note 17 and sources cited therein.

<sup>52</sup> *See infra* note 56. For notable accounts of those times, see WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940* (1963); William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt’s “Court Packing” Plan*, 1966 SUP. CT. REV. 347; *see also* WHITE, *supra* note 51.

<sup>53</sup> Sullivan, *supra* note 18, at 293.

<sup>54</sup> The 1930s activist judges anchored their opposition to the New Deal in the asserted liberty right of contract, which as they interpreted it repeatedly favored the interests of big business and employers, but required increasingly obvious judicial gyrations to maintain. *E.g., Lochner v. New York*, 198 U.S. 45 (1905) (striking down a

state fair employment statute limiting the working day to no more than 10 hours and the work week to no more than 60 hours on the grounds that this regulation “interferes with the right of contract between employer and employee” alike). That judicial imposition of economic liberty, as the judges themselves since have acknowledged, exemplified the Framers’ concerns over “judgment” and “will”—the latter, will, being a judge’s abuse of a court’s power to effectuate the judge’s preferred policy position. *E.g.*, The Federalist No. 10, at 226, 230 (Alexander Hamilton) (Roy P. Fairfield ed. 1981) (“The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”). For incisive accounts of “original” concerns and exchanges regarding federal judicial power and its potential abuse by individuals appointed to be judges, see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND THE MAKING OF THE CONSTITUTION (1996); LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION (1988). By 1937, that prime historical example of the legitimate concern over judicial activism had become untenable, and came to an embarrassing end that continues to haunt and embarrass the institution, as its invocation in liberty-privacy cases ranging from *Griswold* to *Bowers* and *Casey* pointedly show. See Valdes, *Four Score*, *supra* note 17 (comparing these cases and their express concerns over judicial activism).

Today, as *Griswold*, *Bowers*, and progeny also show, the same basic notion—“liberty” protected by due process—is at the heart of privacy jurisprudence, and of the backlashing efforts to arrest it. *Id.* This similarity—the focus on “liberty”—lends itself to superficial comparisons designed to promote backlash kulturkampf; in particular, as *Bowers* specifically illustrates, this similarity permits strategic but inapposite assertions that today’s recognition of liberty-privacy is as much of an illegitimate judicial concoction as the “judicial activism” that blocked reform legislation two generations ago under the asserted liberty to enter into private commercial contracts: even though some of the same judges articulated both the economic and the personal aspects of liberty during the 1920s, one key distinction between the jurisprudence delineating each is that personal liberty—the line of cases elaborating liberty-privacy from 1923 onward—now is the cumulative work-product of multiple judges across ideologies and generations, each of which “built” substantively on precedent, rather than the concentrated handiwork of a small cadre of judges single-handedly engineering an abrupt break from established jurisprudential patterns to promote a larger coordinated campaign aiming to redirect the long-term evolution of law and society.

In this way, since the 1980s backlashes have methodically pursued a doctrinal resurrection of the rights of the propertied as the preferred form of liberty. See, e.g., Symposium, *On Property Rights*, 29 CAL. W. L. REV. 183 (1992), including perhaps most notably, Richard A. Epstein, *Property as a Fundamental Right*, *id.* at 187; see also Richard A. Epstein, *Unconstitutional Conditions, State Power and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985). See generally Christopher T. Wonnell, *Economic Due Process and the Preservation of Competition*, 11 HASTINGS CONST. L.Q. 91 (1983). In the politically pivotal decade of 1980s, this revival of property rights arguments in great measure marched under the rubric of Public Choice Theory, and more generally as “law and economics,” both of which envision intensified judicial scrutiny of legislative actions that burden the rights of “minorities” defined by economic wealth. See generally Geoffrey Brennan & James M. Buchanan, *Is Public Choice Immoral? The Case for the “Nobel” Lie*, 74 VA. L. REV. (1988); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988); William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373 (1988). Cf. Thomas C. Grey, *The*



and consistently have undergirded neocolonial power hierarchies materially and socially in the United States since the ratification of the Constitution.<sup>55</sup> Thus, while the particulars between then and now

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*Malthusian Constitution*, 41 U. MIAMI L. REV. 21 (1986); Steven Kelman, *Public Choice and Public Spirit*, 87 PUB. INT. 80 (1987).

<sup>55</sup> Also not coincidentally, then, “class” and other forms of identity, such as race and ethnicity, remain structurally and empirically intertwined. See, e.g., Roy L. Brooks, *The Ecology of Inequality: The Rise of the African-American Underclass*, 8 HARV. BLACKLETTER J. 1 (1991) (exploring the reasons for the continuing segregation of African Americans in pockets of poverty); Paul Ong & Suzanne J. Hee, *Economic Diversity*, in THE STATE OF ASIAN PACIFIC AMERICA: ECONOMIC DIVERSITY, ISSUES AND POLICIES 31-56 (Paul Ong ed., 1994) (comparing the earnings of Asian Americans to Whites and noting that nearly half of all Americans of Southeast Asian descent live in poverty); Gerald P. Lopez, *Learning About Latinos*, 19 CHICANO-LATINO L. REV. 363 (1998) (discussing the socioeconomic and demographic condition of Latina/o communities in the United States); Diedre Martinez & Sonia M. Perez, *Toward a Latino Anti-Poverty Agenda*, 1 GEO. J. ON FIGHTING POVERTY 55 (1993) (exploring ways of eradicating or mitigating the impoverishment of Latinas/os in the United States). For a current “official” portrait, see Council of Economic Advisers, CHANGING AMERICA: INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING BY RACE AND HISPANIC ORIGIN 2 (1998) (noting that “race and ethnicity continue to be salient predictors of well-being in American society . . . [affecting] health, education, and economic status”). Thus, while “significant progress has been made in expanding the promise of America to members of minority groups . . . the legacy of race and color continues to limit opportunities. The life chances of minorities and people of color in the United States are constrained by this legacy AND by continued discrimination and racial disparities that are often the result of discrimination”—the combined effects of the past as the present. See The President’s Initiative on Race, THE ADVISORY BOARD’S REPORT TO THE PRESIDENT 59, Sept. 1998 (emphasis added). Despite the New Deal and Civil Rights reforms, neocolonial socioeconomic patterns not only remain firmly in place but the divisive material gaps they create seem to be growing under the sway of backlash lawmaking. E.g., Sheldon Danziger & Peter Gottschalk, *A 20-Year Glitch in America*, WASH. POST, Jan. 5, 1993, at A15 (discussing how “income inequality and economic hardship” widened the gap between the “haves” and the “have nots” during the 1980s, during which time “the ranks of the rich increased to an all-time high” as the impact of Reagan’s backlash policies took hold).

The cumulative socioeconomic impact of these “constraints” in turn are reflected in the demographics of power centers in North American society. Fortune 1000 boards continue to be “bastions of aging white males”—they account for three quarters of all board seats that control corporate policy in North America and, increasingly by the extension of globalization, the world. See, e.g., *Good Old Boys’ Network Still Rules Corporate Boards*, USA TODAY, Nov. 1, 2002, at 1; see also HISPANIC ASSOCIATION ON CORPORATE RESPONSIBILITY, SUMMARY, 2002-03 CORPORATE GOVERNANCE STUDY (Dec. 2002) (reporting that “Hispanics” account for 1.8% of the 10,417 board seats in the Fortune 1000 list). The same phenomenon is manifest on the federal judiciary, a similar demographic bastion that reflects the same neocolonial legacies of history on this continent: two thirds of all federal judges in 2002 were white (and openly heterosexual) males. See Alliance for Justice, *Status of the Judiciary: April 2002 Summary Update*, at <http://www.allianceforjustice.org/judicial>; Federal Judicial Center, *The Federal Judges Biographical Database*, at <http://www.fjc.gov/history>. These judges in turn seem “blindly” to reproduce themselves, demographically at least. By example, most of the Supreme Court clerks in 2001 were, again, mostly white (and apparently heterosexual) males. See Tony

of course are varied, in ultimate and practical terms today's backlashing judges seek to undo the historical, structural and substantive significance of the "switch in time"—especially in the form of constitutional case law—and to bring about a restoration of legitimacy to the long-discredited assertions of the 1930s activists.<sup>56</sup> The backlash project of today is to bring back a return of the old deal—the status quo that framed North American society before the lawmaking eras ushered by the New Deal in the mid-1930s and built upon since then during the Civil Rights period of the 1960s.

This project is made possible by a major and key difference between the activism of the judges during the first and second halves of the Twentieth Century—a difference, in fact, that helps to explain the success of today's activist judges despite their have taken up the same basic agenda and posture as their 1930s antecedents: the judges of the 1930s sought to interject the federal judicial power to thwart the policymaking choices of contemporaneous legislative or political majorities, whereas today's judges seek to deploy the same power to unravel the established policymaking choices and precedents of their legislative, executive and judicial predecessors. The willfulness of the 1930s judges was checked by the historically contemporaneous reactions—and timely retaliation—of the Legislative and Executive branches, famously described as Franklin Roosevelt's "court-packing"

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Mauro, *Court Loses Ground on Minority Clerks*, THE RECORDER, Oct. 30, 2001, at 1 (reporting both the historic and current "dearth" of clerks other than white (and openly heterosexual) men). Finally, and similarly, the same histories and legacies of constraint have produced the same demographic disparities that still define the legal professorate of the United States today. See *infra* note 72.

<sup>56</sup> For their part, since that embarrassing collision the judges of the Supreme Court repeatedly have distinguished between "economic" liberty and "personal" liberty under substantive due process on the grounds that majoritarian efforts to regulate the former are no more than state management of the market while majoritarian efforts to regulate the latter amount to a state take-over of individual autonomy or destiny. This distinction substantively amounts to acknowledgement that the state has wide leeway in the regulation of individual participation in the "public" spheres of economic markets but narrow leeway in the regulation intimate choices in the "private" spheres of education, relationships and lifestyle through which individuals typically endeavor to direct their social destiny in the course of living their everyday lives. *E.g.*, *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952) (upholding state regulation of working hours, noting that "if our recent cases mean anything, they leave debatable issues as respects business, economic and social affairs to legislative decision"); see also *Lincoln Federal Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) (upholding state regulation of employment contracts while emphasizing that economic liberty is generally subject to intensive state regulation because such regulations "do not run afoul of some specific federal constitutional prohibition" and, in addition, it should be noted, because constitutional text and design grant the federal government extensive powers over commercial activities).

scheme. No such check from the other branches exists today, as activist judges march in substantial lockstep with, and in the service of, the cultural and political imperatives made dominant by backlash kulturkampf in all three branches of the federal government.<sup>57</sup>

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<sup>57</sup> See Leuchtenburg, *supra* note 52. Thus, it bears emphasis that today's backlash activism is more than simply a form of judicially imposed legal and social retrenchment. Today's law-politics synchronicity was orchestrated, and is enabled, by the multi-pronged pursuit of cultural warfare. In fact, today's backlash activism, in great measure, is a direct product of backlash kulturkampf: the backslashing politicians who have taken control of the political branches in and through the culture wars have installed today's activist judges into power with a clear sense of purpose, made publicly explicit from time to time: precisely to perform this rights take-back. See *supra* notes 41-43 and sources cited therein. Beginning in the 1980s, the second Reagan administration intensified the use of ideology to tailor judicial appointments and, in time, judicial behavior to the backlash agenda. See *infra* notes 66-67 and sources cited therein. In short, today's federal judges practice their neocolonial activism as scripted by the cultural (and legal) politics of their appointments to the federal bench—appointments that, as discussed below, are both a product and a tool of backlash kulturkampf. See *infra* Part II. Thus, contemporaneous retaliation by the Congress or the President to restrain the judges is not only politically unavailable as a “check and balance” on runaway activism, but to the contrary, today's backlash activists are politically applauded and rewarded.

