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## An Analysis of the Supreme Court's Reliance on Racial "Stigma" as a Constitutional Concept in Affirmative Action Cases

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AN ANALYSIS OF THE SUPREME COURT'S RELIANCE ON  
RACIAL "STIGMA" AS A CONSTITUTIONAL CONCEPT  
IN AFFIRMATIVE ACTION CASES

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Stephen R. McAllister\*\*

*This Article focuses on one of the asserted costs of affirmative action: stigmatization. The Article offers structure to the debate over the definition and constitutional significance of the concept of "stigmatization" in the affirmative action context. In addition, this Article sets forth a model for analyzing "stigma" as a constitutional concept, identifies particular strains of stigma on which the Supreme Court has relied and analyzes the Supreme Court's use of the concept of "stigma" in affirmative action cases.*

INTRODUCTION

For the past twenty-five years, the constitutionality and political expediency of affirmative action has dominated the American debate over race.<sup>1</sup> Various advantages and disadvantages, or benefits and costs, arguably associated with affirmative action programs frequently have been the subjects of intense debate.<sup>2</sup> This Article

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1. See, e.g., Charles R. Lawrence III, *Forward—Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 822 (1995).

2. Without attempting to provide a comprehensive list, the following benefits frequently are mentioned: (1) providing a remedy for past discrimination, e.g., Randall Kennedy, *Persuasion and Distrust*, in ETHICS & PUBLIC POLICY CENTER, RACIAL PREFERENCE AND RACIAL JUSTICE 45, 50-51 (Russell Nieli ed., 1991) [hereinafter RACIAL PREFERENCE], (2) educating beneficiaries in ways that ordinarily would be unavailable, e.g., *id.* at 48, (3) leveling the playing field as between beneficiaries and nonbeneficiaries, see, e.g., THOMAS SOWELL, PREFERENTIAL POLICIES 155 (1990), (4) providing role models for youth of the beneficiary class or group, see, e.g., Kenneth L. Karst, *Citizenship, Race and Marginality*, 30 WM. & MARY L. REV. 189 (1988), (5) increasing the wealth of the beneficiary class, see generally *id.*, (6) enhancing the ability of the beneficiary class to self-govern, e.g., Kennedy, *supra*, at 48, (7) providing services to the beneficiary class, e.g., DANIEL C. MAGUIRE, A NEW AMERICAN JUSTICE

focuses on one of the asserted costs of affirmative action: stigmatization.<sup>3</sup>

The concept of stigmatization is particularly important because of the frequency with which the Supreme Court<sup>4</sup> and opponents of affirmative action invoke it.<sup>5</sup> Both affirmative action's proponents and detractors seem to accord stigmatization a near-talismanic

181-82 (1980), (8) preventing social unrest, e.g., Kennedy, *supra*, at 48, (9) promoting diversity, e.g., Kristine S. Knaplund & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. LEGAL EDUC. 157, 158 n.4 (1995); Lara Hudgins, Comment, *Rethinking Affirmative Action in the 1990s: Tailoring the Cure to Remedy the Disease*, 47 BAYLOR L. REV. 815, 822 (1995), and (10) eradicating stereotypes, e.g., Kennedy, *supra*, at 48. See generally Stephen R. McAllister, *One Anglo-Irish American's Observations on Affirmative Action*, 5 KAN. J.L. & PUB. POL'Y 21(1996). Similarly, the following costs frequently are complained of: (1) Reducing opportunities of members of the nonbeneficiary class, e.g., Ken Feagins, 'Wanted-Diversity: White Heterosexual Males Need Not Apply', 4 WIDENER J. PUB. L. 1, 2 (1994), (2) reducing motivation to improve or excel for members of the beneficiary class, e.g., SHELBY STEELE, THE CONTENT OF OUR CHARACTER 88, 90, 116 (1990), (3) spending greater sums to produce the same aggregate output, see, e.g., Nathan Glazer, *Racial Quotas*, in RACIAL PREFERENCE, *supra*, at 3, 13; Thomas Sowell, *Are Quotas Good for Blacks?*, in RACIAL PREFERENCE, *supra*, at 415, 422-23, (4) reducing quality of output, see, e.g., Morris B. Abram, *Fair Shakers and Social Engineers*, in RACIAL PREFERENCE, *supra*, at 29, 37-38; Glenn C. Loury, *Beyond Civil Rights*, in RACIAL PREFERENCE, *supra*, at 429, 441-43, (5) promoting racial tension, see, e.g., MAGUIRE, *supra*, at 174-75, (6) dehumanizing members of the beneficiary class, e.g., Charles Murray, *Affirmative Racism*, in RACIAL PREFERENCE, *supra*, at 393, 396, (7) condescension toward the beneficiary class, e.g., Harvey C. Mansfield, Jr., *The Underhandedness of Affirmative Action*, in RACIAL PREFERENCE, *supra*, at 127, 129, and (8) stigmatization of the beneficiary class, e.g., Carl A. Auerbach, *The Silent Opposition of Professors and Graduate Students to Preferential Affirmative Action Programs: 1969 and 1975*, 72 MINN. L. REV. 1233, 1257 (1988); Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 41-42 (1992).

3. There is, of course, an argument that stigmatization should have no bearing on the legality of affirmative action because the existence of stigmatization is in dispute:

Undoubtedly, when Chief Justice Warren wrote for the Court in 1954, the segregation of blacks and whites by force of law throughout the South was a badge of inferiority affixed by whites in an effort to retain their superior position in a two-tiered society. . . . In other words, the declaration that 'separate is inherently unequal' reflected reality: the only way to bring the quality of education of blacks up to the level of that of whites was to integrate the schools and eliminate the vestiges of legal segregation 'root and branch.'

That shorthand rule, however, which has become the controlling constitutional doctrine for school desegregation, is essentially based on empirical data similar to that used in *Brown*. As with any other empirical assertion, the truthfulness of the rule is only as legitimate as the facts supporting it.

James A. Washburn, Note, *Beyond Brown: Evaluating Equality in Higher Education*, 43 DUKE L.J. 1115, 1155-56 (1994) (footnotes omitted) (emphasis added).

4. See *infra* Part II.

5. See, e.g., SOWELL, *supra* note 2, at 15, 111, 125; STEELE, *supra* note 2, at 117, 120; Abram, *supra* note 2, at 29, 41, 476 n.10; Eastland, *supra* note 2, at 41-42; Stephen C. Minnich, Comment, *Adarand Constructors, Inc. v. Pena—A Strict Scrutiny of Affirmative Action*, 46 CASE W. RES. L. REV. 279, 310 (1995); Charles Murray, *Affirmative Racism: How Preferential Treatment Works Against Blacks*, THE NEW REPUBLIC, Dec. 1984, at 18.

respect, often considering it dispositive in the debate<sup>6</sup> even though evidentiary support for the phenomenon, to the extent it exists, is contested hotly.<sup>7</sup> Indeed, affirmative action's opponents sometimes take the position that simply because a plausible argument exists that affirmative action may result in stigmatization,<sup>8</sup> affirmative

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6. E.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 601 (1990) (Stevens, J., concurring) ("Neither the favored nor the disfavored class is stigmatized in any way."); Eastland, *supra* note 2, at 41 (labeling stigma as the "most damning judgment against affirmative action").

7. Compare Auerbach, *supra* note 2, at 1257 (citing 1975 Carnegie study indicating that a majority of professors and graduate students believe that "affirmative action labels minorities in such a way that they never can be judged on merit alone"), Luis T. Garcia et al., *The Effect of Affirmative Action on Attributions about Minority Group Members*, 49 J. PERSONALITY 427, 436 (1981) (claiming that, empirically, "affirmative action does serve to discount the role of ability in explaining the success of minority group members and augment the lac[k] of ability in explaining their failure"), and Madeline E. Heilman et al., *Presumed Incompetent? Stigmatization and Affirmative Action Efforts*, 77 J. APPLIED PSYCHOL. 536, 543 (1992) (citing "fairly robust" empirical data demonstrating stigmatization through the operation of the attribution theory's discounting process), with Robin D. Barnes, *Politics and Passion: Theoretically a Dangerous Liaison*, 101 YALE L.J. 1631, 1641 (1992) (book review) (claiming that opponents of affirmative action are unable "to establish a direct correlation" between affirmative action and stigmatization), Faye Crosby & Susan Clayton, *Affirmative Action and the Issue of Expectancies*, 46 J. SOC. ISSUES 61, 70 (1990) (claiming that "the connection between [a beneficiary's] personal circumstances and the position of [the beneficiary's] reference group is frequently not made"), Kennedy, *supra* note 2, at 50-51 (arguing that intended beneficiaries of affirmative action do not view benefits as unmerited), Rupert B. Nacoste, *Sources of Stigma: Analyzing the Psychology of Affirmative Action*, 12 LAW & POL'Y 175, 179 (1990) (noting the difficulty with stigma assumption in its underlying assumption that affirmative action policies are monolithic, not varying), and Nadine Strossen, *Blaming the Victim: A Critique of Attacks on Affirmative Action*, 77 CORNELL L. REV. 974, 975 (1992) (claiming that no empirical evidence supports the proposition that affirmative action diminishes self-esteem of its intended beneficiaries). See generally Stephen Coate & Glenn C. Loury, *Will Affirmative-Action Policies Eliminate Negative Stereotypes?*, 83 AM. ECON. REV. 1220, 1239 (1993):

The results of our study give credence to both the hopes of advocates of preferential policies and the concerns of critics. There are circumstances under which affirmative action will necessarily eliminate negative stereotypes. However, there are equally plausible circumstances under which it will not only fail to eliminate stereotypes, but may worsen them. This occurs because job preferences may induce employers to *patronize* the favored workers, which in turn may undercut their incentives to acquire necessary skills.

The empirical studies and surveys, which, as the foregoing suggests, are vast in number, ultimately appear to be hopelessly conflicted on the question of stigma as an empirical matter. We briefly discuss this point further in Part III, *infra*.

8. The Supreme Court has never attempted to define "stigma" precisely in the affirmative action context. See Brian K. Landsberg, *Equal Educational Opportunity: The Rehnquist Court Revisits Green and Swann*, 42 EMORY L.J. 821, 835-38, 860 (1993) (noting uncertainty as to the meaning and role of stigma in Supreme Court jurisprudence).

action is constitutionally infirm, typically under the equal protection guarantees of the Fifth and Fourteenth Amendments.<sup>9</sup>

Such heavy reliance on a complex concept that the Supreme Court has never defined has led to vague and sloppy analysis of the stigmatization issue in the Court's affirmative action cases.<sup>10</sup> This Article offers some structure to the debate over the definition and constitutional significance of the concept of "stigmatization" in the affirmative action context.

