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## The Supreme Court and Affirmative Action: Narratives About Race and Justice

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**THE SUPREME COURT AND AFFIRMATIVE ACTION:  
NARRATIVES ABOUT RACE AND JUSTICE**

BENJAMIN BAEZ\*

I start this essay with what may be a simple premise: judges tell stories in order to persuade others that their opinions are the correct ones. I end with a more complicated premise: the affirmative action “stories” illustrate not only how judges attempt to persuade others but also how language constitutes oppressive social structures. The social phenomenon that is affirmative action should be understood within the discursive field of law, which gives meaning and organization to social institutions and defines justice in ways that serve particular interests and values.<sup>1</sup> By exposing the predominance of certain stories in the Supreme Court’s affirmative action cases, I suggest that the judiciary, rather than being an instrument of justice, actually enforces social hierarchies which benefit certain social groups (e.g., Whites, men, the wealthy) and discourses (e.g., individualism, color-blindness) over others.

I suggest as well that the narratives used in the affirmative action cases enact against historically-subordinated social groups, especially African Americans, a kind of *violence* through speech. This violence, however, is legitimated by legal and social conventions purporting to frame social conflict in neutral ways. The violence is sustained by the stories that permeate social relationships and practices (e.g., those of individual merit), which create hierarchies among individuals and allow courts to justify those hierarchies. I conclude that resistance must include “counter-stories” that oppose the oppressive tendencies of those that are currently privileged in this society.

In this essay, I begin with a presentation of my conceptual framework, which is premised on the notions that law consists of “texts” that reflect our social world, but these “texts” can not be dissociated from the heterogeneous forms of power that permeate social relationships. Next, I provide a brief overview of affirmative action in the United States and its legal history in the Supreme Court. The body of the essay consists of my analysis of the Supreme

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1. See CHRIS WEEDON, *FEMINIST PRACTICE & POSTSTRUCTURALIST THEORY* 34 (2d ed. 1987).

Court cases. Finally, I suggest a strategy for counteracting the predominant narratives of affirmative action.

### CONCEPTUAL FRAMEWORK

#### *Law as Discourse*

Law might be characterized as a “discursive field,” which consists of competing ways of giving meaning to the world and of organizing social institutions and processes. . . . Within a discursive field, however, not all discourses carry equal weight or power.”<sup>2</sup> Discursive fields contain multiple, often conflicting types of discourse that seek to define and shape individuals’ behavior. By ‘discourse’ I mean more than just oral or written language; a discourse includes “our ways of speaking and writing, but also our ways of behaving, thinking, valuing, interacting, and feeling.”<sup>3</sup> A discourse, therefore, creates *knowledge*, and it becomes effective when it is realized in institutional practices.<sup>4</sup> For example, the discursive field of law is constituted by numerous competing types of discourse (e.g., ‘color-blind’ versus ‘race-conscious’), but law privileges a discourse of racial discrimination that attributes it to the isolated acts of prejudiced individuals.<sup>5</sup> An individualistic understanding of discrimination permits courts to punish individual offenders while ignoring how institutional practices (e.g., standardized testing, seniority) affect negatively certain racial and ethnic minorities and White women. Given how discourse becomes ‘practices,’ therefore, it is important to understand, following Foucault, affirmative action’s “discursive fact,” or the way it is “put into discourse.”<sup>6</sup>

My first premise, therefore, is that law is a discursive practice. Law usually is not viewed as discourse; instead, the tendency of legal scholars is to analyze law for its rules, the structure of its institutions, or the effects of judicial rulings.<sup>7</sup> But law is, as White indicated, a rhetorical activity, and so legal analysis should pay attention to its “narratives.” In other words, an understanding of law as rhetoric accounts for how law, as language, makes

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2. *Id.*

3. MARC PRUYN, DISCOURSE WARS IN GOTHAM-WEST: A LATINO IMMIGRANT URBAN TALE OF RESISTANCE AND AGENCY 45-46 (1999).

4. See WEEDON, *supra* note 1, at 109.

5. See Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 29-30 (Kimberlé Crenshaw, et al. eds., 1995).

6. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION VOLUME I, at 11 (Robert Hurley trans., 1978).

7. JAMES BOYD WHITE, HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 29-30 (1985).

community and culture, intentions and motives, subjects and values. White contended that law is “constitutive in nature;” that is,

it creates a set of questions that reciprocally define and depend upon a world of thought and action; it creates a set of roles and voices by which meanings will be established and shared. In creating both a set of topics and a set of occasions and methods for public speech it does much to constitute us as community and as a polity. In all of this it has its own ways of working, which are to be found not in the rules that seem to be at the center of the structure, but in the culture that determines how these rules are to be read and talked about.<sup>8</sup>

White recognized how legal language, with its unique rules and structures, draws upon the culture within which it is made. In this regard, legal texts can not be dissociated from other “common” texts—the associations, allusions, and references that makes us what we are.”<sup>9</sup>

A legal text, for White, stands not only for a kind of policy science, economics, or social process but also a “composition,” which is “made by one mind speaking to another, constructed out of innumerable choices of words and phrases—as a text whose author decides what belongs within it, and what shall be left out, and how its elements shall be characterized and related.”<sup>10</sup> What is important in a legal text is not necessarily the main idea (i.e., the ruling or the rule of law), but how that idea is given meaning by the text. And determining that meaning requires understanding the contexts of the other texts that make up individuals’ lives. Thus, the law’s associations, connotations, allusions, and references must be viewed in conjunction with “the terms and processes of ordinary life and ordinary language.”<sup>11</sup>

Conventions of law require judges to justify their opinions, and so judges must compose a justification for their decisions.<sup>12</sup> These justificatory compositions appear as “stories,” as LaRue explained; that is, judges tell stories in order to persuade others that their opinions are justified.<sup>13</sup> LaRue argued that judicial opinions “are filled with ‘stories’ that purport to be ‘factual’ but that instead are ‘fictional,’ and furthermore, that these ‘fictions’ could not be eliminated without crippling the legal enterprise.”<sup>14</sup> What LaRue meant was that “[w]ithout persuasion, law could not be law, and without fiction there would be no persuasion.”<sup>15</sup> Legal analysis, therefore, should pay

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8. *Id.* at 71.

9. *Id.* at 113.

10. *Id.* at 123.

11. WHITE, *supra* note 7, at 123.

12. *Id.* at 240.

13. L. H. LARUE, CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY 11 (1995).

14. *Id.* at 8.

15. *Id.* at 11.

attention to those moments in the cases when a story is told and to the nature of that story (i.e., its associations, connotations, allusions, and references).

To say that law is rhetoric, however, might imply an attribution to language of too small a role in the constitution of social reality. The liberal-humanist perspectives assume that human subjects possess a “unique essence,” a “rational consciousness” which forms the basis for such political demands as equality and self-determination.<sup>16</sup> Since this human “subjectivity” is deemed fixed and essential, language merely expresses that which already exists—language in this sense is “transparent” and social change does not come about through language.<sup>17</sup> But such liberal-humanist perspectives fail to account for how discourse, ideology, and heterogeneous forms of power constitute subjectivity. In other words, these perspectives assume that human subjectivity exists prior to, and creates, a particular form of discourse, ideology, or power. But, as I suggest later in this section, human subjectivity may be the “effect,” not author, of such discourse, ideology, or power.

Further elaborations of subjectivity are beyond the scope of this essay. But an understanding of the complexity of language requires modification of White’s notion of law as rhetoric, which appears to assume a fixed subjectivity and transparency of language. White appropriately gives prominence to language in legal analysis, but such analysis also should give prominence to how discursive practices within law, and outside of it, give meaning and organization to social institutions, practices, and relationships. Thus, while following generally White’s notion of law as rhetoric, my conceptual framework contains three other premises which modify that notion.

### *Law and Violence*

My second premise is that judicial stories can not be dissociated from the practice of political violence. Cover explained how a judge’s speech signals the imposition of violence.<sup>18</sup> He argued that

Legal interpretation takes place within a field of pain and death. This is true in several senses. Legal interpretative 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. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. Neither legal

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16. See WEEDON, *supra* note 1, at 77.

17. *Id.* at 74-5.

18. Robert M. Cover, *Violence and the Word*, 95 THE YALE L.J. 1601 (1986).

interpretation nor the violence it occasions may be properly understood apart from one another.<sup>19</sup>

Cover explained as well that a judge's speech is not merely rhetoric; it is also "practice." He argued that the judicial utterance is

institutional behavior in which others, occupying preexisting roles, can be expected to act, to implement, or otherwise to respond in a specific way to the judge's interpretation. Thus, the institutional context ties the language act of practical understanding to the physical acts of others in a predictable, though not logically necessary way. These interpretations, then, are not only 'practical,' they are, themselves, practices.<sup>20</sup>

Judicial stories, therefore, do not just work as rhetoric, they are *practices*; they initiate a process in which some actor will impose violence upon another. As Cover explained, "when judges interpret, they trigger agentic behavior . . . that loses its capacity to think and act autonomously."<sup>21</sup> In this way, individuals can act to impose violence without feeling guilt. Furthermore, when these stories are linked to ideology and power, they set the stage for the *conditions of effective domination*.<sup>22</sup>

#### *Law and Ideology*

The third premise underlying my conceptual framework is that effective domination is ensured by ideology. I define ideology broadly to mean the systems of belief that tell individuals how to see the world. Legal interpretation is ideological; the legal system serves the interests of those who control its institutions and rules. Althusser, while following the Marxist notion that state apparatuses (e.g., courts, government agencies, police) are repressive (i.e., they use violence, ultimately, to enforce their prerogatives), argued that state apparatuses also are *ideological* because they organize and promote the ideology of the dominant class.<sup>23</sup> For Althusser, ideological state apparatuses included churches, courts, and schools. Courts, particularly, function simultaneously through repressive mechanisms (e.g., they can initiate the practice of violence), and ideology.

Ideology ensures domination because it is enforced not only through repressive means but also through *interpellation*. According to Althusser, individuals are interpellated (i.e., constituted or created) by the prevailing ideology, but the force of this ideology is so pervasive and silent that

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19. *Id.*

20. *Id.* at 1611.

21. *Id.* at 1615.

22. *Id.* at 1616. (emphasis in original)

23. Louis Althusser, *Ideology and Ideological State Apparatuses (Notes Toward an Investigation)*, in *LENIN AND PHILOSOPHY* 146 (Ben Brewster trans., 1971).

individuals come to think of their identities, actions, or situations as “obvious.” He explained,

Like all obviousness, including those that make a word ‘name a thing’ or ‘have a meaning’ . . . the obviousness that you and I are subjects [of some prevailing ideology]—and that that does not cause any problems—is an ideological effect, the elementary ideological effect.”<sup>24</sup>

Furthermore, language is the instrument of ideology, for the domination of the ruling class is conducted “in words.”<sup>25</sup> That is, the state apparatuses teach “know-how,” but in the “forms which ensure *subjection to the ruling ideology* or the mastery of its ‘practice.’”<sup>26</sup> Language, therefore, might be inextricably linked to ideology and does not merely express it.

Althusser theorized that the “site of class struggle” is within the ideological state apparatuses.<sup>27</sup> He argued that “the class (or class alliance) in power can not lay down the law in the ideological state apparatuses as easily as it can in the repressive state apparatuses, not only because the former ruling classes are able to retain strong positions there for a long time, but also because the resistance of the exploited classes is able to find means and occasions to express itself there, either by the utilization of their contradictions, or by conquering combat positions in them in struggle.”<sup>28</sup> The class alliance in power is less able to control the ideological state apparatuses than the completely repressive ones (e.g., the police, the military), opening the way for contestation in the ideological state apparatuses. Thus, because the ideological practices of the ruling classes are not always effective, courts represent sites of contestation in which conflicting ideologies (and their discourses) struggle for dominance.

#### *Law and “Disciplinary” Power*

The last premise guiding my analysis is that power “coerces” social institutions, practices, and relationships, but this power should be understood “locally.” Given the focus on courts in this essay, the reliance is most heavily on notions of language and its link to ideology, a link which explains how the legal apparatus serves certain political interests and social arrangements. As Foucault explained, however, ideology is the “effect” of power but not its cause. Power, for Foucault, is everywhere local, in the minute details of everyday life.<sup>29</sup> Using Bentham’s conception of the panopticon prison (i.e., the

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24. *Id.* at 171.

25. *Id.* at 133.

26. *Id.* (emphasis in original).

27. *Id.* at 147.

28. Althusser, *supra* note 23, at 147.

29. Michel Foucault, *Body/Power*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972-1977*, at 60 (Colin Gordon ed. & trans., 1980).

tower surrounded by circular cells visible from the tower) as a metaphor for power, Foucault argued that power is “disciplinary” and its effects are normalization.<sup>30</sup> To illustrate, the panopticon permits constant observation and regulation, but its effectiveness lies in the fact that inmates, though unable to observe in return, *know* they are under constant surveillance and behave appropriately.<sup>31</sup> Like the panopticon, power observes everywhere (it is localized in institutions, practices, and relationships), and, though diffuse and invisible, it regulates behavior so pervasively and silently that individuals incorporate its normalizing-effects and regulate themselves. With an understanding of law as narratives, but tied to violence, ideology, and power, I now tell my story of affirmative action.

#### AFFIRMATIVE ACTION IN DISCOURSE

Few topics are as controversial as affirmative action. Affirmative action has been referred to as “a time bomb primed to detonate in the middle of the American political marketplace.”<sup>32</sup> This issue often has been a particularly prominent subject of political campaigns, policy debates, and state referenda.<sup>33</sup> Cooper argued that the “clearest and most pressing danger to the use of racial preferences . . . is coming from the political process; the issue has been brought to the surface by the California Civil Rights Initiative [Proposition 209].”<sup>34</sup> Courts also are increasingly hearing cases challenging affirmative action programs. And colleges and universities, particularly, have become sites for the struggle over affirmative action.<sup>35</sup> There are, for example, a number of pending lawsuits against major public universities,<sup>36</sup> and politically-conservative organizations which oppose affirmative action have focused their attention on colleges and universities.<sup>37</sup>

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30. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 200-01 (Alan Sheridan trans., 1977).

31. *Id.*

32. Steven V. Roberts, *Affirmative Action on the Edge*, U.S. NEWS & WORLD REPORT, 32-38, 32 (Feb. 13, 1995).

33. See Adam Cohen, “*Affirmative Action Face Off*,” TIME; Kristin Brainerd, *Racial Preference: Issue Stirs 2000 Ballot Outlook*, 20 CAMPAIGNS AND ELECTIONS 6 (1999) Peter Schrag, “*The Diversity Defense*,” 46 AMERICAN PROSPECT 57 (1999), available at <http://www.americanprospect.com/archives/46/46schrag.html>.

