No. 14-981

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE CIVIL RIGHTS CLINIC AND THE EDUCATION RIGHTS CENTER AT HOWARD UNIVERSITY SCHOOL OF LAW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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November 2, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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STATEMENT OF INTEREST

Amici curiae are the Civil Rights Clinic and the Education Rights Center at Howard University School of Law. While Howard is often referred to as one of the nation's premier historically Black universities, the school's mission has always been to provide a premier education to all regardless of race or gender. Our nearly 150-year history of providing education, regardless of race, has been informed by the painful reckoning that, at the nation's founding, white supremacy, white superiority, and white privilege were interwoven into the DNA of this country's institutions. Our history and experience in student diversity has also been driven by the clear-eyed acknowledgement that the remains of white privilege continue to haunt our institutions. We respectfully submit this brief in support of Respondents in the belief that any analysis of the constitutionality of race-conscious affirmative action programs in higher education is, at best, incomplete and, at worst, disingenuous without an honest assessment of the role that racial subordination and separation played in the foundation, establishment, and preservation of our most elite higher education institutions.[1]

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[1] Pursuant to Supreme Court Rule 37, this brief is filed with the written consent of all parties. The parties' consent letters are on file with the Court. This brief has not been authored, either in whole or in part, by counsel for any party, and no person or entity, other than amicus curiae or their counsel has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

At their founding in the colonial period, American colleges and universities raised seed money for their endowments by investing in slave ships; constructed their campuses through slave labor; recruited their presidents, trustees, professors, and students among slave traders and slave owners; and, used slaves as campus laborers, staff and servants. As the wealth, power, and prestige of these institutions grew alongside that of the new republic, their researchers and scientists gave intellectual cover for chattel slavery, and later Jim Crow. Through books, papers, and speeches, the eminent faculty and graduates of our best colleges and universities offered what they claimed was irrefutable proof of the inferiority of the Black race and concomitant superiority of the white race. And, in the span of three centuries, institutions such as Yale, Harvard, Princeton, the University of Pennsylvania, the University of Virginia, Brown, Dartmouth, among others, became places where the student body quite literally reified the idea of white supremacy, superiority, and privilege. In the same span of time, under slavery whites, by law, denied Blacks all access to education. Later, under "separate, but equal," Black children were educated just enough to prepare them to be sharecroppers in the fields. Today, racial disparities in early childhood and K-12 education, coupled with racially discriminatory school discipline reinforce the racial foundations of our educational system, and make it all but inevitable that the demographics of our elite institutions remain overwhelmingly white.

All of this is a matter of historical record; and, none of it can be seriously disputed. And yet, in not one of the roughly thirteen cases this Court has decided where the central issue presumably concerned equal

opportunities for Blacks in higher education has a majority of the Court discussed the intersection between higher education and white supremacy, superiority, and privilege. That discussion matters and is long overdue because the nation's continuing struggle with providing fair and equal access for Blacks in higher education is not simply due to the lack of college preparedness on the part of Blacks; nor is the continuing struggle due to what is often quaintly referred to as the Black-White achievement gap, but it is due to a strand of white privilege that is interwoven into the very DNA of our higher education system and cannot be erased by merely pronouncing that "the way to stop discrimination on the basis of race is to stop discrimination of the basis of race." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

ARGUMENT

I. ELITE AMERICAN HIGHER EDUCATION INSTITUTIONS WERE FOUNDED UPON WHITE SUPREMACY IN THE DAYS OF SLAVERY, BUILT ALONG WHITE SUPERIORITY IN THE JIM CROW ERA AND, TODAY, OPERATE ACCORDING TO WHITE PRIVILEGE.

A. Our Most Elite Institutions of Higher Education were Financed by the Slave Trade, Built with Slave Labor, and Flourished in the Slave Economy.

From 1746 to 1769, colleges in America went from the original three—Harvard, Yale and William & Mary—to include other elite institutions such as: Brown, Princeton, Columbia, Dartmouth, and the University

of Pennsylvania, among others.[2] The enslavement of Blacks not only helped fund these new educational institutions, but also created a new elite class of merchants.[3] These slaveholding merchants provided financial support to colonial churches, schools, libraries, missions, and universities.[4] Specifically, the labor and profits made from slaves created both the physical institution and financed the individuals that attended the schools. Colleges at this time were ranked among the largest slaveholders in America.[5] In the process, investments in slave ships became college endowments, slaveholders became college presidents, and slaveholding heirs became college students.

The first slave ship to sail out of British North America was built and sent from Harvard.[6] Colleges received both slaves and land as gifts to help in the creation of these institutions. For example, President Increase Mather, Harvard class of 1656, used "his negro"—a gift from his son Cotton Mather, class of 1678—to run errands for the college.[7] Similarly, Reverend Wheelock, who helped establish Dartmouth College, owed much of his success to the slaves he acquired; and indeed, for a time, there were as many enslaved Black people at Dartmouth as there were

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[2] Amy Goodman, *Shackles and Ivy: The Secret History of How Slavery Helped Build America's Elite Colleges,* Democracy Now (Oct. 30, 2013), http://www.democracynow.org/2013/10/30/shackles_and_ivy_the_secret_history.

[3] Craig Steven Wilder, *Ebony & Ivy: Race, Slavery, and the Troubled History of America's Universities* 47 (2013).

[4] *Id*.

[5] *Id*. at 19.

[6] *Id*. at 29.

[7] *Id*. at 119.

students in the college.[8] Yale also benefitted from the slave economy. In 1732, Yale acquired fifteen hundred acres from the Connecticut General Assembly and rented much of their newly acquired property to slave-holding tenants,[9] allowing the university to increase its influence in real estate and solidify its ties to slavery.[10] The College of Philadelphia (present day University of Pennsylvania) acquired its land from Governor Thomas Penn who donated his estate in Bucks County—an estate that had been worked on for decades by enslaved Africans.[11]

In addition to using the slave trade to build these colleges, slave merchants used their wealth to fund the education of young white boys at the very schools the slave trade and slave economy had helped to erect. For example, one of this nation's founding fathers, Alexander Hamilton, was able to attend present day Columbia (formally known as King's College) because of money he received from slave traders.[12] His tuition and fees were paid from the sale of barrels of rum, manufactured on slave plantations.[13] Charitable gifts helped fund the education of poorer boys, like Hamilton, and announced the influence of American slave traders in the colonies.[14] Furthermore, these elite families sent their sons to these schools to prepare them to manage their commercial holdings, and eventually the

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[8] *Id*. at 113.

