ESSAYS

Racial Critiques of Legal Academia:
A Reply in Favor of Context

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As a scholar of color who neither claims expertise as a result of being black nor writes from a black perspective,¹ I read with interest Professor Randall Kennedy’s provocative article, Racial Critiques of Legal Academia.² In Racial Critiques, Professor Kennedy challenges the claims of a trio of legal scholars of color that they and other scholars of color are partially excluded from legal academic discourse because of their race and, more importantly, that they have a unique, distinctive voice that speaks to certain color-related issues better than the voices of majority—that is, white—scholars.

One might assume that I agree with Racial Critiques’s challenge because I do not speak from a perspective of color, and that a scholar of color who speaks from the perspective of color will vehemently disagree with the tenor and motivations of Kennedy’s challenge. Instead, I propose a new analysis, based not on objective truths, but on the reality of subjective perceptions.

In my view, Kennedy has done both a great service and disservice to all scholars of color who write from a perspective of color. Kennedy’s work raises the question whether scholars of color employ a distinctive or privileged voice when speaking to matters of color,³ and, if so, how should we

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¹ See, e.g., Alex M. Johnson, Jr., Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward A Theory of Relational Leases, 74 VA. L. REV. 751 (1988) (lessor should be free to restrict arbitrarily the alienation of a leasehold pursuant to an ex ante agreement based on the theory of relational contracts); Alex M. Johnson, Jr., An Appeal for the “Liberal” Use of Law and Economics: The Liberals Fight Back, 67 TEX. L. REV. 659 (1989) (arguing for the apolitical, predictive use of economics as a tool to study and analyze legal issues); Alex M. Johnson, Jr. & Ross D. Taylor, Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to Cy Pres and America’s Cup Litigation, 74 IOWA L. REV. 545 (1989) (dynamic interpretation should be used to determine when cy pres should be employed in charitable trusts).


³ The publication of Racial Critiques met with a vigorous response, including a colloquy in the Harvard Law Review, 103 HARV. L. REV. 1844-86 (1990). The articles in the colloquy are: Scott
evaluate such scholarship. Kennedy's negative treatment of the voice of color is unfortunate and a disservice to scholars of color, and particularly Professors Derrick Bell, Richard Delgado, and Mari Matsuda, whom I shall call "the trio of voices."  

Nonetheless, I find persuasive many of Kennedy's arguments. Kennedy is substantially correct when he argues that scholars of color have not proven, and cannot prove that they have been excluded from legal discourse and that they have a unique perspective with respect to certain issues. I also agree with Kennedy that race is not a good proxy for a distinct, privileged voice: The voice of color is not monolithic, and is not necessarily found in every book or article by every scholar of color. Where I part with Kennedy, however, is in the form of proof of distinction he demands. Kennedy relies on impersonal, majoritarian, merit-based criteria that might be characterized as "objective." He demands empirical, analytical proof that the voice is distinct and rejects any intuitive claim that the voice exists and is, in fact, distinct. Based on such objective criteria, I doubt if anyone can ever prove or disprove that Professor Matsuda's racial heritage, for example, enables her to speak with a unique voice. I reject his demand for abstract, objective proof. Rather, I believe scholars of color speak from a distinct perspective when they intend to do so and when they are perceived by others as speaking with that unique voice.

I also disagree with Kennedy's contention that distinctness is ameriorious in the context of legal scholarship. His analytic approach, which assumes mainstream, majoritarian societal norms, prompts the fundamental question of how distinctiveness is evaluated. Kennedy judges scholarship by the standards of the legal academy, which is and has been dominated by majority scholars. I argue that those standards are inappropriate when applied to scholarship written in a distinct voice of color. It is intent and


6. This majoritarian standard is also an elitist standard, although at first glance this may appear an odd, if not oxymoronic, suggestion. For further discussion, see Alex M. Johnson, Jr., The New Voice of Color: Majoritarian, Elitist and Proud of It, 100 Yale L.J. — (forthcoming 1991).

7. Only when we gain distance from the source over time and develop other tools for measuring value—such as recognizing the existence of many other voices and their evaluative worth—can something be adjudged distinct rather than bad. One relatively recent popular example may illuminate my point. When the Beatles' music was introduced in the United States, against what standard was it measured? Initially, it was not received by those within the music industry with the same enthusiasm that it eventually earned. Some of the Beatles' later prestige and respect derived from the fact that their music was later emulated by groups such as The Rolling Stones. Society sees the start of a trend, be it musical or academic, as "distinct" or anomalous, but the majority later recognizes and values the distinct trend because others follow it and, sometimes, in fact, the trend loses its
perception—"context"—rather than objective, impersonal fact that a critic examines when judging the scholarship of one who claims to speak in a distinct voice.

My own challenge to Kennedy’s article takes issue with his reliance on majoritarian, “objective” criteria. Part I summarizes Kennedy’s claims in *Racial Critiques*, particularly his contention that scholars of color have failed to prove that they speak with a unique or privileged voice with respect to certain race-related issues. I argue that Kennedy’s criticism of the trio of voices condenses the debate to a single issue: whether the trio of voices would seek to have their work judged on the basis of merit or on the basis of color.8 Kennedy’s theory assumes an interpretive community of legal scholars whose values are uniform and merit-based.9 Held against this standard, the trio’s claims must fail.

Part I also addresses the trio’s claim that the voice is privileged with respect to certain issues. The voice of color (1) exists but is not monolithic; (2) is possibly but not certainly excluded; and (3) should enjoy a status at least equal to the majoritarian voice which is judged by Kennedy’s merit-based standard.

Part II demonstrates that the claims made by both Kennedy and the trio of voices are erroneous. Both views adopt absolutist premises concerning merit and value that are no longer viable given the pluralistic and interactive nature of our society. Kennedy’s “objective” standard is less and less meaningful as the legal academic community further diversifies by color and gender. Similarly, claims of exclusion are untenable unless we reject certain traditional premises about the nature of academic discourse. I contend, however, that both views represent overly narrow and circumscribed standards for evaluating scholarship.

I reject these extreme standards and instead argue that there is a range or register of voices in the academic debate that support, challenge, and question the values and presuppositions of the community of scholars. The resulting exchange of ideas leads to the evolution or repudiation of the scholarly community’s standards and paradigms.10 This register contains distinct quality as it is absorbed by the majority. Of course, as the Beatles and others have acknowledged, the “distinctive nature” of their music was, in part, due to their assimilation of “black or soul music” into their own music and presentation of this music to a white audience by white performers. This phenomenon is not unique. See DERRICK A. BELL, AND WE ARE NOT SAVED 128 (1987) (whites have systematically copied the work of black jazz musicians). I owe this particular insightful example to my research assistant, Jennifer Slye.

8. Indeed, the argument may be reduced to one addressing whether there is only one appropriate paradigm for evaluating the merits of academic scholarship. For further discussion, see Alex M. Johnson, Jr., Scholarly Paradigms: A New Tradition Based on Context and Color (unpublished manuscript) (on file with the Stanford Law Review).

9. Kennedy concedes that the standards employed to judge entry-level members of the academy may be biased in favor of “sectors of society that possess the power to impose such standards—sectors of society . . . that . . . prosper pursuant to these standards.” Kennedy, supra note 2, at 1763. Kennedy nevertheless embraces these biased standards. See, e.g., id. at 1772-74 (explaining and applying the “mercocratic” model to Delgado’s claim of exclusion).

10. This argument relies in large part on an analogy from G. Edward White, *The Text, Interpretation, and Critical Standards*, 60 Tex. L. Rev. 569 (1982) (arguing that notwithstanding the

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many different voices speaking—singing—at different levels—some alto, some soprano, some bass. Each voice adds to the harmony that is the song of the entire academic community. The trio of voices simply asserts that they can sing or express themselves in a voice or tone by hitting notes (ideas) that majority scholars are unable to achieve because they have a certain attribute (a cultural experience shaped by their race).

Part III addresses a concern at the heart of Kennedy's argument in *Racial Critiques*. If one attributes the privileged, distinctive voice to all scholars of color, then the works of these scholars, including Kennedy and myself, will be judged not on the basis of merit, but rather on the basis of color. As Kennedy defines the term, "‘merit’ stands for achieved honor by some standard that is indifferent to the social identity of a given author." Part III argues, however, that whether or not a scholarly work should be evaluated by the "objective" standard is partly a matter of the author's choice and intent. It is, in short, possible for a scholar of color to convince her audience not to judge her as such. My framework is capable of recognizing—hearing—the voice of color, while not categorizing all works by scholars of color as distinctive.

Part IV lays out an interpretive framework which demonstrates how the voice of color is articulated (sung). I focus on the context within which the author-audience communication occurs. I expand this interpretive context to include both the reader's perception and the author's intent and life experience. Only through this contextual analysis can one determine if and when the scholar of color "sings" with the voice of color.

I conclude by responding to Kennedy's articulation of the political risks he took in publishing *Racial Critiques*. The reader's perception that he speaks in the voice of color makes *Racial Critiques* both powerful and problematic for other scholars of color. *Racial Critiques* is compelling because Kennedy is able to espouse views that, because he is a scholar of color, are not viewed as racist. If similar arguments were made by a majority (white) scholar, charges of racism would be rife. Kennedy's claim that there is no distinct voice of color establishes, then, that there most surely is a voice of color whether one likes it or not.

apparently indeterminate nature of the standards employed to evaluate academic scholarship, points of consensus exist within the interpretive community of scholars as to what constitutes valuable work). For further discussion, see Johnson, supra note 8; text accompanying notes 72-101 infra.

