

The New Voice of Color

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INTRODUCTION

Much has been written about whether scholars of color and feminists speak with a distinctive “voice” in addressing certain race- and gender-related issues.¹ This issue has generated significant controversy, including a recent colloquy in the prestigious Harvard Law Review.² The publication of Professor Randall Kennedy’s article, *Racial Critiques of Legal Academia*,³ in which he challenges the existence of the voice of color and its privilege to speak to certain race-related issues, spawned much of the controversy. Recently, Professor Stephen Carter of Yale Law School added his voice to the debate with an article in the

1. For examples of legal scholarship considering the perspective of people of color, see D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331 (1988) [hereinafter Crenshaw, *Race, Reform, and Retrenchment*]; Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) [hereinafter Delgado, *Storytelling for Oppositionists*] (detailing benefits of speaking in voice through use of narrative or storytelling); Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990) [hereinafter Delgado, *Does Voice Really Matter?*]; Hall, *The Constitution and Race: A Critical Perspective*, 5 N.Y.L. SCH. J. HUM. RTS. 229 (1988); Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) [hereinafter Matsuda, *Looking to the Bottom*]; Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) [hereinafter Matsuda, *Voices of America*]; Scales-Trent, *Black Women and the Constitution*, 24 HARV. C.R.-C.L. L. REV. 9 (1989); Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987) (Patricia J. Williams) [hereinafter Williams, *Alchemical Notes*]; Williams, *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989) (Robert A. Williams, Jr.).

2. *Responses to Randall Kennedy’s Racial Critiques of Legal Academia*, 103 HARV. L. REV. 1844, 1844-86 (1990) [hereinafter *Responses to Racial Critiques*] (responses by Ball, Barnes, Brewer, Delgado, and Espinoza).

3. 102 HARV. L. REV. 1745 (1989) [hereinafter Kennedy, *Racial Critiques*].

inaugural issue of *Reconstruction*.⁴ Professor Carter reiterates several points made by Kennedy. My responses to Kennedy's and Carter's challenges appear elsewhere.⁵

However, both Kennedy's *Racial Critiques*⁶ and Carter's *The Best Black, and Other Tales*,⁷ raise an issue not addressed in my *Reply*⁸: their implicit incorporation of majoritarian standards in their arguments. These standards have crystallized over the years into an evaluative concept of merit employed by the academy in evaluating scholarship by all scholars, including scholars of color. In this Article, I contend that Kennedy and Carter have accepted the values of their "established" peers and that these values are reflected in much of what they assert. I argue that this set of values, especially when used to judge the worth of works written by other scholars of color who advocate the existence and use of voice, should be recognized as majority generated even if articulated by a Kennedy or a Carter speaking in the voice of color.

In Part I, I summarize the claims made by Kennedy and Carter in their recent works. I demonstrate that their views do not reflect the "voice of color" as that term has come to be used, but rather, they reflect the majoritarianism and universalism associated with legal academe's male-dominated, hierarchical professoriate. Part I defines what I term the "Hierarchical Majoritarian" dialect of the voice of color spoken by Carter and Kennedy, through reference to the evaluative standard they have adopted.⁹

Part I also characterizes Kennedy and Carter's voice as a new dialect within the voice of color, albeit Hierarchical Majoritarian. I define the voice of color as encompassing the author's intent, reader perception and acceptance of the author's intent, and reader belief that the author's status as a scholar of color imbues the author with a unique perspective. Only when a scholar of color

4. Carter, *The Best Black, and Other Tales*, 1 RECONSTRUCTION No. 1, 1990, at 6 [hereinafter Carter, *The Best Black*]. *Reconstruction* is a journal founded and edited by Professor Kennedy.

5. Johnson, *Racial Critiques of Legal Academia: A Reply in Favor of Context*, 43 STAN. L. REV. 137 (1990) [hereinafter Johnson, *Reply in Favor of Context*].

6. *Supra* note 3.

7. *Supra* note 4.

8. *Supra* note 5.

9. I labeled the Hierarchical Majoritarian standard—the standard that I contend Kennedy and Carter apply to the works of scholars of color—in earlier drafts of this Article as "Majoritarian Elitist." See, for example, my reference to this Article in *Reply in Favor of Context*, *supra* note 5, at 138 n.6, in which I refer to the title of this Article as *The New Voice of Color: Majoritarian, Elitist and Proud of It*.

I believe that the evaluative standard applied by the academy to judge the work of scholars is fundamentally elitist because the academy contends that there is a neutral standard by which the best, the "elite," can be ascertained and differentiated from non-elite work, and, accordingly, singled out and rewarded. However, due to the pejorative connotations associated with the term "elite," a divisive term, I opted for the term "hierarchical." Basically, I contend that Kennedy, Carter, and perhaps many other scholars of color have embraced the standard of their majoritarian peers in evaluating works of scholars of color who consciously speak in the voice of color. See *supra* note 1. For a discussion of whether minority scholars should embrace the "neutral" standards of the academy, see A. Johnson, *Scholarly Paradigms: A New Tradition Based on Context and Color* (1991) (unpublished manuscript on file with author) [hereinafter A. Johnson, *Scholarly Paradigms*].

draws on her experiences and the insight gained from living as a person of color does she speak with the voice of color.¹⁰

In characterizing the articulation of Hierarchical Majoritarian values as a new dialect within the voice of color, I am not suggesting that Carter and Kennedy speak in the voice of color simply because they are scholars of color. Rather, Carter and Kennedy speak in the voice of color because in joining the debate on key issues in Critical Race Theory, they rely on their experiences and insight gained as people of color; by participating in the voice of color debate, and talking about their experiences as people of color in legal academe, Carter and Kennedy have done exactly that. Moreover, although I disagree with their methodology, Carter and Kennedy share the objectives of many who have been contributing to the voice of color: the eradication of racial prejudice, injustice, inequality, and domination in legal academe and, ultimately, in society.

I contend in Part II that the recent works of Kennedy and Carter, can represent a positive trend in the development of scholarship by people of color: pieces by scholars of color who have wholeheartedly accepted and endorsed the value system of their majoritarian peers, which, at this juncture, does not acknowledge and value the voice of color and its empowering attributes.¹¹ I applaud this development because it demonstrates, perhaps only incrementally, that the position of Blacks and other people of color historically disadvantaged in our society is gradually improving at least at one level: the top.

Moreover, I reject the essentialism that results in privileging one dialect of a voice as “correct” and the experience responsible for the formation of that dialect as paradigmatic. This is inevitable when voice is equated with a single dominant experiential approach. Indeed, I adopt an approach that categorizes variations of the voice of color and embodies multiple consciousness.¹²

To illuminate the value of embracing multiple methodologies, I compare the voice of color debate in Critical Race Theory with the formation and separation of theoretical strands within Critical Feminist Theory. I contend that important parallels can be drawn between the development of these two related theories—theories focusing on the domination of one group by another.¹³ Indeed, insights gained from Critical Feminist Theory support approaching Critical Race Theory with a variegated conception of voice.

In Part III, I compare the Hierarchical Majoritarian voice espoused by Kennedy and Carter with the more generally recognized “voice of color,” which

10. See Johnson, *Reply in Favor of Context*, *supra* note 5, at 160-63.

11. See, e.g., Delgado, *Does Voice Really Matter?*, *supra* note 1, at 103 (asserts Kennedy is believer in “dominant discourse” that is liberal legalism with its rejection of voice and voice-directed scholarship); Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, 103 HARV. L. REV. 1878, 1879-86 (1990) (contends Kennedy relies on “symbolic power” of dominant discourse to critique critical race theorists).

12. See *infra* Part II.B for a definition of multiple consciousness and its opposite—the “univocal” monolithic theory of racial essentialism.

13. See *infra* Part II.A for a discussion of the three strands—difference, different voice, and dominance—of Critical Feminist Theory.

I term the “Monistic dialect of the voice of color.” This comparison reveals methodological differences that animate the debate between these two conceptualizations of voice. Kennedy and Carter have embraced a standard with which the academy is familiar, focusing on individuals and the merits of individualism. To date, proponents of the Hierarchical Majoritarian dialect have limited the debate to actual or perceived inequalities within the legal profession. Professors Derrick Bell, Richard Delgado, Mari Matsuda, and other proponents of the existence of the Monistic dialect of color have expanded the focus of their comments to address not only the issue of publishing and tenure standards, but to question the role of legal academe in society. Thus, advocates of the Monistic dialect of voice focus on the community’s pressing concerns and issues, advocating the expansion of opportunities for those socioeconomically disadvantaged, racially disadvantaged, or both.¹⁴

Moreover, Part III illustrates that, although I view the Hierarchical Majoritarian variation of the voice as inimical to proponents of the voice of color, I believe that everyone speaking with the voice shares many goals and objectives, including the eradication of racism and its deleterious effects on our society and, more particularly, increasing the number of scholars of color in legal academe. Where we differ is in our approaches, orientations, and strategies for achieving these shared normative goals.

Part IV expands on the individualistic and communalistic concepts developed in Part III to address an issue raised implicitly by my characterization of the Monistic dialect of the voice of color as inherently communalistic: Is the Monistic dialect communitarian/republican? Although a more thorough and complete analysis of this issue will need to be addressed in another setting, I sketch out an analysis that situates the Monistic dialect of the voice of color as implicitly, perhaps even unintentionally, incorporating communitarian/republican norms of political theory.¹⁵ Most importantly, by continuing our debate with some understanding of what fundamentally separates us before we arrive

14. Professor Matsuda, in rejecting liberalism and the pluralist tradition, embraces a “voice” premised on common experience:

This Article suggests that those who have experienced discrimination speak with a special voice to which we should listen. Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.

Matsuda, *Looking to the Bottom*, *supra* note 1, at 324. Delgado likewise employs a reductionist approach by focusing on the articulation of voice as an experiential perspective used by “members of [a] marginalized group, by virtue of their marginalized status, [who] are able to tell stories different from the ones legal scholars usually hear.” Delgado, *Does Voice Really Matter?*, *supra* note 1, at 95 (footnote omitted). I recast the Monistic variation of the voice of color as a communitarian voice and compare and contrast it to my conceptualization of a pluralist voice. See *infra* Part IV.

15. By characterizing the Monistic variation of voice as communitarian, I am not claiming that its proponents are synonymous with white communitarians who speak in a philosophical voice that would be impossible to characterize as “a voice of color.” I am, however, claiming that proponents of that Monistic variation of voice have embraced a philosophy that embodies many of the communitarian norms, *along with* the insight/perspective that is a norm innate to the voice of color. See *infra* Part I.A.

at the table, it is my hope that we will enrich our discussions of race-related issues and move on to achieving our shared objectives.

I. BACKGROUND: THE ARGUMENT OVER EXISTENCE

A. *The Debate*

Briefly, proponents of the existence and value of the voice of color allege that scholars of color speak to all issues with a distinctive voice, especially to certain race-related ones, because scholars of color have shared the molding experiences created by racism that caused the voice of color to emerge.¹⁶ Randall Kennedy of the Harvard Law School is engaged in a debate with other scholars over the existence and worth of the voice of color.¹⁷ Kennedy rejects the existence of the voice and its monolithic character, basing his position on a lack of objective proof that a distinctive voice exists. He questions whether the voice of color contains anything unique to distinguish it from other “voices.”¹⁸ Stephen Carter of the Yale Law School likewise questions the existence and worth of voice, although he equivocates more than Kennedy.¹⁹

16. See Johnson, *Reply in Favor of Context*, *supra* note 5, at 146-49.

17. Kennedy's initial challenge to the claim of scholars of color concerning the existence of voice focused on three articles: D. BELL, *supra* note 1 (fictional tale in which eminently qualified minority candidate is rejected at prestigious law school because hiring would threaten white faculty hegemony); Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 563-66 (1984) [hereinafter Delgado, *Imperial Scholar*] (explores exclusion of minority scholars from civil rights scholarship); Matsuda, *Looking to the Bottom*, *supra* note 1 (oppressed, subordinated classes have distinct normative insights that provide them with special voice to which we should listen). Kennedy's initial challenge is discussed in Johnson, *Reply in Favor of Context*, *supra* note 5, at 141-48. Delgado responded to Kennedy's challenge with *Does Voice Really Matter?*, *supra* note 1, and Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872 (1990) [hereinafter Delgado, *Mindset and Metaphor*], which appeared in a colloquy, *Responses to Racial Critiques*, *supra* note 2, written in response to Kennedy's article, *Racial Critiques*, *supra* note 3. The other articles in the colloquy are: Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855 (1990); Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864 (1990); Brewer, *Introduction: Choosing Sides in the Racial Critiques Debate*, 103 HARV. L. REV. 1844 (1990); Espinoza, *supra* note 11. To date, Bell has only responded in a letter to the editor, N.Y. Times, Jan. 26, 1990, at A30, col. 6. Kennedy attended a conference for minority law teachers to explain his position and preoccupation with merit. See R. Kennedy, Remarks at the American Association of Law Schools Workshop: New Voices in the Law (Sept. 9, 1989) (on file with author).

18. See Johnson, *Reply in Favor of Context*, *supra* note 5, at 146-49.

19. A lengthy quotation summarizing Carter's position on this issue is warranted herein, as his comments appear in the inaugural issue of a not so widely circulated publication that is perhaps not readily accessible to the readers of this Article:

The idea that oppression is its own qualification . . . is actually quite an old one. Its appeal to advocates of diversification is easy to understand, for it might be thought of as a wedge for including in mainstream debate voices that have been excluded in the past. But the appeal ought to be resisted, for the idea in its practice can be terribly pernicious.

The argument over difference in scholarly perspective is too complex to rehearse here. Suffice it to say for the moment that the different voice hypothesis is at the very least either too broad or too narrow—that is, either it sweeps under its ambit even the work of those scholars of color who would deny that their voice is different, or it in effect denies them their birthright as members of, dare I say it, the non-white community

In a similar vein, Kennedy refutes Richard Delgado's claim that the academic contributions "of minority scholars [are] frequently either unrecognized or underappreciated by white scholars blinded by limitations of their own racially defined experience or prejudiced by imperatives of their own racial interests."²⁰ Kennedy challenges this claim by asserting that, "Delgado fails to shoulder the essential burden of championing on substantive grounds specific works [by scholars of color] that deserve more recognition than they have been given."²¹ More importantly, Kennedy questions whether the otherwise excluded articles are *worthy* of citation when judged by the objective, meritocratic standard employed by his colleagues and accepted by him.²²

More charitably, Carter believes there may be a more benign explanation for the general lack of scholarship:²³ there may be a "lack of literature" from scholars of color to be cited since there are so few scholars of color in academia, and our entry into the profession is historically recent.²⁴ However, Carter's hypothesis does not stop there. He goes on to suggest that articles

But of course, none of this falsifies the claim that our voice is a distinctive one, and indeed, I am not at all sure that the claim is falsifiable. (Certainly its proponents treat the matter as one to be demonstrated by intuition rather than data.)

Carter, *The Best Black*, *supra* note 4, at 31.

20. Kennedy, *Racial Critiques*, *supra* note 3, at 1747.

21. *Id.* at 1774. Precisely speaking, in *The Imperial Scholar*, Delgado did not expressly identify the articles "overlooked" or improperly cited. He stated that minority scholarship "seems to have been consigned to oblivion." Delgado, *Imperial Scholar*, *supra* note 17, at 562 (citing Bell, Bakke, *Minority Admissions and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3 (1979) (discusses mainstream opposition to any means to achieve racial equality if it burdens white majority, and lists minority scholarship overlooked by Supreme Court in *Bakke*)). The authors cited by Bell include Richard Delgado, Mildred Ravenell (now Mildred Robinson), Cruz Reynoso, Leo Romero, and Ralph Smith. *See id.* at 4 n.2. Espinoza, *supra* note 11, at 1880 n.13, gives a selection of work by minorities on race and civil rights which Delgado could have been referring to as "omitted" or "consigned to oblivion." The articles cited by Kennedy, *Racial Critiques*, *supra* note 3, at 1775 n.127, and identified by Delgado as being overlooked are: Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); Ravenell, DeFunis and Bakke. . . *The Voice Not Heard*, 21 HOW. L.J. 128 (1978); Romero, Delgado & Reynoso, *The Legal Education of Chicano Students: A Study in Mutual Accommodation and Cultural Conflict*, 5 N.M.L. REV. 177 (1975).

22. For a discussion of the meritocratic standard and the fallacy in applying it as the *sole* criterion to evaluate the worth of scholars of color, see Johnson, *Reply in Favor of Context*, *supra* note 5, at 160-63.

23. It may be that I am too charitable in referring to Professor Carter's first apologia for the dearth of citation to works by scholars of color as benign. One might argue that Carter's claim that the lack of scholars of color in legal academia is a valid reason for the lack of scholarship by scholars of color itself represents internalization and acceptance of the historically racist admission and hiring policies of our legal education institutions. Perhaps this situation should not be cited as a failure of scholars of color, but as a failure of the institution of legal academia. *See, e.g.*, Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993 (1989) (demonstrating that focus on civil rights scholarship has shifted from remedying harms caused to victims of racial injustice to alleged "harms" caused to innocent white victims as result of remedies imposed by courts to correct past injustices). My point here is that the focus should not be on the alleged causal link between the dearth of scholars of color and the paucity of scholarly work by minorities, but on the environment creating the situation that leads to a dearth of minority scholars—a task that is ably addressed in Carter's article. *See Carter, The Best Black*, *supra* note 4, at 46-48.

24. Carter, *The Best Black*, *supra* note 4, at 31. Citation analysis is becoming the legal academy's means to measuring success. *See generally The Most-Cited Yale Law Journal Articles*, 100 YALE L.J. 1329 (1991) (unveiling list of *The Yale Law Journal's* most-cited pieces, with commentaries on ranked pieces).

authored by scholars of color are not as heavily cited as their majoritarian peers because “our work must be, on the whole, not as good as the work of white scholars.”²⁵ Carter buttresses his hypothesis with the following statement:

[B]ecause racial preferences in faculty hiring are intended to hire the best potential scholars of color rather than simply the best potential scholars, they might produce a group of scholars who will produce work of lower median quality than the work produced by those hired simply because they are the best potential scholars.²⁶

What I find intriguing about Kennedy’s and Carter’s contentions is their representation in the current debate over Critical Race Theory and the existence and value of voice.²⁷ Simply put, Kennedy and Carter represent the voice of color that I call Hierarchical and Majoritarian—two terms which at first glance present an odd, if not impossible, coupling. Their views are majoritarian in the sense that the standard they articulate and use to measure, judge, and evaluate has been developed by this country’s dominant culture—white males—with little or no input from persons of color, irrespective of class affiliation.²⁸ Moreover, in this Article I use “majoritarian” in a very limited sense to refer to the racial and gender make-up of the majority of members of the professoriate, a body within which the voice debate is now raging. Consequently, in this context, being labeled a “majoritarian” or adopting majoritarian values has nothing to do with general societal values or norms.

Narrowing my focus to an analysis of the professoriate explains this coupling of “majoritarian” and “hierarchical.” The terms are complementary for my purpose: constituting a label for what is the consensus of an insular group (the legal academy) who embrace a hierarchical standard—which may have a discriminatory impact on minority members of that insular group—and accept

25. Carter, *The Best Black*, *supra* note 4, at 45.

26. *Id.* at 46.

27. See Johnson, *Reply in Favor of Context*, *supra* note 5; see also Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 542-43 (urging female scholars of color to speak in their distinctive voices); Delgado, *Storytelling for Oppositionists*, *supra* note 1; Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 608-12 (1990) (Black women experience many “selves” including feminine self exposed to racism that white females cannot experience).

28. Delgado has characterized Kennedy as “a believer in [the] dominant discourse” when it involves the issue of civil rights:

Dominant discourse is incremental, cautious, and footnoted. In civil rights, it holds that slavery was a terrible evil; that this country is painfully extricating itself from its legacy; that overt discrimination is largely a matter of the past; that the rare offender can be caught and punished; and that the gap between whites and blacks is slowly but surely closing. Patience, vigilance and measured progress are what is needed; black self-help measures should be encouraged and reverse discrimination avoided at all costs.

Delgado, *Does Voice Really Matter?*, *supra* note 1, at 103 (footnotes omitted). I agree with Delgado’s assessment, but believe that his definition of dominant discourse, limited as it is to civil rights, is too narrow. I contend that Kennedy has accepted and adopted the dominant discourse with respect to other academic issues as well, including the existence and value of the voice of color.

the majoritarian paradigm, based upon that standard, to establish what is “best.”²⁹ By “hierarchical standard” I mean that its proponents maintain that there is a neutral, objective, evaluative standard by which the “best” scholarship can be ascertained, ranked, differentiated from other works, and rewarded.³⁰ Most importantly, implicit in the notion of a Hierarchical Majoritarian standard is the perception or belief that all have an equal shot at satisfying that standard as long as no *substantive* hurdles are employed to either assist or impede one class or type of individual.³¹ It is a belief that there is but one standard by which to make judgments on what is valuable and best.

