Footnote 43: Recovering Justice Powell's Anti-Preference Framing of Affirmative Action

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For more than four decades, scholars have been debating the constitutional parameters of affirmative action. Central to this debate is Justice Powell's opinion in Regents of the University of California v. Bakke. *For good or bad, that opinion has set not only the doctrinal terms on which lawyers litigate and judges adjudicate the constitutionality of affirmative action, but the normative terms on which many in the public arena discuss the policy as well. However, in all the controversy and contestation over affirmative action, little attention has been paid to footnote forty-three of Justice Powell's* Bakke *opinion. There, Justice Powell suggested that "[r]acial classifications in admissions conceivably could serve a fifth purpose . . . fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures." While elsewhere in* Bakke *Justice Powell consistently described affirmative action as a "preference," in footnote forty-three he maintained that if "race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that [affirmative action is] no 'preference' at all." For the most part, scholars have ignored this footnote. Moreover, no Supreme Court justice has ever referenced footnote forty-three, and only one judge has cited it.*

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This neglect is unjustified. Footnote forty-three could be to affirmative action case law what United States v. Carolene Products Co.*'s footnote four has been to debates over the remedial scope of equal protection jurisprudence more generally — an analytical, normative, and doctrinal anchor. More precisely, footnote forty-three could fundamentally shift the debate about affirmative action in important ways. For one thing, footnote forty-three provides doctrinal support for the reframing of affirmative action away from the misleading conceptualization of the policy as a preference to a more appropriate understanding of affirmative action as a countermeasure. Such a countermeasure conceptualization would make the application of strict scrutiny to affirmative action normatively and doctrinally suspect and would give proponents of affirmative action offensive, rather than merely defensive, arguments in support of the policy. Finally, taking the implications of footnote forty-three seriously could, and should, shape the next wave of affirmative action litigation, including the trajectory of the lawsuits against Harvard University and the University of North Carolina.*

Drawing on footnote forty-three, this Essay urges progressive scholars, lawyers, and judges to do what, for the past forty years, they have largely not done: force conservatives — on and off the courts — to affirmatively defend, rather than merely take for granted, their claim that affirmative action is a racial preference. That defensive posture would require conservatives to rebut an alternative claim — a claim with ever-growing empirical backing — that affirmative action should be understood as a countermeasure that mitigates the inequality problems Justice Powell articulated in footnote forty-three by improving the degree to which admissions regimes effectuate a "fair appraisal of each individual's academic promise."

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INTRODUCTION

For more than four decades, scholars have been debating the constitutional parameters of affirmative action. Central to this debate is Justice Powell's opinion in *Regents of the University of California v. Bakke*.[1] For good or bad, that opinion has set not only the doctrinal terms on which lawyers litigate and judges adjudicate the constitutionality of affirmative action,[2] but also the normative terms on which many in the public arena discuss the policy.[3] Indeed, according to Michael Selmi, "all of the arguments that have developed into affirmative action folklore were present" in the *Bakke* litigation.[4] These include:

[1] 438 U.S. 265, 269-324 (1978).

[2] *See* Ofra Bloch, *Diversity Gone Wrong: A Historical Inquiry into the Evolving Meaning of Diversity from* Bakke *to* Fisher, 20 U. PA. J. CONST. L. 1143, 1158-59, 1164 (2018); *see also* Charles F. Abernathy, *Affirmative Action and the Rule of* Bakke, 64 A.B.A. J. 1233, 1235-36 (1978); John C. Jeffries, Jr., Bakke *Revisited*, 2003 SUP. CT. REV. 1, 2-5, 10-13, 22-23 (2003); Samuel E. McCargo, *Taney's Negroes: Can the Court Un-Ring the Bell?*, 94 MICH. B.J. 42, 43-44 (2015); Alan J. Meese, Bakke *Betrayed*, 63 L. & CONTEMP. PROBS. 479, 484,496-97 (2000); Richard A. Posner, *The* Bakke *Case and the Future of "Affirmative Action,"* 67 CALIF. L. REV. 171, 188-89 (1979); David Simson, *Whiteness as Innocence*, 96 DENV. L. REV. 635, 659-60 (discussing the influence of Justice Powell's *Bakke* opinion on contemporary doctrine regarding standard of review and permissible purposes for affirmative action programs); Dawn R. Swink, *Back to* Bakke*: Affirmative Action Revisited in Educational Diversity*, 2003 BYU EDUC. & L.J. 211, 217 (2003).

[3] *See, e.g.*, Fisher v. Univ. of Tex., 570 U.S. 297, 303, 306 (2013) (relying on Justice Powell's *Bakke* opinion); Grutter v. Bollinger, 539 U.S. 306, 323 (2003) ("Since this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies."); *see also* Michael Selmi, *The Life of* Bakke*: An Affirmative Action Retrospective*, 87 GEO. L.J. 981, 995 (1999) ("Although no other Justice joined Powell's opinion in its entirety, his opinion has guided — indeed one might say determined — all future decisions on affirmative action."); Simson, *supra* note 2, at 661-64 (discussing how Justice Powell's *Bakke* opinion modeled arguments that affirmative action victimizes innocent whites, is inconsistent with racial equality, and thus ought to be strictly limited). Moreover, the diversity rationale that emerges from Justice Powell's opinion not only thoroughly over-determines discussions about affirmative action, but also about race more generally. *See, e.g.*, Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 324-27 (2017) (arguing that the entrenchment of the diversity rationale changed the meaning of nonwhite racial identity, thus incentivizing white people to "reverse pass" as nonwhite to derive personal benefits). On the dominance of the diversity rationale in framing problems of racial inequality, see generally Anita Bernstein, *Diversity May Be Justified*, 64 HASTINGS L.J. 201 (2012); Bloch, *supra* note 2; Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L.J. 811 (1998); Stephen M. Rich, *What Diversity Contributes to Equal Opportunity*, 89 S. CAL. L. REV. 1111 (2016).

[4] Selmi, *supra* note 3, at 988.

> views on the appropriate standard of judicial review; discussions on whether the Davis program could be treated as a form of benign discrimination; distinctions between goals and quotas; comparisons to veterans' preferences; distinctions between affirmative action in hiring and layoffs; discussions on the importance of diversity; questions of stigma, stereotyping, and role models; and extended discussions on the potential efficacy of class-based affirmative action as a substitute for the use of race-based programs.[5]

Absent from the list of issues Selmi describes are questions about the remedial potential of affirmative action that Justice Powell discussed in footnote forty-three of his opinion. There, in describing the various purposes that affirmative action could serve, Justice Powell suggested that "[r]acial classifications in admissions conceivably could serve a fifth purpose . . . fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures."[6] While elsewhere in *Bakke* Justice Powell consistently described affirmative action as a "preference,"[7] in footnote forty-three he maintained that if "race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that [affirmative action is] no 'preference' at all."[8]

The oversight of footnote forty-three in the legal academy is widespread. As best I can tell, legal scholars have cited footnote forty-three only forty-six times.[9] Moreover, up until now, scholars have not subjected the footnote to an in-depth or article-length treatment. Nor does it seem that the footnote has a robust presence in casebooks.[10]

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[5] *Id.*

[6] *Bakke*, 438 U.S. at 306 n.43 (Powell, J.).

[7] *E.g.*, *id.* at 303 (discussing how various conceptual issues are less complex in context of gender classifications compared to the "context of racial and ethnic preferences"). In fact, Justice Powell used this framing even in a different part of footnote forty-three itself. *Id.* at 306 n.43 (discussing reparations as a "justification for racial or ethnic preference"). However, as this Essay shows, footnote forty-three also contains the seeds for undoing this very preference framing. *See infra* Part II.

[8] *Id.* at 306 n.43.

[9] Searches on Westlaw result in 46 references to Powell's footnote forty-three. Westlaw in full text journals & law reviews: Adv: "306 n.43" OR (306 +5 "n.43").

[10] As best I can tell, the only casebooks that include footnote forty-three as part of the *Bakke* excerpt are five casebooks from the 1980s. They are (1) GUNTHER ET AL., CONSTITUTIONAL LAW (10th ed. 1980); GUNTHER ET AL., CONSTITUTIONAL LAW (11th ed. 1985); (2) WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW (5th ed. 1980); WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW (6th ed. 1986); (3) GEOFFREY R. STONE ET AL.,

What's more, no Supreme Court justice has ever referenced footnote forty-three, and only one judge has cited to the footnote.[11]

This Essay argues that the neglect of footnote forty-three is unjustified. Footnote forty-three could be to affirmative action case law, particularly in the context of higher education, what the robustly cited *Carolene Products*' footnote four[12] has been to disputes about equal protection jurisprudence more generally — an analytical, normative, and doctrinal anchor.[13] More precisely, footnote forty-three could fundamentally shift the debate about affirmative action in important ways. For one thing, footnote forty-three provides doctrinal support for the reframing of affirmative action. Instead of the misleading conceptualization of the policy as a preference, footnote forty-three provides a more appropriate understanding of affirmative action as a countermeasure.[14] The argument would be that affirmative action helps

CONSTITUTIONAL LAW (1st ed. 1986); (4) EDWARD L. BARRETT ET AL., CONSTITUTIONAL LAW (6th ed. 1981); (5) JEROME A. BARRON ET AL., CONSTITUTIONAL LAW (2d ed. 1982); JEROME A. BARRON ET AL., CONSTITUTIONAL LAW (3d ed. 1987). None of the current casebooks I examined included footnote forty-three. *See, e.g.,* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, New York: Wolters Kluwer (5th ed. 2017). For extensive background on search terms and methodology utilized see generally Professor Devon Carbado, Appendix of Search Terms & Methodology (on file with author).

[11] Berkley v. United States, 48 Fed. Cl. 361, 370 (2000).

[12] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[13] Footnote four in *Carolene Products* has been cited over 2,000 times in law reviews. *See Carolene Prods.*, 304 U.S. at 152 n.4. In making the analogy to *Carolene Products*, my point is more historical than substantive. Statements of the Supreme Court, even if they don't formally decide an issue in a case (as footnote four in *Carolene Products* did not and footnote forty-three in *Bakke* did not either), can provide arguments that lead to broad theoretical reconceptualizations of the purposes underlying fields like equal protection law. *See id.* ("Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."). For example, it was this statement in *Carolene Products* that became the foundation of John Hart Ely's "process defect theory" of equal protection. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 345 (1987). It is my argument in this Essay that footnote forty-three in *Bakke* could serve a similar role of providing an anchor for the reconceptualization of affirmative action as a countermeasure — a reconceptualization that I am hoping will fare better in the long run than that prompted by *Carolene Products*' footnote four. *See* Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 6-7 (2013) (describing how equal protection law has moved away from the "minority-protective oversight" contemplated by *Carolene Products* footnote four).

[14] For one of the earliest articulations of an anti-preference framing of affirmative action, see generally Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative*

to effectuate precisely the interests Justice Powell sets forth in the footnote, to wit, a "fair appraisal of each individual's academic promise" and the mitigation of "established inaccuracies in predicting academic performance."[15] It does so by counteracting race-based disadvantages that students of color face as they prepare for college, as they put together their admissions file, and as that file is reviewed by admissions officers. At each of these steps, systematic biases introduce inaccuracies that understate the academic accomplishments and promise of those students. Affirmative action helps offset the disadvantages those biases create.

As Luke Harris observed roughly twenty years ago, traditional merit criteria like standardized test scores and GPA are particularly "untrustworthy" with respect to African Americans in that they underpredict their academic promise.[16] Indeed, for Harris, were a university admissions process to rely on traditional merit criteria without employing affirmative action, that university would end up discriminating against African Americans.[17] Harris too, then, views affirmative action as a countermeasure, not a preference, that is able to offer African Americans "greater equality of opportunity in a social context marked by pervasive inequalities, one in which many institutional practices work to impede a fair assessment of [their] capabilities."[18] According to Harris, footnote forty-three not only opens the door to conceptualizing affirmative action along the lines this Essay proposes, it also encourages us to consider whether the Fourteenth Amendment prohibits the use of traditional merit criteria given their disparate impact on African Americans.[19]

Action Debate, 11 HARV. BLACKLETTER L.J. 1 (1994). *See also* Luke Charles Harris, *Rethinking the Terms of the Affirmative Action Debate Established in* The Regents of the University of California v. Bakke *Decision*, 6 RES. POL. & SOC'Y 133 (1999) [hereinafter *Rethinking the Terms*]. As I discuss in further detail below, too few proponents of affirmative action have supported such a framing. *See infra* Part I. This Essay argues that taking footnote forty-three seriously should help boost arguments in favor of such a framing by providing it with explicit support in what is otherwise very hostile Supreme Court affirmative action doctrine. *See infra* Part II.

15 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 n.43 (1978).

16 Harris, *Rethinking the Terms*, *supra* note 14, at 145.

17 *Id.* at 147.

18 Harris here draws from a prior coauthored paper. *See* Harris & Narayan, *supra* note 14, at 4.

19 Harris, *Rethinking the Terms*, *supra* note 14, at 144. For an excellent antipreference conceptualization of Title VII jurisprudence and specifically disparate treatment doctrine, see Noah D. Zatz, *Special Treatment Everywhere, Special Treatment Nowhere*, 95 B.U. L. REV. 1155 (2015).

A final reason a countermeasure framing of affirmative might be important is that this framing would make the application of strict scrutiny to affirmative action normatively and doctrinally suspect. Which is to say, it is much easier for opponents of affirmative action to argue that the policy triggers strict scrutiny when affirmative action is conceptualized as a preference than it would be if affirmative action were viewed as a countermeasure.[20]

Admittedly, one could accept the countermeasure framing of affirmative action this Essay proposes and still insist that the policy should trigger strict scrutiny. The argument would be that understanding affirmative action as a countermeasure still requires institutions to take race into account and taking race into account, for whatever reason, automatically triggers heightened scrutiny. [21] Under this view, the countermeasure approach could shape *how* a court apples strict scrutiny but not *whether* that regime kicks in.[22]

My response to the preceding argument is twofold. First, the countermeasure framing of affirmative action I am offering is intended to intervene into broad public debates about the policy, not just litigation and doctrinal ones. While claims about tiers-of-scrutiny are not particularly salient in these debates, the preference framing of affirmative action is a central feature of the discourse. In this respect, the countermeasure conceptualization of the policy I am propounding could challenge that dominant understanding.

Second, Justice Powell's concurring opinion in *Bakke* was written at a moment in which the race per se model of equal protection had not yet taken hold. In other words, there was a very real question about whether courts should subject race conscious governmental decision-making to something like a tiered approach. Under this approach, courts would apply intermediate scrutiny (or rational basis) to benign or remedial governmental uses of race and strict scrutiny to pernicious or invidious ones.

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[20] *Cf.* Simson, *supra* note 2, at 657-59 (analyzing how Justice Powell's conclusion that strict scrutiny should apply was based on a construction of affirmative action as preferential treatment of nonwhite groups that victimized "innocent" whites).

[21] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 202 (1995) ("[S]trict scrutiny is the proper standard for analysis of all racial classifications, whether imposed by a federal, state, or local actor.").

[22] A court could, for example, employ the countermeasure framing of affirmative action to broaden the compelling state interest justification for affirmative action beyond the diversity rationale.

To be sure, Justice Powell seemed to have rejected the benign/invidious dichotomy.[23] Moreover, Justice Powell clearly viewed the affirmative action plan at issue in *Bakke* not simply as a racial classification but as a form of racial discrimination.[24] Reading footnote forty-three against that backdrop might lead one to conclude that the footnote was not intended to place affirmative action outside of the boundaries of strict scrutiny but a way of saying that, within those boundaries, the policy could serve a "fifth purpose" — namely, the "fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures." Fair enough.

But it is also fair to say that there is support in Justice Powell's opinion for the proposition that courts should not apply strict scrutiny to affirmative action plans that function as countermeasures. To begin with, Justice Powell repeatedly links his claims about race and strict scrutiny to concerns about racial preferences or racial discrimination. Consider the following examples:

- "Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white 'majority' cannot be suspect if its purpose can be characterized as 'benign.'"[25]
- "Once the artificial line of a 'two-class theory' of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived 'preferred' status of a particular racial or ethnic minority are intractable."[26]
- "The concepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgments. As observed above, 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. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of

[23] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294-99 (1978).

[24] *See id.* at 294 (noting that "Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as 'benign'").

[25] *Id.*

[26] *Id.* at 295.

> race and nationality, for then the only 'majority' left would be a new minority of white Anglo-Saxon Protestants."[27]

- "Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary."[28]

- "Moreover, there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is, in fact, benign."[29]

- "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."[30]

- "But we have never approved preferential classifications in the absence of proved constitutional or statutory violations."[31]

In each of the above-quoted passages, Justice Powell's normative concerns about affirmative action seem to derive from a conceptualization of the policy as a preference or as a form of racial discrimination — not, as I argue, as a countermeasure.

