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# FROM STONEWALL TO THE SUBURBS?: TOWARD A POLITICAL ECONOMY OF SEXUALITY

Angela P. Harris\*

## INTRODUCTION

In their articles,<sup>1</sup> Carlos Ball and Sonia Katyal step back from the heat of the moment to place two recent United States court cases concerning the rights of sexual minorities — *Goodridge v. Department of Public Health*<sup>2</sup> and *Lawrence v. Texas*<sup>3</sup> — into a broader perspective. Ball takes up the dimension of time. Comparing the Massachusetts Supreme Court's decision in *Goodridge* to the U.S. Supreme Court's decision in *Brown v. Board of Education*,<sup>4</sup> he examines the phenomenon of social and legal backlash against controversial judicial opinions in the arena of civil rights, and reminds us that backlash is foreseeable, for civil rights struggle in the United States typically consists of "moments of heartening progress followed by instances of discouraging setbacks."<sup>5</sup> Katyal takes up the dimension of space, examining possible implications of the U.S. Supreme Court's decision in *Lawrence* for the civil rights struggles of sexual minorities in post-colonial nations, India in particular.

Both Ball and Katyal are cautiously optimistic. Ball wants gay rights advocates not to despair over the recent state and federal legislative backlash against same-sex marriage, but to move the struggle from the courts to the culture, in order to persuade straight Americans that prohibitions on same-sex marriage are unacceptable restrictions on equality.<sup>6</sup> Taking the long view, Ball argues that despite the current backlash, same-sex marriage advocates have won more than they have lost.<sup>7</sup> Adopting

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\* Professor, University of California – Berkeley School of Law (Boalt Hall). Big thanks to Michael Stein for including me in the conversation. Huge thanks, as well, to Tucker Culbertson, Marc Spindelman, and Frank Valdes for their thoughtful comments on an earlier version of this Article. I am indebted to Greig Crysler for introducing me to the literature of suburbia. Finally, Maya R. Rupert, Boalt '06, provided terrific research and editorial assistance. All miscalculations and mistakes, of course, remain mine.

<sup>1</sup> Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493 (2006); Sonia Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 WM. & MARY BILL RTS. J. 1429 (2006).

<sup>2</sup> 798 N.E.2d 941 (Mass. 2003).

<sup>3</sup> 539 U.S. 558 (2003).

<sup>4</sup> 347 U.S. 483 (1954).

<sup>5</sup> Ball, *supra* note 1, at 1494.

<sup>6</sup> *Id.* at 1536–38.

<sup>7</sup> *Id.* at 1494.

the intonations of the civil rights movement, he exhorts gay and lesbian activists to win the “hearts and minds of straight Americans,”<sup>8</sup> and, in the last line of his article, insists “that the backlash can be “overcome.”<sup>9</sup>

Katyal, too, speaks with hope. She points out that the *Lawrence* Court did not grant protection to a “minority,” but rather spoke in terms of privacy and liberty, principles that are broadly applicable to all persons.<sup>10</sup> For Katyal, the Court in *Lawrence* quietly moved away from the equality-based, analogical identity reasoning that gay and lesbian activists have often been pressured into — “We are just like black people! Just like straight people!” — and toward a substantive vision of sexual self-determination, which Katyal names “sexual sovereignty.”<sup>11</sup> Though Katyal acknowledges the flaws of *Lawrence* — above all its connection of sexual sovereignty to the home, a site that many feminist/queer activists and theorists view as a place of danger rather than security<sup>12</sup> — she nonetheless wishes to celebrate *Lawrence* as an anti-essentialist “triumph.”<sup>13</sup>

Both articles are rich and thought-provoking, and there is much to praise in them. I think Ball and Katyal are right to place these court decisions in a larger context of civil rights struggle across both time and space. It is appropriate, for instance, to discuss these decisions as inseparable from questions of racial subordination and post-colonial struggle.<sup>14</sup> It is also always appropriate to identify and celebrate openings of possibility and moments of hope.

Commentary necessitates critique, however, and, in my role as commentator on these papers, I mean to offer a caution — not as a substitute but as a supplement to the posture of hope and celebration. I argue that a usefully corrective lens through which to see *Brown*, *Lawrence*, and *Goodridge* is the lens of political economy. This lens enables us to see different stories with different lessons than the ones Ball and Katyal extract. From a political economy perspective, *Brown* tells a story of the role law plays in accomplishing, to use Reva Siegel’s apt phrase, “preservation-through-transformation.”<sup>15</sup> Through this lens, both *Goodridge* and *Lawrence* may be seen as

<sup>8</sup> *Id.* at 1537.

<sup>9</sup> *Id.* at 1538.

<sup>10</sup> Katyal, *supra* note 1, at 1434–35.

<sup>11</sup> *See generally id.*

<sup>12</sup> *Id.* at 1480–81.

<sup>13</sup> *Id.* at 1431.

<sup>14</sup> As Darren Hutchinson has argued, the failure to analyze gay and lesbian rights in terms of race and class constructs the gay and lesbian community as white and economically privileged. Darren Lenard Hutchinson, “*Gay Rights*” for “*Gay Whites*”? : *Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1361 (2000). Hutchinson argues instead for “[a] multidimensional analysis of heterosexism and homophobia — one that examines the various racial, class, gender, and other dimensions of gay, lesbian, bisexual, and transgendered identity and the diverse effects of heterosexism.” *Id.* I see both Ball and Katyal as attempting such a multidimensional analysis, and this Article, as well, attempts to meet Hutchinson’s challenge.

<sup>15</sup> Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Form of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997). Cf. Darren Lenard Hutchinson,

beacons of hope (as they surely are), but they can also be seen as invitations to what Andrew Sullivan calls (though to him it's a *good*, if slightly bittersweet, thing) "the end of gay culture":<sup>16</sup> the end, that is to say, of a queer movement that means anything other than the reconsolidation of preexisting relations of privilege and subordination.

In Part I, I tell a story about *Brown* from the perspective of political economy. Part I.A tells the story of how the public commitments represented by *Brown* were eventually engulfed by a suburban industrial complex marked "private." The period following World War II saw the frenzied suburbanization of the United States, underwritten by the federal government though driven by private housing developers. By subsidizing suburban development, the federal government made it possible for more Americans than ever before to own homes, substantially democratizing access to what is for most people their most substantial financial asset. But suburbanization also successfully inserted racial and class segregation into the DNA of property ownership. Because property ownership and education policy were and are so deeply intertwined, the social goal of full racial integration symbolized by the decision in *Brown* was ultimately defeated by the suburban geography of race and class segmentation.

In Part I.B, I bring the story up to the present day, arguing that the contemporary American political economy is dominated by a policy project commonly known as "neoliberalism." I begin with the observation that suburbanization yielded its own politics, a politics of family, consumption, and property values that was both exclusionary and sentimental. Beginning in the late 1960s, and reaching a consolidation of sorts in the 1980 election of Ronald Reagan, political conservatives took advantage of racial resentment, growing economic suffering and vulnerability, and suburban politics to mount a formidable campaign against the New Deal, the American welfare state, and to some extent government itself. Neoliberalism entails a commitment to the dismantling of the economic arrangements sometimes called "Fordism," and their replacement with an economy driven by substantially deregulated markets (themselves driven by the interests of corporate and finance capital), an economy in which capital's upper hand over labor has led to dramatically increasing inequalities of income and wealth.<sup>17</sup> Neoliberalism also entails the dismantling of state institutions meant to

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*The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1 (2005) (arguing that *Lawrence*, as well as other recent Supreme Court cases viewed by liberals as victories, actually serve to contain and limit emancipatory struggle).

<sup>16</sup> Andrew Sullivan, *The End of Gay Culture: Assimilation and Its Meaning*, NEW REPUBLIC, Oct. 24, 2005, at 16.

<sup>17</sup> For a clear and detailed explication of the history and practices of neoliberalism, see generally DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* 125–72 (1990) (exploring "Fordism," what Harvey calls "post-Fordism," and the relationship between modes of commodity production and modes of artistic production). For a lively and accessible account of post-Fordist relations of production and the internal contradictions of capitalism, see WILLIAM GREIDER, *ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM* (1997).

cushion citizens against economic risk, and an approach to governance that favors “privatization,” “deregulation,” and other policies that transfer political power from governments to markets.<sup>18</sup> Finally, neoliberalism entails a series of social projects (often described as “culture wars”) that address the anxieties of the increasingly economically precarious and politically disempowered middle and working classes by constructing a sentimentalized vision of the innocent yet victimized, taxpaying, suburban good citizen and then attacking that citizen’s purported enemies — reliably, queers, liberals, feminists, and blacks; episodically, Asians and immigrants; and most recently people (in the United States and abroad) who “hate America.”<sup>19</sup> Neoliberalism, then, is a complex set of projects that operate simultaneously on economic, political, and cultural fronts. Not surprisingly, neoliberalism has also entailed significant changes in legal thought and practice.

In Part I.C, I argue that *Brown*’s failure and neoliberalism’s success were made possible not only by the collapse of Fordism and the emergence of an energetic, well-funded and well-coordinated, and clever New Right, but also by the philosophical legacy of classical liberalism, which is reflected in legal doctrine and jurisprudence. In the United States, as in other liberal democracies, law is a powerful means by which to translate social demands into institutions and policies. Law by its nature is conservative, and when calls for change that threaten to destabilize existing distributions of material and symbolic power are made, change through law will occur in ways that preserve existing distributions to the greatest extent possible. One way in which this happens is through the absorption of emancipatory claims into what I call “structural liberalism.” By structural liberalism, I mean two inter-related political-philosophical commitments: (1) the separation of family, market, state, and civil society into separate and independent “spheres” which should in principle be governed differently; and (2) a commitment to the ideal of the self-governing subject, through which individuals and groups deemed incapable of self-government may be subjected to kinds of regulation that would otherwise be deemed incompatible with liberty. Gerald Wetlaufer has suggested that the ultimate client of lawyers is

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<sup>18</sup> For a helpful overview of neoliberalism in its domestic and global policy dimensions, see ROBERT POLLIN, *CONTOURS OF DESCENT: U.S. ECONOMIC FRACTURES AND THE LANDSCAPE OF GLOBAL AUSTERITY* (2003). For an argument that the privatization of risk is the most striking theme of neoliberal policymaking, see Jacob S. Hacker, *Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243 (2004).

<sup>19</sup> Thomas Frank describes the cultural dimension of neoliberalism as “the Great Backlash.” THOMAS FRANK, *WHAT’S THE MATTER WITH KANSAS? HOW CONSERVATIVES WON THE HEART OF AMERICA* 5 (2004). Francisco Valdes uses the term “backlash” as well. See Francisco Valdes, *Culture, “Kulturkampf,” and Beyond: The Antidiscrimination Principle Under the Jurisprudence of Backlash*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 271, 283 (Austin Sarat ed., 2004).

always the law itself;<sup>20</sup> I suggest that law's ultimate client in a liberal regime is structural liberalism.

Structural liberalism facilitates the portrayal of economic relations as natural and beyond the scope of politics. The idea of an "anti-political economy," in Elizabeth Iglesias's term,<sup>21</sup> in turn has helped politicians implement neoliberal policies through law. The upshot has been that American law has both made civil rights claims possible and limited their scope. Long before the idea of "running against government" was a gleam in Republicans' eyes, arguments from structural liberalism (energized by old-fashioned race-baiting and class war) were used to defeat various movements toward what William Forbath calls "social citizenship."<sup>22</sup> In the present day, the potency and success of the neoliberal culture war is fueled by structural liberalism: for example, if not for the perception that the economy is a neutral and natural thing that should not be subject to "government intervention," the Republican Party would not have been able to win the hearts and votes of so many working people.

In Part II, I return to *Goodridge* and *Lawrence*. I argue that from a political economy perspective, *Goodridge* (taking, as I think Ball does also, that decision as a metonym for the project of same-sex marriage, just as *Brown* is metonymic of the project of racial integration) can be seen as a victory against bigotry that simultaneously threatens to absorb the gay and lesbian movement into neoliberal politics. The slow-motion breakdown of marriage over the last few decades is an event that has epic economic, political, and cultural implications. If, as Marc Spindelman suggests, "homosexuality's horizon" is limited to achieving same-sex marriage,<sup>23</sup> the possibilities of economic, political, and social revolution suggested by "queering the family" may be lost.

Similarly, *Lawrence* contemplates the folding of sexual sovereignty into the framework of structural liberalism, as the Court's incantations of "liberty" and "privacy" (and its own disclaimers about the possible reach of the decision) suggest. Justice Scalia's fulminations to the contrary, I think "the homosexual agenda" can easily be used to assist, rather than defeat, the material and symbolic politics of neoliberalism. Although Katyal is hopeful about the "intersectional" possibilities of *Lawrence*,<sup>24</sup> I argue that the right the decision seems to recognize — which Katyal

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<sup>20</sup> Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1596 (1990).

<sup>21</sup> See Elizabeth M. Iglesias, *Institutionalizing Economic Justice: A LatCrit Perspective on the Imperative of Linking the Reconstruction of 'Community' to the Transformation of Legal Structures that Institutionalize the Depoliticization and Fragmentation of Labor/Community Solidarity*, 2 U. PA. J. LAB. & EMP. L. 667, 781 & n.21 (2000).

<sup>22</sup> See William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 1 & n.2 (1999).

<sup>23</sup> See Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361, 1361 (2005) ("For some time, the right to marry has defined homosexuality's horizon.").

<sup>24</sup> Katyal, *supra* note 1, at 1492.

names “sexual sovereignty”<sup>25</sup> — has been crafted precisely to foreclose those possibilities. Embracing *Lawrence*, even with the hope of somehow turning it against itself, is a strategy that risks us getting lost, once again, in the mazes of the public/private distinction.