The Article's focus is confined to discussions of race-based affirmative action; it does not consider stigmatization arguments in the context of discrimination involving gender or disabilities, for example. Further, the Article's scope is limited to the stigmatization issue as between Whites and African Americans. Although similar issues exist with respect to other ethnic or racial groups,<sup>11</sup> we view the White/African American paradigm as providing the clearest framework for analysis. Moreover, the cases of *Plessy v. Ferguson*<sup>12</sup> and *Brown v. Board of Education*,<sup>13</sup> joint progenitors of stigmatization as a concept having constitutional significance in interpreting the Equal Protection Clause of the Fourteenth Amendment,<sup>14</sup> arose within that paradigm and discuss the stigma concept in that context.<sup>15</sup>

Part I of the Article sets forth a model for analyzing "stigma" as a constitutional concept. This Part of the Article identifies the different factors that determine the presence and nature of "stigma" in the context of affirmative action. In particular, we identify four controlling factors: the negative attribution behind the perceived stigma, the source of that attribution, the power held by the stigmatized group, and the distributive posture of the stigmatized group. The result of this model is a 16-square matrix that permits us to identify different strains of stigma on which a court might rely in deciding the constitutionality of affirmative action plans.

Part II of the Article utilizes the model developed in Part I to identify the particular strains of stigma on which the Supreme Court has relied. We begin by analyzing two of the Court's most famous race cases, *Plessy* and *Brown*, where the Supreme Court relied to a

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9. See *infra* Part II.B.

10. See *id.*

11. We are aware that a number of the commentators would object to characterization of African Americans as an "ethnic group." See, e.g., Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 21 (1994).

12. 163 U.S. 537 (1896).

13. 347 U.S. 483 (1954).

14. See, e.g., Ralph A. Rossum, *Plessy, Brown, and the Reverse Discrimination Cases: Consistency and Continuity in Judicial Approach*, 28 AM. BEHAV. SCI. 785, 791-93 (1985).

15. See *infra* Part II.A.

considerable extent on the perceived absence or presence of "stigma" in justifying or rejecting the "separate but equal" doctrine under the Fourteenth Amendment's Equal Protection Clause. In particular, we identify the strain of stigma which the Court rejected or relied upon in those two cases—which turns out to be the same strain—and locate it in the matrix.<sup>16</sup> We then build from *Plessy* and *Brown* by examining the Court's affirmative action cases of the past twenty-five years and identifying the strains of stigma relied upon in those cases. This analysis reveals that the Court, or individual Justices, have relied on eight different strains of stigma identified by the model and demonstrated by the matrix.<sup>17</sup>

In Part III of the Article, we summarize our findings and make some observations about the Supreme Court's use of the concept of "stigma" in affirmative action cases. In particular, the analysis identifies several fundamental points about the Court's current reliance on "stigma" as a concept of constitutional significance in the affirmative action context. First, the current, predominant view among the Justices apparently is that the constitutionally relevant strain is inferiority-type other-stigma suffered by powerless beneficiaries. In other words, the Court now focuses on the stigma that Whites accord to those who benefit directly from affirmative action programs. Second, the Court has moved toward endorsing an unfounded and unsound strain of constitutionally relevant stigma that varies from the predominant one in both the type and source of the negative attribution—racism by Whites. Both of these changes in constitutional reasoning represent major shifts from the Court's concept of stigma in *Plessy* and *Brown*.<sup>18</sup>

In addition, it is readily apparent that the Court, as well as individual Justices, has not consistently relied upon any particular concept of stigma in deciding affirmative action cases, although individual Justices' voting patterns from an outcome standpoint are remarkably consistent.<sup>19</sup> This observation opens the Court to charges of outcome-driven decisionmaking in affirmative action cases—a charge perhaps substantiated by the further observation that only two Justices (White and Stevens) have ever taken positions both in favor of and against the constitutionality of particular affirmative action programs. At a minimum, the Court's failure to endorse and consistently rely upon a particular concept of constitutionally significant "stigma" in affirmative action cases results in doctrinal confusion.

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16. See *infra* Table 2 at p. 252.

17. See *infra* Table 3 at p. 269.

18. See *infra* Tables 4 and 5 at pp. 271, 279.

19. See *infra* Table 3 at p. 269.

These findings are important for obvious reasons. The two fundamental changes in the Supreme Court's treatment of "stigma" as a constitutional concept—the departure from *Plessy/Brown* type stigma and the endorsement of racist stigma attributed to Whites—are subject to serious criticism. Moreover, the Court generally has not explained or justified these shifts in its more recent opinions and, indeed, the Court and individual Justices often invoke the talisman of "stigma" without apparent concern for the sense in which the concept is being used and perhaps for outcome-driven objectives. At the least, if the Court is to rely on the concept of "stigma" as one of constitutional relevance in the affirmative action context, the Justices should clearly identify the strain(s) of stigma on which they are relying and explain why such strain(s) are constitutionally relevant.

### I. A MODEL FOR STIGMA AS A CONSTITUTIONAL CONCEPT

The term "stigma" may be defined as a negative characterization or "mark."<sup>20</sup> Thus, the argument that affirmative action causes "stigmatization"<sup>21</sup> essentially involves the nature of that "mark" and the processes by which it is assigned. Not surprisingly, the concept of "stigma" or "stigmatization," especially as used by the Supreme Court, actually has multiple senses.<sup>22</sup> These senses, or strains have different implications, rendering meaningless any notion of stigma as a universal concept. Only by identifying and evaluating the different strains separately can the legitimacy of arguments against affirmative action based on stigma effectively be judged.

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20. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1158 (1986) (defining stigma as "a mark of shame or discredit"); AMERICAN HERITAGE DICTIONARY 1197 (2d College ed. 1985) (defining stigma as "[a] mark or token of infamy, disgrace, or reproach"). See also ERVING GOFFMAN, STIGMA 2-3 (1963):

While the stranger is present before us, evidence can arise of his possessing an attribute that makes him different from others in the category of persons available for him to be, and of a less desirable kind . . . . He is thus reduced in our minds from a whole and usual person to a tainted, discounted one. Such an attribute is a stigma, especially when its discrediting effect is very extensive; sometimes it is also called a failing, a shortcoming, a handicap.

21. "Stigmatization" is defined as "descri[ption] or identifi[ca]tion in opprobrious terms," WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1158 (1986), "characteriz[ation] or brand[ing] as disgraceful or ignominious," AMERICAN HERITAGE DICTIONARY 1197 (2d College ed. 1985), or simply "singl[ing] out." *Regents of University of California v. Bakke*, 438 U.S. 265, 374 (1978) (Brennan, J., concurring in part and dissenting in part).

22. See John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 340-41 (1994).

In this Part of the Article, we explain the two distinct processes that comprise our approach to the task of identifying the different strains. First, we develop an analytical model for constitutionally significant stigmatization from *Plessy, Brown*, and the affirmative action cases. Second, we identify the potential strains by applying the model.

#### A. Developing the Model

The first step in development is determining whether a single comprehensive model or multiple models are required. A single comprehensive model, which at least initially applies to all race-based classifications, whether "benign" like affirmative action or "invidious" like segregation, is the appropriate choice for two reasons. The first is positive: the Supreme Court and its individual members have envisioned stigmatization as a universal concept regardless of context, so the model should as well, if possible.<sup>23</sup> The second is normative: a comprehensive model best serves comparative goals. The following equation provides a quantitative analog:

**Constitutionally significant stigmatization of the group at issue =  $f(x_1, x_2, \dots, x_n)$ .**

where  $x_1, x_2, \dots, x_n$  are the variables that define "stigma."

By definition, a comprehensive analytical approach requires common elements or questions, so the second step in developing the model is to identify these elements. They are analogous to the individual variables  $x_1$  through  $x_n$  in the quantitative analog. Analysis of *Plessy v. Ferguson*,<sup>24</sup> *Brown v. Board of Education*,<sup>25</sup> and the affirmative action cases in which the Supreme Court or individual Justices have invoked stigmatization reveals four important factors: (1) the *negative attribution* underlying the stigma charged, (2) the *source* of that negative attribution relative to the stigmatized group, (3) the *power* held by that group, and (4) the *distributive posture* of that group. The quantitative analog thus appears as

**Stigmatization =  $f(\text{underlying attribution, source, power, distributive posture})$ .**

Having identified the common elements, the final step is determining the range of possible solutions or answers to each

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23. See *infra* Part II.

24. 163 U.S. 537 (1896).

25. 347 U.S. 483 (1954).



element. In the analogous quantitative equation, such possible solutions are represented by hypothetical numerical values which may be substituted for each variable. The cases and individual opinions reveal that each common element has two identifiable potential solutions.

### 1. Negative Attribution Underlying the Stigma Charged

The first element or “variable” evoking stigma’s definition as a negative “mark” or characterization,<sup>26</sup> focuses upon the particular nature of that mark. The underlying attribution of the stigma in *Brown* was inferiority, for the Supreme Court held that African American children were marked as inferior by segregation.<sup>27</sup> This type of stigma provided a sensible focus for inquiry under the Equal Protection Clause—inferiority contradicts equality. Theoretically, as well as practically, however, other negative attributions may be imposed.<sup>28</sup> One could, for example, be marked as being racist, sexist, dishonest, or harassing. Although a complicated philosophical inquiry may sometimes be necessary to determine which attributions are truly “negative” and which are not, it seems safe to assume that some may be commonly agreed upon as negative.

Because different types of attributions doubtless have different effects, at least in the self-fulfilling prophecy sense,<sup>29</sup> it is relevant to discern which are invoked in each particular case. As with the other common elements or “variables” comprising the stigmatization

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26. See *supra* notes 20-21 and accompanying text.

27. See *infra* text accompanying notes 58-62.

28. See, e.g., Feagins, *supra* note 2, at 35 (“The force of harm caused by a loss of benefits or opportunities because of irrelevant group-based classifications is not necessarily felt as a stigma of inferiority. Rather, the harm to the victim is a denial of complete citizenship.”).

29. Inferiority traditionally has been considered the sole relevant negative attribution underlying stigma arising from race-based classifications, see *infra* Part II.A, for discussions of whether such attributions are self-fulfilling and have focused on inferiority or its variants. Some commentators view the phenomenon as originating in attribution by others. For example,

if such stigmatization occurs, it can have far-reaching consequences for the careers of those targeted by affirmative action efforts. The negative expectations of these individuals that would be spawned by a stigma of incompetence could cause distorted perceptions of their behavior and work performance and, if internalized by them, could actually create self-fulfilling prophecies that bring about the very behavior others expect.

Heilman et al., *supra* note 7, at 543-44. Negative attribution by others may also be self-fulfilling because “job preferences may induce employers to *patronize* the favored workers, which in turn may undercut their incentives to acquire necessary skills.” Coate & Loury, *supra* note 7, at 1239. Shelby Steele has suggested that negative self-attributions may also be self-fulfilling. See STEELE, *supra* note 2, at 116.

model, there are two potential solutions or "values" for the underlying negative attribution element. The first is *inferiority*, while all potential others are lumped into a general category called *other*.

