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DOCTRINES OF DELUSION: HOW THE HISTORY OF THE G.I. BILL AND OTHER INCONVENIENT TRUTHS UNDERMINE THE SUPREME COURT'S AFFIRMATIVE ACTION JURISPRUDENCE

Juan F. Perea*

INTRODUCTION

At its inception, affirmative action was understood as a necessary remedy for past discrimination. Fifty years ago, President Lyndon B. Johnson recognized the importance of affirmative action in the pursuit of equality:

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair. . . . This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result. . . . To this end equal opportunity is essential but not enough, not enough.¹

Johnson's speech was "the first moment when a president . . . forcefully and visibly sponsored affirmative action for blacks."² Johnson understood that racial

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¹ President Lyndon B. Johnson, Commencement Address at Howard University, June 4, 1965 (reprinted in IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE* 175 (2005)).

² *Id.*

equality required more than the equal opportunity guaranteed in the Civil Rights Act of 1964.

In the years since Johnson's exhortation to action, the Supreme Court's affirmative action jurisprudence has steered us far away from his vision of affirmative action as necessary to achieve equality between whites and blacks. Rather than seeing affirmative action as a remedy for past discrimination, today's Court interprets affirmative action as a presumptively objectionable program that denies equality to whites. The Court's trajectory has uncoupled affirmative action from its social and historical context and from its most powerful justification.³ In my view, remedying past societal discrimination is the *most* compelling reason for affirmative action.

Notwithstanding, since Justice Powell's opinion in *Regents of the University of California v. Bakke*,⁴ the Court has, with one exception, consistently rejected past societal discrimination as a compelling government interest.⁵ In Powell's words, "remedying the effects of 'societal discrimination,' [is] an amorphous concept of injury that may be ageless in its reach into the past" and is therefore not a compelling government interest.⁶ But what if it can be shown that past societal discrimination is neither "amorphous" nor "ageless" in its reach into the past? What if the foundations of Justice Powell's *Bakke* opinion, later embraced by the full Court, can be shown to be false and misleading when evaluated in the context of historical and sociological evidence? If the foundations of *Bakke*, and later Court decisions on affirmative action, turn out to be apocryphal, then we would have to wrestle with the implications of Supreme Court resistance to affirmative action based on false premises.

In this Article, I test the validity of the Court's analytical premises in the affirmative action cases against historical and sociological evidence. Powerful arguments for affirmative action can be made based on the relatively recent World

³ Lee C. Bollinger, *A Long, Slow Drift From Racial Justice*, N.Y. TIMES (June 24, 2013), http://www.nytimes.com/2013/06/25/opinion/a-long-slow-drift-from-racial-justice.html?_r=0. Bollinger was sued in his capacity as President of the University of Michigan at the time of the Gratz and Grutter lawsuits. *Id.*

⁴ 438 U.S. 265 (1978).

⁵ The exception is *Fullilove v. Klutznick*, 448 U.S. 448 (1980), in which the Court approved of a federal set-aside program for minority businesses in the construction industry based on Congressional findings of nationwide discrimination in that industry.

⁶ *Bakke*, 438 U.S. at 307, 310.

War II-era history of the federal government's policies and subsidies encouraging race discrimination against blacks in education and housing.⁷ In the design and implementation of the G.I. Bill, the federal government explicitly encouraged residential segregation and discrimination against blacks. The G.I. Bill deliberately left the distribution and implementation of federal education and housing benefits to universities, private banks, realtors, and white homeowners' associations, all of whom discriminated openly and pervasively against blacks. This design was necessary to accommodate the desires of southern congressmen to maintain their system of racial segregation, just as had occurred during the New Deal.⁸

I rely on World War II-era history for several reasons. First, the federal encouragement and subsidization of segregation and race discrimination against blacks is clear, provable, and undeniable.⁹ There can be no clearer a violation of equal protection principles than the outright racism of the federal government in subsidizing preferences for whites and discrimination against blacks.

A second reason is that many white Americans continue to benefit from the federal government's racism of that era. Contrary to the beliefs of the nearly two-thirds of whites who "do not believe that whites have benefitted from past and present discrimination against African-Americans,"¹⁰ this history makes crystal clear that whites as a group benefitted enormously from this race discrimination. Although the G.I. Bill is often described in universal, celebratory tones as the "magic carpet to the middle class," this was only true for white veterans, their families, and their heirs. Chiefly because of the racist administration of the G.I.

⁷ In stating that World-War II era discrimination provides a powerful argument for remedial affirmative action, I do not mean to disparage at all the economic and educational legacies of the continuous racism inflicted upon American blacks by whites since the founding and settlement of the English Colonies nearly four hundred years ago. I mean only that the more recent World War II-era history provides recent evidence that proves extensive white racism and its injurious consequences for blacks. Sadly, and incorrectly, it is easy for many whites to dismiss the legacy of slavery and Jim Crow as "past," and "amorphous" in a way that undermines the legitimacy of arguments for a remedy. I think it is harder to do so with more recent history. I will address the characterization of past discrimination as "amorphous" *infra*.

⁸ See generally Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion in the National Labor Relations Act*, 72 OHIO ST. L.J. 95 (2011) [hereinafter Perea, *Echoes of Slavery*] (documenting the way that federal legislation accommodated Southern and Northern racism during the New Deal era by excluding blacks from statutory protections).

⁹ See *infra* notes 80–100 and accompanying text.

¹⁰ ROBERT J. BLENDON ET AL., *THE PUBLIC AND THE PRESIDENT'S COMMISSION ON RACE, THE PUBLIC PERSPECTIVE* 66, 68 (1998).

Bill's housing benefit, white veterans were able to purchase homes, while black veterans were denied access to real estate purchases. The subsequent run-up in house prices has generated an enormous amount of wealth for white homeowners that was denied to African-Americans. As one example, by 2010 the median net worth, including home equity, of white households had grown to \$110,729.¹¹ The comparable figure for black households had grown to only \$4,955, only 4.4% of the net worth of whites.¹² White baby boomers and their children enjoy the benefits of a huge economic windfall that was denied to African-American families and their children because of the federal government's knowing subsidization of racism in the housing market.¹³

A final reason is that the history of World War II-era racism gives us an important factual basis against which we can assess the intellectual foundations of the Supreme Court's affirmative action jurisprudence. One of the striking aspects of this jurisprudence is the disconnection between what the Court says and provable facts of our history.¹⁴ I identify seven highly influential assumptions, premises, and conclusions that Justice Powell relied on in constructing his opinion in *Bakke*. Though initially articulated just by Justice Powell, these premises have been adopted by the full Court and continue to influence the Court's analysis in affirmative action cases.

For purposes of better flow and coherence, I have organized these premises into three sets. The first is a set of three assumptions about affirmative action generally: (1) an increase in the stigma borne by students of color is a proper argument for curtailing affirmative action;¹⁵ (2) affirmative action constitutes racial preference for "no reason other than race or ethnic origin"¹⁶ and "reverse

¹¹ U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, TABLE 1, MEDIAN VALUE OF ASSETS FOR HOUSEHOLDS, BY TYPE OF ASSET OWNED AND SELECTED CHARACTERISTICS: 2010 (2012).

¹² *Id.*

¹³ Baby boomers are defined as the generation that was born between 1946 and 1964. Many of today's boomers are the children of the generation of veterans that served during World War II.

¹⁴ This is the "uncoupling of affirmative action from its social context" referred to by Lee Bollinger. See *supra* note 3.

¹⁵ "Preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." *Bakke*, 438 U.S. at 298.

¹⁶ "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." *Id.* at 307.

discrimination” against whites; and (3) whites are innocent victims who should not bear the burdens of affirmative action.¹⁷ The second set of premises forms the basis for applying strict scrutiny in affirmative action cases: (4) whites have also been victims of discrimination and there is no principled way of distinguishing between the discrimination experienced by whites and blacks;¹⁸ and (5) equal protection must mean the same thing when applied to whites and to blacks.¹⁹ Lastly, the Court has reached two important conclusions about what constitutes a compelling government interest: (6) remedying past societal discrimination is too “amorphous” and is not a compelling government interest;²⁰ and (7) diversity is a compelling government interest.²¹ Upon close analysis, and using the historical context provided by the G.I. Bill, these premises and conclusions turn out to be either false, misleading, or protective only of white interests. Despite their falsity, these premises are widely believed. Because of both their falsity and widespread public belief in them, I call these the doctrines of delusion.

Since Justice Powell’s opinion in *Bakke*, the most important reason for affirmative action—to remedy government-sponsored race discrimination—has played little or no role in the Court’s decisions. Only by returning to the historical context surrounding affirmative action can we reclaim the importance of affirmative action as a remedy for past government and private discrimination. This historical background makes clear that what is needed is *more* affirmative action and *different* affirmative action, not the drastically curtailed version the Court grudgingly endorses for the time being.

Part I of this Article traces the history of the federal government’s overt encouragement and subsidization of race discrimination against blacks in the period surrounding the Bill. Part II evaluates the premises underlying the Court’s

¹⁷ “There is a measure of inequity in forcing innocent persons in respondent’s position to bear the burdens of redressing grievances not of their making.” *Id.* at 298; see also *id.* at 307, 310.

¹⁸ “The white ‘majority’ itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. . . . There is no principled basis for deciding which groups would merit ‘heightened judicial solicitude’ and which would not.” *Id.* at 287.

¹⁹ “The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection it is not equal.” *Id.* at 289–90.

²⁰ “Remedying the effects of ‘societal discrimination,’ [is] an amorphous concept of injury that may be ageless in its reach into the past” and is not a compelling government interest. *Id.* at 307, 310.

²¹ *Id.* at 314–15.

affirmative action jurisprudence in the context of historical and sociological evidence. Part III explores the congruence between the Court's premises on affirmative action and the public's views on race. This congruence, and the outcomes in the affirmative action cases, suggest that the Court is a majoritarian institution intent on protecting the educational and economic interests of whites.

I. THE FEDERAL GOVERNMENT'S RACISM: PUBLIC SUBSIDIES FOR PRIVATE RACISM

A. *The New Deal Era*

Before the Civil Rights Act of 1964, there were few or no constraints prohibiting the federal government from subsidizing and promoting racism. And subsidize racism it did. In the New Deal era, and continuing well after 1964, the federal government discriminated against blacks in federal statutes and in eligibility for and the distribution of federal cash benefits.²²

The politics of the New Deal era caused the federal government's support for racism. Jim Crow was rampant in the South. Southern democrats controlled most of the important congressional committees and held the balance of power required to pass any federal legislation.²³ Southern legislators were unwilling to support legislation that would pay federal benefits directly to blacks and so threaten the plantation economy of the South.²⁴ Direct payments would lessen the financial dependence of blacks and weaken exploitive sharecropping arrangements prevalent throughout the agricultural South.²⁵ In order to enlist the political support of these southern democrats, President Roosevelt and northern democrats agreed to legislation that excluded blacks.²⁶

²² See generally Perea, *Echoes of Slavery*, *supra* note 8. Lyndon Johnson was well aware of the federal government's discrimination against blacks. Johnson served as a southern democrat from Texas in the House of Representatives from 1937 through 1949, and in the Senate from 1949 through 1961, a period encompassing the implementation of New Deal era legislation and the drafting and implementation of the G.I. Bill. This was the context that motivated President Lyndon Johnson's call for affirmative action beyond the equality of opportunity promised under the Civil Rights Act of 1964.

²³ HARVARD SITKOFF, *A NEW DEAL FOR BLACKS* 45 (1978); Perea, *Echoes of Slavery*, *supra* note 8, at 102–03.

²⁴ KATZNELSON, *supra* note 1, at 19; ROBERT C. LIEBERMAN, *SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE* 24 (1998).

²⁵ LIEBERMAN, *supra* note 24, at 27–28.

²⁶ Perea, *Echoes of Slavery*, *supra* note 8, at 102–03; SITKOFF, *supra* note 23, at 44.

Blacks were excluded from all of the major enactments of the New Deal era: the Social Security Act, the National Labor Relations Act, and the Fair Labor Standards Act.²⁷ The principal technique for exclusion was the ostensibly race-neutral exclusion of agricultural and domestic workers from all of these statutes.²⁸ Most southern blacks, and about two-thirds of all black employees, were employed as agricultural and domestic workers, so this exclusion effectively excluded most blacks from the benefits and protections of these statutes. The major benefits of New Deal legislation—old-age pensions, unemployment compensation, the right to bargain collectively, and minimum-wage and maximum hours protections—were thus denied to most black employees.²⁹ To this day, “agricultural and domestic” workers remain excluded from the protections of the National Labor Relations Act, a vestige of New Deal-era racism.³⁰

Another important technique of exclusion was the purposeful decentralization of the administration of federal benefit payments.³¹ Southern legislators understood that centralized federal administration and direct benefit payments to blacks would pose severe threats to the existing racial order in the South.³² Southern legislators shaped New Deal legislation so that state, local, and county-level administrators, all white, were responsible for administering federal benefit payments and resolving disputes over these payments.³³ In the South, these exclusively white administrators were committed to preserving white racial hierarchy over blacks.³⁴ Consequently, white administrators would regularly favor the interests of white farm owners and deny benefits to black sharecroppers and tenant farmers, keeping these black farmers financially dependent on exploitive sharecropping arrangements.³⁵ In this way, local administration of federal benefits became a crucial structural arrangement that facilitated the continuation of the quasi-plantation southern economy and its rigid racial hierarchy, much to the benefit of whites.

²⁷ Perea, *Echoes of Slavery*, *supra* note 8, at 104.

²⁸ *Id.* at 103–04.

²⁹ *Id.* at 10.

³⁰ *Id.* at 96.

³¹ *Id.* at 102; LIEBERMAN, *supra* note 24, at 29–30, 37.

³² Perea, *Echoes of Slavery*, *supra* note 8, at 102; KATZNELSON, *supra* note 1, at 19.

³³ See, e.g., Perea, *Echoes of Slavery*, *supra* note 8, at 107–09.

³⁴ *Id.*

³⁵ *Id.*

These two features of New Deal-era legislation provided a potent paradigm for preserving white racial dominance and privilege in future legislation, including the G.I. Bill. First was to draft the legislation in race-neutral language, to avoid alienating overtly black voters and representatives dependent on black votes. Second was to design the legislation so that federal benefits would be administered by state and local governments. Designing local administration into the structure of federal benefits legislation, by deferring to the traditional racist values prevailing in most communities, guaranteed that federal benefits would be distributed in a way that privileged whites.

B. Structural Racism and the G.I. Bill

The G.I. Bill (or, “the Bill”), also known as the World War II Servicemen’s Readjustment Act of 1944, was a massive federal program intended to ease the transition of veterans back into civilian life.³⁶ The Bill is widely celebrated as one of the “finest two or three [laws] Congress has passed since the constitution took effect.”³⁷ According to President Bill Clinton, the Bill was President Franklin D. Roosevelt’s “most enduring legacy,” giving “generations of veterans a chance to get an education, to build strong families and good lives, and to build the nation’s strongest economy ever . . . [and to help] unleash a prosperity never before known.”³⁸ The Bill “enabled millions of working class Americans to go to college, buy their own homes, and become, in reality, members of the middle class.”³⁹ The Bill is widely credited with creating the American middle class.⁴⁰

While the Bill created a more middle class society, it did so “almost exclusively for whites.”⁴¹ Accordingly, while the Bill is uniformly celebrated in the white community, it has a very different legacy in the black community. One contemporary observer noted that “the veterans program had completely failed

³⁶ See Servicemen’s Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (1945); KATHLEEN J. FRYDL, *THE GI BILL* 1–2 (2011).

³⁷ See FRYDL, *supra* note 36, at 1; MICHAEL J. BENNETT, *WHEN DREAMS CAME TRUE: THE GI BILL AND THE MAKING OF MODERN AMERICA*, at x, 22 (1996).

³⁸ KATZNELSON, *supra* note 1, at 114 (quoting Office of Press Secretary, White House, “Remarks by the President at ‘Remembering Franklin D. Roosevelt,’ 50th Anniversary Commemorative Services,” Little White House, Warm Springs, Georgia, Apr. 12, 1995).

³⁹ *Id.*

⁴⁰ FRYDL, *supra* note 36, at 1; KATZNELSON, *supra* note 1, at 114.

⁴¹ KATZNELSON, *supra* note 1, at 114.

veterans of minority races.”⁴² A major report on black veterans concluded that it was “as though the G.I. Bill had been earmarked ‘For White Veterans Only.’”⁴³

How could such a revered law have been so discriminatory? The answer to this question lies in the structural design of the Bill, which followed the paradigm developed during the New Deal era. The statute was carefully race-neutral on its face, making no distinctions between qualified veterans because of their race. The Bill was also carefully designed however to require federal benefits to be administered locally and so to conform to local prejudices, just as had occurred during the New Deal. In this way, ostensibly race-neutral legislation was purposely designed to be administered locally in a way that denied black veterans access to their putative benefits.

To understand the racism designed into the Bill, it is important to understand that before and during World War II, the federal government operated largely based on Jim Crow. The entire federal military, the Veterans’ Administration (VA), and VA hospitals were segregated. The military was segregated into all-white and all-black units.⁴⁴ Housing, training, and recreational facilities were also segregated.⁴⁵ Segregation meant unequal and inferior treatment for black soldiers, who were subject to abuse, violence, and race discrimination, both on base and in surrounding communities.⁴⁶ As described by historian Kathleen Frydl, “[a]ssaults on African-American soldiers came at the hands of white soldiers, but even more frequently, from local police and local civilians who could not bear to see the prized citizenship status of a uniform adorn a black man.”⁴⁷

Since the military was so segregated, it is easier to understand how Congress could incorporate segregationist values and race discrimination into legislation intended to benefit ex-military members. Reflecting essentially the same political dynamics that prevailed during the New Deal era, the Bill was enacted by a

⁴² *Id.*

⁴³ *Id.* at 115.

⁴⁴ See FRYDL, *supra* note 36, at 223–26; CYD MCKENNA, THE HOMEOWNERSHIP GAP: HOW THE POST-WORLD WAR II GI BILL SHAPED MODERN DAY HOMEOWNERSHIP PATTERNS FOR BLACK AND WHITE AMERICANS 15–19 (2008), available at <http://dspace.mit.edu/bitstream/handle/1721.1/44333/276173994.pdf> (last visited June 23, 2013); KATZNELSON, *supra* note 1, at 101–02.

⁴⁵ MCKENNA, *supra* note 44, at 15–18.

