

MULTIPLE CONSCIOUSNESS AND THE DIVERSITY DILEMMA

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INTRODUCTION

There are many valuable aspects of Professor Malamud's article, *Affirmative Action, Diversity, and the Black Middle Class*.¹ Perhaps her most remarkable point is that we as legal scholars need not limit our arguments to those that the current Supreme Court will accept.² It is especially significant that Professor Malamud—as a former Supreme Court clerk and professor at one of the nation's premier law schools—makes this argument.³ From a former insider's perspective, she restates the basic realist tenet that “[a] judge will be more likely to read precedent as permitting

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As a junior scholar, an Asian American, and a female, it is a pleasure to “crash the symposium party,” as Jean Stefancic so aptly put it. I would like to thank Richard Delgado for his support of this work and for conducting a diverse symphony of voices on this symposium topic; Jean Stefancic for her expert moderation of the panel; Margaret Montoya for her friendship and insights; Fran Ansley, my affirmative action co-commentator; Deborah Malamud, a gracious “subject” for comment; the DePaul law library staff for their assistance and responsiveness; and Gil Gott for his editorial comments. I also drew on the extensive pop cultural knowledge of my mother-in-law, Rosemary Gott, who recalled the particulars of the Johnny Mercer song. Finally, I am particularly grateful to my skilled and committed law review editors, Melanie Lewis, whose thoughtful accommodations around my spring schedule enabled me to participate in this symposium, and Owen Borum.

This reply is based upon Professor Malamud's symposium presentation and first two drafts of her article. Many of the concerns I shared at the symposium and in my first two drafts subsequent thereto have been addressed in the final version of her article. I find the initial exchange of ideas to be important and illuminating because Professor Malamud's original position seems to be representative of thought patterns shared by many self-identified liberals. Therefore, in order to preserve a portion of the initial exchange, I have not significantly modified the original substance or tone of my comments.

1. Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939 (1997).

2. *See id.* at 947-48.

3. Professor Malamud teaches at the University of Michigan Law School and clerked for Justice Harry Blackmun in 1988-89. *See* THE AALS DIRECTORY OF LAW TEACHERS 653 (1996-97).

a broader range of action if the judge is personally convinced there are good reasons to do so, even if these good reasons are reasons (like societal discrimination) that must go unstated."⁴

Through this reminder to continually demystify adjudication, she urges that we stop self-censoring our arguments. Such a suggestion is liberating in the current climate for two reasons: first, it serves as an antidote to reinvigorated conservative legal projects that strive to "naturalize" regressive adjudicatory practices; and second, in the specific context of affirmative action, it promises to move us from the narrow requisites of strict scrutiny⁵ to discourse more openly about white supremacy⁶ and the true covenant of the Fourteenth Amendment, which the courts have broken.

The general challenge to move outside of Supreme Court precedent in affirmative action legal scholarship permits Professor Malamud to direct our focus to societal discrimination as a primary, if not sufficient, justification for continuing race-based affirmative action—a rationale that has been unceremoniously

4. Malamud, *supra* note 1, at 946.

5. Under strict scrutiny review, affirmative action programs must be supported by particularized findings of discrimination and further a compelling state interest. The programs also must be narrowly tailored. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2117 (1995) (identifying strict scrutiny as the proper standard of review for all race-based affirmative action programs, whether local, state, or federal); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (identifying strict scrutiny as the proper standard of review for race-based affirmative action programs enacted by local governments).

6. My working definition of white supremacy is a set of reinforcing and synergistic beliefs and institutional practices and policies reflecting hierarchical group power relations consistent with superiorization of white racial identity or inferiorization of non-white racial identity. Cf. GEORGE N. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* xi (1981) (defining white supremacy as the "attitudes, ideologies, and policies associated with the rise of blatant forms of white or European dominance over 'nonwhite' populations"—a domination achieved by making race or color a qualification for equal participation in civil society); Fran Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 (1989) (referring to white supremacy as a "political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings"); Evelyn Hu De-Hart, *Affirmative Action—Some Concluding Thoughts*, 68 U. COLO. L. REV. 1209 (1997). For further discussion of white supremacy in this volume, see contributions by Margaret Montoya, *Of "Subtle Prejudices," White Supremacy, and Affirmative Action: A Reply to Paul Butler*, 68 U. COLO. L. REV. 891 (1997), and Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841 (1997).

dumped by the Court and many other policy makers.⁷ The resurrection of a compensatory rationale based upon past and present societal discrimination would eliminate many of the roadblocks that the post-liberal Court has constructed against effective racial remedies.

Professor Malamud has also chosen to intervene in the affirmative action debate in a most unpopular, and therefore, I think, courageous way. She has chosen in her paper to defend the Black⁸ middle class as affirmative action beneficiaries. The current vogue among liberal defenders of affirmative action is to sacrifice middle-class African Americans as affirmative action beneficiaries in exchange for a putative, class-based system.⁹ In rhetorical defense of such a compromise, stark juxtapositions are often made of the proverbial black "son of the Pittsburgh neurosurgeon"¹⁰ to the "son of the white sanitation worker."¹¹ Who can argue with such proof of the moral unfairness of current race-based affirmative action policies? Professor Malamud's position as a self-identified white liberal who theorizes about class makes

7. See *Croson*, 488 U.S. at 490 (disapproving of societal discrimination as a rationale to support racial classifications by local and state governments); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (rejecting societal discrimination as a basis for implementing race-based affirmative action by state or local governments and requiring instead "some showing of prior discrimination by the governmental unit involved").

8. I choose to capitalize "Black" for the reasons articulated by Kimberlé Williams Crenshaw in *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1331 n.2 (1988) ("Blacks, like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun."). However, I do not capitalize Black when quoting from Professor Malamud's article, as that is not her analytical preference.

In response to the anti-essentialist critique, I would expand Crenshaw's concept of "cultural group" to "political-cultural group" to recognize that the externally imposed racialization of the previously mentioned groups based upon white supremacy interacts with the internally generated cultural group formation.

9. See Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 CAL. L. REV. 1037, 1097 (1996) (arguing that class-based affirmative action "should supplant, rather than supplement race-based" affirmative action). For his book-length treatment of the same argument, see generally RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996).

10. Malamud, *supra* note 1, at 951 (citing CHRISTOPHER EDLEY, JR., *NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES* 81 (1996)).

11. Ironically, Kahlenberg uses the juxtaposition of "Bill Cosby's offspring over the son of a white sanitation worker" to illustrate the moral unfairness of race-based affirmative action. Of course, Kahlenberg wrote both his book and his article cited above prior to the murder of Bill Cosby's only son. See Kahlenberg, *Class-Based Affirmative Action*, *supra* note 9, at 1061.

her defense of affirmative action for the Black middle class especially potent, since it is immune from attack as mere self-interestedness in an impermissible "racial spoils system."¹² When a professed liberal, white female from a lower middle-class background questions the underlying policy issues, the image of a white sanitation worker must rely on more for moral suasion than the unstated, racist premises of its juxtaposition to the parasitic and pampered Black brain doctor.

While I agree with Professor Malamud's defense of both the compensatory rationale and middle-class African Americans, I do not see why, as a consequence, we must reject the diversity rationale and the inclusion in affirmative action programs of other middle-class minorities in order to make the case. I suppose this zero-sum framing may be emblematic of what divides liberals from race critics (such as myself). The strategic posture of "multiple consciousness"¹³ may inform race critics' understanding of the diversity rationale, so that we are more hesitant to dispense completely with it, especially when appeals to diversity may be the only way for people of color to retain a foothold in institutions of higher education in light of ongoing legal and political backlash against affirmative action. While her critique of diversity as a legitimating rationale is compelling, Professor Malamud, like critical legal scholars who harshly critique rights discourse,¹⁴ may not fully appreciate the cultural

12. Affirmative action critics often refer pejoratively to affirmative action as a spoils system. See, e.g., *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2112 (1995) (applying strict scrutiny review to even federal affirmative action plans to "smoke out" governmental objectives that may be motivated by what the *Croson* Court referred to as "simple racial politics"); *Croson*, 488 U.S. at 510-11 (suggesting that affirmative action is merely a form of racial politics in which a "racial group with the political strength" will "negotiate 'a piece of the action' for its members") (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 539 (1980)); Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1897 (1996) (referring to affirmative action policies in education as "racial patronage" and as an "academic spoils system").

13. Mari Matsuda applied W.E.B. DuBois' concept of "double consciousness" (African Americans' simultaneous understanding of the world based upon the dominant mainstream perspective in addition to one's outsider viewpoint) to rights discourse, observing that "the victim of racism can have a mainstream of consciousness of the Bill of Rights, as well as a victim's consciousness . . . [that] combine powerfully to create a radical constitutionalism . . ." Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 334 (1987).

