
ESSAY

Keith Aoki's Theory of Racial Microclimates

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Keith Aoki began talking with me about racial microclimates¹ in 1997 when we were working on the first of three articles we would write together.² He said: “Bob, I’ve been thinking about this thing called a racial microclimate. You know how a microclimate describes geographic pockets that have a climate that is different from the surrounding area? I think the same thing happens with race.”

I said: “That’s interesting Keith. But I don’t understand. What do you mean by this?”

He said: “Well, you know Omi and Winant’s racial formation theory, how they ‘define *racial formation* as the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed . . . [how they] argue that racial formation is a process of historically situated *projects* in which human bodies and social

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¹ Keith Aoki’s preferred term was microclimate rather than microclimate.

² Keith Aoki & Robert S. Chang, *Half Full, Half Empty? Asian American Electoral “Presence”* in 2008, 86 DENV. U. L. REV. 565 (2009) [hereinafter *Half Full, Half Empty?*]; Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CALIF. L. REV. 1395 (1997), 10 LA RAZA L.J. 309 (1998) [hereinafter *Centering the Immigrant*]; Ibrahim J. Gassama, Robert S. Chang & Keith Aoki, *Foreword: Citizenship and Its Discontents: Centering the Immigrant in the Inter/National Imagination (Part II)*, 76 OR. L. REV. 207 (1997).

structures are represented and organized [and how they] link racial formation to the evolution of hegemony, the way in which society is organized and ruled?”³

I said: “Yes, we cite them in our article.⁴ How does that relate to racial microclimes?”

Keith responded: “Don’t you see? Their work takes seriously the insight that race is a social construct. But Omi and Winant focus on the way that race operates on the national level and focus on historically situated national projects. I think that we haven’t fully appreciated Omi and Winant’s insights, and that if we’re to take racial formation seriously, we need to pay attention to the way that racial formation operates at the local level. We ought, as Kendall Thomas told us, to think about ‘race-ing’ as a verb, that people are ‘raced’ and that individuals and institutions ‘race’ people.⁵ You know how Foucault teaches us that the operation of power is diffuse and is a ‘complex strategical situation in a particular society?’⁶ Well, I’ve been thinking a lot about that and about Jerry Frug’s work on decentralization.⁷ If you put all this together, we need to pay more attention to the way that race is constructed at the local level. National is one thing, but you have to pay attention to the subnational. You have micro-negotiations taking place between individuals; you have micro-negotiations taking place between individuals and local institutions.⁸ You have to pay attention to the operation of power in all its attenuated permutations.”

³ Michael Omi & Howard Winant, *Racial Formation in the United States: From the 1960s to the 1990s*, at 55-56 (2d ed. 1994).

⁴ Chang & Aoki, *Centering the Immigrant*, *supra* note 2, at 139 n.12.

⁵ See Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 443 n.52 (discussing Kendall Thomas’ use of this term at the Frontiers of Legal Thought Conference at Duke Law School in 1990 to describe the social construction of race, emphasizing the notion that race is not static and stable but is instead the product of dynamic social forces).

⁶ MICHEL FOUCAULT, *HISTORY OF SEXUALITY, PART I*, at 93 (Robert Hurley, trans., Vintage 1990) (1976).

⁷ One article that had particularly captured Keith’s attention was Jerry E. Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993). Every time I saw him, he’d ask, “Have you read the Jerry Frug article?” until finally I read it so he would stop asking. One key notion that Keith drew from Frug’s work was the dynamic interplay between the subject, sovereignty, and power. With regard to local governments, “[d]ecentralized localities have a . . . subjected sovereignty: they can exercise power, but they are simultaneously subject to the power of the state.” *Id.* at 256.

⁸ See Keith Aoki, “Foreign-ness” & *Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 ASIAN-PAC. AM. L.J. 1, 58 (1996) (“Neil Gotanda has used the term “micro-negotiations” to describe the practices that subordinated individuals and groups engage in when accepting,

I thought about this for a while and then responded: "I'm with you on the social construction of race and how we need to pay attention to racial projects that operate at the subnational level. And as persuaded as I am by your analysis and its better descriptive accuracy, what work does this thicker description do? You're right about the diffuse operation of power, but what role does law play beyond setting the conditions for engagement? Does law play a role with regard to remedy?"

He was quiet for a while. Then he said, "But isn't this idea about racial microclimes exactly what you're talking about when you talk about subject positions and a radical and plural democracy?"

