Playing The Race Card: White Americans’ Sense of Victimization in Response to Affirmative Action

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Abstract:

“They marched on Washington to reclaim civil rights. They complained of voter intimidation at the polls. They called for ethnic studies programs to promote racial pride. They are, some say, the new face of racial oppression in this nation -- and their faces are White.”a A 2011 poll indicates that Whites have now come to view anti-White bias as a bigger problem than anti-Black bias.b Based on recent Supreme Court opinions, most of the Justices apparently agree that Whites are today’s true victims, as the Court has continued to steadfastly stand up for the rights of White plaintiffs against discrimination in the form of affirmative action.

In determining whether to provide a class with heightened protection, the Supreme Court is inevitably tasked with making some observations about that class’s lot in society. In the past few years, many have advanced the narrative that Whites are in need of protection against discrimination, including the Tea Party, Rush Limbaugh, the state of Arizona, and even the Berkeley College Republicans. Given these social expressions of White victimization, it is no surprise that the Supreme Court has extended its protections to Whites against any laws that are perceived as harming their interests.

In this piece, I seek to explore these social expressions of White victimization and ultimately explain, employing psychological research, how and why this narrative has it backwards. While many pieces of legal scholarship have analyzed the recent popular schema of colorblindness as a normative goal and/or a description of modern America, this piece analyzes an even more recent trend – a divergence from colorblindness, as some Whites are not pretending that race is irrelevant, but are in fact claiming their race as a badge of discrimination.

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**INTRODUCTION**

In the fall of 2011, the Berkeley College Republicans held an “Increase Diversity Bake Sale,” in which they charged different prices for pastries based on the gender and race of the buyer.¹ For each pastry, the group charged two dollars for Whites, one dollar and fifty cents for Asian-Americans, one dollar for Latinos, seventy-five cents for Blacks, twenty-five cents for Native Americans, and gave all women a twenty-five cent discount.² Various other California campuses joined the Berkeley College Republicans in the bake sale, meant to protest SB 185, which would have countered Proposition 209 and permitted the use of race in the college admissions process.³ The asserted purpose of the bake sale was to argue that differential treatment on the basis of race is always wrong. But more specifically, the pricing structure reflects the view of the College Republicans that Whites have to “pay more” to get the same thing as people of color, because people of color are given so much “special treatment.”

When the Civil Rights Movement finally achieved the eradication of formal *de jure* racism, many White Americans were happy to pretend that we lived in a “colorblind” society, in which we ignored the fact that Whites occupied a distinctly superior position in that society. But where *de facto* racism persisted, many leaders felt an obligation to help right that wrong through programs like affirmative action. Yet when institutions enacted

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² *Id.*
the most modest of remedial measures, many Whites began to play the victim. Today, conservative Whites seek to analogize modern “discrimination against Whites” (better known as affirmative action) with the Jim Crow era discrimination against Blacks. They argue that both forms of discrimination ought to receive the same exacting level of review from the Supreme Court: strict scrutiny. In determining what level of review a class of people deserves, the Court cannot consult a statute. Instead, the Court is required to make some observations about that class’s role in society, and some Whites are beginning to advance a narrative of White victimization that is leading the Court to conclude that Whites are a class worthy of heightened protection. A 2011 report indicates that, “Whites have now come to view anti-White bias as a bigger societal problem than anti-Black bias.” A recent poll reveals that, “40% of adults in America think racism against White people is widespread in the United States.” How can so many people feel that discrimination against Whites is widespread when Whites are the most materially well-off group using almost any conceivable measure? That feeling of White victimization simply does not comport with the reality of White privilege.

The cliché example of “playing the race card” involves a Black person being criticized for something unrelated to his or her race and responding, “It’s because I’m Black, right?” Today, when White Americans do not attain their highest educational or vocational aspirations, many are beginning to exclaim, “It’s because I’m White, right?” In this piece, I seek to document this pervasive perception of anti-White bias, as it is reflected

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in social expressions. I consult psychological research to explain why the perception does not match the reality. And in looking at the Supreme Court’s factors for determining the appropriate level of review, I seek to establish that “discrimination” against Whites in the form of affirmative action ought to receive a lower level of review than discrimination against non-Whites. In Part I, I lay out the Court’s equal protection jurisprudence as it relates to affirmative action and the level of scrutiny that so-called “reverse racism” claims receive. In Part II, I explore social expressions of this perception of an anti-White bias in order to construct the conservative case for the application of strict scrutiny to “reverse racism” affirmative action claims. In Part III, I refute that conservative case by demonstrating that Whites are still the oppressors, not the oppressed. In Part IV, I use psychological evidence to explain how that public perception can be so out of sync with reality, the reality that White Americans do not occupy a place in our society that merits heightened scrutiny.