This division is appropriate for several reasons. First, the cases in which the constitutional concept of stigmatization originated, *Plessy* and *Brown*, addressed only inferiority-type stigma.<sup>30</sup> Second, this exclusive focus on inferiority persisted in the affirmative action cases until relatively recently.<sup>31</sup> Third, attributions of inferiority necessarily bear upon the constitutional concept of equality; other negative attributions may not.

## 2. Relative Source of the Negative Attribution

The cases imply a distinction based upon the identity of the stigmatizing group; this element comprises the first element to be considered in parsing the broad constitutional concept of "stigma," as expounded by the Supreme Court and its individual members, into more precise strains. One of two "values" potentially may be assigned. First, the stigmatized and stigmatizing groups may be one and the same; that is, members of the group at issue may negatively characterize themselves as a result of the race-based classification at issue. Second, the stigmatized and stigmatizing groups may be distinct; that is, one group may stigmatize or negatively characterize the other.<sup>32</sup>

The distinction is most easily understood by reference to the general definition of "stigmatization" as the phenomenon in which a negative characterization or "mark" is assigned.<sup>33</sup> By envisioning that mark as a physical object, it becomes clear that the mark's recipient is an essential party to the stigmatization process, whether the mark is assigned by others, or self-inflicted by the recipient. But the assignor's identity makes a difference. For example, the

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30. See *infra* Part II.A.

31. See *infra* Parts III.B.5–III.B.7.

32. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 351 (1987); Morrison, *supra* note 22, at 340. Commentators variously focus on different conceptions. For the view that "stigma" means other-stigma, see Lopez, *supra* note 11, at 28 ("By the 1840s and 1850s, however, U.S. Anglos looked with distaste upon Mexicans in terms that conflated and stigmatized their race and nationality."); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 942 (1989) ("Th[e stigma] approach focuses less on the concrete effects that a government action has on a group's position and more on the message that the action conveys to others." (emphasis added)). For the view that "stigma" means self-stigma, see Landsberg, *supra* note 8, at 860 ("If stigma must be proved, what proves it: intent to stigmatize or the victim's feeling of stigmatization?").

33. See *supra* notes 20-21 and accompanying text.

gravamen of *Brown v. Board of Education*<sup>34</sup> was that African American schoolchildren assigned a negative mark—feelings of inferiority—to themselves as a result of state-enforced segregation.<sup>35</sup> In this regard, the self-imposed stigma is closely akin to a lack of self-esteem. Whether state-enforced segregation caused White children to think less of African American children would have constituted a different issue, although both phenomena could be described broadly as “stigmatization.”

In the affirmative action context, the difference is also clear. A beneficiary of affirmative action may or may not doubt or think less of herself because she is aware that her “race,”<sup>36</sup> a characteristic over which she has no control, has helped her achieve her position. A nonbeneficiary may or may not think less of the beneficiary for the same reason, or for others. But the two phenomena clearly differ.<sup>37</sup> For purposes of this Article, self-imposed negative attribution is referred to as *self-stigma*, while *other-stigma* refers to negative attributions imposed by any group not at risk of being stigmatized.<sup>38</sup>

### 3. Power Held by the “Stigmatized” Group

A meaningful (albeit mostly implicit) distinction arises in the cases between stigma imposed on a politically “powerless” group and stigma imposed on a “powerful” group. As used here, the terms are relative; all groups, whether minority or majority, have some political power, but assuming a clean division along group lines on a binary issue, the majority will be powerful and the minority powerless.

### 4. Distributive Posture of the “Stigmatized” Group

Finally, the cases manifest a distinction between stigmatization potentially suffered by the “beneficiary” group of a race-based classification or policy and that potentially suffered by the other, “nonbeneficiary,” group. As used here, the “beneficiary” group is the group whose immediate purposes the classification is designed

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34. 347 U.S. 483 (1954).

35. See *infra* notes 58-62 and accompanying text.

36. See Lopez, *supra* note 11, at 21 (noting the propriety of describing Whites and African Americans as separate “ethnic” or “racial” groups).

37. Whether stigma is self-imposed or imposed by others is unrelated to the particular group for which stigmatization is an issue. Theoretically, African Americans can stigmatize themselves or be stigmatized by Whites; Whites can also stigmatize themselves or be stigmatized by African Americans.

38. Cf. GOFFMAN, *supra* note 20, at 18-19 (referring to responses to interaction with stigmatized individuals as involving “self-consciousness” and “other-consciousness”).

to serve. All relevant others comprise the "nonbeneficiary" group. Applying this definition in the segregation context, Whites were the beneficiary group, since the immediate purpose of segregation was to keep African Americans separate from Whites for the benefit of Whites.<sup>39</sup> In the affirmative action context, on the other hand, preferred<sup>40</sup> minorities constitute the beneficiary group while Whites constitute the nonbeneficiary group; the immediate purpose of affirmative action is to confer positions (in schools, jobs or construction contracts, for example) on members of or entities within the minority group. Another way to define "beneficiaries" and "nonbeneficiaries" is by the group challenging the classification at issue. Although simplistic, this approach has merit—a beneficiary is unlikely to challenge the classification,<sup>41</sup> or perhaps even to have legal standing to do so.<sup>42</sup>

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39. See Morrison, *supra* note 22, at 322 (noting the position that "the problem with 'separate but equal' is not the separation. The problem is that the facial equality of segregation laws disguised the clear social hierarchy and power under Jim Crow." (footnotes omitted)); Washburn, *supra* note 3, at 1133 ("Brown implied . . . that integration was a matter of a white benefactor and a black beneficiary . . . ." (quoting J. HARVIE WILKINSON III, FROM BROWN TO BAKKE 32 (1979))). Although Wilkinson takes issue with this implication, we do not, for it is merely a reverse of the proposition that segregation was a matter of Whites benefiting at the expense of Blacks, at least to the extent that Whites robbed Blacks of any choice in the matter. "There is a distinct difference between separation that derives from authoritarian imposition on a minority and the separation that occurs as a result of choice by members of a minority group." Washburn, *supra* note 3, at 1150 n.170. W.E.B. DuBois, among others, argued that separation may serve African Americans' purposes as much as those of Whites. See CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS 59, 64 (1993). The flaw in this argument is (unfortunately) demonstrated in part by reference to the powerful/powerless distinction mentioned previously. Whites had the power to impose segregation, and did so.

40. Some consider "preference" terminology inappropriate and misleading because it connotes a sense of undue entitlement. See Luke C. Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER J. 1, 29-30 (1994); see also WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 927 (1986) (defining preference as "the act, fact, or principle of giving *advantages* to some over others" (emphasis added)). We use it anyway, for there is little doubt that under an affirmative action program, some groups receive benefits while others do not. Those receiving benefits are as aptly termed "preferred" as anything else, especially when the term "preference" may also mean "priority in the right to demand and receive satisfaction of an obligation." *Id.* Although this alternative definition connotes a different concept, it also comports with those in which the harms of past discrimination are considered to be an "obligation" which is "repaid" through affirmative action. See, e.g., T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1063-64, 1107 (1991) (identifying affirmative action as the remedy for the violations of the colorblind principle).

41. See *infra* text accompanying note 163, in which Justice Stevens raises a similar point. Yet another way to think about the beneficiary/nonbeneficiary distinction is by reference to principles of altruism. See Lino A. Graglia, *Title VII of the Civil Rights Act of 1964: From Prohibiting to Requiring Racial Discrimination in Employment*, 14 HARV. J.L.

It is important to recognize that the terms “beneficiary” and “nonbeneficiary” groups refer to those *entire* groups.<sup>43</sup> Consider a hypothetical race-based affirmative action program in which African Americans are hired preferentially.<sup>44</sup> Under our approach, African Americans constitute the beneficiary group. There is no distinction between those actually hired under the affirmative action program and those hired independently of it.

### B. Applying the Model

The model developed in Part I.A describes constitutionally significant stigmatization in elemental terms as [ $x_1$ -underlying attribution]-type stigma from a given [ $x_2$ -source] suffered by a group with certain [ $x_3$ -power] and in a certain [ $x_4$ -distributive posture]. Substituting potential solutions or “values” for each element yields the following equation:

**Constitutionally significant stigmatization = [Inferiority or other] [self- or other-] stigma suffered by [powerful or powerless] [beneficiaries or nonbeneficiaries].**

Each different combination of solutions comprises a distinct strain of stigmatization. Because the model has four elements, each with two potential solutions, theoretically there are sixteen possible strains of

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& PUB. POL'Y 68, 76 (1991) (suggesting that proponents of racial preferences “assume a level of altruism . . . on the part of most Americans”); MAGUIRE, *supra* note 2, at 94-95. This approach depends, in part, on the element of the stigmatized group’s political power, for only the powerful group may altruistically confer benefits on other groups. See WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 76 (1986) (defining altruism as “unselfish regard for or devotion to the welfare of others”). This interdependence of elements is analytically undesirable.

42. It seems unlikely that the beneficiaries of affirmative action would have legal standing to challenge such programs. In addition, while some women may think that laws which in some sense favor them over men (for example, state laws that set a lower drinking age for women or that recognize statutory rape only as a crime against women or that provide for a wrongful death action on behalf of the mother, but not the father, of an illegitimate child or a federal law which requires only men to register for the military draft) actually stigmatize women by giving credence to stereotypes. Nonetheless, in the Supreme Court at least, the challenges to such laws generally have been brought by the non-beneficiaries (men in this example), or at least on their behalf. See, e.g., Craig v. Boren, 429 U.S. 190 (1976); Michael M. v. Superior Court, 450 U.S. 464 (1981); Parham v. Hughes, 441 U.S. 347 (1979); Rostker v. Goldberg, 453 U.S. 57 (1981), and it seems doubtful that the Court would have thought the women (the potentially stigmatized *beneficiary* group) to have standing to challenge the laws. The same result would appear compelled in the affirmative action context.

43. See Morrison, *supra* note 22, at 341 (noting the argument against affirmative action that “others will perceive all members of the racial group as inferior, even if all members of the group are not beneficiaries of the affirmative action plan”).

44. See *supra* note 40 (discussing use of “preference” terminology).

stigma. Table 1 provides a grid of the model's sixteen possibilities, each of which is analogous to the result when actual values are substituted into the quantitative equation.

In the next Part, we assess the Supreme Court's treatment of stigmatization in *Plessy*, *Brown*, and its affirmative action cases to determine which strains the Court or individual Justices have found constitutionally significant.

