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The New Voice of Color

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Alex M. Johnson, Jr.†

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† Professor of Law, University of Virginia School of Law. I thank Lynn Baker, Mary Anne Case, Michael Klarman, Jody Kraus, Daniel Ortiz, and Gary Peller for their substantive comments on earlier drafts. Any remaining faults are most likely attributable to the fact that I stubbornly did not heed all of their suggestions. Separate thanks is given to the University of Virginia Law School Foundation for its generous research support.
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EPILOGUE

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


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

However, both Kennedy's Racial Critiques and Carter's The Best Black, and Other Tales, raise an issue not addressed in my Reply: 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.

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

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{10} See Johnson, \textit{Reply in Favor of Context}, supra note 5, at 160-63.

\textsuperscript{11} See, e.g., Delgado, \textit{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, \textit{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).

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

\textsuperscript{13} See \textit{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 theHierarchical 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

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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. 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. 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." Stephen Carter of the Yale Law School likewise questions the existence and worth of voice, although he equivocates more than Kennedy.

16. See Johnson, Reply in Favor of Context, supra note 5, at 146-49.
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." 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." More importantly, Kennedy questions whether the otherwise excluded articles areworthy of citation when judged by the objective, meritocratic standard employed by his colleagues and accepted by him.

More charitably, Carter believes there may be a more benign explanation for the general lack of scholarship: 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. 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.


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 academics 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 "harm" 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.

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." 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.

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. 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. 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

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." 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. 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. 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. 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. 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.

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.


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.


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.\textsuperscript{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.\textsuperscript{36}
At base, perhaps what concerns Kennedy is the development of evaluative
scholarly norms that have the potential for creating “segregated” scholarship.\textsuperscript{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”
spiritualism: 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 \textit{The Best Black} and Kennedy in his article,
\textit{Racial Critiques of Legal Academia}, speak in the voice of color.\textsuperscript{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 character-
ized 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.\textsuperscript{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 domi-
nant cultural group.\textsuperscript{40}

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


\textsuperscript{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.

\textsuperscript{38.} See, e.g., Carter, \textit{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, \textit{Reply in Favor of Context}, supra note 5, at 164.

\textsuperscript{39.} See, e.g., Carter, \textit{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”); \textit{supra} note 1.

\textsuperscript{40.} For a discussion of “integrationist” versus “nationalist” perspectives taken by people of color, see
\textit{infra} notes 99-107 and accompanying text.
of other scholars’ work. The standard used by Kennedy\(^{41}\) 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 truth\(^{44}\)—that in this context is

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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]niversalist 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.


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).
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.

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.

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. 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 ‘perspectiveness.’” 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,
New Voice

is necessary to employ the voice of color; 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, 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. 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. 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. 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.

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.


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).


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.

Those peers serve as interpreters who possess the power to ensure successful communication of Carter’s and Kennedy’s voice by privileging it. 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. 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.

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. 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. 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.

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. Although many generalize about feminist jurisprudence...
idence 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.”

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. West’s omission of the equivalent “difference” theory of critical race theorists, which has been characterized as “liberal feminism” by one scholar who follows and adopts West’s terminology, 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. 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.


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).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.


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

\begin{itemize}
\item \textsuperscript{67} See, e.g., infra notes 97-98 and accompanying text.
\item \textsuperscript{68} See, e.g., infra notes 99-109 and accompanying text (discussion of Peller and his critique of Randall Kennedy).
\item \textsuperscript{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, \textit{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, \textit{Demarginalizing the Intersection of Race and Sex}]; Scales-Trent, \textit{Black Women and the Constitution: Finding Our Place, Asserting Our Rights}, 24 HARV. C.R.-C.L. L. REV. 9 (1989); Note, \textit{Conceptualizing Black Women's Employment Experiences}, 98 YALE L.J. 1437 (1989). MacKinnon contends that Black women are doubly prejudiced by the white male standard since they are neither white nor male:
\begin{itemize}
\item 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.
\end{itemize}

(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. 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. This view has come to be associated with the work of Professor Carol Gilligan. 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. Thus, Critical Feminist Theory easily can


[The “difference” approach . . . argues that women should be permitted to compete on equal terms with men in the public world . . . . Characteristics 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 primarily 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


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:

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


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 domina-
tion 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 method-
ological 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.
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. Mac-
Kinnon’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
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. 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. 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. Indeed, proponents of the difference strand of Critical Feminist Theory might well pay attention to issues raised by the voice of color debate, 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 misinterpret 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

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86. 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.
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

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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 31-34 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. I reject the notion of a monolithic voice of color and my conceptualization of the Monistic dialect of voice is quite different. 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.

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. Where-as "voice" theorists—critical race and feminist—want to change the debate, transform the community so that they are truly part of the integrated whole,
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
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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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.\textsuperscript{Id. at 760 (footnote omitted).}

\textsuperscript{103} \textit{Id.} at 809.

\textsuperscript{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.

\textsuperscript{Id. at 803.}

hegemony who are utilized to perpetuate the dominant/subordinate relationship.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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.\textit{Id.} at 811 (footnote omitted).

\textsuperscript{107} See, e.g., \textsc{C. MacKinnon}, \textsc{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).

\textsuperscript{108} \textit{Cf. supra notes} 73-74 & 77-78 and accompanying text.

\textsuperscript{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, \textit{supra} note 41, at 818 (footnote omitted). Peller notes a similar controversy in American feminism, \textit{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." 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. 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

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10. 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)).

11. Harris, supra note 27, at 588-89.
experience over another, thereby privileging one dialect and silencing others.

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 pressure.”

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 Yonnondio by Precedent and Evidence: The Mashpee Indian Case, 190 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.” Privileging any experience or variation of voice over any other raises the risk of silencing potentially valuable contributors. 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. 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.