It bears emphasizing as well that, for Justice Powell, a significant problem with the medical school's affirmative action policy was that it operated as a racial quota. Scholars have tended to locate Powell's concern in this respect to his "narrow tailoring" analysis. But, for Powell, the quota feature of the affirmative action plan was also at least somewhat relevant to whether strict scrutiny should apply to begin with. According to Powell:

> [T]he operation of petitioner's special admissions program is quite different from the remedial measures approved in those cases. It prefers the designated minority groups at the expense

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[27] *Id.* at 295-96.
[28] *Id.* at 297.
[29] *Id.* at 298.
[30] *Id.*
[31] *Id.* at 302.

> of other individuals who are totally foreclosed from competition for the 16 special admissions seats in every Medical School class. Because of that foreclosure, some individuals are excluded from enjoyment of a state-provided benefit — admission to the Medical School — they otherwise would receive. When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect.[32]

One can read this passage to suggest that part of what makes a classification suspect and therefore subject to strict scrutiny is whether it effectuates precisely the kind of foreclosure Powell describes.

There are two other reasons to believe that, for Justice Powell, affirmative action plans that operate as countermeasures should not trigger strict scrutiny. Consider first Powell's claims about the harms racial preferences impose on "innocent" whites.[33] According to Justice Powell, "The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious."[34] Powell also maintained that the medical school's affirmative action was problematic because it compelled "innocent persons in respondent's position to bear the burdens of redressing grievances not of their making."[35] Whatever the normative purchase of Powell's concerns about the impact of racial preferences on "innocent" whites, those concerns would have considerably less force against an understanding of affirmative action as a countermeasure. More to the point, it's hard to imagine that Justice Powell would mobilize arguments about "innocent" whites against the kind of affirmative action plan he envisioned in footnote forty-three. Indeed, consistent with that footnote, one might say that affirmative action plans that facilitate the "fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures" would not burden whites (in the sense of operating as a racial preference) but unburden African Americans (in the sense of operating as a countermeasure).

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[32] *Id.* at 305.

[33] For a more general discussion of how concerns about white innocence figure in law, see Simson, *supra* note 2. *See also* Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297, 313 (2015).

[34] *Bakke*, 438 U.S. at 294 n.34.

[35] *Id.* at 298.

Finally, Justice Powell's discussion of the desegregation cases provides another axis along which to substantiate the claim that there is some evidence that, from Justice Powell's perspective, courts should not apply strict scrutiny to affirmative action plans that operate as countermeasures. Crucial to Justice Powell's discussion of the desegregation cases is the view that racial preferences should not, juridically speaking, be treated like desegregation remedies. Justice Powell's thinking was that, unlike racial preferences, the desegregation cases "involved remedies for clearly determined constitutional violations."[36] To put Justice Powell's point another way, because racial preferences are not a corrective for some clearly established predicate wrong, they should not benefit from the more relaxed standard of review that applies to the desegregation remedies.

To bring our discussion back to footnote forty-three, one could argue that if an affirmative action plan operated as a countermeasure (not a racial preference) in the way footnote forty-three contemplates, in a remedial sense, that plan would be analogous to the desegregating cases Justice Powell described. The notion would be that, like desegregation remedies, the purpose of the affirmative action plan would be to correct for or mitigate the negative effects of a particular kind of predicate wrong — in this case, biased and inaccurate assessments of the academic abilities of African American students and biased and inaccurate predictions of those students' academic promise. Under this framing of the affirmative action plan, something other than strict scrutiny would be the appropriate standard of judicial review.

Importantly, I am not saying there is no support in Justice Powell's opinion for the view that any advertence to race in a governmental policy should trigger strict scrutiny.[37] I am saying: his opinion also

[36] *Id.* at 300.

[37] Consider, for example, this passage:

> If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process. When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The

supports the view that if affirmative action functions neither as racial preference nor as racial discrimination, but as a countermeasure along the lines articulated in footnote forty-three, courts should not apply strict scrutiny to the policy.

Whether or not Justice Powell would agree with my reading of footnote forty-three is a matter about which reasonable minds might differ. My more fundamental point is that taking footnote forty-three seriously invites, at a minimum, a reengagement of the question of whether courts should apply strict scrutiny to race conscious governmental action that operates as a countermeasure, not a racial preference.

Revisiting, at this historical juncture, the racial preference framing of affirmative action might be particularly important. As I write, both Harvard University and the University of North Carolina are being sued.[38] With respect to the former, a district court recently ruled that Harvard's admissions processes neither violate the constitutional parameters of affirmative action the Supreme Court has articulated nor discriminate against Asian Americans.[39] Nevertheless, that case, and the North Carolina lawsuit, likely will reach the Supreme Court. Although the formal doctrinal framework for adjudicating the constitutionality of affirmative action is largely set,[40] the Supreme Court could shift in the

> Constitution guarantees that right to every person regardless of his background.

Bakke, 438 U.S. at 299 (internal citations omitted).

[38] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.), 397 F. Supp. 3d 126 (D. Mass. 2019) [hereinafter *Students for Fair Admissions 2019*]; Katie Benner, *Justice Dept. Backs Suit Accusing Harvard of Discriminating Against Asian-American Applicants*, N.Y. TIMES (Aug. 30, 2018), https://www.nytimes.com/2018/08/30/us/politics/asian-students-affirmative-action-harvard.html; Carolyn Ebeling, *Lawsuit Calls UNC Admissions Practices Unfair*, DAILY TAR HEEL (Nov. 18, 2014, 1:05 AM), https://www.dailytarheel.com/article/2014/11/lawsuit-calls-unc-admissions-practices-unfair; Jane Stancill, *UNC Has Spent $16.8 Million on Affirmative Action Lawsuit*, NEWS & OBSERVER (Aug. 10, 2018, 7:04 PM), https://www.newsobserver.com/news/local/article216485240.html. Moreover, the Department of Justice is investigating Yale. Brett Samuels, *DOJ, Education Dept Launch Investigation into Yale over Alleged Admissions Discrimination*, HILL (Sept. 26, 2018, 1:26 PM), https://thehill.com/regulation/408540-doj-education-dept-launch-investigation-into-yale-over-alleged-admissions. There is every reason to believe that other lawsuits will be forthcoming.

[39] *Students for Fair Admissions 2019*, 397 F. Supp. 3d at 197.

[40] Broadly articulated, the constitutional question is whether the affirmative action programs at issue survive "strict scrutiny." Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2202-03 (2016); *see also* Grutter v. Bollinger, 539 U.S. 306, 377-78 (2003).

direction of rendering the policy per se unconstitutional, especially given recent changes in its composition.[41] Arguably, the five conservative members of the Court are waiting for the opportunity — substantively or effectively — to declare affirmative action policies unconstitutional. To be clear, my countermeasure framing of affirmative action is unlikely to change their minds. Still, such a reframing provides the liberal members of the Court (and lawyers litigating affirmative action cases) with a set of arguments to broaden the terms on which they defend affirmative action policies.

It bears noting that liberals themselves too often defend affirmative action from the perspective that the policy is a preference. Indeed, for the most part, the difference between liberal and conservative views on affirmative action is that liberals think the "preference" is justified because affirmative action advances diversity, while conservatives think affirmative action is never justified because it effectuates reverse discrimination.[42]

Liberals' acquiescence in the preference framing of affirmative action puts them in a weak position from which to advocate for the policy. That acquiescence both concedes the conservative argument that affirmative action interferes with racially neutral merit-based competition and functions as a plea for exceptionalism on the view that the interference should be tolerated to advance a broader social good.

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[41] *See* Erwin Chemerinsky, *Trump, the Court, and Constitutional Law*, 93 IND. L.J. 73, 79 (2018); David Cole, *Trump's Election Win Is Already Being Felt on the Supreme Court*, NATION (June 28, 2017), https://www.thenation.com/article/trumps-election-win-is-already-being-felt-on-the-supreme-court/; Delano R. Franklin et al., *Kavanaugh's Nomination May Jeopardize Affirmative Action, Experts Say*, HARV. CRIMSON (July 14, 2018), https://www.thecrimson.com/article/2018/7/14/kavanaugh-affirmative-action/; Eugene Scott, *Civil Rights Organizations are Worried about Brett Kavanaugh's Potential Impact on Racial Issues*, WASH. POST (July 11, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/07/11/civil-rights-organizations-are-worried-about-brett-kavanaughs-potential-impact-on-racial-issues/?utm_term=.ecaa9c04a340.

[42] *See* Devon W. Carbado, *States of Continuity or State of Exception? Race, Law and Politics in the Age of Trump*, 34 CONST. COMMENT. 1, 7 (2019). Kim Crenshaw has made a similar observation. *See generally* Kimberlé Crenshaw, *Playing Race Cards: Constructing a Proactive Defense of Affirmative Action*, 16 NAT'L BLACK L.J. 196 (2000). Importantly, some liberal defenses of affirmative action transcend the diversity rationale (though not necessarily the preference frame) to include compensatory rationales. *See, e.g.*, *Bakke*, 438 U.S. at 325 (Brennan, J., concurring in part and dissenting in part) ("Government may take race into account . . . to remedy disadvantages cast on minorities by past racial prejudice."). The point I am stressing is whatever the underlying justification, the starting point typically presupposes the conceptualization of affirmative action as a preference. There are simply few scholarly engagements that explicitly critique the preference framing of the policy.

In this respect, supporting affirmative action from the viewpoint that the policy is a preference is playing defense. Given that the Court has grown even more conservative as a result of its recent additions, and the new challenges to affirmative action in the judicial pipeline, if ever there was a time for liberal Supreme Court justices to play racial justice offense, it is now.

As I have already stated and want to emphasize again, at least some of the conservative justices will likely seek to revisit Justice Powell's conclusion in *Bakke* that the pursuit of diversity can serve as a compelling state interest for affirmative action. Justice Thomas, for example, is already on record as stating that the pursuit of diversity cannot cure the "racial discrimination" that he believes affirmative action effectuates.[43] From Justice Thomas's perspective, "the educational benefits flowing from student body diversity — assuming they exist — hardly qualify as a compelling state interest."[44]

Liberal justices should also revisit *Bakke*. However, they should do so not in order to reject it, but to foreground an overlooked part of the opinion that supports the perspective that affirmative action is not a preference. Footnote forty-three provides both a conceptual way into, and a doctrinal anchoring for, such a reconceptualization. In turn, the question of whether intermediate scrutiny, not strict scrutiny, is the appropriate level of review for affirmative action policies could be back on the table.[45] I am not so naïve as to think that, in the short term, the intermediate scrutiny argument would carry the day. But pushing that

[43] Fisher v. Univ. of Tex., 590 U.S. 297, 320 (2013) (Thomas, J., concurring). For thoughtful engagements of Justice Thomas's opinions on affirmative action, see generally André Douglas Pond Cummings, Grutter v. Bollinger, *Clarence Thomas, Affirmative Action and the Treachery of Originalism: "The Sun Don't Shine Here in This Part of Town,"* 21 HARV. BLACKLETTER L.J. 1, 7 (2005); Scott D. Gerber, *Clarence Thomas,* Fisher v. University of Texas*, and the Future of Affirmative Action in Higher Education*, 50 U. RICH. L. REV. 1169, 1185-86 (2016); Ronald Turner, *Disparate Treatment: Justice Clarence Thomas's Conspicuously Nonoriginalist Affirmative Action Jurisprudence*, 19 TEX. J. C.L. & C.R. 251, 254-56 (2014); Aaron Blake, *Clarence Thomas Compares Affirmative Action Policies to Segregation*, WASH. POST (June 24, 2013) https://www.washingtonpost.com/news/post-politics/wp/2013/06/24/clarence-thomas-compares-affirmative-action-policies-to-segregation/?noredirect=on&utm_term=.64e3a0ebd955; Eyder Peralta, *Justice Thomas Says Court Should Have Gutted Affirmative Action*, NPR (June 24, 2013, 12:26 PM), https://www.npr.org/sections/thetwo-way/2013/06/24/195182864/justice-thomas-says-court-should-have-gutted-affirmative-action.

[44] *Fisher*, 590 U.S. at 320 (Thomas, J., concurring).

[45] *Cf.* Simson, *supra* note 2, at 697 (arguing that eliminating inappropriate influence of "whiteness as innocence" ideology from current doctrine would support arguments for more lenient standard of review for race-conscious remedies like affirmative action).

argument — that affirmative action should be subject to intermediate scrutiny because the policy is not a racial preference — to the forefront, and demonstrating that the countermeasure framing of affirmative action was contemplated by the very opinion that forms the basis of much of today's doctrine, could broaden the terms of affirmative action debates on and off the Court in productive ways.

At bottom, I am urging liberal members of the Court to do what, for the past forty years, they have not done — force conservative justices to affirmatively defend, rather than merely take for granted, their claim that affirmative action is a racial preference. That defensive posture would require conservatives to rebut an alternative claim — a claim with ever-growing empirical backing — that affirmative action should be understood as a countermeasure that mitigates the inequality problems Justice Powell articulated in footnote forty-three. More precisely, liberal Supreme Court justices should shift the affirmative action debate to include contestations about whether affirmative action facilitates what Justice Powell implicitly called for in footnote forty-three — a "fair appraisal of each individual's academic promise" — and whether it counteracts the kinds of "established inaccuracies in predicting academic performance" about which Powell was concerned.[46] This Essay argues that affirmative action functions in both of those ways.

Although the argument I am advancing departs from the current doctrinal baseline for adjudicating the constitutionality of affirmative action, my intervention is decidedly modest. I am not arguing, for example, that affirmative action should be subject to rational basis review. Nor am I contending that the appropriate question to ask with respect to the constitutionality of affirmative action is whether the Equal Protection Clause mandates its use as a remedial imperative to prevent the de facto racial segregation of at least some colleges and universities. I am taking those more progressive arguments off the table here. I do so not because those claims are without merit, but rather because I want to focus attention on the specific implications of a largely forgotten footnote whose content could help fundamentally reshape how affirmative action is conceptualized and adjudicated.

This Essay is organized in two parts. Part I describes how the preference framing of affirmative action plays itself out in the context of university admissions.[47] Part II then details conceptual and empirical

[46] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 n.43 (1978).

[47] Affirmative action has also been controversial in the hiring and contracting context. *See generally* Corey A. Ciocchetti & John Holcomb, *The Frontier of Affirmative*

ways to challenge that preference framework and argues that affirmative action is better understood as a countermeasure that responds to Justice Powell's concerns in footnote forty-three. My hope is that even if people are not persuaded by my countermeasure framing of affirmative action, my arguments will cause them to view the claim that affirmative action is a racial preference for what it is — a highly contestable claim, not an empirical fact. My goal in Part II is to challenge the preference framing of affirmative action, highlight the uninterrogated assumptions on which it rests, and show how affirmative action can play a role left open for it by footnote forty-three.[48] The Essay concludes with a brief

Action: Employment Preferences & Diversity in the Private Workplace, 12 U. PA. J. BUS. L. 283 (2010).

