

THE WOODY ALLEN BLUES: "IDENTITY
POLITICS," RACE, AND THE LAW

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I. BLUES

[T]he blues [is defined by a standard dictionary] as a "song of American Negro origin, that is marked by the frequent occurrence of blue notes and that takes the basic form . . . of a 12-bar chorus consisting of a 3-line stanza, with the second line repeating the first." . . . [However,] I might prefer to define them as musical melanin, pentatonic cargo imported to America from West Africa, with shiploads of slaves.¹

Woody Allen² has always been my favorite film maker. I identify with his angst and his humor—and, if I have to admit it, with his fight to make

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1. FRANCIS DAVIS, *THE HISTORY OF THE BLUES* 4 (1995) (alteration in original) (citation omitted).

2. I started writing this Essay long before the publicized dispute between Mr. Allen and Mia Farrow, his long time companion and mother of his only natural-born child. Nothing in this paper is meant to implicate the concerns and allegations in *MIA FARROW, WHAT FALLS AWAY: A MEMOIR* (1997). I am talking, instead, about the public use of race in Mr. Allen's movies. It is worth noting that I have neither met Mr. Allen nor discussed these issues with him.

homeliness chic. However, at least in the 70s and 80s, Allen failed to include any black people as serious characters in his movies, which took me aback. In the world described by Woody Allen's movies, there are no "real"³ black people.

I can understand not including "real" black people in scenes of intimate family get-togethers, but when a movie called *Manhattan*⁴ has no black people, one is mystified.⁵ I know from his public history and his humor that Woody Allen is concerned about racial issues and is opposed to racism. He has spoken out consistently against the kind of racial politics that dominates public life at the end of the twentieth century, and though I have never met him, I believe that he genuinely would like to see the demise of race and racism in our body politic.

How do you explain the absence of real black people in a large corpus of his cinematic work? The answer that I have come to is a liberal response that reflects my own and slightly older generations. When problems are too difficult, we ignore them and hope they will go away. I think Allen excludes black people from his movies because he is afraid that including them would create the stereotypic characterizations that were the only representations of black people when he became a film maker and are still prevalent today.⁶ I interpret this response of exclusion and denial, what I call the "Woody Allen Blues," to be an outgrowth of the liberal establishment's inability to deal with race and identity. I think Allen would say, "If I leave black characters out of my movies I will not be part of the racist structure created by movies and television programs from *Birth of a Nation*⁷ to *Amos and Andy*."

I want to make the argument that we hear this kind of response about race, class, and identity all the time in our legal culture. "If black people were not so caught up in their racial identity, racism would go away."⁸ "I

3. By "real," I mean a serious character within the main plot of a movie. Allen has included a few black people in the background of his movies, and has occasionally talked about race relations, but he has failed to include black people as main characters in his films. Allen has never explored black characters in the ways that he has explored Jewish and Italian characters. *See, e.g.*, *BROADWAY DANNY ROSE* (Orion 1984) (featuring Allen as a Jewish theatrical agent and Mia Farrow as a Mafia widow). Woody Allen may think that black characters could hurt the monetary value of his movies or he may have a myriad of other reasons for not featuring them.

4. *MANHATTAN* (Orion 1979). *Cf.* *DECONSTRUCTING HARRY* (New Line 1997) (featuring a black prostitute, with little depth, as a chief character) (discussed *infra* Part VI).

5. I do not mean to take a position on the controversy generated by August Wilson calling for a black theater and questioning the use of black actors in "nonblack" roles. This controversy was joined by Henry Louis Gates in the pages of the *New Yorker*. As far as I can tell, Allen does not use white actors to create "black" roles, or black actors to create "white" roles.

6. One only has to watch an episode of the television show *Martin* to see that these stereotypes still exist and that they are not limited to mainly white casts.

7. *BIRTH OF A NATION* (Epoch Production Corp. 1915).

8. The most recent example of this response by a law professor is the article written by

don't want to know a person's sexual orientation; if they simply kept it to themselves, I wouldn't have to deal with it."⁹ "Feminists always see the woman's question in legal problems, but that means they are not cognizant of the larger human question." These are all efforts to silence the question of identity in legal and other social situations. These efforts can be characterized simply as an attack on "identity politics." This Essay is intended to show the inherent nonsense of dismissing "identity politics" as unimportant to understanding the law and doing justice. Such dismissal is a form of the "Woody Allen Blues." I am not making the claim that this effort to dismiss the importance of identity by calling it "identity politics," at least in the nonracist academic circles, is part of some simple notion of racism or homophobia or anti-poor animus. I want to deal with the renewed effort inside the legal academy and in courtrooms to suppress identity and to pose a series of questions about the efficacy and justice associated with doing so. I will end by describing how, in the one area where "identity politics" is not very important, we have the least possibility of creating legal and social change (and that area is class differences).

