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I. Introduction

L.H. LaRue demonstrates in his book, *Constitutional Law as Fiction*, that, at least in the realm of constitutional law, there is no simple correspondence between fiction and falsehood, or fact and truth. Partial or fictive accounts of our constitutional history, even when they are riddled with inaccuracies, may state deep truths about our world, and accurate recitations of historical events may be either intentionally or unintentionally misleading in the extreme.¹ In some ways, this claim is unexceptional; a number of scholars have noted that the "stories" judges tell in the guise of reciting the "facts" of cases or when summarizing the holdings and import of relevant precedent will almost inevitably fall short of historical accuracy.² As all first-year law students quickly discover, courts must mythologize both facts and precedent to some degree simply to produce clean holdings. LaRue's argument as I understand it, however, goes further. According to LaRue, the Supreme Court engages in a form of storytelling or myth-making that goes beyond the inevitably partial narratives of fact and precedent. The Supreme Court also tells stories about our collective past — our political and social history — to support the results for which it argues.³ LaRue shows that those political and social histories are not simply true or false: like stories of fact and precedent, such histories are a blend of fact and falsehood. The narrative histories that are at the center

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3. LA RUE, supra note 1, at 15-27.
of Court doctrine in a number of important areas, including for example, the story told in Establishment Clause cases about the settlers' foundational desire to free themselves of religious tyranny, or the story told in the Warren Court's equal protection jurisprudence about the symbiotic relation between the Court and the civil rights movement, tell only a part of our history at best. If read as history, they mislead and distract more than they enlighten.

Nevertheless, LaRue makes clear that criticism of this sort is not his mission. He believes that the Court's misreadings and mistellings of the historical record, like courts' misreadings of fact and precedent, are inevitable and not altogether undesirable. In his book, LaRue shows that the Court uses these stories, which are most assuredly about our past, not so much to tell us the truth about that past, but to establish what might be thought of as foundational myths which then render our constitutional law persuasive. It is therefore a mistake to criticize or even praise these judicially created stories solely by reference to their historical accuracy. Rather — and precisely because they are fiction (or myth), and in some sense are written and intended to be taken as such — they should be evaluated as fiction (or myth). We need ask of these stories not whether they are historically accurate but whether they are true or false as stories, whether they illuminate something important about our lives that the complexities, ambiguities, and uncertainties of historical truth would obscure.

This Essay has three parts. In the first part, I will provide a somewhat different account to the question at the heart of LaRue's book: the nature of the "truth" about our society that a judicially authored "story" might possess when that story purports to be about our past, but actually departs in significant particulars from historical fact. Although LaRue eschews "theory," he does ultimately provide what might be called an aesthetic theory, or explanation, of the truth such judicially told histories might possess. According to LaRue, a historically inaccurate story can nevertheless be true if it meets two conditions: first, if it is "more or less" true, and second, if it illuminates something "strange and wonderful" about some relevant aspect of our history — in this case, the Constitution. For example, LaRue suggests that the story Justice Marshall told in Marbury v.

4. Id. at 16-31.
5. Id. at 119.
6. Id. at 14.
7. Id.
8. Id. at 11, 14-16.
9. See infra part II.
10. LARUE, supra note 1, at 150-53.
CONSTITUTIONAL FICTIONS

Madison\(^{11}\) about the limits of federal and congressional powers might be a true one: it is more or less true even if not historically accurate in all particulars, and it did indeed create, as well as illuminate, something strange and wonderful about political life.\(^{12}\)

The position I put forward here is not inconsistent with LaRue’s aestheticism, but it has a different focus. Briefly, I will argue that one sort of truth that a more or less true constitutional story about our past might possess is moral or normative. Even a historically inaccurate story might tell us something true if it says something true about the way we should organize our social and political lives. I will also suggest that the Court is not the only institutional actor to use partly fictional histories in such a moralistic way; the use of fictive history for moral education is, in fact, a widely shared social practice.

In the second part of this Essay, I examine some of the costs attached to this general practice both on and off the Court.\(^{13}\) I do not suggest that the use of historical fictions for moral persuasion is costly to the extent that the histories employed are false. Like LaRue, I believe that the relationship between historical accuracy and a story’s truth is extremely complicated. But I do think that the general practice of conveying moral argument in the form of historical fiction does some damage — both to our collective integrity and to the quality of our critical discourses. The second part of this Essay suggests that, for various reasons, the risk that the practice of establishing moral argument through partly fictional historical narrative will entail these costs is even more acute in the domain of law than elsewhere.

In the third and final part of this Essay, I will explore one sort of more or less true story used by the Supreme Court to buttress its affirmative action jurisprudence.\(^{14}\) I will first argue that the use of such stories in the affirmative action debate shows that stories are indeed used by courts and others to convey moral arguments, propositions, and purported moral truths. I will then argue that those debates exemplify the dangers as well as the virtues of that practice.

II. Constitutional and Legal Fictions

One way that a judicially told story that purports to be about our past, but is in fact historically inaccurate, might nevertheless be "true" is moral: A story may be true if it says something true about how we ought to live

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11. 5 U.S. (1 Cranch) 137 (1803).
12. LARUE, supra note 1, at 68-69, 152-53.
13. See infra part III.
14. See infra part IV.
our lives, and it may be true in that way even if it distorts the record in some of the ways LaRue's work highlights. Before looking at judicially told stories, however, it is worth noting that it is not only in legal discourse that quasi-fictional histories are used for moral purposes. Indeed, moralizing in storytelling about the audience's shared past is not an unfamiliar practice, and the discovery of a true moral in historical fiction is not an uncommon phenomenon. To take one obvious example from a nonlegal context, the "truths" told in didactic children's literature rely in some way on distorted historical references and are explicitly moralistic. Furthermore, those moral truths are to some degree unaffected by the historical distortions in the stories that convey them. Disney's version of the Pocahontas story,\textsuperscript{15} for example, clearly sets out to promote the values of individualism, environmentalism, and a respect for minority cultures. Obviously, those ideals might represent moral truths even if the historical Pocahontas bore no resemblance whatsoever to the character depicted in Disney's animated film. Similarly, the story about George Washington and the cherry tree might say something true about personal integrity, even if the event never occurred. As I explain below, the relation of these "moral truths" to the historical record to which they refer is complex; nevertheless, one can reasonably assert that the Pocahontas and George Washington stories might be true in some way, even if they do not accurately reflect the historical record.