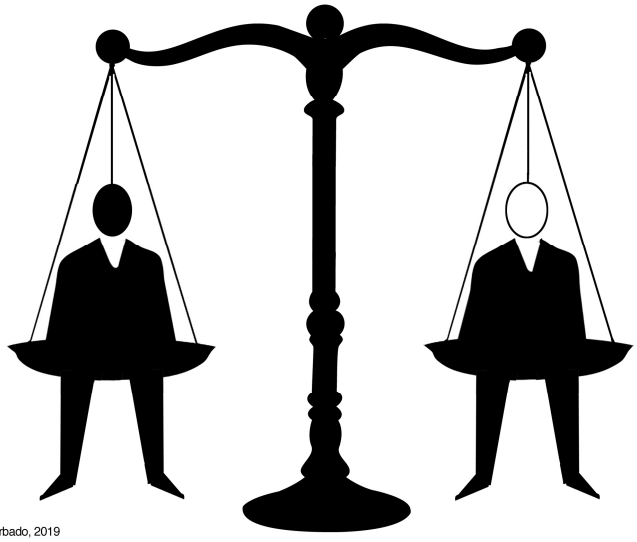
[48] The examples I employ throughout the Essay are, for the most part, framed with reference to black male and white male applicants. Note that I do not describe this framing as the Black/White Paradigm. While I am sympathetic to the concerns that underwrite the Black/White Paradigm critique, I have found some of the ways in which those arguments are advanced worrisome, if not problematic. *See generally* Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1305-12 (2002) (offering a critique of the critique of the Black/White Paradigm). I frame my examples in this way because, for the most part, African Americans (typically men) figure as the quintessential beneficiaries of affirmative action and whites (typically men) figure as the policy's quintessential victims. *See, e.g.*, Cover, TIME, July 10, 1978; *see also* Simson, *supra* note 2, at 642 (arguing that race-conscious remedies cases usually involve claims that whites are being victimized). Moreover, as Luke Charles Harris & Uma Narayan explain, "[T]he hostility to, and the ambivalence about, affirmative action policies is most powerfully articulated in the context of discussions about race-based policies as they pertain to African Americans." Harris & Narayan, *supra* note 14, at 3. An admittedly crude empirical investigation reveals that there are far more discussions about African Americans and affirmative action in the media and in academic journals than about affirmative action and any other group of color. In JSTOR, for example, searching for "African American + affirmative action" yields 18,459 results. A similar search using the term "Hispanic" produces 6,528 articles, and a search employing "Latino" yields 4,146 results. Searches in other databases, including Lexis Law Reviews and Journals, produce similar disparities. Moreover, as between Asian Americans and whites, opponents of affirmative action have been far more invested in focusing on whites as the victims of "reverse discrimination" than on Asian Americans. In JSTOR, a search structured around the inquiry "White + affirmative action + reverse discrimination" produces 5,703 results. A similar search for Asian Americans produces 1,699 results. The recent Harvard litigation is an exception to the general rule that whites in general, and white men in particular, function as paradigmatic "reverse discrimination" victims. *See Students for Fair Admissions 2019*, 397 F. Supp. 3d 126 (D. Mass. 2019). The litigation over the University of Michigan Law School's admissions policy in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and litigation over the University of Texas' admissions policy in *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016), were similar exceptions in that the lead plaintiffs in both cases were white women. *See* Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 425-26 (2014); Steven L. Nelson, *Different Script, Same Caste in the Use of Passive*

discussion of how the countermeasure framing of affirmative action I advance is implicated in the litigation over Harvard's admissions policy.

I. DESCRIBING THE PREFERENCE FRAME

This Part describes the central features of the affirmative-action-as-preference frame as it plays itself out in the university admissions context.[49] I begin with a picture of what people generally have in mind when they think of an ideal admissions process. That image is one in which black and white applicants are treated equally and fairly as their merits are weighed on an "admissions scale." Figure 1 below presents a version of that image.

Figure 1



The image depicts a black person sitting on one side of the scale and a white person sitting on the other. A critical feature of this image is that the scale is perfectly leveled. The black body weighs no more than

and Active Racism: A Critical Race Theory Analysis of the (Ab)use of "House Rules" in Race-Related Education Cases, 22 WASH. & LEE J. C.R. & SOC. JUST. 297, 319 (2016).

[49] The remainder of this Essay draws heavily from Devon W. Carbado et al., *Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISCOURSE 174 (2016) [hereinafter *Privileged or Mismatched*].

the white body. The black applicant and the white applicant are in equipoise.

Moreover, the black person and the white person look exactly the same. The only difference between the two is that one has a black face and the other's face is white. Race, under this view, marks neither disadvantage nor privilege. It is nothing more than skin color. This decidedly thin conception of race trades on colorblindness by inviting us to conclude that, in the context of admissions, race does not — and should not — matter.[50]

In sum, Figure 1's perfectly balanced scales and representation of the black and white applicant as similarly situated communicate both the idea that the admissions process is "colorblind," and that the applicants are being treated equally. Under the admissions system that Figure 1 illustrates, neither the white applicant nor the black applicant is favored. Nor is either one disadvantaged. The admissions process is balanced, racially neutral, and fair.

[50] For a critique of colorblindness, see Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 37-38 (1991) (linking the Supreme Court's colorblind approach to race to biological notions of race). For an account of race as a social construction, see Ian F. Haney-López, *Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 17, 47 (1994).

Now consider Figure 2.

Figure 2

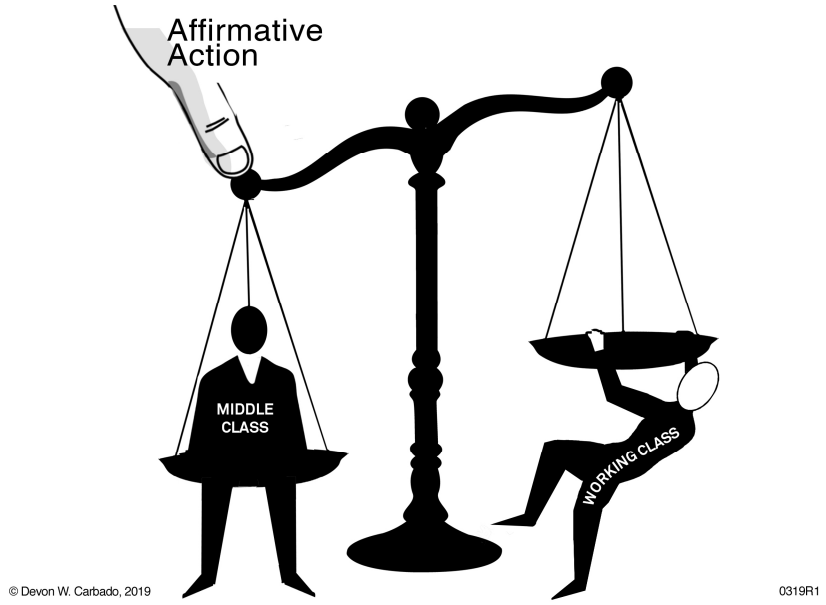


Figure 2 shows how, under a preference framing, affirmative action changes the picture of neutrality that Figure 1 presents. Appearing in the form of a thumb,[51] affirmative action creates an imbalance. The weight of the thumb tips the scales in favor of the black applicant.

Figure 2 illustrates two additional asymmetries that help to shore up the perception that affirmative action is a preference. First, the black applicant is doing nothing to achieve the competitive advantage he enjoys. It is not, in other words, an advantage he *earned*. He is in a favorable admissions position in Figure 2 because of the preference that affirmative action accords to him simply because of his race. The white applicant, meanwhile, struggles mightily to pull the scales down to their original, and presumptively racially neutral, position. But no matter how hard he works, the scales remain tipped in favor of the black

[51] The image of a "racial thumb on the scales" is one that conservative Supreme Court Justices have mobilized in other contexts as well. *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 594 (2019) (Scalia, J., concurring) (arguing that Title VII's disparate impact provisions "place a racial thumb on the scales" by "requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on . . . those racial outcomes" which constitutes racial discrimination).

applicant. The weight of the supposed "black bonus" afforded by affirmative action is too heavy for the white applicant to counteract.[52]

Another feature of Figure 2's preference framing of affirmative action implicates class. Note that the black applicant is marked as "middle class" and the white applicant is marked as "working class." The inclusion of class in the image is an attempt to capture two claims that opponents of affirmative action routinely rehearse: one is that economically privileged blacks are *undeserving remedial beneficiaries* of affirmative action;[53] the other is that economically disadvantaged whites are *undeserving discriminatory targets* of the policy.[54] With class added to the analysis, one leaves Figure 2 with the impression that the depicted admissions system prefers the black applicant (who is

[52] *See* Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. DISCOURSE 590, 597 (2017) [hereinafter *Obscuring Asian Penalty*] (challenging the idea of a "black bonus").

[53] Affirmative action benefits middle class black cities. *See* Khiara M. Bridges, *Excavating Race-Based Disadvantage Among Class-Privileged People of Color*, 53 HARV. C.R.-C.L.L. REV. 65, 83-84 (2018). *See generally* Angela Onwuachi-Willig & Amber Fricke, *Class, Classes, and Classic Race-Baiting: What's in a Definition?*, 88 DENV. U.L. REV. 807 (2011); Lloyd Green, *How Affirmative Action Became an Upper-Middle Class Benefit*, DAILY BEAST (Apr. 7, 2013, 4:45 AM), https://www.thedailybeast.com/how-affirmative-action-became-an-upper-middle-class-benefit. Justice Alito has called affirmative action programs that benefit applicants who are not "disadvantaged" a form of "affirmative action gone wild." Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2232 (2016).

[54] With respect to economic resources, the white applicant in Figure 2 is meant to represent the paradigmatic white victim of affirmative action — a white person who, to borrow from Justice Alito's account, comes from a family that is "absolutely average in terms of education and income." Transcript of Oral Argument at 44, Fisher v. Univ. of Tex., 590 U.S. 297 (2013) (No. 11-345). Importantly, what this framing elides is that even when blacks and whites make the same income, whites are significantly more advantaged in terms of wealth. *See* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A PERSPECTIVE ON RACIAL INEQUALITY 20 (2d ed. 1995); Melvin L. Oliver & Thomas M. Shapiro, *Reducing Wealth Disparities Through Asset Ownership*, *in* ENDING POVERTY IN AMERICA: HOW TO RESTORE THE AMERICAN DREAM 139, 139-43 (S. John Edwards et al. eds., 2007); THOMAS SHAPIRO ET AL., THE ROOTS OF THE WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE 3-5 (2013); AMY TRAUB ET AL., THE ASSET VALUE OF WHITENESS: UNDERSTANDING THE RACIAL WEALTH GAP 13 (2017); *see also* WILLIAM A. DARITY JR. & SAMUEL L. MYERS JR., PERSISTENT DISPARITY: RACE AND ECONOMIC INEQUALITY IN THE UNITED STATES SINCE 1945 60-91 (1998); William Darity Jr. & Melba J. Nicholson, *Racial Wealth Inequality and the Black Family*, *in* AFRICAN AMERICAN FAMILY LIFE: ECOLOGICAL AND CULTURAL DIVERSITY 78, 83-84 (Vonnie C. McLoyd et al. eds., 2005); Darrick Hamilton, *Race, Wealth, and Intergenerational Poverty*, AM. PROSPECTS (Aug. 14, 2009), https://prospect.org/article/race-wealth-and-intergenerational-poverty. *See generally* Melvin L. Oliver & George Lipsitz, *Integration, Segregation, and the Racial Wealth Gap*, *in* THE INTEGRATION DEBATE: COMPETING FUTURES FOR AMERICA'S CITIES 153 (Chester Hartman & Gregory D. Squires eds., 2010).

presumptively privileged despite exerting no effort) over the white applicant (who is presumptively disadvantaged and hardworking). From this vantage point, the admissions process is unbalanced, racially biased, and unfair. It represents an instance of "reverse discrimination."[55]

Importantly, as noted earlier, liberals as well as conservatives acquiesce in some aspects of the picture of affirmative action that Figure 2 paints. In particular, liberals, and not just conservatives, regularly refer to affirmative action as a thumb on the scale or conceptualize the policy as a preference.[56] Indeed, even Justices Brennan[57] and Marshall[58] describe affirmative action as a racial preference in their *Bakke* opinions. The basic difference between conservative and liberal positions on affirmative action is that whereas liberals believe that the costs of affirmative action are outweighed by its benefits (including diversity), conservatives perceive the costs of the policy ("reverse discrimination") too high a price to pay regardless of its benefits.

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[55] Lilly v. City of Beckley, 615 F. Supp. 137, 138 (1985).

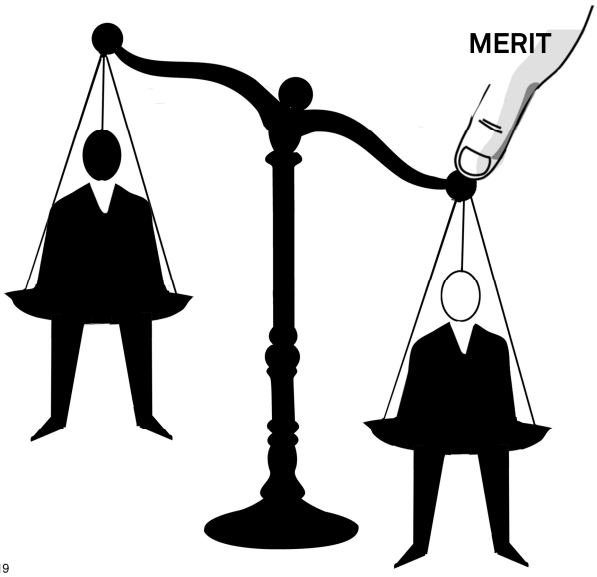
[56] *See* Harris & Narayan, *supra* note 14, at 2 (discussing various liberal authors who frame affirmative action as a preference).

[57] Regents of the Univ. Cal. v. Bakke, 438 U.S. 265, 375 (1978) (Brennan, J., concurring in part and dissenting in part) ("[T]here is absolutely no basis for concluding that Bakke's rejection as a result of Davis' use of racial preference will affect him throughout his life in the same way as the segregation of the Negro schoolchildren in *Brown I* would have affected them. Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second-class citizens because of their color."); *id.* at 378 ("In any admissions program which accords special consideration to disadvantaged racial minorities, a determination of the degree of preference to be given is unavoidable, and any given preference that results in the exclusion of a white candidate is no more or less constitutionally acceptable than a program such as that at Davis.").

[58] Justice Marshall joined Justice Brennan's dissent, which, as previously indicated, expressly trades on the language of preference. *Id.* at 387. However, Justice Marshall's acquiescence in the preference framing is more oblique. *Compare id.* at 387-402 (Marshall, J., concurring in part and dissenting in part) (arguing that the sponsors of various pieces of reconstruction legislation recognized that "special treatment" for African Americans was warranted against the backdrop of slavery), *with id.* at 324-79 (Brennan, White, Marshall, and Blackmun, J., concurring in part and dissenting in part) (arguing that preference is necessary for recreating equality). *See* Luke Charles Harris, *Rethinking the Terms of the Affirmative Action Debate Established in* The Regents of the University of California v. Bakke *Decision*, 6 RES. POL. & SOC'Y 133, 143 (1999) (arguing that "like Powell, Brennan and Marshall seem to share the view that affirmative action necessarily involves giving minority students a 'leg up.'")

Consider now Figure 3:

Figure 3



Like Figure 2, Figure 3 depicts an admissions regime in which the scales are not level. To highlight another feature of the preference framing of affirmative action, assume for the moment that there are no class differences between the black and white applicant. Now note that, under Figure 3, the scales tip in favor of the white applicant. However, unlike in Figure 2, this asymmetry is not because of an unfair or presumptively discriminatory thumb on one side of the scale. Rather, merit explains the asymmetry in Figure 3. The white applicant is advantaged because he is smarter, worked harder, and achieved higher grades and standardized test scores.[59] Figure 3 represents what we

[59] This conclusion is all the more likely against the backdrop of the following. First is the existing assumption that it is unlikely that any institution would intentionally discriminate in favor of white applicants or against black applicants. *See* DEVON W. CARBADO & MITU GULATI, ACTING WHITE?: RETHINKING RACE IN "POST-RACIAL" AMERICA 1-2 (2013). Second are stereotypes about the poor work ethic and intellectual deficit of African Americans. *See* Jason Irizarry, *Cultural Deficit Model*, EDUCATION.COM (Dec. 23, 2009), http://www.education.com/reference/article/cultural-deficit-model/. *See generally* Cheryl I. Harris, Fisher's *Foibles: From Race and Class to Class Not Race*, 64 UCLA L. REV. DISCOURSE 648 (2017) [hereinafter Fisher's *Foibles*]. Third are discourses about the achievement gap between black and white students. *See* Katherine Y. Barnes, *Is Affirmative Action Responsible for the Achievement Gap Between Black and White Law*

might call a fair and racially neutral disequilibrium. Under the logic of Figure 3, colleges and universities should not mobilize the thumb of affirmative action to disrupt a merit-based inequality. Nor, for some proponents of Figure 3, should we otherwise be concerned about the asymmetry Figure 3 illustrates.

However, proponents of Figure 3 who believe that class or social behavior explains black student's competitive disadvantage are not necessarily saying we should simply accept it. But they are saying that "reverse discrimination" is not the right way to address that problem. By and large, their proposed solutions sound in one of two registers.

One set of claims focuses on "black culture." The argument, roughly, is that black parents, community leaders, and political figures should change the cultural habits of black teenagers,[60] encourage them to study hard and stay in school, and persuade them to jettison the thinking that associates the pursuit of academics with "acting white."[61] Hard work, greater effort, and a stronger commitment to school on the part of black students would tip the scales in their favor, make them more competitive, and remove the asymmetry Figure 3 illustrates. The solution for the imbalance in Figure 3, in other words, is for black students to become, like Asian Americans, a "model minority."[62]

Another set of arguments focuses on K-12 education. The claim is that what we are seeing in Figure 3 is an outcome of the fact that, across the United States, black students disproportionately attend poorly funded and underperforming schools.[63] That structural reality

Students?, 101 NW. U. L. REV. 1759, 1763 (2007). Fourth is the assumption that whites do not benefit from affirmative action. ALBERT G. MOSLEY & NICHOLAS CAPALDI, AFFIRMATIVE ACTION: SOCIAL JUSTICE OR UNFAIR PREFERENCE? 122 (1996).