At the time, I had become enamored with work by a left, radical democracy scholar, Chantal Mouffe and her understanding of the complexity of identity. She stated:

Within every society, each social agent is inscribed in a multiplicity of social relation — not only social relations of production but also the social relations, among others, of sex, race, nationality, and vicinity. All these social relations determine positionalities or subject positions, and every social agent is therefore the locus of many subject positions and cannot be reduced to only one Furthermore, each social position, each subject position, is itself the locus of multiple possible constructions, according to the different discourses that can construct that position.⁹

So when Keith asked me whether his idea of racial microclimes was different from or inconsistent with what I'd been thinking about with power and subject positions, it was my turn to be quiet for a while. I had been drawn to Mouffe's notion of subject positions and radical democracy because it seemed to take seriously anti-essentialism¹⁰ and intersectionality¹¹ while providing room for notions of complicity,

rejecting, or transforming different constructions of identity within the discourse of the dominant culture.").

⁹ Chantal Mouffe, *Hegemony and New Political Subjects: Toward a New Concept of Democracy*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 89, 89-90 (Stanley Gray trans., Cary Nelson & Lawrence Grossberg eds., 1988).

¹⁰ See generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 608 (1990) (offering "at least three major contributions that black women have to offer post-essentialist feminist theory: the recognition of a self that is multiplicitous, not unitary; the recognition that differences are always relational rather than inherent; and the recognition that wholeness and commonality are acts of will and creativity, rather than passive discovery").

¹¹ See generally Kimberle W. Crenshaw, *Demarginalizing the Intersection of Race*

where the dynamic operation of power is far more complex than a dyadic notion of the powerful versus the powerless. I recalled that earlier in 1997, Keith, in his contribution to a symposium I had organized on radical and plural democracy had stated, “A theoretical account of the multiplicity and fluidity of identity, both group and individual, . . . creates the space to account for ways in which our micro-practices may undermine that solidarity, even though we may be on the same side.”¹²

At this point, my head was beginning to hurt. I said: “You know that I’m totally with you about the multiplicity and fluidity of identity, but it’s hard for me to see how a theory of racial microclimes will move things forward. I see how it is correct as a matter of theory, and I can see how it’s right as a matter of description, that it more accurately captures racial formation and the more localized racial projects that occur at the subnational level. But in order for it to do work for us, wouldn’t we have to map out these racial microclimes?”

He said: “Exactly. That’s what we need to do.”

He then proceeded to do exactly this in our 1997 article, *Centering the Immigrant in the Inter/national Imagination*.¹³ in which he provided a very thick account of Monterey Park, California.¹⁴ This was a community that underwent tremendous change following the 1965 Immigration and Naturalization Act that removed the racist national origins quota system.¹⁵ He didn’t use the word racial microclimate in that article — in fact, he didn’t use that phrase in his own writing other than an off-hand usage in a short essay in 2005.¹⁶ In talking about Monterey Park and the complicated positioning of Chinese immigrants, Latinas, and Latinos, he modeled how to describe a racial microclimate to reveal how individuals and groups negotiate identity and power, how groups can come together in coalitions that contain

and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. CHI. LEGAL F. 139, 139-40 (arguing that “the multidimensionality of Black women’s experience” is not captured and is in fact distorted by analysis along a single categorical axis such as race or sex).

¹² Keith Aoki, *Direct Democracy, Racial Group Agency, Local Government Law, and Residential Racial Segregation: Some Reflections on Radical and Plural Democracy*, 33 CAL. W. L. REV. 185, 189 n.17 (1997) (citing works by Eric Yamamoto, Mari Matsuda, Bill Hing, and Reginald Robinson).

¹³ Chang & Aoki, *Centering the Immigrant*, *supra* note 2, at 1423-27.

¹⁴ *Id.*

¹⁵ Immigration and Nationality Act of 1965 Amendments, Pub. L. No. 89-236, 79 Stat. 911.

¹⁶ Keith Aoki, *Cities in (White) Flight: Space, Difference and Complexity in LatCrit Theory*, 52 CLEV. ST. L. REV. 211, 212 (2005).

the possibility of deeper or more sustained identification, how fragile these coalitions are, and how racial microclimes change over time.¹⁷

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The idea of racial microclimates or microclimes has begun making its way into works by historians and sociologists.¹⁸ Historian Gerald Horne states, "Texas, indeed the entire region that once belonged to Mexico, was a series of 'racial microclimates.'"¹⁹ Sociologist Phylis Cancilla Marinelli describes the complex social ordering in Arizona's copper mining camps at the turn of the 20th century where Anglos, Italians, and Mexicans competed in racial microclimates in "the absence of a strict racial binary before 1920."²⁰

It is not surprising to find Keith at the cutting edge of ideas.

