

SECOND ANNUAL CULP LATCRIT LECTURE

THE CONSTITUTION OF TERROR: BIG LIES, BACKLASH JURISPRUDENCE, AND THE RULE OF LAW IN THE UNITED STATES TODAY

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I. INTRODUCTION

Today, we celebrate the first annual conference of a second decade in LatCrit theory, community, and praxis,¹ an experiment in critical outsider jurisprudence that Jerome helped mightily to make possible.² Sadly, we do so with

* Professor of Law and Co-Director, Center for Hispanic and Caribbean Legal Studies, University of Miami. I thank the organizers, sponsors, and participants of the LatCrit XI conference, where this Lecture was delivered. In particular, I thank Professor Robert Chang for inviting me to deliver this Second Annual Culp LatCrit Lecture. I dedicate this Lecture to Jerome McCristal Culp, Jr. and to his work. Here, I aim to emulate his example. All errors are mine.

¹ For an overview of the LatCrit experience, from origins to the present, see Angela P. Harris et al., *Beyond the First Decade: A Forward-Looking History of LatCrit Theory, Community and Praxis*, 17 L. RAZA L.J. 169 (2006). The term “LatCrit” was coined at a 1995 colloquium, held in Puerto Rico, on the relationship of critical race theory to “Latina/o” communities. From that colloquium, the annual conferences then flowed. See Francisco Valdes, *Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 2 HARV. LATINO L. REV. 1 (1997) (introducing the papers and proceedings of the first LatCrit conference). On the emergence of a “LatCrit” subject position, see Berta Esperanza Hernández-Truyol, *Indivisible Identities: Culture Clashes, Confused Constructs and Reality Checks*, 2 HARV. LATINO L. REV. 199, 200-05 (1997); Kevin R. Johnson & George A. Martinez, *Crossover Dreams: The Roots of LatCrit Theory in Chicana/o Studies Activism and Scholarship*, 53 U. MIAMI L. REV. 1143 (1999); cf. Margaret E. Montoya, *LatCrit Theory: Mapping Its Intellectual and Political Foundations and Future Self-Critical Directions*, 53 U. MIAMI L. REV. 1119 (1999). See also Elizabeth M. Iglesias & Francisco Valdes, *Afterword – Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas*, 19 CHICANO-LATINO L. REV. 503, 568-71 (1998) (discussing the choice of “LatCrit” as partly a political decision to identify as much as possible with people of color, indigenous people, and other traditionally subordinated groups in the construction of this new discourse and praxis).

² The term “outsider jurisprudence” was first used by Professor Mari J. Matsuda. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2323 (1989). Here, the term is preceded with “critical” to emphasize this key feature of the body of work to which LatCrit theory belongs. LatCrit theory is one strand in

Jerome in our midst only in spirit.³ But while among us in the flesh, he attended every single LatCrit conference, from the first in San Diego through the eighth in Cleveland.⁴ And at the very first one, he asked a question that was then foundational, and remains still pressing: how to participate in the struggles of those who are not us?⁵ That is the question always before us; though struggling for one's own rights is not easy, struggling for the rights of others can be that much harder. Invoking that expansive and determined spirit, the title of this talk, of this Second Annual Jerome McCristal Culp, Jr. LatCrit Lecture,⁶ is *The Constitution of Terror: Big Lies, Backlash Jurisprudence, and the Rule of Law in the United States Today*. As this title indicates, this Lecture tackles big ideas, complex topics, in the brief time allotted. But much of the substantive terrain will be familiar – even though oftentimes suppressed or distorted in the process of constituting today's reign of terror. So, I will touch only on the highlights, and trust that suppressed knowledge is not always forgotten knowledge and that we can revive it together through acts of remembrance.

With these circumstances and limitations in mind, in this Lecture I aim to center the process by which a sense of intimidation, control, and terror has been constituted within the United States, especially since 2000, to silence any dissent or opposition to the consolidation of political and economic power in the hands of the current occupant of the White House and his ideological handlers. In particular, I hope to train our collective, critical attention to a few of the key Big Lies that have paved the way for the ongoing constitution of a terrorized nation on the part of its current rulers. Oftentimes, as I outline below, these Big Lies emanate from backlash-identified quarters of the nation's legal culture, including judicial appointees, or certainly with their complicity. I focus on these law-identified Big Lies because we – most, if not all of us here today – are part of this nation's legal culture, embedded within it: as legal scholars with the formal training to expose these Big Lies, I hope to sound an antisubordination alarm and to spur corrective action. I hope to nudge us toward timely collective resistance as critical legal scholars committed to social justice – toward performing the intellectual work that might inform popular resistance to this constitution of terror in the name of Law and Liberty.

The Lecture proceeds in four main parts. The first focuses on some key basics regarding our positions within the legal academy of this legalistic super-

critical outsider jurisprudence, along with critical race theory, critical race feminism, Asian American scholarship, and Queer legal theory. See also *infra* note 9 (on "OutCrit").

³ Jerome died in February, 2004. For more information on Jerome Culp and his work, visit the LatCrit website at <http://www.laterit.org>.

⁴ For the programs and other information relating to the Annual LatCrit Conferences, please visit the LatCrit website at <http://www.laterit.org>.

⁵ Jerome McCristal Culp, Jr., *Latinos, Blacks, Others, and the New Legal Narrative*, 2 HARV. LAT. L. REV. 479 (1997).

⁶ The Jerome McCristal Culp, Jr., Memorial LatCrit Lecture ("JCL") honors founding Board Member Jerome Culp, Jr., who passed away in 2004, and is designed to ensure a substantive continuation of his work in the areas of law, policy, and socioeconomic justice. Each year's annual lecturer is selected and invited by a committee. For more information, please contact Professor Bob Chang, robert.chang@lls.edu, or visit the LatCrit website at <http://www.laterit.org>.

power, to foreground what we might do in Jerome's footsteps qua critical outsider scholars. The second part outlines several prominent and pernicious Big Lies of the moment, to which Jerome's booming voice would demand that we turn our skills and attention. The third asks us to contemplate what comes next, after this period of massive illegality in the name of Law, as Jerome no doubt already would be asking here today: What comes next, when the furies of reaction and backlash are spent, as surely they will be – are we preparing for "truth" . . . is reconciliation possible? And then, the fourth part closes this year's Culp LatCrit Lecture with four mantras for critical survival and two calls to concrete collective action as a community of activist scholars.

II. CRITICAL OUTSIDER SCHOLARSHIP AND RESISTANCE TO BACKLASH: DOING WHAT (ONLY?) WE CAN

Though Jerome clearly understood that antisubordination theory and practice are always multi-faceted and multi-dimensional endeavors, he also emphasized the importance, the centrality, the indispensability of knowledge-production to the mission of outsider legal scholarship; in other words, he never veered from the roles and responsibilities we bear specifically as critical scholars in a legalistic society.⁷ Though we must remain engaged in multiple activities and communities, our unique contributions, if any, to the historical quest for local and global social justice must be built, in great measure, on the unique resources, skills, talents, and opportunities that mark us collectively and individually as outsider legal scholars. For simplicity's sake, we might group our unique or formal kinds of training, skills, and contributions around three basic sets of scholarly initiative and activity: (1) interrogation, (2) interconnection, and (3) introduction. Allow me to explain briefly.

Interrogation, perhaps the most basic, consists of asking the critical questions. To interrogate critically is to question the multiple arrays of assumptions, imperatives, and effects – unspoken as well as spoken – that drive the status quo.⁸ As OutCrit scholars,⁹ we take interrogation to the next level by interconnecting local or otherwise discrete observations – by moving sociolegal

⁷ See, e.g., Jerome M. Culp, Jr., et al., *Subject Unrest*, 55 STAN. L. REV. 2435 (2003) (in this essay, the last he wrote and published, Jerome clearly evinces this sensibility).

⁸ See, e.g., Culp, Jr., *supra* note 5, at 480 (" . . . LatCrit ought to mean – that we do not accept the status quo."). For an early and eloquent exposition of this methodological point, see generally Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991) (urging antisubordination analyses to "ask the other question" as a means of theorizing across single-axis group boundaries).

⁹ The "OutCrit" denomination is an effort to conceptualize and operationalize the social justice analyses and struggles of varied and overlapping yet "different" subordinated groups in an interconnective way. "OutCrit" thus refers (at least initially) to those scholars who identify and align themselves with outgroups in this country, as well as globally, including most notably those who in recent times have launched lines of critical inquiry within legal culture, including critical legal studies. But while "outsider jurisprudence" may be, but is not always nor necessarily "critical" in perspective, the OutCrit stance is, by definition, critical in nature. See generally, *supra* note 2 (on outsider jurisprudence). OutCrit positionality, then, is framed around the need to critique and combat, in collective and coordinated ways, the mutually-reinforcing systems of structural subordination and domination that construct both outgroups and ingroups. For further discussion of this OutCrit designation, see Fran-

analyses from the atomized to the structural, from the individual to the multifaceted systems of subordination that interlock to encase us all. This move from interrogation to interconnection positions us to discern and document the patterns that varied particularities accumulate to create “different” yet mutually-reinforcing supremacies.¹⁰ Finally, the third basic kind of skill is introduction – the act of importing “new” knowledge, oftentimes historical in nature, and applying it to the situation or issue under study.¹¹ Introduction entails the reclamation of “new” or suppressed knowledge and facts to re-contextualize, to reframe, that which we have interrogated and interconnected. In combination, this trio forms a basic OutCrit toolbox. Now is the time to reach into it, and to pull from it the necessary implements to begin preparations for a return of formal democracy and due process of law to these lands.

As Jerome and other critical pioneers have taught us, these three tools or techniques permit us to assemble and reassemble information to produce, record, and transmit antisubordination knowledge, to spur personal resistance against *all* systems of oppression, based on new and sharper understandings of social injustices and their origins. These basics therefore bring us to perhaps the principal question that this Lecture places squarely before us every year: “What would Jerome do?” “What would Jerome do *now* with these particular kinds of skills, under the specific challenges of the moment?” In the remaining parts of this Lecture, I take up this question.

III. BIG LIES, BACKLASH POLITICS, AND “LEGAL” SUBVERSION: WHAT WOULD JEROME DO?

The constitution of terror is built in great measure on the resurrection of discredited constitutional doctrines that aim to bring back some very old (and raw) deals in American law and society. Oftentimes, this mammoth, ongoing project of resurrection is cloaked in a collection of Big Lies that operate together, within the United States and beyond it, that attempt to justify injustice. These Big Lies help to foment and keep in place the intellectual and political constitution of terror that today passes for the Rule of Law in the United States. Let us briefly apply interrogation, interconnection, and introduction to several of these, as we sketch them in the way that Jerome might have.

cisco Valdes, *Outsider Scholars, Legal Theory & OutCrit Perspectivity: Postsubordination Vision as Jurisprudential Method*, 49 DEPAUL L. REV. 831 (2000).

¹⁰ Culp, Jr., et al, *supra* note 7, at 2446-52.

¹¹ The example of courses on Asian Americans and the Law, which oftentimes integrate history into the law curriculum, illustrates this point. *See generally* Francisco Valdes, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 ASIAN L.J. 65 (2003). More generally, the reclamation of suppressed knowledges is central to the social justice project of critical outsider jurisprudence. *See, e.g.*, Sumi Cho & Robert Westley, *Historicizing Critical Race Theory's Cutting Edge: Key Movements that Performed the Theory*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 32 (Francisco Valdes et al. eds., 2002).

A. *Modern “Originalism” as Substantive Framework for Constitutional Democracy in U.S.*

The first Big Lie is that prevalent forms of contemporary originalism provide the “true” substantive framework for constitutionalism – constitutional democracy – in the United States.¹² Originalism, of course, refers to the ideology that would posit “Framers’ intent” (and related historical indicia) as the first and best answer to all constitutional questions.¹³ Modern originalism therefore has been described aptly (and kindly) as a “one-step” approach to the serious and complex business of constitutional interpretation.¹⁴ This step requires (merely) that judges look back to the late 1700s, when the Constitution was drafted and ratified, and then do whatever they imagine might have been done back then. But this insistence on looking only backwards, to the “original” context, ignores the necessary “second step” in the process: applying the words to changing contexts, the present and future or, in other words, “translating” original meanings or objectives into present-day situations, in much the same way interpreters translate terms or texts from one language to another all the time, even while trying to retain and convey original purposes or meanings.

As a prime exponent of this one-step approach likes to put it: “Now, my theory of what I do when I try to interpret the American Constitution is I try to understand what it meant, what it was understood to mean when it was adopted.

¹² For a sympathetic and contemporary overview, see JOHNATHAN O’NEILL, *ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY* (2005). Over time, of course, and as with any other discursive movement, various strains or versions of originalism have been aired. See, e.g., Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7 (2006). However, the currently prevalent version, both jurisprudentially and politically, is associated with the culture wars and their legal component – backlash jurisprudence. See *infra* notes 42, 74-77 and accompanying text (on the culture wars). This version is the focus of this Lecture. See O’NEILL, *supra*, at 94-160 (tracing the construction of this version of originalism from the 1960s to the 1980s). For an excellent (liberal) presentation of the prevailing or backlash version/s of originalism, see Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 *FORDHAM L. REV.* 545 (2006) (outlining the political history and dynamic of this jurisprudential ideology, including current political deployments).

¹³ For an influential and relatively contemporary exposition of today’s originalism, see Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (urging Framers’ intent and other historical factors as the best tools for constitutional interpretation, even if in the form of “faint-hearted” originalism); see also Edwin Meese III, *Interpreting the Constitution*, in *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* 13 (Jack N. Rakove ed., 1990) (elaborating Reagan-style “originalism,” which is the currently prevalent version, and the one associated with backlash jurisprudence and cultural warfare). For other influential elaborations of originalist arguments, see *infra* notes 40-47 and sources cited therein.

Despite the current political dominance of originalism, responses and alternatives continue to be forthcoming. See, e.g., Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245 (2002) (questioning premises of formalism, originalism, textualism, and other methods associated with backlash jurisprudence and its selective embrace of originalist ideology and practice); see also William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT*, *supra* note 13, at 23 (setting forth a similar, earlier critique of originalist imperatives).

¹⁴ Lawrence Lessig, *Fidelity in Translation*, 71 *TEX. L. REV.* 1165 (1992-93).

And I don't think it changes since then."¹⁵ Slowly but surely, this approach freezes society into an increasingly rigid mold, a mold set in the 1700s. Moreover, it's not what the Framers did, nor what they intended.