[60] *See* DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY 527 (1995).

[61] Even President Obama encouraged black students not to associate studying with "acting white." Ivory A. Toldson, *The 'Acting White Theory' Doesn't Add Up*, ROOT (Jan. 30, 2013, 12:23 AM), https://www.theroot.com/the-acting-white-theory-doesn-t-add-up-1790895058.

[62] *See* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1258-65 (1993) (problematizing "model minority" discourses).

[63] *See, e.g.*, JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA (2006); Frank Adamson & Linda Darling-Hammond, *Funding Disparities and the Inequitable Distribution of Teachers: Evaluating Sources and Solutions*, 37 EDUC. POL'Y ANALYSIS ARCHIVES 213 (2012); Linda Darling-Hammond, *America's Commitment to Equity Will Determine Our Future*, 91 PHI DELTA KAPPAN 8 (2010); Linda Darling-Hammond, *The Color Line in American Education: Race, Resources and Student Achievement*, 1 DU BOIS REV. 213 (2004); Gary Orfield et al., *E*

necessarily means that black students will be at a competitive disadvantage relative to white students. The solution for such disadvantage, however, should not be diversity-oriented tinkering with admissions processes in ways that undermine merit and equality. What we should do, instead, is push for a wholesale restructuring of K-12 education to eliminate the race and class inequalities on which that system currently rests.[64]

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The foregoing three figures provide a summary indication of the central features of the affirmative-action-as-preference frame. Part II now challenges this frame and re-describes affirmative action as a countermeasure that can help secure what Justice Powell contemplated in footnote forty-three in *Bakke*: fair appraisal of each individual's academic promise in light of racial bias that often infiltrates grading or testing procedures.

II. CONTESTING THE PREFERENCE FRAME

This Part offers a way of reconceptualizing affirmative action as a countermeasure to race-based disadvantages that African American students face as they prepare for college, put together their admissions file, and as that file is reviewed by admissions officers. Crucial to this effort is the claim that racial disadvantage is not fully encompassed by class disadvantage. To provide an indication of what I mean, consider the following scenario.

Pluribus…Separation: Deepening Double Segregation for More Students, UCLA C.R. PROJECT (Sept. 2012), https://escholarship.org/uc/item/8g58m2v9.

[64] For arguments in the vein that reforming K-12 education, not affirmative action, is the solution to the underrepresentation of black students in colleges and universities, see Halley Potter, *Transitioning to Race-Neutral Admissions: An Overview of Experiences in States Where Affirmative Action Has Been Banned*, *in* THE FUTURE OF AFFIRMATIVE ACTION: NEW PATHS TO HIGHER EDUCATION DIVERSITY AFTER *FISHER V. UNIVERSITY OF TEXAS* 75, 87-88 (Richard D. Kahlenberg ed., 2014); Tomiko Brown-Nagin, *Rethinking Proxies for Disadvantage in Higher Education: A First Generation Students' Project*, 2014 U. CHI. LEGAL F. 433, 480-97 (2014); Zachary Parker, *The Decades-Long Affirmative Action Debate is Incomplete*, HUFFINGTON POST (Sept. 9, 2013), https://www.huffingtonpost.com/zachary-parker/the-decadeslong-affirmati_b_3575653.html. *See generally* SHERYLL CASHIN, PLACE, NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA (2014); Harris, Fisher's *Foibles*, *supra* note 59; Kimberly J. Robinson, Fisher's *Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185 (2016); Thomas J. Espenshade, *Moving Beyond Affirmative Action*, N.Y. TIMES (Oct. 4, 2012), https://www.nytimes.com/2012/10/05/opinion/moving-beyond-affirmative-action.html.

Imagine that the son of a black lawyer starts his first day at a predominantly white high school. Consider the anxieties his parent might have as she waves goodbye to her teenager. Some concerns — whether her child will eat lunch at the appropriate time (if at all) or will spend too much time on social media — are universal parenthood worries. But beyond these concerns, the black parent will have a number of more racially specific anxieties. To begin with, the black parent will wonder whether her son made it safely to school without being mistakenly profiled as a criminal suspect.[65] She will wonder as well whether the school's so-called Resource Officers (local police officers assigned to work at the school) will intentionally profile him and, once again, ask him to empty his locker so that the officers can ensure the student isn't trafficking in drugs.[66] The black parent will hope that her advice to her son to not argue with the teachers and do exactly as they tell him will prevent teachers from perceiving him as a so-called "boy with an attitude."[67]

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[65] *See* Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526, 535-36 (2014); *see also* REBECCA EPSTEIN ET AL., CTR. ON POVERTY & INEQUALITY, GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 1, 4-6 (2017), https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf; Michael J. Dumas & Joseph Derrick Nelson, *(Re)Imagining Black Boyhood: Toward a Critical Framework for Educational Research*, 86 HARV. EDUC. REV. 27, 34 (2016).

[66] *See generally* Kathleen Nolan, *Policing Student Behavior: Roles and Responsibilities*, *in* THE PALGRAVE INTERNATIONAL HANDBOOK OF SCHOOL DISCIPLINE, SURVEILLANCE, AND SOCIAL CONTROL 309 (Jo Deakin, Emmeline Taylor & Aaron Kupchik eds., 2018); Lauren A. Maddox, *"His Wrists Were Too Small": School Resource Officers and the Over-Criminalization of America's Students*, 6 U. MIAMI RACE & SOC. JUS. L. REV. 193, 205-06 (2016); Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147, 169 (2015); Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765, 777-78, 811 (2017). *See generally* Jennifer Counts et al., *School Resource Officers in Public Schools: A National Review*, 41 EDUC. & TREATMENT CHILD. 405 (2018); Joseph B. Ryan et al., *The Growing Concerns Regarding School Resource Officers*, 53 INTERVENTION SCH. & CLINIC 188 (2018); Stephanie Saul et al., *School Officer: A Job With Many Roles and One Big Responsibility*, N.Y. TIMES (Mar. 4, 2018), https://www.nytimes.com/2018/03/04/us/school-resource-officers-shooting.html.

[67] *See generally* MONIQUE MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS (2018); INEQUALITY IN SCHOOL DISCIPLINE: RESEARCH AND PRACTICE TO REDUCE DISPARITIES (Russell J. Skiba, Kavitha Mediratta & M. Karega Rausch eds., 2016); Subini Ancy Annamma et al., *Black Girls and School Discipline: The Complexities of Being Overrepresented and Understudied*, 54 URBAN EDUC. 1 (2016); Dorothy Hines-Datiri & Dorina J. Carter Andrews, *The Effects of Zero Tolerance Policies on Black Girls: Using Critical Race Feminism and Figured Worlds to Examine School Discipline*, URBAN EDUC. (2017); Simone Ispa-Landa, *Persistently Harsh Punishments Amid Efforts to Reform: Using*

The mother will also reflect on whether the teachers understand that educators hold lower expectations (both consciously and unconsciously) of black students.[68] Salient on her mind will be questions about whether her son's teachers' explicit or implicit biases will affect how they evaluate him. Her concern is that if her son does not actively participate in class, his teachers may believe that he does not understand the material or is not motivated to learn.[69] She may ask herself whether this will be another year in which teachers patronize her son, offer less constructive feedback on his work, and provide few, if any, mentorship opportunities. On the other hand, she may wonder if her son will encounter *more* scrutiny than his white peers as his

Tools from Social Psychology to Counteract Racial Bias in School Disciplinary Decisions, 47 EDUC. RES. 384 (2018); Russell J. Skiba, et al., *Discipline Disparities: New and Emerging Research in the United States*, *in* THE PALGRAVE INTERNATIONAL HANDBOOK OF SCHOOL DISCIPLINE, SURVEILLANCE, AND SOCIAL CONTROL, *supra* note 66, at 235; Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URBAN REV. 317 (2002); Russell J. Skiba et al., *Race is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCHOL. REV. 85 (2011); Richard O. Welsh & Shafiqua Little, *The School Discipline Dilemma: A Comprehensive Review of Disparities and Alternative Approaches*, 88 REV. EDUC. RES. 752 (2018); Denise G. Yull & Marguerite A.F. Wilson, *Allies, Accomplices, or Troublemakers: Black Families and Scholar Activists Working for Social Justice in a Race-Conscious Parent Engagement Program*, 9 CRITICAL EDUC. 1 (2018); JANELLE SCOTT ET AL., NAT'L EDUC. POLICY CTR., LAW AND ORDER IN SCHOOL AND SOCIETY: HOW DISCIPLINE AND POLICING POLICIES HARM STUDENTS OF COLOR, AND WHAT WE CAN DO ABOUT IT, (2017), https://files.eric.ed.gov/fulltext/ED574735.pdf.

[68] *See generally* Hua-Yu Sebastian Cherng, *If They Think I Can: Teacher Bias and Youth of Color Expectations and Achievement*, 66 SOC. SCI. RES. 170, 170-86 (2017); Seth Gershenson & Nicholas Papageorge, *The Power of Teacher Expectations: How Racial Bias Hinders Student Attainment*, 18 EDUC. NEXT 64, 64-70 (2018); Gershenson et al., *Who Believes in Me? The Effect of Student-Teacher Demographic Match on Teacher Expectations*, 52 ECON. OF EDUC. REV. 209, 209-24 (2016); Amy G. Halberstadt et al., *Preservice Teachers' Racialized Emotion Recognition, Anger Bias, and Hostility Attributions*, 54 CONTEMP. EDUC. PSYCHOL. 125, 125-38 (2018); Claire E. Kunesh & Amity Noltemeyer, *Understanding Disciplinary Disproportionality: Stereotypes Shape Pre-Service Teachers' Beliefs About Black Boys' Behavior*, 54 URBAN EDUC. 471-98 (2019).

[69] *See generally* Cherng, *supra* note 68; Patricia Clark & Eva Zygmunt, *A Close Encounter with Personal Bias: Pedagogical Implications for Teacher Education*, 83 J. OF NEGRO EDUC. 147, 147-61 (2014); Halberstadt et al., *supra* note 68; Terrence M. Scott et al., *Teacher and Student Race as a Predictor for Negative Feedback During Instruction*, 34 SCH. PSYCHOL. Q. 22 (2019). Evelyn Y. Young, *The Four Personae of Racism: Educators' (Mis)Understanding of Individual vs. Systemic Racism,* 46 URBAN EDUC. 1433, 1433-60 (2011).

teachers hold his work to a higher standard than theirs.[70] She will also wonder whether her son will encounter books by black authors and whether — across the curriculum — African American experiences will figure meaningfully in the classroom.[71]

The black parent will also have concerns about her son's extracurricular activities. Will her son be cajoled — again — into giving the annual Black History Month speech? Will he be pressured into joining the basketball team (though he would rather play tennis)? Will his classmates tokenize and marginalize him by nominating him for the most insignificant position in student government, the community liaison representative?[72]

The black parent will also think about the racial demographics of the school in a broader institutional sense. Will her son, finally, have a black teacher? A teacher of color? Will there be a few more black students at the school this year? Will some of the black students at the school be in her son's classes so that he feels some measure of racial comfort? Or will her son have to supply racial comfort to his white classmates to make them feel less anxious and nervous around him?[73]

The black parent will also consider whether her son will be categorized as "too black," or too racially conscious, simply because he seeks out other black students for friendships and a sense of social

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[70] *See generally* ANN A. FERGUSON, BAD BOYS: PUBLIC SCHOOLS IN THE MAKING OF BLACK MASCULINITY (2001); PEDRO NOGUERA, THE TROUBLE WITH BLACK BOYS: AND OTHER REFLECTIONS ON RACE, EQUITY, AND THE FUTURE OF PUBLIC EDUCATION (2008).

[71] *See generally* GENEVA GAY, CULTURALLY RESPONSIVE TEACHING: THEORY, RESEARCH AND PRACTICE (2018); Shelly Brown-Jeffy & Jewell E. Cooper, *Toward a Conceptual Framework of Culturally Relevant Pedagogy: An Overview of the Conceptual and Theoretical Literature,* 38 TCHR. EDUC. Q. 65, 65-84 (2011); Heather Coffey & Abiola Farinde-Wu, *Navigating the Journey to Culturally Responsive Teaching: Lessons from the Success and Struggles of One First-Year, Black Female Teacher of Black Students in an Urban School*, 60 TEACHING & TCHR. EDUC. 24, 24-33 (2016); Abiola Farinde-Wu et al., *It's Not Hard Work; It's Heart Work: Strategies of Effective, Award-Winning Culturally Responsive Teachers*, 49 URBAN REV. 279, 279-99 (2017); Geneva Gay, *Preparing for Culturally Responsive Training*, 53 J. TCHR. EDUC. 106, 106-16 (2002); Michelle G. Knight-Manuel et al., *"It's All Possible": Urban Educators; Perspectives on Creating a Culturally Relevant, Schoolwide, College-Going Culture for Black and Latino Male Students*, 54 URBAN EDUC. 35, 35-64 (2019).

[72] *See generally* Alexander M. Czopp, *Studying Is Lame When He Got Game: Racial Stereotypes and the Discouragement of Black Student-Athletes from Schoolwork*, 13 SOC. PSYCHOL. EDUC. 485 (2010); Ann Meier et al. *A Quarter Century of Participation in School-Based Extracurricular Activities: Inequalities by Race, Class, Gender and Age?*, 47 J. YOUTH & ADOLESCENCE 1299 (2018).

[73] On the theory of racial comfort, see generally CARBADO & GULATI, *supra* note 59; Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

belonging to mitigate his and their feelings of racial isolation, racial tokenism, and racial alienation.[74] She will recall her son's account of white students and teachers asking him why black students always self-segregate by, for example, eating lunch together at the same table,[75] when no such questions are asked of white students who sit at the de facto white-only tables that pervade the cafeteria.

The black parent will also think about the kind of college counseling her son will receive. Will the school's counselors steer him away from thinking about competitive colleges and universities as a future possibility?[76] To the extent that those counselors encourage him to apply to such institutions, will they tell him that he is a "shoo-in" on the view that because there are so few "good black students" in the applicant pool for elite colleges and universities, those institutions will aggressively fight over them?

And what if her son is admitted to an elite college or university? Will some counselors instruct him that he should think twice about attending? Will they suggest to him that because he was an "affirmative action admit," he may not be able to compete with the students who were admitted "solely on the basis of their merit?"[77]

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[74] CARBADO & GULATI, *supra* note 59; Carbado & Gulati, *supra* note 73.

[75] *See, e.g.*, BEVERLY DANIEL TATUM, "WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?": AND OTHER CONVERSATIONS ABOUT RACE (2003).

[76] *See generally* Amy L. Cook et al., *"Doing Everything On My Own": Examining African American, Latina/o, and Biracial Students' Experiences with School Counselors in Promoting Academic and College Readiness*, 00 URBAN EDUC. 1 (2018); Pamela Davis et al., *The School Counselor's Role in Addressing the Advanced Placement Equity and Excellence Gap for African American Students*, 17 PROF. SCH. COUNSELING 32 (2013-2014); Natoya Hill Haskins & Kelley Olds, *African American Males' Academic Preparation in K-12 Settings for Highly Selective Universities*, *in* RECRUITING, RETAINING, AND ENGAGING AFRICAN AMERICAN MALES AT SELECTIVE PUBLIC RESEARCH UNIVERSITIES: CHALLENGES AND OPPORTUNITIES IN ACADEMICS AND SPORTS 41 (Louis A. Castenell, Tarek C. Grantham & Bill J. Hawkins eds., 2018).