B. *The Hierarchical Majoritarian Variation of Voice*

I have elsewhere defined my conception of the voice of color as one encompassing the author’s intent, reader perception and acceptance of the author’s intent, and reader belief that the author’s status as a scholar of color imbues the author with some unique perspective.³² My conception of the voice of color is therefore contextual; not all scholars of color possess it or use it all of the time. When scholars of color speak, they are not a priori speaking in the voice of color. The scholar of color must draw on her experiences and general insight gained *as* a person of color before the *voice* of color is articulated.³³ In other words, the voice of color is not synonymous with one’s status within the academy as a scholar of color, although I have argued elsewhere that only scholars of color may speak in the voice of color.³⁴ Kennedy and Carter

29. My colleague Professor Jody Kraus questions whether any “standard” can be nonhierarchical. See J. Kraus, *The “Standard” Criticism of Critical Race Theory* (1991) (unpublished manuscript on file with author). I emphasize that although some, and maybe all, standards are hierarchical, the standard employed by the academy to determine what is meritorious is so rigid and narrowly circumscribed that it does not provide an adequate basis of comparison—which, after all, is what a standard is supposed to do—for works by scholars of color speaking in the voice of color. In other words, white males comprise the hierarchy, which has imposed an allegedly neutral standard that allows them to maintain their hegemony through judicious wielding of the standard. See *infra* notes 41-43 and accompanying text. The standard devalues and ignores the very thing that makes the voice valuable, its distinctiveness. Professor Kraus’ reply to my contention is contained in *The “Standard” Criticism, supra*.

30. See *infra* Part I.B for a discussion of the Hierarchical Majoritarian standard.

31. On the difference between substantive and procedural racism, see Delgado, *Does Voice Really Matter?*, *supra* note 1, at 106 (footnotes omitted):

Realizing that racism has these different [procedural and substantive] guises explains much of the gulf between Kennedy and myself, for Kennedy does not believe in procedural racism, and I do. He is fully, indeed stirringly, sensitized to racism of the substantive variety. He detests (as do I) intentional favoritism based on race: If a white is given a benefit over an equally or more deserving black, Kennedy is quick to condemn it. But racism taking the “procedural” form of seemingly neutral or meritocratic rules that predictably handicap blacks disturbs him relatively little. Kennedy’s refusal to recognize procedural racism lies at the heart of his quarrel with the New Race Theorists.

32. See Johnson, *Reply in Favor of Context, supra* note 5, at 160-63.

33. See, e.g., Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2135-37 (1989) (Patricia J. Williams) (author relates her experience as “first black female” in family to accomplish various objectives).

34. Johnson, *Reply in Favor of Context, supra* note 5, at 160-61.

correctly reject the position that the voice of color exists whenever a scholar of color speaks.³⁵

However, Kennedy, and to a lesser degree Carter, appear to be hostile to the conception of the voice of color because of its potentially stigmatizing effect on the interpretation of scholarship contributed by scholars of color.³⁶ At base, perhaps what concerns Kennedy is the development of evaluative scholarly norms that have the potential for creating “segregated” scholarship.³⁷ In other words, if it is indeed impossible to apply the concept of voice of color selectively to the work of some scholars of color, then it is possible that the scholarship of *all* scholars of color will be evaluated by a different—though not necessarily lesser—evaluative standard. This scenario could lead to the unfortunate development, either actual or perceived, of “separate-but-[un]equal” scholarship: scholarship authored by scholars of color would be judged by an as yet undefined standard; scholarship produced by majority scholars would be judged by the Hierarchical Majoritarian standard.

I firmly believe that Carter in *The Best Black* and Kennedy in his article, *Racial Critiques of Legal Academia*, speak in the voice of color.³⁸ And, despite the fact that the substance of what they say is that scholars of color should embrace the Hierarchical Majoritarian standard and excel pursuant to those norms, they ultimately address the same issue raised by those I have characterized as speakers of the “Monistic dialect of the voice of color”: developing the best strategy to improve the plight of people of color and to achieve racial equality in our society.³⁹ Kennedy and Carter, drawing upon *their* experience as scholars of color, have apparently determined that the best strategy to achieve progress in the legal academy is via an “integrationist,” mainstream approach that embraces the so-called “neutral” evaluative norms of the dominant cultural group.⁴⁰

The Carter/Kennedy approach presupposes the existence of an objective “truth,” which requires that a scholar be computer-like in assessing the value

35. Carter, *The Best Black*, *supra* note 4, at 31; Kennedy, *Racial Critiques*, *supra* note 3, at 1782-87.

36. Carter, *The Best Black*, *supra* note 4, at 31; Kennedy, *Racial Critiques*, *supra* note 3, at 1786-87.

37. This scholarship is already segregated in the sense that it is now scholars of color who, viewed through Kennedy’s eyes, claim that their scholarship is so different that it must be judged by an evaluative standard that appreciates these differences.

38. See, e.g., Carter, *The Best Black*, *supra* note 4, at 27-30 (author, rejecting racial preferences in hiring, contends that “star system” of identifying, nurturing, and hiring new faculty should be abolished and scholarship of all scholars, including scholars of color, should be judged solely on merit). Although Kennedy does not expressly adopt or intend to speak in the voice of color in his article, I contend he does so implicitly: “Kennedy unintentionally uses the same empowering credentials he denies to other scholars of color to logically undermine and challenge the [existence of the voice of color]. Thus, it is ironic that by attacking the claims made by scholars of color, Kennedy proves, in some small way, its existence.” Johnson, *Reply in Favor of Context*, *supra* note 5, at 164.

39. See, e.g., Carter, *The Best Black*, *supra* note 4, at 48 (author argues that racial preferences, i.e., affirmative action, “are not the most constructive method for overcoming the barriers that keep people of color out of high-prestige positions”); *supra* note 1.

40. For a discussion of “integrationist” versus “nationalist” perspectives taken by people of color, see *infra* notes 99-107 and accompanying text.

of other scholars' work. The standard used by Kennedy⁴¹ is based on universalism—that “truth claims . . . are to be subjected to *preestablished impersonal criteria.*”⁴² Yet this standard, like others, is not based on certainty and objective truths. Such a standard must by definition be premised on a form of “consensus” among scholars that claims to be independent of “truth” notions about what is good and what is better.⁴³ Consequently, Kennedy’s meritocratic paradigm is premised on a value—objective truth⁴⁴—that in this context is

41. Kennedy’s challenge to the claims of Delgado, et. al., about the existence of the voice of color illustrates his adoption and articulation of the Hierarchical Majoritarian standard. The meritocratic standard employed by Kennedy, and the application of that standard to those who claim a distinctive voice of color exists, is a reflection of a meritocratic model that divorces the personal identity of the author/scholar from her products, so that “all that is relevant is the relative merits of the works competing for recognition.” Kennedy, *Racial Critiques*, *supra* note 3, at 1772 (footnote omitted). That meritocratic standard presupposes an interpretive community in which the identity of the author/scholar—regardless of whether she is a scholar of color—is irrelevant to those interpreting the text. This meritocratic standard has been attacked as one designed to perpetuate white male hegemony of social institutions:

And integrationists, organizing their perception of racial justice around images of objectivity, rationality, and neutrality, never considered whether this language for distinguishing the worthy from the unworthy itself might serve to help justify racial domination—if not to its victim, then at least to white beneficiaries who need to believe that their social positions are the result of something more than the brute fact of social power and racial domination.

Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 778 (footnote omitted).

42. Kennedy, *Racial Critiques*, *supra* note 3, at 1773 (quoting R. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURES* 607 (rev. ed. 1968)). The Merton quotation reads as follows:

[U]niversalism finds immediate expression in the canon that truth claims, whatever their source, are to be subjected to *preestablished impersonal criteria*: consonant with observation and with previously confirmed knowledge. The acceptance or rejection of claims . . . is not to depend on the personal or social attributes of their protagonist; his race, nationality, religion, class and personal qualities are as such irrelevant. Objectivity precludes particularism.

Id. at 607 (footnote omitted) (emphasis in original). This embrace of universalism with its emphasis on a “neutral” standard is reminiscent of Wechsler’s constitutional theory focusing on “neutral principles.” Wechsler adopted a “process theory” perspective, and advocated that the Supreme Court justify its opinions according to neutral reasons that reflect proper deference to elected legislature. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); see also H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (10th ed. 1958); H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953). *But cf.* Peller, *Neutral Principles in the 1950’s*, 21 U. MICH. J.L. REF. 561, 566 (1988) (author contends “Neutral Principles” is an inherently conservative jurisprudential philosophy and is “constructed on the basis of a fundamentally apologetic social ideology”).

43. Johnson, *Reply in Favor of Context*, *supra* note 5, at 151. As my colleague Professor Lynn Baker pointed out to me, evaluating scholarship is not about “truth” at all. At best, it is about a form of consensus among scholars, entirely independent of “truth” notions, about what is good that is.

44. This commitment to an impersonal standard which is premised on universalism has been described as the preferred, indeed the only, standard employed by integrationists, as compared to the race-consciousness perspective adopted by nationalists:

A commitment to a form of universalism, and an association of universalism with truth and particularism with ignorance, forms the infrastructure of American integrationist consciousness. This universalism is the common theme that connects the integrationist analytic distinctions between reason and prejudice, objectivity and bias, neutrality and discrimination, and integration and segregation. Each dichotomy envisions a realm of impersonality, understood as the transcendence of subjective bias and contrasted with an image of a realm of distortion where particularity and stereotype reign.

Peller, *supra* note 41, at 772 (footnote omitted).

inapplicable and inappropriate, and, since people are made of flesh and not silicon, it is a standard impossible to realize.⁴⁵

The voice of color, on many levels, challenges this concept of consensus. Scholars of color do not speak in a monolithic voice because they have not all had the same experiences. Focusing on the author's nonacademic, real world context, a scholar of color speaks in the voice of color when she makes a claim to a perspective that is not shared by her majoritarian peers because her experiences as a scholar of color are different. Put another way, "[t]he author of color is making a claim to a perspective that is not shared," and is therefore necessarily different, because the crucial value-forming experiences that have defined the perspective are not universally shared by scholars of color.⁴⁶

I contend that scholars of color writing in the voice of color not only belong to a community of legal academics, for which they write and speak in a manner interpretable by that community without reference to the identity of the author/scholar, but also belong to different communities based on their race and background. Further, membership of scholars of color in these unique communities provides them with insight and knowledge—insight and knowledge a majority scholar/reader may be able to grasp only after accepting an interpretive strategy that requires the reader to recognize the identity of the writer.⁴⁷

C. *Limiting the Concept of Voice: A Contextual Approach*

My argument that Kennedy speaks with the voice of color appears, on the surface, to be at odds with my definition of how the voice of color is articulated and interpreted.⁴⁸ Although I have emphasized repeatedly that authorial intent

45. My rejection of the meritocratic standard in this context does not mean that I embrace the norm that all scholarship is judgmentally indeterminate. On the contrary, I believe it is wrong to judge and reject the claims of scholars of color that a distinct voice of color exists when that rejection is based upon an interpretive framework that negates the existence of their color. See Johnson, *Reply in Favor of Context*, *supra* note 5, at 149-51. Yet I have no quarrel with my "conventional," "acolored" scholarship, see e.g., Johnson, *Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases*, 74 VA. L. REV. 751 (1988), being judged by the Hierarchical Majoritarian standard, the standard that I embraced in writing for an audience employing it.

46. Johnson, *Reply in Favor of Context*, *supra* note 5, at 160 (for analysis of existence and treatment of voice of color where material relating to existence and use of voice is reviewed).

47. Thus, when Patricia Williams describes how as "a black, I have been given by this society a strong sense of myself as already too familiar, too personal, too subordinate to white people. I have only recently evolved from being treated as three-fifths of a human, a sub-part of the white estate," the reader cannot view that claim, cannot feel the true intent of the author, without acknowledging the author's identity as a scholar of color—something inconsistent with the Majoritarian Hierarchical standard. Williams, *Alchemical Notes*, *supra* note 1, at 407-08 (footnotes omitted). In essence, like Kimberlé Crenshaw, I argue that the meritocratic evaluative standard—the Hierarchical Majoritarian standard—embodies white, majoritarian norms. Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 1, at 1379 (describing white norm "as a statement of the positive social norm, legitimating the continuing domination of those who do not meet it"). And, more importantly, these white norms "are camouflaged by a stance of cultural neutrality presented as 'perspectivelessness.'" Peller, *supra* note 41, at 758-59.

48. Elsewhere I have acknowledged that a "text standing alone does not have an autonomous meaning independent of any particular interpretation or reading; indeed, 'a text only comes to be a reading, that is, an act of understanding and interpretation.'" A. Johnson, *Scholarly Paradigms*, *supra* note 9 (citing Hoy,

is necessary to employ the voice of color,⁴⁹ Kennedy has denied that the voice exists. Any assertion that Kennedy expressly intends to speak in the voice of color must be viewed with incredulity. Likewise, Carter resists using the concept of *different voice* as an explanatory tool,⁵⁰ and it would be extremely difficult to prove that Carter intends to speak in the voice of color with respect to his views on certain race-related issues. The key question, of course, is whether Carter and Kennedy must *consciously* intend to speak with the voice of color in order for them to do so.

The answer is no. Kennedy does not have to intend to speak with the voice of color in order to employ it.⁵¹ Kennedy acknowledges the fact that he is a scholar of color and that causes readers to attribute to him insight—and thus privilege him to speak with authority to these issues—when compared to his white Majoritarian peers.⁵² In short, Kennedy exploits the fact that he is a scholar of color while criticizing others for their claims about the existence of a special voice and power.

Ironically, the perception that, as a scholar of color, Kennedy does possess some insight to speak to these issues (even if Kennedy denies the existence of the voice of color) proves that such a voice exists.⁵³ It is clear that the *authority* readers credit to Kennedy's argument, as he denies the existence and distinctiveness of the voice of color, may in large part derive from his race.⁵⁴

Part of the power and much of the fear generated by the publication of Kennedy's and, to a lesser degree, Carter's remarks on the existence of the voice of color and its value rest on how their majoritarian peers perceive their work.

Interpreting the Law: Hermeneutical and Poststructuralist Perspectives, 58 SO. CAL. L. REV. 135, 143 (1985)).

49. See A. Johnson, *Scholarly Paradigms*, *supra* note 9 (literary intentionalists, led by E.D. Hirsch and Emilio Betti, believe there is only one right reading of the text based on author's intent which is explicated from text's meaning; interpretivists, led by Hans-Georg Gadamer, reject the intentionalist/objectivist view that equates textual meaning *solely* with authorial intent, but do recognize that interpretation view of literary theory is influenced by interpreter's context as well as author's context).

50. See Carter, *The Best Black*, *supra* note 4, at 31.

51. Taking a Gadamerian contextual view, although the text is determinate enough to limit the range of interpretation, I argue "that interpretation is not static nor totally objective but dependent on a dynamic interaction between author and reader" that could cause the reader to conclude that the author speaks in the voice or dialect of color, not withstanding authorial intent to the contrary. A. Johnson, *Scholarly Paradigms*, *supra* note 9.

52. Kennedy, *Racial Critiques*, *supra* note 3, at 1812.

53. See Espinoza, *supra* note 11, at 1883.

54. See *supra* note 47 and accompanying text. In addition, see S. STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* (1990), for an example of an author whose work is given much credibility and attention because of the color of his skin. I agree with Adolph Reed that "[t]his is an abominably thin, simply-minded book" in which "[a] black person seizes the public stage by ratifying the social prejudices of the wealthy and powerful, all the while complaining of censure and persecution and receiving praise for courageously taking an unpopular stand. Steele's vacuity only indicates how little quality matters in rewarding the performance." Reed, *Book Review*, *NATION*, Mar. 4, 1991, at 274. For other reviews of the book, see Miner, *Book Review*, *NATIONAL REVIEW*, Sept. 17, 1990, at 52; Williams, *Book Review*, *NEW REPUBLIC*, Dec. 10, 1990, at 25 (Juan Williams); Johnson, *Book Review*, *L.A. Times*, Sept. 30, 1990, *Book Review Section*, at 1 (Charles Johnson); Williams, *Book Review*, *N.Y. Times*, Sept. 16, 1990, § 7, at 12, col. 1 (Patricia J. Williams); Nicholson, *Book Review*, *Wash. Post Book World*, Sept. 9, 1990, at 11, col. 1.

Those peers serve as interpreters who possess the power to ensure successful communication of Carter's and Kennedy's voice by privileging it.⁵⁵ It is highly possible that this dialect of the voice of color, spoken in the Hierarchical Majoritarian tongue, is the one that the professoriate will hear. Unfortunately, the message carried by its successful communication questions the work of others who have contributed voice of color scholarship with the objective of fostering development and acceptance of the voice's existence.⁵⁶ Moreover, Kennedy and Carter invoke the Majoritarian Hierarchical standard in interpreting the worth and value of *traditional legal scholarship* and appear to demand that the same standard be applied to their works. As noted below, Kennedy and Carter have excelled pursuant to the traditional Hierarchical Majoritarian standard.⁵⁷

Speakers of the Monistic dialect of the voice of color focus on issues—such as the concerns of the poor and oppressed—that have largely been ignored by traditional legal scholarship which emphasizes normative approaches to the use of law and legal rules in our society.⁵⁸ Those speaking with the Monistic dialect of voice view legal scholarship as a tool, a tool to be used to advance *social issues* that may or may not be *legal issues*. Their work is personal and political, and they view their positions—as scholars in the academy—as powerful platforms from which to advocate beneficial changes.⁵⁹ I contend that proponents of the Monistic dialect of the voice of color are producing valuable, meritorious, *legal scholarship*, and the evaluative standard of the academy must be broadened to recognize its worth.⁶⁰

II. A COMPARATIVE APPROACH TO UNDERSTANDING OUR DIFFERENCES

In this Part, I address two related issues. First, I suggest that the voice of color is undergoing evolution analogous to the theoretical diversification within Critical Feminist Theory.⁶¹ Although many generalize about feminist jurispru-

55. Consider the response of Espinoza:

The danger of Kennedy's article is that it may reinforce assumptions of inadequacy. With the Kennedy imprimatur on traditional conceptions of merit, minorities may be further excluded from faculties and scholarly recognition. Kennedy potentially provides the universal citation in the minds of tenure and promotion committees seeking to dismiss minority scholarship as un compelling or as theoretically misdirected. . . . For the minority scholar, therefore, Kennedy's article increases the risk of writing racial critiques.

Espinoza, *supra* note 11, at 1884-85; *see also* Delgado, *Does Voice Really Matter?*, *supra* note 1, at 110-11.

56. *See generally supra* note 1.

57. *See infra* Part II.B.1.

58. For a postmodern critique of traditional legal scholarship and its emphasis on a normative approach to legal issues, see Schlag, *Normative and Nowhere To Go*, 43 STAN. L. REV. 167 (1990).

59. *See, e.g.*, Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 712 (Duncan Kennedy) (Kennedy makes the point that professors in legal academe have a powerful platform from which to speak, which essentially guarantees that their voice will be heard.).

60. *See generally* A. Johnson, *Scholarly Paradigms*, *supra* note 9.

61. The term "Critical Feminist Theory" is derived from Professor Rhode's article, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990) (defines and discusses feminist critical theories and their relationship

dence and assume that it is monolithic and uniform, Cass Sunstein, in closely examining the works of feminists, has identified three principal (though not necessarily the only) strands that currently comprise Critical Feminist Theory: “difference,” “different voice,” and “dominance.”⁶²

Similarly, Robin West identified two strands or dialects of feminists, cultural feminists and radical feminists, which are equated with Sunstein’s categorization of different voice and dominance strands of Critical Feminist Theory.⁶³ West’s omission of the equivalent “difference” theory of critical race theorists,⁶⁴ which has been characterized as “liberal feminism” by one scholar who follows and adopts West’s terminology,⁶⁵ causes me to utilize Sunstein’s characterization and typology of Critical Feminist Theory. Sunstein’s model is fuller by virtue of its looking not only at the present viable strands of feminist theory—different voice and dominance—but its historical reference to what was perhaps the initial dialect of voice—difference—whose time may have passed. Moreover, this analysis is more appropriate to my task in that I argue that the difference dialect is equivalent to the voice spoken by Kennedy and Carter.

I argue that aspects of Kennedy’s and Carter’s Hierarchical Majoritarian dialect of the voice of color resonate with the difference strand of Critical Feminist Theory. Scholars of color speaking in the Monistic dialect articulate a voice that contains components of both the different voice and dominance strands of Critical Feminist Theory.⁶⁶ Incorporating the latter strand, scholars

to Critical Legal Studies). Professors Harris and Rhode have criticized the essentialism inherent in Critical Feminist Theory. *See id.* at 617, 624-25; Harris, *supra* note 27, at 585-90; *see also* Austin, *supra* note 27, at 539, 543 (urging Black women to write in voice reflecting *Black women’s* experience and rejecting monolithic racial/sexual feminist community).