11. My colleague, Dan Ortiz, suggested to me this analogy of comparing the voices of academics to the musical range or scale of singing voices.

12. Kennedy, supra note 2, at 1772 n.114.

13. In this respect, one can draw a parallel to the current controversy over the Rev. Ralph David Abernathy's autobiography, *And the Walls Came Tumbling Down*. In this book, a black individual makes certain claims about Rev. Martin Luther King, Jr. that many others find objectionable because of the source of the claims and not necessarily because of the veracity of the claims. See Prince & Mayfield, *Furor Grows Over “Mortal” King*, USA Today, Oct. 18, 1989, at 3A, col. 2; *A Fight Among Dr. King's Faithful*, Newsweek, Oct. 23, 1989, at 31, col. 1.
I. THE CHALLENGES TO THE CLAIMS OF THE SCHOLARS OF COLOR

This section examines the manner in which Kennedy challenges the trio of voices and the ground rules he establishes. Given the nature of the proof he requires, proving or disproving his central theses would be impossible. Instead, one must attack his assumptions. To do so, I propose to reorder Kennedy's analysis by first discussing whether the voice of color exists, and then its exclusion from legal academic discourse. A priori, if the voice of color does not exist, it cannot be excluded. 14

A. The Voice of Color: Professor Matsuda

Kennedy chooses Matsuda's article, Looking to the Bottom: Critical Legal Studies and Reparations, 15 to analyze the claim that scholars of color speak with a unique, distinctive voice. 16 In brief, Kennedy rejects Matsuda's claim of distinctiveness because "she fails to show the newness of the 'new knowledge' and the difference that distinguishes the 'different voices.'" 17 Kennedy argues that she cannot provide examples of wrongly-overlooked scholarship which meet his merit-based test. 18 In a theme repeated throughout Racial Critiques, Kennedy demands hard evidence that the voice is unique and distinctive. If the empirical evidence does not support the claim, it is dismissed as lacking merit.

Could the claims made by the trio of voices ever meet Kennedy's standard? Matsuda points to several works that she believes are self-evident proof that a voice of color exists, 19 and notes that majoritarian legal scholars have not cited works of legal academics of color. 20 Merely identifying uncited articles is not enough to satisfy Kennedy's demand for empirical proof that these works are somehow different. 21

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14. I find odd and somewhat troubling the manner in which Kennedy addresses the issue of the voice of color in his article. First, Kennedy questions the existence of the voice of color because its proponents supposedly cannot define the voice of color, and assume that the voice of color is monolithic and possessed by all scholars of color. See Kennedy, supra note 2, at 1780-81, 1802-04. I address these issues in Part III infra. Second, and most importantly, Kennedy conflates the issues of the existence of voice and exclusion in a manner that fails to address accurately the threshold question of whether a voice of color exists. In his view, it is enough to show that the writings of scholars of color have not been wrongfully excluded to answer the question of whether a distinctive voice exists. In this sense, the dual arguments of existence and exclusion have been collapsed into one argument about exclusion. If the voice of color is not unfairly excluded, and it is not recognized, then it must not exist. Consequently in Kennedy's view,

[the exclusion thesis and the distinctiveness thesis intersect in the idea that the value of intellectual work marked by the racial background of minority scholars is frequently either unrecognized or underappreciated by white scholars blinded by the limitations of their own racially-defined experience or prejudiced by the imperatives of their own racial interests.]

Kennedy, supra note 2, at 1747.

17. Id. at 1779.
18. Id.
20. See id. at 351.
21. Kennedy's response to the exclusion claims of Professor Delgado is similar. See notes 45-47 infra and accompanying text.
Kennedy relies on objective standards that may be inappropriate in this context. He denies the existence of a racially distinct voice because Matsuda and others have not convinced him that the voice of color should be privileged on race-related issues or even recognized as something different from the majoritarian voice.\(^{22}\)

Kennedy argues that Matsuda's claims that people of color speak in unison on race-related issues and that all scholars of color speak with a distinctive voice actually support his contention.\(^{23}\) He suggests that class and political differences among scholars of color diversify their viewpoints and perspectives.\(^{24}\) Furthermore, since not all scholars of color have shared the same searing, shaping experiences involving racism, no uniform voice of color would emerge.\(^{25}\) Kennedy convincingly rejects Matsuda's presumption that all scholars of color have undergone the same initiation into "racial victimhood" that would give them a single voice of color.\(^{26}\)

Kennedy's rejoinder may demonstrate that all scholars of color do not speak with a single voice on race-related issues where one would assume they would if a voice of color truly exists.\(^{27}\) Beyond demonstrating that all scholars of color do not speak with one voice, he challenges the claim that any scholar of color can speak with a voice of color. There is, however, a difference between asserting that every scholar of color speaks with a distinctive voice, and asserting that a particular group of scholars of color speaks with a distinct voice of color—a "chorus" of color.\(^{28}\) While Kennedy is correct that the voice of color is neither monolithic nor possessed by every scholar of color, it does not follow that no scholar of color speaks with the distinct

\(^{22}\) Kennedy, supra note 2, at 1778.

\(^{23}\) Id. at 1782-85.

\(^{24}\) Id. at 1782. Although Kennedy's critique of Matsuda's article is substantially correct, it overlooks the fact that she may be generalizing for stylistic reasons. Kennedy's critique also ignores Matsuda's caveat that she is not a spokesperson for all minorities, but is speaking from her experience.

In attempting a non-white response to CLS [Critical Legal Studies], I risk writing about the experiences of other races in ways that may not ring true for some members of that race. Thus it is necessary to state at the outset that I am presenting elements of the non-white perspective gleaned from my reading and my experience for whatever insight the reader chooses to draw. This article is not intended as and cannot be a definitive statement of the minority perspective.

Matsuda, supra note 15, at 331 n.37 (emphasis added). Matsuda's caveat is itself inconsistent with claims that scholars of color all speak with the same voice.

\(^{25}\) Matsuda, however, simply presumes that any scholar of color will have undergone the experience—the initiation into victimhood—that she deems so important. In her analysis, racial status and the experience of racial victimization are fastened together inextricably and unambiguously, creating a vestment that comes in one size and is apparently supposed to fit all people of color.

Kennedy, supra note 2, at 1782 (emphasis in original).

\(^{26}\) Id. at 1782-83.

\(^{27}\) Id. at 1782-87.

\(^{28}\) See notes 119-129 infra and accompanying text. It is possible that some scholars of color speak with the voice of color while others do not, even if one assumes that white scholars can never speak with that voice.
voice of color.29

B. Excluding the Voice of Color: Professor Delgado

It is more difficult to dismiss Kennedy's claim that Delgado and others have failed to prove their racial exclusion thesis.30 In *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*,31 Delgado sets out to prove the exclusion thesis by demonstrating that white scholars who write articles about affirmative action and civil rights issues cite to each other's articles and fail to cite, discuss, or recognize the contributions of authors of color to this scholarship.32 Delgado attributes this shortcoming to the subconscious desire of white scholars to minimize their own guilt and maintain their control over the field.33 If majority scholars control the scholarship in the area, they set the agenda for remedying racism.

Kennedy replies that Delgado has failed to support his claims of racial exclusion with objective evidence demonstrating that particular articles written by scholars of color were ignored when citation was warranted. In other words, Kennedy demands proof based on what has been termed a "meritocratic model."34 It is not enough (and I agree) to assert that articles written by scholars of color are not being cited for reasons having to do with their race if you cannot identify what articles have been wrongfully omitted.

The issue, however, is not whether there are works by authors of color that have not been cited by majority authors; Delgado identifies several.35 Kennedy does little to refute Delgado's assertion that these articles have not been cited by majority scholars.36 Kennedy appears to challenge whether these articles are worthy of citation. Hence, the issue is not exclusion, but merit.37 But Delgado evades the issue of merit by asserting that these works

29. For a discussion of when scholars of color speak with the voice of color, see notes 89-94 infra and accompanying text.
30. See note 14 supra.
32. Id. at 563-66.
I think I have discovered a second scholarly tradition. It consists of white scholars' systematic occupation of, and exclusion of minority scholars from, the central areas of civil rights scholarship. The mainstream writers tend to acknowledge only each other's work. It is even possible that, consciously or not, they resist entry by minority scholars into the field, perhaps counseling them, as I was counseled, to establish their reputations in other areas of law.

Id. at 566 (footnotes omitted).
33. Delgado, supra note 31, at 571 (noting that white legal scholars "rarely deal with issues of guilt" when discussing reparations) and 574 ("It may be that the explanation lies in a need to remain in control [of legal change].").
34. Kennedy, supra note 2, at 1772-73. Delgado has prepared a response to Kennedy's charge that he has failed to prove his exclusion thesis based on a meritocratic model. Richard Delgado, *When A Story is Just a Story, Does Voice Really Matter?*, 76 VA. L. REv. 95, 100-02 (1990); see also Delgado, supra note 5.
35. Delgado, supra note 31, at 576 n.76.
36. Kennedy, supra note 2, at 1775 & n.127.
37. And if merit, as defined by Kennedy, is the only criterion for evaluating academic work, then Kennedy makes a fatal attack on Delgado's exclusion argument because to accept Delgado's contrary point of view that exclusion alone is dispositive, the reader must accept exclusion as prima facie evidence of discrimination. On the contrary, one must investigate the *worth* of the work, judged
are valuable and worthy of citation because they are written by scholars of color and that fact "constitutes virtually a presumption of expertise . . . ." According to Delgado, exclusion eliminates from the discussion perhaps the most important voice. Kennedy, of course, rejects this assertion. Kennedy simply rejects the claim that color has special attributes that are insightful and beneficial to the discussion and resolution of issues to which it speaks.