The legal six-line chorus that gets repeated by the "Woody Allen Blues" is that if we do not speak of race, then racism does not exist. This line of legal music is repeated as we eliminate racism from legal and social settings by eliminating race. The discordant notes you shall read next are my view that this siren song of American culture is wrong-headed.

I would like to add that not all of the individuals who will be discussed here fall into the most egregious forms of the "Woody Allen Blues." To be sure, many have thought and written about the issue of the Constitution in powerful and important ways.¹⁰ However, I want to raise the question among those who share my concern with the racial politics of the country—a belief in a notion of community, citizen and law—that may unintentionally leave out the real lives of the people involved. The problem is that despite our best efforts, there are no black people inside our definitions of citizenship. I believe that the category of whether

Jeffrey Rosen in the *New Republic* attributing the Simpson verdict to Critical Race Theorists. See Jeffrey Rosen, *The Bloods and the Crits: O.J. Simpson, Criminal Race Theory, the Law, and the Triumph of Color in America*, *NEW REPUBLIC*, Dec. 9, 1996, at 27. We took the genie of race out of the bottle. This view is simply another effort to kill the messenger.

9. See, e.g., Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 *UCLA L. REV.* 263, 358 (1995) ("The other side of this coin is that many Americans who self-identify as heterosexual do not seem troubled by working with people whom they identify as gay so long as the subject of sexual orientation never comes into sharp focus. By act of Congress, staying in the closet is now an explicit condition of employment for gay and lesbian members of the armed forces: We won't ask, but if you tell, you're gone.")

10. I think here particularly of Kenneth Karst who has made important contributions to trying to eliminate discrimination over a long history. See generally KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989).

citizen—meant to be or not—is defined in terms of the white male dominated majority. When we speak of an American identity definitionally, we cannot describe in law and social policy such an identity in a way that includes the “other.” I am going to talk most directly about this concern with respect to race, but it applies to gender and sexual orientation as well.

Some critics of identity have argued that the identity concerns of race, gender, and sexual orientation are arbitrary and that we miss important other identities that construct and control people’s lives. Where is the investigation of the so called “trailer trash” who live in double-wides and who are limited by perceptions of their moral and economic insufficiency? By definition, there is an infinite number of ways to organize our interrogation of society. Those of us worried about connecting our politics to identity issues do not claim that these are the only concerns. Some of us are also Republicans, Democrats, Independents, conservatives, liberals, and radicals. A few of us may even live in double-wides as blacks, gays, lesbians, bisexuals, or poor people. The claimed need to engage in some form of identity politics is not a claim of exclusivity. All of us have multiple identities and belong to multiple communities. The reason that we are concerned with issues of race, gender, and sexual orientation is that at this point in American society, these identity concerns are central to much of the oppression that needs to be changed.

II. “IDENTITY POLITICS” AND RACE AT THE END OF THE TWENTIETH CENTURY

Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. . . . *To pursue the concept of racial entitlement*—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.¹¹

[E]qual citizenship as a principle of law—a substantive principle, not one of disembodied formality—looks toward allowing all persons, including nonconformists, the freedom to define themselves Under this principle’s regime, . . . government must protect both self-identification and the

11. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (emphasis added).

refusal to self-identify, both expression and non-expression, over the widest range of identities or non-identities. In sum, . . . ethnic politics often treats individuals as cardboard cutouts, equal citizenship allows people to be their own selves, whole and complex, to name their own realities; where ethnic-style politics tends to value group loyalty over diversity, equal citizenship offers opportunities to be differently different.¹²

Liberal theorists have a difficult time dealing with the issue of identity. Traditional legal and political theory thinks of identity in two ways. One way is to see identity as a product of a particular community or ethnic conglomeration. The other way is to see identity as a product of individual choice. For traditional liberal theorists, the individual is only totally free if she is completely autonomous. Freedom stems from the ability to pick and choose and to create an individual life free of commitments to either a particular community or identity.¹³ Inside this standard liberal theory, the only place for identity connected to an ethnic, racial, or sexual orientation community is as a form of imposing power on others. In this view, for liberal theory to speak about the importance of identity and to claim an identity that is different from some common identity is to fall subject to ethnic, gender, racial or sexual orientation imperialism. The community-connected identity sees its creation as a product of the collective, while individual identity sees itself as a product of individual choice. The problem is, of course, that real identity does not fit neatly into either category. Individual identity cannot explain how or why individuals might choose to be part of a community for some, but not all, purposes. Why do people have a sense of identity that does not necessarily develop from traditional communities, but rather from race, gender, or sexual orientation? Unmodified community identity cannot explain where individual choices come from. If people have to choose from social artifacts of ethnic or racial communities in order to create free choices, where do those choices come from? If there is no black community, how does jazz or blues exist? Many cultural artifacts draw strength from their connection to community; when that connection is lost, the artifact may exist, but it may lose or even gain something.¹⁴ Many of the choices made by the cosmopolitan individual come from ethnic communities. Therefore,

12. Karst, *supra* note 9, at 366.

13. See generally Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REF. 751 (1992).

14. Let me be quite clear here. I do not mean to suggest that, for example, only black people can sing the blues or play jazz. I do mean to say that when those who do join in do so out of the context of the communities that developed those artistic expressions, the art changes. This may be for the better or the worse, but the art changes and that change is never either superior or inferior.

neither approach can explain how to create and sustain identity.