Nonetheless, one-step or modern-day originalists insist that this approach constrains unprincipled exercises of public power, especially by "liberal" federal judges too keen on "rights."¹⁶ Typically, this insistence is offered as originalism's great virtue – despite the contrary record its adherents have accumulated: while clamoring against judicial activism and its unprincipled, anti-democratic nature, originalist backslashers have put together "the most activist Supreme Court in history" in the past decade or so.¹⁷ Indeed, the "current ascendancy of originalism does not reflect the analytic force of its jurisprudence . . . [but rather that it] provides its proponents a compelling language in which to seek constitutional change through adjudication and politics."¹⁸ To understand modern-day, or one-step, originalism we must understand it as a "political practice" in which backlash-identified judicial appointees, like Scalia and Thomas, "use their judicial opinions as conscious tools to excite the anger, fears, and resentments of conservative constituencies, and thus to fan the fires of political mobilization."¹⁹ Junking wholesale well-established areas of doctrine and upsetting longstanding legislative schemes without batting an eyelash

¹⁵ Justice Antonin Scalia, Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer, AU Washington College of Law (Jan. 13, 2005), *available at* <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>.

¹⁶ The demonized era of "liberal activist judges" is depicted as beginning in earnest during the 1960s under Chief Justice Earl Warren and is portrayed as the complaint of backslashers, who "promise . . . that their replacements will not be so free-wheeling." *See, e.g.*, Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992). For now-classic expositions of this backlash portrayal, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (1977), and ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); *see also* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). This campaign of course evokes historical and legitimate concerns over abuses of power, including judicial abuses. For noted examples, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962), and Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); *see also* MARTIN SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* (1964). For historical accounts, see LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000); J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978* (1979). For a remarkable insider's account of the appointment to the Court of Justice Rehnquist, and the ideological purposes behind his appointment in the context of the gathering culture wars, see JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* (2001); DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* (1992).

¹⁷ *E.g.*, THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* (2004) (reviewing the recent record of backlash activism); Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217 (2004) (releasing the findings of a recent study, which concluded that "judges seeking the original understanding are largely unconstrained in their ability to mold the historical record to serve instrumental goals"); *see also infra* note 59 and sources cited therein (on judicial manipulation of legal rules to reach preferred results in recent decades).

¹⁸ Post & Siegel, *supra* note 12, at 549.

¹⁹ *Id.* at 567.

or minding their own words about restraint, backlash-identified appointees deploy what they call “originalism” to inscribe willfully their “anti-anti-discrimination agenda” onto the nation’s heritage – to inflict wounds on individual rights and civil liberties designed to last long.²⁰ Their appointments were pre-meditated acts of cultural warfare on behalf of “traditional” elites and interests, and they continue to act as if they well know it.²¹

Of course, as a theoretical (or doctrinal) proposition, the “intent” of signatories to a written document certainly may be relevant to the interpretation of its text (though not necessarily, nor automatically, dispositive of its meaning). But the lie here is in the proposition that “original” intent provides a lens through which first principles can be identified to guide exercises of public power by lawmakers, including judges. Mainstream liberal scholars have long shown the concept as being incoherent: there is no such thing as a single or stable Framers’ intent.²² As the historical record amply demonstrates, the Framers had different ideas and agendas as they forged the uneasy deflections, ambiguities, and compromises that emerged from the Constitutional Convention in Philadelphia.²³ And as time passed, their respective and differing “original” intents morphed for personal or political reasons as they argued with each other about the meaning of the text they had commonly produced.²⁴ Under its own terms, then, originalism is conceptually incoherent because its foundational premise is fatally flawed; the Framers had multiple, shifting, and mixed intents, which compound many gaps, conflicts, or ambiguities in the larger historical record, among which professed originalists routinely pick and choose according to their tactical or strategic political needs.²⁵

Yet, today’s originalists ignore this history and/or cherry-pick juicy quotations to skew our impressions of historical realities in accordance with their present-day agendas: to argue for the primacy of their version/s of originalism, they actually rely *more* on the views of the Anti-Federalists (whose views did not garner majority support either during the Convention or ratification) than

²⁰ I borrow the apt term from Rubinfeld, *infra* note 74 (on the “anti-anti-discrimination agenda”); *see also generally*, *infra* notes 42, 59, and 70 and sources cited therein (on the maneuvers, gyrations, and tactics of backlash appointees bent on re-writing the Constitution to impose retrenchment of New Deal and Civil Rights legacies).

²¹ *See infra* notes 74-77 and accompanying text (on the culture wars).

²² For a powerful example, see Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980).

²³ For a good compilation of original differences, see PAGE SMITH, *THE CONSTITUTION: A DOCUMENTARY AND NARRATIVE HISTORY* (1980); *see also* LYNCH, *infra* note 40, at 8-70 (reviewing debates within the founding generation over constitutional meanings). For a set of sympathetic profiles that reflects these differences, see Tim Slover, *The Characters Behind the Constitution*, 6 BYU J. PUB. L. 513 (1992).

²⁴ The controversies over the Bank of the United States are an apt illustration. *See infra* notes 32-41 and accompanying text (on the first and second Bank).

²⁵ For a typical example, see Meese, *supra* note 13, at 17 (plucking strategic quotations from Madison and Jefferson to support his arguments while excising inconvenient historical facts from the account). To broaden the account, see *infra* notes 40 and 42 and sources cited therein (on Madison’s flip-flops regarding constitutional meaning and interpretation). For recent confirmation of this taboo, see Smith, *supra* note 17 (reporting results of empirical study finding judges “mold the historical record” to suit their ideological agendas); *see also infra* note 58 and sources cited therein (on judicial manipulation of law, precedent, and procedure to arrive at judges’ politically preferred results).

those of the Federalists (who did garner majority support both during the Convention and ratification).²⁶ This anti-majoritarianism is surprising, if not hypocritical, coming from today's originalists, who profess adoration of majoritarianism as the essence of democracy – even the fictional sort of majoritarianism that in fact is anti-democratic.²⁷

Let's make sure we all got that, because it's really a bit breathtaking when we pause to reflect on it: today, originalism oftentimes is justified (at least by its judicial adherents) as a species of relatively certain legislative history, which ensures interpretive fidelity to the final constitutional text, but this gyration is accomplished by resorting to (selective) quotes from the historical record that prioritize the views of the original *losers*, over those of the original winners, whose text (and therefore, presumably also intent) is the ostensible focus of originalist inquiry. In other words, today's self-styled originalists would have us regard the views rejected formally at the founding by the Framers and ratifiers of the Constitution as somehow binding now, and in perpetuity. Isn't that a bit like asking Jefferson Davis and his Confederacy to supply the "original intent" for today's definitive interpretation of the post-Civil War Reconstruction Amendments enacted after the Union's victory? I know that textual interpretation calls for nuance, and that parol evidence is sometimes permitted in contracts cases, but do they actually teach this kind of stuff as proper legal analysis or methodology in *any* accredited law school today? As a matter of legal method, should the views of winners be drawn from the pens and mouths of losers? Should the "original intent" of a party to *any* writing be imputed from the self-interested sound-bites of the adversary party? Isn't that just a tad mad?

Another key piece of known yet suppressed knowledge, which enables assertion of this Big Lie, is that those men, the Framers themselves, did *not* look to any conception of "intent" (much less their own) for anything of constitutional consequence. They took vows of secrecy regarding their deliberations and kept the windows of the building shut during that hot summer, precisely to avoid this sort of constitutional voodoo.²⁸ Moreover, when they walked in our

²⁶ For a piercing account of this hypocrisy, see Smith, *supra* note 17, at 234-65 (presenting findings of empirical study of originalist opinions invoking Framers' intent to justify announced outcomes).

²⁷ As we see below, this equation of democracy with majoritarianism is another Big Lie of the moment. See *infra* notes 70-72 and accompanying text (on democracy and majoritarianism under this particular Constitution).

²⁸ To preclude any fragments of "intent" from becoming political footballs, the delegates to the Constitutional Convention agreed at the very outset of their proceedings that "the sessions were to be strictly secret." To enforce this mandate, "sentries [were] planted without and within," the windows were kept shut despite the summer heat, and vows of secrecy were exchanged. "So scrupulously was the order of secrecy observed that it was not until many years afterward that anything definite was known of what took place in the convention." MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 58-59 (1913). This "seal of secrecy" was broken most egregiously by James Madison, who posthumously published his notes, but only after uncertain edits. Before dying, Madison had written that he had chosen his seat and organized his time during that summer in order to compile his copious notes, which have delighted historians. See *id.* at 59-60. His breach, however, has helped to create the very conditions that the Framers, as a whole, seemed to have intended to avoid: conditions that enable "Framers' intent" to become, after all, an ideological football –

shoes, they didn't look to anyone else's 'intent' – real or bogus – to tell them what should be done; instead, they turned to experience (and their interpretation of experience) to help them give meaning to the idea of democracy, and to distill that capacious idea to a text most of them could endorse (after much debating and finagling). Indeed, to create the federal Constitution they looked deliberately toward the historical examples they imagined to be the most comparable analogs in democratic society-building, in order to draw from the history and example of others what they thought could be best transplanted to their own times and challenges.²⁹ And notably, they carried on with that experiential, comparative methodology even *after* they had succeeded in persuading the voting colonial population³⁰ to adopt their handiwork as the new nation's supreme charter.³¹ Whether in word or deed, the Framers never made a distinction between their work and ours, between the work of the first generation and its posterity in the ongoing project of constitutional self-governance, between the tasks of devising and applying this Constitution.

The national controversies over the First and Second Banks of the United States illustrate these basic points.³² At issue, constitutionally, in those controversies was whether the federal government was empowered to charter a corporation, such as the Bank. When those controversies initially erupted, the Framers themselves (and their contemporaries) debated whether the document that they had produced did or did not permit this exercise of power.³³ Madison

especially during the past several decades under the rule of "originalist" judges and politicians.

²⁹ Of course, England and ancient Greece and Rome were their principal analogs. See CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS: GREECE, ROME AND THE AMERICAN ENLIGHTENMENT* (1994) (presenting a detailed and extensive study of the Framers' reliance on historical and comparative examples for the project of constitution-making); see also CHARLES F. MULLETT, *FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION, 1760-1776* (1966). "In tracing the sources of American revolutionary ideas of fundamental law we may as well begin with the Greeks, since the colonists in their search for eternal principles applicable to their situation went no further back." *Id.* at 13.

³⁰ The democratic nature of that voting of course is suspect, as the franchise was concentrated in racial and economic elites comprised mostly of men. See, e.g., A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR* (1978) (surveying property-and-identity based structures of inclusion or exclusion that limited exercise of political rights in formative years of this country and legal system); Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 *STAN. L. REV.* 335 (1989) (focusing on property and its relation to voting eligibility).

³¹ Before proceeding any further, perhaps I should hasten to add a caveat on terminology: my use of "Framers" in the plural is not a replication of originalism's defects. While keeping their individuated motives and views uppermost in mind, I endeavor in this Lecture to show only that, *as a group*, they did not endorse, or attempt to establish, today's originalism as a secular religion to settle constitutional questions. The most that can be said about the Framers and their compatriots is that they formed their "original" theories of distrust based on their mutual experiences with each other. For more caveats, see *infra* note 103 and accompanying text (recalling the brevity and other limitations of this exposition).

³² The basic story is told in the famous opinion of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). In *McCulloch*, the Supreme Court upheld federal legislation chartering a federal bank even though the text of the Constitution does not expressly enumerate the power to charter corporations among those vested in the federal legislature.

³³ For an illuminating overall account of the litigation and its broader background, authored by a conservative-identified scholar, see Daniel A. Farber, *The Story of McCulloch: Bank-*

was a leading opponent from his perch in the House of Representatives, together with Jefferson, who had resigned from the Cabinet as Secretary of State after getting mad at Washington because the President favored his Secretary of the Treasury, Hamilton, in Cabinet policy debates, including on the Bank's establishment. Though both had favored the Constitution's adoption (especially Madison, who originally had been a strongly nationalistic Framer), they resurrected vanquished Anti-Federalist themes,³⁴ which today we know as originalism and strict construction (and related concepts).³⁵ Later, they both switched their positions and arguments yet again: once in power as President, Jefferson himself did not practice his own federal powers in the strict manner he had once preached, as his executive unilateralism during the Louisiana Purchase made so plain,³⁶ while Madison reversed course on the Bank's constitutionality soon enough.³⁷ Each of these men – one a Framer and both founders – exhibited multiple and mutually-contradictory “intents” at different times of their lives, regarding the very same and unchanged words of the document, and both switched views depending on political or personal factors rather than on principled intellectual analysis. Isn't it now a bit silly, not to mention dishonest, to pick and choose among them manipulatively, as if they had not?³⁸ Nonetheless, it is in this way that this bundle of cross-related concepts entered once again into respectable general circulation, after the Anti-Federalists had failed to stop the Constitution's ratification using them.

The First Bank was established despite this longstanding, ongoing controversy over both the constitutionality and desirability of such an institution, but its charter lapsed in 1811. The War of 1812 and its exigencies, however, soon made plain to leading figures of the first generation the national need for the institution, and a second charter was issued in 1816. This chartering of a Second Bank of the United States became the flashpoint for the famous case that decided its constitutionality, as well as much else about constitutional mean-

ing on National Power, in CONSTITUTIONAL LAW STORIES 33 (Michael C. Dorf ed., 2004). For another good account that helps to contextualize the case in both historical and jurisprudential terms, see Bray Hammond, *The Bank Cases*, in QUARRELS THAT HAVE SHAPED THE CONSTITUTION 30, 37 (John A. Garraty ed., rev. ed. 1988).

³⁴ See *infra* notes 61-62 and accompanying text (on Anti-Federalism and backlash jurisprudence).

³⁵ “Madison's argument rested on a theory of interpretation that would later be called originalism.” Farber, *supra* note 33, at 38; see *infra* note 46 and accompanying text (on strict construction).

³⁶ For an excellent account and analysis, see Richard J. Dougherty, *Thomas Jefferson and the Rule of Law: Executive Power and American Constitutionalism*, 28 N. KY. L. REV. 513, 513 (2001) (focusing on “the apparent disjunction between Jefferson's professed views on the Constitution in the first decade of the new government, and the actions he subsequently took as President in the first decade of the nineteenth century.”). This seeming disunity is seen in its most stark fashion, perhaps, in the events and arguments surrounding the Louisiana Purchase in 1803 (as compared to his “strict” and “originalist” arguments to oppose the Bank proposed by Hamilton); see also generally, EVERETT BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE (1920) (providing a more comprehensive account focused on the Purchase itself).

³⁷ See *infra* notes 40 and 42 and accompanying text (on Madison's oscillations regarding constitutional meanings).

³⁸ For an important example of this “originalist” dishonesty, see Meese, *supra* note 13.

ings.³⁹ Notably, by then the Framers (and their contemporaries) did not talk up what they respectively thought they (or others) had originally intended, or could claim retroactively that they had once intended. Or really, really believed that they remembered they intended.

