

Michigan Journal of Race and Law

Volume 14

2008

Is a Burrito a Sandwich? Exploring Race, Class, and Culture in Contracts

Marjorie Florestal

University of the Pacific, McGeorge School of Law

Follow this and additional works at: <https://repository.law.umich.edu/mjrl>



Part of the [Contracts Commons](#), [Courts Commons](#), and the [Law and Race Commons](#)

Recommended Citation

Marjorie Florestal, *Is a Burrito a Sandwich? Exploring Race, Class, and Culture in Contracts*, 14 MICH. J. RACE & L. 1 (2008).

Available at: <https://repository.law.umich.edu/mjrl/vol14/iss1/1>

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Race and Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

IS A BURRITO A SANDWICH? EXPLORING RACE, CLASS, AND CULTURE IN CONTRACTS

Marjorie Florestal*

A superior court in Worcester, Massachusetts, recently determined that a burrito is not a sandwich. Surprisingly, the decision sparked a firestorm of media attention. Worcester, Massachusetts, is hardly the pinnacle of the culinary arts—so why all the interest in the musings of one lone judge on the nature of burritos and sandwiches? Closer inspection revealed the allure of this otherwise peculiar case: Potentially thousands of dollars turned on the interpretation of a single word in a single clause of a commercial contract. Judge Locke based his decision on “common sense” and a single definition of sandwich—“two thin pieces of bread, usually buttered, with a thin layer (as of meat, cheese, or savory mixture) spread between them.” The only barrier to the burrito’s entry into the sacred realm of sandwiches is an additional piece of bread? What about the one-slice, open-face sandwich? Or the club sandwich, typically served as a double-decker with three pieces of bread? What about wraps? The court’s definition lacked subtlety, complexity or nuance; it was rigid, not allowing for the possibility of change and evolution. It was a decision couched in the “primitive formalism” Judge Cardozo denided nearly ninety years ago when he said “[t]he law has outgrown its primitive stage of formalism when the precise word was a sovereign talisman, and every slip was fatal. It takes a broader view to-day.” Does it? Despite the title of this piece, my goal is not to determine with any legal, scientific or culinary specificity whether a burrito is a sandwich. Rather, I explore what lies beneath the “primitive formalism” or somewhat smug determination of the court that common sense answers the question for us. I suggest Judge Locke’s gut-level understanding that burritos are not sandwiches actually masks an unconscious bias. I explore this bias by examining the determination of this case and the impact of race, class and culture on contract principles.

INTRODUCTION.....	2
I. THE BURRITO BROUHAHA.....	9
A. <i>A Little Competition Never Hurt Anyone:</i> <i>White City v. PR Restaurants</i>	10

* Associate Professor of Law, University of the Pacific, McGeorge School of Law. I thank the students in my 2006–2007 contracts class for their good-natured and incredibly insightful response to the Burrito Brouhaha. I am indebted to Zanita Fenton, Peter Linzer, Julie Davies, Ruth Jones, Angela Angela Onwuachi-Willig, Kristine Jensen, and Paul Howard, Pacific McGeorge’s librarian extraordinaire. My deep appreciation goes to Jamie Rizzo for her unflagging support through the many bumps and roadblocks on the way to completing this Article. Finally, I am grateful to participants in the AALS Contract Law Professors listserv, in particular Professor Michael Madison of the University of Pittsburgh School of Law, who obtained the legal documents in the case and kindly posted them on the listserv . . . and so began my obsession with burritos.

B.	<i>Interpreting the Clause in White City</i>	13
1.	Two Ships Without Peer, Twenty Bishops and a Partridge in a Pear Tree: Contract Interpretation in a Nutshell.....	13
2.	Plain Meaning, Dictionaries and Common Sense	16
II.	RACE, CLASS AND CULTURE IN CONTRACTS.....	21
A.	<i>Race</i>	21
1.	From Slavery to Freedom: Race and Contracts in Historical Perspective	23
2.	Does a Burrito have a Race?	32
B.	<i>Class</i>	39
1.	On the Existence of Class in Contracts and Society	39
2.	Little Donkeys and Big Gamblers: A Culinary Tour of Class.....	47
C.	<i>Culture</i>	50
1.	The Culture of Contracts	51
2.	White Bread vs. Tex-Mex: Law and the Hybridization of Culture	52
III.	CONTRACTS IN CONTEXT: REFLECTIONS ON LAW, BURRITOS AND SANDWICHES.....	57
	CONCLUSION	58

INTRODUCTION

*What's in a name? That which we call a rose
by any other word would smell as sweet.*¹

★ ★ ★

*Some might say a rose by any other name, but . . .
A rose by any other name would wilt fast,
smell like bitter almonds,
God help you if the thorns broke the skin.*²

1. WILLIAM SHAKESPEARE, *ROMEO AND JULIET* 37 (Signet Classics rev. ed. 1998) (1591).
2. COLSON WHITEHEAD, *APEX HIDES THE HURT* 5 (Doubleday 2006).

Contract disputes don't usually make the evening news.³ And if I had to award a least-likely-to-fire-the-public-imagination prize, it would almost certainly go to the doctrine of contract interpretation. Interpretation is the process by which courts give meaning to the parties' agreement.⁴ Laden as they are with dueling definitions,⁵ displaced commas,⁶ and arcane aids to construction couched in a dead language (*omnia praesumuntur contra proferentum*),⁷ interpretation disputes usually are of interest only to the most devoted specialists. Yet, when a superior court in Worcester, Massachusetts, interpreted "sandwich" to exclude a burrito,⁸ practically every newspaper, radio program, and blog carried the story.⁹ The resulting firestorm of media attention was something of a surprise to say the least.

3. A colleague of mine who teaches criminal law offers a succinct explanation: "There are no dead bodies." If the legions of law students who trudge to my classroom every year with heads hung low are any indication, there seems to be a general consensus from the uninitiated—at least at first blush—that without those dead bodies contract law is "boring." In writing this Article about burritos, I hope to dispel that baseless accusation!

4. See RESTATEMENT (SECOND) OF CONTRACTS § 200 (1981) ("Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning."). Technically, ascertaining the meaning of a contract can be divided into two processes: the process of interpretation, and the process of construction. Interpretation is the process by which a trier of fact determines the meaning intended by the parties themselves. Construction is the process by which a Judge adds terms to a contract by legal implication regardless of whether the parties themselves intended such a meaning. The modern approach is to collapse the two terms into one, and I do so here. See generally PERILLO, *supra* note 53, §§ 3.9–3.17.

5. See, e.g., *Frigalimint Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F.Supp. 116, 117 (S.D.N.Y. 1960) ("The issue is, what is chicken? Plaintiff says 'chicken' means a young chicken, suitable for broiling and frying. Defendant says 'chicken' means any bird of that genus that meets contract specifications on weight and quality, including what it calls 'stewing chicken' and plaintiff pejoratively terms 'fowl'.").

6. See, e.g., *Konic Int'l Corp. v. Spokane Computer Servs., Inc.*, 708 P.2d 932, 933–34 (Idaho Ct. App. 1985) (holding that no contract formed between the parties where buyer believed he was purchasing a surge protector for "\$56.20" and seller intended a purchase price of "\$5,620.00").

7. Under the doctrine of *contra proferentem*, ambiguities in a contract are interpreted against the drafter. See 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 32:12 (4th ed. 2002).

8. *White City Shopping Ctr. v. PR Rests.*, No. 2006196313, 2006 WL 3292641, at *3 (Mass. Super. Ct. Oct. 31, 2006) (ruling that "sandwich" is not commonly understood to include burritos, tacos, and quesadillas).

9. See, e.g., Jenn Abelson, *Arguments Spread Thick*, BOSTON GLOBE, Nov. 10, 2006, at A1; Michael Bauer, *Between Meals, Is a Burrito a Sandwich?*, http://www.sfgate.com/cgi-bin/blogs/sfgate/detail?blogid=26&entry_id=11214 (last visited June 3, 2008); Bob Sassone, *Joho the Blog, Aristotle's Sandwich*, http://www.hyperorg.com/blogger/mtarchive/aristotles_sandwich.html (last visited June 3, 2008); Kevin Underhill, *Lowering the Bar, Judge Rules Burrito Is Not Sandwich*, http://www.loweringthebar.net/2006/11/judge_rules_bur.html (last visited June 3, 2008).

Like many who read only a short recap of the dispute in *White City Shopping Center v. PR Restaurants* (“*White City*”), my initial thought was: “who cares?”¹⁰ Worcester, Massachusetts, is not exactly the pinnacle of the culinary arts? Why all the interest in the musings of one lone judge on the nature of burritos and sandwiches? Closer inspection revealed the allure of this otherwise peculiar case; potentially thousands of dollars turned on the interpretation of a single word in a single clause of a commercial contract.¹¹

The facts of the case are deceptively simple: The owner of a shopping mall entered into an “exclusive use” contract with a sandwich shop—in short, the owner agreed not to lease space in the complex to “a bakery or restaurant reasonably expected to have annual sales of *sandwiches* greater than ten percent (10%) of its total sales.”¹² The owner subsequently leased space in the same shopping complex to a Mexican restaurant selling, among other things, burritos. When faced with the threat of direct competition, the sandwich shop invoked the exclusive use provision, and it immediately sought assurance that the owner would not violate the clause. In response, the owner was said to be “deliberately evasive”¹³ and refused to provide the requested assurance.¹⁴ Thus, the “Burrito Brouhaha” was born.

My interest was piqued. As luck would have it, I was desperately searching for an interesting fact pattern to introduce contract interpretation to my first year law students. In the waning days of the first semester of a year-long course—with tempers short, energies low, and attention turned to understanding old concepts not learning new ones—my students needed a charge if I had any hope of capturing their interest. Oh sure, I had the trusty standby *Frigaliment Importing Co. v. BNS International Sales Corp.*—a case that asks the age old question “What is a chicken?”¹⁵—but to a classroom full of California residents, chickens paled in compari-

10. The other popular reaction is what I call the “*duh!*” response—as in *Duh!* How could anyone doubt that a burrito *is not* a sandwich? See e.g., Squawkbox Noise, <http://squawkboxnoise.wordpress.com/2006/11/11/i-am-glad-we-cleared-that-up> (Nov. 11, 2006, 10:52 AM) (maintaining that “[a]ll of this could have been settled out of court had the judge in the case had the intestinal fortitude to call this case what it was ‘frivolous.’”). In Part II, I explore some of the unconscious assumptions and prejudices underlying the “*duh!*” response.

11. See Brief of Defendant at 9, *White City Shopping Ctr. v. PR Rests.*, No. 2006196313, 2006 WL 3292641 (Mass. Super. Ct. Oct. 31, 2006). Defendant PR Restaurants insists that its actual monetary damages are difficult to quantify, as it includes loss of goodwill—presumably priceless. See *id.*

12. *White City*, 2006 WL 3292641, at *1.

13. Brief of Defendant, *supra* note 11, at 3.

14. *Id.*

15. *Frigaliment*, 190 F. Supp. at 117. As an added bonus, the “chicken case” was authored by Judge Friendly. *Id.* Somehow, that usually elicits a chuckle even from first year law students who by now are rather jaded in the ways of the law.

son to burritos. In my grateful hands, the facts of *White City* quickly formed the backdrop for my own burrito hypothetical.

The results of the exercise were spectacular as students plunged into the complexities of interpreting the term “sandwich”. But the most intriguing moment came during the mock trial when one student implored me to refrain from interpreting “sandwich” in a culturally biased manner.

I found myself surprised and rather amused at the novel experience of having a white female student remind *me*, a black woman, of the need for cultural sensitivity.¹⁶ I was born in Haiti and grew up in New York City (surely *the* most diverse city in the nation). As an international trade and development lawyer, I spent years living out of suitcases in Europe, Asia, Africa, and the Caribbean. The need for a racially, culturally, and class-sensitive approach to law was hardly news to me. Despite my appreciation for differing perspectives, however, I had not conceived of the exercise as anything more than an aid to understanding interpretation.

In the days following the burrito exercise, I found myself coming back to the student’s remark as I obsessively read and re-read the court’s decision. What struck me about the opinion was its almost complete lack of analysis. Citing no authority, the court summarily determined there was no ambiguity in the term sandwich.¹⁷ It then applied “common sense” and one dictionary definition of the word—“two thin pieces of bread, usually buttered, with a thin layer (as of meat, cheese, or savory mixture)¹⁸ spread between them”¹⁹—to conclude a burrito is not a sandwich.²⁰ The only barrier to the burrito’s entry into the sacred realm of sandwiches is an additional piece of bread?²¹ But is it really true that a

16. I use the word “black” deliberately here. While I always refer to blacks born in the United States as “African American”, for some of us the term is not nearly inclusive enough. As a Haitian-born woman raised in Brooklyn, and having spent years living and working in Africa, embracing the designation “African American” to my mind is only a partial truth, denying large parts of who I am.

17. *White City*, 2006 WL 3292641, at *3.

18. Given the rather heaping portions Americans insist on serving themselves, most sandwiches do not consist of a *thin* layer of savory anything. Would a heaping portion prevent a sandwich from being classified as such? Consider the Dagwood—a multi-layered sandwich with a variety of fillings; it is said to attain such a tremendous size and infinite variety of contents as to stun the imagination, sight, and stomach of all but the original maker. The term originated in the 1930s after a comic strip character named Dagwood Bumstead, created by Murat Bernard “Chic” Young (1901–1973). Linda Stradley, History of Hoagies, Submarine Sandwiches, Po’ Boys Sandwiches, Dagwood Sandwiches, & Italian Sandwiches, <http://whatscookingamerica.net/History/HoagieSubmarinePoBoy.htm> (last visited June 3, 2008).

19. *White City*, 2006 WL 3292641, at *3 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002)).

20. *Id.*

21. Tortillas—the base of all burritos—is generally regarded as bread. See, e.g., *Sabritas v. U.S.*, 998 F. Supp. 1123, 1128 (U.S. Ct. Int’l Trade 1998) (noting that “tortillas are unquestionably commonly and commercially accepted as bread in the United States”).

sandwich must be made of *two pieces* of bread?²² What about the one-slice, open-face sandwich?²³ Or the perennial favorite—the club sandwich, typically served as a double-decker with three pieces of bread?²⁴ What about wraps?²⁵ The court’s definition lacked subtlety, complexity, or nuance; it was rigid, not allowing for the possibility of change and evolution. It was a decision couched in the “primitive formalism” Judge Cardozo so abhorred when he said almost ninety years ago:

The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view to-day.²⁶

The *White City* opinion was unsatisfying precisely because it failed to take a broader view. Over the centuries, contract law has undergone an astonishing transformation in the face of evolutionary changes in society. Even the sacrosanct notion of freedom of contract has had to give way to allow courts to police contracts for unfair bargaining. Almost certainly, the sandwich has experienced a metamorphic shift from its early aristocratic roots.²⁷ As food expert Alan Davidson notes, “Sandwiches take so many forms in the modern world . . . that a catalogue would be a book.”²⁸ Both contract doctrine and sandwiches have evolved, but Judge Locke’s decision remains mired in an anachronistic “primitive formalism.” What accounts for that reality?

While the court questions that presumption in passing in a footnote, the tortilla’s status as bread was not at issue in the opinion. See *id.* at 1128, FN 2. Thus, for purposes of this Article, I assume tortillas are bread and that a burrito consists of one slice of bread.

22. A gyro is served open-face on a single slice of pita. JACQUES L. ROLLAND & CAROL SHERMAN, *THE FOOD ENCYCLOPEDIA* 312 (2006) (noting a gyro is a “sandwich of sliced lamb or chicken . . . served in a thick toasted pita.”).

23. The open-face sandwich (also known as open sandwich or open faced sandwich) “consist[s] of one slice of bread with one or more food items on top of it.” Wikipedia, http://en.wikipedia.org/wiki/Open_sandwich (last visited June 3, 2008). Probably the most famous of the open-face sandwiches is the Scandinavian variety, including the Danish *smørrebrød*—a delicacy consisting of a piece of buttered rye bread topped with homemade cold cuts, pieces of meat or fish, cheese or other spreads. Wikipedia, http://en.wikipedia.org/wiki/Cuisine_of_Denmark (scroll down to “Contents” text box; then follow “3.2.1 Pålæg and smørrebrød (open sandwiches)” hyperlink) (last visited June 3, 2008).

24. ALAN DAVIDSON, *THE OXFORD COMPANION TO FOOD* 692 (Oxford Univ. Press 1999) (noting that a club sandwich “is usually a three-decker toast affair, with chicken, mayonnaise, lettuce, tomato, and bacon”).

25. “A wrap is a variant of a sandwich which includes traditional sandwich fillings wrapped in a pita or soft flour tortilla, a lavash or other soft flatbread.” http://en.wikipedia.org/wiki/Wrap_%28food%29 (as visited on August 20, 2007).

26. *Wood v. Lucy, Lady Duff Gordon*, 118 N.E. 214, 214 (N.Y. 1917).

27. John Montagu, the Fourth Earl of Sandwich, is credited with inventing “the sandwich.” Davidson, *supra* note 24, at 692.

28. *Id.*

Despite the title of this piece, my goal is not to determine with any legal, scientific, or culinary specificity whether a burrito is a sandwich. Rather, I explore what lies beneath the somewhat smug determination of the *White City* court that “common sense,” and a rather formalistic reading of the word “sandwich,” answers the question for us. At the risk of being misunderstood, I am suggesting that courts must *add to*, rather than abandon, common sense when analyzing legal questions.

Common sense is a subjective emotion, which sometimes serves as a proxy for unconscious bias and the perpetuation of *status quo* thinking. A judge’s common sense intuitive reaction must be tempered by her more consciously analytical faculties. Professor Jeffrey Rachlinski has written extensively on the question of how judges arrive at decisions.²⁹ Rachlinski observes that “accurate judicial decision making regulates judges who know when to suppress their intuition and engage in deliberative assessment of the case before them.”³⁰ In short, a judge’s common sense or gut-level intuitive reactions—while permissible and useful—must undergo a second layer of logical, deliberative reasoning if she is to arrive at a truly holistic and fully-formed assessment of the case.³¹ Relying exclusively on common sense simply is not enough—particularly given the role race, class, and culture has played in American society and in the evolution of contract doctrine.