34. Charles Cooper, *Race, Law, and Justice: The Rehnquist Court and the American Dilemma*, 45 AM. UNIV. L. REV. 567, 570-1 (1996).

35. *Anti-Affirmative-Action Group Focuses New Campaign on Students and Trustees*, 85 ACADEME 7 (1999).

36. JONATHAN ALGER, *AFFIRMATIVE ACTION IN EDUCATION: A CURRENT LEGAL OVERVIEW* (1998).

37. For example, the Center for Individual Rights, whose primary mission is to eliminate affirmative and has initiated a number of lawsuits against colleges and universities, distributes to college students and trustees the “Guilty by Admission” handbook, which explains their “rights”



The federal government provided the impetus for affirmative action through Title VII of the Civil Rights Act of 1964<sup>38</sup> and Executive Orders 11246 and 11375. These Executive Orders, particularly, have been the major focus of federal affirmative action initiatives by prohibiting discrimination based on race, color, religion, gender, and national origin, and by requiring federal contractors and subcontractors to develop affirmative action plans.<sup>39</sup> Employers and institutions of higher education also may be subject to affirmative action requirements regarding persons with disabilities, disabled veterans, and Vietnam veterans under Section 503 of the Rehabilitation Act and the Vietnam Era Veteran's Readjustment Assistance Act of 1974.

### *Arguments for and Against Affirmative Action*

Affirmative action is controversial because it is framed predominantly as posing a conflict between two important American values: (1) all individuals deserve an equal opportunity to achieve their goals, and (2) hard work and merit—not race, gender, religion, or any other condition over which individuals have no control—should determine which individuals succeed.<sup>40</sup> How affirmative action is framed depends on which of these values is privileged. For example, Eden and Ryan define affirmative action as a “number of policies and practices meant to counter the effects of past racism and level the playing field in today’s society.”<sup>41</sup> Eden and Ryan’s definition takes into consideration the historically-validated discrimination against certain social groups and views affirmative action as necessary for allowing individuals to achieve their goals. On the other hand, Markie defined

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and advises them on ways to contribute to the elimination of racial preferences in higher education, available at <http://www.cir-usa.org>.

38. Section 703 of the Civil Rights Act of 1964 states (in relevant part):

(a) *It shall be an unlawful employment practice for an employer -*

(1) *to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;*  
or

(2) *to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.*

39. See BENJAMIN BAEZ & JOHN A. CENTRA, TENURE, PROMOTION, AND REAPPOINTMENTS: LEGAL AND ADMINISTRATIVE IMPLICATIONS 106 (1995).

40. See generally, Dinesh D'Souza & Christopher Edley, *Affirmative Action Debate: Should Race-based Affirmative Action Be Abandoned as a National Policy?* 60 ALBANY L. REV 425, 427 (1996); Charles Fried, *Uneasy Preferences: Affirmative Action, In Retrospect*, 46 AM. PROSPECT 50 (1999).

41. John M. Eden & John P. Ryan, *Affirmative Action: Contentious Ideas and Controversial Practices*, 63 SOC. EDU. 110, 110 (1999).

affirmative action as “giving special treatment to some candidates on the basis of their membership in a target group.”<sup>42</sup> Markie’s definition focuses on the mere fact of differential treatment, and so it stresses the dilemma that affirmative action poses for a meritocracy.

Many proponents of affirmative action argue that it is necessary to remedy the effects of state-sanctioned discrimination against racial minorities.<sup>43</sup> Other proponents argue that giving certain social groups preferential treatment is necessary to prevent discrimination.<sup>44</sup> Some opponents, however, argue that innocent people (often referring to White males) should not be penalized for the injustices they personally did not commit.<sup>45</sup> Other opponents of affirmative action contend that preferential treatment does not benefit the individuals who need the preferences most—low income individuals.<sup>46</sup> Others argue that affirmative action imposes on racial minorities a sense of inferiority<sup>47</sup> or makes them feel self-hatred and guilt.<sup>48</sup>

Much of the discourse of affirmative action occurs outside the legal arena. But affirmative action, because it necessarily involves a redistribution of resources, is a relevant subject of the discursive field of law. The current legal status of affirmative action is difficult to gauge. Congress and a number of state legislatures attempted to make affirmative action illegal in many situations, or at least sharply limit its legality in public employment.<sup>49</sup> The Supreme Court decisions are sharply divided and inconsistent. Although, a recent Supreme Court case severely restricted the use of affirmative action.<sup>50</sup> Given the importance of the Court’s affirmative action discourse, I discuss its history in the next section.

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42. Peter J. Markie, *Affirmative Action and the Awarding of Tenure*, in *AFFIRMATIVE ACTION AND THE UNIVERSITY: A PHILOSOPHICAL INQUIRY* 276 (Steven M. Cahn ed., 1993).

43. See, e.g., Benjamin Hooks, *Affirmative Action Benefits Minorities*, in *RACISM IN AMERICA: OPPOSING VIEWPOINTS* (William Dudley & Charles Cozic eds., 1991); RONALD J. FISCUS, *THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION* 15-20 (1992); William Julius Wilson, *Affirming Opportunity*, 46 *AM. PROSPECT* 61 (1997).

44. See Leslie Pickering Francis, *In Defense of Affirmative Action*, in *AFFIRMATIVE ACTION AND THE UNIVERSITY: A PHILOSOPHICAL INQUIRY*, *supra* note 42, at 26-30.

45. See Frederick R. Lynch & William R. Beer, *You Ain’t the Right Color, Pal*, 51 *POL’Y REV.* 64 (1990); Steven Yates, *Affirmative Action Should Be Abandoned*, in *RACISM IN AMERICA: OPPOSING VIEWPOINTS*, *supra* note 43, at 147-54.

46. See Shelby Steele, *Affirmative Action Hurts Minorities*, in *RACISM IN AMERICA: OPPOSING VIEWPOINTS*, *supra* note 43, at 133-38.

47. SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* 116-17 (1990).

48. RICHARD RODRIGUEZ, *HUNGER AND MEMORY: THE EDUCATION OF RICHARD RODRIGUEZ* 167-72 (1982).

49. ALGER, *supra* note 36, at 2.

50. *Adarand v. Peña*, 515 U.S. 200 (1995).

## A BRIEF OVERVIEW OF AFFIRMATIVE ACTION IN THE SUPREME COURT

I focus in this paper on the Supreme Court because it not only provides the rule of law for the disposition of affirmative action cases in federal and state courts, but also its cases tell compelling stories about the social world. As Freeman explained, the

Court is basically a storytelling institution. Its cases serve as instructive moral parables, presented to most people as stark, melodramatic media distillations. The Court's stories must engage dialectically with other dominant political institutions, with preexisting cultural assumptions, and other sources of cultural authority (e.g., movies). In the long run, the Court offers a vision of America that normalizes the existing patterns of inequality and hierarchy.<sup>51</sup>

The Court's stories, I will argue, composed within one of the most significant ideological state apparatus in the liberal state, illustrate how law legitimizes a political and economic order which privileges certain discourses (e.g., "color-blindness," legal formalism, and traditional notions of merit). These privileged discourses benefit some groups over others (e.g., Whites, men). The cases illustrate as well, however, how these privileged stories are contested by other stories which provide different views of the social world.

Though I discuss cases in this essay, I did not follow established conventions of legal interpretation.<sup>52</sup> Rather, I conducted a narrative analysis of the cases and relevant literature. I define narrative analysis broadly to mean the broad application of literary theory to the cases; literary theory provides an important avenue for political criticism given the pervasiveness of discursive practices that constitute the social world.<sup>53</sup> I follow generally Roe's notion of applying that theory to the politicized issue of affirmative action to see what kind of "'text' one ends up with."<sup>54</sup> I draw heavily from multiple disciplines in my analysis, specifically critical legal studies, critical race theory, philosophy, policy analysis, poststructuralism, and sociology. These discourses permit an eclectic but richer analysis of the cases.

Narrative analysis of cases provides an important vehicle for social analysis for a number of reasons. First, legal texts are important because judicial speech carries the power of the state. Second, as White, Cover, and

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51. Alan Freeman, *Antidiscrimination law from 1954 to 1989: Uncertainty, Contradiction, Rationalization, Denial*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 285-311, at 286 (David Kairys ed., 3d ed. 1998).

52. I provide in this section a brief overview of the Court's holdings in 11 cases that dealt directly with preferential treatment. This overview focuses primarily on the official opinion and does not refer often to dissenting or concurring opinions. The reliance on the official opinions, of course, makes the Court seem monolithic. It is important to understand, however, that the legal system consists of multiple, conflicting discourses, each seeking and gaining predominance at different times. I attempt to highlight some of these discourses in the next section.

53. See TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 205 (1983).

54. See EMERY ROE, *NARRATIVE POLICY ANALYSIS: THEORY AND PRACTICE* 1-2 (1994).

LaRue explained, law is a rhetorical activity (though inextricably linked to violence) which reflects and remakes culture. Third, the stories generated by the cases are a “force in themselves” in that they often “resist change or modification, even in the presence of contradictory empirical data, because they continue to underwrite and stabilize the assumptions for decision making in the face of high uncertainty, complexity, and polarization.”<sup>55</sup> Finally, narrative analysis is particularly useful for affirmative action cases because legal discourse gives meaning to social structures, and the resolution of the affirmative action cases necessarily involves decisions about social resources.

#### THE CASES

The Supreme Court’s affirmative action cases reveal, as West predicted, the emergence of a “new paradigm” of “conservative constitutionalism . . . [which has recently come to] dominate . . . the Supreme Court, may [now] dominate the federal judiciary, and has already profoundly shaped the constitutional law of the foreseeable future.”<sup>56</sup> West explained that those subscribing to this new paradigm articulate a profoundly conservative interpretation of constitutional tradition, viewing “private and social normative authority as the legitimate and best source of guidance for [government] action.”<sup>57</sup> Conservative constitutionalism contrasts sharply with “progressive” constitutionalism, which views the “power and normative authority of some social groups over others as the fruits of illegitimate private hierarchy.”<sup>58</sup> The Supreme Court’s affirmative action cases, particularly during the past decade, illustrate the predominance of conservative ideology, but this ideology is contested as evidenced by the Court’s failure often to reach a clear majority in the cases and by the existence of progressive ideological positions.<sup>59</sup>

##### 1) *DeFunis v. Odegaard* (1974)<sup>60</sup>

The first affirmative action case before the Court was *DeFunis*, which involved a challenge to the University of Washington Law School’s (UW) admissions policies. DeFunis, a White male denied admission to UW, sued

55. *Id.* at 2.

56. Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 642 (1990).

57. *Id.* at 643.

58. *Id.*

59. I narrowed my sample to those cases dealing with race and gender preferences in the employment or college admissions context (11 cases). I quote often from judicial opinions, which often are written with extensive citations and quotes from other opinions. For clarity, I eliminated this extraneous material from my quotations.

60. 416 U.S. 312 (1974).

under the Equal Protection Clause of the Fourteenth Amendment.<sup>61</sup> UW used a dual admission process for minority (defined as “Black, Chicano, American Indian, and Filipino”) and non-minority candidates, and the former were generally admitted with lower Law School Admission Test (“LSAT”) scores and grade point averages (“GPAs”) than the latter. DeFunis won his case at trial and was admitted to the University, and he was in attendance when the California Supreme Court held that UW’s admissions policies were constitutional. By the time the United States Supreme Court heard oral arguments, DeFunis was in his last term at the law school and was due to graduate regardless of the outcome of the case. The Court, therefore, dismissed the lawsuit as moot. Justices Douglas’ dissenting opinion is particularly important because it argued that UW’s admissions policies must be subjected to strict scrutiny but that the reliance on the LSAT might be discriminatory. Thus, though Douglas advocated the use of strict scrutiny, his progressive ideological stance likely may have justified the use of affirmative action.

2) *Regents of the University of California v. Bakke* (1978)<sup>62</sup>

Four years after *DeFunis*, the Court ruled on the merits of an affirmative action claim in *Bakke*, probably the most important affirmative action case to date. In this case, the Court struck down, without a true majority opinion, the University of California-Davis Medical School’s (UC) affirmative action policies, which included a separate admissions committee for candidates identifying themselves as “economically and/or educationally disadvantaged” and members of minority groups (i.e., “Blacks, Chicanos, Asians, American Indians”). Unlike other candidates (e.g., Whites), the “special” candidates were not summarily rejected if their GPAs were below 2.5. UC also set aside 16 seats for special candidates. Bakke, who applied twice to UC and was denied, alleged a violation of the Equal Protection Clause and Title VI of the Civil Rights Act of 1964 (“Title VI”).<sup>63</sup> Five of the Supreme Court justices combined to hold that UC’s policies involved racial quotas and were illegal, but five justices indicated that race may be used as a factor in admissions decisions.

Justice Powell’s opinion was the swing vote in a decision that invalidated quotas but permitted other forms of affirmative action. Powell argued that the Fourteenth Amendment protects Whites as it does racial minorities, and, thus, “racial and ethnic distinctions of any sort are inherently suspect and thus call

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61. The Fourteenth Amendment states in relevant part: “*nor shall any state . . . deny to any person within its jurisdiction the equal protection of the law.*” U.S. CONST. amend. XIV, § 1.

62. 438 U.S. 265 (1978).

63. Section 601 of Title VI states in relevant part: “*No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.*” 42 U.S.C. 2000d et. seq.

for the most exacting judicial examination.”<sup>64</sup> This argument extending the protection of the Fourteenth Amendment to Whites might have set the stage for the Court’s later, more conservative, opinions. Powell argued, however, that the achievement of a diverse student body is a constitutionally-permissible goal. Academic freedom, long “viewed as a special concern of the First Amendment,” allows UC the freedom to admit those students it believes will contribute to the “robust exchange of ideas.”<sup>65</sup> Nevertheless, Powell contended that the kind of “diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial and ethnic origin is but a single though important element.”<sup>66</sup> Thus, UC’s policies, which emphasized only ethnic diversity, hinders rather than furthers academic freedom.

