

What's Wrong With Rights?

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I. Introduction

In an increasingly polarized America, not appreciably gentler or kinder for the arrival of George Bush, it is perplexing, to say the least, to find left-leaning law professors insisting that civil liberties and rights are "[e]xactly what people don't need."¹ We live in an age in which millions of disenfranchised "aliens" in the United States Southwest are cowed by employers and state agencies alike and are not informed of even minimal citizenship rights. It is an age of police sweeps through whole communities in greater Los Angeles,² in which the official response to real social and economic problems is the draconian imposition of "law and order." However, "order" is usually more evident than "law." The police crackdown on street gangs has involved the use of an extensive variety of police powers, including the addition of the names of uncharged suspects to the police "gang roster" for future surveillance, and the imposition of curfews. The Los Angeles City Attorney, James Hahn, claimed that the main problem lies in the law itself which extends "'excessive' guarantees of due process" to suspects. He advocated the introduction of a bill which would criminalize gang membership, in blatant disregard of the right to freedom of assembly. It is not without significance that the NAACP, normally a stalwart defender of civil rights and liberties, has endorsed Hahn's position.

This is an age of economic and social dislocation, the enor-

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1. Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 Stan. L. Rev. 1, 33 (1984).

2. In the spring of 1988, swarms of police descended on the ghettos and barrios of Los Angeles. The action was an almost military response to the growth of gang violence and, significantly, the encroachment of that violence into once secure white middle class communities. This response, labeled "Operation Hammer," has been credited with massive infringements on the civil liberties of minority youth. See Mike David & Sue Ruddick, *War in the Streets*, New Statesman and Society, Nov. 11, 1988, at 27; Mike David & Sue Ruddick, *Los Angeles: Civil Liberties between the Hammer and the Rock*, 170 New Left Rev. 37 (1988).

mity of which is evident to anyone prepared to look not only in the Southwest, but equally in the midwestern Rust Belt and the decaying cities of the Northeast. While the genesis of this climate is economic and not legal, it is already discernible that in this environment there is a wavering commitment to civil liberties and rights. It is in such a climate that we need to reconsider the Left's deep-seated reservations and hesitations about the discourses and practices of rights. We will call these doubts "the critique of rights."

It is also in this political and economic context, in the crucible of racism and increasingly polarized class conditions existing in the United States, that we think the "rights" debate which has developed between the dominant strand within the Critical Legal Studies movement [hereinafter CLS] and the "minority critiques" is so important. The "minority critiques" are welcome interventions insofar as they begin to challenge the often stunted and partial analyses that have predominated within CLS treatments of rights. These critiques do not, however, directly challenge the theoretical underpinnings of the CLS "critique of rights." This is what we will do. Our attention will be focused on the theoretical basis underlying the CLS "critique of rights" because we contend that without a better theorization of the problem of rights, it will not be possible to move beyond the simple opposition between "for" and "against" rights stances. A better theorization should assist in advancing a more powerful politics of rights, a politics of rights without illusions.

The CLS "critique of rights" does not stand in isolation. It can be located within a more general ambivalence towards rights which affects much of the political Left. This ambivalence has its own history, but it is sufficient to mention just two elements. First, there is textual authority in Marx's work where, in dashing polemical style, he denounced "the so-called rights of man," "the rights of the egoistic man," and called talk of "equal right," "obsolete verbal rubbish."³ Second, rights-hostility arises from the conspicuous role that "rights-talk" has played in the political discourse of the traditional conservative and liberal parties in modern Europe and North America. The revolutionary aspirations of socialism have seemed to require a new rhetoric. This sentiment is reinforced by the hypocritical appeals to rights which so often

3. Karl Marx, *On the Jewish Question*, in *The Marx-Engels Reader* 42, 43 (2d ed. 1972); Karl Marx, *Critique of the Gotha Programme*, in *The Marx-Engels Reader* 531 (2d ed. 1972).

characterize the authoritarian dimensions of formally democratic political systems.

But the "rediscovery" of rights by the Left has its own history. It is worth noting that the necessity to "take rights seriously," to appropriate Ronald Dworkin's slogan, became an imperative for the Left as it came to recognize the need to respond to the most sustained criticism leveled at the socialist project, namely, that socialism is inescapably authoritarian. That charge has carried widespread influence both as a response to the authoritarianism of "actually existing socialism" and as a judgment on the paternalism of social democracy and welfare liberalism.

Secondly, the "rediscovery" of rights has received a substantial impulse from the need to defend previously won rights, liberties and entitlements against encroachments in this era of neo-conservatism symbolized by the transatlantic embrace between Margaret Thatcher and Ronald Reagan. Indeed, the CLS "critique of rights" strikes us as particularly curious and inadequate in this conjuncture. The rise of neo-conservatism has not only focused attention on the importance of defending existing rights, but it has also posed a new set of political questions with which the Left has not found it easy to come to terms. In the short-hand of recent debates, the question revolves around the possibility of identifying counterhegemonic political strategies. This issue is significant for our purposes because the different strategies which have been suggested have typically incorporated a rights discourse.⁴

It is ironic that precisely as the dominant strand within CLS has been trashing liberalism and its commitment to civil liberties and civil rights, writers who have been closely associated with contemporary Marxist theory were rediscovering and rehabilitating some of the important political and cultural commitments of liberal rights and liberties.⁵ Central to these commitments is the goal of protecting the citizen from an overweening state, a crucial consideration not just in the age of Thatcher and Bush, but also when similar issues form such a significant feature of Gorbachev's

4. Stuart Hall, *Thatcher's Lessons*, *Marxism Today*, Mar. 1988, at 20; Stuart Hall, *The Battle for Socialist Ideas in the 1980s*, in *The Socialist Register* 1 (1982); Stuart Hall, *The Toad in the Garden: Thatcherism Among the Theorists*, in *Marxism and the Interpretation of Culture* 35 (1988); Ernesto Laclau & Chantal Mouffe, *Hegemony and Socialist Strategy: Toward a Radical Democratic Politics* (1985); Samuel Bowles & Herbert Gintis, *Democracy and Capitalism: Property, Community and the Contradictions of Modern Social Thought* (1986).

5. Hall, *supra* note 4 (all of his cited works); see also E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (1975); E.P. Thompson, *Writing by Candlelight* (1980); Leo Panitch, *Liberal Democracy and Socialist Democracy: The Antimonies of C.B. Macpherson*, in *The Socialist Register* 144 (1981).

programme in Eastern Europe. One result has been a substantial pro-rights literature produced by Left authors.⁶

Our immediate objective is to interrogate the distinctively North American version of the rights debate associated with CLS. We suggest that a reconsideration of rights does not mean the simplistic affirmation of *all* rights or *all* rights strategies, but means instead, opening up rights to serious consideration and evaluation by the Left in order to develop a positive program for a politics of rights.

We start by scrutinizing representative works within the CLS "critique of rights" and the "minority critiques"; we do so from the intellectual and political conviction that any viable and sustainable radical politics within the conditions of representative political democracy must take rights seriously. While we wish to register immediately our concern that individual civil liberties must be defended against the state, we ultimately seek to go beyond the objective of advancing a Leftist pro-rights argument. In order to instigate a more fruitful debate concerning the relationship between rights, rights discourses and political practice, we will argue that it is necessary to think about the strategic value of *particular* rights struggles, both inside and outside the court system. This concern requires us to engage yet another strand of the rights debate which we label the "rights and social movements" position epitomized by the work of Stuart Scheingold,⁷ Joel Handler,⁸ and Michael McCann.⁹ We will argue that rights discourses and strategies have differing effects, one major factor being that social movements exhibit distinctly different capacities to successfully employ the politics of rights.

II. Situating the Rights Debate

It is important to recognize that the role of rights discourse has its own specific history. We can schematically identify a distinction between the European and American experiences. In Eu-

6. Without attempting a full bibliography of Left pro-rights positions: Bengt Abrahamsson & Anders Broström, *The Rights of Labour* (1980); Allen Buchanan, *Marx and Justice*, (1982); Alan Hunt, *The Politics of Law and Justice*, in *Politics and Power*: IV 1 (1981); Stuart Hall, *Drifting into a Law and Order Society* (1980); C.B. Macpherson, *Democratic Theory: Essays in Retrieval* (1973); C.B. Macpherson, *The Life and Times of Liberal Democracy* (1977); Panitch, *supra* note 5, at 144.

7. Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (1974).

8. Joel Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (1978).

9. Michael McCann, *Taking Reform Seriously: Perspectives on Public Interest Liberalism* (1986).

rope, the political ideology and political theory of the rise of the modern representative state, epitomized by the French Revolution, was articulated in the language of natural rights. But by the nineteenth century, rights discourse was in retreat in Europe with "the displacement of the individual from centre stage in social thought" by various collective concepts the most important of which were nation, class, and people.¹⁰ This new focus found its expression in the concern with the greatest good in utilitarian thought and with class interests in socialist thought.

In the United States, the appending of a Bill of Rights to the Constitution in 1787 and the weaker presence of social reformist and revolutionary socialist thought underlies a substantial continuity in rights discourse. The current attack from CLS theorists on rights discourse needs to be understood as a response to this history. These authors have attempted to displace the orthodox discourse of rights which so suffuses the legal and political realms that it is not only taken for granted but, according to the critique, stultifies thought. The "critique of rights" is, therefore, essentially a reactive move designed to clear a space for radical thought about law. The implication which we draw is that the rights critique is less a substantive feature of critical legal theory than it is a symbol of an attempt to break out of the discursive embrace of liberal legalism.

The reactive nature of the "critique of rights" does, however, stamp a distinctive character on the substantive argument. The most important feature is that there is a considerable difference between the CLS critique and the traditional socialist critique of rights. The focus of the latter starts from a critique of the *form* of rights, namely, their individualism. However, the force of the Socialist's argument is directed against the incapacity of rights to give effect to and to promote human social needs. Much of the CLS critique, whilst also starting from the form of rights, is much more narrowly legalistic in that much of its focus is upon the internal coherence of rights discourse rather than on its substantive capacity to fulfill political ends. Here, we suggest, lies the issue which has divided the CLS approach from the "minority critiques" of CLS since the latter remain primarily concerned with political objectives whilst the engagement of CLS with liberal legalism has led it to a narrower and more internal focus upon the properties of legal discourse. It should be stressed that we do not suggest that

10. 'Nonsense Upon Stilts': Bentham, Burke and Marx on the Rights of Man 152 (Jeremy Waldron ed. 1987) (see Waldron for a more detailed account of the historical trajectory of the rights debate).

CLS authors are not concerned with substantive political questions, but rather, that the focus of their intervention has resulted in their "critique of rights" taking the form of an internal debate within the conceptual terrain of liberal legalism.

It would, however, be inaccurate to view the CLS "critique of rights" simply as an internally or narrowly juristic position. The CLS focus on the logical incoherence of rights discourse is often accompanied by a background political theory of "new communitarianism" or "civic republicanism."¹¹ Reliance on this body of work presents particular difficulties because it lumps together a very diverse range of thinkers: including Michael Sandel, Alasdair MacIntyre, and Bowles and Gintis.¹² Our concern is that the "new communitarianism" involves a diverse range of positions in which one axis is the traditional Left/Right divide, both of which are well represented. Without a diversion beyond the scope of the present essay to explore the complex trends involved, we will be assertive and contend that CLS's attraction to communitarianism functions as an undeveloped alternative to liberal individualism without itself constituting a substantive position able to take the "critique of rights" beyond its initial reactive thrust.

III. The Conceptual Puzzle of Rights

Before examining the "critique of rights," it is necessary to try to find a path through some of the conceptual muddles that are likely to beset any discussion of the theory and politics of rights. We take the view that nothing can be settled by advancing a definition of rights; to do so would be a superficial attempt to impose unity and conformity on the complexity of the contexts in which rights-talk occurs. The word *rights*, like its companions *freedom* and *democracy*, is an ideologically contested concept deployed in incommensurable discourses vying to gain hegemonic influence for their favored combinative set of meanings. The contested nature of rights discourse can be illustrated: two opposed forms of rights discourse give rise to the clash, which has long been a staple of jurisprudential debate, between a "narrow" positivist conception of rights, understood as "legally recognized rights," and a "broad"

11. The most direct link to this tradition is provided by Roberto Unger who is simultaneously an outsider and a mentor to CLS. See Roberto Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561 (1982); Roberto Unger, *Politics: A Work in Constructive Social Theory* (in 3 vols. 1987); see also Allan Hutchinson & Patrick Monahan, *Democracy and the Rule of Law*, in *The Rule of Law: Ideal or Ideology* 97 (1987).

12. Michael Sandel, *Liberalism and the Limits of Justice* (1982); Alasdair MacIntyre, *After Virtue* (1981); Bowles and Gintis, *supra* note 4.

concept of "natural rights" or "human rights," conceived as a moral discourse deployed to provide the basis for interrogating and challenging the adequacy of positive law. In other words, there is a clash between the rights subjects "have" and the rights that they "ought to have." We see no merit in seeking to pursue this engagement because it is fundamentally irresolvable. The best that can be done is to seek to identify different usages of the concept of rights in legal, political, and moral discourses. To this end, we will refer respectively to "legal rights" (rights recognized, and potentially protected, by litigation), "constitutional rights" (rights recognized, and potentially protected, by litigation appealing to express constitutional provisions), "moral rights" (rights-talk placed within moral discourse) and, finally, "rights-claims" (claims or demands advanced by social interests or movements involving an aspiration to convert a moral right into a legal or constitutional right).

These different ways in which rights are talked about form a loosely connected set of *rights discourses*. The implications of our conceptualization of rights are twofold. First, we emphasize the ubiquity of rights-talk; most of the major social, political, and economic struggles of the last few centuries have been fought out in terms of the discourses of rights. Second, there is no sharp distinction that can be drawn between legal rights and other sorts of rights-talk even though the pursuit of such a distinction has been a major preoccupation of liberal jurisprudence. Rather, lawyers and courts invoke a variety of rhetorical forms of rights discourse which shade into the rights-claims of the social movements.

The rights debate mobilizes conflicting intellectual and political aspirations in a densely overlapping set of rights discourses. Rights discourses, whilst open-ended, do exhibit some structure in that their content is almost always located in proximity to the discourses of law, involving claims to entitlements that take a *form* capable of protection and advancement by and through legal action.¹³ Since we take *law* itself to be open and plural in character,¹⁴ even though state law is the dominant or hegemonic legal

13. To say that rights-claims are *capable* of legal recognition and enforcement does *not* imply that rights are either enforceable or, if enforceable, that they are enforced; the effectiveness of rights is a matter for concrete sociological investigation. Indeed, it is important to recognize that many rights-claims, particularly those functioning within "human rights" discourses—such as the right to economic support—do not necessarily correlate either with the economic or legal conditions for their fulfillment.