## I.

*Brown v. Board of Education* is a powerful icon in civil rights discourse, a signifier that has attained mythic proportions as a judicial decision that successfully cemented a cultural revolution. *Brown* has come to stand for a tectonic socio-legal shift: from white supremacy as legitimate state interest to white supremacy as anathema, not only in constitutional culture but in the wider political and social world.<sup>26</sup> This shift, of course, as Carlos Ball notes, was not accomplished with the stroke of a pen; *Brown* was bitterly resisted, most violently in the South.<sup>27</sup> Ball pays special attention to legal historian Michael Klarman’s account of the case.<sup>28</sup> For Klarman, Ball says, “the crucial impact of *Brown* was the backlash that it provoked.”<sup>29</sup> In this account, the sheer ferocity of white Southern defiance drove blacks into the streets, igniting a conflict so violent and so public that the federal government and the rest of the country (indeed, the rest of the world) were forced to pay attention and, eventually, to affirm the principle of racial equality.<sup>30</sup> But even if *Brown* was the indirect rather than direct cause of Americans’ rhetorical turn against white supremacy, Ball argues, present-day gay and lesbian legal activists, reeling from vicious legislative backlashes against same-sex marriage, should take heart.<sup>31</sup> *Brown* teaches the lesson that radical, as opposed to gradualist, legal strategies may be effective. Short-term backlash may mean long-term victory.

As the fiftieth anniversary of *Brown* came around, however, civil rights scholars and commentators taking stock of the decision’s legacy for the racial justice movement were feeling far less certain and far less hopeful about the decision’s legacy. Despite the contemporary judicial embrace of the benefits of “diversity” — strikingly articulated in Justice O’Connor’s majority opinion in *Grutter*<sup>32</sup> — “integration” as a social ideal, not to mention a material reality, seems to have been lost. At the material

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<sup>25</sup> *Id.* at 1445.

<sup>26</sup> I don’t mean, of course, that whites either in public or in private have challenged the *fact* of continued white supremacy, as I will discuss later in the Article, but that (the recent political successes of David Duke notwithstanding) “white supremacy” has been repudiated as a legitimate public or private policy goal.

<sup>27</sup> Ball, *supra* note 1, at 1495–1500.

<sup>28</sup> See generally MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

<sup>29</sup> Ball, *supra* note 1, at 1519.

<sup>30</sup> *Id.* at 1518.

<sup>31</sup> *Id.* at 1494.

<sup>32</sup> *Grutter v. Bollinger*, 539 U.S. 306, 329–33 (2003).

level, the 1990s saw an *increase* in racial segregation in elementary and secondary education.<sup>33</sup> Jonathan Kozol's most recent book, *The Shame of Our Nation*, examines New York City schools and finds them racially hyper-segregated, as well as subject to a culture of discipline that forces students and teachers into obedience to a draconian testing regime inconsistent with the idea of education as a key to democratic citizenship articulated in *Brown*.<sup>34</sup> Perhaps even more importantly, the idea of social integration as a national project of social and cultural reconstruction has been lost. As Charles Lawrence and John Calmore have observed, for many in the civil rights movement, *Brown* was less a statement about the right way to educate black children than a commitment to building what Martin Luther King, Jr., called "the beloved community."<sup>35</sup> Integration, from this perspective, meant a commitment to nation-building; just as not only schools but parks, water fountains, cemeteries, and public accommodations everywhere were brought under the rule of *Brown*, integration meant a commitment to anti-subordination throughout civil society as well as under law.

That vision has largely disappeared. Lawrence argues that a sense of commitment to public education has been replaced by the private scramble for advantage.<sup>36</sup> John Calmore suggests that middle-class African Americans struggling to be "integration warriors" find themselves profoundly discontented.<sup>37</sup> Sheryll Cashin argues that in light of the stresses involved in living in predominantly white environments, many

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<sup>33</sup> For example, a recent press release issued by the Harvard Civil Rights Project states: "With more than 70% of Black and Latino students in the South attending predominately minority schools, and with severe segregation and inequality reflected in the extraordinary dropout rates in segregated high schools, new data signal a trend backwards to the 1960s before widespread busing began for desegregation." Press Release, The Civil Rights Project, Harvard Study Finds that More Than 70% of Southern Black and Latino Students Attend Segregated Minority Schools (Sept. 7, 2005), <http://www.civilrightsproject.harvard.edu/news.releases/reseg05.php>.

<sup>34</sup> JONATHAN KOZOL, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA* (2005).

<sup>35</sup> See generally John O. Calmore, *Random Notes of an Integration Warrior*, 81 MINN. L. REV. 1441 (1997); Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community* (A Continuing Conversation with John Ely on Racism and Democracy), 114 YALE L.J. 1353 (2005).

<sup>36</sup> Lawrence, *supra* note 35, at 1363.

<sup>37</sup> See Calmore, *supra* note 35.

[A] significant number of blacks, regardless of class position, are profoundly alienated from the very mainstream of society upon which they rely in order to access opportunity, material gain, and status. . . . [M]any blacks remain ambivalent and conflicted about both the normative weight and instrumental prospects of an integrated future. There is, in short, a fundamental problem with the black costs of admission to the white world.

*Id.* at 1452 (footnote omitted).



middle-class African Americans have reluctantly abandoned integration as a goal.<sup>38</sup> For many observers, then, *Brown* is not a story about “overcoming,” about short-term backlash and long-term triumph, it is a story about winning the battle but losing the war.

How was the war lost? *Brown* is a story about the taming of a radical vision through law, and more particularly about the limitations that political, economic, and cultural elites have successfully imposed both on legal conceptions of equality and on public law more generally. As civil rights advocates struggled to advance a robust vision of “integration” symbolized by *Brown*, they found themselves up against a political economy that, led by the post-war suburban boom, was becoming a powerful engine of racial and class segregation.<sup>39</sup> Beginning in the late 1960s, a new conservative movement drew on the political economy of suburbia to craft an economic, political, and cultural policy of, as Lisa Duggan calls it, “upward distribution.”<sup>40</sup> It was as successful a movement as it was not only because of the financial resources behind it and its appeal to racialized fears, but because it successfully drew on a pre-existing philosophical liberal language that was also well-entrenched in law.

*Brown* failed in part because suburban voters feared urban black people. More complexly, it failed in large part because it articulated a public right to racial equality that was awkwardly grafted upon, and eventually absorbed by, more deeply entrenched commitments to racialized inequality in zones marked “private.”<sup>41</sup> The

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<sup>38</sup> SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 17 (2004) (“[M]any black people appear to have adopted a ‘post-integrationist’ mind-set, and now most value living among themselves, even as they exhibit a high tolerance for living among other groups. This phenomenon is particularly evident among the black middle class.”). Like Calmore, Cashin attributes this “separatist” preference to weariness with the stresses and disappointments of trying to be an integration warrior. *See id.* at 23 (“[W]hat comes through in the voices of black people is a frustration with the unmet promises of integration.”).

<sup>39</sup> As John Calmore succinctly puts it, “Residential segregation is the ‘structural linchpin’ of the nation’s racial inequality.” Calmore, *supra* note 35, at 1444.

<sup>40</sup> *See* LISA DUGGAN, *THE TWILIGHT OF EQUALITY? NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY*, at x (2003) (“Beginning with the election of Ronald Reagan to the presidency and throughout the 1980s, the overall direction of redistribution of many kinds of resources, in the U.S. and around the world, has been upward — toward greater concentration among fewer hands at the very top of an increasingly steep pyramid.”).

<sup>41</sup> In this Article, I focus on *Brown*’s lack of purchase on the “private” zone of the market. But *Brown* also proved to have no purchase on another sphere traditionally marked “private”: the family. It was more than ten years after *Brown* that the Court finally, in *Loving v. Virginia*, 388 U.S. 1 (1967) (forbidding restrictions on interracial marriage), dared to officially pull marriage from the grip of state-sponsored white supremacy. *Id.* I thank Marc Spindelman for this observation. Indeed, the bar on interracial intermarriage did not crumble even with *Loving*. As Rachel Moran observes, “[W]hen over 93 percent of whites and blacks marry someone of the same race, and approximately 70 percent of Asian Americans and Latinos do, patterns of endogamy appear to be more than romantic accidents.” RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE & ROMANCE* 117 (2001). Moran argues that Americans submerge awareness of their racial choices in an ideology of colorblind romanticism, coupled

decision in *Brown* and the backlash it prompted did transform the public culture, constituting a symbolic victory against bigotry, but this victory was eventually subsumed within a larger loss. And the structures of liberal law facilitated the loss as much as the victory.

A.

Between 1950 and 1970, American residential patterns were dominated by suburban development,<sup>42</sup> and suburbanization created increasing spatial segmentation on the basis of both class and race. Examining New Jersey as a bellwether state with respect to these patterns, historian Lizabeth Cohen explains, the public-private partnership that opened up homeownership to more Americans than ever before had contradictory effects.<sup>43</sup> On the one hand, suburbanization was a program of mass wealth distribution that made the "American Dream" broadly available to ordinary people. On the other hand, suburbanization turned housing into a commodity that was increasingly sold through "niche marketing," meaning that class stratification actually increased.<sup>44</sup>

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with articulated concerns about cultural difference. *Id.* at 116–17. She concludes: "The most striking feature of the aftermath of *Loving v. Virginia* is how readily people have accepted segregation in marriage, so long as it is not officially mandated." *Id.* at 124.

<sup>42</sup> The federal government was the primary moving force in this suburban boom. As Melvin Oliver and Thomas Shapiro note:

Taxation policy, for example, provided greater tax savings for businesses relocating to the suburbs than to those who stayed and made capital improvements to plants in central city locations. As a consequence, employment opportunities steadily rose in the suburban rings of the nation's major metropolitan areas. In addition, transportation policy encouraged freeway construction and subsidized cheap fuel and mass-produced automobiles. These factors made living on the outer edges of cities both affordable and relatively convenient.

MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 16 (1995).

<sup>43</sup> See LIZABETH COHEN, *A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* 202 (2003).

<sup>44</sup> *Id.* As Cohen writes:

Ironically, it was [the] bond between suburban living and mass consumption — the source early on of egalitarian hopes — that was largely responsible [for stratification], as it made market concerns paramount in decisions about how and where one lived. As home in the suburbanized Consumers' Republic became a mass consumer commodity to be appraised and traded up like a car rather than a longstanding emotional investment in a particular neighborhood, ethnic community, or church parish, "property values" became the new mantra. Of course, people still chose the communities they lived in from a range of alternatives, but increasingly they selected among homogenous suburbs occupying distinctive rungs in a clear status hierarchy of communities. . . . Fast disappearing were the

Increasing racial and ethnic homogeneity were being built into housing markets as well. As Cohen notes, the influx of African Americans to northern and western cities during the Second World War, and the “Great Migration” from the South that followed it, sparked “white flight” from the cities to the suburbs.<sup>45</sup> Preexisting racial fears and hostilities — and preexisting practices of de facto racial segregation in housing<sup>46</sup> — were magnified by the behavior of federal mortgage guarantee agencies — the Home Owners Loan Commission (HOLC), the Federal Housing Administration (FHA), and the Veterans Administration (VA). These agencies adopted and formalized the discriminatory practices of private lenders “by considering the presence of racial groups other than whites the greatest obstacle to assigning neighborhoods a favorable rating; a stable community promising minimal defaults on mortgage loans was assumed to be a segregated, white one.”<sup>47</sup> The rating system for making mortgage loans that these government agencies developed (from which the term “red-lining” emerged) was then, in turn, adopted by private lenders, so that racial segregation was threaded into property values by both state and non-state market actors.<sup>48</sup> As a result, Cohen observes, “The presence of black neighbors threatened to depress property values and hence to jeopardize people’s basic economic security, or so homeowners were convinced.”<sup>49</sup>

Race- and class-segmented suburbia had a number of consequences in the economic, political, and social realms that together spelled the end of the integrated society *Brown* symbolized. In the economic realm, the incorporation of racial exclusion into property values built wealth for whites at the expense of blacks. For most Americans, home ownership is the primary source of household wealth. The

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early-twentieth-century suburbs where employers and employees had lived alongside each other. New housing developments were particularly easy to peg at a particular consumer market through home prices, lot sizes, and community amenities, giving new suburban areas instant socioeconomic, and therefore market, identities.

*Id.*

<sup>45</sup> *Id.* at 212.

<sup>46</sup> A classic ethnography describing how African Americans in one northern city, Chicago, were forced by violence and widespread market discrimination to live in a narrow “Black Belt” in the 1930s and 1940s is ST. CLAIR DRAKE & HORACE R. CAYTON, *BLACK METROPOLIS: A STUDY OF NEGRO LIFE IN A NORTHERN CITY* 174–213 (Univ. of Chi. Press 1993) (1945).

<sup>47</sup> COHEN, *supra* note 43, at 214. *See also* DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 51–55 (1993) (describing the federal government’s involvement in perpetuating racial segregation); OLIVER & SHAPIRO, *supra* note 42, at 16 (same).

<sup>48</sup> Daria Roithmayr, *Locked-in Segregation*, 12 VA. J. SOC. POL’Y & L. 197, 220–21 (2004).

