

UNDERSTANDING THE RACIAL DISCOURSE OF JUSTICE REHNQUIST

Jerome McCristal Culp, Jr.*

I. INTRODUCTION

The most potent effects of story derive not from what is told, what is positively represented . . . but from what is omitted, not told.¹

How do we judge the accumulated work of a Supreme Court Justice? Professor (now Judge) Easterbrook suggested several years ago that certain forms of criticism of a court were inappropriate when they did not account for multiple-judge aspects of American appellate courts.² Similarly, we do the individual judges a disservice if we examine only the stated part of their judicial opinions. While various factors enter into the decisionmaking process, an individual judge may simply not state all the factors which motivate her towards a particular result. In addition to the arguments actually articulated, there is a "deep theory," what literary critics call the story.

This story is frequently the most important part of the writing enterprise to the reader. Legal commentators have written about aspects of story and Supreme Court jurisprudence.³ Justices Kennedy and

* Professor of Law, Duke University School of Law. B.A. 1972, University of Chicago; M.A. 1974, Harvard University; J.D. 1978, Harvard Law School. I would like to thank James Coleman, H. Jefferson Powell, Michael Olivas, the members of the audience at the Rutgers School of Law—Camden symposium on the twentieth anniversary of Justice Rehnquist's appointment to the bench, and the participants at the Vanderbilt Law School Faculty Workshop. In addition, my research assistants Ted Edwards, Kelly Evans, and James Smith provided invaluable research assistance.

1. KARL KROEBER, *RETELLING/REREADING: THE FATE OF STORYTELLING IN MODERN TIMES* 19 (1990); see also Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor with an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1 (1982).

2. Frank Easterbrook, *Ways of Criticizing the Courts*, 95 HARV. L. REV. 802, 815-16 (1982); see also Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 808-09 (1983).

3. Thomas Ross has written a number of articles about the story being told by Supreme Court Justices. See Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L.

O'Connor explained the impact Justice Marshall's story about race and the law had on their own deliberations,⁴ though some of us wish that these Justices had paid more attention. However, without these stories the results might easily have been worse.⁵ While much of Justice

REV. 297 (1990) (examining the use of innocence in affirmative action discourse to validate the claims of white workers who are "unconnected" to the racism in the world) [hereinafter Ross, *Innocence and Affirmative Action*]; Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499 (1991) (demonstrating that Supreme Court Justices tell a story about class, race and law in their opinions); Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1 (1990) (showing that racial themes in nineteenth-century cases are still present in contemporary cases); Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989) (examining the stories that the various Justices were telling in their opinions in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989)). For a powerful analysis of the story of race and the Supreme Court, see Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1 (1991) (examining the story told by the Justices about race in historical and contemporary terms).

4. Anthony M. Kennedy, *The Voice of Thurgood Marshall*, 44 STAN. L. REV. 1221 (1992). Justice O'Connor also shared her experiences:

I have perhaps been most personally affected by Justice Marshall as raconteur. It was rare during our conference deliberations that he would not share an anecdote, a joke or a story; yet, in my ten years on the bench with him, I cannot recall ever hearing the same "TM" story twice. In my early months as the junior Justice, I looked forward to these tales as welcome diversions from the heavy, often troublesome, task of deciding the complex legal issues before us. But over time, as I heard more clearly what Justice Marshall was saying, I realized that behind most of the anecdotes was a relevant legal point Through his story, Justice Marshall reminded us, once again, that the law is not an abstract concept removed from the society it serves, and that judges, as safeguarders of the Constitution, must constantly strive to narrow the gap between the ideal of equal justice and the reality of social inequality.

Id. at 1217-18.

5. For example, Justice O'Connor wrote that "[o]ur continued adherence to the standard of review employed in *Wygant* does not, as Justice Marshall's dissent suggests, . . . indicate that we view 'racial discrimination as largely a phenomenon of the past' or that 'governmental bodies need no longer preoccupy themselves with rectifying racial injustice.'" *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 494 (1989) (citations omitted).

Justice O'Connor has consistently been more able to perceive the complaints of women, rather than those of racial minorities, despite her listening to the stories of Justice Marshall. This should not surprise us. However, disclaiming any particularly feminist jurisprudence, Justice O'Connor wrote:

Do women judges decide cases differently by virtue of being women? I would echo the answer of my colleague, Justice Jeanne Coyne of the Supreme Court of Oklahoma, who responded that "a wise old man and a wise old woman reach the

Marshall's story was clear, having been impassionately etched into *United States Reports* over the last twenty-five years,⁶ there was always a deeper story about hope and justice for all. This deeper story went beyond the stated part of his opinions, even including very conservative stories about property and individual liberty.⁷

Chief Justice Rehnquist will be seen as a tremendously important force on the Supreme Court. As this symposium suggests, his voice on many issues has been heard loudly by his fellow Justices, commentators, and lawyers. He has been telling a number of stories about how the law should function in bringing justice to the world. Since it is impossible for a single article to cover his entire record, I will limit my inquiry to the story he has been telling about a topic that interests me as a scholar—race.

Race has been one of the most important issues on the Court's docket over the last twenty years. Beyond obvious issues like affirmative action, school segregation, and employment discrimination, race has impacted areas as diverse as criminal procedure and First Amendment jurisprudence. Justice Rehnquist has been telling his story about race over the last twenty years, and it is important that we tease out the nature of that story.

In this Article, I will demonstrate that Justice Rehnquist has reinserted a jurisprudential view of race which seems to draw upon old notions of white supremacy. The story that Justice Rehnquist tells adheres to very old doctrines of racial oppression of African-Americans, a story that had all but disappeared from the judicial discourse. I will contrast Justice Rehnquist's story about race with his story about economics and his view of the proper influence of

same conclusion." This should be our aspiration: that, whatever our gender or background, we all may become wise—wise through our different struggles and different victories, wise through work and play, profession and family.

Sandra D. O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1558 (1991).

Stories are not always going to be transformative. Indeed, all of us are subject to a background story of racism which competes with any transformative story, making real change difficult for judges, law professors and law students. See Jerome M. Culp, Jr., *You Can Take Them to Water But You Can't Make them Drink: Black Legal Scholarship and White Legal Scholars*, 1992 U. ILL. L. REV. 1021.

6. See Jerome M. Culp, Jr., *Toward A Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 48-62 (presenting Justice Marshall as a leader in creating a black jurisprudence that challenged, to a point, existing legal doctrines).