Moreover, and perhaps even more perversely from a separation of powers perspective, federal judges who dare to resist substantial obeisance to the political demands or ideological imperatives of backlash kulturkampf in their opinions have become the targets of retaliation, receiving threats of hostile, disciplinary scrutiny from the politicians in control of the other two branches. See Bob Herbert, *In America: A Plan to Intimidate Judges*, N.Y. TIMES, Dec. 2000, at A29 (documenting the coordinated effort to force judicial compliance with backlash imperatives); Edward Walsh & Dan Eggen, *Aschcroft Orders Tally of Lighter Sentences: Critics Say He Wants “Blacklist” of Judges*, WASH. POST, Aug. 7, 2003, at A1 (reporting a Justice Department directive ordering U.S. attorneys across the country to be “more aggressive” in reporting judicial deviations from the federal sentencing guidelines, which had been promulgated in large part to discipline “liberal” judges painted as “soft” on criminals and too sympathetic to the constitutional rights of the accused). Ironically, the Supreme Court recently held those guidelines unconstitutional. See *United States v. Booker*, 543 U.S. 220 (2005).

The obvious aim of these law-politics dynamic is to cow independent judges, and to coerce as may be necessary their conformance with the politics of backlash—so much so that even the backlash-identified current Chief Justice recently was prompted to complain of this concerted effort at congressional intimidation of federal judges. See Linda Greenhouse, *Chief Justice Attacks a Law as Infringing on Judges*, N.Y. TIMES, Jan. 1, 2004, at 14 (reporting Rehnquist's “unusually pointed” criticism to enactment of a federal statute similar to the Ascroft directive, which “places federal judges under special scrutiny for sentences that fall short of those called for the federal sentencing guidelines”). A year later, Rehnquist sounded the same skeptical note in his annual report on the state of the federal judiciary: “There have been suggestions to impeach federal judges who issue decisions regarded by some as out of the mainstream. And there have been several bills introduced in the last Congress that would limit jurisdiction of the federal courts to decide constitutional challenges to certain kinds of government action.” These actions include efforts “to strip the federal courts of jurisdiction to hear challenges to the phrase “under God” in the Pledge of Allegiance, to the display of the Ten

Coupled with concurrent efforts to control electoral politics and federal public resources, this focus on controlling the federal judicial power has helped to establish the principal contours of backlash kulturkampf.

*B. Backlash Agendas and the Prongs of War: Identity and Politics, Status and Power*

Today's culture wars are organized generally around three principal sociolegal offensives. The three work in tandem socially and legally. They are interactive and mutually-reinforcing, and help to sustain varied forms of privilege, discrimination and subordination based on race, ethnicity, class, sex, culture, sexual orientation and the like, which similarly interlock in law and society. As evidenced by the illustrative mini-case study presented in this Afterword's counterpart,<sup>58</sup> as well as by the summary capsules sketched below, in this scheme a combination of identity-based biases and prejudices—fairly described as a “Euro-heteropatriarchy”—predominates: a combination of supremacist ideologies that formed in Europe, in particular its northwestern environs, and was inflicted on the world via European conquest and Eurocentric commerce. This particular combination of identity ideology favors the white European male who is both heterosexual and masculine. It favors European-identified cultures—customs, languages, religions. It combines, in the form of neocolonial identity politics, the racism, nativism, androsexism, heterosexism and cultural chauvinism of those regions, which in the centuries of colonialism were exported globally and, more recently, are being reinforced through the social, economic, cultural, legal and political processes of corporate globablization.<sup>59</sup> In purpose and

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Commandments on government property and to the Defense of Marriage Act, a federal law that permits states to withhold recognition of same-sex marriages performed in other states” despite constitutional commitments and norms of mutual recognition.” These and similar political efforts targeting judicial independence, Rehnquist concluded, “could appear to be an unwarranted and ill-considered effort to intimidate individual judges.” See Linda Greenhouse, *Rehnquist Resumes His Call for Judicial Independence*, N.Y. TIMES, Jan. 1, 2005, at 10; see also *Same-Sex Foes Win a Round*, MIA. HERALD, July 23, 2004, at 5A (reporting that the House of Representatives had passed a bill “to prevent federal courts from ordering states to recognize same-sex marriages sanctioned by other states”). As these examples show, the political efforts to control the federal judicial review power track the neocolonial identity politics and social agendas of backlash kulturkampf. See also *infra* Part II.

<sup>58</sup> See Valdes, *Culture by Law*, *supra* note 8.

<sup>59</sup> See Francisco Valdes *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender and Sexual Orientation to Its Origins*, 8 YALE J.L. & HUM. 161 (1996) (describing some basic tenets of Euro-heteropatriarchal social ideologies); Francisco Valdes, *Identity Maneuvers in Law and Society: Vignettes of a Euro-American Heteropatriarchy*, 71

effect, the culture wars aim to reanimate the hegemony of colonial-era traditions within the United States, interrupting anew a slow and troubled historical progression from formal subordination, to formal equality and antidiscrimination, to, perhaps some day, antisubordination and social transformation. Domestically, the neocolonial imperatives of backlash identity politics are being reinforced via the three “prongs” or fronts of the culture wars.

1. Electoral Politics and Raw Majoritarianism: A Return of Democratic Despotism?

The first of these, the targeted use of majoritarian politics to repeal or undermine “liberal” legislation or precedent, is primary because it sets the stage for the second and third prongs or fronts. The basic tactic here is straightforward and time-honored: electing to office politicians that are specifically committed to legislating the “social agenda” identified with neocolonial supremacy.<sup>60</sup> But the aim of this kulturkampf—control of the “soul” of the nation and its future through wholesale exclusions of outgroups from civic life and other forms of rank oppression—does not represent a simple case of politics as usual, as the Supreme Court itself was prompted to recognize in cases like *Romer* and *Lawrence*.<sup>61</sup> The basic objective of backlash kulturkampf—and in particular the national cultural cleansing desired by ardent backlashes to permanently cast the nation’s demography and character in the image and imperatives of the original immigrants—marks a key difference between the politics of fear and control pursued through today’s cultural warfare from the garden variety of electoral power politics expected to occur under the Constitution.<sup>62</sup> Thus, quite explicitly by the 1990s, this primary front

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UMKCL REV. 377 (2002) (elaborating Euro-heteropatriarchy); *see also* Valdes, *Beyond Sexual Orientation*, *supra* note 17 at 1427-28 and sources cited therein.

<sup>60</sup> For examples, *see* Valdes, *Beyond Sexual Orientation*, *supra* note 17, at 1431, n.91.

<sup>61</sup> *See* Valdes, *Four Score*, *supra* note 17.

<sup>62</sup> In keeping with the identity-driven objectives of the culture wars, this agenda of reaction and retrenchment revolves around several recurrent themes: elimination of affirmative action across the board; restriction of immigration from nonwhite societies; reduction of even minimal “safety-net” benefits to the poor; and especially to the immigrant poor; constriction of women’s reproductive rights, including prohibition of abortion; deactivation of environmental safeguards; de jure exclusion of sexual minorities from the “tent” of formal equality. This backlash agenda, conversely, simultaneously seeks enactment of English-supremacy laws, and of tax cuts, subsidies and rebates for wealthy corporations, groups and individuals, and of myriad other social and economic proposals that foreseeably, if not intentionally, serve to shore up the social, cultural, political and economic value of being a white, male, heterosexual, middle-class heir of earlier, perhaps colonizing, immigrants from northwestern Europe. *See generally supra* notes 38-40 and sources cited therein; *see*

or prong of the culture wars had been mobilized in the name of the “angry white male” bent on taking back what he still imagines always to have been naturally, eternally and righteously his on this continent.<sup>63</sup> Packaged in the guise of formal “democracy,” backlashing politicians relentlessly have pursued this first line or prong of the culture wars, repeatedly exploiting culturally oriented “wedge issues” to create sociopolitical polarization and, in the process, to re-seize federal lawmaking power and thereby reconsolidate the cultural supremacy of the nation’s “traditional” socioeconomic elites.<sup>64</sup>

At the federal level, as already noted, this core effort is proximately traceable to the politics of Richard Nixon and his assertion of a “silent majority” seething quietly against the social effects of the preceding legal progress in domestic civil rights,<sup>65</sup> but the watershed moment was the election of Ronald Reagan and the occupation of the White House by his savvy coterie of handlers, who especially in the second term used every institutional means available to arm backlashers for the culture wars.<sup>66</sup> Indeed, after Nixon’s

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*also infra* Part II.

<sup>63</sup> See Valdes, *Beyond Sexual Orientation*, *supra* note 17 at 1429-30 and sources cited therein (discussing this type of essentialized majoritarian identity politics, and their activation to mobilize foot-soldiers in the political campaigns that constitute the culture wars’ first prong).

<sup>64</sup> To pursue this goal, this first prong has taken two principal forms. The first, as indicated by the historical notes above, has been the capture and domestication of the ‘representative’ branches of the federal and state governments. But when this conventional sort of electoral politics have fallen short, as they sometimes do, majoritarian cultural warriors have turned this first line of attack toward ‘popular’ referenda to commandeer policy-making when elected officials hesitate to play backlash politics. At the state level, this ‘direct’ form of electoral attack has produced Prop 187, and then Prop 209, in the bellwether state of California, which materially and symbolically have made criminals of the undocumented and resegregated state educational institutions. This form of attack also is aptly illustrated by the ‘popular’ campaigns to overturn judicial antidiscrimination rulings under the state constitutions of Hawaii and Alaska in same-sex marriage cases through a direct amendment of those states’ fundamental charters. For examples, see Valdes, *Beyond Sexual Orientation*, *supra* note 17, at 1435. This use of “direct democracy” at the local level to circumvent the processes and outcomes of “deliberative democracy” at all levels of public governance—at least when such deliberation fails to produce backlash policymaking—in turn has raised questions about the meaning of both kinds of “democracy” in a society putatively devoted not only to republican self-government for its own sake, but as a means toward a foundational yet long-postponed aspiration that still adorns the portico of the Supreme Court and other public buildings: “equality and justice for all.” See *generally supra* note 46 and sources cited therein.

<sup>65</sup> See *supra* notes 41 and sources cited therein.