I. THE SUPREME COURT’S TREATMENT OF “REVERSE RACISM” AGAINST WHITES

It is highly unlikely that the drafters of the Fourteenth Amendment ever envisioned their contribution toward equality being used to protect Whites from discrimination. Yet in case after case, White plaintiffs allege that affirmative action policies discriminate against them in violation of the Equal Protection clause. Allan Bakke, a White male, was rejected

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6 A sociologist explains the position of many Whites: “We went from being a privileged group to all of a sudden becoming Whites, the new victims . . . . You have this perception out there that Whites are no longer in control or the majority. Whites are the new minority group.” John Blake, Are Whites racially oppressed?, CNN, Mar. 4, 2011, available online at http://www.cnn.com/2010/US/12/21/White.persecution/index.html.
from the University of California, Davis School of Medicine, despite the fact that his academic scores were higher than many Blacks and Latinos who were admitted. Wendy Wygent, a White schoolteacher, lost her job due to a policy of laying off non-minorities first, when layoffs became necessary. Frank Ricci, a White dyslexic firefighter, devoted significant time and money toward studying for a test that determined promotions. His hard work paid off as he placed sixth out of seventy-seven test-takers, but the results were thrown out because of a desire to promote more Black firefighters. These are the faces of modern injustice. These are the victims of discrimination, standing alongside Fred Korematsu, who was interned by the U.S. government simply because he was Japanese-American, and whose case first prompted the Supreme Court to apply strict scrutiny to racial discrimination. The Court offered the same level of protection to Fred Korematsu as it did Allan Bakke – incidentally, Bakke won his case and was forcibly admitted to Davis Med School, while Korematsu lost his case and was forcibly placed in a relocation camp.

I do not at all intend to mock the White plaintiffs in the aforementioned cases. I believe White people can suffer legitimate misfortune, and can certainly be victims of discrimination because of other axis of their identity. After all, “having [White] privilege does not mean one cannot be oppressed in other ways.” Some people hold a real anti-White bias, which can legitimately harm White people based on the color of their skin. I simply disagree with the legal contentions of the White plaintiffs, and maintain that anti-

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10 *Id.*
White bias and the harm it causes Whites is entirely different than racism and the harm it causes people of color. It is a matter of kind, not degree, when comparing discrimination against the oppressor versus discrimination against the oppressed. The Supreme Court does not see it this way.

The Supreme Court applies strict scrutiny to any case where one race is treated differently than another, including in cases of affirmative action.\textsuperscript{12} It does not matter that there is no intended target of discrimination; Whites still claim to be harmed by affirmative action policies because they are not the beneficiaries of such policies. The Court has unequivocally stated, ""[R]acial classifications of any sort must be subjected to ‘strict scrutiny.’""\textsuperscript{13}

The Court has not clearly stated a set of factors that are necessary or sufficient to qualify a class of persons for heightened scrutiny. But the Court frequently utilizes a few general qualifications for heightened review:

- The group has been historically discriminated against, perhaps including subjection to stigma and stereotypes.
- The group possesses an immutable trait.
- The group is a discrete and insular minority.
- The group is powerless to protect itself using the political process.\textsuperscript{14}

\textsuperscript{13} Adarand, 515 U.S. at 220 (citing Wygant, 476 U.S. at 274).
\textsuperscript{14} Lyng v. Castillo, 477 U.S. 635 (1986) ("Close relatives are not a ‘suspect’ or ‘quasisuspect’ class. As a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless"); United States v. Carolene Products Company, 304 U.S. 144 (1938), note 4 (asking "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.").
I will argue that Whites do not satisfy these criteria. One may respond that whether Whites satisfy the criteria is not the appropriate question; if Blacks satisfy the criteria, then any law that treats Blacks differently than Whites ought to be reviewed with strict scrutiny. Laws with a hateful intent against Blacks will be struck down, but also laws that may ostensibly appear innocuous ought to be closely reviewed just in case they harm Blacks, given our nation’s shameful history. This argument applies especially well in the gender context, where women meet the above criteria, at least enough to earn intermediate scrutiny. Laws that are not ostensibly aimed at harming women -- laws that even appear to benefit women -- often actually reinforce gender norms that oppress women. Justice Brennan wisely explained that our traditional notions of male and female roles are driven by a “romantic paternalism, which, in practical effect, put women, not on a pedestal, but in a cage.” Therefore, it is of no consequence that men as a class do not satisfy the suspect class criteria; any law that treats men and women differently, regardless of whether it might hurt men or hurt women, is treated with intermediate scrutiny.

In *Frontiero v. Richardson*, Sharron and Joseph Frontiero brought the suit because a policy automatically qualified women for the military's medical benefits based on the assumption that women were dependent on their husbands. In this couple's case, Joseph was in fact dependent on his military wife, Sharron. A law that seemingly favored women also served to reinforce the norm that women are dependent on their husbands, a norm that encourages women to stay in the home and discourages women from seeking gainful employment and independence.

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16 Id.
17 Id.
This analogy simply does not hold up in the race context, however. Justice Powell has certainly made the argument that affirmative action reinforces the problematic norm that Blacks are incapable of succeeding academically on their own. But that is not the thrust of the opposition to affirmative action; people of color are not lining up as plaintiffs to challenge affirmative action because of this stigma. Chief Justice Roberts says that he has too much “humility” to have any “confidence in [the Court’s] ability to distinguish good from harmful governmental uses of racial criteria.” But while a law-maker could conceivably say a law will help women while secretly intending to keep them in the home, I am aware of no one who has ever articulated an argument that a lawmaker could introduce an affirmative action bill and say it will help Blacks, while secretly intending to hurt them. It is a tenable argument that there may be some negative consequences of affirmative action on Blacks, including stigma, but there is no tenable argument that affirmative action policies are intended solely to cause those negative consequences on Blacks. So even though Justice Roberts clings to his belief in the unknowability of intent, regular people who are not on the Supreme Court seem to have no trouble deciphering whom these affirmative action laws are intended to help. Hence, people of color close to unanimously