Stories that are purportedly historical but partly fictional are also used in adult political discourse to convey moral argument. To take an example from classic literature, Aeschylus's retelling of the history of the House of Atreus in his masterpiece, \textit{The Oresteia},\textsuperscript{16} continues to speak to modern audiences and readers about the value of the rule of law and the role it ought to play in civilized life, even though the myth as told in that play is several tellings and many generations removed from any connection it may or may not have had to a historical family and their internal, lethal warfare. More casually, and less spectacularly, anecdotes and stories serve the same educative, moral function. Ronald Reagan infamously dramatized a moral point about thrift and fraud with purportedly real stories about "welfare queens." From a different end of the political spectrum, Patricia Williams conveyed her complex arguments about white racism with stories that sometimes purported to be historical, but which actually may not have been factually accurate.\textsuperscript{17} Thus, Reagan may have said something true about

\textsuperscript{15.} \textsc{Pocahontas} (Walt Disney 1995). \\
\textsuperscript{16.} \textsc{Aeschylus, The Oresteia} (Robert Lowell trans., Farrar, Straus, Giroux 1978) (circa 458 B.C.). \\
\textsuperscript{17.} \textsc{Patricia Williams, The Alchemy of Race and Rights} (1991).
thrift and fraud, even if there was never a single welfare recipient touring the streets in a Cadillac, and Williams' evocative stories about her experience at Benetton or about the little boy mauled to death by the polar bears in a Brooklyn zoo may have said something important about conscious and unconscious white racism respectively, even if the actual events deviated in particulars from the renditions she provided. Again, those stories tell us something about how we ought to live whether or not they tell us anything historically accurate about our past.

In legal discourse, and quite apart from the quasi-fictional "grand narrative" stories about our political history that LaRue describes, more or less true stories about the past are continually told. Judges and lawyers tell stories about the case at hand or the relevant law that almost invariably involve some degree of fictionalizing. Although these stories about fact and precedent are not used directly toward the end of establishing moral truths, they are unquestionably used to establish legal propositions. Those legal propositions, in turn, sometimes imply and sometimes simply become accepted moral propositions about the way we should live. Like the morals found in children's literature, those legal and moral propositions may be true even if the stories used to convey them are inaccurate. For example, Hawkins v. McGee and Peevyhouse v. Garland Coal & Mining Co. say something about the way we do, and maybe something about the way we should, measure the expectancy interest in contract law, even if the stories used to convey the holdings in those cases are more myth than fact. Likewise, Palsgraf v. Long Island R.R. will continue to stand for a proposition about the limits of tort liability regardless of any new historical evidence that might be unearthed about what actually happened to Mrs. Palsgraf on that train platform seven decades ago. In law, as in politics, and no less than in children's literature, "more or less" true historical fictions are sometimes used to teach, and what they are sometimes used to teach is in the normative realm.

Similarly, the stories about our collective past, which LaRue isolates in Supreme Court doctrine, might be true even though the history they convey is distorted: they may convey moral truths about the way we should live our lives even if the history is inaccurate. It may be that we should tolerate religious differences and minority beliefs, and that we should interpret the First Amendment accordingly, even if the settlers who came here

18. See id. at 45.
19. See id. at 234.
20. 146 A. 641 (N.H. 1929).
21. 356 F.2d 979 (10th Cir. 1966).
22. 162 N.E. 99 (N.Y. 1928).
did not sport a high, catholic regard for spiritual diversity.\textsuperscript{23} It may be that we should construct a notion of fundamental law and of constitutional law that limits the powers of Congress and that empowers the Court to enforce such limits, even if the story Justice Marshall told in \textit{Marbury v. Madison}\textsuperscript{24} in order to convey that message distorted the historical record.\textsuperscript{25} It may be that the Court should develop a symbiotic relationship with the civil rights movement, and that we should interpret the Fourteenth Amendment accordingly, even if it is inaccurate to claim, as Justice Thurgood Marshall did in \textit{City of Richmond v. J.A. Croson Co.},\textsuperscript{26} that the Court has historically done so, or at least had done so until its about-face in \textit{Croson}.\textsuperscript{27} It may be that we should think of societal discrimination as an intentional tort and of city councils as empowered to remedy those torts only on legally sufficient evidence, as Justice O'Connor basically argued in her opinion in that case,\textsuperscript{28} even if the story she told to support these arguments about discriminatory practices in Richmond's construction industry was historically inaccurate — or even historically absurd, as LaRue claims.\textsuperscript{29} If all of this is so, or at least possible, then these histories the Court has told convey truths, even if the facts have been distorted. These truths tell us how we should live, and they are "based on" (to use a metaphor much disfavored by LaRue) "more or less" true histories only in the sense that they refer to events of our collective past in order to rhetorically identify them as ideals and norms which are "ours."

Before turning to the costs of this practice, let me first address a related issue: Why would the Court, a political commentator, or any moral educator or advocate use distorted history as a vehicle for moral or legal argument? Why use any kind of a story — historical or otherwise — to convey a legal or moral argument? Why not just make the argument or the moral claim and leave the story, whether fictional, mythic, or historical, out of it altogether? LaRue argues that the Court tells these stories to make the legal argument persuasive; unless the legal norm is backed up with history, it will fail to persuade, and unless the history is to some degree falsified, it will not sufficiently support the legal norm.\textsuperscript{30} Because we want law to persuade, we should not be so critical of the Court's apparent need to

\textsuperscript{23} See id. at 26-27.
\textsuperscript{24} 5 U.S. (1 Cranch) 137 (1803).
\textsuperscript{25} See id. at 68-69.
\textsuperscript{26} 488 U.S. 469 (1989).
\textsuperscript{27} See LA RUE, supra note 1, at 119.
\textsuperscript{28} See id. at 114-15.
\textsuperscript{29} See id. at 113.
\textsuperscript{30} Id. at 11.
falsify history. Instead, we should critically examine the stories and norms it articulates on other grounds.\(^\text{31}\)

I think that LaRue’s argument is right, but it somewhat oversimplifies the matter. I believe the Court — or anyone — might use historical fiction to make a moral argument for at least three reasons, each of which implies a different relation between the moral argument or proposition and the story used to convey it, and each of which also implies a different relation between the value of the moral argument and the historical veracity of the stories used to support it. As LaRue’s own work and passion rather strikingly prove, sometimes it really does matter whether or not the Court’s histories are accurate. At other times, however, it does not seem to matter as much. When does the historical truth of the story, as opposed to its moral valence, matter, and when does it not?

