

## RESPONSE

### **THE CONSTITUTION HAS NEVER RECOGNIZED US AS FULL PERSONS: OR TO WHAT POLITICS ARE OUR “PROTECTIONS” RETURNING?**

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The title of this essay, “The Constitution Has Never Recognized Us as Full Persons: Or to What Politics are Our ‘Protections’ Returning?” highlights the way that the law and politics are always intertwined, preventing any legal refuge for minoritized communities because the law does not recognize us as full persons, and thus deserving of such protections from politics.

I am not a legal scholar, I am a Black queer ethnographer who examines Black LGBTQ community formations, so I am coming from this perspective. In my response to Marc Spindelman’s very insightful paper in which he calls for us to think with critical precision about what is on the horizon for LGBTQ rights and what to do about it,<sup>1</sup> I want to highlight two central themes: first I want to briefly emphasize my pessimistic view on the future of the law and LGBTQ rights and call for a reframing of this conversation all together. I suggest that we start from the understanding/position that the Constitution, and by extension the law, is a political document and thus there is no realm of the Constitution, the law, which is impervious to politics. At least this is the case regarding the ways that the law is experienced by the communities that I work with and on whose behalf I advocate. Since we are not recognized as full persons,

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1. Marc Spindelman, *The New Intersectional and Anti-Racist LGBTQIA+ Politics: Some Thoughts on the Path Ahead*, 15 CONLAWNOW 1 (2023).

we do not see the law as this refuge or as particularly offering a sphere of impartial protections.

The second point that I want to make is that instead of seeking recognition as full persons in the law and looking to a political document, the Constitution, for refuge from politics, I suggest that we instead focus on and lean into our cultures and create forms of mutual recognition within our community formations that will help us survive and thrive in this current moment and the future. We should not focus so much on and accept the misrecognition that will continue to be the only thing that this White Christian nationalist and heteropatriarchal Settler Colony will offer us.

I will admit I am in a politically bad mood; I am furious and sad; I am frustrated with not only the violence that is constantly visited upon Black people, LGBTQ people of color, especially Black LGBTQ people, women, and birthing people, but also how this violence gets framed by corporate media as culture wars. What is branded as culture wars are really about the political economy. Cultural politics and the political economy operate in tandem although they are constantly cast as operating in separate domains. The so-called cultural issues of abortion, gun violence, and LGBTQ people (particularly the attack on trans's rights and reproductive and bodily autonomy) distract from the aim of advancing and deepening the severe exploitation and extraction of gendered and racialized capitalism and neoliberalism. As African American historian Clarence Lang argues in *Black America in the Shadow of the Sixties: Notes on the Civil Rights Movement, Neoliberalism, and Politics*, some of the characteristics of this neoliberal moment in which we find ourselves are heightened state surveillance, harassment and imprisonment of people of color, racial terrorism by white civilians, and greater class stratification,<sup>2</sup> as well as other conditions of unfreedom for minoritarian communities, including Black LGBTQ+ people. Such attacks on the rights and liberties of LGBTQ+ people of color underpin economic disparities. For instance, according to a 2021 Report published by the Williams Institute,<sup>3</sup> LGBTQ+ people of color, particularly Black LGBTQ people disproportionately suffer from homelessness, food insecurity, poverty, mental illness, criminalization, and death. The aim is to lock out of, or marginalize within, the labor force and the political economy,

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2. CLARENCE LANG, *BLACK AMERICA IN THE SHADOW OF THE SIXTIES: NOTES ON THE CIVIL RIGHTS MOVEMENT, NEOLIBERALISM, AND POLITICS* xi (2015).

3. Soon Kyu Choi, Bianca D.M. Wilson & Christy Mallory, *Black LGBT Adults in the U.S.: LGBT Well-Being at the Intersection of Race*, Williams Institute (Jan. 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Black-SES-Jan-2021.pdf>.

women and people who give birth, LGBTQ+ people, especially people of color to maintain the deep racial, gender, sexual, and social inequities that structure this society. Thus, these culture wars are designed to produce and reproduce crisis and trauma to distract from what Queer historian Lisa Duggan calls, the upward distribution of wealth and resources that creates gross wealth and income disparities and poverty.<sup>4</sup> The U.S. Settler Colonial project has a constitution that does not recognize us a full persons and never will; therefore, all rights and protections (particularly rights to privacy) are always already political and thus precarious in order to maintain this dystopic status quo. Despite the global mythology that this U.S. Settler Colony is a constitutional racial democracy there is no realm of privacy that is “protected” from and uninfluenced by intersectional politics.