3) *United Steel Workers of America v. Weber* (1979)<sup>67</sup>

The Court appeared to move toward a progressive stance when it handed down its decision in *Weber*, which held that Title VII does not prohibit private, voluntary, race-conscious affirmative action plans. A company and the union entered into a collective bargaining agreement which required the Company to, among other things, reserve for Black employees 50 percent of the openings in an in-plant craft-training program until the percentage of Black employees matched the percentage of Blacks in the local labor force. Weber, a White employee who was not selected for the program despite having more seniority than the chosen Black employees, filed a class action lawsuit alleging that the affirmative action program violated Title VII. The Court held that affirmative action is legal if: (1) its purposes mirror those of Title VII (i.e., ends segregation); (2) it does not unnecessarily trammel the interests of White employees (i.e., it does not require their discharge or bars them from promotion); and (3) it is a temporary measure. Justice Brennan’s majority opinion illustrates how a progressive ideology permits the Court to overlook what may be explicit language in a statute limiting affirmative action. Arguing that courts must look to Title VII’s “spirit” and historical context, he determined that Title VII allows remedial affirmative action, despite language in the statute indicating that it was not to be read as requiring racial preferences.

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64. *Bakke*, 438 U.S. at 291.

65. *Id.* at 313.

66. *Id.* at 315.

67. 443 U.S. 193 (1979).

4) *Fullilove v. Klutznick* (1980)<sup>68</sup>

In this case, the Court upheld, without a clear majority, the “minority business enterprise” (MBE) provision of the Public Works Employment Act of 1977, which required that at least 10 percent of federal funds granted for public work projects must be used by contractors to procure services or supplies from businesses owned predominately by “Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aluets.” Chief Justice Burger, whose opinion was joined by two other justices, indicated that the special treatment of minority-owned businesses was justified because Congress had determined that extensive discrimination occurred within the construction industry, and that minority businesses were disadvantaged by working capital, inadequate track record, and other challenges. Burger was persuaded that Congress, as a branch of government, was entitled to judicial deference. This decision would have great significance for the Court’s later cases because it required a more conservative Court to distinguish this case from those in which it rejected affirmative action under similar facts.

5) *Firefighters Local Union No. 1784 v. Stotts* (1984)<sup>69</sup>

The Court in *Stotts* overturned a lower court’s injunction preventing the City of Memphis from laying off any Black firefighters during a budget shortfall. White employees, who were laid off despite having more seniority than the Black employees who were retained, sued along with their Union under Title VII. The lower court issued the injunction pursuant to a consent decree requiring the city to promote and hire Black firefighters. Justice White, writing the majority opinion, argued that because the City laid off White employees with more seniority than the Black employees who were retained, it violated Title VII. This case illustrates how the Justices’ conservative ideology allows them to ignore legal rule conventions. That is, the Court decided the case despite the fact that the White firefighters who were laid off were subsequently rehired; established rule conventions would have justified the dismissal of such a case.

6) *Wygant v. Jackson Board of Education* (1986)<sup>70</sup>

In one of the most important cases about affirmative action, the Court invalidated a collective bargaining agreement that protected minority teachers during layoffs. The agreement indicated that layoffs would be based primarily on the seniority system, except that at no time should the percentage of minority layoffs exceed the percentage of minorities employed at the time of the layoff. The Board, following the agreement, laid off White teachers who

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68. 448 U.S. 448 (1980).

69. 467 U.S. 561 (1984).

70. 476 U.S. 267 (1986).

had more seniority than some Black teachers who were retained. The displaced White teachers sued alleging that their layoffs violated the Equal Protection Clause. Justice Powell, whose opinion was joined by three other justices, claimed that there must be convincing evidence of prior discrimination before a public employer can use limited racial classifications to remedy that discrimination; “Societal discrimination, without more, is too amorphous a basis for imposing a racially-classified remedy.”<sup>71</sup> Powell also rejected the role model theory (i.e., minority teachers serve as role models for minority children) because this would allow the racial classification long past the point required by a legitimate state purpose, and it bears no relationship to remedying prior discrimination.

7) *United States v. Paradise* (1987)<sup>72</sup>

*Paradise* marked Justice Scalia’s entrance into the Court’s affirmative action debates. In this case, the Court upheld a district court order imposing a hiring quota on the Alabama Department of Public Safety. The order required the Department to promote at least 50 percent of “qualified Black” troopers in ranks that were less than 25 percent Black and where promotion practices discriminated against Blacks. Justice Brennan’s opinion, which was joined by three other justices, indicated that the judicial order was justified, even under the strict scrutiny standard. There was in this case a compelling governmental interest in eradicating the Department’s “pervasive, systemic, and obstinate” discriminatory exclusion of Blacks. Remarkably, despite the fact that the Justices acknowledged the evidence of the Department’s systemic discrimination and refusal to abide by previous judicial orders, four Justices dissented in this case, setting up the arguments for later cases that no form of affirmative action is legal.

8) *Johnson v. Transportation Agency* (1987)<sup>73</sup>

The Court in this case upheld the Agency’s affirmative action plan for hiring and promoting women and racial minorities. Johnson, a male candidate for a road dispatcher position, was not promoted in favor of a woman, and he sued under Title VII. Applying the principles of *Weber*, Justice Brennan’s majority opinion argued that an employer may consider sex where there is a “manifest imbalance” that reflected the underrepresentation of women in “traditionally segregated job categories.” Furthermore, for Brennan, the plan was temporary and did not unnecessarily trammel the interests of male employees, create an absolute bar to their advancement, or set aside positions for women.

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71. *Id.* at 296.

72. 480 U.S. 149 (1987).

73. 480 U.S. 616 (1987).



9) *City of Richmond v. Croson* (1989)<sup>74</sup>

In a case involving government contracts and facts similar to those in *Fullilove*, the Court invalidated the City's Minority Business Plan. The Plan required prime contractors to subcontract at least 30 percent of the dollar amount of each contract to minority business enterprises (consisting, as in *Fullilove*, of Black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut citizens). Justice O'Connor's court opinion, which was partially joined by four other justices, purported to apply strict scrutiny and indicated that the City failed to demonstrate a compelling government interest justifying the plan, since the factual predicate supporting the plan did not establish the type of "identified past discrimination" in the city's construction industry that would authorize race-based relief under the Equal Protection Clause. According to O'Connor, a generalized assertion that there has been past discrimination in the construction industry does not justify the use of unyielding racial quotas. O'Connor distinguished *Fullilove* as standing for the principle of judicial deference to acts of Congress. This case clearly illustrates how judges manipulate legal principles to justify their ideological positions. This case, based on facts very similar to those in *Fullilove*, would have allowed the Court to follow the established legal convention of *stare decisis*.

10) *Metro Broadcasting, Inc. v. Federal Communications Commission* (1990)<sup>75</sup>

The Court upheld as constitutional the Commission's policies to enhance minority ownership. The Commission gave preferences to minority-owned companies in awarding licenses, and its distress sale policies allowed broadcasters whose qualifications came into question to transfer their licenses to minority-owned companies in order to avoid a hearing. Justice Brennan's majority opinion indicated that a lower standard of justification is warranted for benign race-conscious measures mandated by Congress; these are permissible to the extent they serve important governmental objectives and are substantially related to the achievement of those objectives. The Commission's policies are justified by the need to increase diversity in the airwaves. This case included strong dissents, and it was later overturned when the make-up of the Court became extremely politically-conservative.

11) *Adarand Constructors, Inc. v. Peña* (1995)<sup>76</sup>

In a case with similar facts as those in *Fullilove* and *Croson*, the Court struck down a financial incentive for federal contractors to hire minority subcontractors. The plaintiff, Adarand Constructors, failed to receive a

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74. 488 U.S. 469 (1989).

75. 497 U.S. 547 (1990).

76. 515 U.S. 200 (1995).

subcontract despite submitting the lowest bid because it was not a certified minority-owned company. Justice O'Connor's majority opinion argued that all racial classifications imposed by state, local, or federal governments violate the Fourteenth Amendment unless they survive strict scrutiny. Purporting to clarify the Court's inconsistencies in this area, O'Connor indicated that *Metro Broadcasting* was overruled to the extent that it justifies a lower standard of judicial review for affirmative action. This case illustrates how willing judges are to ignore prior precedent to further their ideological arguments.<sup>77</sup>

### *Summary of the Cases*

From a formal legal standpoint, the crux of the affirmative action cases is that preferential treatment must be justified by "strict scrutiny," which means that such programs must be "justified by a compelling governmental interest" and be "narrowly tailored to the achievement" of that interest.<sup>78</sup> The Supreme Court also has ruled that affirmative action can not be justified merely on the basis of general "societal discrimination," or when it is not justified by a finding of prior discrimination identified "with some specificity."<sup>79</sup> It appears that barring court-ordered affirmative action to remedy intentional discrimination, public agencies may not attempt to remedy the effects of a historically-validated subordination of certain social groups by others. These cases reveal that the Court, especially in its later make-up, treats all racial classifications as invidious discrimination, disconnecting state action from its historical and political contexts. In refusing to conceive of affirmative action as a corrective, compensatory, or re-distributive remedy, the Court has assumed a definition of discrimination that focuses on the isolated acts of prejudiced individuals rather than the more covert but insidious forms of institutional discrimination.

From a critical legal standpoint, the cases show how the justices manipulate apparently neutral and well-established legal doctrine (e.g., legal precedent, evidentiary rules) to justify their ideological positions, and also how conservative ideological positions predominate on the Supreme Court. The later cases, particularly, indicate that the Court has limited state's ability to resort to antidiscrimination principles to remedy the effects of past discrimination, while concurrently expanding the availability of those

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77. I note here the case of *Taxman v. Board of Educ. of the Township of Piscataway*, 91 F.3d 1457 (3d Cir. 1996), which was settled after the Court heard oral arguments and which might have shed further light on the current's Court's ideological stance. The United States Court of Appeals for the Third Circuit held that the Board violated Title VII when it laid off a White teacher and maintained a Black teacher. *Id.* The teachers were equal in all relevant ways except race. The court, arguing that it was following *Weber* and *Johnson*, indicated that unless affirmative action is remedial in nature, it violated Title VII.

78. *See Wygant*, 476 U.S. at 274.

79. *Id.* *See also Croson*, 488 U.S. at 74.

principles for White litigants challenging that remedy. For example, the Court refuses to permit states to follow the purpose of the Fourteenth Amendment by instituting remedies for the lingering effects of their prior discriminatory practices, but it allows White plaintiffs to use that Amendment to challenge those remedies. In any sense, the Court acts as an ideological and repressive state apparatus on behalf of those who benefit from its decisions. With a conservative ideology, however, the Court serves the particular interests of individual White plaintiffs. But more generally, the Court serves the interests of employers, who now need not be concerned with affirmative action and can pursue their corporate interests accordingly.

As “texts” these cases reveal important aspects about the social world of the past 20 years or so. The cases reflect how a particular racial ideology functions to make the outcomes of these decisions “obvious.” For example, the discourse of color-blindness shapes the meaning of affirmative action as that which forces the return to state-sanctioned discrimination. Furthermore, the cases reflect the continued existence of pervasive notions of racial (and gender) inferiority. Thus, Whites feel compelled to challenge those racial preferences from which they did not benefit as violating common-sense standards of merit, seniority, and the racial hierarchy that sustains those standards. It is to these “textual” aspects of the cases that I direct the rest of the essay.

#### THE AFFIRMATIVE ACTION “STORIES”

The cases discussed in this essay reveal the predominance of six “stories” used repeatedly by the Supreme Court justices to justify their decisions for or against affirmative action. The use of stories is not troublesome *per se*. As LaRue explained, such stories are necessary for persuasion.<sup>80</sup> But, as White indicated, legal stories constitute community;<sup>81</sup> thus, when these stories justify decisions against racial minorities, they constitute a racially-oppressive community and preserve it through repressive means. Furthermore, because these judicial stories takes place within an ideological state apparatus, they interpellate individuals into a racial hierarchy and make it seem “obvious” that such an hierarchy exists.

Social convention require that judges interpret laws. Judges, particularly the Supreme Court justices, are “authorities of legal discourses.” In other words, judges have authority over what can be spoken or written in law and how this is to be done. Since judges have authority over legal discourse, they can influence its “truth.” Furthermore, judges can ensure the enforcement of their “truths” elsewhere through their sovereign power to initiate the repressive forces of other state apparatuses (e.g., the police, the prisons). But because judges have no *actual* control over other apparatuses, and their decisions are

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80. LARUE, *supra* note 13, at 8.

81. WHITE, *supra* note 7, at 71.

subject to appeal, they *must* persuade others that their opinions are correct and legitimate.

Judges persuade in similar ways to that of other political actors. Stone argued that political actors often use “causal stories,” with images of “cause, blame, and responsibility,” to gain support for their side.<sup>82</sup> In other words, these individuals compose stories that describe harms and difficulties, attribute them to the actions of other individuals or organizations, and, thereby, claim the right to invoke government power to stop the harm. Furthermore, political actors manipulate symbolic devices, all the while making it seem as if they are simply describing facts. The stories discussed in this essay appear as causal stories.

### *The Stories*

Freeman noted about the Supreme Court that its stories are presented to the public as “melodramatic media distillations.”<sup>83</sup> The use of melodrama is effective, especially when combined with causal stories. Rosaldo argued that narrators use melodrama in cultural texts to justify their moral stances.<sup>84</sup> He argued that narrators place characters at the point of intersection of primal ethical forces, and that narrators present human events with a

distinctive moral intensity that follows the logic of the excluded middle; it portrays conflicts between absolute good and absolute evil. The earnest exaggeration in such narratives evokes the readers’ partisan responses. The narrator assumes a moral stance toward the protagonists, the protagonists feel persecuted, and the readers react with horror, panic, or sympathetic pity. These dramas move readers to take sides in a battle between virtue and vice.<sup>85</sup>

I relate a melodrama of my own in this essay. My story is that the Supreme Court justices use in the affirmative action cases six melodramatic causal stories, and although these stories are contested, they ultimately constitute in language, ideology, and practice a racially-oppressive social structure and enact against historically-subordinated groups (especially African Americans) a state-sanctioned violence.

#### 1) The Story of the “Impartial Rule Applier”

All cases probably illustrate the existence of this common fiction: the neutral, objective, and impartial judge who mechanically applies the rules of the rational legislature acting in accordance with the will of the people. The

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82. Deborah Stone, *Causal Stories and the Formation of Political Agendas*, 104 POL. SCI. Q. 281, 282 (1989).