In retrospect, I wish that I had been more receptive and more encouraging of his theory of racial microclimes. My resistance didn't really make sense given my view on subject positions, which at some level describes micropractices operating within racial microclimes and which raises the same "so what" questions. Over the years, Keith would occasionally return to this idea of racial microclimes. He'd say, "Bob, remember our conversations about racial microclimes," but he never really took it up beyond the way that it informed his understanding of the world, which was inflected throughout his scholarship.²¹

What I didn't realize was how deeply his ideas pervaded my own understanding of the world. I've begun reevaluating my work through

¹⁷ Chang & Aoki, *Centering the Immigrant*, *supra* note 2, at 1433.

¹⁸ See, e.g., GERALD HORNE, *BLACK AND BROWN, AFRICAN AMERICANS AND THE MEXICAN REVOLUTION, 1910–1920*, at 57-58 (2005); PHYLIS CANCELLA MARTINELLI, *UNDERMINING RACE: ETHNIC IDENTITIES IN ARIZONA COPPER CAMPS, 1880-1920*, at 83 (2009).

¹⁹ Horne, *supra* note 18, at 57-58.

²⁰ Eric V. Meeks, Book Review, 116 *AM. HIST. REV.* 181, 181 (2011) (reviewing PHYLIS CANCELLA MARTINELLI, *UNDERMINING RACE: ETHNIC IDENTITIES IN ARIZONA COPPER CAMPS, 1880-1920* (2009)).

²¹ See, e.g., Keith Aoki, *Direct Democracy, Racial Group Agency, Local Government Law*, and Keith Aoki, *Welcome to Amerizona – Immigrants Out!: Assessing "Dystopian Dreams" and "Usable Futures" of Immigration Reform, and Considering Whether "Immigration Regionalism" Is an Idea Whose Time Has Come*, 38 *FORDHAM URB. L.J.* 1 (2010); Keith Aoki, *(In)visible Cities: Three Local Government Models and Immigration Regulation*, 10 *OR. REV. INT'L L.* 453 (2008) (with John Shuford, Kristy Young & Thomas Hwei); Keith Aoki, *Residential Racial Segregation: Some Reflections on Radical and Plural Democracy*, 33 *CAL. W. L. REV.* 185 (1997); Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 *FORDHAM URB. L.J.* 699 (1993).

the lens of racial microclimes and realize that its greatest power comes in helping us to better understand multigroup dynamics. This is especially the case when examining groups that do not fit comfortably within the black-white racial binary.²² Perhaps this accounts for the rise of its usage with regard to the southwestern United States. I want to emphasize, though, that even our understanding of black-white race relations ought to be analyzed through the racial microclimate lens. Though there are national projects with regard to black racial formation as set forth by Omi and Winant, blackness in the Northeast is different from blackness in the South and blackness in the West. The same can be said for understanding whiteness as a series of regional phenomena. Keith's theory of racial microclimes requires us to do this hard work, despite and because, as a British sociologist recently wrote, "The point is that racial 'microclimates' are ambiguous and uneven and very difficult to read."²³ Difficult as they are to read, this is precisely the work we need to do.

A QUICK SURVEY OF RACIAL MICROCLIMES

When Eric Yamamoto, in his book *Interracial Justice*, wrote about a racial conflict that erupted between African Americans and Vietnamese Americans in New Orleans in the summer of 1996,²⁴ he was describing a racial microclimate. In his book, Yamamoto describes a neighborhood grocery store owned by a Vietnamese American family in a neighborhood that is largely African American. Relations between the store owners and the residents have not been good. A fight between the store owner's son and a young African American man ignites conflict, leading neighborhood residents to accuse the store owners of assault and discriminatory hiring practices, and to boycott the store. The store owners file a federal lawsuit against the organizers of the boycott, claiming economic terrorism. To understand this conflict fully, attention must be paid to the Creole history of New Orleans, to the settlement of the Louisiana coast by Vietnamese fisherman as part of the settlement of refugees following the Vietnam War, as well as to the echoes of Asian-Black conflict that had erupted

²² For early critiques of the black-white racial paradigm, see Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1266-68 (1993); Juan Perea, *The Black/White Binary Paradigm of Race: The "Normal" Science of American Racial Thought*, 85 CALIF. L. REV. 1213 (1997).