14. Some of these critiques are included in an influential critical legal studies anthology entitled *The Politics of Law: A Progressive Critique*, published in 1982. See, e.g., Alan D. Freeman, *Antidiscrimination Law: A Critical Review*, in THE

and political import of the diversity rationale. Moreover, her reclamation project to restore the compensatory rationale trades the benefits and limitations of one liberal defense of affirmative action for another, without necessarily incorporating the power of more transformative perspectives.

This reply has two main parts. In Part I, I use a multiply conscious strategic sensibility to engage Professor Malamud's critique of the diversity rationale. I argue that her criticisms underappreciate the cultural dimensions of racial subordination and the political import of the diversity rationale as a conceptual tool that facilitates community empowerment and coalition building. In Part II, I assess her proposals for reform from a critical race theory perspective. Professor Malamud's version of the compensatory rationale, which as a general principle may hold promise, is limited to a liberal, neo-Myrdalian¹⁵ "societal discrimination-as-prejudice" analysis that is rooted in a pre-civil rights era understanding of racial theory.

I offer the following comments as an inter-communal critique that aims to build alliances between white liberals and race critics who mutually seek to support affirmative action. How we differ may largely be a question of focus. Rather than viewing affirmative action as a whole remedy for racial discrimination to be embraced in part—à la Clinton's "mend it, don't end it" approach—I view affirmative action as a partial remedy to be embraced in whole, and extended. Perhaps, as I suggest in my conclusion, our differences in focus and acceptable rationales may be rooted in how we interpret the unstated predicate and, therefore, the meaning of the Fourteenth Amendment.

Professor Malamud adopts a hybrid, progressive-liberal interpretation of the Fourteenth Amendment. Her reading is progressive insofar as she rejects the current, dominant tendency

POLITICS OF LAW: A PROGRESSIVE CRITIQUE 281 (David Kairys ed., 1982) [hereinafter THE POLITICS OF LAW]; Robert W. Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW, *supra* at 96.

15. Gunnar Myrdal challenged dominant pre-World War II era race theories of biological determinism and successfully replaced them with a "prejudice/bias" model of racial inequality. See generally GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM IN MODERN DEMOCRACY (1944). For a fuller discussion of Myrdal's views on race, prejudice, and inequality, see *infra* Part II.B.

to see the Fourteenth Amendment as imposing a color blindness, offering instead an “understanding that race-based economic inequality stands in the way of achieving diversity without affirmative action.”¹⁶ Her ahistorical, episodic treatment of race and racism, however, maintains a liberal stance insofar as she is more concerned with developing limiting principles for an already limited and disfavored racial remedy¹⁷ than with envisioning a wider set of effective, comprehensive remedies to redress the myriad economic, social, and psychological injuries inflicted under centuries of white supremacy. Not only does Professor Malamud fail to provide for the expansion of affirmative action or other racial remedies, her preference for limitable (and therefore defensible) affirmative action reifies the legitimacy and practice of contemporary meritocracy.¹⁸ Only by underappreciating the temporal and geographical depth and breadth of race and racism as foundational, constitutive elements of U.S. constitutional democracy can one be more concerned with remedial limitation than with expansion of one of the few proven effective racial remedies.

In my conclusion, I conceptualize a somewhat different historical understanding reflected in the Fourteenth Amendment’s unstated predicate—one that reflects a “survival covenant” necessitated by a history of genocide, slavery, conquest, forced assimilation, colonization of labor practices, and other forms of

16. Malamud, *supra* note 1, at 941.

17. One key objection Professor Malamud identifies in her critique of the diversity rationale is the “Very Permanence of Diversity-Based Affirmative Action.” *Id.* at 966. The diversity rationale, she notes, “knows no end point” and “contains no internal limiting principle.” *Id.* “Affirmative action can be temporary . . . only if it is based on an identified social problem that we are simultaneously working to cure.” *Id.*

18. For example, Professor Malamud contends that the diversity rationale is “dangerous if no effort is made to account for the reason why the black middle class cannot compete using traditional merit criteria.” *Id.* at 955. The legitimacy of “testocracy” is taken for granted so that Black [under]performance is framed as a threat to [pseudo]meritocracy. For a critique of testocracy posing as legitimate meritocracy, see Michael Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065 (1997) (critiquing standardized measures of merit as “socially constructed value judgments, not psychometrically determined predictors”); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 968 (1996) (referring to the widespread belief in the functionality of standardized tests as a “testocracy” that masquerades as a “meritocracy” and finding that standardized tests are neither fair, functional, nor predictive).

racial subjugations.¹⁹ Outside of the survival covenant interpretation, I contend that the Fourteenth Amendment has little meaning.

I. PROFESSOR MALAMUD'S CRITIQUE OF "DIVERSITY"

In this section, my comments to Professor Malamud's critique of the diversity rationale attempt to complete the picture she has only partially painted. The elided elements I provide are necessary in order to ground an understanding of diversity's place in ongoing struggles for racial justice. While we may find fault analytically with the diversity rationale, "critical race praxis"²⁰ demands that our work account more completely for the connection between analysis and the contours of antisubordination practice.²¹ In this spirit, then, I offer first a supplement to Professor Malamud's understanding of the structure of racial injustice and its remedies, and second, an additional performative-level²² grounding for the assessment of diversity.

A. *The Diversity Rationale Responds to the Cultural Injuries of Racial Subordination*

In her article, Professor Malamud observes that one way in which advocates of race-based affirmative action have avoided the calls for class-based affirmative action has been to emphasize diversity as the core reason for affirmative action.²³ After

19. See Robert Meister, *Sojourners and Survivors: Two Logics of Constitutional Protection*, 3 U. CHI. L. SCH. ROUNDTABLE 121 (1996) (recognizing the constitutional crisis triggering the passage of the Fourteenth Amendment—namely for the country to "survive" its negative history of racial subjugation); see also *infra* Conclusion.

20. For a definition of critical race praxis, see Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 875-80 (1997) (outlining the conceptual, performative, material, and reflexive starting points of a critical race praxis framework that combines a "critical pragmatic socio-legal analysis with political lawyering and community organizing for justice practice by and for racialized communities").

21. See *id.* at 829.

22. See *id.* at 879-80.

23. Professor Malamud identifies three extra-jurisprudential reasons why diversity has become the main rationale to support affirmative action policies: (1) The diversity rationale "lowers the institutional costs of pursuing affirmative action" because current definitions of "merit" do not have to be disturbed for implementation. The diversity argument also sidesteps William Julius Wilson's "race-for-class" prioritization of "truly disadvantaged" within the African American

explaining the attraction of the diversity rationale to defenders of affirmative action,²⁴ she offers a critique of the diversity defense. In its place, she would prefer that race-based socioeconomic discrimination take center stage in the liberal defense of race-based affirmative action.²⁵

At the outset of her article, Professor Malamud states "that the diversity rationale is unconvincing unless it is coupled with an understanding that race-based economic inequality stands in the way of achieving diversity without affirmative action."²⁶ Professor Malamud is clearly not saying that there is no racial basis for affirmative action, but rather that the racial basis is only invocable using a compensatory rationale.²⁷ A diversity rationale fails, according to Professor Malamud, because it leads to an indeterminate set of relative identity valuations that are apt to miss the significance of race or class. In short, because she identifies historical and material deprivations and inequalities as

community. See Malamud, *supra* note 1, at 948-51. (2) The diversity rationale renders irrelevant middle-class African American performance on traditional merit criteria by defining diversity as merit, thereby providing a way to "smuggle" in race as a permissible bona fide occupational qualification premised upon customer preference. See *id.* at 951-53. (3) The diversity rationale makes affirmative action permanent by making it unnecessary to answer when such programs should end. See *id.* at 953-54.

24. Prefacing her three reasons, Professor Malamud notes that "[e]mbracing the diversity rationale has a number of clear advantages for advocates of the view that the black middle class is a proper beneficiary of affirmative action." *Id.* at 949. It should be clear from the three reasons she selected that these are the advantages from her particular liberal perspective, but that radical critics of meritocracy may have divergent notions as to why the diversity rationale is important. In particular, progressive race theorists may find problematic the uncritical acceptance of "testocracy" and meritocracy inherent in advantage number 2, see *supra* note 18 and accompanying text, as well as the ahistorical, episodic understanding of racial oppression evinced in her framing of advantage number 3, noting the permanence of affirmative action under diversity rationales. For a discussion of the three advantages, see *supra* note 23.

25. See Malamud, *supra* note 1, at 940 (arguing that "the diversity rationale is highly problematic and ought not to be made to stand alone. Instead, the diversity rationale is most persuasive when it is augmented by the view that past and present race-based economic inequality is the reason we cannot achieve meaningful levels of integration without using affirmative action.").

