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**Doctrines of Delusion:
Bakke, Fisher and the Case for a
New Affirmative Action**

IHELG Monograph

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Doctrines of Delusion: *Bakke*, *Fisher* and the Case for a New Affirmative Action

Juan F. Perea[†]

INTRODUCTION

Affirmative action remains one of the most contentious issues we face. It is the “most salient current battlefield in the ongoing conflict over the status of blacks in American life.”¹ Among the legacies of the civil rights era, affirmative action is the most ferociously contested.² So when the Supreme Court heard the case of *Fisher v. Texas*, both sides awaited the Court’s decision with great anticipation. Since the case was argued in October, the wait for a ruling could not have been longer, nor the anticipation greater.

The Supreme Court finally ended the long, tense vigil and issued its decision in *Fisher v. Texas*.³ Justice Kennedy, writing for a surprisingly large majority of the Court, authored a decision that both retains continuity and portends change. The continuity lies in the Court’s reaffirmation of and reliance upon its key precedents in *Bakke* and *Grutter*.⁴ For the time being, diversity remains a compelling interest in higher education.⁵ The portended change comes from the Court’s demand for more rigorous judicial scrutiny of affirmative

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¹ Randall Kennedy, Persuasion and Distrust: The Affirmative Action Debate, in Nicolaus Mills, ed., *Debating Affirmative Action: Race, Gender, Ethnicity and the Politics of Inclusion* 48 (1994).

² Thomas J. Sugrue, Breaking Through: The Troubled Origins of Affirmative Action in the Workplace, in John David Skrentny, ed., *Color Lines: Affirmative Action, Immigration and Civil Rights Options for America* 31, 48 (1998).

³ 570 U.S. ____ (2013)

⁴ 570 U.S. at ____, slip op. at 5 (2013).

⁵ 570 U.S. at ____, slip op. at 6-7 (2013).

action programs in higher education.⁶ In a phrase sure to be oft-quoted, Justice Kennedy warned that strict scrutiny “must not be strict in theory but feeble in fact.”⁷ Accordingly, universities will likely face a higher and more difficult burden in justifying both the need for and the contours of their affirmative action programs.

For the foreseeable future, the debate in courtrooms and in the public will be guided by the Court’s formulation in *Fisher*. Litigants and commentators will argue over whether a university’s affirmative action program is narrowly-enough tailored.⁸ Related questions will arise. Do race-neutral alternatives exist that can yield sufficient diversity to supply the educational benefits desired by universities?⁹ Were race-neutral alternatives seriously considered rather than race-conscious means?¹⁰ Exactly how much diversity is required to yield the educational benefits of diversity?¹¹ Answers to these technical, fact-specific questions will be part of future judicial determinations of the validity of affirmative action programs.

It is jarring to consider that the concepts and formulas the Court uses in evaluating affirmative action have nothing to do with why affirmative action was thought to be necessary and important in the first place. At its inception, affirmative action was understood as a necessary remedy for past discrimination. Nearly 50 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

⁶ 570 U.S. at ____, slip op. at 12-13 (2013).

⁷ 570 U.S. at ____, slip op. at 13 (2013).

⁸ 570 U.S. at ____, slip op. at 12-13(2013).

⁹ 570 U.S. at ____, slip op. at 11 (2013).

¹⁰ 570 U.S. at ____, slip op. at 11 (2013).

¹¹ 570 U.S. at ____, slip op. at 10-11 (2013).

result. . . . To this end equal opportunity is essential but not enough, not enough.¹²

Johnson's speech was "the first moment when a president . . . forcefully and visibly sponsored affirmative action for blacks."¹³ Johnson understood that racial equality required more than the equal opportunity guaranteed in the Civil Rights Act of 1964. Sadly, today it is hard to imagine any American leader capable of articulating the need for affirmative action in these forceful terms.

In the years since Johnson's exhortation to action, the Supreme Court's affirmative action jurisprudence has steered us far away from Johnson's 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. *Fisher* thus takes its place in a long trajectory of decisions that begins with Justice Powell's opinion in *Bakke*, a trajectory that has caused an "unfortunate uncoupling of affirmative action from its social context."¹⁴

In this Article, I respond to this "unfortunate uncoupling" of affirmative action from its social and historical context. I situate the Court's affirmative action jurisprudence within its historical context and test the validity of the Court's analytical premises against the background of history. I believe the most powerful arguments for affirmative action lie in the recent World War II-era history of the federal government's policies and subsidies that encouraged race discrimination against blacks in education and housing.¹⁵ In the

¹² President Lyndon B. Johnson, Commencement Address at Howard University, June 4, 1965 (reprinted in Ira Katznelson, *When Affirmative Action Was White* 175 (2005))

¹³ Ira Katznelson, *When Affirmative Action Was White* 175 (2005)[hereinafter cited as Katznelson]

¹⁴ Lee C. Bollinger, A Long, Slow Drift From Racial Justice, *The New York Times*, op-ed, June 24, 2013. Bollinger was sued in his capacity as President of the University of Michigan at the time of the Gratz and Grutter lawsuits. *Id.*

¹⁵ In stating that World-War II era discrimination provides the most 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 history provides a provable, recent basis in evidence for proving extensive white racism and its injurious consequences for blacks. Sadly, and incorrectly, it is easier for whites

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.¹⁶

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.¹⁷ 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. In my view, this evidence of governmental discrimination provides the strongest argument for affirmative action.

A second reason is that so many white Americans continue to benefit from the federal government's racism. 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,"¹⁸ this history makes crystal clear that most whites benefitted enormously from the discrimination in this era. 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. 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

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*.

¹⁶ 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)(documenting the way that federal legislation accommodated Southern and Northern racism during the New Deal era by excluding blacks from statutory protections).

¹⁷ See *infra* nn. ___ and accompanying text.

¹⁸ Robert J. Blendon, et. al., *The Public and the President's Commission on Race*, *The Public Perspective* 66, 68 (1998).

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 \$110,729.¹⁹ The comparable figure for black households had grown to only \$4,955, only 4.4% of the net worth of whites.²⁰ 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.²¹

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 the provable facts of our history.²² 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 action²³; 2) affirmative action constitutes racial preference for "no reason other than race or ethnic origin"²⁴ and "reverse discrimination" against whites; and 3) whites are innocent victims who should not bear

¹⁹ 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). Melvin Oliver & Thomas Shapiro, *Black Wealth/White Wealth 2* (1995).

²⁰ *Id.*

²¹ Baby boomers are defined as the generation that was born between 1946-1964. Many of today's boomers are the children of the generation of veterans that served during World War II.

²² This is the "uncoupling of affirmative action from its social context" referred to by Lee Bollinger.

²³ "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." 438 U.S. at 298.

²⁴ "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."²⁴ 438 U.S. at 307.

the burdens of affirmative action.²⁵ 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 blacks²⁶; and 5) equal protection must mean the same thing when applied to whites and to blacks.²⁷ 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 interest²⁸; 7) diversity is a compelling government interest.²⁹ 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.

Beginning with Justice Powell’s opinion in *Bakke* and culminating with *Fisher*, the most important reason for affirmative action—to remedy government-sponsored and subsidized 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.

²⁵ “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.” 438 U.S. at 298. See also 438 U.S. at 307, 310.

²⁶ “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.” *Bakke*, 438 U.S. 265, 287 (1978).

²⁷ “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.”²⁷ 438 U.S. at 289-90.

²⁸ “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. 438 U.S. at 307, 310.

²⁹ 438 U.S. at 314-15.

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 G.I. bill. This Part also suggests a new vision of what affirmative action should be. Part II will then evaluate the premises underlying the Court's affirmative action jurisprudence against the evidence of history. Part III assesses the doctrines of delusion and the degree of public belief in them. Lastly, Part IV explores the Court's role as 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

Prior to 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.³⁰

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.³¹ Southern legislators were unwilling to support legislation that would pay federal benefits directly to blacks and so

³⁰ 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 cited as Perea, *Echoes of Slavery*]. 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 1937-49, and in the Senate from 1949-61, 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.

³¹ Harvard Sitkoff, *A New Deal for Blacks* 45 (1978); Perea, *Echoes of Slavery* at 102-03.

threaten the plantation economy of the South.³² Direct payments would lessen the financial dependence of blacks and weaken exploitive sharecropping arrangements prevalent throughout the agricultural South.³³ In order to enlist the political support of these southern democrats, President Roosevelt and northern democrats agreed to legislation that excluded blacks.³⁴

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.³⁵ The principal technique for exclusion was the ostensibly race-neutral exclusion of agricultural and domestic workers from all of these statutes.³⁶ 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.³⁷ 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.³⁸

Another important technique of exclusion was the purposeful decentralization of the administration of federal benefit payments.³⁹ 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.⁴⁰ 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.⁴¹ In the South, these exclusively white administrators were committed to preserving white

³² Ira Katznelson, *When Affirmative Action was White* 19 (2005); Robert C. Lieberman, *Shifting the Color Line: Race and the American Welfare State* 24 (1998).

³³ Lieberman, *supra* note __ at 27-28.

³⁴ Perea, *Echoes of Slavery* at 102-03; Sitkoff, *supra* n. __ at 44.

³⁵ Perea, *Echoes of Slavery* at 104.

³⁶ Perea, *Echoes of Slavery* at 103-04.

³⁷ *Id.* at 104.