[77] The theory of mismatch — that affirmative action mismatches black students to institutions at which they cannot compete — is one articulation of this view. *See* Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 452-53 (2004). For critiques of the theory, see David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1855-98 (2005); Harris, Fisher's *Foibles*, *supra* note 59, at 659-660 n.34; Cheryl I. Harris & William C. Kidder, *The Black Student Mismatch Myth in Legal Education: The Systemic Flaws in Richard Sander's Affirmative Action Study*, J. BLACKS HIGHER EDUC., 102, 102-05 (2004-2005); Daniel E. Ho, Comment, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 Yale L.J. 1997, 1997 (2005); Daniel E. Ho, Reply, *Affirmative Action's Affirmative Actions: A Reply to Sander*, 114 YALE L.J. 2011, 2011 (2005); Richard

The black parent's concerns highlight some (though certainly not all) of the racial obstacles — race-based assumptions, biases, and conduct — that her son will face throughout his high school career, notwithstanding the fact that he is middle-class. I refer to these obstacles cumulatively as "negative action" because they can have a negative impact on the admissions file of the black student five years downstream.[78] More specifically, by negative action I mean any disadvantage students experience in the context of admissions because of their race.[79] The particular focus of this Essay is on how race can negatively impact both a black student's academic trajectory — thus diminishing the competitiveness of that student's admissions file — and how admissions officers evaluate her application.[80] Negative action can manifest itself not only in "hard" evaluative measures, such as standardized test scores and grades, but also in "soft" evaluative measures, such as leadership experience, awards, extracurricular opportunities, internships, and letters of recommendation. The remainder of this Part provides empirical support for what I am calling negative action. Specifically, I foreground the phenomena of implicit biases and stereotype threat, demonstrate how each can operate as negative action, and discuss how both forms of negative action can interfere with the "fair appraisal of each individual's academic promise" about which Justice Powell was concerned in footnote forty-three. With an understanding of negative action in mind, the reader is in a better position to appreciate the framing of affirmative action as a countermeasure.

Lempert, *Mismatch and Science Desistance: Failed Arguments Against Affirmative Action*, 64 UCLA L. REV. DISCOURSE 136, 150 (2016).

[78] I am employing the term "negative action" more expansively than does Jerry Kang. As I discuss more fully in the conclusion, Jerry Kang introduced the concept of negative action to refer to instances in which admissions processes disadvantage Asian Americans relative to whites. *See* Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R. & CV. L.L. REV. 1, 3-6 (1996) [hereinafter *Negative Action Against Asian Americans*]; *see also* William C. Kidder, *Negative Action Versus Affirmative Action: Asian Pacific Americans are Still Caught in the Crossfire*, 11 MICH. J. RACE & L. 605, 615-16 (2006).

[79] The argument that affirmative action is reverse discrimination is essentially an argument that affirmative action is a form of negative action against whites. *Cf.* discussion *infra* Conclusion (critiquing the idea that affirmative action policies result in negative action against Asian Americans). The overarching purpose of this Essay is to contest that frame.

[80] The arguments I advance can be rearticulated with respect to other students of color who are similarly racially disadvantaged in the admissions process.

A. Implicit Biases

At the most general level, implicit biases are unconscious attitudes and stereotypes that we hold about other people, and that can shape how we interact with and evaluate those people.[81] For example, a police officer may hold implicit stereotypes that African Americans are criminally suspect and dangerous, which in turn could influence whether that officer employs deadly force against members of that community.[82] Implicit biases can have a similar impact in the educational context. Indeed, as Rachel Godsil observes, "The power of implicit bias to undermine the educational opportunities for students of color are obvious — their contributions may fail to be recognized for their merit, they may well experience incidents in which they are treated differently by teachers, peers, and administration, or even assumed not to be students at all."[83] There is some, albeit imperfect, evidence that implicit biases operate in precisely the manner Godsil describes, impacting, to the detriment of students of color, critical admissions criteria and decisions, including:[84] (1) the content of letters of recommendation;[85] (2) assessment of resumes;[86] (3) evaluation of

[81] For a general introduction to the phenomenon, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

[82] Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1524-29 (2016).

[83] Rachel D. Godsil, *Why Race Matters in Physics Class*, 64 UCLA L. REV. DISCOURSE 40, 54 (2016).

[84] A number of the underlying studies and findings are described in more detail in Carbado et al., *Privileged or Mismatched*, *supra* note 49, at 213-18.

[85] *See* Kuheli Dutt et al., *Gender Differences in Recommendation Letters for Postdoctoral Fellowships in Geoscience*, 9 NATURE GEOSCIENCE 805, 805 (2016); Chris Houser & Kelly Lemmons, *Implicit Bias in Letters of Recommendation for an Undergraduate Research Internship*, 42 J. FURTHER & HIGHER EDUC. 585, 586-87 (2018); *see also* Frances Trix & Carolyn Psenka, *Exploring the Color of Glass: Letters of Recommendation for Female and Male Medical Faculty*, 14 DISCOURSE & SOC'Y 191, 214-17 (2003).

[86] *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 1011 (2004), http://www.nber.org/papers/w9873; Michael Brownstein, *Attributionism and Moral Responsibility for Implicit Bias*, 7 REV. PHIL. & PSYCHOL. 765, 765 (2015); Eva Derous et al., *Double Jeopardy Upon Resumé Screening: When Achmed Is Less Employable than Aïsha*, 68 PERSONNEL PSYCHOL. 659, 659-61 (2015).

writing samples;[87] (4) student performance on standardized tests;[88] (5) grading;[89] (6) mentoring;[90] and (7) class placement decisions.[91]

Even if implicit biases are plausibly at play across each of the foregoing dimensions of academic experience, one might still reasonably ask the following two questions. First, how would one know whether these biases shaped any particular student's trajectory and academic profile? And, second, how would one determine whether the admissions decision of any particular admissions officer was influenced by implicit biases? These are fair questions about the application of implicit bias research to individual cases for which there are no easy

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[87] *See* David M. Amodio & Patricia G. Devine, *Stereotyping and Evaluation in Implicit Race Bias: Evidence for Independent Constructs and Unique Effects on Behavior*, 91 J. PERSONALITY & SOC. PSYCHOL. 652, 658-60 (2006); Arin N. Reeves, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, NEXTIONS (Apr. 2014), http://www.nextions.com/wp-content/files mf/14151940752014040114 WritteninBlackandWhiteYPS.pdf (demonstrating racial bias in how law firm partners evaluated writing samples).

[88] *See* E.R. Peterson et al., *Teachers' Explicit Expectations and Implicit Prejudiced Attitudes to Educational Achievement: Relations with Student Achievement and the Ethnic Achievement Gap*, 42 LEARNING & INSTRUCTION 123, 123-25 (2016); Linda van den Bergh et al., *The Implicit Prejudiced Attitudes of Teachers: Relations to Teacher Expectations and the Ethnic Achievement Gap*, 47 AM. EDUC. RES. J. 497, 522-23 (2010) (demonstrating that teacher's implicit bias negatively impacted students' performance on standardized tests).

[89] *See* Drew S. Jacoby-Senghor et al., *A Lesson in Bias: The Relationship Between Implicit Racial Bias and Performance in Pedagogical Contexts*, 63 J. EXPERIMENTAL SOC. PSYCHOL. 50, 53-54 (2016); Nicole E. Negowetti, *Implicit Bias and the Legal Profession's "Diversity Crisis": A Call for Self-Reflection*, 15 NEV. L.J. 930, 942-43 (2015); Reeves, *supra* note 87.

[90] Tomiko Brown-Nagin, *The Mentoring Gap*, 129 HARV. L. REV. F. 303, 307-10 (2016); *see* DAVID A. THOMAS & JOHN J. GABARRO, BREAKING THROUGH: THE MAKING OF MINORITY EXECUTIVES IN CORPORATE AMERICA, 26-27 (1999); *see also* Suzanne Bouclin, *Marginalized Law Students and Mentorship*, 48 OTTAWA L. REV. 357, 369-72 (2017); Guy A. Boysen, *Integrating Implicit Bias Into Counselor Education*, 49 AM. COUNSELING ASSOC. 210 (2010) (reviewing empirical studies to conclude that the few studies done on counselor implicit bias have documented significant levels of bias); Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 HASTINGS L.J. 1435, 1449-51 (2008).

[91] *See* John W. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labelling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20, 28-29 (1983) (demonstrating how knowledge of a person's class background can impact perceptions about academic abilities including math, reading, social studies, and science); Valerie N. Faulkner et al., *Race and Teacher Evaluations as Predictors of Algebra Placement*, 45 J. RES. MATHEMATICS EDUC. 288, 303-08 (2014).

answers.[92] But my arguments in this Essay do not depend on mobilizing the science of implicit bias as an *individualized* intervention strategy to correct *particular* admissions decisions. Rather, my aim is to show how implicit biases structurally and systematically[93] bias multiple aspects of the university admissions timeline[94] to the detriment of students of color in ways that justify the use of affirmative action as a *structural* intervention strategy to correct *admissions regimes* writ large.[95] Under this approach, the risk that any given file *could be* impacted by implicit biases, and that large numbers of files *are* very likely impacted across the country, creates the need for a prophylactic like affirmative action as a countermeasure.

This brings us back to the broader point I want to underscore about race and admissions that Justice Powell put on the table in footnote forty-three: if black students are systematically vulnerable to negative action because of race-based implicit biases and white students are not, black students and white students are not competing on equal terms. To put the point in Justice Powell's terms: given the operation of implicit biases and their systematic and structural effects, existing admissions regimes are unlikely to perform a "fair appraisal of each individual's academic promise" but rather infuse multiple aspects of

[92] *See, e.g.*, Jerry Kang, *The Missing Quadrants of Antidiscrimination: Going Beyond the "Prejudice Polygraph*," 68 J. SOC. ISSUES 314, 318 (2012) [hereinafter *The Missing Quadrants*] (explaining that social scientists have not called for the use of implicit bias measurements like the Implicit Association Tests to determine whether implicit biases were at play in specific individual instances).

[93] In support of my arguments in this Essay, implicit bias research shows that implicit biases do not operate randomly, but rather operate in a way that causes people to "systematically prefer . . . socially privileged groups" — in the case of race, whites over blacks. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 474 (2010). Further, as prominent implicit bias researchers have argued, understanding the structural impact of such pervasive implicit biases is important because even small effects can magnify substantially when they affect large numbers of people or the same person repeatedly over time. *See, e.g.*, Anthony G. Greenwald et al., *Statistically Small Effects of the Implicit Association Test Can Have Societally Large Effects*, 108 J. PERSONALITY & SOC. PSYCHOL. 553, 559-60 (2015) (reviewing findings of different meta-analyses, finding that regardless of approach in selecting relevant studies, more than four percent of discrimination-related variation can be accounted for and explaining how even small statistical effects can have large social consequences when affecting large numbers of people or the same person repeatedly).

[94] *See generally supra* notes 84-91 and accompanying text (discussing the ways in which implicit bias affects various admissions criteria).

[95] *Cf.* Kang, *The Missing Quadrants*, *supra* note 92, at 324-25 (conceptualizing forms of affirmative action as a "prevention" strategy to counter the operation of implicit bias).

such regimes with "bias in [their evaluation] procedures."[96] As a result, "race and ethnic background [ought to be] considered . . . to the extent [that it can help] cur[e] established inaccuracies in predicting academic performance," and such a use of affirmative action is "no 'preference' at all."[97] Rather than defend affirmative action in lukewarm and defensive terms as a "preference" whose costs are begrudgingly justifiable, liberal Supreme Court justices should defend affirmative action affirmatively as a structural corrective — or, as I have called it, a countermeasure — to the operation of implicit biases. Justice Powell gave them the doctrinal anchor to do so in footnote forty-three. Findings on the phenomenon of stereotype threat provide even more reason to reframe affirmative action along the lines I am suggesting.

B. Stereotype Threat

One of the most studied, and most prevalent, forms of psychological strain faced by black students is *stereotype threat*.[98] Broadly speaking, stereotype threat refers to a scenario in which (a) there are negative stereotypes about a social group to which one belongs (b) those stereotypes suggest that members of that social group will perform poorly in some specific domain, (c) one is consciously or unconsciously concerned about confirming those stereotypes, and (d) that concern undermines the quality of one's performance. For example, pervasive negative stereotypes that blacks are less intelligent or less capable[99] may cause black students to fear that their performance in school will confirm, to themselves or to others,[100] that these negative stereotypes are true. These worries raise the stakes of school performance, adding an additional layer of pressure to achieve, which in turn increases

[96] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 n.43 (1978) (Powell, J.).

[97] *Id.*

[98] *See* Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 614 (1997); Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCHOL. 797, 797-99 (1995). For a recent review, see generally Steven J. Spencer et al., *Stereotype Threat*, 67 ANN. REV. PSYCHOL. 415, 416-17 (2016).

[99] *See* Paul Verhaeghen et al., *Prime and Prejudice: Co-Occurrence in the Culture as a Source of Automatic Stereotype Priming*, 50 BRIT. J. SOC. PSYCHOL. 501, 503 (2011).

[100] Jenessa R. Shapiro & Steven L. Neuberg, *From Stereotype Threat to Stereotype Threats: Implications of a Multi-Threat Framework for Causes, Moderators, Mediators, Consequences, and Interventions*, 11 PERSONALITY & SOC. PSYCHOL. REV. 107, 112-13 (2007).

stress,[101] undermines learning and engagement,[102] taxes cognitive resources,[103] and impairs academic performance.[104]

The negative impact of stereotype threat on black students has been observed in hundreds of psychological studies employing rigorous experimental methods, both in controlled laboratory settings and in the field.[105] For example, an early laboratory experiment conducted by Claude Steele and Joshua Aronson asked black and white participants to complete verbal questions from the Graduate Record Examinations, or GRE, under one of two randomly assigned conditions: *threat* or *no threat*.[106] In the *threat* condition, participants were told that the questions were a test that would measure their intellectual ability — a

[101] This can be observed even at the physiological level. *See generally* Jim Blascovich et al., *African Americans and High Blood Pressure: The Role of Stereotype Threat*, 12 PSYCHOL. SCI. 225 (2001) (comparing European Americans and African Americans under stereotype threat).

[102] *See* Sapna Cheryan et al., *Ambient Belonging: How Stereotypical Cues Impact Gender Participation in Computer Science*, 97 J. PERSONALITY & SOC. PSYCHOL. 1045, 1049-51 (2009); Jennifer A. Mangels et al., *Emotion Blocks the Path to Learning Under Stereotype Threat*, 7 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 230, 239-40 (2012); Robert J. Rydell et al., *Stereotype Threat Prevents Perceptual Learning*, 107 PROC. NAT'L ACAD. SCI. 14042, 14042-47 (2010); Valerie Jones Taylor & Gregory M. Walton, *Stereotype Threat Undermines Academic Learning*, 37 PERSONALITY & SOC. PSYCHOL. BULL. 1055, 1055-57 (2011).

[103] *See* Sian L. Beilock & Thomas H. Carr, *When High-Powered People Fail: Working Memory and "Choking Under Pressure" in Math*, 16 PSYCHOL. SCI. 101, 101-02 (2005); Sian L. Beilock et al., *On the Causal Mechanisms of Stereotype Threat: Can Skills That Don't Rely Heavily on Working Memory Still Be Threatened?*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 1059, 1069-70 (2006); *see also* Sian L. Beilock et al., *Stereotype Threat and Working Memory: Mechanisms, Alleviation, and Spillover*, 136 J. EXPERIMENTAL PSYCHOL. 256, 272-74 (2007) [hereinafter *Stereotype Threat and Working Memory*]; Jean-Claude Croizet et al., *Stereotype Threat Undermines Intellectual Performance by Triggering a Disruptive Mental Load*, 30 PERSONALITY & SOC. PSYCHOL. BULL 721, 728-29 (2004); Michael Johns et al., *Stereotype Threat and Executive Resource Depletion: Examining the Influence of Emotion Regulation*, 137 J. EXPERIMENTAL PSYCHOL. 691, 701-04 (2008); *cf.* Sian L. Beilock et al., *More on the Fragility of Performance: Choking Under Pressure in Mathematical Problem Solving*, 133 J. EXPERIMENTAL PSYCHOL. 584, 597-99 (2004) (discussing how performing under pressure affects students' abilities to solve mathematical problems).

[104] *See* Hannah-Hanh D. Nguyen & Ann Marie Ryan, *Does Stereotype Threat Affect Test Performance of Minorities and Women? A Meta-Analysis of Experimental Evidence*, 93 J. APPLIED PSYCHOL. 1314, 1326-30 (2008); Toni Schmader & Michael Johns, *Converging Evidence That Stereotype Threat Reduces Working Memory Capacity*, 85 J. PERSONALITY & SOC. PSYCHOL. 440, 449-51 (2003); Taylor & Walton, *supra* note 102, at 1064-66.

[105] *See generally* Nguyen & Ryan, *supra* note 104 (identifying 151 empirical reports on the effects of stereotype threat).