7. For a start on describing aspects of those stories, see Cass Sunstein, *On Marshall's Conception of Equality*, 44 STAN. L. REV. 1267 (1992).

economics on legal issues. This contrast will operate as a check on my analysis of Justice Rehnquist's interpretation of race. I do not claim that this interpretation will capture all of Justice Rehnquist's opinions, but I will describe what is arguably his white supremacist viewpoint and why it has become so important to the legal community.⁸

8. Descriptions of this article have created a mini-furor. See Tony Mauro, *Theory Sees Rehnquist as "White Supremacist"*, LEGAL TIMES, Mar. 1, 1993, at 10; 62 *Former Clerks Reject "Outrageous" Attack*, LEGAL TIMES, Mar. 15, 1993, at 45 (letter to the editor signed by Justice Rehnquist's former clerks expressing their views on this article). Most of Justice Rehnquist's law clerks believe that the issue I raise about Justice Rehnquist is unfair to the personal qualities and notions of fairness that he has, in their view, articulated. *Id.* This group defended the image of Justice Rehnquist without reading my remarks or even expressing a serious interest in receiving a copy. They make the mistake of assuming that all those who help to perpetuate white supremacy are always bad people or racist in every action, a view I have criticized elsewhere. See Jerome M. Culp, Jr., *Water Buffalo and Diversity: Naming Names and Reclaiming the Racial Discourse*, 26 CONN. L. REV. 209 (1993). It is important to note that I have not tried to examine the issues in Justice Rehnquist's career that might suggest that he is a racist in his heart. Others have made examinations of, for example, his responses in his confirmation hearings to be Chief Justice. They found Justice Rehnquist to be, at best, disingenuous about his efforts in opposition to *Brown v. Board of Education* as a law clerk. See RICHARD KLUGER, *SIMPLE JUSTICE* 603-09 (1975); Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson and the Brown Case*, 1988 SUP. CT. REV. 245; Joseph L. Rauh, Jr., *An Unabashed Liberal Looks at a Half-Century of the Supreme Court*, 69 N.C. L. REV. 213, 242-43 (1990); see also *id.* at 245 (Benjamin Hooks, former executive director of the NAACP, stated, "Night has fallen on the Court as far as civil rights are concerned [because of the Rehnquist Court]."). Those hearings themselves raised a number of questions about Justice Rehnquist's sensitivity to issues involving people of color. However, I do not think that history is relevant to Justice Rehnquist's story about race. Whether Justice Rehnquist is a racist in his heart or his individual actions is irrelevant to my interpretation of that story. It is the *story* that is oppressive to the millions of people of color oppressed by the effects of Supreme Court opinions. Justice Rehnquist may be perfectly fair to the black employees at the Supreme Court and to black citizens he sees on the street. The issue I raise in this Article is his fairness to the the interests of black people before the Court.

Jeffrey A. Segal and Harold J. Spaeth examine the voting patterns of the Justices on the Warren, Burger, and Rehnquist Court in terms of liberal policymaking in a number of areas, including civil rights and criminal procedure. Rehnquist has the lowest score of any Justice over that 40-year period by a significant margin. His votes on civil rights (through 1988) are lower than Justice Scalia. Even taking account of the fact that the Justices across eras are not facing exactly the same questions over these 40 years, these numbers are interesting. Rehnquist is almost half as likely to support civil rights policy as Justice Harlan, the judge who was the least supportive in the Warren and Burger era. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 242-60 (1993).

II. THE NATURE OF WHITE SUPREMACY

The ideology of white supremacy . . . encompassed attitudes, beliefs, values, ideals, behavior, and thought on individual, group, and institutional levels. It subsumed antiblack prejudice and Negrophobia. In addition, it represented a deep-seated philosophy of black dehumanization. Predicated upon the assumptions of black cultural inferiority, black biological inferiority, or both, the ideology of white supremacy matured and gained intellectual respectability during the nineteenth century. It signified a rationale and a justification for white oppression of blacks.⁹

White supremacy is a very old doctrine in American political and legal thought. Great American men and women, including Thomas Jefferson¹⁰ and Abraham Lincoln,¹¹ subscribed to versions of white supremacy. It is, therefore, not surprising that this view of black people infected Supreme Court Justices of the nineteenth century. As the quote above suggests, there are two main aspects to white supremacist thinking. The first is the suggestion that blacks are genetically inferior and not entitled to the respect due white people. The second is the denial

This view of the relative direction of Justice and Chief Justice Rehnquist is supported by the work of others as well. Donald Jackson found similar results when examining Justice Rehnquist's views: of the 10 possible votes on affirmative action, Justice Rehnquist had voted for a minority plaintiff one-half a time. (The one-half a time was his vote in support of Justice O'Connor's opinion in *Watson* that disparate impact analysis applies to subjective categories.) DONALD W. JACKSON, *EVEN THE CHILDREN OF STRANGERS: EQUALITY UNDER THE U.S. CONSTITUTION* 124-38 (1992) (Rehnquist wrote the majority opinion finding against minority claimants or their interests in *Martin v. Wilks*, 490 U.S. 755 (1989); joined majority opinions against minority plaintiffs in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Washington v. Davis*, 426 U.S. 229 (1976); joined plurality opinions against minority claimants in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and joined dissents or wrote a dissent to the approval of minority claimants rights in *United States v. Paradise*, 480 U.S. 149, 196 (1987) (O'Connor, J., dissenting joined by Rehnquist, C.J.); *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 535 (1986) (Rehnquist, J., dissenting); *Local No. 28 Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 500 (1986) (Rehnquist, J., dissenting); *United Steelworkers v. Weber*, 443 U.S. 193, 219 (1979) (Rehnquist, J., dissenting).

9. WALDO MARTIN, *THE MIND OF FREDERICK DOUGLASS* 29 (1984).

10. See, e.g., REGINALD HORSMAN, *RACE AND MANIFEST DESTINY* 101-02 (1981); cf. THOMAS JEFFERSON, *Notes on the State of Virginia*, in *WRITINGS* 123, 209-14, 288-89 (1984).

11. See, e.g., ROBERT W. JOHANNSEN, *LINCOLN, THE SOUTH, AND SLAVERY* 31 (1991).

of cultural equality to black Americans.¹² By cultural equality, I do not mean that every aspect of every culture is equally good or just. Rather, those who believe in white supremacy believe that the culture of black people is inferior because it is the culture of nonwhite ("non-superior") people.