To say that race, class, and culture influence law is neither novel nor particularly radical at this point.³² Even a traditionally staid and doctrinal

29. See, e.g., Jeffrey J. Rachlinski, Chris Guthrie, and Andrew J. Wistrich, *Heuristics and Biases in Bankruptcy Judges*, 163 JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS 167 (2007); Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005); Chris Guthrie, Jeffrey J. Rachlinski, & Andrew Wistrich, *Cognitive Illusions in Judicial Decision Making*, 86-1 JUDICATIVE 44 (Jul.-Aug. 2002).

30. Jeffrey J. Rachlinski, Professor of Law, Cornell Law School, Presentation at Boalt Hall conference on Law and Emotion: Judicial Intuition (Feb. 8, 2007).

31. System 1 is reactive and effective where decisions are made intuitively, as Judge Locke did, while system 2 is logical where decisions are made deliberately. See, e.g., Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007).

32. See, e.g., Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Debora L. Threedy, *Feminists and Contract Doctrine*, 32 IND. L. REV. 1247 (1999); Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889 (1997); Amy Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269 (1994); Patricia A. Tidwell & Peter Linzer, *The Flesh-Colored Band Aid-Contracts, Feminism, Dialogue, and Norms*, 28 HOUS. L. REV. 791 (1991); Deborah Waire Post, *Race, Riots and the Rule of Law*, 70 DENV. U. L. REV. 237 (1993); Alice Belcher, *A Feminist Perspective on Contract Theories from Law and Economics*, 8 FEMINIST LEGAL STUD. 29 (2000); Mary Joe Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985); Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235 (1998);

subject like contract law has made room for those who bring a critical perspective to the exploration of key concepts in the discipline.³³ Using the wealth of available critical literature as the framework for my own analysis, I embark on a journey to unveil the hidden and unconscious manifestations of race, class, and culture that help explain the outcome in *White City*.

In Part I, I set out the facts and circumstances surrounding the “Burrito Brouhaha” and identify a number of discrepancies in the court’s analysis. I argue the term “sandwich” as used in the disputed lease is ambiguous and as such the court’s resort to common sense and a single dictionary definition of the term fails to do justice to the complexity of the question raised. I further suggest the court’s gut-level understanding that burritos are not sandwiches actually masks an unconscious bias. By this, I do not mean to reduce the complex *mélange* of factors leading to the courts opinion to a crude and simplistic accusation that “the judge is a racist.”³⁴ Rather, the court’s over-reliance on common sense, or some common understanding of “sandwich” shared by society, is influenced by race, class and cultural considerations because society itself is so influenced.

In Part II, I begin with a historical analysis of the way race, class, and culture have influenced contract law. To examine the impact of race on contracts, I draw from several periods in U.S. history—from slavery to the Reconstruction Era, to the Great Migration of southern blacks to northern cities, and ultimately to the early Civil Rights movement.

With respect to class, I begin by grappling with the “American Enigma”: Why is it that despite the great disparities in wealth, prestige, and power in society, Americans cling to the notion that class does not exist in the United States? I then examine the various definitions of class and ultimately conclude—despite the vehement denials as to its existence, and notwithstanding the difficulty in pinning down a suitable definition—class *does* exist in American society. To further my point, I examine the foundational principle of freedom of contract and suggest that embodied in the principle is the traditional notion of a “classless” society. However, freedom of contract has had to give way to policing doctrines such as unconscionability, which recognizes disparities in bargaining power, precisely because such a classless society is no more than a legal fiction.

Culture also influences the law and is influenced by the law. Thus, I examine the culture of contracts; that is the set of customs, beliefs, and shared understandings that exist within society, which contract doctrine

Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799 (2003).

33. See *supra* note 32.

34. I certainly do not presume racial animus on Judge Locke’s part merely because he authored this opinion.

incorporates into every agreement. I examine the impact of culture both when disputing parties share a common understanding and when they do not.

The impact of race, class, and culture is not limited to history, however. Thus, in Part II I also examine their impact in the *White City* dispute. When the decision was announced, it was met with what I term the “*Duh!*” response; there was an overwhelming chorus of agreement that *of course* a burrito is not a sandwich. I explore this “*duh!*” affect and suggest its roots can be traced back to race, class and culture. I set off on a culinary tour of burritos and sandwiches—from their birthplace in Mexico and England respectively—and trace their integration into American society. Can a burrito be said to have a race? I argue that it can, and that race is Mexican. The sandwich, however, is perceived as race-neutral. I suggest these differing perceptions of race help to explain the different experiences sandwiches and burritos faced in their integration into American society.

Finally, I analyze the role culture played in *White City*. Like many European immigrant groups, the sandwich was seamlessly integrated into American society—so much so that few are aware of its foreign ancestry. Burritos—like Mexicans—have been incorporated without losing their status as “foreign” or “the other.” Part of the explanation for that different experience is the difference in culture of the two items.

In Part III, I reflect on the proper role of context in giving meaning to contractual agreements. A judge’s role in the interpretation of a contract is to define a disputed term in such a way that it does justice to the underlying objectives of the parties to the contract. Contract doctrine will sometimes seek an easy way out of this complex task. For example, courts may resort to maxims of interpretation such as a rule that calls for interpreting a disputed term against the drafter. For the most part, however, modern contract law recognizes the central role of context in giving meaning to contractual terms. But whose context are we talking about? The objective theory of contracts teaches we must interpret terms in the manner of a dispassionate third-party observer. Of course, no such human being has yet been created. The context of our understanding of a particular term is influenced by society, and by the impact race, class and culture has on our society. Part III calls for a broader interpretation of context—one that will bend with our rapidly changing society, rather than break from its inability to evolve.

I. THE BURRITO BROUHAHA

The *White City* dispute on its face involves a traditional commercial transaction. The parties negotiated and executed a complicated lease agreement meant to protect both of their economic interests. In the process, they neglected to define the term “sandwich,” an omission which

would ultimately prove costly for both sides. Without an agreed definition between the parties, the court in *White City* defined the term according to its “ordinary meaning.”

Attempting to discern the “ordinary meaning” of a word is a process fraught with potential landmines of exploding possibilities. The meaning of words cannot be separated from the society in which those words were created; thus a word’s meaning often embodies many of the beliefs, perceptions, and biases of that society. In the following section, I demonstrate the meaning of the word sandwich is not nearly as self-evident as the court suggests. I initially set out the facts of the *White City* dispute, and then explore evidence surrounding the case to suggest the term sandwich as used in this context was ambiguous. Given that ambiguity, Judge Locke could not properly rely on common sense and a single definition of the term to ascribe meaning to the parties’ agreement.

*A. A Little Competition Never Hurt Anyone:
White City v. PR Restaurants*

In March 2001, Panera—a popular chain of café-style restaurants and bakeries³⁵—signed a 10 year lease with White City Shopping Center to occupy retail space in the White City Shopping Center in Shrewsbury, Massachusetts.³⁶ The lease contained an exclusive use clause preventing the White City Shopping Center from leasing space in the same mall to any bakery or restaurant “reasonably expected to have annual sales of sandwiches greater than ten percent (10 %) of its total sales . . .”³⁷ The original lease allowed for a number of exemptions to the exclusive use provision—for example, a Jewish-style delicatessen was exempt from the provision, and thus was free to serve sandwiches.³⁸ For five years the parties’ dealings apparently were amicable, but before the original lease had even expired they decided to renegotiate its terms.

The facts are silent as to why the parties determined to renegotiate the lease early, but what becomes patently clear is that Panera sought greater protection from competing restaurants, and the shopping center was willing to provide that for a price. During the new round of negotiations, the parties agreed to expand the exclusivity clause to cover more

35. Panera is the business name under which “PR Restaurants” operates; it has twenty two restaurants in New Hampshire, Maine and Massachusetts alone. *White City*, 2006 WL 3292641, at *1 (Mass. Super. Ct. Oct. 31, 2006). See also Panera Bread, <http://www.panerabread.com/about/> (last visited June 3, 2008).

36. *White City*, 2006 WL 3292641, at *1.

37. Brief of Defendant, *supra* note 11, at 2. The exclusive use clause also prohibited the operation of luxury coffee and tea establishments such as Starbucks. *Id.*

38. *Id.*

restaurants—the Jewish-style delicatessen lost its exemption,³⁹ as did near-Eastern restaurants that served gyros (a sandwich utilizing pita bread).⁴⁰ But less than one year after signing the amended lease with Panera, the White City Shopping Center entered into a lease agreement with a new client—Qdoba Mexican Grill.⁴¹ Qdoba's menu features salads, tacos, quesadillas, and of course burritos.⁴² Upon learning of the new lease, Panera demanded assurance from the shopping center that Qdoba would not become its neighbor. The shopping center's owner was said to be "deliberately evasive" and refused to provide the requested assurance;⁴³ rather, it beat Panera to the courthouse seeking a declaratory judgment that it was not in violation of its contractual obligation.⁴⁴ Thus began the now infamous Burrito Brouhaha.

Despite the volley of claims, counterclaims, affidavits, and charges, the issue before the court was deceptively simple: Does the term "sandwiches" as it appears in the Panera lease include burritos?⁴⁵ The court's response on this point consists of a single paragraph:

39. The new lease provision held that "[t]he foregoing restriction shall also apply (Without limitation) to a . . . Jewish-style delicatessen within the Shopping Center" *Id.* at 3. Similarly, Dunkin Donuts, which had also enjoyed an exemption under the original lease, could no longer serve sandwiches (assuming it had to begin with). *Id.* A number of other restaurants, however, retained their exemption. *Id.* (noting that "the foregoing restriction . . . shall not apply to (i) the use of the existing, free standing building in the Shopping Center partially occupied by Strawberries and recently expanded for a business serving near-eastern food and related products, (ii) restaurants primarily for sit down table service or (iii) a Papa Gino's restaurant (provided the same continues to operate with substantially the same categories of menu items as now apply to its stores and franchisees generally).").

40. Brief of Defendant, *supra* note 11, at 8.

41. Anthony Miller and Robert Hauser opened the first Qdoba Mexican Grill in Denver in 1995, and by 2003 they were popular enough to have caught the attention of Jack in the Box. The San Diego-based company, known primarily for its burgers (and bizarre commercials featuring a business-suit clad man wearing a grotesquely smiling, baseball-shaped mask), operates Qdoba as a wholly-owned subsidiary. See generally Qdoba, <http://www.qdoba.com/Story.aspx?p=about> (last visited June 3, 2008); Jack in the Box, <http://www.jackinthebox.com/aboutourco/index.php?section=1> (last visited June 3, 2008).

42. Brief of Defendant, *supra* note 11, at 3.

43. *Id.*

44. *White City*, 2006 WL 3292641, at *1. The court's ruling was in response to a preliminary injunction motion filed by Panera seeking to enjoin the Shopping Center and Qdoba from taking any further action. *Id.* Apparently, Qdoba had already spent over \$85,000 in planning and it was contractually obligated to spend over \$300,000 in constructing a restaurant in the shopping center. *Id.* at *2.

45. The issue in the case also includes whether sandwiches covers tacos and quesadillas, but I limit my discussion to the burrito. It is only the burrito that seems to have fired the public imagination.

Given that the term “sandwiches” is not ambiguous and the Lease does not provide a definition of it, this court applies the ordinary meaning of the word. The New Webster Third International Dictionary describes a “sandwich” as “two thin pieces of bread, usually buttered, with a thin layer (as of meat, cheese, or savory mixture) spread between them.” Merriam Webster, 2002. Under this definition and as dictated by common sense, this court finds that the term “sandwich” is not commonly understood to include burritos . . . which are typically made with a single tortilla and stuffed with a choice filling of meat, rice, and beans.⁴⁶

Thus, the court summarily dismisses the conflict between the parties by resort to a dictionary and common sense. Both tools ultimately present some challenges.

The court’s reliance on a single dictionary definition at best is a crude attempt at discerning what the parties meant. Words are slippery entities upon which human beings struggle to place concrete meaning.⁴⁷ All too often, such attempts prove difficult, and resorting to a dictionary merely compounds the problem. For one, words do not have a singular meaning—even in a dictionary. Not surprisingly, the same Webster’s Third New International Dictionary upon which the court relies defines “sandwich” as follows:

Sandwich: 1a. two slices of bread usually buttered, with a thin layer (as of meat, cheese, or savory mixture) spread between them. *1b.* food consisting of a filling placed upon one slice or between two or more slices of a variety of bread . . .⁴⁸

Thus, just a half-step below the definition Judge Locke chose to adopt was one that suggests a burrito surely is a sandwich. How then are we to choose between these competing definitions—to break the tie of meaning, so to speak? The court does so by referencing “common sense” or some shared societal understanding of the word sandwich that transcends

46. *White City*, 2006 WL 3292641, at *3.

47. Justice Holmes once noted:

It is not true that in practice . . . a given word or even a given collocation of words has one meaning and no other. A word generally has several meanings, even in the dictionary. You have to consider the sentence in which it stands to decide which of those meanings it bears in the particular case, and very likely you will see that it there has a shade of significance more refined than any given in the wordbook.

Oliver Wendall Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417 (1899).

48. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2011 (Philip Babcock Gore et al. eds., 1986).

the meaning the parties themselves may have attributed to the term. The consequence is to privilege the shopping center's definition merely because it is in line with society's own understanding and *not* because it is objectively the meaning to which the parties themselves agreed. Given that contracts are agreements between individuals—"a private affair and not a social institution"⁴⁹—such an outcome raises some legitimacy concerns. In the following section, I explore the problem of conflicting meaning, and the available means of interpretation, in further depth.

B. *Interpreting the Clause in White City*

The question of interpretation in contract disputes presents something of a dilemma: Whose perspective should a judge employ in determining what the parties agreed to bind themselves to do? Contract doctrine divides into two schools of thought: The subjective theory of interpretation believes a judge's role is to discern the will of the parties based on their words and actions, while the objective theory looks to the intention of a fictional reasonable person to determine the legal obligations of the parties. In this section, I elaborate on the centuries-long evolution of these two schools to provide the theoretical context in which I will examine the court's interpretation of sandwich in the *White City* opinion.

1. Two Ships Without Peer, Twenty Bishops and a Partridge in a Pear Tree: Contract Interpretation in a Nutshell

Nineteenth century judges relied on the "subjective theory," seeking to discern the parties' intention through their words and deeds. The most famous embodiment of subjective interpretation is the 1864 English case of *Raffles v. Wichelhaus*, better known as the "Peerless" case.⁵⁰ In *Peerless*, a buyer contracts with a seller to purchase and deliver several bales of cotton from Bombay to England on a ship called the Peerless. As luck would have it, there were two ships by that name—one was to arrive in England in October, while the other would arrive in December. The contract did not specify which "Peerless" the parties meant; the buyer believed he had contracted for his goods to arrive on the October Peerless, while the seller believed the agreement called for delivery on the December Peerless. When the buyer refused delivery of the cotton in December, arguing breach of contract, the seller sued.

49. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943).

50. *Raffles v. Wichelhaus*, (1864) 159 Eng. Rep. 375 (Exch. Div.). For an in depth discussion of the case see A.W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 CARDOZO L. REV. 287 (1989).

What is most important about *Peerless* is less the outcome than the methodology. The judge sought to understand what *these parties* believed they had agreed to do, and it ultimately determined they were operating under a different set of assumptions. The English court thus ruled no contract had formed between the parties because there had been “no meeting of the minds;” there could be no basis for holding the parties to obligations they never knowingly or willingly undertook.⁵¹

But the subjective theory was to fall into disfavor. Critics charged it was too difficult and impractical to know what was in someone’s mind, and in the *laissez-faire*, market-dominant economy of the nineteenth century the uncertainties of such an exercise would jeopardize commercial transactions and impede expansion of the marketplace.⁵² Out of the ashes of the subjective theory’s demise would come the objective theory of contract interpretation. The objective theory arrives at a determination of contractual intent *not* through an evaluation of the parties’ understanding, but rather through an assessment of the intent a fictional “reasonable person” would have ascribed to the terms of the contract. Judge Learned Hand’s oft-quoted pronouncement in *Hotchkiss v. National City Bank of New York* perhaps best illustrates the point:

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.⁵³

Proponents of the theory explain its ascendance by noting that it is practical and efficient, almost scientific in its impartiality.⁵⁴ But the objec-

51. *Raffles*, 159 Eng. Rep. at 375–6.

52. See Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1119 (1984) (noting the purpose of “security of transactions” is to “promote commerce”); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 37 (1992) (noting the subjective theory undermined the “national corporate economy”).

53. *Hotchkiss v. Nat’l City Bank of N.Y.*, 200 F.2d 287, 293 (S.D.N.Y. 1911). Accord JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 154 (5th ed. 2003) (“It is not primarily the intention of the parties which the court is seeking, but the meaning of the words at the time and place when they were used.”) (quoting 4 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS 583 (3d ed. 1960)).

54. As one scholar notes—admittedly with more than a hint of sarcasm—the objective theory:

tive theory has its own critics. Followed to its logical conclusion, it binds parties to an intention *neither one of them* held at the time of contract formation.⁵⁵ The Restatement Second of Contracts splits the baby as it were by adopting an approach that melds the subjective with the objective.⁵⁶ The starting point for interpretation is to inquire whether the parties attach some special meaning to the words used in the contract; if so, that meaning will prevail.⁵⁷ But where both parties do not share a common understanding, the court must engage in an additional inquiry: Where neither party knew or had reason to know they were laboring under differing meanings, then it cannot properly be held that a “manifestation of agreement,” had formed between them.⁵⁸ But if one party remains silent despite knowing the other party holds a different meaning, a court will not reward that act of silence.⁵⁹

Thus, contract interpretation is a subtle dance of inquiry between the subjective and the objective. “Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.”⁶⁰ Where a term is capable of more than one interpretation, the fact finder must engage in a search that places the term in its context and must employ extrinsic

[A]llows courts to determine the meaning of contracts without having to determine each party's actual understanding. This view of the objective theory, as a rule of common sense practicality, allows contemporary lawyers to overlook or to reinterpret conflicting nuances in the doctrine, the two most prominent of which are that the doctrine is reasonable, rational, and almost self-evidently true, and that the doctrine is rigorous—even vigilant—standing courageously firm against the wishy-washy mash that is subjective intention or desire.

Amy Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 295 (1994).

55. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 230 (noting that where two parties enter into a contract to sell patent rights and A believes she is selling only English rights, while B believes she is selling English, French and American rights, if a reasonably intelligent third party believes such a sale would include English and American patents, but not French ones, A and B would be bound to that meaning).