[106] Claude M. Steele & Joshua Aronson, *supra* note 98, at 799-800.

statement that for black students activates known racial stereotypes about black intellectual inferiority and triggers the concern that they may confirm this negative stereotype by performing poorly. In the *no threat* condition, participants were told that the questions were simply a laboratory problem-solving task that would not evaluate their intellectual ability. The authors found that black students performed significantly worse than white students in the *threat* condition, but equivalent to white students in the lower-stakes *no threat* condition. In other words, when racial stereotypes of black intellectual inferiority were made salient — simply by stating that the test was diagnostic of intellectual ability — black students faced the psychological strain of stereotype threat, which disrupted their performance and produced a racial performance gap. In contrast, when the questions were framed as non-evaluative (which is very rarely how tests are presented in the real world), the racial performance gap disappeared.[107]

This basic finding has been replicated many times, not just in the laboratory, but also in real-world settings. For example, California at one point had two sets of exams with similar substantive content but different psychological impacts, closely mirroring the *threat* and *no threat* conditions in the Steele and Aronson experiment outlined above. The state-mandated high school exit exam represents a high-stakes testing environment (*threat* condition) in which students must pass to graduate from high school. State achievement exams, by contrast, are low-stakes because performance does not affect students directly (*no threat* condition). In a study of these exams, Sean Reardon and colleagues found that black and Latino students tended to perform just as well as white students on the low-stakes achievement exams, but significantly worse on the high-stakes exit exams.[108]

The effects of stereotype threat have also been documented experimentally many times through randomized controlled trials in which half of the participating students are assigned to complete brief exercises designed to reduce stereotype threat.[109] This method allows

[107] *See id.* at 800-01 (describing the scope of the study and the findings).

[108] *See generally* Sean F. Reardon & Michal Kurlaender, *Effects of the California High School Exit Exam Requirement on Student Persistence, Achievement, and Graduation*, PACE POL'Y BRIEF (Aug. 2009) (establishing that California High School Exit Exam requirements impact minority and female students more than white and male students).

[109] *See, e.g.*, Geoffrey L. Cohen et al., *Recursive Processes in Self-Affirmation: Intervening to Close the Minority Achievement Gap*, 324 SCIENCE 400 (2009) (discussing randomized field experiments in which students were observed between seventh and eighth grade); Geoffrey L. Cohen et al., *Reducing the Racial Achievement Gap: A Social-Psychological Intervention*, 313 SCIENCE 1307 (2006) (examining seventh-grade African

psychologists to directly measure the impact of stereotype threat on black students' academic achievement by observing what happens when this psychological strain is removed as a factor. Meta-analyses[110] examining the performance of the thousands of students who have participated in such stereotype-threat-reduction field experiments over the past decade estimate that the difference in academic achievement when stereotype threat has been experimentally reduced versus when the psychological environment has been left in its threatening state is the equivalent of about sixty-two points on the SAT.[111] In fact, these meta-analyses find that, after stereotype threat is reduced, students contending with negative stereotypes about their performance (i.e., black students) actually outperform their non-stereotyped peers (i.e., white students), even though nothing about these students' substantive knowledge or credentials has changed.[112] These results show the clear depressive impact of stereotype threat on black students' academic performance. Indeed, instead of reflecting academic ability, test scores and grades often reflect, to a significant extent, the presence of race-related psychological threat in students' environments.

Importantly, this process of stereotype threat and resulting depressed performance does not uniquely affect black students. Rather, it represents a normal and ubiquitous response to environments in which negative stereotypes about any group loom large. For example, awareness of the stereotype that older adults have problems with memory can cause older individuals to perform worse on memory tasks when the tasks are framed as diagnostic of memory capacity.[113] Moreover, when stereotypes that women are worse than men at math and at driving are made salient to women, women underperform

American students for the potential effectiveness of "self-affirmation intervention" to combat negative stereotypes).

110 *See* Gregory M. Walton & Steven J. Spencer, *Latent Ability: Grades and Test Scores Systematically Underestimate the Intellectual Ability of Negatively Stereotyped Students*, 20 PSYCHOL. SCI. 1132, 1132-33, 1137 (2009).

111 *See id.* at 1137. This is almost certainly a conservative estimate because this research took place in the students' classrooms and, especially in uncontrolled field settings, no experimental threat-reduction exercise can eliminate stereotype threat or its effects completely. *See id.* at 1133-34.

112 *See id.* at 1135-37.

113 *See* Marie Mazerolle et al., *Stereotype Threat Strengthens Automatic Recall and Undermines Controlled Processes in Older Adults*, 23 PSYCHOL. SCI. 723, 726 (2012).

compared to men on math[114] and on driving tests.[115] However, no such performance differences are observed when these gender stereotypes are not made salient.

Stereotype threat can also negatively impact the performance of white men. For example, when an athletic task is framed as a test of natural athletic ability, white men perform worse than black men;[116] and when white men think that they are being compared in math ability to Asian men, their performance on math tests declines.[117]

The findings of social psychologists on stereotype threat are highly relevant to a proper understanding of affirmative action as a countermeasure in the university admissions context. For one thing, while stereotype threat can affect members of any group that is negatively stereotyped, regardless of whether they believe that the stereotype is true, it results in the greatest performance deficits for those who identify most with the threatened group identity (e.g., their race) and the domain in which they are stereotyped (e.g., school performance).[118] Consequently, it is most likely to negatively impact the quality of the admissions files of those students who are most likely to be highly competitive for, and interested in, attending colleges and universities.

Furthermore, and illustrating my earlier claim that race-based disadvantage in admissions is not fully encompassed by class disadvantage, there is no empirical evidence in the extensive body of

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[114] *See* Michael Johns et al., *Knowing Is Half the Battle: Teaching Stereotype Threat as a Means of Improving Women's Math Performance*, 16 PSYCHOL. SCI. 175, 176-78 (2005); Beilock et al., *Stereotype Threat and Working Memory*, *supra* note 103, at 272-74; *see also* Nguyen & Ryan, *supra* note 104, at 1326-30.

[115] *See* Nai Chi Jonathan Yeung & Courtney von Hippel, *Stereotype Threat Increases the Likelihood that Female Drivers in a Simulator Run Over Jaywalkers*, 40 ACCIDENT ANALYSIS & PREVENTION 667, 672-73 (2008).

[116] *See generally* Jeff Stone et al., *"White Men Can't Jump": Evidence for the Perceptual Confirmation of Racial Stereotype Following a Basketball Game*, 19 BASIC & APPLIED SOC. PSYCHOL. 291 (1997) (discussing the perceptions of athletic ability based upon race).

[117] *See* Joshua Aronson et al., *When White Men Can't Do Math: Necessary and Sufficient Factors in Stereotype Threat*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 29, 39-44 (1999).

[118] *See* Beilock et al., *Stereotype Threat and Working Memory*, *supra* note 103, at 272-74; Michael Inzlicht & Sonia K. Kang, *Stereotype Threat Spillover: How Coping with Threats to Social Identity Affects Aggression, Eating, Decision Making, and Attention*, 99 J. PERSONALITY & SOC. PSYCHOL. 466, 467, 478-80 (2010); *see also* Cheryl R. Kaiser & Nao Hagiwara, *Gender Identification Moderates Social Identity Threat Effects on Working Memory*, 35 PSYCHOL. WOMEN Q. 243, 247-49 (2011); Daryl Wout et al., *The Many Faces of Stereotype Threat: Group- and Self-Threat*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 792, 798 (2008).

research on stereotype threat that suggests that relative economic advantage shields black students from the effects of stereotype threat. A black student who is economically advantaged is just as aware of negative racial stereotypes of intellectual ability as a black student who is economically disadvantaged, and therefore is just as susceptible to the harmful effects of stereotype threat. In fact, to the extent that economically advantaged black students are participating in activities associated with higher socioeconomic status of which blacks have not typically been a part (e.g., ballet, playing the violin, attending private schools), black students may experience *more* stereotype threat as a function of class. Research shows that contextual cues, such as a small number of ingroup members present in a given environment, low minority representation in brochure photographs, and even physical objects typically associated with the dominant, non-stereotyped group can trigger stereotype threat.[119] Based on this work, it is reasonable to think that economically advantaged blacks, who tend to have more exposure to mostly-white environments than economically disadvantaged blacks, may face the negative effects of stereotype threat more consistently and strongly.[120]

It bears emphasizing here that the effects of stereotype threat go beyond performance suppression on tests and thus have the potential to affect many different parts of a student's admissions file. For example, stereotype threat can also negatively impact classroom learning and

[119] *See* Valerie Purdie-Vaughns et al., *Social Identity Contingencies: How Diversity Cues Signal Threat or Safety for African Americans in Mainstream Institutions*, 94 J. PERSONALITY & SOC. PSYCHOL. 615, 626-28 (2008). Research suggests, for example, that under certain conditions, women in predominantly male settings show performance deficits. *See* Cheryan et al., *supra* note 102, at 1058; Michael Inzlicht & Talia Ben-Zeev, *A Threatening Intellectual Environment: Why Females Are Susceptible to Experiencing Problem-Solving Deficits in the Presence of Males*, 11 PSYCHOL. SCI. 365, 369-70 (2000); Mary C. Murphy et al., *Signaling Threat: How Situational Cues Affect Women in Math, Science, and Engineering Settings*, 18 PSYCHOL SCI. 879, 883-84 (2007).

[120] Denise Sekaquaptewa & Mischa Thompson, *The Differential Effects of Solo Status on Members of High- and Low-Status Groups*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 694, 704-06 (2002); Mischa Thompson & Denise Sekaquaptewa, *When Being Different Is Detrimental: Solo Status and the Performance of Women and Racial Minorities*, 2 ANALYSES SOC. ISSUES & PUB. POL'Y 183, 187-88 (2002); *cf.* Inzlicht & Ben-Zeev, *supra* note 119 (studying how exposing females to environments with males reduces their problem solving performance); Denise Sekaquaptewa & Mischa Thompson, *Solo Status, Stereotype Threat, and Performance Expectancies: Their Effects on Women's Performance*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 68 (2002) (discussing the negative stereotypes about women present "in male-dominated environments").

undermine academic relationship building.[121] Because of stereotype threat, black students may be reluctant to join study groups, ask questions in class, or visit professors' office hours.[122] In this respect, stereotype threat is best understood as a "double jeopardy" phenomenon for black students, negatively impacting not only the backend educational dynamics (performance on tests) but frontend dynamics as well (classroom learning and study groups).[123]

What's more, the effects that stereotype threat dynamics have on the behavior of black students, as discussed above, could have interactive effects with interdependent behavior by teachers in ways that compound black students' level of disadvantage. For example, a teacher may assume that a black student who is not speaking in class did not do the relevant assignment or simply did not understand it. The teacher may assume, further, that the black student did not seek guidance because that student is unmotivated, has a poor work ethic, lacks ambition, or is disinterested in his future career. There is little reason to believe that the teacher's default explanation for why the student neither speaks in class nor visits office hours is that stereotype threat (or some other racial phenomenon) is causing the student to disengage.

The problem, then, is not only that such a teacher is unlikely to intervene to diminish the impact of stereotype threat. It is also that the teacher's reaction to the student — based as it is on racial stereotypes — could potentially *heighten* stereotype threat, further decreasing the likelihood that the student will participate in class or visit the teacher in office hours in the future.

Significantly, the consequences of such a stereotype threat domino effect do not end there. Further reducing the competitiveness of the student's admissions file, the teacher in our hypothetical likely will not

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[121] *See* Markus Appel & Nicole Kronberger, *Stereotypes and the Achievement Gap: Stereotype Threat Prior to Test Taking*, 24 EDUC. PSYCHOL. REV. 609, 625-27, 630 (2012) [hereinafter *Stereotypes and the Achievement Gap*]; Markus Appel et al., *Stereotype Threat Impairs Ability Building: Effects on Test Preparation Among Women in Science and Technology*, 41 EUR. J. SOC. PSYCHOL. 904, 911-12 (2011); Mangels et al., *supra* note 102, at 238-40; Rydell et al., *supra* note 102, at 1406; Taylor & Walton, *supra* note 102, at 1064-66.

[122] Stereotype threat can have further downstream effects as well, leading to the avoidance of academically-oriented careers or even dropping out of school altogether. *See* Claude M. Steele, *Race and the Schooling of Black Americans*, ATLANTIC (Apr. 1992), https://www.theatlantic.com/magazine/archive/1992/04/race-and-the-schooling-of-black-americans/306073/.

[123] *See* Appel & Kronberger, *Stereotypes and the Achievement Gap*, *supra* note 121, at 625-27; Taylor & Walton, *supra* note 102, at 1064-66.

steer the student in the direction of valuable internships or cultivate a mentor/mentee relationship with the student. Indeed, the teacher may not even be motivated to write a letter of recommendation for the student. Moreover, to the extent that the teacher does write a letter, she will be limited with respect to the positive things she can say about the student. Finally, the fact that the student will neither have visited the professor in office hours nor meaningfully participated in class means that in evaluating the potential promise of the student, the teacher will have to rely on the very thing that is most negatively impacted by stereotype threat — the students formal academic performance.

Like research on the negative effects of implicit bias, then, the broad and ever-growing literature on stereotype threat supports the conclusion that as education systems and admissions regimes currently operate, black students cannot expect the "fair appraisal of [their] individual[] academic promise" that Justice Powell called for in footnote forty-three.[124] Instead, stereotype threat research has shown the widespread existence of the very "bias in grading or testing procedures" about which Justice Powell was worried.[125] Consequently, research on stereotype threat, too, strongly supports a countermeasure framing of affirmative action under which admissions officers take "race and ethnic background" into account to "cur[e] established inaccuracies in predicting academic performance."[126] Borrowing again from Justice Powell, the deployment of affirmative action as a countermeasure along the preceding lines should be considered "no 'preference' at all."[127] Liberal justices should make this point loud and clear and force conservative justices to confront the decades of research I have summarized above.

In a paper I wrote with Valerie Purdie-Vaughns and Kate Turetsky, two social psychologists, we set out the foregoing evidence, among other empirical data, in even more detail to provide a fuller account of why it is reasonable to conclude that African Americans, across class, face a range of disadvantages in preparing themselves for college. I have been referring to those disadvantages collectively in this Essay as negative action. Recall that I employed that term because the disadvantages I have described can have a negative impact on the academic trajectory of black students and on how admissions officers

[124] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 n.43 (1978) (Powell, J.).

[125] *See id.*

[126] *See id.*

[127] *Id.*

evaluate the applications of those students.[128] Figure 4 is a visual depiction of what I mean.

Figure 4

The basic point of Figure 4 is to show how negative action in the form of implicit biases and stereotype threat weighs down the applications of black students. Remember: negative action can adversely impact black students' grades, standardized test scores, opportunities for mentorship, eligibility for awards, access to extracurricular activities, including student leadership, and the quality of their letters of recommendation.

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Think now about white students. To bring the analysis full circle and lay out the case for reframing affirmative action as a countermeasure in line with Justice Powell's concerns in footnote forty-three, it is helpful to understand not only the side of the admissions coin that is represented by negative action, but its flipside as well — the trajectory of white students on their way to college admission. Rather than facing negative action, white students benefit from what I will call "positive action." While some might frame positive action as the equivalent of

[128] *See* Carbado et al., *Privileged or Mismatched*, *supra* note 49, at 199-229.

"white privilege"[129] or white "ingroup group favoritism,"[130] there are less controversial ways to define the phenomenon. One might, for example, describe positive action simply as the advantages that accrue from not being subject to the forms of negative action set out above. Under this framing, a white student benefits from positive action when, for example, a teacher's evaluation of that student's performance is not compromised by implicit biases.[131] A slightly more expansive way to define the term would be to say that positive action refers to the conduct and decision-making within schools (on the part of teachers, students, and staff) and the governance choices schools make (for example, about the curriculum, admissions, and forms of testing) that, relative to black students, are advantageous to white students. Central to both formulations is the idea that white students gain not only from race-friendly institutional environments, bias-free evaluations,[132] and standardized tests that are not, for them, racially disadvantaging,[133] but also from same-race peer groups, mentors, role models, teachers, and institutional leaders. In short, relative to black students, white students effectively experience a windfall from inhabiting learning environments in which their race raises no questions about their intellectual competence or social belonging.[134] Consequently, those students can

[129] For a classic articulation of white privilege, see generally Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, INDEP. SCH., Winter 1990 (discussing the way in which white privilege manifests in the author's life).

[130] Multiple studies demonstrate that, across multiple decision-making contexts, whites evidence a preference for other whites. *See* Carbado et al., *Privileged or Mismatched*, *supra* note 49 at 193-94 (discussing the ingroup favoritism literature).

[131] Though I have focused on implicit biases, explicit biases would matter here as well.

[132] More precisely, evaluations free from *racial* bias.

[133] Whites are, however, vulnerable to the ways in which class can negatively impact performance on standardized tests. *See* LANI GUINIER, THE TYRANNY OF THE MERITOCRACY: DEMOCRATIZING HIGHER EDUCATION IN AMERICA 19-21 (2015); LANI GUINIER & SUSAN STURM, WHO'S QUALIFIED? 8-10 (2001); William Kidder & Jay Rosner, *How the SAT Creates "Built-In Headwinds": An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131, 133-35 (2002); *see also* William C. Kidder, *Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research*, 12 BERKELEY LA RAZA L.J. 173, 175 (2001); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Deal*, 84 CALIF. L. REV. 953, 987-97 (1996).