## II. SUPREME COURT CASES

### A. *The Origins of Stigma in Constitutional Doctrine*

In *Plessy v. Ferguson*,<sup>45</sup> the Supreme Court addressed the constitutionality of state-enforced segregation of passenger railways.<sup>46</sup> With respect to the Fourteenth Amendment's Equal Protection Clause,<sup>47</sup> the Court refused to countenance the plaintiff's argument that segregation stigmatized Blacks.<sup>48</sup> It first noted that "[l]aws permitting, and even requiring, [the two races'] separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other . . . ."<sup>49</sup> It then reasoned that

the underlying fallacy of the plaintiff's argument [is] in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if . . . the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption.<sup>50</sup>

The Court's language emphasizes inferiority-type self-stigma, and in fact hints that other-stigma is considered irrelevant.<sup>51</sup> The Court

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45. 163 U.S. 537 (1896).

46. *Id.* at 538-40.

47. *Id.* at 543.

48. *Id.* at 550-52.

49. *Id.* at 544.

50. *Id.* at 551.

51. See Jerome M. Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 56; cf. Strauss, *supra* note 32, at 946 ("In *Plessy*, unlike *Strauder*, one had to make arguments about the intangible, psychological effects of segregation in order to show that an inequality existed.").

TABLE 1

|          |       | UNDERLYING CHARACTERISTIC |                |          |           |  |  |
|----------|-------|---------------------------|----------------|----------|-----------|--|--|
|          |       | Inferiority               |                | Other    |           |  |  |
|          |       | POWER                     |                | POWER    |           |  |  |
|          |       | Powerful                  | Powerless      | Powerful | Powerless |  |  |
| IDENTITY | Other | DISTRIBUTIVE POSTURE      |                |          |           |  |  |
|          |       | Beneficiary               | Nonbeneficiary |          |           |  |  |
| Self     | Other | DISTRIBUTIVE POSTURE      |                |          |           |  |  |
|          |       | Beneficiary               | Nonbeneficiary |          |           |  |  |

hypothesizes that Whites would not experience self-stigma were they on the receiving end of segregation, and implies that for that reason, such a statute would not be unconstitutional. The Court seems to recognize that other-stigma might occur, for by arguing that "at least" Whites would not consider themselves inferior as a result of the hypothetical statute, it implicitly acknowledges that African Americans might feel differently. Given the Court's implicit conclusion that the hypothetical statute would be constitutional, however, it clearly did not consider other-stigma germane to the constitutional issue. Further, the Court's characterization that African Americans are stamped with a badge of inferiority only if they "choose[] to" receive it hints at a conception of self-stigma; if stigmatization by others was of any concern to the Court, the stigmatized group's "choice" would be irrelevant.

The Court focused on stigma with respect to the powerless rather than the powerful group, as indicated by both the facts of the case and the role-reversing hypothetical. As to each, the Court considered stigmatic effects not with respect to the group enacting the statute, but the other group.

Determining whether the Court distinguished between stigmatization of the beneficiary and nonbeneficiary group is more difficult, for the Court, at least superficially, took the position that segregation, taken alone, was essentially benefit-neutral.<sup>52</sup> Perhaps the best response is that of Justice Harlan in dissent:

Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . . The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling [sic] in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.<sup>53</sup>

But even the majority could not refrain from implicitly acknowledging that the statute manifested "social prejudices" against African Americans by Whites, the preservation of which was sought by

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52. See, e.g., *Plessy*, 163 U.S. at 544 ("The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but . . . it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." (emphasis added)); *id.* at 550 ("So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation . . .").

53. *Id.* at 557 (Harlan, J., dissenting).



Whites in enacting the statute and which African Americans sought to overturn.<sup>54</sup> Thus, under the definition of the “beneficiary” class as the class the immediate purposes of whom the classification is designed to serve,<sup>55</sup> Whites were the clear beneficiaries of the statute and African Americans the nonbeneficiaries.<sup>56</sup> Similarly, the plaintiff was an African American, so African Americans may be considered the nonbeneficiary class on that ground.<sup>57</sup>

In *Brown v. Board of Education*,<sup>58</sup> the Supreme Court reversed *Plessy* and held that state-enforced segregation of White and African American schoolchildren violated the Fourteenth Amendment. *Plessy*'s reversal resulted not from different analysis, but from the same analysis with different results, for the *Brown* Court used the same approach to stigmatization as the *Plessy* Court.<sup>59</sup> In reaching its conclusion that state-enforced separate but equal accommodations were constitutional, the *Plessy* Court had answered, “not necessarily,” to the question whether the class of powerless nonbeneficiaries of a race-based classification suffer from self-stigma, implicitly requiring an affirmative answer to justify a finding of unconstitutionality.<sup>60</sup> In holding that state-enforced separate facilities are inherently unequal,<sup>61</sup> the *Brown* Court provided a definitive answer:

To separate [African American children in grade and high schools] from others of similar age and qualifications

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54. See *id.* at 551-52 (“The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”).

55. See *supra* Part I.A.4.

56. See Culp, *supra* note 51, at 58 (“From [a Black perspective], the aim of whites who adopted segregation as a mode of social oppression is quite clear—blacks were oppressed precisely because the white majority believed that race mattered and that society should give the white majority support for these claims.”); Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimization in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1377 (1988) (“Segregation and other forms of social exclusion . . . reinforced a racist ideology that Blacks were simply inferior to whites and were therefore not included in the vision of America as a community of equals.”).

57. See *supra* notes 41-42 and accompanying text.

58. 347 U.S. 483 (1954).

59. See Paul Brest, *The Supreme Court, 1975 Term—Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 9 (1976) (describing self-stigma as the root of the *Brown* decision); Landsberg, *supra* note 8, at 835 (“*Brown* seemed to follow *Plessy* in focusing on the feelings of the victim rather than on the motives of the perpetrator of segregation.”); John D. Casais, Note, *Ignoring the Harm: The Supreme Court, Stigmatic Injury, and the End of School Desegregation*, 14 B.C. THIRD WORLD L.J. 259, 262-63 (1994) (describing “self-rejection,” i.e., self-stigma undergirding of *Brown*).

60. See *supra* text accompanying note 51.

61. *Brown*, 347 U.S. at 495.

solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.<sup>62</sup>

In summary, in *Plessy* and *Brown* the Supreme Court clearly identified the precise strain of stigma with which the Court was concerned. The underlying negative attribution was inferiority.<sup>63</sup> The source of that attribution was the stigmatized group itself—African Americans.<sup>64</sup> By necessity on the facts, the Court focused on the imposition of this inferiority-type self-stigma on powerless nonbeneficiaries of segregation—African Americans—not stigmatization of the powerful group<sup>65</sup> or the group that “benefited” from the classification<sup>66</sup>—Whites. The *Plessy/Brown* strain of stigma, inferiority-type self-stigma suffered by powerless nonbeneficiaries, is shown on Table 2 by those cases’ location on the grid of the constitutionally significant stigmatization model.<sup>67</sup>

### B. The Affirmative Action Cases

With the demise of governmentally-enforced segregation, the Supreme Court’s use of and reliance on the concept of stigma has arisen in a different arena—affirmative action. The Court, or its individual members, have addressed the concept in at least seven affirmative action cases spanning the past twenty years and culminating in its recent decision in *Adarand Constructors, Inc. v. Peña*.<sup>68</sup> In several instances, the Justices’ discussions of stigma are

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62. *Id.* at 494; see also Rossum, *supra* note 14, at 793; Casais, *supra* note 59, at 296 (“The stigmatic injury of de jure segregation was the basis for federal court intervention relied on by *Brown I*, as the Court confirmed that such discrimination sends a message of inferiority to the children of the disfavored race.”); Washburn, *supra* note 3, at 1121. See Rossum, *supra* note 14, at 788, for discussion of the *Brown* Court’s motivations in employing this rationale. *But see* Landsberg, *supra* note 8, at 824 (noting that stigmatic injury is a possible reason for *Brown*’s outcome, but also discussing invidious intent and irrationality of race distinctions as alternative rationales of *Brown*’s holding).

63. See *supra* Part I.A.1.

64. See *supra* Part I.A.2.

65. See *supra* Part I.A.3.

66. See *supra* Part I.A.4.

67. See also *supra* Table 1 at p. 248.

68. 115 S. Ct. 2097 (1995). The other six: *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); and *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

In *United Steelworkers v. Weber*, 443 U.S. 193 (1979), the Supreme Court held that a private affirmative action plan does not violate Title VII of the Civil Rights Act of 1964. *Id.* at 209. In his dissent, Justice Rehnquist implicitly invoked notions of stigma.



quite vague and evince little, if any, analytical rigor. These opinions often seem like an attempt to manipulate the concept of stigma, taking advantage of its perceived legitimacy as a factor of constitutional magnitude, while in the final analysis leaving Justices free to achieve whatever end is sought.<sup>69</sup> In other cases, however, the concept is described with sufficient clarity and analytical rigor at least to make it possible to identify the sense or senses in which the Court has used it.<sup>70</sup>

### 1. *DeFunis v. Odegaard*

*DeFunis*<sup>71</sup> was the Supreme Court's first attempt to address the constitutionality of affirmative action. The majority held, in a per curiam opinion, that the white plaintiff's equal protection claim,<sup>72</sup> which was premised on his rejection for admission to a law school that utilized a minority admissions program,<sup>73</sup> was moot.<sup>74</sup> The

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*Id.* at 254. (Rehnquist, J., dissenting) ("Whether described as 'benign discrimination' or 'affirmative action,' the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another.").

There are arguments that although Rehnquist reached no constitutional issue, his conception of stigma in the statutory context is analytically indistinct from those presented in the affirmative action cases discussed at length in this Article. First, Rehnquist did not attempt to distinguish stigmatization arising in the statutory and constitutional contexts. *See, e.g., id.* (Rehnquist, J., dissenting) ("There is perhaps no device more destructive to the notion of equality than the *numerus clausus*-the quota."). Second, assuming with Rehnquist that the principle of equality underlies both the antidiscrimination statutes, *see also* MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 37 (1994), and the Equal Protection Clause, stigmatization may have similar import for analysis of both. Finally, by acknowledging the existence of a substantive difference between stigmatization in the two contexts, Rehnquist's conception is still useful, for through his implicit reference to a single strain, he demonstrates the nonexistence of a universally applicable conception of stigma.

Nonetheless, we decline to include Rehnquist's statutory conception in our constitutional analysis. The antidiscrimination statutes are, of course, more precise in their prohibitions than is the Equal Protection Clause, giving rise to less need, if any, to resort to analytical devices such as stigmatization. Further, the law is replete with similar or identical constitutional and statutory provisions that are interpreted differently. *See, e.g., Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 807 (1986) ("Although the constitutional meaning of 'arising under' may extend to all cases in which a federal question is 'an ingredient' of the action, we have long construed the statutory grant of federal-question jurisdiction as conferring a more limited power." (citation omitted)). Similarly, stigmatization may well have a different meaning in the context of the antidiscrimination statutes than it has under the Constitution.