62. *See, e.g.,* Sunstein, Book Review, 101 HARV. L. REV. 826, 827-29 (1988) (reviewing C. MACKINNON, *FEMINISM UNMODIFIED* (1987) [hereinafter C. MACKINNON, *FEMINISM UNMODIFIED*]). Although some have argued that feminists may be male, no claim is made herein that Professor Sunstein, a white male, is a feminist or is speaking in the feminist voice. Professor Sunstein’s work in this area is selected as a focal point for this analysis not because it represents an exposition of feminist thought, but because Professor Sunstein articulated a categorization of Critical Feminist Theory that I find useful in analyzing the issues addressed here. *See infra* text accompanying notes 63-65.

63. *See West, Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 13 (1988).

64. *See Williams, Deconstructing Gender*, 87 MICH. L. REV. 797, 798 n.2 (1989) (Joan C. Williams) [hereinafter Williams, *Deconstructing Gender*] (author notes that West has dismissed the difference strand in her description of feminist theory).

65. *See Lacey, Introducing Feminist Jurisprudence: An Analysis of Oklahoma’s Seduction Statute*, 25 TULSA L.J. 775, 780 n.18 (1989-90) (author describes feminist jurisprudence and its “three major schools of thought” to unfamiliar readers).

66. *See infra* notes 88-98 and accompanying text. The leading proponent of the feminist “different voice” strand of Critical Feminist Theory is Carol Gilligan. *See* C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982); *see also* N. CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978); J.B. MILLER, *TOWARD A NEW PSYCHOLOGY OF WOMEN* (1st ed. 1976). Law review articles elaborating on the “different voice” strand of Critical Feminist Theory include Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women’s Lawyering Process*, 1 BERK. WOMEN’S L.J. 39, 41-42 (1985); Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986) (arguing that feminist jurisprudence abandons prescribed legal terms); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986) (arguing that feminist jurisprudence relies on vision aligned with republicanism while male perspective parallels pluralist liberal theory); *cf.* Williams, *Deconstructing Gender*, *supra* note 64 (disputing Gilligan’s description of women’s voice that is focused on relationships). For further discussion of “different

of color construct racism as a systemic method of domination and challenge it as such, in much the same way that Professor Catharine MacKinnon constructs and challenges systemic sexist domination.⁶⁷ As a result, scholars of color speaking in the Monistic dialect may be implicitly creating a dominance strand of Critical Race Theory that may ultimately require the rejection of what has been characterized as the integrationist model of racial equality—a model associated with the views of Kennedy and Carter.⁶⁸

Second, analyzing and comparing the development of both critical theories—race and feminist—provides lessons concerning the ideological and philosophical origin of the voice of color, one rooted in domination based primarily on race rather than gender.⁶⁹ An examination of the different strands of Critical Feminist Theory provides perspective that may enrich our understanding of the methodologies that comprise Critical Race Theory. The fact that the voice of color is not monolithic, that Hierarchical Majoritarianism and Monism coexist as ways of speaking, engenders no harm. Indeed, the voice of color may be enriched by this diversity and the debate that flows from it.

A. *Critical Feminist Theory and Critical Race Theory: A Comparative Approach*

Critical Feminist Theory is comprised of a diverse body of scholarship written from many viewpoints that all address the central issues sex equality

voice” feminism and the other strands of Critical Feminist Theory, *see infra* Part II.A.

67. *See, e.g., infra* notes 97-98 and accompanying text.

68. *See, e.g., infra* notes 99-109 and accompanying text (discussion of Peller and his critique of Randall Kennedy).

69. I qualify my assertion that the domination I speak of is based on race rather than gender, because some critical race theorists are also critical feminist theorists who contend that they suffer from *both* race and gender oppression. *See, e.g.,* 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, 141-50 [hereinafter Crenshaw, *Demarginalizing the Intersection of Race and Sex*]; Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989); Note, *Conceptualizing Black Women's Employment Experiences*, 98 YALE L.J. 1457 (1989). MacKinnon contends that Black women are doubly prejudiced by the white male standard since they are neither white nor male:

The inadequacy of the sameness/difference model, and its consequences for equality under law, are strikingly revealed by the law's treatment of women of color. Discriminated against on the basis of race and sex, interactively and synergistically, the situation of women of color should have been improved most under laws addressing both. Instead, the law seems to have them least in mind. First the doctrine had apoplexy trying to decide if their inequality was sex or race. When it faced the fact that it is both at once, women of color were sometimes regarded as different twice over: from the male standard of race and the white standard of sex. This reveals a racism in the law of sex and a sexism in the law of race. White women meet the white male standard as white, if not male, and men of color meet the white male standard as male, if not white. Although a good many women of color can meet any substantive standard around, women of color as such meet neither. This treatment of women of color serves to support the view that the implicit standard for equality is what white men value about themselves and each other—an irreducible minimum of which is often that you be one.

MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1291 (1991) [hereinafter MacKinnon, *Reflections on Sex Equality*] (footnotes omitted).

(or the current state of female domination) raises. According to Sunstein, the difference strand of Critical Feminist Theory is premised on a notion that there is *no* difference between men and women; thus any law which perpetuates difference based on gender should be repealed.⁷⁰ Proponents of the different voice strand of Critical Feminist Theory, on the other hand, argue that there *are* differences between men and women that result in women's speaking in a different voice on certain issues and exhibiting certain attributes that are distinctively female.⁷¹ This view has come to be associated with the work of Professor Carol Gilligan.⁷² Finally, proponents of the dominance strand of Critical Feminist Theory contend that women's status in our society is rooted in their domination by men: laws are inherently biased because they are written, interpreted, and enforced by men.⁷³ Thus, Critical Feminist Theory easily can

70. Two of the leading proponents of the "difference" theory are Cristine Littleton and Wendy Williams. See Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987); Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982); Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985); Williams, *Notes from a First Generation*, 1989 U. CHI. LEGAL F. 99. Consider Cass Sunstein's explanation:

[T]he "difference" approach . . . argues that women should be permitted to compete on equal terms with men in the public world . . . [C]haracteristics legally and socially attributed to women—passivity, weakness, irrationality—are inaccurate or overbroad generalizations and at most the product of anachronistic social practices. Thus, feminists attack distinctions on the basis of gender—for example, laws excluding women from "male" jobs—as reflecting prejudice rather than reality and as perpetuating women's second-class citizenship.

Sunstein, *supra* note 62, at 827; see also *International Union v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) (holding unconstitutional employer's policy barring all women, except women with documented infertility, from jobs involving lead exposure).

71. Prominent proponents of different voice in legal academe include Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Menkel-Meadow, *supra* note 66; Sherry, *supra* note 66. Again, consider Sunstein's insightful explanation of the different voice:

The "different voice" strand of feminist theory, associated most visibly with the work of Carol Gilligan, asserts that there is a distinctly female way of approaching moral and legal dilemmas and that that way has been ignored or downplayed in legal doctrine and scholarship. In this view, women tend to value relationships and connections—an "ethic of care"—whereas men tend to place a higher premium on abstraction, rights, autonomy, separation, formality, and neutrality—an "ethic of justice." . . . The "different voice" approach assumes both descriptive and normative forms, often contending that the legal system unduly emphasizes rules and abstraction and attends insufficiently to context and reciprocal responsibility.

Sunstein, *supra* note 62, at 827-28 (footnotes omitted).

72. See, e.g., C. GILLIGAN, *supra* note 66. Professor Gilligan's work and its effect on legal scholarship has been cogently summarized:

Cultural feminists draw upon Gilligan's work to describe women's "voice" in legal analysis as well as life experiences. Women's voices, they assert, emphasize positive values such as caring, nurturing, and empathy instead of competition, aggressiveness, and selfishness. Women intuitively seek connection and relationships, while men struggle for autonomous individualism. In more concrete terms, cultural feminists advocate a recognition of women's contributions to society, such as child-raising or care-giving. A great deal of their work emphasizes the need for laws such as mandatory child-raising leaves which will encourage these activities.

Lacey, *supra* note 65, at 786 (footnotes omitted).

73. The dominance strand of Critical Feminist Theory focuses on the plight of women as dominated, subordinated beings in our society:

The first approach is to invoke the experience of exclusion and subordination as a source of special insight. According to Menkel-Meadow, the "feminist critique starts from the experiential point of view of the oppressed, dominated, and devalued, while the critical legal studies critique

be recharacterized as three heuristics for defining and analyzing not only the issues that are addressed by the feminist methodology, but also the causal agent that created and reinforces women's current inequitable plight.⁷⁴

I argue that the debate over the existence of the voice of color is diversifying along lines similar to those in Critical Feminist Theory. At one level, I contend that Kennedy's and Carter's adoption of the Hierarchical Majoritarian standard approximates adoption of the difference perspective in Critical Feminist Theory. Briefly, I allege that Kennedy's and Carter's primary focus on the eradication of differing treatment of people of color in our society.⁷⁵ Advocates of the Monistic voice of color have adopted an approach to this issue that is very similar to the different voice in Critical Feminist Theory; they claim their class-based voice speaks from the perspective of the socioeconomic bottom of society,⁷⁶ that it offers a distinctive—*different*—way of approaching moral, legal, and social issues in legal scholarship. Finally, I acknowledge that Critical Race Theory is still developing and will eventually produce a counterpart to the dominance strand of Critical Feminist Theory, the primary ethos of which will reflect what has traditionally and historically been categorized as “nationalism.”⁷⁷ This prediction is grounded in the belief that, like the female

begins—and, some would argue, remains—in a male-constructed, privileged place in which domination and oppression can be described and imagined but not fully experienced.”

Rhode, *supra* note 61, at 623 (quoting Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go to Law School,”* 38 J. LEGAL EDUC. 61 (1988)). See C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 62. See generally C. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) [hereinafter C. MACKINNON, *FEMINIST THEORY OF THE STATE*].

74. See C. MACKINNON, *FEMINIST THEORY OF THE STATE*, *supra* note 73, at 237-39. Perhaps the dominance approach is best explained by distinguishing it from the different voice and difference approaches:

[T]he “dominance” approach describes . . . gender inequality not in terms of arbitrary or irrational differentiation but in terms of the social subordination of women. The problem is not that those similarly situated have been treated differently; it is instead that one group has dominated the other, in part through sexual practices [T]hese feminists see inequality in patterns of interaction between men and women that are normally taken as unobjectionable and even as intrinsic to traditional gender roles The dominance approach joins the different voice approach's critique of partial perspective, but whereas the different voice approach embraces women's need for relationship and connectedness, the dominance approach claims that women need to be freed from practices that subordinate and invade them.

Sunstein, *supra* note 62, at 828-29 (footnotes omitted).

75. See, e.g., Commentary, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1335-36 (1986) (Kennedy) [hereinafter *Persuasion and Distrust*].

76. See *infra* notes 87-90, 118-19, 129-35 and accompanying text.

77. Although advocates of Black nationalism have appeared periodically throughout history, see, e.g., T. VINCENT, *BLACK POWER AND THE GARVEY MOVEMENT* (1971) (contending that Garvey was the direct predecessor of nationalists of the 1960's); *infra* notes 180-81 and accompanying text, there is a somewhat surprising lack of visible advocates of Black nationalism among lawyers and others in the legal profession. Perhaps the paucity of Black nationalists in legal academe is due to the fact that the academy and its Black members—along with most of the Black intelligentsia in the twentieth century—focused on integrationism, rather than nationalism, as a vehicle to achieve racial equality in our society. See *infra* Part III.B.3. Thus although nationalist scholarship has existed previously in other academic disciplines, it is not apparent in the contemporary debate over the existence of a voice of color in legal scholarship. Perhaps what I am acknowledging is the emergence of nationalism in a new form—“legal nationalism”—applied in a contemporary context.

voice, the voice of color is indeed *emerging*, that it has yet to be fully heard and understood, because it cannot be fully articulated until the state of domination by whites over people of color has been eradicated.⁷⁸

However, viewing these three heuristics for addressing issues raised by Critical Feminist Theory and Critical Race Theory as completely separate and distinct does a disservice to the proponents of each heuristic and to the methodological theories identified as feminist and critical race. Focusing first on the former, my view of Critical Feminist Theory is that, to some degree, the three strands of feminism are mutually exclusive in that one cannot fully embrace all the tenets espoused by different voice proponents while simultaneously embracing all the tenets espoused by proponents of the dominance strand of feminism.⁷⁹ On the other hand, the three strands of feminism (and those that I have failed to mention, lesbian feminism for example)⁸⁰ are, in reality, striving for a shared objective: equality between men and women. We can and should view the three principal strands of Critical Feminist Theory as being arranged on a continuum, a continuum in which the overarching goal—achieving parity between men and women in our society—and the transitional goal of improving the state of women in our society are agreed upon by all who would identify themselves as critical feminist theorists. The continuum merely arranges theoretical and tactical orientations on the most efficacious strategy for achieving equality.

78. See, e.g., C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 62, at 38-39 (proposing that “true” feminist voice cannot be heard until women’s state of domination is eradicated from our society, and that women today have a limited, partial perspective of their plight as a result).

79. For example, Professor Catharine MacKinnon, the most vocal proponent of the dominance theory, claims that she is “ambivalent” about the discovery and elaboration of voice as articulated by Carol Gilligan. See MacKinnon, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 *BUFFALO L. REV.* 11, 25-28 (1985) [hereinafter MacKinnon, *Feminist Discourse*]. In *Toward a Feminist Theory of the State*, *supra* note 73, however, Professor MacKinnon is extremely critical of Gilligan’s work. See *id.* at 51. MacKinnon’s critical comments concerning the existence of a “different voice” illuminate the incompatibility between the “voice” and “dominance” strands of Critical Feminist Theory. MacKinnon challenges the articulation of “voice” as a feminine voice by characterizing this conceptualization as a product (social construct) of male domination that is not truly women’s pure voice because women have never had the power to develop such a voice. *Id.* at 28. The “difference” approach is incompatible with both the “different voice” and “dominance” strands of Critical Feminist Theory in that its primary tenet is that there is nothing different about women when compared to men, and it is precisely that sort of thinking that has resulted in the degradation of women in our society; hence, the rejection of the “different voice.” On the other hand, “difference” differs significantly from the “dominance” strand of Critical Feminist Theory in that difference proposes that the removal of legal, de jure distinctions between men and women will eradicate the differentiation between men and women that has created women’s plight—a point of view I find totally inconsistent with the “dominance” strand, which views male domination as a social construct that infects every part of our society and male/female relationships. MacKinnon rejects the notion that the removal of legal distinctions between men and women is desirable and contends that a gender-neutral approach disadvantages women before the law because “society advantages [men] before they get into court, and law is prohibited from taking that reference into account because that would mean taking gender into account.” C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 62, at 35. It follows that a gender-neutral approach results in the perpetuation of women’s inferior state. *Id.* at 73.

80. See, e.g., A. LORDE, *Age, Race, Class, and Sex: Women Redefining Difference*, in *SISTER OUTSIDER* 114 (1984).

I make a similar argument with respect to the three strands of Critical Race Theory. Kennedy and Carter are essentially advocating that people of color should be able to compete in the public world on equal terms with whites.⁸¹ Although the fit is not perfect, Kennedy's and Carter's position on the existence and distinctiveness of the voice of color can be likened to the view currently taken by difference feminist theorists: they resolutely maintain that the plight of people of color will be improved if the discriminatory treatment of people of color is eradicated from the legal system.⁸² This difference position taken by minority scholars is precisely the position taken by integrationists during the fifties and sixties, a position that resulted in the successful elimination of many forms of de jure racism in our society.⁸³ Indeed, proponents of the difference strand of Critical Feminist Theory might well pay attention to issues raised by the voice of color debate,⁸⁴ where the Majoritarian Hierarchical

81. This does not answer the related question of whether Kennedy and Carter are in favor of affirmative action in order to improve the status of people of color in any situation. Although Carter has indicated that he was the beneficiary of affirmative action, *see Carter, The Best Black, supra* note 4, at 7, in light of the positions they have taken in the voice of color debate it is unclear to me how he or Kennedy views affirmative action. My guess (and it is only a guess) is that, to be logically consistent, they have to oppose affirmative action at some point because affirmative action gives benefits to individuals that are not earned pursuant to the Hierarchical Majoritarian standard. Indeed, one can argue that affirmative action is inimical to the Hierarchical Majoritarian standard in that it privileges the identity of the beneficiary over the merit of the content of the item to be evaluated. (My editors at *The Yale Law Journal* now tell me that Carter's views of the issue will soon be out in hardcover in the form of a book, S. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (forthcoming 1991). Based on the book's title, my guess appears accurate).

What is quite odd and inconsistent, however, is Kennedy's unequivocal and enthusiastic support of affirmative action in *Persuasion and Distrust, supra* note 75. In that article, Kennedy supports affirmative action, in part, because he rejects merit as the sole basis for awarding opportunities and benefits in our society:

Finally, and most importantly, many beneficiaries of affirmative action recognize the thoroughly political—which is to say contestable—nature of “merit”; they realize that it is a malleable concept, determined not by immanent, preexisting standards but rather by the perceived needs of society. Inasmuch as the elevation of blacks addresses pressing social needs, they rightly insist that considering a black's race as part of the bundle of traits that constitute “merit” is entirely appropriate.

Persuasion and Distrust, supra note 75, at 1333 (footnote omitted). I am not going to attempt to reconcile Kennedy's view of affirmative action as expressed in *Persuasion and Distrust* with his defense of merit and the Hierarchical Majoritarian standard articulated in *Racial Critiques, supra* note 3.

82. One problem not addressed by “difference” theorists of either camp are the implications of the existence of real differences between men and women (the ability to give birth, for example) and the problems created thereby, and the different socioeconomic status of Blacks and whites. In the first instance, the fact that there are physiological differences between men and women leads to the law's acceptance of differing treatment based on physiological differences, *Geduldig v. Aiello*, 417 U.S. 484, 489 n.20 (1974), which allows for the continuing domination of women by men in our society. *Cf. International Union v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991); *Law, Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 981-1002 (1984) (discusses case law where lack of focus on biological reproductive differences results in a lack of attention to equality concerns). In the second instance, because the Constitution does not protect on the basis of socioeconomic status, no law or legal regulation may be attacked because it privileges the wealthy over the poor, thus resulting in the continued subordination of people of color due to their perpetual disadvantaged socioeconomic condition. Here, it is the lack of law or legal protection that results in the domination of people of color.

83. *See Peller, supra* note 41, at 767-71.

84. Some different voice and dominance critical feminist theorists have indeed attacked the difference conception of Critical Feminist Theory by arguing that the eradication of legal subordination may not result in improving the state of women in any significant way:

dialect of voice is being attacked by those who argue that the eradication of difference and differing treatment by our legal system has done little to truly improve the state of people of color in our society.⁸⁵

Matsuda, Delgado, and others who expressly purport to speak in the voice of color, in consciously arguing that their experiences as women and men of color give them insight, take positions similar to those taken within the different voice strand of Critical Feminist Theory. However, there is one very important distinction: speakers of the Monistic dialect of the voice of color incorporate a class-based position that they implicitly make synonymous with race.⁸⁶ Proponents of the Monistic dialect assert that their methodology is a distinctive way of approaching moral, legal, and social issues that embodies racial consciousness, and that their legal scholarship and doctrine has heretofore been marginalized. They argue that a dominant perspective that professes cultural neutrality in fact represents cultural hegemony of the majority—white males—and has ignored their insight:

Mari Matsuda calls for a new jurisprudence that would look “to the bottom,” with the central idea that one’s position in the social structure of race relations makes a qualitative difference in how one sees and experiences the world. Kimberlé Crenshaw argues that everyday institutional practices embody “white norms” that are camouflaged by a stance of cultural neutrality presented as “perspectivelessness.” Gerald Torres demonstrates how legal categories embody dominant cultural assumptions that mistranslate the inner reality of Native American communities and require cultural conformity as the price of legal recognition. And Richard Delgado more generally contends that race makes a substantial difference in how scholars approach legal topics; he emphasizes storytelling and narrative as elements of a distinctive voice employed by people of color.⁸⁷

At base, I believe these scholars of color speaking in the Monistic dialect are claiming a particular “voice”⁸⁸—a recognition of a perspective that is

[A] decade’s experience with state equal rights amendments reveals no necessary correlation between the standard of constitutional protection provided by legal tribunals and the results achieved. It is unlikely that a federal equal rights amendment would have insured the vast array of substantive objectives that its proponents frequently claimed.

Rhode, *supra* note 61, at 633 (footnote omitted); *see also* MacKinnon, Book Review, 54 U. CHI. L. REV. 759, 760-62 (1987) (reviewing J. MANSBRIDGE, *WHY WE LOST THE ERA* (1986)).

85. *See, e.g.*, Delgado, *Does Voice Really Matter?*, *supra* note 1; Johnson, *Reply in Favor of Context*, *supra* note 5; *Responses to Racial Critiques*, *supra* note 2.

86. Indeed, I contend that proponents of the Monistic dialect speak from the socioeconomic class of the poor and the oppressed, the bottom strata of our society when measured by socioeconomic data focusing on material wealth. For a substantive discussion of this point, *see infra* notes 118-19 & 129-35 and accompanying text.