I have no confidence in the legal frameworks that govern our society because it is a Settler Colony. The constitution was designed by and for “white” propertied men, and they recognized themselves as belonging to the category of full person, only. Notwithstanding the 13th, 14th, 15th, and 19th Amendments, I see no change in the underpinning logics of the constitution or the legal frameworks that govern this society, and from my perspective, it is always political. However, I do have confidence in Black LGBTQ community formations, and I believe in the possibilities of a multi-racial, gender, sexual, and bodily inclusive collectivity to engage and transform politics, one that creates different forms of recognition.

In my Intersectionality class, my students and I were discussing the readings from a unit called “Interrogating Racial Whiteness.” Some of the works we read are Cheryl Harris’s *Whiteness as Property* and George Lipsitz’s *The Possessive Investment in Whiteness*. During the same class meeting we started our discussion of the readings for the unit “Biopolitics, Disability, and Reproductive Justice.” During this discussion, many of the students highlighted the logics of colorblindness, the logics that Professor Spindelman observes in his analysis of the Affirmative Action case now before the U.S. Supreme Court. We are witnessing the color-blindness logics sweep through and underpin a range of attacks on the civil rights gains such as antidiscrimination laws in hiring and college/university admissions. Affirmative Action is meant to level the playing field and address the historical and current forms of white and male privilege that impact hiring, employment, and admissions practices in all public and private institutions in U.S. society. For example, White Affirmative

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4. LISA DUGGAN, *THE TWILIGHT OF EQUALITY? NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY* (2012).

Action has resulted in a professoriate in the U.S. academy of full-time faculty that is 66% white (39% white men and 35% white women).<sup>5</sup>

I asked my class to think back to the first few weeks of class during which we screened *Created Equal* (an episode on the 14th amendment) and *Race the Power of an Illusion*, and we read an essay by Sylvia Wynter<sup>6</sup> called “No Humans Involved.” We also discussed Black Feminist philosopher Kristi Dotson’s argument that Kimberlé Crenshaw’s Intersectionality is a theory of disappearance,<sup>7</sup> that intersectionality, as an intellectual kin to critical race theory, shines a light on the disappearing of women of color and their experiences in the law therefore denying them legal redress for intersectional discrimination and oppression. This class discussion culminated with me articulating one of my central arguments in this class: The U.S. is a Settler Colony (we live in a Neo-colonial moment); it is a White Christian Nationalist heteropatriarchal racial State, whose constitution has never recognized Black people, women, indigenous people, other people of color, and LGBTQ+ people as full persons; and it never will. And one of my students asked me, and I paraphrase, what do we do about this conundrum and my response was/is that we must tear it down and start anew.

Why have I come to this conclusion? While I agree with Professor Spindelman’s trenchant critique of the current constitutional and legal landscape for LGBTQ+ people, I suggest that this discussion needs to be reframed in a way that would deny the impartial legitimacy of the constitution, the law, and the U.S. Supreme Court precisely because of what he observes. As Spindelman highlights in his paper:

Oral arguments in these [Affirmative Action] cases indicated the Court’s conservative majority will likely offer at least in part an originalist account for declaring that what remains of affirmative action in higher education is forbidden by the Fourteenth Amendment’s racial color-blindness obligations and by federal anti-discrimination law rules keyed to them.<sup>8</sup>

The originalist account is a disavowal of the full personhood of non-white people and the legacies of and current racism/white supremacist policies

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5. Characteristics of Postsecondary Faculty, National Center for Education Statistics, U.S. Department of Education, Institute of Education Sciences (May 2022), <https://nces.ed.gov/programs/coe/indicator/csc>.

6. Sylvia Wynter, *No Humans Involved: An Open Letter to My Colleagues*, 1 FORUM N.H.I: KNOWLEDGE FOR THE 21ST C. 1 (1994).

7. Kristi Dotson, “Mapping the Intersections: On How Not to Critique Kimberlé Crenshaw’s Intersectionality,” unpublished paper (on file with author).