69. *See, e.g., infra* Part III.C.

70. *See, e.g., infra* text accompanying notes 119-65.

71. 416 U.S. 312 (1974)

72. *Id.* at 314.

73. *Id.* at 320-21.

74. *Id.* at 319-20.

Court concluded that the plaintiff, who was admitted to the law school pursuant to a court order,<sup>75</sup> would complete his studies regardless of any decision the Court might reach.<sup>76</sup>

Justice Douglas dissented from the Court's finding of mootness, and offered a lengthy exposition on the "merits" of the plaintiff's case and affirmative action in general. On the issue of stigma, he clearly invoked only one strain-inferiority-type self-stigma suffered by powerless beneficiaries: "A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite contrary intentions."<sup>77</sup> The comparison to segregated classrooms seems a clear reference to *Brown*,<sup>78</sup> wherein stigma was more particularly considered inferiority-type self-stigma of a powerless group.<sup>79</sup> The obvious distinction, although apparently unimportant to Douglas, was that African Americans were *beneficiaries* of the affirmative action program in *DeFunis* whereas they were the *nonbeneficiaries* of the segregation at issue in *Brown*.

## 2. *Regents of University of California v. Bakke*

In *Bakke*,<sup>80</sup> a sharply divided Court held that, under the Fourteenth Amendment's Equal Protection Clause, a state entity may not rely solely on race in determining admissions to medical school.<sup>81</sup> A majority of the Justices, however, took the view that a state may at least consider race as a factor in such decisions.<sup>82</sup>

Justice Powell, who wrote the lead opinion, disparaged stigma's value in any analysis of race-based classifications.<sup>83</sup> To the

75. *Id.* at 314.

76. *Id.* at 319-20.

77. *Id.* at 343 (Douglas, J., dissenting). Douglas also wrote that "[o]ne other assumption must be clearly disapproved: that blacks or browns cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place on any lawyer." *Id.* It is unclear whether Douglas was concerned with self- or other-stigma here, for a government's placement of a "stamp of inferiority" could be read as essentially causing the same type of self-stigma that occurred in *Brown*, or it could be read as authorizing stigmatization by others, i.e., the State, viewing the beneficiaries as inferior.

78. 347 U.S. 483 (1954).

79. *See supra* notes 58-67 and accompanying text.

80. 438 U.S. 265 (1978).

81. *Id.* at 320 (Powell, J.). Four of the nine Justices believed that only race could be relied upon. *See id.* at 378 (Brennan, J., concurring in part, dissenting in part).

82. *See id.* at 320 (Powell, J.); *id.* at 379 (Brennan, J., concurring in part, dissenting in part).

83. *Id.* at 295 n.34 (Powell, J.) ("In the view of Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN, the pliable notion of 'stigma' is the crucial element in analyzing racial classifications. The Equal Protection

extent he considered stigma at all, he confined his analysis to inferiority-type other-stigma suffered by powerless beneficiaries: "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."<sup>84</sup> The stereotyping concept implicates feelings by others far more than it involves feelings about oneself.<sup>85</sup> The concept of inability to achieve success evokes notions of inferiority; the quote could as well have read "preferential programs may only reinforce common stereotypes holding that certain groups are inferior and require special protection . . . ." The references to "preferential" treatment and "special protection" belie a concern with beneficiaries only.

The most difficult question is whether Powell considered the relevant inquiry to be the stigmatization of the powerless group, the powerful group, or both. The above language, his opinion's only substantive reference to stigma, provides no explicit answer, and it could at least superficially be applied to either the powerful or the powerless group. However, the overall gist of his statement suggests a concern with only the powerless group. Stigmatization of the powerful group, although theoretically possible, would have been a novel concept in the wake of cases such as *Plessy* and *Brown*,<sup>86</sup> leading one to expect an explicit invocation if so intended.

Powell's reference to achievement of success provides further insight. Neither the inability to achieve success nor perceptions thereof comprise meaningful issues for the politically powerful group; its power, to some extent, marks its ability to achieve success. Thus, to the extent one or the other can be identified as Powell's focus, it is the powerless group.

Justice Brennan, joined by Justices White, Marshall, and Blackmun, concurred in part and dissented in part.<sup>87</sup> Brennan favored analysis of "remedial" race-based classifications under an approach later known as intermediate scrutiny:<sup>88</sup> The government

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Clause is not framed in terms of 'stigma.' Certainly the word has no clearly defined constitutional meaning. It reflects a subjective judgment that is standardless." (citation omitted)).

84. *Id.* at 298.

85. Cf. Coate & Loury, *supra* note 7, at 1220 ("An important component of [the question of whether labor-market gains due to affirmative action can be expected to continue without affirmative action becoming a permanent fixture in the labor market] would seem to be the impact of affirmative action on employers' stereotypes about the capabilities of minority workers." (emphasis added)).

86. See *supra* Part II.A.

87. See *Bakke*, 438 U.S. at 324 (Brennan, J., concurring in part, dissenting in part).

88. See Harry F. Tepker, Jr., *Separating Prejudice from Rationality in Equal Protection Cases: A Legacy of Thurgood Marshall*, 47 OKLA. L. REV. 93, 98 n.40 (1994) (describing "intermediate scrutiny" in the context of purposeful gender discrimination and citing to *Craig v. Boren*, 429 U.S. 190, 197 (1976) for a description of the standard); Jon A.

interest served by the classification must be important and the classification itself must be substantially related to achievement of that interest.<sup>89</sup> Significantly, Brennan considered stigmatization so important that he elevated it to coequal status with intermediate scrutiny's two usual prongs.<sup>90</sup> To the extent precise meaning can be gleaned from Brennan's opinion,<sup>91</sup> he appears to have recognized five different strains of stigma.

First, Brennan considered inferiority-type other-stigma suffered by powerless beneficiaries. He expressed his concern with beneficiaries and with inferiority-type stigma by declaring, "[n]or can the program reasonably be regarded as stigmatizing the program's beneficiaries or their race as inferior."<sup>92</sup>

Once admitted, these students must satisfy the same degree requirements as regularly admitted students . . . .  
Under these circumstances, their performance and degrees

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Ward, Note, *Race-Exclusive Scholarships: Do They Violate the Constitution and Title VI of the Civil Rights Act of 1964?*, 18 J.C. & U.L. 73, 84 (1991).

89. *Bakke*, 438 U.S. at 359 (Brennan, J.).

90. Brennan wrote that

because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such a classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program.

*Id.* at 361; *see also id.* at 373-74 ("The second prong of our test—whether the Davis program stigmatizes any discrete group or individual and whether race is reasonably used in light of the program's objectives—is clearly satisfied by the Davis program."). As is apparent, the precise place of stigma in Justice Brennan's analysis, as well as the precise nature of the relationship required between the program and its objectives, was unclear.

91. Several of Brennan's references to stigma are quite vague. For example: "Nor has anyone suggested that the University's purposes contravene the cardinal principle that racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more." *Id.* at 357-58. It is unclear exactly what Brennan meant by "stigmatize" here, because neither presumptions of inferiority nor governmental sponsoring of invidious notions necessarily mark anyone. *See supra* notes 20-21 and accompanying text. He could have meant other-stigma because the act of classifying is by others and it is the classifying that is based on assumptions of inferiority. But it is equally plausible that he meant self-stigma via the presumption of inferiority underlying the classification. He cited *Brown*, lending a bit of support that self-stigma was his concern, but he cited so many other cases that no precise meaning can be ascertained. Similarly, Brennan thought that "any statute must be stricken that stigmatizes any group," *id.* at 361, and that the "policy of segregation . . . itself stamped Negroes as inferior." *Id.* at 371. No precise conception of stigma can be ascertained from these broad statements.

92. *Id.* at 375.

must be *regarded equally* with the regularly admitted students with whom they compete for standing. Since minority graduates cannot justifiably be regarded as less well qualified by virtue of the special admissions program, there is no reasonable basis to conclude that minority graduates at schools using such programs would be stigmatized as inferior by the existence of such programs.<sup>93</sup>

The concern for *minority* graduates clearly manifests a concern for the powerless rather than the powerful group. Brennan's interest in whether such graduates would be "regarded equally" with other graduates implies a focus on other- rather than self-stigma. Although he conceivably could have meant the students' regard for themselves, common usage suggests that he more likely meant the opinions of others. It is others, i.e., employers, who tend to view a student's "degree[]" and "qualifi[cations]" as important.<sup>94</sup>

Second, Brennan considered whether powerful nonbeneficiaries suffer from the same inferiority-type other-stigma. He wrote that

[i]t is not even claimed that Davis' program in any way operates to stigmatize or single out any discrete and insular, or even any identifiable, nonminority group. *Nor* will harm comparable to that imposed upon racial minorities by exclusion or separation on grounds of race be the likely result of the program.<sup>95</sup>

As indicated by his reference to the "nonminority group," the first sentence refers to powerful nonbeneficiaries. The second sentence implies a concern with other-stigma, for Brennan counterposed the

93. *Id.* at 376 (emphasis added).

94. Brennan's opinion provides additional textual support for the proposition that he specifically concerned himself with whether powerless beneficiaries suffer from other-stigma. For example, he wrote that

race, like, 'gender-based classifications too often [has] been inexcusably utilized to stereotype and stigmatize politically powerless segments of society.' . . . [W]e nonetheless have recognized that the line between honest and thoughtful appraisal of the effects of past discrimination and *paternalistic stereotyping* is not so clear and that a statute based on the latter is patently capable of stigmatizing all women with a badge of inferiority.

*Id.* at 360 (emphasis added). As the passage suggests, stereotyping is an apt description of other-stigma; one seldom stereotypes one's self. Thus, Brennan apparently refers to powerless beneficiaries experiencing other-stigma. He also wrote that "[s]tate programs designed ostensibly to ameliorate the effects of past racial discrimination obviously create the same hazard of stigma, since they may . . . reinforce the views of those who believe that members of racial minorities are inherently capable of succeeding on their own." *Id.* Again, it would be surprising if "those" refers to members of the minority groups themselves.

95. *Id.* at 374 (emphasis added).



stigmatization at issue and that caused by “exclusion or separation,” evoking *Brown*’s self-stigma rationale and thereby implying that the stigma at issue was something different, i.e., other-stigma. He offered no explicit concern with any particular underlying attribution, but elsewhere in his opinion he expressly referred to the stigma of inferiority<sup>96</sup> while offering nothing to the contrary.