87. Peller, *supra* note 41, at 758-59 (footnotes omitted).

88. *Cf.* Ansley, *supra* note 23, at 1025-34. Recently, Professor Matsuda has characterized this form of scholarship as “outsider jurisprudence”: “There is an outsider’s jurisprudence growing and thriving alongside mainstream jurisprudence in American law schools. The new feminist jurisprudence is a lively example of this. A related, and less-celebrated, outsider jurisprudence is that belonging to people of color.” Matsuda,

created by the experience of domination. It is a perspective that looks both inward to personal experience and feeling, and outward in that it calls upon the existing social order to recognize something that it has steadfastly refused to acknowledge: that this is a society premised on inequality in which one community dominates another.⁸⁹

Moreover, as exemplified by scholars of color, one can belong to many communities, some of which dominate and some of which are dominated.⁹⁰ Yet, perhaps only those who share some membership in the latter, the dominated, are able to recognize the true cost of domination as a price paid by *all*.⁹¹ An example of the cost paid by dominators may be the fact that, by focusing their attention on the continued maintenance of the current pattern of domination and subordination, they fail to see that they themselves are being manipulated by others—"a self-conscious ruling class at the top of the structure."⁹² The traditional, albeit Marxist, argument is that socioeconomically disadvantaged whites are so caught up, so involved, in maintaining their dominant *racial* position vis-à-vis people of color, that they fail to see and fully appreciate their own subordinate positions as members of an oppressed socioeconomic class. Consequently, the perspective of proponents of the Monistic voice of color is also outward looking in that it is only when those who dominate are confronted with the perspective of those being dominated that they are able to discern the true costs of domination—to see that issues such as race, ethnicity, and class are social constructs which can be used for both legitimate and illegitimate purposes.⁹³ The Monistic dialect is educational and transformative, descriptive

Public Response to Racist Speech: Considering the Victim's Story, 87 MICH. L. REV. 2320, 2323 (1989) [hereinafter Matsuda, *Public Response to Racist Speech*] (footnotes omitted).

89. See, e.g., Delgado, *Storytelling for Oppositionists*, *supra* note 1, at 2435-40 (establishing why outgroups should tell stories and why others should listen); Matsuda, *Public Response to Racist Speech*, *supra* note 88, at 2323-26 (explaining outsider jurisprudence). My point is that scholars of color speaking in the Monistic dialect challenge the systemic domination of whites over people of color in our society. They do so implicitly and explicitly. Thus, the Monistic voice of color may not only prove the existence of the voice of color, but also serve as a vehicle to challenge a society and a legal system based on racial domination. In this latter context, the Monistic voice of color may be similar to and, in part representative of, the Black nationalist position that I discuss *infra* notes 102-09 and accompanying text; see also, Ansley, *supra* note 23; Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 1; Delgado, *Mindset and Metaphor*, *supra* note 17; Delgado, *Does Voice Really Matter?*, *supra* note 1; Harris, *supra* note 27; Peller, *supra* note 41.

90. In other words, scholars of color, in order to gain entry into the academy, typically have accepted (been forced to accept) membership in the predominantly white, male, upper-middle-class community of academia. Simultaneously, these same scholars of color, by nature of their race, remain firmly rooted in their community of color. Indeed, Carter and Kennedy, as scholars of color, are firmly rooted in the community of color. Given the pervasive nature of race in our society, it is highly unlikely that a Black professional or academic can escape identification with the Black community. Cf. *supra* notes 51-54 and accompanying text.

91. See, e.g., Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 1, at 1381 (discussing stake whites have in racism; role of Blacks as inferior allows whites to "include themselves in the dominant circle—an arena in which most hold no real power, but only their privileged racial identity").

92. See Kennedy, *supra* note 59, at 725.

93. Consider Professor Nancy Ehrenreich's insightful observations:

[T]he prevailing ideology systematically ignores differences among the citizenry as a whole, promoting a homogeneous vision of American society that both excludes those groups who do

and normative, in that it seeks to expand our notion of community to embrace those that have heretofore been excluded; once the norms of the oppressed and dominated have been communicated and incorporated into the community of the oppressor and dominator, the oppressor will hopefully no longer be able to ignore acts of domination premised on “neutrality” or “equality.”

Although proponents of the different voice strand of feminist theory believe that theirs is a distinctly female way of analyzing issues, I am not claiming that there is a distinctly Black or outsider way of analyzing issues that all scholars of color share.⁹⁴ I reject the notion of a monolithic voice of color and my conceptualization of the Monistic dialect of voice is quite different.⁹⁵ I believe similarities lie in the perspective associated with the different voice and the Monistic dialect of the voice of color: both perspectives are rooted in the experience of inequality and subordination; both speak about inequality and hope that, in so doing, there will be a new and better understanding of equality.⁹⁶

More importantly, the Monistic dialect of voice, although similar, contains elements not found in the different voice strand of Critical Feminist Theory. In particular, the Monistic dialect of the voice is dualistic; it includes aspects of the different voice strand of Critical Feminist Theory, as discussed above, as well as the dominance strand. Thus, in finishing my analog to the three strands of Critical Feminist Theory I pose the question: Where in Critical Race Theory is there a single strand resembling the “dominance” strand epitomized by the work of Catharine MacKinnon? The answer may lie in the emergence in legal academia of a contemporary version of Black nationalism—the ideology most often currently associated with Malcolm X. Of course, Malcolm X was not a lawyer, law professor, or “critical race theorist.” Moreover, Malcolm X viewed integration as an inappropriate strategy for Blacks to take to improve their state in American society. Instead, Malcolm X believed that Blacks must form a separate community—free of the dominator and the dominator’s influence—in order to eradicate vestiges of subordination and repression.⁹⁷ Whereas “voice” theorists—critical race and feminist—want to change the debate, transform the community so that they are truly part of the integrated whole,

not fit the accepted American model, and elevates a small but powerful elite to the status of universal “type.” . . . Rendering such groups invisible by ignoring their differences (or even their existence) and assimilating everyone into a purportedly general type, American ideology conceals the conflict created by those differences and thus allows us to avoid the hard decisions that such conflict requires. Only by denying diversity have we been able to see ourselves as tolerant of it.

Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1234 (1990).

94. The term “outsider” has been recently used by Mari Matsuda, *see, e.g.*, Matsuda, *Public Response to Racist Speech*, *supra* note 88, at 2323 n.15, instead of “minority” because it encompasses not only minorities, or people of color, but feminists and others who are not part of the mainstream, which I interpret to be white, male, and heterosexual.

95. *See infra* Part II.B.1.

96. *See, e.g.*, MacKinnon, *Feminist Discourse*, *supra* note 79, at 25.

97. *See* MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* 245-46 (A. Haley ed. 1965) [hereinafter MALCOLM X, *AUTOBIOGRAPHY*].

Malcolm X, a nationalist, perceived the need for integration as a product of the subordination of Blacks in our society.⁹⁸

In a recently published article, Professor Gary Peller contrasts the way in which Blacks and whites perceived integrationist and nationalist images of racial justice in the 1960's and 1970's.⁹⁹ Peller's primary thesis is that the adoption of integrationism—which he associates with cultural universality and neutrality—as the dominant methodology for understanding race relations in American society obscures the ways that “American institutions reflect dominant racial and ethnic characteristics, with the consequence that race reform has proceeded on the basis of integration into ‘white’ cultural practices—practices that many whites mistake as race neutral.”¹⁰⁰

Peller joins the debate over which vision of racial justice should be at the strategic center for people of color by resuscitating the ideology of nationalism and positing it as a viable alternative to integrationist strategies of racial justice. He demonstrates that nationalism was improperly rejected as a viable alternative, in part because it was viewed as an attack on “the distribution of power and privilege in American Society.”¹⁰¹ Peller views the current emergence

98. Malcolm X is chosen as a representative of the nationalist movement because of his position of leadership and his identification with it; clearly there were and are many other Black nationalists who espouse this philosophy that I claim to be analogous to the dominance strand of Critical Feminist Theory, substituting race for gender. It is the focus on domination and subordination by both critical feminist theorists who espouse dominance theories and Black nationalists who embrace a separatist philosophy that may link these two theories. Moreover, both Black nationalists and dominance theorists contend that their respective voices cannot be articulated until the yoke of the oppressor is recognized and removed. Critical feminist theorists, like MacKinnon, believe that women's true voice will become articulated through consciousness raising in which women and only women will participate. *See, e.g.*, C. MACKINNON, FEMINIST THEORY OF THE STATE, *supra* note 73, at 83, 87. Black nationalists believe that Blacks need to develop their own institutions to serve Blacks that are separate from the white community. *See, e.g.*, Peller, *supra* note 41, at 808-09.

On the connection between integration and subordination, see P. GOLDMAN, THE DEATH AND LIFE OF MALCOLM X (2d ed. 1979); MALCOLM X, AUTOBIOGRAPHY, *supra* note 97; MALCOLM X, BY ANY MEANS NECESSARY: SPEECHES AND A LETTER 16-17 (G. Breitman ed. 1970) (opposing integration of school system on basis that its premise is that whites are superior to Blacks and therefore Blacks will necessarily benefit from their interaction with whites); MALCOLM X, MALCOLM X SPEAKS (G. Breitman ed. 1965); *see also* S. CARMICHAEL & C. HAMILTON, THE POLITICS OF LIBERATION IN AMERICA 54 (1967) (integration is “a subterfuge of white supremacy” that represents “a form of painless genocide”); Browne, *A Case for Separatism*, in SEPARATION OR INTEGRATION: WHICH WAY FOR AMERICA: A DIALOGUE 7-15 (R. Browne & B. Rustin eds. 1968) (argues that integration increases white community's control over Black community).

99. Peller, *supra* note 41. It should be noted that Professor Peller is a white scholar. I do not believe it is necessary for me to fully address whether whites can be critical race theorists. Let me just say that I cite Professor Peller without hesitation for I believe that whites well versed in Critical Race Theory are capable of making contributions to the field.

Professor Peller, like most academics, focuses on the Black experience of subordination in our society to the exclusion of experiences of other people of color. This portrayal of Blacks is quite common, perhaps due to Blacks' visible, historical victimization in our society. Whether Blacks' unique status as descendants of former slaves should entitle them to separate or differing treatment from other people of color is discussed *infra* note 112 and text accompanying. My view is that much of Peller's analysis can and should be expanded to encompass all oppressed people of color.

100. Peller, *supra* note 41, at 763.

101. *Id.* at 790. The complete quotation reads as follows:

The mainstream reactions to black nationalism were so vociferous not because the Black Power movement presented any real threat of racial domination by blacks, but rather because black

of Critical Race Theory with its emphasis on what he calls “race consciousness”—what I have characterized as the “Monistic voice”—as the first positive step toward the revitalization of nationalism by Blacks as a strategy for achieving racial justice.¹⁰² Peller defends the nationalist perspective taken by Malcolm X and others as rooted in a Black perspective focused on the domination of Blacks by whites in our society: “In contrast to the integrationist image of discrimination as the social price of racism, the nationalist image was subordination, the hierarchy of the white community over the black community.”¹⁰³

Consequently, like the later-developed dominance strand of Critical Feminist Theory, nationalist theory is rooted in a perspective of domination—a view that racial equality cannot and will not be achieved until all significant aspects of legal, cultural, and societal domination are recognized and removed from our society.¹⁰⁴ Black nationalists view integration as domination through the imposition of white values and norms—universalist meritocratic standards, for example—that privilege whites and maintain the subordination of Blacks and other people of color.¹⁰⁵ What it represents is a form of colonialism. Indeed, nationalists view Blacks who support integrationism as agents of the dominant

nationalism embodied a profound rejection of the reigning ideology for understanding the distribution of power and privilege in American society. Just as integrationism became the mainstream discourse for racial justice—to the extent that it could be articulated in the terms of a deep cultural self-identity of enlightenment-through-evolution toward rationality and objectivity—the nationalist analysis of racial justice became threatening, in part, because it challenged the universalist assumptions underlying these images of progress. For integrationists progress meant transcending race as a basis for social decisionmaking. These images were challenged as themselves elements of a particular ideology of power and of the particular culture for whites.

102. Relevant to this Article and the debate over the existence of the voice of color is Peller’s placement of Randall Kennedy firmly in the integrationist ideology of racial justice with its universalistic, meritocratic norms:

When a new generation of scholars embraced race consciousness as a fundamental prism through which to organize social analysis in the latter half of the 1980s, a negative reaction from mainstream academics was predictable. That is, Randall Kennedy’s criticism of the work of Critical Race Theorists for being based on racial “stereotypes” and “status-based” standards is coherent from the vantage point of the reigning interpretation of racial justice.

Id. at 760 (footnote omitted).

103. *Id.* at 809.

104. Consider the following:

Black nationalists depicted the ideas of rationality, neutrality, and objectivity that integrationists associated with the transcendence of bias and prejudice as the particular cultural rhetoric of “the small minority of white men who live in Europe and North America.” According to nationalists in the 1960s, these traditional categories of liberal and enlightenment thought do not constitute an aracial or culturally neutral standard that measures social progress in overcoming partiality, parochialism, and bias, but instead are simply parts of the dominant world view of white elites.

The rejection of prevailing scholarly standards and methodologies represented one dimension of the challenge to the philosophic assumptions underlying liberal integrationism.

Id. at 803.

105. See, e.g., D. BELL, *supra* note 1, at 110 (discussing H. CRUSE, *THE CRISIS OF THE NEGRO INTELLECTUAL* (1967) [hereinafter H. CRUSE, *NEGRO INTELLECTUAL*]; H. CRUSE, *REBELLION OR REVOLUTION* 48-125 (1968), and R. RIST, *THE INVISIBLE CHILDREN: SCHOOL INTEGRATION IN AMERICAN SOCIETY* (1978)); see also Peller, *supra* note 41, at 796 n.80.

hegemony who are utilized to perpetuate the dominant/subordinate relationship.¹⁰⁶ By challenging the underlying assumptions of liberalism and neutrality that support the hierarchical nature of our society, a society in which people of color are subordinated pursuant to the application of “neutral” standards, nationalists and “dominance” feminists are challenging the subordination of people of color and women, respectively, by rejecting objectivity and liberalism as tools of the dominator.¹⁰⁷

As I mentioned previously, the way proponents of the Monistic voice of color—Matsuda and Delgado, for example—use that voice reveals a *dualistic, hybrid* strain, an element of which is analogous to the dominance strand of Critical Feminist Theory and another to positions taken by Black nationalists.¹⁰⁸ Thus, Matsuda, Delgado, and other proponents of the Monistic voice of color may be exhibiting a nationalist strand of Critical Race Theory when they assert that society is premised on the inequality of one group over another.

Assuming parallels continue between Critical Feminist Theory and Critical Race Theory, the next stage in the voice of color debate may be the development and articulation of a voice that is more purely nationalistic—a voice that is critical of universalism and liberalism—and more radical than either the Hierarchical Majoritarian or Monistic variations of the voice of color.¹⁰⁹ Indeed, I believe we are witnessing the evolution of the Monistic dialect of the voice into a dominance theory of race, a development that, as Peller suggests, is necessary and appropriate. People of color can no longer rely on others—the dominators—to release them from their state of domination. Proponents of the voice of color may have to embrace radical Critical Race Theory if only to illuminate the true racial division that separates our society. Professor Peller’s article should help to hasten the development of such a voice, which will then take its place as a defined third strand of Critical Race Theory.

106. Professor Peller says:

Nationalists deploying a “neo-colonialism” analysis accounted for opposition to the nationalist position in the black community as the effects of “indirect rule,” within which an elite was created among the colonized class, to administer and mediate on behalf of colonialist interests. According to many black nationalists, the black middle class played this role in America, and class differences with the black poor and working class accounted for the middle class support of integration.

Id. at 811 (footnote omitted).

107. See, e.g., C. MACKINNON, *FEMINIST THEORY OF THE STATE*, *supra* note 73, at 161-64 (MacKinnon critiques and rejects concepts of objectivity and neutrality in law and legal decisionmaking).

108. Cf. *supra* notes 73-74 & 77-78 and accompanying text.

109. Peller addresses how nationalists define the community:

Given that a structure of racial domination and oppression marks African-American history, many nationalists, like integrationists, rejected the possibility of identifying with the particular culture that black people created in America on the ground that it reflects the pathologies of subordination and repression. Rather than view African-Americans as constituting a particular and unique community whose culture has been deeply influenced by its formation in the context of American race relations, these nationalists define the community in terms of an earlier time of imagined purity, before the American experience.

Peller, *supra* note 41, at 818 (footnote omitted). Peller notes a similar controversy in American feminism, *id.* at n.120 (citing works by DuBois, Gilligan, MacKinnon, and Menkel-Meadow).

Of more immediate importance, however, to my argument that the voice of color exists, is variegated, and is spoken by Carter and Kennedy, is my demonstration that the Hierarchical Majoritarian dialect of voice fits neatly within the confines of Critical Race Theory when the theory is viewed as a continuum upon which the different dialects of voice are arrayed. What follows is an analysis of the voice of color that establishes and supports this view of Critical Race Theory.

B. *Deconstructing Racial Essentialism in the Voice of Color Debate*

I am a committed believer in what Professors Mari Matsuda and Angela Harris have characterized as “multiple consciousness.”¹¹⁰ Similarly, I reject what Harris has characterized as a “univocal,” monolithic theory of racial essentialism in which one reductionist voice claims to speak for all similarly situated.¹¹¹ I adopt a pluralistic interpretation of Critical Race Theory that rejects this reductionist essentialism by embracing, absorbing, and respecting all theories of the “Black Experience,” including what I have called the Hierarchical Majoritarian dialect spoken by Kennedy and Carter.

Critical race theorists must now confront and address an issue that critical feminist theorists have already confronted and addressed (although not resolved): how to theorize from an experiential approach without privileging one

110. See, e.g., Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 8, 9, 8 (1989) [hereinafter Matsuda, *Multiple Consciousness*] (“Holding onto a multiple consciousness will allow us to operate both within the abstractions of standard jurisprudential discourse, and within the details of our own special knowledge [thus acknowledging that] [t]his constant shifting of consciousness produces sometimes madness, sometimes genius, sometimes both.”) (emphasis in original); Harris, *supra* note 27, at 584 (“As I use the phrase, ‘multiple consciousness’ as reflected in legal or literary discourse is not a golden mean or static equilibrium between two extremes, but rather a process in which propositions are constantly put forth, challenged, and subverted.” (footnote omitted)).

111. Harris, *supra* note 27, at 588-89.

experience over another,¹¹² thereby privileging one dialect and silencing others.¹¹³

Perhaps the greatest threat to this objective is posed by the Monistic strain, which perceives the voice of color as a monolithic voice speaking for all members of the community. That task is impossible since all scholars of color share but one facet of their being, albeit an important one: color. Factors other than color impact scholars of color just as surely as they impact their majoritarian peers. Matters of gender, class, sexual orientation, educational opportunity, environment—the list is endless—affect who the scholar of color is and what she says. Conceding the existence of a monolithic voice of color negates the rich and variegated diversity that scholars of color possess, which is our strength as a collective body.

Indeed, like Critical Feminist Theory, Critical Race Theory is largely experiential, grounded in the experience of scholars of color as participants in a society whose history has been soiled by racism and racist acts toward people of color. To paraphrase Professor Deborah Rhode, the strength of Critical Race Theory voice “originates” in the experience of “being subjected to racism, not just in thinking about racism, [or] in developing concrete responses to that

112. I have previously referred to the issue of whether the Black voice, in any form, should be privileged over that of other groups, *see supra* note 99. I think not, because that leads to the univocal, reductionist voice that I reject. However, to date, the oppression of Blacks in our society is the standard against which all other oppression is measured. *See, e.g.*, D. BELL, *supra* note 1; Ansley, *supra* note 23; Austin, *supra* note 27; Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201 (1982); Crenshaw, *A Black Feminist Critique of Antidiscrimination in Law and Politics*, in *THE POLITICS OF LAW* 195 (D. Kairys 2d ed. 1990); Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 47; Johnson, *Reply in Favor of Context*, *supra* note 5; Lawrence, *supra* note 1. Consider that, in the debate over the merits of affirmative action, the paradigmatic beneficiary of affirmative action is always a Black, not a Hispanic or a member of any other “specially disadvantaged group.” *See, e.g.*, *Persuasion and Distrust*, *supra* note 75, at 1330 n.9 (author is concerned primarily with debate over affirmative action for Blacks). Query whether our approach must change to recognize expressly differences and similarities between, for example, the Hispanic voice and the Black voice because Hispanics, Native Americans, Asians, and other people of color have unique histories, influenced by their treatment by the legal system. *See, e.g.*, Lau, *The Kulcana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 WASH. L. REV. 233 (1989); López, *Training Future Lawyers to Work with the Politically and Socially Subordinated Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1989); Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 SAN DIEGO L. REV. 1043 (1988); Torres & Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625; Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 291 (Robert A. Williams, Jr.); Williams, *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous People’s Survival in the World*, 1990 DUKE L.J. 660 (Robert A. Williams, Jr.). These different voices may take on an added importance when it is recognized that projections indicate that, in the next century, Hispanics will pass Blacks as the largest minority group. *See* Dunn, *Minority Grows at Rapid Rate*, USA Today, Apr. 11, 1991, at A3, col. 5; Dunn, *Hispanic Growth Booms*, USA Today, Feb. 6, 1991, at A1, col. 4.