³⁸ *Id.* at 96.

³⁹ *Id.* at 102; Lieberman, *supra* note __ at 29-30, 37.

⁴⁰ Perea, *Echoes of Slavery* at 102; Katznelson, *supra* note __ at 19.

⁴¹ See, e.g., Perea, *Echoes of Slavery* at 107-109.

racial hierarchy over blacks.⁴² 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.⁴³ 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.

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.⁴⁴ The G.I. Bill is widely celebrated as one of the “finest two or three [laws] Congress has passed since the constitution took effect.”⁴⁵ According to President Bill Clinton, the G.I. 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.”⁴⁶ The Bill

⁴² Id.

⁴³ Id.

⁴⁴ See Servicemen’s Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (1945); Frydl at 1-2.

⁴⁵ Frydl at 1 (quoting James Michener, *Newsweek*, Jan. 11, 1993)); See Michael J. Bennett, *When Dreams Came True: The GI Bill and the Making of Modern America* x, 22 (1996) [hereinafter cited as Bennett].

⁴⁶ Office of the Press Secretary, The White House, “Remarks by the President at ‘Remembering Franklin D. Roosevelt,’ 50th Anniversary Commemorative Services,”

“enabled millions of working class Americans to go to college, buy their own homes, and become, in reality, members of the middle class.”⁴⁷ The Bill is widely credited with creating the American middle class.⁴⁸

While the bill created a more middle class society, it did so “almost exclusively for whites.”⁴⁹ 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 veterans of minority races.”⁵⁰ A major report on black veterans concluded that it was “as though the GI Bill had been earmarked ‘For White Veterans Only.’”⁵¹

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 G.I. 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 G.I. Bill, it is important to understand that before and during World War II, the federal government operated largely on the basis of 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.⁵² Housing, training, and recreational facilities

The Little White House, Warm Springs, Georgia, April 12, 1995, cited in Katznelson at 114.

⁴⁷ Katznelson at 114 (quoting the Journal of the American Council on Education).

⁴⁸ Frydl at 1; Katznelson at 114; Bennett at 28.

⁴⁹ Katznelson at 114.

⁵⁰ Id.

⁵¹ Katznelson at 115.

⁵² Kathleen J. Frydl, *The GI Bill 223-26 (2011)* [hereinafter cited as Frydl]; 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* (masters thesis 2008) available at <http://dspace.mit.edu/bitstream/handle/1721.1/44333/276173994.pdf> (last visited 6/23/2013) [hereinafter cited as McKenna]; Katznelson at 101-102.

were also segregated.⁵³ 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.⁵⁴ 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.”⁵⁵

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 G.I. Bill was enacted by a Congress intent on preserving southern segregation.⁵⁶ “Race was contested terrain in the very inception of the G.I. Bill.”⁵⁷ 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.”⁵⁸ Rankin’s chief priority was to protect the segregated order of the Jim Crow South.⁵⁹ Two important veterans’ organizations, the American Legion and the Veterans’ Administration (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.⁶⁰ The principal legislative device for excluding blacks was to allow local administration of federally supplied benefits under the loose supervision of the Veterans Administration.⁶¹ Local administration permitted the enforcement of Jim Crow segregation in the south and de facto segregation in the North.⁶² 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

⁵³ McKenna at 15-18.

⁵⁴ Frydl at 223-26; McKenna at 15-19.

⁵⁵ Frydl at 225.

⁵⁶ Frydl at 141-42, 145; Katznelson at 121-29.

⁵⁷ Hilary Herbold, *Never a Level Playing Field: Blacks and the GI Bill*, *Jour. Of Blacks in Higher Educ.* 104 (Winter 1994/1995).

⁵⁸ Katznelson at 123.

⁵⁹ Katznelson at 125-26.

⁶⁰ *Id.*; Frydl at 121, 140-42.

⁶¹ Frydl at 137, 140-42, 145; Katznelson at 128.

⁶² Frydl at 121, 229; McKenna at 15-19, 30; Katznelson at 123.

provisions for the dispersion of administrative responsibilities that were designed to shield Jim Crow.”⁶³

Pervasive race discrimination against blacks in higher education and housing meant that G.I. bill 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 G.I. bill.⁶⁴ While white veterans prospered as they pursued higher education and purchased homes with their G.I. 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 consequences of that race discrimination.⁶⁵ The bill provided numerous economic benefits, ostensibly to all veterans who had served at least 90 days and who had received an honorable discharge.⁶⁶ In this article I will focus on two of the most important benefits, the education benefit and the housing benefit.⁶⁷

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.⁶⁸ These cash

⁶³ Katznelson at 124.

⁶⁴ McKenna at 5-7, 43; Frydl at 1, 186, 265; Katznelson at 116; Bennett, *When Dreams Came True* at 116.

⁶⁵ 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.

⁶⁶ See Frydl 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 dollars on G.I. Bill benefits.⁶⁶ The bill was the “first billion-dollar home credit insurance program and the first billion-dollar student loan program.”⁶⁶ About \$14.5 billion was spent on the education benefit.⁶⁶ 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.⁶⁶

⁶⁷ See Servicemen’s Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (1945); Frydl at 1-2.

⁶⁸ See *id.*

benefits were paid directly to individuals rather than institutions, which allowed veterans to use this benefit for tuition at any educational institution that accepted them.⁶⁹ 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.⁷⁰

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.”⁷¹ Harvard, for example, admitted only a handful of black students, at most.⁷² Even the University of Pennsylvania, the most inclusive Ivy League institution at the time, admitted only 46 black students out of 9000 students, about one-half of one percent.⁷³

Princeton had “long had a systematic policy of excluding blacks.”⁷⁴ During the 1940s, Princeton debated the question of whether or not to admit blacks and decided against it.⁷⁵ A survey of student opinion taken in 1942 found that 62 percent of Princeton students opposed the admission of black students.⁷⁶ Fully 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.”⁷⁷

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

⁶⁹ 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) [hereinafter cited as Turner & Bound].

⁷⁰ Turner & Bound at 149.

⁷¹ Meyer Weinberg, *A Chance to Learn* 266 (1977).

⁷² Jerome Karabel, *The Chosen* 52, 236 (2005).

⁷³ Katznelson at 130, 134.

⁷⁴ Karabel, *The Chosen* at 232.

⁷⁵ Karabel, *The Chosen* at 232-36.

⁷⁶ *Id.* at 235.

⁷⁷ *Id.* at 235.

upperclassman and taken to see the Dean of Admissions. Wright recounted what happened next:

The Dean confronted me, looking at me as though I was a disgusting specimen under a microscope. I was in a state of concussive shock when [the Dean] said, “Mr. Weiss didn’t tell us you were colored. You can’t come here. You would be going to a place where you are not wanted. Because you slipped through, I had better see that we add a question about race to our application.”⁷⁸

Wright reported being “shattered” by the incident and eventually enrolled at Lincoln University.⁷⁹

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.⁸⁰ These colleges, however, were severely underfunded and had inadequate facilities incapable of meeting the demand.⁸¹ Accordingly, in 1947 alone, 20,000 black veterans were turned away from black colleges.⁸² One survey showed that 55% of black veterans who applied to southern black colleges were turned away due to lack of space.⁸³

Excepting these historically black colleges, most colleges and universities were overwhelmingly white at the time the G.I. Bill was enacted. And most of them limited severely the number of black students they admitted, if they admitted any at all. The history of

⁷⁸ Donald L. Maggin, *Smashing Princeton’s Color Bar: Racism Stymied by 1940s Students*, Princeton Independent (available at www.princetonindependent.com/simple/novostibolshe.php3?novosti=MzE2NjQ=).

⁷⁹ Karabel, *The Chosen* 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.*

⁸⁰ Katznelson at 130; Turner & Bound at 151(2003).

⁸¹ Katznelson 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 at 151.

⁸² 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)[hereinafter cited as Onkst].

⁸³ Katznelson at 132; Turner & Bound at 152-53.

people of color in higher education prior to World War II is a history of exclusion:

the available history of people of color in U.S. higher educational institutions is severely circumscribed, largely because few people of color aside from those who gained access to Black colleges were able to attend Similarly, there is very little record of Latinos/as and Asians in U.S. higher educational institutions before then. Though stories exist of individual triumph in securing a college degree, the collective experience of people of color in colleges and universities prior to World War II was one of almost total exclusion.⁸⁴

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.⁸⁵ The G.I. 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 G.I. 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."⁸⁶ Even worse, southern white institutions were completely segregated and closed to blacks.

This provable history of race discrimination practiced by almost all white colleges and universities provides ample justification

⁸⁴ Mark Chesler, Amanda Lewis, and James Crowfoot, *Challenging Racism in Higher Education* 33 (2005).

⁸⁵ Turner & Bound at 171; Katznelson at 134; Onkst at 532.

⁸⁶ Committee on Civil Rights, *To Secure These Rights* 23 (1948).