83. Freeman, *supra* note 51, at 286.

84. RENATO ROSALDO, *CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS* 138 (1989).

85. *Id.*

affirmative action cases, however, revealed that this fiction was manipulated to justify a particular stance on race. Consider Justice Powell's comments in *Bakke* in which he argues that the meaning of the Equal Protection Clause can not be tied to the "transitory considerations" of historical discrimination:

[The] mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation. In expounding the Constitution, the *Court's role is to discern 'principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place.'*<sup>86</sup>

Powell argues that the judge must remain above the "shifting" political considerations and historical claims for resources. The judge in his story must remain impartial, apolitical, and ahistorical, and instead "discern" absolute principles that are not subject to the political considerations of a "particular time and space." This story fails to account for how unlikely it might be for anyone to be able to "discern absolute principles" unclouded by ideological perspectives. It fails to account as well for how the very notion of an impartial judge is itself one of a number of possible "pragmatic political judgments of a particular time and place."

Powell's story, furthermore, belies his ultimate position. Later in the case, Powell explained why the traditional concern with African Americans in equal protection analysis need not be considered when Whites claim such protection:

Because the landmark decisions in this area arose in response to the continued exclusion of Negroes from the mainstream of American society, they could be characterized as involving discrimination by the "majority" white race against the Negro minority. But they need not be read as depending upon that characterization for their results.<sup>87</sup>

Thus, Powell's story argues on the one hand for adherence to "universal principles" of equality, and for a judge that is above shifting political judgments, yet he himself refused to apply the legal precedents (and common historical understanding) of the Equal Protection Clause. Powell uses the story of the impartial judge, but then manipulates it to further his ideological stance against affirmative action.

This discussion, however, is not intended to imply that only politically-conservative judges manipulate the story of the impartial rule-applier. Consider Justice Brennan's use of the story to justify his pro-affirmative-action stance in *Weber*:

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86. *Bakke*, 438 U.S. at 299 (Powell, J.) (emphasis added).

87. *Id.* at 294. Note the interesting use of inverted commas around the term "majority," perhaps revealing an ahistorical perspective to race relations.

The prohibition against racial discrimination in 703(a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose. . . . *Examination of those sources makes clear* that an interpretation of the sections that forbade all race-conscious affirmative action would ‘bring about an end completely at variance with the purpose of the statute’ and must be rejected.<sup>88</sup>

Brennan’s story asserts as if there could be no question that his position is correct, or as if his judge can impartially discern the legislature’s intent in formulating an interpretation of Title VII. His story, however, unlike Powell’s, constitutes, following White, a “community” with a history, one that establishes laws to serve higher purposes than merely those that celebrate principles without a social context, without a community. Contrast the kind of “community” constituted by Justice Rehnquist in his use of the story in *Weber*:

As if [the majority opinion’s that Title VII’s legislative history justifies affirmative action] not enough to make a *reasonable observer* question this Court’s adherence to the oft-stated principle that *our duty is to construe rather than rewrite legislation* . . . the Court also seizes upon 703(j) of Title VII as an independent, or at least partially independent, basis for its holding. . . . Thus, by a tour de force reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the *Court eludes clear statutory language, ‘uncontradicted’ legislative history, and uniform precedent* in concluding that employers are, after all, permitted to consider race in making employment decisions.<sup>89</sup>

Justice Rehnquist’s story stresses his understanding of the formalistic principles of Title VII to justify his anti-affirmative-action stance. Rehnquist’s story of the impartial judge not only establishes a community of laws (not individuals), but also implies that the majority’s, not his, opinion is motivated by political considerations. At any rate, the story of the impartial rule-applier characterizes most cases, although some judges (e.g., Rehnquist) adhere to the formal principles of law and others (e.g., Brennan) are willing to apply rules that exist outside of those formal principles (e.g., legislative intent, history).

What appears to fuel the story of the impartial rule-applier is the ideological force of the “model of formality.” Kennedy postulated that our liberal theory of justice involves a model of formality which has three premises: (1) the legal system serves the conflicting ends of the legislature; (2) legislative rules are produced by a rational law-making process; and (3) courts mechanically apply these rules to cases presented to them.<sup>90</sup> The notion that judges are impartial “rule-appliers” responds to what Kennedy defined as the

88. *Weber*, 443 U.S. at 201-2 (Brennan, J.) (emphasis added).

89. *Id.* at 221-2 (Rehnquist, J., dissenting) (emphasis added).

90. Duncan Kennedy, *Legal Formality*, in *PHILOSOPHY OF LAW: JURISPRUDENCE* 495-542, 502-3 (Jules Coleman ed., 1994).

problem of justice in the liberal state—that the power to invoke state force must come from the legitimate representative of the citizenry. Thus, legislators, embodying the “legal sovereign,” make rules applying the various situations in which state coercion might be used, and judges impartially apply those rules, acting as agents of the sovereign.

Kennedy understood, however, that judges can not be merely rule-appliers. They often must choose between rules, and make rules when none appears, to govern the disposition of many complex cases. In reality, what happens is that judges choose among rules, but they justify these choices with the model of formality—having at their disposal the quip that their actions, if unjustified, can always be reversed by the legal sovereign (the legislature). But Kennedy notes that the “judge can not claim that legislative acquiescence legitimizes his action because he himself creates, through his decision of particular cases, the situation from which will emerge an as yet indeterminate constellation of legislative power.”<sup>91</sup> In other words, the judge affects a private outcome, which in turn automatically reacts back upon the political struggle by creating interests that seek to continue or modify the rule and gives the legislators whatever resources are necessary to produce decisions.

The model of formality is ingrained in legal jurisprudence, and the ideological positions of conservatism and progressivism determine whether formalism serves or hinders social justice. Regarding affirmative action, conservatives and progressives disagree not only about the meaning of the Fourteenth Amendment, but also the meaning of “equality” embodied in that amendment.<sup>92</sup> Progressives, such as Brennan, support a “substantive” understanding of equality; conservatives, such as Rehnquist, support a “formal” understanding of equality. In essence, conservatives believe that equality means that individuals should not be irrationally discriminated against by state officials, and that all racial classifications must be irrational because they breach the formal mandates of the constitution. Progressives, on the other hand, believe that equality means affirmatively breaking down the hierarchic domination of some social groups by others, and racial classifications can be constitutional if they correct the maldistributions of social power, wealth, and prestige. Conservative perspectives, however, are predominant in the current Supreme Court, and they pose great risk to the gains made within the last thirty years by racial minorities (and other subordinated groups).

To promote this conservatism in the face of other stories (e.g., those of slavery, Jim Crow, and the civil rights movement), the story of the impartial rule-applier effectively must misappropriate historical stories and important symbols of racial justice. For example, Judge Hand, who vehemently criticized affirmative action, manipulated the story of *Brown v. Board of Education* to

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91. *Id.* at 529.

92. West, *supra* note 56, at 643.

assert that “beginning with *Brown* . . . judges are free to substitute their own views or those of social engineers . . . with the Constitution cast aside, the new clerisy has usurped legislative power, calling into question the continuance of constitutional democracy, in which law flows from the people expressing their will through elected officials.”<sup>93</sup> Hand’s story not only adheres strictly to the model of formality, but in his melodrama *Brown* and affirmative action threaten the continuance of constitutional democracy—they oppose the Constitution. His causal story sets up a harm (to our government by racial preferences) caused by certain individuals and groups (those who press for racial preferences, and, perhaps, those who benefit from them), and gives the courts (and himself as judge) the right to end this threat.

What should be most troublesome for progressively-minded individuals is the effectiveness of the impartial rule-applier story in promoting conservatism by masking it with unquestioned legal and social conventions. It operates as a causal story with “bite” (i.e., with the power to repress resistance through conventions). The insidiousness of this rhetoric—and the ideology of formality supporting it—lies in its “normalcy.” The effectiveness of this story is, following Althusser, its “obviousness,” and its easy conversion into institutional practices that serve those who might benefit from such ideology—certainly the plaintiffs in affirmative action cases, but also those individuals with the political clout to initiate the, per Kennedy, “constellation of legislative power” on their own behalf (such as, e.g., the Center for Individual Rights).<sup>94</sup>

## 2) The Story of the “Intentional Discriminator”

The story of the “intentional discriminator” is common in discrimination cases and was prevalent in the affirmative action cases discussed in this essay. Consider Justice Powell’s reasoning in *Wygant* for rejecting the Board’s claim that it was using affirmative action to remedy its past discrimination:

Respondents also now argue that their purpose in adopting the layoff provision was to remedy prior discrimination against minorities by the Jackson School District in hiring teachers. . . . But the courts concluded that any statistical disparities were the result of the general societal discrimination, *not of prior discrimination by the Board*.<sup>95</sup>

Contrast Powell’s comments with those of Chief Justice Burger, who argued in *Fullilove* that Congress justified its affirmative action despite its failure to identify intentional discrimination:

Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business

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93. W. Brevard Hand, *Affirmative Action: La Mort De La Republique? A Cry from the Wilderness*, 48 ALA. L. REV. 799, 807 (1997).

94. *See supra* note 37.

95. *Wygant*, 476 U.S. at 278 (Powell, J.) (emphasis added).



enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, *even absent any intentional discrimination or other unlawful conduct.*<sup>96</sup>

Both Powell and Burger identify intentional discrimination as the standard for determining not only liability but also remediation. But while Powell used the story of the intentional discriminator to justify an anti-affirmative action stance, Burger, surprisingly, used it to identify another legitimate standard for determining liability and remediation in the affirmative action cases.

The notion of “intention” in law may be premised on what Kelman identified as a view of “human action in phenomenological, forward-looking, free-will—oriented terms, emphasizing the indeterminacy of action, and, correlatively, the ethnical responsibilities of actors.”<sup>97</sup> Racial discrimination, given its moral implications, is linked closely with intention—with a mental act. Pilon argued explicitly that “Discrimination is a mental act. . . . [It] is the reason [that] one refuses to associate [with another] . . . [And] that leads us to say that he discriminated against (or in favor of) another.”<sup>98</sup>

Intention is inextricably linked to the notion of “moral responsibility.” To believe that someone is morally responsible for an act, he or she must be seen as the source of his or her actions.<sup>99</sup> Following this line of thinking, in order for one to be held morally responsible for the racial domination of others, one must first exercise some type of “free will.” These notions of free will, intention, and moral responsibility likely are informed by what Kant identified as the “transcendental idea of freedom,” or belief that the “causality of freedom is not in turn subject, according to the law of nature, to another cause that determines it as regards time.”<sup>100</sup> This means that in order to attribute moral responsibility to an individual, those doing the attribution must first determine that the individual’s actions can not be deemed to be caused by anything other than that person’s intention and free will.

The story of the intentional discriminator is reinforced by the dominant liberal discourse of the free and self-determining individual and the ideology of individualism that such discourse furthers.<sup>101</sup> This discourse assumes, following John Locke, a “state of perfect freedom,” in which individuals order their actions, and dispose of their possessions as they think fit, “within the

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96. *Fullilove*, 448 U.S. at 478 (Burger, C.J.) (emphasis added).

97. MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 86 (1987).

98. Roger Pilon, *Discrimination, Affirmative Action, and Freedom: Sorting Out the Issues*, 45 AM. U. L. REV. 775, 782 (1996).

99. Derk Pereboom, Introduction to *FREE WILL*, vii (Derk Pereboom ed., 1997).

100. Immanuel Kant, *Critique of Pure Reason*, in *FREE WILL* 86-7 (Derk Pereboom ed., 1997).

101. WEEDON, *supra* note 1, at 5.

bounds of the law of nature, without asking leave, or depending upon the will of any other man.”<sup>102</sup> This understanding allows individuals to see the social world, and the relations between individuals, as governed by “contract;” in other words, individuals are presumed to be able (provided they are mentally and physically capable) to negotiate with others to what extent they will adhere to others’ wishes. But social structures are there, obdurate and unavoidable. The story of the intentional discriminator, therefore, and the notions of free will, moral responsibility, and individualism that sustain it, justifies existing social structures because it constitutes a world where actions are determined by free will and not by deterministic laws.

The story of the intentional discriminatory, however, is contradicted by stories that de-emphasize indeterminism. Kelman noted these kinds of contradictions in legal jurisprudence, particularly the contradiction between intentionalistic and deterministic discourses. Intentionalistic discourse assumes that human action is the product of a self-determining will. Such discourse deems the individual as intending his or her actions, and thus, it justifies the allocation of reward and blame in most cases. It purports also to explain the private world (that governed by contract), which is seen as reflecting the uncoerced intentions of individuals. Deterministic discourse, conversely, assumes that human conduct is the outcome of existing structures. Such discourse acknowledges how individual preferences and choices are constrained by social structures, and thus, individuals are neither to be respected nor condemned.<sup>103</sup> The intentionalistic discourse is privileged in law.<sup>104</sup>

The departure from intentionalistic discourse is rare because intention is so ingrained in our predominant liberal discourse. Freeman argued that antidiscrimination law is “hopelessly embedded in the ‘perpetrator perspective.’”<sup>105</sup> This perspective sees racial discrimination as “actions;” in other words, racial oppression is deemed the result of the isolated acts of individuals acting outside of society’s rules or conventions. The objective of antidiscrimination law under this perspective, therefore, is to eliminate the “act,” or to punish the intentional “actor.” Because discrimination is seen as resulting from the intentional transgressions of individuals, courts are easily able to allocate reward and blame to plaintiffs and defendants. The perpetrator perspective appears to inform the intentionalistic discourse of the cases I discussed in this essay, and justified the courts’ “punishment” of the public

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102. John Locke, *Second Treatise of Government*, in PRINCETON READINGS IN POLITICAL THOUGHT: ESSENTIAL TEXTS SINCE PLATO 243-79, at 243-44 (Mitchell Cohen & Nicole Fermon eds., 1996).

103. KELMAN, *supra* note 97, at 86-113.

104. By “privileged” I refer to Kelman’s notion that privileged arguments are presumed to govern in most cases, departures, though permitted, are deemed exceptions requiring special justification. *Id.* at 4.

105. Freeman, *supra* note 5, at 29.

defendants for their intentional discrimination against Whites (e.g., the University of California in *Bakke*; the City of Richmond in *Croson*, the School Board in *Wygant*, etc.).

But intentionalistic discourse often is contested (e.g., Burger's opinion in *Fullilove*). Note how Justice Marshall in *Bakke* explicitly departs from intentionalistic discourse in favor of a deterministic view of discrimination:

In declining to so hold [that a class-based remedy for discrimination is permissible], today's judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. *It is unnecessary in the 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism in our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact.*<sup>106</sup>

Marshall's melodrama rejects the argument that it is necessary to prove that African Americans are victimized by discrimination, or, consequently, that Whites intentionally enact that discrimination. Marshall's "20th Century America" is inherently discriminatory, and no one can escape (or ignore) this.