⁴⁶ FRYDL, *supra* note 36, at 223–26; MCKENNA, *supra* note 44, at 15–19.

⁴⁷ FRYDL, *supra* note 36, at 225.

Congress intent on preserving southern segregation.⁴⁸ “Race was contested terrain in the very inception of the G.I. Bill.”⁴⁹ The legislation was drafted under the leadership of Congressman John Rankin of Mississippi, chairman of the House Committee on World War Legislation. Rankin was one of Congress’s “most unashamed racists.”⁵⁰ Rankin’s chief priority was to protect the segregated order of the Jim Crow South.⁵¹ Two important veterans’ organizations, the American Legion (the Legion) and the VA, were also principals in drafting and supporting the legislation. Both the Legion and the VA were segregated and opposed any attempt to challenge the segregated and unequal racial order in the South.⁵² The principal legislative device for excluding blacks was to allow local administration of federally supplied benefits under the loose supervision of the VA. Local administration permitted the enforcement of Jim Crow segregation in the South and de facto segregation in the North.⁵³ As described by historian Ira Katznelson, the “alliance of the Rankin-led South, the VA, and the Legion produced a bill combining generosity to veterans with provisions for the dispersion of administrative responsibilities that were designed to shield Jim Crow.”⁵⁴

Pervasive race discrimination against blacks in higher education and housing meant that the Bill’s benefits were enjoyed mostly by white veterans. Approximately 16 million veterans, of whom slightly over 1 million were black, ostensibly qualified for benefits under the Bill.⁵⁵ While white veterans prospered as they pursued higher education and purchased homes with their Bill benefits, black veterans languished as they were frequently denied access to their benefits because of their race.

The following sections describe in detail the race discrimination experienced by black veterans as they attempted to use their federal benefits and the

⁴⁸ *Id.* at 141–42, 145; KATZNELSON, *supra* note 1, at 121–29.

⁴⁹ Hilary Herbold, *Never a Level Playing Field: Blacks and the GI Bill*, J. BLACKS HIGHER EDUC. 104 (Winter 1994/1995).

⁵⁰ KATZNELSON, *supra* note 1, at 123.

⁵¹ *Id.* at 125–26.

⁵² *Id.*; FRYDL, *supra* note 36, at 121, 140–42.

⁵³ *Id.* at 121, 229; MCKENNA, *supra* note 44, at 15–19, 30; KATZNELSON, *supra* note 1, at 123.

⁵⁴ KATZNELSON, *supra* note 1, at 124.

⁵⁵ MCKENNA, *supra* note 44, at 5–7, 43; FRYDL, *supra* note 36, at 1, 186, 265; KATZNELSON, *supra* note 1, at 116; BENNETT, *supra* note 37, at 116.

consequences of that race discrimination.⁵⁶ The Bill provided numerous economic benefits, ostensibly to all veterans who had served at least 90 days and who had received an honorable discharge.⁵⁷ In this Article I will focus on two of the most important benefits, the education benefit and the housing benefit.⁵⁸

1. The Education Benefit

The education benefit provided for up to \$500 per year to pay for tuition at educational or technical training institutions and a monthly living allowance while a veteran was in school.⁵⁹ These cash benefits were paid directly to individuals rather than to institutions, which allowed veterans to use this benefit for tuition at any educational institution that accepted them.⁶⁰ Accordingly, this benefit substantially eased any financial constraints that might have been barriers to entry for poor veterans. This benefit was also available to veterans who sought vocational or technical training.⁶¹

Though the legislation was race-neutral in its language, pervasive race discrimination against blacks in higher education meant that blacks were largely denied equal access to their federal education benefits. With few exceptions, most colleges and universities in the country admitted only token numbers of black students. "Southern colleges, virtually without exception, barred black students from attending, and the situation was only marginally better in elite northern colleges."⁶² Harvard, for example, admitted only a handful of black students, at

⁵⁶ I focus on the experiences of black veterans because the discrimination against them was more pervasive and severe than the discrimination faced by veterans of other minority groups. Japanese-American and Latino veterans, in some cases, also suffered severe discrimination in attempting to use their federal benefits.

⁵⁷ FRYDL, *supra* note 36, at 1–2; *see also* Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (1945). The federal government was quite generous with World War II veterans. From 1944–1971, the federal government spent about \$95 billion on G.I. Bill benefits. The bill was the "first billion-dollar home credit insurance program and the first billion-dollar student loan program." About \$14.5 billion was spent on the education benefit. Between 1944–1952, the VA guaranteed 2.5 million home mortgages and paid for over one-third of all new home construction, nearly 5 million homes.

⁵⁸ *See* Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (1945); FRYDL, *supra* note 36, at 1–2.

⁵⁹ *See* FRYDL, *supra* note 36, at 1–2.

⁶⁰ Sarah Turner & John Bound, *Closing the Gap or Widening the Divide: The Effects of the G.I. Bill and World War II on the Educational Outcomes of Black Americans*, 63 J. ECON. HIST. 145, 148 (2003).

⁶¹ *Id.* at 149.

⁶² MEYER WEINBERG, *A CHANCE TO LEARN* 266 (1977).

most.⁶³ Even the University of Pennsylvania, the most inclusive Ivy League institution at the time, admitted only 46 black students out of 9,000 students, about one-half of one percent.⁶⁴

Princeton “long had a systematic policy of excluding blacks.”⁶⁵ During the 1940s, Princeton debated the question of whether or not to admit blacks and decided against it.⁶⁶ A survey of student opinion taken in 1942 found that 62 percent of Princeton students opposed the admission of black students.⁶⁷ One-third of those who supported the admission of blacks favored limitations on them, including “dormitory segregation, exclusion from the eating clubs, the imposition of higher standards than those used for whites, and definite quotas.”⁶⁸

One incident is instructive regarding the race discrimination at Princeton. In 1939, Bruce Wright, a black student, was admitted to Princeton by accident and was awarded a full scholarship. When he arrived to register, Wright was hurriedly pulled out of line by an upperclassman and taken to see the Dean of Admissions. Wright recounted that the Dean looked at him “as though [he] was a disgusting specimen under a microscope.”⁶⁹ The Dean then told him that he was not wanted at Princeton and that he should go some place for “his own kind.”⁷⁰ Wright reported being “shattered” by the incident and eventually enrolled at Lincoln University.⁷¹

Because of their exclusion from white schools in the North and the still-segregated South, 95 percent of black veterans aspiring to higher education had to seek it at about 100 “Colleges for Negroes” in the South.⁷² These colleges, however, were severely underfunded and had inadequate facilities incapable of

⁶³ JEROME KARABEL, *THE CHOSEN* 52, 236 (2005).

⁶⁴ KATZNELSON, *supra* note 1, at 130, 134.

⁶⁵ KARABEL, *supra* note 63, at 232.

⁶⁶ *Id.* at 232–36.

⁶⁷ *Id.* at 235.

⁶⁸ *Id.* at 235.

⁶⁹ *Id.* at 232–33.

⁷⁰ *Id.*

⁷¹ KARABEL, *supra* note 63, at 232–33. Wright later won a Bronze star and a Purple Heart for his service during World War II, and later had a distinguished career as a lawyer and a judge. *Id.*

⁷² KATZNELSON, *supra* note 1, at 130; Turner & Bound, *supra* note 60, at 151 (2003).

meeting the demand.⁷³ Accordingly, in 1947 alone, 20,000 black veterans were turned away from black colleges.⁷⁴ One survey showed that 55% of black veterans who applied to southern black colleges were turned away due to lack of space.⁷⁵

Despite the ostensible availability of educational benefits to all veterans, black veterans did not enjoy the same quality or quantity of educational experiences as their white counterparts. Some black veterans were able to take advantage of their benefits by attending college or vocational training schools.⁷⁶ The Bill improved the educations and professional prospects of many black veterans. In the end, however, black veterans did not benefit to nearly the degree that white veterans did.

Through the Bill's purposeful design requiring decentralized administration of the education benefit, the federal government subsidized white colleges and universities that adhered to racist admissions policies that denied admission to black students. The federal government also subsidized the growth and expansion of these institutions. As found in the 1948 report of President Truman's Committee on Civil Rights, "[i]t is clear there is much discrimination, based on prejudice, in admission of students to private colleges, vocational schools, and graduate schools. . . . In many of our northern educational institutions . . . there is never more than a token enrollment of Negroes."⁷⁷ Even worse, southern white institutions were completely segregated and closed to blacks.

This history of race discrimination practiced by almost all white colleges and universities provides ample justification for affirmative action in higher education today. The federal government's design to accommodate this race discrimination, together with its subsidies for this race discrimination, only strengthens the case. Because of race discrimination against blacks, the Bill actually widened the gap in

⁷³ KATZNELSON, *supra* note 1, at 131–33. Some evidence shows that black veterans wanted further education more than white veterans. One government study showed that, after G.I. Bill benefits were publicly announced, 43 percent of black enlisted men “expressed a definite interest in education and training,” compared to 29 percent of white enlisted men. Turner & Bound, *supra* note 60, at 151.

⁷⁴ David H. Onkst, *First a Negro . . . Incidentally a Veteran: Black World War Two Veterans and the G.I. Bill of Rights in the Deep South, 1944–1948*, 31 SOC. HIST. 517, 529–30 (1998).

⁷⁵ KATZNELSON, *supra* note 1, at 132; Turner & Bound, *supra* note 60, at 152–53.

⁷⁶ Turner & Bound, *supra* note 60, at 171; KATZNELSON, *supra* note 1, at 134; Onkst, *supra* note 74, at 532.

⁷⁷ COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 23 (1948).

educational attainment between blacks and whites.⁷⁸ It also exacerbated existing and future income inequalities, since white incomes increased substantially more with the attainment of college educations.⁷⁹ Affirmative action programs in higher education begin to provide a remedy for the educational and economic costs caused by widespread white racism in higher education.

2. The Housing Benefit

Federal mortgage guarantees led to the virtually exclusive enrichment of white veterans and the near-total exclusion of black veterans. The housing benefit provided federal government guarantees of up to 50% of loans made by private banks and lending institutions to veterans for the purchase or construction of homes, farms, and business properties.⁸⁰ Yet because the vast majority of financial institutions simply refused to make loans to African-Americans, black veterans were denied access to this benefit.⁸¹ In the words of the leading scholar of the G.I. Bill, “it is more accurate simply to say that blacks could not use this [housing benefit].”⁸²

The federal government, through the Federal Housing Administration (FHA) and the Home Owners Loan Corporation (HOLC), had a direct hand in this housing discrimination. The extensive role played by the FHA in encouraging race discrimination in mortgage lending is described by Charles Abrams:

From its inception FHA set itself up as the protector of the all-white neighborhood. It sent its agents into the field to keep Negroes and other minorities from buying homes in white neighborhoods. It exerted pressure against builders who dared to build for minorities, and against lenders willing to lend on mortgages. This official agency not only kept Negroes in their place but pointed at Chinese, Mexicans, American Indians, and other minorities as well. It not only insisted on social and racial “homogeneity” in all its projects as the

⁷⁸ Turner & Bound, *supra* note 60, at 145, 172.

⁷⁹ *Id.*; KATZNELSON, *supra* note 1, at 134.

⁸⁰ FRYDL, *supra* note 36, at 1–2.

⁸¹ KATZNELSON, *supra* note 1, at 139; THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS 46–47 (2005).

⁸² KATZNELSON, *supra* note 1, at 139; FRYDL, *supra* note 36, at 237–38.

price of insurance but became the vanguard of white supremacy and racial purity—in the North as well as the South.⁸³

The FHA's Underwriting Manual provides evidence of the federal government's race discrimination. Until 1948, the underwriting manual "explicitly identified Black Americans as unreliable and undesirable buyers."⁸⁴ The FHA manual recommended racially restrictive covenants until 1950.⁸⁵ This was fully *two years after* the Supreme Court decided that such covenants were unenforceable and contrary to public policy in *Shelley v. Kraemer*.⁸⁶ The FHA manual even included a model racially restrictive covenant, which read as follows:

No persons of any race other than-----[race to be inserted] shall use or occupy any building or any lot, except that this covenant shall not prevent occupancy by domestic servants of a different race domiciled with an owner or tenant.⁸⁷

Black, Latino, and Japanese-American veterans were barred from desirable suburban housing due to the operation of these covenants, even if they could find a bank willing to lend to them.⁸⁸

The FHA actively promoted segregated neighborhoods. Prior to the Bill, the HOLC, had established a grading system for neighborhoods which ultimately institutionalized "redlining" to maintain segregated neighborhoods.⁸⁹ The HOLC grading system was used to rate neighborhoods as desirable or undesirable for the

⁸³ CHARLES ABRAMS, FORBIDDEN NEIGHBORS 229–30 (1955) [hereinafter ABRAMS, FORBIDDEN NEIGHBORS]; SUGRUE, *supra* note 81, at 43–44.

⁸⁴ DESMOND KING, SEPARATE AND UNEQUAL 191 (1995); *see also* KENNETH T. JACKSON, CRABGRASS FRONTIER 198–201 (1985) [hereinafter JACKSON, CRABGRASS FRONTIER] ("black neighborhoods were invariably rated as Fourth Grade. . . . As was the case in every city, any Afro-American presence was a source of substantial concern to HOLC.").

⁸⁵ DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID 54 (1993); ABRAMS, FORBIDDEN NEIGHBORS, *supra* note 83, at 230.

⁸⁶ 334 U.S. 1 (1948).

⁸⁷ ABRAMS, FORBIDDEN NEIGHBORS, *supra* note 83, at 230; KING, *supra* note 84, at 191.

⁸⁸ FRYDL, *supra* note 36, at 238.

⁸⁹ MASSEY & DENTON, *supra* note 85, at 51; JACKSON, CRABGRASS FRONTIER, *supra* note 84, at 197–201.

purposes of bank lending: Grade A was for properties in areas that were “homogeneous and in demand as residential locations”; Grade B was for areas that were “completely developed”; Grade C was for areas that exhibited “infiltration of a lower grade population . . . as well as neighborhoods lacking homogeneity”; and Grade D was for areas “characterized by detrimental influences . . . such as undesirable population or an infiltration of it.”⁹⁰ The presence of blacks in a neighborhood would virtually guarantee a grade of “D.”⁹¹ “As was the case in every city, any Afro-American presence was a source of substantial concern to HOLC.”⁹²

The HOLC’s concerns about the presence of blacks in a neighborhood was influential and was adopted and promulgated by the FHA.⁹³ According to the FHA underwriting manual (the “underwriting manual”), “if a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes.”⁹⁴ Following the principles established by the HOLC, blacks were the presumptively undesirable population of greatest concern. A federal appraiser assigned D grades to Kansas City, because “a large negro population is scattered over all parts of the city which is one of the reasons for the preponderance of D or fourth class grade security areas.”⁹⁵ In Detroit, every neighborhood “with even a tiny African American population was rated ‘D,’ or ‘hazardous’ by federal appraisers and colored red on the HOLC Security Maps.”⁹⁶

Federal underwriting guidelines thus directed and enabled race discrimination by private banks and real-estate brokers. According to historian Thomas Sugrue,

Private-sector discrimination was neither the reflection of the invisible hand of the free market, nor the consequence of blacks acting in accordance with a

⁹⁰ KING, *supra* note 84, at 191; SUGRUE, *supra* note 81, at 43–44.

⁹¹ See JACKSON, CRABGRASS FRONTIER, *supra* note 84, at 198–201 (“[B]lack neighborhoods were invariably rated as Fourth Grade. . . . As was the case in every city, any Afro-American presence was a source of substantial concern to HOLC.”).

⁹² *Id.* at 201.

⁹³ MASSEY & DENTON, *supra* note 85, at 52; JACKSON, CRABGRASS FRONTIER, *supra* note 84, at 208; SUGRUE, *supra* note 81, at 43–44.

⁹⁴ MASSEY & DENTON, *supra* note 85, at 54.

⁹⁵ KING, *supra* note 84, at 191.

⁹⁶ SUGRUE, *supra* note 81, at 44.

preference to live in segregated neighborhoods. Rather, it was a direct consequence of a partnership between the federal government and local bankers and real estate brokers. In fact the boundaries between the public and private sectors in housing were blurry in the postwar period. . . . Federal housing policy gave official sanction to discriminatory real estate sales and bank lending practices.⁹⁷

Banks, already leery of lending to blacks, were given further incentives by federal guidelines to lend only to whites buying properties in segregated white areas.⁹⁸ This was a major factor that gave rise to all-white suburbs surrounding cities.⁹⁹

Private realtors worked together with banks to promote housing segregation and race discrimination against potential black home buyers. According to the Code of Ethics of the National Association of Real Estate Boards (NAREB), the code governing private realtors, "A realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individual whose presence will clearly be detrimental to property values in the neighborhood."¹⁰⁰ A 1943 pamphlet published by NAREB gave examples of potential buyers who would lower property values:

The prospective buyer might be a bootlegger who would cause considerable annoyance to his neighbors, a madame who had a number of Call Girls on her string, a gangster who wants a screen for his activities by living in a better neighborhood, *or a colored man of means who was giving his children a college education and thought they were entitled to live among whites.*¹⁰¹

⁹⁷ *Id.* at 43.

⁹⁸ *Id.* at 34.

⁹⁹ FRYDL, *supra* note 36, at 300–01; KATZNELSON, *supra* note 1, at 114, 116.

¹⁰⁰ ABRAMS, FORBIDDEN NEIGHBORS, *supra* note 83, at 156; MCKENNA, *supra* note 44, at 50 (emphasis added); MASSEY & DENTON, *supra* note 85, at 37.

¹⁰¹ ABRAMS, FORBIDDEN NEIGHBORS, *supra* note 83, at 156; *see also* MCKENNA, *supra* note 44, at 50 (emphasis added); MASSEY & DENTON, *supra* note 85, at 37.