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 G.I. Bill actually widened the gap in educational attainment between blacks and whites.⁸⁷ It also exacerbated existing and future income inequalities, since white incomes increased substantially more with the attainment of college educations.⁸⁸ 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, even more than the educational benefit, led to the virtually exclusive enrichment of white veterans and the 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.⁸⁹ Yet because the vast majority of financial institutions simply refused to make loans to African Americans, black veterans were denied access to this benefit.⁹⁰ 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]."⁹¹

The federal government had a direct hand in this housing discrimination. Until 1948, the Federal Housing Administration's ("FHA") mortgage Underwriting Manual "explicitly identified Black Americans as unreliable and undesirable buyers."⁹² The FHA manual recommended racially restrictive covenants until 1950.⁹³ This was fully *two years after* the Supreme Court decided that such covenants were unenforceable and contrary to public policy in *Shelley v.*

⁸⁷ Turner & Bound at 145, 172.

⁸⁸ Id.; Katznelson at 134.

⁸⁹ Frydl at 1-2.

⁹⁰ Katznelson at 139; Thomas J. Sugrue, *The Origins of the Urban Crisis* 46-47 (2005) [hereinafter cited as Sugrue].

⁹¹ Katznelson at 139; Frydl at 237-38.

⁹² Desmond King, *Separate and Unequal* 191 (1995)[hereinafter cited as King].

⁹³ Douglas S. Massey & Nancy A. Denton, *American Apartheid* 54 (1993)[hereinafter cited as Massey & Denton].

Kraemer.⁹⁴ The FHA manual even included a model racially restrictive covenant.⁹⁵ 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.⁹⁶

The FHA also actively promoted segregated neighborhoods. 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.”⁹⁷ The underwriting manual, which directed private banks in their lending decisions, featured a grading system for rating desirable and undesirable loans: Grade A was for properties in areas that were “homogeneous and in demand as residential locations” (read “white”); 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.”⁹⁸

The “undesirable population” referred to in the FHA manual was African Americans. An FHA 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.” In Detroit, every neighborhood “with even a tiny African American population was rated ‘D,’ or ‘hazardous’ by federal appraisers.”⁹⁹

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 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

⁹⁴ 334 U.S. 1 (1948).

⁹⁵ King at 191.

⁹⁶ Frydl at 238.

⁹⁷ Massey & Denton at 54.

⁹⁸ King at 191; Sugrue at 43-44.

⁹⁹ Sugrue at 44.

sanction to discriminatory real estate sales and bank lending practices.¹⁰⁰

Banks were incentivized by the FHA underwriting manual to lend only to whites buying properties in segregated white areas. This is what gave rise to all-white suburbs surrounding cities.¹⁰¹

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, 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. Such a buyer might be a madame with a string of call girls, a bootlegger, a gangster, *or a colored man of means who was giving his children a college education and thought they were entitled to live among whites.*¹⁰²

Realtors thus treated well-qualified black buyers as persons “whose presence will clearly be detrimental to property values.”

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.¹⁰³ In Mississippi, in 1947, only 2 out of 3,229 VA loans went to black veterans.¹⁰⁴ 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 to obtain adequate housing are extremely limited or non-existent.”¹⁰⁵ As two scholars of the issue concluded, “the vast

¹⁰⁰ Sugrue at 43.

¹⁰¹ Frydl at 300-301; Katznelson at 114, 116.

¹⁰² McKenna at 50 (emphasis added); Massey & Denton at 37.

¹⁰³ McKenna at 59.

¹⁰⁴ McKenna at 59; Onkst at 522. Even by the mid-1970s, less than 2% of FHA/VA mortgages had gone to African-Americans. McKenna at 74.

¹⁰⁵ King at 191-92; Massey & Denton at 54-55. Onkst at 522; McKenna at 58;

majority of FHA and VA mortgages went to white middle-class suburbs.”¹⁰⁶ 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.¹⁰⁷

3. The Economic Effects 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.¹⁰⁸ These discriminatory policies yielded wealth and economic privilege for white veterans and relative impoverishment for black veterans.¹⁰⁹ The G.I. Bill widened the education and income gap between whites and blacks to the benefit of whites.¹¹⁰ The G.I. Bill also widened enormously the wealth gap between whites and blacks, again to the benefit of whites.¹¹¹

A large 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.¹¹² By 1984, the date when most GI Bill mortgages had matured, 7 out of 10 whites owned homes, but only 4 out of 10 blacks owned homes.¹¹³ That ratio of home ownership remains virtually identical today.¹¹⁴

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 \$30,000.¹¹⁵

¹⁰⁶ Massey & Denton at 54.

¹⁰⁷ Cyd McKenna at 37-41.

¹⁰⁸ See, e.g., Frydl at 300-301.

¹⁰⁹ Melvin L. Oliver & Thomas M. Shapiro, *Black Wealth/White Wealth* 150 (1995)[hereinafter cited as *Oliver & Shapiro*].

¹¹⁰ Turner & Bound at 172; Katznelson at 134.

¹¹¹ Frydl at 238; Katznelson at 121.

¹¹² Oliver & Shapiro at 150.

¹¹³ McKenna at 81; Katznelson at 164.

¹¹⁴ 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),

www.census.gov/housing/hvs/files/qtr312/q312press.pdf; Katznelson at 164.

¹¹⁵ McKenna at 81.

By 2006, the median value of white-owned homes was \$185,500; the corresponding figure for black-owned homes was \$129,700.¹¹⁶ 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, which finances good schools, services and infrastructure.¹¹⁷ 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.¹¹⁸ 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.”¹¹⁹

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 the wealth of America’s middle class.¹²⁰ Home equity also finances other forms of wealth creation, such as borrowing against equity at favorable rates, investments, home improvements and college education.¹²¹

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 \$16,000.¹²²

These large disparities in inheritances extend the economic, educational and social privileges of whites. Parental wealth is a significant indicator of the socio-economic status of adult children and is vital in perpetuating the class status of adult children.¹²³ Relatively wealthy white parents are able to provide their adult children with tuition assistance, assistance with down payments on homes and, eventually, with inheritances.¹²⁴ Of course, because of their much

¹¹⁶ *Id.*

¹¹⁷ Oliver & Shapiro at 62-65; Frydl at 300-02; McKenna at 76-77.

¹¹⁸ McKenna at 81-82; Katznelson at 164.

¹¹⁹ Frydl at 300-01.

¹²⁰ Oliver & Shapiro at 64; McKenna at 76, 84.

¹²¹ McKenna at 76-77.

¹²² McKenna at 78; Oliver & Shapiro at 155-56.

¹²³ McKenna at 83.

¹²⁴ McKenna at 78-79; Oliver & Shapiro at 152-56; Frydl at 298.

lesser wealth and inheritances, most African-American parents are not able to provide these economic and social privileges to their children.¹²⁵

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.¹²⁶ By 2010, the median net worth, including home equity, of white households had grown to \$110,729.¹²⁷ 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 1984.¹²⁸ 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.¹²⁹

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.¹³⁰ 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.

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 Johnson,

¹²⁵ Oliver & Shapiro at 152-53; Hilary Herbold, *Never a Level Playing Field: Blacks and the GI Bill*, *Jour. Black Higher Educ.* 104, 106 (Winter 1994/1995).

¹²⁶ 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).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Cf.* Oliver & Shapiro at 2.

¹³⁰ Sugrue at 43.

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 two facets: remedying the race discrimination in higher education financed by the government; and 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.¹³¹ Such a program could be understood as a G.I. Bill for blacks, at long last making benefits available to them that

¹³¹ Katznelson at 171.

were made available exclusively to whites.¹³² Congress could enact such a program using its enforcement powers under Section 5 of the 14th Amendment.¹³³ The courts have upheld, under strict scrutiny, Congress's similarly motivated payment of reparations to Japanese-American victims of internment during World War II.¹³⁴ 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."¹³⁵

This Part has presented evidence of the history of government-sponsored race discrimination in the structure and implementation of the G.I. 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."¹³⁶ 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.¹³⁷ The Court's conclusion is also counterintuitive, since remedying past discrimination and eliminating present discrimination are, or should be, the most

¹³² 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).

¹³³ See U.S. Const. Am. 14, Section 5.

¹³⁴ See *Jacobs v. Barr*, 959 F.2d 313 (D. C. Cir. 1992).

¹³⁵ Katznelson at 170 (citing Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and the Theory*, 43 B.C. L. Rev. 569 (2002)).

¹³⁶ See *Bakke*, 438 U.S. at 307, 310; *Croson*, 488 U.S. at 499, 520; *Grutter*, 539 U.S. at 324.

¹³⁷ 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*, 515 U.S. 200 (1995).

important purposes underlying enforcement of the Equal Protection Clause.¹³⁸ 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 G.I.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, it was Justice Powell who 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*¹³⁹, *Adarand*¹⁴⁰, *Grutter*¹⁴¹, and now *Fisher*¹⁴² stand as prominent examples. Indeed, in *Fisher* the Court reiterated the continuing influence of the principles Justice Powell first articulated in *Bakke*.¹⁴³

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.¹⁴⁴ 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.¹⁴⁵ And in the employment discrimination context, Justice Kennedy used the affirmative action cases to uphold the interests of white firefighters eligible for

¹³⁸ See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954). Cf., e.g., *United States v. Paradise*, 480 U.S. 149 (1987).

¹³⁹ 488 U.S. 469 (1989).

¹⁴⁰ 515 U.S. 200 (1995).

¹⁴¹ 539 U.S. 306, 322-25 (2003).

¹⁴² 570 U.S. ____ (2013).

¹⁴³ 570 U.S. ___, slip op. at 5-8 (2013).

¹⁴⁴ See generally Cheryl I. Harris & Kimberly West-Faulcon, Reading *Ricci*: Whitening Discrimination, Racing 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.