Instead, they talked more about *experience* than about intent: their collective, cumulative experience as a nation, a people. They took a forward-looking approach incorporating cumulative experience into their understanding of the text's meaning, rather than a backward-looking focus on arguable and manipulable constructions of "intent" attributed to a few men years earlier, including many then still alive and politically active. Specifically, they debated the significance of their national experience, both with and without a Bank of the United States, to help them determine whether the Constitution's literal text granted this power to the federal government; in particular, Madison – often-times viewed as *the* principal Framers – changed his mind about the meaning of the unchanged words during this span of time, later finding it necessary to explain this still-delicious inconsistency.⁴⁰

As reflected in the *McCulloch* ruling, during this time the founding generation said something like:

You know, our experience with the First Bank, followed by the "embarrassments" we suffered as a country when it lapsed, showed us that we really need this kind of instrument. So, whatever the document's succinct passages could be interpreted to mean, they should be interpreted to mean what we've learned – based on national experience – that it should mean. Which is, yeah, the federal government *does* have the power to establish a corporation – even though it isn't a specifically enumerated power.⁴¹

In this second round of interpretation, even Madison agreed – publicly! Bingo, done; what's next?

By repeated choices of action and overall example, the Framers of the federal Constitution demonstrated that they never intended so-called original intent/s to be deified, nor society and its Constitution to become ossified, on that superficial basis. On the contrary, their example shows that comparative human experience and its accumulation, and its critical interpretation and reinterpretation, are useful and legitimate sources of constitutional principles and meanings. Originalism, as posited and bandied about these days, is not an accurate reflection of history; it is a sloppy conglomeration of opportunistic and self-serving assertions amounting to a constitutional hoax, a Big Lie deployed strategically and tactically to help roll back individual rights and liberties in the

³⁹ "There is no denying the importance of *McCulloch v. Maryland* Many scholars consider it the single most important opinion in the [Supreme] Court's history." Farber, *supra* note 33, at 33; see also *McCulloch*, 17 U.S. 316, and sources cited therein (on the factual and political background of the case).

⁴⁰ This inconsistency is delicious not per se, but because of the opportunity it provides us to watch Madison's hair-splitting somersaults to harmonize his flip-flops. See, e.g., LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES 40, 594, 779 (Y. M. St. Clair Clarke & D. A. Hall eds., 1832) (tracing Madison's changes of mind, including his response to the "charge of inconsistency"); see also JOSEPH M. LYNCH, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT 71-92 (1999) (focusing on Madison).

⁴¹ See *McCulloch*, 17 U.S. 316.

name of the Constitution and its drafters. These deployments are calculated to freeze American law and society into the image of the 1790s.⁴² So, the stakes are high: next time a student or colleague utters this whopper of a Big Lie, invoke some of this suppressed yet accessible knowledge to correct the error gently but surely.

B. Strict Construction as Valid Canon or Principled Method of Constitutional Interpretation

The second Big Lie is related closely to the first: that “strict construction” is a legitimate, if not *the* most legitimate, approach to constitutional interpretation. By “strict construction,” I mean the bundle of arguments urging that constitutional ambiguities should be resolved, as a matter of law, against a finding of federal power and in favor of a finding for “states rights” – at least whenever issues of vertical federalism are said to arise.⁴³ This strictness is said to safeguard local control of community life, which is said to be an important democratic value of American constitutionalism.⁴⁴ This argument would seem a tough sell, especially after we recall what local “communities” did with (or to) local minorities and vulnerable groups, like people of color, women, children, and disabled persons, until the federal government was finally aroused into remedial action; these historical examples illustrate how local hegemonies tend

⁴² See *infra* notes 78-88 and accompanying text (on the Alien and Sedition era of the 1790s). Today, in keeping with the identity-driven objectives of the culture wars, this reaction and retrenchment revolves around several recurrent themes: elimination of affirmative action across the board; restriction of immigration from non-white societies; reduction of even minimal “safety-net” benefits to the poor, and especially to the immigrant poor; constriction of women’s reproductive rights, including prohibition of abortion; deactivation of environmental safeguards; and de jure exclusion of sexual minorities from the “tent” of formal equality. This backlash agenda, conversely, simultaneously seeks enactment of English-supremacy laws, and of tax cuts, subsidies, and rebates for wealthy corporations, groups, and individuals, and of myriad other social and economic proposals that foreseeably, if not intentionally, serve to shore up the social, cultural, political, and economic value of being a white, male, heterosexual, middle-class heir of earlier, perhaps colonizing, immigrants from northwestern Europe. See Francisco Valdes, “*We Are Now of the View*”: *Backlash Activism, Cultural Cleansing, and the Kulturkampf to Resurrect the Old Deal*, 35 SETON HALL L. REV. 1407, 1410-27 (2005) [hereinafter Valdes, “*We Are Now of the View*”]. In effect, if not design, the backlash agenda might well be regarded as a campaign to consolidate the United States as a Euro-heteropatriarchal society. See generally Francisco Valdes, *Identity Maneuvers in Law and Society: Vignettes of a Euro-American Heteropatriarchy*, 71 UMKC L. REV. 377 (2002) (elaborating Euro-heteropatriarchy); Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender and Sexual Orientation to Its Origins*, 8 YALE J.L. & HUM. 161 (1996) (describing some basic tenets of Euro-heteropatriarchal social ideologies); see also *infra* note 90 (further elaborating the foreseeable, if not calculated, social consequences of this backward-looking methodology).

⁴³ For a searching, contemporary consideration of this historical and current bundle, see HARRY V. JAFFA, *ORIGINAL INTENT AND THE FRAMERS OF THE CONSTITUTION: A DISPUTED QUESTION* (1994).

⁴⁴ For a recent intonation, see the majority opinion in *United States v. Lopez*, 514 U.S. 549 (1995) (using the federal judicial power to strike down, for the first time in a half century, an Act of Congress under the Commerce Clause, which had banned guns from school zones, on the ground that Congress thereby had improperly infringed on local lawmaking prerogatives). For further discussion of backlash opinions echoing this basic point in recent vertical federalism opinions, see Valdes, “*We Are Now of the View*”, *supra* note 42, at 1440-45.

to beget local abuses of democratic ideals.⁴⁵ Nonetheless, the Big Lies persist: first, originalism calls for a backward-looking approach to “Framers’ intent” (and related historical artifacts) that necessarily tends to privilege “original” immigrants, and to fix law and society as it looked in the 1790s. Whenever that Big Lie still allows for doubt, then strict construction stands ready with a call for reductionist definitions of constitutional text establishing the federal government, which serve to insulate entrenched local supremacies from federal power, and thus to perpetuate anti-democratic, neocolonial hierarchies.⁴⁶

In theory, strict construction may be seen as plausible and innocuous: why not? In fact, as we will see in a moment, strict construction has been altogether a different animal. The two-punch argument presented by the twin calls to originalism and strict construction is closely associated with backlash jurisprudence and the culture wars of the past quarter century, which themselves are designed to “take back” the sociolegal legacies of the New Deal and Civil Rights eras.⁴⁷ This second Big Lie, like the first and others, depends on ignorance or suppression of key and accessible knowledge.

To begin with the beginning, we must recall and remind others that strict interpretation as constitutional methodology has been rejected explicitly, repeatedly, and authoritatively by the Supreme Court in some of the earliest landmark cases interpreting the Constitution *and* establishing judicial methods of interpreting the Constitution. In definitive cases known to all of us, like *Marbury v. Madison*,⁴⁸ or *McCulloch v. Maryland*,⁴⁹ or *Gibbons v. Ogden*,⁵⁰

⁴⁵ These abuses are not limited to identity politics based on familiar fault lines like race, class, gender, or sexual orientation. Additionally, for instance, they include the manipulation of the electoral process to entrench minorities as ruling elites based on geography or other factors and to lend a patina of majoritarian legitimacy to exercises of public power when none in fact exists. These anti-democratic abuses of public power under the Constitution prompted the holding in *Baker v. Carr*, 369 U.S. 186 (1962) (striking down Tennessee’s 1901 statute skewing state apportionment rules to ensure that rural minorities would dominate urban majorities, and establishing the “one person, one vote” principle to minimize this sort of “legal” subversion of democracy by other locally-ensconced factions in the future).

⁴⁶ The conceptual, rhetorical, and political intertwining of these two ideas is reflected in the excellent collection on constitutional interpretation and American constitutionalism, whose essays go back and forth between the two concepts, thus illustrating how they have operated jointly throughout American history. See INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT, *supra* note 13; see also LYNCH, *supra* note 40, at 123-39 (on Madison and his shifting deployments of originalism, strict construction, and related concepts in the context of shifting partisan battles, which in time led to the “withering” of his once towering authority).

⁴⁷ See generally Valdes, “*We Are Now of the View*”, *supra* note 42, at 1407 (surveying the political, jurisprudential, and doctrinal aspects of the culture wars, in which these and other Big Lies play a key role); see also *infra* notes 70-79 (on the culture wars and their sociolegal objectives). For richer, additional accounts, see DAVID M. O’BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS (5th ed. 2000); RICHARD L. PACELLE, JR., THE TRANSFORMATION OF THE SUPREME COURT’S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION (1991); MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER (1991); HERMAN SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION (1988).

⁴⁸ 5 U.S. 137 (1803), in which the Federalist judges, led by the newly-appointed Chief Justice John Marshall, declared for themselves the power to review the constitutionality of federal legislative and executive acts – and invalidated the Federalist legislation creating the commissions in controversy. For background, see JAMES F. SIMON, WHAT KIND OF NATION:

the judges of the founding generation were urged to construe the Constitution strictly, and they said something akin to: “no, that’s a bunch of malarkey.” Specifically, Chief Justice Marshall and his colleagues explained, at length, that the “strict” approach would exert a “baneful influence” on American constitutionalism, incrementally narrowing the scope of federal authority and rendering the federal Constitution “a splendid bauble” unfit for national self-governance.⁵¹ That’s the very term they chose – “splendid bauble”⁵² – Google it, or Westlaw or Lexis it – you’ll find it there. Rejecting the methodology of “strict” interpretation of the Constitution because it would render the government “incompetent” to govern, they opted in those now-iconic opinions for an approach that, in their words, they called a “fair” or “sound” interpretation.⁵³ Think about *that*: “strict” vs. “sound.” In their first-generation minds, “strict” equaled unsound, unfair, and incompetent. Yet that’s the same bale of bad goods being peddled to us again, still today. Today’s backslashers, itching to roll back the New Deal and bring back old, neocolonial deals, are peddling *in the collective name of the founding generation* the same time-worn assertions rejected unequivocally by that very generation shortly after the nation’s founding!⁵⁴

Five years later, in another early landmark case on the meaning and interpretation of constitutional text, the Justices expounded on this point further, underscoring the nature of the baneful influence they sought to avert with their direct and emphatic repudiation of strict construction. Listen to this, and then go Google it, if necessary to believe it:

THOMAS JEFFERSON, JOHN MARSHALL AND THE EPIC STRUGGLE TO CREATE A UNITED STATES (2002) (elaborating a comprehensive analysis of the life-long animosities and conflicts between these two members of the founding generation, and how their relationship represented a microcosm of the political struggles that framed the founding).

⁴⁹ 17 U.S. (4 Wheat.) 316 (1819).

⁵⁰ 22 U.S. (9 Wheat.) 1 (1824).

⁵¹ See *McCulloch*, 17 U.S. at 421.

⁵² *Id.*

⁵³ In a unanimous opinion, authored by Chief Justice John Marshall, the Court juxtaposed two basic approaches to constitutional interpretation: the “just” or “fair” or “sound” approach versus the “narrow” or “strict” approach. Opting for the former, those Justices reasoned that the former would entail a “baneful influence” on the nation due to the “absolute impracticality of maintaining it, without rendering the government incompetent to its great objects.” *Id.* at 417-18. This rendering has been precisely the goal of every advocate who interposed these arguments in North American constitutional history. It likewise is the goal of cultural warfare and backlash activism: disabling the government from its capacity to reform entrenched social hierarchies established in part by force of law in eras of formal subordination based on race, ethnicity, gender, sexual orientation, and other forms of social stratification, and that now are structurally entrenched culturally and materially in law and society. Historically dominant groups now waging backlash kulturkampf calculate, correctly, that their privilege and dominance vis-à-vis historically subordinated groups is best preserved, and perhaps amplified, by disabling the possibility of federal power reform historic injustices that have enriched and empowered them. See Valdes, “*We Are Now of the View*”, *supra* note 42, at 1440-44 (discussing federal powers employed historically to disrupt locally entrenched monopolies of power, and the current appointees’ diminution of them through “activist” exercises of the federal judicial review power).

⁵⁴ Valdes, “*We Are Now of the View*”, *supra* note 42, at 1440-44.

Powerful and ingenious minds, taking as postulates that the powers expressly granted to the government of the Union are to be contracted by construction into the narrowest possible compass, and that the original powers of the states are [to be deemed] retained if any possible construction will retain them, may, by a course of well digested but refined and metaphysical reasoning founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may entangle and perplex the understanding, as to obscure the principles which were before thought quite plain and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles.⁵⁵

“*Totally* unfit for use,” they wrote in 1824, just as in 1819 they had written “incompetent.” This unfitness or incompetence is the inevitable result, if not the intended goal, of the calls to strict construction and related concepts sent forth periodically by political factions seeking to “entangle and perplex the understanding, as to obscure the principles which were before thought quite plain.” Incrementally but surely, this approach leaves us with merely a “magnificent structure, indeed, to look at.” Perhaps like a “splendid bauble.”

Strict construction, the original generation warned us explicitly and repeatedly, would “*explain away the constitution of our country.*” Think on that, and think of things now. Are we there yet?

The sirens of Anti-Federalist strictness – the so-called originalists of today – effectively beckon us to undo the work of the Framers. These “powerful and ingenious minds” are hawking bad and dangerous goods – confusing and “obscuring” the situation. “Don’t buy into any of it,” the first generation cautioned, both by word and deed. So we’ve been amply forewarned. And for most of the nation’s history, the warning has sufficed to reject the puzzling persistence of calls to textualism, strictness, and the like: “It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”⁵⁶ Yet this Big Lie continues to persist, and to be peddled to the unsuspecting, as if all this formative constitutional history is merely a child’s fairy tale, something to be set aside and forgotten as we are put to sleep from on high.

For example, as applied by today’s appointees to the high Court, and repeatedly throughout the last decade of the twentieth century, strict construction, and its conceptual cousins, have been used strategically and selectively, yet quite consistently, to undermine national power under the two principal clauses of the Constitution employed during the earlier part of the same century by the federal government’s elected branches to protect social, political, and economic underdogs from ensconced elites: the Commerce Clause of Article I and Section 5 of the Fourteenth Amendment.⁵⁷ In fact, time and again during

⁵⁵ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 222 (1824).

⁵⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J. concurring) (invalidating executive seizure of steel mills to maintain military supplies for Korean War operations).