<sup>49</sup> COHEN, *supra* note 43, at 213.

rise of postwar suburbia vastly expanded Americans' access to this form of wealth overall, but it did so in a racially polarized manner. As Oliver and Shapiro put it:

Locked out of the greatest mass-based opportunity for wealth accumulation in American history, African Americans who desired and were able to afford home ownership found themselves consigned to central-city communities where their investments were affected by the "self-fulfilling prophecies" of the FHA appraisers: cut off from sources of new investment their homes and communities deteriorated and lost value in comparison to those homes and communities that FHA appraisers deemed desirable.<sup>50</sup>

Full access to capital in the form of home ownership continues to elude African Americans and Latinos, despite the official end of government lending policies that encouraged racial homogeneity. Oliver and Shapiro report:

A 1991 Federal Reserve study of 6.4 million home mortgage applications by race and income confirmed suspicions of bias in lending by reporting a widespread and systemic pattern of institutional discrimination in the nation's banking system. This study disclosed that commercial banks rejected black applicants twice as often as whites nationwide. In some cities, like Boston, Philadelphia, Chicago, and Minneapolis, it reported a more pronounced pattern of minority loan rejections, with blacks being rejected three times more often than whites.<sup>51</sup>

This mortgage discrimination appears to have been based far more on race than on economic factors: a Federal Reserve study the following year that adjusted the results for creditworthiness found results less dramatic but still significant.<sup>52</sup> Even when ongoing racial bias is negligible, however, the operation of market forces in an environment initially shaped by racial inequality magnifies that inequality. For instance, in the 1980s, new financial products made available to institutional investors created a market in "subprime lending." Subprime lending involves the extension of home loans and other sorts of loans to people with impaired credit ratings at sometimes exorbitantly high rates.<sup>53</sup> This market relies not on racial differentiation but on geographic differentiation, and so is presumptively inaccessible to civil rights

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<sup>50</sup> OLIVER & SHAPIRO, *supra* note 42, at 18.

<sup>51</sup> *Id.* at 19.

<sup>52</sup> *Id.* at 20.

<sup>53</sup> For a more complete explanation of subprime lending, see generally Tania Davenport, Note, *An American Nightmare: Predatory Lending in the Subprime Home Mortgage Industries*, 36 SUFFOLK U. L. REV. 531 (2003).

law. Yet because of the racialized geography of home ownership, its ill effects are felt disproportionately by communities of color. Thus, a recent joint HUD-Treasury Department report found that black borrowers were five times more likely to take out a subprime home equity loan than white borrowers — a trend that persists at higher income levels.<sup>54</sup>

The cumulative economic effect of these and other phenomena has been, as Oliver and Shapiro conclude, the “sedimentation of racial inequality.”<sup>55</sup> Oliver and Shapiro

tell[] a tale of two middle classes, one white and one black. . . . [T]he claim made by blacks to middle-class status depends on income and not assets. In contrast, a wealth pillar supports the white middle class in its drive for middle-class opportunities and a middle-class standard of living. Middle-class blacks, for example, earn seventy cents for every dollar earned by middle-class whites but they possess only fifteen cents for every dollar of wealth held by middle-class whites. For the most part, the economic foundation of the black middle class lacks one of the pillars that provide stability and security to middle-class whites — assets. The black middle class position is precarious and fragile with insubstantial wealth resources.<sup>56</sup>

Postwar suburbanization has also had complex and wide-ranging effects on American political life. Contemporary American state and local government law and policy are characterized by what Richard Briffault calls “Our Localism,” a commitment to municipal autonomy that has permitted economically homogenous suburbs to avoid the economic, social, and political problems of heterogenous cities.<sup>57</sup>

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<sup>54</sup> See Benjamin Howell, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CAL. L. REV. 101, 103 (2006). Howell argues:

Subprime lending is geographically concentrated in the same minority neighborhoods once denied access to banks and excluded from federal homeownership programs because of their racial composition. Although geographic discrimination alone is not actionable under the Fair Housing Act . . . , if a lender exploits historic racial segregation by marketing higher-priced loans to minority neighborhoods to profit from borrowers' lack of other options, such profiteering may constitute actionable housing discrimination.

*Id.* at 103–04 (footnote omitted).

<sup>55</sup> OLIVER & SHAPIRO, *supra* note 42, at 5.

<sup>56</sup> *Id.* at 7.

<sup>57</sup> See generally Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) [hereinafter Briffault, *Our Localism: Part I*]; Richard Briffault, *Our Localism: Part II — Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990) [hereinafter Briffault, *Our Localism: Part II*].

Briffault argues that the conception of the paradigmatic unit of local government as the post-war suburb, and the ideological association of that suburb with “home” and “family” has led to ever-greater deference by courts to the decisions of municipalities:

The suburb, the most common form of local government today, is conceived of as a small, primarily middle-class residential community, a place for domestic consumption rather than industrial production and a haven from the heartless political and economic world beyond local borders. The central function of local government is to protect the home and family — enabling residents to raise their children in “decent” surroundings, servicing home and family needs and insulating home and family from undesirable changes in the surrounding area.<sup>58</sup>

This view of the purpose of the suburbs has produced, Briffault argues, judicial and legislative support for local autonomy in zoning and school finance, even when those decisions promote what Robert Reich calls the “[s]ecession of the [s]uccessful,”<sup>59</sup> or what Myron Orfield calls the tyranny of the ““favored quarter,””<sup>60</sup> in regional politics.<sup>61</sup> Deference to local autonomy has permitted exclusionary zoning and wealth-based spending by municipalities, sending ripple effects throughout regional political economies: pockets of increasing wealth, alongside pockets of deepening poverty,

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<sup>58</sup> Briffault, *Our Localism: Part II*, *supra* note 57, at 382.

<sup>59</sup> Robert B. Reich, *Secession of the Successful*, N.Y. TIMES, Jan. 20, 1991, § 6 (Magazine), at 16.

<sup>60</sup> MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY 5 (1997).

<sup>61</sup> See Briffault, *Our Localism: Part II*, *supra* note 57, at 384–85; see also ORFIELD, *supra* note 60, at 2–8 (discussing the data that reveal a “favored quarter” in many American metropolitan areas). The ““favored quarter”” consists of outer-ring suburbs “that, through disproportionate political influence, receive massive, disproportionate infrastructure investments that fuel their growth, including new roads and highways, expensive wastewater treatment systems, and other developmental infrastructure.” Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2003 (2000) (citing ORFIELD, *supra* note 60, at 2, 5).

with few or inadequate mechanisms for cross-subsidization.<sup>62</sup> *Milliken v. Bradley*<sup>63</sup> is an example of this kind of deference to local boundaries. In *Milliken*, the Court held that remedies for racial school segregation should not cross city-suburb lines if there was no interdistrict violation.<sup>64</sup> In so naturalizing the boundaries between political jurisdictions, the Court made it impossible to completely remedy school segregation, and thus perpetuated racially differential access to human capital investment.<sup>65</sup>

The politics of the suburbs have even affected the substance and terms of political discourse. Briffault argues that two kinds of segregation characteristic of suburban life — the separation of work from home, which means the separation of production from consumption, and race-class segregation — together produce “the narrowing of discussion through the exclusion of a broad range of critical public issues from local debate and, as a corollary, a tight focus on the private economic and social concerns of local residents.”<sup>66</sup> In the United States, people get a sense of their political life based on where their decisions are most immediately efficacious — where they live. The fact that the processes of economic production take place elsewhere means that political choices about work and the economy seem distant and out of reach. What people care about in suburban politics are issues that seem literally close to home: property taxes, land use, schools. The politics of suburbia are the politics of family and home, and vice versa. Moreover, “home and family”

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<sup>62</sup> As Briffault notes:

The fragmentation of heterogeneous urbanized areas into municipalities segregated by race, class and function has obvious consequences for local public services. The separation of rich from poor and of businesses from residences leads to a separation of taxable wealth from public service needs. Central cities are, of course, also marked by wide ethnic, functional and class differences among neighborhoods, but within cities services are ordinarily funded on a city-wide basis, so that all neighborhoods can call on the tax base of the entire city. Furthermore, poorer and minority residents can participate in city politics, are represented in city legislatures and influence the allocational decisions of city governments. In the suburbs, by contrast, the spatial segmentation of rich and poor and industry and homes takes on added significance, because the separated spaces are also autonomous legal jurisdictions. With municipal budgets largely dependent on the local tax base, intermunicipal wealth inequality becomes the source of significant differences in the quantity and quality of public services.

Briffault, *Our Localism: Part II*, *supra* note 57, at 437–38 (footnotes omitted).

<sup>63</sup> 418 U.S. 717 (1974).

<sup>64</sup> *Id.* at 752.

<sup>65</sup> See Briffault, *Our Localism: Part I*, *supra* note 57, at 24–38 (discussing state school financing cases and arguing that judicial analyses of statewide or regional equalization plans have tended to equate them with loss of local control).

<sup>66</sup> Briffault, *Our Localism: Part II*, *supra* note 57, at 439.

has a particular social and political meaning: a privatized vision of insulation from crime and other social problems, wealth accumulation, and the privacy to enjoy the consumption of lifestyle goods.<sup>67</sup> Briffault concludes:

Politics is framed in terms of “family territoriality”: “The motivating vision in the development of the American suburbs has been . . . that of the family preoccupied with achieving a private environment, and extending the family’s personal space both within and without the house.”<sup>68</sup>

This concern with family life as the creation and protection of private space, when played out in a legal environment that permits affluent localities to separate themselves from the concerns of poor localities, has meant the erosion of any sense of “linked fate” between rich and poor, black and white.<sup>69</sup> Charles Lawrence writes vividly of the impact of this suburban politics of privatization and exclusion on the internal experience of making decisions about education for one’s children:

In a world where knowledge, teaching, and learning are increasingly commodified and stratified, where only those children whose parents can pay will touch a cello, read James Joyce, or see a cell divide beneath a microscope, we realize that we are in a cutthroat competition with other parents to secure the place in the preschool

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<sup>67</sup> As Briffault puts it:

[I]ssues relating to the organization of the economy, the role of government in regulating business, the relationship between the nature of production and distribution of the goods and services produced, the size of business profits, the structure of the work place — issues at the heart of contemporary American life — are simply off the local agenda. There is little room for the politics of the work place or the politics of the economy in residential communities.

*Id.*

<sup>68</sup> *Id.* (quoting Stanley Buder, *The Future of the American Suburbs*, in *SUBURBIA: THE AMERICAN DREAM AND DILEMMA* 193, 200 (Philip C. Dolce ed., 1976)) (footnotes omitted) (omission in original).

<sup>69</sup> COHEN, *supra* note 43, at 228. As Cohen writes:

As residents retreated into suburbs defined by the homogeneity of their populations and the market values of their homes, the barriers they erected against outsiders grew higher, and their conception of “the public good” correspondingly narrowed. . . . [A]s the communities Americans identified with thus constricted, the inequities of postwar life expanded beyond housing to include public services provided and paid for by municipalities, the most important being the provision of education through local schools.

*Id.*



that promises the inside track to the Ivy League. We hear a colleague quietly boasting of a daughter admitted to Yale or Amherst, and we fear our child will be left out, that the promise of her gifts will go unrealized and that it will be our fault. We may disagree in principle with an education system that preserves class hierarchy, but if it's the only game in town and our children are at stake, it's just too scary to opt out.<sup>70</sup>

Most of all, Lawrence mourns the transformation of elementary education from a question of democracy and community to a private question of competition and resources:

*Brown* . . . is not only about access to resources; it is about the creation of community itself. The affirmative act of integration, the movement from dual to unitary, is required for the transformation from an established ideology and structure that excludes and demeans black and brown children to one that values and cares for them as members of the larger community. As the community's chosen instrument for the creation and nurture of mutual relationships and the transmission of values, culture, and knowledge, "public" education creates community and defines its bounds. The transformation of society envisioned by *Brown* cannot be achieved when the location of societal transformation is not held in public trust.<sup>71</sup>

In the end, it was the quiet effects of the political economy of suburbanization, and not the violent and noisy resistance of Southern politicians, that finally laid *Brown*'s vision of an integrated citizenry — a national political community unified across boundaries of race — to rest.

*B.*

In 1964, Barry Goldwater, preaching against government, bureaucracy, and red tape, was soundly defeated in his bid for the presidency and successfully painted as a dangerous extremist by his opponent, Lyndon B. Johnson.<sup>72</sup> Two years later, bearing essentially the same political message as Goldwater, Ronald Reagan became governor of California, beating his opponent Edmund "Pat" Brown by nearly a

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<sup>70</sup> Lawrence, *supra* note 35, at 1374–75.

<sup>71</sup> *Id.* at 1377–78 (footnotes omitted).

<sup>72</sup> See RICHARD WHITE, "IT'S YOUR MISFORTUNE AND NONE OF MY OWN": A NEW HISTORY OF THE AMERICAN WEST 603 (1991).

million votes.<sup>73</sup> In 1980, Reagan took his anti-government stance to the White House, where he served for two terms as one of the most popular presidents in recent memory.<sup>74</sup>

Many have argued that key to the success of the Republican Party in this new era was a backlash against civil rights. The Republican Party has been able to paint itself as the party that stands up to black people by developing key code words like “crime” and “welfare” that allow politicians to mobilize racist stereotypes without appearing racist. But the victory of the larger political coalition I will describe as “neoliberalism” was not purely rooted in bigotry; it also spoke to the material and symbolic interests and desires of a suburbanized America struggling with global economic restructuring without the language to name that restructuring as a political event, rather than a natural disaster. The New Right, and neoliberalism more generally, successfully drew upon preexisting institutional and intellectual resources to craft a campaign that spoke, if not to the hearts and minds of Americans, certainly to their fears and unarticulated longings.

Despite many internal disagreements, from the 1970s into the 2000s, politicians, policymakers, intellectuals, and activists have fought together with remarkable success to dismantle the American welfare state, to provide more control over labor for multinational corporations and more freedom for finance capital, to facilitate a transfer of wealth from the middle classes to a small upper class, and, most importantly, to articulate to the public reasons why these upward distribution projects were right, just, and good for everybody.<sup>75</sup> The ideological leadership of this movement describes itself as “conservative,” but Democrats as well as Republicans have pursued many of these policies, particularly in the economic realm, and today’s self-described “conservatives” have broken away ideologically from the traditional conservatism of the Republican party. Following the lead of other scholars, I will call this new movement “neoliberalism.” I acknowledge that describing this series of interrelated but distinct political projects under one label means glossing over the very real differences that characterize “traditional conservatives,” “neoconservatives,” “paleoconservatives,” “liberals,” “libertarians,” “social conservatives,” the “Christian Right,” and so on. My aim in this Article, however, is to examine the commonalities.