This confusion, in theory, shows up in constitutional practice. To think of the issue of identity in constitutional terms is to be lost in issues of the race, gender, and sexual orientation of people who claim constitutional protection. Drawing on the language found in footnote four of *United States v. Carolene Products*,¹⁵ which interpreted the Equal Protection Clause of the Fourteenth Amendment,¹⁶ courts have provided some meaningful protections for people who are African-American, Mexican-American, Asian, gay, lesbian or female.¹⁷ As Kenneth Karst has pointed out, the requirement that people demonstrate that they are a suspect class in order to get constitutional protection under strict scrutiny has a number of disturbing connotations. As the Court's recent jurisprudence suggests, the notion that a government classification is suspect can be turned around into a question of whether the class at issue warrants suspect status.¹⁸

The problem for African-Americans in the constitutional jurisprudential ferment is that often when they want to claim a racial identity, the law ignores them. For example when police officers use race to stop a suspect on the highway,¹⁹ border guards inspect a person at the border because of race,²⁰ or an African American or Latino seeks admission to a jury, courts have consistently concluded that the racial identity of the person stopped, frisked, inspected, and excluded, does not apply outside of a prohibition on the actor from stating that they are doing so because of the person's race.

15. 304 U.S. 144, 152 n.4 (1938).

16. U.S. CONST. amend. XIV, § 1 (providing that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws").

17. See Karst, *supra* note 9, at 325.

18. See *id.* at 325-26.

19. See, e.g., Joseph Neff & Pat Stith, *Highway Drug Unit Focuses on Blacks*, THE NEWS AND OBSERVER, July 28, 1996, at A1.

A select North Carolina Highway Patrol team, assigned to intercept illegal drugs on Interstates 95 and 85, charged black male drivers at nearly twice the rate of other troopers working the same roads. . . . In 1995, the Special Emphasis Team searched 3,501 vehicles and found drugs in 210—about one in every 17 vehicles searched. Cardwell [head of the western North Carolina's special team] says he's satisfied with the 1-in-17 payoff. "You may have had 17 cars searched where drugs are only found one time," he said. "But that's not to say that that person who didn't have it wasn't involved."

Id.

20. For example, the border check on Interstate 5 between San Diego and Los Angeles is, as far as I can tell, simply a racial test of whether you look Mexican or not. Cf. Robert S. Chang, *A Meditation on Borders*, in THE NEW NATIVISM (Juan Perea ed. 1996) (discussing the Interstate 5 border check). As Professor Chang points out, the border is not limited to the Rio Grande but applies to any international port of entry and includes all international airports, as well as the surrounding countryside—or city or suburban area—within 200 miles of those facilities.

The last comment is a slight exaggeration. Some courts have been willing to say that if there is no other explanation for a sustained pattern of race-connected decisions, they will find that this amounts to racial or gender discrimination.²¹ But the courts' rulings in racial discrimination challenges to juries and police treatment of suspects do not provide real protection for the rights of African-Americans and other people of color so as to ensure their right to participate in the legal process. The individual excluded, frisked, searched and arrested is being treated like any other person traveling on a highway in a Lexus, crossing the many borders of the United States, or serving in a jury pool. There is an American identity that we are all entitled to, but it applies differently to blacks or Latinos in those circumstances. The courts have been known to ignore the racial identity of white people who challenge the right to create African-American communities.²² Evidently, racial communities are the only communities that need not be respected.²³ African-Americans are required to adopt a racial identity in the cases involving redistricting even when they claim they are not black—just communities. Evidently, for a majority on the current Supreme Court, black people are also the only ones who cannot seek political power through their vote. In a state like North Carolina, where black voters are reliable Democratic voters ninety-five percent of the time, it is the Court that is treating the community that makes up North Carolina's Twelfth Congressional District as a "black" one, and not a

21. My favorite case in this area is *United States v. Uwaezhoke*, 995 F.2d 388, 393 (3rd Cir. 1993).

The prosecutors, at the time they exercised the peremptory challenge, knew that Ms. Lucas was a single parent of two children who was making the salary of a postal worker with four years of seniority and renting an apartment in Newark, New Jersey. It is, we believe, fair to infer that the prosecutors, in the absence of any more detailed information concerning Ms. Lucas, speculated that she might live in low income housing in Newark. Having so speculated, the prosecutors inferred that Ms. Lucas was more likely to have had direct exposure to drug trafficking than someone who did not live in low-income housing in Newark. While this conclusion may or may not be empirically correct, we cannot say that it exhibits racially discriminatory intent as a matter of law.