113. Professor Rhode has argued:

Our objective should be multiple accounts that avoid privileging any single universalist or essentialist standpoint. We need understanding that can resonate with women’s shared experience without losing touch with our diversity. The factors that divide us can also be a basis for enriching our theoretical perspectives and expanding our political alliances.

Rhode, *supra* note 61, at 626.

experience."¹¹⁴ Privileging any experience or variation of voice over any other raises the risk of silencing potentially valuable contributors.¹¹⁵ Adopting one voice or one experience as *the paradigmatic experience* entails the cost of ignoring such important factors as gender, culture, socioeconomic class, ethnicity, age, and sexual orientation.

If a "univocal" or monolithic voice of color is artificially distilled from the clamor of dialects, then scholars of color will by necessity ignore a great deal of insight that could enrich Critical Race Theory.¹¹⁶ They may also alienate and isolate many who share their objective, such as Carter and Kennedy. Consequently, one must start from the postulate that Kennedy and Carter are absolutely correct when they challenge the existence and worth of the voice of color if that voice is presumed to emanate in a single chord from every scholar of color, irrespective of authorial intent, perspective, or context. A belief in the monolithic voice of color is stigmatizing and results in racial essentialism that stifles expression and debate.¹¹⁷

1. *Distinguishing Hierarchical Majoritarianism from Monistic*

Creators of the concept of the Monistic dialect, Delgado and Matsuda, for example, adopt a position that is synonymous with socioeconomic class membership and not necessarily color.¹¹⁸ If one substitutes the word "poor" or "oppressed" for "color" in much of the literature advocating the existence of the voice of color, or claiming to speak in that voice of color, the content of that literature would be, by and large, unchanged.¹¹⁹ Hence, I contend that key proponents of the existence of the voice of color have conflated two distinct notions when speaking of the voice's existence: race and socioeconomic class membership. That conflation of race and class creates problems when scholars of color, like Kennedy and Carter, speak with a dialect of the voice

114. *Id.* at 622, 624.

115. A similar issue concerns proponents of Feminist Critical Theory. *See id.* at 624.

116. Harris, *supra* note 27, at 587.

117. Johnson, *Reply in Favor of Context*, *supra* note 5, at 157. To clarify, reducing the voice of color to a monolithic voice articulated by all who attempt to speak in it silences those, like Kennedy and Carter, who either have not shared the same experiences and feelings as other scholars of color, or have shared the same experiences but have not reached the same conclusions.

118. *See* Delgado, *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Nonwhite Underclass*, 78 GEO. L.J. 1929 (1990) [hereinafter Delgado, *Zero-Based Racial Politics*] (argues that nonwhite poor should turn to political conservatives to improve their plight); Matsuda, *Looking to the Bottom*, *supra* note 1; *see also* Barnes, *supra* note 17, at 1866-67 (people of color possess dual consciousness as result of their subordinate position in society); Williams, *Alchemical Notes*, *supra* note 1, at 407-08; Williams, *On Being the Object of Property*, 14 SIGNS 5 (1988) (Patricia J. Williams).

119. *See, e.g.*, Austin, *supra* note 27, at 544-47; *see also* Barnes, *supra* note 17, at 1867-68; Delgado, *Storytelling for Oppositionists*, *supra* note 1, 2435-38 (subordinate, oppressed people of color benefit from storytelling); Delgado, *Zero-Based Racial Politics*, *supra* note 118; Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988) (arguing that oppressed persons of color possess special insight that others lack); Matsuda, *Looking to the Bottom*, *supra* note 1, at 326 (oppressed people speak in distinct voice).

of color that may be reflective of color but not of class affiliation with the poor and oppressed.¹²⁰ However, by separating class from race, the voice of color is distilled, revealed as a pluralistic voice emanating from scholars of color irrespective of class affiliation. Thus, instead of speaking from the vantage point of the oppressed and poor, Kennedy and Carter speak from the viewpoint of persons of color who have adopted the values of their majoritarian peers. Suffice it to say, the values adopted by the majoritarian peers of Kennedy and Carter—the majority of the members of the professoriate in legal academia—neither reflect nor include the views of the poor and oppressed.

Quite the contrary. Professors Kennedy and Carter are tenured professors of the prestigious Harvard and Yale Law School faculties, respectively. They should be congratulated and applauded, for they have played the “legal academia game” according to its traditional rules, *and they have won*. They have both published well and Professor Carter in particular has published on a wide range of topics.¹²¹ They have proven that scholars of color can compete at the top, and excel in the loftiest legal academic environments. In other words, not only have Carter and Kennedy adopted the Hierarchical Majoritarian standards of the professoriate (which is what causes me to characterize their voice as “Hierarchical Majoritarian”), but both have expressly agreed to be judged by that standard and neither has been found wanting.¹²² However, not only have they expressly agreed to be judged by the Hierarchical Majoritarian standard, they are judging others—including other scholars of color—by that same standard.¹²³ Pursuant to the evaluative paradigm employed by Carter and

120. See, e.g., Carter, *The Best Black*, *supra* note 4, at 6: “My father taught at Cornell, which made me a Cornell kid, a ‘fac-brat,’ and I hung out with many of the other Cornell kids in a private little world where we competed fiercely (but only with one another—no one else mattered!) for grades and test scores and solutions to brain teasers.”

121. See, e.g., Carter, *The Dissent of the Governors*, 63 TUL. L. REV. 1325 (1989); Carter, *Essays on the Supreme Court Appointment Process: The Confirmation Mess*, 101 HARV. L. REV. 1185 (1988); Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989); Carter, *The Right Questions in the Creation of the Constitutional Meaning*, 66 B.U.L. REV. 71 (1986); Carter, *The Trouble with Trademark*, 99 YALE L.J. 759 (1990); Carter, *When Victims Happen To Be Black*, 97 YALE L.J. 420 (1988); Kennedy, *Afro-American Faith in the Civil Religion; Or, Yes, I Would Sign the Constitution*, 29 WM. & MARY L. REV. 163 (1987); Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989); Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988); Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622 (1986); Colloquy, *A Reply to Philip Elman*, 100 HARV. L. REV. 1938 (1987) (Kennedy); Comment, *Equality as a Constitutional Concept*, 47 MD. L. REV. 46 (1987) (Kennedy).

122. Consider Carter, *The Best Black*, *supra* note 4, at 48:

Racial preferences are founded on the proposition that the achievements of their beneficiaries would be fewer if the preferences did not exist. Supporters of preference cite a whole catalogue of explanations for the inability of people of color to get along without them: institutional racism, inferior education, the lingering effects of slavery and oppression, cultural bias in criteria for admission and employment. All of these are most sincerely pressed, and some of them may be true. But like the best black syndrome, all of the arguments entail the assumption that people of color cannot at present compete on the same playing field with people who are white. I don't believe this for an instant . . .

123. See, e.g., *id.* at 28-29; Kennedy, *Racial Critiques*, *supra* note 3, at 1760-87.

Kennedy, everyone, irrespective of class or color, has an equal chance at accomplishing the objective to which Kennedy and Carter subscribe.¹²⁴ Consequently, by adopting a standard that presupposes neutrality, adherents to the Hierarchical Majoritarian standard attempt to reduce socioeconomic or class status to a nullity.

In sum, Carter and Kennedy, accomplished scholars who are also people of color, speak with authority. More specifically, they speak with authority on the issue of voice free from any affiliation with the poor and oppressed. In doing so, they prove that the voice of color is pluralistic—that those contributing to it have different immediate concerns and past experiences. The pluralistic voice emanates from scholars of color when they speak in the voice of color irrespective of class affiliation.

Like Critical Feminist Theory, Critical Race Theory must tolerate its factions, incorporating all and learning from the debate that swells between them, or it will shatter, and the shared objectives of overcoming racial prejudice will never be realized. A pluralistic conception of voice must be embraced if Critical Race Theory is to evolve, expand, and mature intellectually.

2. *Comparing Essentialist Approaches: Revealing Class Biases*

Some of the critical feminist theorists have been accused of employing essentialist arguments to address feminist issues.¹²⁵ Professor Rhode recognizes that one of the problems with a universalist feminist critique that is based on an experiential approach is that such an approach may result in the homogenization, or essentialization, of the female voice.¹²⁶ She views this as problematic because “[t]here is no ‘generic woman,’ or any uniform ‘condition of women’” and “no particular experience can claim universal authentic status.”¹²⁷

In fact, when class is analyzed, the essentialist voice of color is, in some respects, the antithesis of the female essentialist voice. The title of Matsuda’s pivotal article, *Looking to the Bottom: Critical Legal Studies and Reparations*, is instructive and illuminating.¹²⁸ Matsuda promotes a voice of color that draws much of its insight from the “bottom” of the community of color because

124. See *supra* notes 29-31 and accompanying text. Perhaps this is true in that people of color may write traditional articles about contracts and intellectual property (such is the approach taken by Carter and, admittedly, myself before obtaining tenure at the University of Virginia, see *supra* note 45). Based upon their published work, with its human element and social consciousness, this is, however, clearly not the desire nor calling of Professors Mari Matsuda and Richard Delgado.

125. See, e.g., Harris, *supra* note 27, at 587.

126. As Professor Rhode has pointed out: “[S]uch efforts to claim an authentic female voice illustrate the difficulty of theorizing from experience without essentializing or homogenizing it.” Rhode, *supra* note 61, at 624.

127. *Id.*

128. Matsuda, *Looking to the Bottom*, *supra* note 1.

it originates from the poorest socioeconomic class of society.¹²⁹ The strength presented by her vision of the voice of color derives from her conception of it as a means of empowering the oppressed segment of our society.¹³⁰ The insight to be gained by listening to her voice stems from the fact that the speaker is a member of the oppressed and dominated class of society.¹³¹

Similarly, implicit in Delgado's conception of the voice of color is the notion that the voice of color is identified and synonymous with marginalized groups in our society whose marginal outsider status enables them to relate important stories—stories that cannot be sincerely told by their privileged majoritarian peers.¹³² Matsuda and Delgado,¹³³ among others, have conflated the notion of race and class and assumed that the two are coterminous when one is referring to the Black Experience or, for our purposes, the voice of color.¹³⁴ Both authors have assumed that a person/scholar of color necessarily speaks with a voice of color that reflects membership in the oppressed, dominated class of society.¹³⁵ The erroneous assumption is that, although all members of the oppressed and economically disadvantaged class are not people of color, all people of color—including scholars of color—are members of this oppressed class, at least in terms of perspective and viewpoint, and speak from that perspective and in that voice. Nothing could be further from the truth.¹³⁶

What is surprising is that proponents of the different voice strands of Critical Race Theory have embraced the view of the socioeconomically oppressed “bottom” of society. These members of the elite socioeconomic class of the dominated group—law professors, writers, artists and other prominent nationalists who must be regarded as the intelligentsia of their genera-

129. For example, consider the following:

The technique of imagining oneself black and poor in some hypothetical world is less effective than studying the actual experience of black poverty and listening to those who have done so. When notions of right and wrong, justice and injustice, are examined not from an abstract position but from the position of groups who have suffered through history, moral relativism recedes and identifiable normative priorities emerge Looking to the bottom for ideas about law will tap a valuable source previously overlooked

Id. at 325-26 (footnotes omitted).

130. See *supra* notes 86-89 & 118-19 and accompanying text.

131. Although the voice of color presented by Matsuda in *Looking to the Bottom* was a “univocal” or monolithic voice, she has subsequently embraced the pluralistic voice of multiple consciousness. See Matsuda, *Multiple Consciousness*, *supra* note 110, at 13.

132. See Delgado, *Storytelling for Oppositionists*, *supra* note 1, at 2435-38; Delgado, *Does Voice Really Matter?*, *supra* note 1, at 95; see also Matsuda, *Voices of America*, *supra* note 1.

133. See, e.g., Matsuda, *Looking to the Bottom*, *supra* note 1, at 324-25; Delgado, *Storytelling for Oppositionists*, *supra* note 1, at 2413.

134. Here, my point is that it is easy, almost automatic, to equate race/color with socioeconomic class membership. Given the woeful socioeconomic state of people of color, see *infra* note 187 and accompanying text, the connection of color to class is credible.

135. Kennedy and Carter have this same problem with socioeconomic class and its effect on the voice of the scholar of color. They fail to acknowledge that socioeconomic class standing can make a difference on who meets the Hierarchical Majoritarian standard.

136. See *supra* notes 33-35 and accompanying text.

tion¹³⁷—have repudiated their own class-based position and status to privilege the experiential framework of the oppressed classes. By embracing a communalistic experiential framework instead of an individualistic experiential framework, these critical race theorists have been able to more fully incorporate in their voice the experiential horizons of the socioeconomic poorer class of the dominated group and to include communal/community goals of this class. In other words, critical race theorists have been able to incorporate the socioeconomically oppressed within their experiential framework even though they themselves as law professors can no longer (if they ever were) be classified as “socioeconomically oppressed.”¹³⁸

It is interesting to note that although critical race theorists come in many colors with many different ethnic backgrounds, by and large its theorists have thus far been unable to expand their voice beyond the prototypical Black experience that is socioeconomically class-based and rooted in oppression.¹³⁹ Blacks may generally focus on one socioeconomic class because the major difference remaining between Blacks and whites, now that de jure segregation has been eliminated, is socioeconomic.¹⁴⁰ The Monistic dialect of voice is, by necessity of its broader societal perspective, thus focused on the remaining major difference between Blacks and whites in our society.¹⁴¹

137. See, e.g., S. CARMICHAEL, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* (1967); H. CRUSE, *NEGRO INTELLECTUAL*, *supra* note 105. For discussion of Black nationalists, see Peller, *supra* note 41, at 783-94.

138. See, e.g., Kennedy, *supra* note 59, at 712-13.

139. See *supra* notes 99 & 112. This does not mean that there are not other voices, other references, that are being articulated and heard. Black feminist legal scholars, for example, are indeed speaking from their unique, dualistic perspective as both scholars of color and women of color. See, e.g., Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 69; Harris, *supra* note 27; Kline, *Race, Racism and Feminist Legal Theory*, 12 *HARV. WOMEN'S L.J.* 115 (1989); Scales-Trent, *supra* note 69. Nonlegal scholars and artists of color have likewise made a substantive impact on the development of Critical Feminist Theory. See, e.g., A. DAVIS, *WOMEN, RACE AND CLASS* (1981); B. HOOKS, *AIN'T I A WOMAN?* (1981); G. JOSEPH & J. LEWIS, *COMMON DIFFERENCES: CONFLICTS IN BLACK AND WHITE FEMINIST PERSPECTIVES* (1981); King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 *SIGNS* 42 (1988); Smith, *Notes for Yet Another Paper on Black Feminism, or Will the Real Enemy Please Stand Up?*, 5 *CONDITIONS* 123 (1979). Indeed, Professor MacKinnon cites Audre Lorde in her own work. See C. MACKINNON, *FEMINIST THEORY OF THE STATE*, *supra* note 73, at 135 n.82 (citing A. LORDE, *USES OF THE EROTIC: THE EROTIC AS POWER* (1978)). The popular works of Toni Morrison and Alice Walker, *Beloved* and *The Color Purple*, respectively, also speak with a perspective that is anything but mainstream and essentialist, to the extent that this essentialism is reflective of one's status in the socioeconomically advantaged class. Indeed, there are many perspectives being voiced in Critical Feminist Theory. See, e.g., A. LORDE, *supra* note 80, at 120 (a Black lesbian perspective); Robson & Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 *TEMPLE L. REV.* 511 (1990):

As a Black lesbian feminist comfortable with the many different ingredients of my identity, and a woman committed to racial and sexual freedom from oppression, I find I am constantly being encouraged to pluck out some one aspect of myself and present this as the meaningful whole, eclipsing or denying the other parts of self.

140. See *infra* note 187 and accompanying text.

141. Many Blacks, Hispanics, and other people of color, of course, still live in segregated neighborhoods. See, e.g., Dunn, *Study: 30% of USA's Blacks Segregated*, *USA Today*, Apr. 10, 1991, at A3, col. 2. The fact that these conditions still prevail legitimizes many of the points made by critical race theorists speaking in the Monistic dialect of voice. However, many view the eradication of de jure segregation as the only legitimate remedy for racism in society.

III. INDIVIDUALISM/COMMUNALISM: OUR IDEOLOGICAL DIFFERENCES

A. *Defining Individualism and Communalism*

Although, like Professor Harris, I adopt a pluralistic voice of color, I recognize that categorizations must be made in order to advance the issues in the debate.

Even a jurisprudence based on multiple consciousness must categorize; without categorization each individual is . . . isolated . . . and there can be no moral responsibility or social change. My suggestion is only that we make our categories explicitly tentative, relational, and unstable, and that to do so is all the more important in a discipline like law, where abstraction and “frozen” categories are the norm.¹⁴²

Categorizing is as important for what it reveals as for the order it presents. By looking to the unifying themes that provide the basis for categorization, one is confronted with the ideological premises underlying the organizational rationale.

Thus, it is not surprising that my attempt to categorize the disparate dialects of Carter and Kennedy—the Hierarchical Majoritarian dialect of voice of color—on the one hand, and Bell, Delgado, and Matsuda—proponents of the Monistic dialect—on the other, reveals an ideological difference that reaches the crux of the debate between these two very divergent conceptions and articulations of voice. Quite simply, the Hierarchical Majoritarian dialect is based on an ideological view that may best be categorized as individualism,¹⁴³ as that term has been defined by Professors Duncan Kennedy,¹⁴⁴ J.M. Balkin,¹⁴⁵ and others.¹⁴⁶ The Monistic dialect seems, on the contrary, to be premised on the ideology of communalism.¹⁴⁷

142. Harris, *supra* note 27, at 586.

143. Associating proponents of the Hierarchical Majoritarian evaluative standard with individualism is not unique or unsupported: “Freedom from racial discrimination is but one instance of the historical move from status to contract, from caste to individual liberty. Individualism and universalism are thereby linked together.” Peller, *supra* note 41, at 774 (footnotes omitted).

144. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (Duncan Kennedy).

145. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197, 202-10 (1990).

146. Espinoza points to commonality as Critical Race Scholarship’s strength:

The strength of Critical Race Scholarship is its identification of the *commonality* of the minority experience. It is shared courage to be different . . . Kennedy’s call for *individualism* reinforces exclusion by delegitimizing the *commonality* of the experience of the otherness many minorities feel with other minorities and which they express in their scholarship.

Espinoza, *supra* note 11, at 1885-86 (emphasis added); see also Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1, 36-39 (1986) (arguing that subjective standard of negligence in tort is relatively individualistic); Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special References to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982) (Duncan Kennedy) (individualist arguments emphasize that injured party is responsible for his injury).

147. See *infra* Part III.B.

Balkin's article argues that an examination of the rhetorical devices employed can reveal much about the ideological position of the speaker. More precisely, the rhetorical devices can illuminate whether the speaker adopts an individualist ideology or a communal ideology with respect to rights and other issues.¹⁴⁸ His categorization of individualists and communalists aptly characterizes the distinction between adherents of the Hierarchical Majoritarian dialect and proponents of the Monistic dialect. As used here, however, that article has much broader applicability.

As Balkin demonstrates, the question of responsibility can reveal ideological positions as well.¹⁴⁹ Briefly, Balkin, building upon Duncan Kennedy's "two opposed rhetorical models for dealing with substantive issues"¹⁵⁰—individualism (synonymous with Balkin's conception of individualism) and altruism (which Balkin denominates as communalism)—describes an alternative model for dealing with substantive issues that focuses on different orientations toward responsibility:

The distinction between individualism and communalism thus classifies arguments about responsibility *according to whether they emphasize or deemphasize the responsibility of particular persons*, either through rules of liability or through excuses and defenses Individualism and communalism, however, are not simply orientations of greater and lesser responsibility in general; they are claims about the responsibility of particular persons.¹⁵¹

Taking a contextualist approach, Balkin further demonstrates that deconstructing the distinction between individualism and communalism is avoided

148. Consider the observations of J.M. Balkin:

The rhetorical devices used to stress or deemphasize the responsibility of injurers and victims are the same regardless of the right involved. Although the right at issue changes, the basic structure of opposing factual characterizations does not. What does change is the group of persons using individualist or communalist characterizations for any particular right. Thus, another way to understand ideology is to study the types of rhetorical devices used by people as they consider different categories of rights.

Balkin, *supra* note 145, at 263.