In domestic politics, “neoliberalism” describes a loose constellation of thinkers, politicians, and activists who advocate “a leaner, meaner government (fewer social

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<sup>73</sup> *See id.*

<sup>74</sup> *See id.* at 607.

<sup>75</sup> The neoliberal agenda emerged as a response to the shocks that struck the global economy in the late 1960s and the early 1970s, epitomized by the sudden spike in energy prices and the oil embargoes in the Middle East. *See* HARVEY, *supra* note 17, at 141–72; *see also* DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005). Fordism — the balance of power between corporate power and organized labor, the Keynesian methods of government regulation of market activities — seemed no longer viable, and technological changes that permitted production to be increasingly “outsourced” overseas or transferred from humans to machines made possible a shift of power from capital to labor. *See* GREIDER, *supra* note 17.

services, more ‘law and order’), a state-supported but ‘privatized’ economy, an invigorated and socially responsible civil society, and a moralized family with gendered marriage at its center.”<sup>76</sup> In international politics, “neoliberalism” represents the translation of these values into a global ideology promoting the opening of foreign markets, the deregulation of finance capital, the standardization of business practices and property and trade regimes according to United States interests, “good governance” practices, and the dismantling of national “welfare states.”<sup>77</sup> As Duggan and others have observed, “neoliberalism” described this way is an ideology shared by Democrats and Republicans, “conservatives” and “liberals” alike: Democratic President Clinton, for instance, presided over the dismantling of “welfare as we know it” in the name of personal responsibility, and pursued domestic and foreign economic policies that for the most part hewed to a center-right agenda.<sup>78</sup>

Neoliberals have targeted the law itself for reform with great success. Francisco Valdes argues that the 1980s saw the emergence of what he calls “culture wars:” an effort to limit civil rights law specifically and public law more generally, using the

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<sup>76</sup> DUGGAN, *supra* note 40, at 10.

<sup>77</sup> *Id.* at xii–xiii. As Duggan notes:

[N]eoliberalism *per se* is generally associated with the set of policy imperatives for international government and business operations called the “Washington Consensus” of the 1980s and 1990s. Generated by the International Monetary Fund, the World Bank and the U.S. Treasury, and also implemented through the World Trade Organization, neoliberal policies of fiscal austerity, privatization, market liberalization, and governmental stabilization are pro-corporate capitalist guarantors of private property relations. They were designed to recreate the globe in the interests of the unimpeded operation of capitalist “free” markets, and to cut back public, noncommercial powers and resources that might impede or drain potential profit making.

*Id.* See also ROBERT POLLIN, *CONTOURS OF DESCENT: U.S. ECONOMIC FRACTURES AND THE LANDSCAPE OF GLOBAL AUSTERITY* 7 (2003) (describing neoliberalism as “a policy agenda . . . including free trade, a smaller government share of the economy and the deregulation of financial markets”).

<sup>78</sup> POLLIN, *supra* note 77, at 5–6.

Clinton’s administration was defined by across-the-board reductions in government spending as a share of the economy’s total spending, virtually unqualified enthusiasm for free trade, only tepid, inconsistent efforts to assist working people in labor markets, and the deregulation of financial markets — with Alan Greenspan providing crucial leadership in granting to financial traders the leeway they had long sought to freely speculate with other people’s money.

*Id.*

For a detailed examination of the cultural war on poor people, particularly poor black women, fought by neoliberals in the transformation of welfare from AFDC to PRWORA, see Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783 (2003).

tools of “majoritarian politics, judicial review, and public spending . . . to mount a ‘take back’ campaign focused on the antidiscrimination principle and its liberal legacies.”<sup>79</sup> Thus, for example, neoliberals have sought to dismantle key elements of civil rights law in the name of the Commerce Clause of Article I of the Constitution, the Tenth Amendment, the Eleventh Amendment, and section 5 of the Fourteenth Amendment.<sup>80</sup> Outside the courtroom, organizing through institutions such as the Federalist Society, neoliberals have utilized majoritarian politics (through, for example, the initiative process in California), court-packing, and the public spending power both to pursue the policy of upward redistribution and, perhaps even more importantly, to alter public discourse about civil rights.<sup>81</sup> Mark Tushnet concludes that beginning in 1980 with Reagan’s presidency, the New Deal constitutional order was gradually dismantled, giving way to a new order.<sup>82</sup> Steven Calabresi, reviewing Tushnet’s book, characterizes this order as “libertarianism-lite.”<sup>83</sup>

Why have these policies been supported by the American public, even though the majority of the public has not benefitted from them materially? The neoliberal project is not only a political and economic project, but also a cultural one. Neoliberals sell their policies by wrapping them in three appealing messages: market regulation is better than government regulation; people should take “personal responsibility” for things that happen to them; and ordinary (suburban) people are the victims of hostile and/or contemptuous groups who now control the reins of power in America.

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<sup>79</sup> Valdes, *supra* note 19, at 283.

<sup>80</sup> *Id.* at 281.

<sup>81</sup> *Id.* at 283–85. There have been similar changes in the common law as well. *See, e.g.*, Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1 (2004).

<sup>82</sup> MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003). For an upbeat argument that this constitutional transformation should be seen as the emergence of a “Renew Deal” — “a more participatory and collaborative model, in which government, industry, and society share responsibility for achieving policy goals” — see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344 (2004).

<sup>83</sup> Steven G. Calabresi, *The Libertarian-Lite Constitutional Order and the Rehnquist Court*, 93 GEO. L.J. 1023, 1059 (2005) (reviewing TUSHNET, *supra* note 82). For Calabresi, the prevailing viewpoint of our era is “liberal” on social issues like abortion, gay rights, and affirmative action and “conservative” on economic issues like levels of taxation and government spending and regulation. The Libertarian-Lite swing voters and independents are not “real” libertarians because they hardly desire a night watchman state. However, they do think the Great Society and the mismanagement of the economy in the 1970s were the result of an excessive amount of government intervention in the economy, for example, through wage and price controls, excessive regulation, and excessive levels of government spending and taxation.

*Id.* at 1038–39.

These messages speak not only to white racial fears, but also to the real suffering that economic disempowerment has brought about for many in the middle and working classes; and they do so in a way that springs organically from the politics of the suburbs and the economics of post-Fordism. In addition, neoliberalist policies are defended in a rhetoric that sentimentalizes “the (suburban) family” and attributes responsibility for the miseries of contemporary post-Fordist capitalism to bad people, not economic and political institutions. These messages and the rhetoric in which they are wrapped owe a debt to the “anti-political economy.”

A central message of neoliberalism has been the position that market regulation is better than government regulation. Neoliberal calls for the abandonment of public space and public institutions and their replacement with market-produced private space and institutions — a message compatible with the ability of affluent suburbs to cut themselves off from responsibility for city ills.<sup>84</sup>

Another central message of neoliberalism — the gospel of “personal responsibility” — also has traction within the politics of the suburbs. Neoliberal policies devolve issues formerly considered collective, such as the management of economic risk, from government to individual families. Neoliberalism supports a robust civil society made up of families and voluntary associations such as churches and charities. But this civil society should be devoted to efforts to properly discipline the individual self, the ultimate locus of moral, economic, and political responsibility. Margaret Thatcher famously once declared that “[t]here is no such thing as society,” only individuals and their families.<sup>85</sup> If there is a neoliberal society, it is a wholly privatized one; it is neither the state’s nor the economy’s job to manage the social. This message, as many have argued, seems to speak directly to racialized anxieties about “Others” deemed incapable of self-government in a society that demands much of the self.

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<sup>84</sup> For example, as the Edsalls argue:

The older-city/suburban-exurban trends have significant consequences both for politics and for policy. While public opinion polls show increasing support for expenditures on education, health, recreational facilities, and a range of other desired public services, a growing percentage of white voters are discovering that they can become fiscal liberals at the local level. They can satisfy these demands through increased suburban and county expenditures, guaranteeing the highest possible return to themselves on their tax dollars, while continuing to maintain policies of fiscal conservatism at the federal level. Suburbanization has permitted whites to satisfy liberal ideals revolving around activist government, while keeping to a minimum the number of blacks and the poor who share in government largess.

THOMAS BYRNE EDSALL & MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* 227–28 (1992).

<sup>85</sup> Lady Margaret Thatcher, *The Keith Joseph Memorial Lecture*, London (Jan. 11, 1996), in *THE COLLECTED SPEECHES OF MARGARET THATCHER* 571, 576 n.1 (Robin Harris ed., 1997) (“‘There is no such thing as society. . . . There are individual men and women, and there are families.’” (quoting *Interview by Woman’s Own* with Margaret Thatcher (Oct. 31, 1987))).

This anxiety about the social burden represented by ill-disciplined or undisciplined subjects comes to the surface in the neoliberal-inspired "culture wars." The political successes of Ronald Reagan have been attributed to his ability at articulating a series of enemies of middle-class people.<sup>86</sup> Valdes names some of those enemies: "immigrants, sexual minorities, racial and ethnic minorities, women, the poor, the disabled, and other Others."<sup>87</sup> Thomas Frank argues that the enemies are "liberals," a label vaguely reserved for those with a lot of intellectual and cultural capital.<sup>88</sup> Of course, some of these groups are perennial enemies in American politics: mobilizing fear and hatred against non-white people, immigrants, and the poor is a noble American tradition, and "intellectuals" have long been held in suspicion by many as not completely American. What seems new is the sense of victimhood articulated by neoliberals: the perception that "they" are winning, and "we" regular people are on the ropes. Some argue that this sense of aggrieved victimhood is a parodic return of the civil rights language of racial injury.<sup>89</sup> Frank argues that this sense of victimhood is a translation of the suffering post-Fordist economic restructuring has wreaked on the working and middle classes: the aggrieved bitterness and resentment against perceived shadowy enemies is misplaced anger at the material and spiritual impoverishment of life under New Economy patterns of production and consumption.<sup>90</sup>

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<sup>86</sup> WHITE, *supra* note 72, at 603 ("Reagan made urban demonstrators, striking farm workers, black rioters, radical students, criminals, and wasteful bureaucrats from Johnson's War on Poverty his targets.").

<sup>87</sup> Valdes, *supra* note 19, at 284. For a consideration of *Lawrence's* significance to this backlash story, see Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy, and Equality*, 65 OHIO ST. L.J. 1341 (2004).

<sup>88</sup> FRANK, *supra* note 19, at 114–15. Frank writes:

The idea has taken many forms over the years — Spiro Agnew called them "nattering nabobs of negativism," the neocons dubbed them "the new class," while others simply refer to them as "intellectuals" — but in its basic outlines the grievance has remained the same. Our culture and our schools and our government, backlashers insist, are controlled by an overeducated ruling class that is contemptuous of the beliefs and practices of the masses of ordinary people. Those who run America, the theory holds, are despicable, self-important show-offs. They are effete, to use a favorite backlash term. They are arrogant. They are snobs. They are liberals.

*Id.* (footnotes omitted).

<sup>89</sup> Thomas Ross, for example, argues that the rhetoric of Supreme Court opinions on race turns whites into innocent victims of racial compensation schemes and non-whites into, presumably, guilty parties. These opinions accept the civil rights logic of racial injury demanding compensation, but flip the roles of perpetrator and victim. See THOMAS ROSS, *JUST STORIES: HOW THE LAW EMBODIES RACISM AND BIAS* 21 (1996); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 302–03 (1990); Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 24–26 (1990).

<sup>90</sup> FRANK, *supra* note 19, at 129–30. Thus, Frank suggests that much of neoliberal rhetoric is simply Old Left rhetoric, with liberals replacing capitalists as responsible for all of life's miseries. *Id.*

Finally, a striking rhetorical feature of the neoliberal culture wars is their framing within what Lauren Berlant calls the “intimate public sphere.”<sup>91</sup> Berlant contends that “since ‘68, the sphere of discipline and definition for proper citizenship in the United States has become progressively more private, more sexual and familial, and more concerned with personal morality.”<sup>92</sup> This trajectory became even more dramatic following Reagan’s successful presidential campaign and the rise of neoliberalism. One aspect of this intimate politics is the assumption that personality — including personal sexual scandals — sheds important light on public figures’ ability to govern.<sup>93</sup> A second aspect is “an increasing tendency to designate political duty in terms of individual acts of consumption and accumulation.”<sup>94</sup> One might think, for example, of Bush’s announcement in the wake of 9/11 that it would be a patriotic act for Americans to go to the mall and shop. A third is the national culture’s obsessive focus on the family and family relations as a stage for public moral dramas of scandal, discipline, and punishment.<sup>95</sup> These family dramas circle

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<sup>91</sup> LAUREN BERLANT, *THE QUEEN OF AMERICA GOES TO WASHINGTON CITY: ESSAYS ON SEX AND CITIZENSHIP* 86 (1997).

<sup>92</sup> *Id.* at 177.

<sup>93</sup> *Id.* at 178. Consider, as examples, both the Clinton sex scandal and the widespread idea in the 2004 presidential election that you should vote for the candidate you would most enjoy having a beer with.

<sup>94</sup> *Id.* Berlant continues:

Two major economic platforms in the last twenty years bear this out: (1) the increasing emphasis on boycotts to enforce conservative sexual morality in the mass media (often on behalf of “our youth”); and (2) the staggering contention, by Presidents Reagan, Bush, and Clinton and their cohort, that receiving federal welfare funds so morally corrupts individuals that they are responsible for the quotidian violence and decay of the inner city, and indeed more generally for the decline of the nation as a whole. This assertion refuses to account for many things racial, gendered, and economic, including the dramatic drop in employment opportunities and wages in the metropolitan industrial sector over the last twenty years, and the social devastation that has taken place precisely in those defunded areas; its logic of displacement onto the consumer reveals how the personal morality citizenship card being played by ruling blocs is central to the ideology of unimpaired entrepreneurial activity that was sanctified as free-market patriotism during and after the Reagan regime.