When the nineteenth-century Court spoke about racial concerns, it seldom spoke about the cultural inferiority of black Americans. The most important exception is Chief Justice Taney's opinion in *Dred Scott*.¹³ Chief Justice Taney certainly spoke in white supremacist terms when he wrote about the biological inferiority of black Americans:

It is very true, that in that portion of the Union where the labor of the negro race was found to be unsuited to the climate and unprofitable to the master, . . . [slavery] had entirely worn out in one of [the States], and measures had been taken for its gradual abolition in several others. But this change had not been produced by any change of opinion in relation to this race; but because it was discovered, from experience, that slave labor was unsuited to the climate and productions of these states¹⁴

The Chief Justice also spoke about the cultural inferiority of black slaves when he explained why they were not entitled to become citizens like Native Americans:

The situation of this population [slaves] was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people¹⁵

Expressions of white supremacy were not limited to Chief Justice Taney. Even great Justices sensitive to aspects of racial subordination have written in terms that support white supremacy. Justice Harlan participated in such rhetoric before he excoriated the majority's opinion in *Plessy*, writing:

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

12. See ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 91-97 (1987) (discussing the differences in educational programs and relationships between black and white students).

13. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

14. *Id.* at 412.

15. *Id.* at 403.

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.¹⁶

For a number of reasons the overt expression of white supremacy has been eliminated from the Supreme Court discourse. The Justices, like the country, have become more tolerant of black Americans. The Court is much less likely to speak of intolerable conditions for black people in terms of intellectual or biological fitness or cultural inferiority. There are exceptions to this change, but they tend to be about nonracial groups or in areas where the Justices' prejudice continues to have vast popular support.¹⁷

There are four aspects to the more subtle white supremacist rhetoric I believe we can discover in the writings of modern Supreme Court Justices. First, the interests of black Americans are not considered important enough to be examined or put into the constitutional calculus—the *interest blindness assumption*. Second, the assumptions regarding factual circumstances, e.g., legislative intent, economic or social policy of social actors, posit that the status quo circumstances of black citizens are fair—the *status quo blindness assumption*. Third, whenever the factual circumstances require the elimination of the privileged position of white Americans, the judge subscribing to white supremacy concludes that the privilege is too important to change—the

16. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) (emphasis added).

17. *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) (majority opinion authored by Stewart, J.) ("The essence of a correctional counselor's job is to maintain prison security [and a] woman's relative ability to maintain order in a male maximum security [prison] could be directly reduced by her womanhood."). Judges are much more likely to make stereotypic statements about the gender or sexual preferences than about race, though racial stereotypes are not totally absent from court opinions:

On a relative and statistical basis, women may well be impacted more by dirty toilets than are men. But so too are women working at jobs designed to require heavy lifting, *so too are whites working in conditions of extreme heat and sunlight*; so too are those of lowland national origin in working at great altitudes, and so too are older people working at jobs requiring great flexibility, strength and speed.

Lynch v. Freeman, 817 F.2d 380, 391 (6th Cir. 1987) (Boggs, J., dissenting) (emphasis added).

white privilege assumption.¹⁸ The fourth element is the assertion that white people involved in a legal dispute have no race—the *identity blindness assumption*.

Each of the four assumptions is as old as the constitutional history of the United States and, prior to Justice Rehnquist's appointment, the Court had moved away from them. We have now significantly returned to an earlier vision when white supremacist thought was much more dominant. I will describe how the Court's story about race has changed in that last thirty years by contrasting two opinions not written by Justice Rehnquist. The first, *Griggs v. Duke Power Co.*,¹⁹ was written for a unanimous Court by Chief Justice Rehnquist's predecessor, Chief Justice Warren Burger. The second, *R.A.V. v. St. Paul*,²⁰ was written by Justice Scalia, the colleague on the current Court who has contributed most heavily to the implementation of Justice Rehnquist's story about race. I will then discuss how Justice Rehnquist has contributed to this alteration in story and the nature of the story that he has produced. Finally, I will question and compare the story he has told about race with the story that he tells about economics and law. In addition, I will try to anticipate your unease regarding my point about white supremacy by examining whether there are alternative explanations that I have overlooked.

Before I discuss these issues I want to suggest a difficulty I have in raising them. Over the last few decades we have become, in many ways, less sophisticated about race than ever before in history. It has become impossible to ask whether actions by any white person are racist without appearing to be shrill and to be asking too difficult a question. In this Article, I do not want to fully reclaim the ground that has been lost, but I do want to go back to distinctions that we earlier understood.

It is quite possible for both white *and* black people to hold some views that support elements of white supremacy and other views supportive of black people. Therefore, it is not inconsistent with my thesis about white supremacy for someone to believe in the cultural or

18. This assumption is a variant on the notion of reactionary politics discussed by Albert Hirschman in *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* 81-132 (1991). He calls this ploy the jeopardy thesis, arguing that conservative reactionaries often make reactionary arguments against change based upon the assumed potential danger to more important concerns.

19. 401 U.S. 424 (1971).

20. 505 U.S. ___, 112 S. Ct. 2538 (1992).

biological inferiority of black people and to find that blacks make good basketball players, Olympic runners, or singers.²¹ As I have suggested in another context, the personal activities of an individual are not a defense to these claims of white supremacy.²² Such views of black people have always been held by the many white and some black Americans who have been the leading proponents of white supremacy.

III. FROM *GRIGGS* TO *R.A. V.*: THE DECLINING DISCOURSE ABOUT RACE

In 1971, the year Justice Rehnquist was confirmed to the Court, the most important racial issue was the interpretation of the 1964 Civil Rights Act. Title VII of the Act, which became effective in July 1965, outlawed employment discrimination with respect to race and other characteristics. Chief Justice Burger's unanimous opinion in *Griggs* was the first Supreme Court interpretation of Title VII, reflecting a change in the Supreme Court's discourse about race. *Griggs* may have been the first²³ Supreme Court opinion rejecting all four of the

21. Indeed, the first refuge of a racist will be to find some small attribute that may be superior in a group that is otherwise viewed as inferior. This permits the second generation to deny that he is racist while at the same time maintaining important racist views. The "darky" who can sing or recite or the black athlete who can compete are all views of black people that have evolved over time in our racist past. See generally DAVID T. GOLDBERG, *RACIST CULTURE: PHILOSOPHY AND POLITICS OF MEANING* 111-16 (1993).