Id.

22. The five plaintiffs in *Shaw v. Reno* did not claim to be white. See *Shaw v. Reno*, 509 U.S. 630, 641 (1993) ("An understanding of the nature of appellants' claim is critical to our resolution of the case. In their complaint, appellants did not claim that the General Assembly's reapportionment plan unconstitutionally 'diluted' white voting strength. They did not even claim to be white. Rather, appellants' complaint alleged that the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a 'colorblind' electoral process.").

23. Compare *Shaw*, 509 U.S. at 630, with *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C.), *aff'd*, 506 U.S. 801 (1992) (affirming the district court's judgement without opinion).

political one. While I write this as a member of that community, I do not deny the “blackness” of that community²⁴ in asserting my belief that the community is political. The court cannot understand that a community might have both a political and a racial identity. Identity is exclusionary and singular. There are reasons buried in the history of the politics of North Carolina why black people vote ninety-five percent Democratic.²⁵ The problem is that white people never have an identity no matter how much it oppresses black people.²⁶ Similarly, there are historical reasons why a majority of the Supreme Court can only see North Carolina’s Twelfth Congressional District, located along the major road of the state and the most urban district in the state, as predominately about race and not about the racism that helped to distribute black people in this pattern to begin with. Chief Justice Rehnquist said for a majority of the Court that:

We do not quarrel with the dissent’s claims that, in shaping District 12, the State effectuated its interest in creating one rural and one urban district, and that partisan politicking was actively at work in the districting process. That the legislature addressed these interests does not in any way refute the fact that race was the legislature’s predominant consideration. *Race was the criterion that, in the State’s view, could not be compromised; respecting communities of interest and protecting Democratic incumbents came into play only after the race-based decision had been made.*²⁷

The question that one could pose to Chief Justice Rehnquist is how could a state that cares about its black community not have race as the predominant factor under his analysis? The Court has adopted the interpretation that race was the only factor in the legislature’s decisions in a manner that is inconsistent with how the Court treats pretext and race in other contexts. For example, in Title VII cases, when the Court asks whether a person who meets the *McDonnell Douglas*²⁸ prima facie test has

24. Indeed, it is that blackness that could be the only explanation for why there is a cognizable harm to the plaintiffs in cases like *Shaw v. Hunt*, 861 F. Supp. 408 (1994), *rev’d*, 517 U.S. 899 (1996).

25. Black people may be unwise in making such choices, but they are the only people not permitted to do so. As I understand the court’s jurisprudence, if a group of largely white tobacco farmers demanded a district represented by a conservative tobacco-defending Democrat representative, they are “just” a political group and not a racial group.

26. *See, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (declaring Tuskegee, a gerrymander, unconstitutional). *Gomillion* is not a contrary example because Tuskegee sought to exclude blacks from being able to participate in the municipal process, and probably excluded them from the benefits of municipal structures. *See id.*

27. *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (emphasis added).

28. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

been discriminated against, the Court has decided that a pretextual answer may not be pretextual. As I understand the current majority use of racial identity, when an employer tells a falsehood in explaining why it fired, failed to promote, or otherwise discriminated against a person because of his or her race or gender, the Court will not assume that the reason why the employer lied was because of discrimination, but will assume that there may have been another reason.²⁹

One response to this question is to say that the Court might be wrong about applying strict scrutiny to redistricting cases. If strict scrutiny is applied, however, it explains the different deference to legislatures. Under our judicial scrutiny, we do treat the use of race by a state differently than we do that of an employer. However, in a world where one race votes for one party ninety-five percent of the time and it is perfectly permissible to try to protect incumbents, party division, or even to maximize the political power of a particular party, it seems odd that there is no possibility of creating a district that otherwise passes constitutional muster because race is important. The Court's interpretation is that race can be a minor influence, but when blacks become a majority, those districts become impermissibly black.

One certain proof that this definition of racial identity is unfair is that, as Justice Souter suggests, the real reason why these districts exist is that the Republican party wanted to place the black voters—who are the most reliable Democratic voters—into districts that would allow more Republicans to be elected in the other districts.³⁰ One is a little suspicious of the Bush Administration's Justice Department being so supportive of the interests of a community that didn't support them politically. It was the conjunction of a Republican administration Justice Department who allied themselves with the black communities of North Carolina to produce the impetus for multiple black districts. The Justice Department's suggestion would have threatened more incumbent Democratic congressmen because

29. On this point, see *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1399 (1997), in which Judge Posner wrote:

The true reason for the action of which the plaintiff is complaining might be something embarrassing to the employer, such as nepotism, personal friendship, the plaintiff's being a perceived threat to his superior, a mistaken evaluation, the plaintiff's being a whistleblower, the employer's antipathy to irrelevant but not statutorily protected personal characteristics, a superior officer's desire to shift blame to a hapless subordinate—conceivably a factor here—or even an invidious factor but not one outlawed by the statute under which the plaintiff is suing; or the true reason might be unknown to the employer; or there might be no reason.