14. The basic contention of legal pluralism is that law is not a unitary phenomenon known as the "law"; rather, there coexist a variety of distinguishable forms of law, both inside and outside the hierarchical system of state-law. Hence, local courts, although subject to some controls and constraints exercised by superior

form, the boundaries of rights discourses cannot be definitionally prescribed.

Further, it is important to stress that rights discourse is individualistic in the sense that its logical form is individualistic; a right is always somebody's right and refers to some interest capable of protection. Even when we consider interests which all or many share, such as a right to physical security, the subjects of such rights are inescapably individualistic. It remains, of course, a potential objection to rights discourse that its logical form has this individualistic frame of reference, but we take individualism *in this limited sense* to be a necessary concomitant of any rights discourse. Yet, not all interests worthy of protection necessarily take this individualistic form. Consider the interests associated with the solidarity of participation in a common project or of the interests involved with the protection of some endangered species. In these situations, benefits to individuals (the pleasure of solidarity or delight in observing a rare species) are secondary or derivative from a collective interest. The problem is whether it is possible or desirable to express collective interests in the individualistic language of rights. Our contention is simply that whilst rights discourses "fit" most comfortably within an individualistic frame of reference there is no theoretical or conceptual barrier to a viable discourse of group or collective rights.

IV. The CLS Critique of Rights

We will consider two major works which represent somewhat different threads within the CLS "critique of rights." The most extended and articulated expression of the critique is Mark Tushnet's "An Essay on Rights."¹⁵ We have will also assess Alan Freeman's work, focusing primarily on "Antidiscrimination Law: A Critical Review," [hereinafter "Antidiscrimination Law"] be-

courts, act with relative autonomy and differently from the appellate courts. The "center" of the state law system is always engaged in projects to centralize and unify the multiplicity of dispersed legal mechanisms, but at the same time, practical exigencies and competing policies generate pressures towards the pluralization of law such that the projects of unification are never realized.

15. Mark Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363 (1984). Our method should be contrasted with that adopted by Tom Campbell in his major work on the relationship between the political Left and the theory of rights. Tom Campbell, *The Left and Rights: A Conceptual Analysis of the Idea of Socialist Rights* (1983). Campbell posits a hypothetical debate between reformist and revolutionary socialists and explores what he considers to be the underlying themes that might arise in such a confrontation. *Id.* Whilst this strategy has undoubted analytic value, it does miss the flavor of "real" positions taken by participants in legal and political controversy. For this reason, we focus on two major texts and subject their arguments to close scrutiny.

cause it represents a more explicitly Marxist analysis of rights characteristic of one strand within the CLS critique.¹⁶ We have selected the writings of Tushnet and Freeman because, although the "critique of rights" is ubiquitous in the texts of most CLS writers, the "critique of rights" is generally assumed rather than argued. Tushnet and Freeman have the particular significance of making the supporting arguments explicit.

A. *Tushnet's Critique of Rights*

The stated objective of Tushnet's argument is to establish a radical critique of rights as a political act of deconstructing the "liberal theory of rights" which, he contends, is a major cultural support of capitalism.¹⁷ He asserts that rights neither aid in "changing society" nor in "understanding how society changes."¹⁸ Tushnet structures his critique of rights into four main arguments: that rights are unstable, indeterminant, manifest reification and, finally, that rights have little or no political utility.¹⁹ We will consider each of his arguments in turn.

Before considering Tushnet's specific arguments, one introductory remark is necessary. He presents his argument by employing an apparently unitary concept of *rights*; the result is that it leads him to overlook potentially important differences between legal rights and constitutional rights (recognized and secured through litigation) on the one hand and rights-claims (the articulation of political objectives in the language of rights) on the other. The underdeveloped concept of rights which he employs undermines Tushnet's critique of rights and accounts for his failure to treat the important, and perhaps differential, roles that rights have and will continue to play in struggles for social transformation. Because he fails to distinguish between different forms of rights discourse, he persistently treats the critique of legal and constitutional rights as if it applied equally to rights-claims.

1. The Instability of Rights

Tushnet begins his discussion of the instability of rights by insisting that we must speak of specific rights. Such rights, he contends, are unstable because they are culturally and historically relative. "[R]ights become identified with particular cultures and

16. Alan Freeman, *Antidiscrimination Law: A Critical Review*, in *The Politics of Law: A Progressive Critique* 95 (David Kairys ed. 1982).

17. Tushnet, *supra* note 15, at 1363.

18. *Id.* at 1371.

19. *Id.* at 1363-64.

are relativized: to say that some specific right is (or ought to be) recognized in a specific culture is to say that the culture is what it is."²⁰ By working inductively from the examples of the right to reproductive choice, which he attempts to show is unstable, Tushnet claims that all specific rights are similarly unstable. Our general contention is that to recognize the historical and cultural relativity of specific rights does not involve the destabilizing effect which Tushnet suggests. It is sufficient to specify the level of abstraction and the historical and cultural context of the rights-talk in which we engage. Accordingly, it is necessary to specify whether the issue at hand involves a rights-claim, rather than a specific legal right. Similarly, the historical and national context also requires specification. Once these steps are taken, our contention is that no general problem of instability undermines the discourse of rights.

In order to illustrate the significance of the relativity of rights, Tushnet asks us to envisage a society in which a number of variables (e.g., universal contraception, no stigma against illegitimacy, etc.) are present. We are then invited to conclude that under these conditions "asking whether a woman has a right to an abortion would be like asking our contemporaries whether we have a rights not to get the flu."²¹ Tushnet's objective here is to indicate that in a society not dramatically different from our own, the claim to a right to abortion would be incoherent. Upon examination, however, his argument collapses. While Tushnet is undoubtedly correct in asserting that technological, social, and cultural changes would condition the specific meaning attached to a right to reproductive choice, it is far less clear that the heart of the current right, a woman's control over her own body, would diminish in importance.

Tushnet's method of discussing specific manifestations of rights in order to ground his claims about instability is unconvincing. All he has shown is that *specific understandings of* rights are relative. He has not dislodged the central claim of those who support rights. Those supporters maintain that, while the specific content of a right is contingent upon the particular conjuncture, abstract rights principles are sufficiently stable to be meaningful across cultures and time. It seems to us that the rights-claim of women to control their bodies is just such a claim, as are the rights to freedom of expression, association and the many other fundamental rights principles recognized in liberal democracies. Therefore, we do not accept Tushnet's contention that changes in social

20. *Id.* at 1365.

21. *Id.* at 1369.

and cultural attitudes to pregnancy will remove the controversial nature of the claim to abortion rights.

Tushnet is also anxious to persuade his reader that rights-talk is at best circular, or beside the point, and at worst, misleading. He invokes the action by African Americans against segregated libraries in 1964 and by homeless persons pitching tents outside the White House in 1982. He then poses the rhetorical question: "Can anyone seriously think that it helps either in changing society or in understanding how society changes to discuss whether the Black men and the homeless men were exercising rights protected by the first amendment? *It matters only whether they engaged in politically effective action.*"²² The lack of a connection between rights and political effectiveness which Tushnet presumes is patently false. He might want us to agree that neither legal rights nor appeals to rights-claims *guarantee* political success, but this only reveals the self-evident truth that there are no guarantees.

Tushnet's formulation of the problem misses the most important issues. What is valuable about claiming legal rights and relying on rights discourses is not the "discussion" which may take place regarding whether they in fact constitute legally recognized rights; the important issue is whether arguments can be marshalled in order to *secure* them as legally protected rights (through litigation) or whether we can profitably use the well-established discourses of rights in order to press these claims as political demands. This line of inquiry speaks far more directly to Tushnet's ultimate concern regarding the parameters of politically effective action than does the question which he himself has posed.

The important question to ask about desegregation and homelessness is: what difference, if any, did the appeal to rights discourse and the use of litigation make for the struggles? The answer is, simply, that the appeal to rights made a difference and rights had different roles in the two struggles to which he refers. To insist that rights made a difference does not involve any lapse into a legal utopianism which represents the belief that there is an homologous fit between morality and legal rights, or that legal rights, once in place, are necessarily secured through litigation, but then, no one believes this.

What is naturally more contentious is the degree of effectiveness of rights struggles, the side-effects that they generate, and other legitimate questions. In brief, Tushnet is correct in pointing to the need to evaluate "politically effective action," but he unne-

22. *Id.* at 1370-71 (emphasis added).

essarily constrains his political calculations by failing to inquire into the part that legal rights and rights discourses may play in that calculation.

2. The Indeterminacy of Rights

While the instability critique suggests that the specific context and content of rights change over time and space, the indeterminacy critique emphasizes that the meanings of rights are open and unstable within particular conjunctures. This part of the critique raises two contentions. First, that to claim a legal or constitutional right "produces no determinate consequences" because of what Tushnet calls "technical indeterminacy";²³ and second, that abstract rights cannot be connected to particular outcomes by virtue of "fundamental indeterminacy."²⁴ These two issues are distinguished by their level of analysis. The indeterminacy critique responds to the rejoinder that "rights structure discourse" and that they provide coherent ways of discussing "what ought to be done."²⁵ Throughout Tushnet's critique, it is clear that he is concerned to establish that, because rights are "indeterminate," they can be invoked by each and every interest, and thus, they can provide no special resource for "the party of humanity."²⁶ Moreover, on those occasions when they do provide a resource in the form of a significant rights victory, they constitute, at best, "momentary advantages" in social struggles.²⁷

What Tushnet refers to as "fundamental indeterminacy" is the incapacity of rights-talk to move from the level of generality or abstraction at which rights-talk is typically pitched, to particular concrete results.²⁸ His objection here is the same as his complaint about the abstraction of rights in his instability critique. It is clear that levels of abstraction and what is involved in moving between them is an issue for most, if not all, forms of thought. Taken alone, however, it does not justify the conclusion that rights are necessarily indeterminant. What Tushnet must demonstrate is that rights-talk does not provide the necessary conceptual apparatus to move from the level of generality of rights-claims to the concrete level of legal-rights. He fails to do this because of his failure, noted at the beginning of this section, to distinguish between

23. *Id.* at 1371.

24. *Id.*

25. *Id.* at 1375.

26. We take the "party of humanity" to designate the general idea of a potential progressive movement.

27. Tushnet, *supra* note 15, at 1371.

28. *Id.* at 1375.

the different conceptual forms and levels employed in rights discourse.

The second strand of his argument is no more successful. It is a reworking of the standard CLS thesis which states that the results of adjudication do not and cannot yield the determinate results which liberal legal theory typically claims. The problem with this line of argument is that it tends to make a more sweeping claim than it can sustain. If it is directed only against an account of adjudication as a form of syllogistic reasoning, then the critical argument is sustainable. But this is largely a "straw-person" argument, since the claim that law is a system of syllogistic reasoning has few followers. The currently influential accounts of adjudication rely instead on some test of coherence. Against coherence accounts of adjudication, the simple CLS argument, "not determinant, therefore indeterminant," does not work.²⁹

One of the key formulations of Tushnet's indeterminacy objection is that "the language of rights is so open and indeterminate that opposing parties can use the same language to express their positions. Because rights-talk is indeterminate, it can provide only momentary advantages in ongoing political struggles."³⁰ There are two very different points being made here. First, he assumes without explanation that it is a negative feature of rights-talk that opposing parties can use the "same language." But it surely is a distinct advantage that litigation is structured around claims that take the common form of rights-claims since this makes possible the comparison of the respective claims. In claiming that rights are open and indeterminate, he fails to address the contention that rights-claims articulate the social conflicts and contradictions embedded in social life and are one of the forms in which these struggles get played out in ways which reflect, albeit in complex and mediated fashions, the prevailing balance of social forces. The ways in which struggles over the implementation and interpretation of legal and constitutional rights get resolved and 'rights-claims' articulated is neither chaotic nor unpredictable.

Tushnet's second contention is that rights-talk can provide no more than "momentary advantages" to any party in struggle.³¹ This conception of rights treats them as epiphenomena, or mere

29. This criticism of CLSs' indeterminacy argument is very similar to that advanced by John Stick. John Stick, *Can Nihilism Be Pragmatic?*, 100 Harv. L. Rev. 332, 352-54 (1986); For a critical account of an attempt to develop adjudication which considers this type of objection, see Mark Kelman, *A Guide to Critical Legal Studies* (1987).

30. Tushnet, *supra* note 15, at 1371.

31. *Id.*

reflections of their social context. This view fails to take into account both the ways in which rights are historically grounded in national legal systems and their effects, not only in structuring rights discourses, but also in influencing the outcome of litigation. Tushnet's claim of radical instability and relativity of rights is paradoxically deterministic, presuming as it does that there is no historical sediment involved in legal rights and rights discourses which root them in the soil of particular cultures and inscribe them with nuances, impediments, and biases. We wish to emphasize that it is necessary to pay close attention to the ways in which the past conditions and constrains the possibilities of the present. Rights need to be conceived as historically forged. This line of inquiry suggests, therefore, that while the language of rights is permeable, it is also "weighted" by the past. Thus, the conclusion that rights-talk can provide only "momentary advantages" to those who rely on it is suspect.

To recognize the element of calculation involved in pressing specific rights-claims is quite different from concluding that because rights do not secure determinant outcomes, "only momentary advantages" can be expected. Consideration of the extent to which private property rights are rooted in the political, economic, and juridical culture of the United States highlights the questionable nature of the indeterminacy assertion. It follows that the rooted nature and constitutive character of rights can also work to the advantage of progressive forces. The important point is that recognition of the sedimentary nature of rights discourse provides us with more strategic clues than does Tushnet's overly deterministic characterization of rights as merely second order phenomena.

Tushnet ultimately conflates the indeterminacy and the instability critiques, both of which he reduces to an emphasis on the cultural and historical relativity of rights. His worry about relativity manifests itself in the tension he envisages in being disposed to approve of demands for "rights in Poland,"³² whilst being cautious or even hostile to calls for rights in the United States. His anxiety boils down to the issue of whether or not there is anything "odd about saying that rights in Poland are a good thing, while rights in the United States are not."³³ Tushnet attempts to resolve this dilemma by pointing out that the United States and Poland are "different cultures."³⁴ But it is not entirely clear that this truism

32. *Id.* at 1381-82. For example, Tushnet is committed to the view that Polish workers have a *right* to form independent trade unions.

33. *Id.* at 1382.