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18 I do not necessarily mean to say that discrimination against men should receive heightened scrutiny while discrimination against Whites deserves rational basis – that affirmative action on the basis of race ought to survive equal protection analysis while affirmative action on the basis of sex ought to fail. I believe there is a distinction between policies that “help women” by assuming they are dependent on their husbands for purposes of military medical benefits, and policies that help women by giving them preferential treatment in college admissions. But the focus of this piece is race and Whites, so I use gender as a foil for the limited purposes of this argument.
19 Bakke, 438 U.S. at 298 (“[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection . . . .”).
support affirmative action, while some White plaintiffs identify the ways in which it hurts Whites.

Do the lawmakers behind affirmative action policies intend preferential treatment for people of color in spite of the adverse consequences on Whites, or do they intend preferential treatment for people of color because of the adverse consequences on Whites? I believe in the former, but I seek to explore the ideas of the many Americans who believe in the latter characterization. The only theory that has been articulated describing an intent to harm behind affirmative action is that the policies may be intended as “reverse racism,” tied up with the racial politics of revenge against Whites. Therefore, if affirmative action policies are to be reviewed using strict scrutiny, it must be because we want to avoid unnecessarily hurting Whites, as they are a suspect class. For those reasons, the relevant question is whether Whites meet the suspect class criteria. And if one believes Glenn Beck, then Whites have indeed suffered a history of discrimination, albeit a very short history, they are an immutable group, and they are increasingly powerless in our government.

II. EXPRESSIONS OF THE BELIEF THAT WHITES ARE A DISCRIMINATED AGAINST, POWERLESS GROUP

“They marched on Washington to reclaim civil rights. They complained of voter intimidation at the polls. They called for ethnic studies programs to promote racial pride. They are, some say, the new face of racial oppression in this nation -- and their faces are White.”21 A decade ago, there was a taboo on Whites talking about race and a feeling that only a fringe White supremacist group would openly acknowledge the “threat” of people of

21 Blake, supra note 6.
color. But today, a substantial number of Whites are finally acknowledging their own Whiteness, but they are exclaiming that they are the modern *victims* of racism. As mentioned, a study by Norton and Sommers reveals that Whites think discrimination against Whites is a bigger problem in society today than discrimination against Blacks.\(^{22}\) They note that, “these trends epitomize a more general mindset gaining traction among Whites in contemporary America: the notion that Whites have replaced Blacks as the primary victims of discrimination.”\(^{23}\)

Norton and Summers look at Justice O’Connor’s infamous prediction in 2003 that affirmative action would no longer be necessary by 2028, and note that “many Whites believe that the moment O’Connor foresaw has already passed, and that the pendulum has now swung beyond equality in the direction of anti-White discrimination.”\(^{24}\) Rather than taking twenty-five years, many Whites believe it took less than a decade for the need for remedial measures to expire, and at this point, “remedial measures” are just exacerbating discrimination in the opposite direction. In fact, 56% of young White people surveyed agreed with the statement that the government has paid too much attention to the problems of Blacks and other minorities over the past few decades.\(^{25}\) The same survey reveals that 58% of Whites believe that racism against Whites has become as big a problem

\(^{22}\) Norton, *supra* note 4 at 215.
\(^{23}\) *Id.*
\(^{24}\) *Id.* at 217; *see also* Juan Williams, *Affirmative Action’s Untimely Obituary*, Wash. Post, July 26, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/07/24/AR2009072402101.html?sid=ST2009072403325 (“[Conservatives] pretend that the nation is already so transformed that a colorblind America is a reality and that affirmative action is superfluous . . . .”).
as racism against Blacks and other minorities. Radio host James Edwards claims that, "Whatever mistakes might have been made in our pasts, they have not only been corrected, but they've been overcompensated for." This belief may follow from the fact that Whites are most likely to frame affirmative action as a preference for less qualified candidates, often through the use of quotas. Rather than framing affirmative action as "outreach" for underrepresented groups, as Blacks are most like to do, Whites think that quotas give resources to people of color at the expense of Whites. Thus, a growing number of conservative Whites think people of color champion affirmative action not in spite of its adverse consequences on Whites, but partially because of its adverse consequences on Whites. Rather than having moved beyond race in America, one conservative journalist explains that racism is simply “under new management, [where leaders use] reverse discrimination as racial payback for past injustices.”

A. To Some Whites, Race is Finally Becoming Visible, Even Salient

The invisibility of Whiteness is a key feature of White privilege. Barbara Flagg calls this “the transparency phenomenon: the tendency of Whites not to think about Whiteness,

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26 Id. at 36-37.
27 Blake, supra note 6.
29 Id.
30 Of course, I do not mean to say that affirmative action necessarily has adverse consequences on Whites to begin with. An increase in diversity at school or the workplace is actually a benefit for Whites. But these conservative Whites ignore the benefits, and focus on the costs to Whites in displaced opportunities.
or about norms, behaviors, experiences, or perspectives that are White-specific.”