⁵⁷ See Valdes, “*We Are Now of the View*”, *supra* note 42 (summarizing doctrinal sketches of some key results produced through backlash activism in recent years, and coinciding with the culture wars); see also generally *supra* note 42 and sources cited therein (on the jurisprudential politics of backlash appointees to federal judgeships).

the entire past century, elite-identified judges have righteously wielded a federal power of judicial review, itself *never* mentioned in the Constitution, to construe express grants of federal powers strictly and deny legal protection to consumers, workers, children, and other vulnerable groups; this supreme hypocrisy, as we all know, led to the infamous 1930s constitutional confrontation between the appointed judges and the elected executive.⁵⁸ Moreover, even while continuing to insist on strict construction of the Constitution as part of their resurrection project, politically-minded judges of these and prior times have chosen to ignore their affectation for strictness whenever it might prove inconvenient from their results-oriented perspectives.⁵⁹ That's when they go activist (among other times).

Compare, for instance, the targeting of the Commerce Clause and the Fourteenth Amendment for ever-so-strict construction with the indulgent leeway given to the Tenth and Eleventh Amendments by the very same political

⁵⁸ For notable accounts of those times, see WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940* (1963); William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347 (1966). Cf. G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000) (elaborating an analysis that seeks to revise conventional understandings of that period and reactions to it since then).

⁵⁹ Backlash activism has included the aggressive review of precedent to narrow their civil rights reach; the heightening of procedural rules to block civil rights claims on technical grounds; the strict interpretation of legislative initiatives on behalf of civil rights communities under both principal instruments for doing so – the Commerce Clause and Section 5 of the Fourteenth Amendment; and, finally, a proactive and unilateral reinterpretation of the Tenth and Eleventh amendments to expand “states’ rights” affirmatively under “fundamental postulates” based on the personal views and preferences mainly of five Justices. Under backlash jurisprudence, burdens of evidence and/or rules of procedure are invoked, and then deployed to shield discrimination from viable claims. Similarly, precedent is critiqued, ignored and rejected – or manipulated through “creative” distinction – while legislation is cabined. See, e.g., Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL’Y J. 547 (2003) (focusing on judicial bias against plaintiffs in employment discrimination cases); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ From Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 947; William B. Gould, IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485 (1990) (focusing on retrenchment in that key term of the Supreme Court); Charles R. Lawrence, III, *“Justice” or “Just Us”?: Racism and the Role of Ideology*, 35 STAN. L. REV. 831 (1983) (focusing on race and white supremacy); Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321 (1989) (critiquing the interposition of jurisdictional and prudential barriers to deflect civil rights actions); Robert P. Smith, Jr., *Explaining Judicial Lawgivers*, 11 FLA. ST. U. L. REV. 153 (1983) (surveying techniques of judicial manipulation of facts and doctrine); C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677 (1984) (critiquing the heightened rules of pleading that various federal judges had erected to rebuff civil rights claimants). These and similar practices have prompted various scholars to question the principled nature of their opinions. See *supra* note 42 and sources cited therein (on backlash politics through backlash activism). Their basic conclusions were more recently corroborated by a study of the cases argued during the 2002 Supreme Court Term. See Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004); see also Peter J. Smith, *supra* note 17 (reporting same results from another empirical study of today’s judges).

judges who so loudly demand strictness as holy principle. You might be surprised; you will find no strictness of construction when you turn to those favorite Amendments of today's backlashes; no, you will find, instead, wildly activist, over-the-top interpretative extravagance. You will find today's backlashing judges telling us, as they alternate from mighty gyration to conclusory assertion and misleading mischaracterization of law and fact (and with an apparently straight face), that the pithy text of those two Amendments to the original document does not mean what it says, not even their plainly plain text.⁶⁰

The knowledge suppressed to enable this Big Lie includes, more broadly, the sleazy intellectual and political histories of strict interpretation (and related concepts) in action, and over the span of the nation's entire lifetime. These histories, taken as a whole, show how the project behind these concepts is nakedly and relentlessly ideological. Time and again, we see these concepts being taken up and tried out, strategically or tactically, by political factions fearing that federal power would trump their own. When no longer useful, the battle-cry fades away, or is turned on its head, *à la* Jefferson and Madison.

The story begins, of course, with the original American political struggle – the ratification of the Constitution. The folks known as the Anti-Federalists deployed these arguments against the folks known as the Federalists to attempt a defeat of the Constitution's ratification.⁶¹ They lost. Yet these concepts were shortly later revived by Madison and Jefferson as a temporary political convenience to counter Hamilton's influence over Federal policymaking in the Washington administrations. But the argument itself lost again, on the merits, so to speak, after the Constitution's implementation, during the debates of the founding generation over the Bank of the United States, as we just saw in the form of the *McCulloch* case. And then this pattern of political ping-pong continued, and continues still.

Coupled to the equally empty claim of "states' rights," unprincipled but catchy slogans based on these terms have stood ready ever since to be re-tooled for tactical maneuvers in constitutional moments.⁶² These terms and ideas became favorite themes of fervent slave owners and racists in the antebellum

⁶⁰ For a good sampler of originalist pronouncements in recent cases, see O'NEILL, *supra* note 12, at 205-12 (reviewing some key 1990s culture war cases); *see also* Valdes, "We Are Now of the View", *supra* note 42 (discussing federal powers in recent vertical federalism cases interpreting these two clauses).

⁶¹ For a compilation of Anti-Federalist dogma and related texts, see THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES (Ralph Ketcham ed., 1986). For a fascinating study of the rhetoric used by both sides during the ratification process, see WILLIAM H. RIKER, THE STRATEGY OF RHETORIC: CAMPAIGNING FOR THE AMERICAN CONSTITUTION 33-48 (1996) (reporting that Anti-Federalist argumentation emphasized negative themes like national consolidation and encroachment on local liberties, fears now associated chiefly with originalism, such as strict construction and states' rights, due to fear of a "big" far-away government); *see also* Peter J. Smith, *supra* note 17 (on the present-day reliance of today's "originalists" on Anti-Federalist slogans and dogmas, as reflected in a recent empirical study of judicial opinions).

⁶² For a classic exposition, see CHARLES J. BLOCH, STATES' RIGHTS: THE LAW OF THE LAND (1958). For a summary overview of "states' rights" sloganeering, and its relationship to strict construction and originalism, *see* Valdes, "We Are Now of the View", *supra* note 42, at 1441-43.

South bent on keeping their grip on their plantations and privileges. Similarly, in the last century this same set of constitutional slogans was trotted out for political recirculation by pro-Apartheid segregationists and Jim Crow white supremacists, still fearing federal interference with entrenched slave-based systems of stratification, exploitation, and oppression nearly a century after the Civil War and the Reconstruction Amendments supposedly settled that “original” mess.⁶³ And, as you know, Big Business and its judicial and political allies liked it, too, interposing the same basic arguments to constrain federal regulation of their economic domination and voracious plunder of the nation during the heyday of the Industrial Revolution as the nineteenth century turned into the twentieth.⁶⁴ This bundle of concepts has been used by judicial appointees to frustrate federal and state legislative policy aimed not only at ensuring equal protection of the law for every person, but also specifically attempting to protect Americans from economic exploitation and social subjugation based original compromises or betrayals, or due to geographic location, individual identity or social status. National history and experience teach that these concepts in practice operate chiefly as tools to undermine or undo both democracy and justice.

Indeed, it took multiple electoral landslides in congressional and executive elections for the New Deal to emerge in the late 1930s from the ruins of the decades-long drive by judges and politicians to suffocate democratically conceived policy-making at the state *and* national level with their selective invocation of these (and related) slogans.⁶⁵ This oft-discredited constellation of now-familiar constitutional jingles has continue/d to percolate as ready-made and nifty-sounding arguments. Before *and* during the past century, local yet powerful factions hoping to deflect federal disturbance of their unjust lock on society, and their loss of the myriad material perks that come with it, have resurrected these jingles and arguments strategically and tactically, as the culture wars and the Big Lies of today’s backslashers make so evident in our own time.⁶⁶ Today, the parallel stories of “strict construction” and “states’ rights” continue in tandem with the latest iterations of originalism, both ideologically and doctrinally, to perform the same stratifying functions as always.⁶⁷

⁶³ For an interesting example, see EDWARD S. CORWIN, *LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING AND DECLINE OF A FAMOUS JUDICIAL CONCEPT* (1948); *see also generally* THE TENTH AMENDMENT AND STATE SOVEREIGNTY: CONSTITUTIONAL HISTORY AND CONTEMPORARY ISSUES (Mark R. Killenbeck ed., 2002) (presenting a recent collection of essays on these issues and topics).

⁶⁴ The obstructions employed various legal fictions and constitutional inventions, including ideas or terms linked to strict construction, states’ rights, and originalism. Somewhat ironically, this obstructionism generally came to be associated with “Lochnerism” after the Justices’ infamous turn-of-the-century opinion in *Lochner v. New York*, 198 U.S. 45 (1905) (invoking “economic” substantive due process to prevent a state legislature from establishing a maximum of sixty working hours weekly, or ten daily, for bakers).

⁶⁵ *See supra* notes 57-60 and accompanying text (on the efforts of judicial appointees to prevent enactment of the New Deal under the banner of strict construction and related concepts).

⁶⁶ *See infra* notes 70-77 and accompanying text (on the dominance of these concepts as refashioned in recent decades through the practices of backlash politics and jurisprudence via the ongoing culture wars).

⁶⁷ *See supra* notes 43-47 and accompanying text (on the intertwining of these concepts).

Thus, the constitutional, political, and legal histories of this Big Lie teach that “strict construction” in action boils down to a calculated constriction of the powers of the federal government in particular ways toward particular ends; specifically during the past century, history shows strict construction (and related concepts) to be a tool used chiefly to undercut in practice the formal commitment to equal opportunity and equal justice as constitutional values of American nationhood. Apart from “political practice” and strategic argumentation, history shows that there *never* has been anything like strict judicial construction of the Constitution;⁶⁸ there has only been a constricting construction of particular clauses for particular ends – like the Commerce Clause, Section 5 of the Fourteenth Amendment, and other text protecting individual civil liberties against the demands of economic and ideological elites. Next time somebody ignorantly sounds this platitudinous call, explain patiently why and how history has shown us that Chief Justice Marshall and his founding colleagues were prescient in their concern over that idea’s predictably “baneful influence.”⁶⁹ Tell a known and documented yet suppressed truth: as practiced, both historically and presently, strict construction (and its cousins) amounts to just a Big Lie.

C. Backlash Kulturkampf and Raw Majoritarianism as American-Style Democracy

Want another Big Lie? Am I getting across that Jerome feeling? I’m trying to. Okay, here’s another that works as context and vehicle for the promotion and inculcation of the prior two: cultural warfare as a garden-variety or legitimate form of democratic politics in this particular republic under this particular Constitution. By cultural warfare I refer of course to the backlash campaigns that, since the 1960s and 1970s, have railed against anything labeled “liberal” or associated with the New Deal or with Civil Rights.⁷⁰ A core tactic

⁶⁸ See generally LAURENCE TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* 41-49 (1985) (on the “myth of the strict constructionist.”).

⁶⁹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

⁷⁰ The thoughts outlined in this section reflect nearly a decade of attention to this phenomenon. See Francisco Valdes, *Culture, “Kulturkampf” and Beyond: The Antidiscrimination Principle Under the Jurisprudence of Backlash*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 271 (Austin Sarat ed., 2004) (focusing broadly on three theoretical perspectives – backlash jurisprudence, liberal legalisms, and critical outsider jurisprudence – to compare their approaches to equality law and policy); Francisco Valdes, *Afterword – Culture by Law: Backlash as Jurisprudence*, 50 *VILL. L. REV.* 1135 (2005) (focusing on backlash interventions in liberty-privacy jurisprudence); Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy and Equality*, 65 *OHIO ST. L.J.* 1341 (2004) [hereinafter Valdes, *Anomalies*] (focusing specifically on *Lawrence v. Texas* and generally on liberty-privacy as a central doctrinal terrain of social and legal retrenchment); Francisco Valdes, *Afterword – Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship, or Legal Scholars as Cultural Warriors*, 75 *DENV. U. L. REV.* 1409 (1998) (focusing on the implications of cultural warfare for sexual orientation scholarship specifically, and for all OutCrit scholars generally); Valdes, “*We Are Now of the View*”, *supra* note 42, at 1407 (surveying the political, jurisprudential and doctrinal aspects of the culture wars, in which these and other Big Lies play a key role).

in this social and ideological warfare is the relentless depiction of New Deal and Civil Rights policy choices as illegitimate concoctions of power-hungry Justices that somehow robbed the nation of its democratic options, although in fact most of the New Deal and Civil Rights laws – such as the antitrust, labor, civil rights, voting rights, and employment rights statutes of those eras, are quintessentially democratic. They are, in other words, Acts of multiple Congresses, signed into law by a series of Presidents, all of course elected democratically. Backlashers also promote this fantastical depiction of our recent national heritage despite the irony that the New Deal itself was the victim of juridical concoctions displacing democratic lawmaking in the name of the very doctrines today’s backlashers now seek to resurrect through cultural warfare, or “kulturkampf.” Under this Orwellian version of reality, today’s judicial appointees righteously displace not only the precedents of their jurisprudential predecessors, but also the democratic, cumulative lawmaking legacies of New Deal and Civil Rights generations, Congresses, and Presidents – and, to boot, in the name of “democracy”!

Setting its cynically fantastical nature momentarily aside, the underlying concept of this Big Lie is that judicially-mandated vindications of constitutional promises are illegitimate unless the majority goes along with the vindication and, conversely, that (practically) anything goes so long as the majority really likes it (or, alternatively, some Justice pronounces that the Framers woulda liked it). The unspoken and untenable premise of this Big Lie, then, is that “democratic” breaches or delays of constitutional promises are legitimized by majoritarian preference or consent. This coarse and audacious idea goes something like this: “Hey, we all voted; you lost; it was fair.” That’s democracy, American style!

The lie here begins with the premise that the Constitution makes majoritarianism a sufficient justification for virtually any result produced politically; this Big Lie asks us to presume that the Constitution provides a license for majorities to do as they wish with the rest of us – sometimes, even a “presumed majority” will do for self-styled originalist judicial appointees, as the willful bare majority in the culture wars case of *Bowers v. Hardwick* expressly did in 1986 to endorse the oppressive and selective enforcement of a general statute

These works, in turn, inform and are informed by related concerns or issues that form part of my larger scholarly agenda. See Francisco Valdes, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 *ASIAN L.J.* 65 (2003) [hereinafter *Critical Legal Education*]; Francisco Valdes, *Identity Maneuvers in Law and Society: Vignettes of a Euro-American Heteropatriarchy*, 71 *UMKC L. REV.* 377 (2002); Francisco Valdes, *Insisting on Critical Theory in Legal Education: Making Do While Making Waves*, 12 *LA RAZA L.J.* 137 (2001); Francisco Valdes, *Race, Ethnicity and Hispanismo in Triangular Perspective: The “Essential Latina/o” and LatCrit Theory*, 48 *UCLA L. REV.* 305 (2000); Francisco Valdes, *Outsider Scholars, Legal Theory and OutCrit Perspective: Postsubordination Vision as Jurisprudential Method*, 49 *DEPAUL L. REV.* 831 (2000); Francisco Valdes, Afterword – *Theorizing “OutCrit” Theories: Coalitional Method and Comparative Jurisprudential Experience – RaceCrits, Queer-Crits and LatCrits*, 53 *U. MIAMI L. REV.* 1265 (1999); 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 (1997); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Inter-Connectivities*, 5 *S. CAL. REV. L. & WOMEN’S STUD.* 25 (1995).

against a particular minority.⁷¹ To swallow this Big Lie we therefore must first pretend to believe that democracy and majoritarianism are synonymous. We also must forget that the Constitution was enacted originally (in great measure) to counter the “tyranny of the majority.”⁷² Similarly, we must overlook the increasingly egregious violation and manipulation of voting rights in this country since at least 2000.⁷³ Finally, we must blind ourselves to the ways in which cultural warfare in fact operates today – as the very opposite of a working democracy in a plural society committed constitutionally to equal opportunity and justice.⁷⁴ We must, in short, ignore or suppress known truths. But it’s difficult, as well as dishonest, given the circumstances and knowledge at hand.

