THE COLOR-BLIND CONSTITUTION, CIVIL RIGHTS-TALK, AND A MULTICULTURAL DISCOURSE FOR A POST-REPARATIONS WORLD

MELISSA COLE*

INTRODUCTION

> People keep telling me that this is historic. I guess it is historic in that we're starting this new age of post-affirmative action. But I don't think it's nearly as much an act compared to the people before me who broke the color barriers the first time.[1]
>
> Eric Brooks, Boalt Hall, Class of 2000

On November 5, 1996, California voters approved Proposition 209, which amended the California Constitution to state that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[2] The new law, of course, generated immediate and aggressive litigation.[3] In the meantime, however, it has had real effects that eerily parallel the beginning of the legal struggle over affirmative action.

Twenty years ago, as the University of California sought to increase the racial diversity of its student body, Alan Bakke successfully challenged the university's affirmative action policy after he was denied admission to

---

* Associate Professor of Law, St. Louis University Law School; doctoral candidate in American Studies, The College of William and Mary; J.D., Columbia Law School, 1993; B.A., Brown University, 1988. For the birth of this article, I owe thanks to Bob Gross for spending a semester with me talking about multiculturalism and for instilling me with his curiosity about Justice Harlan's dissent and to Bill Cooper for helping me trace the legal history. The article would never have reached its present incarnation without the time, assistance, and wonderful conversation of Cynthia Ward. Kim Phillips has earned my gratitude for introducing me to new ways of thinking about African-American history and about race. I am especially grateful to Dave Douglas for his unflagging encouragement and suggestions, and am also thankful to Bob Tuttle for his challenging commentary.

1. Eric Brooks, *quoted in* Tracy L. Brown, *Law Class's Lone Black in Spotlight. Cal-Berkeley Sees Effects of Affirmative Action Vote*, DALLAS MORNING NEWS, Oct. 20, 1997, at 1A [hereinafter Brooks, *Law Class's Lone Black*].

2. CAL. CONST. art. 1, § 31. Although Chief Judge Thelton E. Henderson of the Northern District of California issued a preliminary injunction prohibiting application of the law, *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996), the Ninth Circuit subsequently vacated it, 122 F.3d 692 (9th Cir.), *cert. denied*, 522 U.S. 963 (1997), and, on remand, Chief Judge Henderson granted the defendants' motion for judgment on the pleadings, 1998 WL 61215, at *1 (N.D. Cal. Feb. 3, 1998).

3. For a detailed account of Proposition 209's inception and effects, see LYDIA CHAVEZ, THE COLOR BIND: CALIFORNIA'S BATTLE TO END AFFIRMATIVE ACTION (1998).

UC Davis medical school. In response to Bakke's challenge and the numerous subsequent challenges to other affirmative action programs, the University of California and other public institutions have struggled to fashion affirmative action policies that can withstand legal challenges and conform to legally acceptable requirements. Yet, at the end of two decades of litigation and reform, Proposition 209 became law and a single student of African descent[4] joined the first-year class at Boalt Hall, the law school at the University of California at Berkeley. This result graphically demonstrates a collective (although by no means total) rejection of the old justifications for affirmative action—that years of discrimination against individuals because of their race demand reparations and affirmative action is one means of providing such a remedy. In a contemporary, "color-blind" society, the segregation laws of just a few decades ago have been confined to history[5] and, as a result, the legal arguments based on this legacy have lost their utility. Instead, in a stunning example of the dissonance between legal rhetoric and reality, Boalt Hall, limited by the dictates of Proposition 209, admitted only fourteen students of African descent to the Class of 2000, a decrease of 81% from the previous year.[6] More stunning still, only one student of African descent enrolled.[7]

How do we find ourselves in the midst of this affirmative action backlash just forty-six years after *Brown v. Board of Education* established a program of legal remedies for three hundred years of racial discrimination? The failure of affirmative action, I believe, results from its roots in "civil rights-talk"—the discourse that defines how civil rights are understood and discussed.[8] While the *Brown* opinion itself was neither the birthplace of

4. Throughout this article, I use the term "of African descent" and, although I avoid it, when speaking generally, "Americans of African descent." I have chosen this designation only after much concerned thought. The phrase "African Americans" could be construed to exclude people who are legally treated in the same category as African Americans but do not share the same ancestry, such as people with roots in Caribbean or South American countries. In using this designation, I remain sensitive to Toni Morrison's refusal—and the refusal of others with similar experiences—to identify herself as "American": "My childhood efforts to join America were continually rebuffed. So I finally said, 'you got it.' America has always meant something other to me—them." *Quoted in* PAUL GILROY, SMALL ACTS: THOUGHTS ON THE POLITICS OF BLACK CULTURES 179-80 (1993). Because my article discusses United States history and law, however, it seems appropriate to attach the designation "American" (notwithstanding the other nations in the Americas) to the people directly affected by them, even if only for the limited purposes of this article.

5. As Eric Brooks put it, "Under Proposition 209, Governor Pete Wilson used Martin Luther King's words that now we can finally judge people on the content of their character instead of the color of their skin. I'd like to know how the LSAT can judge the content of someone's character." Brown, *Law School's Lone Black, supra* note 1.

6. Michelle Locke, *Student Expects 'A Difficult Year,'* L.A. SENTINEL, Sept. 3, 1997, at A8.

7. *Id.*

8. In this article, I offer primarily a "top-down" critique of legal discourse, focusing in part on the language of legal opinions, in order to better understand the basis of the rights discourse as it affects larger social understandings and interactions. Rights discourse, I argue, is highly influenced by the social conditions of its particular historical context and, in

political civil rights mobilization nor the arbiter of reparations for the extended and ongoing deprivation of constitutional rights for Americans of African descent, it did "help to redefine the terms of both immediate and long-term struggles among social groups."[9] *Brown* posed and has been accepted as the beginning of reparations for the government-sanctioned racism embodied in *Plessy v. Ferguson* and the "separate but equal" doctrine.[10] It has been cast as a turning point, the moment when the majority of Justices took up the banner of Justice Harlan's *Plessy* dissent and posed the "color-blind Constitution" as a national imperative.[11]

This legacy of civil rights-talk falters in the debate over affirmative action. Because, since *Brown*, civil rights have been perceived as reparations for identifiable past injuries—the model of the color-blind Constitution—their proponents have been hard put to present acceptable justifications for redistributing a limited universe of presumably race-neutral Constitutional rights. They face the objections of people, many of them privileged by the current distribution, who can not see why others with access to those same rights claim to be disadvantaged. I suggest, then, that we reexamine this legacy and reconceptualize our discourse to bring our demands for social equity into what is, in the current legal consciousness of American society, a post-reparations world.

I propose "multicultural discourse" as an alternative to civil rights-talk. Multicultural discourse draws from Critical Race Theory's commitment to a poststructuralist understanding that discourse—here, specifically legal discourse—is both a product of and constantly reproduces hierarchies of race and other social categorizations. It also draws from Critical Race

---

turn, shifts meaning and has a different influence when used in a different historical setting. More importantly, simply shifting the perspective of the inquiry about affirmative action from a top-down legal inquiry to a bottom-up examination of social forces runs the risk of masking the dangers and assumptions of the rights discourse itself. The multicultural discourse I propose is my attempt to further decenter our examination of the interplay between law and social change, to do more than simply shift the perspective from the top to the bottom.

9. MICHAEL MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 285 (1994). *See also* Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1382 (1988) (arguing that the Civil Rights Movement provided the model by which "Blacks gained by using a powerful combination of direct action, mass protest, and individual acts of resistance, along with appeals to public opinion and the courts couched in the language of the prevailing legal consciousness").

10. 163 U.S. 537 (1896).

11. Because of this history, I focus in this article solely on racial hierarchy as it been defined around people of African descent. I do not mean to imply in any way that racial hierarchy is only about people of African descent and "white" people, nor that it can be understood separately from other hierarchies, such as those of gender, disability, and sexuality. For discursive clarity and focus, however, I will specifically consider only how civil rights-talk affects the racial hierarchy and, in particular, its impact on the place of Americans of African descent in that hierarchy, unless otherwise appropriate to the immediate discussion.

Theory the notion that people who are disempowered by legal discourse can incrementally change the discourse by actively participating in it.

This multicultural discourse does not, however, share Critical Race Theory's passionate commitment to "rights"—the constitutional rights that so many people have historically been denied. Because such civil rights-talk, I believe, entangles us in a zero sum game that demands legal justification for redistributing a finite universe of rights, I instead propose that we focus on the process in which we are presently engaged, a process begun by civil rights-talk and the limited success of affirmative action itself. This process manifests itself most obviously in schools and workplaces, where individuals from diverse backgrounds participate in a mutually beneficial project. There, the focus on shared goals helps deflect attention away from the relative value of individuals' differences and toward the positive contributions these viewpoints bring to the shared table.

In laying out this argument, I begin, in Part I, by placing *Plessy v. Ferguson* and, especially, Justice Harlan's dissent in historical context. I show how a concept of constitutionally protected property rights that presumed a natural racial hierarchy underlay both the majority and dissenting opinions. In Part II, I discuss how the NAACP developed the notion of civil rights as reparations for the government-mandated denial of access to constitutional rights legitimized by *Plessy*. This civil rights-talk was so successful that it ultimately led to its own downfall, as the Court began to consider affirmative action cases in which the harm remedied was not actual segregation but its lingering effects. In Part III, I analyze the zero sum game that evolves out of civil rights-talk and the anti-affirmative action arguments it engenders. Finally, in Part IV, I discuss why the concept of "rights" has become ontologically meaningless and politically impaired and propose multicultural discourse as an alternative to civil rights-talk. Affirmative action, I conclude, has been our primary means of beginning the process of this discourse, but our mission should now be to nurture the seeds affirmative action has planted.

I.
Is Our Constitution Still Color-Blind?

From the inception of civil rights-talk, the color-blind Constitution has symbolized the moral imperative of using law to eradicate racial discrimination.[12] Yet even when the NAACP seized upon it as a call for the Supreme Court to enunciate a long-overdue rejection of the *Plessy* decision,

12. Stuart Scheingold has argued that all judicial declarations of rights are merely symbolic, useful only if they mobilize political action. Stuart A. Scheingold, The Politics of Rights: Lawyers, Public Policy, and Political Change 131-48 (1974). *See also* Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1991) (discussing the myth of the "Dynamic Court"); Aryeh Neier, Only Judgment: The Limits of Litigation in Social Change, 12-13, 129, 227-28 (1982) (discussing *Brown* as the turning point in the symbolic power of legal victories to mobilize

its symbolic meaning was at odds with Justice Harlan's intent in his *Plessy* dissent. Stripped of its historical context in the current affirmative action debate, the color-blind Constitution lies at the heart of civil rights-talk's limitations.[13]

A. Plessy v. Ferguson *in Historical Context*

In historical context, *Plessy v. Ferguson*[14] is simply about the property rights of citizenship and the racialized nature of those rights. Justice Harlan's point was not that individuals are equal, regardless of their race. In 1896, the belief that race was a function of biological difference was so much a part of the American consciousness that Justice Harlan need hardly have recognized it.[15] It was implicit in the language available to him for discussing race, and the constraints of that language made it difficult for him to conceive otherwise. The *Plessy* dissent was solely and consciously about *how* (and, in effect, whether) racially inferior Americans of African descent could exercise the constitutional rights they had acquired during Reconstruction.

1. The Search for Property Rights

Old master was a colonel in the Rebel army
Just before he had to run away—

---

political change); *but see* ROBIN D.G. KELLEY, RACE REBELS: CULTURE, POLITICS, AND THE BLACK WORKING CLASS (1994) (demonstrating a grassroots struggle for civil rights far antedating *Brown*).

13. Randall Kennedy has noted that "the opponents of affirmative action have stripped the historical context from the demand for race-blind law." Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1335 (1986) [hereinafter Kennedy, *Persuasion and Distrust*]. *See also* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 47 (1991) ("Whatever the validity in 1896 of Justice Harlan's comment in *Plessy*—that 'our Constitution is . . . color-blind'—the concept is inadequate to deal with today's racially stratified, culturally diverse, and economically divided nation.").

14. 163 U.S. 537 (1896).

15. *See, e.g.*, Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900-1930*, 16 LAW & HIST. REV. 63 (1998). Willrich argues that applications of eugenics during this period were not primarily concerned with race. *Id.* at 99-100. Rather, the American eugenics movement was based on "hereditarianism," the insistence that "hereditary endowment determined social structure." *Id.* at 64. However, "some Southern physicians saw [eugenic sterilization of violent criminals] as an enlightened alternative to lynching for deterring what one of them characterized as 'assaults on women and children by the animalized negroes.'" EDWARD J. LARSON, SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH 26-27 (1995) (*quoting* JOHN E. PURDON, SOCIAL SELECTION: THE EXTIRPATION OF CRIMINALITY AND HEREDITARY DISEASE, *in* TRANSACTIONS OF MASA 465 (1901), *and citing* Hunter McGuire & G. Frank Johnson, *Sexual Crimes Among Southern Negroes*, 20 VA. MED. MONTHLY 122 (1893)). *See generally* STEPHEN STEINBERG, TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY (1995) (discussing the shift from the "scientific racism" of the *Plessy* era to the "liberal social science" of the 1930s through the 1950s).

Look out the battle is a-falling
The darkies gonna occupy the land.[16]

The constitutional rights designated to Americans of African descent in the Reconstruction Amendments were designed primarily to address economic opportunity, embodied in American constitutionalism as property rights and structured to maintain white economic supremacy. In her article *Whiteness as Property*, Cheryl Harris makes clear the racial dimensions of property rights. Prior to the Reconstruction Amendments, she points out, slaves were a form of property, and their ownership a right protected in the Constitution.[17] "Because whites could not be enslaved or held as slaves, the racial line between white and Black was extremely critical; it became a line of protection and demarcation from the potential threat of commodification, and it determined the allocation of the benefits and burdens of this form of property."[18] Property rights thus offered themselves as the most convenient and powerful legal vehicle for maintaining white advantage.

Recognizing the link between property rights and the privileges of citizenship, starting in Reconstruction, many Americans of African descent focused on "economic emancipation" as the first step in acquiring all the rights of citizenship.[19] In his authoritative and prophetic *Black Reconstruction in America*, W.E.B. Du Bois charted the rise of legally mandated segregation as a response to the economic devastation of the South and a reaction of many whites to economic competition with Americans of African descent. As he explained, "[e]mancipation left the planters poor, and with no method of earning a living, except by exploiting black labor on their only remaining capital—their land. This underlying economic urge was naturally far stronger than the philanthropic, and motivated the mass of Southerners."[20]

The connection between property rights and white privilege existed among the white working class as well. Employed in industry rather than agriculture, white members of the working class during Reconstruction and the post-Reconstruction era did not necessarily aspire to land ownership, but they used white property rights to maintain their position of relative privilege in the face of competition from black workers. For example, although the Knights of Labor became the first and one of the most notable

16. THE AMERICAN SLAVE: A COMPOSITE AUTOBIOGRAPHY 161-62 (George P. Rawick ed., 1972), *reprinted in* LEON LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY 117 (1979).

17. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1718 (1993) [hereinafter Harris, *Whiteness as Property*]. *See generally* Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985) [hereinafter Bell, *Civil Rights Chronicles*].

18. Harris, *Whiteness as Property*, *supra* note 17, at 1720-21.

19. W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 1860-1880 351 (1935); *see also* RONALD TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA 131 (1993) ("What blacks wanted most of all, more than education and voting rights, was economic power.").

20. DUBOIS, *supra* note 19, at 671.

interracial labor unions in the United States during the 1880s, the national assembly strictly maintained racially segregated local assemblies and supported the exclusion of Americans of African descent from higher status, better paying jobs. Hence, in 1884, a white organizer in Richmond reported to Terence V. Powderly, a national organizer:

> You are well aware that there is yet in a large section of our country a strong objection on the part of whites to mix with the colored race. This objection may lessen as time goes on, but it cannot be gotten over all at once. As this is the only reason given by those opposed to organizing the colored men, I do hope that you will suggest some way to overcome this trouble and so arrange it that all matters of interest to both white and colored assemblies can be done through committees and that no visiting be allowed except by special invitation. As to helping the colored man in any attempt to benefit himself or to advance the cause of labor or to call on him to assist us in time of trouble, we do not object.[21]

This racial division ultimately destroyed the Knights of Labor, as the Democrats dangled the trump card of white property rights to lure working-class whites away from the labor movement.[22] As DuBois sadly noted,

> [t]he South, after the war, presented the greatest opportunity for a real national labor movement which the nation ever saw or is likely to see for many decades. Yet the labor movement, with but few exceptions, never realized the situation. It never had the intelligence or knowledge, as a whole, to see in black slavery and Reconstruction, the kernel and meaning of the labor movement in the United States.[23]

2. *Voluntary Disassociation*

Plessy v. Ferguson thus arrived at the Court during a time when racialized property rights were invoked to support racial privilege. Americans of African descent recognized that such rights were central in their struggle for full citizenship. At the same time, they expressed little desire for interracial association. The black local assemblies of the Knights of Labor organized around their own social community networks, including family,

21. Letter from Charles M. Miller to Terence V. Powderly (Dec. 20, 1884), *in* PETER RACHLEFF, BLACK LABOR IN RICHMOND, 1865-1890 117 (1989).