Furthermore, Kennedy characterizes this argument as a political one. The primary motivation, according to Kennedy, is to displace majority scholars from influential positions in the fields of civil rights and race relations law in favor of scholars of color. Once again, however, Kennedy's meritocracy arguments have influenced his critique of Delgado's claim because he believes that Delgado's claim is motivated by and symptomatic of a desire on the part of scholars of color to carve out an area in which they will not have to "compete" with majority scholars. Having eliminated the competition, scholars of color will presumably be judged by relative—mediocre in Kennedy's eyes?—standards that compare one scholar of color to another instead of to all scholars irrespective of color.

Assuming there is a voice with which only scholars of color may speak, Delgado's claim that the voice should be privileged is insupportable if its premise is that majority scholars are obligated to defer to the voice of color solely because of the race of its proponents and the mere existence of a voice. The claim of distinctiveness based on racial identity does not equate with worth or, to use Kennedy's term, merit. The fact that scholars of color have something different and distinct to add to the discourse that is uniquely related to their race does not necessarily mean it is universally valuable to majority scholars merely because it is different. Some of the insights brought by the voice of color may be "meritorious," some may not.

Similarly, Delgado's appeal to majority scholars to step aside in favor of scholars of color is shortsighted for the same reasons that Kennedy attacks Delgado's exclusion claim. Indeed, despite Delgado's better intentions, his proposal threatens to produce a segregated body of scholarship with scholars of color privileged to speak to racial issues and whites privileged to speak to white issues, the disturbing consequence being that scholars of color could be limited to certain types of scholarly interests. Delgado's position assumes that color is an ennobling characteristic that when coupled with other, achieved attributes—a law degree, good grades, and an academic position—trumps an individual similarly situated but lacking that attribute.

by whatever standard, to determine if its exclusion is proper or inappropriate based on the relevant standard.

38. Delgado, supra note 31, at 564 n.15.
39. See notes 23-27 supra and accompanying text.
40. Kennedy, supra note 2, at 1774-78.
41. See id. at 1787-88.
42. Id. at 1795. Indeed, "Delgado seems to want to transform the study of race-relations law into a zone of limited intellectual competition." Id.
43. Id. at 1789-91.
44. See Kennedy, supra note 2, at 1801-07 (discussing race as an intellectual credential).
That may be (I doubt it), but Delgado never explains why that one ascribed attribute—color—trumps all others when the relevant gauge is merit or, more precisely, how to define "merit." Nor does Delgado delineate which areas of scholarship should be judged by the traditional standard of merit as Kennedy defines it.

Finally, Kennedy dismisses Delgado's exclusion claim because Delgado cannot prove that those who exclude the works of scholars of color are racially motivated.\(^4\)\(^5\) He challenges Delgado to prove that they were worthy of citation in the first instance.\(^4\)\(^6\) Although determining whether uncited articles justify attention and citations is a subjective inquiry, Kennedy demands empirical, objective proof of merit. Kennedy's argument is circular. It assumes that if the omitted articles contained anything worthy of citation, they would be cited; hence, the burden is on Delgado to show that these articles contained something worth citing, or to find a better standard of merit.\(^4\)\(^7\)

The problem with the arguments of both Delgado and Kennedy is that each assumes a uniform meritocratic model without ever truly defining what is meritorious in this context. According to Kennedy, Delgado has not proved his racial exclusion thesis because he has not shown that the excluded work, when judged by "preestablished impersonal criteria" that are indifferent to the color of the scholar,\(^4\)\(^8\) is found deserving of merit. Conversely, Delgado claims that the works of scholars of color are worthy of citation merely because they are written by scholars of color.\(^4\)\(^9\) Thus, Delgado fundamentally equates color with merit, while Kennedy equates merit with attributes that expressly reject the color of the scholar.\(^5\)\(^0\)

Unfortunately, both Delgado and Kennedy assume that worthy scholarship can be defined objectively and agreed upon by all ex ante. But what is worthy—or meritorious—depends on the views held by the one making the judgment.\(^5\)\(^1\) Most importantly, even if the community of scholars can agree on an objective definition of merit ex ante, such a definition must not ignore the values of pluralism and diversity.\(^5\)\(^2\) Thus, the fact that one audience,

\(^4\)\(^5\) Kennedy, supra note 2, at 1773-77.
\(^4\)\(^6\) "The persuasive way to reveal this alleged sin of omission would be to identify scholarship that deserves to be recognized but that is unfairly overlooked." Id. at 1774.
\(^4\)\(^7\) That Kennedy's argument is circular is buttressed by the fact that he disputes the claims of the trio of voices in the pages of the Harvard Law Review. One could argue that such disclaimers in such a prestigious review itself proves the merit of the articles disclaimed. Of course, the discussion in this essay, as well as in Racial Critiques, may prove that the works of the trio of voices—and other scholars of color—have not been marginalized or excluded.

\(^4\)\(^8\) Kennedy, supra note 2, at 1772-73 (citing ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURES 607 (rev. ed. 1968)).
\(^4\)\(^9\) I understand Delgado to be equating worthiness of citation with "merit." Thus, the work of scholars of color is presumptively meritorious.
\(^5\)\(^0\) For a detailed discussion of the inapplicability of Kennedy's definition of merit to this issue, see text accompanying notes 71-84 infra.
\(^5\)\(^1\) See notes 72-77 infra and accompanying text.
\(^5\)\(^2\) See Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975) ("The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audience for many purposes.'"); see also Texas v. Johnson, 109 S. Ct. 2533, 2541-42 (1989) (speech that invites dispute or angers people is nonetheless protected...
even a majoritarian audience, does not find merit in a certain scholar's work does not mean it would be without merit for another audience. The fact that such ideas are deemed worthy of protection in our society through, for example, the first amendment, is a recognition of the inherent and separate value of diversity.

Kennedy's and Delgado's positions unnecessarily narrow the notion of merit in a manner which obscures the real issue. Their skewed postures turn the debate into a choice between two competing evaluative paradigms for scholarship: color-blind merit, and merit by color alone.

The debate should be over the merit of color, rather than over the definition of a meritocratic model. If we interpret Delgado's contentions as proclaiming the merit of color, then the voice of color is positive and enriching because it informs us as to how some affected groups feel about and perceive certain issues. There is definitely merit in this claim because civil rights law—Delgado's focal point—largely concerns human feeling and perception. Contrary to some of Delgado's broader claims, however, acknowledging the validity of the voice of color does not trump or supplant Kennedy's majoritarian, merit-based standard; neither does the merit-based standard, in itself, deny the existence of the voice of color. Examining issues from a different viewpoint will often yield further insight. The perspective of color is a unique evaluative tool which everyone in the academy should be aware of despite their status as majority scholars. As the first amendment values diversity, so should they.

C. A Racial Critique of the Professoriat: Professor Bell

After reading Racial Critiques many times, I was unsure exactly how Professor Bell's scholarship fit into the article's central purpose of refuting the claims of distinctiveness and exclusion raised by scholars of color. As one of the more popular and distinguished scholars of color in the country and a tenured professor at Harvard Law School, Bell has a platform from which to speak. Bell's works have not been ignored, and he has made no claim of racial exclusion. Of Bell's works discussed by Kennedy, none addresses the issue of whether one speaks with a voice of color merely because one is a member of a racial minority. Bell instead analyzes the behavior and

53. Hence, a neo-Nazi's speech is protected by the first amendment and, unfortunately, may reach a receptive audience that believes it to be worthy. Under the first amendment, the fact that I abhor such speech is, however, irrelevant to the recipient's perception that it is valuable or invaluable. See Collin v. Smith, 578 F.2d 1197, 1206 (7th Cir. 1978) (state may not prohibit speech because it expresses "unpopular view" or "even stirs people to anger"), cert. denied, 439 U.S. 916 (1978).

54. See text accompanying note 127 infra.

55. Bell has recently used that platform to protest Harvard's hiring decisions that have failed to increase the number of tenured or tenure-track female scholars of color on the law school faculty. Bell's position has attracted national attention in the popular press. See, e.g., N.Y. Times, Apr. 24, 1990, at 1, col. 1. Kennedy also teaches at Harvard. More importantly, Kennedy's status as a scholar of color at Harvard University provides additional credibility to his thesis.

56. Kennedy, supra note 2, at 1775 n.127.
actions of whites and their effects on people of color. Still, Kennedy levels against Bell some of the same criticisms he has for Matsuda and Delgado. Kennedy identifies Bell's allegorical tale, The Unspoken Limit on Affirmative Action: The Chronicle of the DeVine Gift, as "[t]he piece that best conveys [Bell's] view of the race problem in the legal academic establishment ...." Kennedy attacks the piece because it posits a fictional scenario focusing on the alleged racial prejudice of majority scholars, while ignoring evidence that in reality majority scholars may not be to blame for the small number of scholars of color. Kennedy hypothesizes that other factors, including "self-limiting social-psychological adaptations," may cause scholars of color "to engage in various strategies of avoidance: for example, exempting themselves from the risks of failure by refusing to compete on the same terms as whites or refraining from investing themselves wholeheartedly in their careers."