<sup>66</sup> See Sheldon Goldman, *Reagan’s Judicial Appointments at Mid-Term: Shaping the Bench in His Own Image*, 66 JUDICATURE 335 (1982-83); Jon Gottschall, *Reagan’s*

electioneering, Reagan's clearly was the next key national milestone in the build-up to today's kulturkampf through electoral politics: his eight years in the White House consolidated the dynamics of cultural warfare in various ways along all three prongs or fronts of these culture wars. Of these, two are perhaps most notable. The first was his sweeping re-composition of the federal judiciary: upon leaving office, Reagan had appointed more than half of all sitting federal judges, including one third of the current Supreme Court Justices, plus the current Chief Justice.<sup>67</sup> The second most notable effect was that Reagan's years, compounding those of Nixon's, provided the training grounds for the troops that succeeded to power in the 1990s, including those that in 1994 were swept into power under Newt Gingrich's "Contract with America" campaign.<sup>68</sup> They were, as noted

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*Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48 (1986-87); Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318 (1989) (all on President Reagan's judicial appointments and their ideological effects on the federal judiciary). By the turn of the century, President Reagan's escalated ideological scrutiny and techniques to ensure ideological purity had produced a paralyzing polarization in the confirmation process, especially in election years: in 1988, when Ronald Reagan faced a Democratic Senate, the senators approved 42 of his judicial nominees; in 1992, when George Bush similarly faced a Democratic Senate, the senators approved 66 of his judicial nominees; in 1996, when Bill Clinton faced a Republican Senate, the senators approved a mere 17 of his judicial nominees. See Frank Davies, *Senate Stalling New Judges: Republicans Block New Judgeships*, MIA. HERALD, Feb. 6, 2000, at 1A (reporting the increased blocking of federal judicial appointments on ideological grounds that comport to kulturkampf politics, and displaying how the culture wars' prongs operate interactively).

<sup>67</sup> During his eight years in power, Reagan secured the appointments of Sandra Day O'Connor, Antonin Scalia and Anthony Kennedy, as well as the elevation of William Rehnquist to the position of Chief Justice.

<sup>68</sup> Among the rising foot soldiers of those years was a young speechwriter-staffer from the Nixon years by the name of Patrick J. Buchanan, who later vied for the Republican nomination himself. It was he, as explained earlier, who issued the backslashers' formal declaration of cultural warfare from the podium of the 1992 Republican National Convention, announcing a new campaign for the "soul of America" through which these self-denominated cultural warriors of retrenchment intended to "take back . . . our cities, and take back our culture and take back our country . . . block by block." See *supra* notes 31-35 and accompanying text. Thus, while the storms of backlash have been gathering since the 1960s and 1970s, perhaps the pivotal moment of triumph in the steady escalation of culture war through majoritarian electoral politics came a mere two years after Buchanan's official declaration of 1992—in the 1994 congressional elections, which put into legislative office the standard bearers of the "Contract with America" and its agenda of buttressing existing structures of neocolonial supremacy through sociolegal retrenchment. See Chris Black, *Buchanan Beckons Conservatives to Come "Home,"* BOSTON GLOBE, Aug. 18, 1992, at A12; Paul Galloway, *Divided We Stand: Today's "Cultural War" Goes Deeper than Political Slogans*, CHI. TRIB., Oct. 28, 1992, at C1. Since then, as noted immediately above, this social conflict has been waged with a vengeance to "take back" the civil rights gains of the past century in the name of the

above and in the parlance of their day, the rising representatives of the “angry white male.”<sup>69</sup> This “front” of the culture wars, as this sketch indicates, exploits the numerical, structural, economic and social capital arrogated and accumulated by the original immigrants, particularly those from England, and retained to this very day by their successors-in-interest for the private benefit not only of the earlier immigrants from the colonial era but also of their neocolonial heirs today and tomorrow.<sup>70</sup>

The cumulative cultural and institutional effects of this first prong or front have been twofold: first, a substantial gutting of civil rights law and the steady (re)normalization of a social environment

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“angry white male.” See generally JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991); JAMES DAVISON HUNTER, *BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA’S CULTURE WAR* (1994).

<sup>69</sup> See, e.g., Grant Reeher & Joseph Cammarano, *In Search of the Angry White Male: Gender, Race and Issues in the 1994 Elections*, in *MIDTERM: THE ELECTIONS OF 1994 IN CONTEXT* (Philip A. Klinkner ed., 1996).

<sup>70</sup> It bears at least passing note that, this backlash resort, or deference, to “direct democracy” in the name of the federal Constitution is supremely ironic: it turns the theory of that constitution, as articulated by its federalist framers, on its head. From their original perspective, the federalists considered raw majoritarianism as a form of “democratic despotism” akin to monarchical despotism—a perspective formed in the crucible of both the revolutionary period in the 1770s as well as the critical period immediately afterward, spanning the 1780s. During this period of sovereignty, the legislatures of the autonomous former colonies, usually elected directly by the eligible voters of the state, enacted statutes that disturbed the property claims of the revolutionary elites—and that helped to prompt the energy they put behind the new Constitution’s adoption. This experience with the “tyranny of the majority” caused James Madison and other key framers to emphasize “deliberative democracy” as a check on mob rule in the name of majoritarian prerogative. In this way, the propertied local and national elites of the first generation became the first “minority” to seek constitutional protection from the dictates of rampant (from their perspective) formal democracy. In this way, they set both the stage and the example for succeeding minorities, including those under attack via raw majoritarianism mechanisms in today’s backlash kulturkampf. E.g., *The Federalist* No. 10 and No. 51 (James Madison) (discussing the problems they perceived with direct democracy); see also, GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, 393-417 (1969) (describing this “Critical Period” of direct democracy or “democratic despotism” leading up to the Constitutional Convention). Though immediate self interest may not have been the sole motivation for the revolutionary and propertied elites of the various former colonies to jettison the Articles of Confederation and to replace them with the markedly different design of the Constitution, their preoccupation with property rights prompted James Madison to conclude that the new charter must be structured to ensure that “the rights of persons were subjected to those of property.” See WOOD, *supra* note 70, at 410 (quoting Madison’s correspondence to Jefferson). Since then, this specific focus on “property versus democracy” among the framing generation has been widely acknowledged as a key, if not exclusive, motivation for the constitutional compromises actually forged in Philadelphia. For an excellent review, see generally JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* (1990).



increasingly hostile to immigrants, sexual minorities, racial and ethnic minorities, women, the poor, the disabled, and other Others; and, second, the use of this electoral clout to launch the second prong or front of the culture wars. This second prong, the installation into lifetime federal judgeships of persons who will use federal judicial powers to reinforce the gains made under the culture wars' first prong or front, is a strategic move made both to protect backlash legislation as well as to clip back offensive precedent. The two prongs, as this brief sketch indicates, work hand in hand.

## 2. Judicial Review, Judicial Will and Backlash Jurisprudence

The second line or prong of attack amounts to court-packing, pure and simple, but on a massive scale. Beginning with and since Nixon's efforts, the national judiciary has been methodically restocked, as much as politically possible, on the basis of race, gender, class and—especially—ideology to restore positively the dominance of Euro-heteropatriarchal “tradition” and those it favors in law and society.<sup>71</sup> Demographically and politically, this process has sustained the over-representation of white, male and heterosexual control over the judicial powers of the federal (and state) government.<sup>72</sup> Rhetorically, they have raised and used the banner of “strict construction” when it comes specifically—and selectively—to civil and human rights, and to contract the so-called liberal legacy, whether expressed in legislative, executive or judicial forms of law and policy. Coupled with equally strategic intonations, and selective versions, of history, tradition, democracy and federalism, backlash

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<sup>71</sup> The so-called “Federalist” Society has served as a key funnel in this process. See Valdes, *Antidiscrimination*, *supra* note 9, at 279-80. At first blush, this organization's naming seems merely odd, given their embrace of classically antifederalist dogma, such as denunciation of federal power generally, and the attendant calls for a selective “strict construction” of federal authority coupled with an unbridled expansion of “states rights” under the Tenth and Eleventh Amendments. See *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* (Ralph Ketcham ed. 1986) (summarizing the failed antifederalist agenda to defeat the ratification campaign of the federalist sponsors of the Constitution); see also *infra* notes 91-103 and accompanying text on recent backlash opinions displaying this dual approach to constitutional interpretation, coupling “strict” construction of federal authority with expansive construction of the Tenth and Eleventh Amendments.

<sup>72</sup> See Valdes, *Antidiscrimination*, *supra* note 9, at 282 and sources cited therein on the demography and ideology of the federal judiciary in recent years. Not coincidentally, the legal academy of the United States reflects a similar demographic portrait today, as it did during the formative years of critical outsider jurisprudence. *Id.* at 277. See also *supra* note 62 and sources cited therein (on Reagan's recomposition of, and pivotal impact on, the make-up and ideology of the federal judiciary).

appointees have generated substantively and ideologically preferred outcomes, effectively re-tightening the grip of neocolonial traditions over both law and society.<sup>73</sup> Tactically, the two key broad purposes behind this second line or prong are, first, to neutralize federal judicial review as an independent check on contemporary backlash lawmaking and, second, to overturn liberal (or otherwise inconvenient) precedents, or other sources of law, established during the hated New Deal-to-Civil Rights eras. In these key ways, the second prong of the culture wars clears the way for the legislative or “democratic” lawmaking conduct, in turn enabled by backlashes’ successful campaigns under the their kulturkampf’s first prong—and even as the first prong also produces the power to make the appointments that will generate the necessary rulings.

This second front or prong of the culture wars has produced the intended effect: turning the nation’s courts into passive or active tribunals, as the case may demand, so that backlash-identified interests generally may count on federal judges to enable sociolegal retrenchment and shield their backlash lawmaking from independent judicial scrutiny. As a result, backlash jurisprudence is characterized both by mighty intonations of an urgent need for “judicial restraint” as a key part of federalism and separation-of-powers concerns that in the preceding decades had been trampled by “liberal activist judges”—as well as by their own unhesitant use of judicial activism to sweep aside formal obstacles to their agenda of social retrenchment. Despite their ringing denunciations of “liberal activism,” today’s backlash judges have exposed themselves to the same denunciations, and to charges bordering on hypocrisy or worse, in their transparent analytical gyrations to generate ideologically preferred outcomes.<sup>74</sup> The jurisprudential results, and the categorical

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<sup>73</sup> See *infra* Part II.

<sup>74</sup> Bruce Ackerman, *The Court Packs Itself*, AM. PROSPECT, Feb 12, 2001, at 48 (noting that the decision in the *Gore* litigation was “not the first time in history that the Supreme Court has made a decision that called its fundamental legitimacy into question” but that this time was unique because of the direct meddling in electoral politics at the highest level). According to one former Supreme Court clerk, these charges flew between the justices themselves, as well as their chambers. See EDWARD LAZARUS, *CLOSED CHAMBERS: THE RISE, FALL AND FUTURE OF THE MODERN SUPREME COURT* 288-325 (1999) (the author clerked for Justice Blackmun in 1988 to 1989). In addition, many scholars have pointed out the doctrinal or analytical oddities unveiled in backlash rulings. See Valdes, *Antidiscrimination*, *supra* note 9, at 287-89 and sources cited therein (providing a bibliography of recent scholarship questioning the substantive integrity of this jurisprudence). This skepticism mushroomed after the intervention of the five-member backlash bloc and their 5-4 demand that all vote counting be stopped in the 2000 presidential election, thereby claiming the power—for the first time in the nation’s history—effectively to select the

consistency of the social, economic and political “winners” and “losers” under the doctrinal re/formulations of backlash jurisprudes, perhaps are most crisply exemplified by the Supreme Court itself, as discussed below.<sup>75</sup>

### 3. Public Resources, Identity Politics and Social Construction

The third line or prong of attack is the targeted control of the federal spending power to fund or de-fund particular programs or policies, as the case may be, in order to accomplish de facto roll-backs that cannot be effectuated wholesale, or directly. This third prong perhaps is best illustrated by the funding battles over abortion, legal aid for the poor, social services for immigrants and so-called ‘welfare mothers,’<sup>76</sup> but it also is shown in the current campaign, under the notorious Solomon Amendments, to withhold federal funds—including financial aid to students—from universities and colleges that do not permit military recruiters and ROTC programs to bring discrimination onto university campuses due to the military’s institutionalized policies of discrimination on the basis of sex, gender and sexual orientation.<sup>77</sup> This third prong of the culture wars aims to reassert control over the federal budget to starve programs that aid foes and to nourish the power and coffers of friends. Under this line of attack, working in tandem with the prior two lines of the culture wars, programs and policies that serve as lifelines to vulnerable communities and groups—including law students who need federal loans to secure an education—effectively are threatened or cut, even though backlashes may not have been able to muster the power to effectuate a direct, substantive take-back of the ‘right’ or ‘benefit’ under assault.<sup>78</sup>

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executive. See supra note 25 and sources cited therein on the *Gore* litigation.