56. RESTATEMENT (SECOND) OF CONTRACTS § 201 (1981).

57. *Id.* § 201(1). For example, imagine in the sale of a top-secret software program both parties choose to refer to the program as “horse” for confidentiality purposes. If the parties attach the same meaning to the word “horse” as used in the contract (horse = software program), then that meaning will prevail, even though in applying the objective theory a reasonable person would not so understand the word horse.

58. *Id.* § 201(2).

59. See *id.* § 201(3).

60. *Id.* § 202(1).

evidence—that is, evidence outside the “four corners” of the agreement—to ascribe meaning to the disputed term.⁶¹

2. Plain Meaning, Dictionaries and Common Sense

Worcester, Massachusetts, is a “plain meaning” jurisdiction.⁶² Like the name suggests, such jurisdictions adopt a certain no-nonsense approach to contract interpretation. Under the rule, “[i]f the words of the contract are plain and free from ambiguity, they must be construed in accordance with their ordinary and usual sense.”⁶³ Unless the parties to the contract provided for a special definition, the meaning of a word used is to be determined by reference to its common meaning, as reflected in dictionary definitions.⁶⁴ It is undisputed that the contract between Panera and the shopping center contained no special definition of the term sandwich, thus the “ordinary meaning” of that term applies. But what the *White City* court fails to acknowledge is that sandwich is ambiguous, thus requiring further inquiry into contextual and extrinsic evidence before the term properly can be defined.

Ambiguity arises when a word is capable of more than one interpretation.⁶⁵ Where a term is *unambiguous*, its interpretation is a question of law for a judge to determine,⁶⁶ but where a term is capable of more than one meaning, clarifying the ambiguity is a task for the fact finder.⁶⁷ To complete its task, the fact finder must read the term in context, and it may have to resort to extrinsic evidence to ascertain the reasonable intention of the parties at the time of contracting. Such extrinsic evidence includes examining the way in which the parties performed on the contract (course of performance); the way in which the parties performed with each other in previous contracts, assuming they have had any (course of

61. See, e.g., *Bohler-Uddeholm America, Inc. v. Ellwood Group*, 247 F.3d 79, 93 (3d Cir. 2001) (noting that “a court may . . . look outside the ‘four corners’ of a contract if the contract’s terms are unclear.”)

62. See *White City*, 2006 WL 3292641, at *3 (citing *Ober v. Nat’l Casualty Co.*, 60 N.E.2d 90, 91 (Mass. 1945)).

63. *White City*, 2006 WL 3292641, at *3. The plain meaning rule is generally disfavored as it can lead to harsh consequences. See e.g., *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 645 (Cal. 1968) (“The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended.”). See also PERILLO, *supra* note 53, § 3.10 (discussing some of the draconian consequences of the plain meaning rule).

64. Brief of Defendant, *supra* note 11, at 6 (citing *Town of Boylston v. Comm’r of Revenue*, 749 N.E.2d 684, 689 (Mass. 2001)).

65. See 11 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 30:4 (4th ed. 2002).

66. *Guilford Transp. v. Pub. Utils. Comm’n*, 746 A.2d 910, 914 (Me. 2000).

67. *Id.*

dealing); or the way in which members of the industry would interpret a particular term (usage of trade).⁶⁸

Linguists take exception to the notion that *any* word could be considered “plain and free from ambiguity”—indeed they point out the term “ambiguity” is *itself* ambiguous⁶⁹—but it is not necessary to take up that challenge in this case. Even in plain meaning jurisdictions, once ambiguity is discerned the fact finder must move beyond the confines of a dictionary to clarify that ambiguity.⁷⁰

Thus the threshold question is whether the term “sandwich” is ambiguous? Judge Locke determined without any analysis that it was not; however, while the court relies on a single definition, as noted above The Webster Third New International Dictionary provides at least two competing plausible definitions: either a sandwich requires two slices of bread or one or more slices.⁷¹ The second definition covers a variety of food items most reasonable people would concede are sandwiches: the Scandinavian open-face sandwiches, which are made with just one slice of bread, wrap sandwiches call for just one slice, and double-deckers require at least three slices of bread.⁷² Because the term “sandwich” has at least two equally plausible definitions, it is ambiguous and the court cannot properly favor one definition over the other without explanation or analysis.

Judge Learned Hand once said “it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary[.]”⁷³ Yet dictionaries are a time-honored tool in the judicial toolbox, one which judges have begun to use with increasing frequency in recent years.⁷⁴ But relying on a dictionary definition in isolation does not accurately reflect the context in which the word is used, for “[w]ords

68. RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981). Some sources of evidence are weighed more heavily than others: Express terms are given greater weight than any other source in determining the meaning of the parties. *Id.* § 203(b). But where the express term is ambiguous, course of performance is given greater weight than course of dealing or usage of trade, and course of dealing is given greater weight than usage of trade. *Id.*

69. Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI.-KENT L. REV. 859, 859 (2004) (noting that “The problem, perhaps ironically, is that the concept of ambiguity is itself perniciously ambiguous.”).

70. 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.12 at 309 (3d ed. 2004).

71. Webster’s Dictionary, *supra* note 48. In fact, the court acknowledges “the parties have submitted numerous dictionary definitions for the term ‘sandwich,’ as well as expert affidavits.” *White City*, 2006 WL 3292641, at *3 n.3.

72. See *supra* notes 23–25.

73. *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945).

74. See Symposium, *Changing Images of the State*, Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1437 (1994) (noting that the Supreme Court has referred to dictionaries in more than six hundred cases over a period of two centuries, and that in recent years the Court’s reliance on dictionaries has reached unprecedented levels).

are not pebbles in alien juxtaposition; they have only a communal existence,” and their meaning is derived only in that context.⁷⁵ Thus, when Judge Locke set out to interpret the term “sandwich” in the contract between Panera and the White City Shopping Center, the complexity of the question required more than a retreat to the Webster Third New International Dictionary. While dictionaries may be a starting point for interpretation, they cannot provide the context necessary to properly gauge what the parties reasonably intended.⁷⁶ And certainly when the dictionary definition creates its own ambiguity, it is necessary to examine extrinsic evidence to determine meaning.

Faced with a similar challenge in determining what is a chicken—competing dictionary definitions and a volley of points and counterpoints raised by plaintiff and defendant—Judge Friendly in *Frigaliment v. BNS International* easily determined the term “chicken” was ambiguous. As a result, extrinsic evidence, including course of performance, course of dealing and trade usage, had to be admitted to provide context.⁷⁷ Judge Locke properly should have made a similar assessment. Doing so would have yielded some relevant information: there is no evidence the parties had previous dealings with each other, thus course of dealing is not instructive; similarly, the trade usage on the term “sandwiches,” is conflicting and therefore unhelpful.⁷⁸ But the past behavior of the parties in negotiat-

75. *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941). Judge Hand goes on to say “and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . .” *Id.*

International law also calls for the ordinary meaning of a word to be read in its context. Vienna Convention On the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

76. The Appellate Body of the World Trade Organization, the trading system’s “supreme court,” similarly has often resorted to the use of dictionaries to determine meaning, a process many trade experts have decried. See, e.g., Raj Bhala & David A. Gantz, *WTO Case Review 2004*, 22 ARIZ. J. INT’L & COMP. L. 99, 158, 184 (2005) (Appellate Body uses Shorter Oxford English Dictionary to define “notwithstanding” and “goods”); Raj Bhala & David A. Gantz, *WTO Case Review 2004*, 23 ARIZ. J. INT’L & COMP. L. 107, 136, 247, 254, 318 (2006) (Appellate Body uses dictionary to define “salted,” “related to,” “market,” and “sporting”).

77. *Frigaliment*, 190 F.Supp. at 117–20.

78. Affidavit of Judith A. Quick at 2, *White City Shopping Ctr. v. PR Rests.*, No. 2006196313, 2006 WL 3292641 (Mass. Super. Ct. Oct. 31, 2006) (asserting “[a]ccording to the USDA definition, an ordinary closed sandwich consists of two pieces of bread (or the top and bottom sections of a sliced roll or bun) with some kind of filling that contains meat or poultry.”). Of course by that definition, the USDA would not consider the quintessentially American peanut butter and jelly sandwich to be a sandwich. Moreover, there is more than a tinge of self-interest rolled into that definition. It turns out that ordinary sandwiches are not subject to the USDA’s jurisdiction because “they are not viewed by consumers as products of the meat food industry or the poultry food industry.” *Id.* Be-

ing the amendment to the lease provides some course of performance data that is relevant; admittedly, there is no evidence indicating exactly what the parties meant by “sandwiches,” but there is strong indication of what the reasonable expectation of the parties were concerning the term. Both Panera and the White City Shopping Center understood they were negotiating for greater market protection for Panera. There could be no other explanation as to why they were negotiating to include more restaurants within the exclusive use provision—that is to *exclude* them from selling sandwiches—other than that Panera was seeking market protection and the White City Shopping Center was willing to give it to them for a price.⁷⁹ The reasonable expectation of the parties gives strong guidance as to what it is the parties intended, and thus should be given great weight.⁸⁰

While the contract between Panera and the White City Shopping Center may not explicitly have identified single-sliced sandwiches, their inclusion is arguably implicit. They were part and parcel of what Panera was seeking—protection from competition—and what the White City Shopping Center was willing to negotiate away. Professor James Gordley makes the point in his essay *The Moral Foundations of Private Law*:

If you enter into a contract, you explicitly want what you expressly agree upon, but if you are fair-minded, you implicitly want whatever terms will make the deal a fair one. While you have not thought of these terms, you would accept them if you did and saw that they are fair.⁸¹

But what if a party is not fair-minded? Gordley acknowledges that one party may want to enrich herself at another’s expense, “[b]ut that is an intention the law should thwart.”⁸² There is some indication of a lack of fair-mindedness on the part of the White City Shopping Center, which if not exactly rising to the level of bad faith, should nonetheless have been thwarted by the law.

cause the USDA does not view burritos as sandwiches, burritos have always been subject to the agency’s regulatory authority. *Id.*

79. See *supra* note 39. See also Jenn Abelson, *Arguments Spread Thick*, BOSTON GLOBE, Nov. 10, 2006, at A1.

80. The Restatement provides in relevant part if the “principal purpose of the parties is ascertainable it is given great weight.” RESTATEMENT (SECOND) OF CONTRACTS § 202(1) (1981).

81. James Gordley, *The Moral Foundations of Private Law*, 47 AM. J. JURIS. 1, 19–20 (2002). The example Gordley uses is that of entering into a contract to purchase a car. While you explicitly want the car itself to be delivered to you, implicitly you will want whatever is necessary to make the car go, including a cam shaft. Even if you had never heard of a cam shaft, you would want it as soon as you understood its relationship to the car. *Id.*

82. *Id.* at 20.

It appears the White City Shopping Center was well aware of the reasonable expectation Panera would have that it was being protected from similar competition. In a very similar lawsuit involving the shopping center and yet another leasee, the Paper Store of Shrewsbury, the shopping center once again acted in a sly manner. The Paper Store believed it had negotiated an exclusivity clause with the shopping center that would not allow it to lease space to a similar competing store. In the clause at issue, the White City Shopping Center agreed:

not to "enter into (a) a lease of space in the Shopping Center for use as a card and gift store selling primarily the kinds of products as are currently sold in Hallmark card and gift stores or stores similar to Card Smart stores ..."⁸³

Despite the clause, the White City Shopping Center went on to lease space to a competitor selling the prohibited items; when confronted, the mall owner responded that he would "do what's best for him and the shopping mall" and that "he didn't believe a little competition would hurt anyone."⁸⁴

In light of the evidence that "sandwich" is capable of more than one meaning, and the reasonable expectation of the parties was that Panera would be protected against competitors (and further evidence that in at least one other occasion, the White City Shopping Center negotiated an exclusivity provision it had no intention of honoring), the court's cursory analysis seems suspect. Why did the court choose to ignore the range of available evidence to give both meaning and *context* to the term "sandwich" as used in *this* contract between Panera and White City?

Professor Jeffrey Rachlinski's work on judicial decision making may shed some light. In *Blinking on the Bench: How Judges Decide Cases*, Rachlinski and his colleagues ask the question "How do judges judge?"⁸⁵ They tackle the age old-debate between the formalists and the realists as to whether judges apply the law to the facts in a mechanical and deliberative way, or whether they rely on hunches and gut feelings. What the authors conclude is that judges generally make intuitive decisions, but good judges subject such hunches to a second layer of analysis and will

83. Paper Store of Shrewsbury v. White City Shopping Ctr., No. 20034828, 2003 WL 23197898, at *1 (Mass. Super. Ct. Dec. 10, 2003).

84. *Id.* The court in that case enjoined The Paper Store's competitor from selling the disputed items. *Id.* at 2. Interestingly, the court noted the term "primarily" used in the lease between the Paper Store and White City was ambiguous. *Id.* at 2-3.

85. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 1 (2007). The quote from Piero Calamandrei which appears in their work seems particularly apt here: "I fear the judge who is too sure of himself, who reaches his decision quickly, jumping immediately to conclusions without deliberation or repentance." PIERO CALAMANDREI, EULOGY OF JUDGES 21 (John Clarke Adams & C. Abbott Phillips, Jr. trans., Princeton Univ. Press 1942).

sometimes override their intuition with deliberation.⁸⁶ Intuitive decision making can lead to accurate results, but it is more likely than the deliberative process to lead judges astray; thus, melding the two processes is likely to lead to a more just outcome.⁸⁷

Judge Locke's opinion in *White City* smacks of an intuitive leap; a gut level reaction that "seems right" on its face and was not subject to a second-layer deliberative process. This is not to say that applying the deliberative process would necessarily lead to a changed result—again, my task here is not to "prove" that a burrito is a sandwich—but it would grant greater legitimacy to the outcome. As Rachlinski and his colleagues note, "[i]ntuition is dangerous not because people rely on it but because they rely on it when it is inappropriate to do so."⁸⁸ In this case, I argue, resort to an intuitive leap or "common sense" is inappropriate. It is inappropriate because intertwined with the "common sense" notion that a burrito is not a sandwich are certain biases—biases concerning race, class and culture.

II. RACE, CLASS AND CULTURE IN CONTRACTS

The Legal Realists successfully made the case that law cannot be divorced from society or the context from which it springs. Contracts are particularly context-bound. In giving meaning to these private arrangements between individuals, a court unabashedly looks to a common understanding shared by society at large. Below, I identify the impact race, class, and culture have had on the development of contract law historically. I then explore how these issues played out in the *White City* dispute.

A. Race

It surely surprises no one to say that race has played a central role in the construction of American law. Examples of the linkage abound: The "Peculiar Institution" of slavery required a series of legal accommodations for its existence, such as the Three-Fifths Compromise, which reduced the personhood of blacks to a fraction of that of whites.⁸⁹ During the

86. Rachlinski *et. al* describe their model as realistic formalism: "The model is 'realist' in the sense that it recognizes the important role of the judicial hunch and 'formalist' in the sense that it recognizes the importance of deliberation in constraining the inevitable, but often undesirable, influence of intuition." Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 3 (2007).

87. *Id.* at 5.

88. *Id.*

89. During the Constitutional Convention of 1787, slavery was the central question facing delegates. Northern delegates sought not to include slaves in any population census of the southern states—to do so would be to award southern states with greater represen-

Reconstruction Era, the Union's legal infrastructure was re-written in an effort to incorporate blacks into the social fabric.⁹⁰ The Civil Rights Movement and succeeding generations of the anti-discrimination struggle continue efforts at using law to stamp out discrimination targeting racial and other minorities.⁹¹ Each succeeding wave of race-based social justice litigation has had significant impact on the evolution of contract law. In this section, I explore that impact by returning to some well-known disputes in the field: the racial covenant cases of the 1930s and 1940s, the Southern legislative response to the abolition of slavery, and *Williams vs. Walker Thomas Furniture Company*, the oft-discussed case on the unconscionability doctrine. I then examine the role race played in *White City*.

tation in the House of Representatives. Southern delegates—for exactly the same reason—wanted slaves counted fully as persons. The Three-Fifths compromise addressed both sides' concerns, although the section conspicuously avoids using the word slave. The Apportionment of Representatives and Taxes clause provides:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

U.S. CONST. art. 1, § 2, cl. 3.

90. See 42 U.S.C. § 1981(a) (2000)(parenthetical). Enforcement of the provision has not been robust. See e.g., 8 JAMES FORD RHODES, *HISTORY OF THE UNITED STATES FROM THE COMPROMISE OF 1850*, 1–236, 384–506 (Macmillan 1920); William Watson Davis, *The Federal Enforcement Acts*, in *STUDIES IN SOUTHERN HISTORY AND POLITICS* 205 (James W. Garner ed. 1914); ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS* (Fordham Univ. Press 2005)(1985); 22 WILLIAM ARCHIBALD DUNNING, *RECONSTRUCTION: POLITICAL AND ECONOMIC, 1865–1877* (Harper & Bros. 1907); C. VANN WOODWARD, *THE BURDEN OF SOUTHERN HISTORY* (3rd ed. 2008); KENNETH M. STAMPP, *THE ERA OF RECONSTRUCTION: AFTER THE CIVIL WAR* (Vintage Books 1965).

In 1989, the Supreme Court limited the application of § 1981, and in the words of Professor Anthony Chase “undermined [its] purpose,” Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 36 (1995), when it held in *Patterson v. McLean Credit Union* 491 U.S. 164, 177 (1989), that the statute applied to the formation of a contract but did not cover “conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions.”

91. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Baker v. State of Vermont*, 744 A.2d 864 (Vt. 1999); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998); *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183 (Alaska 2007); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

1.From Slavery to Freedom:
Race and Contracts in Historical Perspective

In contract law legal doctrines are heavily laced with issues of race. Some prime examples can be found in the racial covenant cases. While northern states generally declined to enact state-sponsored discrimination along the model of the “Jim Crow” laws of the South,⁹² private contracts with restrictive covenant clauses served a similar purpose. Racial covenants prevented white homeowners from selling, leasing or conveying their property in any manner to a member of an “excluded group”.⁹³ The Great Migration of southern blacks from the fields to northern factories in the early twentieth century swelled the number of black families in northern cities, thereby creating an unprecedented need for more housing.⁹⁴ The covenants became a popular tool to preserve “whites only” neighborhoods in the face of this increasing black demand.