22. RACHLEFF, *supra* note 21, at 160-78.

23. DUBOIS, *supra* note 19, at 353.

church, and the segregated workplace.[24] As Booker T. Washington reminded Americans of African descent and promised whites in his 1895 "Atlanta Compromise" speech:

> The wisest among my race understand that the agitation of questions of social equality is the extremist folly, and that progress in the enjoyment of all the privileges that will come to us must be the result of severe and constant struggle rather than of artificial forcing. No race that has anything to contribute to the markets of the world is long in any degree ostracized. It is important and right that all privileges of the law be ours, but it is vastly more important that we be prepared for the exercises of these privileges. The opportunity to earn a dollar in a factory just now is worth infinitely more than the opportunity to spend a dollar in an opera-house.[25]

Even for those people inclined to interracial association, the horrors of lynching in the late nineteenth century made any such proposition lethally dangerous.[26] Lynch mobs used the threat (but rarely the reality) of interracial association as the justification for their extralegal means of maintaining white privilege in the face of the demands for access to property rights

24. RACHLEFF, *supra* note 21, at 123. "Central to African Americans' construction of a fully democratized notion of political discourse was the church as a foundation of the black public sphere." Elsa Barkley Brown, *Negotiating and Transforming the Public Sphere: African-American Political Life in the Transition from Slavery to Freedom*, 7 POPULAR CULTURE 107, 114 (1994).

25. BOOKER T. WASHINGTON, UP FROM SLAVERY 101-02 (William L. Andrews ed., W.W. Norton & Co. 1996). In perhaps the most famous phrase from the speech, Washington stated, "In all things that are purely social we can be as separate as the fingers, yet one as the hand in all things essential to mutual progress." *Id.* at 100. Ten years later, the nascent Niagara Movement—from which grew the NAACP—demanded, among other things, an end to segregation in public accommodations and "the right of freemen to walk, talk, and be with them that wish to be with us." W.E. BURGHARDT DU BOIS, DUSK OF DAWN: AN ESSAY TOWARD AN AUTOBIOGRAPHY OF A RACE CONCEPT 90-91 (Transaction Publishers 1995). However, even ten years after *Plessy*, this view represented an admitted and preferred minority of "the Talented Tenth," an elite and highly educated group of Americans of African descent who adhered to DuBois' "notion that elites (black as well as white) were the purifying, moving force in history." DAVID LEVERING LEWIS, W.E.B. DU BOIS: BIOGRAPHY OF A RACE 206 (1993).

26. In her novel *Beloved*, Toni Morrison imagined how a former slave perceived lynching in the postbellum years:

> Eighteen seventy-four and whitefolks were still on the loose. Whole towns wiped clean of Negroes; eighty-seven lynchings in one year alone in Kentucky; four colored schools burned to the ground; grown men whipped like children; children whipped like adults; black women raped by the crew; property taken, necks broken. He smelled skin, skin and hot blood. The skin was one thing, but human blood cooked in a lynch fire was a whole other thing. The stench stank. Stank up off the pages of the *North Star*, out of the mouths of witnesses, etched in crooked handwriting in letters delivered by hand. Detailed in documents and petitions full of *whereas* and presented to any legal body who'd read it, it stank.

TONI MORRISON, BELOVED 180 (Plume 1988).

made by Americans of African descent.[27] As W.E.B. Du Bois pointed out, lynching was, at bottom, about economics more than interracial association, though it effectively restrained the latter. "Systematic effort was made by the owners [management] to put the Negro to work, and equally determined effort by the poor whites to keep him from work which competed with them or threatened their future work and income.... A three-cornered battle ensued and increased lawless aggression."[28]

Edward L. Ayers has posited that segregation laws began to arise in the post-Reconstruction South only where it became impossible to maintain customary voluntary racial segregation. He asserts that "[i]n the countryside as well as in town, blacks and whites associated with members of their own race except in those situations when interracial association could not be avoided: work, commerce, politics, travel."[29] An increased reliance on interstate rail travel led to the "first wave of segregation laws that affected virtually the entire South in anything like a uniform way."[30] Indeed, between 1887 and 1891, nine southern states enacted railroad segregation laws, laws that "took racial division and conflict for granted but placed the blame and the burden of dispelling that conflict on the railroads."[31]

When viewed in historical context, then, the goal of segregation laws such as the one challenged in *Plessy v. Ferguson* appeared to be the maintenance of white privilege asserted as a legal property right. Segregation laws were not necessary to prevent interracial association because Americans of African descent did not recognize such association as a political expedient to full citizenship and indeed faced significant danger from it.

---

27. Ida B. Wells famously illustrated how lynching was really an extralegal means of denying Americans of African descent their legal rights:

> The latest culmination of this war against Negro progress is the substitution of mob rule for courts of justice throughout the South. Judges, juries, sheriffs, and jailors in these states are all white men, and thus makes [sic] it impossible for a Negro to escape the penalty for any crime he commits. Then whenever a black man is charged with any crime against a white person these mobs without disguise take him from the jail in broad daylight, hang, shoot or burn him as their fancy dictates. A coroner's jury renders a verdict that "The deceased came to his death at the hands of parties unknown to the jury."

CRUSADE FOR JUSTICE: THE AUTOBIOGRAPHY OF IDA B. WELLS 100 (Alfreda M. Duster ed., 1970) [hereinafter CRUSADE FOR JUSTICE]. Gail Bederman has theorized that Wells fought lynching "by producing an alternative discourse of race and manhood. Hegemonic discourses of civilization positioned African American men as unmanly savages, incapable of controlling their passions through manly will." Wells claimed that lynching illustrated "Southern men's unrestrained lust" and that "Northern white men had abrogated their manly duty to restrain vice" by ignoring it. GAIL BEDERMAN, MANLINESS & CIVILIZATION: A CULTURAL HISTORY OF RACE AND GENDER IN THE UNITED STATES, 1880-1917 59 (1995).

28. DUBOIS, *supra* note 19, at 673.

29. EDWARD L. AYERS, THE PROMISE OF THE NEW SOUTH: LIFE AFTER RECONSTRUCTION 136 (1992).

30. *Id.* at 137.

31. *Id.* at 144.

They were necessary, however, where the races had no choice but to intermingle in public spaces that were economically accessible to all. In the factories, whites could assert their property right to the best jobs, but anyone who could afford the price of a first-class train ticket became entitled to first-class travel. The economics of rail travel thus failed to maintain white supremacy.

It was this disruption of the racial order that segregation laws were designed to address. The fact that a white person might find herself sitting knee-to-knee with the person of African descent able to afford a first-class ticket merely served as an undeniable illustration that the white privilege to which her property rights—rights protected by the Constitution—entitled her was being displaced.

B. The Property Rights of Plessy

> The question is not as to the equality of the privileges enjoyed but the right of the Supreme Court to label one citizen as white and another as colored. . . .[32]

Legal challenges to railroad segregation thus became a primary site of contestation over the constitutional rights of Americans of African descent. Americans of African descent brought suit to claim the property rights protected by the Constitution, and whites strongly resisted the claim that these property rights were equal to their own.[33] Within this context, the argument in *Plessy* did not challenge the concept of racial difference, only whether property rights could be used to maintain white privilege. Both the majority opinion and the dissent equally internalized the issue of racial difference, addressing it only as a question of what a citizen became entitled to when she purchased a first-class train ticket.[34]

---

32. Brief of Petitioner, Plessy v. Ferguson, 163 U.S. 537 (1896). The brief is reprinted in its entirety in OTTO H. OLSEN, *Plessy v. Ferguson*: A Documentary Presentation (1864-1896) 98 (1967) [hereinafter Brief of Petitioner].

33. Perhaps the most famous suit other than *Plessy* was brought by Ida B. Wells. In her autobiography, Wells introduces the gendered nature of racial categorization, recounting how she took her seat in the ladies' coach of a Tennessee train on her way to work one day in 1884. When the conductor told her to move, Wells refused, "saying that the forward car was a smoker, and as I was in the ladies' car I proposed to stay. He tried to drag me out of the seat, but the moment he caught hold of my arm I fastened my teeth in the back of his hand." Eventually, it took two men to drag Wells out of the car, to the pleasure of the white passengers; "some of them even stood on the seats so that they could get a good view and continued applauding the conductor for his brave stand." CRUSADE FOR JUSTICE, *supra* note 27, at 18-19. Wells won her case in the circuit court, but the decision was reversed by the state supreme court, which ordered Wells to pay costs. *Id.* at 19-20.

34. *But see* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1297-98 (1991) (contending that *Plessy* challenged the coherence of race as a category and the actual use of that category in racial subordination).

1. The Test Case and the Argument

Plessy began as a deliberate challenge by the Citizens Committee, a local organization of Americans of African descent in New Orleans, to the mandate that, as "nonwhites," they could not sit in first-class cars even if they purchased a ticket that otherwise entitled them to do so. Their first action was to recruit Albion W. Tourgee, a well-known white advocate of racial equality.

Under Tourgee's direction, the Citizens Committee selected a test plaintiff. Homer Adolph Plessy was seven-eighths white and one-eighth black. "[T]he mixture of colored blood was not discernable in him."[35] Indeed, Plessy had to identify himself as not white to the conductor who came upon him sitting in the whites only car of the East Louisiana Railroad bound for Covington, Louisiana.[36] After identifying himself as "colored," Plessy refused to remove himself to the appropriate car, and was arrested when the train reached the next station.[37]

The fact that the Citizens Committee selected a plaintiff who could pass as white attests to the acceptance of biological difference and the focus on whether that difference could deprive Americans of African descent of their property rights. As Cheryl Harris has demonstrated, "[t]he persistence of passing is related to the historical and continuing pattern of white racial domination and economic exploitation that has given passing a certain economic logic."[38] A plaintiff who appeared white deflected attention away from the issue of association; Homer Plessy did not conjure up lynching-inflamed fears of savage African men unable to contain their desire to corrupt the purity of white women.[39] He did, however, reinforce the prevailing belief that, despite his appearance, the presence of "colored blood" in his veins made him biologically different from white passengers.

Selecting Plessy as a plaintiff also allowed Tourgee to make three arguments designed to bypass the white privilege inherent in property rights and to discuss them simply as the rights of citizenship to which Americans of African descent had become entitled during Reconstruction. First, Tourgee argued that Plessy's ability to "pass" as white was itself a property right: "the reputation of belonging to the dominant race . . . is property, in the same sense that a right of action or inheritance is property." The law, he claimed, therefore unconstitutionally granted to the railway conductor the power to deprive Plessy of his property without due process.[40] Here, Tourgee made clear the centrality of property rights in the struggle over

35. *Plessy*, 163 U.S. at 541.

36. Raphael Cassimere, Jr., Plessy*: Like as in* Plessy v. Ferguson, CRISIS, Feb./Mar. 1996, at 17.

37. For more background on the case, see generally CHARLES A. LOFGREN, THE *PLESSY* CASE: A LEGAL-HISTORICAL INTERPRETATION (1987).

38. Harris, *Whiteness as Property*, *supra* note 17, at 1713.

39. *See* BEDERMAN, *supra* note 27, at 58-59.

40. *See* Brief of Petitioner, *supra* note 32.

post-Reconstruction racial definition. Slavery no longer defined the racial hierarchy, but the concept of racial property persisted. By arguing that Plessy had a property interest in his white appearance, Tourgee implicitly accepted the existence of a racial hierarchy and the struggle to define its contemporary parameters. The value of Plessy's ticket alone was not necessarily enough to get him a seat; the added value of his white appearance was.

Tourgee's second argument was that segregation interfered with natural domestic rights, whereby people should be allowed to choose their own associations. His point was not that the races should be allowed to intermingle because that was their natural propensity. Such an assertion would fly in the face of the overriding and dominant assumption that the races were biologically different.[41] Rather, the issue was one of *who* engaged in racial categorization. According to Tourgee, it made no sense to entrust the decision to a railway conductor under threat of criminal sanctions. If appearance was not necessarily determinative of race—and here, again, Plessy's own white appearance became important—the matter of racial categorization was not one for the railroads, but for nature. Tourgee's rhetorical "Will the court hold that a single drop of African blood is sufficient to color a whole ocean of Caucasian whiteness?" thus assumes a far different meaning in historical context when compared to a likely contemporary interpretation in which race is understood as socially, not biologically, determined.[42] Tourgee's emphasis, it seems, was on the fact that biology, *not* social institutions, determined race.

Finally, and perhaps most centrally to later applications of the case, Tourgee urged that "[t]he question is not as to the equality of the privileges enjoyed but the *right of the Supreme Court to label one citizen as white and another as colored* in the common enjoyment of a public highway."[43] Certainly, a contemporary, ahistorical reading of this statement would suggest Tourgee was asserting that the Court did not have the power to recognize race at all. But that reading ignores his other two arguments and belies the fact that, at the time, the parties did not have the perspective or the language to claim that the Court could possibly avoid such recognition. As Tourgee's prior arguments illustrate, he would not, in the context of his times, question the "fact" that the races were indeed biologically different. The Court, in this view, did not have to ignore that difference.

41. *See* Willrich, *supra* note 15, at 98-99 (describing the racist strain of American eugenics).

42. As Barbara J. Fields has cautioned, "To assume, by intention or default, that race is a phenomenon outside history is to take up a position within the terrain of racialist ideology and to become its unknowing—and therefore uncontesting—victim." Barbara J. Fields, *Ideology and Race in American History*, *in* REGION, RACE, AND RECONSTRUCTION 143, 144 (J. Morgan Kousser & James M. McPherson eds., 1982). Rather, "[t]he view that race is a biological fact, a physical attribute of individuals, is *no longer* tenable." *Id.* at 149 (emphasis added).

43. Brief of Petitioner, *supra* note 32 (emphasis in original).

Rather, the issue, as Tourgee's own italics emphasize, was what role the Court could play in affixing the label of one race or another to a citizen. Because many Americans of African descent could pass, he argued; because, as citizens, they had a property right in their reputation as white people; because they had the economic wherewithal to purchase a first-class train ticket, the *government* could not deprive them of the exercise of their property rights. Racial categorization was a function of nature, not of the government, not of the Court, not of the railroads. The Court, Tourgee argued, should remain concerned with the property rights of its citizens, and because it did not have the ability to determine those property rights on the basis of race, it remained for nature, not the Constitution, to segregate the races.

2. *The Court Bows to Nature*

Both the majority opinion and Justice Harlan's dissent reflect the unquestioned "truth" that nature, not the Court, determined race. The difference between them was simply whether those differences could be articulated by the legislature and enforced by the Court. The majority disagreed with Tourgee's contention that the races' natural desire for segregation could not be enacted into law. But Justice Harlan objected that legislating natural segregation raised the danger that the legislation would get it wrong; it was best to treat citizens as citizens and let the biological differences between the races determine how they associated with each other.

The majority opinion viewed the Louisiana statute at issue simply as enforcing what nature had dictated. To allow the races to intermingle in railway cars would, the Court determined, violate the natural preferences of both. While "[t]he object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law," the Court admonished, "in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."[44] The Court thus drew a distinction between legal equality and social interaction: "If the two races are to meet upon terms of social equality, it must be the result of *natural* affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals."[45]

As to the argument that the law deprived Plessy of his property interest in the appearance of whiteness, the Court reasoned that "[i]f he be a

44. Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

45. *Id.* at 551 (emphasis added). *See also* Daniel R. Gordon, *One Hundred Years After* Plessy*: The Failure of Democracy and the Potentials for Elitist and Neutral Anti-Democracy*, 40 N.Y.L. SCH. L. REV. 641, 649 (1996) (explaining the Supreme Court's distinction between political and social equality).

white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man."[46] According to the Court, because whiteness was determined by biology, the Court could not itself grant the privileges of whiteness to Americans of African descent under the guise of property rights. Indeed, according to the majority, if "the enforced separation of the two races stamps the colored race with a badge of inferiority . . . it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[47]

In his dissent, Justice Harlan objected to the majority's contention that the state could be entrusted to legislate a natural racial hierarchy. "It is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to carry," he wrote. "It is quite another thing for government to forbid citizens of the white and black races from travelling in the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach."[48] Justice Harlan thus exposed the majority's conflation of forcing voluntary intermingling with criminalizing just such voluntary conduct. It was not for the government to criminalize what nature mandated: "What can more certainly . . . arouse a feeling of distrust between [the] races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?"[49]

A second and interrelated theme of the dissent was the distinction between race—that which nature determined—and citizenship—entitlement to the rights protected by the Constitution. Justice Harlan denied "that any legislative body or judicial tribunal may have regard to the race of citizens

46. *Plessy*, 163 U.S. at 549. As Cheryl Harris points out, this determination "protected the property interest in whiteness for all whites by subsuming even those like Plessy, who phenotypically appeared to be white, within categories that were predicated on white supremacy and race subordination." Harris, *Whiteness as Property*, *supra* note 17, at 1749.