Bell's story suggests that majority scholars have an unvoiced limit on the number of minorities they will hire, and that they will "resist hiring beyond a certain number of even the most qualified teachers of color." To make this point, Bell hypothesizes a candidate who, despite his stellar credentials for an entry-level faculty position at any law school, is turned away because the school has "enough" scholars of color on its faculty. Unlike Delgado and Matsuda, Bell assumes neither racial distinctiveness nor racial exclusivity. Instead, Bell believes that racist prejudices and fears may have some effect on maintaining the low numbers of scholars of color in legal academia. Whether one believes Bell's claim is largely irrelevant because
Kennedy never denies that majority faculty members may act in a racist fashion to protect their hegemony. Instead, Kennedy discounts Bell’s hypothetical candidate allegory because the dearth of qualified candidates of color makes the entire scenario implausible. Kennedy points to the “possibility of underachievement by black intellectuals” as a cause of the shortfall in “qualified” applicants. In Kennedy’s view, it is not the fault of the academy that the candidate is not out there applying for jobs. Rather, it is the fault of aspiring scholars of color for not complying with the same standards by which majority scholars are judged. Interestingly, Kennedy skirts the issue raised by Bell: Would faculties faced with this admittedly hypothetical candidate reject him purely on the basis of race? I think not, but Kennedy does not respond to that question.

D. Analyzing the Challenge: A Focus on Merit

An analysis of Kennedy’s critique reveals that the core of his objection is his perception that the trio of voices in their claims privilege color over merit. Kennedy is preoccupied with merit, as he acknowledged recently at a conference for minority law teachers.

Unfortunately, this preoccupation prevents Kennedy from reaching the substantive claims of the trio of voices. He never addresses the claim that “voice” is relevant in legal scholarship, be it the voice of color, the feminine voice, or the majoritarian voice. Kennedy also fails to respond to the normative claim that the voice of color benefits all of legal academia. Kennedy’s implicit definition of merit as majoritarian and color-blind keeps him from reaching the heart of the debate.

True, Kennedy succeeded in proving what he set out to prove in Racial Critiques. He proved the limited point that there is no objective basis, judged within his narrow meritocratic standards, for the propositions of distinctiveness and exclusion made by the trio of voices. Kennedy’s main premise, however, undermines his conclusions because the standard he constructs for evaluating scholarship is culturally biased against the inclusion of a voice of color. Kennedy’s narrow definition of merit implies either that all scholars speak in one voice (the majoritarian voice), or that “voice” per se is no more relevant to the determination of merit than the size of the type in which this essay is written. Consequently, the standard by which Kennedy

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67. Kennedy, supra note 2, at 1767 (emphasis in original).
68. In fact, Kennedy appears to sense that the trio of voices would individually and collectively agree to substitute color for merit in evaluating scholarship, something Kennedy, I, and many others would find completely unacceptable.
70. For a discussion and definition of the majoritarian voice that characterizes it as elitist, see Johnson, supra note 6.
71. See notes 65-69 supra and accompanying text.
judges the trio of voices rests on values and presuppositions that have hereto-
fore excluded the voice of color, or for that matter, any "voice" at all.

II. EXPANDING THE CHORUS: HEARING ALL THE VOICES

Kennedy does not set out to define or elaborate his majoritarian, merit-
based standard in Racial Critiques, although he uses the term "merit" re-
peatedly. Implicit in Racial Critiques, however, is the merit-based standard
of an "interpretive community"72 whose intellectual, hierarchical values, if
not expressly majoritarian (white), exclude the voice of color precisely be-
cause it is the voice of color. The concept of voice is antithetical to a concept
of merit based on uniformity and homogeneity—the paradigm employed by
majoritarian scholars to determine worth or merit. Kennedy is subject to his
own critique: The standard with which he starts is culturally biased. (One
could just as easily imagine a majoritarian standard that placed pluralism
and diversity above homogeneity, hierarchy, and uniformity.) Kennedy
speaks from within the majoritarian culture, judging scholarship by stan-
dards created by the majority—standards that do not recognize "voice" as a
relevant, ascribed attribute. Scholars of color, by contrast, speak from
outside the majoritarian culture. They claim exclusivity to the outsider’s
voice because they live on the margins of the majoritarian culture. In my
view, neither perspective captures the fundamental issue.73

Kennedy’s view is too limiting because it unnecessarily constrains the
exchange of ideas in our pluralistic society.74 Despite Kennedy’s color-blind
view of merit, he freely acknowledges that our society is extremely pluralis-
tic, encompassing diverse views, including those of people of color. In fact,
Kennedy uses the diversity of people of color to dispute the notion that there
is a uniform voice of color.75 Kennedy’s meritocratic standard effectively
validates the hierarchical professional standards that are merit-based, but
ignores the social values of diversity and pluralism.76 In this regard, Ken-
nedy is like other scholars who have failed to reconcile pluralism (and the
ideas generated thereby) with a monistic view of meritocracy.77

72. For a definition and discussion of the "interpretive community" in this context, see notes
95-96 infra and accompanying text.
73. Professor Espinoza likewise contends that Kennedy’s preoccupation with process causes
him to avoid the substance of the trio’s arguments and, therefore, the merits of these arguments. See
Espinoza, supra note 3, at 1881.
74. Kennedy appears to contradict himself when he suggests that scholars should “inculcate
what Gordon Allport referred to as ‘habitual open-mindedness,’ a skeptical attitude towards all labels
and categories that obscure appreciation of the unique features of specific persons and their work.”
Kennedy, supra note 2, at 1797 (citation omitted). Kennedy’s approach would apply uniform stan-
dards to a diverse, pluralistic society.
75. Kennedy, supra note 2, at 1783-85.
76. See White, supra note 10, at 585.
77. See, e.g., William E. Nelson, Standards of Criticism, 60 Tex. L. Rev. 447 (1982). Profes-
sor White’s response is noteworthy:
I cannot resist noting that Nelson’s effort to distinguish between ideological pluralism and
a professional consensus on what constitutes good scholarship has a discernible (and to me
revealing) character. It is the distinction of a scholar who seeks to reaffirm the validity of
hierarchical professional standards while at the same time suggesting that hierarchical so-
Kennedy's meritocratic argument is both static and circular. It is circular because it is based on meta-theories that exclude from the definition of merit the very attributes of the scholarship's contribution that a critic seeks to evaluate and, as a result, ignores the contributions of scholars of color who intend to speak in a distinctive voice. It is static because he rejects the introduction of new voices that may influence the evolution of meta-theories. At some point, the new meta-theories will incorporate and absorb the ideas presented by the scholars of color. Kennedy paradoxically repudiates hierarchical social values while simultaneously adopting hierarchical professional standards. This attempt to distinguish between ideological pluralism and a professional consensus on what constitutes meritocratic scholarship seems rooted in Kennedy's desire to avoid the indeterminacy of a standard of scholarship that confers equal respect upon all positions. This is especially troubling to Kennedy given the stigmatizing potential of the standard that presumably would be employed to judge the scholarship of scholars of color.

I believe the voice of color offers a new mode for critically examining previously unquestioned assumptions and theories, a mode that explicitly employs the contributions of scholars of color. Recognizing the voice of color as a distinct and valuable voice reflects the fact that life experiences and individual value systems based on those experiences are relevant in determining which scholarship is worthy or meritocratic. Kennedy's determination that the voice of color is ameritocratic, by contrast, depends on a value system that does not acknowledge the inherent pluralism of our society and excludes any non-majoritarian standard. Kennedy recognizes that this is a diverse, pluralistic society, but he cannot see that his standard for judging scholarship is based on an artificial view of supposedly neutral hierarchical professional standards that in fact are informed by a notion of

cial values are no longer permissible in today's society; all ideological perspectives deserve equal respect.

White, supra note 10, at 585 (emphasis in original).

78. Professor White describes "meta-theories" as tacit value judgments on which scholarly interpretations are based.

Kuhnian logic leads one to the proposition that scholarly interpretation cannot be starkly separated from either scholarly evidence or from the "meta-theories" (tacit value judgments) on which scholarly interpretations are premised. . . . Kuhnian logic adds a new dimension to criticism, for as soon as one unravels a scholar's meta-theory, and then reexamines the scholar's evidence, one can see how the meta-theory was so compatible with certain interpretations of evidence that they were virtually preordained.

White, supra note 10, at 570.

79. For a discussion and definition of paradigms that are Kuhnian in their evolutionary development, see Johnson, supra note 8 (examining and adopting the definition of paradigms set forth in THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 10, 23, 181-87 (2d enlarged ed. 1970)). Milner S. Ball also argues that Kennedy wrongly ignores the possibility that interpretive or evaluative paradigms shift or evolve over time. See Ball, supra note 3, at 1856-57.