The story of the intentional discriminator, though prevalent in affirmative action cases, is not as "obvious" as the story of the impartial rule-applier, and that might be because other stories provide convincing contradictions. Marshall's story, for example, corresponds to what Freeman's identified in antidiscrimination law as the "victim perspective," which deems discriminations as "conditions," rather than "actions."<sup>107</sup> This perspective considers how social conditions are experienced by racial minorities. In this regard, Freeman's and Marshall's stories support those told by, for example, critical race theorists, who argue that racism is embedded in social structures and can not be attributed easily to intentional discrimination.<sup>108</sup>

The stories told by Marshall, Freeman, and the critical race theorists, are potentially effective contradictions to the story of the intentional discriminator because they are supported by many social scientists. For example, Blauner argued that racial oppression is not simply the result of prejudice; it is institutionalized in bureaucratic processes:

The processes that maintain domination—control of whites over nonwhites—are built into the major institutions. These institutions either exclude or restrict the participation of racial groups by procedures that have become conventional, part of the bureaucratic system of rules and regulations. Thus

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106. *Bakke*, 438 U.S. at 400 (Marshall, J.) (emphasis added).

107. Freeman, *supra* note 5, at 29.

108. See, e.g., Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2331-35 (1989). See also CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 5; CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995).

there is little need for prejudice as a motivating force. Because this is true, the distinction between racism as an objective phenomenon, located in the actual existence of domination and hierarchy, and racism's subjective concomitants of prejudice and other motivations and feelings is a basic one.<sup>109</sup>

The stories that contradict the "intentional discriminator" do not presume the necessity of discriminatory intent in order to allocate blame; they would assume the existence of racism and the historically-validated subordination of racial minorities that results from it. Those contrary stories do not privilege evidence of intentional wrong-doing; they privilege evidence of the effects of academic and employment practices on racial minorities.

Perhaps because deterministic discourse strongly counteracts the story of the intentional discriminator, the story is manipulated by conservative judges to fit situations where affirmative action would clearly be warranted under intentionalistic discourse. For example, consider these two apparently contradictory stories told by Justice O'Connor—the first is from *Wygant* and stresses evidence of intentional discrimination to justify affirmative action; the second is from *Paradise* and requires her to justify her stance against affirmative action in the face of such intentional discrimination:

The District Court and the Court of Appeals did not focus on the School Board's unquestionably compelling interest in remedying *its apparent prior discrimination* when evaluating the constitutionality of the challenged layoff provision. Instead, both courts reasoned that the goals of remedying 'societal discrimination' and providing 'role models' were sufficiently important to withstand equal protection scrutiny. I agree with the plurality [opinion] that a governmental agency's interest in remedying 'societal' discrimination, that is, *discrimination not traceable to its own actions*, can not be deemed sufficiently compelling to pass constitutional muster under strict scrutiny. I also concur in the plurality's assessment that the use by the courts below of a 'role model' theory to justify the conclusion that this plan had a legitimate remedial purpose was in error. Thus, in my view, the District Court and the Court of Appeals clearly erred in relying on these purposes and in failing to give greater attention to the School Board's asserted purpose of *rectifying its own apparent discrimination*.<sup>110</sup>

One can not read the record in this case without concluding that the Alabama Department of Public Safety had undertaken a course of action that amounted to *pervasive, systemic, and obstinate discriminatory conduct*. . . . [But] *racially preferential treatment of nonvictims . . . should only be ordered "where such remedies are truly necessary."* . . . If strict scrutiny is to have any meaning, therefore, a promotion goal must have a closer relationship to the percentages of blacks eligible for promotions. . . . But the protection of the rights of nonminority workers demands that a racial goal not substantially exceed the

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109. ROBERT BLAUNER, RACIAL OPPRESSION IN AMERICA 9-10 (1972).

110. *Wygant*, 476 U.S. at 288-9 (O'Connor, J., concurring) (emphasis added).

percentage of minority group members in the relevant population or work force absent a compelling justification.<sup>111</sup>

O'Connor's story in *Wygant* illustrates intentionalistic discourse; she refused to support the School Board's affirmative action program because she believed that it was not based on a prior finding of "[the Board's] own apparent" discrimination. The following year, however, she refused to support an affirmative action remedy in *Paradise*, even though the remedy was based on prior judicial findings of the Department's "pervasive, systemic, and obstinate" discrimination. In *Paradise*, though her story used overtly intentionalistic language, it implied a kind of determinism; that is, she appeared to be saying that despite the Department's blatant discrimination, the eligibility of the Black officers for promotion must be carefully examined—as if the department's actions had nothing (or little) to do with this lack of eligibility. It appears that for O'Connor, the story of the intentional discriminator, and those that contradict it, served her purpose—she used "intention" to justify overturning affirmative action in *Wygant* and downplayed it in attempting to do the same in *Paradise*. Yet, she used very "factual" language, fine distinctions, and legal nuances. But the fact of the matter is that these stories can not be reconciled with each other. She manipulated the story of the intentional discriminator to correspond with her ideological beliefs.

The judges' use of the story to further an anti-affirmative-action stance should make progressive scholars take heed of Flagg's argument that the discriminatory intent requirement reflects the way Whites view racial discrimination.<sup>112</sup> Flagg argued that: (1) Whites view "intent" as an essential element of racial harm, but non-Whites do not; (2) Whites have more confidence in racial neutrality than do non-Whites; and (3) the intent's requirement's failure to effectuate substantive racial justice is indicative of Whites' complacency with, or commitment to, the racial status quo in which they hold the advantage.<sup>113</sup> Blauner made a similar argument when he asserted that Whites and people of color have different views of discrimination: Whites define racism in terms of overt individual acts of discrimination that were common before the 1960s; people of color's definition of racism encompasses the "atmospheric" racism of a social situation, and they see society, or a particular aspect of it, as racist simply because they do not share equally in the distribution of power.<sup>114</sup> Blauner argued that because Whites see racism

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111. *Paradise*, 480 U.S. at 196-9 (O'Connor, J., dissenting) (emphasis added).

112. Barbara J. Flagg, *Was Blind, But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 958-9 (1993).

113. *Id.*

114. Bob Blauner, 'But Things Are Much Worse for the Negro People': *Race and Radicalism in My Life and Work*, in A HISTORY OF RACE RELATIONS RESEARCH: FIRST-GENERATION RECOLLECTIONS 1-36, at 30-1 (John H. Stanfield II ed., 1993).

differently, and are turned off by the over-heated racism discourse, they have come to see the “reverse discrimination” of affirmative action as the most important form of racism.<sup>115</sup>

Flagg’s and Blauner’s arguments should be modified to reflect a predominant ideological imperative that transcends Whiteness or race: the political-liberal-humanist discourse of individualism, and the notions of self-determination, free will, and moral responsibility that furthers it. Racial oppression rarely is seen by those who control the legal apparatus—usually Whites but not necessarily so—as structural, ideological, or normative. O’Connor’s stories, therefore, may be inconsistent in the sense that internally, linguistically, they are contradictory, but they might express as well the external consistency and pervasiveness of liberal-humanist discourse. O’Connor’s stories illustrate how judges confront the contradiction in such liberal discourse: that between an “obvious” belief in self-determinism and the reality of long-standing racial disparity. Thus, her story in *Wygant* was simply about intention (i.e., the lack of evidence of the Board’s prior discrimination), but her story in *Paradise*, which could not negate the evidence of such intention, hinged on the appropriateness of the remedy (i.e., quotas are illegal even with intentional discrimination). Because both of O’Connor’s stories in this sense support the ideology of individualism (and the interests served by it), they were, perhaps, complimentary.

The story of the intentional discriminator, and its manipulation to further the ideology of individualism, will ensure that racial justice is never reached. The story allows courts to maintain a racial hierarchy through repressive means (e.g., by invalidating affirmative action and initiating the processes of violence that punish those who fail to abide by their rulings) *and* through ideology (e.g., individualism). In other words, the story of the intentional discriminator constitutes a world where individuals (a) intend their actions, (b) racial discrimination is rare (because it is often not intended), and (c) overt forms of discrimination are more blameworthy than covert forms. But all ideology, following Althusser, functions on behalf of the dominant classes; thus, it is important to identify in these stories who or what benefits from individualism. In one sense, the White (or male) plaintiffs benefit because they can easily point to intention; public and (especially) private employers might benefit as well because they need not be concerned with the disparate impact of their corporate practices on White women and racial minorities; but ultimately, Whites, men, and the wealthy benefit because the story of the intentional discriminator constitutes a community where institutional arrangements that maintain social hierarchies are deemed the “nature of things.”

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115. *Id.* at 31.

### 3) The Story of the “Stigmatized Minority”

The story of the “stigmatized minority” is pervasive in affirmative action cases. For example, consider the various elaborations of this story in the cases discussed in this essay:

Preferential programs may only *reinforce common stereotypes holding that certain groups are unable to achieve success without special protection* based on a factor having no relationship to individual worth.<sup>116</sup>

*Classifications based on race carry a danger of stigmatic harm.* Unless they are strictly reserved for remedial settings, they may in fact *promote notions of racial inferiority* and lead to a politics of racial hostility.<sup>117</sup>

The story of the stigmatized minority is actually common in affirmative action discourse, often supported by social science research<sup>118</sup> and “legitimized” by certain members of racial minority groups.<sup>119</sup> The story works in contradictions. It conjures up racial inferiority, while at the same time contradicting it. It uses the symbols it purports to reject, but in doing so, reinforces those very symbols. In other words, this story claims to reject the notion that racial minorities are inferior, but all the while it keeps the notion of racial inferiority prominent in discourse.

The story of the stigmatized minority also is a significant causal story; it allocates blame. Consider Justice Thomas’ story of the stigmatized minority in *Adarand*:

Unquestionably, ‘invidious racial discrimination is an engine of repression.’ It is also true that ‘remedial’ racial preferences may reflect ‘a desire to foster equality in society.’ But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called ‘benign’ discrimination teaches many that because of chronic and apparently immutable handicaps, minorities can not compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by government’s use of race. *These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adapt an attitude that they are ‘entitled’ to preferences.* . . . In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as

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116. *Bakke*, 438 U.S. at 298 (Powell, J.) (emphasis added).

117. *Croson*, 488 U.S. at 494 (O’Connor, J.) (emphasis added).

118. See e.g., William M. Banks, *Afro-American Scholars in the University: Roles and Conflicts*, 27 AM. BEHAVIORAL SCIENTIST 325, 333 (1984).

119. See e.g., Thomas Sowell, *We’ve More Than Our Quota of Quotas*, in IN FROM DIFFERENT SHORES: PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA (Ron Takaki ed., 2d ed. 1994); STEELE, *supra* note 47, at 116-8.

discrimination inspired by malicious prejudice. In each instance it is racial discrimination, plain and simple.<sup>120</sup>

Thomas' story in one sense explains why affirmative action is detrimental to racial minorities. In this regard, the story puts forward the judge as a "protector;" one who guards against the debilitating effects of the stigma. But the latter part of his story does something else; it implies blame. In other words, the stigmatized minority is not only made inferior by affirmative action but also becomes "dependent" on government, then feels "entitled" to government benefits. The stigmatized minority, therefore, moves from *victimizing* to *victimizing* by expecting (and receiving) entitlements (a "free handout" so to speak). The minority then causes the very stigma imposed on him or her. Rather than questioning the premise of the stigma, Thomas' story both protects and blames racial minorities. His causal story, therefore, identified the harm and cause as the same.

Thomas' causal story is subtle, but Justice Kennedy's causal story of stigma in *Metro Broadcasting* is much more explicit, indicating that Whites are also victims:

Although the majority disclaims it, the FCC policy seems based on the demeaning notion that members of the defined racial group ascribe to certain 'minority views' that must be different from those of other citizens. Special preferences can also foster the view that members of the favored groups are inherently less able to compete on their own. . . . *The perceptions of the excluded class must also be weighed, . . . [since] there is the danger that the 'stereotypical thinking' that prompt policies such as the FCC rules here, 'stigmatizes the disadvantaged class with the unproven charge of past racial discrimination.'* . . . Until the Court is candid about the existence of stigma imposed by the racial preferences on both affected classes, candid about the 'animosity and discontent' they create, and open about defending a theory that explains why the cost of this stigma is worth bearing and why it can consist with the Constitution, no basis can be shown for today's casual abandonment of strict scrutiny.<sup>121</sup>

Kennedy appears to equate the stigmatized minority with the "stigmatized discriminator," a rhetorical tactic that may create a White victim in a double-sense: a victim of the actual effects of racial preferences and a victim of the symbolic presence of the beneficiaries of affirmative action. In other words, not only will Whites be denied, say, admissions or employment offers because of institutions' use of affirmative action, but the presence of affirmative-action beneficiaries will symbolize that Whites have been unfairly charged with past racial discrimination. In Kennedy's causal story, therefore, racial minorities are to be doubly-blamed.

120. *Adarand Constructors*, 515 U.S. at 240-1 (Thomas, J., concurring) (emphasis added).

121. *Metro Broadcasting*, 497 U.S. at 636-7 (Kennedy, J., dissenting) (emphasis added).



Why might this story be so pervasive in affirmative action discourse? Why does it work? The answer may lie in the way the discourse of stigma is realized in social practices. Goffman defined a person with a stigma as “possessing an attribute that makes him different from others in the category of persons available for him to be, and of a less desirable kind—in the extreme, a person who is quite thoroughly bad, or dangerous, or weak.”<sup>122</sup> Goffman identified three types of stigma: (1) the abominations of the body (e.g., physical deformities), (2) the blemishes of individual character (e.g., weak will, treacherousness, homosexuality), and (3) the tribal stigmas of race, nation, and religion. Those who do not depart negatively from particular expectations are, on the other hand, called “normals.” Goffman postulated that the term “stigma” and its synonyms conceal a “double perspective:”

Does the stigmatized individual assume his differentness is known about already or is evident on the spot, or does he assume it is neither known about by those present nor immediately perceivable by them? In the first case one deals with the plight of the *discredited*, in the second with that of the *discreditable*.<sup>123</sup>

In one sense, the story of the stigmatized minority encompasses most racial minorities in academic and professional settings: those individuals who benefit from racial preferences are *discredited*, and those who do not are *discreditable* (actually, perhaps only African Americans, Latinos/as, and Native Americans). In another sense, the story encompasses *all* racial minorities in all settings: they *discredited* because they depart from the “normal.” The story works because it reinforces the stigma, keeps it in discourse. Goffman asserted that the stigmatization of racial groups functions as a means of removing them from various avenues of competition.<sup>124</sup> Crenshaw and Higginbotham explained how economic and political gains have accrued from the stigmatization of African Americans.<sup>125</sup> Thus, the story of the “stigma” of affirmative action might further two related practices: ensuring that racial minorities are kept out of competition with Whites for all social positions, or maintaining a racially-stratified society by limiting them to certain types of activities.