[9] Wilder, *supra* note 3, at 118.

[10] *Id*. at 117–18.

[11] *Id*. at 118.

[12] *Id*. at 48.

[13] *Id.*

[14] *Id*.

country:[15] John Adams graduated from Harvard, James Madison from Princeton, and Thomas Jefferson from the College of William & Mary.[16]

This system of education bound the nation's intellectual culture to American slavery and the slave trade.[17] Reverend John Witherspoon, the sixth president of the College of New Jersey (present day Princeton), and a slave owner, has been credited with establishing the College's elite Ivy League status.[18] Reverend Witherspoon, and a succession of eight slave owners presided over the College of New Jersey during its first seventy-five years[19], establishing their own intellectual freedom upon human bondage.[20]

Reverend Witherspoon's emphasis on politics and religion, his wholehearted support to the national cause of liberty, and his role as lead member of the Continental Congress influenced several students to enter government service and exert influence over America.[21] His protégés included President James Madison[22], twenty United States senators, three

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[15] *Id*. at 52.

[16] *The Charters of Freedom: A New World is At the Hand*, Nat'l Archives, http://www.archives.gov/exhibits/charters/constitution_founding_fathers_virginia.html (last visited Oct. 27, 2015).

[17] Wilder, s*upra* note 3, at 111.

[18] *Id.* at 81.

[19] *Id*. at 122.

[20] *Id*. at 111.

[21] *John Witherspoon 1768-94*,* The Presidents of Princeton University (Nov. 26, 2013), https://www.princeton.edu/pub/presidents/witherspoon/.

[22] Devin Bent, *Posterity and the Union: In Retirement, Madison Holds Court as Sole Remaining Founding Father*, Montpelier

justices of the Supreme Court, thirteen governors, twenty-three congressmen, and scores of ministers, college presidents, professors, and military officers,[23] all of whom became prominent slave owners in America, and distinguished alumni.[24]

B. The Finest Scholars, Alumni, and Students from Our Most Elite Higher Education Institutions Conceived, Promoted and Defended the Theories and Systems that Justified Slavery, Jim Crow And the Narrative Of White Supremacy.

Slavery was "a regime of governance . . . sustained through the instantiation of its practices in rules of conduct."[25] In order to enforce slavery's rules of conduct, slave states enacted slave codes, encompassing three elements: first, they defined slave status; second, they regulated the slave form of real property; and, third, they delineated slaves' social behavior by providing legal forms for social control.[26] At the heart of these codes was the belief, maintained by none other

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James Madison U. Mag., Winter 2001, *available at* http://www.jmu.edu/montpelier/issues/winter01/madison.htm.

[23] *Id.*

[24] W. Barksdale Maynard, *Princeton In the Confederacy's Service: 150 Years after the Civil War, Rebel Ties Remain Little-Known*, Princeton Alumni Wkly. Mar. 23, 2011, *available at* https://paw.princeton.edu/issues/2011/03/23/pages/4092/index.xml?page=2& (Several Princeton Graduates fought for the confederacy and served as clergymen, throughout the war, at least seven Confederate brigadier generals were Princeton men.).

[25] Christopher Tomlins, *Transplant and Timing: Passages in the Creation of an Anglo-America Law of Slavery*, 10 Berkeley L. Scholarship Repository 389, 390 (2009).

[26] John R. Wunder, *The New Encyclopedia of Southern Culture, Slave Codes* 128 (2008).

than Thomas Jefferson, that Blacks were inferior beings incapable of taking care of themselves.[27] After the Civil War and the end of Reconstruction, as Black Codes replaced slave codes, craniologists, eugenicists, phrenologists, and Social Darwinists, at every educational level, buttressed the belief that Blacks were innately, intellectually, and culturally inferior to whites.[28]

Samuel Morton, a graduate of the University of Pennsylvania—the leading craniologist of the early 1800s and originator of "American School" ethnography—used his study of human skulls to distinguish the intellectual ability of races: Europeans on top, and Africans and Australian Aboriginals on the bottom.[29] To this day, the University of Pennsylvania continues to hold his skull collection.[30] Thomas Jefferson, a graduate of William and Mary, believed, much like many founders of our nation's colleges, that "nature, not slavery, explained the intellectual inferiority of the Negro."[31] Well-to-do planters and merchants routinely turned to college presidents to find "suitable" scholars.[32] For example, in 1773, Colonel Henry Lee, the grandfather of General Robert E. Lee, asked his son to help

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[27] *See generally* Francis D. Colinano, *Thomas Jefferson: Reputation and Legacy* (2006) (ebook).

[28] *Jim Crow Museum of Racist Memorabilia*, Ferris State University, http://www.ferris.edu/jimcrow/what.htm (last visited Oct. 27, 2015).

[29] *See generally* Emily S. Renschler & Janet Monge, *The Samuel George Morton Cranial Collection: Historical Significance and New Research*, Expedition, Nov. 2008, at 30 *available at* http://www.penn.museum/documents/publications/expedition/PDFs/50-3/renschler.pdf.

[30] *Id*.

[31] Wilder, *supra* note 3, at 192.

[32] *Id*. at 106.

locate a tutor for the children of their family friend Robert Carter, of the Nomini Hall plantation.[33]

The influence of college graduates was so expansive that it reached beyond North America into slave-holding societies in the Caribbean and South America. Graduates took up positions among the slave-holding elite as plantation owners and politicians. Others became ministers or educators who upheld slavery through preaching and teaching.[34] Moreover, farmers and scientists gave lectures and dissertations on the physical and mental inferiority of these various groups to international audiences willing to listen.[35] After graduating in Harvard's first class, George Downing, Governor John Winthrop's nephew, spent months preaching to the English in Barbados, Antigua, Santa Cruz, Nevis, and St. Christopher, where he measured demand for New England commodities and gathered advice on establishing slavery in the Puritan colonies.[36]

In the years after the Civil War, some of the best-educated people in the nation began revising history to romanticize and sanitize their relationship to bondage.[37] In a class with the Harvard anatomist John Collins Warren, Henry Watson, a Harvard trained educator, taught that Black people sat at the bottom

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[33] *Id*.

[34] *Emory's Leslie Harris Says We Should Remember The Racist Roots Of American Colleges As We Think About What Went Wrong At OU And Other Schools*, Geo. Mason U. Hist. News Network, Mar. 26, 2015, http://historynewsnetwork.org/article/158939#sthash.LhRpLRPb.dpuf.

[35] Wunder, s*upra* note 26, at 128.