I think the answer depends on the function the history is serving within the moral argument. Again, let me first explore these reasons in the context of children’s literature and political discourse before turning to the law. First, a story might be *symbolic* of a moral truth. When it is, the historical accuracy of the story is largely irrelevant to the story’s moral truth. In Disney’s *Pocahontas*, the liberties the filmmaker took with the historical record do not undercut the moral truths conveyed by the film. Similarly, the fact that Washington may have never cut down a cherry tree, or felt compelled to tell the truth about it, does not diminish the value of personal integrity. Historical distortion might also be irrelevant where stories are used to symbolize moral truths in mature political discourse. Thus, even if there had never been a black child mauled to death by two polar bears in a New York zoo, Williams’s well-told story would still serve as a powerful symbol of a moral truth regarding the lethal effects of even innocent white racism.\(^\text{32}\)

In law as well, stories sometimes only symbolize legal propositions. When they do, as in children’s fables, historical distortion is largely irrelevant to the legal truths for which they stand. Particularly in common-law adjudication, the stories of particular cases might become identified over time with particular legal rules. When they do, these stories become of symbolic importance only, regardless of their original function. Thus, as noted above, although it might have mattered thirty years ago what really happened in *Peevyhouse*, it does not much matter anymore, just as it is no longer crucial to understanding proximate cause that we know exactly what

\(^{31}\) *Id.* at 14.

happened to Mrs. Palsgraf on that train platform decades ago. The mythical versions of both stories — that the breaching contractor's damages were limited to the market price differential between the performance promised and the state of the land, rather than the cost of completion, regardless of the hardship that measure visited upon the nonbreaching farmer; and that Mrs. Palsgraf was denied recovery for an injury she sustained as the result of a falling set of scales set in motion by vibrations caused by an explosion, brought on by a dropped package containing an explosive, caused by the negligent jousting of a passenger by a railroad employee — are what matters. The mythical versions of the *Peevyhouse* and *Palsgraf* facts now symbolize two possible normative understandings of the way we should or should not organize contractual relations or limit recovery in tort to injuries proximately caused by negligence. The historical record in both cases is as irrelevant to those holdings as the historical Pocahontas is to the lessons of the Disney film.

Sometimes, though, a history serves a quite different function in moral argument. A quasi-factual history is sometimes used as a vehicle for a legal or moral truth because it *evidences* some aspect of that truth. When it does, the historical falsity of the story does matter, maybe only incrementally, but maybe quite a bit. Of course, a story might be used both to symbolize and to evidence a truth. But if the story is offered at least in part as evidence of the problem that the moral truth addresses, then the fact that the story never happened, or happened very differently, clearly undercuts or dilutes the moral point. Thus, if the story served to evidence as well as to symbolize moral problems, then it would matter that Ronald Reagan's "welfare queens" never existed, just as it would matter if, as it turned out, Patricia Williams had never been excluded from Benneton on that wintry day in the way she described.\(^3\)33 In both cases, if the story did not just symbolize or dramatize but also evidenced the existence of a social injustice and if the story proves to be false, then the evidence of that social injustice is accordingly weakened. That weakening then undercuts the moral claim that the alleged injustice requires correction.

These principles apply equally to the histories judges tell. Thus, if the facts of *Palsgraf* tell us something about the proper limits of tort liability because they exemplify, rather than simply symbolize, a pattern of causally linked events for which no single trigger actor should be held responsible, then the history might matter, but again — only a little. If the falling scales in that case were not causally related to the dropped explosives after all,

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33. See generally Tushnet, supra note 32 (discussing problem of veracity in narrative jurisprudence); Abrams, supra note 32 (same).
then we have that much less evidence for the proposition that negligent acts
have far-flung consequences for which the actor should not bear responsibil-
ity. Similarly, if the history in *Peevyhouse* is not as generations of students
have learned it to be,\textsuperscript{34} then we have that much less evidence for the propo-
sition that limiting contract damages to market loss has intuitively and
morally unappealing consequences when held values might be idiosyncratic.
It does not follow from the possible falsity of either story that the proximate
cause limit on tort liability is therefore unnecessary, or that limiting con-
tract damages by a market rule is always morally unproblematic. But if the
actual facts of these cases turn out not to support the legal and moral rules
for which they have come to stand, or as in the case of *Peevyhouse*, for
which they constitute a critique, then we have that much less evidence for
the wisdom of those rules or the wisdom of that critique.

There is, though, a third possible relation between historical and moral
truth that is — at least sometimes — implicated in both the small narratives
of fact and precedent routinely used by courts and the grand narratives of
constitutional history occasionally deployed by the Court and described by
LaRue. In such cases, the truth or falsity of the history matters a lot, and
I will therefore focus on this relation in more detail. The Court might use
a story about our past, or about the facts of the case or the relevant prece-
dent, as a vehicle for putting forward a moral truth because the story — the
purported *history* — is constitutive of the moral truth that the story is
designed to convey. A piece of our history "constitutes" a moral truth to
whatever degree the bare fact that we have lived this way in the past in
some way implies that we should live the same way in the future. In other
words, the history is at least a part of the argument for the moral truth.
Historical truth may constitute moral truth to varying degrees in different
cultures. A culture which reveres tradition and traditional ways of life may
be one in which history is entirely constitutive of moral truth. A culture
in which tradition counts for little or nothing may eschew history altogether
as a source of moral authority.\textsuperscript{35} There also may be pockets of culture
within a society in which history is constitutive of moral truth even when
the society is otherwise quite cavalier toward tradition and traditional modes
of ascertaining moral truth. Religious traditions and even religious beliefs
in contemporary Western culture may be one such pocket: modern religious
people may suspend their rationalist doubts and adhere to traditional reli-


\textsuperscript{35} See Anthony T. Kronman, Precedent and Tradition, 99 YALE L.J. 1029 (1990) (arguing that constitutive character accounts for our adherence to rule of precedent).
gious beliefs and practices as a way of honoring or not breaking faith with the beliefs and practices of ancestors. As I will argue in a moment, law may be another such pocket of culture within an otherwise rationalist society in which the truth of moral or normative claims is partly established simply by past practice.

Even in the children's literature described above, histories are sometimes presented as constitutive, rather than simply symbolic or evidentiary of moral truth. As noted above, adults tell children the George Washington cherry tree story primarily as a symbol of a moral truth, and accordingly, the fact that the historical Washington never cut down the tree, much less felt compelled not to lie about it, does not substantially undercut that moral truth — but not entirely. After all, the George Washington story differs from stories such as Aesop's fables because it not only symbolizes the moral truth it seeks to convey, but to some degree, or in some tellings, or in some contexts, it constitutes that truth as well. Children come to know that honesty is the best policy because we teach them that George Washington told the truth in difficult circumstances. The same goes for Pocahontas. To some degree, the story is symbolic only, and to that extent, its historical veracity is irrelevant to the truth of the propositions it suggests about individualism, romantic love, courage, cultural differences, or natural values. But to some degree, the story constitutes the moral lesson it imparts. We can successfully teach our children to value individualism, romantic love, and naturalism through stories like Pocahontas at least in part because they admire people like Pocahontas. That Pocahontas acted the way she did constitutes our reason for believing in the truth of the moral propositions the story puts forward. That Pocahontas saved John Smith supports our conviction that it is possible to act on these beliefs — the Pocahontas story both evidences and symbolizes these convictions. But the story is also constitutive of them; that an admirable person acted on these convictions supports our belief that these are desirable convictions to hold. As William Bennett has recently argued, children's literature should be moral or should point us toward morally appealing ways to live precisely because such literature will invariably constitute our children's moral lives in just this way.36 Children are malleable, and the stories we tell them, whether of Pocahontas or of Power Rangers, do indeed come to constitute their moral values.