²³ CAROLINE KNOWLES, *BEDLAM ON THE STREETS* 155 (2000).

²⁴ ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 1-6 (1999).

at different temporal points in the New York and Los Angeles microclimes.²⁵

When Tekle Woldemikael wrote about Haitian settlement of Evanston, Illinois, as a way to talk about their racial formation — how Blacks in Haiti, upon their arrival in the United States, had to negotiate their racial identity and learned how to become Black Americans — he was describing a racial microclimate.²⁶ This microclimate was a suburb of Chicago, a metropolitan area that had been the site of Black migration from the South.

When Tanya Hernandez writes about the growing conflict between Latinas/os and African Americans and the possible trend of “Latino ethnic cleansing of African Americans from multiracial neighborhoods,”²⁷ we have to situate it within the racial microclimate that is Los Angeles in 2007. This microclimate is characterized by labor market competition, tensions arising from changing demographics in neighborhoods, Latinos “learning the U.S. lesson of anti-black racism,” or resentment by blacks of “having the benefits of the civil rights movement extended to Latinos,”²⁸ as well as anti-black racism among Latinos in Latin America and the Caribbean that is imported when people from those regions migrate to the United States.²⁹

These are but a few of the racial microclimate maps available in the literature. However, as important as the particular is, we can get lost in

²⁵ See generally PYONG GAP MIN, *CAUGHT IN THE MIDDLE: KOREAN COMMUNITIES IN NEW YORK AND LOS ANGELES* (1996) (investigating the racial dynamics that exist between Korean merchants, the African American community, and white society); *STRUGGLES TOWARD MULTIETHNIC COMMUNITY: ASIAN AMERICAN, AFRICAN AMERICAN, AND LATINO PERSPECTIVES* (Edward T. Chang & Russell C. Leong eds., 1994) (discussing race and ethnic relations in the context of the Los Angeles uprising); *READING RODNEY KING/READING URBAN UPRISING* (Robert Gooding-Williams ed., 1993) (discussing the “complex network of conditions — social, economic, political, and ideological” — of urban America that gave rise to the Rodney King incidents).

²⁶ TEKLE MARIAM WOLDEMIKAEL, *BECOMING BLACK AMERICAN: HAITIANS AND AMERICAN INSTITUTIONS IN EVANSTON, ILLINOIS* *passim* (1989).

²⁷ Tanya K. Hernandez, *Roots of Latino/Black Anger: Longtime Prejudices, Not Economic Rivalry, Fuel Tensions*, L.A. TIMES, Jan. 7, 2007, at M1, available at <http://articles.latimes.com/2007/jan/07/opinion/op-hernandez7>. But see Jill Leovy, *Are Black-vs.-Brown Racial Tensions Driving Homicide in L.A.?*, HOMICIDE REPORT: JILL LEOVY CHRONICLES L.A. COUNTY HOMICIDE VICTIMS, available at http://latimesblogs.latimes.com/homicidereport/2007/03/marchers_protes.html (Mar. 1, 2007, 4:45 PM). Leovy, a crime reporter for the Los Angeles Times, while acknowledging some cross racially motivated killings, finds that statistics do not indicate that black versus brown racial tensions are driving up the homicide rate.

²⁸ Hernandez, *supra* note 27.

²⁹ *Id.*

the particular.³⁰ This is precisely the critique that Jerome Culp and I had of the growing scholarship that builds on intersectionality — scholarship that advances concepts of interconnectivity,³¹ cosynthesis of categories,³² multidimensionality,³³ and symbiosis.³⁴ Jerome Culp and I asked the “so what” question:

It’s one thing to say that race, gender, sexuality, class, and nation operate symbiotically, cosynthetically, multidimensionally, or interconnectedly. Analyses like this are very important. The next step is to be able to prescribe or imagine points of intervention. One reason that intersectionality caught on is that Crenshaw had very specific points of intervention with regard to legal doctrine (application of Title VII) and for feminist and antiracist politics. Ehrenreich (and Valdes) focuses on antisubordination practice directed toward coalition building by focusing on commonalities to break down the perceived barriers between subordinated groups. While we regard this to be very important, we think it would be helpful to extend this work more specifically to legal doctrines and legal actors.³⁵

In a similar fashion, I’ve wondered about what kind of legal doctrinal payoff Keith’s theory of racial microclimes might have. I wish that he were still here so that we could continue our conversations and he could show me instead of my stumbling around without his guidance. Since his passing, I’ve begun connecting Keith’s theory of racial microclimes with Ian Haney Lopez’s analysis of

³⁰ Cf. Harris, *supra* note 10 (discussing Borges story, Funes the Memorius). I understand Rich Ford’s critique of “proposals that advance cultural preservation rights as a logical (even logically required) extension of traditional civil rights protections for racial minorities” as being located in a concern that particularism will result in dilution as well as an unworkable equal protection doctrine. See Richard T. Ford, *Race as Culture? Why Not?*, 47 UCLA L. REV. 1803, 1803 (2000).