Realtors thus treated well-qualified black buyers as persons “whose presence will clearly be detrimental to property values.” Realtors who violated these guidelines by attempting to sell to black buyers were subject to threats and violence.¹⁰²

Residents of all-white neighborhoods also participated actively, and violently, to keep their neighborhoods segregated and white. White homeowners created homeowners’ associations to police and enforce the racial boundaries of their neighborhoods in the name of protecting property values.¹⁰³ In the few cases in which a black person successfully purchased or rented a home in a formerly all-white neighborhood, whites from the neighborhood and nearby would gather into mobs, numbering thousands, and would threaten black residents, break windows, fire gunshots, throw firebombs into black-owned homes, and literally burn the homes to the ground.¹⁰⁴ Police sympathetic to the white mobs did little to protect black residents.¹⁰⁵

Because of these discriminatory policies and practices, black veterans were essentially unable to purchase homes. This was true both in the North and in the South. In the New York metropolitan area, in 1950, for example, only about 69 of 69,666 VA loans, less than one-tenth of one percent, were held by non-whites.¹⁰⁶ In Mississippi, in 1947, only 2 out of 3,229 VA loans went to black veterans.¹⁰⁷ The lack of government-backed loans for black veterans prompted President Truman to create an Advisory Committee on Housing Policy. This committee concluded, with some understatement, that “too often, the opportunities of minority group families

¹⁰² JEANNINE BELL, *HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING* 37 (2013); SUGRUE, *supra* note 81, at 216.

¹⁰³ SUGRUE, *supra* note 81, at 211–18; ABRAMS, *FORBIDDEN NEIGHBORS*, *supra* note 83, at 181–87.

¹⁰⁴ BELL, *supra* note 102, at 33–44, 35; ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO 1940–1960*, at 53–67, 95 (1998) (describing massive, violent white riots in the Chicago neighborhoods of Cicero, Fernwood, Englewood, Park Manor, Airport Homes, and Trumbull Park). Although the degree of mob violence against black residents has diminished in recent decades, move-in violence is still commonly faced by blacks who move into white neighborhoods. Some white neighbors threaten and vandalize black-owned homes and their owners, often forcing the African-American homeowners to sell their properties out of fear of more serious harm. *See* BELL, *supra* note 102, at 57–81.

¹⁰⁵ HIRSCH, *supra* note 104, at 94–99.

¹⁰⁶ MCKENNA, *supra* note 44, at 59.

¹⁰⁷ *Id.*; Onkst, *supra* note 74, at 522. Even by the mid-1970s, less than 2% of FHA/VA mortgages had gone to African-Americans. MCKENNA, *supra* note 44, at 74.

to obtain adequate housing are extremely limited or non-existent.”¹⁰⁸ As two scholars of the issue concluded, “the vast majority of FHA and VA mortgages went to white middle-class suburbs.”¹⁰⁹ The enormity of this racist tragedy is accentuated by the fact that, according to a survey of World War II veterans, nearly the same percentages of black and white veterans were interested in home ownership.¹¹⁰

3. The Economic Consequences of the G.I. Bill

The racially discriminatory policies built into the structure of the G.I. Bill had, and continue to have, profound economic consequences.¹¹¹ These discriminatory policies yielded wealth and economic privilege for white veterans and relative impoverishment for black veterans.¹¹² The Bill widened the education and income gap between whites and blacks to the benefit of whites.¹¹³ The Bill also widened enormously the wealth gap between whites and blacks, again to the benefit of whites.¹¹⁴

A substantial part of the enormous wealth gap between whites and blacks is explained by the Bill’s facilitation of home ownership for whites and its effective denial of home ownership for blacks.¹¹⁵ By 1984, the date when most G.I. Bill mortgages had matured, 7 out of 10 whites owned homes, but only 4 out of 10 blacks owned homes.¹¹⁶ That ratio of home ownership remains virtually identical today.¹¹⁷

¹⁰⁸ KING, *supra* note 84, at 191–92; MASSEY & DENTON, *supra* note 85, at 54–55; Onkst, *supra* note 74, at 522; MCKENNA, *supra* note 44, at 58.

¹⁰⁹ MASSEY & DENTON, *supra* note 85, at 54.

¹¹⁰ MCKENNA, *supra* note 44, at 37–41.

¹¹¹ See, e.g., FRYDL, *supra* note 36, at 300–01.

¹¹² MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH 150 (1995).

¹¹³ Turner & Bound, *supra* note 60, at 172; KATZNELSON, *supra* note 1, at 134.

¹¹⁴ FRYDL, *supra* note 36, at 238; KATZNELSON, *supra* note 1, at 121.

¹¹⁵ OLIVER & SHAPIRO, *supra* note 112, at 150.

¹¹⁶ MCKENNA, *supra* note 44, at 81; KATZNELSON, *supra* note 1, at 164.

¹¹⁷ The most recent available data for the 3rd Quarter, 2012, shows that 73.6% of whites owned homes and just 44.1% of blacks owned homes. U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, TABLE 7, HOMEOWNERSHIP RATES BY RACE AND ETHNICITY OF HOUSEHOLDER (2012), available at www.census.gov/housing/hvs/files/qtr312/q312press.pdf; KATZNELSON, *supra* note 1, at 164.

The greater rate of white homeownership, together with higher valuations for white-owned homes and the run-up in housing prices over the last several decades has yielded much white wealth. In 1984, the average value of white-owned homes was \$52,000; the corresponding figure for black-owned homes was less than \$30,000.¹¹⁸ By 2006, the median value of white-owned homes was \$185,500; the corresponding figure for black-owned homes was \$129,700.¹¹⁹ Higher property values of white-owned homes, plus the higher percentage of white homeownership, means good things for white neighborhoods, such as a higher tax base. This tax base finances good schools, services, and infrastructure.¹²⁰ Conversely, lower property values and homeownership rates for black families means a much lower tax base, with correspondingly lower funding for schools, services, and infrastructure.¹²¹ In the words of the leading scholar of the G.I. Bill, "it is clear that local decisions that vitiate the tax base and resources of cities were linked to discriminatory federal housing policy."¹²²

The higher value of white-owned homes, together with the higher rate of white homeownership, means that whites have obtained much wealth attributable to discriminatory federal housing policies. Home equity constitutes the most substantial portion of wealth, about 60 percent of that of America's middle class.¹²³ Home equity also finances other forms of wealth creation, such as borrowing against equity at favorable rates, investments, home improvements, and college education.¹²⁴

Home equity and wealth also produce inheritances. Many white baby boomers (born between 1946–64) and their children have benefitted directly from the government's discriminatory policies through inheritances. The mean lifetime inheritance at age 55 for white baby boomers is \$125,000; for black boomers the corresponding figure is only \$16,000.¹²⁵

¹¹⁸ MCKENNA, *supra* note 44, at 81.

¹¹⁹ *Id.*

¹²⁰ OLIVER & SHAPIRO, *supra* note 112, at 62–65; FRYDL, *supra* note 36, at 300–02; MCKENNA, *supra* note 44, at 76–77.

¹²¹ MCKENNA, *supra* note 44, at 81–82; KATZNELSON, *supra* note 1, at 164.

¹²² FRYDL, *supra* note 36, at 300–01.

¹²³ OLIVER & SHAPIRO, *supra* note 112, at 64; MCKENNA, *supra* note 44, at 76, 84.

¹²⁴ MCKENNA, *supra* note 44, at 76–77.

¹²⁵ *Id.* at 78; OLIVER & SHAPIRO, *supra* note 112, at 155–56.

These large disparities in inheritances extend the economic, educational, and social privileges of whites. Parental wealth is a significant indicator of the socioeconomic status of adult children and is vital in perpetuating the class status of adult children.¹²⁶ Relatively wealthy white parents are able to provide their adult children with tuition assistance, assistance with down payments on homes, and, eventually, with inheritances.¹²⁷ Of course, because of their much lesser wealth and inheritances, most African-American parents are not able to provide these economic and social privileges to their children.¹²⁸

The most remarkable statistics summarizing the vast disparities in wealth created by the federal government's discriminatory policies are statistics on net worth. In 1984, the median net worth of white households was \$39,135; the corresponding statistic for black households was \$3,397, about 9% of the median net worth for whites.¹²⁹ By 2010, the median net worth, including home equity, of white households had grown to \$110,729.¹³⁰ By 2010, the median net worth of black households had grown to only \$4,955, now only 4.4% of the net worth of whites, a decrease of over 50% in percentage terms since 1984.¹³¹ Net worth is important because net worth finances dreams: educational dreams, such as college and graduate school preparation and tuition; and economic dreams, such as a down payment for a home or other asset acquisition.¹³²

Much white wealth and white privilege in education, and, conversely, black poverty and lack of privilege in education, are inextricably tied to the federal government's discriminatory policies promoting racism and segregation.¹³³ Racial preferences for whites—promoted by the federal government and implemented by educational institutions, banks and realtors to a great degree have created the vast disparities in wealth and education enjoyed by whites and suffered by blacks today.

¹²⁶ MCKENNA, *supra* note 44, at 83.

¹²⁷ *Id.* at 78–79; OLIVER & SHAPIRO, *supra* note 112, at 152–56; FRYDL, *supra* note 36, at 298.

¹²⁸ OLIVER & SHAPIRO, *supra* note 112, at 152–53; Herbold, *supra* note 49, at 104, 106.

¹²⁹ U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, TABLE 1, MEDIAN VALUE OF ASSETS FOR HOUSEHOLDS, BY TYPE OF ASSET OWNED AND SELECTED CHARACTERISTICS: 2010 (2012).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Cf.* OLIVER & SHAPIRO, *supra* note 112, at 2.

¹³³ SUGRUE, *supra* note 81, at 43.

This government-encouraged and government-subsidized race discrimination and its enormous educational and economic consequences constitute the strongest argument for affirmative action. The government's racism caused a large, measurable amount of economic and educational damage to African-American veterans of World War II, their families, and the generations of their heirs since that discrimination. As stated originally by President Lyndon Johnson, affirmative action for blacks and other persons of color is a necessary remedy for the government's own race discrimination.

C. Towards a New Affirmative Action

The principle lying at the very heart of the Equal Protection Clause is that racially discriminatory state action must be remedied. The scope of the government-sponsored race discrimination described above suggests the contours of a new affirmative action. Corresponding to this proven discrimination, a new affirmative action should have at least two facets: (1) remedying the race discrimination in higher education financed by the government and (2) remedying the economic harms caused by the government's encouragement and subsidization of racial segregation and race discrimination in housing.

In higher education, that should mean adhering to and expanding race-conscious admissions. Most colleges and universities in existence during the 1930s and 1940s explicitly discriminated against blacks. Princeton excluded all blacks. Harvard and Yale each had tiny quotas for black students. All the white institutions of higher learning practiced outright race discrimination, denying educational opportunities to African-Americans for many years. Affirmative action in higher education today, while insufficient in scope to right the harms of past discrimination, at least constitutes a small remedy for the race discrimination in which almost all white colleges and universities engaged. If anything, its scope should be greatly enlarged to better correspond to the scope of past race discrimination in higher education. Affirmative action in higher education is nothing more than a small step towards justice.

Affirmative action should also redress the economic harms caused by government-directed and government-financed segregation and racial discrimination in housing. A program of economic and educational development benefits could be targeted at identifiable victims of the government's discrimination and their descendants. To compensate for the denial of access to G.I. Bill benefits, a program might include educational grants, subsidized mortgages,

and business and construction loans.¹³⁴ Such a program could be understood as a G.I. Bill for blacks, finally making benefits available to them that were once made available exclusively to whites.¹³⁵ Congress could enact such a program using its enforcement powers under Section 5 of the Fourteenth Amendment.¹³⁶ The courts have upheld, under strict scrutiny, Congress's similarly motivated payment of reparations to Japanese-American victims of internment during World War II.¹³⁷ The compelling moral and practical goal of such a program ought to be "bettering the social conditions in which African Americans live," "[conditions that] affect everyone in our society."¹³⁸

This Part has presented evidence of the history of government-sponsored race discrimination in the structure and implementation of the Bill and the consequences of that discrimination. There is much evidence proving such discrimination. It is not difficult to conceive of the parameters of an appropriate remedy for this race discrimination. This evidence constitutes the strongest justification for affirmative action: as a remedy for proven past federal government discrimination.

Notwithstanding this compelling evidence of the federal government's role in promoting segregation and race discrimination, the Supreme Court has never taken adequate account of this evidence in its affirmative action jurisprudence. Indeed, the Court has disparaged the remedying of past societal discrimination as not "compelling."¹³⁹ The Court has thus reached a conclusion that is exactly the opposite of the conclusions reached by President Johnson and, later, Congress, regarding the need for affirmative action as a necessary part of the pursuit of equality.¹⁴⁰ The Court's conclusion is also counterintuitive, since remedying past

¹³⁴ KATZNELSON, *supra* note 1, at 171.

¹³⁵ While this is not his most preferred solution, Professor Roy Brooks has made just such a proposal for a G.I. bill for blacks. See ROY L. BROOKS, *RACIAL JUSTICE IN THE AGE OF OBAMA* 120–22 (2009).

¹³⁶ See U.S. CONST. amend. XIV, § 5.

¹³⁷ See *Jacobs v. Barr*, 959 F.2d 313 (D.C. Cir. 1992).

¹³⁸ KATZNELSON, *supra* note 1, at 170 (citing Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and the Theory*, 43 B.C. L. REV. 569 (2002)).

¹³⁹ See *Bakke*, 438 U.S. at 307, 310; *Croson*, 488 U.S. at 499, 520; *Grutter*, 539 U.S. at 324.

¹⁴⁰ Congress responded to the need for affirmative action by enacting specific set-asides and targets for the employment of minority-owned businesses in the construction industry. These set-asides were initially upheld as constitutional in *Fullilove v. Klutznick*, 448 U.S. 448, 463–67 (1980). After the Court's turn to colorblindness, however, the Court has rejected such set-asides in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

discrimination and eliminating present discrimination are, or should be, the most important purposes underlying enforcement of the Equal Protection Clause.¹⁴¹ The Court's affirmative action jurisprudence has been awry from the start, avoiding entirely the appropriate remedial role that affirmative action should have. Using the history of government-sponsored racism in the Bill, the next Part of the Article analyzes how and why the Supreme Court has gone so wrong.

II. DENYING THE PAST AND THE PRESENT: ANALYZING THE PREMISES UNDERLYING THE SUPREME COURT'S AFFIRMATIVE ACTION JURISPRUDENCE

The *Bakke* case was the Supreme Court's first sustained engagement with affirmative action. Although the case produced no majority opinion, Justice Powell announced the judgment of the Court. Although Powell wrote only for himself, his opinion has exerted great influence on all the major affirmative action cases decided since *Bakke*: *Croson*,¹⁴² *Adarand*,¹⁴³ *Grutter*,¹⁴⁴ and now *Fisher*.¹⁴⁵ stand as prominent examples. Indeed, in *Fisher* the Court reiterated the continuing influence of the principles Justice Powell first articulated in *Bakke*.¹⁴⁶

One of the most striking developments in recent Supreme Court jurisprudence has been the use of *Bakke* and other affirmative action decisions to curtail the consideration of race in other substantive areas.¹⁴⁷ In the school desegregation context, for example, Chief Justice Roberts used the reasoning in *Bakke* to curtail the use of race in school-assignment decisions.¹⁴⁸ And in the employment discrimination context, Justice Kennedy used the affirmative action cases to uphold the interests of white firefighters eligible for promotion against the interests of

¹⁴¹ See, e.g., *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954); cf., e.g., *United States v. Paradise*, 480 U.S. 149 (1987).

¹⁴² 488 U.S. 469 (1989).

¹⁴³ 515 U.S. 200 (1995).

¹⁴⁴ 539 U.S. 306, 322–25 (2003).

¹⁴⁵ 133 S. Ct. 2411 (2013).

¹⁴⁶ *Id.* at 2417–19.

¹⁴⁷ See generally Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whiteness Discrimination, Racial Test Fairness*, 58 UCLA L. REV. 73 (2010); Michael J. Zimmer, *Ricci's "Color-Blind" Standard in a Race Conscious Society: A Case of Unintended Consequences*, 2010 B.Y.U. L. REV. 1257 (2009).

¹⁴⁸ See *Parents Involved v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720, 722–25 (2007).

black firefighters disqualified from promotion because of disparate results on a promotion test.¹⁴⁹

Justice Powell's opinion in *Bakke* has, therefore, been remarkably influential in the Court's affirmative action jurisprudence and other substantive areas. Powell has been identified rightly as the principle architect of the current Court's ideology of colorblindness.¹⁵⁰ Accordingly, it is important to identify and analyze the fundamental assumptions and premises supporting his opinion, for these premises provide the intellectual foundation for the Court's affirmative action jurisprudence.

This Part explores the highly influential assumptions and premises that Justice Powell relied on in constructing his opinion in *Bakke*. I have organized these premises into three sets. The first is a set of three assumptions about affirmative action generally: (1) an increase in the stigma borne by students of color is a proper argument for curtailing affirmative action;¹⁵¹ (2) affirmative action constitutes racial preference for "no reason other than race or ethnic origin"¹⁵² and "reverse discrimination against whites"; and (3) whites are innocent victims who should not bear the burdens of affirmative action.¹⁵³ The second set of premises supports the application of strict scrutiny in affirmative action cases: (4) whites have also been victims of discrimination and there is no principled way of distinguishing between the discrimination experienced by whites and blacks;¹⁵⁴ and (5) equal protection must mean the same thing when applied to whites and to blacks.¹⁵⁵ Lastly, the

¹⁴⁹ Ricci v. DeStefano, 557 U.S. 557, 581–82 (2009).

¹⁵⁰ Ian F. Haney Lopez, "A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 1029 (2007).

¹⁵¹ "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." *Bakke*, 438 U.S. at 298.

¹⁵² "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." *Id.* at 307.

¹⁵³ "[T]here is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making." *Id.* at 298, 307, 310.

¹⁵⁴ "[T]he white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. . . . There is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not." *Id.* at 265, 287.

¹⁵⁵ "[T]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection it is not equal." *Id.* at 289–90.

Court has reached two conclusions about what constitutes a compelling government interest: (6) remedying past societal discrimination is too “amorphous” and is not a compelling government interest;¹⁵⁶ and (7) diversity is a compelling government interest.¹⁵⁷ I will explore each of these assumptions, premises, and conclusions in turn. I will also test their validity by weighing each of Powell’s assertions against the historical record presented above.