26. *Id.* at 941.

27. Her contribution in this article is to provide a present-day/future-oriented compensatory rationale for affirmative action as opposed to one that is backward-looking.

the legitimate reasons for compensating people of color—even middle-class people of color—through affirmative action policies, the untethered diversity principle, which is analytically distinct from historical and material inequalities, provides no sound basis for a race-conscious remedy.²⁸

Professor Malamud's elevation of the material inequality basis for race-based affirmative action and her rejection of the diversity basis embrace an economic-disadvantage understanding of racial injustice, locating the injury of racial injustice primarily in the field of economic wrongs and maldistribution.²⁹ By focusing on socioeconomic effects of racial oppression, however, she ignores racism's monumental cultural dimensions, thus reproducing a classic oversight of class-based inquiries by devaluing the role of culture in both negative and positive significances—catering, if you will, to the "body" of racial subordination and resistance while ignoring the "head."³⁰ Rather than

28. To be sure, some critical race theorists share the concern of the "untetheredness" of the diversity principle with Professor Malamud. Cf. Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 WIS. L. REV. 105, 111 (arguing that the "current concept of diversity is 'empty' because it lacks a mediating principle. By treating all differences the same, it ignores the 'saliency' of certain differences in this society by extracting differences from their sociopolitical contexts."): Yet rather than "trash" completely the diversity principle, race critics have sought to resurrect it more effectively. Foster, for example, both critiques and offers an operative definition of "diversity" that would recognize systematic exclusion and disadvantage based on individual differences. *See id.* at 112.

29. *See* Malamud, *supra* note 1, at 988 (identifying her major emphasis as "explain[ing] why the economic case for black middle-class affirmative action ought to be made, and why the evidence supports the claim that the black middle class is economically disadvantaged in comparison with the white middle class for reasons centrally related to its race").

30. Professor Malamud does have an appreciation for the cultural injuries of racism, as reflected in her first and second draft subsection comparing Black and white middle classes on "The Management of Rage" and through her examples of prejudiced taxicab drivers in New York City and trailing "loss prevention agents" in department stores. *See id.* at 986, 994. She ascribes to a Bourdieu-inspired understanding of the economic and "social capital" in particular. *See id.* at 969 n.64. *See generally* Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847 (1996) (forwarding a complex cultural understanding of the concept of class). Overall, however, her analysis tends to view cultural injuries as significant primarily because of their impact upon a group's socioeconomic status, not because of any independent damage such injuries pose in terms of cultural disrespect. *See* Malamud, *supra* note 1, at 994 (concluding that "racial disadvantage of being black and middle-class [is] a more powerful barrier to personal and intergenerational advancement than the class disadvantage of being white and working-class," which leads to her support of affirmative action for the Black middle

limiting the operative field of racial injustice to the economic, a more comprehensive model would acknowledge the metabolic relation of economic *and* cultural subjugations that constitute racial injustice. Of course, the opposition of economic and cultural fields of injury³¹ has been at the core of a longstanding tension among critical theorists,³² with conservatives all too happy to warm themselves on some of the theoretical heat that has been generated.

In her recent work, Nancy Fraser addresses the contemporary class versus identity divide that has alienated segments of the New Left, feminists, gays and lesbians, and race critics from each other.³³ Fraser problematizes the intractability of the

class).

31. Michael Omi and Howard Winant identify two of the three dominant paradigmatic approaches to race relations as class-based approaches and nation-based approaches. Class-based approaches emphasize "economic structures and processes" while nation-based approaches emphasize a common history of "colonization," which shapes the need for "cultural autonomy" as a form of "national liberation." MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 24, 38 (2d ed. 1994).

32. Indeed, Nancy Fraser's recent work itself, *see infra* note 34, has been critiqued for establishing such a hierarchy. Iris Marion Young objects to the dichotomous shaping of economic and cultural spheres of injury and corresponding remedy. *See* Iris Marion Young, *Unruly Categories: A Critique of Nancy Fraser's Dual Systems Theory*, 222 *NEW LEFT REV.* 147, 150-54 (1997) (critiquing Fraser's redistribution/recognition theory as "brazenly dichotomous" in which injustices and remedies are "reducible to two, and only two, mutually exclusive categories"). While Young offers a valid critique insofar as Fraser's tendency to identify "pure" forms of culturally based oppression leads to the false dichotomy problem, *see infra* note 42 on Fraser's presumption of the pure cultural case for sexuality, I am not sure that Young's wholesale dismissal of Fraser's contribution is altogether helpful or warranted.

33. *See supra* note 14 and accompanying text for the New Left critique of civil rights, which race critics would later challenge in a classic volume of the *Harvard Civil Rights-Civil Liberties Law Review*. *See* Harlon L. Dalton, *The Clouded Prism*, 22 *HARV. C.R.-C.L. L. REV.* 435, 444 (1987) (articulating "the feeling or fear of many people of color that even as we are being silenced or ignored, our concerns are being appropriated" by critical legal studies); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 *HARV. C.R.-C.L. L. REV.* 301, 322 (1987) (concluding that critical legal studies "does not provide what minorities seek" given "CLS scholars' ironic failure to articulate a satisfactory theory of either the genesis or the treatment of racism"); Matsuda, *supra* note 13, at 331 (calling upon critical legal scholars to extend stated political commitments on racial issues to the "practice of critical scholarship and the development of theory"); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 *HARV. C.R.-C.L. L. REV.* 401, 405 (1987) (pointing out how critical legal studies "has ignored the degree to which rights-assertion and the benefits of rights have helped blacks, other minorities, and the poor").

opposition—class versus identity—and reconceptualizes remedial action to analytically ensure that redress of economic injustice does not necessarily subvert the amelioration of cultural injustice.³⁴ In short, Fraser identifies economic injustices, which are rooted in political structures and processes—such as labor exploitation, labor market segmentation, and historically rooted deprivation³⁵—as separable from cultural or symbolic injustices, which are rooted in societal representation, interpretation, and communication—such as coerced assimilation, cultural domination, invisibility, and disrespect.³⁶ The former set of injustices requires redistributionist remedies to redress the material wrongs, while the latter set calls for recognition-based remedies to redress cultural exclusion and psychological harm inherent in racially oppressive societies.³⁷

One key contribution of Fraser's work is to reinforce the concept of "cultural injustice" that requires societal remedies on a par with, and inseparable from, those addressing socioeconomic injustices.³⁸ While wrongs requiring redistribution may be analytically distinct from those requiring recognition, Fraser is careful to acknowledge that, in practice, economic and cultural injustices are often "interimbricated so as to reinforce one another dialectically."³⁹ Nevertheless, she argues that retaining the analytical distinction between the two types of injustices and requisite remedies is useful and illuminating.⁴⁰ While economic forms of injustice require restructuring of the political economy, cultural injustice requires symbolic or representational affirmation.⁴¹

34. See Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age*, 212 NEW LEFT REV. 68, 69 (1995) (defining her project as one in which she may conceptualize cultural recognition and social equality in ways that support, rather than undermine, one another).

35. See *id.* at 70-71.

36. See *id.* at 71.

37. See *id.* at 73.

38. See *id.* at 71-72 (relying upon cited passages from political theorists such as Charles Taylor and Axel Honneth to emphasize the importance of such cultural or symbolic injustices).

39. *Id.* at 72.

40. See *id.* at 74.

41. See *id.* at 73.

Because racial injustice⁴² involves both political-economic and cultural-symbolic injuries, race-based affirmative action as a remedy may fulfill either a redistributive or a recognitional objective.⁴³ As a redistributive remedy, it reallocates jobs, educational opportunities, and valuable societal resources to those who have suffered (or are suffering) material deprivation according to race.⁴⁴ As a recognitional remedy, it reallocates “respect” to those who have been (or are being) devalued, assimilated, stereotyped, or made invisible under white supremacist norms.⁴⁵

Using Fraser’s insight, we see that affirmative action has the double potential for both economic redistribution and cultural affirmation. However, Professor Malamud treats as zero-sum the redress of economic versus cultural injuries through the policy of affirmative action.⁴⁶ Her retrieval of societal discrimination as a

42. Fraser identifies race and gender as encompassing political—economic as well as cultural—valuational dimensions, therefore requiring both redistribution and recognitional remedies. *See id.* at 78-79. In contrast, she identifies sexuality as implicating primarily recognition-based remediation because its roots do not lie in the political economy, as les/bi/gays are distributed throughout the entire class structure of capitalist society, occupy no distinctive position in the division of labor and do not constitute an exploited class. *See id.* at 77-78. Rather their mode of collectivity is that of a despised sexuality rooted in the cultural-valuational structure of society. *See id.*

43. *See id.* at 80-81. I depart from Fraser’s analysis on this point. The historic lack of serious attention to the material dimension and study of gay/bi/lesbian economic life and class structure calls into question Fraser’s premature conclusion of sexual minorities as a monovalent collectivity. Recent work in queer theory is beginning to question this very premise. *See generally* HOMO ECONOMICS (Amy Gluckman & Betsy Reed eds., 1997); THE MATERIAL QUEER (Donald Morton ed., 1996). *See also* Young, *supra* note 32, at 157 (pointing out that “primary political goals of gay, lesbian, bisexual, transsexual or queer activists are material, economic and political equality: an end to discrimination in employment, housing, health care; equal protection by police and courts; equal freedom to partner and raise children”). Fraser recognizes the redistributive role that affirmative action policies may fulfill. *See Fraser, supra* note 34, at 90. I identify its recognitional aspects. *See infra* notes 43-47 and accompanying text.