[36] *Id*. at 30.

[37] Wilder, *supra* note 3, at 280.

of humanity in physical development, cultural accomplishment, and intellectual potential.[38] In his lectures, Professor Warren revealed that the most advanced scientific research "confirmed the biological supremacy of the boys in that room," a sentiment carried for generations upon matriculation.[39]

C. The Same White Supremacist Ideology that Built and Maintained Our Higher Education Institutions Simultaneously Denied Blacks Any Access to Education During Slavery and Equal Access to Education during Jim Crow.

For over two centuries, between 1636 and 1857, elite institutions built their endowment upon slave labor and educated generations of white leaders on the tenets of white supremacy while Blacks were prohibited, by law from being educated. Fearing that Black literacy would prove a threat to the slave system—which relied on slaves' dependence on masters—whites in many colonies instituted laws forbidding slaves to learn to read or write and made it a crime for others to teach them.[40] An excerpt from the South Carolina Act of 1740 stated:

> Whereas, the having slaves taught to write, or suffering them to be employed in writing, may be attended with great inconveniences; Be it enacted, that all and every person and persons whatsoever, who shall hereafter teach or cause any slave or slaves to be taught to

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[38] *Id*. at 3.

[39] *Id*.

[40] William Goodell, *The American Slave Code in Theory and Practice* 2 (1853).

> write, or shall use or employ any slave as a scribe, in any manner of writing whatsoever, hereafter taught to write, every such person or persons shall, for every such offense, forfeit the sum of one hundred pounds, current money.[41]

Georgia enacted a similar law against slave education in 1770, and all Southern states followed suit by 1803.[42]

Because of this type of legislation, the education of slaves was done in a secret manner—often late at night when slave masters were asleep, or in hidden areas. Only the people who could be trusted were invited to attend "school" in any location "where Secresy [sic] could be secured."[43] Sometimes these schools were held in remote swamps and cane-breaks, where, perhaps, the foot of the white man had never trod.[44] Because of the high level of policing that slave communities experienced, those individuals that did succeed in learning from others had to do so with great care. A Black woman who grew up in Savannah, Georgia stated that "My brother and I being the two eldest, we were sent to a friend of my grandmother, Mrs. Woodhouse, a widow, to learn to read and write . . . . We went every day about nine o'clock, with our books wrapped in paper to prevent the police or white persons from seeing them."[45] As a result of the stringent, restricted access to learning, not many slaves succeeded in being

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[41] *Id*.

[42] Junius P. Rodriguez, *Slavery In the United States: A Social, Political, and Historical Encyclopedia* 271 (2007).

[43] Stuart Buck, *The History of Black Education in America, Acting White: The Ironic Legacy of Desegregation* 42 (2010).

[44] *Id*. at 44.

[45] *Id*.

educated. A census in 1860 documented that only about 5% of the population was literate.[46]

During and after reconstruction, Black schools were severely underfunded. Many Southern states spent an annual average of $3.81 for each Black student enrolled in the public schools; whereas, spending for white students averaged $9.37 per year.[47] One student, when asked why he was not writing on his slate, told a freedom school teacher that he had sold his pencil for a piece of bread. [48] A ten-year-old girl in Charleston, South Carolina chose to give up meals so that her grandmother's limited funds could pay school fees.[49] While many students made choices between their livelihood and their education, most during this period also risked their lives by attending school. With the newly instituted plantation schools came a bout of white hostility that impeded school attendance. In many locations, stoning was the preferred method of attack employed by angry white children who resented the idea of Black children attending school.[50] Colonel Douglass Wilson, a former slave and Civil war veteran recalled school days for his children in New Orleans in 1866.

> We sent our children to school in the morning . . . we had no idea that we should see them return home alive in the evening. Big white boys and half-grown men used to pelt them

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[46] *Id*. at 45.

[47] Nina Mjagkil, *Loyalty in Time of Trial: The African American Experience During World War I* 4 (2011).

[48] Heather Andrea Williams, *Self-Taught: African American Education in Slavery and Freedom* 142 (Waldo E. Martin Jr. et al. eds. 2005).

[49] *Id.*

[50] *Id.* at 149.

> with stones and run them down with open knives, both to and from school. Sometimes they would come home bruised, stabbed, beaten half to death, and sometimes quite dead.[51]

Coupled with the threat of physical violence, the planting and harvest season proved to be another roadblock in education, halting schooling amid dwindling attendance as children were needed in sharecropping fields.[52] For at least half of the 20th century, white school officials shortened the academic year to ensure that Black school children would work until the cotton harvest was complete.[53] By 1910, less than 45% of rural Black Southerners under the age of ten were enrolled in schools, and more than 33% of those aged ten or older were illiterate.[54] From 1914 to 1915, Southern Black children attended an average of thirty-five days of classes during the entire school year in order to help on the farms.[55] The pressures for Black students to tend to sharecropping fields, again, balanced on the want for an education, and the need for survival. Subsequently by 1930, 15% of rural adult Blacks had no formal schooling, and 48% percent had never gone beyond the fifth grade.[56]

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[51] *Id.* at 150.

[52] Mjagkil, *supra* note 47, at 4.

[53] Bartholomew F. Bland & Irma Watkins-Owen, *Winfred Rembert: Amazing Grace* 16 (2012).

[54] Mjagkil, *supra* note 47, at 4.

[55] *Id.*

[56] *The 1930s Education: Overview* Gale U.S. History in Context, http://ic.galegroup.com/ic/uhic/ReferenceDetailsPage/ReferenceDetailsWindow?query=&prodId=UHIC&displayGroupName=Reference&limiter=&disableHighlighting=true&displayGroups=&so

D. Today, the Overwhelmingly White Demographics of Our Most Elite Higher Education Institutions is Neither an Accident of History Nor the Results of Neutral Meritocracy but the Direct Legacy and Inevitable Consequence of White Supremacy, White Superiority, and White Privilege.

The overt racial discrimination of yesterday is now hidden deep within today's colorblind rhetoric. Colorblindness is an instrument of white privilege because it undermines the means of promoting racial equality. Ironically, the demographics for these elite institutions, many of which funnel into Supreme Court clerkship positions and top businesses, remain primarily white. The top three law schools—Harvard, Yale and Columbia—have a significant divide of Black and white students. In 2014, Harvard Law School's student body population was 52.3% white and 8.7% Black;[57] Yale Law School's student body was 63% white and 6.9% Black;[58] and, Columbia Law School's student body was 51.3% white and 6.5% Black.[59]

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rtBy=&zid=&search_within_results=&action=2&catId=&activityType=&documentId=GALE%7CCX3468301121&source=Bookmark&u=sand55832&jsid=55d9d90c4bad282ee2debc3c18227fed (last visited Oct. 27, 2015).