Both the stories of fact and precedent in common-law adjudication and the "grand narrative" stories that the Court tells about our constitutional past

are at least occasionally constitutive of the legal truths they convey in precisely the same sense that children's stories are constitutive of the morals they illustrate. Whether it is because of a lingering commitment to pre-enlightened traditionalism or because of some instrumental value we attach to doing things tomorrow the same way we did them yesterday, the truths conveyed in these stories are not just symbolized by the stories, or even evidenced by them, but are actually a product of them: we believe the legal truths for which they stand because we believe the history in which they are conveyed. To return to the examples taken from common-law adjudication, we prioritize the expectancy interest in contract law or the negligence standard and causation limit in tort because the best "more or less" true story we can tell about the prior cases is that those courts did also.\textsuperscript{37} That is what those courts did then; consequently, that is what we should do now. Those stories are, in part, constitutive of, not just symbolic or evidence of, whatever legal truths we accept as authoritative. Although it may appear irrational or unenlightened to do so, accepting history as constitutive in some way of legal truth may be central not only to our conception of precedent, but also to our notion of the rule of law itself.\textsuperscript{38} It may be central, rather than peripheral, to a legal way of thinking to view historical truths as constitutive of moral truth.

As with stories of fact and precedent, the relation of some of the constitutional histories the Court tells with the legal propositions for which the Court argues are occasionally constitutive. Sometimes, of course, the Court will quite explicitly generate from the history of the framing of the Constitution, or from the history of the Constitution's interpretation, the argumentative rhetoric from which to carve out a holding. The settlers tolerated religious differences or at least came here to escape religious persecution; therefore, the Free Exercise and Establishment Clauses should be interpreted accordingly. The Court has always been sympathetic to the mandate of racial justice found in the Fourteenth Amendment; therefore, the Fourteenth Amendment should be interpreted in such a way as to maintain that relationship. On one level this approach is unproblematic and unsurprising: the creation of the Constitution, like the forging of the common law, was, after all, a historical event. Constitutional truths, legal truths, and constitutional and legal reality, unlike moral truths and moral reality, are quite literally "constituted" by their history.

\textsuperscript{37} See supra text accompanying notes 21-22 (discussing \textit{Palsgraf} and \textit{Peeyhouse}).

\textsuperscript{38} See generally Kronman, \textit{supra} note 35.
At least in our culture, these constitutional truths — legal norms generated by constitutional history — tend to become widely shared moral beliefs for at least two reasons. The first and most important reason concerns the oft-noted and peculiarly elevated moral standing of the Constitution.\footnote{See generally Paul Brest, The Thirty-First Cleveland-Marshall Fund Lecture: Constitutional Citizenship, 34 CLEV. ST. L. REV. 175 (1985-86); Frederick Schauer, Constitutional Positivism, 25 CONN. L. REV. 797 (1993); Robin L. West, Constitutional Scepticism, 72 B.U. L. REV. 765 (1992); Robin West, Natural Law Ambiguities, 25 CONN. L. REV. 831 (1993).} For many people, the Constitution simply is the legal document from which we deduce not only legal truths, but moral truths as well.\footnote{See generally Schauer, supra note 39.} Because of the Constitution’s dual nature, constitutional histories, whether quasi-factual, more or less true, or not true, constitute not only legal propositions but also the moral beliefs they generate. The Constitution is a historical document, the content of which has a peculiarly close relation to the history of its production, and it has unmistakably moral, normative, and aspirational content. For many of us, it follows that the Constitution simply is the documentation of the history that in some ways does and should constitute our shared moral commitments.

A second reason for the occasional constitutive relation, rather than symbolic or evidentiary, between history and moral belief in constitutional law is jurisprudential and is, accordingly, not peculiar to constitutional doctrine. In one sense, and as noted above, legal propositions in all areas of law are constituted by historical truth. As H.L.A. Hart argued some time ago, propositions of law are true or false depending upon whether they correctly restate and then reformulate relevant historical events — such as what the monarch commanded or what the legislature passed — into the normative discourse of law.\footnote{See generally H.L.A. HART, THE CONCEPT OF LAW (1961).} If lawyers could remain as positivistically pure as H.L.A. Hart and other legal positivists would wish us to be, that clear fact would have no relevance whatsoever to the relation between historical truth and moral truth.\footnote{See id.} But, as the never ending jurisprudential debate over the relation of law and critical morality has made clear, few lawyers share such an uncompromisingly positivist view of the relation of law and morality.\footnote{See Ronald Dworkin, The Model of Rules I, in TAKING RIGHTS SERIOUSLY 14-45 (1977).} To some degree, legal truths in our culture, even outside of the heavily moralistic realm of constitutional law, establish moral
norms about the way we should organize our social life. To that extent, the histories that constitute our legal beliefs constitute our moral beliefs as well. Even in the common-law context, if Hawkins v. McGee and Palsgraf are constitutive of the legal truths that the expectancy interest should be measured by the market value of the promise, or that actors should not be liable in tort for the far-flung consequences of their actions, then to whatever degree those legal truths blur or become identical with our moral sense that we should organize life in those ways, the histories of those cases become constitutive of those moral norms. Similarly, in constitutional law, to whatever degree — and it is considerable — legal truths about the permissibility of state control of speech, state interference with equal opportunity, or state control of the private ownership of firearms become more or less accepted moral claims about the proper or desirable relation between the state and the individual, our constitutional history becomes constitutive of those moral beliefs as well.

III. The Costs of Moralistic Historical Narrative

What should we make of this apparently widespread social practice — both on the Court and elsewhere — of using fictive or partial histories to convey moral arguments, propositions, or truths? It may well be the case, as is widely believed, that mature literary fiction only rarely aims for moral or political truth, and it may be that when it does, it cannot possibly be any good, simply by virtue of that fact. As many literary critics have argued, when literature aims to teach moral lessons it becomes merely didactic rather than truly literary. It would be absurd, however, to criticize the use of the historical fictions that appear in legal discourse as merely didactic. The judicial function is largely, not just partly, didactic. Courts fictionalize facts and precedent in order to fulfill that function — in order to state something coherent and more or less unqualified about the way we not only should, but will, organize social life in the future. Surely, the same is true of the Supreme Court’s use of political history. The Court provides a useful, useable, and forward-looking statement about our collective past so as to point us toward some particular potential future. Fictionalizing our history, no less than fictionalizing the facts of the case or the

44. See generally Richard A. Posner, Law and Literature: A Misunderstood Relation (1988). It may also be that this critical rule of thumb is overbroad. See John Gardner, On Moral Fiction (1978) (arguing that literary fiction both can and should be used toward end of moral education).

relevant precedent does indeed, as LaRue suggests, render the legal rhetoric persuasive. But more precisely, it renders the legal rhetoric persuasive from a moral point of view. One might say that the truth that such a constitutional fiction or, more broadly, a legal fiction might have is unabashedly normative despite its inevitable historical distortions. If it tells us something true about how we should structure our collective life — how we should interpret, construe, extend, or repeal our law — then it is true, and if it does not, then it is false.

