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Beyond Modernism and Postmodernism: Working Notes Towards an Asian American Legal Scholarship

Anthony S. Chen†

The author argues that if Asian American legal scholarship should not stake itself exclusively on anti-foundationalist poststructuralist epistemology because it places specific political and epistemological limits on the capacity of racialized and minoritized communities to pursue social justice. He further suggests that the zone of critical discourse located at the intersection of radical Enlightenment thought and poststructuralism offers better epistemological support for a narrative Asian American legal scholarship. To illustrate his thesis the author discusses Neil Gotanda’s critique of colorblind constitutionalism as an example of poststructuralist criticism practiced while remaining true to the imperatives of racial critique.

ANTI-FOUNDATIONALISM AND SOCIAL INEQUALITY: AN EARLY ENCOUNTER

I walked into the classroom a few minutes tardy, slightly flushed from having to hurry across campus and then scramble up two flights of stairs. The course was a graduate-level sociology seminar on interview methods, and I dimly recalled that a professor from another department would be delivering a guest lecture. A quick glance towards the front of the musty room confirmed my suspicions, as an unfamiliar white man with a well-groomed mustache stood at the blackboard, sketching out the rudiments of some theory. Hunching over their notebooks and scrawling down notes, my classmates seemed genuinely absorbed in his presentation, the main
point of which became increasingly clear to me after several minutes of careful listening.

The talk focused on the relationship between our understanding of external reality—our ontology—and our scientific methods of coming to know such a reality—our epistemology. The view we have of the world around us, he insisted, had crucial implications for the way in which we could study it. Based on the view of a simple empirical world, conventional social science sought to isolate specific variables in it and deduce the objective relations which existed among them. Its methodological procedures were useful in understanding this simple empirical world, ruled by nomothetic propositions and governed by overarching social structures. However, a highly complex world, suffuse with contingency and operating in historical time, would consistently defy the inflexibility of such procedures. The existence of a complex world would undermine the certainty with which social scientists could speak of such time-honored verities as social structure, independent and dependent variables, causal paths and objective truth.

Many of the students quickly recognized his remarks as the latest installment in the long-standing debate in the American academy. This ever-expanding firestorm of controversy had taken on multiple frames of meaning over time: objectivism versus subjectivism, structuralism versus poststructuralism, positivism versus postpositivism, modernism versus postmodernism. Some frames clarified the issues at hand, others mystified them, while still others avidly polemicized them. Although he had not invoked any of these totems himself—a curious omission given their prominence and his choice of subject matter—his remarks located him squarely within the ambit of postmodernism.

Some of us felt that he had raised several serious questions, and we glanced somewhat furtively at each other as an unspoken means of registering our common sympathies. After he concluded the presentation, we gingerly raised our hands. The professor called on a friend of mine first. I had conversed with her about the debate over postmodernism several times before. She asked what seemed to be a carefully crafted question, only to have it mostly unanswered. When he called on me, I returned to the concerns she had raised earlier, partly because I felt that he had not answered her question satisfactorily and partly because I had wanted to ask a similar question.

1. A nomothetic proposition is law-like and is generated by methods that are modeled after those of the natural sciences (Naturwissenschaft), while an ideographic proposition is historical, or contingent, and is generated by methods that are modeled after those of the historical sciences (Geisteswissenschaft).

2. In raising the question myself, I made certain to allude to my friend's earlier point. I was concerned about a common sexist classroom dynamic in which a comment raised by a woman becomes the legitimate subject of conversation only after it is repeated, often verbatim, by a man. The man then receives, or claims, credit for the contribution. By alluding to her earlier concern, I was
As it turned out, both of us were deeply concerned about the strand of anti-foundationalism that threaded through his work, for it appeared to legitimate an epistemological stance that would ultimately hinder us from discerning what were otherwise lasting structures of inequality and subordination based on race, class, gender and sexuality. In raising our objections, we were mindful to steer clear of the fulminating invective hurled by word-be defenders of “Truth” and “Objectivity.” Neither of us were interested at all in mouthing the platitudes of an unreconstructed positivism nor allying ourselves with those who stubbornly, and we thought unadvisedly, held on to the notion of a transcendent and objective truth. Our concerns fastened rather onto something entirely different: the possibility for a politics of emancipation in a complicated world.

The professor had apparently already done some thinking about the problem, as his response made clear, but rather than addressing our concerns, without necessarily agreeing with us, he became strangely defensive. Listen to the way that you are phrasing your question, he chided us in a tone of know-it-all indignation. “Structures,” he said. He made the hand gesture for quotes. “You are using theoretical language appropriate only to the ontology of a simple world!”

His condescension did not sit well with me, so I tried rephrasing the question, hoping to elicit a more relevant response. Agreeing with him, I said that the world is indeed a complex place, and that many social scientists need to be disabused of their tendency for reductionistic simplification. But ontological complexity does not ipso factio ratify the free play of radical indeterminancy, nor perforce rule out the possibility of historical continuity. Thus, I argued, the challenge is not only to follow through on the theoretical and methodological imperatives of a Complex World but also to account for the reasons why a Complex World can nevertheless—in the face of unsettling contingency, complexity, and indeterminacy—demonstrate such enduring patterns of injustice and inequality. Though we may have affixed ultimately indeterminate signifiers to such patterns, calling them in turn racism, sexism, class bias, or homophobia, these things are real and lasting in their consequences.

I couldn’t. Instead I wondered why he hadn’t picked up on the words “injustice” and “inequality,” pointing out to him that he had been preach-

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3. Anti-foundationalism refers to an epistemological doctrine that rejects the necessity of appealing to a transcendent, external referent to establish or guarantee truth. See the discussion in Part III.A infra.
ing to the converted for the last hour of his lecture—that many of us had arrived at the same criticisms of conventional social science in our required courses. I deeply wanted him to understand that many of us were similarly concerned about the relations of power that allow the production of scientific knowledge. In my first few years of graduate school, hours of seminar discussion had been devoted to criticizing the secularized clerisy to which I would soon be inducted. And yet at the same time I was hoping to show him that systematic skepticism of truth-claims could go too far if it precluded serious consideration of the "reifying abstractions"—however problematic—of justice and equality. But I also realized that he would not acknowledge these things in front of the class. Knowing that he would never see me as more than a benighted functionary of the scientific orthodoxy, I sat there resigned, fuming, and utterly powerless.

INTRODUCTION

Contemporary jurisprudence has found itself in a period of tremendous ideological and intellectual flux that has provided newfound space for the composition and insertion of previously excluded narratives. And it is precisely at such a moment of fluidity that law professor Robert Chang has taken the opportunity to publish his watershed article, Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space, announcing an Asian American Moment in jurisprudence. Chang argues that both critical race theory and the underlying liberal legalism of traditional civil rights work have failed to produce a jurisprudence that can address the legal needs and historical experiences of Asian Americans. Such a jurisprudence can only be founded if Asian American narratives can be included within it. In order to make room for speaking Asian American experiences into jurisprudential consciousness, Chang rejects the "rational/empirical" mode—which has thus far provided a flawed basis for the inclusion of narratives—in favor of an anti-foundationalist poststructuralism. This latter epistemology offers the greatest promise for building a narrative-oriented Asian American Legal Scholarship (“AALS”).

This paper argues that a progressive AALS should not stake itself exclusively on anti-foundationalist poststructuralist epistemological foundations, particularly if narrative jurisprudence is to play a crucial role reversing the continuing elision of Asian American experiences from contemporary legal thought. In constructing such an argument, I do not wish to be construed as suggesting that AALS has no place in the legal academy nor that narrative has no place in AALS. Chang does make a compelling case for the necessity of both. I merely hope to show how AALS can be based on a critical perspective that foregoes the etiolating excesses of both liberal-modern and postmodern thought.
turalism, I contend, places specific political and epistemological limits on the capacity of racialized and minoritized communities to pursue the elusive but ever-luminous goal of social justice. However, turning away from poststructuralism does not leave us without political recourse, haplessly subject to the machinations of a juggernaut-like liberal legalism. There are powerful critiques of modernity and liberalism that originate more or less within modernity itself and do not positively claim the sign of postmodernism. I demonstrate, moreover, how these critiques share important features with postmodernism while simultaneously retaining the ideals of a radicalized Enlightenment. This shared theoretical space can provide a grounding for a narrative AALS. Discussing the critique of colorblindness by Neil Gotanda, I go on to show how the most powerful and useful insights of poststructuralism are attainable without acceding to the problems of a full-blown poststructuralist position. Following and extending crucial theoretical interventions by Angela Harris and David Palumbo-Liu, I then conclude with the suggestion that critical legal thought of any stripe must adopt a nomadic, contrapuntal sensibility, negotiating a synchronic and diachronic dialectic of what have been regarded only as uncompromisingly dualistic alternatives: modernism and postmodernism, structuralism and poststructuralism, faith and skepticism, optimism and pessimism.

This paper is divided into four parts. In Part I, I sketch out the historical trends in American jurisprudence that provide the context for the emergence AALS. I then proceed to recapitulate Chang’s case for founding an anti-foundational AALS. In Part II, in order to provide an adequate backdrop for evaluating his case, I offer a schematic discussion of poststructuralism and postmodernism, providing a rudimentary genealogy, differentiating their varied strands, and identifying their specific strengths and weaknesses. In Part III, I review and critique the epistemological rationale for a Post-Structuralist AALS, suggesting that there are sources of epistemological support for narrative other than anti-foundationalism. I argue that the critical functions of narrative, as well as the key insights of poststructuralism, can be attained with acceding to the political and ethical agree with Chang that the development of AALS matters to contemporary jurisprudence in much the same way that the inclusion of narrative matters to AALS. What Chang does fail to establish, however, is the notion that poststructuralism represents the best vehicle for advancing both objectives. This paper is therefore a critical and sympathetic attempt to recast AALS on a different epistemological foundation. For an unsympathetic and highly problematic critique of Chang’s position, see Jim Chen, Unloving, 80 IOWA L. REV. 145 (1994) (rejecting the existence of present-day discrimination and interpreting the discourse of racial difference as a tacit overture to racial purity, championing instead a colorblind Creole Republic based on the inevitability of interracial marriage).

6. I am well aware that it is difficult to draw a line between what lies within modernism and what lies outside of it, but I plead that I be accorded the same tolerance as legal scholars who claim to be able to identify that which is distinctively postmodern, for such a linguistic operation implies a rupture with (and hence an exclusion from) that which is modern. I also concede that claiming the sign postmodern does not actually, ipso facto, make it postmodern.

limitations of a strong poststructuralist (i.e., anti-foundational) position. This can be done by turning to the zone of critical discourse located at the intersection of radical Enlightenment thought and poststructuralism. In Part IV, I discuss Neil Gotanda’s critique of colorblind constitutionalism as an example of how a poststructuralist criticism can be practice while holding fast to the imperatives of racial critique.