22. See Culp, *supra* note 8. People often respond to charges that they have done something racist by claiming that they have done something useful for a person of the opposite race. See, e.g., Philip Elman, *Response*, 100 HARV. L. REV. 1949 (1987): "I will not respond to Kennedy's suggestion that 'even more than is usually so, [Elman's] recollections reflect biases' against black people 'that tell us more about the observer than the events observed.' The answer to that is my entire life." *Id.* at 1957 (quoting Randall Kennedy, *A Reply to Philip Elman*, 100 HARV. L. REV. 1938, 1944 (1987) (responding to Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817 (1987))). Such responses miss the point. Good people can do something that is racist or amounts to white supremacy without always doing racist things. White supremacy and racism are deeply embedded in the social discourse. See generally Culp, *supra* note 8.

23. Some of the cases more firmly within the constitutional structure rejected only parts of this framework. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483 (1954). The *Brown* Court accepted the view that the issue of discrimination should be examined through the lens of the majority, which is that of whites. Supporters of *Brown* had difficulty with this view and its implications. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (arguing that constitutional interpretation should be based upon a set of neutral principles, but often is not). *But see* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960) (the notion that race was not at the heart of discrimination in the South is

assumptions that underlie white supremacist discourse.²⁴ The Court made it clear that it would examine at least some of the important concerns of difference and history that underlie much of our racial past. The Court said the Congressional intent was plainly stated in the statute: "to achieve equality of employment opportunities and *remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.*"²⁵

When making assumptions about the intellectual and economic facts in the case, the Court did not assume that blacks were inferior. The Court said:

Because they are Negroes, petitioners have long received inferior education in segregated schools

Congress has now provided that tests or criteria for employment or promotion *may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job seeker be taken into account*

On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job-performance ability.²⁶

Comparing the Court's opinion in *Griggs* with the 1992 opinion in *R.A.V. v. City of St. Paul*,²⁷ a case involving the First Amendment, it is easy to see how far we have traveled from the rejection of white supremacist rhetoric. *R.A.V.* involved the attempt by the city of St. Paul to enforce its hate speech crime act against one of the oldest forms of

laughable and ignores the reality of the southern experience with race and the law); *see also* Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1 (1992) (Supreme Court erred by translating black Americans' demands for equality into a begging for social welfare programs, thereby failing to eradicate the causes of the inequality). *See generally* SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION (Derrick Bell ed., 1980); Jerome M. Culp, Jr., *Black People in White Fact: Assimilation, Culture, and the Brown Case*, 36 WM. & MARY L. REV. (forthcoming January 1995).

24. It is important to note that rejecting these assumptions does not necessarily make the opinion infallible or even appropriate for circumstances existing then or now. The rejection of white supremacist discourse, while important, is only one step toward changing the way black Americans are adversely impacted by the law.

25. *Griggs*, 401 U.S. at 429-30 (emphasis added).

26. *Id.* at 430-31 (emphasis added) (citation omitted).

27. 505 U.S. ___, 112 S. Ct. 2538 (1992).

hate crime—the burning of a cross to terrorize a black family.²⁸ The perpetrators were juveniles who fashioned a crude cross out of a chair and burned it on private property.

The issue of race is dealt with gingerly in Justice Scalia's majority opinion. He identifies the victims as a black family, yet fails to identify the race of the perpetrators, only their status as juveniles.²⁹ The story told in Justice Scalia's opinion is that the perpetrators did not have a race, and, therefore, this was just good clean juvenile fun untainted by any effort to exercise racial privilege. This story demonstrates the *identity blindness assumption* and the *interest blindness assumption*. In addition, when Justice Scalia examines applicable case law and the implementation of the statute, he wrestles with almost no racial examples. The one exception is powerful precisely in what is not said:

[T]hey assert that the ordinance helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish. We do not doubt that these interests are compelling, and that the ordinance can be said to promote them. But the "danger of censorship" presented by a facially content-based statute . . . requires that that weapon be employed only where it is "*necessary* to serve the asserted [compelling] interest . . ." The existence of adequate content-neutral alternatives thus "undercut[s] significantly" any defense of such a statute . . .³⁰

Justice Scalia avoids dealing with the racial aspects of this case by not naming the interest groups affected, draining race from the parties involved. Though I think the result is a great constitutional tragedy, that is not the concern I am raising in this discussion. The Court is simply hiding the interests of white people while ignoring the situation of black people. This type of rhetoric demonstrates the *status quo* and *interest*

28. Racial violence to keep blacks in their place has existed from almost the beginning of their experience in colonial America. See A. LEON HIGGINBOTHAM, *IN THE MATTER OF COLOR* (1978). The Civil War altered the legal status of black people, necessitating a change in the means used for racial oppression. Thus, the Ku Klux Klan was created, instituting the "midnight ride." See generally WILLIAM COHEN, *AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL 1861-1915* (1991); WYN C. WADE, *THE FIERY CROSS* (1987).

29. 112 S. Ct. at 2541.

30. 112 S. Ct. at 2549-50 (citations omitted) (second and third alterations in original).

blindness assumptions.³¹ The most striking aspect of this opinion is that Justice Scalia is joined by Chief Justice Rehnquist, who had previously voted in a flag burning case³² for the states' right to have some nonneutral content-based restrictions on speech. While the Chief Justice does not explain his switch, it seems to be a view about the types of important interests which ought to be protected. Accordingly, this First Amendment opinion and its interaction with the notion of equality embedded in the Thirteenth and Fourteenth Amendments is given additional power.

R.A.V. is an odd opinion for two reasons. It suggests that the racial neutrality argument is not a defense to old-fashioned racism, and that no doctrine, no matter how old or settled, will be safe if the doctrine conflicts with important white interests. In *R.A.V.*, the municipal statute, as interpreted by the Minnesota Supreme Court, was directed towards acts amounting to "fighting words."³³ Despite accepting this interpretation,³⁴ all nine Justices concluded that the ordinance was unconstitutional because it embraced some protected speech. Justice Scalia concluded that this statute fails precisely because it "discriminated" between the kinds of speech that it protected.³⁵ This amounts to placing racist conduct in the same category as political discourse, contrary to other views expressed by Justice Scalia regarding the First Amendment.³⁶

31. There is also an echo of Justice Bradley's famous quotation in the *Civil Rights Cases* that there has to be a time when blacks stop being the special favorites of the law:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected

The *Civil Rights Cases*, 109 U.S. 3, 25 (1883).

32. *Texas v. Johnson*, 491 U.S. 397 (1989).