Recent experience shows these ongoing culture wars to be an elite-driven, majoritarian campaign to amass power in the pursuit of reclaiming lost privi-

⁷¹ See, e.g., Valdes, *Anomalies*, *supra* note 70, at 1377-82 (elaborating this point, and quoting the passage on “presumed” majorities and the constitutionality of statutes).

⁷² From their original perspective, the Federalists considered raw majoritarianism as a form of “democratic despotism” akin to monarchical despotism – a perspective formed in the crucible of both the revolutionary period in the 1770s as well as the critical period immediately afterward, spanning the 1780s. During this period of sovereignty, the legislatures of the autonomous former colonies, usually elected directly by the eligible voters of the state, enacted statutes that disturbed the property claims of the revolutionary elites – and that helped to prompt the energy they put behind the new Constitution’s adoption. This experience with the “tyranny of the majority” caused James Madison and other key Framers to emphasize “deliberative democracy” as a check on mob rule in the name of majoritarian prerogative. In this way, the propertied local and national elites of the first generation became the first “minority” to seek constitutional protection from the dictates of rampant (from their perspective) formal democracy. In this way, they set both the stage and the example for succeeding minorities, including those under attack via raw majoritarianism mechanisms in today’s backlash kulturkampf. E.g., THE FEDERALIST NOS. 10, 51 (James Madison) (discussing the problems they perceived with direct democracy); see also, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, 393-417 (1969) (describing this “Critical Period” of direct democracy or “democratic despotism” leading up to the Constitutional Convention).

⁷³ See *infra* note 106 and accompanying text (on the theft of the 2000 elections); see also Valdes, “*We Are Now of the View*”, *supra* note 42, at 1438-40 (providing capsule summaries of some 1990s voting rights cases in which backlash appointees used the federal judicial review power to unravel democratic lawmaking, in the form of the Voting Rights Act of 1965, as well as undoing established principles and precedents).

⁷⁴ E.g., Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002) (evaluating the current Justices’ manipulation or disregard of precedent and canons of interpretation in pursuit of their anti-anti-discrimination political agenda). Many scholars have drawn similar observations in recent years. See, e.g., Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996); Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Owen Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 5 (1979) (noting that the nation was and is “in the midst of a counter-revolution; not because we are at the verge of a new discovery, but because the discovery of an earlier era is now in jeopardy”); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Kenneth L. Karst, *Religion, Sex, and Politics: Cultural Counterrevolution in Constitutional Perspective*, 24 U.C. DAVIS L. REV. 677 (1991) (elaborating a relatively early analysis of the phenomena now known as backlash kulturkampf and jurisprudence); Stephanie M. Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265 (1984).

lege.⁷⁵ These culture wars are waged through three “prongs” of politicking, each aimed at the judicial and/or political branches of the federal government.⁷⁶ But the objective is not a simple capture of power, as all factions are wont to do. The prize in this instance is no less than control of public power to remake American society and entrench factional supremacy. These culture wars are waged not only as a means of rough-and-tumble backlash politics, but as a means of outwitting democracy in the name of democracy – a push to circumvent or shut down the mechanisms put in place by the Constitution to avert the possibility of perpetual single-faction rule.⁷⁷

To find an apt analog for this ambitious backlash effort we might go back, once again, to the experiences of the original generation. Do you recall the Federalists’ Alien and Sedition Acts, which also were formally democratic yet nakedly political abuses of public power for factional advancement and entrenchment?⁷⁸ As you might recall, the Adams administrations had squandered much of the goodwill that the Federalists, whether deserved or not, in fact had garnered through their stewardship of armed revolution and national politics under George Washington. When their hold on power seemed electorally threatened, they abused their formal public powers to make up nefarious laws like these two, designed to appear legitimate but calculated to disadvantage the opposition, and thus to tighten the incumbents’ grip on public power and its personal privileges. Going dutifully through the motions and rituals of formal democracy as if a photo opportunity, they pursued anti-democratic goals and politics. In the name of liberty, security, and democracy, they unsettled all three.

Wielding their newly-bootstrapped powers under these statutes with an apparent sense of factional doom and personal desperation, Federalist politi-

⁷⁵ The declaration of cultural warfare issued formally, and perhaps most conspicuously, from Republican Presidential contender Patrick Buchanan during his address to the 1992 Republican National Convention, announcing a new campaign for the “soul of America” through which these self-denominated cultural warriors of retrenchment intended to “take back . . . our cities, and take back our culture and take back our country . . . block by block.” See Chris Black, *Buchanan Beckons Conservatives to Come “Home”*, BOSTON GLOBE, Aug. 18, 1992, at A12; Paul Galloway, *Divided We Stand: Today’s “Cultural War” Goes Deeper than Political Slogans*, CHI. TRIB., Oct. 28, 1992, at D1; see generally JAMES DAVISON HUNTER, *BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA’S CULTURE WAR* (1994); JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991). Since then, this social conflict has been waged with a vengeance to “take back” the civil rights gains of the past century in the name of the “angry white male.” See Grant Reeher & Joseph Cammarano, *In Search of the Angry White Male: Gender, Race and Issues in the 1994 Elections*, in *MIDTERM: THE ELECTIONS OF 1994 IN CONTEXT* 125 (Philip A. Klinkner ed., 1996).

⁷⁶ See *supra* note 74 and sources cited therein (on cultural warfare).

⁷⁷ See Valdes, “*We Are Now of the View*”, *supra* note 42 (surveying the origins, objectives and tactics of cultural warfare); see also *supra* notes 74 and 75 and sources cited therein (on cultural warfare).

⁷⁸ For an illuminating account, see JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 3-54* (1951) (recounting the passage of the bills by the Federalists in control of Congress); see also JAMES MORTON SMITH, *FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 94-187* (1956) (sketching the domestic and international political contexts for the passage of these statutes, and the patterns of enforcement that created “hunters and hunted.”).

cians, judges, and agents intimidated dissenting journalists, harassed opposing voters or politicians, and generally suppressed democracy as much as their formally lawful control of public power permitted. Much like now, they used every tool under their control, including the resources of the political branches, to enact and enforce tyrannical statutes, and they used their control of the judicial branch to declare the laws legitimate and pronounce their enforcement of them constitutional. Their uses (and misuses) of public authority for personal or factional political gain set off formative struggles over constitutional meaning and governance in the new republic,⁷⁹ struggles whose themes continue to reverberate, here and now, in the form of the backlash agenda that fuels the current culture wars.

The first of these notorious enactments, the Alien Act, was one of this nation's earliest anti-immigrant actions. It purported, among other things, to authorize the Executive's deportation of non-citizens whom he judged dangerous to the "peace and safety" of the United States, and to otherwise punish or imprison defiant deportees.⁸⁰ The Federalists' enforcement of their new statute reflected their "conviction that the root of all the evil in the United States was the large foreign-born population. Here was the chief source of opposition to the government . . . the recruiting ground of the democrats."⁸¹ "[T]hey attempted, under the guise of patriotism, of concern for the national welfare, and of 'saving the country from internal enemies' to break up the [opposition] party" led by Jefferson and Madison.⁸² But "nationalism alone was not enough to save them: ill-equipped to be the leaders of a people that aspired to move toward democracy, the Federalists in 1798 acted out of fear of the people which was never far from the surface of their minds and which underlay many of their measures."⁸³ "By yielding to the temptation to proscribe, under cover of a war emergency, their political opponents as enemies of the country, the Federalist party in effect confessed its unworthiness to lead the nation at a time of tension and peril."⁸⁴ That was 1798. Now is 2006. Sound familiar?

The second statute, the Sedition Act, was the first's bookend, and might remind some of you of the so-called USA Patriot Act, enacted five years ago this very month with similar hysteria and suspect motives.⁸⁵ Tracking some

⁷⁹ See, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 75-91, *supra* note 13 (reviewing these developments in more detail); see also *supra* notes 13 and sources cited therein (on this basic theme, from various perspectives).

⁸⁰ MILLER, *supra* note 78, at 50-53.

⁸¹ *Id.* at 41.

⁸² *Id.* at 3-4.

⁸³ *Id.* at 10.

⁸⁴ *Id.*

⁸⁵ For an especially incisive analysis, see David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002) (reviewing the pattern of egregious regard for law and due process embodied in the statute and its current enforcement); see also Fletcher N. Baldwin, Jr. & Robert B. Shaw, *Down to the Wire: Assessing the Constitutionality of the National Security Agency's Warrantless Wiretapping Program: Exit the Rule of Law*, 17 U. FLA. J.L. & PUB. POL'Y 429 (2006) (reviewing this aspect of the current abuses of power for political advantage, and concluding that "worst of all, the NSA program is an unchecked exercise of executive power"); Peter Irons, "The Constitution is Just a Scrap of Paper": *Empire Versus Democracy*, 73 U. CIN. L. REV. 1081 (2005) (surveying the statute's effects and noting how some

standard ploys of insecure or maniacal rulers, this statute criminalized, among other things, any written or verbal communication uttered with the “intent to create a belief in the citizens of [the United States] . . . that the Legislature (or President or any Court or Judge of the United States) was induced [to act] by motives hostile to the Constitution, or liberties and happiness of the people” of the United States. “Congressional action against sedition, therefore, supplemented the Federalists’ measures against foreigners The capstone of the internal security program of the Federalist party was the Sedition Law.”⁸⁶

These two laws, moreover, were accompanied by similar enactments that employed public power to manipulate domestic electoral politics – democracy, in other words – and ensconce the Federalist elite in perpetual power. During their relatively brief time on top, the Federalists passed numerous statutes directed at “aliens” and “enemies” and “sedition” with the intention of preventing new immigrants from becoming voters, preventing existing citizens from exercising their constitutional and civil rights, and entrenching a formally democratic monopoly over the federal government. Indeed, “[t]he Federalist system of political intolerance was inaugurated by the Naturalization Act of 1798,”⁸⁷ which continued to bedevil this country with its racist xenophobia for a very, very long time to come.⁸⁸

Under these twin “laws” (and their related statutes), I could be arrested and imprisoned, here and now, for the words I utter today in this Lecture. So could the many writers who have helped to expose the corruption and transgressions of the current occupants of the Executive Branch and their cohorts in other branches or quarters of the government.⁸⁹ Perhaps, so could many of you. Is this democracy? Liberty? The Rule of Law?

This fear, this oppression, this effect, is a key aim of cultural warfare today – just as it was the point of the Federalist equivalents back then: abuse of democratic institutions to subvert democracy “legally” and fix society in the mold and image preferred by its elitist rulers.⁹⁰ Remember, the Framers of the

provisions, like the vague criminalization of acts “dangerous to human life,” imitate the Sedition Act of the doomed Federalists two centuries ago); *see also infra* notes 95-96 and accompanying text (on “patriotism” as used in this statute, and how that usage constitutes another Big Lie that facilitates state-sponsored intimidation of dissent or opposition to the “legal” subversion of democracy by ruling politicians).

⁸⁶ SMITH, *supra* note 78, at 94, 108; U.S. SENATE JOURNAL, 5th Cong., 2nd Sess. (July 4, 1798).

⁸⁷ *Id.* at 22.

⁸⁸ From the very beginning of the federal legislation on naturalization, starting with the first statute in 1790 a few months after the Constitution’s ratification, Congress limited naturalization to “any alien, being a free white person who shall have resided within the limits and under the jurisdiction of the United States for a term of two years.” Naturalization Act, ch. 3, §1, 1 Stat. 103 (1790). This whites-only provision endured for 162 years, until 1952. *See generally* IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 20-24 (2006) (providing capsule history of legal definitions of whiteness in various doctrinal categories).

⁸⁹ *See infra* note 118 and sources cited therein (on the fraud, deception, and profiteering of the current regime).

⁹⁰ Because constitutional text is infamously brief, abstract, and ambiguous, the backlash search for specific text is usually negative. Moreover, by employing the most exacting or restrictive approach specifically to text granting federal powers, backslashing originalists help to ensure a negative outcome via this methodology. On the structuring of methodology

Constitution deeply distrusted each other and understood that they were all going to act like self-interested politicians organized around self-aggrandizing factions – a prophecy they all personally fulfilled, albeit in different ways and times, and to varying degrees.⁹¹ They concluded that there was no escape from this bottom line, and the only question for them therefore was how to control the tendency “to vex and oppress” each other in the pursuit of self-interest, to use Madison’s apt phrase.⁹² Consequently, they set about to erect a system of factional politics that would be self-correcting through electoral contests most of the time, and that would contain structural separations of power, coupled with specific checks and balances on all sources of power, to ensure that “ambition would counteract ambition” regardless of shifting factional fortunes.⁹³

And by the way, these Federalist Acts cannot be viewed as expressions or evidence of “original intent” regarding the constitutionality of the powers purportedly self-bestowed by these (and related) statutes. And this is so even though two towering Framers and founders – and, at that time, the nation’s

during the ratification process to secure preferred results, see RIKER, *supra* note 61 at 129-265 (reviewing the ratification campaigns in several key states, and the structuring of the process as whole by the Federalists to tilt matters in favor of success). Using entrenched power, status, and wealth amassed during the decades and generations of *de jure* patriarchy and white supremacy, the identity-based in-groups established by the original immigrants thus are able structurally to influence inordinately formally “democratic” contests upon which genuine constitutionalism depends.

Consequently, the social and cultural effects of this methodology serve more often than not to privilege “original” arrangements emplaced throughout society at large based on social identities and ownership of property. These arrangements of course favored the propertied white male elites of the colonial period, which, indeed, were “the people” permitted to participate fully in the political decision-making processes used during those times to impose the social, economic, and political structures that, now, are hallowed strategically by backslashers as neutral kinds of history and tradition to wage cultural warfare against the “traditionally” subordinated groups of this country. See *supra* note 30 and sources cited therein (on suffrage and political participation in country’s formative years). Thus, “originalism” and related concepts become code terms for past and self-serving choices regarding “values” that backslashers now say bind us all in perpetuity, both formally and structurally, regardless of the constitutional lessons that later generations might draw, as did the Framers, from social experience or evolution. For a further discussion of Framers’ adaptation of views from the revolutionary to the “critical” period, which caused them to structure “democracy” in fundamentally different terms as a result of the lessons they drew from the latter period, see *supra* notes 26-71 and accompanying text. Over time, the most likely (if not inevitable) social and cultural consequences of backlash methodology are to reverse multiculturalism in the distribution of social goods and formal powers, and revert to a more homogenized structuring of power – an artificial homogeneity that, despite conclusory backslash claims to the contrary, are formally at odds with the formal commitment to equal justice and equal opportunity.