[57] Harv. L. Sch., *Standard 509 Information Report* (2014), http://hls.harvard.edu/content/uploads/2015/02/Std509InfoReport20142.pdf.

[58] Yale L. Sch., *Standard 509 Information Report* (2014), http://www.law.yale.edu/documents/pdf/About/ABA509report_Yale.pdf.

[59] Colum. L. Sch., *Standard 509 Information Report* (2014), https://web.law.columbia.edu/sites/default/files/microsites/admissions/jd/files/2014/std509inforeport-101-101-12-10-2014_13-33-20.pdf.

White privilege is the understanding that, "being born with white skin in America affords certain unearned privileges in life that people of another skin color . . . are not afforded."[60] With over two hundred years of universities denying Blacks the privilege of entering into these elite institutions, legacy clauses—that pull from families that have matriculated from these schools—affords the children of alumni privileges they may not have earned. Although many legacy admissions rates are self-reported, Harvard's legacy admissions rate in 2011 hovered around 30%[61], while Yale admitted 20 to 25% of their legacy applicants.[62] To juxtapose these numbers, 11.8% of the admitted students in 2011 at Harvard were Black.[63]

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[60] Gina Crosley-Corcoran, *Explaining White Privilege To A Broke White Person*, OccupyWallStreet.Net, http://occupywallstreet.net/story/explaining-white-privilege-broke-white-person (last visited Oct. 15, 2015).

[61] Justin C. Worland, *Legacy Admit Rate at 30 Percent*, Harv. Crimson, May 11, 2011, http://www.thecrimson.com/article/2011/5/11/admissions-fitzsimmons-legacy-legacies/.

[62] Pamela Paul, *Being a Legacy Has Its Burden*, N.Y. Times, Nov. 4, 2011, http://www.nytimes.com/2011/11/06/education/edlife/being-a-legacy-has-its-burden.html?_r=2&ref=edlife.

[63] Justin C. Worland, *Harvard Accepts Record Low 6.2 Percent of Applicants to the Class of 2015*, Harv. Crimson, Mar. 31, 2011, http://www.thecrimson.com/article/2011/3/31/percent-class-students-year/.

II. RACIAL DISPARITIES IN PUBLIC SCHOOL DISCIPLINE, RACIALIZED ENFORCEMENT OF ZERO-TOLERANCE POLICIES, AND THE SCHOOL TO PRISON PIPELINE ARE THE MODERN IMPLEMENTS OF A SYSTEM OF WHITE PRIVILEGE THAT HAS TRANSFORMED MOST BLACK K-12 SCHOOLS INTO INSTITUTIONS OF CUSTODY AND CONTROL.

If the financing of American higher education institutions by the slave economy was a first-generation brute demonstration of white supremacy, and if the academic theories these institution promoted in the service of Jim Crow were a thinly disguised second-generation expression of white superiority, then today, the racialization of K-12 school discipline, the discriminatory application of so-called *zero tolerance* policies, and the transformation of primarily Black public primary and secondary schools into institutions of custody and control serve as third-generation instruments of white privilege.

A. Racial Disparities in School Discipline Fortify White Privilege at the Expense of Black Students and Low-Income Students.

Discipline practices in schools affect the social quality of the educational environment, and the ability of children to achieve the academic and social gains essential for success in a 21st century society.[64] Loss

[64] 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, 85 (2011).

of classroom instruction time damages student performance.[65] One recent study found that missing three days of school in a month before taking the National Assessment of Educational Progress translated into fourth graders scoring a full grade level lower in reading on this test.[66] New research shows that higher suspension rates are closely correlated with higher dropout and delinquent rates, having tremendous economic costs for the suspended students as well as for society as a whole.[67]

In K-12 schools throughout the U.S., discipline is disproportionately applied to young Black boys and girls. Research has shown that, typically, the highest suspension rates are for Black males, followed by Black females and/or Latino males.[68] In regards to suspension rates for students with disabilities at the secondary level, Black males are at the highest risk for suspension at 33.8%, while Black females with disabilities are suspended at 22.5%, which is higher than white males with disabilities at both the elementary and secondary level.[69] Unfortunately, the national rates for suspensions by race at the secondary level show
a darker picture. Black males face the greatest risk for suspension at 28.4%, which is 19 points higher than that of white males at 9.4%.[70] Meanwhile, Black females suffer the second highest suspension rate at

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[65] Daniel Losen et al., Ctr. for Civ. Rts. Remedies, *Are We Closing The School Discipline Gap?* (2015).

[66] *Id*.

[67] *Id*.

[68] *Id*. at 6.

[69] *Id*.

[70] *Id*. at 25.

17.9%, compared to white females' suspension rate of 3.8%—higher than all other females and higher than all male subgroups, except Black males.[71] Overall, Black students receive more harsh punitive measures (suspension, expulsion, corporal punishment) and less mild discipline than their non-minority peers for the very same conduct, even when controlling for socio-economic status.[72]

These appalling racial disparities in school discipline at the elementary and secondary level start in the earliest years of schooling.[73] In May 2014, the U.S. Department of Education's Office for Civil Rights studied data from every one of the nation's 97,000 public schools. Among the key and most startling findings is that Black students represent 18% of preschool enrollment but 42% of pre-school students suspended once, and 48% of the pre-school students suspended more than once.[74] On the other hand, white children represent 43% of preschool enrollments, but 28% of preschool children suspended once and 26% of preschool children suspended more than once.[75] The report noted:

> [P]articular concern around discipline for our nation's young men and boys of color, who are

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[71] *Id*.

[72] Nancy A. Heitzeg, *Education or Incarceration: Zero Tolerance Policies and the School to Prison Pipeline*, F. on Pub. Pol'y, no. 2, 2009, at 1, 12, *available at* http://forumonpublicpolicy.com/summer09/archivesummer09/heitzeg.pdf.

[73] Office for Civil Rights, U.S. Dep't of Educ., *Civil Rights Data Collection Data Snapshot: School Discipline* 7 (Mar. 21, 2014), *available at* http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf.

[74] *Id*.

[75] *Id*. at 1.