As LaRue insists, there is not much point in belaboring or bemoaning the revelation that the stories courts employ, whether of facts, precedent, or history, are to some degree fictionalized. If courts are going to be persuasive, and they will undeniably strive to be so, then they will fictionalize history. However, such a rhetorical practice, whether engaged in by the courts, educators, or commentators, and whether or not the moral propositions the story conveys are true or not, does entail at least two costs. The first cost of this general practice is to our personal and collective sense of integrity. The second is to the quality of our critical practices. I will address these two costs in that order.

First, whenever we are steadfastly committed to the moral value a historical fiction conveys and insistent that our past is constitutive of that value, then we will by force wind up engaging in massive acts of collective self-denial about our history. It is for this reason, I suspect, that many parents felt squeamish about Walt Disney's version of the Pocahontas myth, even as we cheered the film's light-hearted endorsements of feminism, environmentalism, and mutual respect for different cultures. The film presented those moral norms through a story that purported to be not just symbolic, but also constitutive of those truths: children were being taught to value these things because they reflect the way that Pocahontas lived and the values that she held, and because Pocahontas is one of our ancestors whom we admire. But making the Pocahontas story constitute the values of mutual respect, feminism, and environmentalism requires a massive distortion of the historical record. We are right to deplore such a failure of integrity. Better, one might think, to teach the values of feminism, environmentalism, and multi-culturalism directly and leave Pocahontas and John Smith out of it altogether.

Of course, within the genre of children's films and literature any particular story that purports to be loosely historical might also be understood as bearing one of the other two relationships to the moral truth they

46. See Larue, supra note 1, at 11.
47. See id. at 14.
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convey, within which the falsity of the history is not so destabilizing. Thus, the Disney corporation can easily and credibly respond to its critics that it had no real intention of exploiting the historical Pocahontas; that the film was a movie about the myth; and that the story was only being used to symbolize, not constitute, the moral truths it propagates. It is not so clear, however, that the same can be said of the genre of law. The legal stories and histories we tell are sometimes, but certainly not always, in an unambiguously constitutive relationship with the legal or moral truths they demonstrate. When they are, it is difficult to simply put aside veracity and to claim for a story nothing more than a symbolic or evidentiary relationship to the truth of the moral proposition it conveys. When the Court presents history as constitutive of, rather than as evidence of or symbolic of, our moral values, then the claim that the Court has misstated facts, history, or precedent does indeed weaken the legal authority in which the misstatement is made.

More generally, it is precisely because legal stories are sometimes in an unambiguously constitutive relationship with the legal and moral truths they establish that the larger claim that the Court consistently falsifies our political and social history threatens to undermine its authority. In law, legal and political stories often constitute, not just symbolize, legal or moral truth. In such cases, if the historical claims are wrong, then the moral authority of the law is indeed severely undercut. To put the same point the other way around, if we strive to maintain our commitment to the moral authority of law and if that moral authority requires some degree of fictionalizing, then we are virtually required by our commitment to the moral authority of law to deceive ourselves about our past.

There is a second cost involved in the use of historical fiction to constitute, evidence, or even just symbolize a moral point that is also heightened in law. If a legal or constitutional fiction can be true, even if historically inaccurate, then such a fiction can also be false; and if I am right that the sense in which a historical falsehood can be true is moral or normative, then such a claim is false where the moral claim it evidences, symbolizes, or constitutes is false. How then do we show, or even argue over, the truth or falsity of moral claims, particularly when they are purportedly constituted by, and not just evidenced by or symbolized by, a claimed history? The obvious strategy, of course, is to attack the moral claim by attacking the purported history that constitutes it. Thus, critics of the expectancy interest in contracts or the negligence standard in tort law

48. By contrast, it was not so easy for Oliver Stone to make the same response to critics of JFK or Nixon.
might seek to undercut the power of those two norms not by appealing to independent critical standards, but by contesting the historical record — by showing that earlier cases had not, in fact, relied upon those norms to the degree claimed by their propounders. To whatever degree the negligence standard in tort and the expectancy interest in contract are constituted, rather than simply evidenced or symbolized, by the stories from which they emerged, their force is accordingly weakened.

The cost I want to identify in the social practice of constituting moral propositions with stories, and then criticizing those propositions by exposing the fictive element in the stories, goes to the nature of these critical discourses: the use of historical fiction to buttress or to constitute normative propositions makes it difficult to criticize those propositions in any way other than by criticizing the histories that purport to convey them. We expend our critical energies debating the history — in effect, providing counternarratives — rather than criticizing the norm. In constitutional law, as in other disciplines, such as religion, in which norms are often constituted by histories rather than simply evidenced or symbolized by them, the risk of this kind of displacement or distraction within critical traditions is, in fact, quite high. We need to talk, for example, not only about whether or not the Founders themselves manifested the virtue of tolerance, but also about whether or not tolerance is a virtue, and if so, what might be its limits. If we accept and participate in the practices of viewing our norms as constituted by our history, then our critical energies will be devoted to the uncovering of counterhistories. If we discover that our founders did not possess or practice that virtue, and if we have left undeveloped other non-narrative means of conveying, constituting, and arguing over our ideals, then we are left truly at sea. We have deconstructed, as it were, the grounds for tolerance, but we have also deconstructed the grounds for moral conviction. By so doing, we have deconstructed all ground for moral critique as well.