I
THE TEXT AND CONTEXT OF ASIAN AMERICAN LEGAL SCHOLARSHIP

A. Fin-de-siècle Jurisprudence

The past two decades have witnessed a veritable sea-change in the discourse of American jurisprudence. Part and parcel of the larger transformation of intellectual production in the American academy, these changes have altered the style and indeed the substance of legal scholarship in a manner that could scarcely have been anticipated by observers only thirty years ago. The doctrines of classical legal thought, or liberal legalism, have once again come under vociferous assault from a variety of seemingly disparate (though ultimately interconnected) fronts.8

As one of the key ideological underpinnings of American civil society, classical legal thought crystallized in the years after the civil war, staggered under the onslaught of criticism by legal realism, reconstructed itself unevenly in the post-W.W.II era and in recent years found an ally in the increasingly conservative Supreme Court appointed by Presidents Reagan and Bush.9 In brief, it conceives of the law as an abstract system of general rules—existing in a neutral fashion above the contaminating fray of political conflict—objectively applied by the judge to particularities of the external world, which is imagined to be inhabited by purely autonomous individuals who are closely circumscribed by discrete spheres of legal rights.10 Its complex internal architecture revolves around the hermetic distinction between public and private law, the production of abstract classifications, and the use of logical formalism as a vehicle for establishing claims to objectivity.11

9. I am well aware that the periodization used here is overly schematic and underplays the intensity and complexity of the struggle among visions of American jurisprudence. For a fuller discussion see Elizabeth Mensch, The History of Mainstream Legal Thought, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 13 (David Kairys ed., 1982). Mensch divides the development of legal consciousness into four epochs: preclassical legal thought (1776-1885), classical legal thought (1885-1935), the realist challenge (1920-1937), and reconstruction of classical legal thought (1940-present).
10. See Mensch, supra note 9, at 18-21.
11. Not surprisingly, the rise of classical legal thought paralleled a growing acceptance of a model of the “self-regulating market, whose ‘invisible hand’ reflected natural and impartial economic laws that needed to remain uncorrupted by political interference.” MORTON J. HOROWITZ, THE
Beginning in the late 1970s, a series of acute criticisms of reconstructed classical legal thought began to emerge in, and proliferate throughout, the legal academy. No article of faith went unexamined, no premise undisputed. This thoroughgoing mood of criticism had an all-encompassing scope, enveloping even the most cherished and inviolate principles of legal liberalism. Subsuming them under the aegis of postmodernism, Gary Minda has identified five overlapping critical jurisprudential movements that took palpable shape in the following two decades: Law and Economics, Critical Legal Studies, Feminist Legal Theory, Law and Literature, and Critical Race Theory.

The first of these movements stressed the use of economics in the analysis of common law subjects. The law and economics movement, as it is called by some observers, has undergone important generational changes. Borrowing heavily from the Chicago school of economics, which had constructed rational-actor models of the social world, the first generation of law and economics possessed supreme confidence in the capacity of economics to illuminate jurisprudence by producing testable, scientific theories about human motivation and action. A centerpiece of first generation thought was the law and efficiency hypothesis, which held that the legal system creates a market environment in which legal rules followed the dictates of economic efficiency. By the mid-1980s, however, a second generation of law and economics scholars (e.g., the so-called New Haven school) had begun to displace the first, retaining a methodological orientation disposed towards abstraction, universalism, and scientific rationality, but relaxing their adherence to the law and efficiency hypothesis. A post-Chicago school strand of second generation scholarship had developed by the 1990s, embracing a more skeptical attitude towards the scientific claims of economics and adopting a neopragmatic stance towards the utility of the economics in jurisprudential analysis.

Designating itself critical legal studies (CLS), the second of these critical legal movements claimed the intellectual mantle of legal realism.

12. The term postmodernism has been the subject of considerable controversy. Indeed, some of the interlocutors identified by Minda might furiously reject the label. I use it here not to suggest that it has an actual empirical referent or that it accurately describes the movements it purports to encompass but simply to remain faithful to the sweep of his argument.

13. While disavowing any totalizing, essential definition of legal postmodernism—a rhetorical strategy to which I will shortly turn—Minda nonetheless elects to (pro)claim that each movement reflects a kind of skeptical intellectual mood that rejects our hitherto unshaken adherence to notions of universal truth, core essences, foundational theories, pregiven meaning, and autonomy of the knowing subject. Id. at 2-4.

14. Id. at 83.

15. Id. at 83-105.

16. Id.

17. Id.

18. Mark Tushnet, Critical Legal Studies: An Introduction to its Origins and Underpinnings, 36
Legal realism had, until then, constituted the only serious paradigmatic challenge to the hegemony of legal liberalism since the late nineteenth century. Like legal realism, CLS adopted a stance of ruthless skepticism regarding the claims made by, and on behalf of, classical legal thought—particularly the claim that the law consisted of a transcendent set of rules, objectively applied by impartial and apolitical operatives.

An interrelated set of feminist critiques also emerged in the late 1970s, showing as much theoretical diversity as other contemporary jurisprudential movements. Many feminist scholars also directly engaged

J. LEGAL EDUC. 505 (1986).

19. See Mark Tushnet, Post-Realist Legal Scholarship, 6 WIS. L. REV. 1383 (1930). As a heterogeneous bloc of discourse with internal shifts and rifts, legal realism has proven difficult to define in precise terms, although it conventionally refers to a body of legal doctrine established by Columbia and Yale University law professors in the 1920s and 1930s. In a broader historical sense, however, realism represents an outgrowth of Progressive legal thought that began with criticism of the *Lochner* decision in 1905, which struck down maximum-hours laws for bakers. As Horowitz maintains, there were important precursors to the realist movement in the Progressive Era, and the movement itself had a lasting impact on the orientation of American legal thought. As such, it is best regarded as an outlook, or a kind of legal sensibility, rather than a canonical set of texts and propositions. HOROWITZ, supra note 11, at 169. At the risk of oversimplification, legal realism can be defined as a critique of classical legal thought that emphasizes the law "in the courts" (as opposed to the law "in the books"), the role of the law in producing rights (rather than protecting already existing rights), the value-laden nature of judicial decision-making and jurisprudence, and, above all, the ensemble of political and moral choices that exist at the heart of the legal system. See Mensch, supra note 9, at 21-22 and HOROWITZ, supra note 11, at 169-92. For a different view of the realist movement see MINDA, supra note 13, at 28-30. Minda distinguishes between two branches of realist thought: radical realism, which represented the critique of formalism contained in the work of Felix Cohen, Walter Wheeler Cook, and Robert Hale; and progressive realism, which attempted to correct the excesses of formalism by turning to a more pragmatic approach to the law. This latter branch of realism, according to Minda, grew out of the legal philosophies of Oliver Wendell Holmes, Dean Roscoe Pound and Benjamin N. Cardozo.

20. The term critical legal studies presents a complicated definitional problem for the careful legal scholar, as it has touched off a plethora of polemic that ranges from dyspeptic excoriation to fatuous hagiography—much like the term postmodernism. In general, critical legal studies can be divided into two major periods of scholarship, one lasting from the mid 1970s to the early 1980s, which focuses on the "fundamental contradictions" underlying liberal legal thought (e.g., self and other, individual and community), and the other extending from the mid 1980s to the present, which incorporates the reading styles and epistemology associated with Derridean deconstruction. See MINDA, supra note 13, at 106-22. Some have been less reluctant to offer general definitions of critical legal studies, arguing that it levels four main critiques against liberal legalism: its illusion of determinacy, its excessive formalism, its presumed self-identity (as opposed to self-contradiction), and its exclusion of extra-legal factors in the judicial decision-making process. TREVIÑO, supra note 8, at 392-3. Other efforts to survey and define the term have been undertaken by central participants in its elaboration as a theory. See Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983); Tushnet, supra note 18; Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L. J. 1515 (1991). With critical legal studies now commanding a wider audience, several volumes have been published with the aim of introducing the reader to its general contours. For instance, see MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987). For a liberal assessment, see ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE (1990).

21. By the early 1980s, feminism in the legal academy could be roughly distinguished into three related but distinct branches: liberal feminism, which focused on women's legal rights (*à la* law professor Wendy Williams of Georgetown Law Center), cultural feminism, which highlighted the cultural and experiential differences of women's lives (*à la* Carol Gilligan, a social psychologist at Harvard University), and radical feminism, which argued that gender inequality in the law results from the
CLS, transforming it in the process and forging a new movement of Fem Cirts, whose project involved gendering the critical imperatives of CLS.

Drawing on contemporaneous developments in literary criticism to elaborate a humanistic appreciation of the cultural and discursive elements of the legal system, a law and literature movement developed through the late 1980s and constituted a fourth source of critical legal thought. Through the late 1980s, the law and literature pursued three main analytical objectives: to show how readings of the great works of literature could shed insight on the underpinnings of the legal system, to make epistemological space for narratives or storytelling within jurisprudence, and to develop new hermeneutic strategies of unpacking the complex ensemble of meanings contained in legal texts. More recently, law and literature scholars have turned to theories of language promulgated by Jacques Derrida, Michel Foucault, Edward Said, Jean-François Lyotard, and Richard Rorty to develop a politics of legal interpretation that recognizes that law and jurisprudence are themselves not merely a pre-given truth-language but are also a kind of constructed rhetoric and narrative.

A fifth source of critical legal thought emerged in the 1980s in the form of critical race theory (CRT). Inheriting an understanding of jurisprudence from both CLS as well as from traditional civil rights litigation, CRT ultimately diverged from both. It disagreed with CLS about issues such as legal rights and essentialism. At the same time, it also became

systematic subordination of women in all aspects of society (à la Catherine MacKinnon, a feminist scholar at the University of Michigan Law School). See MINDA, supra note 13, at 149-51.

22. See MINDA, supra note 13, at 149-51.
23. Id.
24. Id. at 159, 161-66.

26. A symposium at Harvard University in 1987 captured some of the restlessness and disquiet. See Symposium, Minority Critiques of the Critical Legal Studies Movement, 22 HARV. C.R.-C.L. L. REV. 297 (1987). For a list of specific CLS shortcomings, see Richard Delgado, The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?, 22 HARV. C.R.-C.L. L. REV 301 (1987) (arguing that the CLS negative critique of rights and incremental change fails to offer a positive program to replace it, save the implicit valorization of a highly problematic communitarian society that erects few safeguards against racism). Also vital are Patricia J. Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, 22 HARV. C.R.-C.L. L. REV. 401, 422-23 (1987) (suggesting that the sanctity accorded to property rights ought to be extended to civil rights and that people of color have yet to enjoy "rights" long enough to discard them so easily), Matsuda, supra note 34 (arguing that the subaltern classes, i.e. the victims of racial oppression, can provide both a new epistemological source for understanding the operation of racism and a distinctive source of normative insights about how to change law and society) and Anthony E. Cook, Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr., in CRITICAL RACE THEORY, supra note 25, at 85 (arguing that "theoretical deconstruction" of the kind practiced by Cirts should be supplemented with an "experiential deconstruction" that takes into account the experience of those
increasingly apparent to Race Crits that the liberal anti-discrimination measures, which had their historical provenance in the racial radicalism of the 1960s, now represented watered-down legal doctrines that failed to address the pervasiveness and ubiquity of racial domination—save that which fell directly under the narrow definition of racism as a discrete, individual, identifiable act of discrimination based on skin color. Negotiating the limits of CLS and traditional civil rights work, CRT attempted to renew attention on "how deeply issues of racial ideology and power continue to matter in American life." Race Crits mounted a multiple assault on contemporary jurisprudence, liberal and radical alike, with a tireless insistence on the centrality of race to the constitution of American society.