But where there is demand, supply invariably follows. A number of whites breached the covenants and sold their homes to black families who were willing to pay a premium, desperate as they were to find suitable

92. Ronald L.F. Davis describes the etymology of “Jim Crow” as follows:

The term Jim Crow is believed to have originated around 1830 when a white, minstrel show performer, Thomas “Daddy” Rice, blackened his face with charcoal paste or burnt cork and danced a ridiculous jig while singing the lyrics to the song, “Jump Jim Crow.” Rice created this character after seeing (While traveling in the South) a crippled, elderly black man (or some say a young black boy) dancing and singing a song ending with these chorus words:

Weel about and turn about and do jis so,
Eb’ry time I weel about I jump Jim Crow.

Some historians believe that a Mr. Crow owned the slave who inspired Rice’s act—thus the reason for the Jim Crow term in the lyrics. In any case, Rice incorporated the skit into his minstrel act, and by the 1850s the “Jim Crow” character had become a standard part of the minstrel show scene in America. On the eve of the Civil War, the Jim Crow idea was one of many stereotypical images of black inferiority in the popular culture of the day.

Ronald L. F. Davis, *Creating Jim Crow: In-Depth Essay*, <http://www.jimcrowhistory.org/history/creating2.htm> (last visited June 26, 2008).

93. Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 WASH. U. L. Q. 737, 740 (1989) The “excluded group” always included blacks, and it sometimes also included Asian and Native American families, as well as religious minorities. *Id.* at 740 n.11.

94. The seminal work on the migration of blacks to the North continues to be GUNNAR MYRDAL, *AN AMERICAN DILEMMA* (Harper & Bros. 1944); see also, Ware, *supra* note 93.

accommodations.⁹⁵ These families faced lawsuits brought by whites seeking judicial enforcement of their contractual right to be free of black neighbors. The case of *Corrigan v. Buckley*⁹⁶ is illustrative.

In 1926, John Buckley successfully sought an injunction preventing Irene Corrigan from selling her home to Helen Curtis, a black woman.⁹⁷ Buckley relied on an agreement signed by thirty white persons, including Corrigan, "in which they recited that for their mutual benefit and the best interests of the neighborhood . . . they mutually covenanted and agreed that no part of these properties should ever be used or occupied by, or sold, leased or given to, any person of the negro race or blood . . ."⁹⁸ While the Court declined on jurisdictional grounds to decide the case,⁹⁹ it went on to note, "It is obvious that none of these amendments [Fifth and Fourteenth] prohibited private individuals from entering into contracts respecting the control and disposition of their own property. . ."¹⁰⁰ The sentiment expressed in the case could easily be read to *favor* Corrigan's right to sell her home to a black woman—or to a dancing chicken for that matter (if the price was right). But the Court used the foundational principle of freedom of contract to privilege the earlier agreement irrespective of the content of that agreement.¹⁰¹

The Court's analysis is rooted in a classical approach to contracts, which reveres personal autonomy and views freedom of contract as "giv[ing] individual contracting parties all the needed leeway for shaping the law of contracts according to their needs . . ."¹⁰² The state's role in this

95. Ware, *supra* note 93, at 742. Conditions in the areas reserved for black use were so bad that one report noted racial segregation "ha[d] kept the Negro-occupied sections of cities throughout the country fatally unwholesome places, a menace to the health, morals and general decency of cities and plague spots for race exploitation, friction and riots." *Id.* at 741 (quoting PRESIDENT'S CONFERENCE ON HOME BUILDING AND HOME OWNERSHIP, REPORT ON NEGRO HOUSING 45–46 (1932)).

96. *Corrigan v. Buckley*, 271 US 323 (1926).

97. *Id.* at 327.

98. *Id.* at 327.

99. The court determined there was no state action that would call into question possible Fifth or Fourteenth Amendment violations; thus, no substantial constitutional or statutory question existed and it therefore had no jurisdiction to hear the case. *Id.* at 327–28.

100. *Id.* at 330. Despite the Court's refusal to decide the case, for over two decades after *Corrigan* virtually every court that heard a challenge to restrictive covenants relied on the *Corrigan* dicta as governing legal authority. Ware, *supra* note 93, at 741.

101. Freedom of contract is so vast a legal principle that I cannot hope to even begin plumbing its depths. A short synthesis would be to say that the principle embodies the right of individuals to enter into agreements of their own making. Private autonomy, individual choice, and bargaining are the hallmarks of freedom of contract. Society's role would be limited to providing mechanisms to enforce the contract, and intervening in limited circumstances for narrow public policy considerations.

102. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 638 (1943).

tradition is limited to ascertaining whether the parties voluntarily acceded to the terms of the agreement.¹⁰³ Once voluntariness is established, the only permissible action is to enforce the will of the parties at the time of contracting.¹⁰⁴ Even when state intervention would result in a social good—as in this case the establishment of a non-discriminatory society—classical freedom of contract adopts a “hands-off” approach that “reflects a proud spirit of individualism and of laissez faire.”¹⁰⁵

But the rugged individualist approach to contracts—even at its high-water mark in the mid-nineteenth century—may well have been a myth, as Professor Duncan Kennedy suggests.¹⁰⁶ No judge or legislature has ever accepted the notion of an absolute freedom of contract; for example, contract jurisprudence recognizes the state’s role in limiting the rights of minors, or others without full mental capacity, to bind themselves in contracts.¹⁰⁷ The state also refuses to enforce contracts entered into under duress¹⁰⁸ or undue influence,¹⁰⁹ or in some instances where critical information was not properly disclosed.¹¹⁰ In the race context as well, the principle of freedom of contract is discarded when convenient. Professor Jennifer Roback explains that under the Southern wage labor system, which developed with the demise of slavery, “[e]xploitation was not inherent in the capitalist system; rather, government power had to be specifically mobilized to achieve this end.”¹¹¹ The government power she identified was a series of laws that aided southern planters in establishing a labor market cartel that effectively limited the right of blacks and whites to freely enter into contracts. One of the basic types of legislation that made this possible was the contract enforcement and enticement laws. Contract-enforcement laws prevented black farm workers from breaching

103. *Id.*

104. *Id.*

105. *Id.* at 630.

106. Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 579 (1982) (noting “I don’t think one could show that the economy was any less “interdependent,” commodities any less “complex,” or people are more “individualist” in the early than in the late nineteenth or mid-twentieth century.”) *Id.*

107. See, RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981) (“No one can be bound by contract who has not legal capacity to incur at least voidable contractual duties.”) This principle has been used to allow minors, among others, to disaffirm contracts that are not for “necessaries”. See *Halbman v. Lenke*, 298 N.W.2d 562, 564 (Wis. 1980) (noting the purpose of the infancy doctrine is to “[p]rotect[] . . . minors from foolishly squandering their wealth through improvident contracts with crafty adults who would take advantage of them in the marketplace.”).

108. See RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981).

109. See RESTATEMENT (SECOND) OF CONTRACTS § 177 (1981).

110. See RESTATEMENT (SECOND) OF CONTRACTS § 161 (1981).

111. Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?* 51 U. CHI. L. REV. 1161, 1163 (1984).

employment contracts: "[A] laborer who signed a contract and then abandoned his job could be arrested for a criminal offense. Ultimately his choice was simple: he could either work out his contract or go to the chain gang."¹¹² Enticement laws were directed at white planters and sought to prevent them from competing among themselves for black labor by subjecting to criminal sanctions employers who "enticed" away a worker already under contract to another.¹¹³

What contract principles constructed, however, they also worked to dismantle. Before *Shelley v. Kraemer*, in which the Supreme Court ultimately banned racial covenants on principles transcending freedom of contract,¹¹⁴ some courts declined to enforce them based on principles of contract law. For example, in *Hundley v. Gorewitz*, the Court of Appeals for the D.C. Circuit denied enforcement of a restrictive covenant based on the doctrine of changed circumstances.¹¹⁵ "Changed circumstances" is a contractual doctrine based on economic principles.¹¹⁶ While the classical notion of *pacta sunt servanda* (pacts must be respected) calls for performance no matter the circumstances,¹¹⁷ the doctrine of changed circumstances excuses performance in certain instances when it "can only be done at an excessive and unreasonable cost."¹¹⁸

Bluntly stated, the court in *Hundley* concluded blacks had so thoroughly infiltrated the area that plaintiff could not hope to attain his vision of a segregated neighborhood:

[T]he present appellees are not now enjoying the advantages which the covenant sought to confer. The obvious purpose was to keep the neighborhood white. But the strict enforcement of all five covenants will not alter the fact that the purpose has been essentially defeated by the presence of a Ne-

112. *Id.* at 1166 (quoting PETE R. DANIEL, *THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901-1969*, at 25 (1972)).

113. Roback, *supra* note 111, at 1166.

114. In *Shelley v. Kraemer*, 334 U.S. 1, 19-21 (1948), the Supreme Court determined judicial enforcement of restrictive covenants based on race constituted state action, and were thus a violation of the equal protection clause of the fourteenth amendment ("It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint. . .").

115. See *Hundley v. Gorewitz*, 132 F.2d 23 (D.C. Cir. 1942).

116. "Changed circumstances" is a general principle encompassing impossibility or impracticability of performance, as well as frustration of purpose—applicable here. See generally PERILLO, *supra* note 53, §§ 13.1-13.12.

117. *Id.* at 513.

118. *Transatlantic Fin. Co. v. U.S.*, 363 F.2d 312, 315 (D.C. Cir. 1966) (noting "It is now recognized that 'A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.'" (quoting *Mineral Park Land Co. v. Howard*, 156 P. 458, 460 (Cal. 1916)); See also RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981).

gro family now living in an unrestricted house in the midst of the restricted group, and as well by the ownership by another Negro of a house almost directly across the street. And this is just the beginning.

The trend is unmistakable, its effect is apparent, and we are brought to conclude that to grant an injunction enforcing the covenant would merely depreciate all the property in the block without accomplishing the purpose which originally impelled its making, while to deny an injunction will leave all of the properties with a value commensurate to the conditions as they now exist.¹¹⁹

In setting forth the applicable rule in *Hundley*, the court's focus was not on the rights of the black purchaser but on the economic effect of any decision on the white seller and white homeowners in the neighborhood. In short, the court focused on an analysis of economic waste—whether enforcing the contract would produce greater or lesser economic benefits—rather than on social justice.¹²⁰ The economic impact on black families went unnoticed. Black families faced economic challenges whether or not a covenant was enforced. In *Hundley*, for example, Frederick and Mary Hundley purchased and lived in the home for one year before the lower court cancelled their deed and permanently enjoined them from ever “owning, occupying, selling, leasing, transferring or conveying” the property.¹²¹ The Hundley's losses from the sale, moving and relocation costs did not figure in the court's analysis.¹²²

119. *Hundley*, 132 F.2d at 25.

120. The court notes:

This exception to the rule [the doctrine of changed circumstances] is applicable in the case of a covenant such as we have here when, in the natural growth of a city, property originally constructed for residential purposes is abandoned for homes of more modern construction in more desirable locations, for a serious decline in values would follow unless the way was open either for use of the property for business purposes or for the housing needs of a lower income class. And it is also applicable where removals are caused by constant penetration into white neighborhoods of colored persons. For in such cases to enforce the restriction would be to create an unnatural barrier to civic development and thereby to establish a virtually uninhabitable section of the city. Whenever, therefore, it is shown that the purpose of the restriction has been frustrated and that the result of enforcing it is to depreciate rather than to enhance the value of the property concerned, a court of equity ought not to interfere.

Hundley 132 F.2d at 24.

121. *Id.* at 24–25.

122. Even when they were allowed to move into a predominately white neighborhood, blacks suffered economic loss in the face of white flight and falling property values.

It seems no discussion of race and contracts is complete without a reflection on *Williams v. Walker Thomas Furniture Company*.¹²³ But any discussion of that case is fraught with potential landmines littered with the debris of unexamined stereotypes and unexplored clichés.¹²⁴ *Williams* evokes some of the most prevalent stereotypes of black women as fertile, unmarried “Welfare Queens.”¹²⁵ Professor Muriel Morisey Spence identi-

Id. In *The Roosters Egg: On the Persistence of Race*, Professor Patricia Williams recounts her experience of “[t]he mass movement that turned my neighborhood into an ‘inner city’ ...”:

I remember when I was a little girl in the late 1950s, two or three black families moved into our neighborhood where for fifty years my mother’s family had been the only blacks. I remember the father of my best friend, Cathy, going from house to house, warning the neighbors, like Paul Revere with Chicken Little’s brain, that the property values were falling, the values were falling. The area changed overnight. Whites who had seen me born and baked me cookies at Halloween and grown up with my mother now fled for their lives.

PATRICIA J. WILLIAMS, *THE ROOSTER’S EGG* 35 (Harvard Univ. Press 1995).

123. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). *Williams* is part of the canon of contract cases and a perennial favorite in critical scholarship on race. See e.g., Eben Colby, Note, *What Did the Doctrine of Unconscionability Do to the Walker-Thomas Furniture Company?* 34 CONN. L. REV. 625, (2002); Amy Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269 (1994); Blake D. Morant, *The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance Of Context*, 2006 MICH. ST. L. REV. 925 (2006); Muriel Morisey Spence, *Teaching Williams v. Walker-Thomas Furniture Co.*, 3 TEMP. POL. & CIV. RTS. L. REV. 89 (1994); Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 GEO. WASH. L. REV. 183 (1994).

124. In her book *The Rooster’s Egg*, Professor Patricia Williams takes on some of the stereotypes ascribed to poor. “[T]he premises of the mean-spirited welfare war against today’s impoverished have grown into industrial-strength clichés, beginning with the one that welfare recipients are oversexed single women who just want to have fun by making babies so they can support themselves on grotesquely huge welfare checks.” WILLIAMS, *supra* note 122, at 7. She quotes a welfare official as stating “Every time I see a bag lady on the street, I wonder, ‘Was that an A.F.D.C mother who hit the menopause wall—who can no longer reproduce and get money to support herself?’” *Id.* at 6.

125. The term “Welfare Queen” was popularized by Ronald Reagan during the 1976 presidential campaign. DAVID ZUCCHINO, *MYTH OF THE WELFARE QUEEN: A PULITZER PRIZE-WINNING JOURNALIST’S PORTRAIT OF WOMEN ON THE LINE* 65 (1997). See also “Welfare Queen” *Becomes Issue in Reagan Campaign*, N.Y. TIMES, Feb. 15, 1976, at 51. Although he never gave her name—nor her race for that matter—Reagan reputedly was referring to Linda Taylor, a Chicago woman charged with using four aliases and defrauding the state of \$8,000. The “Welfare Queen” image Reagan invoked turned out to be a myth, but it is one slow to die in the American psyche. See, e.g., *id.* (“The ‘welfare queen’ item in Mr. Reagan’s repertoire is one of several that seem to be at odds with the facts.”).

If there were any Cadillac-driving, champagne-sipping, penthouse-living welfare queens in North Philadelphia, I didn’t find them. What I found instead was a thriving subculture of destitute women, abandoned by their men

fies the competing faces of *Williams* when she notes, “Williams has the relatively rare feature of a plaintiff in a civil suit who is not middle-class. . . . The facts and the way they inform the decision invite us to consider how the law may be used as a tool to protect the unprotected.”¹²⁶ In other words, *Williams* presents a teachable moment. It is a case that allows professors willing to stray into the uncomfortable the opportunity to remove the mask of race-neutrality that doctrinal courses like contracts too often hide behind. But as Professor Spence also acknowledges, the case raises troubling possibilities for further perpetuation of the stereotypes that society, and consequently our students, already hold.¹²⁷ Spence ultimately concludes, *Williams* “is well worth teaching.”¹²⁸ Similarly, while recognizing the risk of perpetuating stereotypes, I too believe *Williams* is useful in illustrating the way not only race, but also class and culture effect law. I therefore choose to use it, while gingerly walking around the land-mines.

The appellant in *Williams*—a poor, black, mother of seven, separated from her husband, and dependent on welfare—purchased a number of items on credit from the Walker Thomas Furniture Company.¹²⁹ After more than four years of steady repayment, having paid off \$1,400 of the \$1,700 balance, Williams defaulted on the loan.¹³⁰ The Company invoked its security interest under a clause in the contract allowing it to repossess all the items Williams had purchased. The Court of Appeals for the D.C. Circuit denied enforcement of the contract, concluding the security clause was unconscionable.¹³¹

and left to fend for themselves and their children, with welfare and food stamps their only dependable source of income.

See also, ZUCCHINO, *supra*, at 13–14.

126. Muriel Morisey Spence, *Teaching Williams v. Walker-Thomas Furniture Co.*, 3 TEMP. POL. & CIV. RTS. L. REV. 89, 102 (1994).

127. *Id.* at 103 (acknowledging her “fear that in our longing to see people of color in the law school curriculum we grasp rather desperately at any opportunity to discuss them, overlooking or ignoring the potential for reinforcing stereotypes.”).

128. *Id.*

129. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). The most (in)famous of Ms. Williams’ purchases was an Admiralty stereophonic radio; over the course of five years, items on the Williams’ shopping list included “two pairs of draperies at a cost of \$12.95 . . . one wallet, one apron set, on pot holder set, one set of rugs, one more pair of draperies, one 2 x 6 foot folding bed, one chest, one 9 x 12 foot linoleum rug, two pairs of curtains, four sheets, one WS20 portable fan, two more pairs of curtains, one Royal portable typewriter, two gun and holster sets (presumably toys), one metal bed, one inner spring mattress, four chrome kitchen chairs, one bath mat set, shower curtains, one Speed Queen washing machine . . .” Eben Colby, *What Did the Doctrine of Unconscionability Do to the Walker-Thomas Furniture Company?*, 34 CONN. L. REV. 625, 647 (2002).

130. *Williams*, 350 F.2d at 447.

131. See *infra* text accompanying notes 205–207.

Interestingly, of the five descriptors I used above to identify Ms. Williams, only one of them was omitted from the court's opinion—that Ora Lee Williams was black.¹³² While much has been made of race and the *Williams* case,¹³³ the opinion itself remains conspicuously silent on the matter. Race is the two thousand pound elephant in the room, trumpeting stridently while the court pretends to ignore it.¹³⁴ Why would almost everything about Ms. Williams be fair game for judicial scrutiny, from her marital status, to the number of family members, to the size of her welfare check—\$218 a month¹³⁵—but not her race?