80. See note 109 infra and accompanying text.

81. Others have also endorsed the value of life experiences as part of an interpretive paradigm for evaluating scholarship. See Ball, supra note 3, at 1861; Barnes, supra note 3, at 1867.
As an alternative, I propose an interpretive framework premised on Professor White's view of relative objectivity that values the incumbent academic standard, yet evolves by embracing the views of scholars who may speak and may be interpreted as speaking with a distinct voice. This framework, based on the concepts of interpretation and critical standards, recognizes and values the voice of color without rejecting the majoritarian, hierarchical professional standard that Kennedy and others embrace.

I agree with Kennedy that relatively objective criteria exist for evaluating scholarship. These objective criteria, however, are inseparable from the meta-theories or value judgments on which the scholarly interpretations are based. The use of meta-theories to judge scholarship is possible when the underlying values are agreed upon and expressly articulated by the interpretive community. When those preferences and values are diverse and pluralistic, the possibility exists that we may "have no objective criteria for determining distinguished scholarship and no basis of agreement for deciding how we can go about formulating such criteria, [and, as a result,] we are close to conceding that what we do has as much significance as sound and fury."

What distinguishes the voice of color? The search for the distinctive voice must begin with the text prepared by the scholar of color. The text can and should be used as a source of meaning, though its meaning may be uncertain. The text, in turn, is partly a result of the author's life experiences. The proposition that life experiences influence, consciously and subconsciously, what an author writes is, on the surface, non-controversial. Indeed, it cannot be avoided. My point here is much narrower and focused. I contend that the author's status as a scholar of color and her membership in a discrete, defined community, such as the community of color, gives her experiences at odds with peers raised in the majoritarian culture. Those different experiences particularly influence what the author writes on topics and issues affected by the differences.

Thus, it is hardly a revelation that a scholar of color who attended segregated schools may have different views of civil rights cases, legislation, or critical race theory generally, than her colleague who did not. Similarly, a child growing up in an oppressed community, even when the child herself was not a direct victim of racial oppression, would feel its effects in ways not

82. White, supra note 10, at 585 (discussing incompatibility of hierarchical professional standards with rejection of hierarchical social values).
83. See id. at 574-84.
84. See notes 78-79 supra and accompanying text.
85. White, supra note 10, at 570. Discovering these tacit values will be very difficult—if not impossible—for most interpretive communities.
86. Id. at 569.
87. "The fact that texts will have different meanings for different people in the same generation, or even radically different meanings to different generations, is no reason to conclude that the concept of meaning entirely subsumes the concept of text." White, supra note 10, at 573.
88. See notes 119-122 infra and accompanying text.
experienced and perhaps not understood by her peers outside that community. 89

The everyday experience of the scholar of color that reminds her that she has links to two communities—her oppressed, minority community and her majoritarian, academic community—may influence her referential viewpoint. 90 For example, when I was called upon in Criminal Procedure class to explain how it felt to be stopped and searched by the police, I was angry that the professor assumed that I was stopped and searched at some point in my life. I was even angrier that the professor was right and that almost all the black males in that class (of which there were four) had at some point been subject to racist and intrusive police procedures. 91 If I ever write about the constitutionality or efficacy of police procedures, my status as a scholar of color and my life experiences will influence my writing; not necessarily because I was stopped and searched—there are many white scholars who can perhaps make that same claim—but because I was stopped solely because I was a black youth living in the inner city at a time when that alone made the police view me as the enemy.

In addition, the author's intent may be influenced by her interpretive community. 92 She may assert claims or impart special meanings based in part or whole on her membership in the community of color. Indeed, Kennedy's rejection of the claims made by the trio of voices has special meaning because he is a scholar of color.

Regardless of author's intent, the reader—the interpreter—must be able to discern the text's meaning. It is here that the scholar of color may have

89. One writer describes how as "a black, I have been given by this society a strong sense of myself as already too familiar, too personal, too subordinate to white people. I have only recently evolved from being treated as three-fifths of a human, a subpart of the white estate." Very early on, children of color become aware of the assumptions and expectations that attempt to mark them categorically as second-class citizens unworthy of praise. This "other" consciousness is reinforced across the generations in our familial and community interactions. "We learned from life as well as from books. We learned about injustice, social cruelty, political hypocrisy and sanctioned terrorism from the mouths of our mothers and fathers and from our very own experiences." Many of us remember when we first realized that we were black, and that discovery had a more profound impact than every other thereafter. We do not escape the reality of our experience as members of a racially oppressed group when we enter the legal academy.

Barnes, supra note 3, at 1867 (footnotes omitted) (emphasis in original).

90. Often, and often from necessity, [scholars of color] must live in two worlds, the dominant, dominantly white one, and their own. They are the more likely bilingual, with experience in translation. I seek them out to learn about my world and theirs, and about the art of translation. This is neither to patronize nor to encourage nostalgia about living at the bottom. It is to challenge conventional references for locating who is at the top and who on the bottom and who therefore may enjoy a view with broad horizons.

Ball, supra note 3, at 1861 (footnotes omitted).

91. When I look back now, I find it oddly humorous that we four students of color were thereafter regarded as the experts in Criminal Procedure because we had been subjected to such offensive treatment. I am sure this is not what is meant when it is alleged that having persons of color in the student body adds to the educational experience of all the students.

92. See notes 121-129 infra and accompanying text.
trouble disseminating her message in the voice of color. As Professor White argues, in order for meaningful scholarship to exist, the interpretive community must impose critical standards. Otherwise, the entire academic enterprise becomes radically indeterminate.93 The interpretive community relies on certain tacit presuppositions which help determine the critical standards and the merit accorded to scholarly articles. If these tacit presuppositions do not recognize voice or the distinctiveness of the voice of color, then scholarship by those who claim to speak in the voice of color will be undervalued. In other words, the scholar speaking in the voice of color is not speaking "within the common language of the community."94

I have used the term "interpretive community" to refer to the collective body that serves an evaluative as well as interpretive function within legal academia. The term is associated with literary theorist Stanley Fish.95 Professor Fish believes that "tacit presuppositions" inform the actions of the interpretive community and are impervious to conscious change or choice.96 In his theory, the community cannot choose to accept or reject these tacit presuppositions and they, therefore, serve as constraints on interpretation.

In contrast, I exhort the legal academy to recognize the voice of color. I believe that an interpretive community has the cognitive capacity to recognize the voice of color and embrace it. I believe that these presuppositions are relatively freely chosen. I recognize that this runs the risk of implying that I believe these presuppositions to be no different than any other subjective preference that one can assume or reject at will. This would lead to the radical indeterminacy that Fish seeks to escape and undermine the idea of a stable conception of merit (or some form of community consensus). I agree, however, with Professor White who notes that as new paradigms evolve from old paradigms, tacit presuppositions are employed and are consciously changed. This understanding is aided by the conception of provisionally adopted or accepted truth.97

93. White, supra note 10, at 586.
94. Id. at 576 (emphasis in original).
95. See Stanley Fish, Dennis Martinez and the Uses of Theory, 96 YALE L.J. 1773 (1987).
96. Fish writes, [Judges and legal theorists] merely register[] what they see and proceed[] in ways that seem to them to be obligatory and routine, and they do these things not because they have applied this or that epistemology, but because within the beliefs and assumptions that constitute their perception and their sense of possible courses of action, there is nothing else they could do. Id. at 1785 (emphasis added).
97. But suppose the first possible meaning of objectivity is a more modest one: what has been demonstrated to be a right answer for a community at a point in time and space. . . . If every community paradigm has its "puzzles," to use Kuhn's language, there will be questions to which the community urgently seeks answers, and if I am correct that the quest for the answers must take place within the common language of the community, then prospective answers to urgent questions must be shown to be right. . . . And it is clear that for a time some answers are shown to be right, at least in the sense that they are provisionally accepted and used as a basis for inquiring about other questions. . . .

All objective truth is, in this usage, merely currently provisionally accepted truth. But while the usage is modest, it is not identical to no truth at all or to the aggregate of preju-
I contend that the legal academy has provisionally accepted evaluative standards which are explicit enough to be changed by conscious action of the interpretive community. If we accept the evolutionary nature of paradigms, the evaluative standards can be seen as constantly evolving as consensus evolves within the legal community.

How does the conception of evolving evaluative standards help us interpret claims of scholars of color that their work has been excluded from legal discourse? They are excluded not because of invidious racism, but rather because their claims have not generally been cognizable by the legal academic interpretive community. However, as our culture becomes more pluralistic and our profession becomes more integrated, other values will begin to impinge upon and influence the development of standards and the meta-theories that scholars share. Professor White's theory of relative objectivism—that "what has been demonstrated to be a right answer for a community at a point in time and space\(^9\) is truth—may provide an answer.

Professor White, adopting a Kuhnian approach,\(^9\) argues that there is an evolutionary process by which breakthroughs are made in scholarship despite the presence of preexisting tacit value judgments.\(^10\) The claim of dis-

dice. This is because when members of the interpretive community are persuaded (or have demonstrated to them) that a question has been answered successfully, they cannot be said to have arrived at a consensus of subjective beliefs. They retain their widely divergent beliefs on most of the rest of life; they merely agree that for a time an answer is right.

White, supra note 10, at 578-79 (emphasis in original).