> disproportionately affected by suspensions and zero-tolerance policies in schools. Suspended students are less likely to graduate on time and more likely to be suspended again. They are also more likely to repeat a grade, drop out, and become involved in the juvenile justice system.[76]

B. Racialization of Zero Tolerance Policies Accentuates White Privilege in K-12 Education, and Feeds Black Students into the "School-to-Prison Pipeline."

The term *zero tolerance* describes a range of policies that seek to impose severe sanctions in schools—typically suspension and expulsion—for minor offenses in hopes of preventing more serious ones.[77] Under these policies, students may also suffer harsher penalties and are referred to juvenile authorities.[78]

The implementation of *zero tolerance* policies has resulted in a disproportionate number of Black students being suspended, expelled, or attending alternative schools.[79] The empirical research has demonstrated that Black youth, especially males, are punished disproportionately compared to their white counterparts.[80] The harm has been so great that it has resulted in

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[76] *Id.*

[77] Randy Borum et al., *What Can Be Done About School Shootings?*, 39 Educ. Researcher 27, 28 (2010).

[78] Mitchell, S. David, *Zero Tolerance Policies: Criminalizing Childhood and Disenfranchising the Next Generation of Citizens*, 92 Wash. U. L. Rev. 271, 272 (2014).

[79] *Id.*

[80] *Id*.

what has been termed the "School to Prison Pipeline."[81] According to the Advancement Project, "arrests in school represent the most direct route into the school-to-prison pipeline, but out-of-school suspensions, expulsions, and referrals to alternate schools also push students out of school and closer to a future in the juvenile and criminal justice system."[82]

From 2009 to 2010, it was reported that "[a]lthough Black students made up only 18 percent of those enrolled in the schools sampled, they accounted for 35[%] of those suspended once, 46[%] of those suspended more than once and 39[%] of all expulsions."[83] The disconnect between white teachers and Black students often exacerbates these policies.[84] White teachers feel more threatened by young Black boys, seeing them as *disruptive*, and in need of discipline.[85] On the other hand, teachers and school officials have a tendency of defining disruptive white youth as in need of medical intervention rather than *zero tolerance* consequences.[86] For young Black girls, any deviation from the social norms that define female behavior according to a narrow, white middle-class definition of femininity, brands them as non-conformative, defiant, and disruptive thereby subjecting them to some form of criminalizing response.[87] The consequences of dumping promising Black male

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[81] *Id*.

[82] Monique W. Morris, Afr. Am. Pol'y F., *Race, Gender and the School-To-Prison Pipeline: Expanding Our Discussion to Include Black Girls* 2 (2012).

[83] David, *supra* note 78, at 293–94.

[84] Heitzeg, *supra* note 72, at 12.

[85] *Id*.

[86] *Id*.

[87] Morris, *supra* note 82, at 5.

and female students out of schools and into the streets are disastrous. Overall, this equates to Black students suffering from less time in an academic classroom due to *zero tolerance* policies, which subsequently leads to feelings of alienation from school, elevated dropout rates, and alarming incarceration rates.[88]

C. Racial Disparities in School Discipline, the Racialization of Zero Tolerance Policies, and the School to Prison Pipeline Explicitly Reify the Narrative of Black Criminality and Implicitly Reinforce the Narrative of White Privilege.

Zero tolerance policies and the disproportionate discipline of Black children in the K-12 environment are key examples of the policies defining today's "School-to-Prison Pipeline" making it more likely for Black students to face criminal involvement with the juvenile courts than to attain quality education.[89] Black students are more likely to reap the consequences of the "School-to-Prison Pipeline" because whites perceive Black students as "threatening" and "deviant;"[90] words

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[88] Alicia Darensbourg et al., *Overrepresentation of African American Males in Exclusionary Discipline: The Role of School-Based Mental Health Professionals in Dismantling the School to Prison Pipeline*, 1 J. Afr. Am. Males Educ. 196, 199 (2010).

[89] Christopher A. Mallett, *The School-To-Prison Pipeline: A Comprehensive Assessment* 1 (2015).

[90] India Geronimo, *Systemic Failure: The School-to-Prison Pipeline and Discrimination Against Poor Minority Students*, 13 J. L. Soc'y 281, 297–98 (2011).

all too familiar in the lexicon and mythology of Black criminality.[91]

The narrative of Black criminality perpetuates the use of race as a proxy for criminal propensity. Stereotypes of Black people as violent originated in slavery, are perpetuated today by the media, and are reinforced by the huge numbers of Black people under criminal justice supervision.[92] "Slavery defined Black men as sexual predators and created the image of the violent man, who is the rapist, and who is therefore the target of the law, as a Black man."[93] After the end of slavery, the notion that the freed slaves would become lawless bands of savages served as popular justification for lynchings and anti-Black riots.[94] Today, police killings of Blacks in the form of "justifiable" homicides appear to be a part of America's social milieu.[95] Although, no one knows just how many people are killed by the

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[91] Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. Crim. L. & Criminology 775, 805 (1999).

[92] *Id*.

[93] Lisa A. Crooms, *Speaking Partial Truths and Preserving Power: Deconstructing White Supremacy, Patriarchy, and the Rape Corroboration Rule in the Interest of Black Liberation*, 40 How. L.J. 459, 475 (1997).

[94] N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 Cardozo L. Rev. 1315, 1326 (2004).

[95] Victims also include the mentally ill and non-racial minorities.

police nationwide[96], the disproportionate representation of Blacks among the dead victims is chilling.[97] A Black person is slain by law enforcement and security services with guns once every twenty-eight hours.[98] Young Black males are twenty-one times more likely to be shot dead by police than their white counterparts.[99] Moreover, in 2014, there was extensive media coverage of police killings of unarmed Black people, including Eric Garner, Michael Brown, John Crawford, Tamir Rice, and Levar Jones.[100]

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[96] *See* Richard Peréz-Peña, *Fatal Police Shootings: Accounts Since Ferguson,* N.Y. Times, Apr. 8, 2015, *available at* http://www.nytimes.com/interactive/2015/04/08/us/fatal-police-shooting-accounts.html; Naomi Zack, *White Privilege and Black Rights: The Injustice of U.S. Police Racial Profiling and Homicide* 64 (2015).

[97] Zack, *supra* note 96, at 64 ("[F]rom 2005-2012, a white police officer killed a Black person about twice a week; 18[%] of Blacks killed were under 21, compared to 8.7[%] of whites killed. [And,] 136 African Americans were killed by police in 2012, . . . one every 28 hours.").

[98] *See id.*; *see also* Rick Ayers & William Ayers, *Breathe: Notes on White Supremacy and the Fierce Urgency of Now*, *in* The Assault on Communities of Color xi, xii (Kenneth Fasching-Varner & Nicolas Daniel Hartlep eds., 2015).