IV. Affirmative Action Stories and the Meritocratic Myth

Let me illustrate both sorts of problems with this practice by looking at one corner of our ongoing affirmative action debate as that debate has developed both on the Supreme Court and elsewhere. I want to suggest that at least one argument against affirmative action plans, as well as the defense of those plans against that argument by proponents of affirmative action, has been constrained by the tendency on both sides to convey moral and legal arguments in the form of historical fictions.
The argument against affirmative action I want to focus on is, briefly, the notion that because affirmative action plans are race- or sex-conscious, they constitute an undesirable departure from an otherwise meritocratic society. According to this argument, privileges, power, wealth, and status, as well as the opportunity to acquire them, are properly allocated in this society according to merit — they go to whomever deserves them, where desert is, in turn, determined by some combination of what one has earned and one’s natural aptitude. Both popular and constitutional forms of this argument share the important premise that meritocracy is a desirable way to allocate social goods. Why might this be? Allocation according to merit, of course, is conducive to neither the substantive equality toward which affirmative action is aimed nor the entrenched inequality of societies in which wealth and privilege are allocated according to title or family heritage. The value of distribution according to merit is, in fact, entirely independent of its conduciveness to equality or inequality, just as the value of a particular distribution within a meritocratic society is independent of its impact on equality. The value of distribution according to merit is that it is conducive to a just society, rather than an equal or hierarchical one, in which each member gets the just deserts of his or her merit. Both what we should do and what we normally do in a meritocratic society such as ours is to decide who gets the seats in the medical school class, who gets the government subcontract, who gets the broadcasting license, and who gets the teaching job by determining who best deserves it, who has earned it, or who is best suited for it. Affirmative action violates this principle because it introduces a factor unrelated to merit into these calculations.

I do not, in these comments, want to answer this argument; I want to highlight one feature of it, as well as a feature of the arguments that have been developed by affirmative action defenders to counter it. The Court’s arguments against affirmative action plans that invoke the value of meritocracy, whatever may be the case of its other arguments against affirmative action, rely heavily on stories about individual merit which typically purport to be historical, but which almost invariably are to some degree fictionalized in precisely the way that concerns LaRue.\(^4\) Thus, according to Justice Powell’s opinion in *Regents of University of California v. Bakke*,\(^5\) in two successive years Alan Bakke would have and should have gotten a shot at a medical career, given his MCAT score and grade point average, but for the University of California’s impermissible racial quotas.\(^6\) Bakke

49. See *LaRue*, supra note 1, at 8.
51. Id. at 266.
earned it, he deserved it, he should have been rewarded it — but he was not. Similarly, according to both Justice O’Connor’s and Justice Scalia’s stories in *Croson*, the contractor in Richmond, Virginia, would have and should have gotten its government contract, given its low bid, but for the impermissible racial set-aside. Again, the contractor’s bid entitled it to the contract "on the merits," but it was thwarted by affirmative action. Affirmative action both thwarts attainment of the ideal and perverts normal outcomes. It prevents both the normal and the desirable rewards of merit from flowing to those who earn them.

Although LaRue notes the presence of this meritocratic story in *Croson*, he does not discuss it, focusing instead on the story Justice O’Connor told in that case to support her claim that there was no proven discrimination in government contracting in the Richmond construction industry. The impression left — unintentionally, no doubt — is that the meritocratic story concerning the deserving contractor, unlike the story regarding the lack of discrimination in Richmond, is basically unproblematic. But surely the impression is unwarranted. Both Bakke’s story of thwarted academic opportunity and the government contractor’s story of thwarted opportunity in Richmond are only more or less true, if that. What both stories deny — or fail to mention — are the non- and anti-meritocratic forces that contributed to their successes, specifically the non- and anti-meritocratic value of whiteness in a world that is anything but color- or sex-blind. Bakke’s meritorious grade point average and the contractor’s low bid are at least partly a product of the historical and ongoing exclusions of minorities and others from governmental largesse: Bakke earned his class rank in school systems in which public expenditures grossly favored whites and the Richmond contractor’s low bid reflected a century of access to markets, goods, and labor eased by the shared characteristic of racial privilege.

52. Id.
54. LaRue, supra note 1, at 111.
These historical fictions of thwarted meritocratic success, like the fictional story LaRue discusses of a southern city's construction industry unscathed by racism,58 no doubt work in the pragmatic sense highlighted by LaRue: they help persuade the reader of the rightness of meritocracy, the wrongness of state-sponsored affirmative action, and the correctness of the Court's constitutional analysis. Such stories do indeed make those cases persuasive. It is important to note that one of the reasons they work so well is that they echo the oft-told stories in popular culture of spectacular individual effort and success. Horatio Alger earned his success through hard work, initiative, a willingness to take risks, imagination, and cleverness. Booker T. Washington earned success and acclaim through brilliance, honed oratory, self-education, and diligence. Bill Gates rose to the top through work and talent. Cal Ripken earned millions and the love of a generation of sports devotees through a combination of inborn and practiced skills possessed only by the athletic elite, and the workaday aspirational virtues — stick-to-itiveness, getting the job done, "being there," and showing up for work every day — of the masses. Madonna earned her fame and fortune through a similar combination of talent possessed by a natural elite — an erotic elite — a willingness to use it, and aspirational virtues attainable by all — spunk, initiative, business savvy, and an attraction to the freakishness of the marginal. As has been often pointed out, Bill Clinton is, in one sense, our first meritocratic president: of our Ivy League-educated presidents, Clinton is the first who got to that league through the meritocratic route of high SAT scores and a high grade point average, rather than through the gentlemanly route of winks, nods, and alumni legacies. All of these people became tremendously successful, and all became successful without the help of family connections, class advantage, or race- or sex-based preferences. Their stories all symbolize and evidence the value of meritocracy. In popular political discourse, their success stories stand as ready-made, grist-for-the-mill, mythic arguments against affirmative action.59 These are the background stories — albeit unmentioned by the Court — which make the Court's modern "color blind" equal protection jurisprudence, as well as its hostility to affirmative action, persuasive.

58. See LARUE, supra note 1, at 113-14.
59. For an argument that some narrative jurisprudence by outsiders effectively undercuts, rather than supports, arguments for affirmative action because of its tendency to repeat themes in these familiar, archetypal, individualist narratives, see Ann M. Coughlin, Regulating the Self: Autobiographical Performances in Outsider Scholarship, 81 VA. L. REV. 1229 (1995).
The stories of spectacular individual success that buttress the case for meritocracy in popular culture, however, are obviously fictional in the same way as the stories of thwarted meritocratic achievement in *Bakke* and *Croson*. Clinton and Gates, no less than Bakke, benefitted not only from their initiative, intelligence, and spunk, but from their whiteness as well. Cal Ripken came to fame and glory in a town in which his family connections and his whiteness assured him a level of fan support and devotion that stands in marked contrast to the ugly mix of admiration and race hate bestowed upon Hank Aaron for an unequivocally greater athletic triumph. Madonna did it on her own, but her success is largely owing to the eroticism of an image that is partly a product of racism. The unassailably pure meritocratic success story, in which either spectacular or workaday success is attributable to merit alone, may be, much like the truly "free" contract, as rare as the proverbial bald eagle.