44. *See Fraser, supra* note 34, at 90. However, Fraser categorizes affirmative action as an affirmative versus a transformative remedy because it only provides surface reallocations without addressing overall employment/educational structures (no increase in number of jobs or spaces; no challenge to the concept of merit). *See id.* at 91.

45. While the presence of people of color in predominantly white institutions may reallocate this respect and decenter Eurocentric norms, Fraser points out that the need for continual reallocations of positions or slots “can elicit intense backlash misrecognition” of those receiving surface reallocations as privileged. *Id.* at 91.

46. When introducing her section on “The Disadvantages of the Diversity Rationale,” Professor Malamud declares that “what appears to be the advantage of

rationale matches the redistributive goal of affirmative action. But her discarding of the diversity rationale dispenses with the recognitional goal of affirmative action. Professor Malamud's materialist logic seems to lack a full appreciation for the cultural oppression visited upon people of color under white supremacy. As Charles Taylor points out:

Nonrecognition or misrecognition . . . can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.

.....
 Misrecognition shows not just a lack of due respect. It can inflict a grievous wound, saddling its victims with a crippling self-hatred. Due recognition is not just a courtesy we owe people. It is a vital human need.⁴⁷

Under Fraser's more expansive thinking, one can see the import of crafting racial remedies responsive to, and supportive of, both economic and cultural injustices, and that we should carefully avoid promoting remedies that privilege claims of economic injustice while devaluing claims of cultural injustice, or vice versa. I fear that Professor Malamud's corrective,⁴⁸ though well-intended, threatens to do just that—redress economic wrongs by elevating the compensatory rationale for affirmative action at the risk of occluding cultural wrongs and, as important, misapprehending the negative dialectic of racial injustice.

the diversity rationale—its movement away from issues of social [read economic] justice—becomes its disadvantage." Malamud, *supra* note 1, at 954-55.

47. CHARLES TAYLOR, MULTICULTURALISM AND "THE POLITICS OF RECOGNITION" 25-26 (1992).

48. A close reading of Professor Malamud's work reveals that her critique of class-based affirmative action for its failure to address fully the plight of the African American middle class is intended to strengthen and expand the case for a class-based affirmative action, with race and gender added on as supplemental policy determinants. Near the close of her article, as well as in a previous article, she admits that class-based analyses are unlikely to be sensitive to issues of race and will therefore freeze out the Black middle class. See Malamud, *supra* note 1, at 992; see also Malamud, *supra* note 30, at 1894-1900. The purpose of her present article is to make the case for applying a class-based analysis to the middle classes by pointing out the systematic differences between the Black and white middle classes. At the very least, she argues, even if the racial disparity and inequality between the Black and white middle classes are not acknowledged by including the Black middle class in class-based affirmative action programs, there is a case for co-existing class-based and race-based remedies. In other words, race-based affirmative action is defensible as corrective to the imperfections of a superior class-based remedy, which might have racial blind spots.

B. The Diversity Rationale Provides Political Space to Organize Coalitions and Create Community

In her critique, Professor Malamud argues that the diversity rationale is based upon white institutional utility, rather than minority desert.⁴⁹ She objects to premising affirmative remedy

49. See Malamud, *supra* note 1, at 958-64. Here, I find some of Professor Malamud's unstated assumptions about the lack of "minority desert" in affirmative action practices to be unfounded and troubling. In one of her hypotheticals to illustrate the pitfalls of utilitarian affirmative action, she asks us to consider two teachers, one white and one Black who are hired by a school district. "As a diversity hire," she hypothesizes, "the black employee was hired with less previous job experience and poorer academic preparation; therefore, she assumes (with some reason) that she must work especially hard at her assigned tasks in order to compete and succeed." *Id.* at 962-63.

Professor Malamud assumes that in the practice of racial discrimination, it is easy to separate out the problem of employment discrimination (remediable through Title VII) from the need for affirmative action. She would like for affirmative action to be reserved for those cases in which people of color require an affirmative, albeit heavy, "thumb on the scale" and to preserve employment discrimination lawsuits for those cases in which equal opportunity is not at hand. See *id.* at 955. In an earlier version of her article, Malamud maintained that neither radical critiques of merit—even if correct—nor *Griggs*-like disparate impact violations provide legitimate "first-level" defenses against affirmative action.

This neat analytical division, however, between clear departures from equal opportunity and morally ambivalent situations requiring the "heavy thumb" also breaks down in practice. Given the increasing sophistication of the operation of white supremacy and white privilege in employment discrimination law and employment, affirmative action is often a substitute for equal opportunity. For example, in university faculty affirmative action (very similar to the hypothetical situation described), many "diversity hires" are often overachieving superstars who might never have been hired by an individual, recalcitrant department or school but for institutional financial incentives offered through affirmative action programs, such as "Target of Opportunity" ("TOP") hires. In a TOP hire, the central university administration would offer to "finance" the salary of the diversity candidate to induce a (race and/or gender homogenous) department or school to break with its tradition of all-white and/or all-male hiring by providing a "freebie" superstar academic of color.

Higher educational institutions initiated such programs in the pre-*Crosby* 1980s to compete for those who brought "diversity and excellence" to the university. Therefore, Professor Malamud's automatic assumption that "diversity = noncompetitive" does not comport with my experientially and anecdotally informed understanding of "diversity hiring" in educational institutions. The diversity rationale supporting affirmative action often confuses people into believing that all diversity hiring utilizes affirmative action—a common mistake triggered by the face value of "diversity" labeling coupled with an underappreciation for the interplay of interest convergence and political stratagem. For an elaboration on this interplay, see *infra* notes 53-73 and accompanying text.

In her final draft, Malamud acknowledges the increasing sophistication of discrimination: "The lesson of the last thirty years of antidiscrimination enforcement is that discrimination is a subtle and adaptive phenomenon that is tenacious beyond

upon the white baseline of short-term benefits to an institution's goals and needs.⁵⁰ To do so places affirmative action beneficiaries in the awkward position of being admitted or hired for "the particular ability to be a member of a minority group"⁵¹ as an unstated but enforced part of their terms of admission or job description.

Professor Malamud's focus on the white utility baseline inherent in the diversity rationale, as well as *Brown v. Board of Education's*⁵² integrationist objective, strikes a chord with me because it unmasks the privileging of white over minority interests. However, the "diversity as white utility" critique fails to appreciate either the coercive force of racial hierarchy that requires the convergence of racial remedies with white interests, or the diversity discourse's formative potential for creating progressive, political communities.

Like critical legal studies' radical theoretical critique of civil rights as legitimating existing power relations,⁵³ Professor Malamud's critique of the diversity rationale as legitimating prioritization of white interests ignores how diversity has provided conceptual and legal avenues for subordinated communities to gain moral and political capital and to ensure a measure of relief from racial oppression. In order to fully appreciate the role that diversity plays in the racial "war of position,"⁵⁴ of which

the reasonable expectations of the framers of our antidiscrimination laws." *Id.* at 991. However, Malamud still concludes that "[a]ffirmative action is a poor substitute [for effective antidiscrimination laws]," while acknowledging and offering no viable alternative to ineffective antidiscrimination laws ("but eliminating affirmative action will not make the problem go away"). *Id.*

50. See Malamud, *supra* note 1, at 958-64.

51. *Id.* at 964. Interestingly, for her sweeping statement that "[a]ll things being equal, members of minority groups would far prefer to be hired for their general abilities, rather than for their particular ability to be a member of a minority group," she cites only to Stephen Carter's *Reflections of an Affirmative Action Baby*. *Id.* at 964 n.58.

52. 347 U.S. 483 (1954).

53. See *supra* note 14.

54. See AN ANTONIO GRAMSCI READER: SELECTED WRITINGS, 1916-1935, at 225-30 (David Forgacs ed., 1971) (characterizing war of maneuver as the "frontal attack" and war of position as "siege warfare"). Omi and Winant describe the two terms as follows:

"War of maneuver" describes a situation in which subordinate groups seek to preserve and extend a definite territory, to ward off violent assault, and to develop an internal society as an alternative to the repressive social system they confront. . . .