¹⁴⁵ See *Parents Involved v. Seattle School Dist. No. 1*, 551 U.S. 701, 720, 722-25 (2007).

promotion against the interests of black firefighters disqualified from promotion because of disparate results on a promotion test.¹⁴⁶

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.¹⁴⁷ 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 action¹⁴⁸; 2) affirmative action constitutes racial preference for "no reason other than race or ethnic origin"¹⁴⁹ and "reverse discrimination" against whites; and 3) whites are innocent victims who should not bear the burdens of affirmative action.¹⁵⁰ 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 blacks¹⁵¹; and 5) equal protection must mean the same thing when applied to whites

¹⁴⁶ *Ricci v. DeStefano*, 557 U.S. 557, 581-82 (2009).

¹⁴⁷ Ian F. Haney Lopez, "A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness, 59 *Stan. L. Rev.* 985, 1029 (2007).

¹⁴⁸ "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." 438 U.S. at 298.

¹⁴⁹ "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."¹⁴⁹ 438 U.S. at 307.

¹⁵⁰ "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."¹⁵⁰ 438 U.S. at 298. See also 438 U.S. at 307, 310.

¹⁵¹ "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." *Bakke*, 438 U.S. 265, 287 (1978).

and to blacks.¹⁵² Lastly, the 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 interest¹⁵³; 7) diversity is a compelling government interest.¹⁵⁴ 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 action.¹⁵⁵

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 that “preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection.”¹⁵⁶ Relying on Justice Powell’s reasoning, in *Croson* Justice O’Connor concluded that “[c]lassifications based on race carry a danger of stigmatic harm. . . . they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”¹⁵⁷

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

¹⁵² “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.”¹⁵² 438 U.S. at 289-90.

¹⁵³ “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. 438 U.S. at 307, 310.

¹⁵⁴ 438 U.S. at 314-15.

¹⁵⁵ “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.” 438 U.S. at 298.

¹⁵⁶ 438 U.S. at 298.

¹⁵⁷ *Croson*, 488 U.S. 469, 493-494 (1989).

‘entitled’ to preferences.”¹⁵⁸ 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.”¹⁵⁹ And in his lengthy concurrence in *Fisher*, Thomas wrote that affirmative action “taints the accomplishments of all of those who are admitted as a result of racial discrimination.”¹⁶⁰

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.¹⁶¹ 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 anti-black attitudes, images and emotions today. . . are the pervasive and continuing legacy of the material exploitation and racist framing of slavery and segregation.¹⁶²

Further evidence of the pervasiveness of these stereotypes comes from are the most recent findings of studies on implicit bias, according to

¹⁵⁸ *Adarand*, 515 U.S. at 241 (Thomas, J., concurring in part and concurring in the judgment)

¹⁵⁹ *Grutter*, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part and dissenting in part).

¹⁶⁰ 570 U.S. at ___, slip op. at 19 (2013).

¹⁶¹ See Joe R. Feagin, *Racist America* 97 (2d ed. 2010) [hereinafter cited as *Racist America*].

¹⁶² *Id.*

which “approximately 75 percent of Americans display implicit (automatic) preference for White relative to Black.”¹⁶³

In majority white educational institutions, these “common stereotypes” are pervasive.¹⁶⁴ 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.”¹⁶⁵ 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.¹⁶⁶

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 each other.”¹⁶⁷ Sadly, these stereotypes, pressures and resentments have negative effects on students of color.¹⁶⁸

¹⁶³ Mahzarin R. Banaji & Anthony G. Greenwald, *Blind Spot* 208 (2013).

¹⁶⁴ E. Zamani-Gallaher, Denise O’Neil Green, Christopher Brown III, & David O. Stovall, *The Case for Affirmative Action on Campus* 23, 26 (2010) (“the 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, Amanda Lewis, and James Crowfoot, *Challenging Racism in Higher Education* 102-03, 110-11 (2005). (black student reporting “There’s no way to convince whites we belong here”) [hereinafter cited as *Challenging Racism*].

¹⁶⁵ *Challenging Racism* at 101-02 .

¹⁶⁶ *Challenging Racism* at 114.

¹⁶⁷ *Challenging Racism* at 118.

¹⁶⁸ E. Zamani-Gallaher, Denise O’Neil Green, Christopher Brown III, & David O. Stovall, *The Case for Affirmative Action on Campus* 23, 26 (2010) (“behind efforts to eliminate affirmative action lie factors such as teachers’ low expectations of students of color, the public’s perception of the welfare queen, and many other

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, or inferior, or undeserving *precede* affirmative action programs. These common stereotypes are already part of our culture, widely held and believed by the general public.¹⁶⁹

There has never been a time in American history when a majority of white Americans did not stigmatize African Americans.¹⁷⁰ While it is beyond the scope of this article to explore this idea in great detail, I will give a few examples. The inferiority of Africans was asserted as a reason, a necessary fiction, to justify their enslavement.¹⁷¹ 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.¹⁷² During the Jim Crow era, African Americans were deemed unfit by law to attend school with white children, or to marry white partners.¹⁷³ During World War II, the military was segregated due to white beliefs in the inferiority of blacks.¹⁷⁴ And after World War II, regardless of their

negative stereotypes that adversely affect and further marginalize students of color." [hereinafter cited as *The Case for Affirmative Action*]; *Challenging Racism* at 102.

¹⁶⁹Racist America at 85 ("These racist arguments about contemporary intelligence levels are grounded in nearly 400 years of viewing black Americans and some other Americans of color as having an intelligence inferior to that of white Americans."); *The Case for Affirmative Action* at 32-33.

¹⁷⁰ *Id.*

¹⁷¹ 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).

¹⁷² 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* 105-110 (2d ed. 2007).

¹⁷³ See, e.g., *Brown vs. Board of Education*, 347 U.S. 483 (1954) (finding that laws mandating school segregation violated the Equal Protection Clause); *Loving vs. Virginia*, 388 U.S. 1 (1967) (striking down criminal laws penalizing intermarriage between the races).

¹⁷⁴ See, e.g., Juan F. Perea, et. al., *Race and Races: Cases and Resources for a Diverse America* 159-62 (2d ed. 2007).

accomplishments or means, blacks were deemed unfit to reside in white neighborhoods.¹⁷⁵

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.¹⁷⁶ 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.

Common and widely believed stereotypes of black inferiority are a form of white racism.¹⁷⁷ 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.¹⁷⁸ 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.¹⁷⁹ On the contrary, for the most part racial preferences for whites are recharacterized as the earned result of hard

¹⁷⁵ See *supra* nn. ____ and accompanying text.

¹⁷⁶ In the matter of stereotypes, W.E.B. Dubois had it right, describing the need of white Southerners to disparage black success during Reconstruction: “unfortunately 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 Juan F. Perea, et. al., *Race and Races: Cases and Resources for a Diverse America* 145 (2d. ed. 2007).

¹⁷⁷ See Tim J. Wise, *Affirmative Action: Racial Preference in Black and White* 128 (2005) [hereinafter cited as Wise].

¹⁷⁸ Wise at 122, 79-81 (“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.”).

¹⁷⁹ Wise at 127-28.

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 black students. Rather, the evidence shows that the elimination of affirmative action actually increases hostility towards African American students.¹⁸⁰

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.¹⁸¹ There is no reason why African American students cannot evaluate the presence of or increase in stigma for themselves.¹⁸² 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.¹⁸³ Any argument that rests on presumed black incapacity is itself a racist assumption about the lesser capabilities of

¹⁸⁰ Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action* 85 *Indiana L. J.* 1497 (2010).

¹⁸¹ Joe R. Feagin, Hernan Vera & Nikitah Imani, *The Agony of Education: Black Students at White Colleges and Universities* x-xi, 7, 13 (“Because of the negative climate at many predominantly white colleges, very difficult, painful choices are forced on African American students and parents.”)

¹⁸² Cf. Wise at 125-26.

¹⁸³ Wise at 126.

blacks.¹⁸⁴ 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 whites.¹⁸⁵

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.”¹⁸⁶ Justice O’Connor relied on this language in her opinions in *Croson* and in *Grutter*.¹⁸⁷ 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.”¹⁸⁸ During oral argument in *Shelby v. Holder*, Justice Scalia described the Voting Rights Act as a “perpetuation of racial entitlements.”¹⁸⁹ 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.”¹⁹⁰ Most recently, describing a school district’s use of race to maintain desegregation, Chief Justice Roberts famously wrote, “The way to stop discrimination

¹⁸⁴ *Id.*

¹⁸⁵ “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.” 438 U.S. at 307, 319.

¹⁸⁶ 438 U.S. at 307, 319.

¹⁸⁷ 438 U.S. at 496; 539 U.S. at 323.

¹⁸⁸ 488 U.S. at 520, 524.

¹⁸⁹ Debra Cassens Weiss, Scalia: Reauthorized Voting Rights Act was a “perpetuation of racial entitlement,” www.abajournal.com, (Feb. 28, 2013).

¹⁹⁰ 539 U. S. at 350. (Thomas, J., dissenting).

on the basis of race is to stop discriminating on the basis of race.”¹⁹¹ The idea also enjoys wide popularity in the general public.¹⁹²

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 on the basis of 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.¹⁹³ In some cases, the Court has approved of race-based remedies for proven discrimination without discounting them as simple “racial preferences.”¹⁹⁴

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 as a result of pervasive, federally subsidized racism in the G.I. bill. These benefits gained by whites were the result of the outright, pervasive antiblack 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

¹⁹¹ *Parents Involved vs. School District of Seattle*, 551 U.S. 701, --- (2007).