1. Distinguishing Hierarchical Majoritarian 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. 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. 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{123} Pursuant to the evaluative paradigm employed by Carter and

\textsuperscript{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.”


\textsuperscript{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 . . .

\textsuperscript{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. 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. 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. 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."

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. Matsuda promotes a voice of color that draws much of its insight from the "bottom" of the community of color because

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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 387.

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.

it originates from the poorest socioeconomic class of society. 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. 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.

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. Matsuda and Delgado, 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. 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. 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.

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.
tion—have repudiated their own class-based position and status to privilege the experiential framework of the oppressed classes. By embracing a commun-
alistic experiential framework instead of an individualistic experiential frame-
work, 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.”

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. 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. 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.

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.


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.\textsuperscript{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,\textsuperscript{143} as that term has been defined by Professors Duncan Kennedy,\textsuperscript{144} J.M. Balkin,\textsuperscript{145} and others.\textsuperscript{146} The Monistic dialect seems, on the contrary, to be premised on the ideology of communalism.\textsuperscript{147}

\textsuperscript{142} Harris, supra note 27, at 586.

\textsuperscript{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).

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


\textsuperscript{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 delegitimating 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).

\textsuperscript{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. 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. Briefly, Balkin, building upon Duncan Kennedy's "two opposed rhetorical models for dealing with substantive issues"—individualism (synonomous 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.

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.\textsuperscript{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.\textsuperscript{153} Furthermore, Balkin elucidates the broader applicability of the concepts of individualism and communalism by showing that "interpretive constructions of fact are systematically connected to individualist or communalist arguments about responsibility."\textsuperscript{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.\textsuperscript{155} Most importantly, Balkin describes a manner of constructing a characterization of responsibility that is independent of the discrete issue presented.\textsuperscript{156} Thus, an individualist places blame for the injury on the victim, irrespective of the injury or the issue raised by the injury.\textsuperscript{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.

\textsuperscript{152} Balkin identifies "who is the victim" as being the source of the underlying symmetry between individualism and communalism:

\textit{Individualism 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.}

\textit{Id.} at 210-11.

\textsuperscript{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.

\textit{Id.} at 234.

\textsuperscript{154} \textit{Id.} at 211.

\textsuperscript{155} \textit{Id.} at 262.

\textsuperscript{156} \textit{Id.}

\textsuperscript{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 individualism 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.

\textit{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.\textsuperscript{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.\textsuperscript{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/Communalist

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

\textsuperscript{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, \textit{supra} note 61, at 626.

\textsuperscript{159} \textit{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 (unchal-
lenged 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 publi-
cations. 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 academia 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-

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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 51.
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.  

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 ethnicity—in the whole of society and the issue of so-called "reverse discrimination." 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. 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 systemically 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:

<table>
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<tr>
<th>Type of Diversity</th>
<th>Description</th>
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<tr>
<td>(1) Age Diversity</td>
<td>Age diversity</td>
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<tr>
<td>(2) Teacher-Scholar Diversity</td>
<td>Diversity between teachers and scholars</td>
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<td>(3) Subject Matter Diversity</td>
<td>Subject matter diversity</td>
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<tr>
<td>(4) Theory of Law Diversity</td>
<td>Diversity of orientation as between theory and practice</td>
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<td>(5) Extra-Legal Frame-Work Diversity</td>
<td>Diversity in extra-legal framework applied to legal analysis</td>
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<tr>
<td>(6) Racial, Religious, Ethnic, Gender and Sexual Orientation Diversity</td>
<td>Racial, religious, ethnic, gender and sexual orientation diversity</td>
</tr>
<tr>
<td>(7) Ideological or Political Diversity</td>
<td>Ideological or political diversity</td>
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G. Calabresi, Diversity in Faculty Hiring 2 (July 31, 1990) (unpublished manuscript on file with author) (emphasis added) (footnote omitted).


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-

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168. See supra note 23, at 1021-22 (footnote omitted).


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. 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.

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. 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.

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; Scheppel, 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 undeveloped.) 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 criticized. 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

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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].


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.\textsuperscript{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 \textit{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.\textsuperscript{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. \textit{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

\textsuperscript{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. \textit{WASHINGTON,} supra note 176, at 78.

\textsuperscript{182} See generally \textit{THE SOULS OF BLACK FOLKS,} reprinted in \textit{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." \textit{Id.} at 246. The relevance of the DuBois-Washington debate was suggested to me by Kennedy's discussion of it in \textit{Racial Critiques,} supra note 3, at 1784-85.
their ideological beliefs." 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.

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." 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. In addition, the quality of life of people of color in our society in general, as measured by economic indices, is not improving.

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 1929-30 (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. 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.

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 may 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. 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. 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.

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.

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...
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.\(^{198}\)

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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).


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

200. See, e.g., Note, supra note 195, at 682.
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 liberal 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. Instead, the individual is viewed as part of the community, simultaneously shaping the community to which he belongs and being shaped by it.

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. 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." 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
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.\textsuperscript{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 \textit{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.\textsuperscript{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.\textsuperscript{217}
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.

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
to bring one group up to another’s level of power or status, inevitably constitutes a decision that favors one group and harms another.\footnote{Id. at 1224 (footnotes omitted).}

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.\footnote{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—not nationally if current demographic trends continue. See Walsh, \textit{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, \textit{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. . . .”).}

2. \textit{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.\footnote{As Ehrenreich has noted, this process by which oppressed and marginalized groups are heard will not be conflict-free:}

\begin{quote}
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.\footnote{Ehrenreich, \textit{ supra} note 93, at 1224-25.}
\end{quote}

Further, scholars of color employing
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. 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. 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 trajectoral 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, 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. 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 theor-


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 apo-
gee—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 differ-
ences 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.