But while the invisibility of Whiteness used to be a privilege, some now claim it as a badge of discrimination. For a less than academic look at expressions of this sentiment, one need look no further than Urban Dictionary’s user-generated definition of “reverse racism:” “Blacks having a special TV station (BET, award shows, and even their own month, and Whites not having this.”

As most major networks are controlled by Whites and feature predominantly White actors, it can be argued that Whites already have their own networks: ABC, NBC, FOX, and CBS. (It can similarly be argued that eleven months out of the year celebrate White culture.) But this is not enough for some conservative Whites who want a network explicitly for Whites—a W.E.T. to compliment B.E.T. Many Whites are still content with the status quo and profess a colorblind ideology in which we pretend that everything is equal while Whites occupy a superior position in society. But there is an emerging feeling among some Whites that colorblindness does not define America anymore, as Whites are becoming targets of discrimination based on the color of their skin.

As evidence of discrimination against Whites, some Whites now point to racist epithets and hurtful stereotypes. Tim Wise describes his experience lecturing about racism against people of color at a high school, when several White students became upset that Wise did not address “reverse racism,” citing use of the slurs “honkey” and “cracker” to demean White students. In one Berkeley undergraduate course on race, the moderator

instructed, “[Y]ell up to us all of the stereotypes you associate with White people.”35 The students replied, “Rich. No rhythm. Redneck. Socially unaware. In denial. Drunk. Flip flops. Pearl earrings. Nalgene water bottles. Bleeding heart liberals. Conservative. Scared. Uptight. Hate poor people. Hippies. Gap…”36 Of course, many of the stereotypes associated with White people are neutral, or even positive, but Whites find some of them hurtful. Thus, when a teacher in another classroom attempted to convince the students that the real social evil is discrimination against people of color, one White student was not having it. This student, Tracey, explained, “[I]t seemed like the focus was on Black people or Puerto Ricans or other minorities that are discriminated against, but I’ve been discriminated against too and I’m a White person, so it happens, you know, to everyone.”37 Tracey and other victimized Whites seek to (a) analogize anti-White discrimination with anti-Black discrimination, and (b) maintain that anti-White discrimination has replaced anti-Black discrimination as today’s main obstacle to a just society.

In the 20th Century, some Whites thought of Blacks as subhuman (their concern was that Blacks were dangerous and multiplying everywhere), but today it appears that Whites look at Blacks as superhuman—able to leap from the oppressed to the oppressor, as they take the jobs and money of Whites. And Whites worry that this new position of power may lead to the imposition of Black culture on all Americans. John Blake writes, “Some White Americans. . . feel excluded by popular culture.”38 Some Whites are scared by the fact our commander in chief, most of our star athletes, and our idolized entertainers are now

36 Id.
38 Blake, supra note 6.
Black. Further, some Whites are concerned that the new Black leadership has imposed a culture of political correctness that has gone too far, as it can have demonstrable “negative impact[s] for Whites—on communication, performance, and self-presentation.” Some Whites thus argue that this culture of political correctness impedes their ability to freely express themselves.

**B. A White Rallying Cry in the Media: Glenn Beck, Rush Limbaugh, and the Response to Trayvon Martin**

The emergence of the Tea Party mirrors the cry for a defense of White culture. A recent poll found that “44% of Americans surveyed identify discrimination against Whites as being just as big as bigotry aimed at blacks and other minorities,” and that number shot up to 61% for respondents in the Tea Party. To many Republicans and Democrats, the election of Barack Obama symbolizes that we have finally transcended race and now live in a post-racial, colorblind society. But to many Tea Party members, the election of Barack Obama symbolizes White disenfranchisement, as Blacks begin to overpower Whites. A professor of government and politics compares the Tea Party movement to the conservative movement in the 1970s: “That movement was driven in part by racial hostility and the ability of its leaders to convince White followers that they were victims.”

Jared Taylor, a conservative writer, explained that while the election of Obama woke up many Whites to their victimhood in 2008, the tables had actually turned some time

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39 Id. ("The face of America is changing, says Wise, author of 'White Like Me.' American culture has become so multicultural that many of the nation’s icons -- including celebrities, sports heroes, and other leaders -- are people of color.").

40 Norton, supra note 4 at 952.

41 Blake, supra note 6.

before 2008: “To the extent that White people in some inchoate way see Obama as a symbol of their dispossession, it's only that they have not been seeing what has been going on for years. . . . No other people in the history of the world has given up numerical and cultural dominance willingly. The majority of Whites did not vote for Barack Obama.” Taylor assumes that a Black leader cannot impartially represent the interests of Whites, but likely had no problem with our previous White president representing the interests of people of color, even if the majority of those voters of color voted against him.

Glenn Beck echoes this critique of Obama when he says that the President has a "deep-seated hatred for White people and White culture."43 (Of course, when Katie Couric pushed Beck to define “White culture,” Beck squirmed and provided no answer.44) Beck thinks that as a result of Obama's hatred for White people, Whites are in need of their own civil rights movement.45 He thus held his Rally to Restore Honor in the same place as, and on the anniversary of, Dr. Martin Luther King Jr.’s “I Have A Dream” speech.46

Rush Limbaugh also blames Obama for making Whites the new “oppressed minority.”47 In 2009, two black students beat up a White student on a school bus, and although there was no indication that the attack was racially motivated in any way, Limbaugh was indignant at the absence of hate crime charges in this case. In his radio program, Limbaugh exclaimed, “It’s Obama’s America, is it not? Obama’s America, White

43 Blake, supra note 6.
45 Blake, supra note 6.
47 Blake, supra note 6.
In response, comedian Jon Stewart said jokingly on *The Daily Show*, “Because Barack Obama is president it is now open season on White children . . . and black people are now allowed to hit them.” Rush Limbaugh was not laughing. Concerned about the complacency of Whites in their own subjugation, Limbaugh explains that Whites need a “civil rights movement” of their own because too many Whites currently sit at the “back of the bus.”