8. Spindelman, *supra* note 1, at 4.

against people of color, women, and LGBTQ+ people because none of these groups were recognized as full persons in the Constitution and since the U.S. is, as Kristi Dodson argues, a Settler Colonial project *in process*, the law is a critical site through which the Settler Colonial project is to be fully achieved.<sup>9</sup> Therefore, the conservative justices, who constitute the majority on the Supreme Court, do not recognize, legally, as full persons those other than white cishetero men, even though they are not all cishetero men themselves. And again, this is not a return of racial, gender, and sexual equity, equality, and rights to politics; rather, they are always already political because seizing and maintaining power—advancing the settler colonial project—in process—is the goal. The settler colonial project is a political one, and so are its conservative, and in some cases, its liberal interpretations.

Part of the myth that the U.S. promotes is that it is a constitutional democracy and that there is a domain that the constitution occupies that is outside of or impervious to politics, that LGBTQ+ rights to intimacy, marriage, family, and civic life are, as Professor Spindelman suggests, threatened to be “returned to politics.”<sup>10</sup> These constitutional rights are all bound up in politics and there is no realm for non-heteronormative gender and sexual formations that are not about sexual politics. Following queer legal scholar Teemu Ruskola’s<sup>11</sup> caution about Justice Kennedy’s majority opinion in the 2003 *Lawrence v. Texas* case, it is not pro-queer; rather, it is pro-homonormative gay, read as white, middle and upper class, and privileged, and “homosex-normative” (i.e., monogamous sex; sex with one person at a time, all the time; sex within the home; sex with condoms; and HIV negative sex).<sup>12</sup> This is sexual politics *par excellence*. Following scholars like Dean Spade, Cathy Cohen, and others, while keeping an eye on the legal struggles, I suggest that we turn our energies toward community formations and different forms of recognition and social support. Since the State and the law will not deliver the rights and protections to us because we are not recognized as full persons, we need to build, support, and engage forms of recognition from and on the ground.

Let me close by discussing my work with the Ballroom community which is a Black and Latinx LGBTQ+ cultural formation, which creates,

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9. Kristi Dotson, *On the Way to Settler Decolonization*, 14 ALTERNATIVE: INT’L J. OF INDIGENOUS PEOPLES 190 (2018).

10. Spindelman, *supra* note 1, at 2.

11. Teemu Ruskola, *Gay Rights Versus Queer Theory: What is Left of Sodomy After Lawrence v. Texas?* 23 SOCIAL TEXT 238 (2005).

12. Marlon M. Bailey, *Black Gay Men’s Sexual Health and the Means of Pleasure in the Age of AIDS*, AIDS AND THE DISTRIBUTION OF CRISIS (Jih Fei Cheng, Alexandra Juhasz & Nishant Shahani eds. 2020)

promotes, and affirms forms of gender and sexuality, family, and community for its queer members that go unrecognized and are under attack by the law, no doubt. This community also collaborates with community-based organizations to provide support and care for people who are experiencing homelessness, food insecurity, depression and other forms of marginalization and dispossession.

The increased popularity of Ballroom culture offers needed exposure and professional opportunities for LGBT people of color, particularly Black queer people. However, there is a downside to Ballroom's expansion throughout the globe. The culture has become vulnerable to appropriation. The Black and Latinx communities who created this cultural phenomenon have not gained the recognition they deserve. As white LGBT and heterosexual communities engage and appropriate Ballroom cultural practices throughout the globe, the racism/white supremacy, homophobia, and transphobia that Black and Latinx LGBT communities face, daily, get lost. Yet these experiences are very much part of the Ballroom story. I suggest that we draw from and work with Ballroom communities, recognizing and acknowledging the context out of which the culture emerged sixty years ago and collaborate with the community through not only research, but conceptualizing, modeling, and reimagining Care for LGBTQ communities of color. While I have confidence in community recognition over State recognition, over the constitution and the legal systems in the U.S., I believe that we need to take heed to the critical issues that Professor Spindelman raises about the consequences for communities and movements concerned about race, gender, and sexual equity, anti-racism and anti-homophobia, and the protection of reproductive rights and autonomy. We need to forge communities through coalition, and we also need to lean into the realm of cultural politics because that is where the law is and has always been about a political struggle over personhood.