A. Three Assumptions About Affirmative Action: Stigma, Racial Preference, and White Innocence

1. Increased Stigma Borne by People of Color Is a Proper Argument Against Affirmative Action¹⁵⁸

Justices of the Supreme Court have regularly voiced concern about the possibility that affirmative action increases the stigma borne by African-Americans. In *Bakke*, Justice Powell stated, “preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection.”¹⁵⁹ Relying on Justice Powell’s reasoning, in *Croson* Justice O’Connor concluded, “[c]lassifications based on race carry a danger of stigmatic harm. . . . [T]hey may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”¹⁶⁰

Justice Thomas has been the Court’s most eloquent spokesman on the harms of stigma in several opinions spanning nearly twenty years. In *Adarand*, Justice Thomas stated that affirmative action programs “stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.”¹⁶¹ In *Grutter*, Justice Thomas wrote that the “majority of blacks are admitted to the Law School because of discrimination, and because of [affirmative action] all are tarred as undeserving.”¹⁶² And in his lengthy

¹⁵⁶ “[R]emedying the effects of ‘societal discrimination,’ [is] an amorphous concept of injury that may be ageless in its reach into the past” and is not a compelling government interest.” *Id.* at 307, 310.

¹⁵⁷ *Id.* at 314–15.

¹⁵⁸ “[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.” *Id.* at 298.

¹⁵⁹ *Id.* at 298.

¹⁶⁰ *Croson*, 488 U.S. at 493–94.

¹⁶¹ *Adarand*, 515 U.S. at 241 (Thomas, J., concurring in part and concurring in the judgment).

¹⁶² *Grutter*, 539 U.S. at 373 (Thomas, J., concurring in part and dissenting in part).

concurrence in *Fisher*, Thomas wrote that affirmative action “taints the accomplishments of all of those who are admitted as a result of racial discrimination.”¹⁶³

Stigma, according to these opinions, is the attribution of various demeaning stereotypes to African-American students. Justice Powell worries about reinforcement of the belief that blacks cannot achieve success without “special protection.” Justice Thomas worries that affirmative action programs stamp minorities with a “badge of inferiority” and that all blacks will be “tarred as undeserving,” their accomplishments tainted. It is striking that neither justice says anything about who holds and purveys these stereotypes. It is as though the stereotypes just float freely in space.

If affirmative action increases the demeaning stereotypes inflicted upon African-American students, it is important to realize that the stigma and the demeaning stereotypes are already there, carried by the mostly white students and staffs of majority-white institutions.¹⁶⁴ According to sociologist Joe Feagin,

For most whites and many other non-black Americans, specific antiblack views are part of a broader racial framing of U.S. society. . . . [T]his dominant white-created framing of society includes racial stereotypes, images, emotions, interpretations, and other important elements that legitimate discrimination. . . . Persisting antiblack attitudes, images and emotions today . . . are the pervasive and continuing legacy of the material exploitation and racist framing of slavery and segregation.¹⁶⁵

Further evidence of the pervasiveness of these stereotypes comes from the most recent findings of studies on implicit bias, according to which “approximately 75 percent of Americans display implicit (automatic) preference for White relative to Black.”¹⁶⁶

¹⁶³ 133 S. Ct. at 2432.

¹⁶⁴ See JOE R. FEAGIN, *RACIST AMERICA* 97 (2010) [hereinafter FEAGIN, *RACIST AMERICA*].

¹⁶⁵ *Id.*

¹⁶⁶ MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE* 208 (2013).

In majority white educational institutions, these “common stereotypes” are pervasive.¹⁶⁷ In a study of the environment at the University of Michigan, students of color reported that the central interracial difficulties they encountered with white peers included “racial stereotyping (on both academic and behavioral dimensions), exclusion or marginalization from interaction with white peers, pressure to assimilate and to deny one’s group identity, [and] white resentment about the supposedly unmerited gains of affirmative action.”¹⁶⁸ One African-American student reported the following interaction with his professor:

When I went to pick up my exam in math class, the professor didn’t look as if he knew exactly who I was, but he automatically found the paper with the lowest grade and handed it to me. I told him that that was not my name and not my paper. When I told him my name and he found my paper, my actual score on the exam was perfect.¹⁶⁹

While students of color reported more positive relations with the predominantly white faculty, the study concluded that “patterns of racial relations between students of color and the faculty and between these students and white students often mirror or reinforce one another.”¹⁷⁰

The Justices’ concern about the potential of affirmative action programs to reinforce these stereotypes invites an important observation. The conscious or unconscious will to stigmatize and the imagery of inferiority precede the attribution of demeaning stereotypes. The “common stereotypes” of blacks as incapable of success, inferior, or undeserving *precede* affirmative action programs. These common stereotypes are already part of our culture, widely held and believed by the public.¹⁷¹

¹⁶⁷ E. ZAMANI-GALLAHER ET AL., THE CASE FOR AFFIRMATIVE ACTION ON CAMPUS 23, 26 (2010) (“[T]he White counterparts of these successful achievers may assume that these African Americans received their positions solely because of race and not because of their intelligence, skill, talent and/or creativity.”); MARK CHESLER ET AL., CHALLENGING RACISM IN HIGHER EDUCATION 102–03, 110–11 (2005) (black student reporting that “[t]here’s no way to convince whites we belong here”).

¹⁶⁸ CHESLER ET AL., *supra* note 167, at 101–02.

¹⁶⁹ *Id.* at 114.

¹⁷⁰ *Id.* at 118.

¹⁷¹ FEAGIN, RACIST AMERICA, *supra* note 164, at 85 (“These racist arguments about contemporary intelligence levels are grounded in nearly 400 years of viewing black Americans and some other

There has never been a time in American history when a majority of white Americans did not stigmatize African-Americans.¹⁷² While it is beyond the scope of this Article to explore this idea in detail, I will give a few examples. The inferiority of Africans was asserted as a reason, a necessary fiction, to justify their enslavement.¹⁷³ Thomas Jefferson speculated about the lesser intelligence of blacks, while at the same time discounting and disparaging evidence of the intellectual accomplishments of Phyllis Wheatley, Benjamin Banneker, and others.¹⁷⁴ During the Jim Crow era, African-Americans were deemed unfit by law to attend school with white children or to marry white partners.¹⁷⁵ During World War II, the military was segregated due to white beliefs of the inferiority of blacks.¹⁷⁶ After World War II, regardless of their accomplishments or means, blacks were deemed unfit to reside in white neighborhoods.¹⁷⁷

What is important about all of these examples, and there are many more that could be recited, is that they all *precede* anything we could label affirmative action. The will to stigmatize blacks and to attribute inferiority to blacks has always been an important aspect of white culture in the United States.¹⁷⁸ Just as the will to stigmatize and demean blacks long preceded affirmative action, so will it long continue regardless of whether affirmative action ends or not. The life of those “common stereotypes” has been, and continues to be, remarkably long and robust.

Americans of color a having an intelligence inferior to that of white Americans.”); ZAMANI-GALLAHER, *supra* note 167, at 32–33.

¹⁷² ZAMANI-GALLAHER, *supra* note 167, at 32–33.

¹⁷³ See HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES: 1492–PRESENT* 23–38 (1995); EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM* 327–28 (1975).

¹⁷⁴ See Thomas Jefferson, *Notes on the State of Virginia, Query XIV* (1787), reprinted in JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 105–10 (2007) [hereinafter PEREA ET AL., *RACE AND RACES*].

¹⁷⁵ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (finding that laws mandating school segregation violated the Equal Protection Clause); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down criminal laws penalizing intermarriage between the races).

¹⁷⁶ See, e.g., PEREA ET AL., *RACE AND RACES*, *supra* note 174, at 159–62.

¹⁷⁷ See *supra* notes 98–102 and accompanying text.

¹⁷⁸ In the matter of stereotypes, W.E.B. Du Bois had it right, describing the need of white Southerners to disparage black success during Reconstruction: “[U]nfortunately there was one thing that the white South feared more than negro dishonesty, ignorance, and incompetency, and that was negro honesty, knowledge and efficiency.” W.E.B. DU BOIS, *RECONSTRUCTION AND ITS BENEFITS* (1910), reprinted in PEREA ET AL., *RACE AND RACES*, *supra* note 174, at 145.

Common and widely believed stereotypes of black inferiority are a form of white racism.¹⁷⁹ It is easy to demonstrate that any increase in demeaning stereotypes attributable to affirmative action is but another form of white racism. While affirmative action for blacks allegedly increases demeaning stereotypes about blacks, note that racial preferences for whites generate no stigma at all. There are many preferences in academic admissions enjoyed primarily by whites, such as preferences for legacy admits, certain geographical origins, athletes, and qualifications like standardized tests that privilege whites.¹⁸⁰ None of these preferences, however, become the objects of criticism or stigmatization of whites. Perhaps most egregiously, the naked racial preferences enjoyed by whites and denied to blacks in opportunities for education, home ownership, employment, and wealth, amply documented above, yield absolutely no demeaning stereotypes or stigma for whites.¹⁸¹ On the contrary, racial preferences for whites are re-characterized as the earned result of hard work and superior merit. The obvious double standard at play here—the attribution of demeaning stereotypes to blacks when a program assists them, contrasted with the attribution of praiseworthy characteristics rather than stigma to whites when numerous programs assist them—shows the racist character of the differential attributions.

Offering stigma as a reason to oppose affirmative action is, then, remarkably self-serving for whites. White racism, in the form of commonly held demeaning stereotypes about blacks, is offered as a reason why measures designed to remedy the effects of that racism should not be adopted. In other words, continuing white racism is asserted as a reason for denying a remedy for white racism.

In addition to being self-serving for whites, there is no reason to think that the elimination of affirmative action will reduce the commonly held stereotypes attributed to blacks. The reduction of stigma argument, in addition to being self-serving, is empirically wrong. The elimination of affirmative action will not suddenly yield an appreciation for the qualifications and deserved admissions of

¹⁷⁹ See TIM J. WISE, AFFIRMATIVE ACTION: RACIAL PREFERENCE IN BLACK AND WHITE 128 (2005).

¹⁸⁰ *Id.* at 79–81, 122 (“Nationally, anywhere from twelve to twenty-five percent of each freshmen class at top schools will be filled by the children of alumni, which is far more than the number admitted because of so-called racial preference for people of color.”).

¹⁸¹ *Id.* at 127–28.

black students. Rather, the evidence shows that the elimination of affirmative action actually increases hostility towards African-American students.¹⁸²

If affirmative action increases the stigma inflicted upon African-American students, this is another way of saying that white people resent the presence of blacks in presumptively white environments. Blacks deal with such hostility all the time.¹⁸³ There is no reason why African-American students cannot evaluate the presence of or increase in stigma for themselves.¹⁸⁴ There is no reason why black students cannot make their own informed decisions about what is best for themselves: whether the degree of hostility in a majority-white environment is worth tolerating. The argument that increased stigma should result in curtailing affirmative action seems to rest on the idea that black students are incapable of deciding what is in their best interest.¹⁸⁵ Any argument that rests on presumed black incapacity is itself a racist assumption about the lesser capabilities of blacks.¹⁸⁶ A much better response to the possibility of increased stigma faced by black students is to make campuses healthier environments for black students by reducing the propensity of white students and faculty to stereotype black students negatively.

2. Affirmative Action Constitutes “Racial Preference” for Blacks and “Reverse Discrimination” Against Whites¹⁸⁷

Many justices of the Supreme Court assume that affirmative action constitutes “racial preference” for blacks and/or “reverse discrimination” against whites. In *Bakke*, Justice Powell wrote that “preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.”¹⁸⁸ Justice

¹⁸² Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 INDIANA L.J. 1497 (2010).

¹⁸³ JOE R. FEAGIN ET AL., *THE AGONY OF EDUCATION: BLACK STUDENTS AT WHITE COLLEGES AND UNIVERSITIES* x–xi, 7, 13 (1996) (“Because of the negative climate at many predominantly white colleges, very difficult, painful choices are forced on African American students and parents.”).

¹⁸⁴ Cf. WISE, *supra* note 179, at 125–26.

¹⁸⁵ *Id.* at 126.

¹⁸⁶ *Id.*

¹⁸⁷ “If petitioner’s purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected. . . . Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.” *Bakke*, 438 U.S. at 307, 319.

¹⁸⁸ *Id.*

O'Connor relied on this language in her opinions in *Croson* and in *Grutter*.¹⁸⁹ Justice Scalia, concurring in *Croson*, wrote that "the benign purpose of compensating for social disadvantages . . . can [not] be pursued by the illegitimate means of racial discrimination. . . . Where injustice is the game, however, turnabout is not fair play."¹⁹⁰ During oral argument in *Shelby v. Holder*, Justice Scalia described the Voting Rights Act as a "perpetuation of racial entitlements."¹⁹¹ Describing the University of Michigan Law School's admissions program, Justice Thomas wrote that "racial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy."¹⁹² Most recently, describing a school district's use of race to maintain desegregation, Chief Justice Roberts famously wrote, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."¹⁹³ The idea also enjoys wide popularity in the public.¹⁹⁴

A remedy for proven discrimination, however, is not a preference of any kind. I have argued that the strongest justification for affirmative action is as a remedy for proven federally-subsidized race discrimination in education and housing and the economic consequences of that discrimination. Remedies for proven inequality are not preferences. The pervasive white racism of the World War II era constituted discrimination solely based on race. A remedy for this discrimination suffered by black Americans is not "preferring members of any one group for no reason other than race." We do not ordinarily consider remedies for injuries to be "preferences" granted to the victims of injuries. Remedies seek to "make [the victims] whole for injuries suffered" because of discrimination.¹⁹⁵ In some cases, the Court has approved of race-based remedies for proven discrimination without discounting them as simple "racial preferences."¹⁹⁶

¹⁸⁹ *Id.* at 496; *Grutter*, 539 U.S. at 323.

¹⁹⁰ *Croson*, 488 U.S. at 520, 524.

¹⁹¹ Debra Cassens Weiss, *Scalia: Reauthorized Voting Rights Act was a 'perpetuation of racial entitlement'*, ABA JOURNAL (Feb. 28, 2013, 1:23 PM), <http://www.abajournal.com>.

¹⁹² *Grutter*, 539 U.S. at 350 (Thomas, J., dissenting).

¹⁹³ *Parents Involved*, 551 U.S. at 748.

¹⁹⁴ FEAGIN, RACIST AMERICA, *supra* note 164, at 124; Michael Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSP. ON PSYCHOL. SCI. 215 (2011).

¹⁹⁵ *Franks v. Bowman Trans. Co.*, 424 U.S. 747, 763 (1976).

¹⁹⁶ *See Franks*, 424 U.S. at 763; *Paradise*, 480 U.S. at 171; *Fullilove*, 448 U.S. at 463–67.

Even if one is to consider such a remedy a “racial preference,” it is both interesting and highly misleading that the only “racial preferences” currently debated in the courts and in the public are those that provide some benefit to blacks. It is whites, however, not blacks, who are the true beneficiaries of racial preferences. Consider the massive economic and educational benefits unjustly gained by whites because of pervasive, federally subsidized racism in the G.I. Bill. These benefits gained by whites were the result of the outright, pervasive anti-black racism of whites. White veterans were preferred in education, housing, lending, and employment solely because they were white. Blacks were denied access to these benefits solely because they were black. In contrast to these enormously consequential gains whites received because of racial preferences for whites, the benefits that blacks and other historically underrepresented minorities receive as a result of affirmative action are modest indeed.

In the United States, most whites “incorrectly believe that African-Americans are as well off or better off than the average white.”¹⁹⁷ The facts tell a very different story; there is no significant area of life in which whites do not constitute the most privileged group in society. Whites are the most privileged group in access to health care, education, jobs, income, housing, and wealth, just to name a few significant areas.¹⁹⁸ White families enjoy the highest median net worth of all the racial groups, a net worth that is 22 times the median net worth of black families, an economic benefit that results directly from white racism.¹⁹⁹ The average black family earns an income that is less than two-thirds the income of the average white family.²⁰⁰ The average white person has a life expectancy that is four to six years longer than the average African-American.²⁰¹ Black Americans are “twice as likely as whites to be unemployed, three times more likely to live in poverty, and more than six times as likely to be incarcerated.”²⁰²

Whites also enjoy significant racial preferences in higher education. Of all the racial groups, whites are the most likely to be admitted to their first choices of

¹⁹⁷ BLENDON ET AL., *supra* note 10, at 66.

¹⁹⁸ *Id.*

¹⁹⁹ U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, TABLE 1, MEDIAN VALUE OF ASSETS FOR HOUSEHOLDS, BY TYPE OF ASSET OWNED AND SELECTED CHARACTERISTICS: 2010 (2012); OLIVER & SHAPIRO, *supra* note 112, at 2.

²⁰⁰ FEAGIN, RACIST AMERICA, *supra* note 164, at 21.

²⁰¹ *Id.*

²⁰² NAT’L URBAN LEAGUE, THE STATE OF BLACK AMERICA 2009, at 1–2 (2009).

college or university.²⁰³ White students also enjoy disproportionate privilege at institutions that admit legacies, the children of alumni. "There are far more legacy admissions than there are students who benefit from affirmative action."²⁰⁴ For example, at Ivy League schools 96% of living alumni are white, meaning that at these schools the overwhelming majority of legacy admits will be white.²⁰⁵ At these and other top schools, the children of alumni constitute between twelve to 25% of each entering class, a number that far exceeds the number admitted because of affirmative action.²⁰⁶ In addition, preferences awarded by admissions committees for attendance at the most academically challenging schools, for taking advanced courses, and for participation in interesting extracurricular activities will all disproportionately favor white students, who disproportionately inhabit the wealthy, mostly segregated neighborhoods that are able to support such schools.²⁰⁷

Whites are disproportionately over-represented in institutions of higher learning. In recent years, among students matriculating at selective colleges, whites constituted 78 percent of students, contrasted with blacks (8 percent), Latinos (4 percent), and Asians (11 percent).²⁰⁸ In postgraduate education, whites constitute 70.3 percent of students, compared with 21.5 percent of students who are black or Latino.²⁰⁹ In law school enrollments, whites constitute 77 percent of the students, compared with 15.3 percent of students who are black and Latino.²¹⁰ In medical schools, whites constitute 60.2 percent of the students, compared to 7 percent of students who are black and 8.9 percent who are Latino.²¹¹ In most college,

²⁰³ WISE, *supra* note 179, at 72.

²⁰⁴ *Id.* at 122.

²⁰⁵ *Id.*

²⁰⁶ *Id.*; Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 995 (1996).

²⁰⁷ WISE, *supra* note 179, at 80–81, 123–24. Blacks only represent 6% of the students attending the country's most affluent high schools (which will often be the most challenging), while whites constitute 84% of such students. *Id.* at 80.

²⁰⁸ THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 139–40, 174–75 (2009).

²⁰⁹ U.S. DEP'T OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, FAST FACTS (2012), available at <http://nces.ed.gov/fastfacts/display.asp?id=98>.