*Id.*

<sup>95</sup> Berlant discusses in this regard the figure of the child as the exemplary American, a child who is alternately impossibly innocent and in need of protection, and a monster necessitating punishment and control. *Id.* at 87 (discussing the image of the innocent fetus as exemplary citizen). For a discussion of how the image of sexually corrupted children drove a congressional moral panic about the dangers of the Internet, see Mona Lynch, *Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 *LAW & SOC. INQUIRY* 529 (2002).

alternately around images of victimized children and around images of evil queers and selfish feminists bent on destroying “the family.” This relentless promotion of “family values” appeals, of course, to the fundamentalist Christian wing of neoliberalism, for whom restoring patriarchal power is closely tied up with the goal of aligning the state with religious authority. The dramas staged within the intimate public sphere, however, also appeal to a broad swath of Americans, and we may see them as congenial to, though not necessitated by, the suburban politics of home and family.

The political, economic, and cultural dimensions of neoliberalism are not a seamless whole; I will return to this point in Part II when I suggest that neoliberalism can survive, even thrive on, same-sex marriage. Despite many internecine disagreements, however, there is broad agreement among neoliberals on the basics of the project; and the public support for neoliberal policies is such that Democrats as well as Republicans promote them.<sup>96</sup>

### C.

How could this happen? How is it that a civil rights revolution focused on political and social inclusion could coincide with a massive project of segregation and hierarchy involving the very same factors of race and class? And how is it that working-class and middle-class people could vote for policies that redistribute wealth and power upward rather than downward — that would seem to flagrantly contradict their material interests?

Two quotes are instructive. “‘Segregurbia’ has flourished,” the director of the Mayor’s Commission on Group Relations (Newark, New Jersey’s civil rights agency) “cynically put it in 1962, because ‘the free enterprise system lurking in many American hearts has provided more moves to all-white suburbs than the billion words of love have promoted the spiritual advantages of economic and integrated city living.’”<sup>97</sup> Thomas Frank provides the second quote: “In the backlash mind business is natural; it is normal; it is beyond politics.”<sup>98</sup>

The collapse of the democratic ideals behind *Brown* is an instance of what happens when civil rights are articulated within what Elizabeth Iglesias calls an

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For the argument that American society’s fixation on the sexualization of children is not entirely healthy, see JAMES R. KINCAID, *EROTIC INNOCENCE: THE CULTURE OF CHILD MOLESTING* (1998).

<sup>96</sup> The case in point being, of course, President Bill Clinton, who was responsible for implementing many neoliberal economic policies, including dismantling “welfare as we know it.” Jason DeParle, *The Clinton Welfare Bill: A Long, Stormy Journey*, N.Y. TIMES, July 15, 1994, at A1. For a sustained argument that Clinton’s economic policies exemplified rather than challenged neoliberalism, see POLLIN, *supra* note 77.

<sup>97</sup> COHEN, *supra* note 43, at 213.

<sup>98</sup> FRANK, *supra* note 19, at 128.



"anti-political economy."<sup>99</sup> Once integration could be represented as a merely moral idea and then pitted directly against economic interest, it was sure to lose. More generally, *Brown* failed because the rights it represented ultimately bowed to, rather than successfully challenging, the basic principles of what I call "structural liberalism": (1) a segmented approach to the governance of family, market, state, and civil society; and (2) a politics that targets purportedly broken, inadequate, threatening, or dependent subjects, not the failures of liberalism itself, as the cause of group conflict. In the present day, neoliberalism profits, as Frank suggests, from a public discourse that also obeys the rules of structural liberalism, a discourse in which markets are non-political and social suffering is the fault of evil or undisciplined subjects.<sup>100</sup>

Some ideas are so ubiquitous that they become taken for granted and treated as simple common sense. One of these ideas in Western political thought is the notion, rooted in classical liberal political theory, that the social world is divided into separate spheres, "public" and "private." The public sphere is the domain of politics and government; the domain of the private sphere is identified sometimes with "the market," sometimes with "the family," sometimes more broadly with "civil society."<sup>101</sup> Rather than seeking to rule over the people in every facet of their lives, the state in a liberal regime is "distinguished by trying to work through the freedom or capacities of the governed."<sup>102</sup> Part of the state's responsibility is to protect this freedom, by refraining from intervention in the spheres of social life considered "private," such as the family and the market, without a good reason.<sup>103</sup>

When might a good reason exist? Central to classical liberal theory is the assumption that self-government, rather than government by a sovereign or a deity, is at the heart of freedom. Crucial to the framework of liberalism, then, is the necessity of a self up to the task of self-government in each of these spheres. Buried at the heart of classical liberal theory is an unarticulated anxiety about whether the subject of self-government is in fact up to the task. The art of government entails, then, judicious

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<sup>99</sup> Iglesias, *supra* note 21. Cf. JAMES FERGUSON, THE ANTI-POLITICS MACHINE: "DEVELOPMENT," DEPOLITICIZATION, AND BUREAUCRATIC POWER IN LESOTHO (1994) (describing international development agencies and state bureaucracies as "anti-politics machines" because they reduce poverty and degradation to failures of technological advancement, rather than the effects of exploitation and domination).

<sup>100</sup> See *supra* note 89 and accompanying text.

<sup>101</sup> Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1501 (1983). See also ETIENNE BALIBAR, "Rights of Man" and "Rights of the Citizen": The Modern Dialectic of Equality and Freedom, in *MASSSES, CLASSES, IDEAS: STUDIES ON POLITICS AND PHILOSOPHY BEFORE AND AFTER MARX* 39 (James Swenson trans., 1994); Karl Marx, *On the Jewish Question*, in THE MARX-ENGELS READER 26 (Robert C. Tucker ed., 2d ed. 1978).

<sup>102</sup> MITCHELL DEAN, GOVERNMENTALITY: POWER AND RULE IN MODERN SOCIETY 15 (1999).

<sup>103</sup> *Id.* at 51.

intervention into spheres considered “private,” when necessary to further or protect the subject’s autonomy.<sup>104</sup>

This endemic anxiety about the capacity for self-government becomes a full-blown panic when liberal practices of governance meet subjects considered inherently incapable. Sometimes liberal theory deals with this crisis of the subject by excluding from the polity in the first instance those subjects deemed inadequate to the task of self-government, such as non-Europeans.<sup>105</sup> For those subjects essential to political community yet nevertheless deemed defective in their capacities — namely, women — liberal theories have incorporated various complex machinations to cement women’s place under the rule of men while admitting them to some form of citizenship.<sup>106</sup> Finally, in liberal societies in which non-Europeans have won the struggle to be formally included as citizens, elite anxieties over the capacity of those citizens to truly govern themselves, combined with the general anxiety, unease, and resentment that the concept of self-government produces in the citizenry, have facilitated the unleashing of all kinds of nonliberal powers against subjects deemed failed, dependent, or otherwise inadequate to the task of self-government. These powers are alternately directed toward the exclusion or assimilation of imperfect subjects.

The exercise of these nonliberal forms of coercion, discipline, and punishment is legitimated both through outright stereotyping and stigma and through figuring these exercises of power as nonpolitical. As several scholars and others have shown, the neoliberal project of “welfare reform” through the 1970s, 1980s, and 1990s focused on attacking black people’s, especially black women’s, capacity for self-government, and thus justifying the need to use coercive government policies to teach them self-discipline.<sup>107</sup> At the same time, as Martha McCluskey shows,

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<sup>104</sup> *Id.* As Mitchell Dean elaborates:

Liberalism as an art must decide under what circumstances and in what combination to allow the play of the forces of the market, the affections of families, the sympathies of community, and the laws of population, and when to intervene to protect and invoke the rights and liberties of individuals that are vital to securing such processes. Liberalism is an art of government not only because it recognizes that there are limits to the role of the state but because what it determines as falling outside the political sphere is itself necessary to the ends of government.

*Id.*

<sup>105</sup> See CHARLES W. MILLS, *THE RACIAL CONTRACT* (1997) (exploring how the central theorists of classic liberalism assume, often without much argument, that theories of self-government apply only to European peoples, whose heritage prepares them for the task).

<sup>106</sup> See CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988) (arguing that a “sexual contract” securing the social domination of women by men underpins the “social contract” of liberal theory).

<sup>107</sup> See Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1576–78 (1996) (book review).

conservative scholars translated these political attacks into a technocratic (and hence presumably value-free) economic analysis of “moral hazard.”<sup>108</sup> The notion of the “anti-political economy” — the figuring of market institutions as governed by natural laws of supply and demand, economic analysis as value-free, and the sphere of the market itself as pre-political — helps conceal subordination and naturalize inequality: formal political, social, and civil rights can be upheld even while material injustice persists.

When emancipatory movements run out of steam, they often do so by being incorporated into the de-radicalizing framework of structural liberalism. This is Lisa Duggan’s diagnosis of what happened most recently in the 1980s to the new social movements:

The overarching Liberal distinction between the economy, the state, civil society, and the family consistently shaped, and ultimately disabled progressive-left politics by separating *class politics* — the critique of economic inequality — from *identity politics* — protest against exclusions from national citizenship or civic participation, and against the hierarchies of family life.<sup>109</sup>

Duggan’s otherwise powerful account of the eclipse of the “new social movements” of the 1960s and 1970s by neoliberal doctrines and practices grows vague when she tries to explain how this all happened — how it was that leftist emancipatory political movements gave up their economic demands and became focused on purely cultural “identity politics.”<sup>110</sup> She ends up wheeling out that old straw man, the “civil rights lobby,” to explain how “[t]he reproductive freedom movement receded, but the National Abortion Rights Action League remained; the Civil Rights and Black Power movements disintegrated, but the NAACP persisted.”<sup>111</sup> I think the explanatory piece Duggan is missing is the pivotal role that law plays in the United States as the fulcrum for turning political demands in the streets into institutional policy. After all, “identity politics” did not somehow swallow up the entire progressive left in the 1980s and 1990s: as Duggan herself concedes, for example, “the movement born to fight AIDS and HIV infection linked identity and civil rights politics with an encompassing vision of material and cultural equality, and drew upon the resources of activists, theorists, artists, and scientists to construct an imaginative range of political interventions during the 1980s.”<sup>112</sup> The problem was not the revolutionary vision, but the increasingly meager set of legal tools with which to make that vision a reality.

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<sup>108</sup> McCluskey, *supra* note 78, at 807.

<sup>109</sup> DUGGAN, *supra* note 40, at 7.

<sup>110</sup> See generally *id.* at 74–83.

<sup>111</sup> *Id.* at xviii.

<sup>112</sup> *Id.* at xix.

This dynamic of recuperation also did not begin with the new social movements. As William Forbath and other legal historians have shown, the politics of class in the United States are inextricably intertwined with the politics of race, and the periodic rise and fall of what Forbath calls “social citizenship” — the claim, through both law and policy, to robust economic and social rights as well as formal political and civil rights — is linked to African American civil rights struggle.<sup>113</sup> The response of elites to claims for social citizenship has often been the granting of “racial” rights at the expense of “class” rights. Some historians place responsibility on anti-racist activists themselves for abandoning the project of class rights in favor of narrower, but more politically attainable, “racial rights” accessible to the already privileged — the “like white.”<sup>114</sup> Political elites, however, must bear the lion’s share of the blame for molding emerging “civil rights” around the framework of structural liberalism, leaving civil rights without an economic underpinning.<sup>115</sup>

Whatever the allocations of blame, it should be clear that the reduction of new social movements’ demands for recognition owes much to the conservative tendencies of American jurisprudence. Law secures substantive rights, but always in favor of preserving and maintaining existing power relations. When law preserves status inequality by transforming it, it often does so through its power to map and defend the borders between what is properly public and what is private; what constitutes “state action” and what does not; what is public subordination and what is mere “private discriminations,” “social discrimination,” or “market forces;” what is the business of the law and what is purportedly beyond the law’s purview and in the realm of the “social.”

For example, *Brown* did transform the political demand for racial equality into a legal right — in realms deemed “public,” such as arenas subject to de jure segregation and even public accommodations and housing (which had for generations been considered “social” rather than fully “political” and therefore amenable to racialized exercises of the state police power). But *Brown* did not fully overrule *Plessy*’s designation of some areas of social life as beyond the power of the law to alter. Over time, and not without contestation, the courts implementing *Brown* pulled back from intervening too far into the political geography of race. This political geography remained naturalized, figured as private rather than public, the product of choice not coercion. Structural liberalism made a space for “private” discriminations and “private” economic action; it made space as well for a sphere of

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<sup>113</sup> Forbath, *supra* note 22.

<sup>114</sup> See, e.g., Risa Lauren Goluboff, “*Let Economic Equality Take Care of Itself*”: The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s, 52 UCLA L. REV. 1393 (2005); Risa L. Goluboff, “*We Live’s in a Free House Such as It Is*”: Class and the Creation of Modern Civil Rights, 151 U. PA. L. REV. 1977 (2003) (arguing that the NAACP in the 1940s abandoned its representation of sharecroppers to focus on the needs of bourgeois blacks, thus contributing to the contemporary narrow purview of “civil rights”).