¹⁹² Feagin, *Racist America* at 124; Michael I Norton and Samuel R. Sommers, *Whites see Racism as a Zero-Sum Game That They Are Now Losing*, 6 *Perspectives on Psychological Science* 215 (2011).

¹⁹³ *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976).

¹⁹⁴ See *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976); *United States v. Paradise*, 480 U.S. 149, 171 (1987); *Fullilove v. Klutznick*, 448 U.S. 448, 463-67 (1980).

white.”¹⁹⁵ 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.¹⁹⁶ 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.¹⁹⁷ The average black family earns an income that is less than two-thirds the income of the average white family.¹⁹⁸ The average white person has a life expectancy that is four to six years longer than the average African American.¹⁹⁹ 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.”²⁰⁰

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 college or university.²⁰¹ 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.”²⁰² For example, at Ivy League schools ninety-six percent of living alumni are white, meaning that at these schools the overwhelming majority of legacy admits will be white.²⁰³ At these and other top schools, the children of alumni constitute between twelve to twenty-five percent of each entering class, a number that far exceeds the number admitted because of affirmative action.²⁰⁴ 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

¹⁹⁵ Robert J. Blendon, et. al., *The Public and the President’s Commission on Race* at 66.

¹⁹⁶ *Id.*

¹⁹⁷ 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). Melvin Oliver & Thomas Shapiro, *Black Wealth/White Wealth 2* (1995).

¹⁹⁸ Feagin, *Racist America* at 21.

¹⁹⁹ *Id.*

²⁰⁰ National Urban League, *The State of Black America 2009 1-2* (2009).

²⁰¹ Wise, *Affirmative Action* at 72.

²⁰² Wise, *Affirmative Action* at 122.

²⁰³ *Id.*

²⁰⁴ *Id.*; Sturm and Guinier, *Affirmative Action*.

activities will all disproportionately favor white students, who disproportionately inhabit the wealthy, mostly segregated neighborhoods that are able to support such schools.²⁰⁵

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).²⁰⁶ In postgraduate education, whites constitute 70.3 percent of students, compared with 21.5 percent of students who are black or latino.²⁰⁷ In law school enrollments, whites constitute 77 percent of the students, compared with 15.3 percent of students who are black and latino.²⁰⁸ 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.²⁰⁹ In most college, 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

²⁰⁵ Wise, *Affirmative Action* 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.

²⁰⁶ 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).

²⁰⁷National Center for Education Statistics,
<http://nces.ed.gov/fastfacts/display.asp?id=98>

²⁰⁸American Bar Association,
(http://www.americanbar.org/groups/legal_education/resources/statistics.html).

²⁰⁹Association of American Medical Colleges: <https://www.aamc.org/data/facts/>. Asian/Pacific Islander students constitute 23.1 percent of medical school students, a number disproportionately high compared to their percentage of the population.

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 action.²¹⁰

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 that “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.”²¹¹ And in *Wygant* Powell wrote that “[a]s part of this Nation’s dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy.”²¹² 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.”²¹³ In the same opinion, Justice Scalia wrote that “even ‘benign’ racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be

²¹⁰ “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.” 438 U.S. at 298, 307, 310.

²¹¹ 438 U.S. at 298, 307, 310.

²¹² *Wygant*, 476 U.S. at 280-81 (opinion of Powell, J.).

²¹³ 539 U.S. at 341.

disadvantaged on the basis of race.”²¹⁴ 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.²¹⁵

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.”²¹⁶ 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. No evidence is presented in these cases on this question, which is actually contested by many persons. 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 Court means.²¹⁷ 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. As Professor Cecil Hunt describes, it is as though the Court takes judicial notice of “white innocence,” even though any such innocence is highly contestable and not suitable for judicial notice or judicial assumption.²¹⁸ 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?”

²¹⁴ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 527 (1989) (Scalia, J., concurring). See also *Johnson v. Santa Clara County*, 480 U.S. 616, 657-77 (1987) (Scalia, J., dissenting).

²¹⁵ 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 *U. Mich. J. Race & Law* 477, 531 (2006) [hereinafter cited as *White Innocence*].

²¹⁶ *White Innocence* at 533.

²¹⁷ *White Innocence* at 523-24.

²¹⁸ *Id.* at 523.

In addition to never defining innocence, the Court never tells us to whom the innocence applies. It is obvious, however, that the Court intends for innocence to apply only to whites. In her opinion in *Grutter*, Justice O'Connor would only consider approving an affirmative action program that worked "the least harm possible to . . . innocent persons competing for the same benefit."²¹⁹ She approved of Michigan Law School's affirmative action program because its individualized consideration "does not unduly harm nonminority applicants."²²⁰ 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 with whiteness has troubling implications. 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.²²¹

It is hard to imagine any reasonable basis for concluding 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 lesser-qualified 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 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

²¹⁹ 539 U.S. at 341.

²²⁰ *Grutter*, 539 U.S. at 341.

²²¹ See *supra* nn. ___ and accompanying text.

understood as constitutive of their fair share of educational opportunities.²²² 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 maybe university administrators are doing the victimizing. University administrators who engage in affirmative action, and probably many who don't, 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.²²³

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 55.²²⁴ The corresponding figure for black baby boomers is only \$16,000, only one-ninth the inheritance of whites.²²⁵ These inheritance figures correspond to the numbers on median net worth, which for whites is \$110,729 and for blacks only

²²² Ronald J. Fiscus, *The Constitutional Logic of Affirmative Action* 8 (1992).

²²³ See *supra* nn. ___ and accompanying text.

²²⁴ McKenna at 78; Oliver & Shapiro at 155-56.

²²⁵ McKenna at 78; Oliver & Shapiro at 155-56.

\$4,955.²²⁶ Since home equity constitutes about 60% of net worth²²⁷, the proportion of white net worth attributable to racism is quite high.

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.²²⁸ 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.²²⁹ 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."²³⁰ As another example, "personal guilt or innocence is irrelevant to the claim of right, as when a party 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."²³¹

²²⁶ 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). Melvin Oliver & Thomas Shapiro, *Black Wealth/White Wealth* 2 (1995).

²²⁷ McKenna at 76-77; Oliver & Shapiro at 148.

²²⁸ Oliver & Shapiro at 2; Thomas M. Shapiro, *The Hidden Cost of Being African American: How Wealth Perpetuates Inequality* 3 (2004).

²²⁹ Cheryl I. Harris, *Whiteness as Property*, 106 *Harv. L. Rev.* 1709 & n. 286 (1993).

²³⁰ *Id.*

²³¹ Ronald J. Fiscus, *The Constitutional Logic of Affirmative Action* 45 (1992).

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, better preparation and consequently higher standardized test scores that continue to advantage whites and disadvantage blacks and latinos.²³² 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.²³³ 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.²³⁴ 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.²³⁵ Bakke applied to UC Davis twice and was rejected twice.²³⁶ The first time he was rejected principally because he applied late in the admissions cycle, after most seats in the class had been filled.²³⁷ 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

²³² See *supra* nn. ___ and accompanying text.

²³³ See Derrick Bell, *Diversity's Distractions*, 103 *Colum. L. Rev.* 1622, 1631 (2003) (“standardized 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.”).

²³⁴ Joel Dreyfuss and Charles Lawrence III, *The Bakke case: The Politics of Inequality* 16 (1979) [hereinafter cited as *Dreyfuss & Lawrence*].

²³⁵ *Id.*

²³⁶ *Id.* at 21, 29.

²³⁷ *Id.* at 21.

has the tendency to arrive at conclusions based more upon his personal impressions than upon thoughtful processes using available sources of information.”²³⁸ 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.²³⁹ In addition, the dean of the medical school had as many as five discretionary admits for children of alumni or donors who otherwise wouldn’t be admitted.²⁴⁰

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.”²⁴¹ 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.”²⁴² 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.”²⁴³

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.²⁴⁴ As a young man, Bakke benefitted directly from Jim Crow segregation by attending an all-white, segregated school in Dade County, Florida.²⁴⁵ The quality of education he received likely contributed to his success and his high test scores. This quality of

²³⁸ Dreyfuss & Lawrence at 29.

²³⁹ Dreyfuss & Lawrence at 20, 29-30.

²⁴⁰ Dreyfuss & Lawrence at 24, 42-43.

²⁴¹ Transcript of Oral Argument in *Grutter v. Bollinger*, reproduced in *The New York Times*, April 1, 2003, p. 12.

²⁴² *Gratz v. Bollinger*, 539 U.S. 244 (2003)(citing App. to Pet. for Cert. 109a).

²⁴³ University of Texas at Austin, respondents, Brief in Opposition at 13-14 & n.6.

²⁴⁴ See Tim J. Wise, *Affirmative Action 74-76* (2005).

²⁴⁵ Dreyfuss & Lawrence at 15.