B. Towards a Post-Structuralist Asian American Legal Scholarship

The multiple challenges to legal liberalism have opened up an ideological and intellectual space in which to insert new understandings of jurisprudence. To stake out an Asian American narrative space in American jurisprudence, Robert Chang has announced a new movement aimed towards fostering an Asian American Legal Scholarship in his article, Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space.

In the article, Chang argues that traditional civil rights work and critical race theory are both inadequate to the task of producing a jurisprudence capable of addressing the unique concerns of Asian Americans as a racialized minority in the United States. The former approach merely glosses over racial differences in the name of color blindness, while the latter approach fails to specify the multiple ways in which Asian Americans differ from other racialized minorities. As such, there is a vital need for the development of a distinctive, narrative-oriented Asian American Legal Scholarship (AALS) that can take into account the particular social location of Asian Americans. According to Chang, the narratives of an AALS require a receptive epistemological space, which can be attained by eschewing the "rational/empirical mode" and replacing it with a post-

who have been excluded in the past). See Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-discrimination Law, in CRITICAL RACE THEORY, supra note 25, at 103 (pointing out the silence of CLS scholars on the issue of race and arguing that "rights discourses" provided an institutional and discursive site that enabled the black civil rights movement to make positive gains in the struggle against racial oppression).

27. Crenshaw, supra note 25, at xv.
28. Id. at xix.
30. As Chang writes, "traditional civil rights work, with its focus on color blindness or denial of substantial difference, even when done in the context of securing rights for Asian Americans, is inadequate to address fully the needs of Asian Americans.... Critical race theory, which claims that race matters but which has not yet shown how different races matter differently, is also inadequate to address fully the needs of Asian Americans." Id. at 1247-48.
31. Id. at 1251-68.
structuralist understanding of narratives.\(^{32}\)

In an effort to formulate an Asian American Legal Scholarship, Chang’s argument proceeds in four stages. First, it establishes the uniqueness of the racial discrimination faced by Asian Americans, recounting recent (and past) episodes of anti-Asian violence and nativistic racism as well as pointing out the pernicious sociopolitical consequences of the Model Minority Myth. Second, it embraces the use of narrative in jurisprudence as a means of “speak[ing] our oppression into existence, for it must first be represented before it can be erased.”\(^{33}\) Following Matsuda and Delgado,\(^{34}\) it contends that narratives by legal outsiders matter and then goes on to appropriate poststructuralism—while rejecting what he calls the rational/empirical mode—as the best “strategy for validating narrative.”\(^{35}\) Third, it provides a narrative account of the Asian American experience, concentrating on our historical and present-day legal and political exclusion as well as on the experience of internment endured by Japanese Americans during World War II. Fourth, it sets out the various stages of an AALS, beginning with the color blindness of traditional civil rights work, continuing through the color consciousness of cultural and radical AALS, and concluding with a poststructuralist, narrative-sensitive AALS.

The vision of an AALS propounded by Chang lies squarely at the intersection of three strands of contemporary legal thought, bringing together the poststructuralist epistemology of second generation CLS, the vigilant racial awareness of CRT, and the storytelling imperatives of narrative jurisprudence.\(^{36}\) This synthesis reveals the powerful and creative potential of contemporary jurisprudential movements for transforming established—and concomitantly, establishmentarian—modes of legal scholarship. Building upon common critical objectives lends greater potency to problematizations of the existing legal order.

The strengths of such a synthesis, however, also constitute its greatest weakness. Untempered syncretism runs the risk of constructing a motley concatenation of theoretical discourses whose underlying epistemological premises are at fundamental odds with one another. The uncanny insights of poststructuralism and postmodernism\(^{37}\) can be taken too far, ultimately

\(^{32}\) Id. at 1267.

\(^{33}\) Id.


\(^{35}\) Chang, supra note 4, at 1271.

\(^{36}\) The law and literature movement and feminist legal scholarship also provide significant sources of insight for Chang. *See infra* Part III.A.

\(^{37}\) There are important substantive differences between poststructuralism and postmodernism, as I discuss in Part II, but I use them conjointly in references to Chang only because he does not distinguish between the two terms himself. Chang, supra note 4, at 1271. Angela Harris notes that his usage of *poststructuralism* resembles her usage of *postmodernism*. *Angela Harris, Foreword: The*
returning to undercut the reasons for their elaboration. It is therefore difficult to justify an absolutist commitment to poststructuralism when other sources of critical thought can have far less potential to call into question the possibility of emancipation that explicitly animates the projects of early Crits, Fem Crits, and Race Crits alike. However, in order to understand the relationship between the political aims of AALS and the range of epistemologies available to it, we must first comprehend the philosophical and ideological setting upon which the drama of contemporary jurisprudence is staged. It is for this reason that we now turn to an analysis of modernism and postmodernism.

II

THE EPISTEMOLOGICAL AND IDEOLOGICAL TERRAIN OF CONTEMPORARY JURISPRUDENCE

A. False Antinomies: Modernism and Postmodernism

Mention the word *postmodernism* or *poststructuralism* to anyone ambling around the American academy, and you are likely to encounter one of three reactions: sincere perplexity, haughty derision or conspiratorial recognition. No terms in recent memory have touched off comparable levels of furor and angst. In fields as diverse as anthropology, sociology, law, women’s studies, cultural studies, ethnic studies, history, communications, organizations, political theory, ethics, literary crit-

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38. For example, the emancipating impulse can be readily detected in such statements as “Critical Race Theory is a gasp of emancipatory [sic] hope that law can serve liberation rather than domination.” Cornel West, *Forward to Critical Race Theory*, supra note 25, at xii.

39. For example, see *Writing Culture: The Poetics and Politics of Ethnography* (James Clifford and George E. Marcus eds., 1986) (formulating a postmodern critique of anthropology, focusing on questions of writing and the possibility of cross-cultural knowledge). *See also Postmodernism and Anthropology* (Karin Gielen et al., eds., 1995).

40. For a reckoning and reworking of the sociological canon in light of postmodernism, see *Contested Knowledge: Social Theory in the Postmodern Era* (1994).

41. Works engaging postmodernism and poststructuralism in American jurisprudence are virtually endless. For a good introduction, see *Mind*, supra note 13.


45. For a response to the postmodernist challenge by historians, *see Joyce Appleby et al., Telling the Truth About History* (1994) (arguing against a postmodern historiography and for the utility of certain versions of modernism).

46. For a consideration of postmodernism and poststructuralism in the field of communication, see Brianke G. Chang, xvii *Deconstructing Communication: Representation, Subject, and Economies of Exchange* (1996) (scrutinizing “the idealist-transcendental economy” and suggesting “a way out of the aporia endemic to transcendentalism by drawing out the philosophical implications of this subjectivist-based problematic”).

47. For a series of essays that adopt, criticizes, extends and repudiates postmodernism and its
cism and architecture, the collision between the modern and postmodern seems to be a limitless horizon towards which scholars ineluctably gravitate.\(^5^0\)

The lines of conflict are so rigidly drawn and the maelstrom of invective so intense that it has become difficult to see beyond the polemic flung around by acolytes of modernism and postmodernism alike, whose melodramatic declamations are taken as so many badges of allegiance. The result has been an unfortunate degeneration of intellectual discourse wherein participants on both sides forget the injunctions of their own sworn affiliations and participate in a falsely constructed conversation in which caricature dominates over scrupulous and meticulous analysis.

From the point of view of postmodernism, a postmodern theoretical sensibility seems to be a kind of all-encompassing, emancipatory awareness that repudiates and subverts the hidden tyrannies of Enlightenment thought. Postmodernism regards Enlightenment thinking as a retrograde philosophical outlook with deadly cultural consequences. Postmodernism unwittingly takes up the trope of revolutionary upheaval and fancies itself a vanguard of a new epoch whose object is to overthrow the foundations of a monochromatic modernism. For the postmodernist, the term *postmodern* is likely to evoke whole network of congenial associations, each of which contains self-validating political meaning: hybridity, locality, polymorphousness, schizoprehnia, polyvocality, anti-essentialism, indeterminacy, anti-systematicity, fragmentation, marginality, anti-foundationalism, heterogeneity, contingency, multiplicity, and dispersion. In contrast to the postmodern, which is said to be an unstable and plural entity, the term *modern* seems to fall well outside of the postmodern imperative to historicize and pluralize “grand abstractions” and comes across as a static totality that ruthlessly stamps out cultural difference by the imposition of metanarratives, surrendering to the illusions of unity, essences, determinacy, essentialism, and centrality.\(^5^1\)

From the point of view of “modernism,” postmodernism is viewed as a kind of infidel, illegitimate discourse, the likes of which will lead us at

\(^{48}\) See, e.g., Jonathan Arac, Postmodernism and Politics (1986).


\(^{50}\) Several general guidebooks which survey the vast spread of postmodernism were published in the early 1990s, and new ones seem to appear in the bookstore on a monthly basis. See Thomas Docherty, Postmodernism: A Reader (1993); A Postmodern Reader (Joseph Natoli and Linda Hutcheon eds., 1993). For a brief and helpful initiation, see Madan Sarup, An Introductory Guide to Post-Structuralism and Postmodernism (2d ed. 1993).

\(^{51}\) As Harvey observes in a well-balanced examination of modernism and postmodernism, “Postmodernism sees itself rather more simply: for the most part as a willful and rather chaotic movement to overcome all of the supposed ills of modernism.” David Harvey, The Condition of Postmodernity 115 (1990).
any moment away from the nimbus-clad revelations of the Enlightenment and down a dark and irreversible path of nihilism and moral relativism.\textsuperscript{52} Building upon a theme of contagion, modernism constructs a narrative in which it represents the last standing defender of the whole of Western civilization, warding off the "barbarians at the gate" with a glinting broadsword. Abandoning any pretense to rational discourse, modernism constructs a paranoid delusion in which postmodernists represent nothing less than the \textit{fin-de-siècle} incarnation of the Sophists, who are all but hell-bent on dismantling the spotless edifice of modernity. To borrow a felicitous phrase from Alan Megill, they are seen as "prophets of extremity."\textsuperscript{53} In such a fashion, modernists insert themselves into a long-standing cultural formation that privileges the speaker as a latter-day Socratic, inveighing against the moral relativism of his or her opponent, whose philosophical doctrines threaten to crumble the possibility, and even the desirability, of rational discourse itself.