⁹¹ A faction stood for no principles; it was held together by the pre-eminence of a leader and the hope of plunder and rapine. It was a union of the vicious, the base and ignorant under the leadership of the unprincipled. And, as Hamilton said, faction was the “natural disease of popular governments” and accounted for the shortness of their life-expectancy.

MILLER, *supra* note 78, at 11.

⁹² See THE FEDERALIST No. 10, at 55 (James Madison) (The Lawbook Exchange, Ltd., Martino Publishing, 2001) (noting that the structure of the U.S. government must be one of checks and balances).

⁹³ THE FEDERALIST No. 51, at 118 (James Madison) (The Lawbook Exchange, Ltd., Martino Publishing, 2001) (“Ambition must be made to counteract ambition.”).

only two Presidents, Adams and Washington – both blessed this desperate and doomed power grab: had the Constitution been presented as vesting these sorts of powers in the new national government – the partisan criminalization of political expression and ideological exclusion or deportation of potential opposition voters – the Anti-Federalists would have prevailed hands down. No, these (and related) Acts do not and cannot stand as legitimate precedent for similar present-day abuses in the name of operational necessity. By historical consensus, these (and similar) Acts of anti-democratic, majoritarian, and factional abuse stand as a scandalous betrayal of first principles, a repudiated experience from which the nation must learn and re-learn foundational lessons, just as the Framers studied and learned fundamentals from their own experiences, and those of others.⁹⁴

From a truly original (as opposed to originalist) constitutional perspective, *anything* that excites factional greed and the pursuit of self-interest through public politics to the point where the substantive and structural safeguards of the Constitution are effectively deactivated must be regarded at least as suspect. The circumvention of the Constitution through disingenuous technicality will render it a “splendid bauble” – “unfit” and “incompetent” to the systemic tasks for which it was composed and adopted. This much was true in 1789 and 1798, and it remains true in 2006. Merely because a particular faction or group of factions can claim to control “a majority” at any given moment does not change this bedrock fact, at least not from a constitutional perspective.

Therefore, do not let yourself be kidded into complacency. The waging of cultural warfare, of backlash kulturkampf, is *not* the practice of democracy, even if superficially it might, kinda, seem like it. It is *not* business as usual. And raw majoritarianism is *not* the form of government established by this Constitution. On the contrary, the structural safeguards of that document – including features like separation of powers, checks and balances, and the Electoral College – are all designed to problematize majoritarianism, to disrupt the equation between majorities and winners – to avoid, in the worst-case scenario, mob rule instigated by unscrupulous, unprincipled demagogues. Whether in 1798 or 2006, political, cultural, or ethnic cleansing is a subversion of the Constitution, even if pursued and accomplished through formally democratic channels; when conducted for personal or factional political gain or enrichment, it is downright despicable.

Next time somebody intones simplistic claims of “democracy” to justify today’s despotism and cronyism, try out a bit of (principled) originalism. Revive this kind of forgotten or suppressed history. Drop a timely reminder of the original constitutional architecture establishing this republic, and of the compelling, continuing political reasons for this design.

⁹⁴ Along these lines, one bright spot is the recent recognition of these functional fundamentals by the Supreme Court in cases like *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Romer*, majoritarian politicians had sought to exclude a minority from unfettered participation in the political process on ideological grounds, while in *Lawrence*, a majoritarian legislature sought to criminalize a minority and the relationships of members of that minority. For a discussion of these (potentially) important rulings, see Francisco Valdes, *Anomalies*, *supra* note 70.

D. Patriotism as Duty of Blind Obedience to the Ruling Class

Should I go on with the Big Lies? So many envelop us . . . do we have time for one more? Okay, how 'bout this one; it's short, and so timely: "patriotism" as a name for knee-jerk loyalty and (undue) obedience to ruling elites. As shown by the passage of the so-called USA Patriot Act in October 2001, today "patriotism" is repeatedly misused by politicians in control of the Executive Branch (and their allies) to badger, smear, and destroy anyone who dares to question their hunger for power and profit through war – to club down any and all expressions of dissent into silence, whether from members of Congress, the mainstream media, established academics, or private citizens.⁹⁵ And of course, the engineers and biggest culprits in today's smear tactics, the loudest breast-beating, self-proclaimed "patriots" of us all, are also to be found among the most privileged evaders or cunning dodgers of military service⁹⁶ during the nation's last (undeclared and fraudulent) war.⁹⁷

⁹⁵ For a sampler of examples involving authors, actors, musicians and private citizens, see Susan N. Herman, *Patriotic Dissent*, 45 WASHBURN L.J. 21, 26 (2005). In this short essay, the author recounts an emblematic moment, which illustrates the culture of fear and self-censorship that this campaign of smear and intimidation is designed to produce among everyday Americans: "My own mother-in-law expressed fear that the government would attempt to silence me, perhaps locking me up for my dissenting views." *Id.* at 26. For other examples, see Frank Rich, *It's All Newsweek's Fault*, N.Y. TIMES, May 22, 2005, at § 4-13 (discussing the use of same tactics against mainstream press); see also *supra* note 85 and accompanying text (on the USA Patriot Act); Jim Rutenberg, *For White House, War of Words, at Least, Is Battle Where It Excels*, N.Y. TIMES, Sept. 26, 2006, at A21 (reporting on similar attacks on the patriotism or integrity of members of Congress who dare voice any dissent); Scott Smallwood, *Inside a Free-Speech Firestorm: How a Professor's 3-Year Old Essay Sparked a National Controversy*, CHRON. HIGHER ED., Feb. 18, 2005, at A10 (reporting the dismissal of a respected and prominent tenured professor due to an expression of views on the causes of terrorism, which some politicians had deemed "extreme."). Of course, the effort to intimidate the press is now made easier by the longer-term assaults on the media begun under Nixon and Reagan as part of the culture wars. See Valdes, "We Are Now of the View", *supra* note 42, at 1433 n.57 and sources cited therein (on Nixon's and Reagan's handiwork).

⁹⁶ Though the details seem to have been made deliberately murky, the bottom line is clear: none of the grown men so ready to send young troops to fight and die overseas ever served a day in the military during wartime, even though they could have. Instead, during the Vietnam War era most of them scurried to hide in comfortable havens to substitute for their obligation to serve during that time of compulsory military service based on the draft system then in place. Senator Chuck Hagel of Nebraska, a veteran, said,

It is interesting to me that many of those who want to rush this country into war and think it would be so quick and easy don't know anything about war. . . . They come from an intellectual perspective versus having sat in jungles or foxholes and watched their friends get their heads blown off. I try to speak for those ghosts of the past a little bit.

Michael Hirsh, *Hawks, Doves and Dubya*, NEWSWEEK, Sept. 2, 2002, at 24, 27-28. Of course, this merely "intellectual perspective" is the result of evading service: "Cheney, Wolfowitz and Perle all avoided Vietnam – Rumsfeld was a Navy pilot between wars – and Bush was one of the 'sons of the powerful' whom [former Secretary of State Colin] Powell, in his 1995 memoirs, condemned" for their habit of "wrangl[ing] slots in Reserve and National Guard units." *Id.* Ironically, under their current and unprecedented misuse of the Reserve and National Guard to stretch military resources, those escape hatches would be shut today to service dodgers like Bush and Cheney.

⁹⁷ From origins to collapse, the parallels in executive deception in initiating American military hostilities in Vietnam and Iraq are eerie. See, e.g., John Hart Ely, *The American War in*

This clubbing and smearing in the name of patriotism extends to illegal wiretapping of private citizens, surveillance of libraries and the means of communication, defamation, harassment, and other official transgressions that are spookily reminiscent of the Alien and Sedition era (such as immigration exclusions based on political viewpoint, secret warrantless searches, ethnic profiling, military tribunals, and “secret preventive detention” at the unilateral discretion of the executive).⁹⁸ Like the Federalist exertions of the 1790s, these tactics aim to generate and insinuate a sense of fear and self-censorship among the populace at large, and to leave undisturbed the thievery and thuggery of their rulers. Eerily echoing the old Federalist rhetoric of the 1790s, the failed political hack installed into power at that time as Attorney General of the United States remarked, “[t]o those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies.”⁹⁹ So, just think of today’s per/version of patriotism as the political counterpart to the current per/version of originalism as a form of respectable or plausible jurisprudence.¹⁰⁰ Just another cheap “political practice.”

Yet, in American constitutional and political history, the concept of patriotism aligns with the concept of revolution, of armed revolution, of organized armed uprising. Remember? It was the “patriots” against the “loyalists,” at least originally.¹⁰¹ The deviant episodes marked by the Federalist campaigns of the 1790s, or the McCarthyism of the 1950s – both now still and firmly in the national hall of really big shames – stand in stark contrast to these origins. In the storyline of this country, the “original” revolutionaries were the “patriots” *precisely* because they asked the impolite questions, made disturbing noise, and stood up against governmental power – even if that government was formally lawful under then-existing political structures or systems. Whether one agrees with the Framers’ decision to rebel, their personal and organized actions in defiance of the lawful rulers of the world’s then-only superpower did, in fact, take a lot of sustained individual courage – the diametric opposite of sycophantic obedience to formally lawful authorities. And so does patriotism today.

For better or worse, the American notion of patriotism – not writ large in some philosophical or abstracted way, but in the specific context of this Constitution and of the legal and political history of the United States – thus stands for the proposition that the people have a right to call upon the people to revolt

Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About, 42 STAN. L. REV. 877 (1990); John Hart Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn’t Tell Us About*, 42 STAN. L. REV. 1093 (1990) (recounting, and assessing the constitutionality of, the nation’s last undeclared war).

⁹⁸ See, e.g., Cole, *supra* note 85, at 960-78 (reviewing this feature of the current scheme).

⁹⁹ See, e.g., Ashcroft: *Critics of New Terror Measures Undermine Effort*, CNN.COM, Dec. 7, 2001, available at <http://www.cnn.com/2001/US/12/06/inv.ashcroft.hearing/>.

¹⁰⁰ See *supra* note 12 and accompanying text (on currently dominant versions of originalism). In particular, see Post & Siegel, *supra* note 12, at 545 (on originalism as a political as well as legal phenomenon).

¹⁰¹ For a solid recounting, see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (enlarged ed. 1992). In particular, review the Framers’ “logic of rebellion.” *Id.* at 94-160.

against their oppressors, their rulers. Unless, perhaps, one's aim is to ignite a new round of McCarthyism in this country, or a return of the rush to tyranny witnessed by the founding generation under the wane of the Federalists and their "laws" against immigrants and so-called sedition. If those are not your ends, however, American-style patriotism is more about dissenting vocally *and* physically from the "legal" subversion of national values by rulers, and less about blind obedience to politicians who somehow have gotten their hands on the people's government, not to mention our treasury.¹⁰²

This reminder of patriotism's meaning in the American political lexicon should sound familiar – as should all of the facts that belie the preceding Big Lies, which we have outlined so briefly here today. Indeed, it's *all* traditional stuff; nothing critical or radical here – just a sprinkling of ironic (or principled?) originalism. And by the way, I've not tried in this Lecture to propose that the Framers or revolutionaries were good guys, or bad guys, for that matter. Nor the Federalists or Anti-Federalists. Nor any other politician or faction (except of course for the "evil-doers" behind the ongoing culture wars).¹⁰³ In this Lecture I have accepted as a given the Framers' original sketch of humans and society. Without doubt, over history the various factions mentioned in this Lecture have all acted like the petty schemers and piggish combinations of self interest that the Framers' explicitly had in mind when they crafted the design and contents of the document; they have endeavored to "vex and oppress" each other, and the rest of us, out of greed, ambition, righteousness, arrogance, ignorance, and vanity.¹⁰⁴

Thus, with this final Big Lie, I'm just trying to remind us all that it's demonstrably false and simply stupid for ignorant or cunning fools to proclaim now, after this long and known history, that patriotism somehow equals unquestioning obedience to the latest dictates of a government official, or his or

¹⁰² For a contemporary essay sounding some of these general points, see Michael Kazin, *A Patriotic Left*, DISSENT, Fall 2002, at 41.

¹⁰³ This Lecture simply does not allow for an exhaustive teasing of the many angles that the big-picture concepts discussed here might beckon. The limited purpose of this discussion therefore has been to bring into sharp relief some of the many corrosive ideas, or Big Lies, that help to enable and explain much of today's constitutional dangers. These Big Lies, as we have seen, are cross-associated conceptually, politically, and ideologically. Today, they are being hawked principally by politicians and political appointees with formal lawmaking power, and by the networks that have installed them into power, to misuse that power in the name of the Constitution and its Framers. In this way, they disclaim responsibility for the horrors they perpetrate, shift attention to history and the Framers, and thereby attempt to cloak their Big Lies in a sense of principle and legitimacy. In fact, however, as we have seen their maneuvers depend greatly on mass ignorance, on the widespread suppression of documented facts and documentable knowledge. See *supra* note 31 and accompanying text (on caveats).

¹⁰⁴ Key Framers of the Constitution explained their work-product to their own generation by presenting it as a system of checks and balances designed to ensure that no political, social, or identity-based "faction" would ever be able to "vex and oppress" – in other words, to subordinate – others in perpetuity; though the most salient social groups in the minds of the Framers were religiously based, they expressed the concern in terms of social groups or "factions" constructed by identity, geography, property, or industry. See THE FEDERALIST No. 10, at 55 (James Madison) (The Lawbook Exchange, Ltd., Martino Publishing, 2001); see also *supra* note 91 and accompanying text (on factions, and the premises and design of the Constitution).

her minions – yes, even if it's the Parliament, or the King and his ministers. Or the current occupants of the White House and their agents. In fact, as this suppressed or conveniently ignored historical knowledge reminds us, “patriotism” equals just about the exact opposite of blind personal obedience to formally lawful governments. So please, next time someone uses “patriotism” to bludgeon critical inquiry or silence civic dissent, try a bit of original patriotism: remind that sorry soul of this powerful history, this liberating knowledge.

IV. RESTORING THE RULE OF LAW: TRUTH, ACCOUNTABILITY, RECONCILIATION?

Is it just me, or is it just about now that Jerome's booming voice would be asking us whether we had begun to think about what comes next and how we might or should contribute to a better aftermath, a next reconstruction? Will the next cycle of the political, legal, and constitutional history of this country be like that of this country after the Civil War? Or do we look to the experience with tribunals after the Second World War? Or do we learn from Spain after Franco, Argentina after the Junta, Chile after Pinochet, South Africa after Apartheid, Indonesia after the Marcos? Do we seek lessons from Romania, Hungary, the Czech Republic, or other former Soviet satellites after socialization? What do we do? Have *you* begun to think about that?