[99] Paul D. Grant & Carl A. Grant, *To Be Men and Women: The Black Struggle for Justice Continues*, *in* The Assault on Communities of Color, *supra* note 98, at 173 (2015).

[100] Kenneth Lawson, *Police Shootings of Black Men and Implicit Racial Bias: Cant's We All Just Get Along*, 37 U. How. L. Rev. 339, 339–40 (2015); Daren Lenard Hutchinson, *Continually Reminded of Their Inferior Position: Social Dominance, Implicit Bias, Criminality, and Race*, 46 Was. U. J.L. & Pol'y 23, 23–24 (2014) ("Reports of racially charged police killings of Black men have generated so much media attention that the Associated Press has named these stories the 'top news' of 2014.").

Though the media sensationalized each of these tragic murders, the driving force behind the sensationalism was arguably two-fold. First, whites were not punished for the homicides they committed.[101] Second, whites tended to believe the killings were justified, while Blacks did not.[102] Horrifically, whites' perceived justification of these recent killings mirror the perceived justification of the racialized lynchings and murders of Blacks by whites throughout the nation's history. Each instance became a manifestation of white privilege that exemplified patterns and institutional expressions of social domination and Black criminality.[103] Each unpunished killing was treated as a symbol of overall social injustice;[104] one that enforced white privilege[105] and solidified its presence in the lived experiences of Blacks via the judicial and extra-judicial decision of whites to murder and dehumanize unarmed Black citizens.[106]

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[101] *See* Hutchinson, *supra* note 100, at 110; Zack, *supra* note 96, at 18 ("The sense that rights have been violated intensifies when police who kill in such instances fail to be criminally indicted or are acquitted in criminal trial for manslaughter or murder.").

[102] Zack, *supra* note 96, at 25 (citing public opinion polls).

[103] Ayers & Ayers, *supra* note 98, at xii.

[104] *Id.* at xiii ("[A]fter Mike Brown's murder justice-seeking people said, 'Hands up, don't shoot!' and, after Eric Garner was choked to death, [justice-seeking people] chanted 'I can't breathe!' And the cohering, crystallizing sentiment has become a simple phrase with massive implications pointing toward profound and radical changes: Black Lives Matter!"); Zack, *supra* note 96, at 99.

[105] Again, by white privilege we mean the understanding that "being born with white skin in America affords certain unearned privileges in life that people of another skin color . . . are not afforded . *See* Crosley-Corcoran, *supra* note 60.

[106] Ayers & Ayers, *supra* note 98, at xii; Melinda Jackson & Dari Green, *Contradicting Realities in the Mythical Post-Racial:*

III. IN THE COURT'S RACE-CONSCIOUS AFFIRMATIVE ACTION JURISPRUDENCE, WHITENESS IS THE PRIVILEGE THAT DARES NOT SPEAK ITS NAME.

The point of recounting the role that the slave economy played in the founding of our elite colleges and universities, the extent to which the best and brightest minds from these institutions provided intellectual cover for American racial segregation, and the fact that racialized discipline policies in public education now serve as invisible third-generation instruments of white privilege is to highlight the moral artificiality—not to say intellectual dishonesty—of constitutional analysis of race-conscious affirmative action programs without a frank discussion of white privilege. Yet, perhaps the most insurmountable obstacle to that sort of intellectually honest discussion is, with all due respect, this Court's own reluctance—not to say, unwillingness—to acknowledge plainly, and without equivocation, the reality that the nation's continuing struggle with providing fair and equal access for Blacks in higher education is not simply due to the lack of college preparedness on the part of Blacks, or due to what is often quaintly referred to as the Black-White achievement gap, but also due to a strand of white privilege that is woven into the very DNA of our higher education system and that cannot be erased by pronouncing that "the way to stop discrimination on the basis of race is to stop discrimination of the basis of race." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

America Blinded to Matters of Color?, in The Assault on Communities of Color, *supra* note 98, at 88.

So, it is more than a little remarkable that, in over two centuries, this Court has decided thirteen cases where the central issue presumably concerned equal opportunities for Blacks in higher education, and in not a single one of these cases has a majority of the Court discussed the intersection between higher education and white supremacy, white superiority, and white privilege. Seven of the Court's decisions—*Berea College v. Kentucky*,[107] *Missouri ex rel Gaines v. Canada*,[108] *Sipuel v. Bd. of Regents of Univ. of Okla.*,[109] *Sweatt v. Painter,*[110] *McLaurin v. Oklahoma State Regents,*[111] *Fisher v. Hurst,*[112] and *United States v. Fordice*,[113]—grappled with the legitimacy and legacy of racial segregation. The remaining six—*Defunis v. Odegaard*,[114] *Regents of Univ. of California v. Bakke*,[115] *Grutter v. Bollinger*,[116] *Gratz v. Bollinger*,[117] *Fisher v. Univ. of Texas at Austin*,[118] and *Schuette v. Coal. to Def. Affirmative Action*[119]—have directly and indirectly confronted race-conscious affirmative action admission

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[107] *Berea Coll. v. Kentucky*, 211 U.S. 45 (1908).

[108] *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938)

[109] *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948).

[110] *Sweatt v. Painter*, 339 U.S. 629 (1950).

[111] *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

[112] *Fisher v. Hurst*, 333 U.S. 147 (1948).

[113] *United States v. Fordice*, 505 U.S. 717 (1992).

[114] *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974).

[115] *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

[116] *Grutter v. Bollinger*, 539 U.S. 306 (2003).

[117] *Gratz v. Bollinger*, 539 U.S. 244 (2003).

[118] *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

[119] *Schuette v. Coal. to Def. Affirmative Action*, 134 S. Ct. 1623 (2014).

policies at public institutions of higher education. Some, like *Berea College,* matter only as a sort of historical relic. Others, like *Gaines*, *Sipuel*, *Sweatt, Hurst*, and *McLaurin,* stand as stark reminders of the Court's fitful attempts over nearly half a century to disguise the doctrine of separate but equal as something other than a moral abomination. But, as for the remaining decisions on race-conscious affirmative action, the Court has insisted time and time again that the single most important lesson to be derived from the American experience with slavery and Jim Crow is that race itself, as opposed to white supremacy, is such a corrosive concept that any and all of its uses should be subject to strict scrutiny.

A. The Court's Silence Regarding the Effects of White Privilege on Higher Education is Part of a Deeper Reluctance to Acknowledge the Legacy or Presence of Racism.