Some commentators, besides myself, have noted the severity of this schism and criticized the excesses of both modernism and postmodernism. David Palumbo-Liu, for instance, "acknowledge[s] the usefulness of postcolonial and postmodern discourses within contemporary Asian American scholarship" but at the same time endeavors to show how there are "certain intellectual and ideological consequences in deploying these concepts.\textsuperscript{54} The literary critic Terry Eagleton has targeted the consumerist variant of postmodernism for his ire, though he admits that his favored alternative,

\textsuperscript{52} This characterization of the conflict exaggerates the schisms, of course, but there has in fact been no shortage of criticism aimed at variously formulated understandings of postmodernism (aesthetic, architectural, cultural, social, et cetera). Some more interestingly polemical efforts in social and political theory include \textsc{Alex Callinicos, Against Postmodernism: A Marxist Critique} (1990); \textsc{Calvin O. Schrag, The Resources of Rationality: A Response to the Postmodern Challenge} 49 (1992) (arguing that "incommensurability, conflict of perspectives, paralogy, and dissenus do not have the final word" and trying to establish that "the communicative practices of our historical inherence [sic] would be seen to provide possibilities for rational critique, articulation, and disclosure as these are geared to an understanding of shared experiences, evaluation, and emancipation"); \textsc{Peter DeW, The Limits of Disenchantment: Essays on Contemporary European Philosophy} (1995). A less critical engagement with postmodernism can be found in \textsc{Richard J. Bernstein, The New Constellation: The Ethical-Political Horizons of Modernity/Postmodernity} (1991).

\textsuperscript{53} \textsc{Allan Megill, Prophets of Extremity: Nietzsche, Heidegger, Foucault, and Derrida} (1985).

\textsuperscript{54} Palumbo-Liu, \textit{supra} note 7, at 58. Citing the connection between eugenics and the notion of hybridity in the early twentieth century, Palumbo-Liu goes on to caution that the appropriation of postmodernism by Asian American studies can lead to a narrow focus on the present, in which a vast history of manipulation and exploitation becomes irrelevant. The deployment of postmodern discourse has no inherent political content, Palumbo-Liu argues, for both migrant laborers and multinational corporate executives can be described as hybrid without acknowledging the vast difference in social power. "This is not to blindly cast suspicion on all that we do, nor innocently celebrate the effects of postmodernity, rather, I think we need to track the effects of our theoretical meditations, specifically as they intersect and interpenetrate specific regimens which materialize our discourse differently." \textit{Id.} at 63.
international socialism, has failings and challenges of its own. On balance, however, the current state of affairs presents two versions of a categorical opposition: either a revolutionary postmodernism against an anti-quarian modernism (à la the postmodern imaginary) or an infectious, nihilistic postmodernism against an upright, sacrosanct modernism (à la the modern imaginary). There seems to be little space for a nuanced account of their (inter)relationship.

The rigidly dualistic view of the difference between the two discourses rests on three historical misunderstandings.

First, it misreads the historical complexity of modernism and the relationship it bears to both modernity and the Enlightenment. The notion of a unified modernism, existing as a hypostasized totality, seems as ridiculous and unyielding as the notion of a unified postmodernism. Modernism refers to a kind of cultural sensibility that developed in response to the “great transformation” undergone by European society during the middle-nineteenth to early-twentieth century: the shift from Gemeinschaft (agrarian community) to Gesellschaft (urban society) (Tönnies), from mechanical to organic solidarity (Durkheim), and from feudalism to capitalism (Marx). By way of contrast, modernity refers to a particular ensemble of political institutions, economic arrangements, and social practices. Ac-
According to David Harvey, modernism can be divided into at least four phases, some of which built on essentializing Enlightenment notions and some of which readily criticized those notions, attempting to radicalize them without effacing them completely. Modernism also developed unevenly, proceeding at different velocities and to different effects in the aesthetic, economic, cultural, and social spheres.

In contemporary American jurisprudence, modernism has been associated with legal liberalism and classical legal thought, and the tendency has been to borrow from postmodernism and poststructuralism as a way of subverting liberal legalism. This maneuver conflates modernism and liberalism, failing to recognize that the manifold problems wrought by modernity have precipitated a rich tradition of self-flagellation and self-suspicion long before the emergence of postmodernism. What is reviled by many of what Minda calls “postmodern jurisprudential movements” is not so much the whole Western tradition but a specific liberal version of the Enlightenment that embraces the seemingly limitless powers of human reason to provide the basis for the scientific investigation of nature, the secular liberation of humankind from religious myth and animism, and the rational pursuit of human progress.57

This constellation of rational discourses which make up the liberal Enlightenment have crystallized in the structure and substance of classical legal thought. Seemingly unbeknownst to legal scholars today, however, the liberal Enlightenment has produced a pantheon of critical commentators long before postmodernism. They range from such intellectual luminaries as Max Weber, who saw the connection between the “disenchantment of the world” and the “iron cage” of rationality,58 to Horkheimer and Adorno of Institut für Sozialforschung,59 and indeed the whole tradition of Western Marxism, from Lukács, Gramsci, Marcuse, Althusser, and Habermas.60 These intellectuals belong to a cultural formation or tradition of thought which can be called the radical Enlightenment.61 Long before postmodernists attempted to overturn and subvert the modernism of the liberal Enlightenment, intellectuals of the radical Enlightenment developed useful critical tools which may be used to question

57. See generally MINDA, supra note 13. For a useful introduction to the intellectual history of the Enlightenment, see NORMAN HAMPSON, THE ENLIGHTENMENT (1990).
60. See MARTIN JAY, MARXISM AND TOTALITY: ADVENTURES OF A CONCEPT FROM LUKÁCS TO HABERMAS (1984).
61. I should like to thank Jim Stockinger for introducing me to the term radical Enlightenment. My own usage of it differs from his slightly, but the impetus for creating it remains the same: to indicate a philosophical discourse that simultaneously tries to negate and elevate (Aufhebung) the central features of Enlightenment thought.
the foundation assumptions of society, without resorting to its necessary destruction.

Second, the dualism also misreads the theoretical complexity of postmodernism and poststructuralism, homogenizing crucial differences within and among them. By reacting so vehemently, adherents or defenders of liberal modernism fail to distinguish between strands of postmodernism and poststructuralism, attributing to the whole movement the glitzy immoderations of the extreme wings. As a highly open network of discourses, loosely united by a Wittgensteinian notion of "family resemblances," postmodernism and poststructuralism are obsessed with different aspects of the social world, and even conflicts among putative family members are not uncommon. I shall say more about these similarities and differences later, but for now suffice it to say that the theoretical discourse of postmodernism is differentiated enough to sustain a wide variety of readings, some of which are extreme in their assertions and therefore resemble the monstrous creature of modernist histrionics, and some of which share seldom-discussed similarities with modernism itself.

Lastly, the construction of straw figures in the existing debate rules out of hand the possibility that some modernist critiques of the liberal Enlightenment share important similarities with postmodern critiques. For example, Horkheimer and Adorno are highly critical of the scientific pretensions of liberal Enlightenment thought, which makes a false division between subject and object that permits the domination of nature. Their writings clearly demonstrate their disenchantment with the Enlightenment: "The only kind of thinking that is sufficiently hard to shatter myths is ultimately self destructive." This existence of commonalities suggests that there is space in the philosophical discourse of modernity for the kind of insistent skepticism demanded by postmodernism and the normative commitment to social justice upheld by the project of the radical Enlightenment.

B. The Anatomy of Poststructuralism and Postmodernism

So far I have used the terms postmodernism and poststructuralism more or less interchangeably, but now I would like to specify some of the substantive differences between the two theories. The discussion here will necessarily be schematic, as I hope to merely sketch out the topography of

62. See infra Part II.B and accompanying notes.
63. MAX HORKHEIMER AND THEODOR W. ADORNO, DIALECTIC OF ENLIGHTENMENT 7 (1995) ("Enlightenment is totalitarian.... In advance, the Enlightenment recognizes as being and occurrence only what can be apprehended in unity: its ideal is the system from which all and everything follows .... The multiplicity of forms is reduced to position and arrangement, history to fact, things to matter.")
64. Id. at 4.
the theoretical terrain, avoiding a detailed exegesis and critique. My general aim is to show how poststructuralism and postmodernism designate a range of theoretical positions, some compatible and others incompatible with the political project of an Asian American Legal Scholarship. This breadth will subsequently enable us to fashion a poststructuralism that is useful for Asian American Legal Scholarship.

1. Postmodernism.

As I noted in Part II.A., modernism is often used to refer to the cultural forms and practices associated with a specific regime of economic production, viz., industrial capitalism. In much the same way, postmodernism can be seen as the whole mode of cultural expression—constituting a kind of cultural Weltanschauung—that emerges concurrently with the material developments of advanced industrial capitalism. Indeed, the literary and cultural critic Frederic Jameson explicitly defines postmodernism as the "cultural logic of late capitalism." But what are the prevalent features and characteristics of postmodernism, especially as it pertains to social theory? Two prominent and widely-debated answers are given by contemporary French philosophers: Jean-François Lyotard and Jean Baudrillard.

"I define postmodern as incredulity towards metanarratives," writes Jean-François Lyotard. According to Lyotard, the metanarratives [grand recits] of the modern age, and of modernism, have failed us. Neither the dialectic of the Spirit, nor the march of rational progress, nor even the emancipation of humanity are "sufficient for our purposes." What we are left with is the infinite play of language games, of incommensurable little narratives [petit recits]. The broadly conceived struggles of former ages no longer speak to the fragmented and heterogeneous realities of the postmodern epoch, where scrupulous attention to the local and finite are the only inroads to (partial and limited) understanding.

65. I realize that the following discussion would be best carried out through a close, textual reading of original texts, but owing to the limits of time and space, such an effort is not possible. I ask for some latitude here, for the intent of this section is to provide a discussion of postmodernism and poststructuralism that—by virtue of its breadth, not its (lack of) depth—enables us to begin to comprehend its complexity.

66. My concern here is not unlike Weedon's for gender: "to make poststructuralist theory accessible to readers to whom it is unfamiliar, to argue its political usefulness and to consider its implications for feminist critical practice. By feminist critical practice I mean ways of understanding social and cultural practices which throw light on how gender power relations are constituted, reproduced and contested." CHRIS WEEDON, FEMINIST PRACTICE AND POSTSTRUCTURALIST THEORY viii (1987).


69. LYOTARD in THE POSTMODERN TURN, supra note 68, at 32.
The emphasis on difference and skepticism of the general is characteristic of many strands of thought which claim the sign of postmodernism; however, these doctrines do not come without consequences. As Madan Sarup notes, "Lyotard insists that the field of the social is heterogeneous and non-totalizable. As a result he rules out the sort of critical social theory which employs general categories like gender, race and class. From his perspective, such categories are too reductive of the complexity of social identities to be useful."

The notion of the infinite play of meaning recurs throughout postmodernism and can also be found in the writing Jean Baudrillard. The present age, for Baudrillard, is one characterized by an increasingly wide disjuncture between signifier and the signified, the illusion and reality, the imitation and the original. Accordingly, one must question whether there are any external guarantees of meaning at all, and if the signifier bears any relation whatsoever to the signified, or if it only bears relation to other signifiers. The postmodern age signals our plunge into hyper-reality (simulacrum), "a new condition in which the old tension between reality and illusion, between reality as it is and reality as it should be, has been dissipated."