As this litany illustrates, the historical examples are many, and the models they suggest are “different” but the query for us as critical legal scholars remains constant: What does a society do when a period of official, “legal” criminality ends, and the criminals live amongst us still?¹⁰⁵ To which historical experience, including those of this nation, should we turn when we try to look beyond the horrors of the moment and imagine setting the stage for a better future – at least a functional restoration of formal democracy and due process of law? What do we do, politically and constitutionally, with a legacy of such massive illegality, like the one being accumulated each day of the past six years through abuses of power, known and unknown – power certainly stolen in 2000, and (perhaps, probably?) re-stolen in 2004.¹⁰⁶ Apart from minimal levels of coerced obeisance, then, should we take seriously, as binding Law, the extra-legal assertions of the corrupt politicians and “ruffians in robes”¹⁰⁷ who,

¹⁰⁵ [T]he question is not merely when will the stack of lies, of abuses become so high, so unstable, so inexcusable that the entire nation finally takes notice and the whole house of cards comes crashing to the ground in a big nasty soul-jarring spirit-cleansing patriotism-redefining whoomp and smothers the whole lot of them, but rather, can it be soon enough?

Mark Morford, *Downing Street is for Liars: Why Aren't the Media Screaming About the Latest Proofs of Bush's War Scams? Don't You Know?*, S.F. CHRON., June 22, 2005, available at 2005 WLNR 10166573 (commenting on the release of memos between Bush cronies and the British government indicating that the Iraq invasion was indeed an intentional fraud on Congress and the people); see also *infra* note 118 and sources therein (on the facts of this “conspiracy” and the attendant profiteering).

¹⁰⁶ See *Bush v. Gore*, 531 U.S. 98 (2000); see also ALAN M. DERSHOWITZ, SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000 (2001); GREG PALAST, THE BEST DEMOCRACY MONEY CAN BUY (2003).

¹⁰⁷ I borrow the colorful phrase from none other than John Ashcroft, the notorious politician whom Bush installed into office as Attorney General after his defeat for re-election to the Senate from Missouri. See, e.g., Robyn E. Blumner, *Ashcroft's Rule of Law Not Necessarily*

enabled in great part by Big Lies, have installed each other into public office and currently occupy or control the executive (and judicial) branches of the federal government?¹⁰⁸ Which model, or mix of models, can or should we help to develop *now*, using our skills as critical scholars *proactively*, to ensure effective accountability after this official reign of terrifying impunity?

Originalist exultation over their reconquest of law and society can lead to failure by overreach, as the current occupant of the Oval Office might demonstrate in the form of his principal historical legacy.¹⁰⁹ In the meantime, the predatory machinations and pernicious sneakiness that cover for the erosion of democracy, liberty, and the Rule of Law from coast to coast are taking their toll – a toll that will last far beyond the next two years. The question thus left is: what next? Have we begun to work through these weighty queries? Are we preparing to do our part toward a restoration of formal democracy and the Rule of Law in the United States? Are we helping to forge the legal frameworks for truth and accountability?¹¹⁰ And if not us, then who? Who? Think about it, *literally*: who, if not us?

These questions, my friends, are not outlandish, nor premature. On the contrary, they are queuing up and demanding attention. As the historical examples to which I have only briefly alluded illustrate, other generations and societies have had to come to grips with their like, for better or worse. So will we, for better or for worse.

V. MANTRAS FOR SURVIVAL AND CALLS TO ACTION: FROM THEORY TO PRAXIS

I close this year's Lecture with the four mantras of critical survival and the two calls for concrete collective action to which I referred at the outset. The mantras are somewhat simple reminders, which I repeat to myself when I need some re/grounding, and that I offer here to you as affirmations to recall in moments of fatigue. The calls for action close these brief thoughts on a forward-looking note. Both the mantras and the calls are designed to enable, sustain, and focus a collective move, on our part, from theory to praxis regarding specifically the constitution of terror within the United States, and the Big Lies that on the surface serve to normalize this "legal" subversion of formal democracy.

Constitutional, ST. PETERSBURG TIMES, Nov. 18, 2001, at 6D (quoting his remark, and reviewing Ashcroft's record of legal subversion of democratic constitutionalism throughout his entire career as a politician).

¹⁰⁸ For a pointed elaboration of this point, see Bruce Ackerman, *The Court Packs Itself*, AM. PROSPECT, Feb. 12, 2001, at 48 (noting that the decision in the *Gore* litigation was "not the first time in history that the Supreme Court has made a decision that called its fundamental legitimacy into question," but that this time was unique because of the direct meddling in electoral politics at the highest level).

¹⁰⁹ Newly-elected Senator James Webb of Virginia, who previously served in the Reagan Administration, was the first to note that Bush had become "a failed president" with "two years to try to show some true leadership." See David Lerman, *Webb Has Influential Roles in First Week*, DAILY PRESS, Jan. 14, 2007, at A1.

¹¹⁰ Fortunately, much important work along these lines already has been pioneered. See *infra* note 118 and sources cited therein (on the thievery, deception, and thuggery of the current occupants of the federal executive office).

First, remember always that we are citizens of multiple communities, and this multiplicity will make demands upon us that stretch (and sometimes outstrip) our abilities. The legal academy, as much as our communities of origin or residence, represents a community to which we must attend. The academy is *one* of our communities – and is itself the site of multiple battlefronts in the historical quest for social justice.¹¹¹ Therefore, we’ve got to do serious antisubordination work, both here and there; the question is not “here *or* there” but rather “here *and* there.”

Second, never doubt that legal scholarship and teaching are always, *always* political – always were, always are, always will be, at least *legal* scholarship.¹¹² Ain’t no way it can be otherwise, in a legalistic society that uses law to help engineer and mask, if not outright valorize, social castes and ills. So don’t vex yourself imagining otherwise, much less trying to perform the impossible. Protect yourself from those who are still in the Matrix¹¹³ – those who are still blinded by “objectivity” or “neutral principles” and other entrenched legal fictions. But don’t vex yourself. Just continue, best you honestly can, with your part in this ongoing, historical relay race toward postponed reckonings.

Third, be confident in your sense that this moment, this historical moment in which we live right now, represents a truly extraordinary time. Cultural warfare is not mom-and-pop democracy in action.¹¹⁴ The sustained, orchestrated, extreme efforts undertaken to control judges – from appointment¹¹⁵ to

¹¹¹ Harris et al, *supra* note 1 (discussing LatCrit efforts within legal academia).

¹¹² Not coincidentally, this mantra is also one of the original LatCrit “guideposts.” *Id.*

¹¹³ This film, for good reason, is seen as a metaphor for the situation at hand. *See, e.g.,* STEPHEN FALLER, *BEYOND THE MATRIX: REVOLUTIONS AND REVELATIONS* (2004).

¹¹⁴ As previously described, this term refers to the rollback agenda of the “culture wars” taking place during the past quarter century. *See supra* notes 70-77 and accompanying text (on cultural warfare).

¹¹⁵ The success of this grand-scale “court packing” backlash scheme has long been noted, and well documented. *See, e.g.,* Sheldon Goldman, *Reagan’s Judicial Appointments at Mid-Term: Shaping the Bench in His Own Image*, 66 *JUDICATURE* 335 (1982-83); Sheldon Goldman, *Reagan’s Judicial Legacy: Completing the Puzzle and Summing Up*, 72 *JUDICATURE* 318 (1989) (all on Reagan’s judicial appointments and their ideological effects on the federal judiciary). By the turn of the century, Reagan’s escalated ideological scrutiny and techniques to ensure ideological purity had produced a paralyzing polarization in the confirmation process, especially in election years: in 1988, when Ronald Reagan faced a Democratic Senate, the senators approved forty-two of his judicial nominees; in 1992, when George Bush similarly faced a Democratic Senate, the senators approved sixty-six of his judicial nominees; in 1996, when Bill Clinton faced a Republican Senate, the senators approved a mere seventeen of his judicial nominees. Jon Gottschall, *Reagan’s Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 *JUDICATURE* 48 (1986). *See* Frank Davies, *Senate Stalling New Judges: Republicans Block New Judgeships*, *MIAMI HERALD*, Feb. 6, 2000, at 1A (reporting the increased blocking of federal judicial appointments on ideological grounds).

The same rhetoric and campaign continues to this day, as the daily news reports demonstrate. *See, e.g.,* Elisabeth Bumiller, *Bush Vows to Seek Conservative Judges*, *N.Y. TIMES*, March 29, 2002, at A24; Robert A. Carp et al., *The Decision-Making Behavior of George W. Bush’s Judicial Appointees: Far-Right, Conservative or Moderate?*, 88 *JUDICATURE* 20 (2004) (reporting that overall voting patterns indicate that the most recent appointees “are among the most conservative on record”).

intimidation¹¹⁶ – are only some examples. Others include the unprecedented spectacle of those same judges taking control of elections at the highest levels of national life, and installing into public power by dictum their patrons and allies.¹¹⁷ And then combining to use their control of public office to undo established laws and re-establish social inequality, to demonize political opponents and suppress dissenting expression, to pillage the public Treasury and enrich their cronies, and to otherwise abuse the mechanisms of public authority, subverting democratic norms and institutions in pursuit of perpetual power and personal or familial profit.¹¹⁸ This is *not* politics as usual; cultural warfare

For a broader historical account of how the federal judiciary became so politicized, see RICHARD HODDER-WILLIAMS, *THE POLITICS OF THE U.S. SUPREME COURT* 33-45 (1980) (on the politics of the Nixon nominations to the Supreme Court).

¹¹⁶ In addition to manipulation of the nominations and appointments processes, backlash politicians also have tried to intimidate sitting judges into complying with their ideological preferences. See, e.g., Bob Herbert, *In America: A Plan to Intimidate Judges*, N.Y. TIMES, Dec. 4, 2000, at A29 (documenting the coordinated effort to force judicial compliance with backlash imperatives); Edward Walsh & Dan Eggen, *Ashcroft Orders Tally of Lighter Sentences: Critics Say He Wants 'Blacklist' of Judges*, WASH. POST, Aug. 7, 2003, at A1 (reporting a Justice Department directive ordering U.S. attorneys across the country to be “more aggressive” in reporting judicial deviations from the federal sentencing guidelines, which had been promulgated in large part to discipline “liberal” judges painted as “soft” on criminals and too sympathetic to the constitutional rights of the accused). Ironically, the Supreme Court later held those guidelines unconstitutional. See *United States v. Booker*, 543 U.S. 220 (2005).

The obvious aim of these law-politics dynamic is to cow independent judges, and to coerce as may be necessary their conformance with the politics of backlash – so much so that even William Rehnquist, the backlash-identified Chief Justice, was prompted prior to his death to complain of this concerted effort at congressional intimidation of federal judges. See Linda Greenhouse, *Chief Justice Attacks a Law as Infringing on Judges*, N.Y. TIMES, Jan. 1, 2004, at A14 (reporting Rehnquist’s “unusually pointed” criticism to enactment of a federal statute similar to the Ashcroft directive, which “places federal judges under special scrutiny for sentences that fall short of those called for the federal sentencing guidelines.”).

A year later, Rehnquist sounded the same skeptical note in his annual report on the state of the federal judiciary: “There have been suggestions to impeach federal judges who issue decisions regarded by some as out of the mainstream. And there were several bills introduced in the last Congress that would limit the jurisdiction of the federal courts to decide constitutional challenges to certain kinds of government action.” These actions include efforts “to strip the federal courts of jurisdiction to hear challenges to the phrase ‘under God’ in the Pledge of Allegiance, to the display of the Ten Commandments on government property and to the Defense of Marriage Act, a federal law that permits states to withhold recognition of same-sex marriages performed in other states” despite constitutional commitments and norms of mutual recognition. Linda Greenhouse, *Rehnquist Resumes His Call for Judicial Independence*, N.Y. TIMES, Jan. 1, 2005, at A10. These and similar political efforts targeting judicial independence, Rehnquist concluded, “could appear to be an unwarranted and ill-considered effort to intimidate individual judges.” *Id.*

¹¹⁷ See generally *supra* notes 106-08 and sources cited therein (on the 2000 election and related issues).

¹¹⁸ As we all know all too well, news reports have been brimming with incredible facts for years, which can serve as leads to formal investigations, but the most telling development is the stunning exposé and repudiation issued recently in book form by one of the earliest designers of backlash politics. See KEVIN PHILLIPS, *AMERICAN DYNASTY: ARISTOCRACY, FORTUNE AND THE POLITICS OF DECEIT IN THE HOUSE OF BUSH* (2004). In like vein, during the past year a series of books have been published that jointly establish a solid point of departure for prosecution, impeachment, and the like. See, e.g., ELIZABETH DE LA VEGA, *United States v. Bush* (2006) (laying out the basics for a classic legal case based on conspir-

amounts to a commandeering of formal democracy to conduct a neocolonial resurrection, a sociopolitical “cleansing” of North American society, a roll-back of civil rights and liberties that no truly free, just, and open society can long endure.¹¹⁹ These times are indeed extraordinary; they aren’t entirely unprecedented, but they *are* undoubtedly extraordinary. And these extraordinary times thus call on us to imagine, create, and undertake extraordinary corrections.

The fourth, and last, mantra of survival is crucial: appreciate your own finitude. Our interventions and corrections, both individual and collective, will always be limited, imperfect, and fragile.¹²⁰ In a world of enormous derangement, our critical exertions never have been, and never can be, good enough to match the scale of evil and exploitation confronting us. And that’s okay, too. I wish it were different, but it’s not. So we – you – do what we/you can, the *best* we/you can. This last mantra is *not* a rationalization to enable excuses or complacency; it’s just a reminder that, at the end of the day, we are finite, and

acy to defraud the United States through trickery); MICHAEL ISIKOFF & DAVID CORN, HUBRIS: THE INSIDE STORY OF SPIN, SCANDAL AND THE SELLING OF THE IRAQ WAR (2006) (detailing key facts of the conspiracy as it regards the invasion of Iraq); T. CHRISTIAN MILLER, BLOOD MONEY: WASTED BILLIONS, LOST LIVES AND CORPORATE GREED IN IRAQ (2006) (exposing the pattern of corruption and profiteering among the conspirers and their clique); FRANK RICH, THE GREATEST STORY EVER SOLD: THE DECLINE AND FALL OF TRUTH FROM 9/11 TO KATRINA (2006) (similarly detailing the pattern of lies, deceptions and other crimes and misdemeanors involved the conspiracy); THOMAS E. RICKS, FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ (2006) (focusing on the public relations machinery created to conduct the conspiracy); RON SUSKIND, THE ONE PERCENT DOCTRINE (2006) (documenting the intentional manipulation of intelligence under the direct orders of Dick Cheney, current occupant of the Vice Presidency, to “sell” the conspiracy to Congress and the American people); BOB WOODWARD, STATE OF DENIAL: BUSH AT WAR, PART III (2006) (providing insider accounts of the facts related to the conspiring).