. . . [W]ar of position can only be predicated on political struggle—on the existence of diverse institutional and cultural terrains upon which

the affirmative action question is a part, one must return to the legal genesis of the diversity rationale and Justice Powell's 1978 *Bakke* opinion.⁵⁵

At the time of the *Bakke* decision, affirmative action advocates had hoped that the courts would uphold the University of California at Davis' affirmative action plan, which reserved sixteen spots for students of color out of 100 first-year medical school seats.⁵⁶ But a divided Supreme Court struck down the plan as an impermissible "quota"⁵⁷ yet authorized the use of race as a criterion in admissions to promote the legitimate state interest of "diversity."⁵⁸ Little did affirmative action advocates know that what appeared to be a crushing defeat in 1978 would become what Michael Olivas twenty years later referred to as the "high point" of racial remedies.⁵⁹

Affirmative action activists came to embrace the monopoly of the diversity rationale as a pragmatic bargain—requiring relinquishment of the compensatory rationale emphasizing historical and contemporary racial discrimination in exchange for the continued constitutional legitimacy of affirmative action now permissible under the more palatable diversity rationale.⁶⁰ Powell's opinion in *Bakke*, like Johnny Mercer's tongue-in-cheek

oppositional political projects can be mounted, an upon which the racial state can be confronted.

OMI & WINANT, *supra* note 31, at 80.

55. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (announcing that a "properly devised admission program" may take race into account to ensure the "diversity" of its student body); *see also* Foster, *supra* note 28, at 108 n.16 (noting that Justice Powell first articulated and legitimated the forward-looking diversity rationale in *Bakke*).

56. *See* JOEL DREYFUSS & CHARLES LAWRENCE, *THE BAKKE CASE: THE POLITICS OF INEQUALITY* 19 (1979) (detailing the contours of the UC Davis affirmative action plan).

57. *Bakke*, 438 U.S. at 315-20.

58. *Id.* at 320.

59. *See* Michael A. Olivas, *The Decision is Flatly, Unequivocally Wrong*, *CHRON. HIGHER EDUC.*, Mar. 29, 1996, at B3. In this editorial analyzing the recent decision in *Hopwood v. University of Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996), Professor Olivas comments on the irony posed by the increasingly anti-affirmative action Supreme Court that renders affirmative action supporters with nostalgic yearning for the "good old days" of *Bakke*. "Who knew in 1978," Olivas asks, "that we were at the high point of affirmative action, that its wave had crested, that the *Bakke* decision is what we must fight to protect nearly twenty years later?" *Id.*

60. Such a future-oriented rationale need not emphasize any institutional wrongdoing in terms of de jure or de facto discrimination by institutions or employers seeking to implement affirmative action.

World War II-era lyric, was an exhortation to “ac-cen-tuate the positive”—diversity’s benefits—and “e-lim-i-nate the negative”—talk of institutionalized and structural discrimination.⁶¹ Thus, the embrace of the diversity rationale has always had a pragmatic side that unfortunately also helped make structural subordination invisible.

To critique the current diversity regime for catering to institutional utility is to adopt a temporally confined and abstracted notion of racial politics. Professor Malamud’s white baseline critique of the diversity rationale, absent an understanding of the affirmative action wars of position fought over the past twenty years, is flawed by presentism—it is a critique that erases the historical contingency of a practice based on a logic that is tested only by contemporary observations.⁶² Professor Malamud’s critique of diversity as serving white interests minimizes the controlling context of racial ideology and racism that shaped the adoption of diversity as a compromise rationale. She may unadvisedly presume that it was (and is) possible, via proper enlightenment-style argumentation, to convince courts of law and public opinion that white-utility interests are not the proper grounds for supporting necessary race-based remedies.

Further, Professor Malamud’s critique of diversity seems to underappreciate the concept’s potential in organizing resistance to racially repressive regimes. As an illustration of what I mean, I shall relate my personal experience as a former student organizer. I recall working with fellow law students to form an

61. JOHNNY MERCER & HAROLD ARLEN, *Ac-cen-tchu-uate the Positive*, on THE CAPITOL RECORD SERIES (Capitol Records 1989). Richard Delgado observed how the remedy of affirmative action similarly “eliminates the negative” historical understanding of U.S. race relations:

Minorities are hired or promoted because we have been unfairly treated, denied jobs, deprived of our lands, or beaten and brought here in chains. Affirmative action neatly diverts our attention from all those disagreeable details and calls for a fresh start. . . . At best, then, affirmative action serves as a homeostatic device, assuring that only a small number of women and people of color are hired or promoted. Not too many, for that would be terrifying, nor too few, for that would be destabilizing.

Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222, 1223-24 (1991), reprinted in CRITICAL RACE THEORY: THE CUTTING EDGE 355-56 (Richard Delgado ed., 1995).

62. See JUDITH BUTLER, BODIES THAT MATTER 223-28 (1993) (describing as “presentist” the conceit of autonomy that one arrives in the world without history and absent power relations, thereby enabling one to reclaim or resignify temporal meanings by virtue of individual will or choice). I thank Robert Westley for bringing Butler’s definition to my attention.

organization to promote affirmative action in faculty hiring at our school, University of California at Berkeley's Boalt Hall. As one of the first orders of business, we needed to agree on a name for our organization. Eventually, we became known as the Boalt Coalition for a Diversified Faculty ("CDF"). However, I had initially advocated what I felt was a more accurate name, the Boalt Caucus for a Desegregated Faculty, since at the time, there was only one tenured faculty member of color, and three white, tenured women.⁶³ Twenty years prior, there had been only one tenured faculty member of color (and only one woman).⁶⁴ In the end, I accepted "Diversified" over "Desegregated" because it became clear that we would have more success attracting members and achieving our goals with the more palatable moniker.

This was true because of the powerful effects of "interest convergence."⁶⁵ We had to phrase our civil rights agenda in terms of white majority interests.⁶⁶ Diversity would benefit everyone, majority and minority faculty and students alike. It would put a happy face on racial oppression and would not require anyone to stipulate to white, heterosexual, or male privilege, thereby increasing chances for reaching the broadest possible membership base.⁶⁷ In another sense, it would permit anyone, whatever their

63. See Flyer Announcing One of the First Meetings for the Caucus for a Desegregated Faculty on Oct. 1, 1986 (on file with *University of Colorado Law Review*). These statistics were supplied to our organization by the Boalt administration for 1986-87. For confirmation, see Memorandum from Nola Yee, Coordinator, Publications and Communications, Boalt Hall School of Law, University of California at Berkeley, to Melanie Lewis, Editor-in-Chief, *University of Colorado Law Review* (June 16, 1997) (on file with *University of Colorado Law Review*). In actuality, the statistic of three tenured women at Boalt for 1986-87 overstated the case, as one of the three professors was jointly appointed in law and sociology. Thus, the more accurate number of tenured women faculty at Boalt was 2½.

64. Boalt faculty personnel records for 1967 reflect these numbers. See *id.*

65. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (arguing that racial remedies are extended to redress injuries suffered by Blacks only when, if granted, such remedies "will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites").

66. See *id.* Bell's interest-convergence analysis provides the foundation for Professor Malamud's "white utility" criticisms of diversity. See also Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984) (criticizing the white utility-based justifications of affirmative action as demeaning to minority admittees who are treated as ornaments who exist to pique the curiosity of white professors and students).

67. This multiple-consciousness understanding of liberal terminology is characterized by Kimberlé Crenshaw as "self-conscious ideological struggle," engaged

level of political engagement, to join the movement for racial justice, and thus continue the dialogical process of developing a critical understanding of racial power relations. Finally, "Diversified" projected the image (corresponding to a stated commitment) of a broader coalitional membership.⁶⁸ Desegregation, of course, implies a historical practice of racial separation and exclusion.⁶⁹ Such a word in our organizational name would have conveyed the primacy of racial oppression over other forms of oppression. I believe we were ultimately more successful as a movement than any of us thought possible when we started the organization because of our ability to achieve coalitional appeal. "Diversity" in our name did not diminish the multiple consciousness that led us to choose that word, and it announced a coalitional stance in the struggle for a more inclusive faculty and law school atmosphere.

Our movement was not an isolated one in the late eighties to early nineties.⁷⁰ Across the country, a variety of multicultural, diversity movements sprang up at college campuses demanding ethnic studies graduation requirements, student and faculty affirmative action, gay and lesbian studies, and multicultural centers.⁷¹ These "diversity movements" largely addressed the

to "minimize the costs of liberal reform while maximizing its utility." Crenshaw, *supra* note 8, at 1385.