<sup>115</sup> See Forbath, *supra* note 22.

the “social,” or civil society, in which the state could actively manage race relations and yet the courts would defer to its choices. Thus what Melvin Oliver and Thomas Shapiro have called the “sedimentation of inequality”<sup>116</sup> — the buildup of economic wealth and political power in families, geographic “spaces,” and market institutions marked “white,” initially accomplished in part through overtly racialized state action — was left undisturbed.<sup>117</sup> Today, as scholar of race and space Richard Ford observes: “Segregated neighborhood schools are . . . defended as the natural reflection of existing housing patterns, themselves the outgrowth of private preferences for neighborhoods and neighbors. If the neighborhoods happen to be racially segregated, this and the resulting segregation of the public schools, we are told, are not the responsibility of the law.”<sup>118</sup>

A striking feature, in this regard, of the cultural dimension of neoliberalism is its relationship to economic policy and the workings of markets. Thomas Frank argues, as we have seen, that working-class and middle-class Americans are drawn to neoliberalism because it articulates the hidden injuries of post-Fordist economic restructuring and mass consumption.<sup>119</sup> Neoliberalism does so, however, by translating these injuries into the symbolic realm: people in Kansas are not suffering because jobs have gone overseas, but because a series of “enemies” has seized control of American culture.<sup>120</sup> This shift works only because most Americans see markets and economic forces not as political, but as somehow beyond politics (or if not beyond politics, certainly beyond the capacity of the average voter to affect or even grasp). Economic forces thus become just facts of life to which we all must adjust as best we can. As Frank puts it:

The erasure of the economic is a necessary precondition for most of the basic backlash ideas. . . .

. . . Conservatives are only able to ignore economics the way they do because they live in a civilization whose highest cultural expressions — movies, advertisements, and sitcoms — have for decades insisted on downplaying the world of work.<sup>121</sup>

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<sup>116</sup> See OLIVER & SHAPIRO, *supra* note 42, at 51.

<sup>117</sup> See generally *id.*

<sup>118</sup> Richard Thompson Ford, *Brown's Ghost*, 117 HARV. L. REV. 1305, 1307 (2004).

<sup>119</sup> See *supra* note 89 and accompanying text.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 128–29.

## II.

## A.

The claims to family that GLBT people began to make in the 1980s — claims that suddenly erupted into the same-sex marriage movement in the 2000s — have, like the claims to integrated education made by African Americans in the 1940s — a political economy dimension. GLBT claims are linked to an emergent crisis in “the family” itself, that singular name given to a far from unified network of state and non-state institutions and practices. Beginning in the early 1970s, domesticity — a set of practices and ideologies that had linked relations of production, relations of consumption, and relations of reproduction together since the late nineteenth century — was threatened by a series of shocks, some primarily economic and others primarily social in origin. As the crisis in the global economy touched off by the 1970s spike in oil prices and the emergence of “stagflation” seemed suddenly impervious to Keynesian remedies, the stability represented by “Fordism” — an industrial economy able to provide relatively high wages to a largely male workforce supported by wives at home; corporations willing to trade off some profits in exchange for labor stability; and a substantial (if not generous, compared to European countries) welfare state — broke down.

Corporations began to move their operations overseas and cut jobs and benefits in search of greater profits; under this threat, labor made increasing concessions. The economy itself began to de-industrialize, moving toward information and services, and as it did so, bad jobs replaced good jobs. Real wages fell, work hours rose, and women began to move into the work force in substantial numbers in order to make up for household shortfalls. At the social level, technological innovations like the “Pill” and the cultural revolutions of the hippie movement, “Women’s Liberation,” and “Gay Liberation” began to provide increasing alternatives to heterosexual monogamy. “The family” — the institution within which wives were supposed to provide care to children, the infirm, and the elderly and be dependent, in turn, on their “breadwinner” husbands; the institution through which the state subsidized these heterosexual households through tax and benefits policies; the institution that was to provide a haven in a heartless world, buffering individuals against the psychological and cultural shocks imposed by capitalism and substituting the pleasures of private “love” for shortfalls of joy and satisfaction in the market and the public sphere — was suddenly in crisis.<sup>122</sup>

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<sup>122</sup> As Kath Weston observes:

The historical shift that placed family issues at the center of GLBT politics and associated gay rights with claims to kinship represented much more than a rhetorical move. The changes desired were never merely ones of nomenclature: substitution of *spouse* or *partner* for *boy-friend*, *parenting* for *child care*, *family of friends* for *homies* and *buddies*.

Gay liberation, or the GLBT movement, offered a creative response to this series of crises. GLBT activists and thinkers threaded together the personal and the political to encourage queer people to come out of the closet, and to name and challenge Western heteropatriarchy as an ideology, and a pernicious one. Its anti-subordination emphasis brought urgency from a new direction to the questions: What makes a satisfying life? What is a family? What are families for?

GLBT people, like feminists, have worked to queer “the family,” to bring its contradictions and its inadequacies to the surface, to make it visible as a set of economic and political entitlements, a tentacular institution with roots in the state and the market and not simply a private relation of intimacy. Like civil rights advocates of the 1960s, queer people have drawn on images of joy as well as critique: articulating narratives of desire, pleasure, and intimacy, unmooring them from religiously-based rituals of punishment and denial and from the heterosexual economy of repression and silence.

But what will become of this project of queering the family when it is transformed through the legal system into a claim for “equality” in marriage and family rights? Civil rights law, as we have seen from the story of *Brown*, consistently delinks claims for recognition from claims for redistribution; civil rights become recognition rights when implemented through the “anti-political economy.” Those who have the economic and social privilege to exercise their new rights will be able to. The rest will not.

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By asserting claims to kinship, GLBT people could simultaneously make claims on material conditions that included country of residence and resources allocated through state-certified marital or biogenetic connection. In the process, they called attention to symbolic aspects of blood and marriage that worked to naturalize certain forms of kinship in European and North American societies.

. . . .  
 . . . [B]y encouraging people to come out and subjecting the permanence of biological ties to review, the GLBT movement had inadvertently helped open the space to pose the question, what makes a family? . . . The responses are multiple and emerge from historically changing conditions. What perhaps mattered most was not so much the answer to the question but rather the posing of the question, which created occasions for the recognition and adjudication of queer sorts of differences in the configuration of daily intimacies.

Kath Weston, *Families in Queer States: The Rule of Law and the Politics of Recognition*, 93 RADICAL HIST. REV. 233, 233–34 (2005). For more on the crisis of the Western nuclear family and various feminist responses to this crisis, see, for example, JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 86–7 (2000); STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP (1992); MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004); JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000).

Some of the consequences of this preservation-through-transformation are social and cultural. Thus, for example, made invisible again will be those whose queerness goes beyond simple same-sex monogamy. As Weston notes:

The focus on father and mother in legal precedent leaves little room for numbers in excess of two: little room for aunts, for cousins, for religious or political communities that take collective responsibility for children, for larger-than-nuclear households.

There are few if any pages in U.S. case law that yield directly relevant precedent for people who come from parts of the world where a mother's brother is supposed to maintain a key relationship with her child, sometimes taking more responsibility for the child than the mother's partner. Nor is there much room in U.S. case law for the gay man who has cared for a child two weekends a month since the child's birth, serving as an uncle of sorts but without any prospect of formal visitation rights. Nor are there precedents for kinship ties fashioned of friendship, despite a long history of GLBT people according friendship a special place in their hearts. Legalization of same-sex marriage would do little to strengthen the position of any friend, non-biologically related *tío* (uncle), or mother's brother who felt compelled to turn plaintiff. Wherever precedent rules in this legal system, "blood" ties and a nuclear model of family looms large.<sup>123</sup>

A second likely outcome of the absorption of queering the family into same-sex marriage is also social-cultural. As Michael Warner has forcefully argued, the politics of same-sex marriage threatens not only to make queer alternatives to the monogamous couple invisible; it instills a politics of respectability within the GLBT movement itself that begins to call forth what Marc Spindelman calls the "like-straight" argument, valorizing those people who look just like straight people except for being gay and casting out (again) as weird, sick, and not representative of "us" those whose queerness appears excessive.<sup>124</sup>

But GLBT requests to be included in the institution of marriage when transformed into legal "equality" rights will also have political-economic effects. The absorption of queering the family into same-sex marriage threatens to silence, of course, the gay and feminist critique of marriage itself, precisely at a time when the economic, political, and social functions of marriage have become dramatically

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<sup>123</sup> Weston, *supra* note 122, at 136.

<sup>124</sup> See Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615, 1619–32 (2004). See generally MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999).



unstable and unclear. Marriage as a delivery system for various economic and social benefits, as a fix for the wounds and inequalities of capitalism, is no longer working for increasing numbers of people; the push for same-sex marriage threatens to drown this recognition in an ocean of sentimentality. It will leave stranded all of those populations for whom marriage is already an inadequate answer to problems of poverty: for example, working class queers (and poverty is gendered female and nonwhite), mothers, and disabled people. And it presents no obstacle to — in fact, may further — the pursuit of the dream of romantic-sexual fulfilment as the horizon of the culture of consumption: that thing, which in remaining “priceless,” enables everything else to be bought with MasterCard.<sup>125</sup>

Secondly, and in a convergence with the political economy of *Brown*, the GLBT focus on the family, when transformed into a civil right to equality, threatens to strengthen, rather than destabilize, the privatized political economy of suburbia. As we have seen, the political economy of the post-war suburbs has emphasized technologies of exclusion (NIMBYism) as a means of supporting property values, and the politics of property values precludes meaningful participation in decisions about economic production or the political public interest at large, encouraging instead a privatized praxis of household and individual competition, consumption, and strategic advantage. At the regional level, the politics of suburbia has proved to be much more effective an engine of white supremacy and class war against the poor than the White Citizens’ Council ever was.

*Goodridge*, then, promises both real material and symbolic security for some GLBT people, and a victory against the right-wing politics of stigmatization of homosexuality. But framed as Ball has framed it — a battle for legal equality, with ups and downs but progressing toward a long-term “overcoming”<sup>126</sup> — I worry that the fight for same-sex marriage risks becoming yet another example of preservation through transformation. The fight for same-sex marriage, it is true, has angered those elements of the conservative coalition who are most closely identified with religious fundamentalism, and a victory for same-sex marriage means a defeat of those forces who would write a narrow understanding of Leviticus into the Constitution and common law. Yet, in the end, the political economy of the Right is well able to absorb queers as long as they stand ready to get married, move to the suburbs, and vote for lower taxes.

It is in this sense that the fight for same-sex marriage can be understood as a “sideshow”: to the extent that the face-off in the social realm between bigots and anti-bigots distracts us from the larger forces of containment and cooptation, to the extent that we are satisfied with equality lite, queer progressives — like the middle- and working-class people Thomas Frank analyzes in *What’s the Matter with*

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<sup>125</sup> See generally EVA ILOUZ, CONSUMING THE ROMANTIC UTOPIA: LOVE AND THE CULTURAL CONTRADICTIONS OF CAPITALISM (1997).

<sup>126</sup> See *supra* note 9 and accompanying text.

*Kansas*?<sup>127</sup> — miss the continued process of upward distribution, a process that even a definitive win against the prejudice of homophobia will not stop or even slow.

And there is room under the neoliberal tent for gay and lesbian identities (just as there is room within the Republican Party for the Log Cabin Republicans). Just as neoliberalism was able to deflect and absorb the radical energies of the racial justice movement, it has the capacity to deflect and absorb the radical energies of the gay and lesbian movement.

## B.

What of the transformative possibilities of *Lawrence*? At the end of her article, Sonia Katyal suggests that the dangers of *Lawrence* — most notably, the danger inherent in tying “sexual sovereignty” to conceptions of liberty and privacy, which themselves are tied to the private sphere in general and the home in particular — can be avoided by an “intersectional” approach.<sup>128</sup> As I read Katyal, what she means by “intersectionality” in this context includes a challenge to structural liberalism’s separation of spheres. Thus, in order to make “sexual sovereignty” real for women and children, as well as for queers who lack the capacity to (or do not wish to) limit their sexual expression to the home, the traditional line between the public and the private that “privacy” marks must be made porous, or redrawn entirely. The language of privacy and liberty makes autonomy depend on the control of private property, and the control over the less-powerful (the defective subjects of the world) that private property makes possible.<sup>129</sup> For private property to truly confer liberty, it is necessary for everybody to have some.<sup>130</sup>

I agree with Katyal entirely on this point. It would be wonderful to be able to generate rights to property, to public as well as private space, to the redistribution of material resources necessary for everybody to exercise sexual autonomy, out of the right to sexual sovereignty. Yet I wonder how optimistic we ought to be about the chances that *Lawrence* can be pulled in this direction. As Katyal herself notes, the courts that have had occasion to consider the case have so far rejected such an expansion. And *Lawrence* itself, as nearly all the scholars interpreting the opinion have agreed, entwines sexual sovereignty so closely with a strict public-private distinction that it is difficult to see how that distinction can be defeated on *Lawrence*’s own terms. At stake, for example, is the familiar machinery of “negative rights” versus “positive rights,” “equality” versus “special rights,” “formal equality” versus

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<sup>127</sup> FRANK, *supra* note 19.

<sup>128</sup> Katyal, *supra* note 1, at 1491.

<sup>129</sup> See generally Samuel Freeman, *Illiberal Libertarians: Why Libertarianism Is Not a Liberal View*, 30 PHIL. & PUB. AFF. 105 (2001).

<sup>130</sup> For a version of this argument that works off the idea of “forty acres and a mule,” see generally Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL’Y 37 (1990).

“affirmative action,” “compensation” versus “accommodation,” that have successfully cabined civil rights for other groups in the past.<sup>131</sup> In order to defeat this machinery, progressives would have to, I think, alter both the existing jurisprudence and the face of the existing judiciary.