Like Lyotard, Baudrillard articulates a theory of meaning that makes it difficult to establish grounds for the pursuit of social justice. The dissolution of the distinction between reality and illusion calls into question the possibility of ethical reflection and makes it difficult for subordinated groups to wage campaigns to improve their material and political circumstances. In short, postmodernism does signify an intensely skeptical intellectual mood, but it is a skepticism born of disillusionment with the grand "failures of Marxism" and a turn towards an all-encompassing aestheticization of the world.

2. Poststructuralism

Generally speaking, poststructuralism represents a multi-faceted intellectual movement growing out of a critical engagement with the equally multi-faceted structuralism that antedated it. In particular, poststructuralism can be seen as a response to the work of three specific authors: Ferdi-

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70. SARUP, supra note 50, at 154. See also Nancy Fraser and Linda Nicholson, Social Criticism without Philosophy: An encounter between feminism and postmodernism, in THE POSTMODERN TURN, supra note 68, at 249 ("For Lyotard, the illegitimate genres include large-scale historical narrative and social-theoretical analyses of pervasive relations of dominance and subordination.")

71. For a useful collection of his work, see JEAN BAUDRILLARD: SELECTED WRITINGS (Mark Poster ed., 1990). For a lengthier secondary analysis of the development of his ideas, see DOUGLAS KELLNER, JEAN BAUDRILLARD: FROM MARXISM TO POSTMODERNISM AND BEYOND (1989).

72. SARUP, supra note 50, at 164.

73. Id. at 165.

74. That the United States never sustained a mass socialist movement can partly account for the wide appeal of theories proclaiming the death of Marxism.
nand de Saussure, a structural linguist who devised an influential theory of linguistic meaning;\textsuperscript{75} Claude Lévi-Strauss, a structural anthropologist whose work constituted the reigning paradigm of sociological and anthropological thought in the postwar era;\textsuperscript{76} and Louis Althusser, a structural Marxist whose social theory set the terms of discourse and dispute in Western Marxism during the 1970s.\textsuperscript{77} Although the various strands of structuralism focused on different aspects of the social world, structuralism itself can be understood as a response to the overly volitional and self-indulgent philosophies of existentialism and phenomenology, which stressed the radical autonomy of the self-producing subject. Structuralism sought to contextualize the subject by concentrating on the larger structures of language (de Saussure), culture (Lévi-Strauss), and political economy (Althusser) that made subjective experience and consciousness possible.

Like the structuralism from which it emerges, poststructuralism is a plural term. As Weedon notes, “it does not have one fixed meaning but is generally applied to a range of theoretical positions developed in and from the work of Derrida, Lacan, Kristeva, Althusser, and Foucault.”\textsuperscript{78} For the purposes of our discussion, I shall focus here on Derrida, Foucault, and a specific branch of feminist poststructuralism.

\textit{a. Jacques Derrida}

The Derrida’s work focuses on two interrelated aspects of language: its instability and its role in promulgating a delusional metaphysics of presence.\textsuperscript{79} Derrida rejects the Saussurean model of linguistic meaning—his theory of signification—which distinguishes between a signifier (a word or a concept) and the signified (the concept or object in-itself). Saussure holds that the meaning of a sign (the unity comprised by the signifier and the signified) derives from the distinctness of a signifier from all other signifiers. Signifiers thus have no intrinsic meaning and no inherent connection to their signified. Their fixed meaning derives from their unique location in a network of different signifiers. Derrida rejects Saussure’s notion that meaning is any way fixed, and asserts instead that the signifiers never simply refer to other signifiers in a determinate, finite fashion. There is instead a chain of never-ending signifiers, one after the other. According to Derrida, meaning is produced out of the simultaneous differ-

\textsuperscript{75} Ferdinand de Saussure, \textit{Course in General Linguistics} (1959).
\textsuperscript{78} Weedon, \textit{supra} note 66, at 19.
\textsuperscript{79} In broadly characterizing the work of both Derrida and Foucault, I have relied heavily on Sarup, \textit{supra} note 50, especially at 32-57. Two of Derrida’s most influential works were published nearly two decades ago. See Jacques Derrida, \textit{Grammatology} (1976); Jacques Derrida, \textit{Writing and Difference} (1978).
ence and deferral of the signified, denoted by the neologism *differance*. Meaning is thus unstable and unfixed, endlessly moving and never coming to rest.

This view of language is closely bound up with his critique of the metaphysics of presence, out of which derive the notions of logocentrism and phonocentrism. Logocentrism refers to the dependence of Western systems of thought on the notion of *logos*, an essence or truth which acts on the foundations of our beliefs. This *logos*, or transcendental signifier, is an illusion which conceals the way in which the world is always already mediated by language—and hence an ideological ruse to cover up the fact that there are no external guarantees of meaning. This logocentrism can be exposed by a deconstruction which, through close textual analysis, shows that the meaning of the text is subverted by the very terms of discourse which are said to authorize it. Phonocentrism is the conceit by which speech, as the putatively authoritative manifestation of the "self-presence of full self-consciousness" (i.e., the notion that it represents the self-consciousness of a determinate speaker), is privileged over writing (which can be subject to endless interpretation). The critique of logocentrism and phonocentrism display the characteristic skepticism of postmodernism; however, for Derrida the skepticism comes out of a critique of linguistic meaning via a reading of the logocentric bias of Western metaphysics.

b. Michel Foucault

It has been suggested by Paul Rabinow that the underlying logic in Foucault's *oeuvre* consists in the way he attempts to "historicize grand abstractions." Indeed, even a cursory examination of his work shows that he proceeds from topic to topic, placing into historical development intellectual objects which have otherwise seemed natural and objective. On closer inspection, however, relations of power are seen to constitute knowledge about the object, whether it is madness, various branches of scientific knowledge, delinquency, or sexuality. This historicist view of the world, which can loosely be called genealogy, leads Foucault to condemn global or systematic forms of theory. Such systems subsume the historical world into grand explanatory systems and thereby fail to understand it as a series of discontinuities and historical differences. For Foucault, the truth-claims of Enlightenment thought are not eternal and immutable but rather part of a regime of self-validating discourses. These discourses legitimize their position in power relations by expurgating their Other: the mad, the criminal, the deviant, the irrational, the non-scientific.

This will to theory represents a will to power that underlies all truth-

claims. Like Lyotard, Baudrillard and Derrida, Foucault concurs with the critique of the subject and the critique of objective truth. Unlike his three colleagues, however, Foucault fastens his concern on the way in which the production of knowledge is made possible by the creation of certain regimes of power, each with their own specific technology and apparatus.

c. Feminist Encounters with Poststructuralism and Postmodernism.

Feminism has found poststructuralist theory useful in a number of different ways. It has enabled feminist analysis of the heterogeneity of women’s experiences, and the way in which those experiences, often contradictory, are bound up in discourse and subjectivity. It has provided an avenue, previously closed off, for bringing these questions to the center of our analytical consciousness. However, many feminists have insisted that poststructuralism, with its emphasis on free-play and indeterminacy, should not lapse into a politically useless theory.

In an effort to rework poststructuralism to accommodate the political imperatives of feminism, Chris Weedon has argued “a feminist poststructuralism must pay full attention to the social and institutional context of textuality in order to address the power relations of everyday life.” Moreover, sharing the Foucaultian emphasis on power (though unafraid of locating power in terms of political interest), feminist poststructuralism must show how “[d]iscursive practices are embedded in material power relations which also require transformation for change to be realized.” One of the great strengths of poststructuralist feminism is that it offers one way to avoid the dichotomy between liberal feminism, which defines “the truth of women’s nature within the terms of existing social relations” and radical feminism, which stresses “fixed difference, realized in a separatist context.” Instead, poststructuralist feminism “requires attention to historical specificity in the production, for women, of subject positions and modes of femininity and their place in the overall network of social power relations.” This reconstructed style of poststructuralism, as we shall see in our consideration of Neil Gotanda’s work, will prove useful for Asian Americans as well.

82. See generally Weedon, supra note 66.
83. Id. at 25.
84. Id. at 106.
85. Id. at 135.
86. Id.
87. See infra Part III and notes.
III
TOWARDS A POST-STRUCTURALIST, NARRATIVE-ORIENTED AALS

A. Anti-Foundational Post-Structuralism and the Politics of AALS

With these schematic remarks about postmodernism and poststructuralism in place, we are now well-positioned to review and critique the epistemological rationale for a Poststructuralist Asian American Legal Scholarship. Chang begins his argument by observing the status of narrative in contemporary critical race theory. The “different voice” debate, he observes, has created what can be seen as an “essentialist trap,” forcing a categorical insistence on the existence of an essential “voice of color” in order to provide strong grounds for accepting the transformative value of stories told by scholars of color. Following Alex M. Johnson, he rejects the trap and asserts that “[i]t is time now for critical race theory to ... move beyond the different voice debate, because the use of narrative need not depend on a different voice thesis.” It can instead make use of an alternative epistemological strategy: an anti-foundational poststructuralism.

According to Chang, the “different voice thesis” subscribes to a version of standpoint epistemology that cannot escape the inflexibilities of the “rational/empirical mode,” which has thus far constituted the dominant paradigm of evidentiary value in the legal academy. In the rational/empirical mode, the case for the use of personal narrative has been made on the grounds that the perspectives of legal outsiders provide a fuller understanding of an objective reality. This particular deployment of standpoint epistemology within the rational/empirical mode holds that narratives of the oppressed provide access to “a view of reality that is more impartial than that of the ruling class and also more comprehen-

88. For the article which initiated the debate, see Randall L. Kennedy, Racial Critiques of Legal Academia, 102 HARV. L. REV. 1745 (1989). For subsequent articles involved in the “different voice” debate, see Colloquy, Choosing Sides in the Racial Critiques Debate, 103 HARV. L. REV. 1844 (1990); Daniel A. Farber & Suzanna Sherry, Telling Stories Out of School: An Essay on Legal Narratives, 45 STAN. L. REV. 807 (1993); Richard Delgado, On Telling Stories in School: A Reply to Farber & Sherry, 46 VAND. L. REV. 665 (1993). The “different voices” debate centers around the question of whether scholars of color “speak in a different voice” than other scholars as well as the question of how jurisprudence should alter itself if a “different voice” does in fact exist. Farber and Sherry maintain that the strongest case for the inclusion of narratives told by scholars of color would be the empirical demonstration of a “voice of color” that qualitatively differs from other, more dominant voices. Farber & Sherry, supra, at 818. This argument forces scholars of color into the difficult position of having to choose between essentializing a “voice of color” or abandoning these grounds for the inclusion of narrative.