If any event should be a rallying cry for the notion that Blacks are the victims, not the victimizers, of Whites, it is the tragic death of an unarmed Black teen, Trayvon Martin. Instead, conservative Whites try to portray George Zimmerman as the real victim, as well as some White individuals who were attacked by young Blacks in response to their frustration over Martin’s death. One conservative periodical, *The Examiner*, described the Martin backlash attacks, “Now it has reached a point where the media in some markets are refusing to even report black on white hate crimes.” Author and owner of the ultra-conservative site, VDare.com, Peter Brimelow “asserts that much of White America’s anxiety derives from living under a black president and changing demographics.” VDare’s official Twitter site features tweets from April 16, 2012 saying “Black Mob Attack Whites Seven Separate Times, Prompted by #TrayvonMartin Case” and “#Obama Regime War On

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49 Abcarian, *supra* note 42.  
50 Blake, *supra* note 6.  
52 http://www.vdare.com/splash  
Whites Continues.” On April 2, 2012, VDare tweeted, “The FBI Still Doesn’t Get Hate Crimes, Especially Anti-White Ones.” Another conservative journalist writes that the Obama administration and the Justice Department have tolerated and tacitly encouraged intimidation of voters all across the country, “so long as those being victimized were White and the victimizers were black.” (Thus, contrary to decades of empirical research, it appears the criminal justice system is far too lenient on Blacks who attack Whites.)

Because of the alleged disenfranchisement of White Americans, radio host James Edwards says Whites have become the “dispossessed majority,” and must organize like other stigmatized groups. He explains, “There is no organization to stand up to advance the interests of the dispossessed majority.” Chief among the ways in which White interests get trampled is affirmative action, according to Edwards. The pendulum has swung too far, as Whites are the new victims of discrimination. Edwards says, “They’re the victims of it every day.”

Although it may seem that I have merely documented the opinions of some extremists, the sentiment has clearly gained traction with many Americans, as reflected by the survey data.

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54 Twitter feed of “vdare” available online at https://twitter.com/#!/vdare.
55 Id.
56 Adams, supra note 31; see also Blake, supra note 6 (“Conservative news outlets ran a number of stories last summer highlighting an incident from the 2008 elections, in which activists from the New Black Panther Party appeared to be intimidating voters at a polling place. Those claims were never proven.”).
57 Blake, supra note 6; see also Abcarian, supra note 42 (describing one disgruntled White woman who exclaimed, “It’s like we are the forgotten people.”).
58 Blake, supra note 6.
59 Id.
60 Id.
C. An Education: The Role of Critical Race Theory in Creating Anti-White Bias

Aside from the workplace, debates over affirmative action primarily center on the classroom. On the one hand, advocates of affirmative action point out that people of color are currently underrepresented in institutions of higher learning, and the few that are there face discrimination. On the other hand, most opponents of affirmative action argue that we are post-racial, and no group faces discrimination in school, so there is not a need for racial tinkering in admissions. But an emerging conservative voice goes further by arguing that people of color in fact have too much power in the classroom, and it is instead Whites who face discrimination in school.

One Texas group called the “Former Majority Association for Equality” has begun providing scholarships to White male students. The group’s president contends that every other group gets preferential treatment, and thus targeting resources toward White male students simply levels the playing field. He explains, “Living in America, you hear about this minority or that minority, but it’s never been used in the same sense for Caucasian Americans.”

Some critics blame the persecution of White students on the emergence of Ethnic Studies Departments and Critical Race Theory. Arizona recently passed HB2281, which effectively bans Ethnic Studies courses in the state’s schools. The statute specifically prohibits all courses that “promote resentment toward a race or class of people.” Proponents of the bill say that ethnic studies courses are “divisive,” but the school board

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61 Id.
62 Id.
63 Id.
president explains that, “Chicano studies classes benefit students and promote critical thinking.” Thus, some Whites ideologically oppose the goals and very existence of Race and Ethnicity Studies, in part because they worry that these classes teach students of color to hate Whites, and in part because they object to the idea of providing a resource to students of color that is not provided to Whites. (A White student is of course allowed to enroll in a Black History class or Chicano Literature class, but the perception is that these departments are created for students of color, and there is no department for White students, assuming one does not count History, Economics, Political Science, English, etc.).

Beyond Ethnic Studies, many have identified Critical Race Theory specifically as the more dangerous threat to White students. Some individuals, including Arizona Governor Jan Brewer, would object to the very idea of a class studying Black history. A larger number of individuals object to the tenets of Critical Race Theory, which many consider to be more radical than an Ethnic Studies course. In 2012, conservatives began attacking President Obama by linking him to Derrick Bell, the late Harvard Law Professor and pioneer of Critical Race Theory. Thereafter, various media outlets and pundits, including Rush Limbaugh and Soledad O’Brien, began fighting to define exactly what Critical Race Theory means and how damaging Obama’s association with the field should be, because of the allegedly anti-White lessons the field has to offer.