30. See *Bush v. Vera*, 517 U.S. 952, 1045 (1996).

it would have made it harder to hold on to the now significantly less-Democratic districts in the rest of the state.³¹

How is it that the court can see lots of different reasons for an employer's action but will ignore the real reason when it is clearly presented to it? Standards of review will not explain this difference. My academic colleagues who agree with me that the Court is wrong in this analysis have suggested that if we simply changed the standard of review, or if we correctly applied rules of standing in these cases, our current jurisprudence could be saved.³² Certainly, the Court's current jurisprudence in the redistricting cases is frothing with external and internal conflict. I want to argue, at its heart, that it is possible to produce a fairer and more consistent system, but the issue that keeps pushing the system toward inconsistent and unfair rules is its adherence to the "Woody Allen Blues."

I do not argue that this may be the appropriate litigation strategy. Courts are non-Kuhnian institutions. Unless pushed by large societal and jurisprudential forces, inertia limits how fast and far the courts will move. Sometimes, however, it is important not to become too locked into our current paradigm to consider a jurisprudential leap to a different and better discourse. The court did this with respect to *Plessy v. Ferguson*³³ and to *Dred Scott v. Sandford*.³⁴ Unfortunately, history teaches us that it was in the wrong direction. However, the Court may have moved us in the right direction with its leaps in *Brown v. Board of Education*³⁵ and *Baker v. Carr*.³⁶ I do not claim that big changes or changes in directions always lead to better results. Law is a product of people and requires our constant attention. However, sometimes our notions of how to achieve a just society are just plain wrong. I cannot prove that our approach to race is wrong or going constantly in the wrong direction. Certainly, Leroy Clark is right that we have made some substantive improvements in the conditions of African-Americans over the last 136 years, but I am not sure that we can

31. It is no accident that the final result of this process has been in the last two congressional elections that Republicans made significant inroads on the traditionally Democratic North Carolina delegation. That delegation is now evenly divided between Democrats and Republicans, including the two black representatives from the Twelfth and the Second Districts. After the 1994 election the delegation was even more Republican, becoming majority Republican for the first time since Reconstruction.

32. See generally Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276 (1998) (arguing that the Court confuses standing jurisprudence with redistricting jurisprudence). This article is responding to an article by John Hart Ely. See John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576 (1997) (arguing that the Court has correctly applied standing jurisprudence).

33. 163 U.S. 537 (1896).

34. 60 U.S. 393 (1857).

35. 347 U.S. 483 (1954).

36. 369 U.S. 186 (1962).

be sure of the direction of future change.³⁷ We may be standing at the end of the Depression or the end of Reconstruction. It is difficult to know where we are, but it is not unreasonable to question whether we can be sure of the direction of change in racial or sexual orientation oppression.

I want to argue that at its heart, the jurisprudence of the courts and of its liberal critics share a common view of identity. Ultimately, both urge us to get beyond identity to become part of the common. This desire for a constitutional program to get over identity is part of the problem instead of being part of the solution. To get beyond race, gender, and sexual orientation in constitutional discourse is to ultimately fall prey to the "Woody Allen Blues." The concerns of the racial or sexual minority are lost inside the definition of the majority. I fear that when that is the tune of constitutional discourse we will not deal importantly with the concerns of African-Americans or hear the songs of difference.

III. ESSENTIALIST ANTI-ESSENTIALISM: "IDENTITY POLITICS" AND GENDER AND SEXUAL ORIENTATION

Your identity becomes the sole ground of politics, the sole determinant of political good and evil. Those who disagree with my "politics", then, are the enemies of my identity.³⁸

The Colorado amendment does not, to speak entirely precisely, prohibit giving favored status to people who are homosexuals; they can be favored for many reasons. . . . But it prohibits giving them favored status because of their homosexual conduct—that is, it prohibits favored status for homosexuality.³⁹

The call by Arthur Schlesinger Jr., Jean Bethke Elshtain, and several Justices of the Supreme Court for an American or universalist identity and against "identity politics" has aspects of the "Woody Allen Blues." Those most opposed to "identity politics" suggest that it is possible to create a universal identity, or more precisely, an "American" identity, free of the distortions associated with race, gender, or sexual orientation. In decrying the use of identity by the weakest groups in the political discourse, these authors, by definition, defend the right of a majority of the American polity to define the universal. The universal in these models draws its authenticity from the right and the power of the majority to define itself. The only

37. See Leroy D. Clark, *A Critique of Professor Derrick A. Bell's Thesis of the Permanence of Racism and His Strategy of Confrontation*, 73 DENV. U. L. REV. 23, 46 (1995).