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122. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 3 (1963).

123. *Id.* at 4 (emphasis in original).

124. *Id.* at 139.

125. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, *supra* note 5; A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (1996).

But if all stories are subject to contradiction, why does this story pervades the affirmative action discourse, even the narratives of progressive judges?<sup>126</sup> Goffman theorized that the stigma a person possesses relates to a “category . . . available for him to be.” Thus, as with any discourse, the stigma needs to be realized in institutional practices to be effective.<sup>127</sup> Social and historical contexts are crucial for defining and maintaining stigmas. In academia, for example, the ideology of individual merit is important, and this ideology is realized in institutional practices that define merit by standardized admissions tests, grade point averages, the “quality” of prior schooling, the taking of certain types of courses, and so forth. Students of color, who generally do not do as well as Whites on these criteria, are presumed to be unqualified. Thus, the story of the stigmatized minority has a “truth” to it; that is, when judged by these notions of individual merit alone, affirmative action will mean that students of color (generally) will have less merit than White students (generally). The academic practices, therefore, plays a crucial role in creating and maintaining the stigma of affirmative action and, thus, they ensure the effectiveness (and apparent unassailability) of the story of the stigmatized minority.

The story of the stigmatized minority in affirmative action discourse can be contradicted, however, if one follows Goffman’s definition of the stigma. Goffman argued that stigmas relate to physical, character, or tribal attributes; thus, “affirmative action,” as the institutional practice that it is, can not be stigmatizing because it is not an attribute that one possesses. The story, therefore, can be contradicted as internally incoherent. More important, the story’s focus on affirmative action really is a proxy for the actual, but considerably more uncomfortable, stigmatic attribute—*race*. Affirmative action discourse is framed often in racial terms. Though White women, physically-disabled individuals, and others might benefit from affirmative action, they are not stigmatized by it—rather, they are not stigmatized by it in the same way that are African Americans, and, perhaps, Latinos/as and Native Americans. In the context of affirmative action, *race* is the referenced attribute, and race plays upon certain norms (such as merit).

The “stigma” of affirmative action can not be disassociated from the norms of the social world (i.e., race and merit). As Goffman suggested, to understand “differentness,” one should look to the:

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126. For example, Justice Douglas in *DeFunis*, who argued that the LSAT was discriminatory, nevertheless asserted that, “A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end may produce that result despite its contrary intentions. One other assumption must be clearly disapproved: that blacks or browns cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place on any lawyer.” *DeFunis*, 416 U.S. at 343 (Douglas, J., dissenting).

127. See WEEDON, *supra* note 1, at 104-14 (for an accessible discussion of the power of discourses).

ordinary. . . . It can be assumed that a necessary condition for social life is the sharing of a single set of normative expectations by all participants, the norms being sustained in part because of being incorporated. When a rule is broken restorative measures will occur; the damaging is terminated and the damage repaired, whether by control agencies or by the culprit himself.<sup>128</sup>

In this way, the “normal” and “stigmatized” are an inextricable part of normative processes of social life—one comes with the other. The normal and the stigmatized, however, are, following Goffman, not persons but perspectives, “generated in social situations during mixed contacts by the virtue of the unrealized norms that are likely to play upon the encounter.”<sup>129</sup> In other words, these social categories are enforced locally at the level of social interaction by norms. The story of the stigmatized minority, therefore, may not originate structurally in courts, but locally in norms.

The “norms” in this society are premised on social hierarchies. Balibar noted the “latent hierarchy” in universal principles of human behavior.<sup>130</sup> Historically, this hierarchy has favored Whites over non-Whites (as well as, men over women, the wealthy over the poor, etc.). If the traditional notion of merit is the “universal,” then it creates both the “normal” (i.e., those who score well on standardized tests, those who went to the best schools) and the “stigmatized” (i.e., those who do not do well on appropriate criteria). Furthermore, if Crenshaw is correct that Whiteness is associated with “normatively positive characteristics,”<sup>131</sup> then the normal is White and the stigmatized is non-White. Together, these norms create this story: the attainment of merit can be assumed for Whites but not for certain racial minorities. The story of the stigmatized minority works because it plays upon such norms. This story, however, is incoherent in the associations it creates between race and affirmative action; rather, the proper association is between race and norms. The rhetorical tactic of tying stigma to affirmative action, at any rate, has political benefits for those who benefit from the stigma of race: it forces racial minorities (and White women to some extent) to defend their presence in the professional workforce or on college campuses, rather than collectively attacking the norms and practices that lead to discrimination.

That the affirmative action discourse focuses on race categories, especially that of African Americans, leads to a final but important point. The stigma of African American racial group membership was prominent in the affirmative action cases. Despite the stereotypes, and consequent discrimination, faced by other racial and ethnic minorities—for example, “Latinos/as are lazy,” “Asian

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128. GOFFMAN, *supra* note 122, at 127.

129. *Id.* at 138.

130. Etienne Balibar, *Racism as Universalism*, in *MASSES, CLASSES, IDEAS: STUDIES ON POLITICS AND PHILOSOPHY BEFORE AND AFTER MARX* 197 (James Swenson trans., 1994).

131. Crenshaw, *supra* note 125, at 113.

Americans are the model minority”—African Americans may be particularly stigmatized by race. Recently, eugenics has resurfaced, especially since the release of books such as *The Bell Curve: Intelligence and Class Structure in American Life*.<sup>132</sup> Furthermore, significant social problems (e.g., crime, welfare, the breakdown of the family, drugs, teenage pregnancy, and dead-beat dads) seem to be linked in political discourse to African Americans. The affirmative action debate, thus, has again centered on the intellectual or cultural inferiority of African Americans.<sup>133</sup>

While it might not be constructive to provide relative weight to each marginalized group's suffering—such tactics have the potential effect of pitting marginalized groups against each other—few can deny that African Americans have tougher battles than other social and political groups. The stigma of being Black has a long history—one that began long before this country was founded. Jordan explained that even before the English and others colonized the new world and Africans were enslaved, they were seen as libidinous, ugly, of defective religion, and savage.<sup>134</sup> Thus, the story of the stigmatized minority plays upon the symbols of African Americans' inferiority that shape the perceptions of these individuals and influence how they are treated.

#### 4) The Story of the “Innocent White Victim”<sup>135</sup>

The story of the “innocent White victim” is similar to that of the “intentional discriminator” in that there is some difficulty justifying a “penalty” to an individual who has not been deemed to have committed a wrong. In this regard, the story supports the predominant liberal-humanist stories of self-determination, free will, and moral responsibility. As Ansley argued, the emergence of the innocent White victim rhetoric evidences the shift in antidiscrimination jurisprudence from altruism to individualism.<sup>136</sup> But the story of the innocent White victim has other connotations. It re-frames discrimination, not as that which is validated by a history of state-sanctioned racial oppression, but as the “victimization” of the White individual who has to bear the penalty for that history. Furthermore, the story of the innocent White

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132. RICHARD J. HERRNSTEIN & CHARLES A. MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994).

133. Dinesh D'Souza furthered the notion of cultural inferiority when he argued that the reason African Americans do not do as well as other racial groups on standardized tests is “cultural breakdown.” D'Souza & Edley, *supra* note 40, at 430.

134. Winthrop Jordan, *First Impressions: Libidinous Blacks*, in *IN FROM DIFFERENT SHORES*, *supra* note 119, at 41-51.

135. The rhetoric of innocence has appeared in regard to males. I use the racial connotations in this essay, however, because they predominate in the affirmative action discourse.

136. Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 *CORNELL L. REV.* 1014 (1989).

victim is an effective rhetorical strategy for thwarting efforts to remedy that historically-validated oppression because its “facts” can not be contested by anyone; that is, an affirmative action benefit for one individual necessarily results in a denial of the benefit to another.

The story of the innocent White victim appears in most affirmative action cases. Consider, for example, two elaborations of the story—the first by Justice Powell in *Wygant*; the second by Justice Scalia in *Johnson*:

Here, by contrast, the means chosen to achieve the Board’s asserted purposes is that of laying off nonminority teachers with greater seniority in order to retain minority teachers with less seniority. *We have previously expressed concern over the burden that a preferential-layoffs scheme imposes on innocent parties. . . . Layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives.*<sup>137</sup>

It is unlikely that today’s result will be displeasing to politically elected officials, to whom it provides the means of quickly accommodating the demands of organized groups to achieve concrete, numerical improvement in the economic status of particular constituencies. Nor will it displease the world of corporate and governmental employers . . . for whom the cost of hiring less qualified workers is often substantially less—and infinitely more predictable—than the cost of litigating Title VII cases and of seeking to convince federal agencies by nonnumerical means that no discrimination exists. *In fact, the only losers in the process are the Johnsons of the country, for whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals—predominantly unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent.*<sup>138</sup>

In Powell’s story, the “innocent parties” were White teachers who were laid off by the School Board despite having more seniority than the minorities who kept their positions; the concern of this story appears to be the disruption in the plaintiffs’ lives due to social forces they personally did not initiate. Scalia’s story, however, is different in two significant ways. First, he frames the story so melodramatically that he need not mention the term “innocence” to make the story effective. Second, Scalia’s story creates a “victim” out of much more than particular plaintiffs—it creates “victims” out of (1) a whole class of politically-weak individuals, who will be abandoned by the Court; (2) the political process, because it will have to respond to the political demands of organized groups (presumably racial minorities and White women); (3) the integrity of meritocracy, because employers will have to hire “less qualified” individuals in order to avoid being sued by (presumably) racial minorities and

137. *Wygant*, 476 U.S. at 282-3 (Powell, J.) (emphasis added).

138. *Johnson*, 480 U.S. at 677 (Scalia, J., dissenting) (emphasis added).

White women; and (4) the Supreme Court itself, because it will turn away from its asserted moral imperative—one that champions the cause of the politically weak, which White males are. Scalia's story, much more so than Powell's, utilizes melodrama to "victimize" individuals, values, traditions, and history.

The effectiveness of the innocent White victim story might be that it is realized in practice in the transformation of antidiscrimination law. As Kairys indicated, the rhetoric of innocence leads to two related practices.<sup>139</sup> First, the discrimination claims of African Americans, other racial and ethnic minorities, and White women, are rendered nearly impossible to prove by a series of what purports to be just evidentiary and burden rules. There is now skepticism, Kairys argued, that Whites have discriminated (or continue to do so), even when there is strong evidentiary proof of it. Second, Whites' claims of discrimination have been greatly facilitated and enlarged, so that now

they have next to no burden. They don't have to prove purposeful discrimination with any kind of detailed proof. The moral tone of the opinions is a strong moral repudiation. There's judicial activism without a mention of the judicial restraint language that fills the opinions when minorities or women raise discrimination claims.<sup>140</sup>

It appears that the story of the innocent White victim serves as a crucial rhetorical device for re-thinking, and consequently changing, the meaning and practice of antidiscrimination law.

There might be a psychological basis for the story of the innocent White victim as well. Underlying this rhetoric of innocence might be, as Ross argued, Whites' psychological need to avoid facing their advantaged status in this society. Ross argued that this rhetoric obscures this question: "What White person is 'innocent,' if innocence is defined as the absence of advantage at the expense of others?"<sup>141</sup> This argument casts the question of innocence as one of *equity* rather than *responsibility*. Furthermore, Ross argued that the symbol of innocence, one of the most powerful symbols of our culture, is almost always presented opposite the symbol of the "defiled taker."<sup>142</sup> Thus, in the affirmative action rhetoric of college admissions, for example, the "innocent" White applicant to a prestigious college is coupled with the "defiled taker," the racial minority admitted in the "innocent's" place. Ross' arguments reveal how the story of the innocent White victim makes difficult the discrediting of plaintiffs in the affirmative action cases. The story focuses attention on the individual being "disadvantaged," such as, say, Allan Bakke. He was denied admission to the University of California-Davis Medical School, and perhaps his denial

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139. David Kairys, *Race, Law, and Justice: The Rehnquist Court and the American Dilemma*, 45 AM. U. L. REV. 567, 572 (1996).

140. *Id.*

141. Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 301 (1990).

142. *Id.* at 310.

resulted in the admission of racial minority student with “less qualifications.” In such a story, Bakke is an “innocent victim” burdened with the indiscretions of history.

Ross argued as well that this rhetoric of innocence is connected to “unconscious racism,” in the sense that Whites have many negative beliefs and feelings about non-Whites. Thus, the innocence rhetoric “represses” this racism by (a) allowing Whites to deny the charge of racism, and (b) denying racial minorities actual victim status.<sup>143</sup> Devins contested Ross notion of “unconscious racism” because it goes to far. “Disparities in employment, education, and housing may well be caused by factors other than conscious and unconscious racism.”<sup>144</sup> Devins’ arguments, however, appear too ahistorical, and he falls into the trap of accepting notions of intention. Ross’ argument has merit, but perhaps in a slightly different sense than he intended. Ross implies that the innocence rhetoric “represses” unconscious racism. But such an argument falls too close to what Balibar argued is the pitfall of anti-racism discourse: it is too embedded in the rationalist notions of prejudice or false consciousness.<sup>145</sup> For reasons that I will explain later in more detail, racism can not be deemed to result from prejudice, false consciousness, or any notion that implies intention.

The story of the innocent White victim, however, might be connected to racism, but it does not purport to deny that racism—at least not the stories in the Supreme Court cases. Not many Justices (or people, perhaps) deny Whites’ historically-validated subordination of racial minorities (or men’s oppression of women, etc.), or that racism’s effects still linger. But the story might work because it furthers, to borrow Sedgwick’s metaphorical phrases, the “privilege of unknowing,” or the “open secret.”<sup>146</sup> The story allows individuals who use it to look away from their privileges—especially those ensured by race, gender, and class. The story allows those individuals to keep those “open secrets”—the existence of privileges, and how they benefit from them—“hidden” in the closet.

##### 5) The Story of “Racial Hostility”

Consider these elaborations of the story of racial hostility:

By hitching the meaning of the Equal Protection Clause to these transitory considerations [e.g., common stereotypes, innocent persons], we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces. Disparate constitutional tolerance of such

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143. *Id.* at 310-12.