[134] There are other axes along which white students may feel alienated. Class, sexual orientation, and first-generation status are three examples that come readily to mind. Importantly, however, each of these examples could also be intersectional forces in the institutional experiences of black students as well. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of*

traverse educational environments with (at a minimum) the benefit of the doubt, realize their academic potential without race-based burdens, and thus reflect that potential more effectively in their admissions file.

Of course, not every form of positive action will be at play in every admissions file. Similarly, not all white students benefit from positive action in the same way and to the same extent. And, of course, not every dimension of positive action is represented in the account that I have articulated above. One can make similar observations about negative action, including the fact that not all black students are equally vulnerable to the phenomenon. The point I mean to stress, however, and the point that is crucial in the context of footnote forty-three, is that if, as a general matter, white students benefit from positive action and black students do not, white students and black students are not competing on even ground. To mix metaphors, the scales are tipped in favor of whites along the lines that Figure 5 depicts:

Figure 5

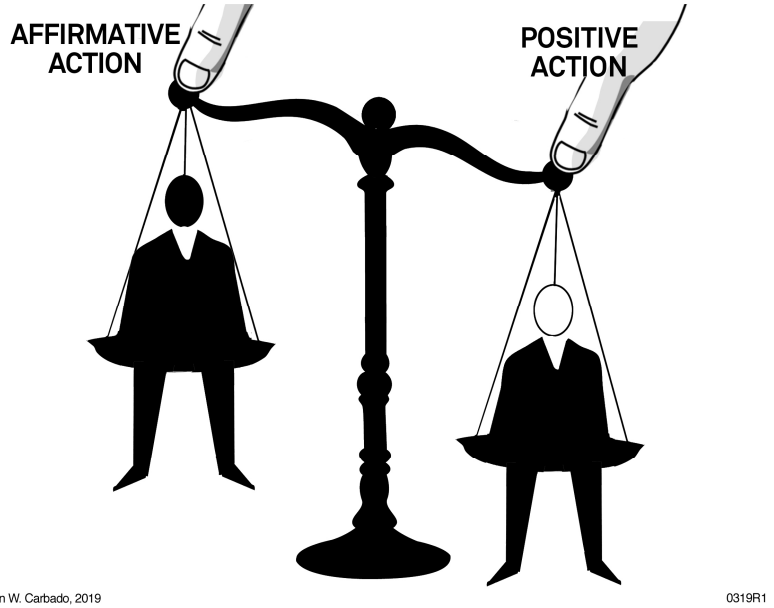
Under Figure 5, the default admissions regime is uneven. The scales are unbalanced. The thumb of positive action advantages the white student. From the vantage point of Figure 5, the white and black

Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1 U. CHI. L.F. 139, 141-50 (1989) (setting forth the theory of intersectionality).

students are not subject to a "fair appraisal of each individual's academic promise." Whereas black students are vulnerable to "bias in grading or testing procedures,"[135] or what I have been calling negative action, white students experience the absence of those biases in the form of what I have been calling positive action.

The next two figures reintroduce the thumb of affirmative action into the analysis. Consider first Figure 6.

Figure 6



In this image, affirmative action is a part of the picture, but it does not create the imbalance. Indeed, even with the thumb of affirmative action, the scales are still uneven. They continue to lean in a direction that disadvantages the black student. The weight of the thumb of positive action exceeds the weight of the affirmative action thumb. Under Figure 6, while affirmative action is ameliorative, that is, it acts as a countermeasure to positive action, the policy is not enough to level the scales. What should be clear from Figure 6, drawing again from Justice Powell's words in footnote forty-three, is that affirmative action is "no 'preference' at all."[136] Indeed, it is not even enough to fully "cur[e]

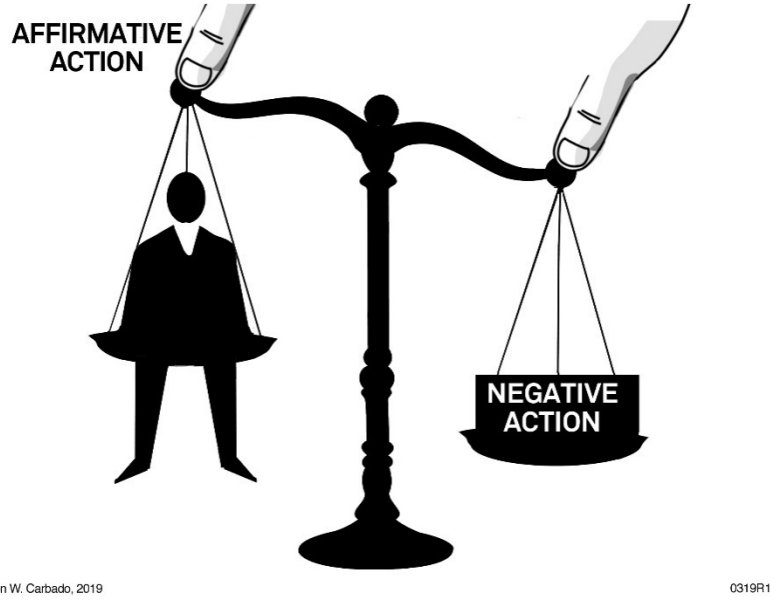
[135] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 n.43 (1978) (Powell, J.).

[136] *See id.*

established inaccuracies in predicting academic performance" that implicit biases and stereotype threat, among other factors, have introduced.[137]

Another way to tell the story Figure 6 illustrates would be to frame affirmative action with reference to negative action. Here, the point is that affirmative action may be insufficient to counteract the disadvantages negative action creates. Figure 7 provides that juxtaposition.

Figure 7



As with Figure 6, in Figure 7 affirmative action performs an ameliorative role. But the presence of affirmative action is not enough to offset the weight of negative action. Consequently, the scales continue to slope in a direction that disadvantages black students.

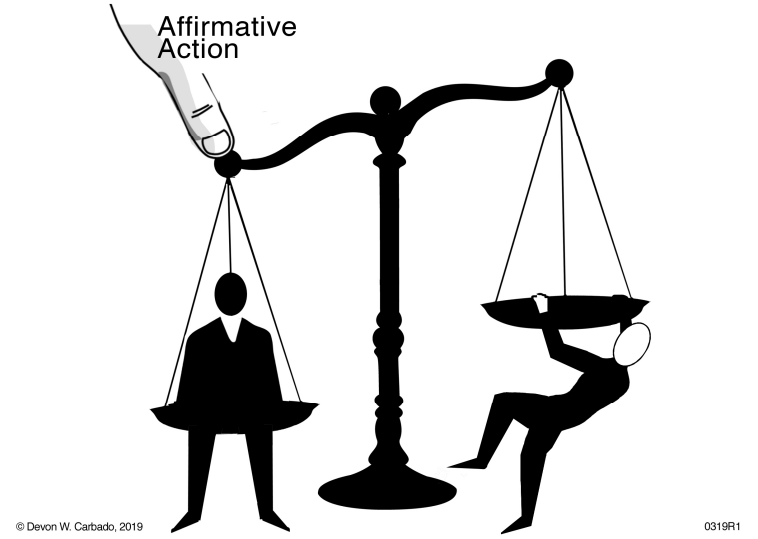
A caveat is in order at this point: Notwithstanding the very specific narrative that Figures 6 and 7 invite, I should be clear that I do not present these images as strong empirical claims. It is conceivable that in some instances, the effect of affirmative action might be to level out the scales. In other instances, the policy might have an overcorrection effect, tilting the scales in favor of black students. Because context will surely matter, the specific pictures Figure 6 and Figure 7 paint are best

137 *See id.*

viewed as a soft default. The more important takeaway from those figures is that affirmative action does not disrupt an otherwise racially neutral baseline. It attempts to correct for positive and negative action to ensure the "fair appraisal of each individual's academic promise" and to "cur[e] established inaccuracies" in evaluating this promise.[138]

This brings us back to a version of Figure 3, the representation of affirmative action as a racial preference. The image, again, is this:

Figure 3



Part of what this image communicates is that, but for affirmative action, the white applicant would be in a more competitive position than he currently occupies. A stronger version of this argument frames affirmative action as an admissions barrier for whites. More precisely, the claim is that affirmative action *causes* admissions officers to deny admission to individual white students whom those officers would, in the absence of affirmative action, admit.[139]

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[138] *Id.*

[139] In other words, the preference framing of affirmative action creates the impression that affirmative action does the opposite of what Justice Powell called for: it overrides the "fair appraisal of [the] academic promise" of the *white* student. *Id.* As I have laid out above, this framing inappropriately overlooks, among many things, the combined effects of positive action for white students and negative action against black students. *See* discussion *supra* Sections II.A, II.B. As I describe below, the more specific argument that affirmative action causes the rejection of individual white students is suspect on additional grounds as well. *See* discussion *supra* Conclusion.

That argument is more spin than empiricism. First, as a doctrinal matter, plaintiffs in affirmative action cases are not required to demonstrate that, but for the use of affirmative action, a specific college or university would have admitted them.[140] As Elise Boddie persuasively argues, "courts credit white resentment of affirmative action as a cognizable injury."[141] Second, more than a decade ago, Goodwin Liu exposed the "causation fallacy" in the argument that affirmative action causes institutions to deny admission to individual white applicants.[142] Building on Liu's work, Kimberly West-Faulcon has rehearsed a similar claim, focusing specifically on the litigation over the University of Texas' admissions policies.[143] The crux of her argument is that there are simply too few black students in the admissions pool of elite colleges and universities for affirmative action to have the causation effect opponents of affirmative action attribute to the policy.[144]

In some ways, even the images I have employed to challenge the racial preference framing of affirmative action invite the "causation fallacy" argument in that they paint a picture of admissions in which — throughout the admissions process — an individual white student finds himself in contestation with an individual black student over a particular admissions spot. In reality, I know of no school that would describe its admissions process in that way. Most, if not all, schools would say that they employ some version of "holistic review" under which admissions decisions are based on something like a totality of the circumstances analysis.[145] Admissions slots, in such a system, are not

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[140] *See* Elise C. Boddie, *supra* note 33 at 313; Erin E. Byrnes, *Unmasking White Privilege to Expose the Fallacy of White Innocence: Using a Theory of Moral Correlativity to Make the Case for Affirmative Action Programs in Education*, 41 ARIZ. L. REV. 535, 546 (1999); Nikole Hannah-Jones, *What Abigail Fisher's Affirmative Action Case Was Really About*, PROPUBLICA (June 23, 2016, 12:28 PM), https://www.propublica.org/article/a-colorblind-constitution-what-abigail-fishers-affirmative-action-case-is-r.

[141] Boddie, *supra* note 33, at 301.

[142] *See* Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1060-78 (2002).

[143] *See* Kimberly West-Faulcon, *Forsaking Claims of Merit: The Advance of Race-Blindness Entitlement in* Fisher v. Texas, *in* CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 335, 21-30 (Steven Saltzman ed., 2013).

[144] *See id.* at 25-26 (analyzing the percentage representation of African Americans at the University of Texas); West-Faulcon, *Obscuring Asian Penalty*, *supra* note 52, at 592-97.

[145] Scott Jaschik, *How They Really Get In*, INSIDE HIGHER ED. (Apr. 9, 2012), https://www.insidehighered.com/news/2012/04/09/new-research-how-elite-colleges-make-admissions-decisions; *see* Michael N. Bastedo et al., *What Are We Talking About When We Talk About Holistic Review? Selective College Admissions and its Effects on Low-SES Students*, 89 J. HIGHER. EDUC. 782, 790-95 (2018); Kimberly Davis, *A Holistic*

filled by comparing individual applicants against each other, but by evaluating whether an individual student would contribute to the overall class profile that a school desires in such a way that an offer of admission should be made. Of course, standardized test scores and GPA typically weigh more heavily than other variables. And proponents of the preference framing might argue that affirmative action "causes" the rejection of at least some white students with high test scores if at least some nonwhite students with lower test scores were admitted. However, this creates the false impression that slots are assigned based on test scores and grades *only*, which erases both other important admissions considerations and the fact that students are admitted based on overall contributions to the incoming class.[146] Thus, while most elite colleges and universities employ affirmative action in the context of admissions, they do not have affirmative action slots as such.

Furthermore, even if a school aspired to conduct its admissions process so that each spot was a tournament between an individual white student and an individual black student, it simply could not do so. Given the relatively small number of black students in the applicant pool of elite colleges and universities, and the fact that not all black applicants will be beneficiaries of affirmative action, it is hard to see how there could ever be an admissions system in which every white student finds himself in competition with a black beneficiary of affirmative action for a particular admissions spot.

A relatively recent study on race and admissions provides concrete numbers that support the foregoing description and describes the impact of affirmative action on white applicants as negligible.[147] Focusing specifically on Harvard University, the study concludes that removing *all* black and Latino applicants from the admissions process would increase the likelihood of white applicants being admitted by only one percent.[148] Thus, even assuming, *arguendo*, that admissions

Quandary-Higher Education, DIVERSE (Aug. 16, 2012), https://diverseeducation.com/article/17317/; Sara Harberson, *The Truth About 'Holistic' College Admissions*, L.A. TIMES (June 9, 2015, 5:00 AM), http://www.latimes.com/opinion/op-ed/la-oe-harberson-asian-american-admission-rates-20150609-story.html.

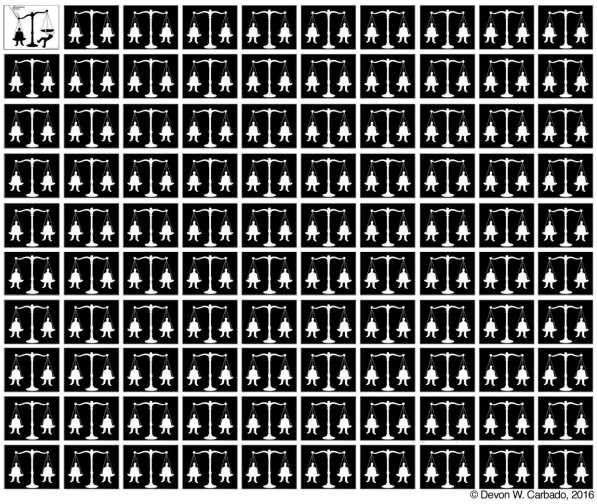
[146] In other words, holistic admissions regimes recognize that a "fair appraisal of each individual's academic promise" requires paying attention to more than test scores and grades. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 n.43 (1978) (Powell, J.).

[147] *See* Sherick Hughes et al., *Causation Fallacy 2.0: Revisiting the Myth and Math of Affirmative Action*, 30 EDUC. POL'Y 63, 80-89 (2016).

[148] *Id.* at 80-81. The authors' analysis also applies to the Asian Americans — that is to say, affirmative action has virtually no impact on the admissions rates for Asian Americans. *See id.*; West-Faulcon, *Obscuring Asian Penalty*, *supra* note 52, at 592-97.

regimes do include tournaments between individual black and white applicants and that affirmative action is a racial preference, the worst-case scenario for white applicants looks something like Figure 8:

Figure 8



In only one of the hundred admissions scales — the first one in the upper left corner — is a white student in a tournament with a black applicant who is benefitting from the affirmative action thumb on the scale. The remaining ninety-nine scales are comprised of students who are not black.[149]

To repeat: I do not think that admissions systems operate as tournaments, and it is not my view that, if one thinks of admissions processes as scales, but for affirmative action, the scales are otherwise balanced. I employ Figure 8 not to acquiesce in any of the foregoing ideas but to visually present the strongest case against affirmative action as a preference in university admissions. That case, as the picture Figure 8 depicts suggests, is decidedly weak when put into the proper context, even if taken on its own terms.

More fundamentally, and as this Essay demonstrates, the very conceptualization of affirmative action as a preference is flawed. In footnote forty-three, Justice Powell urged us to consider whether admissions systems effectuate the "fair appraisal of each individual's

[149] I "should be clear to note that we do not present Figure [6] as an empirical claim but as heuristic device to demonstrate the minimal (potentially at most [one] percent) impact of affirmative action on whites." Carbado et al., *Privileged or Mismatched*, *supra* note 49, at 198 n.56.

academic promise."[150] If they do not, if there is racial "bias in grading or testing procedures" or there are "inaccuracies in predicting academic performance," and this Essay has shown that both sets of problems likely plague admissions processes, then the use of affirmative action to counteract those problems is "no 'preference' at all."[151] This is the case that liberal justices and other supporters of affirmative action in university admissions should make. They should force conservative justices to stop taking the preference framework for granted and confront the ever-growing case in favor of affirmative action as a countermeasure.