47. *Plessy*, 163 U.S. at 551. In her book *Making All the Difference: Inclusion, Exclusion, and American Law*, Martha Minow uses a postmodern framework to explain how the *Plessy* majority was able to assert that the only inferiority imposed by the law existed in the perception of Americans of African descent themselves. *See generally* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990). She states that, by assuming racial difference was natural, the majority created its own "objective," normative point of view that rendered irrelevant the point of view of Americans of African descent. In this way, the goal of government "neutrality" actually demanded the maintenance of the status quo. *Id.* at 70. This observation applies equally to Justice Harlan's dissent, which makes the same assumption that racial difference is natural. *See* discussion, *infra* at 22-23.

48. *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting).

49. *Id.* at 560.

when the civil rights of those citizens are involved."[50] The Constitution was designed to protect such rights, not to define them.[51]

Thus, we finally come to Justice Harlan's invocation of a "color-blind Constitution" within a more complete context:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.[52]

Justice Harlan did not challenge the unchallengeable notion that a natural racial hierarchy existed. Where he parted ways with the majority was in whether it was up to the government to enforce what nature mandated.

In its historical context, then, Justice Harlan's dissent offers far less to the contemporary affirmative action debate than its frequent citation suggests. *Plessy* followed the "conventional wisdom" of its day[53] in assuming biological racial difference and a natural racial hierarchy. Both ideas have lost much, if not all, of their resonance in today's debate, when we recognize that race is a function of social construction, not biology. Yet the color-blind constitution is invoked to justify arguments on both sides of the debate over whether the government has a role in redressing the effects of thinking that presumed a natural racial hierarchy, thinking that informed both the majority opinion and Justice Harlan's dissent. Notably, the color-blind Constitution has been invoked by debaters on both sides of this question. This misapplication of the color-blind Constitution is rooted in its deliberate and timely use in the ending of segregation, but in our post-legal segregation times, it hobbles civil rights-talk.

---

50. *Id.* at 554-55.

51. *See generally* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986). Sherry claims that a modern understanding of "individual rights" embodied in the Constitution should see such rights as "abstract and universal, and. . . expected to resolve disputes without attending to the concrete attributes of the particular individuals involved." *Id.* at 546.

52. *Plessy*, 163 U.S. at 559.

53. LOFGREN, *supra* note 37, at 197. Lofgren further asserts that *Plessy* had little impact on the subsequent increase in Jim Crow legislation. *Id.* at 200-04. Whether it actually did is an argument beyond the scope of this article.

II.
A COLOR-BLIND *BROWN* AND THE RISE OF CIVIL RIGHTS-TALK

> The post-Reconstruction reaction [to the Fourteenth Amendment] was to create a body of constitutional doctrine which constricted the amendment into the narrowest possible confines of original intent and came near frustrating entirely the old Radical equalitarian and humanitarian ideal. In our own time, another Radical evolution of social-political ideology has undoubtedly brought the force and intent of the amendment with respect to race and caste far nearer to the old antislavery ideal out of which the language of the first section grew.[54]

In *Brown*, at the urging of the NAACP, the Court exposed the hegemonic construction of the racialized rights embraced by both the *Plessy* majority and dissenting opinions.[55] The *Brown* Court recognized that when the state protected a concept of property rights that maintained white supremacy it actually imposed a racial hierarchy distinct from the "natural" one.[56] In doing so, the Court shifted the inquiry from whether the state could regulate racial difference to whether reparations were due for such actions.[57]

---

54. Alfred H. Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049, 1086 (1956).

55. A number of scholars have mistakenly assumed that the legal victory in *Brown* was the catalyst for the grassroots political activities of the Civil Rights Movement. *See, e.g.*, NEIER, *supra* note 12, at 11-13 (positing a direct link between *Brown* and Martin Luther King's leadership in the Civil Rights Movement). Recent historical scholarship has demonstrated most convincingly that the Civil Rights Movement began long before *Brown* and the emergence in the national consciousness through the activities of Martin Luther King and SNCC. *See, e.g.*, CHARLES M. PAYNE, I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE (1995); and KELLEY, *supra* note 12. Here, I discuss the legal development of Justice Harlan's "color blind Constitution," *not* the heroic actions of the people whose grassroots actions also brought about change, and my focus on the Court's opinions is not meant in any way to imply that legal victories have been solely responsible for societal advances.

56. *See* Harris, *Whiteness as Property*, supra note 17, at 1750:

> *Brown I* held that, parity of resources aside, the evil of state-mandated segregation was the conveyance of a sense of unworthiness and inferiority. To its credit, the Court not only rejected the property right of whites in officially sanctioned inequality, but also refused to protect the old property interest in whiteness by not accepting the argument that the rights of whites to disassociate is a valid counterweight to the rights of Blacks to be free of subordination imposed by segregation.

57. In an influential article written five years after the *Brown* decision, Herbert Wechsler asserted that, after *Brown*, the proper inquiry in cases challenging segregation laws focused on associational right—"the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved"—and not discrimination. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959). Derrick Bell, in an equally influential article, adopted "Wechsler's search for a guiding principle in the context of associational rights" to argue that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the

Subsuming the various constitutional rights denied Americans of African descent under the concept of "civil rights," the NAACP used social scientific data to place this penumbra of constitutional rights in its contemporary context and to craft the tools by which to redress these denials. In the process, the NAACP prompted the Court to change its rights-talk from the *Plessy*-era rhetoric—that protecting property rights necessarily maintained the natural order—to civil rights-talk, a language of entitlement to reparations for government-imposed disruptions to that order.[58]

Importantly, this rhetoric resonated far beyond the Court or even the realm of purely legal discourse. Rather, civil rights-talk reflected then and continues to reflect how all people—laypersons, lawyers, judges, politicians—understand civil rights. As Michael McCann has explained, this broad view of how law interacts with a larger social discourse sees

> law as a constitutive element of social life. . . . [L]aw is understood to consist of a complex repertoire of discursive strategies and symbolic frameworks that structure ongoing social intercourse and meaning-making activity among citizens. . . . Such legal conventions . . . are inherently indeterminate, pluralistic, and contingent in actual social practice.[59]

Law, in this view, both constantly influences and is continually influenced by other social interactions, creating a legal discourse imbued with actions and understandings that determine the lived meaning of legal opinions and legislation. Although its roots lie in the *Brown* opinion, civil rights-talk reflects how law is understood within a larger social-legal discourse.

A. Hinging the Case Against Plessy v. Ferguson *on Justice Harlan's Dissent*

The NAACP launched its legal campaign to integrate the public schools in the midst of the Depression of the 1930s.[60] As in the depression of 1877-78, greater competition for jobs led to stronger assertions of white

interests of whites." Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) [hereinafter Bell, *Interest-Convergence Dilemma*].

58. Justice Marshall later suggested that this strategy was just what the NAACP had intended. Denouncing a majority opinion that saw nothing onerous in the differential treatment of people with developmental disabilities, Justice Marshall wrote: "[W]hat once was a 'natural' and 'self-evident' ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom. Compare *Plessy v. Ferguson* . . ., with *Brown v. Board of Education* . . . ." City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 466 (1985) (Marshall, J., dissenting).

59. MCCANN, *supra* note 9, at 282.

60. For a detailed account of the NAACP campaign that culminated in *Brown*, see RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *Brown v. Board of Education* and Black America's Struggle for Equality (1976).

supremacy and the white property rights supported in *Plessy*.[61] As a result, Americans of African descent renewed their efforts to overrule *Plessy* as an impediment to property rights, not because it interfered with interracial association.[62]

The NAACP directly attacked *Plessy* without asking the Court to overrule it. Nathan Ross Margold argued that one could read *Plessy* as not necessarily countenancing segregation *per se*, but only segregation that provided equal facilities. Thus, *Plessy* could be employed to litigate the issue of segregation "as now provided and administered,"[63] while cautiously side-stepping the issue of the legality of segregation itself. This approach avoided the risky proposition of baldly asking the Supreme Court to reverse itself. More importantly, it maintained the focus on property rights rather than associational ones. The issue was not whether the races could be segregated, but whether that segregation robbed Americans of African descent of their guaranteed property rights in equal facilities.

Changing social attitudes toward race also played a large role in the NAACP's successful approach in *Brown*. Starting in the 1930s, thinking about race had undergone what Stephen Steinberg calls a "paradigm shift" from "scientific racism" to "liberal social science." Although race itself was still understood as a biological fact, the "cultures" associated with race were not. In other words, "blackness" was immutable, but the pathology associated with "blackness" was a product of the social circumstances of "black" people. Racism—as opposed to race—thus became a moral issue, and the black "culture" of poverty and "underachievement" could be overcome through education and hard work. Race was thus understood to be a product of biology, while the cultural assumptions associated with it were recognized as often illegitimate value judgments.[64]

---

61. *See, e.g.*, RACHLEFF, *supra* note 21, at 187 ("If [white workers] rejected the traditional relationships of the paternalistic social hierarchy, they had to embrace new relationships of equality with their black counterparts. Few were ready to do so.").

62. The historian Lizabeth Cohen argues that during the Depression of the 1930s, Americans of African descent in Chicago forged a new sense of commercial independence as they responded to segregation and discrimination by boycotting white-owned businesses and starting their own.

> [P]articipation in mainstream commercial life made blacks feel more independent and influential as a race, not more integrated into white, middle-class society. With strict limitations on where blacks could live and work in Chicago, consumption became a major avenue through which they could assert their independence. In time, purchased items—clothing, trinkets, cars—would take on special cultural significance within black society that was often unintelligible to whites.

LIZABETH COHEN, MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO 1919-1939 154 (1990).

63. KLUGER, *supra* note 60, at 134 (quoting Nathan Ross Margold) (emphasis omitted).

64. *See* STEINBERG, *supra* note 15, at 50. Steinberg locates this shift in thinking in the 1930s—when the NAACP began its legal campaign—and finds its greatest expression in GUNNAR MYRDAL, AN AMERICAN DILEMMA (1944). According to Steinberg, Myrdal, a

The NAACP therefore successfully attacked the "equality" of various segregated graduate schools, and focused increasingly on the intangible factors of inequality in a way that would enable the Court to rule in *Brown* that segregated facilities simply could not be equal.[65] The NAACP-litigated precursors to *Brown* "so tightened the standard of equality," according to a 1953 commentator, "that racial separation in public graduate and professional schools has been, in practical effect, foreclosed."[66] The NAACP accomplished this goal without attacking the issue of racial classification itself. Rather, it focused on the separate facilities to which "blackness" entitled one.

Prior to *Brown*, then, the NAACP cases declined to challenge the proposition underlying both the majority and dissenting opinions in *Plessy*, that there existed a natural racial hierarchy based on biological difference and that the Constitution demanded only that the races receive equal government protection of their racialized rights.[67] At the same time, however, by challenging increasingly intangible inequalities in an educational context, the NAACP also capitalized on the understanding that racism was a moral issue to introduce the idea that interracial association was a necessary prerequisite to equal protection of those rights.

Scholarship on the issue of segregation and equal protection in the years before *Brown* encouraged this approach by emphasizing the role the government had played in legislating white supremacy. For example, an article published in the *Columbia Law Review* in 1950 concluded that the Fourteenth Amendment was limited in its legal scope but that, nevertheless, "equal protection deserves measure as more than a rule of law, for it

social scientist, amassed voluminous evidence showing that racism was institutionally generated but lamely concluded it was a moral, not an institutional issue, largely because he was funded by the conservative Carnegie Foundation. STEINBERG, *supra* note 15, at 35, 41-42.

65. In 1948, in the first of the successful Supreme Court cases, *Missouri* ex rel. *Gaines v. Canada*, 305 U.S. 337 (1938), the Court found that the state of Missouri failed to provide an equal law school education to a student of African descent because it did not maintain a separate law school for students of African descent within the state, but instead would pay his tuition at an out-of-state school. In *Sweatt v. Painter*, 339 U.S. 629 (1950), the Court required the admission of students of African descent to the University of Texas Law School, even though a separate law school for them existed within the state. The Court held this law school was inferior in "those qualities which are incapable of objective measurement but which make for greatness in law school." *Id.* at 634. That same year, the Court held in *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950), that the state had violated the equal protection clause by admitting a student of African descent to the state university's graduate school under conditions that restricted "his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." *Id.* at 641.

66. Case Comments, 10 WASH. & LEE L. REV. 190, 193 (1953).

67. I do not mean to imply that the NAACP attorneys believed that Americans of African descent were biologically inferior to whites. Without more evidence, it is impossible to speculate on how they accommodated the idea of biological racial difference. It would, however, be presentist and ahistorical to suppose that they understood race as a social construct, a contemporary idea introduced by postmodern theory. *See* Fields, *supra* note 42, at 152.

represents a part of a symbol, the symbol of equality."[68] Quoting Schuyler Colfax, Speaker of the House of the Thirty-ninth Congress, which enacted the Fourteenth Amendment—"I call them men, not freedmen"—the authors posed the moralistic question, "Who would say that we have not made of the Negroes of America a class apart, freedmen still?"[69]

Armed with the NAACP's victories in the graduate school cases, coupled with this shift in thinking about the role of laws in creating and maintaining a racial order, the NAACP brief in *Brown* attacked *Plessy* as allowing legislation to perpetuate an unnatural racial hierarchy. It explicitly took issue with the idea that legal segregation merely mirrored a natural racial order:

> Segregation was designed to insure inequality—to discriminate on account of race and color—and the separate but equal doctrine accommodated the Constitution to that purpose. Separate but equal is a legal fiction. There never was and never will be any separate equality. Our Constitution cannot be used to sustain ideologies and practices which we as a people abhor.[70]

That the Justices consciously applied a new, remedial meaning of "civil rights" is apparent from the memoranda circulated during the drafting of the *Brown* opinion. Justice Frankfurter, for example, wrote that "[l]aw must respond to transformation of views as well as to that of outward circumstances. The effect of changes in men's feelings for what is right and just is equally relevant in determining whether a discrimination denies the equal protection of the laws."[71] Justice Jackson objected to relying on the

68. John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 168 (1950).

69. *Id.* at 169. Similarly, the political scientist Howard Jay Graham, writing that same year, criticized what he saw as the contemporary view of equal protection without reference to its roots in antebellum abolitionism. The theory of popular sentiment, recognizing the societal beliefs that drove the drafting of the Fourteenth Amendment, he posited, "confused moral with civil and constitutional rights." Yet, despite, and perhaps in some measure because of this confusion, Graham found the theory of popular sentiment appealing. "It rests on an ethical interpretation of our national origins and history which most Americans today proudly accept as a challenge and an ideal. Its orientation is the orientation of the Supreme Court in recent years." Howard Jay Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment, Part II: Systemization, 1835-1837*, 1950 WIS. L. REV. 610, 660 (1950).

70. *See* KLUGER, *supra* note 60, at 646 (quoting the NAACP's brief in *Brown*). The brief also urged the Court to reexamine the historical evidence of the intent behind the Fourteenth Amendment: "When the [*Plessy*] Court employed the old usages, customs and traditions as the basis for determining the reasonableness of the segregation statutes designed to resubjugate the Negro to an inferior status, it nullified the acknowledged intention of the framers of the [Fourteenth] Amendment, and made a travesty of the equal protection clause." *Id.* at 646 (same). Finally, building on the integration of the armed forces and the feeling of post-war unity, the brief asserted that "[t]wentieth century America, fighting racism at home and abroad, has rejected the race views of *Plessy v. Ferguson* because we have come to the realization that such views obviously tend to preserve not the strength but the weakness of our heritage." *Id.* at 645-46 (same).

71. *Id.* at 685.

"elusive psychological and subjective factors" presented in the NAACP brief, but conceded that segregation was wrong because of the extent to which Americans of African descent had assimilated, thus rendering government-mandated racial distinctions unfair.[72]

In its unanimous decision, the Court chose to place the issue of segregation in its contemporary context, as urged by the NAACP. "We must consider public education in light of its full development and its present place in American life throughout the nation," the Court opined.[73] The Court thus enabled itself to draw upon the sociological and psychological evidence the NAACP had presented and to conclude that "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding [of the psychological damage suffered by children of African descent relegated to segregated schools] is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected."[74]

Based on contemporary understandings "that the use of racial classifications to segregate was inherently subordinating,"[75] the Court sounded the death knell for *Plessy* by holding that "[s]eparate educational facilities are inherently unequal."[76] It did not, however, overrule *Plessy*'s validation of biological racial difference. The Court's understanding of how a racial hierarchy was perpetuated was rooted in then-current understandings of racism that essentially blamed its victims by assuming that racism resulted from existing conditions, not that racism necessarily created them.[77] Indeed, these ideas were so central to the Court's, and society's, thinking, that they needed no explicit explanation.[78]

In the end, the *Brown* opinion is a reflection of its times, the expression of a legal institution poised to accept the fact that legally mandated discrimination created the very racial hierarchy that was used to justify it. The logical response to these past wrongs was to remedy them; the "civil rights-talk" of the *Brown* Court became that of reparations.[79]

---

72. *Id.* at 689-90.