One benign explanation might be that race simply is irrelevant to a determination of the case, while the other descriptors perhaps evidenced Ms. Williams' lack of bargaining power relative to the furniture company, a principle that forms the foundation for the court's decision. In other words, one might argue the other descriptors of Ms. Williams support the court's finding that she was the weaker party in the transaction, and the furniture company took advantage of its position to force her assent to terms so unfair no reasonable person would agree to them absent coercion.¹³⁶ But could race not be yet another factor allowing the company to take advantage of Ms. Williams?

132. See *Williams*, 350 F.2d at 445. Despite the court's omission, research has shown that indeed Williams was black. See e.g., Blake D. Morant, *The Relevance of Race and Disparity in Discussions of Contract Law*, 31 NEW ENG. L. REV. 889, 926 n.208 (1997) (noting that a colleague had verified Ms. Williams' race).

133. See, e.g., Kastely, *supra* note 123, at 269. See also Morant, *supra* note 132.

134. See, e.g., Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model for the Prohibition of Racial Discrimination in the Contracting Process*, 62 GEO. WASH. L. REV. 183, 205 (1994) ("There can be no doubt that concerns about racism percolate beneath the surface[] of *Williams* ... although the court[] ... [was] confined to dealing with symptoms of that disease (substantive and procedural unconscionability) rather than directly confronting the disease itself.").

135. *Williams*, 350 F.2d at 448.

136. A third explanation might be the belief among some whites that referencing race is itself racist. Race "neutrality"—and absence of all indicia of race—for some represents the height of equality. As Margaret Mahoney notes, this attempt at color evasion rests on a perception of the inferiority of the "Other":

Color and power evasion are pervasive in public discourse in the United States. When whites are color evasive, they fail to notice their own color, the color of others, and any difference between them. Color evasion treats noticing color or race as a manifestation of prejudice. Although color evasion seems to many white Americans like courtesy, the idea that noticing race is itself prejudiced rests on a fundamental sense that race involves the inferiority of the "Other." White privilege is the product of a social history of radical power and subordination. Adopted in an effort to avoid being racist, color evasion implicitly preserves values drawn from essentialist racism.

Professor Blake Morant argues it is reasonable to assume knowledge of Ms. Williams' race "and any negative stereotypes and prejudices associated thereto, [which] also may have contributed to the company's decision to tender the burdensome installment contract."¹³⁷ If true, ignoring the impact of race on Williams' bargaining power limits the court's ability to fully redress the grievance. The court's willful blindness to the impact of race—color blindness—allows the furniture company to continue targeting others in Ms. Williams' position.¹³⁸ Colorblindness thus adversely impacts blacks, and the antidote requires a consciousness on the part of blacks and whites of the role of race in law.¹³⁹

[C]olorblindness seeks to deny the continued social significance of the category, to tell blacks that they are no different from whites, even though blacks as blacks are persistently made to feel that difference. Color consciousness allows for recognition of the distinct and difficult difference that race has

137. Morant, *supra* note 132, at 929. Professor Amy Kastely argues that in failing to acknowledge race, the court leaves readers with a vague sense of Ms. Williams' incompetence and need for charity from honorable people. Kastely, *supra* note 123, at 306. Indeed, Kastely argues, the court's decision *invites* readers to focus on race-charged proxies such as lack of education and single parenthood rather than on racism and predatory pricing considerations:

By failing to include further detail about the contracts between Walker-Thomas and Williams and by resting instead on the vague and broadly associated listing of limited power, little knowledge, limited education, and lack of choice, Judge Wright's opinion allows—even invites—the reader to use raced tropes linking poverty, lack of education, single parenthood, and lack of capacity with black women and to disregard the connection between white racism and exploitative pricing and collection practices.

Kastely, *supra* note 123, at 306.

138. Apparently, that is exactly what the Walker-Thomas Furniture Company did. See Colby, *supra* note 123 (noting that in the ten years prior to *Williams*, the furniture company sought writs of replevin against approximately one thousand people. After *Williams*, the company pursued customers in default with even greater vigor. The only change was that sued customers for the balance of the contract rather than seeking writs of replevin.). *Id.* at 657.

139. Kastely notes:

By failing to . . . even name Williams' race, Judge Wright's opinion leaves readers with nothing but the vague sense that Williams, a black woman receiving welfare, was incompetent and in need of charity from honorable people, a sense given form and credibility only because of its correspondence with racist stereotypes of black women.

Kastely, *supra* note 123, at 307.

made; it facilitates white awareness of the efforts of African Americans to describe and examine that difference.¹⁴⁰

2. Does a Burrito have a Race?

"I know of no chef or culinary historian who would call a burrito a sandwich. Indeed, the notion would be absurd to any credible chef or culinary historian,"¹⁴¹ said Christopher Schlesinger, celebrated New England chef and affiant in the *White City* dispute. Schlesinger's view that the two food items could never be considered part of the same genus comes down to a question of lineage: "A sandwich is of European roots," he asserts, while "a burrito, on the other hand, is specific to Mexico."¹⁴²

Such a categorical statement raises immediate suspicion: Is a New Orleans Po' Boy¹⁴³ not a sandwich merely because it is of *American* rather than European origin? And if the American variety is capable of evolving into a bona fide sandwich—despite its ancestry—than why not the burrito? For many, however, the notion that burritos are not sandwiches is self-evident. But as I've argued above, embedded in that perspective are certain unconscious notions of race. Acknowledged or not, burritos are perceived to have a racial status, that of Mexicans; sandwiches are perceived as white.

Admittedly, the most difficult aspect to this discussion is ascribing race to an inanimate object like a burrito. Is this simply taking anthropomorphism too far? Somehow, assigning a certain class or cultural status to an object does not seem to raise the same challenge. The Lamborghini is easily identified as an upper class toy, and a bottle of champagne is synonymous with French culture. But can a burrito be said to have a race? And if so, does Mexican qualify?

Categorizing Mexicans within the U.S. racial framework is a complex task. The first question one confronts—whether Mexican constitutes a race—calls for multiple responses. Sociologists have claimed Mexican as

140. Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 52 (1995) (quoting T. Alexander Aleinikoff, *A Case for Race Consciousness*, 91 COLUM. L. REV. 1060, 1087 (1991)).

141. Schlesinger Affidavit ¶ 2.

142. *Id.* ¶¶ 3–4.

143. A Po' Boy, also known as an Oyster Loaf, is a sandwich from New Orleans made with French bread and filled with fried oysters, shrimp, fish, soft-shelled crabs, crawfish, roast beef and gravy, roast pork, meatballs, or smoked sausage. They are served either "dressed" (usually with mayonnaise, lettuce and tomatoes) or "undressed" (plain). Linda Stradley, *History of Hoagies, Submarine Sandwiches, Po' Boys Sandwiches, Dagwood Sandwiches and Italian Sandwiches*, WHAT'S COOKING AMERICA, 2004, <http://whatscookingamerica.net/History/HoagieSubmarinePoBoy.htm>.

an ethnicity rather than a race,¹⁴⁴ but this only begs the question. In race-conscious America, ethnicity and race are inextricably linked. As one scholar notes, “the illness of racism still confuses just about everything—so much that you can’t even begin to talk about ethnicity without having to place almost primary emphasis on the underlying question of race.”¹⁴⁵ Professor Laura Gomez, in her recent book *Manifest Destinies: The Making of the Mexican American Race*, suggests the designation of Mexican as an ethnicity is a “misconception.”¹⁴⁶ She maintains that “[r]acial categories and racial differences are socially constructed; rather than having inherent significance, race is historically contingent and given meaning by persons, institutions, and social processes.”¹⁴⁷ In essence, Mexican is a race because American society makes it so.

The second question one inevitably confronts in a discussion of race and Mexicans is this: If Mexican is a race are Mexicans black or white?¹⁴⁸ In what has been termed “the Black/White binary of race,”¹⁴⁹ American society largely recognizes exclusively those two races despite the rapid

144. See, e.g., Rachel F. Moran, *Neither Black Nor White*, 2 HARV. LATINO L. REV. 61, 70 n.27 (1997) (“The view of Latinos as an ethnic, rather than a racial, group is consistent with their treatment on the United States Census,” which indicates that Latinos can be of any race.); See also OFFICE OF MGMT. & BUDGET, DIRECTIVE NO. 15, RACE AND ETHNIC STANDARDS FOR FEDERAL STATISTICS AND ADMINISTRATIVE REPORTS, 43 Fed. Reg. 19260 (1977).

Of course the term ethnicity is fraught with its own problems. One author contends that “[e]thnicity is treated like a kind of disease.” Ishmael Reed et al., *Is Ethnicity Obsolete?*, in *THE INVENTION OF ETHNICITY* 226, 228 (Werner Sollors ed., 1989).

145. Reed, *supra* note 144, at 231. See also LAURA GOMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* 2 (2007) (“Race and ethnicity overlap in important ways—and in fact race as it operates in the United States generally subsumes ethnicity”).

146. GOMEZ, *supra* note 145, at 1.

147. *Id.* at 3.

148. Gomez relates a poignant story regarding her own ten year old son who one day asked the big question—“Mom, are we white?”:

I asked him to tell me more about what he was interested in finding out. “Well, back when there was slavery, were Mexicans white or black?” I began my answer by saying the question was complicated and one that people disagreed about. I told him that Mexican Americans had ancestors who were Indian, African, and Spanish, but they were primarily indigenous. I said that I did not believe we were white. He responded with another question—“Then why don’t we say whites, blacks, and browns?”—and then was quickly off to get ready for school.

Id. at 149.

149. See RICHARD DELGADO, *The Black/White Binary: How Does It Work?*, in *THE LATINO/A CONDITION: A CRITICAL READER* 369–75 (Richard Delgado & Jean Stefancic eds., 1998).

increase in Latino and Asian populations.¹⁵⁰ However American courts have had to grapple with the racial status of Mexicans in society. In the seminal 1897 case of *In re Rodriguez*, a federal court confronted the question outright.¹⁵¹ The issue before the court was whether Mr. Rodriguez—a citizen of Mexico—could be naturalized as an American given that “he is not a white person, nor an African, nor of African descent.”¹⁵² While the court concluded Mr. Rodriguez was “lamentably ignorant” and that his “untrained mind [was] deficient in the power to elucidate or define the principles of the constitution”—one of the requirements for citizenship—it nevertheless concluded he was eligible for naturalization: “[W]hatever may be the status of the applicant viewed solely from the standpoint of the ethnologist, he is embraced within the spirit and intent of our laws upon naturalization”¹⁵³ The result of *In re Rodriguez* was an implicit determination that Mr. Rodriguez was “white enough,” at least for purposes of U.S. naturalization law. Professor Gomez labels this constrained grant of whiteness as “off-white”—Mexicans are sometimes considered legally white but socially are always considered non-white.

Assuming Mexican is a race—although it is admittedly difficult to locate in a strictly black/white racial paradigm—the question still remains: Is there really a link between race and *burritos*? Interestingly, the ordinary citizen on the web had little difficulty making the connection. Shortly after the *White City* opinion was announced, bloggers set to work providing social commentary in a way that would have given Nina Totenberg a run for her money.¹⁵⁴ One blogger “pull[ed] out the race card” in questioning the cultural (and culinary) imperialism of the decision:

OK I guess I am going to . . . pull out the race card here. . . .

This is kind of offensive here. OK if burritos are found in northern Mexico. Why didn't they get a Mexican to say “no, that is not a sandwich”? [sic] If they did the case would have been settled easily I am not saying this to be racist (so if

150. See Moran, *supra* note 132, at 61 (“In 1960, when the modern civil rights movement was in its ascendancy, Whites accounted for almost 90% of the population, and Blacks represented nearly 10%. Latinos and Asian Americans combined amounted to only about 5% of the total population. Not surprisingly, race relations were largely defined in Black-White terms”).

151. *In re Rodriguez*, 81 F. 337, 348 (W.D. Tex. 1897). I gratefully acknowledge Professor Gomez’s discussion of the case, which provides the background for my own analysis.

152. *Id.* at 337. Of course, as the court noted, Mexicans had been collectively naturalized under the Treaty of Guadalupe Hidalgo in 1848. *Id.* at 339, 350–51.

153. *Id.* at 354–55.

154. Nina Totenberg is a legal reporter with National Public Radio who often comments on Supreme Court cases. For Totenberg’s biography, see National Public Radio, Nina Totenberg, NPR Biography, <http://www.npr.org/templates/story/story.php?storyId=2101289> (last visited May 28, 2008).

you're white, please don't take offense) but why does this government and media use white people to define Mexican culture and food?¹⁵⁵

In another entry, a blogger cast the shadow of the affirmative action debate over burritos asking, "Doesn't anyone know the difference between 'legislative' and 'judicial?'" then stating, "If it had been legislative, a) it wouldn't be called the White City Shopping Center, and b) diversity foods would be given preference in any case."¹⁵⁶

And in an even more crude allusion to race, another blog entry asked, "At what moment then, does a burrito become a burrito? When it sneaks across the border in a closed-up box trailer towed by a big rig, then is abandoned, while locked still inside, in the desert without food, water, ventilation or Xbox."¹⁵⁷

What is illuminating about the blog commentary is that it does identify race as an issue; but only the burrito is assumed to have a race. The sandwich is considered race neutral. I maintain a similar dynamic exists in the *White City* opinion.

So, how did the race of burritos affect decision making in *White City*? Race played a significant but silent role in the proceedings. It provided the unspoken gloss that lent legitimacy to the decision, despite the fact that Judge Locke's opinion evidenced a gut-level intuitive reaction rather than the reasoned analysis necessary to resolve this complex issue. As noted above, because the parties failed to incorporate a special meaning of the term sandwich into their agreement, the court properly looked to the ordinary meaning society generally imparts on the term. Based on the public reaction when the court's decision was announced, the opinion captured the shared understanding of many. The public response to the *White City* decision was an overwhelming "*duh!*" As one blogger put it, the distinction between the two items was so self-evident that "the judge could have deferred to the true experts that were not called . . . [a]ny 12-year old-kid."¹⁵⁸ This chorus of agreement begs further reflection. Is the distinction between burritos and sandwiches really so self-evident that no further analysis is required?

I have already argued the term sandwich is ambiguous, thus the court properly should have examined the context of the

155. Posting of Cameltoes to Obscure Store and Reading Room, http://obscurestore.typepad.com/obscure_store_and_reading/2006/11/judge_rules_tha.html (Nov. 10, 2006, 7:59:12 AM).

156. Postings of Pete R. & Dan Collins to Protein Wisdom, <http://www.proteinwisdom.com/?p=7677> (Nov. 13, 2006, 11:08 PM & 11:18 PM).

157. Posting of McGehee to Protein Wisdom, <http://www.proteinwisdom.com/?p=7677> (Nov. 13, 2006, 10:35 PM).

158. Squawkbox Noise, <http://squawkboxnoise.wordpress.com/2006/11/11/i-am-glad-we-cleared-that-up/> (Nov. 11, 2006, 10:52 AM).

agreement—beyond mere dictionaries—to clarify the ambiguity. In addition to words, the court might well have looked to additional sources of information. I digress from contract law for a moment to borrow from international trade law. I find it helpful in order to illustrate my broader point that what the court has deemed self-evident is actually a complex legal question.

Trade dispute panels are often tasked with determining whether one product is “like” another.¹⁵⁹ In so doing, they examine not only the tariff heading countries have assigned to a particular product (Which would be equivalent to a dictionary definition in this context), but they also look to the function and purpose the two products serve in order to determine whether they are “like” one another.¹⁶⁰ Similarly, the court might well have looked to the function and purpose sandwiches and burritos serve in order to determine whether burritos are sandwiches—or at least their functional equivalent.

Despite their distinct origins—the sandwich was invented by no less venerable a personality than an English Earl, while the burrito was created to feed and strengthen Mexican gold miners¹⁶¹—burritos and sandwiches serve the same function and purpose. Of course, they are meant to be eaten, but more specifically, both fall within the same category of “fast casual” food.¹⁶² They are generally cheap, quick, and do not require an elaborate dining set up. In short, burritos and sandwiches serve the same purpose, fall within the same niche market, and cater to the same clientele. Yet they are perceived as completely different products. Interestingly, the wrap sandwich—despite its similarity to burritos—does not face the

159. Under Article I of the General Agreement on Tariffs and Trade, a treaty signatory may not discriminate between “like products” based on country of origin. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pt. 5, 55 U.N.T.S. 194 [hereinafter GATT]. In other words, if the United States imposes a tax of 5% on cocoa from Ivory Coast, it must provide the same tax treatment to cocoa from Belgium. The more difficult question is must the United States provide the same treatment for raw cocoa from Ivory Coast and chocolate bars from Belgium? To answer the question, a trade dispute panel would analyze whether cocoa and chocolate bars are “like products”—and it would look, among other things, to the function and purpose of the two products.

160. Professor Robert Hudec notes that “‘likeness’ generally indicates that two products are competitive, and . . . that the relative degree of competitiveness between two products will determine the economic effects that differential treatment will have upon the less favored product.” Robert E. Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an “Aim and Effects” Test*, 32 INT’L LAW. 619, 626 (1998).

161. See *infra* text accompanying notes 190–205.

162. “Fast casual” dining is the latest trend for consumers who do not want full table service but prefer higher-quality food and a dining experience a step above “fast food”. See, e.g., Wikipedia.org, List of fast casual restaurants, http://en.wikipedia.org/wiki/Fast_casual (last visited May 28, 2008).

The trend incorporates many culinary choices, including sandwich, Asian, Mexican and hamburger eateries. Devlin Smith, *Fast-casual*, ENTREPRENEUR, Dec. 2003, http://findarticles.com/p/articles/mi_m0DT1/is_12_31/ai_111163625.

same perception difficulties; few would argue that a wrap is not a sandwich.

Given the ambiguity in meaning of the term sandwich, as well as the shared function and purpose burritos and sandwiches serve, why did Chef Schlessinger, the court, and popular opinion all converge around the notion that burritos clearly are not sandwiches? Why do so many see the distinction as self-evident? Critical theorists have shown one of the greatest dangers in challenging majority norms is that they seem so . . . well, *normal*, self-evident, unassailably true.¹⁶³ They have effectively demonstrated that the “*duh!*” response is nothing more than a single frame of reference within which to explore a question; but because that single frame represents the view of the majority, it dominates legal culture such that even calling it into question raises questions of triviality, banality or obviousness.¹⁶⁴ Strangely enough, a band-aid and a crayon serve to illustrate the point.