149. Balkin says:

My point is that a background set of ideological assumptions undergirds our use of the terms "responsibility" and "causation." We simply have a different set of prejudices about who is doing what to whom and who is responsible for it when we move from economic rights to expressive rights. This difference no doubt explains the reactions that economic libertarians occasionally receive in more mainstream circles. Such thinkers, who may hold the right of free contract almost as dear as that of free speech, undergird their beliefs with a consistent series of background assumptions about who is responsible for the injuries and losses that occur in a market economy. In fact, these beliefs are not too dissimilar from the mainstream views regarding responsibility with respect to speech. Nevertheless, the rhetoric of self-reliance embedded in the metaphor of the marketplace of ideas has a distinctly different political valence when it is applied to economic rights.

Id. at 260 (footnote omitted).

150. Kennedy, *supra* note 144, at 1685.

151. Balkin, *supra* note 145, at 206-07 (emphasis added).

when the identity of the injured party and the injuring party is agreed upon.¹⁵² Once this critical consensus is reached, an analysis of responsibility based on either a characterization of individualism which deemphasizes responsibility to the victim by the injurer, or communalism which emphasizes the responsibility of the injurer to the victim, can be utilized to examine a wide variety of issues.¹⁵³ Furthermore, Balkin elucidates the broader applicability of the concepts of individualism and communalism by showing that “[i]nterpretive constructions of fact are systematically connected to individualist or communalist arguments about responsibility.”¹⁵⁴

Finally, Balkin extracts from his analysis of individualism and communalism the significant conclusion that the way individuals characterize responsibility is thoroughly tied to their underlying ideological beliefs.¹⁵⁵ Most importantly, Balkin describes a manner of constructing a characterization of responsibility that is independent of the discrete issue presented.¹⁵⁶ Thus, an individualist places blame for the injury on the victim, irrespective of the injury or the issue raised by the injury.¹⁵⁷ Conversely if the person is a communalist, she will characterize the facts to emphasize, for example, the responsibility of the injurer for the injury.

152. Balkin identifies “who is the victim” as being the source of the underlying symmetry between individualism and communalism:

[I]ndividualism and communalism are really mirror images of each other. Communalism emphasizes the responsibility of the injurer and deemphasizes the responsibility of the victim, while individualism takes precisely the opposite strategy. Because from different perspectives one can be either the injurer or the victim, individualist and communalist arguments turn out to be the same arguments with the parties reversed. This analytical indeterminacy as to who is the injurer and who is the victim is the source of the underlying symmetry between individualism and communalism.

Id. at 210-11.

153. One rather lengthy quotation may clarify the meaning of individualism and communalism and at the same time expose the mirror-like quality of these two terms:

The individualist and communalist orientations take relatively standard and opposite positions regarding these issues [characterizations of free will, choice, and adequate alternatives]. Because the individualist position stresses the defendant’s lack of responsibility, it deemphasizes the defendant’s free will and capacity to make reasonable, informed decisions, or deemphasizes the existence of alternative courses of action or their adequacy and efficacy . . . because the individualist orientation always places responsibility for the victim class on the victims themselves, the individualist position stresses the victim’s free will, reasoning capacity, and adequate, available alternative courses of action.

The communalist orientation, unsurprisingly, is precisely the opposite.

Id. at 234.

154. *Id.* at 211.

155. *Id.* at 262.

156. *Id.*

157. Or, as Professor Balkin states:

To the extent that we believe that the cause of poverty is individual sloth, we divert blame from social practices and institutions.

The methods we use to characterize responsibility do not change as we move from issues of consumer protection to criminal law to free speech to abortion. The same techniques of individualist and communalist argument recur, and they can be used to generate the same types of factual characterization and recharacterization. Ideology, then, is reflected by how people choose characterizations of responsibility in different social settings.

Id.

Moreover, once the ideological differences are exposed for what they are—a difference between those who support individualist goals versus those who support communitarian goals—the debate over the existence and use of voice is clarified and reduced to what I perceive as a question of approach, orientation, and strategy, not a normative debate over the existence and power of voice and its aspirational goals. In other words, I contend that proponents of both dialects of voice, Monistic and Hierarchical Majoritarian, actually share many goals and objectives. Indeed, notwithstanding the furor generated by Kennedy's article, I believe Kennedy and Bell, or Carter and Matsuda, for example, actually agree on most of the truly important issues that affect Critical Race Theory. Although I am not attempting to minimize the differences between the two camps, I think many have carelessly overlooked the similarities that bind the two and the benefits to be gained by recognizing, analyzing, and constructively utilizing differences to achieve the common goal.¹⁵⁸

Thus, I propose that some attention be given to the underlying issue on which all agree. In the furor over the publication of so-called "divisive" articles like Kennedy's and Carter's, our attention should not be diverted from the important goal of eradicating racism in the professoriate in particular and in society in general. Nothing will be gained if we lose sight of the fundamental objective and spend our time in vituperative debates over which conception of voice is right because there can only be *one* correct conception. As indicated, a pluralistic voice of color that rejects racial essentialism is a strength and not a weakness as long as all substantially agree on the overall objectives and goals.¹⁵⁹

What is revealing about the debate over the existence and use of voice is that *all* enlightened scholars of color firmly believe in racial equality and the premise that this society, and the legal community, has yet to achieve that desired state. What the debate fails to reveal is the *preferred* ideological perspective for accomplishing that goal: individualism, communalism, or some variant or combination of these two ideologies?

B. *Reconstructing Variations of the Voice of Color as Individualist/Communist*

I wish to expand on Balkin's original premise and demonstrate that, in addressing the issue of the voice of color and its existence and worth, Balkin's

158. Indeed, Professor Rhode has come to the same conclusion in her analysis of feminist critical theory:

Although critical feminists by no means speak with one voice on any of these issues, part of our strength lies in building on our differences as well as our commonalities. Precisely because we do not share a single view on this, or other more substantive concerns, we need theories but not Theory.

Rhode, *supra* note 61, at 626.

159. See *supra* Part II.B.1.

individualist and communalist constructs can be used to categorize the two distinct dialects within the voice of color that are represented by what I have characterized as “Hierarchical Majoritarian” and “Monistic.”

To begin, consider that, based on the number of scholars of color admitted to those ranks and the number of potential scholars of color available to be admitted to the academy, people of color, for whatever reason, have thus far failed to fully enter the legal academy. Consequently, there are many indices, including anecdotal ones, upon which one can make the statement (unchallenged for the most part) that people of color have not successfully integrated the legal academy:

According to AALS Statistical Data for 1987-1988, 327 of the 360 new law teachers were nonminority. Of the nonminority hires, 32% were law review members, 10.6% had advanced degrees, only 59% had been admitted to the bar, 39% had never practiced, and only 12% had publications. Of the 33 minority hires in 1987-1988, 21% were law review members, 18% had advanced degrees, 94% were admitted to the bar, 91% had practiced, and 15% had publications. . . . The data for 1986-1987 and 1988-1989 are similar.¹⁶⁰

Presumably, all would agree that the responsibility—culpability—for the creation of the status of legal victimhood falls squarely on the shoulders of the male-dominated, majoritarian, white elite that until recently *exclusively* controlled the gateway into the legal academy.¹⁶¹ This issue of responsibility is the means by which we may now move Balkin’s analysis into our discussion of the voice of color debate.

1. *Continuing Harm: The Question of Responsibility*

I believe it is indisputable that harm continues long after eradication of the status of legal victimhood; focusing again on legal academia, the lack of people of color in the academy is but one indicia of that harm. Indeed, a better way of analyzing this post-legal victimhood issue is by defining who is responsible for the remedy once the actual injury (although not the harm that injury causes)

160. Espinoza, *supra* note 11, at 1882 n.21; see also Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 539-48 (1988) (discussing low number of minorities on American law school faculties); Olivas, *Latino Faculty at the Border*, CHANGE, May-June 1988, at 6-7 (demonstrating low number of Latinos on law school faculties).

161. If the legal academy is viewed as a microcosm of society, I would phrase the issue as follows: assuming that official, legal barriers to the entry of scholars of color into the legal academy have been obliterated by a combination of laws, regulations, and changing social mores, what I characterize as the status of “legal victimhood” for people of color as it pertains to their opportunity to become *equal* participants in legal academe is eliminated. For a poignant description of the victories leading to the eradication of legal barriers that created the status of legal victimhood, contrasted against the current questioning of affirmative action, see Ansley, *supra* note 23, at 999-1005; *infra* note 170 and accompanying text.

ceases. Once all agree injury has occurred, the questions become "Who is responsible?" and "What is the appropriate remedy?" For example, is removing the injury enough, or is something more required? If so, how much more? (I am ignoring, for the sake of discussion, the more difficult question of whether the injury is remediable and assuming the injury can be remedied.)

Some will argue, of course, that removing the injury is enough; since the injurer has removed the injury and responsibility for the harm has been discharged, any continuing harm must be borne by those injured. Others, including the victim, will argue that it is the injurer's responsibility to remedy the injury completely, irrespective of cost or its impact on others, until the vestiges of legal victimhood are eradicated in the legal academy.¹⁶²

In sum, in many respects the ongoing debate between the proponents of the Hierarchical Majoritarian voice of color and the Monistic voice of color is really one about responsibility. The issue can be synthesized into a single question: Who is responsible for the current dismal plight of scholars of color in today's legal academy? Proponents of the Hierarchical Majoritarian dialect point a rather powerful finger at scholars of color themselves and attempt to prove that scholars of color are largely responsible for their own plight.¹⁶³ On the contrary, proponents of the Monistic dialect believe that the responsibili-

162. Indeed, the issue has been previously phrased as whether one adopts an "equality as result" model or an "equality as process" model in the race discrimination context—an issue that also implicates group-based versus an individual-based model of racial discrimination. See, e.g., Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 1, at 1341-42. Thus:

Under the [equality as result] model, which has not been widely followed by the courts, the concern is neither with protecting individuals from specific acts of discrimination (although it would bar such acts) nor with assuring the neutral governmental treatment of groups themselves [the equality as process model], but rather with eliminating the conditions of inequality under which groups exist. In contrast, the traditional ideology lacks this concern with assuring equality of results and does not conceive of discrimination as the perpetuation of structures of inequality.

Ehrenreich, *supra* note 93, at 1187 (footnote omitted). The group-based model is equated with the "equality as result" model that rejects the goal of abstract neutrality and the concept of merit. Discrimination—racial and sexual—is measured by its effect on the group, and thus discrimination is defined as the failure to eliminate conditions of subordination. *Id.* at n.37 (citing Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and Weber*, 59 N.C.L. REV. 531, 539-41 (1981); Fallon & Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 12-26; Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-53 (1978)).

163. "[T]he paucity of black professors in the leading law schools is largely explained by the paucity of leading candidates who are qualified by traditional standards for such posts." Kennedy, *Racial Critiques*, *supra* note 3, at 1762; see also *id.* at 1765-67. Also, consider the following from Professor Carter:

The lack of citations is the easier to explain. One obvious candidate is a lack of literature. In other words, there are so few people of color writing about, say, corporate income tax that even a rational (i.e., quality-based) sorting of the available literature would be unlikely to turn up many (or any) articles by non-white scholars. . . . [T]he solution is plainly to urge more scholars of color to turn their attention to corporate tax. If we are not merely the "best black" scholars, but instead have the capacity to produce scholarship as good as anyone's, then this strategy would surely result over time in an increase in the amount of outstanding work by professors who happen not to be white. It is only if that future outstanding work is not cited that there is reason to worry over the motivation of the non-citers.

Carter, *The Best Black*, *supra* note 4, at 31.

ty for the plight of scholars of color must be borne primarily by members of the male-dominated, majoritarian hegemony that until recently has had exclusive control over the legal academy.¹⁶⁴

Now this debate on the current culpability for injury caused by the creation of the status of legal victimhood has become a thinly sheathed analogy to the ongoing debate concerning the efficacy of affirmative action—the cry for diversity in legal academe based on personal characteristics, e.g., race and ethnicity¹⁶⁵—in the whole of society and the issue of so-called “reverse discrimination.”¹⁶⁶ The controversy over affirmative action in society can be recharacterized as conflict between opposite ideological positions involving communalism and individualism. Applying these disparate positions to the affirmative action debate in the legal academy, those opposing affirmative action (reverse discrimination in their eyes) adopt the individualist position and, beyond removing the injury, assume little responsibility for the plight of the victim.¹⁶⁷ They allege it is the victim’s responsibility to overcome any linger-

164. Follow, for example, Bell’s seventh candidate chronicled in *And We Are Not Saved*, *supra* note 1. Bell hypothesizes that a predominantly white law school faculty will refuse to hire an otherwise perfect and acceptable candidate for a tenure-track position on the faculty because the candidate is Black and would increase the minority faculty members to twenty-five percent. *See also* Delgado, *Imperial Scholar*, *supra* note 17, at 566 (contention that white professors comprise a clique of “imperial scholars” who have systematically ignored and excluded from citations the works of scholars of color). *But see* Kennedy, *Racial Critiques*, *supra* note 3, at 1760-70 & 1771-78 (replying to Bell and Delgado).

165. There are many other characteristics that may be suitably viewed as “diverse” enough, i.e. valuable enough, for whatever reason to apply different (lesser?) standards to measure that individual’s qualifications for an entry level position, for tenure evaluation, or a lateral tenured position at a law school. Dean Calabresi has actually enumerated eight such characteristics:

[T]he following types of diversity . . . may be relevant to a well formed faculty: (1) age diversity, (2) diversity between teachers and scholars, (3) subject matter diversity, (4) diversity of orientation as between theory and practice, (5) diversity in theory of law, (6) diversity in extra-legal framework applied to legal analysis . . . (7) *racial, religious, ethnic, gender and sexual orientation* diversity . . . (8) ideological or political diversity.

G. Calabresi, *Diversity in Faculty Hiring* 2 (July 31, 1990) (unpublished manuscript on file with author) (emphasis added) (footnote omitted).

166. A partial list of the exhaustive scholarship that analyzes this issue includes: Ansley, *supra* note 23; Bell, Bakke, *Minority Admissions and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3 (1979); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Freeman, *supra* note 162; Greenawalt, *Judicial Scrutiny of “Benign” Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559 (1975); *Persuasion and Distrust*, *supra* note 75; Ravenell, *supra* note 21, at 28; Smith, *Alternatives to Paralysis: A Working Paper Precipitated by the Affirmative Action Cases*, 61 OR. L. REV. 317 (1982); Smith, *Reflection on a Landmark: Some Preliminary Observations on the Development and Significance of Regents of the University of California v. Allan Bakke*, 21 HOW. L.J. 72 (1978); Sullivan, *The Supreme Court, 1985 Term—Comment: On the Sins of Discrimination: Last Term’s Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986).

167. *See* Ansley, *supra* note 23, at 1005-22 (opponents of affirmative action create “white victims”). The current debate over the legitimacy of affirmative action and its pejorative designation as “reverse discrimination” demonstrates Balkin’s view of individualism and communalism as mirror images. Balkin contends that individualism and communalism can be deconstructed unless the victim is identified and agreed to by the combatants. Thus, when the white worker is viewed as a victim of affirmative action, communalistic prose is used by the Court to protect the white worker’s rights at the expense of the originally injured person of color. Communalism, then, that which is trumpeted for its beneficial use to improve the plight of people of color, is used in this fashion to harm the same class of individuals when the “victim” is a white worker. And the Supreme Court has expanded the rhetoric of responsibility to protect the white victimized worker. Thus,

ing difficulties, no matter how severe, encountered in his odyssey to becoming a full-fledged, equal member of the legal academy.

Those supporting affirmative action within the legal academy, on the other hand, take a communalist position and argue that the injurer—society or, for our purposes, the legal academy—is responsible for the plight of the victim and must accept that responsibility as an on-going one by providing effective remedies. Removing the legal barrier that caused the injury is not enough according to communalists. Thus, if the debate is centered on the lack of people of color in the legal academy, the argument is that the academy must take full responsibility for the lack of true integration and, as a component of accepting full responsibility, must take further steps to eliminate the disparity between scholars of color and the majoritarian members of the legal academy.¹⁶⁸

2. *The Victim's Story*

On a more subtle level, the issue of responsibility is implicitly raised within the context of whether the preferred method of expressing the Monistic voice of color—questioning the storytelling technique used by many adherents of the Monistic voice, for example—is appropriate in the professoriate.¹⁶⁹ Storytelling, with its emphasis on the first person voice of the victim, is more apt to place the responsibility for the injury on the injurer rather than on the victim.¹⁷⁰ Thus, adherents to the Monistic voice of color praise this new meth-

[t]he new discourse [limiting affirmative action] most frequently casts the relevant parties not as the excluding employer versus the black aspirant, but as the black aspirant versus the innocent white incumbent. Accordingly, the new style results not only in reduction from public to private, but in a radical misalignment of the parties. It allows us to refuse to end the conditions of white supremacy while portraying the refusal as a valiant defense of a powerless underdog. Such a stance is comfortable for white Americans, who typically cherish both prerogatives and commitment to a democratic ideal.

Ansley, *supra* note 23, at 1021-22 (footnote omitted).

168. Thus, an "equality as result" model is adopted rather than an "equality as process" model. See *supra* note 162 and accompanying text; see also Ansley, *supra* note 23, at 1005-22. My view on affirmative action is too complex to detail herein and awaits further explication in an article I am co-authoring with Jody Kraus in which we address the goals and methodology for achieving affirmative action in law school. Suffice it to say, in the context of the current debate, I am a communalist when it involves taking a theoretical perspective on affirmative action and thus believe it is the injurer's responsibility to fully remedy the harms occasioned to the victim due to its illegal and immoral acts of racism.

169. See, e.g., D. BELL, *supra* note 1; Delgado, *Storytelling for Oppositionists*, *supra* note 1; Matsuda, *Voices of America*, *supra* note 1. On storytelling generally, see, *Symposium: Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) [hereinafter *Symposium*]; West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985); Williams, *Alchemical Notes*, *supra* note 1.

170. Indeed, I contend that white males do not employ the narrative, storytelling style because to do so would result in their talking about their dominance and that currently is not socially acceptable discourse. Also, to emphasize their dominance and dominant position would demonstrate the fact that the meritocracy they believe in is not really a true meritocracy, but rather a system providing them with built-in advantages. I owe this insightful observation to my former students Sharon and Bernard Goodwyn, who shared their thoughts with me while discussing a preliminary draft of *Reply in Favor of Context*, *supra* note 5, in December 1990 (copy of remarks on file with author).

odology for articulating voice.¹⁷¹ Moreover, proponents of the Monistic dialect firmly believe it is the responsibility of the professoriate to receive this new paradigm for expressing thoughts and ideas as an appropriate vehicle for legal scholarship, believing it is entitled to as much weight and respect as traditional approaches to scholarship.¹⁷²

Speakers of the Hierarchical Majoritarian dialect denigrate the use of storytelling as an effective vehicle for debating issues in the dominant discourse and believe it is the responsibility of all scholars, including scholars of color, to speak in the dominant discourse.¹⁷³ In this instance, that means creating work capable of being evaluated by the Hierarchical Majoritarian standard, which is premised as a neutral evaluative standard that purportedly claims to eliminate the personal attributes of the author.¹⁷⁴

3. *Remembering that the Question Has Been Asked Before*

This question of responsibility for the plight of people of color is not new. The dispute between proponents of the Monistic dialect and proponents of the Hierarchical Majoritarian dialect is in some respects eerily reminiscent of the early twentieth-century debate between Booker T. Washington and W.E.B. DuBois over how to improve the plight of people of color in this society.

171. See, e.g., Matsuda, *Looking to the Bottom*, *supra* note 1; Scheppelle, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989); Williams, *Alchemical Notes*, *supra* note 1.

172. See, e.g., Delgado, *Storytelling for Oppositionists*, *supra* note 1; Espinoza, *supra* note 11. Also consider the following:

With respect to standards for scholarship, narrative is no more immune to normative criticism than other forms of legal scholarship. Kennedy's attack, because it gives currency to inappropriate standards, may postpone elaboration of appropriate ones. (Suitable criticism is possible and necessary but currently underdeveloped.) One of the several functions of minority storytelling is to nudge the language of law toward art and away from social-science discourse. Types of aesthetic judgment become available. Beginning questions of fit evaluation revolve around whether a story is well-written: what does it do with language? With silence? Is it an exercise in domination and self-indulgence? Or is it an invitation to engaging, communal creation and re-creation?

There is another apt possibility of evaluation, as much a matter of ethics as of aesthetics. . . . [Storytelling] is demanding of both author and evaluator. It asks emboldening questions: what does this voice now make it possible for me to say in my own writing? Who does this text now make it possible for me to be as a law faculty member? Which empowering connections, freshly revealed as possible, can I now risk establishing between me as a lawyer and those belittled by law? The telling criticism, that is to say, will be an animating change in academic lawyers and the legal academy. Or the lack of such change. The standard is exacting.

Ball, *supra* note 17, at 1862-63 (footnotes omitted).