¹¹⁹ For example, in defending the 2000 nomination of John Ashcroft – a prominent but recently defeated backlash politician from Missouri – to take over the federal Justice Department and become the nation’s chief federal law enforcement officer, a backlash-identified talk show host based in the nation’s capital declared, “[t]his is culture war – two mutually exclusive world views continue to fight for preeminence in our culture.” James Kuhnenn & Ron Hutcheson, *Ashcroft is Next Political Flash Point; Partisan Lines are Clearly Drawn*, MIAMI HERALD, Jan. 11, 2001, at 1A. For other examples of today’s cultural warfare in action, see Comment, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118 (1995) (deconstruction the racialized political dynamics of that early Proposition); Nicolas Espiritu, *(E)Racing Youth: The Racialized Construction of California’s Proposition 21 and the Development of Alternate Contestations*, 52 CLEV. ST. L. REV. 189 (2005) (focusing on cultural warfare against youth of color in California through the use of the proposition system in that state); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California’s Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 650-58 (1995) (analyzing the racial rhetoric and politics of Proposition 187); see also Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class*, 42 UCLA L. REV. 1509 (1995) (analyzing the identity politics and social consequences of recent legal “reforms”); see generally *supra* notes 70-93 and sources cited therein (on the politics of cultural warfare).

¹²⁰ This mantra reflects a familiar LatCritical refrain. See, e.g., Francisco Valdes, *Foreword: Under Construction-LatCrit Consciousness, Community and Theory*, 85 CAL. L. REV. 1087, 1093-94 (1997), 10 LA RAZA L.J. 1 (1998).

everything we attempt is flawed, but none of us can afford to let these facts drive us crazy, into paralysis.

Hoping that these mantras will help ensure our survival, if not our success, I close with two calls for collective action, which I hope will channel our collective creativity and energy toward a move from theory to praxis on the challenges mounting before us. Both calls are to individual initiative – collective action being, after all, the coordination of individual wills and acts. But plainly both also require coordination and collaboration; both entail steps or processes that span multiple skills and areas of knowledge – from legal research and critical analysis to document-creation and coalition-building. Both, in short, focus squarely on the kinds of skills that we can bring to bear on the situation at hand as formally trained legal scholars. To do the work sketched below requires us to engage the constitution of terror in this country as a *community* of activist *and* critical legal scholars.

First, we need to get on the ball, to help with a plan for the restoration of the Rule of Law in the United States. We must use our scholarly skills and positions to contribute to the elaboration, in real time, of conceptual, doctrinal, and constitutional frameworks for accountability, so that the nation has substantive options when these criminals are out of power, when questions of power abuses can be seriously visited. And we need to ensure these options include consideration of international recourse, as well as domestic legal regimes.¹²¹ Suspected criminals like Kissinger ought to be afraid to travel, just like Pinochet – a Kissinger monstrosity – finally came to feel afraid.¹²² Bush too, and Cheney and Rumsfeld. We must help to ensure accountability from the principals and profiteers, not only from the low-level scapegoats thrown to the namby-pamby so-called “liberal” press as scandal fodder, as we witnessed recently after the exposé of military-sponsored torture in the Abu Ghraib prison.¹²³ Those who have orchestrated today’s abuses of power and purse are the ones who need to be dogged by the intellectual and legal framework that we are uniquely positioned to help develop. Will we do so? Or will they all really just walk?

¹²¹ See generally Berta Esperanza Hernández-Truyol, *Building Bridges: Bringing International Human Rights Home*, 9 LA RAZA L.J. 69 (1996) (urging LatCrit and other OutCrit scholars to link analyses of “domestic” legal issues to frameworks offered by international law sources).

¹²² Recently declassified documents corroborate long-held suspicions that Kissinger tacitly authorized the Pinochet coup against his country’s democratically elected President Allende, and by extension the bloodthirsty political cleansing that took place immediately afterward. See Dep’t of State, Memorandum of Conversation (June 8, 1976) (transcribing conversation between Pinochet and Kissinger). The prosecution of Pinochet, and the revelation of U.S. complicity in his and similar crimes, have created a new level of concern among human rights violators used to operating with impunity. See, e.g., Laurie Goering, *Wariness of Arrest Abroad Keeps Many in S. America*, CHI. TRIBUNE, Dec. 15, 1998, at 6; Rupert Cornwell, *The Trials of Kissinger*, THE INDEPENDENT, Apr. 23, 2002, at 4. Though American military and political might protects suspected criminals from effective investigation and prosecution, in time these recent developments might lead to a different international environment that ensures accountability even among the most powerful politicians.

¹²³ See, e.g., Bob Herbert, *On Abu Ghraib, the Big Shots Walk*, N.Y. TIMES, Apr. 28, 2005, at A25 (criticizing the focus of official inquiries into torture and abuse at the lowest levels of military operations).

Second, we need to start enlisting the international community in the restoration of electoral integrity and formal democracy within the United States. We can begin by contacting other organized groups, other NGOs,¹²⁴ both within and beyond the country, to help build the political and intellectual framework for international monitoring of state and federal elections throughout this country; as people, as citizens and residents of this country, as victims of this tyranny, we need to call for international observers to do what this country is accustomed to doing for everybody else around the world. As legal scholars, working together with other concerned groups, we can help to formulate and issue a broad-based call for international safeguarding of the electoral process in the United States, demanding that established international standards for ascertaining electoral integrity be independently enforced here, and until such time as local and national elections can be certified as free and fair. Until we know that politics matter and voting counts; in other words, at least until the mad rush toward paperless voting is tempered by a national requirement of a foolproof paper trail.¹²⁵

To begin the move toward praxis on the issues of democracy, accountability, and the Rule of Law outlined above, we can build on the existing structure of collective projects that we have established and nurtured during the past decade. Our academic events, like this annual LatCrit Conference, provide ready venues for the exploration and development of a plan of action through presentations, workshops, panels, and the like. Other regular academic events that we conduct, such as the South-North Exchange on Theory, Culture and Law (“SNX”),¹²⁶ and the International and Comparative Law Colloquium

¹²⁴ In 2006 LatCrit, Inc. secured formal accreditation to operate as an NGO (non-governmental organization) before the United Nations. For more information on the LatCrit NGO project, please visit the LatCrit website at <http://www.latcrit.org>.

¹²⁵ This requirement seems to be the only readily available minimal step toward checking the seemingly heightened tendency to steal elections. The national experience with the 2000 presidential election is of course the primary exemplar of this problem, and of the crisis of confidence in law and democracy that it produces. This self-inflicted damage is exemplified by the public acknowledgement of the current Court’s most senior Republican appointee, John Paul Stevens, who frankly conceded in the aftermath of the 5-4 halt to vote-counting in 2000 that those five Justices’ action in *Bush v. Gore* had seriously shaken “the Nation’s confidence in the judge as an impartial guardian of the rule of law.” 531 U.S. 98, 129 (2000) (Stevens, J., dissenting); *see also supra* notes 106-08 and sources cited therein (on the 2000 controversies and their consequences).

¹²⁶ The South-North Exchange on Theory, Culture and Law (“SNX”) is a newer project designed to bring together critical theorists from various disciplines and regions of the hemisphere (and beyond) to discuss problems in the application of theory to current social problems and policy issues. The basic concept is to create a venue focused on south-north relations, and on issues that affect or constitute south-north polarities, to strengthen LatCrit theory and praxis in hemispheric terms. This annual encounter convened for the first time in mid-December 2003, and has met annually since then at the campus of the InterAmerican University of Puerto Rico School of Law in San Juan, Puerto Rico, to focus critical attention on various substantive themes ranging from constitutional reform to the rights of indigenous people. The next SNX was scheduled for May 10-12, 2007 in Rio de Janeiro, Brasil, under the theme of “*Race & Color Across the Americas: Comparative Constructions of Racial and Ethnic Subjugation.*” For more information on the 2007 SNX please contact this year’s SNX Program Coordinators, Professors João Feres Júnior at jferes@iuperj.com.br and Denise Ferreira da Silva at denisesi@usc.edu, or Project Team Coordinator Colin Crawford at ccrawford@gsu.edu.

(“ICC”),¹²⁷ provide established venues that already enable discussion and action with scholars, activists, and NGOs across the hemisphere and world. Our academic journal, CLAVE,¹²⁸ can help us publish and disseminate texts, and more generally to raise awareness of suppressed yet liberating knowledge. In short, our individual initiatives and community efforts during the past decade, now in the form of the LatCrit Portfolio of Projects, provide a flexible platform from which we can devise the best means of antisubordination praxis for this particular occasion.¹²⁹

Fortunately, the individual and collective labors of our first decade now offer us a functioning infrastructure for personal and collective initiative. But as individuals situated in varied and far-flung institutional settings we additionally can offer courses and seminars; organize conferences and clinics; publish essays, columns, articles, and books; deliver talks in diverse venues; and generally undertake a host of other possible consciousness-raising, action-inducing activities that tap our skills and leverage our institutional positions or resources. Clearly, then, we are trained and positioned to act, both as individuals and a community.

And, as citizens of multiple communities we also can and should call upon our Senators and Representatives in Congress – at least those we think might care about separation of powers, deliberative democracy, and due process of law. Advise them of our plans, our project. Explain who we are, and the resources we can bring to the table. Invite them to join us in these efforts, to support our determination that government be made once again to bow, or at least nod seriously, to Law. Offer to share informal, periodic updates on our

¹²⁷ The LatCrit Colloquium on International and Comparative Law (“ICC”) has met seven times since 1995 in locations ranging from Miami to Málaga to Santiago de Chile to Buenos Aires and Cape Town. This rotating Colloquium aims to foster transnational and interdisciplinary interaction among LatCrit theorists in the United States and elsewhere with scholars, activists, and policymakers at the sites where the Colloquium meets. As with the Annual Conferences, the Annual Call for Papers, Panels and Participation is posted on the LatCrit website, and the program proceedings subsequently are published in the form of law review symposia. For more information, please contact the LatCrit ICC/CGC Project Team coordinator, Professor Robert Westley at rwestley@law.tulane.edu, or Professor Yanira Reyes at reyesyaira@hotmail.com.

¹²⁸ CLAVE (klá-ve) is the LatCrit academic journal published in hard copy as well as online. The hard copy issue is published by the Inter-American University of Puerto Rico (“IAUPR”) School of Law and is a peer-reviewed periodical with two issues per year edited by a LatCrit Board of Editors and Contributing Editors in conjunction with a Student Editorial Board. The online version is managed by the same editorial board with teams that work on English, Spanish, and Portuguese submissions. The hard copy Journal is administered through the IAUPR School of Law. The hard copy version features articles and notes focused on antisubordination theory. The online issue is managed through the University of California-Berkeley School of Law. The online version of CLAVE features a diverse variety of both collective works, such as symposia based on various LatCrit programs or events, as well as individual articles or montages submitted for publication year-round. For more information please visit the CLAVE website at <http://clave.org>.

¹²⁹ The LatCrit Portfolio of Projects consists of all initiatives or events undertaken collectively by the LatCrit community, and thus is a constantly evolving collection of efforts. Projects range from academic events and publications, to student-oriented programs and scholarships, to NGO-related activities that aim to influence policy-making internationally. For more information on the LatCrit Portfolio of Projects, visit the LatCrit website at <http://www.latcrit.org>.

progress, and to coordinate plans and actions. Suggest they call upon us in turn, should enough in the Congress develop the spine and will to consider substantively investigating and analyzing the high crimes and misdemeanors of the past six years. We are all able to do all this. Are we willing? Are we ready?

Our scholarly skills, our critical passions, and our antisubordination commitments constitute a unique and key combination of human resources to help catalyze and sustain the momentous undertakings necessary to press for accountability and restoration of democracy and law in the wake of this long inter-national nightmare. If Jerome were with us today, more than only in spirit, I think this much is the least he would expect, if not demand, both of himself and of us. For posterity's sake, I hope we will timely rise to the occasion. And on that hope, I turn to conclude these thoughts.

VI. CONCLUSION

Perhaps at times during this Lecture you thought you felt moments of bombast and hyperbole. If so, I hope they reminded you of Jerome at his best – his booming voice, his thumping fist, his plain talk. I certainly tried to conjure him here for us – “intended” it to be so. Because, you see, I think that if you linger and reflect on those moments, you might conclude that every word of this Lecture, like Jerome's own body of work, utters a documented or documentable fact and speaks to a truth you know.

Perhaps more importantly, I was emboldened by a little yet electrifying encounter on my way here, for this very Lecture, to follow, as much as I could, in Jerome's footsteps today – to speak plainly, without the qualifications and equivocations that, in the name of nuance and grace, can suck the life out of most legal discourse. This little incident made me think, for the first time in quite a while, that our comeback will, indeed, come. Plus, Jerome always knew how to work a good parable into his thinking to drive home the human and intellectual point of his message.

During the past couple of days that we have been here, I have discussed briefly with some of you, and debated interminably with myself, whether I should dare to wear this special T-shirt here today, for this Lecture. Reflecting, I think, the sense of orchestrated intimidation and self-censorship I previously described as a mark of these troubled times, most of you (of those to whom I spoke) confirmed my own inclinations, and fears, by cautioning against it. And though that, too, was my tendency, I finally could not do it; at the last minute, I put the thing on and came over here.

As I walked up the big lawn out front, and toward this hall, a patrol car with spinning red-and-blue lights seemed headed our way. Slowly it approached, and the more it neared the more it seemed to be deliberately coming toward us. My thoughts raced to your precautions and my own trepidation. I was incredulous, questioning what my eyes were telling me. For a flash, I thought: “Could I, too, really be disappeared?” “No, it's impossible,” I told myself. Or is it? Given the message of the Lecture I was prepared to deliver, my mind wondered as seconds ticked.

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Pulling up alongside us, with tinted power window rolling down, a handsome officer of the law leaned over and said, "Great T-shirt." Dizzied, I said, "Excuse me?" He repeated, "Great T-shirt," this time with a thumbs-up as the window went up and the car drove away.

I stood there in disbelief, and slowly joy swelled. As I took in this huge little incident, I decided: if that young lad in law enforcement can understand this historical moment and the stakes in play, and stop to applaud a long-haired stranger sporting a T-shirt with the visage of the guy in the White House, accompanied by the words "international terrorist" in bold letters, then the act of speaking these truths to you, in plain talk, seems less an expression of civic courage than an acceptance of a minimal obligation to truth and Justice. And that's what I hope we always do.

Given this urgent obligation, and our core convictions, perhaps, the Framers' "original" example is where the journey before us might, or should, ultimately lead. And, as was the case back then, this possibility, dear friends, is no hyperbole. Think on it. And thank you for this honor.