73. *Brown I*, 347 U.S. at 492-93.

74. *Id.* at 494-95. The Court declined to rule on the historical roots of the Fourteenth Amendment because the evidence was "[a]t best, . . . inconclusive." *Id.* at 489.

75. Gotanda, *supra* note 13, at 47.

76. 347 U.S. at 495.

77. *See* STEINBERG, *supra* note 15, at 50-52 (discussing notions of so-called "inherent" qualities of race and genetic theories and their role in "liberal social science").

78. *See* Harris, *Whiteness as Property*, *supra* note 17, at 1753 ("[T]he status quo of substantive disadvantage was ratified as an accepted and acceptable base line.").

79. Many legal scholars have criticized the Court's determination, in *Brown II*, that desegregation proceed "with all deliberate speed" as backing away from the Court's commitment. *See, e.g., id.* at 1755-56 ("Although the Court was unwilling to give official sanction to legalized race segregation and thus required an end to 'separate but equal,' it sought to do so in a way that would not radically disturb the settled expectations of whites that their interests—particularly the relative privilege accorded by their whiteness—would not be violated.") & n.200 ("There is some evidence to suggest that the *Brown I* decision was in

B. *The Utility of Civil Rights-Talk in the* Brown *Era*

The *Brown* Court's shift from protection of racialized property rights to a concept of remedial civil rights—its determination to repair the damage created by the "separate but equal" doctrine on children's "hearts and minds"[80]—is not as radical as one might assume. Americans of African descent had agitated for an end to the disadvantages of segregation since the time segregation laws had been enacted.[81] World War II brought with it a new perception of the United States as a world leader, and the integration of the armed forces—due in large part to A. Philip Randolph's fierce grassroots campaign[82]—at least symbolically held out the promise that Americans of African descent shared in that position. As a world leader fighting the "Communist threat," the United States government also had reason to exhibit its democratic values, especially to developing nations.[83] The *amicus* briefs filed by the Department of Justice further noted that Jim Crow segregation handicapped U.S. foreign policy in the nation's competition with the Soviet Union for influence in Africa.[84]

This change in perspective allowed the Court to apply what Neil Gotanda has termed a "historical" concept of race. Under this rubric, "heightened judicial review should be applied to all restrictions that curtail the civil rights of a racial group."[85] Gotanda contrasts this concept of "historical-race" with the *Plessy* Court's application of "formal-race," the idea "that use of any racial classification is subject to strict scrutiny without reference to historical or social context."[86] In other words, contemporary circumstances enabled the *Brown* Court to recognize that legally mandated

---

part a reaction to the Court's reluctance to involve itself in a seemingly endless inquiry into whether a particular set of circumstances was 'equal.'" (internal citations omitted)). The fact remains that, regardless of the Court's ultimate commitment to desegregation, the concept of rights that it invoked—the "civil rights-talk" that it spoke—was remedial. In the parlance of legal consciousness, the subsequent inaction of the Court does not alter the meaning civil rights took on.

80. *Brown I*, 347 U.S. at 494.

81. *See, e.g.*, EVELYN BROOKS HIGGINBOTHAM, RIGHTEOUS DISCONTENT: THE WOMEN'S MOVEMENT IN THE BLACK BAPTIST CHURCH, 1880-1920 (1993); NEIL R. MCMILLEN, DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW (1989); JOHN DITTMER, BLACK GEORGIA IN THE PROGRESSIVE ERA 1900-1920 (1977).

82. *See generally* PAULA PFEFFER, A. PHILIP RANDOLPH: PIONEER OF THE CIVIL RIGHTS MOVEMENT (1990).

83. Derrick Bell makes these points—and the additional one that "the South could make the transition from a rural, plantation society to the sunbelt with all its potential and profit only when it ended its struggle to remain divided by state-sponsored segregation"—to support his argument that the *Brown* decision was made possible only by its value to whites. Bell, *Interest-Convergence Dilemma*, *supra* note 57, at 524-25.

84. *See* Mark Tushnet, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1885 (1991) (discussing an *amicus* brief filed in the restrictive covenant cases).

85. Gotanda, *supra* note 13, at 48.

86. *Id.*

segregation subordinated Americans of African descent in a way that justified and perpetuated an unnatural racial hierarchy. Importantly, race itself was still viewed as biological; the social hierarchy organized around race, however, was not. It was this historical social ordering of white privilege that the *Brown* Court addressed, not the nature of the denied constitutional rights that still presumed white privilege.

While this recognition represented a necessary and vitally important step forward in civil rights-talk, it also set up rights as a zero sum game.[87] In *Plessy*, the government had a role to play in protecting the "natural" racial order and the racialized property rights that went with it. In *Brown*, the explicit aim of the Court was to repair the damage created by *Plessy*-like "protections" of constitutional property rights; the civil rights belonging to Americans of African descent became the "right" to be free from governmental action that created a badge of inferiority. This thinking, however, questioned neither the concept of biological racial difference, nor the underlying racial order.[88] Most importantly, it did not recognize that the constitutional property rights denied Americans of African descent themselves supported white privilege.

The tension between the belief in a natural racial hierarchy and the desire to provide reparations for institutional subordination created what Derrick Bell calls the "interest-convergence dilemma." He explains that:

> The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior social status of middle and upper class whites.[89]

---

87. Several commentators have made the argument that the *Brown* decision created undue reliance on the judiciary, rather than the legislative process, to effect social change. Mary Ann Glendon, for example, argues that *Brown* led Americans to "expect too much from the Court where a wide variety of other social ills were concerned," instead of relying on political decisionmaking. MARY ANN GLENDON, RIGHTS TALK 6 (1991). Her concern echoes that of some commentators writing in *Brown*'s aftermath. For example, one commentator remarked that the decision constituted a "fiat"—effectively an act of legislation without popular support—but that it was nonetheless "heartening to persons who love freedom, who shrink from cruel prejudice and the blighting of lives, who deplore that narrowness and callousness of mind which the legalized subjugation of the Negro has reciprocally generated, by an irony of justice, in the white himself." Peter A. Carmichael, *Conscience and the Constitution*, 14:4 ANTIOCH REV. 405, 411 (1954). Similarly, another commentator characterized the opinion as a political decision to change public policy rather than neutral judging, but concluded that, in taking this approach, the Court "took a great stride towards the realization of the American ideal." John P. Roche, Plessy v. Ferguson: *Requiescat in Pace?*, 103 U. PA. L. REV. 44, 53 (1954).

88. *See* Charles Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 428-29 (1960) ("[T]he equal protection clause of the fourteenth amendment should be read as saying that the Negro race, as such, is not to be significantly disadvantaged by the laws of the states.").

89. Bell, *Interest-Convergence Dilemma*, *supra* note 57, at 523.

In other words, the remedial civil rights belonging to Americans of African descent recognized by the *Brown* Court are available only when they do not require whites to give up their claim to the constitutional rights that privilege them. *Brown* did not affect the racialism of the property rights that underlay the *Plessy* decision but rather adopted a new concept of civil rights whereby Americans of African descent were entitled to reparations for deliberate government efforts to deny them access to those property rights protected by the Constitution. As Michael McCann has noted, in past decades, this "powerful legal legacy privileging property rights and 'free' marketplace relations in liberal society [has] especially worked to restrict effective deployments of civil rights law. . . ."[90]

The appearance of Bell's interest-convergence dilemma in *Brown* in the guise of reparations-based civil rights embedded it, and the zero sum game of rights, within rights discourse.[91] The very way civil rights have been evaluated, both legally and extralegally, after *Brown* implicitly assumes that civil rights are remedial. This assumption, now implicit within rights discourse, has obviated the need to express it explicitly.[92] Once set forth in *Brown*, the concept of civil rights as reparations assumed a tautological insistence that civil rights could mean nothing else—that access to the constitutionally protected property rights they had historically been denied would bring Americans of African descent social as well as legal equality.

A zero sum game of civil rights in which constitutional rights were to be redistributed among all races thus became naturalized, a legal "truth" from which further jurisprudential "knowledge" would be derived. At the same time, the status quo racial hierarchy became the natural one, the base from which the zero sum game continues to be judged, the inviolate body of constitutional rights which may be redistributed only if a compelling reason exists to do so.[93] So was born the civil-rights talk in which the affirmative action debate has been waged.

---

90. MCCANN, *supra* note 9, at 285.

91. "Discourse about rights has become the principal language that we use in public settings to discuss weighty questions of right and wrong, but time and again it proves inadequate, or leads to a standoff of one right against the other." GLENDON, *supra* note 87, at x.

92. For example, writing recently in the area of disability discrimination law, which "was aimed at a similar historical problem and rested on a similar underlying philosophical analysis" to racial discrimination law, Norman Daniels notes that, "To some extent, antidiscrimination legislation of all kinds looks backwards. It aims to correct for the historical effects on current practices of past attitudes and practices." Norman Daniels, *Mental Disabilities, Equal Opportunity, and the ADA, in* MENTAL DISORDER, WORK DISABILITY, AND THE LAW 281, 283 (Richard J. Bonnie & John Monahan eds., 1997).

93. Cheryl Harris sees in *Brown* a similar "dialectical contradiction" in that

> it dismantled an old form of whiteness as property while simultaneously permitting its reemergence in a more subtle form. White privilege accorded as a legal right was rejected, but de facto white privilege not mandated by law remained unaddressed. In failing to clearly expose the real inequities produced by segregation,

III.
COLOR-BLIND CONSTITUTIONALISM AND THE ZERO SUM RIGHTS GAME

The limits of the civil rights-talk engendered by *Brown* came into view in the 1970s, when integration reached its logical turning point toward affirmative action.[94] As the Court addressed government-sponsored affirmative action policies, civil rights-talk itself sounded the death knell for these policies. In the Court's first affirmative action case, *Regents of University of California v. Bakke*,[95] Justice Marshall, in a dissenting opinion, carried on the banner of the color-blind Constitution he had helped create in *Brown*. In so doing, he invoked Justice Harlan's dissent, concluding that, because *Plessy* derailed this constitutional mandate by allowing racial classification, it was necessary to continue to use racial classifications to remedy the damage the Court had done.[96]

Two years later, in *Fullilove v. Klutznick*,[97] the color-blind Constitution became a weapon of affirmative action's opponents. Although the majority approved the affirmative action plan at issue there,[98] Justice Stewart, in a heated dissent, argued that the majority's approval of remedial racial classification violated the goal of a color-blind Constitution and "derailed" the equal protection clause's direction "to eliminate detrimental classifications based on race."[99] By the time Justice Scalia adopted the

---

the status quo of substantive disadvantage was ratified as an accepted and acceptable base line—a neutral state operating to the disadvantage of Blacks long after de jure segregation had ceased to do so.

Harris, *Whiteness as Property, supra* note 17, at 1753.

94. In the 1960s, some states and localities promoted integration without findings of past discrimination, see Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87, 94 (1979), signaling the maturing of *Brown*'s explicitly remedial approach into affirmative action policies. For a summary of the post-*Brown* backlash, see MINOW, *supra* note 47, at 24. The limits of *Brown*'s remedial declaration also became painfully apparent in the 1970s busing controversy. *See, e.g.*, NEIER, *supra* note 12, at 62-64. Indeed, public interest attorneys' and others' frustration over the courts' inability to enforce fully the mandate of *Brown* generated a cynical outpouring of works lamenting the futility of litigation as a catalyst for social change and urging instead that attorneys channel their energy and resources into direct political action. *See, e.g., id.*; JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978).

95. 438 U.S. 265 (1978). The Court had earlier granted *certiorari* to an affirmative action case in *De Funis v. Odegaard*, but subsequently dismissed it as moot. 416 U.S. 312 (1974). In his dissenting opinion to the dismissal, Justice Douglas stated that "[t]he Equal Protection Clause commands the elimination of racial barriers, not their creation, in order to satisfy our theory as to how society ought to be organized." *Id.* at 342.

96. *Bakke*, 438 U.S. at 401 (Marshall, J., dissenting).

97. 448 U.S. 448 (1980).

98. At issue in *Fullilove* was the federal government's minority business enterprise program, which was explicitly directed toward remedying identified past discrimination by the very entities arguably disadvantaged by it. *Id.* at 453.

99. *Id.* at 523, 531 (Stewart, J., dissenting).

color-blind Constitution as a reason to attack the affirmative action program in *City of Richmond v. J.A. Croson Co.*,[100] the transformation was complete. As Justice Scalia wrote in his concurrence in the Court's most recent affirmative action case, *Adarand Constructors, Inc. v. Pena*,[101] "the government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."[102]

This conservative use of the color-blind Constitution to strike down affirmative action programs has erected three barriers to a rights-based justification of affirmative action that have exhausted the utility of civil rights-talk. First, it attacks the concept of reparations by refusing to distinguish between "detrimental" and "benign" discrimination and rejecting the idea of "prospective remedies." Secondly, it characterizes calls for remedial civil rights as illegitimate demands for group rights, setting up an opposition between civil rights, which explicitly recognize race, and individual rights, which, in contrast, appear race-neutral. By rhetorically deracializing individual rights, it claims victim status for the "white" individuals who "suffer" from affirmative action programs and posits potential stigmatization for the individuals affirmative action seeks to benefit. Finally, from these limitations emerges a picture of a "rights pie,"—a limited universe of rights to be sliced up, certain pieces going to certain racial groups. Under this view, the concept of individual rights leaves no room for diversity, for sharing the pie instead of dividing it up, for making it large enough to feed everyone.

A. The "Distributive" Justice of "Benign" Discrimination

The great power of the NAACP's campaign to end legal segregation lay in its ability to expose how the government had played a role in perpetuating the very inequalities used to justify continued segregation. The problem of this identifiable source of racial oppression was so great that destroying that source constituted a tremendous triumph, a breakthrough of incredible resonance. At the same time, this approach relied on two

100. 488 U.S. 469, 521 (1989) (Scalia, J., concurring).

101. 515 U.S. 200 (1995). The Court granted *certiorari* to another affirmative action case in 1997. Piscataway Township Bd. of Educ. v. Taxman, 519 U.S. 1089 (1997) ("Piscataway II"). That case was brought under Title VII of the Civil Rights Act of 1964, and did not assert a Fourteenth Amendment equal protection claim. Taxman v. Board of Educ. of Township of Piscataway, 91 F.3d 1547, 1552 n.5 (3d Cir. 1996) (en banc) ("Piscataway I"). The Court subsequently dismissed the case pursuant to Rule 46.1 of the Supreme Court Rules, Piscataway Township Bd. of Educ. v. Taxman, 522 U.S. 1010 (1997), after the parties agreed to a settlement. *See* NAT'L L.J., Dec. 1, 1997, at A8 (describing the terms of settlement). It is worth noting that the Third Circuit opinion from which the appeal proceeded stated that "[t]he diversity interest the Court found sufficient under the Constitution to support a racial classification [in *Metro Broadcasting Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990)] had nothing whatsoever to do with the concerns that underlie Title VII." *Piscataway I*, 91 F.3d at 1562-63.

102. *Adarand*, 515 U.S. at 239 (Scalia, J., concurring).

interrelated assumptions that would later prove troubling: first, that identifiable government racism was largely, if not solely, responsible for racial oppression,[103] and, second, that the problem lay only in the denial of equal access to constitutionally protected rights—the property rights at issue in *Plessy*—not in the inherent racialism of those rights themselves.[104]

These limitations surfaced in the shift from challenging legal segregation to defending affirmative action. Like the legal challenges to segregation laws, "[a]ffirmative-action programs . . . were designed to remedy a segregationist view of equality in which positivistic categories of race reigned supreme."[105] Under this view, Justice Brennan explained in his *Bakke* dissent, unlike racial distinctions made under the "separate but equal" doctrine, which turned equal protection "against those whom it was intended to set free,"[106] benign racial classifications are in fact necessary to fulfill the mandate of the equal protection clause. He thus invoked a color-blind Constitution as a laudable goal, but one impossible in light of the reality of societal racial oppression.[107]

The problem is that opponents see "no logical stopping point" in the reparations-based justification for affirmative action.[108] What began as a plurality belief in *Bakke* that there was no way to measure whether a racial

---

103. This is not to say that the NAACP and others did not believe that racism—simple racial hatred—would not exist but for legal segregation (although this theme plays some part in the NAACP briefs). The NAACP sought a legal solution for institutionalized oppression, and hoped that this solution would affect the "hearts and minds" of America's children, and, indeed, its adults as well. *See generally* KLUGER, *supra* note 60. (The reference to "heart and minds" is from *Brown I*, 347 U.S. at 494.)