173. Professor Ball's article in the colloquy, *supra* note 17, neatly captures the debate over storytelling's worth as a technique used by scholars of color:

The "something else" chosen by Bell, Delgado, Matsuda, and others—the centrality and significance of the choice elude Kennedy—is storytelling. . . . The more nettlesome question, given that they are good stories, is whether they work as legal scholarship. I think they do, and on several levels. . . . Personal narrative has found little place in Kennedy's world. His is a "cosmopolitan intellectual community," . . . Kennedy would reinvigorate an academic ideal of detached, individualistic, monastic purity of heart.

Id. at 1858-60; see also *Symposium*, *supra* note 169.

174. See *supra* notes 27-31 and accompanying text (discussion of evaluative standard employed by Hierarchical Majoritarians).

DuBois accused Washington of adopting an essentially individualist position with respect to the injuries that had been inflicted on people of color by white society.

In [Washington's] failure to realize and impress this last point [that "while it is a great truth to say that the Negro must strive and strive mightily to help himself, it is equally true that unless his striving be not simply seconded, but rather aroused and encouraged, by the initiative of the richer and wiser environing group, he cannot hope for great success,"] Mr. Washington is especially to be criticised. His doctrine has tended to make the whites, North and South, shift the burden of the Negro problem to the Negro's shoulders and stand aside as critical and rather pessimistic spectators; when in fact the burden belongs to the nation, and the hands of none of us are clean if we bend not our energies to righting these great wrongs.¹⁷⁵

The Hierarchical Majoritarian dialect can be analogized to the position taken by Washington¹⁷⁶—that people of color must prove they can excel according to the hierarchical evaluative standard set forth by the majority before people of color will fully be accepted and integrated into majoritarian society.¹⁷⁷ The burden of proof, then, weighs on scholars of color to establish that they can succeed under that evaluative standard.¹⁷⁸ Conversely, proponents of the Monistic dialect of the voice of color can take solace in the position of DuBois, who repudiated Washington's accommodationist views.¹⁷⁹ The third element in the racial triad that approximates the three strands in Critical Feminist Theory and is analogous to the dominance theory, is the nationalist position asserted most prominently by Marcus Garvey at the turn of the century.¹⁸⁰

175. DuBois, *Of Mr. Booker T. Washington and Others*, in *AFRO-AMERICAN HISTORY: PRIMARY SOURCES* 221, 230 (T. Frazier ed. 1970) [collection as whole hereinafter *PRIMARY SOURCES*].

176. Washington said "the whole future of the Negro rested largely upon the question as to whether or not he should make himself, through his skill, intelligence, and character, of such undeniable value to the [white] community in which he lived that that community could not dispense of his presence . . ." B. WASHINGTON, *UP FROM SLAVERY*, reprinted in *THREE NEGRO CLASSICS* 29, 137 (1965) [collection as whole hereinafter *THREE NEGRO CLASSICS*].

177. See, e.g., W.E.B. DUBOIS SPEAKS 270-71 (P. Foner ed. 1976); Washington, *The Atlanta Exposition Address, 1895*, in *PRIMARY SOURCES*, *supra* note 175, at 216-21. See generally B. WASHINGTON, *supra* note 176.

178. Washington's position on the value of merit once again reinforces my characterization of him as an individualist: "My experience is that there is something in human nature which always makes an individual recognize and reward merit, no matter under what colour of skin merit is found." B. WASHINGTON, *supra* note 176, at 111; see also *id.* at 192 ("In the economy of the God there is but one standard by which an individual can succeed—there is but one for a race. This country demands that every race shall measure itself by the American standard.").

179. See *supra* note 175 and accompanying text.

180. See E. CRONON, *BLACK MOSES* (1955); A. GARVEY, *GARVEY AND GARVEYISM* (1970); T. VINCENT, *supra* note 77. Indeed, both Booker T. Washington and W.E.B. DuBois espoused the nationalist position; the former in his call for self-help and separatist ideas of Black advancement, the latter in his critique of the National Association for the Advancement of Colored People. See Peller, *supra* note 41, at 784-85.

Admittedly, the matter is much more complicated than merely ascribing to speakers of the Monistic dialect the views and voice of DuBois, ascribing to speakers of the Hierarchical Majoritarian dialect the views and voice of Washington, and ascribing to future or emerging nationalists the views and voice of Marcus Garvey.¹⁸¹ If it were that simple, perhaps history could lead us to some acceptable resolution of this debate. Unfortunately, when history is consulted, the matter becomes more complicated than first appearances would indicate.

Not only might some quibble with my characterization of univocalists as DuBoisian and Hierarchical Majoritarians as Washingtonians, but there is also a credible claim to be made that proponents of the Majoritarian Hierarchical dialect are indeed adherents to DuBois' philosophy in their not so subtle adoption of his "talented tenth" principle. DuBois believed in the establishment of a talented tenth of young Blacks who would compete *on equal terms* with whites pursuant to their evaluative standards and norms and thereby prove to whites that Blacks could compete equally with them. DuBois presumed that once white people were shown that Blacks could compete on equal terms with whites, whites would repudiate their notions that Blacks were inferior, and recognize the natural and civil rights of Blacks.¹⁸²

In many ways Carter and Kennedy are our "talented tenth," standing as proof that Blacks *can* compete on equal terms. However, Matsuda and Delgado are, I think, just as talented, and they have shown that we can be ourselves and challenge the academy to accept us. In short, the voice of color includes, but is more than, a "talented tenth."

C. *Deconstructing the Differences in Approaches: Focusing on Goals and Objectives*

I could continue along with this reasoning by pointing out instances in which our protagonists view responsibility differently. However, that is not the purpose of this Article. I would, instead, like to explore the connection between ideology and responsibility detailed by Balkin and its application to the debate over the voice of color. In concluding his article, Balkin persuasively argues "that the ways in which people characterize responsibility are deeply tied to

181. Indeed, there is a passage which supports the view that Washington may be a communalist: As for my individual self, it appeared to me to be reasonably certain that I could succeed in political life, but I had a feeling that it would be rather a selfish kind of success—individual success at the cost of failing to do my duty in assisting in laying a foundation for the masses.

B. WASHINGTON, *supra* note 176, at 78.

182. See generally THE SOULS OF BLACK FOLKS, reprinted in THREE NEGRO CLASSICS, *supra* note 176, at 209. Moreover, DuBois contended that "Mr. Washington represents in Negro thought the old attitude of adjustment and submission. . . . Mr. Washington's programme practically accepts the alleged inferiority of the Negro races." *Id.* at 246. The relevance of the DuBois-Washington debate was suggested to me by Kennedy's discussion of it in *Racial Critiques*, *supra* note 3, at 1784-85.

their ideological beliefs."¹⁸³ Extending this analysis, I firmly believe that the differences between proponents of the Monistic and the Hierarchical Majoritarian dialects of voice can be reduced to a difference in ideology on how these scholars of color view and select characterizations of responsibility.

The communalist orientation of scholars of color who use the Monistic dialect of voice has already been noted. The Monistic dialect of voice does not focus on the success or attainment of individual goals, but rather on the success of the masses, the oppressed—the community. It is simply a different way of looking at the same issue: the individualist measures progress by examining the achievements of those at the top; the communalist measures progress by examining the achievements of those at the bottom.¹⁸⁴

Applying this again to our model, as a result of these antithetical approaches, an individualist and a communalist may draw sharply different conclusions about the progress of scholars of color. As scholars of color successfully integrate the most prestigious universities and prove that they are successful according to whatever standard is applied, one can look to their successes and come to the conclusion that scholars of color have "arrived."¹⁸⁵ On the other hand, from the bottom, one sees something else: statistics reveal that the number of scholars of color at elite institutions is not increasing significantly.¹⁸⁶ In addition, the quality of life of people of color in our society in general, as measured by economic indices, is not improving.¹⁸⁷

183. Balkin, *supra* note 145, at 262.

184. Once again, the issue can be rephrased as whether one adopts an "equality as result" model or an "equality as process" model. See *supra* notes 162, 168.

185. Although I am tempted to provide a list of those scholars of color, other than Carter and Kennedy, who have successfully integrated the academy at the most prestigious institutions and succeeded pursuant to the Hierarchical Majoritarian standard, I fail to do so for fear of unintentionally omitting (and thereby perhaps offending) some deserving minority scholars. A list of minority scholars appears in the 1990-1991 annual volume of the *AALS Directory of Law Teachers*; each reader can independently assess for herself our collective and individual successes.

186. See *supra* note 160 and accompanying text.

187. Between 1978 and 1987, Blacks in the "poorest of the poor" category—those with incomes below half the poverty line (below \$4,528 for a family of three in 1987)—increased by 69% during the period, and half of the Blacks in this category were children. See CENTER ON BUDGET AND POLICY PRIORITIES, *STILL FAR FROM THE DREAM: RECENT DEVELOPMENTS IN BLACK INCOME, EMPLOYMENT AND POVERTY* v (Oct. 1988). Unemployment statistics demonstrate that the gap between Black and white unemployment widened, Blacks being unemployed at a rate 2.57 times that of whites in 1987. *Id.* at x. Finally, the gap between white and Black income levels widened to its greatest spread—with a Black family earning a mere 56.1% of the typical white family income in 1987—wider than any year since 1967 when the Center began collecting data. *Id.* at vii.

Richard Delgado has responded to this trend:

Every index of Black and brown emiseration today warrants alarm. Measures of Blacks' income, net wealth, educational attainment, life expectancy, infant mortality, rates of serious illness, drug addiction, and incarceration are worse than those of whites. On most of these measures, the Black-white gap is increasing, and on some, Blacks stand worse off today than they did ten or even twenty years ago.

Delgado, *Zero-Based Racial Politics*, *supra* note 118, at 292-30 (footnotes omitted); see also Bell, *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 ST. LOUIS U.L.J. 393, 393-94 nn.1-3 (1990). As of 1987, almost one half of young Blacks—45.6% of Black children under 18 years of age, and 49% of Black children under six years of age—live in poverty. *Id.*

These ideological differences are reflected in the strategies and approaches taken for improving the progress of scholars of color and people of color in our society. It is only natural that individualists who embrace the Hierarchical Majoritarian evaluative standard would utilize strategies designed to ensure that all scholars of color have equal access to the gates of academe. Once those gates are open, it is up to the individual to step through and prove that she belongs there; it is *her* responsibility.

On the contrary, communalists who embrace the Monistic dialect of voice would urge more fundamental changes, such as abolishing the gate built by a white male hegemony that requires a password in the white man's voice for passage.¹⁸⁸ Proponents of the Monistic voice of color, however, do not, I believe, advocate nihilistically that, once the gate has been abolished, no standard can be used to determine who passes through. Instead, the standard must be modified and expanded so that the attributes of the voice of color will be valued and judged fairly by the academy as making a contribution to our collective mission of both educating and learning.¹⁸⁹

I contend that communalism, with its focus on the masses, is the preferable ideological perspective from which to advance the goals of people of color in society. As with the very different debate between DuBois and Washington, history may¹⁹⁰ ultimately judge *which* was the correct ideological perspective—integrationist or nationalist, Hierarchical Majoritarian or Monistic—from which to fight to attain the common objective of true racial equality both within and outside of legal academe.¹⁹¹ There is no doubt, however, about the wor-

188. This password is also known to Professor Carter and other scholars of color who have learned ("earned") it by abiding by the rules imposed by the keepers of this gate. Did I with the publication of my traditional articles? See *supra* notes 45 & 124 and accompanying text; see also Carter, *The Best Black*, *supra* note 4, at 9 (author asserts that "Star System" helped him obtain entry level position in academy and he "made the rest of the journey" to current success and position on his own).

189. On the contrary, the current meritocratic evaluative model employed by the academy ignores and devalues the unique contributions provided by proponents of the voice of color by embracing a "neutral" standard that claims perspectivelessness.

190. I contend that history "may" ultimately judge which ideological perspective is correct because history, like many things, is largely subjective and contextual. Indeed, although I find DuBois' position in the debate much more appealing, I hesitate to conclude that DuBois won the debate—although if forced to choose I would state that history can be very easily interpreted (from our current perspective) to support the position that DuBois held the much stronger hand. Just as there is no absolute truth, there is no absolute historical interpretation of events. See A. Johnson, *Scholarly Paradigms*, *supra* note 9. Thus, from our contextual perspective, the differences that were once thought to divide Dr. Martin Luther King, Jr. and Malcolm X, viewed through a historical prism, may reveal some similarities. See, e.g., Farley, *King, Malcolm X Leave Legacy of Tactics*, *USA Today*, Feb. 21, 1991, at D4, col. 2. Thus, many theorists and activists contend that Martin Luther King, Jr. and Malcolm X were growing more alike until the times of their untimely deaths. See, e.g., J. CONE, *MARTIN & MALCOLM & AMERICA* (1991). Moreover, it may be impossible for history to judge which ideological perspective is best suited to achieve the common goal because that may require a contextual perspective—the attainment of the racial equality or, alternatively, some might argue, a societal state in which Blacks are dominant—that may never come to pass. Perhaps the "players" in the debate will change, but, given the role that race plays in our history, the debate over the means to equality will always be with our society.

191. In light of my assertion that the integrationist approach is the predominant approach of voice proponents, see *supra* notes 75 & 77 and accompanying text, perhaps the question should be rephrased as to whether scholars and people of color who embraced integrationism made a mistake by opting for a

thiness of the battle. Carter and Matsuda, Kennedy and Delgado—the fight goes on.

IV. A COMMUNITARIAN PERSPECTIVE: SITUATING THE MONISTIC VARIATION OF VOICE

Professor Balkin, whose work leads me to suggest that Monistic scholars of color speak in a communalistic voice, disavows any explicit connection to the theoretical doctrine that has come to be known as communitarianism.¹⁹² However, I prefer the approach taken by Sandel, a leading proponent of communitarianism:

[T]o say that members of society are bound by a sense of community is not simply to say that a great many of them profess communitarian aims, but rather that they conceive their identity—the subject and not just the object of their feelings and aspirations—as defined to some extent by the community of which they are a part. For them, community describes not just what they *have* as fellow citizens, but also what they *are*, not as a relationship they choose (as in a voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity.¹⁹³

In this context, however, I expand on this definition of communalism, with its emphasis on responsibility, by broadening it to encompass political theory. I define communitarianism as a political theory that rejects liberalism and its emphasis on the individual. Indeed, it is liberalism's preoccupation with the individual and the individual's participation within particular interest groups that fosters a focus on self and allows differences—such as race, ethnicity, and gender—to divide our society. Instead, my conception of communitarianism, as discussed herein, is premised on a view of the individual's conception of the community and his participation in the community as constitutive of the individual's identity.¹⁹⁴

The version of communitarianism that I embrace constitutes the individual's identity by his role in a given community and not his more general role in society. My focus is on the moral community and what is “just” and “good,” because the goal of critical race theorists is no longer the eradication of the legal vestiges of racism in our society, but, rather, the eradication of racism in our social relations, including legal ones. That goal can be more easily realized

solution that, in the short run, appeared attractive, but in the long run proved detrimental?

192. Consider Balkin, *supra* note 145, at 206 n.32 (citation omitted): “Unfortunately, I have discovered that the word ‘communalism’ is likely to be confused with ‘communitarianism,’ a theoretical position often contrasted with political liberalism. . . . Communalism, like individualism, is an orientation about responsibility that one finds within liberal discourse, not outside of it.”

193. M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 150 (1982) (emphasis in original).

194. *See id.* at 149-51.

pursuant to a communitarian perspective in which individual goals and aims are constitutive of the communities to which the agent belongs.

I view communalism and communitarianism as related and sympathetic, and not as inapposite. Consequently, I expand communalism to incorporate aspects of communitarianism and its related political vision of American democratic government—republicanism.¹⁹⁵ For example, it is through the dialogic component of communitarianism, with its view of the community as inclusive,¹⁹⁶ that the responsibility norms embraced by Balkin's view of communalism (and, earlier, Duncan Kennedy's view of altruism which is a precursor to communalism) may and should develop.

In this Part, I shall summarize communitarianism/civic republicanism and compare it to liberalism/pluralism.¹⁹⁷ Further, I shall illuminate the communitarian aspects that I contend the proponents of the Monistic voice of color have embraced. By exploring the themes inherent in communitarianism that I see emerging in Critical Race Theory, I hope to show that the voice of color debate is not simply a debate that can be cabined as addressing only legal issues and appropriate evaluative paradigms. On the contrary, those advocating the existence of the voice of color are beginning to develop a moral and political theory that must be further explicated from the rhetoric of the debate.¹⁹⁸

195. Some definition of terminology is in order. As has been discussed in Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682, 682 n.1 (1988), the terms "communitarianism," on the one hand, and "republicanism" or "civic republicanism," on the other, have been used interchangeably in legal and political scholarship. Thus far, I have drawn a distinction between communitarianism as a political philosophical theory in which the individual is situated and republicanism as a vision of participatory government that is grounded in communitarianism. Conversely, I have drawn the same distinction between liberalism as a political philosophy or theory in which the individual is situated and pluralism as a vision of government that is grounded in liberalism. I will maintain my (some might contend artificial) semantic distinction between communitarianism and republicanism, on the one hand, and liberalism and pluralism on the other, because it helps to address the issues in a more precise manner.

196. Here I mean "inclusive" in the sense that all the members of society, especially the poor, are an essential part of the idea of community and, furthermore, that aid to that disadvantaged segment of the community is an essential obligation of the community. See Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999 (1988).

197. For a discussion of the pluralist understanding of government that is contrasted to a competing vision of a republican government, see R. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* (1967); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985). For pluralist thought generally, see A. BENTLEY, *THE PROCESS OF GOVERNMENT* (1908); *THE BIAS OF PLURALISM* (W. Connolly ed. 1969); R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956); T. LOWI, *THE END OF LIBERALISM* (2d. ed. 1979); D. TRUMAN, *THE GOVERNMENTAL PROCESS* (1963); *infra* note 218. For the economic perspective, see for example, Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

198. Once again, symmetry is present in a discussion and comparison of Critical Feminist and Critical Race Theory. Lacey, *supra* note 65, at 783, argues that "[m]uch of feminist jurisprudence is also communitarian, emphasizing ideals of cooperation and connection instead of competition and autonomy." I concur in her pronouncement to the extent it applies to the "different voice" strand of Critical Feminist Theory. It is unclear to me that the other strains of Critical Feminist Theory can likewise be characterized as communitarian.

A. A Brief Primer on Communitarianism

Defining communitarianism precisely and comparing it to liberalism is a Herculean, if not impossible, task well beyond the scope of this Article. Some have argued that communitarianism is “an improvement on classic liberalism,”¹⁹⁹ while others have claimed that it repudiates and rejects liberalism.²⁰⁰ Finally, Professor Frank Michelman, a leading proponent of communitarianism and republicanism, has recently contended that republicanism and liberalism are in some sense compatible and indeterminate.²⁰¹

My task herein is merely to point out those aspects that, for me, represent the core of communitarianism: the emphasis on community, the individual’s situatedness within that community, and the dialogic in the community as a methodology for achieving “right” actions leading to good consequences.²⁰² At its simplest, communitarianism can be defined as a *deemphasizing of individualism and individual rights*—which are so important for the liberal view of self—and a privileging of the individual’s role in the community so as to realize the attainment of right actions that lead to good consequences within the larger community.²⁰³ Thus, in the writings of communitarians, one can identify a number of arguments that attempt to explain why the liberal view of the self is inadequate: the liberal view of the self (1) is empty; (2) violates our self-perceptions; (3) ignores our embeddedness in communal practices; (4) ignores the necessity for social confirmation of individual judgments; and (5) pretends to have an impossible universality or objectivity.²⁰⁴

199. Delgado, *Zero-Based Politics*, *supra* note 118, at 1939-40.

200. *See, e.g.*, Note, *supra* note 195, at 682.

201. *See, e.g.*, Michelman, *Conceptions of Democracy in American Constitutional Agreement: Voting Rights*, 41 FLA. L. REV. 443, 450 (1989) (“In sum, we cannot convincingly distinguish liberal constitutionalism from a republican counterpart by setting the former in deep, conceptual opposition to deliberative conceptions of communicative action. Trenchant distinctions, if any, between liberal and republican conceptions of political engagement must lie elsewhere.”); Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self Government*, 100 HARV. L. REV. 4 (1985) [hereinafter Michelman, *Traces of Self Government*]; *see also* Cook, *Foreword: The Postmodern Quest for Community: An Introduction to a Symposium on Republicanism and Voting Rights*, 41 FLA. L. REV. 409, 414 & *passim* (1990) (discussing Michelman’s theories of republicanism and liberalism).

202. Consider the following: “As philosophical terms, ‘rightness’ pertains to voluntary actions, while ‘goodness’ pertains to the consequences of those actions. A utilitarian evaluates actions in terms of the goodness of their consequences; in other words, for the utilitarian, ‘right’ actions are those that lead to ‘good’ consequences.” Sagoff, Book Review, 92 YALE L.J. 1065, 1066 (1983) (reviewing M. SANDEL, *supra* note 193).

203. *See, e.g.*, Delgado, *Zero-Based Racial Politics*, *supra* note 118, at 1937-38 (footnote omitted): Members of the [communitarian] school . . . argue that classic liberalism’s reliance on individualism and individual rights must be expanded in a more communitarian direction. Human beings can only develop their capacities through participation in social life. Affiliation is central to individuality and moral identity; it makes reflective life possible.