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As a prelude to concluding, I should note that I am mindful that many readers may still not be persuaded by the anti-preference framing of affirmative action that this Essay articulates. But, as I suggested in the Introduction and will reiterate here, I am less invested in convincing such readers that I am right in my view that affirmative action is a countermeasure than I am in persuading them that the conceptualization of affirmative action as a preference relies on a number of questionable baseline assumptions that, for the most part, scholars, lawyers, and judges have not seriously scrutinized.[152] Indeed, my sense is that it is precisely the failure of proponents of affirmative action to imagine the policy outside of a preference framework that explains the underutilization of footnote forty-three and the defense of affirmative action that it makes possible.

To think further about the role of the frameworks[153] and baseline assumptions that are always at play in shaping our views about public policy and legal regimes, an analogy to gender and sexual harassment

150 *See Bakke*, 438 U.S. at 306 n.43 (Powell, J.).

151 *Id.*

152 *Cf.* David Simson, *Fool Me Once, Shame on You; Fool Me Twice, Shame on You Again: How Disparate Treatment Doctrine Perpetuates Racial Hierarchy*, 56 HOUS. L. REV. 1033 (analyzing Title VII disparate treatment law, including Title VII affirmative action law, to show how mistaken baseline assumptions, or "baseline errors," about the nature and extent of continued racial inequality in the workplace create a mistaken conceptualization of Title VII disparate treatment law as symmetrical and protecting all racial groups equally when, in fact, the doctrine is asymmetrical and perpetuates racial hierarchy to the detriment of workers of color).

153 *See id.* at 1067 (explaining concept of "framework critique" developed in Critical Race Theory); *see also* Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149, 157-58 (2014) (same).

might be helpful.[154] For purposes of this exercise, assume that sexual harassment exists across different kinds of workplaces in the United States.[155] Assume further that the phenomenon predominantly affects women, but is underreported and therefore difficult to regulate directly.[156] Against the backdrop of those assumptions, it would be hard to argue that female workers across America are competing with their male coworkers on a level field. The existence of sexual harassment makes the workplace a more difficult environment for women to navigate than for men.[157]

In line with these considerations, we typically do not frame efforts to counteract sexual harassment in the workplace as a gender preference. Nor are anti-sexual harassment policies generally framed as "reverse discrimination" initiatives that are justified to advance gender diversity. Instead, efforts to combat sexual harassment are understood as countermeasures that are meant to prevent and counteract the deviation from a fair work environment that sexual harassment represents.[158] In other words, we conceptualize measures against sexual harassment as

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[154] Of course, discussions about race are always already gendered, at least implicitly. See Kimberelé Crenshaw, *supra* note 134, at 139-41.

[155] This is not a particularly radical assumption. *See, e.g.*, Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NPR (Feb. 21, 2018), https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment.

[156] *See* Tara Golshan, *Study Finds 75 Percent of Sexual Harassment Victims Experienced Retaliation When They Spoke Up*, VOX (Oct. 15, 2017, 9:00 AM), https://www.vox.com/identities/2017/10/15/16438750/weinstein-sexual-harassment-facts; Cameron Kimble & Inimai M. Chettiar, *Sexual Assault Remains Dramatically Underreported*, BRENNAN CTR. FOR JUST. (Oct. 4, 2018), http://www.brennancenter.org/blog/sexual-assault-remains-dramatically-underreported.

[157] None of what I am saying is intended to deny or elide the fact that men experience sexual harassment as well. *See* Kathryn J. Holland et al., *Sexual Harassment Against Men: Examining the Roles of Feminist Activism, Sexuality, and Organizational Context*, 1 PSYCHOL. MEN & MASCULINITY 17, 18 (2016); Amy E. Street et al., *Gender Differences in Experiences of Sexual Harassment: Data From a Male-Dominated Environment*, 75 J. CONSULTING & CLINICAL PSYCHOL. 464, 464-65 (2007); Hanna Rosin, *When Men are Raped*, SLATE (Apr. 29, 2014, 12:54 PM) https://slate.com/human-interest/2014/04/male-rape-in-america-a-new-study-reveals-that-men-are-sexually-assaulted-almost-as-often-as-women.html. The fact remains, however, that women are more vulnerable to the phenomenon than men.

[158] Catharine MacKinnon's groundbreaking work established the idea. *See* CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 6-7 (1979). *See generally* Catharine A. MacKinnon, *Sex Equality: On Difference and Dominance*, *in* TOWARD A FEMINIST THEORY OF THE STATE 216-31 (1991) (discussing the various difference between men and women and how those differences impact equality).

countermeasures to a material disadvantage introduced into the workplace by sex-dependent behavior that predictably harms and burdens women. As I have tried to show above, we can, and should, conceptualize affirmative action in university admissions in similar ways. It, too, can be thought of as a countermeasure against race-dependent disadvantages that predictably harm and burden black students. Thus, it, too, should be understood as a countermeasure, not a preference. This is the lesson we can unearth from footnote forty-three in *Bakke*.

To be clear, I am not suggesting that my analogy to sexual harassment maps perfectly onto the race/admissions affirmative action context. Unequivocally, it does not. Though some analogies are better than others, they are all necessarily imperfect. In this respect, I urge the reader not to overread the import of my comparative turn to sexual harassment. The harms of implicit bias and stereotype threat in the context of admissions are not like the harms of sexual violence. I draw on the analogy here for the limited purpose of demonstrating that contingent assumptions and normative choices (not just factual observations) structure the ways in which we conceptualize legal interventions and partly determine when we frame particular policies as preferences and when we do not. My contention in this Essay has been that part of the reason why so many judges and commentators frame affirmative action as a racial preference is that those judges and commentators accept deeply embedded and insufficiently interrogated assumptions that black students and white students (1) compete on a racially neutral playing field, (2) are subject to bias-free evaluation processes, and (3) are viewed through racially immaculate perceptions.[159] Footnote forty-three in *Bakke* reminds us that if such assumptions turn out to be wrong, our framing of affirmative action as a preference may have to give way as well. As I have shown in great detail in this Essay, there are very good conceptual and empirical reasons to conclude that these assumptions are inaccurate. Such conclusions ought to be reflected in the law of affirmative action. At the very least, liberal supporters of affirmative action, on the Supreme Court and elsewhere, ought to put their best foot forward when they defend the policy, which means reconceptualizing affirmative action as a countermeasure. They should not, as many currently do, attempt a begrudging defense of affirmative action that accepts those very same

[159] *See* Jerry Kang, *supra* note 81, at 1500-04 (suggesting that, with respect to race, our perceptions are not immaculate).

questionable assumptions laid out above. Justice Powell, as surprising as that may be, provided the opening for such a strengthened defense of affirmative action in footnote forty-three in *Bakke*. It is time to take that opening seriously.

CONCLUSION

I have argued that the preference framing of affirmative action is normatively and empirically problematic. To advance and support this claim, I have highlighted a number of racial disadvantages that black students experience prior to, and in the context of, admissions that might make their application files appear less competitive than those of their white counterparts (who do not experience the same disadvantages). I have explained that these disadvantages are not class-dependent. Indeed, conspicuously absent from the disadvantages I have described is K-12 segregation and inequality.[160] I have excluded that factor from the analysis to avoid getting bogged down in a debate about whether K-12 inequalities are a class-based problem or a racial one (I think they are both). Instead, I have focused on a set of factors whose impact transcends class. My aim in concluding is to broaden my discussion of the implications of reconceptualizing affirmative action as a countermeasure by foregrounding how this reconceptualization helps us better understand the problematic ways in which opponents of affirmative action are mobilizing Asian Americans in the debate.

For the most part, and prior to the Harvard litigation, opponents of affirmative action employed Asian Americans to create a "bad minority" versus "good minority" dichotomy and to then use this dichotomy to show that affirmative action was not really necessary. At its core, their argument was that if African Americans were more like Asian Americans, in the sense of evidencing the same kind of work ethic and strong commitment to education, they would be equally competitive in admissions even without explicit consideration of race and, thus, there would be no need for affirmative action.[161] Under this view, the solution to the competitive disadvantage that black applicants experience in the

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[160] *See* ERICA FRANKENBERG ET AL., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 4-6 (2003); *see also* JOHN KUCSERA & GARY ORFIELD, NEW YORK STATE'S EXTREME SCHOOL SEGREGATION: INEQUALITY, INACTION AND A DAMAGED FUTURE 35-52 (2014).

[161] *See Affirmative Action: Overview*, NAT'L CONF. STATE LEGIS. (Feb. 7, 2014), http://www.ncsl.org/research/education/affirmative-action-overview.aspx.

context of admissions is for black students to be more like the "model minority" that Asian Americans represent.[162]

Model minority arguments have figured less prominently in the most recent wave of affirmative action litigation. Far more salient has been the even stronger claim that Asian Americans are "reverse discrimination" victims of the policy.[163] The idea underlying this claim is that Asian American students with high incoming credentials, in particular standardized test scores and grades, are not being admitted because the spots that they would have otherwise received are taken up by lower performing black and Latino affirmative action admits. Opponents of affirmative action are pointing to Harvard's admissions practices as a case in point.[164] But, the facts underlying the lawsuit against Harvard are far more complicated than this "reverse discrimination" account suggests. To understand what I might mean, it is helpful to return to the concept of "negative action."

Recall that by negative action I mean any disadvantage that students of color experience in the context of admissions because of their race.[165] This Essay has focused on the various ways in which race can negatively impact multiple aspects of a black student's academic trajectory (which then become part of that student's admissions file) and how an admissions officer evaluates that student's application.

But negative action can function in other ways as well, as Jerry Kang's introduction of the term makes clear.[166] Kang's definition of negative action was specifically intended to engage arguments about Asian

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[162] The work by Robert Chang and Frank Wu provides a critique of the "model minority" perspective. *See generally* Chang, *supra* note 62 (discussing how Asian Americans are discriminated against in the legal field because of the "model minority" label); Frank Wu & Theodore Hsien H. Wang, *Beyond the Model Minority Myth: Why Asian American Support Affirmative Action*, 53 GUILD PRAC. 35 (1996) (asserting that Asian Americans face a "glass ceiling" created by the idea of the model minority).

[163] *See* Iris Kuo, *The 'Whitening' of Asian Americans*, ATLANTIC (Aug. 31, 2018), https://www.theatlantic.com/education/archive/2018/08/the-whitening-of-asian-americans/563336/. This framing is articulated repeatedly in Justice Alito's dissent in *Fisher II*. *See* Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2227 (2016) (Thomas, J., dissenting) (alleging that the university's affirmative action "plan discriminates *against* Asian American students) (emphasis in original).

[164] *See* Complaint at 17, 28, 37, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.), 346 F. Supp. 3d 174 (D. Mass. 2018) [hereinafter *Students for Fair Admissions 2018*] (No. 14-CV-14176-ADB), 2018 WL 4688308; *see also Students for Fair Admissions 2019*, 397 F. Supp. 3d 126 (D. Mass. 2019).

[165] *See supra* Part II.

[166] *See* Kang, *Negative Action Against Asian Americans*, *supra* note 78, at 3.

Americans and affirmative action. More specifically, Kang deployed the term negative action to explore whether admissions practices discriminate against Asian Americans, "using the treatment of Whites as a basis for comparison."[167] According to Kang, "negative action against Asian Americans is in force if a university denies admission to an Asian American who would have been admitted had the person been White."[168]

In other words, Kang's definition of negative action is focused on discrimination against Asian Americans in favor of whites. My conceptualization of negative action broadens the phenomenon. I define negative action to encompass all of the disadvantages students experience in the context of admissions because of their race. Under this view, the discrimination problem that Kang describes is just one manifestation of negative action.

The inquiry Kang proposes does not turn on whether an institution utilizes affirmative action. It turns instead on whether an admissions process, with or without affirmative action, treats Asian Americans worse than it does whites. Even if such negative action were established, however, this would do nothing to establish the separate conclusion that an affirmative action program was the source of this negative action or that it represents a preference for black students. Though Jeannie Suk Gersen does not employ the term negative action, her analysis of the Harvard case reflects Kang's sensibility to disaggregate these questions and reminds us that "it is important not to conflate two separate concepts: the legal issue of affirmative action and the factual issue of whether Harvard discriminated against one particular racial group."[169] In other words, it is possible for an admissions system to operate in a way that, *at the same time*, (1) engages in negative action in the form of discrimination against Asian Americans and in favor of whites; *and* (2) uses affirmative action as a countermeasure that addresses the harmful effects of the broader types of negative action suffered by black students that I have laid out in this Essay (e.g., those caused by implicit biases and stereotype threat). The current affirmative action litigation against Harvard relies in its attacks against the policy on obscuring, indeed erasing, the fact that discrimination against Asian Americans in favor of whites (i.e., negative action in the narrow sense) need not be, indeed

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167 *Id.*

168 *Id.*

169 *See* Jeannie Suk Gersen, *Anti-Asian Bias, Not Affirmative Action, Is on Trial in the Harvard Case*, NEW YORKER (Oct. 11, 2018), https://www.newyorker.com/news/our-columnists/anti-asian-bias-not-affirmative-action-is-on-trial-in-the-harvard-case.

logically is not, tied to the existence of an affirmative action program. By presenting negative action against Asian Americans and affirmative action as intertwined, this litigation adds additional fuel to the fire that attacks affirmative action as an illegitimate preference for students of color — a preference that now not only disadvantages whites, but students of color as well.

A recent article by Jonathan Feingold puts these negative action dimensions of the Harvard litigation into even sharper relief.[170] A central move Feingold makes is to redeploy the evidence that the plaintiffs, Students for Fair Admissions ("SFFA"), are mobilizing to challenge Harvard's admissions policy, including its affirmative action program. Feingold's intervention highlights the multiple ways in which the evidence used by SFFA's own expert reveals that it is white students who benefit from the anti-Asian bias that SFFA alleges, not black or Latino students that may have benefited from Harvard's affirmative action program. According to SFFA's expert, Asian Americans fare worse than similarly situated whites with respect to the personal rating score, their overall score, and their selection for admissions.[171] In other words, to the extent Harvard's admission practices reflect anti-Asian, pro-white bias, an important part of the picture is about neither black students nor affirmative action. Instead, it is about white students and negative action. Thus, while SFFA invites us to conceive of blacks/affirmative action and Asian Americans as antagonists in the narrative they articulate about Harvard, their own empirical evidence tells a more complicated story. A critical feature of that story is not about whites and Asian Americans as similarly situated victims of affirmative action, as SFFA may have us believe; it is about Asian Americans as victims of negative action and whites as beneficiaries of the phenomenon.

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[170] *See generally* Jonathan P. Feingold, SFFA v. Harvard*: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707 (2019) (discussing how the public views the Harvard case as an affirmative action case when it is actually about negative action against Asian Americans). Importantly, SFFA also raised questions about the constitutionality of affirmative action writ large, but the district court rejected that argument. S*ee Students for Fair Admissions 2018*, 346 F. Supp. 3d 174, 187-88 (D. Mass. 2018).

[171] *See Students for Fair Admissions 2018*, 346 F. Supp. 3d at 193-94; *see also Students for Fair Admissions 2019*, 397 F. Supp. 3d 126 (D. Mass. 2019). To be clear, and as Feingold himself notes, "SFFA also contends that Harvard treats Asian American applicants, on average, differently than black and Latino applicants. Given that Harvard openly employs an affirmative action policy, the fact that Harvard considers the race of underrepresented students of color is neither surprising nor indicting." Feingold, *supra* note 170, at 136.

It would be worrisome, to say the least, if such conflations and oversimplifications became the basis for the conservative Supreme Court justices to adjudicate affirmative action as unconstitutional per se. Whether liberal supporters of affirmative action realize it, they would be implicated in that outcome. Which is to say, SFFA's assault on affirmative action expressly trades on the preference framing of the policy in which liberals have long acquiesced. My hope, then, is not only that liberals will come to see how their defense of affirmative action has watered the seeds from which wholesale attacks of the policy have grown, but also that they jettison the preference conceptualization of the policy going forward and take advantage of the language in footnote forty-three to frame affirmative action as a countermeasure designed to facilitate the "fair appraisal of each individual's academic promise in . . . light of . . . bias in grading or testing procedures," as well as other forms of negative action, that create race-dependent "inaccuracies in predicting academic performance."[172] If liberals take this largely forgotten footnote more seriously, they can push affirmative action discourses in the direction of describing the policy as a racial justice measure that is "no 'preference' at all."[173]

[172] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 n.43 (1978) (Powell, J.).

[173] *See id.*