34. *Id.*

helps his argument. He is *not*, we think, saying that Polish workers should have the right to join a union, and that United States workers should not have such a right. Rather, he is saying that while he approves of the *demand* for political and legal recognition of trade union rights in Poland, he does not favor political strategies for United States' social movements which focus on rights. Tushnet argues that there is no contradiction in arguing "on pragmatic grounds" for rights strategies in one culture, but not in another.³⁵ We agree with this general sentiment. However, we suggest that the way in which he distinguishes between Poland and the United States is unsustainable. He claims that in Poland formalism reigns and thus, the critique of rights may not have much cultural sway; but in the United States, where legal realism has been an important, although admittedly not unassailable, intellectual force, he concludes that the "critique of rights" "seem[s] to have substantial cultural power."³⁶

There are two problems with this distinction between the United States and Poland. First, Poland is not formalist as he claims. Rather, until recently, the primacy of the political system (the Party) inhibited formalism whilst generating bureaucracy. Second, and more important to our position, Tushnet recognizes that the legal realist message in the United States has not undermined "the enduring commitment to rights in the culture generally."³⁷ Moreover, it is not obvious without further argumentation, that acceptance of the indeterminacy critique undermines either the general political strategy of mobilizing rights-claims, or even the strategy of making legal rights discourses through litigation. Legal realism only indicates that the extreme legal formalist understanding of adjudication is naive.

3. Rights and Reification

In discussing reification, we are in the familiar CLS territory of the fundamental contradiction between self and others. As Duncan Kennedy formulated it: "The fundamental contradiction—that relations with others are both necessary to and incompatible with our freedom . . . is not only an aspect, but the very *essence* of every problem."³⁸ The language of rights, Tushnet recognizes, captures our contradictory predicament and sets up rights as both boundaries against the intrusion of others and entitlements to our

35. *Id.* at 1379-81.

36. *Id.* at 1381.

37. *Id.*

38. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buffalo L. Rev. 205, 213 (1979).

claims for social resources. The key step in Tushnet's argument is his contention that, whilst rights recognize human experience, "the reification critique claims that treating those experiences as instances of abstract rights mischaracterizes them."³⁹

Tushnet's argument in support of this contention merits close scrutiny. He proceeds by considering what experience is involved when he goes on a march to oppose United States intervention in Central America. He contends that the description that he is "exercising a right" mischaracterizes his experience.⁴⁰ "The experiences become desiccated when described that way. We must insist on preserving real experiences rather than abstracting general rights from those experiences."⁴¹ This seems to involve a naïve view of experience which simply equates the immediate and the subjective with the real. It is clear that Tushnet's motivations and experiences are complex. By demonstrating, he is, amongst other things, expressing his political convictions and looking forward to meeting up with some out-of-town friends. Tushnet is correct in pointing out that rights-talk does not embrace *all* dimensions of experience, but then nobody has ever claimed that it does or should. Rights-talk should be regarded as one of a number of different perspectives on a complex, multilayered event like Tushnet's participation in a demonstration. Rights-talk is probably irrelevant if our focus is upon his get-together with friends, but should the police try to break up the demonstration or if Tushnet were arrested, rights-talk becomes relevant.

There is an important kernel to the reification critique, but it is a critique of legal formalism rather than one of rights-talk. It is formalism which tends to *reduce* the complexity of social relations to the narrower limits and possibilities of the legal form. For example, the complexity of marital relations may be reduced to the contractual framework of formalism. Such a reduction is not implicated in rights-talk except where it is articulated in the discourse of legal formalism.

In addition, Tushnet rejects liberal rights partly because in their typically abstract form they have the "troublesome consequence" that, if he has the right to exercise free speech by demonstrating against United States intervention in Central America, then he is pushed towards conceding that others have the same rights with respect to issues which Tushnet finds repugnant. Tushnet assumes that this "troublesome consequence" can be

39. Tushnet, *supra* note 15, at 1382.

40. *Id.*

41. *Id.*

avoided by eschewing the abstract language of liberal rights. Objection to the abstract nature of liberal rights places Tushnet in important company. Marx objected to them on just such grounds.⁴² Liberal rights have precisely the abstract character which Tushnet and Marx attribute to them. We maintain, however, that the abstract character of liberal rights is, in fact, desirable. It makes possible a first stage evaluation of rights-claims that distinguishes the general form of the rights-claim from the characteristics of the particular acts or circumstances which give rise to the claim. It is important to establish, for example, whether a freedom of speech right is at stake before arguing whether the particular form of that right should be upheld or rejected. We see this as a useful adjunct to and supportive of pluralist principles. Further, the inclusive character of liberal rights encourages public debate on matters of importance. The contemporary literature on new social movements promotes the expansion of public or "free spaces." We agree that it is in these "free spaces" that politics can be usefully and openly engaged in. And this sort of open and democratic engagement is prompted by a *prima facie* commitment to equal access to rights-claims. One of the distinct advantages of abstract rights is the way in which they throw the burden on those who would seek to deny them to a particular group or individual to show why that group or individual should not, for the good of the community, have access to the right. The need to defend limitations on, or exceptions to, rights is supportive of pluralistic, progressive, democratic, and communal dialogue.⁴³

4. The Political Utility of Rights

In this section, Tushnet sets out to dispute the "pragmatic arguments" often marshalled by supporters of rights. He disputes the claim that "the idea of rights is politically useful" and argues that "the idea of rights is affirmatively harmful to the party of humanity."⁴⁴ To pose the issue in this way, however, is to treat rights instrumentally; a conception of rights that we dispute in the final portion of this paper. It is the question of what *we* can *do* with rights discourses and legal rights that Tushnet sidesteps throughout his arguments against rights. This is partly a consequence of his failure to distinguish clearly between different uses

42. For a discussion of Marx's treatment of rights, see Amy Bartholomew, *Should a Marxist Believe in Marx on Rights?*, in *The Socialist Register* 264 (1990).

43. This position should be contrasted with Hutchinson and Monahan's argument that liberal rights theory has "corrosive implications for communal aspirations." Hutchinson & Monahan, *supra* note 11, at 114.

44. Tushnet, *supra* note 15, at 1384.

to which rights discourses can be put, but also of his failure to distinguish between legal rights and rights-claims. He implies that the critique of legal rights as indeterminate undermines the value of political struggles around rights discourses. It is significant that he provides no support for this contention.

In supporting the position that rights-talk is positively harmful, Tushnet puts forward the argument that the substantive content of rights doctrine often contradicts the interests of the "party of humanity," and that the dangers to which rights such as the first amendment are directed are "largely hypothetical."⁴⁵ The first arm of the argument suggests nothing more than what the Left already knows: that rights doctrines tend to better support the interests of the "privileged" than others. This does not necessitate the conclusion that such rights, skewed and inadequate as they are, are not still potential resources for progressive movements. Moreover, his analysis is silent on the question of whether progressive forces would likely be worse off vis-a-vis the "privileged" and more powerful in the absence of rights. The second arm of the argument can only be regarded as an "end of politics" position which is stunning in its failure to acknowledge current attacks on long-held, firmly entrenched rights.

He points out that the contemporary rhetoric of rights is loaded in that it is more frequently and strenuously advanced in a form which accords priority to negative rights over positive rights.⁴⁶ He recognizes that one response is to struggle to reformulate the rhetoric of rights in order to give a higher profile to positive rights. For example, if we contrast the rhetoric of rights in the United States with that in Sweden, it is clear that in the latter case the affirmation of positive rights has a much more powerful presence.⁴⁷ Tushnet's response to this proposal to pursue a strategy involving a focus on positive rights can be broken down into two phases. He first contends that:

[He] cannot pretend to have an argument against that course and would not want to weaken my comrades' efforts to build a society that guarantees positive as well as negative rights. But there do seem to be substantial pragmatic reasons to think that abandoning the rhetoric of rights would be the better course to pursue for now.⁴⁸

45. *Id.* at 1389.

46. The distinction between negative and positive liberty was powerfully articulated by Isaiah Berlin, *Two Concepts of Liberty*, in *Four Essays on Liberty* 118 (1970). For purposes of this article, his distinction may be treated as equivalent to a distinction between individual and social rights.

47. See Abrahamsson & Broström, *supra* note 6, at 19-43.

48. Tushnet, *supra* note 15, at 1394.

Though it is far from clear what Tushnet considers "substantial pragmatic reasons," we should consider the positive strategy which he advocates. "People need food and shelter right now, and demanding that those needs be satisfied . . . strikes me as more likely to succeed than claiming that existing rights to food and shelter must be enforced."⁴⁹

Unfortunately, Tushnet does not share with the reader the reasons for his intuitive preference for "demands" over "rights." His claim seems counterintuitive. Beginning from his concern that the hungry get fed, a concern we share with him, we must make some judgment about how that objective is to be secured. In struggles over the distribution of resources, each interest pressed must, at a minimum, advance and sustain some legitimation of the claim. Why should the hungry be fed? Why do they have some claim against the resources of the community?

The great variety of legitimations available fall into two broad groups. The first group, which is the most widely employed, encompasses the argument from entitlement (of which "human rights" discourse is an important example and within which every individual has a claim against the community for some level of provision of the basic conditions of life). The alternative is the charity argument which reasons that the poor have no rights against the community, but that the community manifests virtue by dispensing charity. Does the "demand strategy" advocated by Tushnet provide an alternative? We contend that there can be no such thing as a "demand strategy" since it makes no sense to justify satisfaction of a demand by merely stating, "because we demand it." Social claims, especially new ones, require some mode of legitimation. It is the special significance of legal and constitutional rights that they serve the distinctive role of being pre-legitimated claims. Legal and constitutional rights mark out those social claims and demands which are already adopted for approval by the political system and which have available some access to legal resources for their enforcement. It should be noted that this does not involve any assumption about the efficiency or the effectiveness with which particular political systems protect rights. It does, however, underline the important contention that legal rights are distinguishable from moral rights, that is, from those claims of entitlement which are accorded high moral priority.

Claims invoking entitlement may take many forms. For example, it is strategically significant whether an interest seeks to harness its claim under an existing and recognized legal or consti-

49. *Id.*

tutional right or whether it accepts that there is no existing right, but chooses to argue that such a right should be recognized; that is, makes a 'rights-claim'. Further, it is possible to advance an entitlement claim within a discourse which does not invoke the word *right*. But it is not clear that anything is achieved by this verbal self-limitation; rights-talk is the most general and pervasive form of claims based on entitlement. What is significant is that by virtue of their close proximity to pre-legitimated legal and constitutional rights, as well as their embeddedness within ethical and moral discourses, rights-claims may have special potential for being accepted as legitimate claims which should be accorded legal status. This is why social movements historically have relied upon rights-claims.

Thus, one significant weakness of Tushnet's position is that he does not have an alternative strategy the merits of which can be compared with rights strategies. Indeed his criticism of "blue-printism"⁵⁰ leads him to reject either the possibility or the desirability of offering a programmatic alternative. Not only does he fail to make out a persuasive case against the political utility of rights, but he fails to provide a viable alternative as well. While we share his concern about not wanting to engender any illusions regarding the existence of a simple connection between rights and the goals of progressive social movements, our sense is that his negative critique of rights is a serious overreaction which gives rise to the political mistake of ignoring the potential of rights strategies for contemporary struggles.

We have provided a critique of Tushnet's position with the aim of demonstrating that many of his claims regarding rights are either untenable or are inadequately supported. On this basis, we reject his argument that the Left must abandon rights strategies and discourses. Finally, we wish to indicate some of the political consequences which flow from Tushnet's problematic position. We do not share Tushnet's view that, because liberal rights theory is "a major cultural support of capitalism," rights should be discarded by the Left.⁵¹ This position is too simplistic. While it is undeniably the case that the commitment to liberal rights, as wavering and inadequate as that commitment is, provides support to contemporary capitalist states, it is equally clear that the current commitment to rights renders liberal capitalism more desirable than non-liberal capitalism. The actions of contemporary neo-conservative governments demonstrate the pressing need, not for

50. *Id.* at 1398-99.

51. *Id.* at 1363.

the abandonment of rights and rights theory by the Left, but rather for refinement of our analyses and strategies and close consideration of issues which have been ignored. In addition to the obvious desirability of defending citizens against the encroachments of neo-conservative policies and actions, the importance of rights is indicated by the way in which neo-conservative forces have been able to capture citizen interest in freedom, choice, and protection of the individual against bureaucracy.⁵² In part, the reason for their success has been because the rhetoric of the Left has largely either ignored or taken a negative stance on these issues. The paternalism of social democracy and welfare states has raised for many people real questions demanding answers concerning the place of choice and the individual in "mass society." The neo-conservative response to these concerns is not the only one possible. Yet, until the Left decides to get serious about investigating and thinking about rights, rights-claims, and rights strategies, the gap will be filled by the Right.

B. Freeman's Critique of Rights

To posit a unitary critique of rights within CLS is probably to oversimplify the differences within CLS's "critique of rights." Alan Freeman's work provides a rather different set of arguments directed against rights than those put forward by Tushnet. In particular, Freeman relies more explicitly on a Marxist conceptualization of law and rights, and emphasizes law as ideology rather than relying upon the concepts of indeterminacy, instability or reification. The ideological character of law and rights has been a persistent theme in the Marxist version of the critique of rights within CLS.⁵³ Attention to both "Antidiscrimination Law: A Critical Review"⁵⁴ and the more recently published, "Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay,"⁵⁵ permits a comparative assessment of the work of the "early" and the

52. For a very useful analysis of neo-conservatism that distinguishes between neo-conservative rhetoric regarding "more limited government" and the reality which includes increased state expenditure in particular areas such as military spending and "re-invasions of the state into civil society and the private behaviour of individuals," see Reginald Whitaker, *Neo-Conservatism and the State*, in *The Socialist Register* 2 (1987).

53. A concern with the ideological character of rights also informs Tushnet's project. He suggests as much in making his claim that because rights provide part of the "cultural capital that capitalism's culture has given us," they must be delegitimated. Tushnet, *supra* note 15, at 1363.

54. Freeman, *supra* note 16.

55. Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 Harv. C.R.-C.L. L. Rev. 295 (1988).

"mature" Freeman, an undertaking made pertinent because of the shifts in his position.

The Marxist trace within the CLS "critique of rights" is well represented by Freeman, whose contribution has been important in formulating a critique of the role of rights in capitalist societies. He emphasizes the role of law and rights as ideology, but we will argue that his analysis is weakened by the overly simplistic conception of ideology which he employs. Closely connected to this unsatisfactory treatment of ideology is an approach to power which is insufficient for the task.

In "Antidiscrimination Law," Freeman seeks to understand the perseverance of racism and discrimination in the face of three decades of antidiscrimination law and to explain the contemporary retrenchment in legal doctrine after twenty years of apparent progress. His thesis is that antidiscrimination law in the United States has "served more to rationalize the continued presence of racial discrimination . . . than it has to solve the problem."⁵⁶

Freeman identifies three distinct periods in the development of Supreme Court antidiscrimination doctrine. The first era, ushered in by *Brown v. Board of Education*,⁵⁷ saw the introduction of a decontextualized, colorblind, "perpetrator perspective" which focused on specific acts of discrimination by guilty individuals.⁵⁸ In the second period, a more contextualized, result-oriented approach emerged. Freeman labels this approach the "victim perspective."⁵⁹ The significance of the "victim perspective" was that it took into account the systemic nature of racial discrimination and posed a challenge to the hegemonic understanding of equality of opportunity which had previously resisted such concrete and potentially destabilizing doctrines. While the "victim perspective" never gained dominance, it did compete for acceptance in this interim period. The previously dominant "perpetrator perspective" re-established its hegemony again in the mid-1970s.