33. *In re R.A.V.*, 464 N.W.2d 507, 509 (1991). "Fighting words" is used to denote a category of speech, the prevention and punishment of which does not raise a First Amendment problem. The Court first recognized this category in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). However, the exception created by the *Chaplinsky* Court has had practically no impact on the Court's subsequent First Amendment jurisprudence.

34. *R.A.V. v. City of St. Paul*, 112 S. Ct. at 2542.

35. *Id.* at 2550.

36. *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) (Scalia, J., concurring in judgment) ("Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered . . .

IV. REHNQUIST'S CONTRIBUTION

Certainly no American text of the sort I am discussing was written for black people—no more than *Uncle Tom's Cabin* was written for Uncle Tom to read or be persuaded by [T]he subject of the dream is the dreamer.³⁷

Justice Rehnquist is certainly the most hostile justice toward claims of civil rights in this half century and in terms of the norms of his time perhaps ever.³⁸ As first an Associate Justice and then As Chief Justice he has opposed permitting the use of government to eliminate the vestiges of discrimination in cases as diverse as employment discrimination and jury selection. He has found few civil rights that he finds important to protect that will redound to the benefit of black citizens and others of color. He has worked to essentially eviscerate the effects of the two most important civil rights statutes of the second reconstruction: the 1964 Civil Rights Act and the 1965 Voting Rights Act. Others have chronicled the extent to which he has been hostile to those interests.³⁹ I want to emphasize that the issue I raise is not about his conservatism but the story he is telling about race and the law. It is that story that has left black citizens at the mercy of limited government protection and subject to overt private and public restrictions.⁴⁰

immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy.”)

37. TONI MORRISON, *PLAYIN' IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* (1992).

38. See *supra* note 8 (especially the discussion of Segal and Spaeth's study).

39. See, e.g., Mary C. Daly, *Affirmative Action, Equal Access and the Supreme Court's 1988 Term: The Rehnquist Court Takes a Sharp Turn to the Right*, 18 *HOFSTRA L. REV.* 1057 (1990); Brian Landsberg, *Equal Educational Opportunity: The Rehnquist Court Revisits Green and Swann*, 42 *EMORY L.J.* 821 (1993) (the Court, led by Chief Justice Rehnquist, has been moving away from the principles in *Green and Swann*); Brian Landsberg, *Race and the Rehnquist Court*, 66 *TUL. L. REV.* 1267 (1992) (in the 29 cases involving race, the Rehnquist Court has narrowed the legacy of the Burger Court).

40. I do not mean to suggest that Justice Rehnquist is completely beyond the possibility of redemption in terms of the story he is telling in race cases. He has occasionally supported the interests of black people. See, e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985) (majority opinion by Rehnquist found that article of Alabama Constitution which prohibits citizens from voting if they violate moral standards was adopted partially as a means of excluding black citizens from voting; article is not saved because legislature also intended to prevent poor whites, as well as all blacks, from voting). The Chief Justice was willing to reject the blandishments of Justice Thomas's concurrence in *Holder v. Hall*, ___ U.S. ___, 114 S. Ct. 2581 (1994), that would have gutted the Voting Rights Act. Unlike Justice Thomas, he is not willing to completely ignore 20 years of jurisprudence to eviscerate congressional action that he does not like. However,

Justice Rehnquist joined the Burger Court shortly after it had unanimously decided *Griggs*. In one of his first opinions, *Jefferson v. Hackney*,⁴¹ he reintroduced the white supremacist elements of interest blindness and status quo blindness.⁴² The state of Texas participated in the federal assistance program. However, the Texas Constitution placed limits on the total resources the state could allocate to welfare payments.⁴³ To meet this constitutional limit, the state initially cut aid to the blind and disabled by five percent and aid to dependent children by fifty percent.⁴⁴ The state did not reduce assistance to the elderly. Plaintiffs, recipients of Aid For Families with Dependent Children (AFDC) in Texas, challenged the constitutionality of applying a lower percentage reduction factor to AFDC than the other three categorical programs. Justice Rehnquist concluded that the decision to treat these programs differently did not violate the statutory requirements of federal law nor the constitutional limitations of the Fourteenth Amendment.⁴⁵ In coming to this conclusion, he told a story about race contradicting that told by the *Griggs* Court.

Justice Rehnquist applied the *interest blindness* concern to this case.⁴⁶ Ignoring the interests of black people, Justice Rehnquist wrote:

one would be more comfortable with the possibility that this was a permanent change in the story he is telling if one were certain that he would not provide the fifth vote for this position in the future. See discussion of *R.A.V.* *supra* notes 27-36.

41. 406 U.S. 535 (1972).

42. See *infra* notes 46, 49 and accompanying text. Professor Ross has correctly noted the extent to which other Justices have contributed to this story. He attributes the notion of innocence to a number of decisions written by Justice Powell and to dissenting opinions written by Justice Stewart. See Ross, *Innocence and Affirmative Action*, *supra* note 3. The notion of innocence is certainly a way of reproducing aspects of what I call white supremacy. I believe it is fair to attribute this to Justice Rehnquist because he was raising similar concerns in other areas.

43. *Jefferson*, 406 U.S. at 537.

44. At the time of the hearing before the Court, this had been raised to 75%. *Id.* at 537 n.3.

45. *Id.* at 543-47.

46. For other cases that support this doctrine, see, e.g., *Prince Edward School Foundation v. United States*, 450 U.S. 944 (1981) (Rehnquist, J., dissenting from denial of certiorari) (school with history of discrimination against blacks can prove nondiscrimination by simply asserting nondiscrimination policy). Rehnquist's dissent argues of a view of discrimination out of sync with our times and embodies interest blindness and no race assumptions. Compare *Bob Jones Univ. v. United States*, 461 U.S. 574, 617 (1983) (Rehnquist, J., dissenting) (IRS did not have congressional support for such a far-reaching policy of nondiscrimination) with *Rust v. Sullivan*, 500 U.S. 173 (1991) (majority opinion authored by Rehnquist, C.J.) (Rehnquist supports agency determination of congressional policy that vastly expands the congressional language and policy). The Chief Justice manipulates theory to find a policy that supports the status

Appellants are thus left with their naked statistical argument: that there is a larger percentage of Negroes and Mexican-Americans in AFDC than in the other programs, and that the AFDC is funded at 75% whereas the other programs are funded at 95% and 100% of recognized need. As the statistics cited in the footnote demonstrate, the number of minority members in all categories is substantial. The basic outlines of eligibility for the various categorical grants are established by Congress, not by the States; given the heterogeneity of the Nation's population, it would be only an infrequent coincidence that the racial composition of each grant class was identical to that of the others. *The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be.* Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment.⁴⁷