In *The Flesh-Colored Band Aid—Contracts, Feminism, Dialogue and Norms*, Patricia Tidwell and Peter Linzer note “[f]or years we ‘understood’ what a flesh-colored band-aid was—until black people pointed out that

163. Professor Patricia Williams, famed proponent of critical race theory, recalls a television program she watched in which black students from inner-city schools were asked to refute statistics showing the lack of educational opportunities available to them. Williams writes:

It was unbearable listening to these young people try to answer this question. It put them in an impossible double bind. On the one hand, the invisible norm was the “average” (achieving) white middle-class ideal; although this was never articulated, this is what they had to prove themselves the same as. On the other hand, these were lower class kids who came from tough inner-city neighborhoods where very few of their friends could realistically entertain aspirations to become neurosurgeons or microbiologists. It was this community from which they were being cued to be different . . . I am not faulting these young people’s aspirations or goals. What concerns me is the way in which not just this commentator, but also society at large forces them and others like them to reconcile their successful status with a covert cultural standard.

Patricia J. Williams, Comment, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525, 531 (1990).

See also Patricia A. Tidwell & Peter Linzer, *The Flesh-Colored Band Aid—Contracts, Feminism, Dialogue and Norms*, 28 HOUS. L. REV. 791, 794 (1991) (“What we see as obvious—often so obvious that we really give it no thought—may be only one of many ways of looking at things, but a way that has dominated our legal culture for many years.”).

164. See, e.g., Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 68 (1987) (noting that “[p]ower is at its peak when it is least visible, when it shapes preferences, arranges agendas, and excludes serious challenges from discussion or even imagination”). See also Tidwell & Linzer, *supra* note 163, at 801–02 (noting that “because the power of naming is an invisible power, challenging it often exposes the challenger to scorn and accusations of triviality”).

their skin was not pinkish-beige.”¹⁶⁵ Like the band-aid, peach-colored crayons were self-evidently “flesh-colored,” until Crayola decided to change the name in 1962.¹⁶⁶ Before the name change, peach-hued crayons and peach colored band-aids were incontrovertibly and self-evidently “flesh-colored”; both common sense and a twelve-year-old child could have told you as much. It was only when some developed eyes enough to see and ears enough to hear that the unconscious biases embedded in the name “flesh” could be revealed.¹⁶⁷

Apex Hides the Hurt, a novel by Colson Whitehead, makes a similar point. The protagonist in *Apex* is a nomenclature consultant—a man paid to name things “so that they sound catchy,”¹⁶⁸—who is charged with creating an ad campaign for flesh-colored band-aids:

The man walked around the conference room table, provoking the good men in their good suits to reconsider the basic laws of their profession. Band-Aids are flesh-colored, the man said. Most adhesive bandages are flesh-colored. Are advertised as such. And it did not occur to anyone to ask, whose flesh is this? It ain't mine, and with that the man pulls back one sleeve to reveal his wrist, and the skin there.¹⁶⁹

With this single revelatory act, the man in the conference room rips the veil of silence to expose the complexity that lies underneath. What had long been held as self-evidently true was demonstrably false. It was all a question of perspective.

165. Tidwell & Linzer, *supra* note 163, at 817.

166. On its Website detailing crayon chronology, Crayola® says “peach” was changed from “flesh” in 1962, “partially” as a result of the U.S. Civil Rights Movement. “Indian Red” was renamed Chestnut in 1999 in response to educators who felt some children wrongly perceived the crayon color was intended to represent the skin color of Native Americans. The name originated from a reddish-brown pigment found near India commonly used in fine artist oil paint. Crayola Creativity Central™, Color Corner, <http://www.crayola.com/colorcensus/history/chronology.cfm> (last visited May 28, 2008).

167. Crayola® now sells the “Crayola® Multicultural Marker Classpack®,” which includes 10 markers each of: golden beige, beige, tan, tawny, bronze, terra cotta, mahogany and sienna, as well as a lesson plan. The Crayola Store.com, http://www.crayolastore.com/product_detail.asp?T1=CRA+58%2D8217& (last visited June 4, 2008).

168. WHITEHEAD, *supra* note 2, at 22. In real life, finding just the right name for things has become a big problem for brands with a global reach; a recent New York Times article acknowledged the difficulty: “Before it used to be like climbing a hill. Now, it’s like crossing the Himalayas.” Kate Weisman, *In a Global Marketplace, Claiming a Name Becomes an Art In Itself*, N.Y. TIMES, Mar. 8, 2007, available at <http://www.nytimes.com/2007/03/08/business/media/08adco.html>.

169. WHITEHEAD, *supra* note 2, at 88.

B. Class

The role of class in the unfolding drama of American law is not as obvious as race. Whereas race is immutable,¹⁷⁰ even the existence of class distinctions is hotly contested: "American society presents the enigma that despite great differentials in wealth, prestige and power, there are no clearly marked social classes."¹⁷¹ The myth of a classless society holds great sway with Americans; there is a true yearning to believe a person's measure is determined by her character not her bank account, and the ability to rise out of the rankest poverty is constrained only by one's willingness to engage in "hard work." The following section explores the role class plays in contract jurisprudence, and then examines the impact of class in *White City*.

1. On the Existence of Class in Contracts and Society

In America, class is taboo.¹⁷² Why? To acknowledge the existence of a class is to acknowledge the existence of "a structured system of economic inequality . . . that tends to reproduce itself over time, and that is not changed by the mere fact that some individuals are mobile within it."¹⁷³ Class is taboo because its existence runs counter to the myth of the American Dream. Despite the numerical impossibility, most Americans see themselves as "middle class" with fairly limitless possibilities for

170. In law, however, nothing ever is quite as simple as it seems. There is the question of mixed races. See Angela Onwuachi-Willig, *Undercover Other*, 94 CAL. L. REV. 873 (2006). But see GOMEZ, *supra* note 145, at 147. Professor Gomez notes that:

American racial dynamics were and are often seen as the mirror opposite of Latin American race relations While Spanish-Mexican categories are viewed as flexible, American categories are viewed as historically fixed. In reality, the Spanish-Mexican system regularly produced racial dynamics that were harder than they appeared to be, while the Anglo-American system regularly produced dynamics that were more malleable than they appeared to be.

Id. She goes on to note, however, that "the United States actually includes both models of race relations." *Id.*

171. Walter Goldschmidt, *Social Class in America – A Critical Review*, 52 AMERICAN ANTHROPOLOGIST 483 (1950). Goldschmidt asserts that in understanding the organization of American society, "the fluidity of class position and the force of the cultural denial of class must always be kept in mind." *Id.* at 495.

172. See, e.g., Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 802 (2003) ("Class is important in its own right, but in the United States people usually do not talk much about it.").

173. Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452, 454 (1997).

advancement.¹⁷⁴ The existence of class distinctions would belie the long-cherished ideal of upward mobility.

In this section, I first explore American resistance to acknowledging the role of class in society. I then ask if class exists, how is it to be defined? Finally, I explore some of the class presumptions embodied in contracts doctrine.

When Oprah Winfrey hosted a show entitled “What Class Are You? Inside America’s Taboo Topic,”¹⁷⁵ I was struck by the layers of irony and paradox it presented. Here is the richest black woman in America, born into one of its poorest families,¹⁷⁶ confronting the existence of class when her own situation would seem to deny it: How can the American Dream be a myth when Oprah is its very embodiment? In an interview with Robert Reich, former labor secretary for the Clinton Administration, Oprah herself deals with the seeming contradiction:

WENDY: My name is Wendy, and I grew up in a family that didn’t have a lot of money, and I’m now middle class

My sister is my biggest critic. She’s always saying things to me like I’m phony, and who am I trying to pretend to be, where do I think I came from? And I just have high standards for myself, because I believe in the American dream. I know that in my future I will have my big house, my fantasy engagement ring, nice cars, because I work hard. And if you work hard, you can achieve anything.

WINFREY: I believe that. Are we wrong to believe that Bob?

174. See, e.g., Mahoney, *supra* note 172, at 831 (“Many Americans identify with ‘middle class’ status.”).

175. Apparently, the topic was so taboo Oprah had a difficult time finding participants. See *Oprah Winfrey Show: What Class Are You? Inside America’s Taboo Topic* (Harpo Prods., Inc. television broadcast Apr. 21, 2006) (noting that class is “a topic so taboo, so controversial, my producers had a hard time getting people to even talk about this.”). During the show, Oprah interviewed a series of people from all social strata—from those born into enormous wealth, like Jamie Johnson, heir to the Johnson & Johnson fortune, to those who live from paycheck to paycheck, and even those who apparently had fallen from great heights. Nicole Buffett, granddaughter of Warren Buffett, the second richest man in the world, identified herself as “middle class.” Nicole Buffett is employed by a rich family for whom she does “a lot of organizing of things in their home, organizing of toys.” *Id.* She neither has a trust fund nor will she inherit any of her grandfather’s vast fortune. *Id.*

176. With an estimated fortune of \$1.5 billion, Oprah is the richest woman in entertainment. See Lea Goldman & Kiri Blakeley, *The Twenty Richest Women in Entertainment*, FORBES.COM, Jan. 18, 2007, http://www.forbes.com/2007/01/17/richest-women-entertainment-tech-media-cz_lg_richwomen07_0118womenstars_lander.html. She was raised in an impoverished family in rural Mississippi. *Id.* (follow “Oprah Winfrey” hyperlink).

MR REICH: Well, we're not wrong to believe it. It's a very important part of the American creed. But the fact of the matter is it is getting harder. It's getting harder because that ladder is getting longer, it's getting harder because the middle rungs of that ladder are not there any longer. It's getting harder because a lot of kids who are poor or working class are not getting the schools that they need and are not having the connections and the models of success they need.

WINFREY: Yeah. Well, listen, I am a believer in the American dream of rags to riches, because I was just sitting here thinking about what class I was born into. I wasn't even lower class. I don't know if there's a class for po. Not poor, but po . . .

Mr. REICH: Oprah, you are a model. That's a great model for America. You are a model. But I'll tell you . . .

WINFREY: Yes. It's a model, it's a model. It's a model.¹⁷⁷

In a land where Horatio Alger's heroes are revered for their ability to "pull themselves up by their own bootstraps,"¹⁷⁸ the reality that one's potential may be circumscribed by one's parentage does not sit well. Even so, Oprah eventually had to concede that class mobility was difficult, and her own rise rather unique.¹⁷⁹

177. *Oprah Winfrey Show*, *supra* note 175, at 12–13.

178. Cf. IVAN LIGHT & CAROLYN ROSENSTEIN, *RACE, ETHNICITY AND ENTREPRENEURSHIP IN URBAN AMERICA* 205 (1995). "In Horatio Alger's nineteenth-century children's novels, initially disadvantaged young men overcome obstacles 'by luck and pluck' . . . [I]n contemporary American culture, the 'Horatio Alger tradition' stands for a philosophy of rugged individualism . . . [with] a profound faith in the ability of determined individuals to succeed by dint of supreme efforts."

179. Reich and Winfrey had the following exchange:

Mr. REICH: But unfortunately, we live in a society in which most the [sic] important predictor of where you're going to end up in terms of class and also wealth is your parents' class and their wealth, because they can send you to a good school, they can afford a good—a good suburban school. They can tend [sic] send you to extracurricular activities. They can—they can make sure they have models all around you and connections.

WINFREY: Because most people, regardless of what happens for some people like myself, most people end up being in the same class that their parents were born into.

Mr. REICH: Most people end up in the same class as their parents.

Oprah Winfrey Show, *supra* note 175, at 13.

What is class anyway? A good, all-purpose definition is hard to come by, but the search crosses disciplines as sociologists, lawyers and others seek an understanding of the elusive concept.¹⁸⁰ Professor Martha Mahoney suggests “[t]he term is unfamiliar, packed with many different meanings, and uncomfortably radical.”¹⁸¹ Discussions of class for some raise seemingly outmoded references to communism and the revolution of the proletariat, but on the rare occasion class is explored in American popular culture there is little radicalism to be found. Rather, class is defined strictly in consumerist terms. Erin, a guest on the Oprah show, makes the point:

ERIN: Because of my class, I definitely do like to look a certain way. I like to wear the clothes that I wear and the—have the bags that I have so I can definitely fit into the upper class level. Even my kids are judged by social class. By the age of 10 if you don’t have Limited Too clothes, Gap, Abercrombie, American Eagle, then you don’t fit in.¹⁸²

Class status is signaled by an ostentatious display of consumption. What you wear defines who you are—your place in the social hierarchy.¹⁸³ Professor Walter Goldschmidt finds an explanation for this consumption-oriented definition of class in, among other things, the fact that American society is predominantly urban and impersonal:

[T]he general secular character of American society, the urbanization of its population and consequent depersonalization of social relationships, and the overwhelming importance of pecuniary considerations in everyday life combine to render a generically fiscal value system operative upon all major segments of the society. The jealously guarded privacy in financial matters requires this to be further symbolized; hence the

180. See, e.g., Goldschmidt, *supra* note 171, at 483 (“The sociologists have, from the beginning, struggled with the problem, and in the past decade students of the other social disciplines have attacked it . . . [I]ts implications have been discussed by educators and by at least the psychologically oriented portion of the medical profession.”).

181. Mahoney, *supra* note 172, at 802.

182. *Oprah Winfrey Show*, *supra* note 175, at 7. A guest, Wendy, commented:

I love my \$200 jeans and my Chanel glasses and my designer clothes, because I worked very hard for them. People’s perception of me is that I’m snotty or snobby or unapproachable because of the way that I dress or maybe the way that I walk and talk. They automatically assume I’m from a higher class.

Id. at 12.

183. See *id.*

importance of occupation (source of income) and expenditures (its public display).¹⁸⁴

Apparently, if you have little opportunity for intimate exchange with your neighbor, the only remaining option is to inform him of your wealth by lavish display. Interestingly, this blatant exhibition is reserved for the pretenders—the “wannabes,” and the moderately wealthy. The truly upper class, those who have had generations to acclimate to a great deal of wealth, feel little need to overtly signal their privilege.¹⁸⁵ And just as American popular culture defines upper class by patterns of conspicuous consumption, lower class is defined by a lack of the same: “I buy, therefore I am” is the mantra of the middle class, and those unable to partake simply do not exist.¹⁸⁶

184. Goldschmidt, *supra* note 171, at 493.

185. In their discussion of “old money” versus “new money,” Oprah and Jamie Johnson, heir to the Johnson & Johnson fortune, clarify the distinction between what I call “the pretenders”—those who want to be perceived as wealthy and those with modest wealth—and the truly wealthy:

Mr. JOHNSON: And yeah, I mean, it’s—it’s that—that is really kind of how it was played in my family. And I think it’s pretty much because the culture that my father is a part of and this unspoken rule among the wealthy never to talk about class.

WINFREY: Yeah.

Mr. JOHNSON: . . . and never, really, to talk about money.

WINFREY: Well, that would be old money, because new money now, that’s all they do is talk about it.

Mr. JOHNSON: Yeah.

WINFREY: Right? They’re blinging and blinging and blinging, you know what I mean? Yeah.

Mr. JOHNSON: Yeah, I think that is true. I think certainly it is part—more a part of the old world elite.

Oprah Winfrey Show, *supra* note 175, at 17.

186. In a poignant exchange between Oprah and a guest, James, a self-identified member of the working class, describes his sense of alienation and invisibility given his status:

JAMES: Hi. My name is James. I was born poor. But I work every day, but I’m part of the working poor class of people. Upper class people, to me, you can tell when they’ve got more than you have An upper class person tends to look down on a person that don’t [sic] have anything, like you’re just nobody. I don’t have much in my life, but I am somebody. Maybe one of these days I’ll have some things, but I won’t walk around snooty.

The perception of Oprah's guests that class is about consumption represents the dominant view, but as Mahoney writes: "When people in America refer to 'class,' they usually mean status rather than economic relations of power."¹⁸⁷ The distinction between class and status is subtle but significant: "Class is differentiated from status in that the latter suggests a range and continuum, while class connotes a degree of unity and some form of homogeneity among its members."¹⁸⁸ Admittedly, a true understanding of the class/status divide requires—dare I say it?—some examination of the Marxist critique of labor and capital, but that is a task for another day.¹⁸⁹ Simply put, class is an organizational system for structuring society—class lines once drawn are nearly impermeable, and membership tends to be passed on from one generation to the next.¹⁹⁰

WINFREY: So you say, James—James, you say you often feel, what, invisible.

JAMES: Yeah. All the time. All the time.

Id. at 15.

This theme of invisibility also resonates in matters of race. In *Invisible Man*, Ralph Ellison's nameless narrator, a young black man, recounts the tensions, struggles and humiliations that have literally driven him underground. "I am an invisible man . . . I am invisible, understand, simply because people refuse to see me. . . . When they approach me they see only my surroundings, themselves, or figments of their imagination—indeed, everything and anything except me." RALPH ELLISON, *INVISIBLE MAN* 3 (Spec. 30th Anniversary Ed., Random House)(1952).

187. Mahoney, *supra* note 172, at 823.

188. Goldschmidt, *supra* note 171, at 491.

189. Mahoney uses "the term 'status' to refer to economic and social inequality that does not consider relations of group power and exploitation and the term 'class' to refer to economic inequality constructed through relationships of power and exploitation between social groups." Mahoney, *supra* note 172, at 827.

Mahoney notes two major concepts of class and status that divide social and political theory. "One, associated with Max Weber, analyzes economic participation through a focus on distribution and the market and emphasizes status as an important aspect of structural inequality. The other, associated with Karl Marx, emphasizes class relations in a system of production and the exploitation of labor by capital." *Id.* at 818.

190. Cf. Malamud, *supra* note 173. In what sounds suspiciously like a vision of potential class warfare, Oprah and Reich address why a discussion of class in America is even necessary:

WINFREY: So, why should we care about class?

Mr. REICH: If the rich are getting richer and the poor are getting poorer and everybody in the middle is worried about keeping where they are, our society could come apart, Oprah. I mean, it is—it's happened before in history. Societies are fragile things. They're based on trust. And if people don't feel that they have a fair chance of getting ahead, if they feel that—in this case, 40 percent of all the wealth in this country is held by the top 1 percent and they're giving it to their children and their children and their children, a

Status is more flexible; one's status can rise or fall with one's job, income, and consumption patterns.¹⁹¹ Thus, Oprah Winfrey's change in status cannot deny the existence of class in America.