38. JEAN BETHKE ELSHTAIN, *DEMOCRACY ON TRIAL* 53 (1995).

39. *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting).

alternative is a set of universal principles that define themselves. Such principles would have to be unique and omnipresent in all cultures, at all times, if there is to be no touch of the particular in their universality. Neither these authors, nor the judicial practitioners, have suggested an example of such principles. Accordingly, those who claim an identity for political purposes of changing the status quo are criticized by these universalists for being essentialists. However, their anti-essentialism does not extend to particular forms of nationalism, including Americanism, or particular forms of individualism that mask their commitment to the dominant culture.

When Jean Elshtain argues that the object of the gay civil rights movement has to be the withering away of a gay identity, she makes this anti-essential claim for heterosexual life.⁴⁰ Gay, lesbian, and bisexual people, by seeking to liberate themselves from the universal, violate the things that can not be part of the public discourse. This claim by Elshtain describes the way that the “Woody Allen Blues” constructs gay, lesbian and bisexual identity. Identity in this model is simply defined as opposition to heterosexual life. However, the reason for that opposition is destroyed by the extension of civil rights to gays and lesbians, and, therefore, the reason for a separate and disruptive identity is eliminated.⁴¹ The rest of identity is a product of private spaces. Part of the liberal ideology is a reliance on the individual to make choices. However, it is not clear what role identity plays in forming those choices. For Elshtain, Scalia, and Schlesinger, the role is negative, creating choices that are defined from the outside thereby limiting the individual. But how are individual choices created without the influence of some community? It is clear how Justices Scalia and O’Connor have a view of community from their opinions in *Shaw v. Reno*,⁴² *City of Richmond v. J.A. Croson*,⁴³ and *Romer v. Evans*.⁴⁴ For O’Connor, a community based upon race is suspect for redistricting purposes, unless the community exists for other purposes.⁴⁵ Black people cannot gather to fight their oppression under this model. In this model, black people and their communities are the problem, and the solution is a replacement of those communities by white dominated districts. Black and brown communities are essentialist, and white communities are simply a

40. See JEAN BETHKE ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT* 104 (1981).

41. See *id.*; Gary Lehring, *Essentialism and the Political Articulation of Identity*, in *PLAYING WITH FIRE: QUEER POLITICS, QUEER THEORIES* 173, 178-79 (Shane Phelan ed. 1997) (arguing that by making the personal political, gay liberationists have eliminated the category of personal and the notion of privacy from political and cultural discourse).

42. 509 U.S. 630, 642 (1993).

43. 488 U.S. 469, 476 (1989); *id.* at 735 (Scalia, J., concurring).

44. 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

45. See *Shaw*, 509 U.S. at 642.

reflection of the universal.

Similarly, Justice Scalia's description of the "homosexual" community as a politically powerful faction that is simply being chastened by the majority for its imposition of "special" rights for "homosexuals,"⁴⁶ is a description of a heterosexual community that reflects the universal. Justice Scalia's claim is that the "homosexual" community is making essentialist claims and that the universal power of the majority is, by definition, not essentialist.

Ultimately, these attacks on the identity of those who are seeking political change about what is fair and equal is an effort to prevent change. Gays, lesbians, and bisexuals have no claim to politics if individual treatment is fair. For the post-civil rights state, there can be no identity politics that is fair because fairness has already happened at the individual level.

In this model, all individual identity claims are "personal" and the personal is not regulable by the law. This is, for gays, lesbians, and people of color, an erasure of their stories and their political existence. It is the "Woody Allen Blues" sung nationally by a "special" Amen chorus—majority rules.

IV. AFTER IDENTITY POLITICS

Skinner said the South Carolina chapter of the Sons of Confederate Veterans hopes to attract its first black member, following Virginia, Texas, Tennessee, Maryland and Florida.⁴⁷

Traditional ways of eliminating identity to create the common citizenship, or the cosmopolitan person, do so by arguing that race or ethnicity (including gender and sexual orientation) influences the results in a small number of cases, and that these small number of cases should not be the driving force behind the creation of legal rules.⁴⁸ For Professor Epstein, race cannot be an influence if both parties are of the same race, and the legal rule should not be different if the parties are of different

46. See *supra* note 32 and accompanying text.

47. Lyn Riddle, *Confederate Museum; Blacks who Fought for South Honored*, THE ATLANTA CONST., Feb. 28, 1997, at 2C.

48. See Richard A. Epstein, *Legal Education and the Politics of Exclusion*, 45 STAN. L. REV. 1607, 1624-25 (1993) ("For example, assume that there is a dispute between two (or more) people of the same race or the same sex and that a rule must allocate competing legal rights between them. Now identify the rules that allow these disputes to be resolved in a fashion acceptable to both sides. Are they different from those which would be adopted in a dispute between black and white, between male and female?").