Consistent with his other beliefs, Rush Limbaugh opposes teaching Critical Race Theory in Law Schools. On his April 4, 2012 show, Limbaugh denounced Harvard Law

65 Id.  
School’s Critical Legal Studies program, Critical Race Theory program, and Derrick Bell, for attempting to dismantle racial injustice: “[t]hat's how they view it. And they view the Constitution as a mechanism for rich White guys to always hold onto all of the power. This is what they are taught. And so their objective is to take that apart, to strike that down, and this is where critical legal studies comes into play.”68 Limbaugh seems to think that Critical Race Theory is a mechanism for teaching students of color to go out into the world and discriminate against Whites. One White student discusses the lessons that came out of a Berkeley undergraduate course on race: “teaching someone that . . . . ‘Okay, White man is the enemy.’ Then . . . . I feel that someone would look at me and say, ‘Okay, he’s White, that’s the enemy.’ I’m a White man, right? So that’s how I take it.”69 A piece from the School of Education at John Hopkins describes the stress that discussing race in the classroom can have on White students, where “one comment can upset a White student so much that it impacts the student's educational experience.”70 Some Whites feel that courses on race inherently victimize Whites in the classroom. As one White student explains, “I feel silenced. I do not feel safe. I do not want to come to class.”71

One might think that the emergence of Critical Whiteness Studies would appease those conservatives who complain that students of color are given their own Ethnic Studies departments, while Whites get nothing. Instead, “detractors have said the field itself

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69 Stark, supra note 35.
70 Helling, supra note 11.
71 Id. (To be clear, the New Horizons piece does not endorse the idea that Race Studies in school is unfair to Whites. It simply provides a mouthpiece to some White students who object to Race Studies, and presents strategies for helping these students to accept the existence of White privilege.)
[Critical Whiteness Studies] demonizes people who identify as White.”\textsuperscript{72} Conservatives have “derided Whiteness studies as anti-White.”\textsuperscript{73} It thus seems that in higher education, Whites feel discriminated against by the very existence of Ethnic Studies departments, including Whiteness Studies, and are especially victimized when they enroll in such a class and become the target of all the anti-White prejudice in the room. Given the lack of some explicitly pro-White class, it is no wonder so many “White Americans . . . . feel ignored in higher education.”\textsuperscript{74}

\textit{D. The Supreme Court Weighs in on the “New Minority of White Anglo-Saxon Protestants”}

The Supreme Court has picked up on, and in some instances fueled this sentiment that Whites are the true victims of racism in America today. Judges must make observations about society to determine how much Whites are discriminated against. But as the Law and Society movement has taught us, that flow is not unidirectional; the law also informs our cultural commonsense. Judges’ opinions on White victimization are relevant because judges generate both legal and social norms.

In \textit{Croson}, Justice O’Connor feared the tyranny of the majority -- the Black majority. O’Connor justified the application of strict scrutiny for a law that favored minority-owned businesses at the cost of White businesses because half the city’s population was Black, and

\textsuperscript{72} Kellogg, supra note 5.
\textsuperscript{73} Id.
\textsuperscript{74} Blake, supra note 6.
a majority of the City Council was Black. She writes, "[A] law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature." 

In Bakke, Justice Powell wrote that if liberals got their way and every minority group got special protection from the Court in the form of heightened review, then only one group would be left with no protection: "a new minority of White Anglo-Saxon Protestants."

Finally, the Supreme Court’s reversal of Sonya Sotomayor’s Ricci opinion can be construed as a vindication of White victimhood. Cheryl Harris and Kimberly West-Faulcon explain that some believe that, “Judge Sotomayor’s decision in favor of New Haven in the court below was a grave racial injustice.” Thus, when Justice Sotomayor was nominated to the Supreme Court, Frank Ricci himself appeared to tell the Senators that this Latina woman whom they were considering for the highest Court in the land “had discriminated against him in an appellate case because he is White.” The Senators heard Ricci’s message and some capitalized on this sense of White victimization: “They attacked her as a racist, and where they scored points is with a lot of Americans -- not only with conservatives, but a lot of Democratic White males -- who have been on the losing end of affirmative action.”

Conservative opponents of affirmative action have thus created a case for treating Whites as a suspect class: they are a discriminated against group, and they are powerless to use the political process to protect themselves. Students in our schools are being taught to hate Whites, our racist president ignores (or despises) his White constituents, and Whites

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76 Id. (quoting JH Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 739, n. 58 (1974)).
78 Cheryl I. Harris & Kimberly West-Faulcon, Reading Ricci: Whitening Discrimination, Racing Test Fairness, 58 UCLA L. Rev. 73, 76 (2010).
79 Abcariian, supra note 42.
80 Id.
cannot find jobs because of racial quota systems. And the icing on the cake: now, Whites have to pay twice as much to buy a pastry.