Katyal does worry about the transnational effects of “gayspeak,” given the variety of sexual minority identities around the globe. She observes that beginning in the nineteenth century, the translation of queer sexualities into Anglo-European legal discourses began to focus not so much on activities as on persons.<sup>132</sup> Gay and lesbian activists soon took up this discourse of identity in order to press their claims for legal rights in intelligible, effective ways: homosexual persons, not persons who engaged in deviant behavior, became the target of suppression and the subject of liberation. Yet, Katyal points out that the language of identity can serve as a prison-house as well as a mechanism with which to gain emancipation. Defending a subject named “the homosexual” necessarily flattens or even erases the internal hierarchies within the group, and threatens to naturalize the category itself, erasing its origins in social power.<sup>133</sup>

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<sup>131</sup> Consider, for example, Michael Stein’s exegesis of how these distinctions work to isolate disability rights as “special,” requiring “accommodation,” and therefore beyond the civil rights pale as compared to racial and gender rights. Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 606 (2004).

<sup>132</sup> Katyal writes:

Whereas early classifications of homosexuality, for the most part, concerned themselves with sexual acts, rather than sexual identities, later disciplinary processes began to focus more on the homosexual as a distinct type of person, a “species,” rather than a type of behavior. Early court opinions, for example, carved from the law a vision of a homosexual species, thereby willingly embracing the notion that American society could be neatly encapsulated into homosexual and non-homosexual persons. In *Bowers v. Hardwick*, for example, the Court observed that its opinion did not require it to judge sodomy (in general) or homosexuality (in particular); instead, it circumscribed its query to ask only whether the Constitution conferred the fundamental right upon “homosexuals to engage in sodomy.” By carving out a particularized inquiry — focusing its gaze on homosexuals, as opposed to society generally — the Court reified the notion that sexual identity, rather than activity, marked citizens for both liberation and moral opprobrium, depending upon which side of the line they fell.

Katyal, *supra* note 1, at 1437–1438 (footnotes omitted).

<sup>133</sup> Katyal quotes Nan Hunter:

The civil rights claim represents the most powerful device for securing equality in American society, yet is premised on recognition of a coherent group identity. What often goes unspoken in the assertion of such a claim is the tension between the desire to deconstruct the imprisoning category itself and the need to defend those persons who are disadvantaged because they bear the group label.

*Id.* at 1439 (quoting Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 546–47 (1992)).

This dilemma of identity, Katyal notes, is pressing not only within the confines of the United States but around the world. The language of gay rights, connected to the social norm of gay identity, is a global export from the West: people who participate in same-sex intimate relationships everywhere are urged to “come out” as gay and to join the (Western-led) movement for gay liberation. This is problematic, however, for a number of reasons. For people in post-colonial nations, a universal Western gay subject may look just as imperialist as did the universal unmarked subject of History.

The “we are everywhere” slogan gone global also has economic consumption implications. As Duggan notes, one of the continuing projects of neoliberalism is to turn “global cultures into ‘market cultures.’”<sup>134</sup> This process can clearly be seen with regard to homosexual identity. Katyal quotes Arnaldo Cruz and Martin Manalansan on this point:

Queerness is now global. Whether in advertising, film, performance art, the Internet, or the political discourses of human rights in emerging democracies, images of queer sexualities and cultures now circulate around the globe. . . . In a world where what used to be considered the “private” is ever more commodified and marketed, queerness has become both an object of consumption, an object in which nonqueers invest their passions and purchasing power, and an object through which queers constitute their identities in our contemporary consumer-oriented globalized world.<sup>135</sup>

For Katyal, the Court’s opinion in *Lawrence* provides a potential escape from these problems. Katyal argues that *Lawrence* introduces the principle of what she calls “sexual sovereignty.” Sovereignty has an external and an internal aspect. Externally, sovereignty draws on notions of equal treatment and respect among other sovereigns, as well as freedom from interference. Internally, sovereignty entails the exercise of authority, and thus draws on the principle of self-determination, as well as the liberty to pursue one’s own vision of the good. *Lawrence*, as Katyal shows, deliberately rejects the identity-bound discourse of equality in favor of three liberty and privacy principles — “spatial privacy, expressive liberty, and deliberative autonomy” — that together map, not rights accorded to certain kinds of persons (“homosexuals”), but rather a set of powers attendant to *all* (sovereign) persons.<sup>136</sup> For Katyal, this

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<sup>134</sup> DUGGAN, *supra* note 40, at 12.

<sup>135</sup> Katyal, *supra* note 1, at 1434 (quoting Arnaldo Cruz-Malavé & Martin F. Manalansan IV, *Introduction: Dissident Sexualities/Alternative Globalisms*, in *QUEER GLOBALIZATIONS: CITIZENSHIP AND THE AFTERLIFE OF COLONIALISM* (Arnaldo Cruz-Malavé & Martin F. Manalansan IV eds., 2002)).

<sup>136</sup> Katyal, *supra* note 1, at 1435. Katyal notes that the *Lawrence* Court, importantly, locates these rights in individuals and not in the marital couple. *Id.* at 1465.

conception of sexual sovereignty has the potential to map more productively onto non-Western sexual cultures than does the language of homosexual-heterosexual equality.

Katyal is not naive; she is frank about the “containment” strategy *Lawrence* carries within it. Sexual sovereignty, for the Court, is tied to the private sphere and especially the home. But, as Katyal recognizes, not all persons have the kind of access to private property that would enable them to exercise this sexual sovereignty. Moreover, Katyal explicitly acknowledges Marc Spindelman’s argument that paeans to “home” and the joys of private intimacy have traditionally marked out a zone of sexual abuse for women and children, as well as disempowered men.<sup>137</sup> She also adverts to Mary Anne Case’s suggestion that the right to sexual sovereignty as contemplated by the courts is in fact a right that will be recognized only within the context of a sanctioned (marital or quasi-marital) relationship: teenagers and single women, for example, need not apply.<sup>138</sup> And the potential limitation of even expressive liberty — the right to engage in sexual intimacy as a form of identifying and pursuing the good — to the private sphere troubles Katyal.

Yet, at the end of the day, Katyal is more optimistic than pessimistic about *Lawrence*. What is needed, she argues, is a coupling of the potential of *Lawrence* with a robust concept of “intersectionality”:

*Lawrence* must, to be truly effective, take up the call of intersectionality — and recognize that empowering the private domain of sexuality requires a more fuller protection of the “publics” of sexuality — whether they affect one’s outward expression, one’s choice of partner, one’s sexual activities in public, or one’s associational choices.<sup>139</sup>

Such an intersectional understanding of *Lawrence* would be useful not only in non-Western sexual cultures but for all of us.

I agree with Katyal that because “homosexual” identity has a particular Anglo-European history and culture, sexual minorities who do not identify themselves as “homosexuals” should not be asked to adopt such an identity (or else make a persuasive “like gay” argument) in order to escape repressive state power. Yet the colonial dynamic that concerns her is possible even if the thing being exported is a right rather than an identity. Consider, in this regard, recent controversies within Western feminist theory about the dangers of “multiculturalism.” Some liberal feminists have argued that local, particular patriarchal cultures in the global South impede

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<sup>137</sup> *Id.* at 1470–71 (citing Spindelman, *supra* note 124, at 1634).

<sup>138</sup> *Id.* at 1477–78 (citing Mary Anne Case, *Of “This” and “That” in Lawrence v. Texas*, 2003 SUP. CT. REV. 75).

<sup>139</sup> *Id.* at 1491.

the spread of gender equality.<sup>140</sup> From this perspective, attempts to recognize a "cultural defense" within North American criminal justice systems, and more broadly to adopt a goal of "multiculturalism" in Anglo-American law, are threats to feminist equality. This equation of gender equality and universalism, however, reproduces the assumption that rights travel from West to East, North to South. It erases feminist work in the global South, and it erases patriarchal domination within the global North.<sup>141</sup> Anti-"multicultural" feminism repeats the trope famously articulated by Gayatri Spivak in which "white men [or women] are saving brown women from brown men."<sup>142</sup> It therefore reproduces the dynamics of subordination in the name of anti-subordination.

It is easy to imagine a similar discourse being constructed around *Lawrence's* right of sexual sovereignty. To the extent that "local" (i.e., non-European or North American) sexual cultures do not accommodate themselves easily to translation and implementation of this right, they will be perceived as backward and as in the way of universal queer progress. Of course such a colonial dynamic need not occur. But it is hard to see how *Lawrence's* lack of explicit identity language alone prevents that colonial dynamic, either. Is "sexual sovereignty" produced for global export really distinguishable from "homosexual identity" similarly produced and distributed?<sup>143</sup> Does the universal spread of "sexual sovereignty" rather than "homosexuality" avoid the process of suturing desires to the market, and the processes of group identity formation to the processes of market niche creation and the practices of consumption? Or might it provide precisely the level of standardization that is necessary to underpin the endless creation of difference and desire on which globalized cultures of consumption thrive?

My worry about sexual sovereignty in this regard, then, is that as possessed by gays and lesbians, sovereignty is indeed a threatening notion to fundamentalists of all kinds. But it potentially mimics rather than avoids the colonizing dynamic. Moreover, from the market point of view, sexual sovereignty for all is not a threatening

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<sup>140</sup> See, e.g., SUSAN MOLLER OKIN, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 7 (Joshua Cohen et al. eds., 1999).

<sup>141</sup> See, e.g., UMA NARAYAN, *Restoring History and Politics to "Third World Traditions"*, in *DISLOCATING CULTURES: IDENTITIES, TRADITIONS, AND THIRD-WORLD FEMINISM* 41 (1997); SHERENE H. RAZACK, *LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE, AND CULTURE IN COURTROOMS AND CLASSROOMS* (1998); Inderpal Grewal, *'Women's Rights as Human Rights': Feminist Practices, Global Feminism, and Human Rights Regimes in Transnationality*, 3 *CITIZENSHIP STUD.* 337 (1999); Leti Volpp, *Feminism Versus Multiculturalism*, 101 *COLUM. L. REV.* 1181 (2001).

<sup>142</sup> Gayatri C. Spivak, *Can the Subaltern Speak? Speculations on Widow Sacrifice*, 7/8 *WEDGE* 120, 121 (1985).

<sup>143</sup> Katyal describes the way the Indian government has taken up anti-homosexual sodomy attitudes previously espoused by pre-Wolfenden Britain. Katyal, *supra* note 1, at 1450. Perhaps the new Western import of sexual sovereignty represents the best strategy to challenge this move: fighting fire with fire. But, then again, perhaps sexual sovereignty should be understood in the first place as already local and particular, already saturated with culture, rather than as a neutral universal container that can be filled with the needs of particular cultures.

notion to neoliberal relations of production and consumption; it is a marketing opportunity, one more way in which to stave off the global threat of overproduction.

Indeed, *Lawrence*'s silence on the question of the subject can be read as troubling rather than progressive. Katyal's choice of the term "sovereignty" to describe the right crafted in *Lawrence* is brilliantly perceptive. As others have noted, *Lawrence*'s rhetoric of liberty and the need to create zones of privacy to protect citizens from the repressive power of the state calls up the image of the sovereign self-governing subject that has always been the imagined subject of classical liberal political theory. "Sovereignty," as Katyal observes, captures both the connotation of relations of dignity, respect, and equality among sovereigns (sovereignty's external dimension) and the connotation of a far-reaching domestic "police power" which other sovereigns will have no authority to challenge (sovereignty's internal dimension).<sup>144</sup>

As critical international law scholars have argued, however, both the external and internal dimensions of sovereign power carry with them the potential for subordination. Externally, the question of the subject — who is to be counted as a "sovereign" and who is not — has, in the context of colonial struggle, translated into a jurisprudence under which some sovereigns are more sovereign than others.<sup>145</sup> Internally, the idea of sovereignty as providing a shield against challenges to the exercise of police power has enabled repression of disempowered groups through the presumption of state nonintervention.<sup>146</sup>

Sexual sovereignty, we can imagine, may have the same pitfalls as state sovereignty. The Court has come to identify the unit of sovereignty as the individual, not the household. Yet the concept of sovereignty does not rule out the possibility (indeed, the likelihood) that those who are deemed in advance as less than sovereign masters of their sexuality — women and children definitionally; situationally all those who lack actual control over their sexualities in relation to others; and all those who lack adequate access to sufficient money and property to control a "private" space — will not be accorded the rights and perquisites attendant to sexual sovereignty.

Consider, for example, *Lawrence*'s relevance for the domestic and global sex trades. If ever a case could be made to support Katyal's call to buttress the private rights announced in *Lawrence* with state action that would enable all persons to develop their capacity for sexual sovereignty, it would seem that commercial sex would be the place to make that case. Through a combination of economic exploitation, "private" violence, and state repression, workers at the bottom of the commercial sex industry, both its domestic and global versions, suffer staggeringly high levels of violence, substance abuse, exploitation, injury, stress, and ill health.<sup>147</sup> Moreover, as Sylvia Law observes, in the United States huge resources are poured

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<sup>144</sup> Katyal, *supra* note 1, at 1461.

<sup>145</sup> See generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2004).

<sup>146</sup> *Id.* at 87–89.

<sup>147</sup> See generally Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523 (2000).

into regulating commercial sex.<sup>148</sup> Yet, the bulk of these resources are directed through the criminal justice system, toward the punishment, not protection, of the poorest women and men who provide commercial sex. Streetwalkers and other workers in the commercial sex industry are presumed not to need sovereignty because they have it already. Thus, a common argument in the prostitution debate identifies sex workers as free actors in a voluntary market, and therefore as precisely the opposite of coerced labor.<sup>149</sup>

Despite the equation of markets with freedom, it seems obvious that streetwalkers could use a little less freedom and a little more sovereignty. The majority opinion in *Lawrence*, however, makes it very clear: this case “does not involve . . . prostitution.”<sup>150</sup> “Public” versus “private” is the very spine of the opinion’s reasoning; and the right of privacy has been conveniently crafted so as to leave unprotected those who are most in need of it.