<sup>75</sup> See *infra* Part II; see also *supra* note 40 and sources cited therein on backlash activism and legal retrenchment through cultural warfare.

<sup>76</sup> For examples, see Valdes, *Beyond Sexual Orientation*, *supra* note 17, at 1438-40 and sources cited therein.

<sup>77</sup> Just this year, the Third Circuit Court of Appeals invalidated this act of congressional oppression, in pursuit of cultural warfare specifically against sexual minorities, under the First Amendment. See *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004). For background information on this legislation and the efforts of legal educators to ameliorate its effects as well as to reverse it, see Francisco Valdes, *Solomon’s Shames: Law as Might and Inequality*, 23 THURGOOD MARSHALL L. REV. 352 (1998).

<sup>78</sup> This prong of the culture wars also works in tandem with the others, as illustrated by *Rust v. Sullivan*, 500 U.S. 173 (1991), in which the Supreme Court rubber-stamped the selective defunding of programs that provide abortion-related information to thwart in practice, as much as possible, women’s right to informed

As this brief sketch indicates, law and policy are central to the

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and unfettered reproductive choice. In this particular case, the first prong of the culture wars produced the legislature with the will and animus to target women's rights for systematic and strategic retrenchment, the second produced the courts that would undermine reproductive rights jurisprudentially and shield discriminatory or abusive legislation from effective challenges, and the third line of attack produced the de-funding statute when other jurisprudential and legislative efforts to erase abortion altogether continued to falter despite intensifying backlash fire. For similar examples of this dynamic, see Valdes, *Beyond Sexual Orientation*, *supra* note 17, at 1439-40, n.126.

These three prongs or fronts of the culture wars effectively serve to help reanimate the historic dominance of colonial-era traditions within the United States, interrupting anew a slow and troubled historical progression from formal subordination, to formal equality and antidiscrimination, to, perhaps some day, antisubordination and social transformation. See *supra* note 13 and sources cited therein on antidiscrimination and antisubordination. But this cultural warfare is not limited to these three principal lines of reaction and attack: these established lines of backlash kulturkampf have been accompanied by additional efforts focused on control over the instruments or means of knowledge production and dissemination as part of cultural formation and politics. These reinforcing efforts notably have included the creation of a think tank network to concoct justifications for this take-back campaign for public consumption. For an excellent expose of this particular aspect of backlash kulturkampf, see JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA* (1996).

These efforts also have included the systematic "deregulation" of the means of mass communication since the 1980s to permit, if not facilitate, their formal consolidation in ever-larger combinations of capital, which in turn have helped impose centralized corporate control over broadcast journalism as a profession, as well as to unravel longstanding public policies in favor "viewpoint diversity" in the mass media. See Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839 (2002) (surveying the policy changes effectuated during the past two decades of cultural warfare, during which policy was redirected from the long-held objective of "dispersed ownership" and replaced with the policy of "media concentration" currently in place, and evaluating the impact of the media ownership rules and patterns as a "huge non-democratic organized force that has major power over politics, public discourse and culture"). This redirection of media policy and politics was effectuated through executive appointments the Federal Communications Commission, whose actions have been challenged judicially with mixed results. For a recent example involving these media concentration policies in the context of a particular mega-merger, see *Prometheus Radio Project v. FCC*, 373 F.3d 372 (2004) (upholding in part and invalidating in part the FCC's ownership policy decisions). The end result has been an increasingly concentrated and homogenized use of the media to construct mass perceptions and public consciousness in ideological and cultural alignment with the politics of fear and control that help to motivate backlash in law and society—an unprecedented concentration of private power over mass media through a redirection of federal public policy to further entrench the cultural hegemony of neocolonial interests, "values" and politics at the expense of a heterogeneous and multicultural society. This structural disabling of independent media outlets to naturalize a potential or actual obstruction to the backlash agenda thus has been part and parcel of today's kulturkampf at least since Nixon's notorious bashing of the so-called "liberal" media. See *supra* note 41.

waging of backlash kulturkampf to bring about a social and formal restoration of the old or “traditional” deal that governed North American society since colonial times. As this sketch also illustrates, the culture wars’ three prongs are interactive and mutually-reinforcing. Though backlashes are not yet able to synchronize or control the outcomes of their campaigns perfectly, they methodically manipulate the levers of power in carefully orchestrated ways that pose the most acute threat to the possibility of social equality in North America today. To advance these aims, today’s backlash appointees have employed manifold tools and concepts to redraw entire areas of constitutional jurisprudence to their ideological liking.

## II. LAW, IDENTITY AND ANXIETY: BACKLASH ACTIVISM AS CONSTITUTIONAL JURISPRUDENCE

As the mini-case study sketched in the counterpart to this Afterword illustrates, liberty-privacy law—and majoritarian regulation of gender and sexuality—have been central to the assertion of backlash politics in the form of backlash jurisprudence.<sup>79</sup> This doctrinal centrality makes manifest the salience of supremacist anxieties within backlash circles over gender and sexual identities, and over their social evolution and articulation during the past century and today. The salience of other sociolegal identity categories targeted by backlashes (and fueled by similar anxieties of threatened supremacies) is similarly underscored by other doctrinal areas subjected to substantive and/or procedural and evidentiary transmutation under backlash activism during the past two decades or so.

Most notable, perhaps, is the salience of race and ethnicity, and of backlash anxieties over the legal and social disturbance of “traditional” hierarchies based on them, as illustrated first and foremost by the direct interventions into the substance and administration of antidiscrimination law under both statutory and constitutional federal equality mandates. The gathering clouds of backlash (and the limits of liberal vision) can be seen in early cases like *Washington v. Davis*,<sup>80</sup> the 1976 ruling that made plain how prevalent conceptions of equality were socially limited to formal, as opposed to actual, aspirations. In that case, the Justices decided that state actions with a foreseeable or predictable disparate negative impact on traditionally subordinated groups would not be deemed impermissible discrimination in most constitutional equality cases

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<sup>79</sup> See Valdes, *Culture by Law*, *supra* note 8.

<sup>80</sup> 426 U.S. 229 (1976).

unless the victim-plaintiff could prove an actual subjective motive or “intent” to cause or exacerbate such disparities. In choosing to opt for this doctrinal standard—a choice neither inevitable nor calculated to effectuate formal equality in social terms—the Justices of course chose to place foreseeably difficult, if not insurmountable, evidentiary obstacles to the vindication of violated civil or constitutional equality rights: already able to occlude actual intent and adept at it, henceforth defendants would also be better able to couch their discriminatory practices in ostensibly neutral actions that more easily shielded them from legal liability.<sup>81</sup> Perhaps unwittingly, those judges presaged some of the rhetorics and techniques that since have become backlash hallmarks; perhaps the Supreme Court’s 1989 term best marks the earliest moment of ascendancy for backlash jurisprudence in institutional terms.

Three 1989 rulings—*Atonio v. Wards Cove Packing Co., Inc.*,<sup>82</sup> *City of Richmond v. J.A. Croson Co.*,<sup>83</sup> and *Patterson v. McLean Credit Union*<sup>84</sup>—exemplify backlash jurisprudence, and its social hostility to civil rights in race/ethnicity cases, while pretending fidelity to the antidiscrimination principle. The first and third focus on race in antidiscrimination employment contexts, both under the Constitution and federal legislation, while the second case focuses on race and the Fourteenth Amendment in affirmative action nonfederal set-aside programs. In each case, the majority claimed neutral and righteous adherence to the antidiscrimination principle and its remedial mandates. In each instance, however, the result was to roll back equality policies or “affirmative action” programs designed primarily to interrupt self-perpetuating racial hierarchies instilled over time by rules of law, and thus to implement in socially meaningful terms the “opportunity” promised to all by formal equality.<sup>85</sup> Each ruling in this trio signals and exemplifies backlash antidiscrimination jurisprudence, and its hostility to civil rights laws socially while paying lip service to them formally.<sup>86</sup>

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<sup>81</sup> For an early and incisive analysis of this doctrinal choice, see Charles Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN L. REV. 317 (1987).

<sup>82</sup> 490 U.S. 642 (1989).

<sup>83</sup> 488 U.S. 469 (1989).

<sup>84</sup> 491 U.S. 164 (1989).

<sup>85</sup> For an incisive review of this trio, see Gould, *supra* note 38.

<sup>86</sup> In the first, *Wards Cove*, the judges effectively overturned an inconvenient precedent, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which had held that a showing of a subjective intent to discriminate was not the only way to prove discrimination under the statutory scheme established by Congress; unlike a claim made under the Constitution and effectively precluded by *Washington v. Davis*, *Griggs*

had held that the disparate impact of a facially neutral employment practice also could suffice to prove a statutory violation. Yet in *Ward's Cove* the judges opined to the contrary: in their opinion, employment practices that actually had segregated workers of color in the lowest-paying and lowest-status job categories of the workplace were not deemed sufficient to state a claim of discrimination because the segregation could, the judges speculated, be a "pool" problem.

In *Croson*, the judges decided that remedial efforts of state and local governments to ameliorate the present effects of pervasive societal discrimination in the past based on race would be subjected to the same level of hostile judicial scrutiny as applied historically to invidious forms of discrimination designed to subordinate social groups on the basis of race, nationality or ethnicity. By choosing to apply this "fatal" form of strict scrutiny to affirmative action programs enacted by state or local governments, the *Croson* judges not only interposed their power over democratic decision-making in ways markedly inconsistent with the general valorization of majoritarianism in backlash jurisprudence. For an example of such valorization, see Valdes, *Culture by Law*, *supra* note 8 (discussing the majority opinion's intonation of deference to democracy in *Bowers*, decided by a 5-4 vote, and reversed last year by another 5-4 vote). In effect, they circumscribed the discretion of today's majorities to disgorge some of the ill-gotten gains arrogated and bequeathed by their predecessors-in-interest. And to impede local equality efforts in this way, they strained for a novel conceptual formulation that superficially justifies their assertion of this power: henceforth, democratic policy initiatives designed to disgorge the ill-gotten gains of white supremacy through majoritarian practices of invidious discrimination would be formally equated in backlash jurisprudence with remedial policies or programs designed to ameliorate the continuing legacies of those practices. This inversion is not only Orwellian, but it also is foreseeably likely to short circuit legislative interest in policy innovations that might translate the formal commitment to equality into a socially relevant set of practices and outcomes.