²¹⁰ See *Section of Legal Education and Admission to the Bar*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/legal_education/resources/statistics (last visited Apr. 7, 2015).

²¹¹ Asian/Pacific Islander students constitute 22.8 percent of medical school students, a number disproportionately high compared to their percentage of the population. *FACTS: Applicants*,

graduate, and professional school classrooms, all one needs to do is to look around to see that the majority of students are white. How can it be said that blacks get racial preferences in education when our institutions of higher education remain overwhelmingly and disproportionately white?

The disproportionate representation of whites in institutions of higher education shows the falsity of the term “reverse discrimination” when referring to whites who are not admitted to their most desired schools. The disproportionately large representation of whites at most institutions shows that decisions not to admit certain whites is not because of their race. Rather, it is because their qualifications are less desirable than those of all the other whites who are admitted. Whereas the discrimination against blacks has been based solely on their race and skin color, one cannot say the same of alleged discrimination against whites. When nonwhite race is used as a plus factor to admit a black or Latino student, this act does not constitute discrimination against a white *because of* the race of the white person. It is simply that, in a context that includes more highly qualified whites, the rejected whites ranked lower. In a world of limited opportunities, disproportionate numbers of more qualified whites were preferred. In such a world, the fact that petitioners are white has not hurt them; it has simply not benefitted them in comparison to all the other whites who were admitted. This is not race discrimination at all in the sense that race discrimination is suffered by blacks and Latinos.

Accordingly, it is very misleading to describe the rejection of white applicants as “reverse discrimination.” Such rejections carry none of the meanings of racial inferiority that characterizes the discrimination experienced by blacks and Latinos. It is just as misleading to characterize affirmative action, a remedy for past discrimination against blacks, as “racial preference” for blacks. It was always intended to be, and remains, a remedy for race discrimination against them.

3. Whites Are “Innocent Victims” of Affirmative Action²¹²

The rhetoric of white innocence and white victimization has played an important part in the Court’s affirmative action jurisprudence. In *Bakke*, Justice Powell wrote “there is a measure of inequity in forcing innocent persons in respondent’s position to bear the burdens of redressing grievances not of their

Matriculants, Enrollment, Graduates, MD/PhD, and Residency Applicants Data, ASSOCIATION OF AMERICAN MEDICAL COLLEGES, <https://www.aamc.org/data/facts/> (last visited Apr. 7, 2015).

²¹² *Bakke*, 438 U.S. at 298. “[T]here is a measure of inequity in forcing innocent persons in respondent’s position to bear the burdens of redressing grievances not of their making.” *Id.*

making.”²¹³ In *Wygant*, Powell wrote “[a]s part of this Nation’s dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy.”²¹⁴ In *Croson*, Justice O’Connor thought that the narrow tailoring of an affirmative action program was necessary “to assure that it will work the least harm possible to other innocent persons competing for the benefit.”²¹⁵ In the same opinion, Justice Scalia wrote, “even ‘benign’ racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race.”²¹⁶ Whites are thus “innocent persons” or “individual victims” who bear the “burden,” “harm,” or “injustice” of affirmative action. Through its frequent reference to the concept, the Court has encouraged widespread belief, across the ideological spectrum, in white innocence and victimization.²¹⁷

There are several interesting aspects of the Court’s use of the concept of “white innocence.” First, there is no definition of what the Court means by “innocence.” Innocence of what? Of racism against blacks? Of responsibility for the deprivations faced by many black candidates for admission to school or employment? It seems to mean something like “contemporary Whites are not responsible or blameworthy for the history and legacy of racism in American society.”²¹⁸ Still, it is noteworthy that the Court, by never defining what it means by innocence, nor to whom it applies, leaves the concept vague and subject to broad interpretations.

Second, the Court simply assumes that whites in affirmative action cases are innocent. The concept of white innocence, and evidence in support of and against the concept, is never discussed or evaluated in any of the affirmative action cases. The Court simply assumes that whites are innocent. Yet many non-white persons, and some whites, in light of the racism and its consequences as described above, would not consider contemporary whites to be “innocent” in the sense that the

²¹³ *Id.*

²¹⁴ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280–81 (1986) (Powell, J., opinion).

²¹⁵ *Grutter*, 539 U.S. at 341.

²¹⁶ *Croson*, 488 U.S. at 527 (Scalia, J., concurring); see also *Johnson v. Santa Clara Cnty.*, 480 U.S. 616, 657–77 (1987) (Scalia, J., dissenting).

²¹⁷ 5 RONALD J. FISCUS, *THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION* 7 (1992); see Cecil J. Hunt, II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477, 531 (2006) [hereinafter Hunt, *White Innocence*].

²¹⁸ Hunt, *White Innocence*, *supra* note 217, at 533.

Court seems to mean.²¹⁹ The Court seems to take judicial notice of “white innocence,” even though any such innocence is contestable.²²⁰ It seems particularly inappropriate to assume “white innocence” in a court of law, where determinations of innocence or guilt always depend on evidence. On what basis, other than wishful thinking, does the Court decide that whites are “innocent?”

In the Court’s view, innocence applies only to whites. In her opinion in *Grutter*, Justice O’Connor would only approve an affirmative action program that worked “the least harm possible to . . . innocent persons competing for the same benefit.”²²¹ She approved of Michigan Law School’s affirmative action program because its individualized consideration “does not unduly harm nonminority applicants.”²²² These references make clear Justice O’Connor’s primary concern for minimizing harm to “nonminority applicants,” i.e., white people.

This exclusive identification of innocence and harm suffered with whiteness has troubling implications in the affirmative action cases. The Court assumes that all whites are innocent. But the Court also assumes that all innocents are white. The Court makes innocence and whiteness coextensive. If whites are “innocent” and harmed by affirmative action, then by implication blacks and other nonwhites who benefit from affirmative action must be “guilty” of causing harm to whites. Yet considering the degree and pervasiveness of racism against blacks, amply documented above, it is hard to understand why blacks are not considered innocent and at least as deserving as whites.²²³

Under the varied rationales for affirmative action, it does not seem reasonable to conclude that black students are somehow victimizing whites. Independent of affirmative action, many black students are admitted based on their numerical and other qualifications. The fact that whites with mediocre qualifications compared to other whites are not admitted does not give rise to any legitimate claim of victimization. I have argued that the strongest basis for affirmative action is as a remedy for past discrimination against blacks as a group. A remedy for past victimization cannot fairly be understood as itself a form of victimization, even if some persons are inconvenienced. Affirmative action can also be understood as

²¹⁹ *Id.* at 523–24.

²²⁰ *Id.* at 523.

²²¹ *Grutter*, 539 U.S. at 341.

²²² *Id.* at 309.

²²³ See generally Hunt, *White Innocence*, *supra* note 217.

corrective, in the sense of correcting for racial disparities in numerical qualifications that have their genesis in racism. It can be seen as a way to make things more right. Under the Supreme Court's jurisprudence, affirmative action admissions can be understood as necessary for diversity and its educational benefits in university communities. Lastly, under concepts of distributive justice, the admission of blacks can be understood as constitutive of their fair share of educational opportunities.²²⁴ In none of these instances can black candidates fairly be seen as victimizing or injuring whites. Admitted black students are merely taking their share of a finite number of seats in the class.

If black students are not victimizing innocent whites, then the only "guilty" victimizers left are university administrators. University administrators who engage in affirmative action, and probably many who do not, are merely trying to assemble the most qualified and diverse classes they can. There seems to be neither an intention nor a result on the part of admissions officers to victimize or disadvantage whites. The fact that whites are enrolled in disproportionate numbers in colleges and graduate schools throughout the country demonstrates that there is no victimization of whites because they are white.²²⁵

The Court also assumes that affirmative action programs harm innocent whites. Harm or injury in the context of affirmative action means the loss of a benefit or an opportunity to which the injured plaintiff would have been entitled but for the affirmative action programs at issue. It is important to recognize that no one, regardless of scores or other criteria, is entitled to be admitted to most educational institutions. In order to demonstrate harm, white plaintiffs would have to show that, but for affirmative action, they would have been admitted to the schools to which they applied.

The generalized claims of white innocence made by the Court and believed by many whites are seriously weakened by the fact that white baby boomers and their children have received great financial and educational benefits from the federally-subsidized racism of the recent past. While whites may be unaware of these and other unearned benefits their whiteness, their lack of awareness does not change the fact that they received enormous benefits from government-sponsored racism. White baby boomers typically inherit an average of \$125,000 at age 55.²²⁶ The

²²⁴ FISCUS, *supra* note 217, at 8.

²²⁵ See *supra* notes 204–12 and accompanying text.

²²⁶ MCKENNA, *supra* note 44, at 78; see OLIVER & SHAPIRO, *supra* note 112, at 155–56.

corresponding figure for black baby boomers is only \$16,000, only one-ninth the inheritance of whites.²²⁷ These inheritance figures correspond to the numbers on median net worth, which for whites is \$110,729 and for blacks only \$4,955.²²⁸ Since home equity constitutes about 60% of net worth,²²⁹ the proportion of white net worth attributable to racism is substantial.

The huge majority of today's high school, college, and graduate school students are the children of baby boomers. The children of white baby boomers have benefitted directly from the racism-generated home ownership that has produced such wealth from the 1950s to the present. These white children have benefitted not just from that enormous wealth but also from all of the enhanced educational and financial opportunities that high net worth provides: better neighborhoods, better financed and higher-quality schools, more opportunities for extracurricular activities and enrichment, and far greater financial and institutional support for standardized test preparation and for college applications.²³⁰ All of these factors, of course, increase the grade point averages, the standardized test scores, the number of advanced courses, and the overall attractiveness of the academic dossiers that these students present to college admissions committees.

The claim of white innocence under these circumstances reduces to a claim of being potentially unknowing beneficiaries of unjust enrichment produced by government and private racism. Most whites, both baby boomers and their children, should be considered beneficiaries of unjust enrichment. As such they have no valid claim of entitlement to the fruits of the unjust enrichment.²³¹ As one example, "the family of an embezzler who occupies a house or possesses goods purchased with stolen funds is not considered to have a normatively secure claim to the goods merely because they did not actively perpetuate the wrong."²³² As another example, "personal guilt or innocence is irrelevant to the claim of right, as when a party

²²⁷ MCKENNA, *supra* note 44, at 78; see OLIVER & SHAPIRO, *supra* note 112, at 155–56.

²²⁸ U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, TABLE 1, MEDIAN VALUE OF ASSETS FOR HOUSEHOLDS, BY TYPE OF ASSET OWNED AND SELECTED CHARACTERISTICS: 2010 (2012); OLIVER & SHAPIRO, *supra* note 112 at 2.

²²⁹ MCKENNA, *supra* note 44, at 76–77; see OLIVER & SHAPIRO, *supra* note 112, at 148–50.

²³⁰ OLIVER & SHAPIRO, *supra* note 112, at 2; THOMAS M. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY 3 (2004).

²³¹ Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1774 n.286 (1993).

²³² *Id.*

innocently comes into possession of stolen goods; the claim on those goods by the rightful owner is not forfeited because of the innocence of the current possessor.”²³³

This is why, in the affirmative action context, claims of white innocence are quite weak. Whites have no valid entitlement to the fruits of racism. Racism produced the better neighborhoods and school districts and better preparation and consequently higher standardized test scores that continue to advantage whites and disadvantage blacks and Latinos.²³⁴ Whites are the beneficiaries of unjust educational enrichment. Definitions of qualification for college admission or employment that privilege these measures of unjust educational enrichment continue to confer unearned rewards on already unfairly advantaged whites.²³⁵ Whites who gain admission because of higher average numerical standards are being further rewarded for the racism that produced their educational privilege. As beneficiaries of unjust enrichment, whites who claim to be innocent victims, or the Court that claims such status for them, stand on weak ground.

It is remarkable that the Supreme Court assumes that all whites are innocent victims of affirmative action programs. These presumptions seem even more remarkable when we consider that the Court places this mantle of innocence and victimization upon the plaintiffs in the leading affirmative action cases, most (perhaps all) of whom would have been denied admission in the absence of affirmative action. Alan Bakke, for example, despite excellent numerical credentials was rejected by all twelve medical schools to which he applied.²³⁶ His age at the time of his application, 33, was old relative to most applicants and may have been a factor in his consistent rejections.²³⁷ Bakke applied to UC Davis twice and was rejected twice.²³⁸ The first time he was rejected principally because he applied late in the admissions cycle, after most seats in the class had been filled.²³⁹

²³³ FISCUS, *supra* note 217, at 45.

²³⁴ See *supra* notes 80–133 and accompanying text.

²³⁵ See Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1631 (2003) (“[S]tandardized tests are retained for the convenience of the schools even though they privilege applicants from well-to-do families, alumni children, and those born into celebrity.”).

²³⁶ JOEL DREYFUSS & CHARLES LAWRENCE III, *THE BAKKE CASE: THE POLITICS OF INEQUALITY* 16 (1979).

²³⁷ *Id.*

²³⁸ *Id.* at 21, 29.

²³⁹ *Id.* at 21.

The second time he was rejected because he had an unsatisfactory interview with a UC Davis faculty member, who concluded that Bakke was “a rather rigidly oriented young man who has the tendency to arrive at conclusions based more upon his personal impressions than upon thoughtful processes using available sources of information.”²⁴⁰ Bakke’s overall lack of qualifications is made clearer by the facts that many applicants with scores higher than his were not admitted and several other white students with scores lower than his were admitted to the UC Davis medical school class.²⁴¹ In addition, the dean of the medical school had as many as five discretionary admits for children of alumni or donors who otherwise would not be admitted.²⁴²

Most, if not all, of the other plaintiffs in more recent cases would also have been rejected, with or without affirmative action. Regarding Barbara Grutter, counsel for the University of Michigan stated during oral argument that “[t]he record evidence would indicate . . . that Barbara Grutter would not have been admitted under a race-blind program.”²⁴³ In the companion case to *Grutter*, Jennifer Gratz was described as “well qualified [but] less competitive than the students who ha[d] been admitted on first review.”²⁴⁴ And regarding Abigail Fisher, the named plaintiff in *Fisher v. Texas*, the University of Texas affirmed that “the undisputed evidence demonstrated that Fisher would not have been offered fall admission.”²⁴⁵

Plaintiffs Bakke, Grutter, and Fisher, all of whom were less competitive than all the other whites who were admitted, suffered no injury due to affirmative action since they would not have been admitted in its absence. Notwithstanding their lack of qualifications, the Court still cloaked them in the status of innocent victims. Alan Bakke, however, rather than being an innocent victim, illustrates how a white candidate benefits from racism and unearned white privilege.²⁴⁶ As a young man, Bakke benefitted directly from Jim Crow segregation by attending an all-white,

²⁴⁰ *Id.* at 29.

²⁴¹ *Id.* at 20, 29–30.

²⁴² *Id.* at 24, 42–43.

²⁴³ Transcript of Oral Argument at 54, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

²⁴⁴ *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003).

²⁴⁵ Brief for Respondent at 13–14 n.6, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2012) (No. 11-345).

²⁴⁶ See WISE, *supra* note 179, at 74–77.

segregated school in Dade County, Florida.²⁴⁷ The quality of education he received likely contributed to his success and his high test scores. This quality of education was denied outright to his black counterparts in Jim Crow Florida. When the Supreme Court ordered Bakke admitted to UC Davis solely on the basis of his test scores, they conferred upon him yet another unearned benefit of white racism.²⁴⁸

In the end, then, the claim of innocent white victimization underlying many of the affirmative action cases falls flat. The claim of innocence is seriously weakened by the unearned advantage that racism gave, and continues to give, to whites. Whites are not entitled to the fruits of racism, nor are they presumptively entitled to admission at their schools of choice. If we take into account the distribution of opportunities that would exist in a world free of racism, then “questions of innocence and blame are fundamentally irrelevant in affirmative action cases, and the controlling question is one of equity.”²⁴⁹

*B. The Premises Supporting Application of Strict Scrutiny:
Historical Discrimination Against Whites and the “Same”
Equal Protection*

1. Whites Too Have Suffered a History of Discrimination
and There Is No Principled Way to Distinguish Between
the Experiences of Whites and Blacks²⁵⁰

Justice Powell posits that the United States is a “nation of minorities”²⁵¹ in which each ethnic minority can “lay claim to a history of prior discrimination” by the State and private individuals. He describes how each ethnic minority “had to struggle—and to some extent struggles still” to overcome prejudice.²⁵² Powell is

²⁴⁷ DREYFUSS & LAWRENCE, *supra* note 236, at 15.

²⁴⁸ WISE, *supra* note 179, at 76.

²⁴⁹ FISCUS, *supra* note 217, at 45. Under principles of distributive justice and in the absence of racism, each racial group’s fair share of opportunities would match its proportion of the population. Accordingly, the disproportionately large share of opportunities held by whites is excessive and unfair to racial minorities. Racial minorities should enjoy their fair, proportional share of educational and economic opportunities. *See id.* at 45, 47.

²⁵⁰ “[T]he white ‘majority’ itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. . . . There is no principled basis for deciding which groups would merit ‘heightened judicial solicitude’ and which would not.” *Bakke*, 438 U.S. at 295–96.

²⁵¹ *Id.* at 292.

²⁵² *Id.*

clearly referring only to white ethnic groups, since he cites only immigration histories as evidence of the discrimination suffered by European immigrants.²⁵³

In Powell's view, both white ethnics and blacks have suffered discrimination, rendering the groups similarly situated and their experiences indistinguishable. Powell is thus relying on classic, but outdated, notions of ethnicity. According to ethnicity theory, "contemporary race relations should be understood as the competition between similarly situated ethnic groups comprised of individuals bound together by shared cultures."²⁵⁴ Ethnicity theory minimizes the role of racism, present and structural, in impeding the progress and possibilities of racial minorities.²⁵⁵

Yet Powell's assertions are plainly wrong, since the experiences of white ethnics and blacks are easily distinguishable.²⁵⁶ The fair-skinned European immigrants who faced discrimination upon their arrival in the United States were allowed to become white.²⁵⁷ They consider themselves white and are considered white by others.²⁵⁸ As whites, they benefit from white privileges.²⁵⁹ The history of the G.I. Bill shows that its public and private administrators were well able to distinguish between whites and blacks for the purpose of excluding blacks from the educational and economic benefits received almost exclusively by whites of all ethnicities.²⁶⁰

Everyone knows, at some level, that the experiences of blacks and whites are not, and never have been, the same in this country. Some members of the Court have recognized to some degree the extreme material inequality suffered by blacks.²⁶¹ Consider a hypothetical. Imagine a space traveler from another planet

²⁵³ See *id.* at 292 nn.30–33.