Despite the difficulties in defining it, and notwithstanding the denials as to its very existence, class has played a central role in shaping American law. Considerations of class are inherent in many of the doctrines underlying contract law. It is useful to go back to the foundational principle of freedom of contract to illustrate the point. The cult of individualism is the single defining characteristic of the doctrine; the state's role in enforcing procedurally-fair contracts is limited, and personal responsibility rests with the parties to ensure the terms of their exchange are equitable: "Either party is supposed to look out for his own interests and his own protection. Oppressive bargains can be avoided by careful shopping around. Everyone has complete freedom of choice with regard to his partner in contract . . ." ¹⁹² But in order for this narrative of personal choice and individual autonomy to operate effectively, it requires a world where parties "meet each other on a footing of social and approximate economic equality."¹⁹³ In short, it requires a classless society.

In *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, Professor Friedrich Kessler lays out the mythical world in which an unfettered notion of freedom of contract can properly function:

The individualism of our rules of contract law, of which freedom of contract is the most powerful symbol, is closely tied up with the ethics of free enterprise capitalism and the ideals of justice of a mobile society of small enterprisers, individual merchants and independent craftsmen.¹⁹⁴

This bucolic vision acknowledges not everyone will benefit equally:

Society, when granting freedom of contract, does not guarantee that all members of the community will be able to make use of it to the same extent. On the contrary, the law, by protecting the unequal distribution of property, does nothing to

lot of people feel excluded. That's not good for society. That doesn't keep America together.

Oprah Winfrey Show, *supra* note 175, at 23.

191. For example, Malamud points out that in black middle class families, parents often have a difficult time passing their status on to their children. Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1891–92 (1996).

192. Kessler, *supra* note 102, at 630.

193. *Id.*

194. *Id.* at 640. See also Kennedy, *supra* note 106, at 568–69. (laying out the basic assumptions and rules that make up freedom of contract).

prevent freedom of contract from becoming a one-sided privilege.¹⁹⁵

Once both parties have manifested assent to the bargain, the state's interest in policing the *terms* of the contract is limited at best:

Since a contract is the result of the free bargaining of parties who are brought together by the play of the market and who meet each other on a footing of social and approximate economic equality, there is no danger that freedom of contract will be a threat to the social order as a whole.¹⁹⁶

But that world—the world of individual merchants and craftsmen equally-yoked—is dead, if it ever really existed. As Kessler notes, once capitalism moved from small enterprises and intense competition to monopolies, the meaning of the contractual relationship was radically altered.¹⁹⁷ The rise of the unconscionability doctrine is a direct recognition of the impact of class on contracts.¹⁹⁸

Designed to police the bargain struck between unequal parties, the doctrine allows a court to refuse enforcement of a contract deemed to be

195. Kessler, *supra* note 102, at 640.

196. *Id.* at 630.

197. *Id.* at 640 (“With the decline of the free enterprise system due to the innate trend of competitive capitalism towards monopoly, the meaning of contract has changed radically.”). Kessler went on to note that “freedom of contract must mean different things for different types of contracts. Its meaning must change with the social importance of the type of contract and with the degree of monopoly enjoyed by the author of the . . . contract.” *Id.* at 642.

198. In a provocative essay exploring this point, James Gordley places unconscionability squarely in the tradition of fairness:

In the Aristotelian tradition, it is not hard to see why a court will not enforce unfair terms: the concept of fairness belongs to the definition of contract. A contract of exchange is an act of commutative justice in which the value of what each party gives should equal that of what he receives, thereby preserving each party's share of purchasing power.

Gordley, *supra* note 81, at 17. Gordley takes issue with the efficiency rationale of modern economists:

The reason courts give relief when terms are unfair, I suppose, is that otherwise one of the parties would have been put to extra expense acquainting himself with the risks and burdens the contract imposes on him, and then objecting I do not think one can explain what courts have done for centuries by recent insights about efficiency supplied by those who are committed to finding economic explanations of anything that needs to be explained.

unconscionable.¹⁹⁹ In recognizing notions of fairness, oppression and lack of meaningful choice, the unconscionability doctrine repudiates the underlying premise of freedom of contract that parties are meeting “on a footing of social and approximate economic equality.”²⁰⁰ In that way, unconscionability is almost unapologetically paternalistic;²⁰¹ it recognizes that, in the immortal words of the pigs that ran the humans out of George Orwell’s *Animal Farm* to establish themselves as the new master class, “Everyone is equal, but some are more equal than others.”²⁰²

2. Little Donkeys and Big Gamblers: A Culinary Tour of Class

Class, like race, played an unconscious but significant role in the *White City* opinion. It is not of course the class of the parties that is relevant, but rather the class of the disputed items—the sandwich and burrito. In this section, I set off on the trail of the burrito and sandwich, tracing their origins back to the Motherland. Along the way, I argue that class-based images of the burrito and sandwich affected the *White City* decision. In my view, part of the explanation for the chorus of agreement that a burrito cannot be a sandwich—the “duh!” response—lies in the difference in class of the two items. Descended from English nobility, sandwiches are generally perceived as “higher class” than burritos. But *White City* also illustrates a broader theme: the convergence of race and class in American society. What is interesting is that the sandwich is able to straddle both the low and high-class world, while the burrito is consigned exclusively to the low class realm.

199. The open question regarding unconscionability is how the term is to be defined. Both the Restatement (Second) of Contracts and the Uniform Commercial Code contain similar unconscionability provisions. See, e.g., U.C.C. § 2-302 (2007).

Unfortunately, the Code provision is not a model in clarity. As Professor Arthur Leff famously noted, “If reading this section makes anything clear it is that reading this section alone makes nothing clear about the meaning of ‘unconscionable’ except perhaps that it is pejorative.” Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 487 (1967). We do know the purpose of the doctrine is to prevent any “oppression or unfair surprise” of the weaker party, and the most durable definition of unconscionability can be found in *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965): “Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” *Williams*, 350 F.2d at 449.

200. Kessler, *supra* note 102, at 630.

201. Paternalism exists within “any legal rule that prohibits an action on the ground that it would be contrary to the actor’s own welfare.” Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 763 (1983). The central premise of paternalist rules is that the one must be protected from assenting to terms not in her best interest—even when such assent is voluntary, and may in fact be in her short-term best interest.

202. GEORGE ORWELL, *ANIMAL FARM* 133 (Russell Baker preface, Signet Classic 1996) (1946). This reference is particularly appropriate in a discussion of class because the book was a satire of the Russian Revolution and Stalin’s Russia.

The sandwich has a rather illustrious lineage. It was born sometime in the Eighteenth century when the profligate gambler John Montagu, the Fourth Earl of Sandwich, faced a daunting dilemma: Should he extricate himself from the gaming table in order to get a bite to eat?²⁰³ In a fit of inspiration, the Earl determined his meals should be brought to him at the table; but to avoid sullyng the cards (Who doesn't hate dirty cards?), he confined himself to eating his meat layered in between bread. In modern times, we may well have labeled the Earl an addict and prescribed an intervention or the nearest Gambler's Anonymous meeting, but the Eighteenth century apparently was more forgiving—at least of the upper class. By the time the word first appears in print in 1762, the sandwich had become “truly English,” and so much a staple of the upper class that one “was able to observe numerous important contemporaries supping off cold meat ‘or a Sandwich’.”²⁰⁴

The history of the burrito is decidedly more pedestrian. It is said to have originated in northwestern Mexico where it was made popular by gold miners.²⁰⁵ Originally made using donkey meat,²⁰⁶ the burrito was a popular meal because it was filling and portable, slipping easily into the miners' saddlebags.²⁰⁷ In short, the burrito was a cheap and nourishing way to feed people who worked hard for a living and could not afford to spend a great deal of money on food.

The class-bound imagery of the two items stand in marked contrast: The sandwich evokes images of wealthy indolence—a pampered English dandy who fills his days with wine, women, and gambling. Images of the burrito call to mind endless sweat and toil. The word itself—“little donkey”²⁰⁸—harkens to a beast of burden laboring under a harsh, burning sun. Indeed, even the bread making process elicits different images for the sandwich than for the burrito. While sandwich-bread making calls to mind industrial processes, Alan Davidson describes the process of making tortillas²⁰⁹ in this way:

[C]onsider the scene just after daybreak in the towns and villages across the Republic. Along the nearly empty streets, women walk slowly but purposefully, brightly coloured plastic

203. DAVIDSON, *supra* note 24, at 692.

204. *Id.*

205. Wikipedia.org, Timeline of the Burrito, http://en.wikipedia.org/wiki/Timeline_of_the_burrito (last visited June 8, 2008).

206. Janey M. Rifkin, *A View of Acculturation*, HISPANIC TIMES MAGAZINE (2001), available at http://findarticles.com/p/articles/mi_m0FWK/is_2_24/ai_73325316.

207. The burrito was originally called a “burro”. Mike Dunne, *Burritos, or ‘Burros,’ Traced to Mexico*, THE SACRAMENTO BEE, Jan. 22, 2003, at F4.

208. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 300 (1986).

209. “The stuffed tortilla called a burrito, which means literally ‘little burro,’ first appeared on a menu in Los Angeles’s famed El Cholo Spanish Café in the 1930s.” 1 ANDREW F. SMITH, *FOOD AND DRINK IN AMERICA* 171 (2004).

buckets hefted on their shoulders. They are on their way to or from the mill, about the business of getting their maize ground for the daily bread (tortillas).²¹⁰

Admittedly, there is some element of romanticism in the image of women in solidarity heading off to the mill to ground up the day's bread. But one quickly realizes the tortilla-making process is a long and arduous one:

Each night, they boil dried maize with water and lime, leaving it to soak overnight. In the morning, they drain it and rub the skins off the grains, before placing it in a bucket to take it off to the mill. There it is ground into a coarse wet flour (*masa*, or *nixtamal*). Once home again, they will shape it by hand or by hand press into flat cakes (tortillas).²¹¹

While these differing images may have some impact on public perception, does class imagery influence legal decision making? Certainly. Consider the images evoked in *Williams v. Walker Thomas* and *In re Rodriguez*, two cases previously cited above. In *Williams*, the picture of a single woman with seven children purchasing a stereo with her \$218 a month welfare check was sufficient to elicit the paternal instincts of the court. In *re Rodriguez* similarly evokes class-based imagery. The opinion made much of the fact that Mr. Rodriguez was allegedly "a very ignorant and illiterate man"²¹² and that his speech befitted someone "of his class and humble condition of life."²¹³ Thus, conferring citizenship on Mr. Rodriguez required the court to overlook not just his race, but also his class. It was ultimately able to do so because Congress had not established class-based limitations on citizenship.²¹⁴

Class played an interesting role in the *White City* dispute. In my view, the court's gut-level reaction that burritos are not sandwiches—and the public's overwhelming support—can be traced back to the burrito's low-class status. But equally as compelling is the convergence of class and race in the decision. As Professor Deborah Malamud observes, "class in America is intertwined with race, gender, and ethnicity, each of which is part of the structure of economic relations in this country."²¹⁵ Both *Williams* and *In Re Rodriguez* illustrate that interplay, which is too often overlooked in any discussion of class and race in American society. It is this convergence that helps to explain why the sandwich can straddle

210. DAVIDSON, *supra* note 24, at 499.

211. *Id.*

212. *In re Rodriguez*, 81 F. at 337.

213. *Id.*

214. *Id.* at 355 ("Congress has not seen fit to require of applicants for naturalization an educational qualification, and courts should be careful to avoid judicial legislation.").

215. Malamud, *supra* note 173, at 454.

high- and low-class status, while the burrito is firmly entrenched in the low class realm. For example, the quintessentially English cucumber sandwich evokes a far different image than the Italian-inspired Hoagie—an overwhelming meat-cheese-lettuce-tomatoes-and-onions laden concoction that is topped off with a dash of oregano-vinegar dressing and served on an Italian roll.²¹⁶ The Hoagie's status as the invention of Italian dockworkers in Philadelphia places it firmly in the low-class category, while cucumber sandwiches are consumed by royalty. Yet, both the cucumber sandwich and the hoagie are able to occupy the category "sandwich" without objection. The burrito meets resistance not just because of its class but also because of its race—and the way the two play off each other.

C. Culture

Culture is defined as "a set of values, beliefs, traditions, [or] customs . . . which serve to identify and bind a group together."²¹⁷ It may be said, for example, that a firm or industry has a "business culture" because the individuals who make up that sector share a common understanding on particular issues; similarly, a religious organization can have a culture, as can a racial or linguistically similar group of individuals. But culture is ever changing. As Professor Leti Volpp notes, "[w]e should understand culture as being in a constant state of becoming, not as self-contained and impermeable."²¹⁸ One culture seeps into the next, and the experience transforms the two into something wholly new and different. In public discourse, however, the legal implications of culture are routinely ignored. Professor Volpp maintains that "[l]egal invocations of 'culture' too often fail to understand culture as imbricated with the material or the political, but rather, present culture as if it is somehow cordoned off from economic and political concerns."²¹⁹ Law and culture are intertwined; indeed, law *is* culture. Law is a reflection of our culture—of our shared values,

216. The most widely accepted story on the invention of the Hoagie centers on an area of Philadelphia known as Hog Island, which was home to a shipyard during World War I (1914–1918). The Italian immigrants working there would bring giant sandwiches made with cold cuts, spices, oil, lettuce, tomatoes, onions, and peppers for their lunches. These workers were nicknamed 'hoggies.' Over the years, the name was attached to the sandwiches, but under a different spelling."

Stradley, *supra* note 18, at 2.

217. DAVID THROSBY, *ECONOMICS AND CULTURE* 63 (2001).

218. Leti Volpp, *Migrating Identities: On Labor, Culture, and Law*, 27 N.C. J. INT'L L. & COM. REG. 507, 513 (2002).

219. *Id.* at 516. The Haitian writer Edwidge Danticat makes a similar point: "[E]conomics and politics are . . . intrinsically related in Haiti. Who is in power determines to a great extent whether or not people will eat." Edwidge Danticat, *We Are Ugly, But We Are Here*, THE CARIBBEAN WRITER (1996), available at <http://www.webster.edu/~corbette/haiti/literature/danticat-ugly.htm> (last visited October 17, 2008).

customs and ideals. Professor David Dow notes “we express ourselves in the laws we enact, and there is no better measure of a culture than the laws that govern it.”²²⁰ In this section, I explore the impact of culture on contract law—and *vice versa*.

1. The Culture of Contracts

Contract doctrine incorporates community norms into the agreements of private parties, even when the parties have not explicitly articulated those norms within the contract. For example, both the Uniform Commercial Code (“UCC”) and the Restatement of Contracts recognize industry custom—or the “usage of trade”—as a legitimate aid in the interpretation of contracts.²²¹ *Nanakuli Paving & Rock Co. v. Shell Oil Co.* presents a controversial use of custom to interpret the express term of a contract.²²²

In *Nanakuli*, the contract provided the price of asphalt would be “Shell’s Posted Price at time of delivery.”²²³ While the term seemed clear on its face, *Nanakuli* argued it was the custom of the industry in Hawaii for Big Oil to “price protect” asphalt purchasers. Price protection meant Shell oil would shield its customers from market volatility; it did so by allowing those who had previously bid on paving contracts to purchase the asphalt for the price in effect at the time of the bid, instead of the “posted price.”²²⁴ Despite the contract’s seemingly *unambiguous* term, the Ninth Circuit held it permissible to admit what appeared to be contradictory evidence of custom to give meaning to the parties’ agreement. The court justified its decision by noting “[t]he [UCC] would have us look beyond the printed pages of the contract to usages and the entire commercial context of the agreement in order to reach the ‘true understanding’ of the parties.”²²⁵

Fisher v. Congregation Bnai Yitzhok represents a different axis in the intersection of culture and contracts. In *Fisher*, an orthodox Jewish congregation hires a rabbi to perform religious services. After the parties signed the contract, but before Rabbi Fisher could begin performance, the congregation adopted a reform approach; men and women were permitted to sit together during services.²²⁶ Arguing that officiating in a

220. David R. Dow, *Law School Feminist Chic and Respect for Persons: Comments on Contract Theory and Feminism in the Flesh-Colored Band Aid*, 28 HOUS. L. REV. 819, 819–20 (1991).

221. U.C.C. § 1–205; RESTATEMENT (SECOND) OF CONTRACTS § 203 (1981).

222. *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772 (9th Cir. 1981).

223. *Id.* at 778.

224. *Id.* at 777–78.

225. *Id.* at 780.

226. *Fisher v. Congregation B’nai Yitzhok*, 110 A.2d 881, 882 (Pa. Super. Ct. 1955).

*trefah*²²⁷ synagogue would violate his beliefs, Rabbi Fisher refused to perform services and instead sued for damages under the contract.²²⁸ The issue for the court was whether the contract between Fisher and the congregation contained an understanding that the synagogue was, and would remain, orthodox. In order to address the question, the court first determined it had to read into the contract both the states' laws and the "Hebrew law as to separate seating,"²²⁹ because the parties had implicitly incorporated the Torah into their contract.²³⁰ Although the contract contained no express term on the status of the synagogue, the court ruled the parties *had* contracted on the common understanding that the congregation would remain orthodox; such an intention was implicit in the contract and had to be read into it.²³¹

Contract law thus incorporates culture into private agreements—both explicitly and implicitly. Culture takes the form of a shared understanding between the parties. In both *Nanakuli* and *Fisher*, the parties have the same (or a similar) culture, but what happens when cultural norms diverge?

2. White Bread vs. Tex-Mex: Law and the Hybridization of Culture

The impact of culture is probably the most subtle of the three influences on the *White City* opinion. Chef Schlesinger's view that a burrito cannot be a sandwich because it does not share the same European cultural heritage²³² provides the framework for analyzing that impact. Schlesinger's view of culture is static and impermeable, but American culture—and cuisine—is both fluid and embracing. For better or worse, America is the land of the "melting pot," with immigrants arriving from around the world. But, while the United States integrated all of these cultures into a uniquely American experience, the path to integration was markedly different for some. Over time, Greek, Irish and Italian immigrants—to name just a few—assimilated seamlessly within the broader majority culture. Groups such as Mexicans integrated with their status as

227. A *trefah* synagogue is one that violates Jewish law. *Id.*

228. *Id.*

229. *Id.* at 883.

230. *Id.* at 883–84.

231. *Id.* at 884.