98. Id. at 579.

99. As paraphrased by Professor Eisenberg:
[A] paradigm is a model, principle, or theory that explains most or all phenomena within its scope, but is sufficiently open-ended to leave room for the resolution of further problems and ambiguities. At the time of its formation, a paradigm looks both backward and forward. Looking backward, the paradigm permits and indeed requires the reconstruction of prior explanations. Looking forward, the paradigm will be applied and extended, by further articulation and specification, to resolve additional problems and ambiguities and to uncover new or previously disregarded phenomena.

Melvin Aron Eisenberg, The Bargain Principle and Its Limits, 95 Harv. L. Rev. 741, 751 (1982) (paraphrasing T. Kuhn, The Structure of Scientific Revolutions, supra note 79, at 10, 23, 181-87); see also Ball, supra note 3, at 1856-57 (making a Kuhnian argument that majority scholars may be blind to the significance of scholarship of color but this will change as this scholarship is "translated").

100. There is, however, an important distinction lurking here: the distinction between scholarship as ultimately contingent, in the sense that it is shaped by paradigms within a professional community and beliefs within the larger culture, and scholarship as provisionally finite, in the sense that certain works appear, are evaluated, and provide opportunities for concrete disagreements by persons who may share meta-theories but differ sharply on issues of a less exalted kind. . . . [O]ne cannot address the question of how scholarship is received by communities without addressing the scholarship that in fact appears. On some occasions new scholarship may be wholly cognizable within the tacit interpretive framework of a community; on other occasions it may not be. But on all occasions, the merits of a work of scholarship cannot be determined independently of an assessment of the work itself. Judgments about scholarship cannot be said to be wholly determined; they are susceptible to revaluation by exposure to the scholarship being judged. Indeed it may be the appearance of seminal scholarship that stimulates the formation of mini-communities ("schools" of thought), rather than the presence of communities that predetermine what scholarship will be seminal.

White, supra note 10, at 577-78 (emphasis in original).
tinctiveness made by the trio of voices is plausible given the expansion of the interpretive community. The meritocratic standard espoused by Kennedy and others represents one manner of evaluating scholarship. Yet our culture and the meta-theories on which scholarly interpretations are premised are no longer constrained to one over-arching paradigm which excludes all others.

I believe we are at a crossroads in legal scholarship. The changing membership of the interpretive community is challenging the tacit presuppositions and hence the standards by which we evaluate scholarly work. Like society generally, the legal academic community is becoming more diverse and pluralistic. What was previously the exclusive realm of white men is giving way, slowly, painfully and not without objection, to a multi-cultured, multi-hued, dual-gendered professoriat. The standard of merit used by Kennedy in *Racial Critiques* represents an unfortunate attempt to maintain the traditional “elitist” consensus in the face of indisputable changes in the professoriat and in our society.101

III. REJECTING THE ABSOLUTES: THE ROLE OF CONTEXT IN LIGHT OF HIERARCHICAL STANDARDS

Part of what I find intriguing about *Racial Critiques* is Kennedy’s adamant, militant adoption of the meritocratic standard by which to measure the existence and worth of the voice of color.102 His use of the standard is puzzling in light of his earlier criticism of the use of merit and questions concerning “the thoroughly political . . . nature of ‘merit.’” 103 How can merit, criticized by Kennedy on the one hand, be used in *Racial Critiques* to judge the claims of the trio of voices? As I thought about the role of merit in light of Kennedy’s apparently inconsistent positions, and my own views about merit as one of many evaluative standards, I came to the conclusion that the inconsistent positions taken by Kennedy have nothing to do with his conception of merit and its appropriate use in the professoriat. I agree to an extent with Kennedy’s earlier claims that merit is not objectively neutral and apolitical. Merit is, rather, a reflection of the interpretive community employing an appropriate evaluative standard.

The real problem, I fear, is the claim by the trio of voices that the voice of color is homogenous and common to all scholars of color regardless of

101. Academic life has been arranged on the principle that contributions are not valued equally; efforts to replace that principle with parliamentary democracy have resulted in academic freedom of an uninformed and unsettling kind. It is unsound . . . to think that because one is an egalitarian one is therefore unqualified to recognize the unequal quality of educational achievements; it is unsound to think that because one is a pluralist one must view all scholarship as equally meritorious. *Id.* at 586; see also Johnson, *supra* note 6 (discussing elitism inherent in the application of the majoritarian standard).

102. Ball states that Kennedy adopts an “academic ideal of detached, individualistic, monastic purity of heart” that masks and perpetuates the existing power structure. *Ball, supra* note 3, at 1860.

other exogenous factors. This claim has the potential to classify all work produced by scholars of color as "only" that, regardless of topic or author's intent. The claim of a monolithic voice of color is as insupportable as the claims that the evaluative standard of merit is value neutral, can be divorced from its cultural context, and can be apolitically applied to "fairly" judge the worth of all scholarship. I cannot accept either extremist view.

As a scholar who does not claim to speak in the voice of color, I find it paradoxical to critique the work of a scholar of color who criticizes the trio of voices. Indeed, those familiar with my scholarship might initially assume that I would agree wholeheartedly with Kennedy's conclusion. Thus, unsurprisingly, I generally agree that no monolithic voice of color exists.

I strongly disagree, however, with Kennedy's assertion that a simple literature survey of black scholarship shows that people of color do not speak with a uniform voice. The obvious fact that all people of color do not agree on all issues of race—as Matsuda asserts—fails to address the issue of whether any voice of color exists. There are two problems. First, voice and view are not synonymous. Of course, there are conservatives of color who disagree with affirmative action programs and other so-called issues of color where one might predict otherwise. Second, it is possible that some but not all scholars of color are endowed with a voice of color that whites do not share.

My sense is that Kennedy's critique is fundamentally motivated by a fear that a race-influenced conception of merit would jeopardize his vision of true academic equality and respect for minority scholars by his white colleagues. Kennedy fears that the label "voice of color" will further marginalize legal scholars of color. The fact that some members of a class do not share all its distinctive attributes does not necessarily mean that the distinctive attributes of that class do not exist. Rather, the class is probably defined too broadly and must be redefined to exclude those who do not possess—or do not wish to exercise—the unique, qualifying attributes.

I have no problem with my work being considered the work of a scholar of color, nor does Kennedy, I believe. The problem presented for Kennedy, myself, and others by the claim that we speak with a uniform voice of color, whether or not we intend to or believe ourselves capable, is that labeling it as such may supplant a judgment of that work based on its merit.

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104. Indeed, I have been mildly and informally criticized by some liberals and scholars of color for "selling out" by adopting a "conservative" law and economics approach to the resolution of certain issues. But see Johnson, An Appeal For The "Liberal" Use of Law and Economics: The Liberals Fight Back, supra note 1.

105. Blacks—and others of color—have often disagreed about the solution to problems that intimately affect people of color. It should come as no surprise that prominent blacks such as W.E.B. DuBois and Booker T. Washington disagreed strongly with respect to the resolution of issues that had a severe and disproportionate impact on members of their own race. Kennedy, supra note 2, at 1785. Indeed, the current debate between Kennedy and the trio of voices is reminiscent of the DuBois-Washington debate. See Johnson, supra note 6, at —.

106. Kennedy, supra note 2, at 1784 n.178.

107. See notes 27-29 supra and accompanying text.

108. See text accompanying notes 121-129 infra.
Kennedy senses that the label "voice of color" will stigmatize and stereotype scholars. Kennedy does not absolutely reject the concept of a voice of color; he rejects the concept that the voice of color exists merely as an extension of one speaking as a scholar of color. Furthermore, he should have no objection to differentiating it from other voices so that all scholars of color are not "wrongly" or blindly associated with it. If, however, the voice of color cannot be convincingly differentiated from the majoritarian voice, it does not exist.

What is not expressly stated in Kennedy's critique of Matsuda's thesis, but is implied throughout, is his disdain for the stigmatizing potential of her claim. Matsuda makes broad claims that all scholars of color are compelled to act in particular ways, including struggling against oppression by speaking through the voice of color. If she were correct, then Kennedy's work and my own would be included within the voice of color. That may stigmatize our work because it may signal the reader to evaluate the work, not on its merit, but on the basis of the color of the author. Readers will employ that signal either to privilege or degrade the quality of the work. Both are wrongheaded if the author has not chosen to have the work identified as one speaking from the voice of color. The problem with Matsuda's broad claim about voice is that it destroys options.

Kennedy's goal is commendable: He wants the option of having his work judged on its merits and not as a scholar of color. His desire to be read and interpreted as a scholar and not "merely" as a scholar of color is, however, not inconsistent with the claim that a voice of color exists. By requiring objective proof that the voice of color exists and finding that proof lacking, Kennedy seeks to prevent others from stereotyping his work, as well as mine, on the basis of our color. In this respect, to paraphrase Shakespeare, he doth protest a bit too much.

Kennedy's position in Racial Critiques likewise rejects options. Matsuda's view of the world is all-inclusive because it embraces the works of all scholars of color, whether they intend to speak in the voice of color or not. Kennedy's total repudiation of the claims by the trio of voices likewise denies an option to those who wish to speak in the voice of color because they cannot objectively prove to his satisfaction that one exists. Kennedy's view is as narrow and confined as Matsuda's is broad and amorphous. Neither is accurate.