Third, although he considered it unimportant as applied to affirmative action, Brennan at least acknowledged the potential for powerless nonbeneficiaries to suffer from inferiority-type other-stigma. He wrote that “race, like, ‘gender-based classifications too often [has] been inexcusably utilized to stereotype and stigmatize politically powerless segments of society.’”<sup>97</sup> As discussed previously,<sup>98</sup> the focus on stereotyping buttresses the conclusion that powerless nonbeneficiaries of race-based classifications may be subject to other-stigma, and as discussed in the preceding paragraph, Brennan likely focused on inferiority rather than some other negative attribution.

Fourth, Brennan implicitly acknowledged the issue of inferiority-type self-stigma suffered by powerless nonbeneficiaries that had been at issue in *Brown*.<sup>99</sup> Fifth, and finally, he considered the same issue with respect to powerful nonbeneficiaries: “[T]here is absolutely no basis for concluding that Bakke’s rejection as a result of Davis’ use of racial preference will affect him throughout his life in the same way as the segregation of the Negro schoolchildren in *Brown I* would have affected them.”<sup>100</sup> Bakke represents the class of powerful nonbeneficiaries, and the reference to *Brown* indicates a concern with inferiority-type self-stigma.

### 3. *Fullilove v. Klutznick*

In *Fullilove*,<sup>101</sup> the Supreme Court held a federally mandated ten percent set-aside for minority subcontractors valid<sup>102</sup> under the “equal protection component” of the Fifth Amendment’s Due

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96. See *supra* text accompanying notes 93-94.

97. *Bakke*, 438 U.S. at 360 (quoting *Kahn v. Shevin*, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting)).

98. See *supra* note 85 and accompanying text.

99. *Bakke*, 438 U.S. at 372 (Brennan, J.) (“Since separation of school-children by race ‘generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone,’ the conclusion is inescapable that applicants to medical school must be few indeed . . .” (citation omitted)).

100. *Id.* at 375.

101. 448 U.S. 448 (1980).

102. *Id.* at 492.

Process Clause.<sup>103</sup> The plurality opinion did not address the concept of stigma in reaching the conclusion that the program was constitutionally valid, but several of the other opinions did address that question.

Justice Marshall, joined by Justices Brennan and Blackmun, concurred in the judgment but argued for application of the intermediate scrutiny standard proposed by Brennan in *Bakke*.<sup>104</sup> Beyond regurgitating many of Brennan's vague notions of stigmatization in *Bakke* with attendant imprecision,<sup>105</sup> Marshall invoked portions of that opinion which placed importance on inferiority-type other-stigma suffered by powerless nonbeneficiaries.<sup>106</sup> Marshall also added some cryptic language of his own:

That the set-aside creates a quota in favor of qualified and available minority business enterprises does not necessarily indicate that it stigmatizes. . . . The set-aside . . . is carefully tailored to remedy racial discrimination while at the same time avoiding stigmatization and [penalization of] those least able to protect themselves in the political process. Since under the set-aside provision a contract may be awarded to a minority enterprise only if it is qualified to do the work, the provision stigmatizes *as inferior* neither a minority firm that benefits from it nor a nonminority firm that is burdened by it.<sup>107</sup>

As discussed previously,<sup>108</sup> the qualification issue, at least with respect to the beneficiaries, indicates a concern with other-stigma,

103. *Id.* at 473.

104. *Id.* at 517 (Marshall, J., concurring).

105. For example, Marshall wrote that in *Bakke*, he and those who joined Brennan's opinion "firmly adhered to 'the cardinal principle that racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more,'" *Fullilove*, 448 U.S. at 518 (Marshall, J.) (quoting *Bakke*, 438 U.S. at 357-58 (Brennan, J., concurring in part, dissenting in part)), that "governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization," *Fullilove*, 448 U.S. at 519 (Marshall, J.), and that "any statute must be stricken that stigmatizes any group." *Id.* (quoting *Bakke*, 438 U.S. at 357-58 (Brennan, J., concurring in part, dissenting in part)). This commentary is decidedly unclear as to what Marshall means by "stigmatize" or "stigmatization."

106. "[R]ace has often been used to stigmatize politically powerless segments of society, and . . . efforts to ameliorate the effects of past discrimination could be based on paternalistic stereotyping . . ." *Fullilove*, 448 U.S. at 519 (Marshall, J.) (citing *Bakke*, 438 U.S. at 360-61 (Brennan, J.)). See *supra* notes 93-94 and accompanying text for an explanation of why this formulation indicates a concern with whether powerless nonbeneficiaries suffer from inferiority-type other-stigma.

107. *Fullilove*, 448 U.S. at 521 (Marshall, J.) (citations omitted) (emphasis added).

108. See *supra* text accompanying note 93.

and Marshall's attention to inferiority as the underlying negative attribution is explicit. Thus, he was at least concerned with inferiority-type other-stigma suffered by powerless beneficiaries.

But Marshall's reasoning with respect to stigmatization of a nonminority firm seems nonsensical. Stated in reverse, if beneficiaries are *not* qualified, nonbeneficiaries *are* stigmatized. The only possible sensible meaning of that argument is that the nonbeneficiaries would feel or be marked as even more inferior than the beneficiaries because the beneficiary rather than the nonbeneficiary firm was selected—certainly a novel argument and one probably worth discounting as ill-considered. If not, the argument invokes notions of powerful nonbeneficiaries experiencing inferiority-type self-stigma, other-stigma, or both, even though everyone apparently would know that the beneficiaries were unqualified.

Justice Stewart, joined by Justice Rehnquist, dissented, favoring instead a "colorblind" approach to race-based classifications.<sup>109</sup> Justice Stewart's only reference to stigma was a quote from Justice Powell's lead opinion in *Bakke*,<sup>110</sup> which, as described previously,<sup>111</sup> indicated a focus on inferiority-type other-stigma suffered by powerless beneficiaries.

Justice Stevens also dissented, disparaging each of what he identified as four justifications advanced for the set-aside provision at issue.<sup>112</sup> Placed in the broader context of one of these—increased minority participation in the economy—he conceived of a stigmatic strain of inferiority-type other-stigma suffered by powerless beneficiaries: "[A]n absolute preference that is unrelated to a minority firm's ability to perform a contract inevitably will engender resentment on the part of competitors excluded from the market for a purely racial reason and skepticism on the part of customers and suppliers aware of the statutory classification."<sup>113</sup> The "minority firm" represents the powerless beneficiary class, "skepticism" explicitly refers to *others* and implies an underlying attribution of inferiority. Stevens further declared that "a statute of this kind

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109. See *Fullilove*, 448 U.S. at 522-23 (Stewart, J., dissenting).

110. "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." *Id.* at 531 (quoting *Bakke*, 438 U.S. at 298 (Powell, J.)).

111. See *supra* notes 84-85 and accompanying text.

112. Stevens considered each of the following four justifications: (1) providing reparation for past injuries to the beneficiary class, (2) providing a remedy to the specific beneficiary firms that were injured by discrimination in the past, (3) providing minority subcontractors with a "piece of the action" in contracting, and (4) fostering greater minority participation in the economy. See *Fullilove*, 448 U.S. at 536 (Stevens, J., dissenting).

113. *Id.* at 545.

inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. . . . [T]hat perception . . . can only exacerbate rather than reduce racial prejudice . . . ."<sup>114</sup> Although either beneficiaries or nonbeneficiaries could be included in the "many" to whom Stevens refers, leaving both self-stigma and other-stigma as potential meanings, the second sentence implies inferiority-type other-stigma. Self-stigma would only tangentially, if at all, contribute to racial prejudice.<sup>115</sup>

#### 4. *Wygant v. Jackson Board of Education*

In *Wygant*,<sup>116</sup> a fractured Court held a state-sponsored layoff preference for minority teachers invalid under the Fourteenth Amendment's Equal Protection Clause.<sup>117</sup>

Only Justice Marshall, in a dissent joined by Justices Brennan and Stevens, mentioned stigmatization. He noted that Justice Powell had, in *Bakke*, "called for a 'principle for deciding whether preferential classifications reflect a benign remedial purpose or a malevolent stigmatic classification.'"<sup>118</sup> No precise conception of what Marshall meant by stigma can be derived from this oblique reference. One could speculate, however, that he was unconcerned by racial classifications that benefit the powerless, i.e., minorities. Therefore, any affirmative action plan established by the powerful for the benefit of the powerless would not involve a "malevolent stigmatic classification" absent an intent by the powerful to stigmatize the powerless.

#### 5. *City of Richmond v. J.A. Croson Co.*

In *City of Richmond v. J.A. Croson Co.*, a divided Court held that strict scrutiny applies to all state-sponsored affirmative action programs when challenged under the Equal Protection Clause of the Fourteenth Amendment.<sup>119</sup> Applying that standard of review, the Court struck down a municipal set-aside program designed to benefit minority subcontractors.<sup>120</sup>

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114. *Id.*

115. See Morrison, *supra* note 22, 313, 340 n.184 (attributing to Stevens a concern that "others see affirmative action beneficiaries as inferior").

116. 476 U.S. 267 (1986).

117. *Id.* at 269-70, 284.

118. *Id.* at 311 (Marshall, J., dissenting) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 294-95 n.34 (1978) (Powell, J.)).

119. *Id.* at 493-94 (plurality opinion).

120. *Id.* at 511.

In the plurality opinion, Justice O'Connor, joined by Chief Justice Rehnquist and Justices White and Kennedy, invoked stigmatization and focused upon the strain of inferiority-type other-stigma suffered by powerless beneficiaries. To this end, she practically echoed Justice Stevens' comments in *Fullilove*: "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."<sup>121</sup> She also quoted Justice Powell's *Bakke* opinion in which he addressed the strain of inferiority-type other-stigma suffered by powerless beneficiaries.<sup>122</sup>

Justice Stevens concurred in the judgment and in portions of Justice O'Connor's opinion. He differed from the plurality by taking the position that other interests besides remedying past discrimination could suffice to justify affirmative action,<sup>123</sup> but he found the program at issue in *Croson* lacking.<sup>124</sup> On the subject of stigma, he raised the by now familiar refrain that powerless beneficiaries may be subjected to inferiority-type other-stigma.<sup>125</sup>

Significantly, Justice Stevens also invoked a strain of stigmatization which was novel in that no Justice in any of the previous affirmative action cases, let alone in *Plessy* or *Brown*, had raised it. He wrote that "[t]here is a special irony in the stereotypical thinking that prompts legislation of this kind. Although it stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its supposed beneficiaries."<sup>126</sup> Stevens' treatment of three of the four elements comprising constitutionally significant stigmatization was not unusual.<sup>127</sup> The power held by<sup>128</sup> and the distributive posture<sup>129</sup> of the stigmatized group in his conception are apparent, for the "disadvantaged class" obviously refers to the class of powerful

121. *Id.* at 493. Compare *supra* text accompanying note 114.