104. *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 101 (1992) ("Affirmative action policies intended to compensate for the inadequacy of civil rights laws, are challenged by the claim that the mere presence of the civil rights statutes guarantees racial equality.") [hereinafter BELL, FACES AT THE BOTTOM].

105. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 110 (1991). *See also* Fullilove v. Klutznick, 448 U.S. 448, 516 (1980) ("The time cannot come too soon when no governmental decision will be based upon the immutable characteristics of pigmentation or origin. But in our quest to achieve a society free from racial classification, we cannot ignore the claims of those who still suffer from the effects of identifiable discrimination.").

106. Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 326-27 (Brennan, J., dissenting).

107. Brennan wrote:

> Against this background [of legally mandated segregation beginning with *Plessy* and ending with *Brown*], claims that the law must be "colorblind" 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 cannot . . . let color blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens

Id. at 327.

108. *See* Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 432 (1988). *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 527 (1989) (Scalia, J., concurring) ("[E]ven '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.").

classification was truly "benign"[109] became the majority position in *Adarand* that "[t]o pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred."[110] Affirmative action's opponents thus force proponents of "benign," or remedial, governmental recognition of race to distinguish such policies from detrimental governmental race-consciousness.

In *Brown*'s time, the distinction was apparent: detrimental racial classifications turned equal protection "against those whom it was intended to set free," while benign racial classifications ensured equal access to constitutionally protected rights.[111] With this distinction came the understanding that, by ensuring equal access to the rights guaranteed by the Constitution, benign race-consciousness ultimately remedied more than just particular discriminatory laws, but other historical forms of racial oppression as well.[112]

This position forces a contextual analysis of affirmative action programs for which traditional legal analysis presumes a "corrective" justice approach. As Martha Minow frames it, the relevant question becomes "against what backdrop of institutional practices was the affirmative action plan adopted?"[113] In other words, the relevant issue becomes whether the program is designed to remedy the deliberate denial of access to constitutional rights for certain racial groups.[114] Affirmative action does not claim

109. *Bakke*, 438 U.S. at 298.

110. *Adarand*, 515 U.S. at 239 (Scalia, J., concurring). *See also* Metro Broadcasting, Inc. v. Federal Communications Comm'n, 497 U.S. 547, 609 (1990) (O'Connor, J., dissenting) ("'Benign racial classification' is a contradiction in terms. Governmental distinctions among citizens based on race or ethnicity, even in the rare circumstances permitted by our cases, exact costs and carry with them substantial dangers. To the person denied an opportunity or right based on race, the classification is hardly benign."); *id.* at 634-35 (Kennedy, J., dissenting) ("[A] fundamental error of the *Plessy* Court was its similar confidence in its ability to identify 'benign' discrimination.").

111. *See Bakke*, 438 U.S. at 326-27 (Brennan, J., dissenting).

112. Neil Gotanda has termed this understanding "historical-race." He explains that "[h]istorical-race embodies past and continuing racial subordination, and is the meaning of race that the Court contemplates when it applies 'strict scrutiny' to racially disadvantaging government conduct. The state's use of racial categories is regarded as so closely linked to illegitimate racial subordination that it is automatically judicially suspect." Gotanda, *supra* note 13, at 7. He contrasts it with "formal-race," "socially constructed formal categories . . . unrelated to ability, disadvantage, or moral culpability." *Id.* Gotanda views Justice Harlan's *Plessy* dissent as "a peculiar mix of historical-race and formal-race." *Id.* at 39.

113. MINOW, *supra* note 47, at 385.

114. Under the traditional view of "corrective justice," "compensation should be paid to the one harmed and . . . it should be paid by the one who caused the harm." RONALD J. FISCUS, THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION 9 (Stephen L. Wasby ed., 1992); *see also* Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 865 (1995) ("The paradigm of corrective justice involves an identifiable tortfeasor compensating an identifiable victim for injuries that a court can clearly attribute to that tortfeasor's illegal behavior."). Brest and Oshige suggest a "justice-related rationale[ ]" for affirmative action in which "[a] group is a candidate for inclusion if (1) it is significantly and

harm by particular individuals or institutions but rather a history of racial oppression; in rights-discourse, however, the oppressive racial order cannot stem from rights themselves, and therefore must flow from individuals' or institutions' historical practices.[115]

A corrective justice approach that measures both the rights of the "victims" and those of the "perpetrators" thus demands a strong showing of culpability. In turn, culpability appears only when historical discrimination has an identifiable source—either an individual or an institution—and is recent enough to justify "punishing" its perpetrators.[116] It presents a further problem in "the balancing of historical experiences," which demands a level of "compensation" commensurate with the group's historical oppression.[117] Finally, the historical limitation of a rights discourse that demands the identification of individual or institutional racism is of particular moment now, when social scientists debate whether people are still in fact institutionally disadvantaged because of their race or are instead in the process of attaining their unfettered position in American society.[118]

The proposed solution to overcoming this historical problem of corrective justice has been to recharacterize affirmative action as "distributive" justice.[119] In contrast to "corrective" justice, which demands the identification of specific victims and victimizers, "distributive" justice "is indifferent

intractably disadvantaged, (2) (for some theorists) this status is largely the result of discrimination against the group, and (3) if affirmative action will help ameliorate the group's disadvantaged status." *Id.* at 873.

115. "For people who don't believe that there is such a thing as institutional racism, statements alleging oppression sound like personal attacks, declarations of war." WILLIAMS, *supra* note 105, at 102.

116. Such a demand underlies the Court's opinion in *Croson* that "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1990).

117. *See* Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1321 (1986); *see also* Richard A. Posner, *The* Bakke *Case and the Future of "Affirmative Action,"* 67 CAL. L. REV. 171, 176 (1979) ("The four groups singled out for preferential treatment by the Davis medical school are not the only groups that have been discriminated against in this country.").

118. *See, e.g.*, STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE (1997), and the many newspaper editorials it spawned.

119. The Court similarly endorsed "prospective" remedies in *Metro Broadcasting*, "even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination." Metro Broadcasting, Inc., v. Federal Communications Comm'n, 497 U.S. 547, 564 (1990). *See also* Adarand Constructors, Inc., v. Pena, 515 U.S. 200, 269 (1995) (Souter, J., dissenting) ("The Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination."); *Croson*, 488 U.S. at 551 (Marshall, J., dissenting) ("A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism."). Sheila Foster has somewhat imprecisely identified the Court's advocacy of prospective remedies in *Metro Broadcasting*

to how an individual's subordinate status came about—whether it is the result of happenstance, discrimination, or cultural maladaptation to post-industrial American society."[120]

Cheryl Harris explains that "a distributive justice framework does not focus primarily on guilt and innocence, but rather on entitlement and fairness. Thus, distributive justice as a matter of equal protection requires that individuals receive that share of the benefits they would have secured in the absence of racism."[121] Yet, in arguing that "doctrine and legal discourse [should] be directed toward just distributions and rights rather than punishment or absolution and wrongs,"[122] Harris fails to grapple with her own powerful illustration of just how deeply racialized the rights she seeks to redistribute are. As she recognizes, "[w]hiteness as property is derived from deep historical roots of systematic white supremacy that has given rise to definitions of group identity predicated on the racial subordination of the 'other,' and that has reified expectations of continued white privilege."[123] A stronger justification than distributive justice—a reliance on difficult-to-define "entitlement and fairness"—is needed to overcome such "reified expectations."

Furthermore, distributive justice reinforces the zero sum game and its accompanying assumption of white privilege by emphasizing the fact that there are only so many "rights" to go around—that "[a]s part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy."[124] There are limited spaces available in a medical school class,[125] limited government contracts open to bidding,[126] and limited jobs in a tight economy. Despite

---

as the "forward-looking rationale [of] diversity. . . ." Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 WIS. L. REV. 105, 108 [hereinafter Foster, *Difference and Equality*].

120. Brest & Oshige, *supra* note 114, at 867.

121. Harris, *Whiteness as Property*, *supra* note 17, at 1783.

122. *Id.* at 1784.

123. *Id.* at 1784 (footnotes omitted). Harris finally defends affirmative action as "a principle . . . based on a theory of rights and equality" and claims that "[a]ffirmative action *might* challenge the notion of property and identity as the unrestricted right to exclude." *Id.* at 1789 (emphasis added).

124. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 280-81 (1986) (Powell, J.). *See also* MCCANN, *supra* note 9, at 7 ("Among the most important of such legal conventions are discourses regarding basic *rights* that designate the proper distribution of social burdens and benefits among citizens.") (emphasis in original); Greenawalt, *supra* note 94, at 87 (asserting that affirmative action conflict arose "when individual blacks and members of other minority groups began to be given benefits at the expense of whites who, apart from race, would have had a superior claim to enjoy them. . . .").

125. *See, e.g.,* Regents of Univ. of Calif. v. Bakke, 438 U.S. 265 (1978).

126. *See, e.g.,* Adarand Constructors, Inc., v. Pena, 515 U.S. 200 (1995); Fullilove v. Klutznick, 448 U.S. 448 (1980).

the fact that no one has a legal "right" to any of these things, the perception becomes one of competing rights, a fight for who gets to keep their "rights" and who must give them up.[127]

B. The Victimization of the Victims and the Victimizers

The premise of civil rights-talk is that the equal protection clause should be used to eradicate barriers to equal enjoyment of constitutionally guaranteed rights. Yet opponents of affirmative action use these same constitutionally guaranteed rights as a reason for rejecting race-based remedies.[128] In the age of *Plessy*, rights were considered naturally racially ordered,[129] but in contemporary times, relying on traditional Enlightenment liberalism strips both rights and their uses of any substantive racial considerations.[130] If we are all entitled to some rights, if race is meaningless in assigning those rights, the argument goes, then the government may not recognize race in any way, even a corrective one.[131] This focus on the deracialized individual denies claims to group rights based on race and argues that recognizing race in affirmative action plans merely stigmatizes their beneficiaries while victimizing innocent whites.[132]

---

127. Aryeh Neier apparently seeks to overcome this and other objections to distributive justice by proposing that the courts may legitimately engage in it when some compelling principle of traditional corrective justice justifies it and the court's action ensures the proper functioning of the pluralist democratic order. *See* NEIER, *supra* note 12, at 236. At bottom, his solution depends on a profoundly structuralist faith in institutional change, for it assumes that judicial actions may correct the racial hegemony perpetuated by the political ones.

128. *See, e.g.,* Robert G. Dixon, Jr., Bakke: *A Constitutional Analysis*, 67 CAL. L. REV. 69, 85 (1979) ("[T]he function of law, specifically constitutional law, is to protect individuals, as individuals, against the destruction of discrimination at the hand of the state. And that protection is given even when the oppressive action is simply a shortcut to a perceived social good.").

129. *See* discussion, *supra* at Section I.A. & n.15.

130. Suzanna Sherry has outlined how liberal individualism evolved in "a constitutional structure designed to withstand and cater to [the] baser aspects [of human nature]." Sherry, *supra* note 51, at 559. Sherry contends that the modern paradigm of individual rights "must . . . encompass a system of abstract rules that recognize both the priority of the individual and the likelihood that diversity will engender dispute." *Id.* at 546. For a historical discussion of how the Constitution is based on liberal concepts of individual rights rather than the classical republicanism that characterized the revolutionary period, see generally GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969).

131. "Thus the critic of affirmative action programs is able to concede that racism is a greater enemy than racialism, and yet point as well to the risks involved in perpetuating racialism." Carter, *supra* note 108, at 434-35. Patricia Williams adds that "most of us devoutly wish this to be a colorblind society, in which removing the words 'black' and 'white' from our vocabulary would render the world, in a miraculous flash, free of all division. On the other hand, real life isn't that simple." WILLIAMS, *supra* note 105, at 83.

132. To the contention that individual rights trump group identity, advocates of identity politics counter that "history and context determine the utility of identity politics." Crenshaw, *supra* note 34, at 1299. Similarly, saying that race is socially constructed without accounting for the society that constructed it sidesteps the imperative of postmodernist observations about race. The fact that race has no biological or natural meaning compels the

1. Victimization

The most obvious outgrowth of the use of individual rights to counter demands for affirmative action is the focus on the rights of the "victims" of affirmative action—that is, "white" people.[133] If the rights sought through affirmative action are the very ones that the white majority already enjoys, then the rights given up by the white majority in the zero sum game assume as much priority as the rights sought by the beneficiaries of affirmative action.[134] As Morris Abram, a self-described "participa[nt] in the civil rights struggle" has put it, "[c]ivil rights belong to all Americans; they are too important to be captured by a set of special interest groups."[135]

In his article "When Victims Happen to Be Black," Stephen Carter debunks this position by demonstrating how the perception of victimhood itself is socially constructed so that only whites appear to be victims.[136]

---

conclusion that social forces created it; social forces must therefore be employed to deconstruct it. *See* Harris, *Whiteness as Property*, *supra* note 17, at 1761 ("The law's approach to group identity reproduces subordination, in the past through 'race-ing' a group—that is, by assigning a racial identity that equated with inferior status, and in the present by erasing racial group identity.").

133. Justice Scalia has written:

> 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.

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 528 (1989) (Scalia, J., concurring). *See also* Fullilove v. Klutznick, 448 U.S. 448, 528 (1980) (Scalia, J., concurring) (arguing that to be constitutionally valid, affirmative action plans must be enacted "in response to identified discrimination" and must be based on "findings that demonstrate the existence of illegal discrimination"); Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 298 (1978) (plurality opinion) (objecting to the unfairness of forcing an individual who has not personally participated in past discrimination to bear the burden of remedying it).

134. Writing about *Bakke*, Derrick Bell illustrates the weakness in this reasoning. He explains that "[t]he Court introduced . . . an artificial and inappropriate parity in its reasoning—that is, that blacks and whites applying to medical school have always been treated equally in a state that has never practiced racial discrimination—and thus chose to ignore historical patterns, contemporary statistics, and flexible reasoning. It could then self-righteously deplore giving special privileges to any race in the admissions process." BELL, FACES AT THE BOTTOM, *supra* note 104, at 102-03.

135. Abram, *supra* note 117, at 1326. Abram uses the term "civil rights" as opposed to individual rights, but the thrust of this comment is that affirmative action negates individual merit by focusing on group-based goals. *See also* Adarand Constructors Co. v. Pena, 515 U.S. 200, 231 (1995) (taking the position that affirmative action programs undermine the equal protection clause's protection of individual rights in favor of group rights); *Croson*, 488 U.S. at 505-06 ("To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged person. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.").

136. Carter, *supra* note 108, at 421 ("The meaning of victimhood in our society is constructed by a dominant culture that often displays difficulty conceiving that important harms can come in varieties unlikely to afflict its members.").

This process results from what he calls "bilateral individualism," the "invent[ion] [of] a reality in which the only victims are those who have suffered at the hands of transgressors, and in which any sanctions should be directed toward deterring or punishing those transgressors."[137] This theory, Carter explains

> denies that all black people are "victims" in any legally or morally cognizable sense. Whether or not there are any present day legacies of racism past, the bilateral individualist construction of victimhood denies that anyone holds a legal responsibility to alleviate them. A victim is someone injured by someone else, and only the someone else, not the society as a whole, deserves punishment.[138]

The result, he concludes, is that

> [i]n contemporary America, the victims of racialist government programs happen to be white. Every act of victimization requires a transgressor, and for the white male victims of racially conscious affirmative action, the political leadership tracks down the transgressors with alacrity. And who do the transgressors turn out to be? Why, the "less qualified" individuals who have taken the spaces rightly belonging to the excluded white males. In the upside-down world of bilateral individualism, the transgressors are victims who happen to be black.[139]

Yet deconstructing victimhood does not eliminate the basic problem of the zero sum game. Even if racially oppressed groups are seen as victims, the argument remains that they must be compensated without victimizing "innocent" whites. If the point of affirmative action is to guarantee previously disenfranchised groups access to individual rights, infringing on those same rights held by others requires some justification.

In a talk about affirmative action at the 1997 American Studies Association conference, Mari Matsuda wondered why—and *how*—"angry white men" believe that "there's nothing left for them."[140] The answer becomes apparent when one recognizes the zero sum game of rights discourse. Affirmative action is about access to individual rights that are themselves racialized and part of a hegemonic order. To break down that hegemonic order "something" must be taken away from the people it privileges—the privilege guaranteed by those very individual rights.

---

137. *Id.*

138. *Id.* at 435.

139. *Id.* at 438-39.

140. Mari Matsuda, Remarks at the Panel "We Won't Go Back": Public Talk About Affirmative Action, American Studies Association/Canadian Association for American Studies, Going Public: Defining Public Culture(s) in the Americas, Washington, D.C. (Oct. 31, 1997) (notes on file with the author).