68. Our objective was to increase racial, gender, sexual orientation, and intellectual diversity on the Boalt Hall faculty. Our constituencies and position statements reflected these imperatives. See, e.g., Coalition for a Diversified Faculty Statement of Position (May 3, 1989) (proclaiming that diversity of perspectives at Boalt Hall "can only be attained if the faculty's composition with regard to race, gender, sex, sexuality, and ideology are broadened") (on file with *University of Colorado Law Review*); Open Letter to Boalt Students Re: Nationwide Law Student Strike (Apr. 5, 1990) (announcing purpose of the strike as protesting "Unequal Treatment Under the Law: Racism, Sexism, Classism, and Heterosexism in America's Law Schools") (on file with *University of Colorado Law Review*).

69. Bell refers to the NAACP's concerted legal desegregation strategy as intended "to eliminate racial segregation, not merely in the public schools but throughout society." Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 6 (Kimberlé Crenshaw et al. eds., 1995).

70. See Foster, *supra* note 28, at 108-09 (noting that diversity movements on campuses nationwide urge faculties to "diversify"); JOY JAMES, *TRANSCENDING THE TALENTED TENTH: BLACK LEADERS AND AMERICAN INTELLECTUALS* 172-73 (1997) (describing a 1992 student movement at University of Massachusetts—Amherst demanding affirmative action faculty hiring).

71. See Foster, *supra* note 28, at 108 (observing that "diversity has been invoked more generally in this society as a justification for hiring more minorities and women on university faculties, for increasing university multicultural and ethnic

cultural injustice of exclusion from academia, and may in the long run even have served the interests of institutions that initially opposed diversification. But whether diversity can be co-opted to serve hegemonic interests is a question that should be answered in the broader context of its potential as a coalitional organizing concept.⁷² Likewise, we should assess seriously the accomplishments of the diversity rationale in underwriting claims to access for communities of color to higher education and employment before too hastily dispensing with such an effective discursive formation.⁷³

studies requirements, for including more minorities and women in the workforce, and for awarding scholarships on the basis of race”).

Most recently, in the wake of California's Proposition 209's resegregation of higher education, a new student organization at Boalt Hall calling itself "New Directions in Diversity" formed and released a more than 100-page report on diversity in law school admissions. See Cecilia V. Estolano et al., *New Directions in Diversity: Charting Law School Admissions Policy in a Post-Affirmative Action Era* (May 9, 1997) (on file with *University of Colorado Law Review*). The concept of diversity as a tool of resistance and coalition in a political environment hostile to affirmative action is even more important today at Boalt than when CDF was active in the late 1980s and early 1990s.

72. In my own work, I have been troubled by the way in which successfully advocated, multicultural requirements and affirmative action hiring have been used by universities, schools, and departments to portray themselves as self-correcting institutions of enlightened fairness. This portrayal tends to inhibit the future ability of students to organize "counter-hegemonically" in light of the alleged institutional progress on racial remediation.

Nevertheless, a New Left critique might only dismiss the end product of absorption of a racial challenge as the bottom-line measurement of "radicality," which I believe misses the important community formation insight. A better measurement of transformative politics would evaluate the progress (or regress) not only in terms of the ultimate substantive/programmatic changes implemented, but the process by which those changes occurred. The bottom-line assessment of radicality must weigh the extent to which the process of change mobilizes, vocalizes, and energizes subjected communities of color.

73. Here, I agree with Crenshaw when she states that such [self-conscious, ideological] struggle is necessary because:

Black people can afford neither to resign themselves to, nor attack frontally, the legitimacy and incoherence of the dominant ideology. The subordinate position of Blacks in this society makes it unlikely that African-Americans will realize gains through the kind of direct challenge to the legitimacy of American liberal ideology that is now being waged by critical scholars.

Crenshaw, *supra* note 8, at 1385.

II. PROFESSOR MALAMUD'S PROPOSALS FOR REFORM

Throughout her article, Professor Malamud suggests that her proposals involve bold social and political risk-taking.⁷⁴ As a

74. See, e.g., Malamud, *supra* note 1, at 951, 955, 998. For example, her subtitles, "Avoiding Hard Questions About Black Middle-Class Performance," "Ignoring the Problem of Black Middle-Class Performance Does Not Make It Go Away," and "Saying Words That Hurt," evince a bold posture and general chastisement of those not engaging in such risk-taking. *Id.* In fact, at one point, Professor Malamud asserts that "[s]ilence in the face of [white-Black standardized test] differences is irresponsible, especially in light of the legal, moral, and political problems the differences present." *Id.* at 955. But there is another reading of this silence. Certain settled debates do not warrant ongoing discussion on the basis that discussion dignifies, and is therefore complicit in returning society to retrograde debates. Many scholars and politicians refuse to debate or engage seriously Holocaust deniers for this very reason. Similarly, many race critical scholars wish not to revisit and normalize the "Bell Curve" debate that returns U.S. race discourse to the eugenical period of biological determinism. For this discourse, see generally CHARLES DAVENPORT, *HEREDITY IN RELATION TO EUGENICS* (1911); HENRY HERBERT GODDARD, *FEEBLEMINDEDNESS: ITS CAUSES AND CONSEQUENCES* (1914); E.S. GOSNEY & PAUL POPENOE, *STERILIZATION FOR HUMAN BETTERMENT* (1930); MADISON GRANT, *THE PASSING OF THE GREAT RACE* (1919); HARRY HAMILTON LAUGHLIN, *EUGENICAL STERILIZATION IN THE UNITED STATES* (1922); PAUL POPENOE & ROSWELL H. JOHNSON, *APPLIED EUGENICS* (1918); *Psychological Examining in the United States Army, in 15 MEMOIRS OF THE NATIONAL ACADEMY OF SCIENCES* (Robert M. Yerkes ed., 1921); LOTHROP STODDARD, *THE REVOLT AGAINST CIVILIZATION: THE MENACE OF THE UNDERMAN* (1922).

By no means is eugenical scholarship and ideology limited to the pre-World War II era. *The Bell Curve* by Richard Herrnstein and Charles Murray was a national bestseller in 1994. RICHARD HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994). For a thorough tracing of postwar neo-eugenical scholarship, see WILLIAM TUCKER, *THE SCIENCE AND POLITICS OF RACIAL RESEARCH* 138-295 (1994). Some of the works cited by Tucker in this tradition include: HANS J. EYSENCK, *THE INEQUALITY OF MAN* (1973) (warning that political attempts to disregard nature's laws of genetically determined inequality are "doomed to failure"); Linda S. Gottfredson, *Societal Consequences of the g Factor in Employment*, 29 J. OF VOCATIONAL BEHAV. 379, 398-406 (1986) (arguing that lower Black intelligence produces the expected outcome of socioeconomic inequality); Dwight J. Ingle, *Racial Differences and the Future*, 146 SCIENCE 375, 376-378 (1964) (arguing that the high fertility rate of "indolent incompetent Negroes is a threat to the future success of this race"); Arthur R. Jensen, *How Much Can We Boost IQ and Scholastic Achievement?*, 39 HARV. EDUC. REV. 1, 82 (1969) (concluding that "various lines of evidence . . . viewed all together, make it a not unreasonable hypothesis that genetic factors are strongly implicated in the average Negro-white intelligence difference"); J. Philippe Rushton, *Race Differences in Behaviour: A Review and Evolutionary Analysis*, 9 PERSONALITY & INDIVIDUAL DIFFERENCES 1009 (1988) (finding that Blacks systematically rank lower than whites on traits such as intelligence, brain size, sexual restraint, etc., that separate humans from lower primates).

Professor Malamud may be correct that the contemporary resurgence of pseudo-scientific racism and biological determinism requires a breaking of silence

risk-taker, I welcomed the prospect of a bumpy ride. But to my disappointment, I felt that Professor Malamud's proposal to replace the diversity rationale with the compensatory rationale lacked transformative vision and reflected a more general failure of the liberal imagination as it confronts issues of social justice in the post-Reagan era.⁷⁵ In essence, Professor Malamud adopts a neo-Myrdalian model of "societal discrimination as prejudice."⁷⁶ Like Myrdal, Professor Malamud rejects biological determinism as an explanation for Black underperformance and inequality, and expands Myrdal's prejudice thesis by identifying societal discrimination, not merely individual prejudices, as a key determining factor. And like Myrdal, she leaves uninterrogated existing systems of meritocracy and reinforces an essentialized understanding of white over Black race relations.

A. *Professor Malamud's Non-Critique of Meritocracy*

Prejudice models of racial inequality, defined largely by Gunnar Myrdal, view racial discrimination as an irrational by-product of leftover prejudices from the days of slavery.⁷⁷ The solution for such prejudice is to educate individuals beyond the

on such debates. However, if such a debate is to occur, I would hope that its starting point is not centered on rebuttal of asserted intellectual, biological, cultural, or moral deficiencies of people of color—especially African Americans—but on the social meaning and irony of the resurgence of such theories in a post-civil rights, purportedly "color-blind" America.