122. See *Croson*, 488 U.S. at 494 (plurality opinion) (" '[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth.' " (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (Powell, J.)).

123. *Id.* at 511 (Stevens, J., concurring).

124. *Id.* at 511-12.

125. " '[E]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race.' " *Id.* at 517 (quoting *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (Stevens, J., concurring)).

126. *Croson*, 488 U.S. at 516 (Stevens, J., concurring).

127. See *supra* Part I.A.1-4.

128. See *supra* Part I.A.3.

129. See *supra* Part I.A.4.

nonbeneficiaries, i.e., Whites. Stevens was imprecise as to the source of the underlying negative attribution,<sup>130</sup> but his use of the term "charge" evokes notions of others' attitudes. What was particularly surprising and novel was his treatment of the underlying negative attribution element itself.<sup>131</sup> Although the term "stigmatization" had always been understood to embody attributions of inferiority, Stevens used it in a completely different sense: as embodying attributions of *racism*. As it turns out, this novel idea assumes considerable importance in the Court's most recent affirmative action decisions, although not for Justice Stevens himself.

Justice Marshall, joined by Justices Brennan and Blackmun, dissented. With respect to stigmatization, Marshall merely quoted a portion of his opinion in *Fullilove*; a portion from which no clear meaning can be derived and which fails to identify any particular strain of stigma.<sup>132</sup>

#### 6. *Metro Broadcasting, Inc. v. FCC*

In *Metro Broadcasting*,<sup>133</sup> the Supreme Court, applying intermediate scrutiny,<sup>134</sup> upheld<sup>135</sup> two FCC radio station licensing policies that manifested a preference for minority ownership.<sup>136</sup>

Justice Brennan, writing for the Court, exclusively focused on inferiority-type other-stigma suffered by powerless beneficiaries:

Minority broadcasters, both those who obtain their licenses by means of the minority ownership policies and those who do not, are not stigmatized as inferior by the Commission's programs. Audiences do not know a broadcaster's race and have no reason to speculate about how he or she obtained a license; each broadcaster is judged on the merits of his or her programming. Furthermore, minority licensees must satisfy otherwise applicable FCC qualifications requirements.<sup>137</sup>

130. See *supra* Part I.A.2.

131. See *supra* Part I.A.1.

132. "[G]overnmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization' . . . ." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 552 (1989) (Marshall, J., dissenting) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 518-19 (1980) (Marshall, J., concurring)). See *supra* note 105 for a discussion of Marshall's vagueness with respect to stigma in *Fullilove*.

133. 497 U.S. 547 (1990).

134. See *id.* at 565; see also *supra* text accompanying note 88.

135. *Metro Broadcasting*, 497 U.S. at 600.

136. See *id.* at 552.

137. *Id.* at 596 n.49.

As discussed previously,<sup>138</sup> Brennan's focus on "minority broadcasters" reflects concern with the class of powerless beneficiaries. His attention to the usual underlying negative attribution—inferiority—is explicit, and his focus on audience judgment clearly indicates that other-stigma is the relevant source. Significantly, the Court's identification of inferiority-type other-stigma suffered by powerless beneficiaries marked the first time a *majority* of the Court recognized a precise stigmatic strain in an affirmative action case.

Justice Stevens concurred, emphasizing that a majority of the Court had finally endorsed his view that something other than remedying past discrimination could justify affirmative action as a constitutional matter.<sup>139</sup> He also echoed the majority's focus on inferiority-type other-stigma suffered by powerless beneficiaries. Although he wrote in vague terms—"Neither the favored nor the disfavored class is stigmatized in any way"<sup>140</sup>—the authorities on which he relied indicate that, at least with respect to beneficiaries, he shared the majority's particular concern.<sup>141</sup> Stevens also implicitly repeated his novel invocation in *Croson* of racism as a relevant underlying negative attribution of constitutionally significant stigmatization.<sup>142</sup>

Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, dissented, favoring strict scrutiny of all race-based classifications whether "benign" or "invidious."<sup>143</sup> O'Connor took a broad view of stigmatization:

[Race-based classifications] may embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—

138. See *supra* text following note 94.

139. *Metro Broadcasting*, 497 U.S. at 601 (Stevens, J., concurring).

140. *Id.* at 601.

141. Justice Stevens cited his own opinions in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 516-17 (1989) and *Fullilove v. Klutznick*, 448 U.S. 448, 545 & n.17 (1980). *Metro Broadcasting*, 497 U.S. at 601 & n.2 (Stevens, J., concurring). Part of the text referred to in *Croson* indicates a concern with whether powerless beneficiaries suffer from inferiority-type other-stigma. See *supra* note 125 and accompanying text. The text in *Fullilove* makes note of the same concern. See *supra* notes 113-114 and accompanying text; see also *Fullilove*, 448 U.S. at 545 n.17 (Stevens, J., dissenting) ("[E]ven preferential treatment may act to stigmatize its recipient groups, for although intended to correct systemic or institutional inequities, such a policy may imply to some the recipients' inferiority and especial need for protection." (quoting *United Jewish Organizations v. Carey*, 430 U.S. 144, 173-74 (1977) (Brennan, J., concurring in part))).

142. The *Croson* text cited by Stevens in support of his broad statement that "[n]either the favored nor the disfavored class is stigmatized in any way," *Metro Broadcasting*, 497 U.S. at 601 (Stevens, J., concurring) (citing *Croson*, 488 U.S. at 516-17), refers to stigmatization of *nonbeneficiaries* only in this novel racism sense. See *supra* notes 126-131 and accompanying text.

143. *Metro Broadcasting*, 497 U.S. at 634 (O'Connor, J., dissenting).

according to a criterion barred to the Government by history and the Constitution. Racial classifications, whether providing benefits to or burdening particular racial or ethnic groups, may stigmatize those groups singled out for different treatment . . . .<sup>144</sup>

As indicated by the reference to stereotyping,<sup>145</sup> O'Connor probably was concerned with other- rather than self-stigma. It appears that she intentionally drew no distinction between beneficiaries and nonbeneficiaries, and implicitly failed to distinguish between powerful and powerless groups.

The most interesting issue raised by O'Connor's dissent is whether she shared in Justice Stevens' conception of a strain of stigma underlain by attributions of racism. It is possible that individuals' "thoughts and efforts" could refer to such attributions. More likely, given her elucidation of those individuals' "very worth as citizens," she meant inferiority. Thus, to the extent O'Connor's view of stigma can be pigeonholed into any of the sixteen potential strains of constitutionally significant stigmatization identified previously,<sup>146</sup> she seemed to give credence broadly to four: inferiority-type other-stigma, whether suffered by (1) powerless nonbeneficiaries, (2) powerless beneficiaries, (3) powerful nonbeneficiaries, or (4) powerful beneficiaries.

Justice Kennedy, joined by Justice Scalia, also dissented, explaining why in his view the program at issue would fail strict scrutiny.<sup>147</sup> Kennedy clearly expressed concern with inferiority-type other-stigma suffered by powerless beneficiaries:

[A] plan of the type sustained here may impose "stigma on its supposed beneficiaries," and "foster intolerance and antagonism against the entire membership of the favored classes." Although the majority disclaims it, the FCC policy seems based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens. Special preferences also can foster the view that members of the favored groups are inherently less able to compete on their own.<sup>148</sup>

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144. *Id.* at 604 (citation omitted).

145. *See supra* note 85 and accompanying text.

146. *See supra* Part I.B.

147. *Metro Broadcasting*, 497 U.S. at 633-35 (Kennedy, J., dissenting).

148. *Id.* at 635-36 (citations omitted); *see Morrison, supra* note 22, at 340 n.184 (attributing to Kennedy the concern that "others see affirmative action beneficiaries as inferior"). That Kennedy was concerned with other- rather than self-stigma is clearly



Additionally, Kennedy joined in Justice Stevens' conception of racism-type other-stigma suffered by powerful nonbeneficiaries, writing that "[t]here is the danger that the 'stereotypical thinking' that prompts policies such as the FCC rules here 'stigmatizes the disadvantaged class with the unproven charge of past racial discrimination.'" <sup>149</sup> Thus, although the Court upheld the affirmative action programs at issue in *Metro Broadcasting*, Justice Stevens had planted an idea—that the relevant stigma includes Whites stigmatized by charges of past racism—in *Croson* which began to take hold in the Court's jurisprudence in *Metro Broadcasting*. That idea became a definite part of the Court's jurisprudence in its most recent affirmative action decision, as the following discussion illustrates.

### 7. *Adarand Constructors, Inc. v. Peña*

Recently, in *Adarand*, <sup>150</sup> the Supreme Court addressed financial incentives favoring employment of minority subcontractors in federal highway construction projects. <sup>151</sup> The Court overruled *Metro Broadcasting* and held that even federal "benign" race-based classifications are subject to strict scrutiny. <sup>152</sup>

*Adarand* marked the second time that a majority of the Court adopted a particular stigmatic strain in an affirmative action case. <sup>153</sup> The Court did so in two ways. First, the majority concerned itself with the by now common strain of inferiority-type other-stigma suffered by powerless beneficiaries. Writing for the Court, Justice O'Connor quoted from Justice Stevens' *Fullilove* <sup>154</sup> dissent: "[A] statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race." <sup>155</sup> As established earlier, this language identifies the strain of inferiority-type other-stigma suffered by powerless beneficiaries. <sup>156</sup>

Second, the Court invoked stigma as a notion of powerful nonbeneficiaries experiencing racism-type other-stigma. In support,

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shown by his conjecture that "[p]erhaps the tolerance and decency to which our people aspire will let the disfavored rise above hostility and the favored escape condescension." *Metro Broadcasting*, 497 U.S. at 637 (emphasis added). Condescension, in this context, certainly refers to attributions by others rather than the self.

149. *Metro Broadcasting*, 497 U.S. at 636 (Kennedy, J., dissenting) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 516 (1989) (Stevens, J., concurring)).

150. 115 S. Ct. 2097 (1995).

151. *Id.* at 2101-02.

152. *Id.* at 2117.

153. *Metro Broadcasting* was the first. See *supra* Part II.B.6.

154. 448 U.S. 448 (1980).

155. *Adarand*, 115 S. Ct. at 2113 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 545 (Stevens, J., dissenting)).

156. See *supra* notes 113-114, 125 and accompanying text.

O'Connor drew upon this strain's genesis: Justice Stevens' *Croson*<sup>157</sup> concurrence: "Although [the legislation at issue] stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its supposed beneficiaries."<sup>158</sup> It is significant and perhaps surprising, given the infrequency with which a majority of the Court had ever precisely invoked particular stigmatic strains as constitutionally significant issues, that a strain so far removed from the sort contemplated in the progenitor *Plessy* and *Brown* cases ultimately has received the Court's endorsement.