2. Stigmatization

Even advocates of affirmative action recognize the inherent danger in naming and acting upon difference based upon a crude assessment of race. For example, Martha Minow writes that "[a]lthough racial identification under federal civil rights statutes provides a means of legal redress, it can also recreate stigmatizing associations, thereby stimulating prejudice and the punitive consequences of difference."[141]

The stereotyping/stigmatization argument is two-fold. The simpler contention is that "[r]everse discrimination . . . involves the use of race as a simple, convenient proxy for individual characteristics that may be costly to measure directly."[142] The more complicated assertion is, as Minow argues, that using the very socially constructed categories of racial difference that create inequality necessarily reproduces it by enhancing their utility.[143]

A number of responses to these arguments present themselves. First, as Justice Brennan set out in his *Bakke* dissent, affirmative action may gain formerly excluded racial groups admission into a school, job, or other position, but it does not alter the expectations that they perform on a satisfactory level once they have been admitted.[144] Indeed, such "visible competence of minority group members may reduce outsiders' negative stereotypes and reinforce positive ones about the group as a whole."[145]

---

141. MINOW, *supra* note 47, at 45. Minow's solution is to dismantle the assumption that difference is stigmatizing and that equality should be premised on sameness. *Id.* at 50. In an examination of *Metro Broadcasting*, Samuel L. Starks also addresses the stigmatization claim. Providing evidence that Americans of African descent themselves supported affirmative action, he posits that "the stigma that results from affirmative action comes not from the use of racial preferences but from the deep-seated racial views and stereotypes that are triggered by the preferences." Samuel L. Starks, *Understanding Government Affirmative Action and* Metro Broadcasting, Inc., 1992 DUKE L.J. 933, 964-65 (1992).

142. Posner, *supra* note 117, at 177. *See also* Metro Broadcasting, Inc., v. Federal Communications Comm'n, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) ("Social scientists may debate how people's thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think.").

143.The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution to the first problem that aggravates the second is no solution at all.

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 519 (1990) (Scalia, J., concurring). *See also* Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 298 (1978) (plurality opinion) (stating that race-based affirmative action programs reinforce "common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth"). Patricia Williams responds that, "Blacks, for so many generations deprived of jobs based on the color of our skin, are now told that we ought to find it demeaning to be hired, based on the color of our skin. Such is the silliness of simplistic either-or inversions as remedies to complex problems." WILLIAMS, *supra* note 105, at 48.

144. *Bakke*, 438 U.S. at 374 (Brennan, J., dissenting).

145. Brest & Oshige, *supra* note 114, at 871.

Randall Kennedy makes the additional point that "the uncertain extent to which affirmative action diminishes the accomplishments of blacks must be balanced against the stigmatization that occurs when blacks are virtually absent from important institutions in the society."[146]

The more entrenched problem is how the focus on who is harmed the most or the least—whose rights are important enough to diminish someone else's—makes it difficult to move beyond the zero sum game and to take into account how affirmative action may benefit everyone, regardless of their race or historical privilege. Because civil rights-talk assumes that the problem to be remedied is the denial of rights, not the rights themselves, the issue becomes framed as how to justify taking rights away from whites and redistributing them to everyone else.[147]

C. "Rights Pie"

Rights discourse thus leaves affirmative action like a pie to be divided, not shared or expanded. With the "rights pie" as the starting point for the debate, its present form becomes a position of presumed neutrality, and any movement from the status quo must be justified. This demand for justification leaves no room to examine the shared benefits of affirmative action separate from the concept of how it ensures individuals' "rights."

The status quo "neutrality" position leads to the argument that affirmative action violates our heritage of awarding merit, not birthright. Morris Abram takes this stance in arguing that

> the mere fact that some meritocratic devices have the result of excluding proportionally higher numbers of minorities does not in itself demonstrate that minorities are not getting a fair shake. And the fair shake principle, unlike the norm of proportional representation, is perfectly consistent with our meritocratic view of the relevant differences between individuals. . . .[148]

In direct response to this contention, Randall Kennedy counters that "many black beneficiaries of affirmative action view claims of meritocracy with skepticism" because of the "political" nature of merit, its malleability based on "the perceived needs of society."[149]

---

146. Kennedy, *Persuasion and Distrust*, *supra* note 13, at 1331.

147. In essence, the issue is framed as one of "quotas": "The quota rhetoric presents a stark choice: any acknowledgement of race will lead us over the edge into racism." John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 320 (1994).

148. Abram, *supra* note 117, at 1316.

149. Kennedy, *Persuasion and Distrust*, *supra* note 13, at 1332-33. As Duncan Kennedy has observed, "the intense fundamentalist preoccupation with stereotyping is . . . closely tied to what strikes me as the fetishizing of 'individual merit.'" Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 737 [hereinafter Kennedy, *Cultural Pluralist*].

In other words, merit is merely a means of maintaining white privilege, the status quo from which it is measured. As Richard Delgado explains, "Merit is what the victors impose. . . . Those in power always make that which they do best the standard of merit."[150] He goes on to argue that standards of merit disregard "morally relevant data, particularly events that happened in the past," and therefore prevent distributive justice or reparations.[151]

Thus, "[g]overnmental neutrality may freeze in place the past consequences of differences."[152] As Patricia Williams points out, "neutrality" ultimately becomes invisibility for those people left out of the "neutral" base.[153] In the end, "obsession with merit funnels emotional energy into generating distinctions that will justify the claim that differences in people's rewards and punishments are deserved rather than arbitrary"[154] and will result in the maintenance of a hegemonic racial order that cloaks its own distribution of privilege.

Merit, then, becomes a matter of competing rights—a tool used to protect the privileges of whiteness that, in doing so, impedes historically oppressed racial groups' access to constitutionally protected rights.[155] Affirmative action, Cheryl Harris explains, "exposes the illusion that the original or current distribution of power, property and resources is the result of 'right' and 'merit.'"[156] Yet, even as she exposes the racialism and entrenched white privilege of rights and merit, Harris advocates using affirmative action merely to "rethink[ ] rights . . . from the perspective of those whose access to [them] has been limited by their oppression."[157] Rethinking rights from within a racialist paradigm means that shifting to a nonwhite perspective requires justification because it inherently involves

150. Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1721 (1995). "[M]erit is, basically, white people's affirmative action. . . ." *Id.* at 1723.

151. *Id.* at 1724-25. "[M]erit, like most legal terms, gets applied against a background of cultural assumptions, presuppositions, understandings, and implied exceptions, most of which operate against our people." *Id.* at 1726.

152. MINOW, *supra* note 47, at 42. Against this possibility, Minow sets up the equal likelihood that "any departure from neutrality in governmental standards uses governmental power to make those differences matter and thus symbolically reinforces them." *Id.*

153. WILLIAMS, *supra* note 105, at 119 ("What the middle-class, propertied, upwardly mobile black striver must do, to accommodate a race-neutral world view, is to become an invisible black, a phantom black, by avoiding the label 'black' (it's all right to be black in this reconfigured world if you keep quiet about it).").

154. Kennedy, *Cultural Pluralist*, *supra* note 149, at 719.

155. Cheryl Harris describes how

> *Bakke*'s presumptions about "merit" were also the Court's presumptions and formed an essential part of the idea that Bakke had a specific right to be admitted to medical school based on a "universal" definition of merit. This reductive assessment of merit obscures the reality that merit is a constructed idea, not an objective fact.

Harris, *Whiteness as Property*, *supra* note 17, at 1770.

156. *Id.* at 1778.

157. *Id.* at 1779.

taking rights away from the white people they privilege in the name of distributive justice. This shifting between competing claims leaves no room for seeing the shared benefits of affirmative action and founders in the zero sum game.

D. What Is Left of Civil Rights-Talk About Affirmative Action?

Arguments in favor of affirmative action finally face defeat by the civil rights-talk used to advance them. Since *Brown*, the root of the affirmative action debate has been over how to eliminate impediments to gaining constitutionally protected individual rights for racial groups denied access to them without infringing on those rights as they now exist for the white population they empower.

The underlying assumption of this approach is that the rights themselves do not play a hegemonic role in the construction and maintenance of a racial hierarchy. Gaining access to those rights seems a logical starting point for reworking them, but because of the false race-neutrality assigned to them, gaining that access requires justifying their redistribution. The redistribution paradigm encourages charges of white victimization and nonwhite stigmatization because it does not allow for a perception of affirmative action as mutually beneficial.

By invoking civil rights to justify government recognition of race as an element critical to the provision of race-neutral individual rights, we end up in the same place as when we use individual rights as a reason to prohibit governmental distinctions based on race: with a handful of racialist rights that are primary gears in the hegemonic mechanism of racial hierarchy. The question remains, then, whether civil rights-talk is the best means of justifying affirmative action programs. The answer to that question, it seems to me, is a "no" fully conscious of the important symbolic role rights play in the struggle for racial equality. While it is difficult to give up an idea that has accomplished so much of such importance, that has radically altered ways of living for so many people, the very salience of these changes prompts the need for a new way to talk about destroying racial hegemony. Only when affirmative action ceases to be about rights can the debate bypass the zero sum game that leaves the oppressed in the position of having to justify the means to overcoming their own oppression.

IV.
AN ALTERNATIVE TO CIVIL RIGHTS-TALK

> "Rights" feels new in the mouths of most black people. It is still deliciously empowering to say. It is the magic want of visibility and invisibility, of inclusion and exclusion, of power and no

> power. The concept of rights, both positive and negative, is the marker of our citizenship, our relationship to others.[158]

I do not advocate abandoning civil rights-talk lightly. The symbolic meaning of rights has tremendous resonance, for me as well as for civil rights-talk's many advocates. Importantly, civil rights stand for what so many have been denied and what we now claim in the face of those who try to keep us down.

Yet this powerful rhetoric plays an equal role in conservative invocations of individual rights, threatening to reduce rights-talk to substantive meaninglessness. "Rights" have taken on a multitude of different meanings for a multitude of different people precisely because of their symbolic power. They have come to derive meaning only in an oppositional sense—I have a right to something because someone else does not, or we both have a right to it either because someone else does not or because everyone does. The zero sum game provides the framework for conceptualizing rights. Everything becomes an entitlement, and distinctions blur between individual rights, constitutional rights, civil rights, and just plain "rights."

In this rights discourse, the diversity and multiculturalism[159] that are the products of affirmative action beg for justification as either political rights or the ends of civil rights or the means to individual rights. Such justifications fail to do justice to the concepts. "Diversity" and "multiculturalism" become ideas that take away from the status quo, concepts that must be defended, laudable goals, but goals that must be assessed according to a cost-benefit analysis measured against the status quo of white privilege.

Stepping outside the rights discourse allows a reconceptualization of multiculturalism as a discourse, a way of shifting the power dynamics that infect our current language and way of knowing—the same language and way of knowing that inform and limit rights discourse. Multicultural discourse allows us to learn to speak in a way that refuses to perpetuate a false racial hierarchy. In this sense, multiculturalism is not a goal, but the process toward a mutually beneficial end, a discourse that allows us to understand what we have constructed and to reconstruct it according to the contemporary reality of society's diversity.

A. Rights Resonate

The reasons for continuing to employ rights rhetoric toward the goal of destabilizing the hegemonic racial order are compelling. As McCann carefully explains, rights discourse is "malleable," a contested terrain in

158. WILLIAMS, *supra* note 105, at 164.

159. Although other commentators, including those discussed below, assign their own meanings to these terms, by "diversity," I mean distinctions between people that are not defined in oppositional terms, as "difference" is; by "multiculturalism," I mean the existence of diversity as it functions within an alternative discourse to civil rights-talk.

which the very structure of the discourse—an inviolate set of "rights" belonging to all American citizens—sets certain limits on the power the dominant class gains from the hierarchy embedded in the rights paradigm.[160]

On the most basic level, then, rights discourse allows for the liberal justification of rights as a legal mechanism for achieving equality, a way of "focus[ing] on erasing *mis*characterizations of persons as inferior in behalf of an underlying belief in the rational, autonomous selfhood of all human beings . . . ."[161] Cynthia Ward explains that "liberals have attempted to see through [socially constructed] differences to the essential humanity of (for example) women, racial minorities, and handicapped persons."[162] She argues that rights are vital because they are grounded in a liberal understanding of essential human sameness that accords all human beings entitlement to respect and personal autonomy.[163]

While Critical Race theorists reject the idea that we can embrace sameness as the basis for rights because of its white-centered definition,[164] they emphatically have "not abandoned the fundamental political goal of traditional civil rights scholarship" and continue to believe in "the efficacy of 'rights talk.'"[165] Angela Harris describes this aspect of Critical Race Theory as "modernist" (as opposed to its postmodernist understanding of

160. MCCANN, *supra* note 9, at 283.

161. Cynthia V. Ward, *On Difference and Equality*, 3 LEGAL THEORY 65, 88 (1997) [hereinafter Ward, *Difference and Equality*].

162. *Id.* at 73.

163. *Id.* at 98-99. The conceptual problem with Ward's defense of rights based on human "sameness" is how that "sameness" has been articulated from a particular, exclusionary perspective. The ideal of a shared sense of autonomy and entitlement to respect has great intellectual appeal, but our ability to give voice to it is constrained by a system of language and knowledge that makes it difficult to describe or utilize autonomy and respect in a non-hegemonic manner.

164. *See id.* at 92-95. Ward describes Critical Race theorists' "politics of difference" as "the idea that disadvantaged groups—most prominently racial minorities—have developed distinct methods of viewing the world and functioning within it that, as a matter of justice to those groups, must be preserved via the explicit importation into law of group rights and special treatment." *Id.* at 93.

165. Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 750 (1994) [hereinafter Harris, *Jurisprudence of Reconstruction*]. Harris recounts how Critical Race theorists broke with advocates of Critical Legal Studies over the use of rights discourse: "[A]ll [of the Critical Race theorists] rejected the yearning to go beyond rights to more direct forms of human connection, arguing that, for communities of color, 'rights talk' was an indispensable tool." *Id.* (citing Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities* Want?, 22 HARV. C.R.-C.L. L. REV. 301, 306-07 (1987) (describing rights for minorities as "invigorating cloaks of safety that unite us in a common bond"); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 357 (1987) (arguing that historical context of soldiers of color fighting for America in World War II "lends new meaning to the concept of rights"); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 432-33 (1987) (arguing that society should create more rights, not fewer) [hereinafter Williams, *Alchemical Notes*]; Kimberle W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1384-85 (1988) (describing the gains that rights talk has brought about for Americans of African descent)).

the contingent and constructed nature of race),[166] "grounded in a moral faith: that human beings are created equal and endowed with certain inalienable rights; that oppression is wrong and resistance to oppression is right; that opposing subjugation in the name of liberty, equality, and true community is the obligation of every rational person."[167] In its conscious use of civil rights-talk, she summarizes, Critical Race Theory "aims not to topple the Enlightenment, but to make its promises real."[168]

Thus, although Critical Race theorists "concede[ ] that the concept of rights is indeterminate, vague, and disutile,"[169] they also contend that rights are too important to be abandoned, especially by those who have historically been denied them. Patricia Williams illustrates:

> For blacks . . . the battle is not deconstructing rights in a world of no rights; nor of constructing statements of need, in a world of abundantly apparent need. Rather the goal is to find a political mechanism that can confront the *denial* of need. The argument that rights are disutile, even harmful, trivializes this aspect of black experience specifically, as well as that of any person or group whose vulnerability has been truly protected by rights.[170]

Rights are thus the symbol and the tool of the people who have been oppressed by their denial, a communal expression of individual worth. Mari Matsuda and Charles Lawrence tell how "[o]ur parents taught us that this struggle [for civil rights] is not just about individual advancement nor only about the advancement of one's racial group. The struggle for human dignity is for all human beings."[171]

The need answered by rights is, for people historically denied them, far more than simply a political tool or legal mechanism. Perhaps their greatest resonance—and the reason I tread so cautiously in urging that we find another way of speaking—is that they are a symbol of respect for people to whom it is long overdue. Williams' lyricism captures the depth of this resonance:

---

166. *See* discussion *infra* Section IV.B.

167. Harris, *Jurisprudence of Reconstruction*, *supra* note 165, at 754.

168. *Id.*

169. Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 900 (citing Williams, *Alchemical Notes*, *supra* note 165, at 430).

170. WILLIAMS, *supra* note 105, at 152. Cheryl Harris summarizes this need in a poem about her grandmother, who was forced to "pass" in order to take a job at a white department store to support her family:

> she walked into forbidden worlds
> impaled on the weapon of her own pale skin
> she was a sentinel
> at impromptu planning sessions
> of her own destruction. . . .

Harris, *Whiteness as Property*, *supra* note 17, at 1709.

171. CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION xv (1997). *See also* MCCANN, *supra* note 9, at 299-300.

> For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity: rights imply a respect that places one in the referential range of self and others, that elevates one's status from human body to social being. For blacks, then, the attainment of rights signifies the respectful behavior, the collective responsibility, properly owed by a society to one of its own.[172]

For these important reasons, Williams and other Critical Race theorists defend their very engagement in a discourse of rights that promises to disempower them even as they seek to loosen its hegemonic grip on American society.[173] To Williams, "the problem with rights discourse is not that the discourse is itself constricting but that it exists in a constricted referential universe."[174] "What is needed, then," she concludes, "is not the abandonment of rights language for all purposes, but an attempt to become multilingual in the semantics of evaluating rights."[175]

I share with Williams this belief that multilingualism will provide us with the means of dismantling the racial hierarchy that informs civil rights-talk. However, I part ways with her in my understanding that the very nature of the language and knowledge of rights discourse—its roots in the zero sum game—prevents us from changing civil rights-talk without abandoning it, at least temporarily.

B. Shifting the Discourse

Civil rights-talk currently consists of arguments about how to shift a preexisting universe of individual rights between different groups of people laying claim to them.[176] This way of thinking and talking about rights signals that we have reached a point where we must find a new discourse that can accommodate a true reworking of the hegemonic racial hierarchy.

Critical Race Theory recognizes the racialism of the discourse but rejects the idea that civil rights-talk has been trapped by it, becoming reproductive rather than transformative. Relying on postmodern theory to shift the inquiry from one about the nature of difference to how the legal system

172. WILLIAMS, *supra* note 105, at 153.

173. Although she does not identify as a Critical Race theorist, Martha Minow agrees that the language of rights allows those who use it to demand that attention be directed toward otherwise neglected points of view. *See* MINOW, *supra* note 47, at 389.

174. WILLIAMS, *supra* note 105, at 159.

175. *Id.* at 149.

176. *See* discussion *supra* Section III.

reproduces and reinforces it,[177] Critical Race theorists employ poststructuralist discourse theory, which "relies on a social constructionist understanding of the concepts 'language' and 'power.'"[178] Angela Harris cogently describes how poststructuralist theory informs an understanding that legal discourse itself is both produced by and reproduces the dominant, hierarchical order. "Discourse theory puts language at the center of human experience by asserting that language not only describes the world, it makes it," she explains.[179]

> In discourse theory . . . language is implemented through power relations which, in turn, are shaped by social understandings created through language. A "discourse" refers both to a system of concepts—the set of all things we can say about a particular subject—and to the relations of power that maintain the subject's existence. The project of post-structuralist theory is to tell stories

177. For an explanation of Critical Race theorists' "dual commitment" to both postmodernism and "the goals of traditional civil rights scholarship," see generally Harris, *Jurisprudence of Reconstruction*, *supra* note 165. *See also* Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1389-90 (1991) (rationalizing "linguistic pluralism" in part with "the notion of the special, sacred standing of the individual" and additionally because "[i]n telling people they must abandon their native accent, we impede their ability to participate in the democratic process").

178. Harris, *Jurisprudence of Reconstruction*, *supra* note 165, at 772. Many feminist scholars similarly "challenge[ ] the traditional notion that law is a neutral, objective, rational set of rules, unaffected in content and form by the passions and perspectives of those who possess and wield the power inherent in law and legal institutions." Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1, 10 (1992) [hereinafter Albertson Fineman, *Feminist Theory in Law*]. For example, cultural feminists—those feminist legal scholars who assume that gender differences exist, although they may disagree on the origins of those differences (*see, e.g.*, Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 41-42 (1985) [hereinafter Menkel-Meadow, *Portia in a Different Voice*])—recognize that "[m]en with power created the dominant cultural discourses—languages, symbols, disciplines, institutions—that control political, legal, economic, social, scientific, and organizational practices governing our gender-integrated adult society." Leslie Bender, *From Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1, 18 (1990). In legal discourse, Carrie Menkel-Meadow explains, "[b]ecause men have, in fact, dominated by controlling the legal system, the women's voice in law may be present, but in a male form." Menkel-Meadow, *Portia in a Different Voice*, *supra*, at 50. Feminist legal scholarship, however, has frequently come under attack for simply creating an alternative "female" discourse that replicates the racial hierarchy. *See, e.g.*, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 606-07 (1990) [hereinafter Harris, *Race and Essentialism*] ("These are the strategies of zero-sum games; and feminist essentialism, by purveying the notion that there is only one 'women's experience,' perpetuates these games."). Catharine MacKinnon has responded to these concerns by arguing that male dominance constitutes the overriding experience of all women and therefore is valid as a defining commonality. *See, e.g.*, Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM, 13, 17-18 (1991); *see also* Albertson Fineman, *Feminist Theory in Law*, *supra*, at 20 ("[S]ociety has generated, and continues to recreate and act upon, universalized, totalizing cultural representations of women and women's experiences.").

179. Harris, *Jurisprudence of Reconstruction*, *supra* note 165, at 773.

about how certain discourses emerge, shift, and submerge again.[180]

For example, in the context of rights discourse, Derrick Bell describes "contradiction closing" cases, where the Court decides in favor of civil rights litigants "if the policies they attack are so blatantly discriminatory as to shock (or at least embarrass) the public conscience."[181] "These cases serve as a shield against excesses in the exercise of white power, yet they bring about no real change in the status of blacks. . . . [They] provide[ ] blacks and liberals with the sense that the system is not so bad after all."[182]

This poststructuralist concept of discourse accounts for how the very word "rights" has lost its meaning in the zero sum struggle to control it. A hegemonic discourse endows the concept "rights" with a meaning that privileges the powerful. Critical Race theorists seek to wrest that meaning away by engaging in the same discourse, attempting to shift the power relations that define and are defined by the concept "rights."[183] But the concept itself finally collapses under the weight of this fierce struggle that neither side is about to give up.[184]

---

180. *Id.* at 774. *See also id.* at 743 :

For race-crits, racism is not only a matter of individual prejudice and everyday practice; rather, race is deeply embedded in language, perceptions, and perhaps even reason itself. In CRT's "postmodern narratives," racism is an inescapable feature of western culture, and race is always already inscribed in the most innocent and neutral-seeming concepts. Even ideas like "truth" and "justice" themselves are open to interrogations that reveal their complicity with power.

181. Bell, *Civil Rights Chronicles*, *supra* note 17, at 32.

182. *Id.* McCann, too, recognizes the limits of political mobilization based in civil rights-talk: "[T]actics of legal mobilization . . . are always limited and limiting for citizen action. Practical legal knowledge is not shapeless, boundless or arbitrary, after all. Both the supply of relevant legal strategies and 'sensible' constructions of those strategies are constrained by the specific historical context in which action takes place." MCCANN, *supra* note 9, at 283-84.

183. See MCCANN, *supra* note 9, for a thoughtful examination of how pay equity advocates attempted to use rights discourse to shift the power structure undergirding it.

184. Contributing to the disarray is the struggle over whether and how those individuals empowered by the discourse may participate in the struggle to disrupt it. For example, Richard Delgado criticizes "false empathy," when "a white believes he or she is identifying with a person of color, but in fact is doing so only in a slight, superficial way." Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 70 (1996). "[F]alse empathy," Delgado's Rodrigo Crenshaw asserts, "is worse than none at all, worse than indifference." *Id.* at 94. The only role for whites in disrupting the hegemonic legal discourse, according to Rodrigo (and, presumably, Delgado) is to become "race traitors"—identify[ing] with blacks radically and completely . . . when other whites ask for their help in reinforcing white supremacy"—or by "subversion from within"—in particular by working with "disaffected working-class whites." *Id.* at 96, 98. *See also* Cynthia V. Ward, *A Kinder, Gentler Liberalism?: Visions of Empathy in Feminist and Communitarian Literature*, 61 CHI. L. REV. 929, 955 (1994) [hereinafter Ward, *Empathy*] ("In the end, advocating political empathy is a cop-out. . . . Empathy is political Valium: it neither changes the polity nor maps out a plan for achieving change; it simply makes us less anxious about the fact of social inequality, and less determined to confront the hard questions about how, or even whether, to end it."). *But see* Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574,

Thus, as Cheryl Harris demonstrates, the hegemonic property right in whiteness becomes Bakke's assertion that he has "a specific right to be admitted to medical school."[185] Similarly, from every site of the affirmative action struggle spring "rights": the "right" to a particular job, a particular government contract, or a particular broadcasting license. In fact, no one has a vested right to any of these things, only an opportunity to be considered. The intense contestation over the concept of "rights" has finally rendered them ontologically meaningless. Once one recognizes the rendered emptiness of rights discourse, civil rights-talk stutters, stalls, and ultimately chokes.[186]

An alternative to rights discourse must circumvent this zero sum game. Following Critical Race theorists' lead by engaging in the discourse in order to consciously change it, the alternative must nevertheless rely on some justification other than rights to demand this change. In doing so, it can provide a new way of understanding the human dignity and entitlement to equal treatment that lie at the heart of Critical Race theorists' commitment to rights.

C. Constructing a Multicultural Discourse

"[T]o criticize rights-based challenges because they are limited and insufficient is inadequate without reference to more promising alternative strategies and discourses available to citizens."[187] Such a useful alternative to rights discourse must, at a minimum, articulate other ways of knowing and speaking that do not replicate the existing power structure. At the same time, in a legal context, such an alternative must rest upon some justifying legal claim. As "rights" are the legal mechanism for demanding some change in the status quo, so an alternative discourse must replace them with another tool that serves the same purpose. The alternative I propose, "multicultural discourse," provides a means of demanding change that allows those disempowered by rights discourse to speak to those whom this discourse keeps in power. At bottom, it proposes a reexamination of the process in which we are already engaged, a refocusing on the process itself, rather than on the competing poles of different individuals' rights.

1649 (1987) ("[E]mpathic narrative is part of legal discourse, and . . . empathic understanding can play a role in legal decisionmaking.").

185. Harris, *Whiteness as Property, supra* note 17, at 1770.

186. McCann offers the useful caveat that "rights are socially constructed conventions, and . . . their specific substantive content is unstable, indeterminate, and contingent over time. However, it is misleading to conclude from these premises that rights talk is an arbitrary, meaningless masquerade that carries no real practical power." MCCANN, *supra* note 9, at 297. My point is that, far from being rendered arbitrary or meaningless, rights are made more powerful and dangerous by their very lack of stable meaning.

187. *Id.* at 308.

1. Experienced Storytellers

Changing a discourse to disrupt the hierarchy embedded in it requires participation in the discourse itself, using the language while imbuing it with a different meaning.[188] As McCann explains, "hegemonic relations are consistently renegotiated through ongoing struggles between dominant and subaltern groups."[189]

> [T]he manifestations of hegemony are multiple, complex, variable, and dynamic over time and across space. "A lived hegemony is always a process," argues Raymond Williams.... [H]egemonic power has no single source or center; nor does it uniformly sustain any single axis of class or other hierarchy. Moreover, hegemony is never passive or complete, but always is contestable and contested at various points. "It has continually to be renewed, recreated, changed and modified. It is also continually resisted, limited, altered, challenged by pressures not at all its own," notes Williams.[190]

The poststructuralist tenets of Critical Race Theory exploit precisely this possibility by using a narrative form that allows its advocates to speak with voices otherwise silenced.[191] "This kind of storytelling emphasizes the

188. It therefore must do more than Mary Ann Glendon's suggestion that we simply shift from rights-discourse to political discourse without examining the power dynamics of the discourses themselves. *See* GLENDON, *supra* note 87, at x ("Our anemic political discourse does help to solve a communication problem arising out of our diversity. But abandoning the effort to explain, inform, justify and translate has higher costs in the realm of politics than in popular speech."). Glendon recognizes that "we regularly overlook the effects of laws and policies upon the environments within which sociality flourishes, and the settings upon which individuals depend for their full and free development," *id.* at 75, but herself overlooks the hegemonic and racialized settings in which those laws and policies are constructed.

189. MCCANN, *supra* note 9, at 306.

190. *Id.* (quoting RAYMOND WILLIAMS, MARXISM AND LITERATURE 112 (1977)).

191. *See* Angela P. Harris, *Race and Essentialism*, *supra* note 178, at 615 ("In order to energize legal theory, we need to subvert it with narratives and stories, accounts of the particular, the different, and the hitherto silenced."); Harris, *Jurisprudence of Reconstruction*, *supra* note 165, at 756 ("Legal storytelling by outsiders often follows a postmodernist narrative."); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 543 ("The voice and vision reflected in [the minority female legal scholar's] work should contain something of the essence of the culture that she has lived and learned...."). Angela Harris describes the criticism under which legal storytelling has fallen. *See* Harris, *Jurisprudence of Reconstruction*, *supra* note 165, at 756 (citing Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 819-30 (1993)) ("Storytelling, they insist, must be confined within modernist narrative: it must be 'legal,' it must constitute 'scholarship,' it must contain 'reason and analysis,' and it must be based on more than mere 'emotive appeal.'" (internal citations omitted)). For in-depth criticisms of Farber and Sherry, see, for example, Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994). For Farber and Sherry's response, see Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647 (1994).

extent to which what you see depends on where you stand: the extent to which 'subject positions' are multiple, shifting, and ultimately not reducible to language."[192] Thus, "[p]ostmodernist narratives destabilize modernist ones by insisting, 'And that's not necessarily true.'"[193]

In this destabilizing narrative mode, Patricia Williams muses in her "diary of a law professor" "in an old terry bathrobe with a little fringe of blue and white tassles dangling from the hem, trying to decide if she is stupid or crazy,"[194] while Derrick Bell and Richard Delgado engage in conversations with Geneva and Rodrigo Crenshaw (half-siblings), respectively.[195] Speaking to themselves or to their alter egos, these narratives reflect the uncertain and shifting ways in which we "know," and the lack of absolutes that undermines the notion of the law as a normative set of objective and universal rules. Most importantly, they reflect the lack of universality in the concept of "rights" and their inherently unstable meaning.

Yet Critical Race theorists' legal storytelling depends on a particular historical definition of self that demands the continued embrace of civil rights as reparations. These historical selves are shaped by the denial of rights. Mari Matsuda and Charles Lawrence preface their book on affirmative action by introducing their parents "because we are their children, and we write from what they taught us;" Patricia Williams informs the reader that her perspective as a female law professor of African descent comes from her ancestry—her great-great-grandmother Sophie and a white lawyer named Austin Miller, who purchased Sophie at eleven years of age and "immediately" impregnated her.[196] Cheryl Harris tells the reader about

192. Harris, *Jurisprudence and Reconstruction*, *supra* note 165, at 756. "Storytelling of this kind produces a deliberately induced vertigo, a vertigo of the sort the critics of normativity attempt to produce using a more conventional third-person omniscient voice." *See also* Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2282-83 (1992) (describing how each of us speaks from a "positioned perspective").

193. Harris, *Jurisprudence and Reconstruction*, *supra* note 165, at 758.

194. WILLIAMS, supra note 105, at 4.

195. *See, e.g.*, Bell, *Civil Rights Chronicles*, *supra* note 17 (introducing Geneva Crenshaw); Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) (review essay) (introducing Rodrigo Crenshaw).

196. LAWRENCE & MATSUDA, *supra* note 171, at xix; WILLIAMS, *supra* note 105, at 4. This ancestry leads to an exquisitely destabilizing confusion. Williams' mother tells her about Austin Miller's legal background just as Williams is about to start law school:

> When my mother told me that I had nothing to fear in law school, that law was "in my blood," she meant it in a complex sense. First and foremost, she meant it defiantly; no one should make me feel inferior because someone else's father was a judge. She wanted me to reclaim that part of my heritage from which I had been disinherited, and she wanted me to use it as a source of strength and self-confidence. At the same time, she was asking me to claim a part of myself that was the dispossessor of another part of myself; she was asking me to deny that disenfranchised little-black-girl who felt powerless and vulnerable.

Id. at 216-17.

her grandmother, who "passed" as white in order to work at a department store.

> The fact that self-denial had been a logical choice and had made her complicit in her own oppression at times fed the fire in her eyes when she confronted some daily outrage inflicted on Black people. . . . Learning about the world at her knee as I did, these experiences also came to inform my outlook and my understanding of the world.[197]

The power and importance of these historical selves literally speak for themselves. Yet they also compel Critical Race theorists to defend civil rights-talk passionately, even as they try to change it. Their project in using legal storytelling is to destabilize the legal discourse (and, specifically, rights discourse) because their self-understanding has been informed by the way in which these discourses have excluded them. These historically constructed selves demand civil rights as a means of entering the discourses in order to change them.[198]

We must, then, take from Critical Race Theory the project of altering the hegemonic discourse by participating in it, but abandon the historical justification for that participation. History undoubtedly continues to demand reparations, but the law fails to recognize history as the basis for justice. When affirmative action ceases to be about redressing an identifiable and current denial, the "right" to equal treatment loses its historical imperative and civil rights-talk loses its power to transform.[199]

Instead, we need to speak as individuals with individual histories—histories that often overlap and coincide but that are merely one part of our individual experiences.[200] Teresa de Lauretis usefully describes "experience" as "one's personal, subjective engagement in the practices, discourses, and institutions that lend significance (value, meaning, and affect) to the events of the world."[201] From this understanding that one's identity "is the product of her own interpretation and reconstruction of her history,

197. HARRIS, *Whiteness as Property*, *supra* note 17, at 1711-12.

198. *See* Richard Delgado, *Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545, 574-75 (1995) (discussing Rodrigo's disappearance after his struggle to justify narrative legal discourse).