Even more aggressively or actively, in the last of this 1989 trio the judges decided to reconsider a well-established precedent *sua sponte*, without any request from the parties. Brushing aside another precedent they apparently considered inconvenient, *Runyon v. McCrary*, 427 U.S. 160 (1976), the judges in *Patterson* announced that the antidiscrimination protection in private employment contracts mandated by Section 1981, the Civil Rights Act of 1866, henceforth would be limited strictly to the moment of the contract's "formation"—and not to actions and omissions preceding formation or constituting performance. Consequently, the periods of time that may be denominated as contract negotiation and contract performance, and the actions taken by employers during that time, became immunized from statutory regulation. The predictable and practical social effect of this willful reconsideration and rejection of a precedent that had withstood the test of time under the watch of many judges was to eviscerate the statute's ambit and severely limit its capacity to promote employment equality in operation.

Though reversals of precedent are supposed to be rare and circumspect, the activism based on speculation that the *Wards Cove* judges displayed made plain that traditional institutional canons would not restrain backlash kulturkampf in the form of backlash jurisprudence. In order to help set the stage for wholesale reversals in the form of backlash jurisprudence, then-Justice William Rehnquist asserted in 1990 that Supreme Court precedents decided by a 5-4 vote and "over spirited dissents" merited lesser deference as precedent. *Payne v. Tennessee*, 501 U.S. 808, 828-29 (1991) (reversing two precedents from 1987 and 1989). Because most of the backlash reversals of precedent are themselves 5-4 rulings reached over spirited dissents, this assertion in turn should make it easier to justify in coming years the reversal of most backlash rulings rendered during this period of backlash kulturkampf.

Notwithstanding the contorted justifications proffered in those opinions, the ideological valence and political imperatives of the choices and actions taken in the 1989 cases were obvious to contemporary observers, and remain so today. As Justice Marshall famously said shortly afterward, “the Court’s approach to civil rights cases has changed markedly . . . . It is difficult to characterize last term’s decisions as a product of anything other than a retrenching of the civil rights agenda.”<sup>87</sup> Since then, and through the 1990s, the five-member cadre of backlash justices needed to proclaim backlash rulings as the “supreme law of the land” has coalesced with increasing frequency to unravel delicate strands of antidiscrimination and related fields of law, oftentimes in the name of history and tradition and/or democracy and federalism. Since then, a bare majority of the current appointees to the Supreme Court has embarked on an ambitious campaign of doctrinal revision that seems organized primarily by outcome-oriented concerns that track the neocolonial dynamics of the culture wars and endorse the imperatives of reaction and retrenchment: whether driven by simple coincidence or ideological imperative, the fact remains that in culture war cases, sexual minorities, racial/ethnic minorities, religious minorities, women, environmentalists and/or the disabled, among other Others, invoked the law’s protection but were judicially rebuffed and pushed beyond the reached of conveniently redrawn jurisprudential borders. This constancy holds true with few exceptions, and usually takes place through the juridical manipulation of asserted conflicts between the demands of history, tradition, democracy and federalism against the needs or wants of civil rights—or, as the matter oftentimes has been phrased, a conflict between federal might (on behalf of outgroups) and states’ rights (on behalf of ingroups).<sup>88</sup>

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<sup>87</sup> Hon. Thurgood Marshall, *Transcription of Remarks, Annual Judicial Conference, Second Circuit of the United States*, 130 F.R.D. 166, 167 (1990).

<sup>88</sup> Though not the focus of this summary sketch, it bears note that backlashes exploit even purely technical or “procedural” cases as retrenchment opportunities. For example, in *Allen v. Wright*, 468 U.S. 737 (1984), the early core of judges associated with backlash spearheaded a decision that black school children and their parents had no standing to challenge illegal tax exemptions to racially discriminatory private academies because they had not personally applied for admission to them, even though the pleadings stated injury based on “elementary economics” that reduced integrated education. Likewise, in *Lujan v. Defenders of Wildlife*, 504 U.S. 505 (1992) the same basic core of backlash justices rebuffed the claims of environmentalists, again interposing standing requirements: the problem here, declared those judges, was that the environmentalists had not purchased airline tickets to the locales in question. Hence, their injury was not imminent. At the same time, the same basic set of appointees perceived standing in *Northeastern Florida Chapter of Associated General Contractors v. Jacksonville*, 508 U.S. 656 (1993), for white



In the early 1990s, the backlash bloc turned its attention to race and its intersection with electoral politics—the first prong of the culture wars. Four important interventions during that decade, including *Shaw v. Reno* in 1993, punctuated their efforts in voting rights cases to whittle away methodically at federal civil rights legislation designed to help pry open the doors of the political system—legislation designed to enable the meaningful participation in formally “democratic” lawmaking of racial minorities traditionally excluded de jure and de facto from the electoral, and hence lawmaking, process.<sup>89</sup> The sociolegal background of these interventions is clear: after generations of exclusion, coinciding with the formative years of the Republic and the accumulation or entrenchment of economic position and social status, outgroups were in no position suddenly to claim their political rights under formal

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construction workers complaining of a minority set-aside program—even though none of them had tried to apply for a contract under the challenged program. These cases showed that sometimes the judges will accept loss of “opportunity” to satisfy the requisite of “injury” while other times they demand the injury be something more, something difficult to satisfy; and which of the two they pick appears to depend on whether or not these five justices like or dislike the type of claim and claimant before them. For similar examples and critiques, see *supra* note 38 and sources cited therein on the manipulation of litigation results by federal judicial appointees. Indeed, these sorts of in/consistencies have induced dissenting justices (as well as other commentators) to observe that backlash jurisprudence on procedural, jurisdictional and related fields “is no more than a poor disguise” for these judges’ attitudes toward the underlying claims and claimants. *E.g., Allen*, 468 U.S. at 766 (Brennan J., dissenting).

<sup>89</sup> The other 1990s voting rights cases following from *Shaw* include *Miller v. Johnson*, 515 U.S. 900 (1995), wherein lower federal judges twice had struck down state legislative redistricting plans that, based on the 1990 Census, included two and three black-majority districts. Instead, the lower courts had ordered a plan with a single such district, thus cutting the potential electoral strength of racial minorities by half or more. In another one of these cases, *Abrams v. Johnson*, 521 U.S. 74 (1997), the same basic scenario recurred. When they reached the Supreme Court, the backlash bloc of five upheld both judicial reductions in the state legislative plans, declaring that those state legislative efforts, generated in part by the Voting Rights Act to maximize minority representation, amounted to an impermissible form of racism. And, during that same term, the same five justices indirectly struck down federal regulations in *Reno v. Bossier Parish*, 520 U.S. 471 (1997), that had required the Justice Department to consider dilution of minority voting strength when state voting procedures are modified, effectively licensing statutorily-prohibited “retrogression” in voting rights gains. In these three cases, as in *Shaw*, backlash jurisprudence interjected newly heightened evidentiary standards to trump democratic decision-making in the form of local and state redistricting plans as well as in the form of the federal legislation that since 1965 had mandated such efforts. See also *infra* note 91. After these four rulings over a four-year period by the same bloc of five judges, the growing but numerically-outnumbered racial/ethnic minorities of the United States are positioned for even greater marginality in the electoral politics that produce law—including antidiscrimination law and its retrenchment or expansion—via the ongoing culture wars.

federal equality against the localized ingroup machines that by and large ran their states, if not their local communities and neighborhoods. After decades of poll taxes, literacy tests, and other devices used by entrenched elites in the states to deny in practice the formal right to vote to racial minorities, the Voting Rights Act of 1965 was enacted to lend federal weight to minority rights to full and meaningful access to electoral power, including a mandate of no “retrogression” in gains. The law worked to some extent, creating an unprecedented level of minority elected officials; but as with other civil rights legislation, meager social effects triggered fierce traditionalist reaction. And precisely because control of elections and their results is key to the neocolonial agenda of the culture wars, backlash jurisprudence has been quite active—and “activist”—in the voting rights law: to retrench unwelcome minority advances in lawmaking prowess, backlash jurisprudence incongruously pits Equal Protection’s antidiscrimination mandate on behalf of local white ingroups, and against the principal congressional remedy tailored to multiple generations of anti-minority voting rights discrimination. Perversely, this inverted judicial concoction serves to eviscerate or circumscribe that majoritarian (or “democratic”) remedy in the very name of formal equality.

This area of backlash activism was marked for transmutation in 1993’s *Shaw v. Reno*,<sup>90</sup> which set aside a redistricting plan established pursuant to established interpretations of constitutional equality law and accepted applications of the Voting Rights Act. This ruling set the stage for the subsequent voting rights cases of that decade and backlashers’ substantive retooling (and practical diminution) of minority voting rights, and thus of electoral influence. Despite their professed deference to majoritarian lawmaking, backlashers displayed no compunction in their use of judicial power to trump the law and policy choices of the Congress and President as embodied in the Voting Rights Act. Moreover, as in *Croson* and other backlash rulings, today’s appointees were forced to redraw case law dramatically in order to narrow the previously well-established remedial uses of race and ethnicity, in this instance under the Voting Rights Act. As in *Croson* and most other backlash rulings, the practical effects of their opinions and choices help to frustrate, rather than to effectuate, the central purpose of a remedial statute—in this instance, eliminating the historic and present suppression of outgroup electoral power based specifically on race and ethnicity. In addition to baring the teeth of backlash, *Shaw* and its kulturkampf progeny illustrate the

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<sup>90</sup> 509 U.S. 630 (1993).

interactive and mutually reinforcing interplay of the culture wars' first two prongs, in which the first prong produces the power to legislate and to appoint judges, who in turn will exercise their institution's powers to dismantle existing legal structures and shield new backlash legislation from any serious or principled review.<sup>91</sup>

Having narrowed the federal power to promote democracy in substantive terms under this landmark legislation, the backlash appointees were poised to tackle federal power to promote antidiscrimination as law and policy in more general terms: by 1995, when the preceding years of backlash appointments finally jelled into a more-or-less solid line-up to control the Court's powers, the backlash bloc began to pronounce a "new" kind of backlash federalism that suddenly presented just-as-new problems for federal antidiscrimination lawmaking and enforcement in varied doctrinal or social categories. Since then, these efforts have focused, but certainly have not been limited to, four constitutional provisions that interact sharply in backlash opinions. The first, Congressional power under the Commerce Clause of Article I, is the only one of the four found in the body of the original document. The other three are found in the amendments to the original: the Tenth Amendment, the Eleventh Amendment, and Section 5 of the Fourteenth Amendment, which contains its enforcement provisions. The Commerce Clause and Section 5 have proven over history to be the main sources of federal legislative authority over civil rights law and policy—over federal authority to legislate the antidiscrimination principle into law, and to enforce the Equal Protection Clause of the Fourteenth Amendment in relatively proactive ways that help to break up local neocolonial oligarchies, and their grip on access to wealth, power and opportunity. Thus, as with the Voting Rights Act, the sociolegal background of these interventions is clear; using the Tenth and Eleventh Amendments, by the mid-1990s these five judges were prepared to begin in earnest to put an end to that.