To borrow language from Justice Thomas, on issues of white supremacy and white privilege, the Court's "silence in this case is deafening." *Grutter v. Bollinger*, 539 U.S. 306, 371 (2003) (Thomas, C. dissenting). Despite hundreds of years of discriminatory laws, "racism" was not mentioned in a Supreme Court decision until a 1944 concurring opinion delivered by Justice Frank Murphy in *Steele v. Louisville & Nashville Railroad Company.*[120] 323 U.S. 192, 208 (1944) (Murphy, F. concurring) ("Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation.").

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[120] William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction,* 100 Ky. L.J. 1, 2 (2012).

Justice Murphy used the term "racism" again in his dissent in *Korematsu v. United States* and his concurrence in *Ex parte Endo*, released on the very same day.[121] *Korematsu v. United States*, 323 U.S. 214, 233 (1944) (Murphy, F. dissenting) ("Such exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."); *Ex parte Endo*, 323 U.S. 283, 307 (1944) (Murphy, F. concurring) ([D]etention in Relocation Centers of persons of Japanese ancestry regardless of loyalty is not only unauthorized by Congress or the Executive but is another example of the unconstitutional resort to racism inherent in the entire evacuation program.").

For years "racism" only appeared in dissenting and concurring opinions.[122] The word "racism" was not used in a majority opinion until 1992 in *Georgia v. McCollum*.[123] 505 U.S. 42, 58 (1992) ("We have, accordingly, held that there should be a mechanism for removing those on the venire whom the defendant has specific reason to believe would be incapable of confronting and suppressing their racism.").

In 1967, *Loving v. Virginia* marked the first and only time that the Supreme Court of the United States struck down legislation because it was enacted to support white supremacy. 388 U.S. 1 (1967).[124] Similarly, the Court has only used the term "white privilege" once in a footnote. *Parents Involved in Cmty. Sch. v. Seattle*

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[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] The majority has often discussed white supremacy "to describe white supremacy groups. *See, e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 229 (1985); *Walker v. City of Birmingham*, 388 U.S. 307, 319–20 (1967).

Sch. Dist. No. 1, 551 U.S. 701, 782 n.30 (2007) (describing white privilege as "an invisible package of unearned assets which I can count on cashing in each day, but about which I was meant to remain oblivious.").

B. In Contrast to Its Reluctance to Acknowledge the Concept of White Privilege, the Court has been Far More Open to Discuss, Whether in Approbation or Condemnation, the Notion of Black Inferiority.

Both the notion of Black and white as biologically distinct categories, as well as the identification of the Black race as being of a lower order were in great part the creation of the legal system.[125] The earliest cases involving questions of race were heard in state courts that, in many instances, had to determine the petitioner's race, which in itself determined the person's status. *See Brom and Bett v. Ashley*, (Mass. 1781); *Hudgins v. Wright*, 11 Va. 134 (1806); *Vaughan v. Phebe*, 8 Tenn. (Mart. & Yer.) 5, 5 (1827). In *Hudgins v. Wright*, the Virginia Supreme Court heard arguments of a petitioner challenging her enslavement based on her mother's status as a Native American. The court held for the petitioner on the basis that Native American slavery ended in Virginia in 1691. *See Wright*, 11 Va. at 139. In defining each party's burden, the court

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[125] Ariela J. Gross, *What Blood Won't Tell: A History of Race on Trial in America* 17 (2008).

stated "[w]here white persons, or native American Indians, or their descendants in the maternal line, are claimed as slaves, the *onus probandi* [or burden] lies on the claimant; but it is otherwise with respect to native Africans and their descendants, who have been and are now held as slaves." *Id*. In *Vaughan v. Phebe*, the Tennessee Supreme Court of Errors and Appeals, heard the case of a petitioner who claimed that she was wrongly held in slavery because her great-grandmother was a Native American woman. 8 Tenn. (Mart. & Yer.) at 5. The court held for the petitioner and based its decision on the record that her maternal aunt had previously brought a successful [freedom] case which relied on the same information.[126]

Over time, this Court heard some of these same "freedom suits."[127] In *"Negro" John Davis v. Wood*, 14 U.S. 6, 4 (1816), this Court dealt with very similar facts as those of *Hudgins* and *Vaughan*. However, unlike *Hudgins* and *Vaughan*, in an opinion delivered by Chief Justice John Marshall, the Court held that: "[e]vidence by hearsay and general reputation is admissible only as to pedigree, but not to establish the freedom of the petitioner's ancestor, and thence to deduce his or her own." *Id*. at 8. In the coming years, the Court would buttress its support of "the idea of 'negros' as a degraded race [helping] justify the anomaly of chattel slavery in a republic that was otherwise devoted to liberty."[128] Thus, in 1856, with its opinion in *Dred Scott v. Sanford,* 60 U.S. 393 (1856), the Court expressly shifted an entire race of people into the non-

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[126] Jason A. Gillmer, *Suing for Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South*, 82 N.C. L. Rev. 535, 537 (2004).

[127] *Id.* at 541.

[128] *Id*.

human category.[129] In ruling upon *Dred Scott*'s claim for freedom, Chief Justice Roger Taney phrased the question before the Court as "Can a negro, whose ancestors were imported into this country, and sold as slaves, become [a citizen under] the Constitution of the United States, [be] entitled to all the rights, and privileges . . . guarantied by that instrument to the citizen?" *Dred Scott*, 60 U.S. at 403. The Court answered that:

> [A]s beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, [the Black race] had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.

Id. at 407.

So ingrained was this notion of Black inferiority that even while condemning the majority's separate but equal doctrine in *Plessy v. Ferguson*, 163 U.S. 537, 538 (1896), Justice Harlan pointed out that "[t]he white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty." *Id*.

C. The Court's Colorblindness, Merit, and Innocence Rhetoric Both Renders Invisible and Perpetuates White Privilege.

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[129] *See generally* Paul Finkelman, *Scott v. Sandford: The Court's Most Dreadful Case and How It Changed History*, 82 Chi.-Kent L. Rev. 3 (2007).