199. *See, e.g.*, City of Richmond v. J.A. Croson Co., 448 U.S. 448, 498 (1990) (requiring identification of a specific harm and a particular perpetrator of that harm to justify affirmative action).

200. "[W]e must continually emphasize within any account of subjectivity the historical dimension. This will waylay the tendency to produce general, universal, or essential accounts by making all our conclusions contingent and revisable." Linda Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 SIGNS 405, 431 (1988).

201. TERESA DE LAURETIS, ALICE DOESN'T: FEMINISM, SEMIOTICS, CINEMA 159 (1984).

as mediated through the cultural discursive context to which she has access,"[202] Linda Alcoff derives the concept of "positionality." She explains that:

> the concept of positionality includes two points: first . . . that the concept of woman [or any other social construction] is a relational term identifiable only within a (constantly moving) context; but, second, that the position that women find themselves in can be actively utilized (rather than transcended) as a location for the construction of meaning, a place where a meaning can be *discovered* (the meaning of femaleness).[203]

Importantly, one's position is not only fluid with respect to a particular social categorization within which one may fall, but also in terms of the multiple social categorizations embodied in every individual. Thus, "the subject or self should be considered singular and positions of the self multiple—or multipositional."[204] As Earl Lewis explains,

> It is important . . . to remember that we can never see the total self. At best, we can glimpse the totalizing self. It is a self that refuses to surrender to a simple mathematics. Race plus class plus gender does not approximate the complexities of self because no one is simply additive. The notion of multipositionality takes into consideration a complex social calculus, a calculus that allows us to add, subtract, multiply, and divide parts of our identities at the same time.[205]

The multipositional self, then, is not only shaped by multiple histories, but shapes each and all of them. Rather than using history as a demand for change, it utilizes the experiences created by its history to negotiate with the categorizations that it embodies.[206] A multicultural discourse is composed of the voices of individual multipositional selves, participating in, shaping, and always changing the discourse. By focusing on the multipositional rather than the historical self, multicultural discourse demands, not

202. Alcoff, *supra* note 201, at 434.

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

204. Earl Lewis, *Connecting Memory, Self, and the Power of Place in African American Urban History*, 21 J. URBAN HIST. 347, 356 (1995).

205. *Id. See also* Harris, *Race and Essentialism*, *supra* note 178, at 608 ("Black women experience not a single inner self (much less one that is essentially gendered), but many selves. This sense of a multiplicitous self is not unique to black women, but black women have expressed this sense in ways that are striking, poignant, and potentially useful to feminist theory.").

206. *See* Miranda Oshige McGowan, *Diversity of What?*, 55 REPRESENTATIONS 129, 135 (1996) (advocating that we "pay closer attention to the ways in which individuals and groups define themselves rather than defaulting to the socially dominant understanding of who belongs to what race or ethnicity").

equal access to historically denied rights, but participation in one's own, individual self-construction.[207]

2. *A Justification Other than Rights*

Although individuals' multipositional voices may be compelling, standing alone, they offer no legally cognizable demand for respect or entitlement. An individual's experience may indeed merit concern, even redress, but the zero sum game balks when redress demands someone else's sacrifice.[208] We must therefore replace rights with some other justification for change.

As Cynthia Ward explains, "[o]n the postmodern view, *any* assumption of sameness among humans is suspect because it so often leads us to ignore or suppress radical difference."[209] Yet, she asks, "[i]f people are radically and irreducibly different, what justifies legal equality?"[210] In

207. Will Kymlicka offers his own breed of "multiculturalism" as a means of "accommodat[ing] enduring cultural differences, rather than remedy[ing] historical discrimination." WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 4 (1995). He expressly rejects the criticism that "the liberal focus on individual rights reflects an atomistic, materialistic, instrumental, or conflictual view of human relationships. [He believes instead] that this criticism is profoundly mistaken, and that individual rights can be and typically are used to sustain a wide range of social relationships." *Id.* at 26. Kymlicka advocates "[a] comprehensive theory of justice in a multicultural state [that] will include both universal rights, assigned to individuals regardless of group membership, and certain group-differentiated rights or 'special status' for minority cultures." *Id.* at 6. Adding a subset of "group-differentiated rights" to constitutionally protected individual rights, as we currently struggle to understand and define them, however, merely returns the debate to the zero sum game, as Kymlicka recognizes: "[T]he sacrifice required of nonmembers by the existence of these rights is far less than the sacrifice members would face in the absence of such rights." *Id.* at 109. Not only does this proposition perpetuate without even attempting to solve the zero sum game, it leaves the power in the hands of the powerful, without offering any reason why those in power (the "non-members") would choose to afford special rights to members of disempowered groups. Further, the cost-benefit analysis Kymlicka offers is structured around the viewpoint of the majority. Finally, and perhaps most limiting to any practical application of Kymlicka's brand of "multiculturalism," it applies only to people who can claim a "national" identity, that is, *not* "racial or descent groups, but . . . cultural groups." *Id.* at 23.

Robert Justin Lipkin offers several additional criticisms of Kymlicka in his article *Can Liberalism Justify Multiculturalism?*, 45 BUFF. L. REV. 1 (1997). Of particular relevance to this discussion, Lipkin describes Kymlicka's understanding of the goal of liberal theory as "a kind of super-culture," *id.* at 36, that presupposes a cultural belief in freedom and autonomy. "Instead, genuine concern for different cultures should reveal a capacity for permitting such cultures to thrive despite one's inability to understand the culture in one's own terms. . . . In this spirit, a liberal should permit (and encourage?) cultures that are incompatible with liberalism's commitment to deliberative rationality and autonomy." *Id.* at 38.

208. *See* discussion *supra* Section III.

209. Ward, *Difference and Equality*, *supra* note 161, at 87.

210. *Id.* at 87-88. *See also* Ward, *Empathy*, *supra* note 184, at 954 ("Minimal, but necessary, assumptions about the sameness of all human individuals, an identity of being that justifies equal treatment under the rules established by liberal law, are fundamental to liberal equality. And indeed, upon what basis other than sameness *can* equality be justified?").

other words, if none of us can agree on what "rights" mean—if, as proposed by poststructuralist theory, they have no ontological meaning[211]—then what justifies the goal of, or the demand for, engaging in multicultural discourse with an eye toward dismantling racial hierarchy?

Robert Williams proposes an alternative to rights as a justification for mutual dignity and respect when he describes how "different peoples, with radically divergent cultural backgrounds, languages, value systems and traditions achieve[d] peace and accommodation with each other."[212] Williams examines a situation in which neither party could lay claim to rights to justify their position: the initial meetings between the Five Confederated Tribes of the Iroquois and the European invaders of the seventeenth century. Here, the "indigenous tribal peoples [were left] with little choice but to meet head-on the numerous challenges of creating and sustaining cooperative relationships and firm alliances with the newcomers to their lands."[213]

Central to the meeting of these different peoples was their mutual interest in Canadian fur trapping. This mutual interest was also the source of their opposition—the Iroquois had over-hunted in the Hudson River Valley and sought to establish ties with the Huron tribes in Canada in order to continue trading with the Dutch, but the French were threatened by this challenge to their fur-based trading empire.[214] Rather than focus on their differences, however, the Iroquois communicated with the European invaders in the "language and metaphors of connection, solidarity, and trust" to create the 1645 Treaty at Three Rivers.[215]

Chief Kiotseaeton opened the negotiations by greeting the French as "brothers," thus seeking "to establish a close, symbolic connection and a channel of communication with his former enemies."[216] He emphasized "[s]hared benefits and cooperation, rather than predatory competition and debilitating war."[217] Finally, employing the "principal metaphor deployed by Iroquois diplomats throughout the treaty literature of the Encounter era,"[218] Kiotseaeton proposed that the parties "link arms firmly together" to acknowledge their mutual reciprocal obligations, "interdependent relationships of communication, solidarity, and shared suffering."[219]

---

211. *See* discussion *supra* Section IV.B.

212. Robert A. Williams, *Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace,* 82 CAL. L. REV. 981, 982-83 (1994).

213. *Id.* at 983-84.

214. *Id.* at 1021-22.

215. *Id.* at 1021.

216. *Id.* at 1024.

217. *Id.* at 1032.

218. *Id.* at 1032.

219. *Id.* at 1044. Williams finds a modern legal equivalent to the Iroquois notion of "linking arms together" in "the increasing recognition in modern American law of obligations arising out of reliance on long-term relationships." *Id.*

"Linking arms firmly together" similarly allows us to focus on the mutual benefits of exchanges with people whose experiences differ from ours, rather than conceiving of their gains as our losses. Avoiding the zero sum game, in which individual rights compete for primacy, multicultural discourse proposes the shift described by Williams: "Through frequent dialogue, sharing, reciprocal exchanges of gifts and goodwill, and the mutualization of interests and resources, different peoples [can] attain 'one mind,' and 'link arms together' in a multicultural treaty relationship."[220]

3. A Multicultural Discourse

Multicultural discourse is the process of focusing on mutually beneficial goals, which, in turn, encourage people to listen to the storytelling of multipositional selves, finding value rather than conflict in the contingent and fluid experiences of individuals. If one person's individual experience can bring a new perspective that might further the mutual project, what becomes apparent is the value of that person's perspective, not its threat. In this way, multicultural discourse does not create, reproduce, or evaluate difference but rather incorporates it in the nonoppositional form of diversity.

Others have considered diversity as a goal of civil rights-talk, but not an alternative to it. For example, Sheila Foster advocates "[t]he prospective value of diversity . . . in the inclusion and participation of formerly excluded groups so as to empower those individuals to decide and define for themselves what outlooks and viewpoints they will have."[221] While Foster recognizes difference as "located within relations between people and institutions,"[222] she does not take this relational context into account in her legal equality argument. Rather, she claims that "a distinction can be drawn between those differences perpetuated by systematic exclusionary forces in society and those differences that members of groups create for themselves as a matter of pride and culture."[223] The distinction, it seems to me, is not so clear. Speaking about difference in a discourse that presumes its hierarchical valuation problematizes *any* assertion of it.

Foster also argues that the "empowerment of the historically marginalized must occur within their own communities."[224] By stating that "[i]ndividual self-definition can occur within communities where language, heritage, and certain goals are widely shared,"[225] Foster seems to imply that communities can shape their own discourse that avoids the hierarchy of the dominant one. This proposition yields two problems: first, she offers no

220. *Id.* at 996.
221. Foster, *Difference and Equality*, *supra* note 119, at 141.
222. *Id.* at 154.
223. *Id.* at 152.
224. Sheila Foster, *Community and Identity in a Postmodern World*, 7 BERKELEY WOMEN'S L.J. 181, 190 (1992) (review essay).
225. *Id.*

corrective to the production of a different hierarchy within the community's discourse;[226] second, and more limiting to her argument, she fails to bridge the gap between intra-community self-empowerment and inter-community understanding.

Instead, the process of dismantling the hegemonic hierarchy needs to take place through interpersonal interactions between diverse people in a context that does not reproduce unequal positions of power. A mutually beneficial project—for example, education or work product—becomes a shared site of experience and a reason for individuals' singular experiences, based on their multipositionality, to be expressed and valued. The mutual project and the contributions to it are evaluated, but not the personal attributes of the people participating in it.

It does not matter if diversity thus understood is a matter of "culture" or race or any other social or self-construction. Diversity exists but need not and should not be defined in a multicultural discourse because to do so would deflect attention away from the mutually beneficial project, in which individuals' differences themselves are not important, but the perspective these multipositional selves can contribute are vital. Multicultural discourse is composed of voices whose value is absolute but not relative, a discourse that is contingent and constantly evolving.

It bears repeating that multicultural discourse is a process, a way of refocusing how we think and speak about the struggle for equality, not a concrete plan that can be set down, debated, and amended. Affirmative action has been a part of that process and has, in many ways, recreated the circumstances of the Iroquois and French that Williams describes. While it is currently understood primarily as a battleground of opposing interests, affirmative action also takes place in situations where people who have been socially constructed as different come together in a mutual project. Affirmative action programs have been developed in schools and workplaces precisely because of the value of diversity in these settings. The problem is not with the programs themselves, but in the conscious focus on defining diversity.

Fetishizing "diversity" as a goal that must be tied to particular historical selves (or pieces of them) focuses us on the history, not the process. If we seek to dismantle hierarchies of race and other social constructions by altering our concepts of power at work and school, we need to let the changes reproduce themselves and the multipositional selves negotiate their experiences and, in the process, influence the experiences of others.

Power relations will not change overnight. Placing a person of color in a supervisory position does not "empower" that person, nor what she has to say, in a complete sense. However, it does insist that her voice be heard and provides a context in which what she has to say is important to the

226. *See* Crenshaw, *supra* note 34, at 1253.

community project and may therefore be perceived as contributing to a mutually beneficial end.

Affirmative action may therefore both produce and be the product of a new understanding of leaders. Abandoning the idea that leaders must be recognizable politically or legally, I recommend that we turn our attention to "grassroots" leaders, the people who speak where they can and how they can to shift the discourse incrementally from one that marginalizes and limits them to one that increasingly incorporates their voices and the voices of others, both like and unlike them.[227] A supervisor in the workplace, a student in class, a local merchant—all have roles to play in taking advantage of how far civil rights-talk has taken us and in moving beyond its limits to contribute to the ongoing and constant renegotiation and redefinition of an ever-changing multicultural discourse. Allowing diverse people's voices to be heard in a context where their messages are perceived as mutually beneficial thus creates the circumstances in which they can be heard more easily, in which the discourse itself changes so that diversity becomes a nonhierarchical part of it rather than its product.

CONCLUSION

McCann reminds us that, "[j]ust as legal consciousness develops through experience in material life, . . . so do legal discourses *become material* in the very process of action within different social spaces."[228] The concept of civil rights as an entitlement to reparations for past, pervasive harms, therefore, is not confined to lawyers and legal scholarship. It informs the extralegal lives of many more people, who participate in the legal discourse as well and who shape it by their actions. These same people are also engaged in a multicultural discourse. The discourses are not real; they are merely the structures we use to explain how knowledge is produced and reproduced. If we simply replace the civil rights-talk that informs legal discourse with the framework of multicultural discourse, we find ourselves able to see a process that is already in place, and likewise find ourselves freed from the zero sum game and our reliance on the very social categorizations we seek to break down.

227. Historians such as Charles Payne have begun to remind us of the significant contributions of grassroots leaders to the civil rights movement. *See, e.g.*, PAYNE, *supra* note 55. Similarly, thanks to the contributions of the grassroots leaders yet to be recognized in the battle for affirmative action, we hear an incremental shifting toward a multicultural discourse, as "women" replace "girls" and sit in boardrooms and employers hold "holiday" parties—replete with Kwanzaa decorations—in place of the old Christmas ones. These are small changes, and I certainly do not believe they begin to address deeper systemic inequalities (in fact, one might argue that they are designed to blind us to them), but they help lead to the realization that the woman who picks up the phone might be the attorney, not her secretary, or that the man of African descent in the courtroom is not the criminal defendant but is representing him.

228. MCCANN, *supra* note 9, at 283.

In this view, affirmative action can be understood, not as an end in and of itself, but as a means toward an end. The point should not be that affirmative action is a "right," nor, I contend, can "rights" be the end toward which it is employed. If affirmative action is to survive, and to retain any meaningful force, it must be used as a means toward replacing the hegemonic discourse of rights with a multicultural discourse in which difference is contingent and shifting, not reduced to a binarism subject to valuation, even if that binarism is the basis for legal demands.

Efforts to destabilize rights discourse fall into a zero sum game. A multicultural discourse sidesteps this deadlock and instead focuses on the ongoing process of destabilizing and dismantling the hierarchy that civil rights-talk replicates and recreates, even as it seeks to do just the opposite. Affirmative action has been and, I hope, will continue to be the primary means of furthering this process. It offers a multitude of circumstances in which diverse people have a reason to listen to each others' voices and focus on a mutually beneficial project rather than the relative value of the voices—a "linking arms together" as opposed to an attempt to redistribute a finite handful of rights. The understanding of a truly nonhierarchical multicultural discourse can take place only incrementally, but, in the end, it will reflect voices and ways of knowing, not socially constructed and constructing power relations.

Multicultural discourse ultimately may offer us nothing more than a new way of talking and thinking about rights. If so, I welcome the day when the concept of rights is meaningful and communicative, not contested and limited. On the other hand, if multicultural discourse leads to a different understanding of why human beings deserve equal treatment and why categorical difference is our own construction, then so much the better. Such a result can only point the way toward new and hopeful ways of celebrating ourselves.