Justice Rehnquist argued that the change in reimbursement standards for the AFDC programs was not infected with discrimination because the welfare department did not know the makeup of the program and had no discriminatory intent.⁴⁸ He concluded that a standard specifically

quo of racial discrimination and white supremacy embedded in the social structures that produced *Bob Jones University* and *Prince Edward County*. See also *Board of Educ. v. Dowell*, 498 U.S. 237 (1991) (majority opinion authored by Rehnquist, C.J.) (approving the ending of court supervision of school system because the effects of de jure segregation had been eliminated). Rehnquist goes out of his way to find that the effects of long history of discrimination have been eliminated in the 13 years since the Court first began efforts to remedy legal discrimination. Rehnquist supports all four of the assumptions that genuflect to a status quo that does not eliminate white supremacy.

47. *Jefferson*, 406 U.S. at 548 (emphasis added) (footnote omitted).

48. Justice Rehnquist wrote in support:

The three-judge court found that the "payment by Texas of a lesser percentage of unmet needs to the recipients of the AFDC than to the recipients of other welfare programs is not the result of racial or ethnic prejudice and is not violative of the federal Civil Rights Act or the Equal Protection Clause of the 14th Amendment." The District Court obviously gave careful consideration to this issue, and we are cited by its opinion to a number of subsidiary facts to support its principal finding quoted above. There has never been a reduction in the amount of money appropriated by the legislature to the AFDC program, and between 1943 and the date of the opinion below there had been five increases in the amount of money appropriated by the legislature for the program, two of them having occurred since 1959. The overall percentage increase in appropriation for the programs between 1943 and the time of the District Court's hearing in this case was 410% for AFDC, as opposed to 211% for OAA and 200% for AB. The court further concluded [that] "[t]he depositions of Welfare officials conclusively establish that the defendants

embracing black people's interests would make the legislative process unworkable. This is a version of the *status quo* perspective underlying Justice Rehnquist's story about race, a view leaving the concerns of black plaintiffs outside the law's reach. Though such a conclusion is not new,⁴⁹ it has been reinvigorated by Justice Rehnquist's work.

The history of discrimination in Texas makes the district court's conclusion suspect.⁵⁰ In spite of the demographic profile of welfare recipients in Texas, the Court does not recognize race as playing a role in Texas's decision.⁵¹ It is hard to imagine the kind of ignorance about

did not know the racial make-up of the various welfare assistance categories prior to or at the time when the orders here under attack were issued."

Id. at 547 (footnote omitted).

49. See, e.g., Culp, *supra* note 6.

50. Justice Marshall points out part of the story in his dissent:

The record contains numerous statements by state officials to the effect that AFDC is funded at a lower level than the other programs because it is not a politically popular program. There is also evidence of a stigma that seemingly attaches to AFDC recipients and no others. This Court noted in *King v. Smith*, 392 U.S., at 322, that AFDC recipients were often frowned upon by the community. The evidence also shows that 87% of the AFDC recipients in Texas are either Negro or Mexican-American. Yet, both the District Court and this Court have little difficulty in concluding that the fact that AFDC is politically unpopular and the fact that AFDC recipients are disfavored by the State and its citizens, have nothing whatsoever to do with the racial makeup of the program. This conclusion is neither so apparent, nor so correct in my view.

Jefferson, 406 U.S. at 575 (Marshall, J., dissenting).

51. The Court suggests there was no discrimination because the welfare officials did not know the recipients' racial makeup. While at some level this may be true, a look at the largest programs, assistance for older citizens (OAA) and AFDC, reveals that the one that received the least reduction as white and the one that suffered the largest as nonwhite.

Program	Year	Percentage of Blacks, Mexican-Americans	Percentage of White-Anglos	Number of Recipients
OAA	1969	39.8	60.2	230,000
	1968	38.7	61.3	
	1967	37.0	63.0	
APTD	1969	46.9	53.1	4,213
	1968	45.6	54.4	
	1967	46.2	53.8	
AB	1969	55.7	44.3	14,043
	1968	54.9	45.1	
AFDC	1969	87.0	13.0	136,000
	1968	84.9	15.1	
	1967	86.0	14.0	

program recipients postulated by the courts, since fears about the nature of welfare recipients still exist in our thinking about welfare and race.⁵² Justice Rehnquist does not require the Court to deal with the harsher impact of its decisions on racial minorities, permitting excuses that, as Justice Marshall points out, do not hold water.⁵³ Justice Rehnquist concludes that the proposed neutral standards suggested by the state are sufficient to meet the rational basis test of the Constitution:

Applying the traditional standard of review under that amendment, we cannot say that Texas' decision to provide somewhat lower welfare benefits for AFDC recipients is invidious or irrational. Since budgetary constraints do not allow the payment of the full standard of need for all welfare recipients, the State may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the

Id. at 548 n.17.

52. See, e.g., CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS* (1992) (welfare is a program that is not very extensive; most of the recipients already supplement their incomes through work or other family help because almost no welfare recipient can make it on the existing income assistance).

53. Justice Marshall argued that:

Although the District Court accepted the State's contentions that there are differences between AFDC children and other recipients which warranted different treatment under the federal statutes, I find each of the reasons offered totally unpersuasive.

First, Texas argues that AFDC children can be employed, whereas recipients of other benefits cannot be. Assuming *arguendo* that this is true, it is an argument that falls of its own weight. Whatever income the children earn is subtracted from need, or it is excluded from consideration under 402(a)(8) to encourage self-help. Thus, income is already reflected in the computation of payments, or it is excluded in order that a specific legislative goal may be furthered

Second, the State maintains that AFDC families can secure help from legally responsible relatives more easily than recipients under other programs. Assuming again for purposes of discussion that this is true, it should be plain that any support from any relatives is subtracted from the State's grant

Third, Texas points to the likelihood of future employment for AFDC recipients, a likelihood that it says is nonexistent for older persons and others who receive aid. Federal law provides that a State may only consider income that is currently available in allocating funds. 45 CFR § 233.20(a)(3)(ii). This contention is therefore irrelevant.