What is the connection of these "more or less" true stories of meritocratic success to the moral or legal proposition they are intended to convey, either in constitutional or popular discourse? I think there is no easy answer. To some extent, the stories in popular discourse are intended only to symbolize the moral truth of meritocracy, and when they are used in this way, the historical distortion on which they rest is beside the point. Like the Pocahontas story or the George Washington myth, it does not matter anymore whether Horatio Alger pulled himself up by his bootstraps or not; his story has come to symbolize the virtue of doing so. Similarly, to whatever degree the stories of Booker T. Washington, Gates, Clinton, Madonna, and Ripken are symbolic, the truths they convey about effort, talent, and reward are not undercut by their partiality.\(^\text{60}\)

Sometimes, though, even in popular discourse, these success stories do not just symbolize or evidence the value of meritocratic distributions, they also constitute that value. To that degree, their falsity more radically undermines the moral point these stories seek to convey. We value meritocracy partly because we admire successful people, where success is defined in terms of money, fame, or power, and we have come to believe

\(^{60}\) To some extent, however, these stories are intended not just to symbolize, but to evidence the moral truth, and when and if they are false, then to that degree — but only to that degree — do they undercut the truth for which they stand. Of course, sometimes it is the hero’s stature, rather than the moral truth, that is undercut. For admirers of the Kings and the Kennedys, the revelation that JFK’s book, *Profiles in Courage*, was ghostwritten, or that Teddy Kennedy cheated on his college exams, or that Martin Luther King plagiarized his dissertation, only slightly, if at all, undercut the meritocratic virtues of honesty, integrity, and diligence. For most of us, admirers as well as critics, these revelations lessened our admiration of the man, not our commitment to the virtues that the mythical versions of their lives had evidenced.
that the way they achieved those goods was through their own merit. Madonna, Gates, Clinton, and Ripken got there, the story goes, through a combination of initiative, hard work, spunk, a willingness to take risks, and their God-given talents. We admire Madonna, Gates, Clinton, and Ripken; thus, we admire those traits. Similarly, albeit on a less spectacular scale, the meritocratic success story constitutes the moral value of meritocracy in the more ordinary cases that form the grist of litigation. We value meritocracy in part simply because it is the vehicle by which Bakke gets his seat in the medical community and the government contractor gets his contract. These hard-working, play-by-the-rulebook, ordinary Americans are the people we are accustomed to seeing as doctors, teachers, and contractors. The route by which they normally acquire these positions, or would acquire them but for affirmative action, accordingly seems not just normal and natural, but right.

On the Court, it is even more clear that the case for meritocracy is constituted by, rather than simply symbolized by, Bakke's and Croson's stories of thwarted success. Indeed, without these stories, there literally would be no case. "Bakke the case" is completely dependant on "Bakke the story." Bakke would have and should have gotten into the University of California's medical school on his own merit, but was thwarted by affirmative action — thus the damage and the sought after remedy. Obviously, the case would have looked very different, and truly unwinnable, if Bakke would have gotten in not on merit, but because he was an alumni legacy or because of some other nonmeritocratic set-aside. Similarly, "Croson the case" requires "Croson the story": Croson would have gotten the government contract on the merits of its low bid but for the affirmative action set-aside. Obviously, Croson also would have looked different, and been equally unwinnable, if Croson had been awarded the bid, but for the set-aside, because of a bribe. Although not elaborated, these stories of thwarted success are central, not peripheral, to the Court's holdings in these two cases. Again, given the elevated moral status of constitutional discourse, they have come to constitute not only a part of our legal understanding of the limits of constitutionally permissible affirmative action, but also a part of our understanding of the moral impermissibility of affirmative action.

Both costs discussed above with respect to the social practice of constituting moral truth and argument with historical fictions — costs to integrity and to critical discourse — are borne out by the nature of these

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61. See supra text accompanying notes 50-52.
62. See supra text accompanying note 53.
stories of thwarted success as well as the counterstories to those histories put forward by defenders of affirmative action. Because stories of meritocratic success, both thwarted and achieved, to some extent constitute, rather than simply symbolize or evidence, the value we place on meritocracy, their possible falsity is potentially corrosive of that value. If we wish to maintain our commitment to meritocracy and to maintain our belief that meritocracy is the normal, as well as desirable, route to success, then we are forced, in effect, to deny the degree to which history shows otherwise. We are forced to distort our history. We are forced to deny, collectively, the degree to which the success of white contractors in Richmond, Virginia, is built on a history of racial oppression. We are forced to deny the degree to which the popularity of Cal Ripken or Madonna is a function of their whiteness, or the degree to which the academic successes of Bakke or Clinton was a product of a distribution of public resources skewed by race. We are forced to deny the extent to which the advantage, successes, and potentiality of every white person is a product of racial advantage rather than of individual merit standing alone.

This denial, however, goes deeper. A belief in both the ideal and the typicality of meritocracy forces us to deny the extent to which success is a function not only of unearned racial privilege, but of any factor unrelated to merit. It forces us to deny, for example, both in our individual and in our collective histories, the influence of family connections in securing employment or education opportunities. It forces us to deny the influence of luck. It forces us to deny the extent to which we presently rely, or at some time have relied, on the good graces and good words of neighbors, friends, and extended families in securing coveted slots for our children in private schools or extracurricular activities. It forces us to deny the extent to which we continue to hold our jobs after our years of peak productivity because of an unstated commitment of our employers to ensure our well-being beyond the years when that commitment could be justified by reference to our comparative merit. It forces us to deny, in short, the importance not just of luck, but also of our social connections — our connections to family, friends, neighbors, and indulgent employers — to our individual economic well-being. The psychic cost of these individual and collective acts of denial, to say nothing of the political cost, is high.

Defenses of affirmative action against the argument for meritocracy exhibit the second cost of our tendency to view the value of meritocracy as a function of these purportedly historical success stories. Precisely because

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64. See Peller, supra note 63.
of the degree to which stories of meritocratic success constitute, rather than simply symbolize or even just evidence, the value of meritocracy, defenders of affirmative action focus, logically enough, on their falsity. The critique of meritocracy incident to defenses of affirmative action, in other words, has been almost entirely devoted to demonstrating the lack of real meritocracy in public and private life: those who apparently achieved some degree of success did so in large part because of privileges of which they may not have been aware, but which were nevertheless operative. Plenty of institutions which purport to be meritocratic in fact are not — witness the preferences for alumni legacies and faculty children in college admissions. This argument "from hypocrisy" has its political and logical justification. But it also has its costs. The major cost is that it distracts the defenders of affirmative action from the work of mounting a critique of the value of meritocracy itself. In fact, it further entrenches the value of meritocracy by highlighting departures from it, if anything. Relatedly, it then distracts us from the work of understanding the value of our non- and even anti-meritocratic labor and educational practices, and of constructing a defense of affirmative action that would build on its similarities to those practices, rather than dilute the purported evil of nonmeritocratic affirmative action by highlighting their existence.