Freeman attempts to explain these shifts in legal doctrine and addresses the interesting question of how the relatively progressive "victim perspective" came about. His examination is based on a perspective which emphasizes the long-run persistence of racial discrimination. He argues that both the historical pattern and the content of antidiscrimination law can best be understood by reference to the ideological role of law. Specifically, he argues

56. Freeman, *supra* note 16, at 97.

57. 347 U.S. 483 (1954).

58. Freeman, *supra* note 16, at 98-99.

59. *Id.* at 98.

that antidiscrimination law has been more important for legitimating existing class and race relations than it has been for ameliorating racism and discrimination. Hence, the seemingly progressive change implicit in the shift to the "victim perspective" is explained by Freeman as being "in the interests of the ruling class" while the reversion to the "perpetrator perspective" is explained by reference to both the "needs" of capitalism and to the paradoxical fact that the "victim perspective" laid the ideological groundwork for its own displacement.⁶⁰ Each of these theses deserves closer scrutiny.

Freeman posits the existence of a "deep structural explanation" for the development of antidiscrimination doctrine.⁶¹ Why did the "victim perspective" emerge? The weight of his argument rests upon the assertion that it was in the interests of the "ruling class" to "accept and partially implement a commitment to the end of racism."⁶² The "victim perspective" embodied this ideological framework. He then argues that the "victim perspective" made possible the reinstatement of the narrower "perpetrator perspective" since it allowed the Supreme Court to pretend that discrimination had been overcome. This functional explanation of the demise of the victim approach and the re-emergence of the "perpetrator perspective" is preferred by Freeman to an explanation which would address litigation strategies and the struggles within which they are embedded. He argues that "the law's refusal to incorporate the "victim perspective" has had little to do with either the logic or effectiveness of legal argument or the subjective wishes of the participants in the legal process."⁶³

The dominant "perpetrator perspective" is credited with legitimating class and race relations by shifting the blame for failing to achieve social aspirations onto individuals; thus, obscuring structural barriers to equality. He treats this perspective as corresponding in some unspecified way to the "needs" of capitalism. In fact, he asserts that "legal ideology had to reject the victim perspective" since the implications of the "victim perspective" are inimical to the "needs" of capitalism.⁶⁴ During the course of this inescapably determinist⁶⁵ line of argument, Freeman rejects those Marxist ap-

60. *Id.* at 110-12.

61. *Id.* at 111.

62. *Id.* at 110.

63. *Id.* at 106.

64. *Id.* at 113.

65. Freeman's position is determinist in that capitalism, even at an abstract level, is conceived of as having "needs" which are necessary to its continued existence. Moreover, all elements of the social system are programmed, by some unspecified mechanism, to provide for these "needs."

proaches which would treat gains in antidiscrimination law as halting, fragile and reversible, but, at the same time, would claim they constitute "a substantive gain in the class struggle."⁶⁶ He eschews this view by arguing that, even if successful, civil rights reform would not significantly undermine the class structure itself; and this he takes to be the primary yardstick by which the success of antidiscrimination law should be judged. Freeman believes that whatever gains have been achieved were accepted in order to legitimate capitalism: "From this perspective, the goal of civil rights law is to offer a credible measure of tangible progress without in any way disturbing the basis of class structure."⁶⁷ He argues that it was in the interests of the ruling class to "bourgeoisify" a small section of the black underclass in order to "transform them into active, visible legitimators" of capitalism.⁶⁸

Freeman operates under the presumption that legal doctrine should be evaluated primarily in terms of its concrete results; on this measure, he pronounces civil rights law a failure. The only criterion of "success" which he recognizes is the achievement of a radical undermining of the foundations of class society. The result is that Freeman denies the possibility of struggling within law and thus, ultimately seems to counsel abstention from legal struggles.⁶⁹

Freeman wants to evaluate legal doctrine in terms of its success or, more simply, the results which stem from its application in litigation. He argues that "judged by the only sure criterion for assessing the success or failure of civil rights law—results—the effort has largely failed."⁷⁰ He arrives at this conclusion because of the manner in which he sets up "the problem" of racism. He insists that racial discrimination exists at, what he calls, the "deep level of class structure." The consequence of thus conjoining race and class is that the only criterion of success in evaluating legal doctrine which he will admit is that a radical undermining of the foundations of class society must be demonstrable. Such a test is, of course, virtually unpassable. It leads him to refuse the goal of struggling within law and ultimately reinforces his abstentionism with regard to legal struggles. He concludes that to attempt to redress racial discrimination without addressing class relations leads to one becoming "part of the legitimization process";⁷¹ to espouse affirmative action can yield nothing more than "token

66. Freeman, *supra* note 16, at 107-10.

67. *Id.* at 110.

68. *Id.*

69. *Id.* at 106, 109.

70. *Id.* at 96.

71. *Id.* at 114.

bourgeoisification."⁷²

We believe Freeman's project is an important one. He seeks to confront a development in American constitutional law which has held ideological pride of place in American constitutional mythology, namely, the "overcoming" of the United States' racist past through commitment to constitutionally entrenched equality of opportunity. By focusing on the doctrine of equality of opportunity and asserting that even progressive court victories may contribute to this process, Freeman raises the important issue of the ideological dimension of rights. Not the least of Freeman's accomplishments is his unerring recognition of the limited potential of typical affirmative action remedies for substantial redress in a class-divided society. However, Freeman's treatment of the development and consequences of the ideology of equality of opportunity and antidiscrimination law is marred by significant theoretical weaknesses which also have important political and strategic consequences. We contend that Freeman's position is class reductionist and probably functionalist.

His analysis is class reductionist in the way in which it treats the priority of class oppression over racial oppression. It is functionalist in arguing that capitalism has "needs" which are, in some unspecified way, recognized and satisfied by the courts. This problem is one which has plagued Marxist scholarship on law and rights, and we do not wish to insinuate that Freeman alone bears its mark.

Freeman's analysis of antidiscrimination doctrine rests upon a problematic account of the nature of racial oppression. Whilst he seeks to acknowledge the specificity of racial oppression, his analysis proceeds to recognize only class, and not race, as central to his inquiry. For example, he argues that: "The history of antidiscrimination law suggests that no genuine liberation or change in the conditions associated with the historical practice of racial discrimination can be accomplished without confronting class structure."⁷³ While we endorse analyses and strategies that clarify and rest upon the linkage of racism to the history of capitalist practices and class relations, Freeman's analysis goes too far. He obliterates the importance of race and racial specificity in law, legal strategy, and history. His assertion that civil rights law has had the "goal" of maintaining racist social relations is class reductionist and his insistence that participating in legal struggles around racial discrimination simply legitimates prevailing relations is overly sim-

72. *Id.*

73. *Id.* at 97.

plistic and strategically damaging. While he is correct to stress the instrumental limits of antidiscrimination doctrine in a capitalist society like the United States, this does not necessarily lead to the conclusion that antidiscrimination doctrine has no significant part to play in progressive struggles against racial oppression.

Struggles around antidiscrimination doctrine and affirmative action, even those not informed by class analysis, may serve to sharpen the issues. They have the capacity to radicalize progressive forces and might also encourage future political struggles which articulate race and class concerns in counterhegemonic ways. Because of his assumption that race cannot be adequately dealt with in the absence of class politics, Freeman fails to consider these possibilities. Even if he is correct in claiming that racism cannot be eliminated until capitalism is abolished, it is important not just to insist that such an anti-capitalist revolution is unlikely to be sufficient in itself to eradicate racial oppression, but also to consider the role which rights struggles will need to play in the struggle against all forms of oppression.

Second, as we have shown above, Freeman seeks to explain the history of antidiscrimination legal doctrine by reference to its ideological function. Such a position becomes functionalist when he fails to offer any account of the mechanism by which the courts keep legal doctrine in line with the functional requirements of capital. For example, he describes the various stages of antidiscrimination doctrine and insists that they have met the contemporary needs of capital, but he makes no effort to explain why the Court reverted to the "perpetrator perspective." All he offers is that the "victim perspective" "had" to be scuttled, and that it performed its function by paving the way for retrenchment. Merely by claiming that this shift was functional for capitalism, as indeed it may well have been, does not explain either the reasons for or the mechanism of the shift. The fact that he characterizes *both* the "victim perspective" and the "perpetrator perspective" as being "in the interests of the ruling class" crystallizes the analytical and political-strategic problems with this sort of analysis.

His argument that the Supreme Court "had" to retrench, because the victim approach is inimical to capitalism is either contradictory or assumes that legal doctrine adjusts, by means of some unspecified process, to the needs of capital. Moreover, even if the "victim perspective" *had* to be rejected, it was surely not inevitable that the Court would return to the "perpetrator perspective." This significant shift requires some explanation other than the invisible hand of the "needs of capital." To account for the reemergence of

the "perpetrator perspective" would require an explanation pitched at a lower level of abstraction—one which would attend to the play of specific causal processes. It is significant that Freeman fails to explain how the interests of the "ruling class" or the "needs of capitalism" might be recognized by the courts and be satisfied.

At the heart of Freeman's theoretical weaknesses lies an insufficient attention to the relational character of power and to the actual, empirical balance of power in the period under consideration. It is not that he fails to recognize the conflicts endemic to class society or that oppression is a relational concept; indeed he does so explicitly. The problem is that this recognition is not integrated into his treatment of the development and effects of antidiscrimination doctrine. There are, in fact, two closely related, but distinguishable, elements in Freeman's treatment of power. First, he employs an analysis which assumes that power is monopolized by the ruling class. Second, his treatment of power both underlies and is a consequence of his functionalist analysis. Let us expand upon these contentions.

His view of ruling class power as monolithic imports the assumption that, not only is this class homogeneous, but that it has a single identifiable interest with respect to antidiscrimination doctrine. It further imports the idea of a ruling class so powerful that it is, in some unspecified way, able to realize its interests.⁷⁴ This view leaves little room for seriously maintaining that power is relational. Relational views of power ground their analysis in the relationship between classes or other social groups. Freeman's one-sided view of power is embodied in his assertions that the development of antidiscrimination law "corresponds" to the interests of the ruling class and the consequent lack of attention to the role played by other classes.

The assumption of a class monopolization of power has damaging consequences.⁷⁵ First, it is, in a sense, too radical in that it assumes that power is wielded by the "powerful" and denied to the "powerless."⁷⁶ Such an analysis is predisposed to explain all reforms or retrenchments as occurring at the behest of the ruling class and is thus inclined toward a political strategy of simple oppositionalism. Second, Freeman's thesis that law facilitates the

74. *Id.* at 110-14.

75. The assumption of a class monopolization of power is prevalent in elite theories which have historically exerted much influence on Left scholarship in the United States. See, e.g. Charles Wright Mills, *The Power Elite* (1956).

76. See Leo Panitch, *Elites, Classes and Power in Canada*, in *Canadian Politics in the 1980s*, 229 (2d ed. 1984).

persistence of capitalism by maintaining people of color disproportionately in the "underclass", and that this is in the interests of the "ruling class," assumes an always-already present or given balance of power. Furthermore, it supposes that the resistances and struggles of the "underclass" are necessarily irrelevant to both the trajectory and content of the law.

Freeman's inattention to the significance of the relational character of class power is a consequence of his functionalism. We have shown that he posits that the "victim perspective" emerged primarily in order to legitimate capitalism, that it receded because of the "needs" of capitalism, and that the entire uneven history of antidiscrimination doctrine evolved in line with the interests of the ruling class. Thus, not only are the "needs" of the ruling class presumed, but, more significantly, his analysis assumes that these "needs" are satisfied by the law (or other institutional or ideological mechanisms). One of the central problems with such an analysis is the way in which it operates as a substitute for serious attention to the processes of change and struggle through which the courts are goaded and prodded into acting. The functionalist approach preferred by Freeman manifests itself in a number of problems in his analysis.

First, Freeman never explains how the needs of the system, or the interests of the ruling class, are met. It is interesting that when discussing simple Marxist explanations of race, Freeman indicates that he is well aware that functionalist approaches do little more than describe an existing state of affairs. By failing to attend to agency and contests, they can explain little. Yet, this is precisely the form of argument he then uses to assert that the "goal" of antidiscrimination law is to legitimate capitalism.⁷⁷

Second, his account of the development of antidiscrimination doctrine is essentially ahistorical. The rich history of the contests and struggles for power and influence is passed over in his preference for analysis constructed in terms of the interests of the ruling class and the "needs of capitalism." This failure to attend to the real struggles around and within antidiscrimination law suggests a blindness to the participants, organizations, strategies and contestations involved in the fight for civil rights. By treating the Supreme Court as unilaterally imposing a vision of antidiscrimination doctrine, there is a readiness to blame the Court, and indeed rights doctrine in the abstract, for outcomes which were, in fact, historically forged by and through a multiplicity of agents and events. A consequence of this approach is that the role of other

77. Freeman, *supra* note 16, at 110.

social actors in the construction of antidiscrimination law is never investigated. For example, there is no mention of the role of the NAACP, of African American churches, white working class racism, or racist trade union practices. Without inquiring into such matters, it is misleading to prosecute rights doctrine—or antidiscrimination law—in the abstract.

Not only do we lose an analysis of actors in struggle, of the richness of history, of strategy and alliances, of blockages and chance occurrences, in his story, but his approach also has damaging consequences for his treatment of legal ideology. He treats the ideological character of antidiscrimination doctrine as similarly monolithic and unfissured. As a consequence of his treatment, ideological effects are also treated as essentially unidimensional. How could it be otherwise conceived given the elision of struggle, conflict, and agency in his analysis? It is only upon an analysis which attends to these issues that a more complex picture of ideology might be developed.

Instead, Freeman concentrates exclusively on the overarching ideological effect of "equality of opportunity" in legitimating continuing class and race inequalities. He neglects, for example, to ask how antidiscrimination victories or the uneven development of antidiscrimination doctrine effected various civil rights movement organizations and the African American freedom struggle in general. To take him to task for not asking questions such as these is legitimate since his purpose is to encourage us to "unthink" legal ideology.⁷⁸ In order to do this, we must be able to see and attend to the various threads of this ideology and consider the possibility that there may be alternative meanings or even counter-ideologies present in legal doctrine. In attending only to the legitimating qualities of antidiscrimination law, he fails to consider the other possibilities including, that such cases were important symbolic victories and may have provided significant rhetorical resources in the form of legitimated rights which the civil rights movement was then able to mobilize. While the antidiscrimination doctrine may have had broader ideological effects and could, in fact, have disempowered the African American freedom struggle, Freeman's failure to seriously consider alternatives renders his account of ideology unpersuasive.