204. *See, e.g.*, W. KYMLICKA, LIBERALISM, COMMENTS, AND CULTURE 49 & *passim* (1989); A. MACINTYRE, AFTER VIRTUE (1981); M. SANDEL, *supra* note 193; *see also* Note, *supra* note 195, at 682 (footnotes omitted); Fried, Book Review, 96 HARV. L. REV. 960-61 (1983) (reviewing M. SANDEL, *supra* note 193):

Communitarian thinkers reject liberalism as reflecting an impoverished vision of the self, one that discounts our participation in common traditions and practices and ignores the fulfillment that

Most importantly, communitarians emphasize two aspects of their political theory that is inherent in and attractive to proponents of the Monistic dialect of voice. First, implicit in the communitarian philosophy is an emphasis on the contextual—the individual is not viewed atomistically as the sum of parts separate from others.²⁰⁵ Instead, the individual is viewed as part of the community, simultaneously shaping the community to which he belongs and being shaped by it.²⁰⁶

Second and similarly, the individual's achievement of civic virtue and attainment of voluntary action is not viewed as an iconoclastic process in which the individual unilaterally makes choices based on self-reflection.²⁰⁷ On the contrary, the individual makes choices, shares his views and receives the shared efforts of others through a continuing dialogue within the community. Communitarians rely on the dialogic as a vehicle to reconcile tensions created by the fact that "[t]he positive notion of freedom requires both that one have reasons for actions and that the reasons be one's own . . . on the one hand, . . . on the other, it rejects all predeterminations of human essence and social role."²⁰⁸ Thus,

Binding together the various reconciliatory projects are certain characteristic themes. There are themes of dialogue: conversation, inclusion, and recognition; themes of history: narration and continuation; themes of responsibility: contextuality and immediacy; and themes of identity: shared humanity (including difference) and common good (including confrontation with difference) . . . Together, these themes compose a

individuals can achieve through citizenship. In contrast to liberalism's individualist portrayal of politics, communitarianism emphasizes the classical conception of a political community animated by a shared conception of the good.

205. Professor Michelman offers a more eloquent description:

This interdependence of individual and society is said to lead individuals to recognize their common ground with others by showing them how they are both different from and the same as others. In a strongly emergent feminist theme, the suggestion is that awareness of interdependence invites recognition of how our sameness *is* our difference.

Michelman, *Traces of Self Government*, *supra* note 201, at 32 (footnotes omitted).

206. For instance:

Communitarians argue that human agency cannot be intelligibly abstracted from the ends and purposes that an individual has as a member of society. It is only as residents of particular regions, as practitioners of certain callings, as adherents to particular religions, and, ultimately, as citizens of particular regimes that individuals arrive at determinate choices about how to live. From that communitarian perspective, certain affiliations and viewpoints are central to a person's moral identity, not just because they are chosen, but because they make reflective, deliberative choice possible.

Note, *supra* note 195, at 689 (footnotes omitted).

207. Note the observation made by Michelman in *Traces of Self Government*, *supra* note 201, at 18: In the ensuing brief sketch of the republican and antifederalist case, the authors [of a constitutional law casebook: G. STONE, L. SEIDMAN, C. SUNSTEIN, & M. TUSHNET, *CONSTITUTIONAL LAW* (1986)] highlight two central, organizing ideas: civic virtue and general good. These two ideas are closely related. Republicanism's "animating principle" is said to be civic virtue. Civic virtue is in turn defined as "the willingness of citizens to subordinate their private interests to the general good."

208. Michelman, *Traces of Self Government*, *supra* note 201, at 31 (footnotes omitted).

loose unity of their own. They characterize a modern project of ethical reconciliation through dialogue, in search of freedom.²⁰⁹

Conversely, liberalism has been criticized for its focus on the individual divorced from his context and the resulting atomistic conception of the individual. One way to understand liberalism is to examine the political vision of government most often associated with it—pluralism:

Under the pluralist view, politics mediates the struggle among self-interested groups for scarce social resources. Only nominally deliberative, politics is a process of conflict and compromise among various social interests. Under the pluralist conception, people come to the political process with preselected interests that they seek to promote through political conflict and compromise. Preferences are not shaped through governance, but enter into the process as exogenous variables.²¹⁰

Also important to my thesis is the notion, inherent in pluralism, that groups—factions—are formed, alliances are made, and, as a result, there is the distinct possibility that one group or alliance of groups—the controlling faction—representing its constituent interest can control and dominate the legislative or executive process,²¹¹ and “subvert the bargaining and compromise on which the model is based. Factional domination effectively deprives other groups of the opportunity to assert their views.”²¹² Thus, the development of a “rights-based” view of pluralism in which certain rights are characterized as “spheres of individual autonomy”²¹³ that the government must respect and hold inviolate can be viewed as one response to the problem of factions and the domination of the majority by the minority.²¹⁴ Similarly, the development

209. *Id.* at 33 (footnotes omitted); see also Delgado, *Zero-Based Racial Politics*, *supra* note 118, at 1938. Finally, it has been contended that one of the leading proponents of communitarianism, Michael Sandel, resolves the vexing dilemmas of distributive justice and social policy as a result of his vision and conception of the role of community. Fried, *Liberalism, Community, and the Objectivity of Values*, 96 HARV. L. REV. 960, 965 (1983).

210. Sunstein, *supra* note 197, at 32.

211. And I would add judicial through the executive. By 1993, about two-thirds of the federal judiciary will have been selected by Presidents Reagan and Bush. See Goldman, *The Bush Imprint on the Judiciary: Carrying on a Tradition*, 74 JUDICATURE 294, 294 (1991). As to whom President Bush is picking, consider that 89.6% of his appointees are male, 95.8% are white, and “the proportion of millionaires appointed by Bush reached one-third, an increase over the proportion for the Reagan appointees, which, in turn, had been a dramatic increase over the Carter proportion of millionaires.” *Id.* at 299 (table), 302.

212. Sunstein, *supra* note 197, at 33.

213. *Id.*

214. The recent dispute over federal race-specific educational grants/scholarships is indicative of the thorny emotional issues raised by any explicit race categorizations—including explicit affirmative action issues—even when those categorizations are beneficial to minorities. So-called “conservative” and “liberal” Blacks disagree vehemently on the need for such grants in this postmodern age in which the “negative” legal vestiges of race have been eliminated. See, e.g., Morganthau & McDaniel, *Dropping a Hot Potato*, NEWSWEEK, Dec. 24, 1990, at 18; Turque & Cohn, *Black Conservatives Quarrel over Quota*, NEWSWEEK, Dec. 24, 1990, at 20. Although I safely predict much will be written about this controversy in the immediate future, my view is that Black conservatives will embrace “neutral standards” because affirmative action

of “discrete and insular” minorities that must be protected by the courts because they are unable to protect themselves effectively in the political process is yet another response to the problem of factions.²¹⁵

B. *Situating the Voice in a Communitarian Perspective*

Applying my critique of pluralism to the ongoing debate within the academy over the existence and use of voice, I contend that embedded in the dialect of voice of color that I have characterized as “Monistic” is a *kernel* of philosophy that is more characteristic of communitarianism than liberalism. In other words, my definition of the “voice of color” is broad enough to allow scholars of color to embrace individualistic or communitarian approaches. Proponents of the Monistic dialect favor a communitarian approach to self-definition. However, before I turn to a descriptive analysis of that perspective, I believe there is a substantive component to the communitarian perspective that I find so intriguing. This substantive component may explain, in part, why I contend that adherents to the Monistic dialect have articulated a communitarian perspective.

1. *The Substantive Component: Turning Away from Pluralism*

Briefly, in a pluralistic democracy in which people of color constitute a “discrete and insular” minority, the capture of that democracy by majoritarian factions who exclude or only partially include minorities (and then only when they are needed for some exogenous reason and not because they are truly constitutive of the faction) is a reality.²¹⁶ The same reality is present within the legal academy. Hence, in light of the fact that scholars of color constitute a discrete and insular minority of the academy, it is not surprising that proponents of the Monistic dialect of voice would embrace a communitarian vision of their collective self that implicitly rejects pluralism and liberalism as guiding political and philosophical theorems.²¹⁷

is allegedly stigmatizing or enforcing notions of inferiority. See, e.g., S. STEELE, *supra* note 54, at 111-25. Embracing a “neutral standard” represents an embrace of the status quo and the current allocation of rights and powers in our society—a position I find untenable. I believe there is a difference between negative and positive categorizations based on race, and “positive” categorizations are needed to remedy the ills engendered by the “negative” categorizations.

215. Sunstein, *supra* note 197, at 34 (citing *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)). See generally J. ELY, *DEMOCRACY AND DISTRUST* (1980).

216. See, e.g., Delgado, *Zero-Based Racial Politics*, *supra* note 118 (asserts nonwhite poor should form coalition with conservative political groups to improve plight, as compared to liberal groups who have taken them for granted and manipulate them for their own objectives).

217. Implicit in the individualist/pluralist theory is the notion that:

[T]he ideal of pluralism assumes an ever-expanding political/legal pie; minorities can get more “rights” without whites losing theirs. This assumption is what animates the “equal opportunity” model’s view that “special” treatment of minorities (and women) is both unnecessary and illegitimate. It also at least partially accounts for the ambivalence with which Congress and the courts have often approached the alternative, “equal results” theory of discrimination; to the extent that such a theory seems to require the progress of minorities to be at the expense of whites,

Pluralism, and its focus on individualism and individual attainment, may be one of the factors largely responsible for the dominated position of scholars of color within the context of the legal academy. In other words, the factionalism innate to a pluralist vision of democracy weakens the voice of color because it stratifies the voice into strains and dilutes each strain within that voice so that they are either not heard at all (perhaps because their interests are not needed to achieve a winning faction), or only heard when the dominant faction in legal academia needs to engage the polity represented by proponents of the voice of color in order to legitimize and maintain their dominance. In other words, the diverse polity for which advocates of the voice of color speak, the community of color, must deal with the dominant faction: they must speak in the dominator's language—the Hierarchical Majoritarian dialect—or their voice will not be heard in rights discourse.²¹⁸

My analysis herein is limited to how proponents of the voice of color view their individual/collective self. I believe that pluralism explains the dominated position of scholars of color within the context of the legal academy. Further, in defining the “voice of color” and placing scholars of color within that voice, I am acknowledging multiple dialects, in this context meaning pluralistic and communitarian strains, *within* a unified voice of color. Finally, as a supporter of the Monistic dialect of voice, I favor a communitarian approach to self-definition that places scholars of color in the context of their respective community rather than in an individual context. Consequently, proponents of the Monistic dialect of voice may embrace communitarianism as a means for self-definition because it escapes the zero-sum game which is pluralism.

Part of each group's identity is its awareness of its position in a hierarchy of groups. Because groups are mutually defined in this way, it is simply impossible to accommodate one group without in some way affecting others. And, since one group's gain will virtually inevitably be another's loss, any judicial decision, even one that attempts merely

courts have been reluctant to endorse it.

Ehrenreich, *supra* note 93, at 1221 n.160.

218. This view of pluralism supports the notion that the interest-group struggles that result within a majority or faction are a result of the market's working efficiently, and the compromises that take place in the political market are a natural result of that market efficiency. *See, e.g.,* Sunstein, *supra* note 197, at 33 (citing Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983)). Moreover, it is not surprising that representatives of the community of color would reject this vision of pluralism because it has not worked—the community of color has not been improved by participation in this process. *See, e.g.,* Delgado, *Zero-Based Racial Politics*, *supra* note 118, at 1929-30. As Ehrenreich explains,

The ideal of pluralism is logically incoherent not only because the concepts of freedom and security are relational (one group's liberty is another's injury), but also because group identities themselves are relationally and hierarchically constructed in current American society. As a result of that construction, individual groups' fates are inextricably linked: One group's benefit will almost always be another's loss. . . . [G]roups attain their identity in contrast with other groups, in the same way that words attain their meaning in contrast with other words.

Ehrenreich, *supra* note 93, at 1223 (footnotes omitted).

to bring one group up to another's level of power or status, inevitably constitutes a decision that favors one group and harms another.²¹⁹

Thus, as long as the dominators—white males—maintain a numerical majority, it is not surprising that proponents of the Monistic dialect of voice would turn away and embrace a substantive vision of government and society in which the community is defined inclusively. It follows from this communitarian perspective that their dialect will be heard and considered part of a dialogic, rather than being lost in a mechanistic process that produces a governing faction and silences others.²²⁰

2. *Descriptive Attributes*

Turning to the descriptive attributes of communitarianism that are reflected in the Monistic dialect of voice, one obvious feature of the Monistic voice of dialect that intimates a communitarian perspective is the emphasis of voice emanating from the community and not the individual.²²¹ For example, even the method of articulation of the Monistic dialect—storytelling and narrative—is indicative of its grounding in the communal perspective. So it is not surprising that much voice-directed scholarship, including that of proponents of the Monistic dialect, relies on storytelling and the narrative exposition of self that situates the self within the community.²²² Further, scholars of color employing

219. *Id.* at 1224 (footnotes omitted).

220. Taking a cynical view, one can argue that it is not surprising that republicanism is being revived and accepted by academics given the fact that, as society is becoming more pluralistic, that same diversity is eroding the white male hegemony that, for the last two centuries, has dominated and controlled society. Republicanism can be seen, perhaps, not only as a postmodern philosophical phenomenon but also as a practical political reality in the postmodern era in which whites will soon no longer constitute a statistical majority in some of our more populous states—California and Texas, for example—nor nationally if current demographic trends continue. See Walsh, *School Colors: White Students at the University of California at Berkeley Search for Identity*, San Francisco Chron., Feb. 4, 1990 available in LEXIS, Nexis Library, Major Papers file (“Berkeley’s experience with diversity is being watched closely, as a microcosm—albeit a privileged one—of California’s demographic transformation. By the year 2010, whites will be a minority statewide, and there is keen interest in how the state’s educational elite will learn to coexist.”); see also Johnston, *Tending Corporate Lines of Communication*, 6 ROCHESTER BUS. J. 10 (1990) (“At the same time, changing demographics are bringing white Anglo-Saxons closer to minority status. That trend, plus increased emphasis on the global economy, requires greater cultural awareness from executives. . . .”).

221. As Ehrenreich has noted, this process by which oppressed and marginalized groups are heard will not be conflict-free:

In summary, given that any action by one group produces some sort of harm to others, the ideal of a pluralistic coexistence of all groups is unrealistic, especially within existing social arrangements. Neither the principle of tolerance for diversity nor the concept of societal consensus can provide neutral grounds upon which to resolve cases, for choices among conflicting groups cannot be avoided. . . .

Conflict may be inevitable, under current conditions, but that does not mean that progress is impossible.

Ehrenreich, *supra* note 93, at 1224-25.

222. See generally Symposium, *supra* note 169. Also consider Michelman’s hypotheses:

By so situating ourselves, or our community, in a particular history, we supply ourselves with the objective or cognitive element required for ethical choice. Narrative is a tool of self-knowledge, practical reason, self-government, and positive freedom.

the Monistic dialect of color have taken a pragmatic approach to the issue of the state of people of color in our society that is centered in the past yet looks to the placement of the individual in the present and future societies.²²³ In a related way, through the use of narrative and storytelling, critical race theorists who speak in the Monistic dialect are engaged in the process of redefining their ethical identities to embrace race-conscious perspectives. And finally, the dialogic community embraced by communitarianism is inclusive rather than adversarial. Its method is to allow all to speak, and its vision of society is one in which all members are included in the community and all voices are heard.

CONCLUSION: A CALL FOR CLOSURE

I have articulated my belief that the issue presented by the conflicting positions of Carter and Kennedy, on the one hand, and those who have been conscious proponents of the voice of color, on the other, is indicative of a much larger issue: how one views society and the individual's role within that society. What is exciting is that the debate addressed herein has the potential to illuminate a much more comprehensive debate—a theoretical debate, the outcome of which is deeper understanding of the perspective of those whose interests have thus far been subordinated.

By expanding communalism to address the communitarian aspects that I contend are inherent in its notion of responsibility, I have attempted to situate the Monistic dialect of the voice of color within the appropriate communitarian framework. By expanding the debate over the existence of the voice of color to address its grounding in political ideology, I have implicitly assumed something that I have expressly addressed elsewhere: that the voice of color exists, that it is diverse, and that it is capable of articulation in differing theoretical forms.

Indeed, the development and evolution of Critical Race Theory and the concomitant emphasis on race consciousness during the last score of years lends considerable support to the existence of a voice of color.²²⁴ Consequently, notwithstanding the publication of Kennedy's article, my *Reply*, this Article,

Michelman, *Traces of Self Government*, *supra* note 201, at 64.

223. This approach has been explained by Michelman:

Pragmatism looks to shared experience to produce intermediate premises, which although local, provisional, and relative to situation, may be normatively sufficient for the occasion. Pragmatism is congenial with the understanding of practical reason as "mediating" between general principles and particular problematic situations. It suggests that our pasts—understood not as closed traditions but as experiences that orient or "shape" our current situations and directions of change—may provide the resources of self-recognition, necessary for normative guidance and validation. Closely related is the idea of what might be called trajectorial self-definition (of individuals and communities) through narration—that is, through integrative reconstruction of personal or social pasts as "stories" that define ethical identities (or characters) "thick" enough to guide current choice.

Michelman, *Traces of Self Government*, *supra* note 201, at 31-32 (footnotes omitted).

224. See, e.g., Peller, *supra* note 41, at 758.

and Professor Carter's observations in his companion article,²²⁵ I contend that the debate over the *existence* of the voice of color has concluded.

EPILOGUE

One issue remains—an issue that has largely gone unaddressed in the literature: Where do we go from here? Proving the existence of voice or Critical Race Theory means very little if the voice and the theory are viewed simply as descriptive manifestations of different experiences. The key issue, of course, is to what end are the voice and Critical Race Theory employed? I believe that most, if not all, proponents of voice and Critical Race Theory would contend that their exposition of shared insight is motivated by a desire to improve the plight of people of color in our society, and in so doing, improving society.

To that end, however, both the voice of color and Critical Race Theory can benefit immeasurably by undertaking two related tasks. First, as indicated and addressed previously, much can be learned from a comparison of Critical Race Theory and Feminist Theory. I have barely scratched the surface. Further exploration of both theories must be undertaken to explore common ground and to explain salient differences. At some point, I imagine, the issue that must be confronted is whether the two theories which focus on the dominated in our society are compatible or incompatible.²²⁶ The answer will illuminate important ways in which the dominated in our society view each other.

Moreover, although I have attempted to briefly sketch my notion that proponents of the voice of color have a communitarian perspective implicit in the exposition of their work and the ideals upon which they are based, further exploration and study of both political and moral theory is warranted by those utilizing the voice of color and Critical Race Theory. First, however, scholars must question how they are divided before completely rejecting the substance of each other's ideas. My feeling is that our differences are basically theoretical and that our dialogue will be enriched if we do not confine ourselves in theoret-

225. See Carter, *Academic Tenure and "White Male" Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065 (1991).

226. This perhaps is simply a restatement of the question often raised by Black feminists and others with respect to the plight of Black women: "Are Black women discriminated against in our society because they are women or because they are Black?" The easy answer today is both, but the troubling question is can we construct a world when discrimination based on only one of those attributes—color or gender—is acceptable to proponents of either Critical Feminist Theory or Critical Race Theory, respectively? If the answer is no, as well it should be, then I contend that there should be very little difference in the positions and ideals of Critical Race Theorists and Critical Feminist Theorists. As one Black woman put it:

I am a double minority, black and female, and it cuts both ways. Even when I am accepted as a black, I have to fight the female portion. If you're a female, you've got to be able to prove that once a month you're not going to go down the drain, that you're able to hold your own. And that's true within the race and outside the race.

Matory, *Lifting As They Climb* (Book Review), 1 RECONSTRUCTION No. 1, 1990, at 2, 3 (quoting NAACP lobbyist Althea Simmons in a review of B. LANKER, *I DREAM A WORLD* (B. Summers ed. 1989)); see also MacKinnon, *Reflections on Sex Equality*, *supra* note 69, at 1291.

ical straightjackets. Second, in order to fully realize the benefits to be achieved by expressing our ideas, we must place them within a somewhat larger theoretical framework. Critical Race Theory will reach its full exposition—its apogee—only if viewed and explored as a vision of what our society ought to be, and not simply as a focus for debate regarding its existence.

Finally, these seemingly two diametrically opposed variations of voice—the individualistic Hierarchical Majoritarian and the communalistic Monistic dialects of voice—should be recognized as different approaches for achieving a common objective: the eradication of racial prejudice, injustice, and inequality—the state of being dominated—in the academy and society. It is our differences that strengthen us in our quest to achieve this common objective. If we lose sight of this common objective and engage in vitriolic debate concerning which viewpoint is “correct,” we will then let our differences divide us, and our shared objective will never be realized.