III. THE EMERGING “WHITES AS VICTIM” NARRATIVE HAS IT BACKWARDS

Although I pushed back on this emerging White victimization narrative as I described it in the previous section, in this section, I go further and offer a brief look at why that narrative is factually incorrect. I examine some basic statistics in this country to show that Whites in fact occupy a superior position in America today. Suffice it to say, there are greater tragedies facing this nation than Allan Bakke having to settle for his second choice Medical School. A snapshot of a few of those tragedies is below:

- The unemployment rate for Blacks is roughly twice as high as that of Whites. The unemployment rate of Latinos is a third higher than that of Whites.81
- As for powerful professionals, “blacks and Hispanics make up a mere 4 percent to 6 percent of the nation’s lawyers, doctors and engineers.”82
- Whereas 45% of Blacks and 47% of Latinos own homes, the homeownership rate for Whites is 75%.83
- The median household income for Whites is $20,000 per year more than both Blacks and Latinos.84
- The percentage of Blacks and Latinos living below the poverty line is more than double the percentage of Whites.85
- And “Blacks are six times more likely and Latinos are three times more likely than Whites to be incarcerated.”86

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82 Williams, supra note 24.
84 Id.
85 Id.
Thus, modern America is better explained by White privilege than White victimization. But it goes beyond Whites having more money than people of color; Whites hold implicit biases against people of color. Some people of color also harbor biases against Whites, but Glenn Beck and Rush Limbaugh would be surprised to learn that most people of color actually exhibit biases in favor of Whites. Still, evidence suggests that Whites, as the more advantaged group, are likely to harbor more intense biases against outside groups than those biases of the disadvantaged groups. The problem is made all the more acute where the same group that harbors the most intense biases also has the most power in society, so that institutional structures replicate those biases.

IV. THE PSYCHOLOGY OF PRIVILEGE: HOW THE PERCEPTION OF WHITES CAN BE SO OUT OF SYNC WITH REALITY

In looking at the vast and readily apparent inequalities that exist between Whites and people of color, as well as the myriad of recent research on implicit bias, the emerging notion that Whites are the true victims of discrimination today is baffling.

Russell Robinson offers an explanation for this “Whites as victims” phenomenon in Perceptual Segregation, where he unpacks how Whites can be blind to the discrimination against people of color going on right in front of them, shedding some light on the rationale


88 Nilanjana Dasgupta, Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations, 17 Soc. Just. Res. 143, 143 (2004) (“Individuals who belong to socially advantaged groups typically exhibit more implicit preference for their ingroups and bias against outgroups than do members of socially disadvantaged groups.”).
behind this irrational perception.\textsuperscript{89} “In particular, studies have shown that many White people overestimate the socioeconomic progress that African Americans have achieved in employment, wages, and other important measures of advancement.”\textsuperscript{90} That overestimation is likely heightened by White individuals’ perception that people of color are getting constant leg-ups due to affirmative action. This explains why some Whites think that Blacks have overtaken Whites, and discrimination against Whites is the problem. The incongruity of reality and the perception of these Whites is displayed in my unscientific charts below, where the X-Axis is time, and the Y-Axis is the percentage of fictional units of power and resources that each group has:

<table>
<thead>
<tr>
<th>Reality</th>
<th>What Some Whites Perceive</th>
</tr>
</thead>
<tbody>
<tr>
<td><img src="chart1.png" alt="chart" /></td>
<td>![chart2.png]</td>
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Psychologists have developed the Prospect Theory, which can further illuminate the discrepancy between perception and reality. Eibach and Keegan confirm that Whites tend to think that there has been greater progress toward equality than Blacks do.\textsuperscript{91} They apply


\textsuperscript{90} Id.

the Prospect Theory, which holds that changes seem greater when framed as losses rather than gains.\textsuperscript{92} So while Whites perceive progress toward equality as a \textit{loss} in their share of resources, and Blacks view that same progress as a gain, Whites are more likely to overestimate the amount of progress that has been made.\textsuperscript{93}

The Prospect Theory also relates to another psychological and economic theory: the Endowment Effect, which holds that people are likely to pay less to gain X than they would charge to give up X once they own it.\textsuperscript{94} In one famous experiment, participants in a study were given mugs, and they were only willing to part with those mugs for twice the price that other participants were willing to pay.\textsuperscript{95} Theoretically, if a rational person valued a mug at $5, she would be willing to pay $5 for it, or sell it for $5. However, most of us humans are irrational and appear to inflate the value of a good as soon as we gain a proprietary interest in it. In American society, Whites own a disproportionately high stake of power and resources. The Endowment Effect thus informs us that it would take a lot for many Whites to be willing to give up that proprietary interest. For example, when one seat in Congress is lost by a White congressperson to a Black congressperson, Whites may think they have given up a lot, while Blacks think their gain is marginal. Such thinking confirms that it is harder to give up power and privilege than it is to give up the urgency to gain it after a history of so many years without.

Besides their personal gain and loss, Blacks and Whites perceive the change differently because of their reference points. Eibach and Ehrlinger demonstrate that Whites

\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{95} Id.
are more likely to compare today’s progress to the past, while Blacks are more likely to compare today’s progress to the ideal.\textsuperscript{96} The further one looks back, the more considerable the progress of Blacks seems to be, comparatively speaking. With this in mind, it makes sense that this “racial unease is more pronounced among older White Americans . . . . The idea that we’re losing our country is something that’s not going to have a lot of resonance for someone under 30. These are White folks who don’t remember the country that their parents are talking about.”\textsuperscript{97} It would thus seem that the only reason Whites think that Blacks have taken over as the dominant group is that they are comparing today with the “good ole days” of outright White supremacy.