Two 1995 cases, *Adarand v. Peña*<sup>92</sup> and *United States v. Lopez*,<sup>93</sup> mark the doctrinal ascendancy of this backlash effort to tightly

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<sup>91</sup> Thus, despite their custom of intoning the need for judicial deference to majoritarian democracy, in these rulings the backlash bloc deployed the federal judicial power under their current control to trump longstanding democratic policy choices, embodied in the Voting Rights Act, to further stack the political deck against racial-ethnic minorities in the periodic contests of formal or nominal democracy—exercises of power that, as described above, constitute the first and primary "front" or prong of the culture wars. See *supra* notes 58-75.

<sup>92</sup> 515 U.S. 200 (1995).

<sup>93</sup> 514 U.S. 549 (1995).

circumscribe federal legislative power under Section 5 and the Commerce Clause, respectively. In *Adarand*, the judges overturned a key precedent—*Metro Broadcasting, Inc. v. FCC*<sup>94</sup>—to subject Congress’ use of remedial Section 5 powers to “strict” judicial scrutiny, thus giving the backlash bloc heightened power to invalidate civil rights legislation while simultaneously inhibiting legislative capacity to use antidiscrimination law to root out socially entrenched realities instilled and valorized de jure. In *Lopez*, they declared that Congress had no power to regulate guns around public schools under the Commerce Clause because gun control is not related to commerce; under the Tenth Amendment gun regulation falls beyond federal reach. While *Lopez* thus was not an antidiscrimination suit, the reduction of federal legislative power under the Commerce Clause came freighted with historical and potential significance for antidiscrimination law and policy,<sup>95</sup> as was borne out during the next several terms.<sup>96</sup>

The very next year, 1996, the backlash bloc was busy emplacing the related doctrinal conditions necessary for this sweeping reduction in the remedial antidiscrimination powers of the federal government, as exemplified by their pronouncements in *Seminole Tribe of Florida v.*

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<sup>94</sup> 497 U.S. 547 (1995).

<sup>95</sup> The social reduction or elimination of discrimination in and through federal regulation of the economy had become an especially salient element in the elaboration of the antidiscrimination principle because of prior decisions of the Court, which in earlier times had restricted the meaning of the Fourteenth Amendment. Denied in the *Civil Rights Cases*, 109 U.S. 3 (1883), the power by a prior set of judges to legislate antidiscrimination law directly under the Fourteenth Amendment, Congresses of the Twentieth Century turned to other Article I powers under the Constitution. As a result, the Civil Rights Act of 1964—an antidiscrimination linchpin—and other landmark civil rights laws were enacted, and upheld, as exercises of the Commerce Clause power. When backlash judges chip away at this particular power, they do so with full knowledge of that power’s central role in the historic development—and maintenance—of antidiscrimination law as national policy in the United States. Moreover, the Fourteenth Amendment is explicitly directed at state action, and thus Section 5 powers are similarly restricted—or so held these same judges in a recent case involving both the Commerce Clause and Section 5. See *infra* notes 100-101 and accompanying text. The historical and substantive bottom line is clear: the Commerce Clause is and has been the primary basis for federal capacity to reach “private” discrimination, while Section 5 is and has been the main federal means to compel state compliance with federal standards equality. Both are essential pillars of federal antidiscrimination lawmaking and law enforcement. Using federalism generally, and the Tenth and Eleventh Amendments specifically, backlash jurisprudence therefore targets both for retrenchment. See also *infra* notes 98-103 and cases cited therein.

<sup>96</sup> See *infra* notes 100-103 and accompanying text on the 2000 term federalism cases.

*Florida*,<sup>97</sup> a case key to this set-up. In *Seminole Tribe*, this bloc of five judges again single-handedly decided that Congress had no power under the portion of the Commerce Clause relating to “Indian tribes” to subject states to suits in federal court for violations of federal rights. More generally, in *Seminole Tribe* these five judges—again single-handedly overturning precedent—declared that the Eleventh Amendment trumped Article I, and that Congress therefore could not authorize suits against states under the Commerce Clause for violations of federal rights. Within a few short years, the backlash appointees had managed to begin sidelining the principal sources of federal antidiscrimination lawmaking employed during the past century to enact most of today’s civil rights federal statutes—thus bringing them all into constitutional question.

Exacerbating these mid-1990s interventions, the same five judges then followed up on their *Seminole Tribe* ruling three terms later, in three backlash rulings of the 1999 term that emphasized their determination to render Section 5 of the Fourteenth Amendment the exclusive source of federal legislative power to abrogate state immunity in the enforcement of federal civil rights laws.<sup>98</sup> But the backlash bloc furthermore used these federalism cases to constrict even this power, in effect emphasizing their intent to employ the federal judicial review power not only to incapacitate federal legislative power over civil rights pursuant to the Commerce Clause, but also to monitor actively Congressional enactments under Section 5 designed to enforce the Fourteenth Amendment’s equality mandate on behalf of social or economic outgroups. These and similar backlash rulings, imputed to federalism, have asserted “for the first time since the founding of the Republic that Congress has no authority to subject a State to the jurisdiction of a federal court at the behest of an individual asserting a federal right”—an astonishing assertion entailing wholesale reversals of precedent that, therefore, have prompted spirited protests from that same Bench.<sup>99</sup> In other words, the five backlash judges effectively (and again single-handedly) declared in these remarkable opinions that Congress of course may pass its antidiscrimination and civil rights laws, but it

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<sup>97</sup> 517 U.S. 44 (1996).

<sup>98</sup> In *Alden v. Maine*, 527 U.S. 706 (1999), the same bloc further declared that federal rights cannot be asserted in state courts either—unless the states agree to let themselves be sued. In two more cases of the 1999 term involving the same parties, *Florida Prepaid v. College Savings Bank*, 527 U.S. 627 (1999), these same five justices—again overturning precedent—extended “states rights” yet again, declaring that states were immune to patent and unfair advertising suits under federal statutory schemes.

<sup>99</sup> *E.g.*, 517 U.S. at 100 (Souter J., dissenting).

cannot authorize suits by private citizens to enforce those concededly constitutional laws, nor to remedy their actual violation. Formal, but not social, equality is likely to survive this sort of backlash activism.

Pushing ahead with their forced contraction and redirection of well-established law and policy, the same five backlash appointees of the current Court banded together again in the first term of the new millennium to pronounce, in *United States v. Morrison*,<sup>100</sup> that Congress could not, under the Commerce Clause, enact the civil remedy provisions of the Violence Against Women Act, because violence against women—like gun control in *Lopez*—was deemed, in their view, unrelated to “commerce.” Moreover, Section 5 powers also failed here, the judges declared in *Morrison*, because, in their view, the problem of “violence against women” simply did not merit the sort of statute or remedy that Congress enacted.<sup>101</sup> *Morrison* thus illustrates aptly the vise into which the backlash judges have put federal civil rights power: the cumulative doctrinal valence of the backlashes’ opinions in *Morrison* and other culture war cases is designed to eviscerate the potential for either the Commerce Clause or Section 5 to serve as sturdy bases of federal civil rights legislation in the new millennium. With these strings of cases, the five backlash judges responsible for these willful rulings single-handedly here created the means for backlashes in all branches and levels of government to side-step the two main tools used historically by Congress to enact into law federal antidiscrimination policy, thus helping to turn back the hands of time to the 1930s, when a similarly activist group of judges on the Supreme Court used that tribunal to block federal power to legislate social or formal reform.<sup>102</sup> With these and similar rulings of the new millennium, the backlash bloc deploys

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<sup>100</sup> 529 U.S. 598 (2000).

<sup>101</sup> And in another backlash ruling of the 2000 term, *U.S. v. Morrison*, *supra* note 100, the same five judges furthermore concluded that Section 5—the second main Congressional tool to promote equality—was no answer either, because the statute sought to reach violence against women generally, including private rather than state action. By limiting progressively the potency of Section 5 through selectively strict construction, the backlash quintet solidifies the social and legal entrenchment of neocolonial inter-group hierarchies and supremacies, as well as magnifies their ideological agenda. See *supra* notes 72-75 and accompanying text.

<sup>102</sup> By cutting down the power of Congress to regulate commerce in general, these five justices foreseeably, if not calculatedly, make it more likely that entrenched “private” biases and prejudices fanned by Law in preceding generations will continue to pervade both social and economic transactions, and to preserve through the net effects of those transactions the historic skews established formally, socially and economically under *de jure* regimes of subordination. Thus, the social stratification of society constructed through *de jure* subordination becomes the entrenched *de facto* status quo in social and economic relations.

the federal judicial power to prohibit the use of the Law to undo what the Law previously was marshaled to do; backlash appointees use the federal judicial power to deny to the remedy the tools necessary to match and fit the harm, thus leaving in place the *de facto* status quo previously established and consolidated *de jure*.<sup>103</sup>

The summary capsules sketched above of course present an abbreviated and incomplete rendition of neocolonial kulturkampf through backlash jurisprudence. But, as this critical sketch indicates, backlash retrenchment sweeps across multiple swaths of constitutional law, and adversely affects many if not all outgroups, whether based on race or ethnicity, gender or sexual orientation, and disability or age. And as in *Patterson*, *Croson*, *Adarand*, *Lopez*, *Morrison*, and so many of the culture war cases sketched above, backlash jurists assert without compunction their control of the federal

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<sup>103</sup> The new millennium also saw the same judges' continued and intensified employment of the Eleventh Amendment to shield states from federal or citizen efforts to force compliance with federal rights, and these cases sometimes have required backlashes to retrench well-established precedents on Congress' Section 5 powers as well. For example, in *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), Congress had exercised its Section 5 powers to ban employment discrimination based on disability and to require accommodations that would open access for the disabled to the nation's social and economic mainstreams. But the backlash bloc decided that Congress simply had failed to develop a legislative record in the exercise of its democratic will to support sufficiently, in the view of these five justices, the legislative conclusion that disabled workers required federal legislative antidiscrimination action to ensure their equal protection in employment under the law. For good measure, the judges went further in this case, holding that Section 5's reach would henceforth be halted at the state level, and therefore will be not be able to reach local governments, such as cities and counties, where most of the workplace discrimination at issue in *Garrett* took place anyway. In this way, the backlash bloc engineered a remarkable contraction of democratic decision-making at the federal level, interposing their own power as a bloc in current control of the Supreme Court to restrict the potential for pro-equality democratic lawmaking, and doing so yet again at the direct expense of a long-marginalized social group: disabled workers.