Let me simply suggest what such a critique of meritocracy, and relatedly, such a defense of affirmative action, might look like. Most people that I know will, when asked, do whatever is in their power to help their family members, friends, and neighbors secure job or schooling opportunities. Furthermore, many people I know, surely including myself, to some degree owe their own employment or educational opportunities to the "affirmative actions" of friends, neighbors, or family members. It is not only the Ma and Pa grocer who hire their son or daughter as their cashier without thinking twice about whether or not they have hired the best person for the job, and how, if at all, such a departure from meritocracy may be justified. Most of us in a position to do so quite willingly bring to the attention of appointments committees, applications committees, hiring committees, or potential employers the names and resumés of persons to whom we are related, or persons with whom we are friendly, or even persons with whom we have only a neighborly acquaintanceship. Furthermore, most people in a position to extend this kind of help to the people they know were themselves the beneficiaries of precisely this sort of affirmative aid at some point in their lives or careers. These connections are typically made without any guarantee other than the promise that one will do one's best to see that the friend, cousin, or other will be given the opportunity to make his or her meritorious case. But no matter how limited or qualified the aid, this common practice — a practice of connection that
bridges the gulf of personal ties and the impersonality of public life and work life — is quite clearly a form of affirmative action. It is an affirmative act of care and connection, and it flies in the face of our meritocratic ambitions. It is no wonder that we shy away from public recognition that we engage in it, and even more anxiously, from public recognition that we are beneficiaries of it.

This practice, indefensible from the perspective of a meritocratic ethic, is not only defensible, it is laudable from the perspective of what has come to be called an ethic of care. Helping people that we care about achieve their goals in employment and education, no less than elsewhere, is a quintessential "affirmative act" of care. Rather than repress the knowledge that we engage in these anti-meritocratic affirmative acts, we should and could instead use our experiences with and of these connective practices as a basis for rethinking and re-evaluating the meritocratic ideal. If we could own up to, rather than deny, our connective practices, we might see that meritocracy is deeply at odds with some of our practices, many of which, but for the meritocratic ideal, are not only seemingly innocuous but laudable. If they are, then the important question is not so much whether we should make an exception from the meritocratic norm for the exceptional case of affirmative action, but whether we should give up our practices of affirmative acts of connection in furtherance of the abstract and counter-experiential ideal of meritocracy.

The answer may be no. The idealized meritocratic world — in which, unlike even our best, real world attempts, "merit" could be readily defined in a way that corresponded perfectly with the job or educational opportunity at hand — would be an unattractive and unappealing place. Testing, re-evaluation, and reshuffling of personnel would be a constantly intrusive feature of work life. Nonmeritocratic factors, such as the cost of upset expectations of long-term employment, might still count for something, of course, in managerial calculations, but they would have to be constantly weighed against the meritocratic imperative to maximize productivity, competency, and performance. Loyalty between employer and employee would be irrelevant and counterproductive, and personal connections — of family, friends, and neighbors — would count for nothing. The line between public life, governed by performance standards and impersonal evaluative reviews, and private life, governed by norms of altruism and unconditional and untested affection, would become more inflexible, and their policing would become an even more overriding imperative. Hiring on the basis of a personal connection would be as suspect and as illegitimate

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65. See generally CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION (1984).
as we now regard a refusal to hire on the basis of race or gender. We would be judging and judged constantly not "on the basis of our character,"66 but on the basis of our merit — our competency, performance, skills, and most importantly, competitive ranking. Work life in its entirety would become an enterprise of competition not only between firms and institutions, but within them as well. Of course, this is a fair description of a good bit of our present work world and a fair description of entire segments of the employment market. This hyper-meritocracy and the breakdowns of relations between employer and employee and between employees on the job are also, if reported trends are a fair indication, a growing rather than a diminishing phenomenon. But at least many of us do not regard it as an ideal toward which we ought to strive. Rather, we regard it as a travesty. And we so regard it, in part, because it blatantly conflicts with our utterly non- and anti-meritocratic efforts to infuse our work life with some semblance of personal, connecting virtues. We so regard it, in fact, because it represents the dismantling of our practices of affirmative care.

An embrace, rather than a denial, of our connecting and anti-meritocratic practices in the workplace and in education might both constitute the basis of an experiential critique of the meritocratic ideal and clarify the contours of a stronger justification for affirmative action. The problem of justice posed by our networking, connecting practices on behalf of friends, family, and neighbors, is not that those practices are non-meritocratic, but that they perpetuate patterns of group-based exclusion. The pool of friends, family, and neighbors to whom white persons routinely extend acts of affirmative assistance in job and school opportunities rarely include persons of color. Whites disproportionately hold positions of privilege, and the practice of affirmatively caring for one's own thereby perpetuates a racial hierarchy. There is nothing inevitable or desirable about that exclusion, but it is an undeniable fact with pernicious consequences for racial justice in this society. One solution to the problem is, of course, rigorous meritocracy. But that is not the only solution, and if we embrace it we may find that we have embraced an unacceptably uncaring ideal for our workplace lives and ethics. A second solution is affirmative action. Affirmative action on this account is effectively a remedy for the injustices caused by the limitations of our practices — whether or not of our abilities — of care.

V. Conclusion

I have explored in these comments only the costs of one story — the meritocratic success story — as it appears in the affirmative action debate. I suspect, however, that these same costs are present in all of the constitutional fictions LaRue discusses in his book. As LaRue shows, lawyers and judges trade in stories — storytelling is normal, not exceptional, to law. Those stories may indeed be true even when partly fictional, and one way they may be true is if they say something true about the way we should organize our lives. But if they may be true in this way, they may also be false — and that falsity is connected only in complicated ways with their historical inaccuracy. The story of legal limits at the heart of *Marbury v. Madison*\(^6^7\) and the story of constitutional growth and evolution at the heart of *McCulloch v. Maryland*\(^6^8\) may or may not say something true about how we should organize our political and social institutions and our lives. Whether or not what those cases say is "true" in this way is something we can partly uncover by exposing the histories behind the stories. Surely a story that presents a form of social organization as both the norm and the ideal, and which induces in us widespread practices of denial, is not a good story. But the critique should not stop there. We also need to ask whether the ideal of a constitutional government of limits or the ideal of a constitutional government of growth and evolution are good ideals to have. To answer that question we need to examine, but then move beyond, history. To show that the purported history is partly fictional is only to show that the story is just that — a story. We need to ask whether its moral point is a vision we should embrace. To even ask such a question, much less answer it, means that we must acknowledge, but then free ourselves from, the powerful sway of historical fictions on our moral beliefs.

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67. See *LaRue*, supra note 1, at 42-70.
68. See id. at 70-93.