75. In her four-celled matrix, Fraser identifies affirmative versus transformational types of remedies that address redistributive and recognitional injustice. See Fraser, *supra* note 34, at 87. Fraser identifies transformational remedies as those offering a deep restructuring of relations of production and recognition, while affirmative remedies merely conduct surface reallocations of existing goods and identities. See *id.*

76. This paradigm, while a forward advance from the eugenical belief in the inherent inferiority of people of color, nevertheless adopted a strategy of assimilation for African Americans and endorsed the existing structures of the U.S. political economy. See MYRDAL, *supra* note 15, at 906 (arguing for educational priorities that "make the Negro child adaptable to and movable in the American culture at large"); see also OMI & WINANT, *supra* note 31, at 17. Professor Malamud's analysis is "neo"-Myrdalian in that she is not advocating for assimilation per se, but she, like Myrdal, fails to critique the existing political-economic structure.

77. See generally MYRDAL, *supra* note 15, Part II, Chapters 4-6 (tracing how whites need to rationalize the practice of slavery with their belief in the "American Creed"). See also DAVID SOUTHERN, GUNNAR MYRDAL AND BLACK-WHITE RELATIONS: THE USE AND ABUSE OF AN AMERICAN DILEMMA 1944-1969, at 61 (1987) (noting how the slavery rationale "led [whites] to develop elaborate, if transparently expedient, theories of black inferiority").

irrationality of their racist beliefs. However, Myrdal's prejudice model does not ground a systematic critique of societal structures or power relations,⁷⁸ and Professor Malamud does not steer such a collision course.

Professor Malamud makes clear that she favors affirmative action as a tool of reformation, not transformation.⁷⁹ In fact, she opposes the diversity rationale precisely because it is "dangerous if no effort is made to account for why the black middle class cannot compete on traditional merit criteria,"⁸⁰ thereby inviting society to duck from the question of why the "thumb on the scale"⁸¹ for Black hiring and admissions "needs to be so heavy."⁸² Professor Malamud's liberal conclusion that socioeconomic inequalities, as opposed to biological or cultural deficiencies, are at the root of the results of Black test-takers does not question the ability or the accuracy of standardized tests to measure merit, nor the extent to which the meritocracy can be expected to flex with any changes that might tend to favor currently "underachieving" groups.⁸³

It is not disparate test scores *per se* that reveal the insidiousness of meritocracy as much as that regime's functional-

78. See *supra* note 76 and accompanying text.

79. Professor Malamud's arguments and framing of issues belie a firm belief in the system of meritocracy in place at institutions of higher education, and therefore represent the advocacy of Fraser's category of "affirmative" racial remedies, which require ongoing surface reallocations to subordinate groups because no deep restructuring project is undertaken. For Professor Malamud's merit-friendly framing of the issues, see *supra* note 74. Other statements evince a firm and uncritical acceptance of the ideology and practice of contemporary meritocracy. See *infra* notes 80-83 and accompanying text.

80. Malamud, *supra* note 1, at 955.

81. *Id.*

82. *Id.*

83. Cf. Sturm & Guinier, *supra* note 18, at 968 (referring to the widespread belief in the functionality of standardized tests as a "testocracy" that masquerades as "meritocracy," and finding that "[s]tandardized tests are neither fair, functional, nor predictive"). See generally Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121 (1993) (examining racially biased narratives in LSAT questions); Olivas, *supra* note 18; Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251 (1995) (contending that employment tests are typically weak predictors of future productivity and that individual test scores do not accurately measure a person's true abilities); Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law-School Admission Decisions*, 72 N.Y.U. L. REV. 1, 34 (1997) (concluding that overreliance upon LSAT scores in law school admissions decisions results in a loss of validity and a systematic and predictable discriminatory selection process).

ity within the "iron cage"⁸⁴ of white supremacy. To leave our analysis subject to the general premises of meritocracy will ensure the persistence of superficial redistributions at the margins of the social economy as the sole corrective. Of course, the so-called "radical critique of merit," which refuses to afford merit the sanctified status of a mathematical certainty, would find Professor Malamud's implicit defense of merit as reproductive of the historical and ongoing racial economy, certainly not transformative of it.⁸⁵ Fraser sees the end result of affirmative (as opposed to transformative) remedies as marking "the most disadvantaged class as inherently deficient and insatiable, as always needing more and more. In time, such a class can even come to appear privileged, the recipient of special treatment and undeserved largesse."⁸⁶

Fraser's warning reflects a concern that deeper structures of domination may actually be strengthened when reforms are undertaken in ways that leave unchallenged the operational logic of subordinational systems. Race-critical approaches⁸⁷ would encompass both a critique of the socioeconomic determinants of particular outcomes of merit assessment, as offered by Professor Malamud, and the more thorough-going radical critique that makes visible the differentiatonal logic of racial supremacy which historically, institutionally, and ideologically grounds meritocracy. From this perspective it is crucial to interrogate the utopia

84. RONALD TAKAKI, *IRON CAGES: RACE AND CULTURE IN NINETEENTH-CENTURY AMERICA* (1979).

85. For one "radical critique of merit," see Sturm & Guinier, *supra* note 18, at 996 (arguing that "the existing meritocracy excludes people based on their race, gender, and class status" and simultaneously "includes people who are wealthy, male, and white," . . . thereby granting "further advantages to the already advantaged" and "creat[ing] barriers for those who are not").

86. Fraser, *supra* note 34, at 85.

87. By race-critical approaches, I include critical race praxis, see Yamamoto, *supra* note 20, and multiple consciousness, see Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 *WOMEN'S RTS. L. REP.* 7, 9 (1989); Matsuda, *supra* note 13. Indeed, legal progressives within the Society of American Law Teachers (a liberal-progressive membership organization of legal academics) and critical race theory (institutionalized through an annual summer workshop) are articulating searching critiques of diversity as an inadequate rationale with which to ground comprehensive racial remediation programs. See 9th Annual Critical Race Theory Workshop Program (1997) (reflecting a plenary session entitled, "Rethinking Racial Remedies: Beyond Meritocratic Diversity") (on file with author).

of equal opportunity standardized test-taking as a sufficient vision of a racially just future.

B. The Compensatory Rationale and the Essentialized Black-White Understanding of Race Relations

Gunnar Myrdal's race relations project focused on historical and contemporary experiences between African Americans and whites.⁸⁸ By privileging the experience of slavery as primary, Myrdal distinguishes African American experiences from those of other racial group experiences.⁸⁹ This racialized form of "exceptionalism" provides the basis for placing limitations on racial remedies.⁹⁰

88. Myrdal's study commissioned by the Carnegie Corporation was devised at the outset as an in-depth study of African Americans. See SOUTHERN, *supra* note 77, at 1.

89. Myrdal concluded that the problems of Blacks departed significantly from those of other racial minority groups:

It was true that other groups such as the Chinese and Japanese suffered because of their race. But the black minority constituted the largest group regarded as unassimilable by the white majority. And because blacks were the only Americans who had been enslaved and subjected to a rigid caste system, black-white relations, Myrdal maintained, could not be approached as a typical minority problem.

Id. at 59.

90. For a racialized example of exceptionalism, see SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM (1996).

The situation of African Americans has been qualitatively different from that of any other racial or ethnic minority in the United States. African Americans did not come willingly to this country seeking reprieve from poverty or discrimination; they were, rather, forced into the status of an underclass facing racism from the start. . . . They are thus the great exception to the American Creed, to American ideological exceptionalism.

Id. at 113. See also, e.g., *City of Richmond v. J.A. Croson*, 488 U.S. 469, 527 (Scalia, J., concurring) ("It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups.")

Angela Harris is currently theorizing the phenomenon of "Black exceptionalism," a work-in-progress that she presented at the LatCritII conference in San Antonio, Texas, on May 3, 1997. See Leslie Espinoza & Angela P. Harris, *Embracing the Tar Baby: LatCrit Theory and the Sticky Mess of "Race,"* 10 LA RAZA L.J. (forthcoming Nov. 1997). While I find the forms of racialized exceptionalism mentioned above and by Malamud to be problematic and anti-coalitional, I heed the caution issued by John Calmore, who observes that certain appeals to transcend the bipolar conception of race may lead to an "ahistorical decontextualization" of racial oppression and an diminishment of the "recognized need to redress the perpetuation of [an oppressive] history that particularly plagues African Americans." John Calmore, *Exploring Michael Omi's "Messy" Real World of Race: An Essay for "Naked People Longing to Swim Free,"* 15 LAW & INEQ. J. 25, 61-62 (1997).