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.²⁴⁶

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.”²⁴⁷

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

4. Whites too have suffered a history of discrimination and there is no principled way to distinguish between the experiences of whites and blacks.²⁴⁸

Justice Powell posits that the United States is a “nation of minorities”²⁴⁹ 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.²⁵⁰ Powell is clearly referring only to white ethnic groups, since he cites only immigration

²⁴⁶ Tim J. Wise, *Affirmative Action 76* (2005)

²⁴⁷ Ronald J. Fiscus, *The Constitutional Logic of Affirmative Action 45* (1992). 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.

²⁴⁸ “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.” 438 U.S. at 287.

²⁴⁹ 438 U.S. at 292.

²⁵⁰ 438 U.S. at 292.

histories as evidence of the discrimination suffered by European immigrants.²⁵¹

In his view, white ethnics and blacks have both 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.”²⁵² Ethnicity theory minimizes the role of racism, present and structural, in impeding the progress and possibilities of racial minorities.²⁵³

Yet Powell’s assertions are plainly wrong, since the experiences of white ethnics and blacks are easily distinguishable.²⁵⁴ The fair-skinned European immigrants who faced discrimination upon their arrival in the United States were allowed to become white.²⁵⁵ They consider themselves white and they are considered white by others.²⁵⁶ As whites, they benefit from white privileges.²⁵⁷ 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.²⁵⁸

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.²⁵⁹ Consider a hypothetical. Imagine a space traveler from another planet who happened to visit and study the United States.²⁶⁰ This space traveler,

²⁵¹ 438 U.S. at 292 nn. 30-33.

²⁵² Ian Haney Lopez, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness, 59 *Stan. L. Rev.* 985, 1023, 1028 (2007).

²⁵³ *Id.* at 1022-23.

²⁵⁴ 438 U.S. at 387.

²⁵⁵ Joe R. Feagin, *The White Racial Frame* 77 (2010) (describing how poor Irish immigrants came to be accepted as white).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ See *supra* nn. ____ and accompanying text.

²⁵⁹ *Grutter*, 539 U.S. at 344-46 (Ginsburg, J., dissenting); *Bakke*, 438 U.S. at 387-402 (Marshall, J., dissenting).

²⁶⁰ 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

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.²⁶¹ 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.”²⁶² 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.²⁶³ 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.”²⁶⁴ 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.”²⁶⁵ 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.²⁶⁶ It is striking that Justice Powell ignores entirely Justice Marshall’s dissent, the historical literature on slavery and Jim Crow, and the facts of that race discrimination itself.

(1993); Derrick Bell, *Faces at the Bottom of the Well: The Permanence of Racism* 158-60 (1992) (chronicle of the space traders).

²⁶¹ *Id.*

²⁶² Joe R. Feagin, *Racist America* at 205.

²⁶³ See, e.g., 438 U.S. at 388 (Marshall, J, dissenting) (citing several histories documenting African American history).

²⁶⁴ 438 U.S. at 294.

²⁶⁵ 438 U.S. at 387 (Marshall, J., dissenting).

²⁶⁶ See, e.g., 438 U.S. at 388 n. 1.

Powell's statements equating the discrimination experienced by white ethnics 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."²⁶⁷ 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 whites 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."²⁶⁸ 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 whites 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; and that strict scrutiny is appropriate in

²⁶⁷ 438 U.S. at 287.

²⁶⁸ 438 U.S. at 400-01.

analyzing both racially discriminatory classifications and corrective affirmative action classifications.²⁶⁹

Historical evidence shows that whites 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 whites 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.

5. Equal protection must mean the same thing for persons of different races.²⁷⁰

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.”²⁷¹ These phrases has become a shibboleth in the Court’s affirmative action jurisprudence. Justice O’Connor repeats the phrase in her opinions in *Croson*, *Grutter*, and *Adarand*.²⁷²

Having asserted, against all evidence, that the discrimination suffered by whites 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 discrimination

²⁶⁹ 438 U.S. at 289-90.

²⁷⁰ “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.” 438 U.S. at 289-90. See also *Croson*, ---; *Adarand*, 515 U.S. 200, 218 (1995); *Grutter*, 539 U.S. 306, 323 (2003).

²⁷¹ 438 U.S. at 89-90.

²⁷² *Croson*, 488 U.S. at 494; *Grutter* at ---; *Adarand*, 515 U.S. at 218.

are treated the same as classifications that themselves discriminate and injure on the basis of race.²⁷³

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.²⁷⁴ New York can deny employment to recovering addicts taking methadone but permit employment to others arguably similarly situated, such as recovering alcoholics.²⁷⁵ 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.²⁷⁶ Gender classifications are analyzed under intermediate, not strict scrutiny, to allow more government latitude in regulating gender.²⁷⁷

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.²⁷⁸ 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.²⁷⁹ 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.²⁸⁰ 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.²⁸¹ The Court has also allowed a woman to be promoted rather than a man in a traditionally gender-segregated workplace.²⁸²

²⁷³ See *Bakke*, 438 U.S. at 294 & n.34.

²⁷⁴ *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955).

²⁷⁵ *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979).

²⁷⁶ *Frontiero v. Richardson*, 411 U.S. 677 (1973).

²⁷⁷ See, e.g., *United States v. Virginia*, 518 U.S. 532 (1996).

²⁷⁸ 424 U.S. 747 (1976)

²⁷⁹ 424 U.S. at 777.

²⁸⁰ 480 U.S. 149 (1987).

²⁸¹ 480 U.S. at 179-80.

²⁸² *Johnson v. Transportation 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.²⁸³ 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.²⁸⁴ The Court wrote that “as a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly ‘color-blind’ fashion.”²⁸⁵ 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. . . . it 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.²⁸⁶

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.²⁸⁷ 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.²⁸⁸

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

²⁸³ 448 U.S. 448 (1980).

²⁸⁴ 448 U.S. at 477-78.

²⁸⁵ 448 U.S. at 482.

²⁸⁶ 448 U.S. at 484-85.

²⁸⁷ 959 F 2d 313 (D.C. Cir 1992).

²⁸⁸ *Id.*

an eerie similarity with the interpretation of equal protection the Court gave us in *Plessy v. Ferguson*.²⁸⁹ 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.²⁹⁰

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 remnants of past discrimination.²⁹¹

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 have gone to a person of

²⁸⁹ 163 U.S. 537 (1896).

²⁹⁰ *Plessy*, 163 U.S. at 552.

²⁹¹ 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 Post-race 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.").

color. In this way, the Court prefers whites every time it limits or strikes down affirmative action.²⁹²

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

6. Remediating the effects of past societal discrimination is not a compelling government interest.²⁹³

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."²⁹⁴ 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."²⁹⁵ 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."²⁹⁶ And in *Grutter*, Justice O'Connor wrote that "Justice Powell rejected an interest in remediating societal

²⁹² 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. ____ (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 Cheryl I. Harris & Kimberly West-Faulcon, Reading *Ricci*: Whitening Discrimination, Racing Test Fairness, 58 UCLA L. Rev. 73 (2010).

²⁹³ "remediating 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." 438 U.S. at 307, 310.

²⁹⁴ 438 U.S. at 307, 310.

²⁹⁵ *Wygant*, 476 U.S. 267, 276 (1986).

²⁹⁶ *Croson*, 488 U.S. at 499. See also 488 U.S. 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 in the judgment).

discrimination because such measures would risk placing unnecessary burdens on innocent third parties.”²⁹⁷

Contrary to the Court’s rhetoric, the evidence I presented in Part I demonstrates that past societal discrimination is neither “amorphous” nor “ageless 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 G.I. Bill with the intention that it be locally administered, to leave undisturbed the racist segregation prevalent in both the North and the South.²⁹⁸ It was drafted this way at the behest of Southern democratic congressmen who wanted no federal interference in their regime of segregation.²⁹⁹ Federal policy encouraged and subsidized segregation and homogeneous white neighborhoods.³⁰⁰

²⁹⁷ *Grutter*, 539 U.S. at 324.

²⁹⁸ See *supra* nn. ____ and accompanying text.

²⁹⁹ See *supra* nn. ____ and accompanying text.

³⁰⁰ See *supra* nn. ____ 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

The racism of the private entities receiving G.I. 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 only underfunded historically black colleges.³⁰¹ As a result of the G.I. Bill, the educational gap between whites and blacks widened to the detriment of blacks.³⁰²

Due to the racist administration of the G.I. Bill's housing benefit, "it is more accurate to say that blacks could not use this [benefit]."³⁰³ 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."³⁰⁴ In the end, "the vast majority of FHA and VA mortgages went to white middle-class suburbs."³⁰⁵

The economic consequences of this government sponsored and subsidized racism have been devastating for the African American community. By 1984, only 40 per cent of black families owned homes, versus 70 per cent of white families, a statistic that has remained constant as recently as Fall, 2012.³⁰⁶ Rising house prices have generated enormous wealth for white families and have left most

billion dollars between 1944 and 1971. See McKenna at 5-7, 43; Frydl at 1, 186, 265; Katznelson at 116; Bennett, *When Dreams Came True* at 116.

³⁰¹ See supra nn. ___ and accompanying text. 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.

³⁰² Katznelson at 131-33; McKenna at 106-107; Turner & Bound at 145, 151; 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).

³⁰³ Katznelson at 139; Frydl at 237-38.

³⁰⁴ McKenna at 50; Massey & Denton at 37.

³⁰⁵ Onkst at 522; McKenna at 58; Massey & Denton at 54.

³⁰⁶ 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), www.census.gov/housing/hvs/files/qtr312/q312press.pdf; Katznelson at 164.