144. Neal Devins, *The Rhetoric of Equality*, 44 VAND. L. REV. 15, 44 (1991).

145. Balibar, *supra* note 130, at 199.

146. EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 80 (1990).

classifications may well serve to *exacerbate racial and ethnic antagonisms rather than alleviate them*.<sup>147</sup>

The perceptions of the excluded class must also be weighed, . . . [since] there is the danger that the ‘stereotypical thinking’ that prompt policies such as the FCC rules here, ‘stigmatizes the disadvantaged class with the unproven charge of past racial discrimination.’ . . . Until the Court is candid about the existence of stigma imposed by the racial preferences on both affected classes, candid about the ‘*animosity and discontent*’ they create, and open about defending a theory that explains why the cost of this stigma is worth bearing and why it can consist with the Constitution, no basis can be shown for today’s casual abandonment of strict scrutiny.<sup>148</sup>

The story appropriates the understanding of the history of racial hostility to justify a restriction of affirmative action. One may argue that the use of the terms connoting *hostility* (e.g., antagonism, discontent, tension) does not mean anything other than that affirmative action will create conflict in social settings. But the “story of racial hostility” is troublesome, as Edley pointed out, because it epitomizes the “classic ‘blame the victim’ strategy and could be rephrased as, ‘if you will be quiet, we will all be more comfortable.’”<sup>149</sup> Furthermore, when combined with the story of the “innocent White victim,” one can see that the attribution of blame for racial strife to racial minorities absolves White aggressors of moral responsibility for their hostile reaction to racial minorities on college campuses or employment settings.

Perhaps the story of racial hostility reflects judges’ reliance on sociological theories that analyze race relations as class struggles: the main idea being that racial antagonism is a manifestation of underlying economic relations. Lal explained that racial conflict arises when the socially dominant group perceives a real or imagined threat to an established way of life as a result of claims by subordinate groups for a greater share of resources.<sup>150</sup> But, as Wilson and Braddock explained, the class-based theories of racial hostility “neglect the importance of a coherent ideological formulation that sanctions and legitimates race-based differences in labor market placement, that, ultimately, result in differential economic rewards based on race.”<sup>151</sup> Wilson and Braddock asserted that race relations since the 1980s reflect the predominance of a “new racial ideology.” This racial ideology has several tenets, including (a) racial discrimination does not exist anymore, (b) African Americans receive preferential treatment, (c) support for race-based policies to remedy

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147. *Bakke*, 438 U.S. at 299-8 (Powell, J.) (emphasis added).

148. *Metro Broadcasting*, 497 U.S. at 636-7 (Kennedy, J., dissenting) (emphasis added).

149. D’Souza & Edley, *supra* note 40, at 439.

150. Barbara B. Lal, *Symbolic Interaction Theories*, 38 AM. BEHAVIORAL SCIENTIST 421, 427 (1995).

151. George Wilson & Jomills Braddock, *Analyzing Racial Ideology: Post-1980 America, in POSTMODERNISM & RACE* 129-43, at 132 (Eric Mark Kramer ed., 1997).



socioeconomic inequality has declined, and (d) African Americans are personally responsible for their disadvantaged status. If Wilson and Braddock are correct, then courts, as ideological state apparatuses, further this racial ideology through their stories.

The use of terms connoting *hostility* in race discourse conjures up certain images of violence: lynchings, burning crosses, race riots, and so forth. Justice Scalia explicitly uses these images. For example, consider his use of the story of racial hostility in two passages from *Croson* to justify his anti-affirmative-action stance:

At least where state or local action is at issue, only a social emergency rising to the level of imminent danger of life and limb—for example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the Fourteenth Amendment that ‘our Constitution is color-blind, and neither knows nor tolerates classes among citizens.’<sup>152</sup>

Apart from their societal effects, however, which are ‘in the aggregate disastrous,’ it is important not to lose sight of the fact that even ‘benign’ racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race. As Justice Douglas observed: “DeFunis who is white is entitled to no advantage by virtue of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.” *When we depart from this American principle we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns.*<sup>153</sup>

It is difficult to read Scalia’s words without shuddering at their reiterations of racial violence. Scalia’s stories exemplified most clearly, following Cover, the violence of the judicial word.<sup>154</sup> Cover’s elaboration of juridical violence underscores the power of the judiciary to enact violence through speech.<sup>155</sup> While Cover did not refer specifically to the stories judges tell to justify their initiations of the mechanisms of violence, we can use Cover’s notion to

152. *Croson*, 488 U.S. at 522 (Scalia, J. concurring) (emphasis added).

153. *Id.* at 527 (emphasis added).

154. Justice Scalia’s “race” stories are problematic in other contexts as well, conjuring up images of violence, especially in the forms of “fires.” For example, in *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992), a case in which the Supreme Court overturned the conviction [under a bias-crime statute] of a seventeen-year-old skinhead who burned a crudely-made cross on the lawn of the only African American family in his neighborhood, Scalia’s majority opinion used the metaphor of fire to justify his belief that the real offense was the disregard of the First Amendment: “Let there be no mistake about our belief that burning a cross in someone’s front yard [note how he stripped away the identity of the victims] is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.” *Id.* at 2550. For a wonderful rhetorical analysis of this case, see JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 52-65 (1997).

155. BUTLER, *supra* note 154, at 47.

explain, using Scalia's example, that violence is enacted through interpretation and through persuasion.

Judicial speech, as Cover explained, does not occur outside the context of violence. But in a racially-stratified world, the judicial stories enact violence in another sense: they justify the racial hierarchy as "obvious" and blame minorities for the racial disparity. Court speech, then, not only constitutes the social world linguistically, as White theorized, but in practice as well because that speech carries the power of the State. The stories, therefore, are not just rhetorical devices, they are "practices." How can speech be "practice"? In order to understand how speech can manifest itself in practice, one need understand the notion of "performatives." Following J. L. Austin, Butler explained that performativity refers to words that not only name, "but also in some sense . . . perform what [they] name. . ."<sup>156</sup> For Butler, in order for the performative to succeed—that is, to perform what it names—it must echo prior actions and accumulates "*the force of authority through the repetition or citation of a prior and authoritative set of practices.*"<sup>157</sup> What this means, Butler explained, is that a performative "works" to the extent that *it draws on and covers over* the constitutive conventions by which it is mobilized.

Courts, of course, are state apparatuses; thus, their words are "sovereign performatives"<sup>158</sup>—they perform what they name—because they accumulate the force of juridical convention. But the stories draw on other conventions that ensure their performativity. To illustrate, Scalia's speech enacts violence through rhetoric and practice; as juridical speech, Scalia's words rise to level of sovereign performative, but it also draws on the "authoritative set of practices" of racial oppression (e.g., race riots, fires, cross burnings) to gain performativity. The story of racial hostility brings forth conventions of social domination, and in doing so, symbolically enacts them again through language. The story of racial hostility, thus, exemplifies the symbolic violence of language in race discourse.<sup>159</sup> And its performativity allows it to "perform what it names" in antidiscrimination law, namely the social domination of racial minorities.

#### 6) The Story of "Color-Blindness"

The story of "color-blindness" is one of the most powerful rhetorical strategies for thwarting affirmative action initiatives.<sup>160</sup> Williams noted how

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156. *Id.* at 44.

157. *Id.* at 51 (emphasis in original).

158. *Id.* at 71-82.

159. See Karen A. Callaghan, *Symbolic Violence and Race*, in POSTMODERNISM AND RACE 65-77, at 71-75 (Eric Mark Kramer ed., 1997).

160. Legal scholars have debated the notion of color-blindness for some time. Those contesting existence of color-blindness include: Frances L. Ashley, *Stirring the Ashes: Race, Class, and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993 (1989); Amy L.

problematic the ideal of color-blindness is for African Americans, who can attest to its potential for liberating purposes (e.g., when it is used to eliminate segregation), while experiencing a world that is anything but color-blind.<sup>161</sup> The story works because it gets its strength from the model of formality, “common sense” understanding of history (that led to the passage of antidiscrimination law in the first place), and the liberal-humanists discourse of individualism. The story, however, is frequently contradicted, often within the same case. Consider, for example, the following two stories—the first is from Justice Powell in *Bakke*, who used the history of racial oppression, and previous Supreme Court cases dealing with it, to justify his stance that the Fourteenth Amendment applied with equal force to Whites as it did to racial minorities; the other is from Justice Brennan in *Bakke*, who used the same history of racial discrimination to make an opposite argument:

Because the landmark decisions in this area arose in response to the continued exclusion of Negroes from the mainstream of American society, they could be characterized as involving discrimination by the “majority” [note the inverted commas] white race against the Negro minority. *But they need not be read as depending upon that characterization for their results. It suffices to say that “over the years, this Court has consistently repudiated ‘distinctions between citizens solely because of their ancestry’ as being ‘odious to a free people whose institutions are founded upon the doctrine of equality.’*<sup>162</sup>

Our Nation was founded on the principle that “all Men are created equal.” *Yet candor requires acknowledgment that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery.* The consequences of this compromise are well known and have aptly been called our ‘American Dilemma.’ . . . *Against this background, claims that law must be ‘color-blind’ or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality.* This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we can not—and, as we shall demonstrate, need not under our Constitution or Title VI, which merely extends the constraints of the Fourteenth Amendment to private parties who receive federal funds—let color blindness become myopia which masks the reality that many ‘created equal’ have been treated within our lifetime as inferior both by law and by their fellow citizens.<sup>163</sup>

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Knickmeier, *Blind Leading the Color-blind: The Evisceration of Affirmative Action and a Dream Still Deferred*, 17 N. ILL. L. REV. 305 (1997).

Those defending color-blindness include: Hand, *supra* note 93, at 799-860; John Marquez Lundin, “*The Call for a Color-blind Law*,” 30 COLUM. J. L. & SOC. PROBS. 407 (1997).

161. PATRICIA J. WILLIAMS, *SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE* (1997).

162. *Bakke*, 438 U.S. at 294 (Powell, J.) (emphasis added).

163. *Id.* (emphasis added).

Note how the story of color-blindness effectively manipulates history. Powell's story not only manipulates American history, but also Supreme Court precedent; it can not work without doing so because there exists irrefutable evidence of racial oppression (e.g., slavery). The story alludes to cases that "repudiated" ancestry "distinctions" as "odious;" yet, those cases all involved Whites' discrimination of racial minorities. Arguing that those cases "need not be read" as only prohibiting the oppression of racial minorities, the story then ignores the historical contexts in which those cases were decided and argues that discrimination against Whites is also that which was "constantly repudiated." The story's choice to extend the Equal Protection Clause to Whites then became *precedent*; other judges repeatedly cited this story as precedent for the argument that the affirmative action equates with the kinds of discrimination that has historically been the Court's concern in antidiscrimination law. Brennan's story, of course, also uses history, but this story does require as much manipulation of history as Powell's because it coincides with the those stories told by historians, social scientists, "common sense," and even the Court's own prior cases.

The manipulation of history is very prominent in these stories, but this can not be attributed only to politically-conservative stories. Consider these examples from *Croson* of the use of history to justify contrary stances on affirmative action—the first is from Justice Scalia; the others are from Justice Marshall:

It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups. But those who believe that racial preferences can help to 'even the score' display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice still. *The relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, 'created equal,' who were discriminated against.* And the relevant resolve is that it should never happen again. Racial preferences appear to 'even the score' (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white. Nothing is worth that embrace. Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged will have a disproportionately beneficial impact on blacks. Only such a program, and not one that operates on the basis of race, is in accord with the letter and the spirit of our Constitution.<sup>164</sup>

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164. *Croson*, 488 U.S. at 527-8 (Scalia, J., concurring) (emphasis added).

It is a welcome symbol of racial progress when the former *capital of the Confederacy* acts forthrightly to confront the effects of racial discrimination in its midst.<sup>165</sup>

In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brutal and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful thinking, the majority today does a grave disservice not only to those victims of past and present racial discrimination in this Nation whom government has sought to assist, *but also to this Court's long tradition of approaching issues of race with utmost sensitivity.*<sup>166</sup>

Scalia's story indicates that the point of the history of racial oppression is not that "Blacks, or Jews, or Irish" were victimized by discrimination, but that it was the discrimination of "individual men and women, created equal." This story coincides with common sense—individuals were discriminated against—but it ignores that those individuals were victimized by discrimination *because they were Blacks, Jews, or Irish*. The history the story refers denies itself. Marshall's story conjures up images of the Civil War ("Capital of the Confederacy"), state-sanctioned discrimination ("state-sponsored racism"), and racial violence ("brutal . . . forms of state-sponsored racism"), but he also manipulates Supreme Court precedent by stating that the Court ignores its "long tradition of approaching issues of race with utmost sensitivity." The Supreme Court, Marshall well knows, often acquiesced to racial discrimination, if not enforced it outright.<sup>167</sup> One need only hear the words *Dred Scott* and *Plessy* to know that the Supreme Court does not have a tradition of dealing with issues of race with sensitivity (and the decision in *Croson* certainly can not be said to illustrate such sensitivity). Marshall manipulated this history probably to make the majority in *Croson* face its hypocrisy in race matters.

Justice Kennedy manipulates history as well, but his story is different from Marshall's, or even Scalia's:

Almost 100 years ago, in *Plessy v. Ferguson*, this Court upheld a government-sponsored race-conscious measure, a Louisiana Law that required 'equal but separate accommodations' for 'white' and 'colored' railroad passengers. . . . The *Plessy* Court concluded that the 'race-conscious measures' it reviewed

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165. *Id.* at 528 (Marshall, J., dissenting) (emphasis added).

166. *Id.* at 552-3 (emphasis added).

167. Perhaps Marshall meant that the Supreme Court has shown sensitivity to race issues within the last 30 years or so. But a review of the race discrimination cases during the seventies and eighties dispels any notion of race sensitivity.

were reasonable because they served the governmental interest of increasing the riding pleasure of railroad passengers. The fundamental errors in *Plessy*, its standard of review and its validation of rank racial insult by the State, distorted the law for six decades before the Court announced its apparent demise in *Brown v. Board of Education*. *Plessy's standard of review and its explication have disturbing parallels to today's majority opinion that should warn us something is amiss here.*<sup>168</sup>

Kennedy's story is significant for two reasons. First, it certainly underscores the importance of the color-blindness ideal. But more important, it uses a commonly-perceived symbol of racial oppression as a weapon against racial justice. Kennedy appeared to say that any attempt to remedy racial injustice is as "insulting" and "disturbing" as the result in *Plessy*, which for almost 60 years legitimated a state-sanctioned violence on racial minorities. This story, by equating affirmative action with Jim Crow, ignores how *Plessy* codified in law the racial prejudice against African Americans through its legitimation of racial inferiority. And while affirmative action may discriminate against Whites, it can not enact the kind of state-sanctioned violence against them that *Plessy* and many other Supreme Court cases have enacted against African Americans and other social minorities.