²⁵⁴ Lopez, *supra* note 150, at 1023.

²⁵⁵ *Id.* at 1022–23.

²⁵⁶ *Bakke*, 438 U.S. at 387.

²⁵⁷ JOE R. FEAGIN, *THE WHITE RACIAL FRAME: CENTURIES OF RACIAL FRAMING AND COUNTER-FRAMING* 82–83 (2009) (describing how poor Irish immigrants came to be accepted as white).

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ See *supra* notes 36–133 and accompanying text.

²⁶¹ *Grutter*, 539 U.S. at 344–46 (Ginsburg, J., concurring); *Bakke*, 438 U.S. at 387–402 (Marshall, J., concurring in part and dissenting in part).

who happened to visit and study the United States.²⁶² This space traveler, observing the distribution of material and societal resources between whites and blacks would have no difficulty observing the obvious: that whites control a disproportionately large amount of social resources and that blacks are far less privileged.²⁶³ The truth of the privileged status of whites can be demonstrated another way. Suppose white people were offered a chance to become black. Very few, if any, whites would choose to become black. Yet if whites and blacks were truly the same in circumstances and social meanings, there would be no major disincentive associated with being black. When political scientist Andrew Hacker asked white college students how much compensation they would seek if they suddenly became black, most white students responded that “it would not be out of place to ask for \$50 million, or \$1 million for each coming black year.”²⁶⁴ The desire of whites to remain white, and to seek huge bounties in order to live as blacks, is a tacit admission of the privileged status of whites.

Powell’s discussion of discrimination simply negates the racial history of the United States. In his discussion, he refers in detail only to discrimination suffered by white ethnics, with no reference to race discrimination against blacks.²⁶⁵ Throughout his opinion, he gives only a cursory reference to the nation’s “legacy of slavery and racial discrimination” and to the “continued exclusion of Negroes from the mainstream of American society.”²⁶⁶ In contrast, Justice Marshall’s powerful dissent in *Bakke* reminds us that “during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro.”²⁶⁷ Marshall’s dissent chronicles the history and severity of discrimination against blacks and relies upon the rich body of historical research documenting slavery, Jim Crow, and their present legacies.²⁶⁸ It is striking that Justice Powell ignores entirely Justice

²⁶² Cf. Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 23 (2011); Derrick Bell, *Political Reality Testing: 1993*, 61 FORDHAM L. REV. 1033 (1993); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 158–60 (1992) (chronicle of the space traders).

²⁶³ BELL, *supra* note 262, at 158–60.

²⁶⁴ FEAGIN, *RACIST AMERICA*, *supra* note 164, at 222.

²⁶⁵ See, e.g., *Bakke*, 438 U.S. at 388 (1978) (Marshall, J., concurring in part and dissenting in part) (citing several histories documenting African American history).

²⁶⁶ *Id.* at 294 (majority opinion).

²⁶⁷ *Id.* at 387 (Marshall, J., concurring in part and dissenting in part).

²⁶⁸ See, e.g., *id.* at 388 n.1.

Marshall's dissent, the historical literature on slavery and Jim Crow, and the facts of that race discrimination itself.

Powell's statements equating the discrimination experienced by white ethnicities and blacks leads to his further claim that "[t]here is no principled basis for deciding which groups merit 'heightened judicial solicitude' and which would not."²⁶⁹ He cites no authority for this proposition. He prefers to rely only on his own personal understanding of race relations in reaching that conclusion.

The claim that there is no principled basis for distinguishing between groups seems clearly incorrect. The principled basis for differentiating between white ethnicities and blacks for constitutional purposes is the infinitely greater degree and severity of discrimination suffered by blacks at the hands of whites. In the United States, the discrimination suffered and still suffered by African-Americans is *sui generis*. As stated by Justice Marshall, the "experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law."²⁷⁰ Even in the more recent post-World War II era, the blatant racism of most universities, bankers, realtors, and neighborhood associations, guided and subsidized by the government, caused provable educational and economic harms suffered to this day by most African-Americans.

The principled basis for distinguishing between whites and blacks lies in the depth of historical evidence that proves the preferences given to whites, the race discrimination against blacks, and the present consequences of that race discrimination. The principled basis denied by Justice Powell is plain and clear: to provide a remedy for state-subsidized racism and state-produced racial inequality. The principle is simple and fully consistent with the heart of the Equal Protection Clause: that discriminatory state action demands a remedy.

Justice Powell asserts that European immigrant whites and blacks have both suffered discrimination, and that there is no principled way to distinguish between them. It is logically necessary for him to assert that white ethnics and blacks have suffered similarly from discrimination to reach the conclusion that distinctions between whites and blacks have "no principled basis." These propositions become foundations for two important conclusions in the affirmative action cases: that whites and blacks are similarly situated with respect to the Equal Protection Clause;

²⁶⁹ *Id.* at 296 (majority opinion).

²⁷⁰ *Id.* at 400–01 (Marshall, J., concurring in part and dissenting in part).

and that strict scrutiny is appropriate in analyzing both racially discriminatory classifications and corrective affirmative action classifications.²⁷¹

Historical evidence shows that white ethnics and blacks have not suffered the same discrimination and are therefore not similarly situated with respect to the Equal Protection Clause. The difference in the discrimination suffered chiefly by blacks provides a principled basis for differentiating between white ethnics and blacks. The historical evidence, therefore, shows that Justice Powell is wrong. The provable falsity of these key assertions ultimately undermines the whole basis for finding that strict scrutiny should apply the same in evaluating racially discriminatory classifications as in evaluating remedial affirmative action classifications.

2. Equal Protection Must Mean the Same Thing for Persons of Different Races²⁷²

In *Bakke*, Justice Powell wrote that “the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection it is not equal.”²⁷³ These phrases have become a shibboleth in the Court’s affirmative action jurisprudence. Justice O’Connor repeats the phrase in her opinions in *Croson*, *Grutter*, and *Adarand*.²⁷⁴

Having asserted, against all evidence, that the discrimination suffered by white ethnics and blacks is indistinguishable, Justice Powell now asserts that equal protection must be the same for all. This language becomes the foundation for analyzing all racial classifications using strict scrutiny. The logic is something like this: since all discrimination is the same, and equal protection must be the same, then all racial classifications must be treated the same, using strict scrutiny. This also becomes the conceptual heart of the colorblindness idea, under which all considerations of race are presumed nefarious and unconstitutional. Under the colorblindness rationale, classifications involving race that intend to remedy past

²⁷¹ *Id.* at 289–90 (majority opinion).

²⁷² *Id.*; see also *Croson*, 488 U.S. at 494; *Adarand*, 515 U.S. at 218; *Grutter*, 539 U.S. at 323.

²⁷³ 438 U.S. at 289–90.

²⁷⁴ *Croson*, 488 U.S. at 494; *Grutter*, 539 U.S. at 323; *Adarand*, 515 U.S. at 218.

discrimination are treated the same as classifications that themselves discriminate and injure based on race.²⁷⁵

It is important to note that Powell's demand for "sameness" in equal protection only seems to apply to the affirmative action context. Under the Court's traditional jurisprudence, it is perfectly consistent with equal protection principles for the state to treat differently situated individuals differently. Thus, opticians can be treated differently, and less well, than optometrists or ophthalmologists without offending the Equal Protection Clause.²⁷⁶ New York can deny employment to recovering addicts taking methadone but permit employment to others arguably similarly situated, such as recovering alcoholics.²⁷⁷ Massachusetts can enact an employment preference for veterans even when such a preference works to the extreme disadvantage of women, who constituted a tiny percentage of veterans at the time.²⁷⁸

The Court has also held that persons and groups can be treated differently as a remedy for past discrimination. In *Franks v. Bowman*, for example, the Court approved of the award of competitive seniority as a remedy for past discrimination in hiring.²⁷⁹ This resulted in unequal treatment for whites and blacks because affected "innocent whites" had to suffer certain negative economic effects from displacement of their seniority.²⁸⁰ And in *United States v. Paradise*, the Court approved a court-ordered promotion quota that required the promotion of one black police officer for each white policeman promoted.²⁸¹ In addition, the Court approved of quotas for promotions such that the number of black officers in each rank would number 25 percent, the percentage of blacks in the relevant labor market.²⁸² The Court has also allowed a woman to be promoted rather than a man in a traditionally gender-segregated workplace.²⁸³

²⁷⁵ See *Bakke*, 438 U.S. at 294 n.34.

²⁷⁶ *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

²⁷⁷ *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568 (1979).

²⁷⁸ *Frontiero v. Richardson*, 411 U.S. 677 (1973).

²⁷⁹ *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976).

²⁸⁰ *Id.* at 777.

²⁸¹ *United States v. Paradise*, 480 U.S. 149 (1987).

²⁸² *Id.* at 179–80.

²⁸³ *Johnson v. Transp. Agency of Santa Clara*, 480 U.S. 616 (1987).

Until *Adarand*, the Court had deferred to federally-mandated economic set-asides and other remedies for past discrimination. In *Fullilove v. Klutznick*, the Court upheld a requirement that at least 10 percent of federal funds granted for local public works projects must be used to procure supplies or services from businesses owned or controlled by minorities.²⁸⁴ This federal mandate resulted from a comprehensive national congressional study that found pervasive past and present race discrimination in the allocation of federal construction money.²⁸⁵ The Court wrote “as a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly ‘color-blind’ fashion.”²⁸⁶ The Court approved of this remedy notwithstanding the fact that some white-owned firms, themselves perhaps innocent of discrimination, might lose some business:

It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such “a sharing of the burden” by innocent parties is not impermissible. . . . [I]t was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.²⁸⁷

In *Jacobs v. Barr*, the court found that a compensatory remedial program for Japanese-Americans interned during World War II survived an equal protection challenge by an interned German-American.²⁸⁸ The court analyzed the case under strict scrutiny and found that the remedial purpose of compensating Japanese-Americans for their internment was a compelling government interest.²⁸⁹

These numerous exceptions to the “sameness” of equal treatment demonstrate that Justice Powell’s demand for “sameness” is clearly optional, not necessary. Powell’s concept of sameness shares an eerie similarity with the interpretation of

²⁸⁴ *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

²⁸⁵ *Id.* at 477–78.

²⁸⁶ *Id.* at 482.

²⁸⁷ *Id.* at 484–85.

²⁸⁸ *Jacobs v. Barr*, 959 F.2d 313 (D.C. Cir. 1992).

²⁸⁹ *Id.*

equal protection the Court gave us in *Plessy v. Ferguson*.²⁹⁰ In *Plessy*, the Court found that separate and allegedly equal train cars for whites and blacks constituted equal protection for both races. The Court ignored that white racism caused the statutory separation of the races and suggested that harms resulting from racial segregation were invented by blacks:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction on it.²⁹¹

The *Plessy* court thus constructed an equal protection in which formally equal law, or "sameness" of treatment, in fact preserved and promoted massive racial inequality.

Similarly, Powell's assertion of a requirement of "sameness" in equal protection preserves and protects the existing distribution of white privilege and black inequality. A requirement of "sameness" and formally equal treatment locks in all the effects of past discrimination and makes voluntary remedies for past discrimination essentially impossible. The Court's rulings in disparate impact cases, requiring proof of discriminatory intent to establish a violation of equal protection, also accomplish the same work, making it impossible to redress the structural legacies of past discrimination.²⁹²

The "same equal protection" thus equates to the protection of white educational and economic interests. To strike down or limit affirmative action because of a need for "sameness" of treatment or putative injury to "innocent" whites, means that a white person is awarded an opportunity that otherwise would

²⁹⁰ *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²⁹¹ *Id.* at 551.

²⁹² See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976). The difficulty in proving discriminatory intent under the Constitution has generated much recent scholarship. See, e.g., Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Posttrace Equal Protection*, 98 GEO. L.J. 967, 994 (2010) ("This treatment of constitutional claims . . . presumes that disparate outcomes are no longer caused by racism. It is, in short, another attack on the salience of race.").

have gone to a person of color. In this way, the Court prefers whites every time it limits or strikes down affirmative action.²⁹³

C. *What Constitutes a Compelling Government Interest?: Past Societal Discrimination and Diversity*

1. *Remedying the Effects of Past Societal Discrimination Is Not A Compelling Government Interest*²⁹⁴

Since *Bakke*, the Court has consistently rejected assertions of past societal discrimination as a compelling government interest warranting relief under the Equal Protection Clause. Justice Powell's reasoning was that any such justification was too "amorphous" and potentially "ageless in its reach into the past."²⁹⁵ In *Wygant*, four justices, reiterating Powell's view, expressed the view that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."²⁹⁶ In *Croson*, Justice O'Connor wrote that "[l]ike the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota."²⁹⁷ And in *Grutter*, Justice O'Connor wrote that "Justice Powell rejected an interest in remedying societal discrimination because such measures would risk placing unnecessary burdens on innocent third parties."²⁹⁸

Contrary to the Court's rhetoric, the evidence I presented in Part I demonstrates that past societal discrimination is neither "amorphous" nor "ageless

²⁹³ In the related context of employment discrimination, the Court has also expressed its preference for whites. See, e.g., *Ricci v. DeStefano*, 557 U.S. 557 (2009) (given a choice between the interests of whites who passed a test for promotion, and the interests of blacks, who were disproportionately disqualified by the unverified test, the Court preferred the interests of the whites). See Harris & West-Faulcon, *supra* note 147.

²⁹⁴ *Bakke*, 438 U.S. at 307, 310 ("Remedying the effects of 'societal discrimination,' [is] an amorphous concept of injury that may be ageless in its reach into the past" and is not a compelling government interest.").

²⁹⁵ *Id.*

²⁹⁶ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986).

²⁹⁷ *Croson*, 488 U.S. at 499; see also *id.* at 520 ("The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected.") (Scalia, J., concurring).

²⁹⁸ *Grutter*, 539 U.S. at 324.

in its reach into the past.” Further compounding the injustice, the Court has implemented its burden of proving past societal discrimination such as to make such discrimination essentially impossible to prove, regardless of the quantum or quality of evidence. The Court’s disparate allocation of evidentiary burdens for white plaintiffs and defendants shows the Court’s clear favoritism towards the claims of whites. Lastly, the Court’s hostile, unreceptive attitude towards remedial claims based on past societal discrimination reveals the Court’s agenda to protect the current educational and economic interests of whites at the expense of blacks and other minorities.

So the question raised in *Bakke*, and its progeny, is whether the evidence of past societal discrimination is an “amorphous concept of injury” or “ageless in its reach into the past.” Since the period for which I present evidence concerning the enactment and implementation of the G.I. Bill begins with World War II and extends to the 1960s, it cannot be deemed an “ageless reach into the past.” It is finite, bounded and recent.

Is this evidence of past discrimination too “amorphous” a concept of injury? It is hard to see what is amorphous about this history. The federal government adopted the Bill with the intention that it be locally administered, to leave undisturbed the racist segregation prevalent in both the North and the South.²⁹⁹ It was drafted this way at the behest of southern democratic congressmen who wanted no federal interference in their regime of segregation.³⁰⁰ Federal policy encouraged and subsidized segregation and homogeneous white neighborhoods.³⁰¹

The racism of the private entities receiving Bill subsidies is clear. The ability of black veterans to take advantage of their educational benefits was severely constrained by racism throughout the country. Blacks were denied access to white institutions in the North and South and were left with the possibility of attending

²⁹⁹ See *supra* notes 48–54 and accompanying text.

³⁰⁰ *Id.*

³⁰¹ See *supra* notes 80–110 and accompanying text. These policies are documented in the FHA’s housing manual and its residential grading policies, which awarded high grades only to homogenous white neighborhoods. See *id.* Approximately \$14.5 billion dollars was spent on the education benefit. The housing benefit was the “first billion-dollar home credit insurance program,” involving billions of dollars in government guarantees. The massive spending on G.I. Bill programs totaled \$95 billion dollars between 1944 and 1971. See, e.g., BENNETT, *supra* note 37, at 116; FRYDL, *supra* note 36, at 1, 186; KATZNELSON, *supra* note 1, at 116; MCKENNA, *supra* note 44, at 5–7, 43.

only underfunded historically black colleges.³⁰² Because of the Bill, the educational gap between whites and blacks widened to the detriment of blacks.³⁰³

Due to the racist administration of the Bill's housing benefit, "it is more accurate to say that blacks could not use this [benefit]."³⁰⁴ Bankers, following the FHA guidelines, refused to lend in areas that contained "a large negro population" and refused to lend to black borrowers. Realtors, following their national code of ethics, were instructed to preserve the segregation of neighborhoods by avoiding the introduction of "any race or nationality, or any individual whose presence will clearly be detrimental to property values."³⁰⁵ In the end, "the vast majority of FHA and VA mortgages went to white middle-class suburbs."³⁰⁶

The economic consequences of this government sponsored and subsidized racism have been devastating for the African-American community. By 1984, only 40 percent of black families owned homes, versus 70 percent of white families, a statistic that has remained constant as recently as fall 2012.³⁰⁷ Rising house prices have generated enormous wealth for white families and have left most black families far behind in net worth. As of 2010, the median net worth of white households was \$110,729, while the median net worth of black households was just \$4,955, only 4.4 percent of the net worth of whites.³⁰⁸ The recent financial crisis has made this gap even worse.³⁰⁹

³⁰² As a result, 95% of black veterans were forced to try to take advantage of their educational benefits in the more overtly racist, statutorily segregated South. They could only attend the 100 "Colleges for Negroes," whose facilities were so inadequate that 55% of black veterans seeking higher education there were turned away because of a lack of capacity.

³⁰³ KATZNELSON, *supra* note 1, at 131–33; MCKENNA, *supra* note 44, at 106–107; Turner & Bound, *supra* note 60, at 145, 151; Onkst, *supra* note 74, at 529–30.

³⁰⁴ FRYDL, *supra* note 36, at 237–38; KATZNELSON, *supra* note 1, at 139.

³⁰⁵ See MASSEY & DENTON, *supra* note 85, at 37; MCKENNA, *supra* note 44, at 50.

³⁰⁶ See MASSEY & DENTON, *supra* note 85, at 54; MCKENNA, *supra* note 44, at 58; Onkst, *supra* note 74, at 522.