The political message of his position is that until, and unless, a massive assault on class domination is in place, we may as well not do anything. If we act, Freeman implies, we inevitably fall into the trap of "co-optation" and may ignore "the possibility that

78. *Id.* at 111.

some measure of racial change may well be in the self-interest of the contemporary dominant classes."⁷⁹ While, of course, he is right that this *may* be the case, it is not necessarily so. It will only be possible to identify and distinguish when the likelihood of integration or co-optation outweighs the likelihood of constructing counterhegemonic struggles by developing analyses which squarely confront these questions, rather than presuming that legal struggles "naturally" co-opt social movements. Such analyses must raise questions about the kinds of interests being asserted, the transformational potential of the specific rights-claims employed, the various ways in which interests and identities might be constituted and represented and the possibilities of combining movements and their demands into more encompassing and challenging forms. But these issues are premised on a quite different understanding of power and agency than is evident in Freeman's early analysis.

In his response to the minority critiques, "Racism, Rights and the Quest for Equality of Opportunity,"⁸⁰ Freeman charts his own political development from concerned liberal to disenchanted liberal to radical scholar. It is an important piece for a variety of reasons, not the least of which is that it makes explicit what seems to underlie a great deal of the CLS's "critique of rights" in general and Freeman's critique in particular. That is, a deep disenchantment with strategies involving law and rights in the quest for equality—especially racial equality—and the pivotal role played by *Brown v. Board of Education* and its progeny in contributing to this process of disillusionment.⁸¹ If limited to a critique of legal strategies aimed at achieving formal equality of opportunity, such disenchantment might be supportable. However, there has been a general tendency to leap from the specificity of this issue and this set of rights to far broader claims about the problematic nature of rights in general without making the required stops along the way. Freeman's most recent work is no exception. It introduces significant new dimensions to his position whilst retaining key notions from his earlier work; the net result is to produce significant tensions within his current work. Therefore, the more recent text appears to be a work of transition. We will focus on those elements which are relevant to understanding his position on rights in general, rather than on the issue of "equality of opportunity."

79. *Id.* at 110.

80. Freeman, *supra* note 55.

81. For a similar treatment of the "minority critiques," see Morton J. Horwitz, *Rights*, 23 Harv. C.R.-C.L. L. Rev. 393 (1988).

Freeman reiterates the importance of attending to the ideological dimensions of rights by arguing that it is this dimension of rights that is most significant for radical treatments of rights, rather than their indeterminacy, instability, or reifying characteristics. His treatment of ideology operates at two levels. At a high level of generality, he continues to treat ideology much as he had in his earlier work where he presents it as monolithic, unfissured, and as obscuring real relations. Based upon this understanding of ideology, he continues to call for "unthinking" or "critical legal debunking of rights claims" in order to "free oneself from the strait-jacket of prevailing ideology."⁸² He even employs the notion of false consciousness, although he admits, without elaborating upon the point, that this is a "risky" business. At this level, he is keen to hold onto previously elaborated notions only to be contradicted at the next level of his analysis. At his second level, which represents what is new about his approach to ideology, he engages in a substantive analysis of the way in which ideology functions to narrow "the permissible bounds of political discourse."⁸³ This leads into an analysis of the way in which ideology, including legal decisions, helped to circumscribe the civil rights movement's goals and its room for legal maneuver. Thus, he provides an analysis, absent from his earlier work, of how formal equality doctrine congealed into the "only reasonable option" to pursue.

Freeman's question now is: How has rights doctrine and ideology circumscribed the legal strategies of the movement? Here, we see a more political approach to the question; one in which the *interaction* between agency and structure is explored more thoroughly than in his earlier work. We no longer get the message that, whatever strategy the movement had employed, the outcome would have been the same. We are no longer presented with capitalism's "needs" and ruling class interests as major explanatory devices. While there is still no attention to the political or social context of the movement's legal strategy, this analysis is far richer than his earlier one.

A key link to his earlier work is found in the following passage:

Rights are granted to, or bestowed upon, the powerless by the powerful. They are ultimately within the control of those with authority to interpret or rewrite the sacred texts from which they derive. To enjoy them, one must respect the forms and norms laid down by those in power. One must especially avoid excesses in behavior or demands. Rights are never 'owned',

82. Freeman, *supra* note 55, at 324.

83. *Id.* at 343.

merely loaned, and all too easily manipulated away or neutralized by the dismissal of their potentially transformative promise as fantasy. It is easy to catalog the false promises and harsh realities associated with regimes of rights.⁸⁴

The problem with this formulation is not its recognition of the slipperiness of rights and rights discourse; rights are ultimately and continually contestable and revocable. They are not inalienable, sacrosanct, or above the play of politics. We have endorsed this understanding of rights throughout our arguments. What is problematic in Freeman's analysis is his vision of power relations. This vision replicates the overly simplistic and disabling treatment embedded in his earlier analysis. Rights are conceived as being "bestowed" or granted, rather than pried away and won. Rights are bestowed by the "powerful" upon the "powerless." They are ultimately controlled and shaped by those in authority. Here, those "in authority" are limited to those who are in official contact with the law—the legislators, and the judges who interpret the law.

This treatment of power stands uncomfortably alongside newer aspects of his analysis which belie this one-sided treatment of power. In the newer aspects of his analysis of power, he recognizes the opportunities, spaces, and tensions for engaging in counter-hegemonic political strategy. But such an analysis only makes sense within the framework provided by a relational conception of power.

In his treatment of the struggle for equality of opportunity, Freeman learns from the "minority critiques" of CLS. Rather than focusing on the courts as the authoritative and single-handed interpreters and fashioners of doctrine, as he had done in his earlier work, he engages in an examination and analysis of the fight for equality of opportunity by focusing on the litigants and the context in which their efforts were located. He now accepts from the "minority critiques" that "membership rights"—the rights of citizenship broadly construed—may be crucial for those who have been treated as other. He also acknowledges that the struggle itself may be empowering and that the "unique power of rights rhetoric and belief" may act as a "source of imagery and inspiration" to collectivities in struggle.⁸⁵ Finally, he articulates his new position when he argues that there is:

a discernible difference between the felt authenticity of communal struggle for rights, and defensive complacency about the functional utility of rights. I wish to be allowed to talk

84. *Id.* at 331.

85. *Id.* at 335.

about the latter without being perceived as trampling on the former.

I believe that the civil rights movement has been compromised by the implicit limitations associated with reliance on rights and the legalism of formal equality.⁸⁶

What is new in this analysis is the recognition of the potential value of struggling for rights. What is old—insofar as it resonates with the themes present in his earlier work—and odd is his persistent belief that rights contain implicit limitations which compromised the civil rights movement. This is odd because, despite the fact that his subsequent analysis is far more attentive to agents in struggle and to the limitations of social and political conditions within which they act, when making general statements he still insists on displacing the analysis of the social construction of rights with an analysis which comes back to the “implicit limitations” of rights-talk. Yet, there is still no account of what it is that is inherently limiting about rights-talk.

Freeman also reveals a significant refinement in his continuing project of delegitimizing rights. Now, he distinguishes between complacent belief in the instrumental utility of rights and their potential role as political resources. This is a useful distinction which he uses to specify what is and what is not problematic about rights. Insofar as we have criticized Tushnet for certain slippages in this regard—particularly for applying conclusions derived from a critique of the functional utility of rights to the value of rights discourse in the broader sense—this level of specificity and sensitivity to distinguishing the separate issues involved is an advance. Yet, it rests quite uncomfortably alongside the view that there are implicit limitations in relying on rights.

Neither his second level of analysis of power, nor his newer understanding of rights, however, has significantly affected Freeman's assessment of the political utility of rights strategies. In place of a discussion of the politics of rights, we are given the meager sustenance of a vision, reproduced in a hypothetical exam question, in which a “cosmic coalition” struggles for material and substantive social reform.⁸⁷ What is missing in this hypothetical are questions regarding how rights struggles might contribute to the “cosmic coalition.” There is no discussion, for example, of how pursuing, pressing, stretching, and interrupting existing rights discourses could contribute to the strategy and solidarity of the “cosmic coalition.” We contend that it is necessary to look closer to

86. *Id.*

87. *Id.*

home than such hypothetical "cosmic coalitions." We need to look toward establishing a new politics of rights.

V. The Minority Critiques of CLS

The "minority critiques" of CLS offer wide-ranging criticisms of CLS.⁸⁸ The criticisms are organized around three aspects of the CLS project: first, the CLS preference for informal over formal structures;⁸⁹ second, the critique of rights itself; and third, CLS's inattention to developing a positive political vision and program. Each contribution of the "minority critiques" offers distinct arguments regarding the roles of rights, rights discourses and rights struggles in the politics of minority movements. These critiques are particularly important in several respects. They draw attention to the role of rights in the formation of the identities of minorities,⁹⁰ to the potential protection offered to oppressed minorities by rights, and to the complexity and variety of experiences associated with rights discourse and struggles. We will focus primarily on those aspects of the critiques that relate most closely to the CLS "critique of rights."

There are three interdependent themes in the "minority critiques" which are particularly germane to our concerns. It is important to note that each of these themes revolves around the concepts of "experience" and "position." First, the "minority critiques" maintain that the CLS "critique of rights" has ignored minority experiences with rights struggles and that these experiences offer unique insights into issues of rights and justice.⁹¹ Second, they argue that minority experiences are functionally different from those of nonminorities or of the "white Left," and that CLS has failed to recognize this difference.⁹² Third, while some con-

88. The set of texts which we treat as comprising the "minority critiques" are: Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 Harv. C.R.-C.L. L. Rev. 301 (1987); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323 (1987); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 Harv. C.R.-C.L. L. Rev. 401 (1987); Harlon L. Dalton, *The Clouded Prism*, 22 Harv. C.R.-C.L. L. Rev. 435 (1987); Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 Law & Inequality 103 (1987).

As Kimberlé Williams Crenshaw's contentions are different from the rest of the "minority critiques," we deal separately with her arguments at the end of this section. Kimberlé Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331 (1988).

89. See, e.g., Delgado, *supra* note 88.

90. See, e.g., Patricia Williams, *supra* note 88; Delgado, *supra* note 88.

91. We utilize the concept "minority" here rather than "people of color" or "African American" because we believe it is the most inclusive term.

92. Patricia Williams, *supra* note 88, at 415.

tributors cite additional factors, all of the "minority critiques," except those of Crenshaw, conclude that the weaknesses in the CLS project are rooted in the privileged position of its white "founding fathers."⁹³ We will deal with these three themes in turn, and consider Crenshaw's arguments separately.

The first contention, that CLS has paid insufficient attention to minority experiences with rights and rights discourses, is taken up in all of the "minority critiques." Robert Williams, Jr. argues that in failing to attend to the richly textured experiences of the mobilization of rights discourses by and for minorities, the CLS "critique of rights" demonstrates the "perils of a disengaged theoretical stance."⁹⁴ He eloquently summarizes the contention that rights constitute "icons" for minorities:

For peoples of color . . . these icons mark trails along sacred ground. The attack by the Critical Legal Studies movement on rights . . . discourse can be seen as a counter crusade to the hard campaigns and long marches of minority peoples in this country. Minority people committed themselves to these struggles, not to attain some hegemonically functioning reification leading to false consciousness, but a seat in the front of the bus.⁹⁵

Patricia Williams also argues that the inward-looking position of the "critique of rights" leads scholars like Tushnet to misjudge the political utility of rights struggles. Moreover, she contends that by attending to concrete rights struggles by minorities, CLS would have recognized that minorities do know that rights and rights discourses are complex, contradictory, and fraught with failures and dangers as well as with opportunities. Finally, Patricia Williams and the other scholars argue that it is only by ignoring the minority need for rights, to protect them against some of the worst ravages of oppression, that the "critique of rights" can fail to comprehend the instrumental value of legal and constitutional rights for minorities.

We are in full agreement with the "minority critiques'" assessment of the consequences of CLS's general failure to analyze concrete struggles and the contribution of minority scholarship and history. While we assume that the contributors to the "minority critiques" would agree, we would simply like to stress that the rich variety of the deployment of rights discourses and rights strategies by social movements deserves attention. Hence, it is not just

93. Rarely have a group of male academics been forced to age so rapidly; CLS activists like Duncan Kennedy, Mark Tushnet and Peter Gabel have made the passage from "young turks" to founding fathers in less than a decade.

94. Robert Williams, Jr., *supra* note 88, at 121.

95. *Id.* at 120.

the experiences of minorities with rights discourses that should be studied—even though the African American freedom struggle has been the most significant rights-based struggle in the contemporary period in the United States. By focusing exclusively on minorities' experiences with rights discourses, the important history of other rights struggles is ignored; for example, those struggles waged by women for the vote and by trade unions for labor rights. We also suggest that reactionary struggles of the "new Right" around issues like "father's rights" require analysis. The lack of attention of the CLS "critique of rights" to the wide variety of the uses of rights by a broad range of different social movements is damaging to CLSs' critical and political project. Indeed, comparative study of the employment of rights discourses by social movements is necessary to enable us to tease out the potentially differential implications of the utilization of rights discourses by different sets of interests.

Employing the notion of "looking to the bottom," Mari Matsuda makes the most elaborated claims regarding the salience of minority experiences for CLS scholarship.⁹⁶ She argues that "looking to the bottom" raises essentially two points. First, it focuses analytical attention on the experiences and struggles of minorities; and, second, it incorporates epistemological claims which depend upon the concepts of "experience" and "standing" which culminate in the assertion that the racially oppressed have the standing required to provide the "ideals" necessary to guide progressive political strategy.⁹⁷

According to Matsuda, the major weakness in the CLS "critique of rights" is the fact that it lacks a "normative source." The voice of the racially oppressed is offered as a "new epistemological source."⁹⁸ This new epistemological source entails "adopting the perspective of those who have seen and felt the falsity of the liberal promise."⁹⁹

To the extent that Matsuda is arguing for the creation of intellectual and political alliances "with the bottom,"¹⁰⁰ we think her contribution is important. When she argues for the critical incorporation of lessons learned from concrete rights struggles and the perceptions of the experiences of those struggles as articulated by the participants, her arguments are unassailable. These are precisely the sorts of inquiries that we have taken Freeman and

96. Matsuda, *supra* note 88.

97. *Id.* at 337-49.

98. *Id.* at 324-25.

99. *Id.* at 324.

100. *Id.* at 324-26, 361.

Tushnet to task for ignoring. "Looking to the bottom," in the sense of actively including the voices of the oppressed, studying with them their experiences, and listening seriously and critically to their stories, would indeed make a crucial contribution to CLS considerations of rights. There are, however, aspects of Matsuda's arguments that are more problematic.