In another 2000 case, *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), the same bloc of five judges joined to issue Part IV of the opinion, attributed to the Court, in which they declared that Congress also lacks power under Article I to abrogate states' sovereign immunity, even when a state law or practice allegedly violates a federal law or right that is within the constitutional purview of Congress. Additionally, the same five judges used that same portion of the opinion to block suits by a state's *own* citizens—an expansion of the Eleventh Amendment beyond its plain text, which expressly refers only to immunity from suits against states by citizens of "other" states. U.S. CONST. amend XI. This blatantly selective textual expansion seems, again, most likely to help suppress the use of legal process to vindicate substantive antidiscrimination claims based on federal law. Moreover, in *Kimel*, as in *Garrett*, the backlash judges went further: Section 5 was no answer here either, they opined, this time asserting that the statute was not "appropriate legislation" because its remedies were more potent than the judges thought necessary, or appropriate. *Kimel*, 528 U.S. 62, 82-93.

judicial power to undo established precedent and democratic or majoritarian lawmaking, whether in the form of state or federal legislation, when those sources of law stand in the way of accomplishing the backlash agenda of the national culture wars—and regardless of their contrary proclamations at other times formally adoring judicial restraint, deference to democracy and the like.<sup>104</sup> The backlash record in jurisprudence-making thus emerges as tightly consistent with the neocolonial agenda of backlash kulturkampf: when state power is used on behalf of outgroups or to uphold the “liberal” legacy of the Twentieth Century, the use is invalidated or narrowed, either directly through substantive pronouncements or indirectly through evidentiary, procedural and similar roadblocks; when state power is used on behalf of ingroups to retrench the “liberal” legacy, it is accommodated, congratulated, validated. The “losers” are: federal powers over the enforcement of all civil rights; women’s equality and reproductive choice; immigrants’ ability to build a dignified and secure life; gun control legislation to protect schools and schoolchildren; the environment; black children in elementary and secondary public schools and their parents; the disabled; older workers; the criminally accused; the voting strength of African Americans, Latinas/os, Asian Americans and other racial/ethnic minorities; sexual minorities and their ability to cultivate without persecution their intimate relationships; families, careers and other basic elements of life; and the disabled and their opportunity to function socially and with dignity. As a set and individually, the contorted opinions in these and similar culture war cases since the mid-to-late 1980s to the dawn of the new millennium have thrown new roadblocks in the way of this nation’s unfinished and acrimonious progression toward social equality and social equity under the rule of law. And with the dawn of the new millennium, the patterns and imperatives of backlash kulturkampf through backlash jurisprudence not only remain unabated, but appear poised

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<sup>104</sup> In all of these cases, however, the backlash judges continue paying lip service to the principles underlying the precedent and legislation that they subvert. At no time does backlash jurisprudence confess its disdain for the national commitment to the antidiscrimination principle. Instead, as briefly sketched above, various techniques appear to mask the purpose and effects of their opinions: conflicts with competing values are conjured, and used to curtail civil rights; rules of evidence and procedure are invoked, and then deployed to shield discrimination from viable claims; precedent is critiqued and rejected—or manipulated through “creative” distinction; pro-equality legislation is cabined. *See supra* notes 80-103 and accompanying text. The details and crannies of these culture war cases are myriad, but the overarching pattern of their doctrinal and social results is not. *See supra* notes 26-59 and accompanying text.



to continue with increasing stridency its systematic unraveling of the policies and precedents of established in previous generations, or by other institutions of law.

However, as this symposium and other LatCrit publications help to illustrate,<sup>105</sup> critical legal scholars in the United States (and beyond it) continue seeking ways to preserve the limited and fragile gains secured under the antidiscrimination principle while simultaneously articulating the principles and techniques of an antistatist framework.<sup>106</sup> Thus, if measured in national and immediate terms, this sociolegal moment seemingly belongs to backlashers and their neocolonial agenda of bringing back the old deal. Yet the OutCrit labors that continue to elaborate evolutionary understandings of “equal justice for all” simultaneously help to ensure that law and policy remain viable means of resuming the nation’s fitful historic march toward the ultimate goals of justice and equality in the not-too-distant the future. This moment, in sum, represents a juncture from which both backlashers and OutCrits issue urgent calls to the nation.

### III. ESTABLISHING THE WAYS AND MEANS OF PRESENT AND FUTURE RESISTANCE: SOCIAL JUSTICE PEDAGOGIES AND CRITICAL LEGAL EDUCATION

Control of knowledge, and of knowledge construction, at bottom is as central to the success of backlash kulturkampf as is control over the legislative, executive, and judicial powers of the federal government. And as critical education theorists have shown, all forms of education over time become institutions that tend to operate either as instruments of colonization and self-colonization, or of the contrary—emancipation and self-emancipation.<sup>107</sup> Under this view, formal education oftentimes operates to justify the world constructed by the cultural, economic and political elites that

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<sup>105</sup> See, *supra* note 3 for previous LatCrit symposia and visit the LatCrit website, <http://www.latcrit.org>, for a more up-to-date listing of publications.

<sup>106</sup> See Valdes, *Antidiscrimination*, *supra* note 9 at 273 (contrasting the liberal, critical and backlash jurisprudential approaches to the antistatist principle); see also Jerome M Culp, Jr., et al., *Subject Unrest*, 55 STAN. L. REV. 2435 (2003) (discussing antidiscrimination and antistatist).

<sup>107</sup> For the classic articulation, PAOLO FREIRE, *PEDAGOGY OF THE OPPRESSED* (rev. ed. 2000). For one law student’s insightful view of his educational experience in social and structural terms, see David Aaron DeSoto, *Ending the Conquest Won Through Institutionalized Racism in Our Schools: Multicultural Curricula and the Right to an Equal Education*, 1 HISP. L.J. 77 (1998).

dominate society and control its institutions of education.<sup>108</sup> In the usual course of things, then, mainstream formal education tends to serve the interests of the status quo; in its usual form, education formalizes and systematizes the inculcation of cultural politics to ratify the world as is. In short, “education” in practice oftentimes is tantamount to domestication in fact.

In the context of the lands now known as the United States, this practice effectively means that education—legal and otherwise—operates to justify the world constructed by Eurocentric elites during the heyday of militarist colonialism and imperialism, and furthermore celebrates the reinforcement of those legacies through a new heyday of corporate globalization based on colonial bequests. As inherited by each generation of humans, legal education specifically serves to justify and perpetuate the social legacies of colonial conquest as constructed by, or embedded in, various forms of law and policy.<sup>109</sup> This service of course is performed both by what is left out as well as by what is put into the content or substance of contemporary legal education; by leaving out, for instance, knowledge of the systematic imposition on this nation and others of supremacist identity politics through law an policy to motivate conquest and rationalize subordination— a systematic imposition of power that forms a key part of the legal story that explains so much of the injustice manifest in contemporary students’ social inheritance,

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<sup>108</sup> See, e.g., ANTONIA DARDER, *CULTURE AND POWER IN THE CLASSROOM: A CRITICAL FOUNDATION FOR A BICULTURAL EDUCATION* xvii (1991) (citations omitted); see also ANDREA GUERRERO, *SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION* (2002) (documenting the restoration of institutionalized preferences for whiteness in elite law schools, and the ensuing process of resegregation at one prominent institution).

<sup>109</sup> The footprints of colonial conquest throughout the Americas of course are well documented. See generally CHARLES GIBSON, *SPAIN IN AMERICA* (1966); RAMON GUTIERREZ, *WHEN JESUS CAME, THE CORN MOTHERS WENT AWAY: MARRIAGE, SEXUALITY AND POWER IN NEW MEXICO, 1500-1846* (1991); LYLE H. MCALISTER, *SPAIN AND PORTUGAL IN THE NEW WORLD, 1492-1700* (1984); NATIVE AMERICAN TESTIMONY: A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO PRESENT, 1492-1992 (Peter Nabokov ed., 1991); DAVID J. WEBER, *THE SPANISH FRONTIER IN NORTH AMERICA* (1992). American adventurism and interventionism throughout the Americas under policy imperatives such as the Monroe Doctrine and the Cold War continues this history. See, e.g., RODOLFO ACUÑA, *OCCUPIED AMERICA* (3d ed., 1988) (assessing Chicana/oc communities as internal colonies); Gilbert Paul Carrasco, *Latinos in the United States: Invitation and Exile*, in *IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE* 190 (Jean F. Perea ed., 1997); WALTER LAFEBER, *INEVITABLE REVOLUTIONS: THE UNITED STATES IN CENTRAL AMERICA* (2d ed. 1993); Ediberto Roman, *Empire Forgotten: The United States’ Colonization of Puerto Rico*, 42 *VILL. L. REV.* 1119 (1997). For a discussion of colonialism’s combined effects from one LatCritical perspective, see Francisco Valdes, *Race, Ethnicity and Hispanismo in a Triangular Perspective: The “Essential Latina/o” and LatCrit Theory*, 48 *UCLA L. REV.* 305 (2000).

and which every new generation struggles to understand; indeed, this sociolegal inheritance *is* the status quo that remains under contest in the current culture wars.

A. *The Backlash Agenda and Ignorance as Education: Reinforcing Unjust Power*

One example of deceptively-sanitized knowledge offered via contemporary (and uncritical) legal education is found in the omission of the so called “insular cases” from the case books and courses employed to teach constitutional law to new classes of entering students nationwide every year.<sup>110</sup> The Insular Cases, a series of controversies decided as the 19th Century turned into the 20th, lent a judicial patina to North American imperialism during the years of manifest destiny to justify the conquest and subjugation of people in territories that are not states of the United States on the basis of specifically Euro-heteropatriarchal identity politics. People, such as those in Puerto Rico, were deemed unfit on racial, ethnic and cultural grounds to become part of the American nation state.<sup>111</sup> This

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<sup>110</sup> Among the Insular Cases, perhaps the most significant one is *Downes v. Bidwell*, 182 U.S. 244 (1901), in which the Supreme Court ratified the North American administration of Puerto Rico as a territory. See generally JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985). These cases capture a brutal side of constitutional law and nation-building, and for this reason are not to be found anywhere that a typical contemporary law student might venture. The end result is a skewed understanding of legal history and constitutional law. See generally, Sanford Levinson, *Why the Canon Should be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241 (2000).

This particular curricular gap or skew of course is congruent with the structural bents of mainstream legal education in the United States, which from the time of its formalization was shaped in explicit ways by the social, cultural and political dominance of white, Anglo-American nativist-racism as well as societal sexism. See, e.g., Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1475-92 (1997) (recounting how the American Bar Association, the bar examination, the Law School Aptitude Test and other “gatekeeping” mechanisms were originated and calculated to be racist, anti-immigrant, sexist and anti-Semitic); William C. Kidder, *The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 TEX. J. WOMEN & L. 167 (2000) (discussing how the LSAT continues to project that history into the present); see also ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983) (providing a comprehensive account of the politics—including the identity politics—that dominated the institutionalization of formal legal education); see generally NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* (1999) (providing a similar history focused, more generally, on the standardized tests used in various educational settings in the United States).

<sup>111</sup> See RUBIN FRANCIS WESTON, *RACISM IN U.S. IMPERIALISM* (1972) (providing a comprehensive account of U.S. imperialism and white supremacy, and illustrating how the areas targeted by those imperialist ventures now are the sources of today’s

act of institutionalized omission and others like it enables the sanitized history of the status quo spoon fed to students, day in and day out across the country and globe, to keep each succeeding generation socially tranquilized, economically exploited, culturally subjugated and politically subordinated. In its dominant uncritical form, mainstream education teaches every generation to genuflect to, and then how to help maintain rather than challenge, the cultural, economic and social skews inflicted on these lands since 1492.