³⁰⁷ The most recent available data for the 3rd Quarter, 2012, shows that 73.6% of whites owned homes and just 44.1% of blacks owned homes. U.S. CENSUS BUREAU, HOMEOWNERSHIP RATES BY RACE AND ETHNICITY OF HOUSEHOLDER, TABLE 7 (2012), available at www.census.gov/housing/hvs/files/qtr312/q312press.pdf. See also KATZNELSON, *supra* note 1, at 164.

³⁰⁸ U.S. CENSUS BUREAU, MEDIAN VALUE OF ASSETS FOR HOUSEHOLDS, BY TYPE OF ASSET OWNED AND SELECTED CHARACTERISTICS: 2010, TABLE 1 (2012), available at <http://www.census.gov/people/wealth/data/dtables.html>. Accord OLIVER & SHAPIRO, *supra* note 112, at 2.

³⁰⁹ See Annie Lowry, *Recession Worsened Wealth Gap for Races*, N.Y. TIMES, Apr. 29, 2013, at B1.

Even this brief summary of the race discrimination influencing the enactment and administration of the Bill shows that this discrimination against blacks was neither “amorphous” nor “ageless in its reach into the past.” The harms caused by this discrimination reach directly into the present. All of this racial discrimination against blacks, and the corresponding racial preference extended only to whites, is provable and well documented both in this Article and in the works of the historians and sociologists cited herein. If Congress were to conduct hearings and collect evidence on the question, its conclusions would be the same as the conclusions others and I have reached.³¹⁰

Interestingly, the Court acts inconsistently by allowing remedies for some past discrimination but then disallowing remedies for the past discrimination the Court labels “societal.” All discrimination addressed in a court is “past discrimination,” i.e., discrimination that occurred in the past. There is not really that much difference between the past discrimination the Court has found redressable and past societal discrimination. As discussed above, the Court has found that congressional and court remedies for past discrimination can be compelling and has approved of quotas, affirmative action, and retroactive seniority as remedies for discrimination.³¹¹ The Court has simply narrowed the range of redressable past discrimination to its narrowest and to the smallest number of cases.

In addition to expressing outright hostility towards the redress of past societal discrimination as a government interest, the Court has implemented a very demanding, if not impossible standard for proving such discrimination. Although the Court has been unclear, Justice O'Connor described the burden of proof as a “strong basis in evidence for [the] conclusion that remedial action was necessary” in *Croson*.³¹² While these words seem to describe an achievable standard, in its recent cases the Court has disparaged the possibility of upholding affirmative action on this basis. Indeed, in *Croson* the Court rejected the evidentiary value of a voluminous congressional study documenting nationwide discrimination in the

³¹⁰ This is not to say that everyone interprets the history of the G.I. Bill uniformly. Some historians write about it in celebratory terms and emphasize the real gains that African Americans made as a result of the legislation. See, e.g., SUZANNE METTLER, *SOLDIERS TO CITIZENS: THE G.I. BILL AND THE MAKING OF THE GREATEST GENERATION* 54–57 (2005) (arguing that the G.I. Bill provided the greatest opportunities for training and education that African Americans had ever known). The fact remains, however, that racism affected enormously the opportunities available to African Americans and as a result they never enjoyed the same quality or quantity of opportunities as their white counterparts.

³¹¹ See *supra* notes 281–91 and accompanying text.

³¹² *Croson*, 488 U.S. at 500.

construction industry. If a formal, lengthy congressional study did not constitute a “strong basis in evidence,” it is hard to imagine any evidence that would satisfy the Court.

The demanding standard of proof that the Court requires to support remedies for past societal discrimination stands in marked contrast to the harms that the Court is willing to presume that whites suffer from affirmative action. As discussed earlier, the Court simply assumes that the white plaintiffs in these cases are “innocent” and that they have been injured by affirmative action, even if they were unqualified for admission in the absence of affirmative action.³¹³ The Court credits the mere assertions, unsupported by any evidence, of injury alleged by relatively unqualified white plaintiffs then denies the relevance of and evidence of a long history of racial discrimination.

This double standard shows, rather blatantly, the Court’s favoritism towards whites and the degree to which it molds its doctrines to protect the interests of whites. The Court’s breezy conclusions that evidence of past societal discrimination is “amorphous” and not compelling are simple value judgments. One could as easily read the evidence of past racism I have presented and find it compelling. The Court simply refuses to acknowledge evidence of past and present racism and its consequences.

One marvels at the breathtaking audacity and dismissiveness of the Court’s rhetoric rejecting past societal discrimination as a compelling government interest. The redress of past racial discrimination, whether labeled “societal” or otherwise, should rank as one of the most compelling government purposes under the Equal Protection Clause.³¹⁴ In the end, the Court’s failure to acknowledge past societal discrimination as a compelling basis for a remedy is simply a form of white denial that operates to preserve white interests. This denial, by undermining redress for discrimination and fairer distribution of desirable social opportunities, reinforces the already formidable advantages whites hold in education, employment, and wealth. In effect, the Court’s rejection of affirmative action as a small measure of

³¹³ See *supra* notes 213–50 and accompanying text.

³¹⁴ Girardeau Spann describes the importance of past societal discrimination: “The Supreme Court has insisted that affirmative action is not available to remedy general ‘societal discrimination,’ even though general societal discrimination is precisely the type of diffuse, embedded, and often unconscious discrimination that continues to perpetuate the attitudes and stereotypes that have been transmitted during the nation’s long history of racial oppression.” See Girardeau A. Spann, *Whatever*, 65 VAND. L. REV. EN BANC 51 (2012) [hereinafter Spann, *Whatever*]; see also Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT. 249 (2004).

remedy for past discrimination guarantees that the unjustly gained economic and educational benefits of federally subsidized racism shall continue to be reserved exclusively for whites. In addition to protecting the educational and economic interests of whites, the Court promotes the belief that remedying past discrimination is unimportant (“not compelling”). As Justice Marshall wrote, dissenting in the *Croson* case, a “majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice.”³¹⁵

2. Diversity Is a Compelling Government Interest

Justice Powell’s conclusion in *Bakke* that diversity is a compelling government interest has influenced profoundly the Supreme Court’s affirmative action jurisprudence. For the last thirty-five years, his conception of diversity has been the principle guiding admissions decisions in colleges and universities across the country. In *Bakke*, Justice Powell found that only broad-ranging, and not racially targeted, diversity constituted a compelling government interest: “the diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”³¹⁶ He disparaged UC Davis’s program because “petitioner’s special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.”³¹⁷ In *Grutter*, Justice O’Connor embraced Powell’s conception of diversity, concluding that “the Law School has a compelling interest in a diverse student body [and] that a diverse student body is at the heart of the Law School’s proper institutional mission.”³¹⁸ Most recently in *Fisher*, the Court reaffirmed that “obtaining the educational benefits of ‘student body diversity is a compelling state interest that can justify the use of race in university admissions.’”³¹⁹

³¹⁵ *Croson*, 488 U.S. 469, 552–53 (1989) (Marshall, J., dissenting). Justice Marshall continued, writing that “I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges.” *Id.* at 553.

³¹⁶ *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978). Powell described his preferred notion of diversity, which includes “exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.” *Id.* at 317.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013).

Diversity is important, but not principally for the reasons the Court has stated. Racial diversity matters because we are a racially diverse nation. Educational and other institutions should be diverse because our country is diverse. Institutions should be diverse to reflect the distribution of opportunities that would exist in the absence of racism.³²⁰ Institutions should also be diverse to remedy the results of their pervasive denial of educational opportunities to black and other minority students. Another very important reason for educational institutions to be diverse is because they are one of the few institutions, in addition to workplaces, where sustained contact between whites and persons of color can occur under conditions of relatively equal status. Racial diversity, or integration, under conditions including equal status, has been shown to reduce racism.³²¹ In a racist society like the United States,³²² the reduction of racism should be a national interest of the highest importance.

It is striking that *none* of the rationales I just described play any role in the Supreme Court's discussions on diversity. The Court's treatment of diversity—valuable only for its educational benefits—has steered our national conversation about affirmative action very far away from the most important reason for affirmative action: to remedy the direct consequences of government-subsidized racism. Instead of discussing appropriate remedies for this racism, the Court has steered discussion towards small technical matters such as “critical mass”³²³ and the precise amount of diversity necessary to achieve educational benefits.³²⁴

In addition to distracting from the most important reasons for affirmative action, the Court has found diversity to be compelling only because diversity has been posited to be in the interest of whites. The importance of diversity as a benefit

³²⁰ See *FISCUS*, *supra* note 217, at 13.

³²¹ Thomas F. Pettigrew & Linda R. Tropp, *Does Intergroup Contact Reduce Prejudice: Recent Meta-Analytic Findings*, in *REDUCING PREJUDICE AND DISCRIMINATION* 93, 110 (Stuart Oskamp ed., 2000) (“[M]eta-analytic data support the contention that optimal intergroup contact should be a critical component of any successful efforts to reduce prejudice.”).

³²² BANAJI & GREENWALD, *supra* note 166, at 208 (noting that the most recent studies of implicit bias show that fully 75% of whites manifest an automatic preference for whites and a corresponding lack of preference for blacks).

³²³ *Grutter*, 539 U.S. at 335–36; see also Tomiko Brown-Nagin, *The Diversity Paradox: Judicial Review in an Age of Demographic and Educational Change*, 65 VAND. L. REV. EN BANC 113, 124 (2012) (“The concept, endorsed in *Grutter*, is conceptually ambiguous. At present, it is unclear whether critical mass is a quantitative concept, a qualitative concept, or both.”).

³²⁴ *Fisher*, 133 S. Ct. at 2419.

to whites is particularly clear in the *Grutter* opinion. Justice O'Connor described the educational benefits of diversity as "substantial": "the Law School's admissions policy promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"³²⁵ Yet it is white students who benefit disproportionately from any such educational benefits, in part because they are disproportionately over-represented on most campuses and in part because they are the least likely to have contact with other racial groups before college.³²⁶ "To the extent that cross-cultural interactions occur between whites and blacks, Latinos, or Asians, the students of color typically are the cultural teachers; whites typically are on the receiving end of the exchange, learning about the culture of color."³²⁷

According to Justice O'Connor, diversity helps legitimize majority-white society and institutions generally. After reciting the importance of diversity to "major American businesses" and the military's officer corps,³²⁸ she wrote that "in order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." In other words, diversity is necessary to preserve the legitimacy of American leadership and institutions, which, notwithstanding our black president, remain overwhelmingly white.

The fact that diversity is posited and defended in the interests of whites is an apt illustration of Professor Derrick Bell's interest convergence theory. According to Professor Bell, gains in civil rights, or, in the case of affirmative action, the preservation of parity, occurs only when it is in the interests of whites: "Once again, blacks and Hispanics are the fortuitous beneficiaries of a ruling motivated by other interests that can and likely will change when different priorities assert themselves."³²⁹

The diversity rationale is, then, deeply problematic. It steers us away from the far more important discussion about how to remedy extensive government-

³²⁵ *Grutter*, 539 U.S. at 330.

³²⁶ Brown-Nagin, *supra* note 323, at 130 ("Whites are the least likely to comfortably interact with those from different racial backgrounds because they are the least likely of all college matriculates to have interacted with other racial groups prior to arriving on campus.").

³²⁷ *Id.*

³²⁸ *Grutter*, 539 U.S. at 330–32.

³²⁹ Bell, *supra* note 235, at 1625.

subsidized racism in the administration of Bill benefits.³³⁰ A focus on diversity as understood by the Court disparages the significance of race and race discrimination in our history and contributes to widespread public ignorance about race.³³¹ The diversity rationale is also quite vulnerable to changes in the perceived value or need for diversity. As soon as the justices decide that the educational benefits of diversity are questionable or insufficient, the diversity rationale will be rejected and affirmative action will be rejected along with it. In contrast, affirmative action as a remedy for past discrimination rests on evidentiary underpinnings that are less subject to debate and judicial or public whim.

D. Summarizing and Assessing the Doctrines of Delusion

These, then, are the doctrines of delusion.

1. Assumptions the Court Relies upon About Affirmative Action Generally

The Court tells us that because affirmative action increases the stigma borne by students of color it should be curtailed. This translates into the proposition that increases in white racism in response to the presence of black people and other minorities are a proper reason to curtail remedies for white racism. This rationale, stripped of legalese, is as unsavory as it is circular.

The Court tells us that affirmative action constitutes racial preferences for blacks and “reverse discrimination” against whites. However, remedies for past discrimination against blacks in education, housing, and employment do not constitute “preferences” at all, any more than restitution from a thief who steals my wallet constitutes a “bonus” or a “preference” for me. The true beneficiaries of racial preferences are the white veterans who received their G.I. Bill benefits exclusively because of their white race and their heirs who have reaped all the ensuing educational and economic gains from race discrimination against blacks. Yet the Court fails entirely to recognize these exclusively white racial preferences. It is impossible to reconcile the claim that affirmative action constitutes “reverse discrimination” against whites with a factual record that proves that whites continue to be the most privileged, overrepresented racial group in higher education. It is simply false to characterize remedial affirmative action as a “racial preference” or as “reverse discrimination” against whites.

³³⁰ *Id.*

³³¹ *Bakke*, 438 U.S. at 315 (“Petitioner’s special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.”).

The Court tells us that whites are “innocent victims” of affirmative action programs. Remarkably, for a court of law, the Court simply assumes both the innocence and the victimization of the plaintiffs in affirmative action cases without any basis in evidence. Yet claims of white innocence are weakened seriously by the unearned advantages that racism produced, and continues to produce, for whites. Claims of victimization are hard to swallow when the plaintiffs in the education cases would not have been admitted in the absence of affirmative action. Whites are clearly not “innocent victims” of affirmative action. Rather, they are beneficiaries of past discrimination against blacks and of the Court’s generous favoritism in granting all whites the sympathetic status of “innocent victims.”

This first set of assumptions about affirmative action—increased stigma, “racial preferences” for blacks constituting “reverse discrimination” against whites, whites as “innocent victims”—does not fare well under close analysis. They are either supportive of white racism, highly misleading, or false.

2. Premises That Support Application of Strict Scrutiny in Affirmative Action Cases

Justice Powell tells us that whites, like blacks, have been victims of discrimination and that there is no principled way of distinguishing between the discrimination experienced by whites and blacks. In his myopic view, whites and blacks are therefore similarly situated with respect to the Equal Protection Clause. Yet everyone with any knowledge of history knows that the race discrimination experienced by blacks in the United States is and has been immeasurably worse than anything experienced by white ethnicities. The history of the administration of the G.I. Bill *proves* the racial preferences granted to whites and the outright race discrimination experienced by blacks. The voluminous evidence of the unique severity, ubiquity, and longevity of race discrimination against blacks provides a strong, principled basis for differentiating between whites and blacks. The Court tells us “the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.”³³² Despite the superficial appeal of this grand rhetoric, the statement is belied by the Court’s own precedents, showing that it regularly allows the guarantee of equal protection to mean different things for different people. In particular, the Court has permitted differential treatment of others by race as a remedy for past discrimination. The Court’s adoption of a principle requiring “sameness” of treatment negates the United States’ long history of race discrimination against

³³² *Bakke*, 438 U.S. at 289–90.

blacks and forecloses the possibility of any meaningful remedy for that history. The Court thus denies equality by insisting on formally equal treatment, despite the fact that whites and blacks are not similarly situated with respect to the history and consequences of race discrimination.

These conceptual underpinnings of strict scrutiny in affirmative action cases are therefore very weak. The assertion equating the discrimination experienced by white ethnicities and blacks is historically false. Under circumstances of government-sponsored race discrimination against blacks and racial preferences for whites, the insistence that equal protection must be formally the same for both groups promotes continuing inequality by preserving unjustly gained white advantages in education and wealth and preventing or limiting affirmative action that would reduce these disparities. The Court denies, rather than promotes, racial equality.

3. Conclusions About Compelling Government Interests

The Court tells us that past societal discrimination is “amorphous” and therefore is not a compelling government interest. Yet I have provided much evidence of past societal discrimination and its serious continuing effects. Like an ostrich with its head firmly planted in the sand, the Court simply ignores our racial history. The Court’s denial of our history, like its insistence on strict scrutiny for remedial affirmative action, supports its protection of white educational and economic interests.

The Court tells us that, unlike remedying past societal discrimination, the educational benefits of racial diversity constitute a compelling government interest. Yet these benefits accrue principally to white students, who are least likely to have contact with other racial groups before college, and to white institutions that gain legitimacy through the presence of a few persons of color in their midst. It is noteworthy that the only interest that the Court allows to support affirmative action is an interest that principally benefits whites.

In concluding that diversity is compelling but remedying past societal discrimination is not, the Court prefers a weak rationale that benefits whites, over a strong rationale that would likely be of greater benefit to blacks and other minorities. Once again, the Court prefers the interests of whites. Once again, the Court refuses to engage with our long history of white race discrimination against blacks.

Overall, then, these basic premises do not support the Court’s hostility and skepticism towards affirmative action. Upon critical consideration, the Court’s premises are false, highly misleading, supportive of white racism, and protective of unjustly gained advantages held by whites in education and economic well-being. This evaluation of the Court’s premises tells us that the Court, ignoring all

evidence, promulgates false and misleading doctrines, the doctrines of delusion, that are self-serving for whites by protecting white interests. The next section explores the degree of public belief in these doctrines.

III. THE COURT AS A MAJORITARIAN INSTITUTION

This Part examines the close correspondence between the Court's premises and conclusions about affirmative action and the views of a majority of whites on the same issues. I also consider the implications of this congruence. In the affirmative action cases, the Court emerges as a majoritarian institution intent on protecting the educational, economic and status interests of whites.

The subsection below describes the views of a majority of whites on race, in an order corresponding roughly to the discussion of the Court's premises above. The views described in this subsection come from public opinion polls and studies conducted about race relations. The next section explores the Court as a majoritarian institution, reflecting the values and ideas of a majority of whites.

A. Majoritarian Beliefs About Race

Like the Court, most whites disapprove of giving presumed "preferences to blacks and other minorities"³³³ and many whites believe that affirmative action constitutes "reverse discrimination" against whites.³³⁴ Most whites also believe that whites are the "innocent victims" of affirmative action.³³⁵ According to political scientist Ron Fiscus, the "[innocent persons argument] is a widely held, racially polarizing social argument. The near-universal belief in it is without doubt the single most powerful source of popular resentment of affirmative action."³³⁶ The Court's easy willingness to assume the validity of white innocence and victimization without evidence surely fuels this belief. Remarkably, a recent study found that whites now view themselves as the primary victims of racism.