90. Chang, supra note 4, at 1270.

91. Id. at 1278. It is important to note here that Chang argues that standpoint epistemologies can exist in both the rational/empirical and poststructuralist mode. However, it is puzzling why he never turns to them as a strategy for including narrative and instead only addresses poststructuralism. Cf. id. at 1283.
For Chang, there are several problems with such a view. First, there is no overwhelming reason to accept the proposition that oppression confers special access to objective truth, since partial (or subaltern) status "would not necessarily provide less distorted views, but differently distorted views." Second, standpoint epistemology in the rational/empirical mode seems to imply an additive view of oppression, leading to a counterproductive assumption that gives members of the oppressed group (in this case women) a special, privileged access to reality. Third, standpoint epistemologies, can devolve into essentialism, and thus they run the risk of implying that there is an essential "women's experience," or for that matter, an essential "black women's experience." For these reasons, Chang maintains, it becomes necessary for us to seek an epistemology that does not claim to know an objective reality.

Poststructuralism represents the epistemological escape-hatch for narrative jurisprudence because it is "anti-foundational," relying as it does on a "conception of language and knowledge that is not based on any universal theoretical ground." It holds that knowledge can exist only "within the local, partisan point of view, which is posited as the only available point of view." The effect of such an epistemology is to liberate legal scholars from the necessity of establishing the legitimacy of their narratives in the terms of the "rational/empirical mode," for if all narratives are local and partial, then there are no satisfactory grounds for privileging one account over another.

Bearing a close resemblance to the critique of metanarratives articulated by Lyotard, the argument becomes rather disconcerting here because it raises a whole host of important questions. For what reason do we wish

92. Id. at 1281 (quoting ALISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE 370-71 (1983)).
93. Id. The underlying assumption here, of course, is that all views are distorted: that objective truth does not and cannot exist.
94. Id. at 1282.
95. Cf. id. at 1283.
96. Id. at 1284 (quoting Deborah L. Rhode, Feminist Critical Theories, 42 STAN. L. REV. 617, 620 n.8 (1990). See also STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 344 (1995) ("Anti-foundationalism teaches that questions of fact, truth, correctness, validity, and clarity can neither be posed nor answered in reference to some extracultural, ahistorical, nonsituational reality, or rule, or law, or value; rather, anti-foundationalism asserts, all of these matters are intelligible and debatable only within the precincts of the contexts or situations or paradigms or communities that give them their local and changeable shape.").
97. Chang, supra note 4, at 1284.
98. Id. at 1279 ("since all standpoints are equally validated (or invalidated), there is no longer any compelling reason to privilege any viewpoint. To state it differently, my personal narrative is as relevant as your personal narrative, and since both of them are equally relevant, they are equally irrelevant.").
to avoid privileging one personal narrative over another? What does “privileging” mean? Does an acceptance of a poststructuralist basis for narrative mean that someone cannot be wrong? Is this the same as saying that narratives matter? Chang provides preemptive responses to these questions, and it is instructive to quote him at length:

The fear is that if we go down the postmodern road, we will no longer be able to practice social criticism in a compelling way, because without objectivity, Asian Americans and other disempowered groups cannot claim that our emergence from subordination “is less artificial and constructed that that which [we] have cast off.” This conclusion seems to be the ultimate logic of the poststructuralist critique. However, this conclusion is not as devastating as it first might seem. It does not render political action impossible; if anything, it does the opposite, in the sense that political action is all that will be left. The poststructuralist critique changes the present game, which involves the search for legitimation, by eliminating the possibility of any appeal to external standards for legitimation. It becomes, as it were, anything but a question of power, where no one can claim a superior legitimacy nor deny the legitimacy of another’s viewpoint or story. Narratives, then, cannot be discounted because in this game of power there is no “objective” standard for disqualification; one “wins” by being more persuasive.99

For Chang, the postmodern or poststructural road neither signals the end of “social criticism” nor negates the possibility of political action; it does precisely the opposite. It prevents the exclusion of outsider narratives on the basis of (an arbitrary) “reason” and ensuring that their voices will be heard. “Political action,” he asserts, “is all that will be left.”100

Even in light of these reassurances, however, several bothersome questions still remain. The first of these problems relates to the question of how one might go about “persuading” someone else. Whom do we persuade? By what criterion? If we are to avoid replacing one arbitrary external referent (objectivity) with another (persuasiveness), what does one look for in order to adjudicate persuasiveness?101

Second, there is a misreading here of the primary fear of those criticizing a strong (i.e., anti-foundationalist) postmodern position; the concern is not that it will become impossible to prove that the emancipation of Asian Americans “is less artificial and constructed than that [condition of subordination] which [we] have cast off.”102 It is a different question alto-

99. Id. at 1285-6 (quoting Katharine Bartlett, Feminist Legal Methods, 103 HARV. L. Rev. 829, 879 (1990)).
100. Id.
101. One possible objection here would be to argue that the notion of “adjudication” itself represents a kind of holdover from the rational/empirical mode, where meaning has external guarantees and intrinsic decidability. I would reply to such an objection by making the same argument about the term “persuasive,” which also connotes a kind of rank ordering, if only a momentary one.
102. Chang, supra note 4, at 1285-6 (quoting Bartlett, supra note 99, at 879).
gether. Like the existence of a "different voice," the social construction of reality is a false issue. All but the most obstinate positivists agree that the production of knowledge is not value-free. The question is not whether our understanding of the world is constructed but rather how it is constructed and with what possible consequences. Indeed, the real concern with the strong postmodern or poststructuralist position is the fear that it would blithely dismiss struggles for social justice as the pursuit of an "objective" fiction.

Third, if we are to take the notion of anti-foundationalism seriously, then the inescapable conclusion is that there is no guarantee of meaning—even the meaning of the narratives constructed by outsiders. The implications of anti-foundationalism are nothing if not thoroughgoing, as it opens up the possibility of the free-play of signification in the Baudrillardian sense of the *simulacrum* or the (radical) Derridean sense of deconstruction, in which the meaning contained in narratives is at once fractured, contradictory, and ultimately undecidable. Such a stance would not bode well for an Asian American Legal Scholarship, which requires narratives to have meanings that matter. This point would seem to be further confirmed by the fact that the narratives deployed by Chang himself do not at all resemble the narratives necessitated by an anti-foundational poststructuralism. Rather than representing the contradictory, undecidable meanings of a fractured subjectivity, his stories are told by a person whose subjectivity is clearly unified—if only in the activity of inscription—and whose stories have a concrete strategic aim.103

Emblematic of a general sense of uneasiness, these three concerns are merely specific manifestations of a larger, more troubling issue: the political practice entailed by an anti-foundational, poststructuralist epistemology. If there is a lesson to be learned from our cursory discussion of the field of theoretical discourse surrounding poststructuralism, then it is that it should not be appropriated lightly nor innocently.104 Our appeal to it should be rigorously critical, and we should take care to specify the specific strengths and liabilities it will likely bring us.105

With such a mandate in mind, it would seem that the politics immanent within an *anti-foundational* poststructuralist epistemology are problematic, ultimately coming to undercut the reasons underlying its initial formulation. By refusing the politics of foundations, one loses the foundations of politics. Such an epistemology undermines our ability to deem one narrative more important than another.106 It installs a kind of narrative

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103. See generally Chang, supra note 4; Robert S. Chang, *The End of Innocence or Politics after the Fall of the Essential Subject*, 45 Am. U. L. Rev. 687 (1996).
104. Cf. Palumbo-Liu, supra note 7, at 63.
105. Chris Weedon makes a similar point about feminism and poststructuralism. Weedon, supra note 66, at 20.
106. I would distinguish the act of assigning relevance from the act of assigning privilege. As-
monism whereby all narratives have the same relevance, leaving us frustrated and unable to justify how and why our narratives should matter. It privileges the local by denying the possibility of the universal, seeming to ascribe an inherent political content to the former while refusing even to consider the strategic utility of the latter. It conflates the notion of legitimation with the notion of legitimacy, which has the effect of permitting patently illegitimate political action. Above all, it claims to “change the present game” by leaving nothing but political action, all while grossly overestimating the political capital or efficacy of outsider groups.

If political action is “all that is left” to the game, then we are in hot water indeed! My encounter with the guest lecturer, the story with which I began this essay, offers a telling illustration. Suspicious of objective truth-claims and stressing instead the complex contingencies of the social world, this professor considered himself the intrepid messenger of new theoretical profundities, the architect of a critical intervention that would liberate us from antiquarian and ossified ways of understanding the world. And yet when my friend and I asked him questions about how long-standing patterns of subordination could exist in such a world, the professor chastised us for our ostensible inability to free ourselves from the strictures of positivist thought. Deeply misunderstanding our concern, which related to the possibility for a politics of emancipation in a Complex World, he spoke to us as though we were pitiable, deluded creatures who

107. There is no guarantee that the anti-foundational poststructuralism offers a tenable defense against the arbitrary exercise of crass, political domination, were it to replace a rational/empirical mode which arbitrarily excludes outsider narratives in the name of an imaginary objective truth.

108. For example, with no foundation, stories from legal conservatives who have experienced “reverse discrimination” can now have the same status as stories of women of color who cannot advance beyond the “glass ceiling.”

109. The notion of strategic essentialism, as exemplified by the phenomenon of pan-Asian identity, represents one possible deployment of the universal. See Yen Le Espiritu, ASIAN AMERICAN PAN-ETHNICITY 162 (1992) (“Although the pan-Asian concept may have originated in the minds of non-Asians, it is today more a reflection of this misperception. Asian Americans did not just adopt the concept but also transformed it to conform to their ideological and political needs.”). Matsuda also maintains that it is possible for “instrumental uses of formal legal rules to achieve substantive justice.” Mari J. Matsuda, Public Response to Racists Speech: Consider the Victims’ Story, 87 MICH. L. REV. 2230, 2326 (1989).

110. In order to rescue the ethics of AALS, Chang attempts to argue that even seemingly incontrovertible, transhistorical statements have their proper context. He begins by observing that the first reaction to anti-foundationalism is the desire to rescue the claim that “all Nazis are bad, all of the time.” Relying upon Stanley Fish, he counters the argument by asserting that making “a universal, ahistorical claim about all Nazis being bad is meaningless because the phrase ‘all Nazis are bad’ has meaning only in certain contexts.” Chang, supra note 4, at 1285. If contexts are truly important to evaluating the meaning of statements, however, then the first question to be asked by an AALS is, what is our context? I would venture that the answer is that we belong to the same context that gives meaning to the statements “all Nazis are bad all the time.” If so, what then?
had been brainwashed into believing that “structures” and “patterns”—of any sort—existed.111

This is at once a remarkable reversal of the prevailing intellectual mood as well as an insidious transformation of racial privilege. To appreciate it requires some historical perspective. Only twenty years ago, that guest lecturer might have called me too subjective for raising questions about race, gender, class, or sexuality; today, in a delicate irony befitting our postmodern condition, I am dismissed as not subjective enough for raising the very same questions. In spite of our basic philosophical agreements about the underlying complexity of the social world, the relations of gender and racial power remained firmly established between us. This professor served as the source of authoritative knowledge, even though he may have claimed only to “know” that the subject had died well before well-meaning folks like us had arrived at the university!