Awareness and wariness of this power and knowledge is precisely why critical theory is absent or marginal, still, in formal law school curricula from coast to coast, effectively withholding thereby for most law students any structured opportunity to acquire self-liberating knowledge in the general course of a typical legal education.<sup>112</sup> Thus, historically as well as presently, the principal aim and effect of uncritical mainstream legal education is to prevent the possibility of self-decolonization and, instead, to help promote the assimilation and domestication of each new generation in the putative name of progress and prosperity. In contrast, by critical legal education I therefore mean a formal educational experience that aims to provide students with the knowledge and skills to promote social emancipation as well as self-emancipation. At the most basic and provisional level, critical education signifies the active application of critical theory, and in particular of outsider jurisprudence, to the fields of formal knowledge that we teach in law school classrooms or elsewhere. Critical legal education is the pedagogy that teaches law through the lens of LatCrit and OutCrit theorizing—a critical social justice pedagogy representing a fusion of conventional doctrine and LatCrit knowledge together with critical education theory.<sup>113</sup> Like critical pedagogy, critical legal education is aimed at ending the remains of colonial conquest.<sup>114</sup>

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immigrant communities, including Cuba, Puerto Rico, Hispaniola, the Philippines and other areas in and beyond the Americas); *see generally* SCOTT NEARING & JOSEPH FREEMAN, *DOLLAR DIPLOMACY: A STUDY IN AMERICAN IMPERIALISM* (1925) (providing a contemporary critical analysis of U.S. expansionism and its socioeconomic imperatives).

<sup>112</sup> *E.g.*, Francisco Valdes, *Insisting on Critical Theory in Legal Education: Making Do While Making Waves*, 12 *LA RAZA L.J.* 137 (2001).

<sup>113</sup> *See* Francisco Valdes, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 *ASIAN L.J.* 65 (2003) [hereinafter *Critical Legal Education*].

<sup>114</sup> *See id.* at 72-74. This mission statement thus claims for critical legal education a grounding and vision similar to the kinds of “critical pedagogy” posited more generally among critical education theorists for educational ventures devoted, as are these and similar efforts, to social justice for the traditionally-subordinated of the world. Critical pedagogy refers to an educational approach rooted in the tradition of

As these notes indicate, the key initial ingredients for establishment of critical legal education therefore are critical educators and critical scholarship: the former, incorporating and using the latter in the classroom, is the first necessary step toward creating the means and conditions for the delivery of a critical education to today's law students. Thus, the (limited) diversification of the North American legal professorate racially and otherwise during the past two or so decades, and the emergence of critical outsider jurisprudence that these "outsiders" in legal academia have helped generate during that time, have put into place the two key initial conditions for interested law students to learn the skills, knowledge and modes of inquiry that will allow them to develop the critical capacities to reflect, critique and act to transform the broader societal conditions under which they, and we, live.

*B. Toward a Critical Legal Education: A Survey of Current Efforts*

Work toward a critical education in North America in recent years has spanned several categories of effort.<sup>115</sup> The first might be

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critical theory. Critical educators perceive their primary function as emancipatory and their primary purpose as commitment to creating the conditions for students to learn the skills, knowledge and modes of inquiry that will allow them to inquire critically about the role that society has played in their self formation. More specifically, critical pedagogy is designed to give students the tools to examine how society has functioned to shape and constrain their aspirations and goals and to prevent them from even dreaming about a life outside the one they presently know. Critical legal education and pedagogy, at their best, provide lifelines of power based on knowledge and principle to marginalized students struggling to become aware of the ways and means through which felt and known oppressions are normalized, materialized, even valorized.

<sup>115</sup> This work suggests various—at least seven—features that help to define such an education, if it is to achieve its bedrock emancipatory aims. The first of these features is the centrality of specific history, so that we may understand the present and its origins—its social construction across the generations. The second is the importance of interdisciplinarity in all categories of study and approaches to knowledge, and in legal education specifically, to help contextualize the law and its social operations. The third feature is the necessity of dialectical method—that is, a give-and-take designed to ensure interactivity, through which knowledge and skill are transmitted and internalized more effectively and organically. Fourth is the indispensability of multidimensional critical analysis to avoid the blind spots of essentialisms and the pitfalls of stereotypes. The fifth feature is recognition of the key and symbiotic relationship twines theory to action, a process through which social activism is sharpened by critical awareness and vice versa, an ongoing process to help ensure solidly grounded theory *and* practice. Sixth is heightened awareness and understanding of the processes and consequences of dominant forms of globalization to help put a spotlight, a critical spotlight, on the latest iteration of colonial identity politics. And the seventh feature of a critical legal education is a methodical mapping both of contextual particularities and the interlocking patterns that particularities form across multiple borders, so that we ensure both a

described as *individual intervention*. That is, courses which faculty members all over the country create and introduce to the curriculum and sustain as part of the curriculum through their personal commitment to the teaching of that course year after year. The second might be described as *institutional reforms*. A prime contemporary example of this kind of institutional reform is the “critical race concentration” at the UCLA School of Law, which provides a structured two-year curriculum for students interested in the study of race and law in multi-dimensional and critical terms.<sup>116</sup> The third example might be described as *collective insurrections*, by which I mean the collective efforts of scholars and activists from different institutions, identities, disciplines, world regions and time zones who strive to transcend the limitations and the borders of time, space and culture to design and mount collective interventions in the business-as-usual routines that mainstream, conventional, or traditionalist legal education spoon feeds to us on a daily basis. In this last category are two examples mounted by LatCrit and OutCrit scholars from various disciplines, institutions and countries to establish accessible opportunities for students across and beyond the United States: the Critical Global Classroom (CGC), a study-abroad program in law, policy and social justice activism<sup>117</sup> and the LatCrit

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comparative and a critical understanding of social realities, and of how they are co-constructed through law and its institutions. These seven features, perhaps coupled with others I may have overlooked here, provide a sturdy foundation for the implementation of critical legal education at multiple levels of intervention—whether in individuated, programmatic or combinations of forms. See generally Valdes, *Critical Legal Education*, *supra* note 113.

<sup>116</sup> Students graduate with a certification that is noted in their diplomas. For a recent review of both kinds of these efforts, see Francisco Valdes, *Barely at the Margins: Race and Ethnicity in Legal Education-A Curricular Study with LatCritical Commentary*, 13 LA RAZA L.J. 119 (2002).

<sup>117</sup> The CGC focuses on human rights and comparative law from a critical perspective and is aimed to include the substantial study of critical theory in international contexts and comparative terms. In addition students attend the LatCrit Colloquium on International and Comparative Law, where they interact directly and substantively with diverse scholars from different disciplines and regions of the world. And after the program concludes, the companion Cyber Classroom Project encourages and enables CGC graduates (and other like-minded students, activists and faculty) to stay in touch and collaborate on matters of mutual interest via electronic and other means. The CGC and Cyber Classroom Project jointly create opportunities to forge relationships and build networks of like-minded individuals in a formal educational setting, which ideally will continue beyond the six weeks of the CGC program, to carry out social justice projects of various sorts in local communities, as well as in global venues. In content, design and aim, these projects, like others in the LatCrit Portfolio of Projects, represents a collective effort at institutionalizing critical approaches to legal education: both teach and *are* social justice practice at the personal *and* programmatic level. For more information on the CGC and other LatCrit projects, please visit the LatCrit website at

Student Scholar Program (SSP), which provides scholarships and mentoring opportunities for students in law and other disciplines anywhere in the world to conduct and publish research on race and ethnicity.<sup>118</sup> These three kinds of reformatory efforts—whether in the form of individual interventions, institutional reforms or collective insurrections—strive to establish criticality in legal education to help create substantive areas of knowledge and effective conceptual platforms from which students may “make waves” as agents of social and legal transformation.<sup>119</sup> Combined with the production and application of OutCrit scholarship, these three types of interventions into the variegated ways and means of formal legal education help to set the stage for a longer-term capacity to promote progress toward a postsubordination society—and, more to the point, these types of interventions likewise help to preserve our collective capacity to expose and ameliorate, and eventually to undo, the many ravages of backlash kulturkampf.

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<http://www.latcrit.org>.

<sup>118</sup> This program invites students from any discipline in good standing at any accredited institution any place in the world to submit an original, unpublished manuscript related to questions of race, ethnicity and law. These parameters are deliberately flexible to accommodate innovative cross-disciplinary work devoted to race, ethnicity and social justice: students who enroll in seminars or similar classes, where they already are devoting time to the development of substantive papers, are well positioned to participate in this program every year. As another ongoing collective experiment in critical legal education, the Student Scholar Program aims to help students produce the knowledge that helps to explain the present—explain it in historical, contextual and multidimensional terms. For more information on the SSP and other LatCrit projects, please visit the LatCrit website at <http://www.latcrit.org>.

<sup>119</sup> These two new experiments in collective social justice programs not only strive to institutionalize critical legal education, but they also are designed to work hand in hand: both the CGC and the SSP are designed to operate as lifelines to students at law school campuses nationwide and beyond. Both respond to student accounts, which we oftentimes hear, of intellectual and human isolation experienced by critically-minded students in their so-called home institutions. Both offer programmatic opportunities to study areas of law and approaches to policymaking that otherwise might not be available to today’s socially conscious students in structured, formal settings. Moreover, both the CGC and the SSP are intended to help cultivate critically-minded students who might be interested in pursuing a teaching career in law or other disciplines. Both the CGC and the SSP are designed to work synergistically as lifelines to students, as well as pipelines for them into the legal—or other kinds of—academies. Both are examples of collective insurrections in the name of critical legal education. Along with the never-ending work of individual faculty from coast to coast, these collective experiments seek to establish the makings of critical legal education within the confines of traditional legal institutions. See Valdes, *Critical Legal Education*, *supra* note 113, at 89-96.

## CONCLUSION

Time and again, the “culture war cases” of the past two decades or so—whether deemed doctrinally in the realm of liberty-privacy, equality and antidiscrimination, voting rights and democracy or other areas of law and policy vital to the well-being of traditionally subordinated groups in the United States—occasion backlash rulings made possible by the court-packing prong of the culture wars. As such, backlash jurisprudence represents the juridical portion of this larger societal reaction to the meager social and political gains secured to “outsiders” by the formal legal advances of the New Deal-Civil Rights eras. Thus, with few exceptions, today’s backlashing judges continue to use every constitutional opportunity to actively and methodically redraw established or evolving lines of law and policy in favor of neocolonial elites, and to retrench New Deal and Civil Rights legislation, constitutional precedent and other sources of formal equality. To accomplish this basic aim, and as the illustrative sketch of cases presented above shows, backlashers resort to substantive, evidentiary and procedural devices to buttress neocolonial hierarchies of privilege and to rebuff minority claims to justice and access. This substantive effect, is not one big coincidence but rather one giant calculation—as the very declaration of formal backlash made clear from the outset; these judicial practices, in short, reflect and reinforce the larger dynamics of backlash *kulturkampf* that, in turn, help/ed to compose today’s bench for this very purpose.

These doctrinal revisions—and the social legacies they aim to entrench further in the legal and social norms of the nation—is what LatCrits and other OutCrits must confront and combat; it is this repudiation of the Civil Rights and New Deal legacies that LatCrits and allied scholars must work now to repudiate in turn. In this context, and at this urgent historical juncture, this year’s conference theme and symposium provide a welcome and needed contribution to the antistatist scholarship that remains the bedrock of critical outsider jurisprudence, including LatCrit theory and praxis. But in addition to the ongoing production of this critical counter-knowledge, LatCrits and allied OutCrits must take the work on critical legal education sketched above to the next level: scholarship, while important as an enduring record and tool, is alone insufficient. We must also work individually, collaboratively and creatively to import critical knowledge, including our growing body of scholarship, into today’s education of tomorrow’s leaders. As this year’s conference and symposium underscore, our work as activist



scholars must continue to focus *both* on the production of critical knowledge as well as on the incorporation of social justice pedagogies into contemporary systems of formal education.