She occasionally seems to go beyond arguing for taking minority voices and experiences seriously and extends to minority experiences a special or privileged status. Her argument draws on radical feminist arguments about "experience" and "position"; she relies explicitly on Catharine MacKinnon's work and extends it to the context of racial oppression.¹⁰¹ While her arguments focus on what CLS can learn *from* minority experience, her claims about the status to be accorded that experience seem to shift in the course of her argument. Hence, in addition to calling for the incorporation of minority experiences, "albeit with a critical eye,"¹⁰² she also maintains that "those who have experienced discrimination speak with a special voice to which we should listen."¹⁰³ When approached "from the position of groups who have suffered . . . moral relativism vanishes and identifiable priorities emerge."¹⁰⁴ Finally, as indicated above, we are counselled to "adopt the perspective of the oppressed."¹⁰⁵ Thus, she attributes to the racially oppressed "distinct normative insights."¹⁰⁶ Here she draws upon the legal concept of "standing" in order to maintain that "one needs to ask who has the real interest and the most information. Those who are oppressed in the present world can speak most eloquently of a better one . . . They will advance clear ideas about the next step to a better world."¹⁰⁷

This seems to go beyond arguing for inclusion of the voice of experience either in order to redress previous exclusion or because the voices of the oppressed may have something unique to contribute by virtue of the specificity of their experiences. That "experience" should be listened to is incontrovertible, but whether it has any other epistemological status or priority is more controversial. The category "experience" is important in rejecting all forms of paternalism through which outsiders tell the oppressed what they

101. *Id.* at 359.

102. *Id.* at —; see also Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 *Signs: J. of Women in Soc'y* 515 (Pt. 1 1982), 8 *Signs: J. of Women in Soc'y* 635 (Pt. 2 1983).

103. Matsuda, *supra* note 88, at 347.

104. *Id.* at 325.

105. *Id.* at 324.

106. *Id.* at 326.

107. *Id.* at 346-47.

experience. But the valorization of experience should not lead to unsupported claims about its methodological or theoretical *priority* without far more argumentation.

We want to be clear that efforts to address the pertinence of "experience" and "position" to scholarly inquiry are extremely important. Serious attention, however, must be paid to the sorts of claims that are being made about the epistemological status of experience. We fully accept that one's social position—class, gender, race—and one's "experience" are relevant to scholarship and to developing normative insights. Particular positions and experiences are likely to lead individuals to highlight certain issues and problems whilst throwing other issues into the shadows. It is, however, important to distinguish between the objective social location, or "position," of groups and the forms of consciousness, or "perspectives," that are generated from within that "position."¹⁰⁸ Neither "position" nor "experience" provide any guarantee as to the political pertinence or merit of perspectives that are generated within that experience. Matsuda does not provide any support for her claim that the experience of oppression provides one with a *better* conceptualization of justice or with "distinct normative insights." There is no guarantee that such primary experience will generate a positive, coherent vision of a political alternative. Indeed, it seems just as likely that experience of oppression could generate shallow conceptions of justice and pessimistic visions of the future.

The nub of the problem is contained in Matsuda's use of the concept of "standing," which entails the claim that the oppressed have the "real interest" and the "most information" to produce normative solutions and to map desirable and just futures. The problem is that her concept seems to conflate "position" and "perspective." In so doing, she appears to assume that she has provided the necessary grounds for the validation of her political conclusion. We maintain that such normative insights require specific justification. Ideas that arise from an experience of oppression are pertinent to overcoming that oppression, but provide no guarantees as to the helpfulness of the answers provided. It is by no means self-evident that primary experience will generate a positive vision of an alternative. In addition, it seems clear that the social position from which one "knows" is not all that is relevant. The concepts

108. For a useful discussion of the concept of "standpoint," see Alison M. Jagger, *Feminist Politics and Human Nature* 369-89 (1983). For a similar treatment of "perspective," see Maureen Cain, *Realism, Feminism, Methodology and Law*, 14 *Int'l J. of Soc. of L.* 255-68 (1986).

and knowledge historically available to the speaker in that position are also pertinent and probably condition the normative conclusions which are available. Thus, the invocation of "experience" and "standing" is important and provocative. In order to provide, however, the means of addressing CLS's "normative void," these concepts, and the consequences to be drawn from them, will require more theoretical elaboration and justification.

Matsuda's treatment of "experience" actually raises a variety of claims, in addition to the priority of voices which emerge from the experience of racial oppression, which deserve consideration. First, the notion of experience is treated as essentially unitary, such that all those who share a common general situation, such as women or African Americans, are assumed to share a common experience. It is highly problematic to make this assumption and it results in a failure to explore or to take account of the diversity of experiences. While Matsuda is careful in her footnotes to disclaim writing the "definitive statement of the minority perspective"¹⁰⁹ and attempts not to speak for other minority experiences (thus evincing a sensitivity to the existence of a variety of oppressed experiences),¹¹⁰ her methodological prescriptions for CLS—listening to and studying minority experience—are treated as listening to experience-in-the-singular. This is pertinent because only on the assumption that there is a *unitary* experience of racial oppression could minority experience yield a singular "normative source."

Second, Matsuda does not adequately defend the proposition that minority experience of racial oppression is more important than class and gender experiences of oppression.¹¹¹ An orthodox

109. Matsuda, *supra* note 88, at 331-32 n.37.

110. *Id.*

111. Matsuda asserts that "[a] minority perspective cuts across class lines There is something about color that doesn't wash off as easily as class." *Id.* at 360-61. However, this observation does not, of itself, justify the prioritization of racial oppression.

Our critique of Matsuda's treatment of "position," "experiences" and "standing" is, in some respects, consistent with Randall Kennedy's. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 Harv. L. Rev. 1745 (1989). However, his critique is limited to a concern with the way in which an argument like Matsuda's "stereotypes scholars," *id.* at 1787, and the way in which such arguments detract from "individual identity, achievement, and dignity," *id.* at 1794. Insofar as these are concerns about meritocracy and the intellectual reputation of scholars, these are not our concerns. Our concern is with the unsupported claims which exclude some visions and privilege others.

It should be clear that our position is quite different from Kennedy's in a number of respects. For example, consistent with his concern to preserve meritocracy, he does not accept that "position" and "experience" can be considered relevant; also, his argument that the "standing" concept articulated by Matsuda rests upon a view of race which attributes "naturalness, essentiality, and inescapability"

Leftist argument could be advanced that class oppression is primary for the limited, but crucial, purpose of developing adequate normative visions. In a less orthodox vein, an argument could be made that race and gender oppression can yield distinctly just and adequate normative visions only when coupled with a class standpoint. While it is true that the experience of racial oppression in the United States is closely coupled with class oppression, the standpoints of race and class still require independent elaboration in order to yield normative visions that deal with the separate, yet inescapably linked, issues to which each standpoint attends.

The second major claim advanced by some of the "minority critiques" is that rights perform different functions for minorities than they do for others. It should be noted that this claim also invokes a conception of "experience." Patricia Williams makes the most use of this argument by claiming that both the "metalanguage of rights" and the experience of empowerment or disempowerment resulting from reliance on rights discourse is differentially related to racial experience. She offers a concrete illustration of her assertion regarding "experience" by comparing her own expectations whilst looking for an apartment with those reported to her by Peter Gabel (a white male and CLS founding father).¹¹² Williams sought formality in her dealings, while Gabel preferred informal arrangements.¹¹³ In addition, she argues that the historical experience of the utilization of rights discourse has been "an effective form of discourse for blacks."¹¹⁴

In a compelling passage, Williams argues that rights that have been attained through struggle have been crucial to African

to the concept is inaccurate. Compare *id.* at 1801 with Matsuda, *supra* note 88, at 346-47.

We do, however, find Kennedy's proposal for thinking in terms of a "substantive concept of Blackness," rather than one based solely upon status, interesting. Such a concept

differentiates the status of racial background from the characteristics that define 'blackness' as an idea, sensibility, or point of view. It affirms the possibility of black scholars thinking 'white' and white scholars thinking 'black'. It makes clear the complexity and contingency of the relationship between racial background and intellectual work.

Id. at 1803.

Finally, his concern about the "unspoken condescension" surrounding minority scholars' work which inhibits fruitful engagement with it and his "defense" for subjecting the "minority critiques" to searching criticism obviously strikes an important chord with us. *Id.* at 1818.

112. Patricia Williams, *supra* note 88, at 406-16.

113. *Id.* For more developed arguments dealing with the interests of minorities in formality, see generally Delgado, *supra* note 88.

114. Patricia Williams, *supra* note 88, at 410.

Americans' identity and sense of inclusion in a culture where they have been treated as invisible and as "other." She argues that

[f]or the historically disempowered, the conferring of rights is symbolic of all the denied aspects of humanity: rights imply a respect which places one within the referential range of self and others, which elevates one's status from human body to social being. For Blacks, then, the attainment of rights signifies the due, the respectful behavior, the collective responsibility properly owed by a society to one of its own.¹¹⁵

On the other hand, she argues that the "white Left" may have no need for rights because they already have the resources that rights provide. "The Olympus of rights discourse indeed may be an appropriate height from which those on the resourced end of inequality, those already rights-empowered, may wish to jump."¹¹⁶

Similarly, Delgado argues that rights serve different functions for minorities and CLS scholars, who, as privileged members of the community, have "little use for rights."¹¹⁷

The general contention that rights may have different consequences and functions for different groups is important and has been overlooked by CLS. However, we question the implication that CLS or the "white Left" may have no need for rights and rights discourse. Rights discourse is, for example, important in providing the groundwork for public debate, something privileged intellectuals presumably need as much as anyone else. Moreover, to the extent that the "white Left" is politically active, police and other forms of repression are an all too frequent feature of that experience. In these circumstances, the "white Left" is in need of the arsenal of potential protections available within the retinue of civil rights.¹¹⁸

Third, the "minority critiques" typically locate a source of the weaknesses of the CLS "critique of rights" in the typically white, privileged "biography" of its members.¹¹⁹ Robert Williams, for example, argues that, while rights are much more than abstract concepts for minorities, "what else could a right be other than an

115. *Id.* at 416; see also Crenshaw, *supra* note 88 (A lucid analysis of the importance of rights struggles and the attainment of full citizenship for those who have been constructed as "other.").

116. *Id.* at 415.

117. Delgado, *supra* note 88, at 306.

118. Nor does the fact that we know, for example, that police typically treat African American detainees worse than white ones alter the need that both categories have for rights.

119. See Dalton, *supra* note 88; Delgado, *supra* note 88; Patricia Williams, Jr., *supra* note 88; Robert Williams, Jr., *supra* note 88.

It should be reiterated that Kimberlé Crenshaw does not rely upon this contention. Crenshaw, *supra* note 88.

abstraction for someone who has never had their abstractions taken away from them."¹²⁰ The emphasis that the "minority critiques" place upon CLS's "composite biography" is problematic. The claim that this "composite biography" goes some way toward explaining the failings of the CLS "critique of rights" is overly determinist. The "minority critique" implies that social origins determine political positions. This argument is weak because it does not lend itself to evaluation. Furthermore, this line of argument has the negative consequence of implying that, because CLS "founding fathers" are white and privileged, they hold the views they do. Reliance on this type of argument avoids the need to address the substance of the CLS "critique of rights." As we have also argued, CLS has paid inadequate attention to the positive face of rights and rights struggles, but we contend that this is not primarily for reasons having to do with "position" and "experience." Rather, we have been concerned to suggest what we believe is the stronger explanation; that the deficiencies in the CLS "critique of rights" result from theoretical, not biographical, failings.

The lack of attention in the "minority critiques" to the theoretical failings of the CLS critique of rights leaves those problems substantially unaddressed and hinders their ability to move significantly beyond simply stating that rights and rights discourses have been useful and may be in the future. In addition, it is significant that the "minority critiques" are constructed in relation to or, perhaps more accurately, as a reaction against, the CLS "critique of rights." Thus, the "minority critiques" tend to constitute simply a reaction against the CLS position. This raises considerable problems for the "minority critiques" and for the future of their project. The consequence is that, while the "minority critiques" raise crucial points of contention, they do not adequately ground the political project they seek to advance.

We draw attention to this because we support what we take to be the core of the "minority critiques" project: to recuperate the crucial history of minorities' struggles for rights and to think strategically about the potentialities for utilizing rights discourses. Their failure, however, to take up the theoretical problems leaves them either appropriating notions central to the CLS "critique of rights" or simply turning them on their head without transforming them. The failure to directly challenge the theoretical underpinnings of the CLS "critique of rights" in a sustained manner weakens the "minority critiques'" ability to deal with significant issues regarding rights issues they correctly identify, but are unable to

120. Robert Williams, Jr., *supra* note 88, at 125.

overcome. Therefore, while they are extremely important for opening up the space in which to debate the potentiality of rights, the "minority critiques" fail to challenge the theoretical underpinnings of the CLS "critique of rights" and their ability to move significantly beyond CLS is hindered.

Matsuda's contribution, in particular, commences with the assumption that, while the CLS critique is essentially sound and is useful to minority scholars and interests, it requires supplementation.¹²¹ As is evident from our criticisms of Tushnet and Freeman, the assumption that the CLS critical project is fundamentally sound, but only requires an infusion of minority experience in order to stave off its critics and develop a positive political vision and program, is one we do not share. Many of these contributions do not, therefore, break out of the limiting theoretical-political embrace of the CLS "critique of rights," but rather, supplement it. One potential consequence is that the embrace may be tightened. The problem with the approach of supplementing CLS is revealed in the way in which, for example, Matsuda treats the distinction between reparations and liberal rights. While her analysis and support for the concept of reparations for Japanese Americans and native Hawaiians is strong, the ready acceptance of much of the CLS critique of liberal rights as overly individualistic, co-optational, and the like is unfortunate because it fails to challenge these presuppositions.

The "minority critiques" identify several problems in the CLS "critique of rights." First, the CLS critique treats reform as integrative and co-optive. A second problem is their contention that rights encourage "false consciousness."¹²² Third, and perhaps most significant, is CLS's inattention to rights, struggles, and the deployment of rights discourses. But it is the theoretical weaknesses of CLS's "critique of rights" which create these problems. A core weakness in the "critique of rights," as the "minority critiques" correctly point out, is its inattention to rights struggles. But

121. Matsuda, *supra* note 88, at 330. Delgado takes a very different tack by asking whether CLS has "what minorities want" and by answering in the negative. Delgado, *supra* note 88.

122. For a discussion of this point, see Delgado, *supra* note 88. Delgado argues that the CLS critique of reformism, that it merely legitimizes existing society, is wrong because minorities know that rights victories do not necessarily mean social change is immanent, and that victories may or may not help or hinder the strategic goals of the movement. However, he offers no account of what sorts of strategies might be more likely to aid social movements. While he criticizes the CLS "critique of rights" for their support of the concept of false consciousness, this criticism is framed in very circumscribed terms: "One should begin by asking whether the concept of false consciousness holds true for minorities." *Id.* at 311.

it is precisely because the CLS "critique of rights" has typically employed functionalist and state-centered analyses, which commence from assumptions and starting points that obscure agency and struggles, that it so fails. This is, in turn, intimately connected to the inadequate conceptualization of power relations which, as we have argued, pervades much of the CLS "critique of rights."