The State makes only two other arguments. One has already been rejected. Texas urges that the purposes of the federal programs differ, but the history belies this contention. The other is that the numbers of AFDC recipients is rising and this program should therefore bear the burden of monetary limitations. The obvious problem with this argument is that . . . Congress has indicated that increased eligibility for AFDC is desirable

hardships of an inadequate standard of living. While different policy judgments are of course possible, it is not irrational for the State to believe that the young are more adaptable than the sick and elderly, especially because the latter have less hope of improving their situation in the years remaining to them. Whether or not one agrees with this state determination, there is nothing in the Constitution that forbids it.⁵⁴

The story appears on its face to be uninvolved with race but it has, buried in its structure, the full panoply of concerns about the impact on citizens of color.⁵⁵ The story Justice Rehnquist tells assumes that the status quo is fine, that the interests of black people are not important to this determination, that white people do not have a color and that it is possible, therefore, to be neutral about the structure of the Equal Protection Clause.

We see a similar discourse about race in another of Justice Rehnquist's first opinions, *Moose Lodge No. 107 v. Irvis*.⁵⁶ A black state legislator denied service in a private club claimed that the club's liquor license was state action; therefore, the denial of service was a violation of the Equal Protection Clause of the Fourteenth Amendment. Justice Rehnquist found no issue of constitutional magnitude implicated by the state's help in providing a liquor license to someone wanting to engage in racial discrimination, concluding:

The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, *such a holding would utterly emasculate the*

Jefferson, 406 U.S. at 579-80 (Marshall, J., dissenting).

54. *Id.* at 549.

55. Except where noted, my discussion of race will be about black and white racial issues. It should be clear to any participant in the discussion that other people of color, other disfavored minority groups, and women are sometimes influenced by similar issues. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (Fourth Amendment not violated by routine visual searches of cars near the border). The *Martinez-Fuerte* Court is not concerned that the check points to catch "illegal aliens" are primarily concerned with catching brown and, to a lesser extent, black people. The Court seems to conclude that the intrusion on the Fourth Amendment is small since most white people will not be subject to this kind of border stop.

56. 407 U.S. 163 (1972).

*distinction between private as distinguished from state conduct set forth in The Civil Rights Cases . . . and adhered to in subsequent decisions . . .*⁵⁷

Justice Rehnquist sees the concerns of the private club's white patrons as being paramount. He starts with a notion that the status quo of the liquor license is appropriate, because in some situations the black plaintiffs are not permitted to apply or purchase a liquor license for their own club, public or private. He ignores the cost of being a racial minority in that situation. Representative Irvis was not seeking to leave the comforts of his home community in the Hill District in Pittsburgh, but to get a drink in Harrisburg near the state capital where he served his constituents. The club's refusal was to him a public refusal because of the nature of the Harrisburg community and because, as a member of a racial minority, it is not always possible to reproduce what the majority community does. Justice Rehnquist implies that the injury here is the kind of injury suffered by all of us who are refused access to places that are private in nature. He ignores the extent to which the provision of a liquor license in fact makes that private space very public, particularly for those citizens who are black.

Justice Rehnquist's story infects his work in other areas. For example, in *Barclay v. Florida*,⁵⁸ a black defendant was found guilty of participation in the heinous murder of a white hitchhiker. In a separate hearing, the same jury provided an advisory recommendation: life imprisonment for the defendant and death for his accomplice, the apparent ring leader. The trial judge ignored the jury's recommendation and concluded that death was appropriate for both.⁵⁹ Contrary to Florida law, facts about the murder were deemed to be aggravating circumstances by the trial judge.⁶⁰ The judge spoke of the horrors of war and why this murder was comparable to Nazi actions in World War II.⁶¹ However, Justice Rehnquist concluded that the failure of the trial court did not amount to a constitutional violation, because the Florida Supreme Court had sufficiently examined these issues.⁶²

The importance of Justice Rehnquist's story is obvious if one examines a case like *Barclay*. Justice Rehnquist does not see the extent

57. *Id.* at 173 (emphasis added).

58. 463 U.S. 939 (1983) (plurality opinion).

59. *Id.* at 944.

60. *Id.* at 945.

61. *Id.* at 948, 948-49 n.6.

62. *Id.* at 956-58.

to which the white judge is out of control in his application of apparently neutral standards to this black defendant. The Court should have carefully scrutinized this case, since extensive evidence had been presented regarding the power of race to influence a case's outcome. Instead, Justice Rehnquist applied the most limited review of the case, ignored some case law on point, and suggested that the issue of whether a court has adhered to its own standards does not violate the Constitution.

The story that Justice Rehnquist tells is, once again, extremely limited and exclusive of the interests of black people. The status quo with respect to criminal procedure is assumed to be fair despite ample opposing evidence in the record. The story, properly understood, is that black criminal defendants do not have rights. This is easiest to see if one reads the Supreme Court of Florida's opinion reducing Barclay's sentence to life imprisonment. The court concludes that the district court had not adhered to important constitutional and other procedures in sentencing the defendant to death.

The powerful story told by Justice Rehnquist can be read in a number of important cases. Dissenting in *Batson v. Kentucky*, Justice Rehnquist concludes that "there is simply nothing 'unequal' about the state using its peremptory challenges to strike blacks from the jury in cases involving black defendants so long as such challenges are also used to exclude whites in cases involving white defendants."⁶³ He concluded that past discrimination is not relevant in examining the failure of blacks to vote.⁶⁴ He does not see that the notion of normality assumes the status quo is sufficient in cases involving the test standards for hiring determinations.⁶⁵

The most powerful indictment of Justice Rehnquist's story was his vote in *Shaw v. Reno*.⁶⁶ In *Shaw*, five white plaintiffs argued that the creation of districts with a majority of African-Americans violated their

63. 476 U.S. 79, 137 (1986) (Rehnquist, J., dissenting).

64. *Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002, 1013 (1984) (Rehnquist, J., dissenting from denial of certiorari). This contradicts the principles that underlie the Voting Rights Act and common sense.

65. *See Bushey v. New York State Civil Serv. Comm'n*, 469 U.S. 1117, 1120-21 (1985) (Rehnquist, J., dissenting). An alteration in the normalization curves for black candidates is an inappropriate response to the failure of black plaintiffs to live up to the norm. This view of such normalization led Democrats to alter the 1991 Civil Rights Act in order to prohibit such policies, in spite of strong evidence that in terms of professional norms, such normalization can be appropriate.