³¹ Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Inter-Connectivities*, 5 S. CAL. REV. L & WOMEN’S STUD. 25, 47-49 (1995).

³² Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1280 (1997).

³³ Darren Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 565-67 (1997).

³⁴ Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKCL. REV. 251, 272 (2002).

³⁵ Robert S. Chang & Jerome M. Culp, Jr., *After Intersectionality*, 71 UMKC L. REV. 485, 490 (2002).

*Hernandez v. Texas*³⁶ that was part of the same symposium as Keith's and my *Centering the Immigrant* article.³⁷

Haney Lopez recounts:

On May 3, 1954, Chief Justice Earl Warren delivered the unanimous opinion of the Court in *Hernandez v. Texas*, extending the aegis of equal protection to Pete Hernández and reversing his conviction. The Court did not do so, however, on the ground that Mexican Americans constituted a protected racial group. Although the Court noted that the equal protection clause served primarily to protect groups marked by "differences in race or color," it also noted that "from time to time other differences from the community norm" might define groups needing the same protection. Pursuing this approach, the Court held that the Fourteenth Amendment protected Hernández because he belonged to a class distinguishable on some basis "other than race or color" that nevertheless suffered discrimination as measured by "the attitude of the community" in Jackson County, Texas.³⁸

Hernandez involved a Mexican American defendant who challenged his conviction based on the exclusion of Mexican Americans from jury service.³⁹ His claim was complicated by what has been termed the "other-white" strategy deployed by the League of United Latin American Citizens ("LULAC") in their pursuit of justice for Mexican Americans.⁴⁰

This "other-white" strategy was deployed to overcome Jim Crow style segregation deployed against Mexican Americans.⁴¹ Though it had some success in combating discrimination against Mexican

³⁶ 347 U.S. 475 (1954); Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race in LatCrit Theory*, 85 CALIF. L. REV. 1143, 1143 (1997) [hereinafter *Race, Ethnicity, Erasure*]; see also Haney Lopez, *Retaining Race: LatCrit Theory and Mexican American Identity in Hernandez v. Texas*, 2 HARV. LATINO L. REV. 279, 279 (1997).

³⁷ Symposium, *LatCrit Theory*, 85 CALIF. L. REV. 1087 (1997).

³⁸ López, *Race, Ethnicity, Erasure*, *supra* note 36, at 1143.

³⁹ *Hernandez*, 347 U.S. at 476.

⁴⁰ This legal strategy took advantage of an 1897 decision that effectively held that the Mexican immigrant claimant was legally white within the purview of the naturalization laws and therefore eligible for U.S. citizenship. *In re Rodriguez*, 81 F. 337 (W.D. Tex. 1897). The decision was premised on the operation of the Treaty of Guadalupe Hidalgo, which provided for citizenship for persons of Mexican ancestry, and the naturalization laws, which limited naturalization to free white persons and persons of African nativity or descent.

⁴¹ See Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181, 1189 (1997).

Americans,⁴² the “other white” strategy ultimately supported white supremacy without actually resulting in equal whiteness for Mexican Americans and other Latinas/os. A startling example of this took place in Texas public schools in the 1960s “when schools began to use Mexicans’ ‘other white’ status cynically to ‘desegregate’ black schools using Mexicans.”⁴³ The failure to understand this cynical deployment of whiteness in the face of an ideology of white/Anglo supremacy allowed the Texas courts to claim, with a straight face, that Mexican Americans are white; whites are not excluded from juries; therefore, Mexican Americans have no claim to racial discrimination from juries.