There are problems with respect to the internal dimension of sovereignty also, despite *Lawrence*’s stipulation that the rights it is recognizing inhere in the individual, not the marital relation or the household. As Marc Spindelman has argued, *Lawrence* echoes classical liberal rhetoric that marks the “private sphere” generally, and the home in particular, as a place into which state power has no authority to intervene.<sup>151</sup> *Lawrence*, as well, seems to adopt the “like-straight” reasoning by which homosexuals are to be given the keys to the heterosexual mansion. Privacy and liberty within patriarchal culture have historically meant that the household is a free zone for domestic abuse. Given the continued realities of patriarchal culture, not all “individuals” in the private sphere have equal power, the Court notwithstanding. To this extent, *Lawrence* looks like an attempt to re-brand patriarchy by making it gay-friendly.

Finally, there is reason, I think, to be concerned about the impact of *Lawrence* as a resource for the non-state disciplinary regulation of intimate relations. As Spindelman also notes, the briefs submitted by gay and lesbian activists on behalf

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<sup>148</sup> *Id.* at 527. According to Law:

In 1996, 99,000 people were arrested in the United States on prostitution and prostitution-related charges, and in 1994, 12,243 people were arrested in New York state alone. In 1985, police in the nation’s sixteen largest cities made as many arrests for prostitution as for all violent crimes combined. And police in Boston, Cleveland and Houston arrested twice as many people for prostitution as they did for all homicides, rapes, robberies and assaults combined — and perpetrators evaded arrest for ninety percent of these violent crimes.

*Id.* (footnotes omitted).

<sup>149</sup> See generally Jane E. Larson, *Prostitution, Labor, and Human Rights*, 37 U.C. DAVIS L. REV. 673 (2004).

<sup>150</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>151</sup> See generally Spindelman, *supra* note 124.



of *Lawrence* were soaked in sentimentality for marriage as the site of fulfilled romantic love.<sup>152</sup> A whisper of sentiment even found its way into the Court's opinion when Justice Kennedy observed: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."<sup>153</sup> Michael Warner argues vigorously, however, that linking "good" sexuality with enduring, couple-based, romantic love establishes a disciplinary norm (once again, built on heterosexuality) that can then be enforced against all those who fail to meet the standard.<sup>154</sup> To the extent that queers obey the siren call of respectability and seek to prove their conformity to such norms, they betray the anti-normative stance that has made queer culture both anti-subordinationist and compassionate.

Given these problems with the limited right of "sexual sovereignty," it is puzzling why Katyal mentions, but instantly passes over, the possibility that non-Western sexual cultures could serve as a resource for the development of a transformative rights discourse, and focuses instead on the possibilities represented by *Lawrence*.<sup>155</sup> Perhaps "sexual sovereignty" could have the greatest potential not on the terrain of U.S. constitutional law, but on the terrains of international human rights law and constitutional law in nations, such as South Africa, that have evolved beyond the eighteenth-century version of structural liberalism that separates "negative" from "positive," "first-generation" from "third-generation" rights.<sup>156</sup> The idea here is not to foster the kind of fundamentalism that arises as modernity's shadow, by looking for approaches to sexual cultures that would be rooted in a pure, authentically untouched by Western Culture indigenous practice. Rather, the idea is that in terms of civil society, legal rights, and markets, countries in the "global South" — or the "Second World" of the European Union — might be more fertile ground in which to develop a sexual sovereignty right in transformative directions.

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<sup>152</sup> *Id.* at 1619–20. For another argument that *Lawrence* can or will be read as endorsing only relationship-based sexuality, see Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L.REV. 1399 (2004). For a contrary view on this point, see Valdes, *supra* note 87, at 1398.

<sup>153</sup> *Lawrence*, 539 U.S. at 567.

<sup>154</sup> WARNER, *supra* note 124.

<sup>155</sup> Katyal, *supra* note 1, at 1433.

<sup>156</sup> For example, Berta Hernández-Truyol notes that "South Africa is exceptional in expressly listing sexual orientation as a prohibited basis of discrimination." Berta E. Hernández-Truyol, *Querying Lawrence*, 65 OHIO ST. L.J. 1151, 1209 (2004). Hernández considers *Lawrence* in the context of international, regional, and foreign jurisprudence as well as within U.S. domestic law, and argues that non-U.S. legal decisions in many cases analyze the question of same-sex performances in a much more holistic and nuanced way. See generally Hernández, *supra*. She notes, as well, that courts in other countries and regions, such as Europe, Canada, and South Africa, have situated prohibitions on same-sex performances within an analysis of oppression, *id.* at 1262, whereas "[b]y looking at privacy and/or equality separately, the [*Lawrence*] Court does not center on, although it recognizes, the significance of subordination." *Id.* In light of this, it would be interesting to press Katyal further on the possibilities of a right to sexual sovereignty, for example, within Indian constitutional law.

## C.

Ball's and Katyal's thoughtful papers bring us back to the distinction between liberal and progressive struggles for social change. Progressives share liberalism's substantive goals — honoring individual dignity, liberty, self-development, and self-determination; honoring the relations of equality and interdependence that make those individual achievements possible. Liberalism has a dynamic, constantly expanding quality. By accepting that the good cannot be agreed upon — even named — in advance, it holds us open to the necessity of constant interaction with that which cannot yet be articulated, either to ourselves or to others; and it asks us to embrace unintended consequences, among them the sudden speaking of slaves, women, natives, and queers in languages “we” had reserved for “ourselves.”

What distinguishes progressives from “liberals” as that term is popularly used on the Left these days is progressives' commitment to self-criticism, or to put it less nicely, their pessimism. For progressives, the structural means by which we have traditionally pursued the ends of liberalism are deeply flawed. The horizon of liberalism is inclusion: subordinated groups seek full citizenship, to be treated like everybody else, to have their “differences” treated as morally irrelevant rather than as evidence that they are failed or lesser subjects. The problem with this kind of inclusion is that it leaves unchallenged and invisible the status hierarchies on which full citizenship already depends.

The horizon of progressive social movement is transformation of what “citizenship” means for everyone, through the never-ending effort of “looking to the bottom.”<sup>157</sup> Taking seriously liberalism's relentless move outward to the bottom, into the unknown, means, for progressives, challenging the rules of structural liberalism: making visible and challenging the normative politics of the subject, and making visible and challenging structural liberalism's separation of spheres. From this perspective, liberal expansion necessarily means destabilization, not only of who belongs to the “circle of the we,” but of what “we-ness” means, and what rights a person must have to pursue the substantive goals of liberalism.<sup>158</sup>

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<sup>157</sup> Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987). I am using the word “citizenship” here in a non-technical sense to mean full inclusion in a society.

<sup>158</sup> William Connolly's attempt to describe a politics of “enactment” as an essential part of an ideal democratic culture is relevant here. For Connolly, a truly democratic culture makes a commitment to remain open to the possibility that new claims of injustice will destabilize the very ground upon which “we” as first-class citizens stand. See WILLIAM E. CONNOLLY, *THE ETHOS OF PLURALIZATION* 181 (1995).

The politics of enactment, therefore, is not sufficiently represented through the language of overcoming prejudice, promoting tolerance, extending diversity, or following a settled code of justice among preexisting subjects. Such portrayals not only underplay the constructed, relational character of what we are, they also conceal the precarious political process by which a new claim to identity is drawn onto the register of justice from a nether region residing below it.

I agree with Ball and Katyal that recent gay and lesbian activism concerning intimacy rights has the potential to further progressive work. But engagement through the law is always a double-edged sword. In a society like ours in which law is the linchpin of governance, translating social claims into legal ones is necessary. But it is important also to recognize law's commitment to the rules of structural liberalism. Law tends to absorb emancipatory struggles and translate them into one-dimensional rights — "civil rights," like "equality," that lack traction in the economic and social realms. Law works as well to obscure the problem of the subject, making it easy for certain groups to fall outside the realm of legal rights entirely, at least until they carry the burden of proving they are just like the groups already inside the charmed circle of citizenship. Retelling *Brown* as a story about political economy helps us see how this works. If there is a lesson in *Brown* and possibilities in *Lawrence*, they lie in remembering to question the story the law tells about itself: about its own neutrality and universality, and about the "progress" in the form of movement toward full "inclusion" it eternally holds out as a seduction.

So, what is to be done to maintain the progressive bite of intimacy rights? The need to surface the liberal problem of the subject means, as Ball and Katyal both suggest, that the struggle for the emancipation of sexual minorities cannot stop in the courtroom, but must continue to ripple through the entire culture.<sup>159</sup> One aspect of the power and beauty of queer organizing — take ACT-UP as an example — has been in its insistence on redefining the personhood of gay and lesbian people, and more recently trans people, in ways that force heterosexuals to redefine their own personhood. By refusing the frame of disease or evil, and directly confronting straight people with the spectacle of how "normality" is defined by and dependent on relations of abjection — how heterosexuality is a construct dependent on homosexuality — queer movements have shifted the culture. If Andrew Sullivan is right that Fire Island looks like just another suburb these days, it is also the case that "gay-straight alliances" are spreading in high schools and that young people are increasingly willing to identify as sexual minorities and to accept the fluidity of sexual identity.

This work, however, has not gone far enough, for gay/lesbian identity continues to submerge its own crisis of the subject. For over a decade now, voices within gay

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<sup>159</sup> John Calmore, drawing on the writing of Tom Stoddard, argues, like Ball, that the most valuable legacy of *Brown* and other Warren Court decisions was the culture-shift that they made possible. John O. Calmore, *The Law and Culture-Shift: Race and the Warren Court Legacy*, 59 WASH. & LEE L. REV. 1095, 1099 (2002). Calmore explains Stoddard's argument:

[F]our factors are essential for rulemaking to produce a cultural-shift: a broad and profound change in the law, public awareness of the change and its significance, a general sense that the change is legitimate or valid, and continuous enforcement of the change. All four of these must exist; anything less reduces the result to mere rule-shifting. According to Nan Hunter, a fifth necessary factor for culture-shift is public engagement.

*Id.* at 1100 (footnotes omitted).

and lesbian legal scholarship have criticized the mainstream movement's failure to adequately "look to the bottom," particularly with respect to issues of race and class.<sup>160</sup> Katyal builds on this call for multidimensionality by introducing a post-colonial perspective. If progressives are to take seriously the problem of the subject, we have to recognize and challenge the status hierarchies that emerge from our own process of imagining "gay" or "lesbian" identities.

What of the need to challenge structural liberalism's commitment to separate spheres? Looking to the bottom is critical here as well. The fight for intimacy rights can be seen as a way of challenging the public/private distinction, as feminists have struggled to do. Certainly this is the hope Katyal articulates for *Lawrence*. But I, like others, see *Lawrence* rather as capitulation to the traditional public/private distinction, not a challenge to it. In my view, what is needed within gay/lesbian struggle is an attempt to "politicize" (that is, make visible the politics already therein) the "private sphere" of the market. This is important because there are poor queer people, as others have pointed out.<sup>161</sup> It is important also because we live in a historical moment in which neoliberalism is ascendant and "private" markets are touted as the answer to all social ills. The neoliberal project threatens to undercut whatever progressive bite was left in legal rights activism, for as the public sphere of rights shrinks to insignificance, if we have no language in which to talk about economic relations as political, then status inequalities maintained by capitalism will both increase and be impervious to challenge. We will all be living in Kansas.

This is not an Old Left call to abandon identity politics for the "real," more "fundamental" business of class organizing. As Lisa Duggan so powerfully shows, the material and the symbolic are intertwined in any social formation.<sup>162</sup> Certainly neoliberalism, as we have seen, is both a material and a symbolic politics. The point is not either-or, but both-and. Consider that queers are not, as Madison Avenue and some politicians would have it, mostly affluent and in possession of more disposable income than straights.<sup>163</sup> Consider that queers have a deep stake in the economics

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<sup>160</sup> See generally Darren Lenard Hutchinson, *Gay Rights/Whites and Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997); Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay "Victories"*, 4 L. & SEXUALITY 83 (1994) (questioning the transformative value of progress on selected current issues for sexual minority subgroups, including the trans/bi-gendered); Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of "Sexual Orientation"*, 48 HASTINGS L.J. 1293, 1315-18 (1997) (discussing similar shortcomings in sexual orientation legal scholarship).

<sup>161</sup> See generally Eric Heinze, Essay, *Gay and Poor*, 38 HOW. L.J. 433 (1995) (focusing on the intersection of poverty and same-sex orientation); Hutchinson, *supra* note 14.

<sup>162</sup> See generally DUGGAN, *supra* note 40.

<sup>163</sup> Economist Mary Virginia Lee Badgett argues that there is good reason to believe that because of sex discrimination, gender discrimination, and sexual orientation discrimination, sexual minorities may be less affluent than similarly situated straight people. MARY VIRGINIA LEE BADGETT, *INCOME INFLATION: THE MYTH OF AFFLUENCE AMONG GAY, LESBIAN, AND BISEXUAL AMERICANS* (1998).

of the family, a stake that I have argued is not limited to the need for “inclusion” but extends to the need to transform family relations altogether. Consider as well that queers have a stake in saving and remaking American and world cities, those sites of social invention: queer cultures arose there, and continue to embrace young people seeking relief from discrimination. Like Ball, I think we should ask for more rather than less. Like Katyal, I think that the right path is the multidimensional one.

#### CONCLUSION

Emancipatory struggles, such as the new social movements of the 1960s and 1970s, have sought to make visible liberalism’s crisis of the subject, challenging the stigmatization of those deemed incapable of proper self-government and demanding their full incorporation into citizenship. Counter-emancipatory politics, for its part, sometimes rebuffs these challenges outright, and other times absorbs them into structural liberalism, yielding “formal equality,” or “civil rights.” It is important to recognize the distinction between liberal and progressive struggle, and to recognize, as well, that there are different levels of struggle. Confronting and defeating bigotry is always a good thing. *Goodridge* and *Lawrence* truly are victories, and should rightly be celebrated. But we must also remember that challenging bigotry is only part of a complex struggle for social transformation. A political economy lens reminds us to be wary of a path that would take us from Stonewall to the suburbs.