racism.⁴⁹ One response is that this approach to identity and racism produces the use of tokens. The issue of identity is addressed by the inclusion of one black person in the group or one black person who shares the view of nonblack people. If Justice Thomas agrees with me, I am free of the concern that my views may be racist, as many white academics and jurists seem to believe. If the Sons of Confederate Veterans can find one black person who will join them, then the claim that they are a racist organization or that they stand for racism is eliminated. In this model, racism is just racial essentialism. Racism has no subtlety, no volume or timbre.

This view of the law, race, and racism is at the heart of the “Woody Allen Blues,” because it is a truncated view of how race works in our society. Race influences the growth and development of many laws.⁵⁰ This should not surprise us but as long as we engage in the “Woody Allen Blues,” law cannot take cognizance of it. We are legally incapable of seeing race or racism because we have structured a law that does not permit their existence. Race can only be important in getting us to a rule that eliminates its existence. Neither racism nor race exists in this model.

This is not a minor force in the law of race. Whenever the law acknowledges the existence of racial identity, the constitutional jurisprudence has to find a way to eliminate it. So, when a Reconstruction Era Congress passes legislation to limit the ability of private parties to discriminate against African Americans, the Supreme Court has to conclude in the Civil Rights Cases that such legislation was beyond the power of Congress and unnecessary because the “states” would protect the interests of black people. Having states provide real protection would mean that the law had to acknowledge that identity and we cannot do that inside this model of race and racism.

Similarly, in striking down the ugly history of racial segregation in public education, the Court had to do so in such a way that no real progress occurred. After requiring some real change, the Court could not find the jurisprudential will to make that progress permanent by either including suburbs in the process or by continuing the process long enough to effectuate change. Even when the Supreme Court does make a notable shift in emphasis, as in the Court’s significant decision in *Griggs v. Duke Power Co.*,⁵¹ subsequent court decisions have eviscerated its power while others, like *St Mary’s Honor Center v. Hicks*,⁵² have eliminated the power of the

49. *See id.*

50. *See* Anders Walker, *Legislating Virtue: How Segregationists Disguised Racial Discrimination as Moral Reform Following Brown v. Board of Education*, 47 DUKE L.J. 399, 405-423 (1997) (showing the connection between changes in laws concerning legitimacy and marriage in order to change the status of African Americans after the *Brown* decision).

51. 401 U.S. 424 (1971).

52. 509 U.S. 502 (1993).

Court's efforts to change the status quo in the other important line of Title VII cases. It is hard to look at this history and see jurisprudential ability to create permanent progress or a commitment to racial justice.

One answer provided by my (unfortunately temporary) colleague Gerry Spann is that we should expect nothing less.⁵³ Our system allows the political majority to win and all this suggests is that when we win in the courts, other political majorities will be created to thwart it. The political majorities to limit the rights of immigrants—significantly Asian and Latino—and to eliminate affirmative action through referendums in California are just part of the political response to efforts to find racial justice.

I will concede that law can play a role in making certain political moves more difficult, but if racial groups or gays and lesbians are to protect themselves from political oppression, they must form coalitions around their oppression. These coalitions need not be exclusively identity-based, but the political history of our country suggests that identity-based support has been close to mandatory to make change possible.

There are several possible reasons for the necessity of identity-connected politics. It may be that if there is no commotion among those who share an identity, it is impossible to convince a significant majority among those not identified that wrongs exist. If black people are not complaining about social justice, why should the vast majority of white people conclude injustice is the rule rather than the exception? Why, for example, is there almost no class-based politics in the United States? Is it possible that the fact that there is very little class-based identity in our society that allows those of us in the middle and upper classes to say poverty must not be so bad? The American polity lacks a welfare rights league or a labor party seeking class-connected concerns.

Indeed, the judicial or legislative response may create rules that allow the development of identities that did not exist, and those identities may push for the implementation of the rules. Something of that nature has happened on college campuses with respect to Title IX. Women have used that regulation to force universities to shift the position of women athletes inside the university community, and some communities of women not previously seen are present on our campuses. These political responses are not identity-less aggregations.

I believe that politics is part of the solution, but I want to suggest that the elimination of the "Woody Allen Blues" is also part of the solution. If the ultimate legal question is how to get race out of the discourse, the only tune that the courts can play is one that takes race and other identity out of the discourse. It is the legal call for assimilation as the only appropriate

53. See generally GIRADEAU SPANN, *RACE AND THE COURTS* (1997).

rule that turns back efforts at racial justice. It is not bad Supreme Court Justices or ineffective counsel that stop us from having a racially just legal system, but commitment to the death of identity and its corollary: ignoring racism.