What kind of politics is involved when a tenured, white male professor who claims a postmodern pedigree can silence the narratives of women and people of color on the basis of their “reifying tendencies” and criticize them for their false consciousness of “structures” of inequality? In the words of Rey Chow, what is missing here is “an account of the institutional investments that shape his own enunciation” of postmodernism.112 The absence of such an account indicates a positive source of cultural and political power—of which postmodernism is no innocent bystander—that should itself represent one of the prime targets of a poststructuralist AALS.

B. Alternative Rationales for Narrative: Beyond the Rational/Empirical and Poststructuralist Mode

In rejecting anti-foundational poststructuralism as well as the rational/empirical mode, one has not necessarily abandoned all hope of providing a rationale for narrative which neither presumes the existence of an objective reality nor vitiates the foundations for progressive racial politics. In spite of these cautionary comments, it would nevertheless be extraordinarily foolhardy of us to throw out the poststructuralist baby with the anti-foundationalist bathwater. The emergence of poststructuralism has indisputably altered contemporary theoretical consciousness in important ways, serving as a corrective influence to the systematic oversights of liberal-modernism.

This critique of anti-foundational poststructuralism should therefore not be read as a categorical rejection of all poststructuralism, but as an effort to rethink the epistemological and political underpinnings of a progressive Asian American Legal Scholarship. The project of an AALS ar-

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111. The scenario depicted here articulates with the notion of “vulgar anti-essentialism” discussed by some critical race theorists. See, e.g., Crenshaw, supra note 25, at xvii.

ticated by Chang—to avoid the difficulties with a traditional civil rights
approach and simultaneously specify the ways in which Asian Americans
stand differently in relation to the law—still remains intact and no less ur-
gent. Contrary to the false dichotomy promulgated by the sycophants of
modernism or postmodernism, there are multiple paths that can be taken,
including the theory of communicative action offered by Habermas and the
socialist humanism of E. P. Thompson.113 I shall discuss another such path
here which lies at the intersection of the intellectual traditions of the radi-
cal Enlightenment and certain elements of poststructuralism, primarily
those of feminist poststructuralism. This intersection is sufficiently rich to
provide an alternative basis for narrative while retaining the capacity to
generate critical insights that prompted us to turn to poststructuralism in
the first place.

I begin with the example of historian E. P. Thompson. In the preface
to THE MAKING OF THE ENGLISH WORKING CLASS, Thompson outlines a
conception of history that avoids the reifying tendencies of empiricist so-
cial science and regards history as a highly (though not infinitely) complex
process.114 Class, he argues, is a word that “ties loosely together a bundle
of discrete phenomenon” and does not represent, in poststructural par-
lance, an undifferentiated unity.115 Rather, it is a “historical phenomenon”
that connects “a number of disparate and seemingly unconnected events....”116 In contradistinction to some economists or sociologists,
Thompson does not “see class as a ‘structure’, nor even as a ‘category’, but
as something that in fact happens....”117 This means that, “like any other
relationship, it is a fluency which evades analysis if we attempt to stop it
death at any given moment and anatomise its structure.”118

Thus, class exists and unfolds as a process over historical time, re-
quiring a fine-grained method such as narrative to capture any proper un-
derstanding of it. In the absence of narrative, one “segregates certain
events from this process and examines them in isolation.”119 One can then
compound the problem by putting “these fragmentary studies back to-
gether again, constructing a model of the historical process made up from

113. JÖRGEN HABERMAS, THE PHILOSOPHICAL DISCOURSE OF MODERNITY X (1987); E. P.
114. See THOMPSON, supra note 113. For a lengthier, polemical reflection on Marxism and the-
eory, see E. P. THOMPSON, THE POVERTY OF THEORY (1978). This volume emerged from a contentious
philosophical dispute between Thompson and Althusser. For a reckoning of the fortunes of Western
Marxism since World War I, see PERRY ANDERSON, CONSIDERATIONS ON WESTERN
MARXISM (1976). For an analysis of the subject since Hegel, see JAY, supra note 60. For a reflection Western Marxism
from the mid-70s to the mid-80s, see PERRY ANDERSON, IN THE TRACKS OF HISTORICAL MATE-
RIALISM (1983).
116. Id.
117. Id.
118. Id.
119. Id. at 204.
a multiplicity of interlocking inevitabilities, a piecemeal processional.\textsuperscript{120} In a larger philosophical sense, then, Thompson's approach here reflects a radical Hegelian moment in Marxism that emphasizes the way in which culture, meaning, and other ideational elements in the cultural apparatus take part in a complex historical movement that can only be grasped through narrative or by close attention to historical development.\textsuperscript{121}

The implication here is that narrative gives us some kind of understanding of the complex set of dynamics that constitute the historical world. This is particularly important when history has been "written from above." The distinction between history "written from above" and history "written from below" does not necessarily betray a nostalgia for a full historical process as much as it follows one of the central critical tenets of poststructuralism: that historical knowledge is itself not an innocent process of discovery but is rather an act of intellectual production, caught up in a network of power relations that privilege one account over another. As Ranajit Guha argues about existing Indian historiography, the inadequacy "of elitist historiography follows directly from the narrow and partial view of politics to which it is committed by virtue of its class outlook."\textsuperscript{122} The project of subaltern studies, the research collective which has set out to produce a revisionist Indian history, seeks to uncover the ways in which hundreds of thousands or even millions of the Indian people contributed "on their own, that is, independently of the elite to the making and development of this nationalism."\textsuperscript{123} Thus, history from below can help to expose how existing conceptions of the world participate in the domination of one group by another. This is the same process that Richard Delgado talks about when he asserts that counter-narratives help de-mystify and de-naturalize the structures of legal liberalism.\textsuperscript{124} The point here is that there are justifications for subaltern narrative that do not require an appeal to a transcendental signified but merely the discernment of configurations of signifiers that have definite political interests.\textsuperscript{125}

\textbf{C. The Critical Strengths of Poststructuralism}

The critical effects demanded by Chang's account of anti-foundational poststructuralism are still possible—and no less urgent—with

\begin{footnotesize}
\begin{enumerate}
\item[120.] Id. at 205.
\item[121.] G. W. F. Hegel, \textit{The Philosophy of History} x (1988) ("We must therefore say that the narration of history is born at the same time as the first actions and events that are properly historical.").
\item[123.] Id.
\item[124.] Delgado, \textit{supra} note 34.
\item[125.] For a reflection on the hybridity of Asian American identity and the cultural politics of \textit{positioning} made possible (and indeed necessitated) by it, see Lisa \textit{Low}, \textit{Heterogeneity, Hybridity, Multiplicity}, in \textit{Immigrant Acts} 60 (1996).
\end{enumerate}
\end{footnotesize}
a less extreme version of poststructuralism, a version which resonates deeply with certain strands of the radical(ized) Enlightenment. I argue that there are at least three features of poststructural thought that are crucial to establishing a critique of legal liberalism (and the traditional civil rights work based on it) while maintaining viable politics for an AALS.

Skepticism towards Universals. It is important to distinguish between skepticism towards universals, which connotes a deep suspicion of the claims that universals make of themselves, and outright rejection of them, which denotes an immediate and categorical refusal. The skepticism of poststructuralism enables one to question the category of the universal and challenge it directly. Instead of simply regarding it as an objective category, beyond the pale of politics and therefore completely innocent, a poststructuralist sensibility continuously questions the universal and attempts to ascertain whether it acts in ways other than those by which it presents itself. As such, a poststructuralist sensibility makes it possible to discern the ways in which the discourse of the universal mystifies and masks the political relations that constitute it. As Calhoun has written about critical feminist standpoint epistemologies, "[they] can help us to recognize how gender may operate as a category constituting relations of inclusion and exclusion, of visibility and invisibility, particularity and generality even where it is most resolutely denied and the illusion of gender-free universality maintained." This suspicion extends to universals of all persuasions, including the notion of justice itself. As Focault once said in a debate with Noam Chomsky: "If you like, I will be a little bit Nietzschean about this; in other words, it seems to me that the idea of justice in itself is an idea which in effect has been invented and put to work in different types of societies as an instrument of a certain political and economic power or as a weapon against that power." This skeptical view of justice
differs vastly from the anti-foundational preemptive dismissal of it as another variety of simulacrum, for here the notion of justice serves as the instrument and object of political conflict.

**Balance between Abstract and Concrete.** Against the objectifying tendency of liberal Enlightenment thought, poststructuralism validates the particularities of experience. A viable poststructuralist epistemology, however, must balance the close, fine-grained analysis of power, language, and subjectivity with a broader understanding of the larger—if equally contingent—social, cultural, economic, and political forces which frame them.\(^{130}\) It does not necessarily follow from the multiplicity of experience and heterogeneity of the social world that the discernment of systematic subordination or exploitation is an impossibility. Fraser and Nicholson put the point bluntly: "A first step is to recognize, *contra* Lyotard, that postmodern critique need forswear neither large historical narratives nor analyses of societal macrostructures."\(^{131}\) This appreciation of the complex interrelationship between the abstract and the concrete, between the general and the particular, between history and biography, is a characteristic of certain strands of feminist poststructuralism that would well serve Asian American Legal Scholarship.

**Emphasis on Historicity.** In contrast to much poststructuralist work which delicately skirts historical questions, the writings of Michel Foucault contain a deep sense of historicism which disrupts our sense of natural objects and classifications, placing them into the context of the political relations which make them. This is useful for Asian American Legal Scholarship because it enables us to understand, for instance, the way in which the definition of race, which presents itself as rooted in biology, changes over time according to the exigencies of political, economic, and social conflict.\(^{132}\)

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130. Weedon, *supra* note 66, at 8 ("For a theoretical perspective to be politically useful to feminists, it should be able to recognize the importance of the *subjective* in constituting the meaning of women's lived reality. It should not deny subjective experience, since the ways in which people make sense of their lives is a necessary starting point for understanding how power relations structure society.")


132. Another example would be how the notion of "merit" changed in admissions policy at the University of California, Berkeley with the increase in Asian Americans applicants during the 1980s. See L. Ling-chi Wang, *Meritocracy and Diversity in Higher Education*, 20 URB. REV. 189.
Racial Domination and the Legal Doctrine of Colorblindness

The work of Neil Gotanda best exemplifies the skeptical sensibility that lies squarely at the intersection of poststructuralism and the intellectual traditions of the radical Enlightenment. This intersection promises to provide not only a rationale for the inclusion of narrative in jurisprudence, as I have argued above, but also a surer epistemological and political foundation for a progressive Asian American Legal Scholarship.

In *A Critique of “Our Constitution is Color-Blind,”* Gotanda argues that the Supreme Court’s “use of color-blind constitutionalism—a collection of legal themes functioning as a racial ideology—fosters white racial domination.” Gotanda asserts that color-blind constitutionalism, a metaphor which was to serve as a prescription for racial equality, has precisely the opposite effect, serving instead as the linchpin for the reproduction of a system of racial privilege and hierarchy that continues to stratify our society even today. Gotanda discusses five principle examples of how color-blindness has performed such an ideological function: the public-private distinction, the doctrine of nonrecognition, the system of racial classification, the legal definition of race in formal terms, and the implicit theory of social change. In the course of making his argument, he brings to bear several facets of critical thought that I identified in Part III.C. For the purposes of our present discussion, I shall focus on only three of his five examples. My primary aim here is to show how his analysis of color-blind constitutionalism incorporates the insights of poststructuralism without recourse to a thoroughgoing anti-foundationalism that threatens the formation of a viable political practice.