Professor Malamud's acceptance of the white over Black framework is particularly ironic since she is ostensibly restoring a race analysis to class-based paradigms of affirmative action.⁹¹ Her objective is contradicted by the undermining of a unified concept of race.⁹² Race cannot be unified through the concept of white supremacy because Professor Malamud rejects the operation of white supremacy in structuring social relations of people of color broadly,⁹³ and generally defends the legitimacy of meritocracy.⁹⁴ Race analysis applies primarily, and perhaps exclusively, to African Americans. As Professor Malamud divulges, "Some of the patterns I have pointed to in the disadvantaging of the black middle class either do not exist or exist to a far lesser extent for other minority groups. Can coalitions among peoples of color—and between peoples of color and women—survive the particularizing of the extent of their socioeconomic disadvantage?"⁹⁵ This passage reveals that, whereas she had seen the Black middle class as racialized, she assumes the predominantly *class*-determined nature of other groups of color, and further assumes that political identity formation for these groups hinges upon class instead of race, as if race for these groups does not have its own set of formative imperatives.

In fact, she consistently places Asian Pacific Americans (APAs) closer to whites along the white-Black dyad, so that APA political interests are pitted against those of African Americans. When she criticizes the diversity rationale because of its impact on "overachieving minorities," she refers to APAs, along with Jews, as "classic American 'model minorities.'"⁹⁶ While she has

91. Professor Malamud ingeniously intervenes in the class-based affirmative action policy debate by arguing that racial differences and biases inhere in the definition and experience among classes—here, the middle class. See Malamud, *supra* note 1, at 988 (contending that "the evidence supports the claim that the black middle class is economically disadvantaged in comparison with the white middle class for reasons centrally related to its race").

92. See *id.* at 999-1000.

93. See *id.* Professor Malamud forwards her own racialized version of the "exceptionalist" argument—that is, African Americans are uniquely discriminated against on the basis of race, which reserves affirmative action as a middle-class remedy for Blacks only. See *id.*

94. See *supra* notes 79-83 and accompanying text.

95. Malamud, *supra* note 1, at 999.

96. *Id.* at 965 ("Another problem with a pure diversity rationale is its political unpalatability to groups that ought to be part of the civil rights coalition, but that are currently 'overrepresented' in choice positions. I think here of classic American 'model minorities': Jews and, more recently, Asian Americans."). Her use of quotes

a good point about how the diversity rationale can serve to discriminate more harshly against APAs than whites in what Jerry Kang refers to as "negative action,"⁹⁷ she makes this point by reinscribing problematic stereotypes of APAs as a uniformly successful, exemplary minority who do not face racial discrimination and who are locked in a zero-sum relationship with African Americans.

The dominant white over Black framing of liberal racial remedies locks such reforms into a narrow range of experimentation because of a failure of imagination. Because merit embraces a white baseline of performance, and societal discrimination embraces a Black baseline of experience, those caught in between the white-Black polarity have difficulty living up to either white defined norms of achievement, or Black defined norms of discrimination. A feedback problem arises: if white liberals influenced by the white over Black dichotomy define the measurement of racial discrimination so that only African Americans qualify as victims of societal discrimination, then only African American problems of discrimination are studied and funded, so that the findings of African American discrimination become legitimate and verify the existing measurement of racial discrimination, and so on.

An alternative racial formation analysis would conceptually link the experiences of various groups of color through the critique of white supremacy.⁹⁸ The challenge for critical race theory is to analyze how consistent and divergent the injuries and contestations of white supremacy are among groups of color.⁹⁹

around model minority are not suspect quotes since the rest of her text supports the construction of APAs as a model minority. Therefore, her use of quotes is meant to signify that the term model minority is someone else's.

97. Jerry Kang, *Negative Action Against Asian Pacific Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C. R.-C.L. L. REV. 1 (1996) (arguing that Dworkin's defense of affirmative action based on "diversity" arguments may lead to favoring whites over APAs where APAs are represented in university admissions or employment sectors above their national population of three percent).

98. For an excellent example of such an alternative formulation, see TOMÁS ALMAGUER, *RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA* 210 (1994) (comparing the Nineteenth Century experiences of Native Americans, Chicana/os, and Asian Americans in California as united by the "enactment of group interests, to retain privileged access to social rewards for European Americans").

99. See Yamamoto, *supra* note 20, at 892 (prioritizing the critical race project of "differentiation"—that is, to explore how "varying historical experiences and current socio-economic conditions create different racial images, status and power

CONCLUSION

Professor Malamud's defense of affirmative action makes pivotal the legitimation of affirmative action for the Black middle class under a compensatory rationale of socioeconomic discrimination. But her well-intended defense of racial remedies may serve another unintended purpose. In order to reclaim the compensatory rationale, Malamud finds it necessary to discount the diversity rationale. Diversity, it seems, is far too dangerous and permissive a defense. Read with this emphasis, Malamud's subtextual objective is to develop limiting principles with which the Pandora's box of affirmative action as an untamed, morally compromised racial remedy may be properly contained and therefore sustained.

Perhaps my disagreement with Professor Malamud can be traced back to an interpretation of the Fourteenth Amendment that diverges from those *au courant*. The Supreme Court fears, and thinks that the Fourteenth Amendment protects against, an impermissible "racial spoils system"¹⁰⁰ that would unjustly enrich a group absent a finding of discrimination.¹⁰¹ I do not share this general view of the Fourteenth Amendment. Instead I believe it represents a kind of "survival covenant" that this nation entered into after the Civil War.¹⁰²

Slavery and other forms of racial oppression and supremacy isomorphically or homologously related to slavery were the occasion of the covenant.¹⁰³ For our nation to survive it had to

among racial groups"); see also Calmore, *supra* note 90, at 72 (acknowledging how "[r]acism in America mutates and impacts people of color in similar and different ways").

100. See *supra* note 12.

101. See *City of Richmond v. J.A. Croson*, 488 U.S. 469, 495-96, 506 (1989) (calling into question the remedial motivation of the majority-Black Richmond city council's affirmative action plan: "The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation").

102. See Meister, *supra* note 19, at 123 (describing the survival covenant as an alternative understanding of the U.S. Constitution "based originally on the need to recover from the horrors of slavery and the Civil War and to protect the living victim—survivors, as we shall call them—from a repetition of past patterns of abuse"). As a "national survival story," Meister argues that the Fourteenth Amendment must be understood so that "each new repetition of a pattern or practice of racism is a new violation of rights. When such a new violation can be shown, the presumption that it revives old traumas can justify the imposition of drastic remedies." *Id.* at 169.

103. I add to Meister's single example of slavery to ground the survival

solemnly declare its permanent repudiation of the "original sin" of slavery and white supremacy, and all subsequent related forms of racial injury.¹⁰⁴ This is the unstated predicate of the Fourteenth Amendment. I maintain that the Fourteenth Amendment has no meaning at all outside this covenant. The Amendment that would protect endangered whites from an impermissible spoils system involves a different covenant whose time has, by a far sight, not yet arrived.¹⁰⁵

Professor Malamud's rejection of the diversity rationale, and perhaps her understanding of the Fourteenth Amendment, reflect a liberal concern that "pandemonium is liable to walk upon the scene,"¹⁰⁶ if we do not ground affirmative action in the compensatory rationale and the white over Black binarism that would provide tolerable limiting principles. From my perspective, this preoccupation prevents the liberal imagination from truly "latching on to the affirmative"—action, that is—and leaves it messing with old "Mr. In-Between."¹⁰⁷

covenant; genocide and enslavement of indigenous peoples, conquest of the southwest territories resulting in Mexican/American land dispossession, and colonial labor policies and immigration exclusion directed toward Asian immigrants, are some examples of other forms of racial oppression. While his survival covenant theory is grounded historically in the African American experience and could be used to support "Black exceptionalism," *see supra* note 90, his interpretation that the covenant prevents "each new pattern or practice of racism" as possibly reviving the racial trauma of slavery is broad enough to mount a unified race critique of white supremacy. *See Meister, supra* note 19, at 169.

104. *See Meister, supra* note 19, at 123, 169.

105. For example, although white men make up 48% of the college educated workforce, they hold more than 90% of the top jobs in news media, 90% of officer positions and 88% of the directorships in U.S. corporations, 85% of tenured college professorships, and 80% of management level jobs in advertising, marketing, and public relations. *See Affirmative Action Still Needed to Keep the Workplace Fair, MINORITY MARKETS ALERT*, Dec. 1, 1995. The weekly median white male earnings for 1992 was 33% higher than that of any other U.S. group. *See GLASS CEILING COMM'N, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL, THE ENVIRONMENTAL SCAM* (Mar. 1995).

106. *MERCER & ARLEN, supra* note 61.

107. *Id.*