66. 509 U.S. ___, 113 S. Ct. 2816 (1993).

rights. Justice O'Connor, writing for a five-person majority including the Chief Justice, concluded that the plaintiffs did not have a race, explicitly making the *identity blindness assumption*. However, to allow these claims, the Justices had to resolve the question of plaintiff injury. Justice Rehnquist's opinion in *Jefferson* set the standard for much of the Court's jurisprudence. Justice Rehnquist reasoned that showing only a possible connection is insufficient because it would cripple effective legislative action.⁶⁷ How this same Justice can be part of a five-person majority in *Shaw* can only be explained by his support for white supremacy. The Court, speaking through Justice O'Connor, does not claim white supremacy is the goal of the opinion. However, there is no other explanation for the Court's reasoning that any exercise of power by a black majority threatens the Constitution while the one hundred year history of white gerrymandering is simply irrelevant.

Shaw is color blind in the same sense that *R.A.V.* is color blind. Both assume that white supremacy, the racial status quo, is an appropriate base line and that any deviation from that status quo invades a protected right. For the white juveniles of St. Paul, the deviation from the status quo was an effort to limit the absolute right of white people to frighten black people with "political speech." For white people who reside in the congressional district in North Carolina, this includes the right to maintain control over the political process despite a history of oppression.⁶⁸ Some would defend Justice Rehnquist by contending that he was simply seeking the colorblind solution, but Justice O'Connor's opinion in *Shaw* admits that race will be considered. There is no color blindness if some, but not all, use of race is improper, and that use is connected to the empowerment of black people.

V. BAD MEN ARE NOT NECESSARILY RACIST: THE ECONOMIC DISCOURSE OF JUSTICE REHNQUIST

By examining Justice Rehnquist's economic discourse, one can see his keen analytic mind at work. He is a very sophisticated jurist with respect to economic issues,⁶⁹ able to examine the impact of law on the

67. See *supra* note 47 and accompanying text.

68. This oppression can be seen in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and also in the fact that 40 counties in North Carolina are still covered by the Voting Rights Act.

69. See Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984).

marginal participant. Similarly, he is able to examine the *ex ante* and *ex post* concerns of legal situations. I want to suggest, however, that his story about race is, ultimately, the dominant story of his career.

Economic issues are buried within both the *Jefferson*⁷⁰ and *Moose Lodge*⁷¹ opinions. However, in neither case does Justice Rehnquist utilize economic factors in reaching his decision. Ultimately, it seems, economics does not matter when race is involved. *Moose Lodge* concerned the limited number of liquor licenses allocated in a community under control of the government. Justice Rehnquist, ignoring the economic question, reasoned that this limit is not likely to be important in many situations. He did not consider the impact of this limitation on black plaintiffs who are, like the traveler at early common law, unlikely to be able to find a place to drink.⁷² An economically-focused story may not have changed the outcome, but it would certainly have altered the the factors he discussed. One of these factors would have been the economic impact on black people due to an inequitable distribution of a limited state resource—liquor licenses.

Similarly, the *Jefferson* Court's rational basis scrutiny of the legislature's decision ultimately depends upon the legislature's explanation, in partially economic terms, of the differences between AFDC and other recipients. Justice Rehnquist assumed that the average return to the participants was the predominant concern, ignoring the extent to which statutory requirements make the marginal incentive the same for all groups. Justice Rehnquist's result is not necessarily wrong, but the story he tells in reaching that result echoes most powerfully the interests of white citizens at the expense of important concerns of black citizens.

VI. CONCLUSION

Federal courts have long indulged civil rights plaintiffs. Prior to the Supreme Court's 1988 decision in [*Wards Cove*⁷³], for example, federal courts habitually ignored the traditional allocation of burdens of persuasion and production in civil litigation by shifting the burden of

70. See *supra* notes 41-55 and accompanying text.

71. See *supra* notes 56-57 and accompanying text.

72. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175-77 (1972). The recent incidents with respect to the Shoal Creek Country Club are but the tip of the iceberg with respect to the extent of exclusion faced by racial minorities and, to a lesser extent these days, by religious groups and women.

73. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

persuasion in Title VII disparate impact cases from the plaintiff to the accused employer, and “thus overturning eight centuries of jurisprudence.” In *Ward’s Cove*, [sic] the Supreme Court disapproved this supererogatory coddling of civil rights plaintiffs, admonishing that “[t]he burden of persuasion . . . remains with the disparate impact plaintiff.” *The Supreme Court thereby restored to normality the method for allocating burdens of persuasion and production in Title VII disparate impact cases.*⁷⁴

The nature of Justice Rehnquist’s story about race is important because it leaves significant concerns unexamined and, therefore, not included. Students increasingly come to my classes with an incorrect assumption about the state of the law and black people, as typified by the opening quote in this section. Normality is seen in a particularly stilted way, where black employment discrimination plaintiffs, criminal law defendants and concerns in tort matters are not part of the discourse. Students see normality from a white perspective, a result brought about by the racial story told to their generation. This story excluded black concerns, thereby leaving white majority concerns as the norm.

If students perceive civil rights plaintiffs as special favorites of the law, there will be no mercy or justice for these plaintiffs. However, simply telling the story of black people will not ensure that justice triumphs. If this were true, powerful stories of black injustice would echo within the opinions of Justices Kennedy, Thomas,⁷⁵ and O’Connor. The truth is, story is only a beginning of discourse, not an end of justice or truth. Judges failing to understand this are ignorant to the extent of their involvement in racism. Justice Marshall’s great contribution has been, and will continue to be, his ability to say that there is an untold powerful story that needs examination in the bright sunshine of judicial deliberation. Conversely, Justice Rehnquist’s legacy

74. Jeffrey D. Hanslick, Comment, *Decisions Denying the Appointment of Counsel and the Final Judgment Rule in Civil Rights Litigation*, 86 NW. U. L. REV. 782, 782 (1992) (emphasis added) (second and third alterations in original) (footnotes omitted). This view of the recent history of civil rights plaintiffs is wrong. Courts have often put the burden of proof on defendants in situations both inside and outside the civil rights context. See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 259 (5th ed. 1984) (discussing the doctrine of *res ipsa loquitur*); Francis H. Bohlen, *The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof*, 68 U. PA. L. REV. 307 (1920). Indeed, one can see a shift in the burden of proof to defendants in a number of areas, especially those shifting from a negligence standard toward strict liability. While this trend may be distasteful (or even wrong), the trend is evident in a significant set of differing circumstances.

75. See discussion of *Holder v. Hall*, 114 S. Ct. 2581, *supra* note 40.

will be his efforts to bury important concerns of black participants in the American legal system.