The public-private distinction. Classical legal thought draws a sharp line between the public and private spheres, distinguishing between actions over which the government has legitimate jurisdiction (public) and actions which are outside the domain of government and thus relevant only to the relations between autonomous individuals (private). Under a regime of color-blind constitutionalism, racial discrimination can only be prohibited in the public sphere; discriminatory acts in the private sphere may have their basis in race if they fall under the constitutional protections of contract, association and speech, or religion. “Taken together,” argues Gotanda, “[the] constitutional protections for racial discrimination in the pri-

134. *Id.* at 3.
135. *Id.* at 8.
vate sphere constitute a ‘private right to discriminate.’”

The implicit ‘right’ to private discrimination has important consequences for the perpetuation of racial domination, for it creates a legal structure that favors the entrenched interests of racial privilege. That is to say, in order to avoid the charge of racial discrimination, a defendant merely has to prove that an action falls either in the sphere of private relations or is non-governmental in nature (in the case of an action being perpetrated by a governmental agent). With the “common-sense” distinction between public and private firmly established, the burden of proof devolves onto the plaintiff, who must show that the action either falls within a public relation or is governmental in nature. This attempt often leads to charges that the plaintiff has compromised the legal process by introducing “political” criteria, ultimately leaving the discriminatory act unexamined. Gotanda sharply criticizes the public-private distinction, since it enables the judiciary to frame its choices as “apolitical decision[s],” when in fact the “common sense” distinction itself has indisputable political origins and continues to have significant political consequences. This deception has the effect of ensuring that “underlying racial preferences are disguised.”

Racial Categories. Although race presents itself as immutable and rooted in biological differences, historical inquiry reveals that the concept has changed quite fluidly over the two or three centuries that it has existed. The construction of race varies according to political exigencies, cultural traditions, or economic necessities. Thus, the rule of hypodescent, or the one-drop rule, which is the current principle of racial vision and division in America, represents only one possible system of racial classification. Gotanda argues that under the ideology of color-blindness, race is regarded as an objective fact of existence, which prevents people from understanding the ways in which race has been and continues to be contingent on social struggles and political conflict. This lack of historical awareness reinforces the notion that race, as a natural category, cannot be the legiti-

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136. Id. at 11.
137. Id. at 15. A good example of the latter is set forth in the dissenting opinion of Justice O’Connor, joined by Justices Rehnquist and Scalia in Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991) (ruling on peremptory challenges in jury selection) where O’Connor advanced the argument that “a peremptory strike by a private litigant is fundamentally a matter of private choice and not state action.”
138. Id. at 13-14.
139. Id.
140. Id. at 15-16.
141. In the United States, “one-drop of blood” from an “inferior” race automatically makes you a member of that race. This is known to sociologists as the one-drop rule or the principle of hypodescent. Thus, one drop of “black” or “Asian” blood makes you a black or Asian person in the U.S. This categorization has been enforced by legal sanction as well as social custom. Other countries, such as Mexico or Brazil, operate on a different system of classification.
142. Cf. id. at 34.
mate basis of judicial decision-making, leaving the ideology of color-blind constitutionalism untouched and race-based remedies to discrimination bereft of substantial support.

**Formal-Race.** The term formal-race designates one of the most common ways in which the Supreme Court uses the notion of race, as a formalistic category that remains "unconnected to the historical reality of Black oppression." By the term race, Gotanda means the way in which race has been treated by the Supreme Court as a neutral category of individual difference with no more legal meaning than the shape of one's earlobe. Thus, formal-race prohibits jurisprudence from assigning differential legal status to an individual based on how much discrimination was (or is) suffered by the race to which she or he belongs. The notion of formal-race moreover contributes to the maintenance of racial privilege by restricting the scope of racism to identifiable acts of individual prejudice—acts of white-hooded racism. "In short," Gotanda writes, "color-blind constitutionalists live in an ideological world where racial subordination is ubiquitous yet disregarded—unless it takes the form of individual, intended and irrational prejudice." Color-blind constitutionalism, reliant on notions of formal-race, cannot conceive of racism as a large-scale structural or institutional process, thereby excluding from consideration the vast majority of contemporary racism.

Gotanda's critique of the public-private distinction resonates powerfully with certain facets of poststructuralism. For example, poststructuralist thought is deeply suspicious of the claim that the public-private distinction is objective and universal, a claim which, unquestioned, enables the discourse of objectivity and neutrality mask its actual status as both an instrument and object of political struggle. Gotanda's critical sense also shares with poststructuralism the imperative to challenge the hegemonic "common sense" which prevents us from discerning the ways in which race is not natural but constructed—that putatively "given" categories of existence are not "given" at all but are rather made in complex, historical time and are therefore amenable to being unmade. Moreover, Gotanda insists on a perspective that acknowledges that "race is not a simple, unitary phenomenon" as it is portrayed by color-blind constitutionalists. "Rather," he argues, "race is a unique social formation with its own meanings, understandings, discourses, interpretive frameworks..."
lived social experience[s]. This view shares with poststructuralism the emphasis on heterogeneity and difference. And yet Gotanda does not feel it necessary to pursue an anti-foundationalist course, which would take the evident plurality of the social world as grounds for the radical free-play of meaning. Any ‘reconstruction jurisprudence,’ Gotanda concludes, “must appreciate the systemic nature of subordination in American society.”

V

CONCLUSION: TOWARDS A CRITICAL JURISPRUDENCE OF RECONSTRUCTION

I began this paper by arguing that we should reconsider the wisdom of appropriating an anti-foundational poststructuralism as a means of establishing the legitimacy of narratives by Asian Americans. I went on to argue that anti-foundationalism entails a problematic conception of politics for AALS. In an effort to outline an alternative approach, I then attempted to show how intellectual resources at the intersection of poststructuralism and the radical Enlightenment are broad and powerful enough to sustain both a rationale for the inclusion of narrative and a critique of liberal legalism. To illustrate how such an approach might work, I analyzed the work of Neil Gotanda on color-blind constitutionalism, reading it as an expression of a specific kind of poststructuralist sensibility.

Adopting a reconstructed poststructuralism, however, still presents some problems for a progressive AALS. This stems in part from the difficulty of drawing hermetic distinctions between anti-foundational poststructuralism and less extreme versions of poststructuralism. Neither is distinctly compartmentalized, and the two can shade imperceptibly into one another. Another problem is the fact that poststructuralism (and postmodernism), despite its putative opposition to system-building, has become itself a kind of reigning intellectual orthodoxy, not the least of which is because of the zealousness with which publishers have taken it up and disseminated it around the globe. It sells. In a delicate irony, the commercial allure of poststructuralism to an educated and intellectual elite lies in the way in which it presents itself as a novel, subversive critique, opening up new vistas of investigation and undermining the foundations of all existing understanding. It has now become nearly inescapable. As Christopher Norris has noted elsewhere, any up-and-coming assistant professor in the humanities or social sciences cannot get ahead these days without being able to come up with a handy definitions of the master terms of poststructuralism: metanarratives, discourse, deconstruction, différance.

So, for all of the ways poststructuralism has informed my own theo-

147. Id.
148. Id.
BEYOND MODERNISM AND POSTMODERNISM

Theoretical consciousness, I am still at the same time somewhat suspicious of it. Indeed, I suspect that it is not entirely accidental that the "death of the subject" and the "deconstruction of rights" have been coeval with the increasing representation of women and people of color in the legal academy. There has been an influx of diverse viewpoints which have benefited in many ways from poststructuralist thought, but the increasing demographic change in the student body may also be prompting a subtle backlash.150 The empirical data here are familiar but merit recapitulation. Women constituted only 3.7% of student enrolled in law school in 1963. A decade and a half later, in 1978, women represented 30.8% of law students. By 1995, fully 44% of law students were women. The representation of students of color has increased as well. In 1978, the first year that the American Bar Association kept track of racial statistics, minority students made up only 8.6% of the students enrolled in law school. By 1995, the figure had risen to 19.8%.151 More progress can be made, to be sure, but the demographic changes in legal education are astounding when one considers that the average law school student body only three decades ago was overwhelmingly white and male. The point here is that we should historicize postmodernism and approach it from a critical angle, for it is not inherently oppositional and can be placed in the service of racial privilege no less readily than whatever proceeded it.

From the standpoint of a critical AALS, then, it would seem that neither modernism nor postmodernism can offer unqualified support. And yet it also seems that AALS requires both of them, to ever-changing degrees. Angela Harris has advised critical race scholars to use the tension between modernism and postmodernism as a way of developing insights into the operation of the law.152 Following her argument, I would insist that a critical Asian American Legal Scholarship must adopt a contrapuntal sensibility, negotiating a synchronic and diachronic dialectic of what have previously been regarded only as uncompromisingly dualistic alternatives:

150. As Patricia Williams observes, "The word 'rights' feels so new in the mouths of most black people." Williams, supra note 26, at 431. Being at the point where rights still seem novel, moving to deconstruct them, or announce their death seems radically premature.


<table>
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<th>Year</th>
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<th>Total Women J.D.</th>
<th>Total Minority J.D.</th>
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<td>1963</td>
<td>46,666</td>
<td>1,739</td>
<td>N/A</td>
</tr>
<tr>
<td>1978</td>
<td>116,150</td>
<td>35,775</td>
<td>9,952</td>
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<td>129,318</td>
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152. Harris, supra note 37. This tension can be seen in the work of Gotanda as well. Gotanda (like Chang) couples the liberating aims of critical legal studies and critical race theory—the escape from legal liberalism as well as racism—with the imperative to recognize and accommodate Asian American difference. Neil Gotanda, Critical Legal Studies, Critical Race Theory and Asian American Studies, 21 & 22 AMERASIA J. 127 (1995).
modernism and postmodernism, structuralism and poststructuralism, faith and skepticism, optimism and pessimism. This is not a call for vapid and self-indulgent oscillation but rather a studied, self-reflexive, nomadic movement that is always mindful of the complex ways in which racial power can be exerted and maintained.

David Harvey begins his magnificent book, THE CONDITION OF POSTMODERNITY, with a passage from the writings of the French pre-Symbolist poet and critic Charles Baudelaire. Pithy and prescient, it bears repeating here: “Modernity is the transient, the fleeting, the contingent; it is the one half of art, the other being the eternal and the immutable.”

This linkage between the ephemeral and the ever-lasting provides us with one way of understanding the major difference between the concepts within modernism and structuralism and those embraced by postmodernism and poststructuralism. The former draws the line in such a way as to privilege the universal, while the latter draw the line to privilege the contingent. A progressive Asian American Legal Scholarship must be critical and strategic when rendering the difference for itself, drawing and redrawing the line but never fully effacing it.

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153. HARVEY, supra note 51, at 10.