The voice of color is a matter of perception and intent. For the same

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109. My central objection to the claim of racial distinctiveness propounded by Professor Matsuda and others of like mind can best be summarized by observing that it stereotypes scholars. . . . Matsuda substitutes for the traditional, i.e., negative stereotype, a positive stereotype. But as Louis Lusky once noted, "any stereotype results in a partial blindness to the actual qualities of individuals, and consequently is a persistent and prolific breeding ground for irrational treatment of them."


110. See notes 119-129 infra and accompanying text.
reasons that we do not assume that whites speak with a uniform voice, we can also reasonably assert that not all scholars of color speak with a uniform voice. Yet, when whites do speak with diverse voices we fail to demand that they be judged on the basis of their race. Similarly, when scholars of color speak, they should not be judged on the basis of their race. But one need not deny that the voice of color exists in order to insure that one’s work is not stereotyped. Admittedly, one could easily avoid this problem if the category sought to be stereotyped does not exist. But the fact that it does exist does not necessarily mean that everyone who possesses some or all of the requisite characteristics for membership should or will automatically be included. What is needed, however, is more information about the group to be categorized and stereotyped and its characteristics in order to insure proper categorization.

Indeed, majoritarian standards do exist by which to judge the merit of the work of a scholar of color. The impersonal, meritocratic, and acolored critical standards employed by the interpretive community should also be applied to the work of the scholar of color. One can speak to one, to some, or to all of the interpretive communities to which one belongs. Consequently, a scholar of color can speak to the community of color and be judged by the evaluative standards of the community of color.

Although not capable of evaluation pursuant to the consensus-driven meritocratic evaluative model,111 scholarship written in the voice of color is not without standards. The voice of color carries insight and hence enriches the academy.112 Such scholarship must be judged in part on how well it conveys the exclusive experiences that give rise to the distinctive voice. In other words, if the value of such scholarship is in its distinct perspective, it must demonstrate to members of the academy first, that distinctiveness, and second, the value of that distinctiveness.

Moreover, when a scholar of color speaks in the voice of color it is not only or predominantly other scholars of color who judge the worth of that scholarship by the evaluative standard. Limiting the judgmental function to scholars of color would defeat the primary purpose of authors’ employing the voice of color. The primary audience for the voice of color, I believe, is not other scholars of color who may have shared the same life experiences113 but rather majoritarian scholars who have not shared those formative, unique life experiences.

At one level, the ongoing debate over the existence of the voice of color is about control over the vocabulary of legal discourse.114 Scholars of color

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111. See notes 6-9 supra and accompanying text.
112. See notes 15-29 supra and accompanying text.
113. For a discussion of life experiences and how these experiences shape and influence the scholar’s work, see text accompanying notes 119-122 infra.
114. In this respect, the debate is very similar to the current debate in law and literature between Posnerians and Critical Legal Scholars:

The unstated issue in the academic controversy between the law and economics movement and the law and literature/hermeneutics movement seems to be the question of control of the vocabulary of legal discourse. As David Carlson has pointed out, control over the
demand that their unique voice and vocabulary be added to that of majority scholars. Majority scholars, some of whom resist that demand, may prefer that the existing vocabulary and power structure remain the same. The success of the voice of color should be measured by its impact on that vocabulary, not by its impact on other scholars of color.115

On the other hand, any scholar should be able to speak without reference to her color on non-race issues, and be judged according to the “neutral” evaluative standards of that community. Likewise, the scholar of color may speak in the voice of color on race issues, including issues that may or may not appear to be race-related but become such because of the author’s claim that her race is relevant. In such instances, the scholar’s work intersects two communities, and the author is attempting to articulate (sing) the voice of color.

It is not difficult to understand the professoriat’s reluctance to accept the normative implications of recognizing the voice of color expressly. This, of course, diminishes the hegemony of white scholars. Majority scholars will quite naturally resist the voice of color if they can never attain or obtain this powerful, valuable insight. According worth to the voice of color may dilute the value or potential of those who cannot possess the voice.116

Does this mean that when we recognize and privilege the voice of color, we must also recognize and privilege a white voice? Moreover, would not we, as scholars of color, find offensive scholars who claim to speak in the white voice? Would this claim be racist and exclusionary? These tough questions need to be addressed,117 lest we set the troubling precedent of endorsing a social structure that is separate and unequal.

Any distinction between a white voice and the majority voice within the professoriat would be, however, chimerical. The interpretive community of academic scholars presupposes a white, male majoritarian language that represents the voice of white men. Critical Legal Scholarship argues that law is a tool of social control and domination and is not egalitarian and value neutral. The voice of white male hegemony has controlled legal discourse. The lack of a distinct white voice is not puzzling, nor is the failure to label some

vocabulary governs access to the prestigious law reviews, control over panels at leading conferences and “even access to political power.” As any clever trial lawyer knows, language governs our ideas, and words have an uncanny way of policing our perceptions. Judith Schenck Koffler, Forged Alliance: Law and Literature, 89 COLUM. L. REV. 1374, 1389-90 (1989) (footnote omitted).

115. Indeed, if the audience of the voice of color was limited to other scholars of color, its power as a paradigm-shifting theory would be negated. See notes 124-127 infra and accompanying text. Quite the contrary, the voice of color addressed solely to other scholars of color would result in the ghettoization of such scholarship in that such works would be deemed of limited value by majoritarian standards and of value only to other scholars of color.

116. For a discussion of this issue, see text accompanying note 127 infra.

117. My preliminary answer is that scholars of color speak in the majority or white voice to most issues—those that are not racially related—because the voice of the scholar of color is identical to the voice of the white or majority scholar on those issues that are not significantly shaped or affected by a scholar’s values and life experiences. See notes 121-122 infra and accompanying text.
texts as articulating the white voice.\textsuperscript{118}

IV. CONTEXT AND THE TRIO OF VOICES

One can never avoid speaking from the context that is the author's life experience (horizon)\textsuperscript{119} even if one makes a conscious effort to be neutral or atextual. In this respect, then, persons of color always speak from the perspective or context of color to the extent that their experiences as people of color have shaped their development. Yet, speaking from the perspective or context of color is not synonymous with speaking with the voice of color.

On the contrary, scholars of color and majoritarian scholars share many values and life experiences.\textsuperscript{120} In a few crucial areas, however, they diverge, especially in race-related areas (or in the case of feminists, sexual discrimination). Consequently, one would expect that scholars of color and majoritarian scholars see and evaluate many things similarly, but some important things differently. In particular, one could predict that scholarship by scholars of color would treat race-related issues quite differently than that of their majoritarian colleagues.

Analyzing the issue from this perspective, one understands why scholars of color do not speak with a monolithic voice and why scholars of color can speak with an "acolored," majoritarian voice. For example, the way scholars of color and majoritarian scholars view leaseholds and the enforceability of clauses limiting assignments does not significantly rest on their different values and life experiences.\textsuperscript{121} The way one sees and analyzes issues such as affirmative action, on the other hand, may be greatly informed and influenced by our different horizons. In short, the voice of color is not completely a matter of the speaker's intent or the reader's interpretation, but rather is a function of the author's context. The author of color is making a claim to a perspective that is not shared (and perhaps cannot be shared).

One need consider three variables to determine if the scholar of color speaks with the voice of color as articulated by the trio of voices. First and foremost, the scholar must intend to speak with the voice of color and claim that the context within which she developed is different from the majority scholar. Second, in order for the voice of color to be communicated, the reader must understand the author's intent to speak in the voice of color. Finally, the reader must believe that the author's contextual experience causes the author to see things differently, in effect, privileging the author to

\textsuperscript{118} Elsewhere, I have characterized more precisely the voice as majoritarian and elitist. See Johnson, supra note 6.


\textsuperscript{120} I am indebted to my colleague Professor Daniel Ortiz for this insight.

\textsuperscript{121} Johnson, Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward A Theory of Relational Leases, supra note 1.

\textsuperscript{122} This aspect of the paradigm focusing on the reader's perception of the writer's intent is referential in some respects: The reader must ascribe particular characteristics to the writer or connect the writer to a certain thematic or philosophic approach.
RACIAL CRITIQUES

speak in the voice of color. In this “privileged” situation, both the author and the reader make normative interpretive adjustments based on the author’s race. The racial identity of the author may influence the interpretive framework the reader employs in analyzing the article.

Neutrality, as opposed to privilege, exists when the scholar of color is not speaking from the voice of color. This occurs when the author makes no claims that her life experiences or values diverge from that of the typical-majority-reader, and the reader is not aware that the author is a scholar of color or, if aware, recognizes that she is not speaking with the voice of color.

Dissonance occurs in one of two situations. First, the author may speak in the voice of color while the reader may not interpret the author’s voice as one of color on that issue or refuse to privilege the author with any special or explanatory power. The reader may be incapable of employing the correct interpretive strategy to privilege the voice of color because she does not belong to the interpretive community that recognizes the distinctive voice of color (believing, for example, that the experiences of people of color are not somehow fundamentally different from white people).

Dissonance can also occur when the scholar of color is not speaking with the voice of color but the reader interprets the author as speaking with this voice. Kennedy seems to believe that recognizing a voice of color necessarily entails this type of stereotyping or dissonance. In order for this interpretive framework to help explain whether a voice of color exists, it must establish that an author can signal that she is speaking with the voice of color.