232. See Schlesinger Affidavit, *supra* note 141 and accompanying text. It is not clear under Schlesinger's definition whether even the Mexican *torta* would be considered a sandwich. Wikipedia (Which constitutes our common understanding of so many things!) defines *torta* as "a Mexican sandwich, served on an oblong 6–8 inch firm, crusty white sandwich roll, called a bolillo, telera or birote. Tortas can be served hot or cold. Common ingredients may include but are not limited to:" marinated pork or steak, shredded beef, green pepper fried in egg batter or beef tongue. Wikipedia, <http://en.wikipedia.org/wiki/Torta> (last visited June 9, 2008).

“the other” intact.²³³ While race and class play a significant role in explaining the differing experiences, culture also has an impact. Like Mexicans, burritos have had a tough time assimilating. Both the sandwich and burrito have becoming quintessentially American, but their status as cultural icon is vastly different. The sandwich is un-hesitantly American, while the burrito is perceived as a hybrid Tex-Mex concoction that is neither fish nor fowl. It is only when the burrito is appropriated and repackaged as a “wrap,” does it attain All-American status. In this section, I examine how cultures and cuisines are adopted into the American “brand” and the differing treatment they experience.

There is something about white bread sandwiches that for immigrants scream of belonging. I remember in elementary school being sent off for the day with a bag lunch lovingly packed by my mother. Invariably, my bag would be filled with wonderful Haitian food (my mother was a good cook)—*poisson, boulet, griot* and *du riz ak pwa*,²³⁴ were family staples. But when I sat at the cafeteria table, what I longed for—what I *needed*—was a peanut-butter-and-jelly sandwich on white bread. It seemed everyone in the world was eating a white bread sandwich, except me. For whatever reason, I could never get my immigrant mother to accept sandwiches as proper lunchtime fare.

The white bread experience seems to resonate with children from across the immigrant spectrum. Years after the experience, Raefaela, a daughter of farm workers in California’s lower San Joaquin Valley, recalls “how embarrassed she was to eat her tortilla-wrapped burritos alongside her classmates who had white-bread sandwiches.”²³⁵ Two scenes from the movie *My Big Fat Greek Wedding* encapsulate both the poignancy and comedy of the experience: In the first scene, a young, dark-haired Greek child—Toula Portokalos—sits alone in a lunchroom full of chatting, laughing blonde girls eating their white bread sandwiches.²³⁶ Toula slowly pulls out her lunch. Immediately, Popular Blonde Girl #1, sitting at a table filled with worshipping followers, takes the opportunity to pounce:

“What’s *that*?” she asks.

233. Although Mexicans have been portrayed as an ethnic group that eventually will assimilate as other (European) groups have done, Laura Gomez, Richard Delgado, and others disagree. See, e.g., GOMEZ, *supra* note 145, at 1; Richard Delgado, *Locating Latinos in the Field of Civil Rights: Assessing the Neoliberal Case for Radical Exclusion*, 83 TEX. L. REV. 489, 504–05 (2004).

234. Fish, meatballs, fried pork and rice and beans.

235. Dunne, *supra* note 207, at F4. Burritos were a staple of life at the time. Raefaela remembers her parents, who were farm workers, making burritos—filled with potatoes, cheese, eggs and chili—and taking them to work. *Id.*

236. MY BIG FAT GREEK WEDDING (Warner Bros. 2002). The movie is a romantic comedy film directed by Joel Zwick and starring Nia Vardalos, who is also the screen-writer.

"Moussaka,"²³⁷ Toula replies.

"*Moose caca?*" she sneers, sending her cohorts into gales of laughter.²³⁸

In the second scene, we are transported almost two decades ahead, and a now thirty-year old Toula stands at the brink of spinsterhood (at least by Greek standards).²³⁹ Seeking to transform her ordinary life, she goes back to school. Once again, Toula finds herself in a lunchroom full of perfect blonde women eating—of course—white bread sandwiches. But *this* time, rather than sitting alone at the table for rejects, Toula joins the others. *This* time, she has her own white bread sandwich, which she happily munches while laughing and chatting with the others. At last, she is one of them. She is accepted.

By cloaking herself with the cultural icon of the dominant group, Toula is able to assimilate. But Toula's experience is made possible by her status as Greek. Although initially ostracized, Greeks and Greek culture were ultimately incorporated into the majority culture; their differences became charming cultural quirks rather than an excuse for discrimination. But for Mexicans and other non-white immigrants, the experience is different. While Mexicans and their culture have become part of the American experience,²⁴⁰ their incorporation is as a hybrid rather than a seamless integration.

The assimilation of sandwiches and burritos in American cuisine has some similarities. Both food items share an important trait—although they were invented elsewhere, burritos and sandwiches have become quintessentially American. In a scholarly discussion of Mexican cuisine, for example, no mention is made of the burrito.²⁴¹ Similarly, while the sandwich was once hailed as "truly English," its *Oxford Companion to Food* entry now features almost exclusively American creations—the club,

237. Moussaka is a traditional Greek dish with layers of ground lamb or red meat, sliced eggplant and tomato, topped with a white sauce and baked. Wikipedia.org, Moussaka, <http://en.wikipedia.org/wiki/Moussaka> (last visited June 9, 2008).

238. My Big Fat Greek Wedding, *supra* note 236.

239. As Toula says, "Greek girls are supposed to do three things in life: marry Greek boys, make Greek babies, and feed everyone, until the day we die." MY BIG FAT GREEK WEDDING, *supra* note 236.

240. Mexicans are typically seen as belonging to a "foreign" culture. It is important to remember, however, that at least in states like California, New Mexico and Texas, it is the *American* culture that is foreign given that those states were originally part of Mexico. For an interesting discussion of the incorporation of those states into the United States, see GOMEZ, *supra* note 145.

241. See DAVIDSON, *supra* note 24, at 499–500. Indeed, some claim the burrito is an *American* invention. Dunne, *supra* note 207, at F4 (noting that "[b]urritos have been around since at least 1934, when the word first saw print in the United States The word ['burrito'] may not have come into play extensively in California until the 1960s.").

Reuben and submarine sandwiches, among others.²⁴² Thus, both the sandwich and burrito have become “Americanized.” In the process, both have evolved considerably from their roots. American sandwiches, in contrast to their sometimes dainty cousins from across the pond (think cucumber sandwiches), range from the Dagwood—once described as “a mountainous pile of dissimilar leftovers precariously arranged between two slices of bread”²⁴³—to the beef-and-sauce laden Sloppy Joe, and the now-popular wrap sandwich. Burritos too have strayed considerably from the traditional rice-and-beans (with a bit of donkey meat thrown in) and now come bursting with a number of exotic stuffings to tempt the American palate.²⁴⁴

Both the sandwich and burrito have intermingled with American culture to produce a hybrid not easily recognized in its culture of origin. But within American culinary circles, the sandwich is accepted as “truly American,” so much so that few are aware of its English ancestry. Burritos are incorporated into the American culinary landscape as a “fusion” Tex-Mex cuisine that retains its outsider status; as do Mexicans.²⁴⁵ The name

242. DAVIDSON, *supra* note 24, at 692. In the *Oxford Companion to Food*, the listing of sandwiches is all-American—the Reuben sandwich, a New York Jewish creation, the club sandwich, which may have been named after double-decker ‘club cars’ running on U.S. railroads from 1895, and the submarine sandwich, popular in the South.

243. Stradley, *supra* note 18, at 1. The Dagwood was invented as an homage to the comic strip “Blondie,” and the sandwich itself has spawned a number of chain sandwich shops catering to Dagwood lovers in Florida. See *Dagwood’s Sandwich Shoppe Coming to Lakewood Ranch*, HERALDTRIBUNE.COM, May 3, 2007, available at <http://www.heraldtribune.com/apps/pbcs.dll/article?AID=/20070503/BREAKING06/70503011&start=1>.

244. Qdoba Mexican Grill, the burrito chain at issue in the *White City* dispute, offers Ancho Chile BBQ (roasted pork in a Mexican-style BBQ sauce), Grilled Vegetable (red pepper, yellow squash, and zucchini), Fajita Ranchera, Queso, and Poblano Pesto signature burritos on its menu. Qdoba Mexican Grill, <http://www.qdoba.com/> (follow “Menu” hyperlink; then follow “Signature Burritos” hyperlink) (last visited June 10, 2008).

Wahoo’s Fish Taco, a chain with restaurants in California, Colorado, Hawaii and Texas, offers Banzai burritos, with fish, shrimp, chicken, carne asada or carnitas, and peppers, onions, zucchini, broccoli, mushrooms, and cabbage. Wahoo’s Fish Taco, <http://www.wahoos.com> (follow “Wahoo’s Menu” hyperlink and select state; then follow “Banzai Burritos” hyperlink) (last visited June 10, 2008).

245. Part of the explanation for what I term the “hybridization” of Mexican and American culture has to do with Mexicans themselves. In *Chicano Narrative*, Professor Ramon Saldivar notes the unique status of Mexican Americans. Like Native Americans, they became “an ethnic minority through the direct conquest of their homelands” when Mexico lost the war with the United States in 1848. Saldivar maintains that under those circumstances, Mexicans attempted tenaciously to cling to their traditional way of life—to maintain their cultural values—where a new culture was being foisted on them. RAMON SALDIVAR, *CHICANO NARRATIVE: THE DIALECTICS OF DIFFERENCE* 13 (1990). A poem written by America Paredes, entitled *The Mexico-Texan*, demonstrates this hybridization effect:

burrito itself—even if one is unaware, it means “little donkey”—speaks to its south of the border origin.

Interestingly, the wrap seems to have jumped the fence in a way the burrito cannot; despite their similarities, a wrap is considered both American and a sandwich while the burrito is not.²⁴⁶ Created with just one slice of bread, the wrap looks suspiciously like a burrito—so much so that the comedian George Lopez once said, “The best things brought to the U.S. from Mexico are the tortilla and burrito. Now Americans steal it, and create this phenomenon called a wrap.”²⁴⁷

THE MEXICO-TEXAN

The Mexico-Texan he's one fonny man
 Who leeves in the region that's north of the Gran',
 Of Mexican father he born in these part,
 And sometimes he rues it dip down in he's heart.
 For the Mexico-Texan he no gotta lan',
 He stomped on the neck on both sides of the Gran',

The dam gringo lingo he no cannot spik,
 It twisters the tong and it makes you fill sick.
 A cit'zen of Texas they say that he ees,
 But then, why they call him the Mexican Grease?
 Soft talk and hard action, he can't understan',
 The Mexico-Texan he no gotta lan' . . .

Except for a few with their cunning and craft
 He count just as much as a nought to the laft,
 And they say everywhere, “He's a burden and drag,
 He no gotta country, he no gotta flag.”
 He no gotta voice, all he got is the han'
 To work like a burro, he no gotta lan'

Id. at 11.

246. What is the distinction between the wrap and the burrito? The American Heritage Dictionary defines a wrap as “a flatbread, such as a tortilla or lavash, rolled around a filling;” it defines a burrito as “flour tortilla wrapped around a filling, as of beef, beans, or cheese.” American Heritage Dictionary of the English Language (Joseph Pickett ed., 4th ed. 2000), available at www.bartleby.com/61.

247. Tim O'Malley, *Seizing the Burning Idea*, AMERICAN VENTURE MAGAZINE, 2008, http://www.americanventuremagazine.com/article_print.php?id_article=117. George Lopez is a well-known Mexican-American comedian. For a biography, see George Lopez, <http://www.georgelopez.com/bio/bioinfo.html> (last visited June 10, 2008).

III. CONTRACTS IN CONTEXT: REFLECTIONS ON LAW, BURRITOS AND SANDWICHES

A court's role in the interpretation of contracts is to seek meaning.²⁴⁸ Once a dispute finds its way into a courtroom, the parties have proved themselves unable to arrive at a shared understanding—perhaps they had one that fell apart, or they never had one at all. Whatever the reason, it is now for the court to discern the meaning of their agreement, often from conflicting and competing alternatives. The process necessarily requires a bit of “rough justice.” Professor Robert Cover notes that legal interpretation is simply “a form of practical wisdom.”²⁴⁹ As such, the meaning the court constructs may not accurately reflect what either party understood to be the terms of their bargain. Contract interpretation is an objective process, after all. The shift from the subjective theory has led courts to adopt the notion of a common understanding as a guidepost in the quest for meaning. I have sought to peer ever more closely into this common understanding—what lies beneath it? The short (and long) answer is “everything.” The common understanding of a society necessarily includes all of its beliefs, prejudices and challenges. In *White City*, the court's common understanding of the word sandwich embodies all of the underlying preconceptions and misconceptions we hold concerning race, class and culture.

Common sense will tell you that a burrito is not a sandwich, says Judge Locke. Whose burrito? Whose sandwich? Whose common sense? The problem with the *White City* opinion is not that the judge resorted to common sense, but that he failed to see that he was omitting a great deal of context. The *White City* opinion suggests the words burrito and sandwich have a static, objective meaning that is consistent regardless of context. The judge saw his task as finding and imposing that meaning. On analysis, the term sandwich proved itself to be ambiguous, but rather than discerning its meaning in *this* contract, the court imposed meaning using a rather formalist approach of resorting to a single definition contained in a dictionary. But legal interpretation does not exist in a vacuum—it is always context-driven. Professor Cover puts it this way: “Legal interpretation . . . can never be ‘free;’ it can never be the function of an understanding of the text or word alone.”²⁵⁰ Similarly, both the Restate-

248. Professor Robert Cover notes that at times, that meaning can have violent implications. “Legal interpretation takes place in a field of pain and death Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.” Richard M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

249. *Id.* at 1610.

250. *Id.* at 1617.

ment and the UCC reject an approach to legal interpretation that neglects the centrality of context.²⁵¹

In failing to adequately examine the context in which the word is to be defined, the court has adopted a common understanding that eviscerates the experience of many. In short, a common understanding that focuses exclusively on the experience of the dominant group is no common understanding at all. As Professor Cover notes, “any commonality of interpretation that may or may not be achieved is one that has its common meaning destroyed by the divergent experiences that constitute it.”²⁵² The only context the court provides is an oblique one—the context of a “common understanding.”²⁵³

CONCLUSION

Is a burrito a sandwich? How about a sushi roll? Perhaps a folded-over slice of pizza (New York-style) or a calzone would fit the bill? Does the Shepard's pot pie meet your definition of a sandwich? The Jamaican patty? Would it matter if it was served on coco bread? I have argued in this Article that common sense standing alone is not sufficient to answer the *legal* question whether a burrito is a sandwich; I will concede, however, that in lay terms we do seem to have a common understanding of what generally constitutes a sandwich. Most of us would probably agree sushi is decidedly *not* a sandwich, nor is Shepard's pot pie for that matter. A pizza? That would be stretching it. But I'm willing to bet we would

251. Indeed, although I maintain the term “sandwich” is ambiguous, as one scholar notes whether a term is ambiguous or not, “the Restatement Second encourages the parties to plumb the context surrounding the particular bargain to aid the trier of fact in interpreting the ‘term’—that is, ascertaining its ‘meaning.’” Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 205 (1998). Karl Llewellyn, the UCC's drafter, maintains that “the law of the transaction is imbedded in the total situation and that the task of the ‘law authority’ is to discover it.” Richard E. Speidel, *Restatement Second: Omitted Terms and Contract Method*, 67 CORNELL L. REV. 785, 791 (1982).

252. Cover, *supra* note 248, at 1609.

253. Interestingly, I am not so sure that in Worcester, Massachusetts, where the dispute was litigated, there truly would be a common understanding that burritos cannot be sandwiches. Worcester is located in Central Massachusetts approximately 45 miles west of Boston, has a population of 175,500 and is the second-largest city in New England. See City of Worcester, Massachusetts, <http://www.ci.worcester.ma.us/>. See also U.S. Census Bureau, 2006 American Community Survey, http://factfinder.census.gov/home/saff/main.html?_lang=en (follow “Data Sets” hyperlink; then follow “American Community Survey” hyperlink; then follow “Data Profiles” hyperlink; search “Worcester, Massachusetts”). Its Latino population is more than double that of Massachusetts in general, and is almost four percent higher than the general U.S. population for Latinos. The population of Worcester is relatively diverse, with Hispanics making up 18.9 % of the population as compared with only 8.0 % of the population of the state. See *id.* If a burrito is not considered a sandwich in that context, perhaps it should be.

have some heated arguments over the calzone. And I just might be able to convince you that a Jamaican patty inserted in between coco bread is not only heavenly but also a sandwich. We all have gut-level reactions to help us arrive at an answer, and our instinctive reactions are not “wrong.” They are merely insufficient to provide legal meaning to a disputed term.

Legal interpretation requires not merely first level reactive reasoning, but also second-level rationality. The second aspect to the exercise is particularly important because our first level reactions incorporate a common understanding—if not properly managed—eviscerates context. We revert to a “primitive formalism” that lacks subtlety, complexity or nuance. My point in this Article was never to convince you that a burrito is a sandwich. Rather, I took issue with the idea that either common sense or a shared understanding of the term—rather than a rigorous application of contract interpretation doctrine—is sufficient to give us the answer.

So, is a burrito a sandwich? I don’t know—it’s ambiguous. Ironically, had the court completed its analysis Panera likely would have lost anyway because it drafted the contract.²⁵⁴ Under the maxim *omnia praesumuntur contra proferentum*, ambiguity should be interpreted against the drafter.²⁵⁵

★ ★ ★

254. Memorandum of Decision and Order on Defendant’s Motion for Preliminary Injunction at 7, *White City Shopping Center, L.P. v. PR Rests., L.L.C.*, No. 2006-196313 (Mass. Super. Ct. Oct. 30, 2006). Panera failed to define the term “sandwich,” and arguably it had notice. Before executing the lease, Panera knew that other Mexican-style restaurants that served burritos existed near the shopping center. *Id.* If it wanted absolute protection, it should have included Mexican-type restaurants within the exclusivity clause rather than relying on a broad reading of sandwich.

255. *But see*, *Great Lakes Airlines, Inc. v. Smith*, 14 Cal. Rptr. 153, 158 (1961) (holding that despite fact sales contract for used aircraft was prepared by attorneys for defendant—with minimal input from plaintiff—court’s declining to construe alleged ambiguity against the plaintiffs did not appear to be error). *See also*, *Tri-City Concrete Co. v. A.L.A. Constr. Co.*, 179 N.E.2d 319, 320 (Mass. 1962) (holding that statement in letter from concrete company to construction company providing that “sales memo” would supplement and confirm construction company’s order did not serve to incorporate terms of “sales memo” as part of original contract).