Without an exploration of these problems, the weaknesses of the CLS "critique of rights" are likely to be replicated and, indeed, with respect to the issue of power, are replicated in some of the "minority critiques." To take just one example, much is written in the "minority critiques" about the benefits of "looking to the bottom." Yet, in the analyses proffered, power is often conceived much as it is in the "critique of rights" itself; as "something" wielded almost exclusively by the oppressors. Patricia Williams, for example, argues that African Americans have made "something out of nothing" by struggling over the meaning of rights.¹²³ Yet, she simultaneously utilizes the same vision of power which underlies the "critique of rights": "It is true that the constitutional foreground of 'rights' was shaped by whites, parcelled out to Blacks in pieces, ordained in small favors, as random insulting gratuities."¹²⁴ Similarly, Matsuda approves of Derrick Bell's conclusion that rights are recognized for minorities "only when they coincide with the interests of those in power."¹²⁵

These assessments of victories in the politics of rights are the same as those made by the CLS "critique of rights." This is not surprising given, as these excerpts indicate, that their assumptions about power are similar to those made in the CLS critique. It was this treatment of power which lead CLS, in the first place, to over-emphasize the legitimizing qualities of rights discourse, to employ the concept of "false consciousness," and to be inattentive to rights struggles.

On the other hand, when considering the instrumental value of rights and rights discourses for minority movements, the minority critics tend to treat rights and rights discourses as neutral tools or instruments, equally utilizable by all. Thus, the basic 'thingification' of rights infiltrates both the CLS "critique of rights" and some of the "minority critiques."¹²⁶ The "minority critiques" employ a social democratic version of instrumentalism where rights are conceived as *neutral* instruments, rather than as ones com-

123. Patricia Williams, *supra* note 88, at 430.

124. *Id.*

125. Matsuda, *supra* note 88, at 392.

126. See, e.g., Robert Williams, Jr., *supra* note 88.

pletely appropriated by the bourgeoisie or the white oppressors. Thus the "thingification" of rights is present in both the CLS critique and in the "minority critiques."

The "minority critiques" essentially do no more than stand the CLS "critique of rights" on its head with regard to the "revolution-reform dichotomy." While the CLS "critique of rights" generally opposes what it designates as legal reformist strategies, the minority critics try to revive the importance of reform. This statement of the difference, however, itself impedes real conceptual and, ultimately, strategic progress. Neither side in this debate has begun the difficult task of transcending the dichotomy between reform and revolution and neither asks, what is probably the crucial questions: Which strategies of reform and under what conditions may these strategies be so transformative as to foster social transformation on such a scale and to such an extent as to amount to a revolution?

Kimberlé Crenshaw makes an important contribution to the "minority critiques" regarding the role of rights struggles for African Americans in attending to the dilemmas of relying on rights discourse in political mobilization and raising important strategic questions confronting a radical politics of law.¹²⁷ She argues that the focus of the CLS "critique of rights" on legal ideology and "rights consciousness" has excluded an analysis of race consciousness and racism; a major factor in the the way in which African Americans have been constructed as "other." In addition, she criticizes the CLS characterization of legal reform as performing an ideological role, associated as it is with the attendant conclusion that efforts toward securing legal reform cannot "serve as a means for fundamentally restructuring society."¹²⁸ Crenshaw explains this gap in the following way: "Removed from the reality of oppression and its overwhelming constraints, the [CLS] Critics cannot fairly understand the choices the civil rights movement confronted or, still less, recommend solutions to its current problems."¹²⁹ Hence, without an understanding of the roles played by "race consciousness" and the "otherness dynamic," CLS scholars are unable to assess the complex dynamic of legitimation and transformation embedded within the political use of rights by African Americans.¹³⁰

By slighting the ideological importance of racism, CLS's nor-

127. Crenshaw, *supra* note 88.

128. *Id.* at 1350.

129. *Id.*

130. *Id.* at 1381.

mative solutions, which remain at the level of "trashing," are undermined. Crenshaw argues that the view that legal consciousness is primarily responsible for racial domination is unrealistic and, in fact, historically coercion has been far more important than consent. The "ideological source of this coercion is not liberal legal consciousness, but racism."¹³¹ If this position is correct, then "the Critics" single-minded effort to deconstruct liberal legal ideology will be futile."¹³² Finally, and quite properly in our opinion, she takes the CLS critique to task for failing to appreciate the "transformative potential that liberalism offers."¹³³ She concludes: "The most troubling aspect of the Critical program, therefore, is that "trashing" rights consciousness may have the unintended consequence of disempowering the racially oppressed while leaving white supremacy basically untouched."¹³⁴ Crenshaw levels her general critique at both Alan Freeman and Mark Tushnet. Along lines not inconsistent with our criticisms of Freeman's work, she argues that by failing to seriously attend to the nature and consequences of racism, he cannot appreciate the importance of rights struggles to a people who have been isolated.¹³⁵ She argues that, had Tushnet considered the history of the civil rights movement's use of rights discourse, he would have seen that it was in fact "a radical movement-building act."¹³⁶ She concludes that "[b]ecause Tushnet's "critique of rights" is not sufficiently related to racism, his prescriptive comments are unpersuasive."¹³⁷

As we have argued above, a case can be made that, had CLS looked at the uses made of rights discourses by social movements, CLS might well have assessed rights differently. A more powerful argument, however, is that the theoretical failures of Tushnet and Freeman lie at the heart of their impoverished conceptualizations of rights. Significantly, Crenshaw identifies many of the same problems in the CLS critique of rights as we have. She criticizes, for example, Tushnet's preference for the discourse of "needs" by examining the historical experience of African Americans with the assertion of needs-based arguments. She argues that what may be useful about employing rights discourse is that it invokes the arguments for the social "inclusion"¹³⁸ of minorities and thus, turns

131. *Id.* at 1357.

132. *Id.*

133. *Id.*

134. *Id.* at 1357-58.

135. *Id.*; see also *id.* at 1364 (Crenshaw's critique of Freeman for being class reductionist).

136. Crenshaw, *supra* note 88, at 1365.

137. *Id.* at 1365.

138. *Id.*

"society's 'institutional logic' against itself."¹³⁹ She also emphasizes that "trashing" "offers no idea of how to avoid the negative consequences of engaging in reformist discourse or how to work around such consequences."¹⁴⁰

Equally important is her consideration of the discourses actually used by the civil rights movement. She maintains that the only way in which the movement could have been even *potentially* effective was by using the entrenched discourse of liberal rights to turn American society's "institutional logic" against itself.¹⁴¹ This amounts to a trenchant reversal of the arguments emblematic of the CLS "critique of rights." She usefully identifies the central gap in CLSs' analysis as the failure to deal with the question of strategy when making use of reformist discourse; that is, how to "avoid the 'legitimizing' effects of reform."¹⁴² Based on this analysis, she raises the important question, which the CLS "critique of rights" does not, of *how* to participate in reformist discourse. She argues that "[w]hat subordinated people need is an analysis which can inform them how the risks can be minimized, and how the rocks and the very hard places can be negotiated."¹⁴³ Hence, the importance of her argument is to help us come to terms with the dilemma that rights struggles may partake of both legitimation and transformation.

Crenshaw turns to an analysis of racial oppression and race consciousness in order to assess the importance of rights struggles by African Americans. Insofar as race consciousness has created African Americans as "other," rights struggles have proved important. Legal categories have, in fact, been important in constituting the conception of "race." Hence, the attack on the symbolic rules imposing inequality can not be viewed as unimportant; "to say that the reforms were 'merely symbolic' is to say a great deal."¹⁴⁴

She argues that the use of rights discourse may have co-opted the civil rights movement and provided legitimation for continuing oppression: "the otherness dynamic provides a fuller understanding of how the very transformation afforded by legal reform itself has contributed to the ideological and political legitimation of continuing Black subordination."¹⁴⁵ As well, however, the uses of rights rhetoric enabled the civil rights movement to provoke a

139. *Id.* at 1366 (footnote omitted).

140. *Id.*

141. *Id.*

142. *Id.* at 1368.

143. *Id.* at 1369.

144. *Id.* at 1378.

145. *Id.* at 1381.

number of crises as well as to utilize state power by wielding the "appropriate rhetorical/legal incantations."¹⁴⁶ Contradictions are endemic in such reliance on rights discourses. The establishment of formal equality has provided an ideological support for legitimating the continuing material inequality and oppression of African Americans and has contributed to the "loss of collectivity among Blacks."¹⁴⁷

Crenshaw's arguments about rights are important, particularly in relation to the other "minority critiques." Her analysis explicitly addresses, but does not solve, the question of strategy. She grasps the nettle of thinking about "reform" and its potential to be used in ways consistent with Gramsci's notion of "war of position."¹⁴⁸ Her analysis directly raises questions about the uses of rights discourses so as to minimize their disempowering aspects. She rejects the position which indicates that, as "ideological constructs," laws cannot be relied upon in progressive struggles for "fundamentally restructuring society."¹⁴⁹

Yet, in her analysis there is still a strong tendency to see rights discourse, or at least equality discourse, as a neutral resource and as a "level playing field." Additionally, she assumes both that social movements must use the prevailing "institutional logic" and that, to do so, they must bolster the dominant ideology. Both of these assumptions are open to question. Her assumption that the prevailing "institutional logic" must be used fails to consider the circumstances in which new discourses might be pertinent. She also assumes that counterhegemonic rights strategies, waged upon the terrain of existing discourse, cannot be so disruptive of that discourse as to undermine prevailing ideology. These are issues the answers to which should not be assumed. Rather, these are the questions which need to be addressed in articulating a *politics* of rights.

While Crenshaw is attentive to the complexity of rights doctrine, her discussion fails to focus on the specificity of the rights discourse in question—equality rights; nor does she raise questions about the transferability of her observations regarding equality rights doctrine to other rights discourses. Instead, her analysis tends to slip, from a focus on equality rights, to conclusions about rights discourses in general.¹⁵⁰

It must be said, however, that the most problematic aspect of

146. *Id.* at 1382.

147. *Id.* at 1383.

148. See Antonio Gramsci, *Selections From the Prison Notebooks* 108-10 (1971).

149. Crenshaw, *supra* note 88, at 1350.

150. See, e.g., *id.* at 1384-85.

Crenshaw's analysis lies in her treatment of the character of race consciousness. While she criticizes Freeman's treatment of legal consciousness for failing to adequately take into account the importance of race consciousness, she argues that Freeman isolates the wrong "needs" as compelling legal retrenchment. The crucial "need," she argues, was not class-based, but rather, "the need to respond to racism and race issues."¹⁵¹ In so doing, she incorporates Freeman's functionalist understanding of "needs" whilst putting a new spin on that understanding by arguing that the courts were responding to the need to recreate racism in a particular image. The result is that she advances an overly monolithic analysis of the character of race consciousness. Here, problematic assumptions embedded in the CLS "critique of rights" are imported into the analyses of the minority scholars. Crenshaw has turned the CLS critique on its head, but has not transcended it.

The great significance of the "minority critiques" is that they challenge the central judgment of the CLS authors about the role and utility of rights. While they mount this challenge, we have argued that they do not provide us with an adequate account of the origin of the unsatisfactory theory and politics espoused by the CLS "critique of rights." Beyond this, however, the real significance of the "minority critiques" is that they have placed the question of the politics of rights where it should be, in the center of the agenda.

VII. Towards a New Politics of Rights

Our extended examination of the CLS "critique of rights" and of the responses of the "minority critiques" suggests, not only some conclusions, but more positively, points toward some suggestions about an alternative approach to rights and their place in progressive political strategies. The CLS "critique of rights" is simply far too suspicious of rights. It conceives of rights as being dangerously slippery (unstable and indeterminant); so much so that they are always likely to create illusions amongst any of the disadvantaged or oppressed who might be tempted or mislead into relying on rights as a part of a struggle for social change. The "minority critiques" make the trenchant counter that nobody, least of all progressives, should fail to recognize that rights and struggles organized around rights have made major contributions to the civil rights movement and to minority struggles generally.

The implication of our discussion is the contention that it is

151. *Id.* at 1361.

necessary to follow the "minority critiques" in opening up a different and more politically informed debate around rights. Our conception of rights revolves around the simple idea that they are a potential resource. Certainly, there is nothing intrinsically harmful or dangerous about rights that should lead social movements to abjure rights, but neither is there any guarantee that a political strategy relying on either the enforcement or the creation of rights will be successful. A twofold approach is needed: first, a conceptualization of rights that captures their unsettled characteristics, and second, a theory of rights that explicitly addresses the question of political strategy. It is on the basis of a reconceptualization of rights and within the context of a debate around political strategy that it will be possible to avoid the unhelpful circularity of "for" and "against" rights arguments. Even more important, such a context may lead to more valuable results if progress can be made toward specifying the conditions under which rights strategies can make a useful contribution to the overall strategy of social movements.

We do not propose to embark upon an extended discussion of the role of rights in political strategies; to do so is beyond the scope of this essay. We are concerned only with establishing the extent to which such a project would depart from the way in which the rights debate between CLS and its critics has developed. It is, however, significant to note that the shift of focus we propose runs parallel to certain recent trends in contemporary progressive thought. For example, amongst contemporary social and political theory we find an enthusiastic defense of rights in the "postliberal" democratic strategy advanced by Samuel Bowles and Herbert Gintis.¹⁵² Their starting point is broadly consistent with the approach which we have espoused.

Personal rights are neither liberal nor reactionary, nor revolutionary; they are neither an ephemeral veil of privilege nor the lever of revolutionary change; they are neither prior to society nor its mere reflection. Personal rights are simply part of a discourse. . . . This discourse has been deployed in popular struggles for the expansion of liberty and democracy, and has been used by elites to justify private property and a restricted franchise. In contemporary capitalism, the discourse of rights thus belongs to no specific class or group and corresponds to no integrated world view.¹⁵³

This trenchant denial of any necessary class associations of rights does, however, lead to a view which we find problematic:

152. Bowles & Gintis, *supra* note 4.

153. *Id.* at 152.

that rights discourses are simply *neutral* resources equally available to every interest. But this inference is, we suggest, simply implausible and amounts to nothing more than a straight negation of a class determinist view that rights are necessarily and intractably bourgeois. Their failure to go beyond an initial rejection of class determinism is apparent in the following formulation:

A discourse is a set of tools. People use these tools to forge the unities that provide the basis for their collective social practices. . . . The content of a discourse is simply the constellation of uses to which it is regularly put. The meaning of rights, in turn, is precisely their socially structured deployment in social action. Lacking an intrinsic connection to a set of ideas, words, like tools, may be borrowed. Indeed, like weapons in a revolutionary war, some of the most effective words are captured from the dominant class.¹⁵⁴

The weakness of their analysis resides in the metaphor of discourse as a "tool" which assumes that the tool is inanimate, and thus, neutral. As such, a "tool" is capable of being "picked up" and "borrowed" by whomsoever has the will to do so. What is missing from this metaphor is the *work* that has to be added in order to transform a discourse to serve a new objective. Also missing is recognition of the *limits* that the form of any discourse may impose on attempts to infuse it with new content.