At one level it must be recognized that the text of articles written by all scholars about issues that predominantly affect people of color, including, but not limited to affirmative action, racial discrimination, and poverty in the inner city, does not automatically reveal the author’s race. For example, separate articles by Professor Alan Freeman and Professor Derrick Bell may not be self-evidently written by a white and a black scholar. Of course, the reader may be able to make certain observations with respect to

123. A personal anecdote may better demonstrate how this dissonance can occur. My article, Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relation Leases, supra note 1, was not written from a perspective of color or with any claim to expertise on the basis of my race. I wanted it judged on meritocratic standards having nothing to do with my race. A friend at another school told me that he asked a colleague who read that article to give his opinion on its merits. The reader responded that on a scale of one to ten it was a six or seven. In defending the article, my friend happened to mention that I am black. The colleague supposedly responded, “Well, in that case, it is a 9 or a 10.” Unfortunately, I have no doubt that if this exchange did not take place exactly as written (which I believe it did), one like it probably occurs daily at law schools around the country.


125. Bell’s works include AND WE ARE NOT SAVED, supra note 58; RACE, RACISM AND AMERICAN LAW (2d ed. 1980); Application of the “Tipping Point” Principle to Law Faculty Hiring
the political inclinations, class identification, or other personal characteristics of the author. The reader will not, however, be able to definitively determine the race of the author. Thus, a white scholar may speak with what may appear to be the voice of color. Conversely, a black scholar may speak with what may be objectively viewed as an acolored, majoritarian voice.\textsuperscript{1}

The author can do much, however, to influence the reader's perception and enhance her acceptance of distinctive scholarship by signalling that she is attempting to speak with the voice of color. Signalling occurs when the author identifies herself as a scholar of color and thereby informs the reader of the author's context and perspective. Once she sends the signal, the reader can accept or reject it.

Those sympathetic to the idea of acknowledging the voice of color should recognize (and reject) the argument that any such recognition denigrates authors who are not scholars of color and their contribution to the academic discourse that affects racial minorities. If one views color as an empowering factor, it is a factor that some scholars can never attain. Hence, the argument goes, one may reasonably reject the voice of color, with the intent that such rejection serve as a leveling device that places the majority scholar on an equal level with the author of color. In effect, a rejection of the voice of color conveys the message to the law professor of color that we are all law professors, and law professors of color are no different than majority law professors. One can interpret this rejection of the voice of color as a method of maintaining the homogeneity of the interpretive community of the professoriat by denying the pluralism that has recently begun to invade the academy.\textsuperscript{127}

Rejecting the voice of color, however, does not create or maintain homogeneity. In fact, it privileges the majority view. Although majority scholars may reject the voice of color, such a rejection does not result from a concern about privileging the voice of color. It is a way of actually privileging the majority scholar's perspective on race-related issues. Those of us who recognize the voice of color recognize that, like majority scholars, minority scholars can never attain the majority voice. That is, if majority scholars' experiences prevent them from seeing some issues and perspectives that the voice of color addresses, then logically the experiences of scholars of color would blind them to certain perspectives on issues of color—and not necessarily racist ones—to which majority scholars can speak. Thus, by rejecting the voice of color, the majority voice alone, which by definition excludes the minority voice, will remain to define the horizon upon which to view and interpret racial issues.

Accepting the voice of color entails rejecting any "majoritarian," "objec-

\textsuperscript{Policies, supra note 62; and Strangers In Academic Paradise: Law Teachers of Color in Still White Schools, 20 U.S.F. L. REV. 385 (1986).}

\textsuperscript{126. See, e.g., Thomas Sowell, Affirmative Action Reconsidered: Was It Necessary In Academia? (1975); Lee A. Daniels, New Black Conservatives, N.Y. Times, Oct. 4, 1981, § 6 (Magazine), at 20, col. 2 (cited in Kennedy, supra note 2, at 1784 n.178).}

\textsuperscript{127. See notes 76-77 supra.
activist" views on race-related issues. It involves recognizing that both majority and minority voices result from the respective life experiences of members of the various groups. Both voices then are each uniquely privileged and together provide a panoply of competing views.

Thus, signaling and acceptance of the voice of color signal does and should continue to occur. In looking at the articles that Kennedy discusses, I was struck that, without exception, each author, in one way or another, identified himself or herself as a minority. Conversely, Alan Freeman almost apologetically identifies himself as a white scholar in his most recent article discussing a color-related issue. My intuitive sense is that this self-identification or labelling occurs quite often when the author wishes to speak with the voice of color. Thus, although it is impractical to prove in this essay that all scholars of color identify themselves as scholars of color when they speak with the voice of color, my guess is that scholars of color do generally either expressly or implicitly identify their race. Further, I believe that the reader usually receives the message that the author is in fact a minority and speaks from this voice.

By looking at the author's intent and the signals received and interpreted by the reader, the voice of color is created and recognized by the reader to speak to certain color-related issues. This interpretive framework is appropriate if the claims of the trio of voices are circumscribed to apply to some but not all works of scholars of color—specifically those with different life experiences or values. While proof satisfactory to Kennedy's standards is not forthcoming, the claims of the trio of voices and the objections raised by Kennedy can be reconciled.

V. Conclusion

In Part IV of his article Kennedy discusses the political factors that influenced Racial Critiques. Though a critique of the trio of voices, Kennedy's own scholarship supports the interpretive framework I have outlined. My contention is simply this: Kennedy was able to publish Racial Critiques because he is a scholar of color and not in spite of that fact. Moreover,

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128. The scholar's reputation and prestige may identify him as a scholar of color and thus obviate the need to signal the reader. Bell, for example, is so well-known within legal academia that any self-identification as a scholar of color may be redundant. I, however, am not known as a scholar of color, and thus felt compelled to mention in the opening sentence of this essay that I am a black scholar.

129. The only reason I did not undertake such an empirical survey in conjunction with this essay is timeliness. Given the current controversy over Kennedy's remarks and his appearance at the AALS Section on Minorities, see notes 65 & 69 supra, I decided to sacrifice the empirical study in favor of a timely response to Racial Critiques.

130. Kennedy, supra note 2, at 1810-19.

131. Espinoza reaches a similar conclusion:

The very existence of Kennedy's piece, however, serves as a counterpoint to his thesis that race does not count in the assessment of scholarship. Kennedy contends that minorities should not be assumed by virtue of their experience to have a unique insight or message about the way the world works, yet his own article was considered important, and worthy
those who share his views will give them considerable weight—some would argue disproportionate weight—because he is a scholar of color.

Majority scholars may listen to Kennedy’s attack on the trio of voices not necessarily because he speaks with the voice of color but conceivably because they believe Kennedy has special authority to speak on the issue of the existence of the voice of color, which he emphatically denies.

Kennedy makes much of the fact that the voice of color is not monolithic, that there are conservative as well as liberal scholars of color, and that one cannot articulate a comprehensive voice of color without addressing the role of conservatives of color who oppose affirmative action. My supposition is that the voice of the new conservatives of color is so powerful, so damning to some, precisely because it emanates from people of color. Instead of narrowly confining the conception of the voice of color to a political viewpoint, I view the voice of color as, to a degree, apolitical.

The debate between the trio of voices and Kennedy about the existence of voice can be recharacterized as one involving the existence of a monolithic voice. In Racial Critiques, Kennedy proves quite decisively that no such monolithic voice of color exists. In doing so, Kennedy simultaneously demonstrates that a voice of color does indeed exist. I think I have demonstrated the reciprocal relationship between the author and reader that creates the voice of color. Kennedy exploits that reciprocal relationship in some of his earlier work. His voice is so powerful because he writes in a voice of color, and his readers perceive this voice. Conversely, Racial Critiques is so powerful because it originates from a scholar of color who, in this instance, readers will perceive wrongly as writing from the perspective or power of color. Kennedy unintentionally uses the same empowering credentials he denies to other scholars of color to logically undermine and challenge the contributions of the trio of voices. Thus, it is ironic that by attacking the claims made by scholars of color, Kennedy proves, in some small way, its existence.

The concept and use of “voice” in legal scholarship, is controversial both for what it portends for the professoriat in the future and what it says about the history of the legal academy. I believe that we are on the verge of a new era in legal scholarship in which merit, as traditionally defined, will no longer be the only evaluative standard by which to judge a scholar’s contribution to the professoriat. As the legal community changes to mirror the

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of publication, primarily because he is black. The unspoken legitimation of Kennedy’s critique is based on his blackness.

Espinoza, supra note 3, at 1883 (footnote omitted).

132. Even though race-conscious preferential treatment is one of his major points of discussion and one of the main areas in which, according to him, intellectuals of color have been marginalized, Delgado completely overlooks the contributions of black conservative intellectuals who vigorously oppose race-based preferential treatment. Matsuda, by contrast, does at least acknowledge ideological disagreements among people of color. Yet she portrays these disagreements in a way that dramatically understates their sharpness and significance.

Kennedy, supra note 2, at 1784 (footnote omitted).
changes in our society, elitism and homogeneity must give way to the values of pluralism. New paradigms must emerge on the ashes of the old, and the role of voice in this process will be crucial. The key component of voice is that it challenges assumptions that have previously gone unquestioned in the legal community. Thus, the standard of merit and what that standard means for the professoriat will be reexamined. The concept of voice, which I view as minority scholars' call to be included in the professoriat, may be the vehicle for developing new evaluative paradigms that recognize the valuable contributions of all scholars, not merely those judged by the majoritarian concept of merit that ignores the values of color and diversity.