This litigation strategy produced mixed results for Mexican Americans. First, it wasn’t always successful in securing the same rights as “non-Mexican Whites.”⁴⁴ And at times, the strategy proved to be too successful and backfired when it came to exclusion from juries. As Ian Haney Lopez has demonstrated, the Texas state courts eventually came around to LULAC’s claim that Mexicans were legally white and used it to reject claims of racial discrimination in violation of the Fourteenth Amendment when Mexican Americans were excluded from juries.⁴⁵ Because other whites served on juries, Mexican Americans, *qua* whites, had no legitimate complaint about racial

⁴² See George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 UC DAVIS L. REV. 555, 560-71 (1994).

⁴³ Ariela Gross, “*The Caucasian Cloak*”: *Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 GEO. L.J. 337, 387 (2007). In challenging this practice in a case involving Corpus Christi, James DeAnda complained that:

Corpus Christi Independent School District, like many Texas districts, had turned the “other white” notion to its own illegitimate purposes. In order to delay the court-ordered desegregation, while at the same time obscuring its slow pace, district officials frequently assigned African and Mexican Americans to the same schools, rather than to white schools, a practice often facilitated by the close proximity of the ghettos to the barrios. The administrators maintained that, because Mexican Americans were “white,” the barrio-ghetto schools had been desegregated.

Steven H. Wilson, *Some Are Born White, Some Achieve Whiteness, and Some Have Whiteness Thrust Upon Them: Mexican Americans and the Politics of Racial Classification in the Federal Judicial Bureaucracy, Twenty-Five Years After Hernandez v. Texas*, 25 CHICANO-LATINO L. REV. 201, 213 (2005).

⁴⁴ See, e.g., Martinez, *supra* note 42, at 56-66 (recounting early cases regarding public accommodations).

⁴⁵ See López, *Race, Ethnicity, Erasure*, *supra* note 36, at 1169-70 (discussing *Rogers v. Texas*, 236 S.W.2d 141 (Tex. Crim. App. 1951); *Sanchez v. Texas*, 243 S.W.2d 700 (Tex. Crim. App. 1951); *Salazar v. State*, 193 S.W.2d 211 (Tex. Crim. App. 1946)).

discrimination under *Strauder v. West Virginia*⁴⁶ and the Fourteenth Amendment.

What we had in *Hernandez* was the extension of equal protection to a member of a group that was subordinated as part of a racial microclimate — Jackson County, Texas. Understood in this way, you end up with a more nuanced approach to equal protection, where instead of being based on pure or simple race classification, attention is paid to the social conditions that construct race and produce inequality. As Haney Lopez describes, the lawyers in *Hernandez* presented evidence of exclusion, social discrimination, and separate bathrooms at the courthouse. What we have then is the evidence-based construction of a group and its treatment that then justified the legal intervention.

I think part of why we didn't stick with this evidence-based approach to demonstrating a racial microclimate within which you had to prove that you suffered discrimination as measured by "the attitude of the community" was because we fell in love with the false safety of strict scrutiny — we fell in love with the short-hand that membership in a racially subordinated group merited strict scrutiny and legal intervention without recognizing how this would slide so quickly into a colorblind formulation where membership in a racial group, completely divorced from evidence of discrimination, became a sufficient basis for legal inquiry and legal intervention.

With strict scrutiny of race, we thought we were getting something; instead, we lost the opportunity to tell the story of racism that justifies the legal protection granted by heightened scrutiny. Keith Aoki's theory of racial microclimes brings us back to Ian Haney Lopez's description of the approach used by the Warren Court in *Hernandez*.

We can imagine a different trajectory of equal protection jurisprudence where the white plaintiffs in *City of Richmond v. J.A. Croson Co.* would not benefit from the equal protection clause because they would not be able to demonstrate a racial microclimate where white contractors were disadvantaged when only 0.67% of contracts went to minority contractors.⁴⁷

Keith Aoki's theory of racial microclimes gets things right as a matter of description. Race has multiple contingent meanings. Racial orderings are multiple and contextual, temporal as well as temporary. Attention to the local microclimate is crucial for understanding how

⁴⁶ 100 U.S. 303, 310 (1879).

⁴⁷ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 479-80 (1989) (holding that Richmond's affirmative action plan for government contracts violated the equal protection clause).

discrimination operates and what kinds of interventions would disrupt or remedy this discrimination. In addition to perhaps laying the groundwork for a new theory of equal protection, we have to pay more attention to the local. I think that law professors pay too much attention to the federal courts and not enough attention to state courts. Whether we like it or not, there is a whole lot of race jurisprudence taking place in state courts, and the result of state courts' racial jurisprudence, I suggest, has more of an impact in the daily lives of people of color than federal race jurisprudence. Keith's theory of racial microclimes tells us where we need to do our work.