The instrumentalist view of rights also pervades the CLS literature. The "minority critiques" treat rights as neutral tools, whilst the CLS critique tends to treat them as tools that have been appropriated by the bourgeoisie. It is important to move away from both versions of this "thingification" (reification) of rights.

One potentially fruitful way of transcending instrumentalist conceptions of rights is by reconceptualizing them as the crystallization of past struggles and the resulting balances of forces or power, which are thereby legitimated. Rights play a role in constituting the terrain for subsequent social action and interaction. Rights thus typically constitute arenas of struggle or contestation. Stuart Scheingold begins to capture this idea:

Rights, like the law itself, do cut both ways—serving at some times and under some circumstances to reinforce privilege and at other times to provide the cutting edge of change. This ambivalence means that rights in the abstract cannot be thought of as either allies or enemies of progressive tendencies but rather as an arena for struggle.¹⁵⁵

Our suggested reconceptualization stresses, as Scheingold's concep-

154. *Id.* at 153.

155. Stuart Scheingold, *Constitutional Rights and Social Change: Civil Rights in Perspective*, in *Judging the Constitution* 76 (1988) (accompanying footnote omitted).

tion does not, that these arenas are not neutral frameworks for social contests, or "level playing fields." Rather, they entail a pre-constituted content and form which provides advantages to some interests over others.

To conceptualize rights in this way has a number of advantages. First, it orients attention to the historical construction of specific rights and shifts focus away from abstract speculation about the nature of rights-in-general. As a result, differences and variations between and within rights become more significant and may yield more productive strategic clues. Second, such a reconceptualization serves to emphasize that any particular right is neither a neutral instrument nor an innocent concept; rather, rights manifest a materiality that is constructed in the course of past struggles. Past victories and defeats are inscribed into the fabric of rights. Our attention is thereby directed towards taking account of the limitations and potentials inscribed within each specific rights discourse. In turn, this points us towards making an assessment of the desirability of any particular social movement making use of some specific rights-claims to advance its demands.

Moving from an instrumentalist conception of rights to one which attends to their historically constructed materiality facilitates the development of a politics of rights which is attentive to strategic questions about the selection of rights and rights-claims and the work involved in transforming existing discourses to serve new political objectives.

Thus, our concern is to find a more satisfactory way of retaining and developing the idea of a focus on the deployment of discourses in social action. An important part of any such analysis requires a focus upon what we will call "discursive struggles."¹⁵⁶ Such an approach denies the neutrality of discourse and enjoins a sensitivity to the presence of impediments to the transformation of a rights discourse in carrying forward a new politics.

Bowles and Gintis grasp one aspect of the possibilities opened up by rights when they identify the radical potential of rights discourse. "The radical democratic potential of the discourse of rights has always been the manner in which rights enhance people's capacity to label unwarranted privilege and illegitimate authority, and thereby to isolate a 'them' and to mobilize a democratic 'us.'"¹⁵⁷ The focus, it should be noted, is upon the negative or critical role of rights discourse. What is missing is an exploration of

156. The concept of "discursive struggle" is developed in Nicholas Abercrombie, Stephen Hill, and Bryan Turner, *Sovereign Individuals of Capitalism* (1986).

157. *Id.* at 154.

the problems associated with transforming rights discourse in such a way as to make it an effective vehicle for new social or collective aspirations. These problems are central features of any project to develop a new politics of rights and it is to this issue that we now turn.

It is time to redirect the rights debate; it has for too long been trapped in a sterile opposition between pro-rights and anti-rights positions. Just such a reorientation is underway in the developing discussion of the relationship between law and social movements; whilst this discussion has been concerned to draw conclusions about whether social movements oriented to reform programs should rely on rights strategies, the approach has been largely sociological rather than political. The key question has been: what consequences, either positive or negative, flow from the adoption of rights strategies?

We will outline some of the themes which need to be integrated within a more adequate theorization of rights strategies by briefly comparing and contrasting the work of Scheingold, Handler and McCann.¹⁵⁸

Scheingold, emphasizing the importance of symbolic politics, shifts attention to the multilayered nature of rights discourse. He suggests the mobilizing capacity of rights may be more significant than whether litigation provides a secure mechanism for achieving and enforcing social change.

Handler's contribution is more cautious, even skeptical. He concedes the importance of consciousness raising and legitimation, but queries the nature of the audiences affected by litigational strategies, and suggests that they are likely to achieve little more than "symbolic reassurance." His skepticism manifests itself in his assuming the inherent weakness of social reform movements. According to Handler, this weakness will necessarily cause them to remain the junior partner of government and bureaucracy within the embrace of institutionalized pluralism or societal corporatism. His general conclusion is worth quoting at some length:

But at its core, by turning to the legal system, social-reform groups have appealed to traditional institutions, and their claims for social justice have been based on traditional American constitutional values. It should come as no surprise, then, that law-reform activity by social-reform groups will not result in any great transformation of American society. Instead, it is, at its most successful level, incremental, gradualist, and moderate. It will not disturb the basic political and economic or-

158. These three authors best exemplify the "law and social movements" tradition. See Handler, *supra* note 8; McCann, *supra* note 9; Scheingold, *supra* note 7.

ganization of modern American society.¹⁵⁹

One significant feature of Handler's work is that it does seek to take account of the characteristics of the reform movements as an independent variable. This part of his project is largely aborted, however, because of his preoccupation with the "free-rider problem." The free-rider issue, as developed by Mancur Olson, Jr.,¹⁶⁰ contends that organizations with large, dispersed memberships have the least chance of success in organizing and achieving their goals because individual participants as rational, self-interested individuals have no necessary interest in contributing towards the cost of collective goods since they will receive the benefit anyway. This is only a "problem," however, within the narrow psychological assumptions of market conceptions of interests and benefits and certainly has little relevance to most social movements since participants are rarely motivated significantly by conceptions of personal advantage.

McCann simply casts aside these artificial impediments; he recognizes that action directed towards collective goods does not selectively benefit members or activists of the organizations involved.¹⁶¹ However, this entirely sensible approach has the paradoxical effect that McCann advances the fact that social movements of this type are altruistic or non-utilitarian movements as the reason for excluding them from his study. In so doing, he removes, among others, the civil rights and women's movements. His general conclusion is no more optimistic than Handler's.

I demonstrate that the activists' interest-group tactics for creating "civic balance" have expanded formal institutional representation within government without developing either sufficient organizational cohesion or moral authority to significantly challenge the substantive priorities of the modern corporate state [T]herefore the public interest reform agenda has remained a mostly peripheral force in American public life.¹⁶²

We want to suggest a more positive estimation of the potential of rights strategies than either Handler or McCann without falling into the trap of an idealization of rights.

We suggest that one of the best ways of articulating such a

159. Handler, *supra* note 8, at 233.

160. Mancur Olson, Jr., *The Logic of Collective Action* (1965).

161. McCann goes too far toward an altruistic model of social reform by excluding all those movements where there also exists a possibility of self-interested benefits. By excluding the civil rights, women's liberation, and trade union movements, he excludes most of the significant contemporary social movements. It is sufficient, we suggest, to note that in all these cases the likely benefits to activists are small when measured against their commitments of time, energy, and risks.

162. McCann, *supra* note 9, at 25.

position is in terms of the Gramscian concept of hegemony.¹⁶³ Hegemony is significant because it allows us to understand the complex processes whereby single-issue public interest campaigns *may* achieve sufficient critical mass to acquire an importance that takes them beyond the peripheral status common to single-issue campaigns. It is important to our argument to insist that a "single-issue" movement remains so only in so far as it develops no hegemonic potential. It is significant that both Handler and McCann treat ecological movements as single-issue campaigns doomed to remain on the fringes of reform. Yet, the scale of the ramifications of the Exxon Valdez crime/disaster and, even more obviously, the impact of the Green Party in the Federal Republic of Germany reveal the hegemonic potential of conservation politics. This hegemonic potential may manifest itself in two ways: (1) either the core issue expands in such a way that other political issues come to be seen through its concepts and priorities (e.g. Green politics "redefines" that which was previously marginal—the negative side-results of economic progress, as the core of the political agenda, and in so doing, creates linkages between those things which were previously seen as "accidents" such as oil spills and nuclear reactor failures); or (2) hegemonic potential may be manifested in bringing together previously disparate issues within a unitary political perspective (e.g. the way the West German Greens have combined an anti-nuclear environmentalism with an anti-nuclear disarmament strategy).¹⁶⁴

Our point is *not* that every single-issue campaign can rock governments, but that analyses which assume the powerlessness of reform movements simply miss the infrequent but enormously important cases where real transformations in the political and cultural agenda are put on the map. We put the point in terms of issues being put on the map to emphasize that hegemonic potential is rarely realized; however, the history of politics is studded with challenges to the existing order which come close to mounting a hegemonic challenge. Some challenges fail through their inability to construct a breadth sufficient to sustain their challenge, whilst in other cases, the dominant hegemony is able to adapt, articulate, and transform a challenge in such a way that its hegemonic potential is blunted. Concretely, some combination of these two processes is likely to account for the blunting of a hegemonic po-

163. Gramsci, *supra* note 148. For an interpretation of Gramsci's concept similar to the one relied upon here, see Laclau & Mouffe, *supra* note 4.

164. For a fuller treatment of the application of hegemonic analysis to rights struggles, see Alan Hunt, *Rights and Social Movements: Counter-Hegemonic Strategies*, 17 J.L. & Soc'y 1-20 (1990).

tential. In passing, we would suggest that some concept indicating such a blunting would be a useful addition to the conceptual apparatus. For want of a better term, we suggest the concept of "hegemonic failure."

It is now necessary to make the connection between hegemony and rights strategy. Most social and political movements that have arisen since the late eighteenth century (and many earlier ones) have articulated their goals as rights-claims. What has been much more varied has been the extent to which movements have emphasized either (a) law-reform strategies designed to transform rights-claims into legally recognized and potentially enforceable legal or constitutional rights, or (b) "litigation strategies" employing court action, either defensively or aggressively, as means of advancing their rights-claims.

Let us apply this line of analysis to McCann's perceptive account of some American reform movements over the last three decades (remembering that he excludes both the civil rights movement and the women's movement). He draws attention to the way in which the reform movements of the 1960s generated a new "public ethic" which exhibited hegemonic potential. The new "public ethic" challenged the boundaries between politics/market, state/civil society, public/private and, in so doing, challenged the acceptability of the goal of capital accumulation and economic expansion. However, one of McCann's most interesting contentions is that many social reform movements have been silent about, and indifferent towards, larger macroeconomic problems. The failure of the reform movements to address these issues, he suggests, manifests a lack of attention to the concerns and needs of the majority of citizens.

An attention to hegemonic analysis can refine this analysis. The formulation of a new "public ethic" provides a precondition of hegemonic influence, but a crucial stage requires the articulation of that ethic in forms that do not simply address, but have the capacity to *transform*, the political consciousness of social groups, strata, or classes currently outside the influence of the new ethic. McCann's reference to neglect of the needs and concerns of the majority of citizens refers to the continued sway of a consumer consciousness amongst the majority of the working class. Two issues of importance create tension and require a heightened strategic analysis within the movements. On the one hand, the movement needs to reach outward to extend its ideological influence. As long as its aspirations conflict with the commonsense of the working class, it is easy for political reaction to mobilize that

resource and marginalize the reform program. For example, if ecological issues are conceived as "wimpish" and effete, they will remain politically marginal. On the other hand, even in a period of expanded judicial activism, the forms of discourse likely to be successful with a liberal judiciary are those narrower forms in which the rights-claims of consumer and environmental movements were first articulated. Such movements do not, of course, arise exclusively from within the professional middle classes. Staughton Lynd's study of the emergence of the struggle for public control of economic assets in industrial Ohio through the discourses of collective rights is an important illustration.¹⁶⁵ The general point remains that movements have to learn to function at different discursive levels without confusing or contradicting themselves or alienating potential new constituencies of support. It is in this way that an adequate theorization of rights makes contact with and informs the creation of political strategy.

One of the important consequences of the experience of the new social movements in the United States has been the generation of litigation strategies which are themselves significant critiques of the legal process. The resultant legal strategy is well captured by David Trubek's phrase "democratization of the rule of law."¹⁶⁶ McCann is correct, we think, in seeing the emergence of this "judicial model of democracy" as a significant product of the new social movements.¹⁶⁷ It is, we suggest, too early to judge whether these rights oriented strategies have had their time and have fallen victim to the Reagan era. We think it more likely that the 1990s will see a sharper separation between movements operating internally and professionally within the formal legal and political order, and other more ambitious movements concerned with developing their hegemonic potential by searching out ways of articulating political aspirations that, whilst drawing upon their distinct experiences, have the capacity to transcend their immediate origins. This is the reason why civil rights politics is of such enormous significance in the United States; the potentiality of a hegemonic strategy capable of generating a viable set of alliances across race and class or race and gender would act as a tidal wave on American political culture.

165. Staughton Lynd, *Communal Rights*, 62 Tex. L. Rev. 1417, 1417-41 (1984); see also Staughton Lynd, *The Genesis of the Idea of a Community Right to Industrial Property in Youngstown and Pittsburgh 1977-87*, 74 J. Am. Hist. 926 (1987).

166. David Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 L. & Soc'y Rev. 529, 529-69 (1977).

167. McCann, *supra* note 9, at 113.

One important implication is that attempts to debate about whether the NAACP litigation strategy has or has not been successful or to measure the impact of *Brown v. Board of Education* on racial segregation are of limited value unless they are placed in the context of the wider dynamics within which the civil rights movement has been located. This contention is, in turn, linked to the idea that there is no neutral context in which the success or failure of rights strategies can be evaluated.

The effectivity of a rights strategy depends, in addition to this general consideration, upon the extent to which the rights appealed to are consistent with the current shifts in the makeup of the hegemonic ideology and, more specifically, upon shifts in the dominant legal ideology. Periods of hesitancy, self-doubt, vacillation and even crisis allow shifts in the continual process of reconstituting hegemony thereby opening up spaces into which new rights-claims may press and receive either legislative or judicial recognition. Similarly, processes of retreat or reversal mark the dynamic of legal change. The increased difficulties encountered by most progressive social movements during the Reagan era may be in part explained by a greater self-confidence within the hegemonic ideology and hence, a greater capacity to resist and repel oppositional rights-claims.

It follows from this analysis that, in Claude Lefort's phrase, "rights are constitutive of politics" and that "where right is in question, society — that is, established order — is in question."¹⁶⁸

168. Claude Lefort, *Politics and Human Rights*, in *The Political Forms of Modern Society* 243-44, 258 (1986).