But this age trend does not jive with the story that Glenn Beck and Co. are telling. If an older person had witnessed Black students kept out of school because of their race, one would think the older person would be sympathetic to targeting attention toward getting Black students into schools today. And it would instead be the young people who never lived through the Jim Crowe era who would not understand why Blacks seem to be getting handouts. White youths have not seen the history of racism and their only experience with race has been growing up with seemingly unfair affirmative action policies, so one would think that young Whites would be leading the Rally To Restore Honor. That is not the case. Instead, it is older Whites that think the pendulum has swung too far. Older Whites have lost more of their privilege in the last few decades and that loss looms larger than both the

\textsuperscript{97} Blake, \textit{supra} note 6 (quoting Tim Wise).
gains that Blacks have seen, and the small loss that young Whites have experienced.\textsuperscript{98} This suggests that the ideal equilibrium is different for different people; that it is not just race that colors perception, but age as well. Blacks and young Whites think we are not there yet, but old Whites think we have already passed that point – suggesting that the ideal point of “equality” for old Whites is actually a state of unspoken subtle superiority.

So while Glenn Beck's story is that Whites have been okay with the progress of Blacks up until they crossed the line into superiority, history shows that Whites have actually been worried about losing their status of superiority at every increment of progress in the struggle for racial justice. As Sociologist Matt Wray put it, "Whites have never really felt terribly secure in their majority status. It's often said that it is lonely at the top, but it's also an anxious place to be, because you live in constant fear of falling."\textsuperscript{99} Thus, Whites worried about slave revolts in the 1800s, they worried about “uppity negroes” at the time of segregation,\textsuperscript{100} and today they are worried about affirmative action. But at none of these stages is it fair to say that Blacks surpassed Whites as the dominant group in America.

\textbf{CONCLUSION}

Despite the insistence of many that we live in a “colorblind” society, there is an increasing number of Whites who are affirmatively owning their White racial identity, not necessarily to fight for White supremacy (as some hate groups have been doing for

\textsuperscript{98} Again, I do not mean to ascribe to the Zero-Sum model by assuming that gains by Blacks necessarily entail losses for Whites, but that is how many Whites see it, so I include that perspective for the purposes of my analysis.

\textsuperscript{99} Blake, \textit{supra} note 6.

\textsuperscript{100} \textit{Id.}
centuries), but rather to coalesce as an oppressed minority. If one believes this story of Whites losing the presidency, losing cultural icons, losing spots in college, and losing jobs, then it would make sense to treat discrimination claims against Whites with strict scrutiny. However, we have seen that this perception of White victimization is not in line with a reality where Whites occupy a distinctly superior position in society, as Whites hold more than their fair share of wealth, and are disproportionately represented in positions of power, including our government. This perception is likely a result of psychological phenomena whereby Whites feel like they have lost more than they actually have lost, because of the immense power and resources they had to begin with.

Far from being a minority in need of the Court’s protection, White Americans have not suffered a history of discrimination and are not powerless to use the political process. The Court stands behind a veil of know-nothingness when it comes to the motives and effects of affirmative action, claiming that any law that distinguishes races has the potential to hurt someone on the basis of their skin color, an inherently unjust outcome. But the Court ought to come right out and say who they are worried about hurting: White people. This argument is not intended to discredit Justice Thomas’s concern about the potential stigma and adverse consequences that affirmative action may have on people of color, but that concern has never appeared to be the core of the Court’s opposition to affirmative action. The Court cannot know for sure what policymakers intend to do when crafting affirmative action programs, but the concern is whether there is a hidden intent to hurt Whites, as there is no tenable argument that legislators write affirmative action policies to stigmatize people of color and thus maintain White superiority.
Moreover, the only state interest that the Court has accepted as compelling enough to justify any affirmative action has been “diversity,” an interest that benefits Whites. Remedying past societal discrimination is not framed to help Whites, and perhaps not coincidentally, has also been rejected as a compelling state interest. But affirmative action can create a diverse classroom, which will lead to a richer classroom experience for Whites than they otherwise would have had in a homogenously White classroom. Thus, in weighing the costs and benefits of affirmative action, the Court is actually weighing the costs to Whites against the benefits to Whites. Unfortunately, from the perspective of most Whites, that is a balancing act that affirmative action cannot survive.

There is hope however. The more that we engage and respond to those who advance a theory of White victimization, the more we can convince them that it is people of color, not Whites, who are in need of heightened protection through our legal system. Education is key to dispelling the myth that Whites are today’s victims. Although there are paths to enlightenment that do not require a college degree, those individuals who have a bachelor’s degree are significantly less likely than individuals who have not completed high school to agree with the statement that discrimination against Whites has become as big a problem as discrimination against Blacks and other minorities (57% vs. 43%).

Moreover, even given the discrepancies between the views and reference points of Blacks and Whites, psychological research indicates that President Obama’s rhetoric “has the potential to substantially bridge these racial divisions.” Thus, it is possible for us to one

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101 Millenials Survey, supra note 25 at 37.
day live in an America where everyone has an equal opportunity to succeed, and where everyone will pay the same price for a pastry.