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 per cent of the net worth of whites.³⁰⁷ The recent financial crisis has made this gap even worse.³⁰⁸

Even this brief summary of the race discrimination influencing the enactment and administration of the G.I. 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 I and others have reached.³⁰⁹

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 really not 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

³⁰⁷ 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). Melvin Oliver & Thomas Shapiro, *Black Wealth/White Wealth 2* (1995).

³⁰⁸ Annie Lowry, *Wealth Gap Has Widened Among Races Since Recession*, N.Y. Times, April 28, 2013.

³⁰⁹ 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.

discrimination.³¹⁰ 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*.³¹¹ 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.³¹² Indeed, in *Croson* the Court rejected the evidentiary value of a voluminous congressional study documenting nationwide discrimination in the 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 our 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.

³¹⁰ See supra nn. ___ and accompanying text (preceding section on exceptions to Court's demand for "sameness" in equal protection).

³¹¹ *Croson*, 488 U.S. at 500.

³¹² See supra nn. ___ and accompanying text.

³¹³ See supra nn. ____ and accompanying text.

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 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

7. 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.

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."³¹⁴ See Girardeau A. Spann, Whatever, 65 Vand. L. Rev. (En Banc) 51 (2012). See also Girardeau A. Spann, The Dark Side of *Grutter*, 21 Const. Comment. 249 (2004).

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."

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 And 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

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, documented above.³²¹ 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

³¹⁶ 438 U.S. at 315. 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 *Grutter*, 539 U.S. at 329.

³¹⁹ *Fisher*, 570 U.S. ____, slip op. at 7 (2013).

³²⁰ Ronald J. Fiscus, *The Constitutional Logic of Affirmative Action* 13 (1992).

³²¹ See nn. ___ and accompanying text.

racism.³²² In a racist society like the United States³²³, 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"³²⁴ and the precise amount of diversity necessary to achieve educational benefits.³²⁵

In addition to distracting us all 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 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."³²⁶ 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 college³²⁷: "To the extent that

³²² Thomas F. Pettigrew & Linda R. Tropp, Does Intergroup Contact Reduce Prejudice? Recent Meta-Analytic Findings, in Stuart Oskamp, ed., *Reducing Prejudice and Discrimination* 93, 110 (2000) ("meta-analytic data support the contention that optimal intergroup contact should be a critical component of any successful efforts to reduce prejudice.").

³²³ The most recent studies of implicit bias show that fully 75 percent of whites manifest an automatic preference for whites, and a corresponding lack of preference for blacks. Mahzarin R. Banaji & Anthony G. Greenwald, *Blind Spot* 208 (2013).

³²⁴ *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) [hereinafter cited as *Diversity Paradox*].

³²⁵ *Fisher*, 570 U.S. ___, slip op. at 10 (2013).

³²⁶ 539 U.S. at 330.

³²⁷ *Diversity Paradox* 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.").

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.”³²⁸

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 corps³²⁹, 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.”³³⁰

The diversity rationale is, then, deeply problematic. It steers us away from the far more important discussion about how to remedy extensive government-subsidized racism in the administration of G.I. Bill benefits.³³¹ 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.³³² 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

³²⁸ Diversity Paradox at 130.

³²⁹ 539 U.S. at 330-32.

³³⁰ 539 U.S. at 332.

³³¹ See also Derrick Bell, *Diversity’s Distractions*, 103 Colum. L. Rev. 1622 (2003)[hereinafter cited as *Diversity’s Distractions*].

³³² This disparaging of the importance of race is evident in Justice Powell’s formulation: “petitioner’s special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.”

a remedy for past discrimination rests on evidentiary underpinnings that are less subject to debate and judicial or public whim.

III. ASSESSING THE DOCTRINES OF DELUSION

A. 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.³³³ 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.³³⁴ 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.

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

³³³ See supra nn. ___ and accompanying text.

³³⁴ See supra nn. ___ and accompanying text.

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. And 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 whites. 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. Justice Powell’s assertions should be deemed silly, even laughable, but for the harm they have enabled the Court to perpetuate.

The Court tells us 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.”³³⁵ Despite the superficial appeal of this grand rhetoric, the statement is belied by the Court’s own precedents showing that the Court regularly allows the guarantee of equal protection to mean different things for different

³³⁵ See, e.g., *Bakke*, 438 U.S. at 289-90.

people. In particular, the Court has allowed 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 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 whites 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. Once again, the Court protects the interests of whites in the name of equal protection.

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.

B. Belief in the Doctrines of Delusion

Supreme Court opinions both reflect and shape public opinion. The reasoning and arguments that the Court expresses in its opinions are influential in creating the terms of public discourse about race.³³⁶ As just one example, consider the now national currency of the term "diversity" in relation to affirmative action. "Diversity" was a word rarely invoked to describe racial composition before the *Bakke* and *Grutter* cases. The Court singlehandedly transformed a concept of remedy for racial discrimination into a discourse about "diversity."

Most whites believe in the doctrines of delusion. There is a close correspondence between the Court's premises and conclusions about affirmative action and white views on the same issues. Most whites disapprove of giving presumed "preferences to blacks and other minorities."³³⁷ Many whites also think that affirmative action constitutes "reverse discrimination" against whites.³³⁸ Remarkably, a recent study found that whites now view themselves as the primary victims of racism. According to this study, "changes in Whites'

³³⁶ Cf. Fiscus, *Constitutional Logic of Affirmative Action* at 7.

³³⁷ Joe R. Feagin, *Racist America* 124 (2d ed. 2010) [hereinafter cited as *Racist America*].

³³⁸ *Racist America* at 124,198-99. On the overrepresentation of whites in higher education, see *supra* nn. ___ and accompanying text.

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.”³³⁹

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.³⁴⁰ In the employment context, very few white people ever report being victims of race discrimination.³⁴¹ Only four percent of race discrimination claims filed with the EEOC are filed by whites.³⁴² And claims filed by whites are usually less credible than claims brought by people of color.³⁴³ One would think that if race discrimination against whites was a serious problem, there would at least be some evidence of it.

On the other hand, the prevalence of antiblack racism and racial inequality is well documented. Blacks and other people of color file ten times as many discrimination complaints than whites, even though whites constitute a large majority of the workforce.³⁴⁴ And unlike whites, blacks actually do experience race discrimination. According to one expert, “[o]ver the course of a normal lifetime, a typical black man or woman likely faces thousands of instances of blatant, covert, or subtle discrimination at the hands of whites.”³⁴⁵

Most whites also believe that they are the “innocent victims” of affirmative action. 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

³³⁹ Michael I. Norton & Samuel R. Sommers, Whites See Racism as a Zero-Sum Game They are Now Losing, 6 *Perspectives on Psychological Science*, 215-18 (2011).

³⁴⁰ See Jordan Weissman, The Best New Argument for Affirmative Action, *The Atlantic*, July 2013 (“white 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.”).

³⁴¹ Tim J. Wise, *Affirmative Action* 35 (2005) [hereinafter cited as *Affirmative Action*].

³⁴² *Affirmative Action* at 35.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Racist America* at 143. See also Joe R. Feagin & Melvin Sykes, *Living with Racism: The Black Middle-Class Experience* (1994)

of affirmative action.”³⁴⁶ The Court’s easy willingness to assume the validity of white innocence and victimization without evidence surely fuels this belief. Despite deep white beliefs in this idea, neither white innocence nor victimization capture the realities of unjustly gained educational enrichment and relatively unconvincing credentials.

There is also great 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.³⁴⁷ Whites enjoy a rosy view of the racist past of the United States and “the extreme oppressiveness of U.S. slavery is thus not taken seriously by many white Americans.”³⁴⁸ The evidence shows that 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.³⁴⁹ 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.”³⁵⁰ These are remarkable beliefs, since these polls were taken *before* enforcement of *Brown vs. Board of Education* and *before* enactment of the Civil Rights Act of 1964.³⁵¹ This was the time of state-mandated separate and unequal schools and massive Southern resistance to desegregation. This was the time of unlimited, open race discrimination in employment. This was the time of unabashed, federally-subsidized race discrimination in higher education, housing and lending.³⁵² In 1959, black men had average weekly earnings that were approximately 57 percent of the earnings of white men.³⁵³ The fact that whites could believe that blacks were treated equally under factual circumstances demonstrating vast inequality speaks volumes about the degree of white denial of racial reality.

³⁴⁶ Fiscus, *Constitutional Logic* at 7.

³⁴⁷ *Racist America* at 88.

³⁴⁸ *Racist America* at 88-91.

³⁴⁹ *Racist America* at 88.

³⁵⁰ Tim Wise, *Colorblind* 65, 197 n. 42 (2010); Tim J. Wise, *Affirmative Action* 39 (2005).

³⁵¹ See Gerald Rosenberg, *The Hollow Hope* (1993)(demonstrating that *Brown* made little difference for 10 years after the decision).

³⁵² See *supra* nn. ____ and accompanying text.

³⁵³ Census data, 1960. See James P. Smith & Finis R. Welch, *Black/White Male Earnings and Employment*, in F. Thomas Juster, ed., *The Distribution of Economic Well-Being* 233 (1977).