In the place of an honest assessment of the legacy of white privilege in higher education, the Court has, time and time again, reiterated the notion that the United States Constitution requires—and American society should aspire to—colorblindness. This notion of colorblindness emerged even before the end of the Civil War as a means of opposing any attempt to provide for the education and welfare of newly emancipated slaves and, as such, was always more of an *idée fixe* than a defensible moral philosophy. Between 1863 and 1868, Congress took up a series of social welfare legislation, generally termed the Freedmen's Bureau Act and mostly designed to ease assimilation of newly freed slaves into American society.[130] In the course of congressional debates over these pieces of legislation, and long before Justice Harlan would declare in *Plessy v. Ferguson* that "our Constitution is color-blind, and neither knows nor tolerates classes among citizens,"[131] there developed a basic narrative of colorblindness that race-conscious remedies are *per se* unconstitutional; that they only serve to confer benefits upon a special class of citizens; that they are better apportioned on the basis of social class rather than race; that they inevitably breed dependency in Blacks and resentment in whites; that they create the impression that Blacks are unable to succeed through their own hard work; and that, once adopted, these remedies risk extending into perpetuity. Not much has changed in the intervening 150 years. The narrative of colorblindness has remained remarkably consistent, as has the seemingly sincere belief on the part of some that it is, or ought to be, the answer to every race question, the

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[130] *See* Section I.

[131] *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

solution to every race problem, and the cure to every race conflict.

The harm in failing to acknowledge the effects of years of policies that have promoted white supremacy, white superiority, and white privilege is aggravated by the Court's assessment of race-conscious remedies through the prism of so-called merit-based admissions and white innocence.[132] Merit-based admission considerations are far from objective. Scholars who defend merit-based admissions assume merit is "neutral, impersonal, and somehow developed outside the economy of social power."[133] In Justice Thomas's *Grutter* dissent, he revealed the myth of meritocracy when he explained that "[t]he rallying cry that in the absence of racial discrimination in admissions there would be a true meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to 'merit.'" *Grutter v. Bollinger*, 539 U.S. 306, 367—68 (2003).

Legacy status, for example, is considered in the admissions policies of many institutions of higher education. Research has shown that the benefit of having legacy status as an applicant is the equivalent of a 47-160 point increase on the SAT.[134] Because of the history of discrimination at institutions of higher

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[132] Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. Rev. 425, 427 (2014).

[133] Gary Peller, *Toward Critical Cultural Pluralism: Progressive Alternatives to Mainstream Civil Rights Ideology, in* Critical Race Theory: The Key Writings that Formed the Movement 124, 132 (1995).

[134] Peter G. Schmidt, *Color and Money: How Rich White Kids are Winning the War over College Affirmative Action* 31 (2007).

education, it is rare for Black students to have adequate representation in the legacy applicant pool.[135] Thus, in effect, legacy status becomes an "educational grandfather clause" benefitting white applicants at a higher rate by allowing racially discriminatory policies that were long ago deemed unconstitutional to continue to influence future enrollment.[136]

Moreover, the Court's seeming acquiescence to the notion of white plaintiffs as innocent victims of race-conscious remedies has resulted in a narrative that finds victimhood in the privileged and villainy in the oppressed. For example, in *Regents of Univ. of Cal. v. Bakke*, this Court stated that it was inequitable to force "*innocent* persons . . . to bear the burdens of redressing grievances not of their making." 438 U.S. 265, 298 (1978) (emphasis added). The Court further explained that race conscious policies should be "subject to continuing oversight to assure that it will work the least harm possible to other *innocent* persons competing for the benefit." *Id.* at 308 (emphasis added). By using the language of innocence, the Court has created an unusual dynamic where white persons are assumed to belong in institutions of higher education while Black persons are assumed undeserving of the same opportunity. At least three other examples illustrate this point. In *Wygant v. Jackson Bd. of Educ.*, this Court held that a clause protecting minority teachers from layoffs in a collective bargaining agreement between the Board of Education and the teachers union was unconstitutional. 476 U.S. 267, 283 (1986). The Court emphasized that, while racial discrimination

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[135] *Id.*

[136] Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. Rev. 1745, 1749 (1996).

exists in this country, "as the basis for imposing discriminatory legal remedies that work against *innocent* people, societal discrimination is insufficient and over expansive." *Id.* at 281 (emphasis added). In *Grutter*, the majority quoted Justice Powell in explaining that narrowly tailored race conscious policies "are subject to continuing oversight to assure that it will work the least harm possible to. . . *innocent* persons competing for the benefit." 539 U.S. at 341. Even Justice Blackmun's defense of affirmative action policies necessarily included a word about the *innocence* of those whom the policies affect in explaining that "[h]istory is irrefutable, even though one might sympathize with those who—though possibly *innocent* in themselves—benefit from the wrongs of past decades." *City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 561 (1989) (Blackmun, H., dissenting) (emphasis added). In *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, a case in which the district's school assignment program was deemed unconstitutional, Justice Thomas explained that "[a]lthough presently observed racial imbalance might result from past *de jure* segregation, racial imbalance can also result from any number of *innocent* private decisions, including voluntary housing choices." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 750 (2007) (emphasis added).

CONCLUSION

There is a longstanding tradition in the Court's "race" jurisprudence of the Court speaking what it believes are hard truths to civil rights plaintiffs. Less than twenty years after the end of the Civil War, Justice Bradley, writing for the majority in *The Civil Rights Cases,* 109 U.S. 3, 25 (1883)*,* lectured Black plaintiffs who had been denied access to public

accommodations not to rely upon the federal government to vindicate their civil rights because "[w]hen a man has emerged from slavery . . . , there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . ." Similarly, in the days of Jim Crow, when an armed mob of white men nearly lynched a group of Black applicants at a whites-only sawmill, in *Hodges v. United States*, 203 U.S. 1, 9–10 (1906), the Court found it illegitimate for Congress to make the attempted lynching a federal crime because at the close of the Civil War the nation granted Blacks citizenship "doubtless believing that thereby in the long run their best interests would be subserved, they taking their chances with other citizens in the states where they should make their homes." More recently, in upholding race-conscious remedies for the sake of student body diversity, Justice O'Connor, writing for the majority in *Grutter v. Bollinger*, 539 U.S. 306, 343 (2006), believed it necessary to warn that "we expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

In the same spirit, *Amicus curiae* respectfully submit that no determination of the constitutionality of race conscious affirmative remedies can take place without facing the hard truth that white privilege remains an indelible strand of higher education. "We are capable of bearing a great burden, once we discover that the burden is reality and arrive where reality is."[137] If race be the great American burden we must bear, the hard

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[137] James Baldwin, *The Fire Next Time*, *in* The Price of the Ticket: Collected Non-Fiction 1948-1985 333, 372 (1985).

reality this Court needs at long last to face is white privilege.

Respectfully submitted,

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November 2, 2015