³³³ FEAGIN, *RACIST AMERICA*, *supra* note 164, at 124; *see also* HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA* 182 (1997) [hereinafter SCHUMAN ET AL., *RACIAL ATTITUDES*] ("Depending on phrasing, [white support for compensatory preferential treatment for blacks] has ranged from at most a third of the white public to just a few percentage points, with little evidence of change over time.").

³³⁴ *Id.* at 124, 198–99.

³³⁵ *See, e.g.*, MELANIE E.L. BUSH, *EVERYDAY FORMS OF WHITENESS* 206 (2011) [hereinafter BUSH, *EVERYDAY WHITENESS*].

³³⁶ *Cf.* FISCUS, *supra* note 217, at 7 ("It will not be easy to convince working-class whites 'that they need not pay for the sins of discrimination with jobs they already have, but that they must do so with jobs or promotions they might otherwise have gotten but for affirmative action.'").

According to this study, “changes in Whites’ conceptions of racism are extreme enough that Whites have now come to view anti-White bias as a bigger societal problem than anti-Black bias.”³³⁷

Most whites hold these beliefs despite the fact that they are demonstrably false. Whites remain the most privileged and overrepresented group in higher education, belying both the notions of “racial preferences” for blacks and “reverse discrimination” against whites because of their race in higher education.³³⁸ In the employment context, very few white people ever report being victims of race discrimination.³³⁹ Only four percent of race discrimination claims filed with the EEOC are filed by whites.³⁴⁰ Blacks and other people of color file ten times as many discrimination complaints as whites, even though whites constitute a large majority of the workforce.³⁴¹ And claims filed by whites are usually less credible than claims brought by people of color.³⁴² If race discrimination against whites is a serious problem there should at least be some evidence of it. On the other hand, evidence shows the continuing prevalence of both overt race discrimination and more covert or unconscious manipulation of merit standards against blacks in employment settings.³⁴³

There is also congruence between the Court’s discrediting of past societal discrimination as “not compelling” and widespread public disbelief about the seriousness and pervasiveness of past and present racism.³⁴⁴ Many white

³³⁷ Norton & Sommers, *supra* note 194, at 215.

³³⁸ Jordan Weissman, *The Best New Argument for Affirmative Action*, THE ATLANTIC (July 2013), <http://www.theatlantic.com/business/archive/2013/07/the-best-new-argument-for-affirmative-action/278241/> (“[W]hite students are now more overrepresented at the most selective U.S. colleges than they were in 1995. . . . Our top schools are even whiter, at least compared to the U.S. population as a whole, than when grunge was still big.”).

³³⁹ WISE, *supra* note 179, at 35.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ See, e.g., Ryan Light et al., *Racial Discrimination, Interpretation and Legitimation at Work*, reprinted in Mathew O. Hunt & George Wilson, *Race, Racial Attitudes and Stratification Beliefs: Evolving Directions for Research and Policy*, 634 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 42–43, 48–50 (2011) [hereinafter Light et al., *Racial Discrimination at Work*] (“Qualitative work on black experiences indicates that discrimination remains a persistent problem.”).

³⁴⁴ *Id.* at 88.

Americans hold a rosy view of the racist past of the United States and “the extreme oppressiveness of U.S. slavery is thus not taken seriously.”³⁴⁵ The evidence shows that most whites have consistently minimized the seriousness of racism as a barrier to the participation of blacks and other people of color in education and the economy.³⁴⁶ For example, Gallup polls conducted in 1962 and 1963 found that “between two-thirds and nearly 90 percent of whites said blacks were treated equally with regard to jobs, schooling and housing opportunities.”³⁴⁷ These are remarkable beliefs, since these polls were taken *before* enforcement of *Brown v. Board of Education* and *before* enactment of the Civil Rights Act of 1964.³⁴⁸ This was the time of state-mandated separate and unequal schools and massive Southern resistance to desegregation. This was the time of unabashed, federally-subsidized race discrimination in higher education, housing, and lending, and unconstrained, open race discrimination in employment. In 1959, black men had average weekly earnings that were approximately 57 percent of the earnings of white men.³⁴⁹ It remains true today that, compared to whites, blacks and Latinos experience much greater poverty, earn substantially less income, and hold much less wealth.³⁵⁰ The fact that whites could believe and still believe that blacks were treated equally under factual circumstances demonstrating vast inequality speaks volumes about the degree of white denial of racial reality.

Although conditions for African-Americans have improved, especially since World War II, many whites continue to deny the significance of, and even the existence of, race discrimination against blacks.³⁵¹ The majority of whites “do not

³⁴⁵ FEAGIN, *RACIST AMERICA*, *supra* note 164, at 88; *see also* SCHUMAN ET AL., *RACIAL ATTITUDES*, *supra* note 333, at 163–66 (“Thus an emphasis on past oppression of blacks as a basic source of racial inequality has lost support over the past two decades, particularly among more educated white Americans.”).

³⁴⁶ *See also* Light et al., *Racial Discrimination at Work*, *supra* note 343, at 42 (“Whites . . . often express support for meritocratic ideals . . . yet they remain reticent to acknowledge potential structural and historical impediments that minority groups face.”).

³⁴⁷ TIM J. WISE, *COLORBLIND* 65, 197 n.42 (2010); WISE, *supra* note 179, at 39.

³⁴⁸ *See* GERALD ROSENBERG, *THE HOLLOW HOPE* (1993) (demonstrating that *Brown* made little difference for 10 years after the decision).

³⁴⁹ *See* James P. Smith & Finis R. Welch, *Black/White Male Earnings and Employment*, in *THE DISTRIBUTION OF ECONOMIC WELL-BEING* 233 (F. Thomas Juster ed., 1977) (citing data from the 1960 Census).

³⁵⁰ BUSH, *EVERYDAY WHITENESS*, *supra* note 335, at 4, 6.

³⁵¹ FEAGIN, *RACIST AMERICA*, *supra* note 164, at 88; SCHUMAN ET AL., *RACIAL ATTITUDES*, *supra* note 333, at 171 (“The majority of whites deny the importance of discrimination and place most of the

believe there is major racial discrimination widespread across this society.”³⁵² Contrary to the evidence, “40 to 60 percent of all whites say that the average Black American fares equally or better in terms of job, incomes, schooling, and health care than the average white person, despite the reality that Blacks continue to lag behind significantly in many or most categories.”³⁵³ According to a 2009 poll, 76 percent of whites reported that “Blacks have achieved racial equality, or will soon achieve it.”³⁵⁴ The majority of whites “reconcile the continuing reality of racial inequality with their beliefs about little discrimination by blaming people of color for their lack of effort.”³⁵⁵ The belief that race discrimination is inconsequential stands in marked contrast to the findings of many recent studies of implicit bias, which find that seventy-five percent of Americans hold implicit preferences for whites relative to blacks.³⁵⁶

A final predominant white belief deserves comment. One study showed that nearly two-thirds of whites “did not think that whites as a group had benefitted from past and present discrimination against black Americans.”³⁵⁷ Such beliefs are disproved by the history of the G.I. Bill’s federally-subsidized racial preferences for whites and race discrimination against blacks. The idea that whites have not benefitted from racism against blacks is simply irreconcilable with the historical record.

There is, therefore, much congruence between what the Court tells us about race and affirmative action and what most whites believe. Most whites inhabit a world filled with racial beliefs that are false, unsupported by evidence and self-

burden for black disadvantage on blacks themselves, putting primary emphasis on inadequate black motivation.”).

³⁵² FEAGIN, *RACIST AMERICA*, *supra* note 164, at 101; SCHUMAN ET AL., *RACIAL ATTITUDES*, *supra* note 333, at 169, 171 (“White respondents have some difficulty when asked to account for black disadvantage. The type of explanation that has greatest appeal is one that focuses on a lack of motivation by blacks to improve their own status in America.”).

³⁵³ BUSH, *EVERYDAY WHITENESS*, *supra* note 335, at 4, 168.

³⁵⁴ *Id.* at 4, 168.

³⁵⁵ FEAGIN, *RACIST AMERICA*, *supra* note 164, at 101; SCHUMAN ET AL., *RACIAL ATTITUDES*, *supra* note 333, at 169, 171 (“White respondents have some difficulty when asked to account for black disadvantage. The type of explanation that has greatest appeal is one that focuses on a lack of motivation by blacks to improve their own status in America.”); BUSH, *EVERYDAY WHITENESS*, *supra* note 335, at 169.

³⁵⁶ BANAJI & GREENWALD, *supra* note 166, at 208.

³⁵⁷ FEAGIN, *RACIST AMERICA*, *supra* note 164, at 12 (citing BLENDON ET AL., *supra* note 10, at 66).

serving. One recent study of white Californians found that their understandings of racial reality “are not a rational, unbiased reflection of available evidence, but instead reflect strong motivations to deny the impact of racism.”³⁵⁸ One can understand why whites would have strong motivations to deny or remain ignorant of the facts surrounding race and racism. White ignorance and denial support the presumed entitlement of whites as a group to the unjustly gained economic and educational advantages of white racism.

For whites as a group, there is no more self-serving and comforting set of interlocking beliefs than to believe that whites are the innocent victims of widespread racial preferences and racial discrimination in a world now free of racism against blacks, a racism that was never serious and that provided no benefit to whites.

B. *The Majoritarian Court*

The Supreme Court’s affirmative action cases largely implement white biases and protect white interests. These cases teach us that the Court is a principally majoritarian institution acting consistent with majoritarian beliefs and values.³⁵⁹ As stated by Michael Klarman, “the conventional wisdom that the U.S. Supreme Court heroically defends racial minorities from majoritarian oppression is deeply flawed: Over the course of American history, the Court, more often than not, has been a regressive force on racial issues.”³⁶⁰ When it comes to protecting minority interests, “the Court identifies and protects minority rights only when a majority or near majority of the community has come to deem those rights worthy of protection.”³⁶¹

While it may seem unusual to most lawyers to consider the Court as a majoritarian institution, political scientists have long understood the Court’s devotion to majoritarian interests. In 1935, Dr. Ralph Bunche described:

³⁵⁸ See FEAGIN, *RACIST AMERICA*, *supra* note 164, at 88 (citing Glenn Adams et al., *The Effect of Self-Affirmation on Perception of Racism*, 42 J. EXPERIMENTAL PSYCHOL. 616–26 (2006)).

³⁵⁹ See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); GIRARDEAU A. SPANN, *RACE AGAINST THE COURT* 3, 19–22 (1993) [hereinafter SPANN, *RACE AGAINST THE COURT*].

³⁶⁰ Michael J. Klarman, *Has the Supreme Court Been Mainly a Friend or a Foe to African Americans?*, SCOTUS BLOG (Feb. 1, 2010, 10:26 AM), <http://www.scotusblog.com/2010/02/has-the-supreme-court-been-mainly-a-friend-or-a-foe-to-african-americans/>.

³⁶¹ *Id.*; see also SPANN, *RACE AGAINST THE COURT*, *supra* note 359, at 3 (“The Supreme Court is better understood as serving the veiled majoritarian function of promoting popular preferences at the expense of minority interests.”).

The failure to appreciate the fact that the instruments of the state are merely the reflections of the political and economic ideology of the dominant group. . . . [T]he Constitution is a very flexible instrument . . . in the nature of things, it cannot be anything more than the controlling elements in American society wish it to be.³⁶²

In the 1960s, political scientist Robert Dahl wrote that “the policy views dominant on the court are never very long out of line with the policy views among the lawmaking majorities of the United States. . . . [T]he Supreme Court is inevitably a part of the dominant national alliance.”³⁶³ More recently, legal scholar Barry Friedman has also described the majoritarian nature of the Court.³⁶⁴

Not only is the Court a highly majoritarian institution, but through its affirmative action decisions the Court has made itself the nation’s primary policymaker on racial issues. This is so because, with the exception of *Grutter*, the Court has struck down the decisions of more democratically responsive branches of federal, state, and local government to voluntarily engage in affirmative action.³⁶⁵

This is a deeply ironic and disturbing result for several reasons. First, it is Congress, not the Court, which has the explicit constitutional power to enforce the Fourteenth Amendment.³⁶⁶ It is inappropriate for the Court to use its powers of judicial review to supersede an explicit constitutional grant of power to Congress.

In addition, the Court has a very poor record historically in respecting or enforcing the equality of non-whites in the United States. Prior to the Fourteenth Amendment, the Court rendered proslavery decisions supporting a national right to capture fugitive slaves³⁶⁷ and disparaging blacks as “so far inferior, that they had

³⁶² Ralph J. Bunche, *A Critical Analysis of the Tactics and Strategies of Minority Groups*, 4 J. NEGRO EDUC. (1935), quoted in Derrick Bell, *Racial Equality: Progressives’ Passion for the Unattainable*, 94 VA. L. REV. 495 (2007).

³⁶³ Linda Greenhouse, *Law and Politics*, Opinion Pages, N.Y. TIMES, Feb. 19, 2014.

³⁶⁴ See FRIEDMAN, *supra* note 359, at 369–72.

³⁶⁵ *Richmond v. J.A. Croson*, 488 U.S. 469 (1989); *Adarand Constructors v. Peña*, 515 U.S. 200 (1995); see also *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (disabling local governments from voluntarily engaging in limited race-conscious efforts to enhance desegregation).

³⁶⁶ See U.S. CONST. amend. XIV, § 2.

³⁶⁷ *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

no rights which the white man was bound to respect.”³⁶⁸ The Court also approved of white dominion and control over the lands, and eventually the fates, of American Indians.³⁶⁹ After enactment of the Fourteenth Amendment, the Court has: struck down laws protecting the civil rights of blacks;³⁷⁰ enforced segregation;³⁷¹ permitted the racist internment of Japanese-Americans;³⁷² prevented redress for structural inequality;³⁷³ permitted re-segregation of public education;³⁷⁴ and struck down protective provisions of the Voting Rights Act.³⁷⁵ While the Warren Court rendered important decisions enforcing minority rights, most prominently *Brown v. Board of Education*³⁷⁶ and *Loving v. Virginia*, that Court is now understood to be an anomaly.³⁷⁷

The Court’s majoritarian orientation and the congruence between the Court’s and the general public’s hostility toward affirmative action, virtually guarantee that the Court will continue limiting affirmative action. *Fisher*’s nod in the direction of stricter application of strict scrutiny is a small step in this direction.³⁷⁸ More recently, in *Schuette v. Coalition to Defend Affirmative Action*,³⁷⁹ the Court took a

³⁶⁸ *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

³⁶⁹ *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

³⁷⁰ *The Civil Rights Cases*, 109 U.S. 3 (1883).

³⁷¹ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

³⁷² *Korematsu v. United States*, 323 U.S. 214 (1944).

³⁷³ *Washington v. Davis*, 426 U.S. 229 (1976).

³⁷⁴ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

³⁷⁵ *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013).

³⁷⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

³⁷⁷ See, e.g., Michael Kent Curtis, *Judicial Review and Populism*, 38 WAKE FOREST L. REV. 313, 353 (2003) (“In many ways, the years from 1936 to 1969 were an anomaly. The Warren Court decisions . . . were different because they extended constitutional protection to blacks, to the poor, to those accused of crime, and to those purveying sexually-oriented books. And they were different because the Court often actively promoted democratic decision-making.”).

³⁷⁸ 133 S. Ct. at 2428–29. One could ask why, if that is the Court’s primary goal, did the Court not just eliminate affirmative action altogether in *Fisher*? One answer is “that invalidating an affirmative action plan so closely modeled on the plan upheld in *Grutter* will make it difficult to view the Court’s distaste for affirmative action as anything other than purely political.” Spann, *Whatever*, *supra* note 314, at 203.

³⁷⁹ 134 S. Ct. 1623 (2014).

major step towards the abolition of affirmative action by allowing Michigan voters to adopt a constitutional amendment banning affirmative action.³⁸⁰

IV. CONCLUSION

The history of the G.I. Bill shows racial preferences for whites and overt race discrimination against blacks by the federal government, educational institutions, bankers, realtors and local neighborhood homeowners' associations. Due to this race discrimination, promoted and subsidized by the federal government, black veterans were denied opportunities for higher education and home ownership. The economic consequences of this race discrimination have been costly for the African-American community.

Affirmative action was originally conceived as a remedy for past race discrimination against blacks and other minorities. Yet instead of upholding the voluntary efforts of universities, localities and the federal government to provide some remedy for our history of race discrimination, the Court has, with the exception of *Grutter*, uniformly rejected and even disparaged such efforts.

Justice Powell's opinion in *Bakke* relied on numerous false and misleading premises to justify strict scrutiny review and to reject past societal discrimination as a compelling government interest. These false, misleading premises are the "doctrines of delusion." To one degree or another, the Court recites and relies upon these doctrines of delusion in all its affirmative action cases since *Bakke*, culminating in its most recent decisions in *Fisher* and *Schuette*. Doctrines of delusion thus constitute the heart of the Supreme Court's rationales for opposing remedial affirmative action and allowing only a weaker "diversity" rationale.

The history of race discrimination in the enactment and administration of the G.I. Bill prove the falsity and misleading nature of the doctrines of delusion. The Court's rote adoption of these doctrines, notwithstanding contrary evidence and argument, raises serious questions about the Court's role in our society. The Court has made itself the nation's primary policymaker on race, despite its dismal historical record of promoting and permitting injustice and inequality for African Americans and other minorities. The congruence between the Court's and the public's views on race and affirmative action show the Court to be a principally majoritarian institution that protects majoritarian interests. In the context of

³⁸⁰ *Id.*

affirmative action, the Court plainly prefers and protects the educational, economic and status interests of whites.

As stated by one writer, “racism is not merely a simplistic hatred. It is, more often, broad sympathy toward some and broader skepticism toward others.”³⁸¹ The Court has shown its broad sympathy toward whites and its broader skepticism toward blacks and toward attempts to remedy our history of past discrimination against them. The Court promulgates false doctrines of delusion to justify doctrinally its preferences for whites and their interests.

This is what the evidence shows. We should trust the evidence, not the rhetoric. We should see the Court not as a court of justice or equality, but rather as a primary defender of white privilege and racial inequality.

³⁸¹ Ta-Nehisi Coates, *Fear of a Black President*, THE ATLANTIC (Sept. 2012), available at <http://www.theatlantic.com/magazine/archive/2012/09/fear-of-a-black-president/309064/>.