The other side of the notion of identity politics is also an issue of some misappropriation. Politics that centers on the identity of participants in legal question is frowned upon. When an oppressed social group organizes politically to fight that oppression, we can not normally say that organizing is wrong. So if that is not wrong, how can identity politics be wrong?

The answer given by its critics is that identity politics must ultimately make identity the only issue. Organizing along racial, gender, or sexual orientation community lines is wrong, because these community concerns will trump the concerns of what we hold in common. "Identity politics" is a bad phrase because it connotes narrow parochial factional concerns, and, as we learned from the Federalist papers, the danger of such factions. We have only to look at former Yugoslavia to see the dangers of identity politics. Identity politics leads to war, strife and discord. Only through the imposition of the common good can these horrors be avoided. This seems to me to be an argument that proves too much. What kind of coalition that does not draw on some community of oppression is likely to be effective in the real world. Even a call for a class-based coalition for change would be a product of a similar community. If race does not exist and therefore racial communities are suspect, poverty too is problematic in any kind of uniform way. As traditionally stated, this view of identity politics seems like a defense of the status quo. If people can not organize their concerns about the law around identities that they care about, who will be organized to alter anything?

V. CONCLUSION

[T]he ideal of a national community, embracing all our races and cultures, is one we cannot afford to abandon. To put that ideal in constitutional language that does not ask the reader to ignore history, we might say this: In the eyes of government, America has only one class of citizens.⁵⁴

A number of years ago when I was helping my current employer search for our third director of African-American Studies in approximately two years, one of the candidates described her experience in interviewing for similar jobs in all the best colleges and universities in the country. The candidate described going to a number of places and meeting the one long-

54. Karst, *supra* note 9, at 368-69.

time black professor. Often, this singular representative on campus arrived at the brunch, tea, or reception dressed in a dashiki, or African headdress. A number of these people mumbled something incoherent and left the room, not able to make contact with a person of some similar racial identity—or perhaps anyone. The candidate concluded that being on these largely white campuses had destroyed the ability of many of these people to maintain their identities.

The candidate for director of African-American Studies also remarked that sometimes, there was a slightly different group of singular black faculty. They were extremely conservative in their speech and dress, and to all visible signs, completely assimilated into the culture of these white campuses. These singular black figures, the candidate thought, were no happier in trying to come to grips with their identity and that of their campuses. As the only tenure track black faculty member at Duke University School of Law, I did not have the courage to ask which category I fell into.

Both of these responses by black faculty are inadequate. Both of these responses are the personal equivalent of adopting the "Woody Allen Blues." When the singular black professor hangs on to an identity and tries to use it as a shield against the institutional denial of her existence by wearing the outward indicia of race, she uses those affectations as real politics. This response of using racial culture as a defense, without effective political action, is personally supportive but socially unrewarding because racial identity is not part of any recognizable solution. It is in response to the call of the "Woody Allen Blues" that says to people of color that they are professors who are well tanned. This response cannot move society to where we want it to be. The opposite response of giving in to the call of the "Woody Allen Blues" is also inadequate. Assimilation has costs too, in dignity and self worth. I believe that the only transformative solution entails rejecting the "Woody Allen Blues" and requiring new and hopefully better solutions to be produced. For law, this means rejecting the seductive song of the "Woody Allen Blues" and substituting a rule of anti-subordination. This rule of anti-subordination by necessity requires the law to respect the existence of the identities of its racial and sexual minorities. This rule is not self-enforcing, but neither is the "Woody Allen Blues." Courts and legislatures play it every day, not recognizing its force or importance.

A better 12-bar chorus consisting of a 3-line stanza, with the second line repeating the first, would be one that says subordination is wrong and must be eliminated. This chorus would call for the elimination of some racial concerns, but only when they support the creation of subordination. Race is evil only when it supports subordination. When we sing the wrong blues, we do not understand why we are unhappy. Identity is not the problem, and neither is "identity politics." Whether law is part of the

solution ultimately depends on whether law produces an appropriate song.

VI. EPILOGUE

A final note—in one of Woody Allen's most recent films, *Deconstructing Harry*, there is a significant black character.⁵⁵ Unfortunately, my guess about Woody Allen's inability to deal with race is borne out by this character. She is all that racial stereotypes find in black women from the very beginning of our country. She is a prostitute who is not too bright, but very instinctual and supportive. Woody Allen lacks the ability to find real black people with real lives and depth. The question for the law is whether there is some better tune that can be sung instead of the "Woody Allen Blues" that does not fall back into recreating oppressive pasts. Unfortunately, for Woody Allen and his depiction of black people in film, the answer is apparently no. I believe the law can and should do better than Mr. Allen.

55. See *supra* note 4 and accompanying text.