In one sense, these different views of color-blindness illustrate different understandings of equality, such as the progressivism and conservatism uncovered by West.<sup>169</sup> But the story of color-blindness signifies more than whether one views equality in a "formal" or "substantive" sense. The commitment to color-blindness, Flagg explained, appears to indicate that the more certain one is never to consider race relevant to any assessment of an individual's abilities or achievements, the most certain one can be that racism has been overcome.<sup>170</sup> This line of thinking, Flagg asserted, reflects individualism, or "the traditional liberal view that the autonomous individual, whose existence is analytically prior to that of society, ought never to be credited with, nor blamed for, personal characteristics not under her own control, such as gender or race . . ."<sup>171</sup> Seligman made a stronger argument about the pervasiveness of individualism in our political discourses. He argued that the notion since the seventeenth century of "an 'autonomous, agentic individual—that makes civil society possible,' . . . has come to the define our very ideas of the private realm as well as our evaluation of it in respect to those realms deemed more public in nature. In fact, the moral and ethical elevation of the private arena—as that arena where virtue, morality, and conscience are realized—over the public arena emerged concomitantly with the growing

168. *Metro Broadcasting*, 497 U.S. at 631-2 (Kennedy, J., dissenting) (emphasis added).

169. West, *supra* note 56, at 710.

170. Flagg, *supra* note 112, at 953.

171. *Id.*

Western realization of individual agency and autonomy.”<sup>172</sup> I do seek to deconstruct individualism in this essay; I claim only that individualism underlies the notion of color-blindness and gives it force, rather than racial prejudice or ill-will on the part of the judges.

The story of color-blindness has disastrous effects for racial justice. It works structurally by guaranteeing that courts discount history, acontextualize law, and engage in formalistic rhetoric about race. As Kairys pointed out, the notion works because it implies that racial minorities “have gotten too much;” that “things have gone too far, and color-blindness brings things back to neutral.”<sup>173</sup> What this rhetoric has done, Kairys asserted, is created a basic reversal of social roles regarding race: “we’re seeing a successful challenge to the notion that the presumptive victims of racism are black, and the presumptive racists are white.”<sup>174</sup> Gotanda similarly asserted that color-blind constitutionalism maintains Whites’ domination of non-Whites.<sup>175</sup>

Kairys’ and Gotanda’s arguments about color-blindness contend that we are dealing with a new racial ideology.<sup>176</sup> Wilson and Braddock make the same argument when they stated that the conservative “backlash” to the economic and political gains made by racial minorities since the mid-1960s has manifested itself in a “relatively sophisticated and appealing ideological form: specifically (couched in values that seemingly reaffirm ‘fair play’ and ‘equal opportunity’), there have been growing calls for a color-blind society where no special significance, rights, or privileges attach to one’s race.”<sup>177</sup> The story of color-blindness obscures the emergence of the “new” racial ideology from the last 20 years or so, one that accomplishes the same results as state-sanctioned discrimination, but this time using the laws (and symbols) intended to ensure racial justice against racial justice itself.

### *The Significance of These Stories*

Cover asserted, quoting J. B. White, that “law is best regarded ‘not as machine for social control, but as what I call a system of constitutive rhetoric: a set of resources for claiming, resisting, and declaring significance,’ . . . but I

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172. Adam B. Seligman, *Individualism as Principle: Its Emergence, Institutionalization, and Contradictions*, 72 IND. L. J. 503, 505 (1997).

173. Kairys, *supra* note 139, at 583.

174. *Id.* at 584.

175. Neil Gotanda, *A Critique of “Our Constitution is Color-blind,”* in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 5, at 257.

176. Kimberlé Crenshaw made a similar argument when she argued that the “hegemonic” role of racism in American ideology has always been premised on race-consciousness, which is not only central to the domination of African Americans but also to Whites’ acceptance of the legitimacy of racial hierarchy and their identity with elite interests. Crenshaw, *supra* note 125, at 112.

177. Wilson & Braddock, *supra* note 151, at 129.

insist that it is those things in the context of the organized social practice of violence. And the ‘significance’ or meaning that is achieved must be experienced or understood in vastly different ways depending upon whether one suffers that violence or not.”<sup>178</sup> The stories discussed here, following Cover, take place in the context of the organized social practice of violence. The violence I refer is not “physical” in the common understanding of the word—it is symbolic and ideological—but it manifests itself in “practices.” The legal discourse that justifies a racially-stratified social order ensures violence through the performative power of the judicial word, which is accomplished not only through state power but also through the iteration of conventions of social domination (e.g., the use of stigmas, racial hostility). The courts’ enforcement of this domination, however, can not be said to result from judges’ racial prejudice—judges might be unaware that they are involved in the mechanisms of domination. In the rest of the essay, I speculate on the complex link between racism, norms, and courts and provide a theory for why courts legitimize social domination.

Racism is pervasive in this society, but it might be inappropriate to attribute its persistence to prejudice, intention, social structures, or even ideology—if that is taken to mean a concerted effort by the ruling class to justify its social domination. Racism might be persistent and effective because it is furthered by “knowledge” and “norms,” which constitute the basis for the kind of prejudice, intention, social structures, and ideology that realize racism into practice. Balibar noted the “contradictory” link between racism, universalism, and nationalism. According to Balibar, universalistic notions of human action and behavior are premised on a latent racial hierarchy.<sup>179</sup> Universalistic notions become the bases of “knowledge.” In other words, racism, according to Balibar, constitutes a *mode of thinking*; that is, ways of connecting words with images to create concepts. At the root of this “knowledge” is the need to know—the “desire for knowledge.”<sup>180</sup> Balibar theorized that humans beings want to know why things are the way they are. Racism provides the answer: “because [racial] differences are the universal essence of what we are.”<sup>181</sup> Furthermore, when racism and universalism are linked with nationalism, which is about creating national unity, then powerful institutions, such as the legal system, are needed to help create that unity, which in Western civilizations is premised on a racial hierarchy. The inherent racial hierarchy in “knowledge” produces discourses that form the basis for the meaning and organization of social institutions, practices, and relationships. If Balibar is correct, then it is understandable why courts legitimize racial

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178. Cover, *supra* note 18, at 1602.

179. BALIBAR, *supra* note 130, at 197.

180. *Id.* at 200.

181. *Id.*



disparity—because racial differences are “universally and nationally meaningful.”

Balibar provided an understanding of the role of “knowledge” in the maintenance of oppression. Foucault linked knowledge and power to argue against the conceptualization of power as the prerogative of states, institutions, or classes of individuals. Power is ‘disciplinary’ and exists in every social relation (e.g., in the family) and institution (e.g., in prisons, in courts, in schools). Such power is ‘repressive’ in the sense that it determines, essentially, what is “normal” and what is not, how things must be discussed, who has authority to speak, and so forth. Furthermore, this disciplinary power is repressive in another sense: it is linked significantly with the power of state apparatuses. For example, according to Foucault, juridical power is now “grounded in the mechanisms of disciplinary coercion.”<sup>182</sup> Stated differently, disciplinary mechanisms legitimize juridical power, which in turn enforces, but disguises, the processes of normalization. To illustrate this point, consider the legal institutions’ legitimation of racial inequality. Despite the presence of antidiscrimination laws, courts consistently refuse to uphold their tenets, adhering to the belief that racial inequality is ‘natural’ (i.e., such inequality results from merit, inadequate education, etc.).<sup>183</sup> In this sense, legal analysis should attend to how court decisions are informed by the normalizing influences of social institutions and practices.

Power, however, is not inherently ‘repressive;’ it also is ‘productive.’ In other words, disciplinary power ‘produces’ knowledge about individuals, which often is used to justify oppression. Just as the panopticon would allow for the examination of prisoners in order to ‘correct’ them;<sup>184</sup> disciplinary power examines individuals in order to ‘know’ them—and this “knowledge” is used by others in order to ‘correct’ individuals or make them ‘normal.’ For Foucault, power produces “absences and gaps: it overlooks elements, introduces discontinuities, separates what is joined, and marks off boundaries.”<sup>185</sup> The knowledge established by disciplinary power creates norms, and these norms are internalized by individuals and result in self-

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182. Michel Foucault, *Two Lectures*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972-1977*, at 105 (Colin Gordon trans. & ed., 1980).

183. See, e.g., the persuasive essays on the courts’ reluctance to enforce the legal and moral imperatives of antidiscrimination law in: Derrick Bell, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM*; Robert Cover, *The Origins of Judicial Activism in the Protection of Minorities*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* (Martha Minow et al. eds., 1992); *CRITICAL RACE THEORY: THE KEY WRITINGS THAT SHAPED THE MOVEMENT*, *supra* note 5; *CRITICAL RACE THEORY: THE CUTTING EDGE*, *supra* note 108; HIGGINBOTHAM, *supra* note 125; *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION*.

184. FOUCAULT, *supra* note 30, at 200-01.

185. FOUCAULT, *supra* note 6, at 83.

regulation. Thus, for example, racial differences among individuals are ‘produced’ by social practices (e.g., standardized testing), and that ‘knowledge’ of racial differences initiates (or ‘coerces’) the processes of normalization and self-regulation. That knowledge justifies discriminatory practices, forces individuals to succumb to those practices, and makes it seem natural that they should do so. Legal analysis, therefore, should pay attention to these social practices—these local stories—in order to understand how they provide the disciplinary coercion for juridical power. These local racial discourses, formed in institutions, practices, and relationships provide the “disciplinary coercion” and set the stage for the sovereign discourses of the legal apparatus.

The affirmative action stories illustrate that courts accept as “universal” the disparity of the social existence between Whites and racial minorities, and no legal principle, such as Title VI, Title VII, or the Equal Protection Clause, can change the *universality* or *disciplinary power* of that disparity. Racial disparity results, these cases seem to indicate, not from the intentional or ideological political and economic domination of one group by another, or even from oppressive institutional practices, but from the knowledge of the inherent differences between those groups—a knowledge which creates norms and are realized in institutional practices. The challenge for progressively-minded individuals is not to focus from “above” on the legal or state apparatus, but from “below” on the normalizing influences of discourses which permeate social relationships, practices, and institutions. And given how discourses use language and stories, resistance might begin with reconstituting the stories that predominate in affirmative action discourse.

#### RESISTING THROUGH “COUNTER-STORIES”

The pervasiveness of social hierarchies in ways of thinking encourages pessimism. But resistance is possible. Cover, for example, argued that a judge may or may not be able to “change the deeds of official violence, but she may always withhold the justification for this violence. She may or may not be able to bring a good prison into being, but she can refrain from sentencing anyone to a constitutionally inadequate one.”<sup>186</sup> To understand the possibility of resistance, one needs to understand the law’s constitutive rhetoric, to borrow White’s words, and how it furthers social domination. This constitutive rhetoric might itself be the key to resisting social domination. Because judicial stories take place in a “community,” they are vulnerable to innovation and subversion. Since courts rely on legal scholars and other researchers for guidance, these scholars must assert counter-stories to traditional legal jurisprudence. I offer in this section three “theoretical” suggestions for

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186. COVER, *supra* note 18, at 1622.

resisting the predominant discourse that supports oppressive social structures; these suggestions are theoretical in that involve ways of thinking, and, as a result, they are subject to practical application and evaluation.

First, progressive scholars should reject universalism or other stories that purport to “discipline” individuals to particular ways of thinking or behaving. Foucault might be correct when he argued that resistance to disciplinary power must be “anti-disciplinarian.”<sup>187</sup> In other words, progressive scholars must expose the historical contents of oppressive disciplinary notions, and then counteract them by asserting non-oppressive ones. Progressive legal scholars more so than others have the social authority to assert counter-stories that constitute social justice. Although these counter-stories will encounter resistance from predominant stories that support oppression, to be iterated counter-stories must be in circulation. For example, legal scholars might tell stories that expose the role of mathematics (e.g., in defining, quantifying, and standardizing intelligence) in the mechanisms of oppression.

Second, the “court speech act” should be resisted when it is oppressive. Although court speech functions with sovereign performativity, resistance becomes possible if one accepts, as Judith Butler contended, that all speech acts are vulnerable to “insurrectionary” counter-speech. Progressive scholars, perhaps especially those in law schools, should produce “insurrectionary acts” that assert critical perspectives of the law, the sciences, and “common sense.” These scholars could, for example, assert how law furthers certain political interests, but also how vulnerable (and unstable) these interests are to discursive practices. These acts alone, of course, can not change the sovereign speech act, but they begin to resist the power of its performativity.

Finally, progressive scholars must understand that individual resistance makes a difference. If power is localized, per Foucault, in “disciplinary mechanisms,” then progressive scholars must understand and resist the system of localized acts, beliefs, and historical contents that underlie them. All individuals in all social settings discipline and are disciplined, but the oppressive nature of a particular discipline can be resisted. For Foucault, power and resistance were related; the existence of power depends on a “multiplicity of points of resistance: these play the role of adversary, target, support, or handle in power relations. These points of resistance are present everywhere in the power network.”<sup>188</sup> This may mean that resistance is never outside of power, but it also may mean that resistance can subvert certain mechanisms and make them less physically oppressive. Stated differently, resistance may be directed toward stripping away oppressive mechanisms’ links to social, economic, and cultural hegemony. Though the general normalizing functions of power may not be subject to subversion, any

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187. FOUCAULT, *supra* note 18, at 108.

188. FOUCAULT, *supra* note 6, at 95.

particular norm (e.g., the norm(s) that constitute ‘intelligence’) can be resisted. If power is localized, then social activism begins locally—in classes, in departments, in institutions, in communities. As Gordon explained, changes in practices and beliefs start at the local level, which then get interlinked in national and international affiliations that begin to change attitudes and motives.<sup>189</sup> Progressive scholars might, for example, question normative admissions policies within their own departments. No one, therefore, should see himself or herself as insignificant in initiating social change.

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189. Robert W. Gordon, *Some Critical Theories of Law and Their Critics in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, DAVID KAIRYS 641-61 (3d ed. 1998).