Although conditions for African Americans have certainly improved, especially since World War II, whites continue to deny the significance of, and even the existence of, race discrimination against blacks.³⁵⁴ The majority of whites “do not believe there is major racial discrimination widespread across this society,” and instead “reconcile the continuing reality of racial inequality with their beliefs about little discrimination by blaming people of color for their lack of effort.”³⁵⁵ This belief 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 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 completely disproved by the history of the G.I. Bill’s federally-subsidized racial preferences for whites and race discrimination against blacks.³⁵⁸ The idea that whites have not benefitted from racism against blacks is simply irreconcilable with the historical record.³⁵⁹

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-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.”³⁶⁰ 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 white entitlement to the unjustly gained economic and educational advantages of white racism. For whites, there is no more self-serving a set of interlocking beliefs than to

³⁵⁴ Racist America at 88.

³⁵⁵ Racist America at 101.

³⁵⁶ Mahzarin R. Banaji & Anthony G. Greenwald, *Blind Spot* 208 (2013)[hereinafter cited as Banaji & Greenwald].

³⁵⁷ Racist America at 12 (citing Blendon, et. al., “The Public and the President’s Commission on Race,” p. 66).

³⁵⁸ See supra nn. ____ & accompanying text.

³⁵⁹ See supra nn. ____ & accompanying text.

³⁶⁰ See Feagin, *Racist America* at 88, citing Glenn Adams, Teceta Thomas Tormala, and Laurie T. O’Brien, “The Effect of Self-Affirmation on Perception of Racism,” 42 *Journal of Experimental Psychology* 616-26 (2006).

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. This is the set of beliefs that, though provably false, makes whites feel good about the unjust enrichment they have attained at the expense of blacks.

IV. ASSESSING THE COURT

Although we are still taught that the Supreme Court's role is to protect minority rights from overreaching by the majority, the affirmative action cases teach us that that understanding is wrong.³⁶¹ 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."³⁶² Far from being countermajoritarian, the Court is principally a majoritarian institution acting consistent with majoritarian beliefs and values.³⁶³ 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."³⁶⁴

We saw in the previous section that there is much congruence between the Court's beliefs about race and affirmative action and the opinions of whites. This should not be surprising, for there is little reason to think that the Supreme Court, composed mostly of elite whites, would hold views that vary significantly from those of other whites. As described by sociologist Joe Feagin,

³⁶¹ Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1-8, 67 (1996) [hereinafter cited as Klarman].

³⁶² Michael J. Klarman, *Has the Supreme Court Been Mainly a Friend or a Foe to African Americans?*, Scotus Blog, Feb. 1, 2010, available at <http://www.scotusblog.com/2010/02/has-the-supreme-court-been-mainly-a-friend-or-a-foe-to-african-americans/>.

³⁶³ See Barry Friedman, *The Will of the People* 14, 369-72 (2009); Girardeau A. Spann, *Race Against the Court* 3, 19-22 (1993).

³⁶⁴ Klarman, *supra* n. __ at 17-18. See also Spann, *Race Against the Court* at 3 {"the Supreme Court is better understood as serving the veiled majoritarian function of promoting popular preferences at the expense of minority interests."}.

Given the fact that a greatly disproportionate share of decisionmakers at the top of the U.S. judicial and political system are white, it is not surprising that white assumptions and interests generally predominate. The assumptions of most whites in control of these institutions include: 1) the idea that racial inequality is no longer a serious societal problem needing significant government intervention; and 2) the notion that the legal system currently operates in a generally fair and nonracist fashion.³⁶⁵

Judges are raised within the same culture as the rest of us and so share the biases and views held by society at large.³⁶⁶ Implicit bias in favor of whites is pervasive.³⁶⁷ Seventy-five percent of Americans display implicit preferences for whites relative to blacks.³⁶⁸

These same implicit biases affect judges, jurors, lawyers, and courtroom processes. One study of the implicit bias of judges concluded that judges showed an implicit preference for whites over blacks.³⁶⁹ Judges who showed a preference for whites, when primed to believe a defendant was black, delivered harsher sentences.³⁷⁰ At least one federal judge attempts to counteract the implicit biases of jurors in his courtroom with special jury instructions.³⁷¹ Other studies show that defense attorneys and jurors also show similar degrees of implicit bias.³⁷² Responding to the prevalence of implicit bias in

³⁶⁵ Racist America at 145.

³⁶⁶ See Spann, *Race Against the Court* at 19, 22 (“Because judges are well socialized before they assume office, they will also have internalized the biases and predispositions that enable the majoritarian branches to view undervaluation of minority interests as acceptable governmental behavior.”)

³⁶⁷ Banaji & Greenwald at 208.

³⁶⁸ *Id.*

³⁶⁹ See Jeffrey J. Rachlinski et al., *Does Unconscious Bias Affect Trial Judges?*, 84 *Notre Dame L. Rev.* 1195 (2009); Justin D. Levinson & Robert J. Smith, eds., *Implicit Racial Bias Across the Law* 22 (2012).

³⁷⁰ *Id.*

³⁷¹ Hon. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 *Harv. L. & Pol’y Rev.* 149 (2010).

³⁷² See Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 *DePaul L. Rev.* 1539, 1542 (2004); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 *W. Va. L. Rev.* 307 (2010).

courtrooms, the National Center for State Courts has produced a guide, “Helping Courts Address Implicit Bias.”³⁷³

The Supreme Court’s affirmative action decisions largely implement white biases and protect white interests. In these cases the Court applies strict scrutiny and has struck down affirmative action programs enacted at the state and local level³⁷⁴, and at the federal level.³⁷⁵ In both of these instances, the Court has struck down legislative conclusions that affirmative action was warranted.

Because of its willingness to strike down legislatively-created affirmative action, the Court has made itself our nation’s primary policymaker on racial issues. This is a deeply ironic and disturbing result for several reasons. First, it is Congress, not the Court, that has the explicit constitutional power to enforce the Fourteenth Amendment.³⁷⁶ 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 slaves³⁷⁷ and disparaging blacks as “so far inferior, that they had no rights which the white man was bound to respect.”³⁷⁸ The Court also approved of white dominion and control over the lands, and eventually the fates, of American Indians.³⁷⁹ After enactment of the Fourteenth Amendment, the Court has: struck down laws protecting the civil rights of blacks³⁸⁰; enforced segregation³⁸¹; permitted the racist internment of Japanese-Americans³⁸²; prevented redress for structural inequality³⁸³; permitted resegregation of public education³⁸⁴; and struck down protective

³⁷³ Available at http://www.ncsconline.org/D_Research/ref/implicit.html.

³⁷⁴ Croson, 488 U.S. 469 (1989).

³⁷⁵ Adarand, 515 U.S. 200 (1995).

³⁷⁶ See U.S. Const. Am. 14, Section 5.

³⁷⁷ Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

³⁷⁸ Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

³⁷⁹ Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

³⁸⁰ The Civil Rights Cases, 109 U.S. 3 (1883).

³⁸¹ Plessy v. Ferguson, 163 U.S. 537 (1896).

³⁸² Korematsu v. United States, 323 U.S. 214 (1944).

³⁸³ Washington v. Davis, 426 U.S. 229 (1976).

³⁸⁴ Parents Involved in Community Schools. v. Seattle Sch. Dist No. 1, 551 U.S. 701 (2007).

provisions of the Voting Rights Act³⁸⁵. While the Warren Court rendered important decisions enforcing minority rights, most famously *Brown v. Board of Education*³⁸⁶, that Court is now understood to be an anomaly.³⁸⁷

We have seen that the Court's primary result in affirmative action cases is to protect the economic, educational and social status of whites. One could ask why, if that is the Court's primary goal, didn't the Court 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."³⁸⁸ By upholding its doctrinal formulations that deny racial equality, the Court avoids the more objectionable accusation that it is engaged in pure politics.³⁸⁹

The Court's majoritarian orientation, the congruence between the Court's and the general public's hostility toward affirmative action, virtually guarantees that the Court will continue limiting affirmative action. *Fisher*'s nod in the direction of stricter application of strict scrutiny is but one small step in this direction.³⁹⁰ The Court will have additional opportunities to curtail affirmative action next term, in ruling on the validity of Michigan's ban on affirmative action, and again in the *Fisher* case, should it decide to re-hear the case on appeal from reconsideration in the courts below.

V. 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 and realtors. Due to this race discrimination, promoted and subsidized by the federal

³⁸⁵ *Shelby County v. Holder*, 500 U.S. ____ (2013).

³⁸⁶ *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954).

³⁸⁷ 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 decisionmaking.")

³⁸⁸ *Girardeau A. Spann, Whatever*, 65 *Vand. L. Rev. (En Banc)* 51 (2012).

³⁸⁹ *Id.*

³⁹⁰ 570 U.S. at ____, slip op. at 13 (2013).

government, black veterans were denied opportunities for higher education and home ownership. The economic consequences of this race discrimination have been devastating for the African-American community.

Affirmative action was originally conceived as a remedy for this 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 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." The Court recites and relies upon these doctrines of delusion in all its affirmative action cases since *Bakke*, and most recently in *Fisher*. 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 the contrary evidence, 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 general public's views on race and affirmative action show the Court to be principally a majoritarian institution that protects majoritarian interests. In the context of 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."³⁹¹ 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

³⁹¹ Ta-Nehisi Coates, *Fear of a Black President*, Sept., 2012, available at <http://www.theatlantic.com/magazine/archive/2012/09/fear-of-a-black-president/309064/>.

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.