Justice Thomas concurred. Like the majority of which he was a part, he invoked a concept of stigma as involving inferiority-type other-stigma suffered by powerless beneficiaries: "So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority . . . ."<sup>159</sup>

Thomas also recognized the strain of stigma that is perhaps closest to that recognized in *Plessy* and *Brown*, marking the first time since Justice Douglas' *DeFunis* dissent that any Justice had taken notice of it. This strain, inferiority-type *self*-stigma suffered by powerless beneficiaries, differs from the *Plessy/Brown* strain only in the distributive posture of the stigmatized group:<sup>160</sup> the former refers to beneficiaries while the latter refers to nonbeneficiaries. Thomas wrote that "[t]hese programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."<sup>161</sup> His focus on the underlying negative attribution of inferiority and on the group of powerless beneficiaries—minority recipients of affirmative action—is explicit. As to the source of the underlying negative attribution, Thomas focused on the beneficiary group's own attributions, for he lumped the "badge of inferiority" with other purported self-induced attitudinal effects: development of dependencies or attitudes of entitlement.

Justice Stevens, joined by Justice Ginsburg, dissented, taking issue with the analytical approach the majority used to justify strict scrutiny.<sup>162</sup> With respect to stigma, Stevens acknowledged although

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157. 488 U.S. 469 (1989).

158. *Adarand*, 115 S. Ct. at 2113-14 (quoting *Croson*, 488 at 516-17 (1989) (Stevens, J., concurring)) (alteration in original).

159. *Id.* at 2119 (Thomas, J., concurring).

160. *See supra* Part I.A.4.

161. *Adarand*, 115 S. Ct. at 2119 (Thomas, J., concurring).

162. *See id.* at 2120-31 (Stevens, J., dissenting). Justices Souter and Breyer also dissented. Justice Souter wrote a separate dissenting opinion, joined by Justice Breyer,

ultimately dismissed the strain of inferiority-type self-stigma suffered by powerful beneficiaries that Justice Thomas recognized. Stevens noted, “No beneficiaries of the specific program under attack today have challenged its constitutionality—perhaps because they do not find the preferences stigmatizing . . . .”<sup>163</sup> Even assuming that the beneficiaries did feel stigmatized, however, Stevens was “not persuaded that the psychological damage brought on by affirmative action is as severe as that engendered by racial subordination.”<sup>164</sup>

### III. RESULTS AND ANALYSIS

The opinions of the Court or its members have focused on different strains of stigma by virtue of the four different elements, or “variables,” identified previously.<sup>165</sup> In fact, as shown in Table 3, all but one potential strain of inferiority-type stigma, that of self-stigma suffered by powerful beneficiaries of a race-based classification, have been recognized at one time or another in the Supreme Court’s affirmative action cases.<sup>166</sup>

Analysis of the elements which the Court and individual Justices have focused on in each case reveals several interesting points, both with respect to individual Justices’ notions<sup>167</sup> and to particular

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which did not address stigma as a justification for their views. *See id.* at 2131-34 (Souter, J., dissenting, joined by Ginsburg and Breyer, JJ.). Similarly, Justice Ginsburg’s separate dissenting opinion, joined by Justice Breyer, did not address the question. *See id.* at 2134-36.

163. *Id.* at 2122 n.5.

164. *Id.*

165. *See supra* Part I.A.

166. With respect to inferiority-type self-stigma, that suffered by powerless beneficiaries was recognized by Justice Douglas in *DeFunis*, *see supra* Part II.B.1, and Justices Thomas and Stevens in *Adarand*, *see supra* Part II.B.7; that suffered by powerless non-beneficiaries by Justice Brennan in *Bakke*, *see supra* Part II.B.2; and that suffered by powerful nonbeneficiaries by Justice Brennan in *Bakke*, *see id.*, and arguably by Justice Marshall in *Fullilove*. *See supra* Part II.B.3. With respect to inferiority-type other-stigma, that suffered by powerless beneficiaries was recognized by the Justices listed *infra* note 171; that suffered by powerless nonbeneficiaries by Justice Brennan in *Bakke*, *see supra* Part II.B.2, Justice Marshall in *Fullilove*, *see supra* Part II.B.3, and Justice O’Connor in *Metro Broadcasting*, *see supra* Part II.B.6; that suffered by powerful beneficiaries by Justice O’Connor in *Metro Broadcasting*, *see supra* Part II.B.6; and that suffered by powerful nonbeneficiaries by Justice Brennan in *Bakke*, *see supra* Part II.B.2, arguably Justice Marshall in *Fullilove*, *see supra* Part II.B.3, and Justice O’Connor in *Metro Broadcasting*. *See supra* Part II.B.6.

167. For example, as shown in Table 3, Justice Brennan took what might be termed the broadest view of stigmatization by invoking five separate strains. Justices Marshall and O’Connor share second place, invoking four strains apiece. Of course, these summaries include only opinions authored by those Justices; they have joined in the opinions of others as well and may to a less definite degree be considered as also recognizing strains in those opinions. Due to our lack of confidence that an individual Justice’s decision to join an opinion necessarily indicates that the particular Justice

TABLE 3

| IDENTITY             |                      | UNDERLYING CHARACTERISTIC   |  |   |  |
|----------------------|----------------------|---|--|---|--|
|                      |                      | Inferiority   |  | Other   |  |
| DISTRIBUTIVE POSTURE |                      | POWER   |  | POWER   |  |
|                      |                      | Powerful  | Powerless  | Powerful  | Powerless  |
| Self                 | Other                |   |  |   |  |
|                      | DISTRIBUTIVE POSTURE | Beneficiary   |  | Nonbeneficiary  |  |
|                      | Beneficiary          | <i>Bakke</i> (1978) (Brennan)<br><i>Fullilove</i> (1980) (Marshall)         | <i>Metro</i> (1990) (O'Connor)   | <i>Bakke</i> (1978) (Brennan)<br><i>Fullilove</i> (1980) (Marshall)<br><i>Metro</i> (1990) (O'Connor) |  |
|                      | Nonbeneficiary       | <i>Bakke</i> (1978) (Brennan)<br><i>Fullilove</i> (1980) (Marshall)         | <i>Bakke</i> (1978) (Powell & Brennan)<br><i>Fullilove</i> (1980) (Marshall, Stewart & Stevens)<br><i>Crosby</i> (1989) (O'Connor & Stevens)<br><i>Metro</i> (1990) (the Court, Stevens, O'Connor & Kennedy)<br><i>Adarand</i> (1995) (the Court & Thomas) | <i>Bakke</i> (1978) (Brennan)<br><i>Fullilove</i> (1980) (Marshall)<br><i>Metro</i> (1990) (O'Connor) | <i>Crosby</i> (1989) (Stevens)<br><i>Metro</i> (1990) (Stevens & Kennedy)<br><i>Adarand</i> (1995) |
| Other                | Self                 |   |  |   |  |
|                      | DISTRIBUTIVE POSTURE | Beneficiary   |  | Nonbeneficiary  |  |
|                      | Beneficiary          | <i>DeFunis</i> (1974) (Douglas)<br><i>Adarand</i> (1995) (Thomas & Stevens) | <i>Plessy</i> (1896)<br><i>Brown</i> (1954)<br><i>Bakke</i> (1978) (Brennan)   |   |  |
|                      | Nonbeneficiary       | <i>Bakke</i> (1978) (Brennan)<br><i>Fullilove</i> (1980) (Marshall)         |  |   |  |

stigmatic strains,<sup>168</sup> which we identify but do not attempt to critique fully here. Most significant, and therefore meriting extended discussion, are two shifts that have occurred in the Supreme Court's use of stigmatization as a constitutional concept in the affirmative action cases. We also offer a few comments on the "consistency" of the Court's, and individual Justices', reliance on stigma as a constitutional concept in affirmative action cases.

A. *The Current, Predominant View Among the Justices of Constitutionally Relevant Stigma Apparently is Inferiority-Type Other-Stigma Suffered by Powerless Beneficiaries*

As introduced into equal protection jurisprudence in *Plessy* and *Brown*, the Supreme Court's initial concept of stigma was one of powerless *nonbeneficiaries* of a race-based classification experiencing inferiority-type *self-stigma*. Some aspects of this focus—on the powerless rather than powerful class, on the nonbeneficiary rather than the beneficiary class—are not surprising, for the cases were brought by minorities challenging statutes under which they were victimized.

In the affirmative action cases, in contrast, the Court's concept of stigma has focused on a different strain—that of powerless *beneficiaries* of a race-based classification suffering from inferiority-type *other-stigma*. Table 4 depicts this transition in the Court's focus. At least where feelings of inferiority are the feared underlying characteristic, this strain is the only one that a majority of the Court has invoked.<sup>169</sup> Additionally, this strain has been invoked most frequently in the varied non-controlling Court opinions.<sup>170</sup> Given that a prevalent strain of stigma has emerged that differs from the concept's origins, both in the distributive posture of the group whose

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agrees with the strain of stigma identified by the opinion's author, we generally limit our analysis to Justices who have authored opinions which discuss the concept of stigma.

168. For example, it seems that any focus on inferiority-type stigma potentially suffered by the powerful departs from *Brown*, for the self-stigma at issue there was imposed largely by perceived and actual infliction on members of the powerless group by the powerful group. Perhaps it is best described as a sense of helplessness. See Casais, *supra* note 59, at 263.

169. See, e.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

170. The opinions include those of Justices Powell and Brennan in *Bakke*, see *supra* Part II.B.2; Justices Marshall and Stewart in *Fullilove*, see *supra* Part II.B.3; Justice Stevens in *Fullilove*, see *supra* Part II.B.3; *Croson*, see *supra* Part II.B.5, and *Metro Broadcasting*, see *supra* Part II.B.6; Justice O'Connor in *Croson*, see *supra* Part II.B.5, and *Metro Broadcasting*, see *supra* Part II.B.6; Justice Kennedy in *Metro Broadcasting*, see *supra* Part II.B.6; and Justice Thomas in *Adarand*. See *supra* Part II.B.7.



stigmatization is at issue<sup>171</sup> and in the source of the underlying negative attribution,<sup>172</sup> the remaining issue is whether these differences are legally or practically significant.

### 1. The Shift in Focus as to Distributive Posture

While the *Plessy/Brown* strain of stigma focused upon non-beneficiaries, the predominant focus in the affirmative action cases—perhaps not surprisingly—has come to rest upon beneficiaries. However, compelling arguments exist that, in the affirmative action context, stigma should be legally irrelevant for beneficiaries.<sup>173</sup>

First, as Justice Stevens suggested in his *Adarand* dissent, it may make some sense to pay attention to the side of the debate on which the particular plaintiffs lie.<sup>174</sup> It may be condescending to tell members of minority groups, “This program stigmatizes you,” when members of those groups generally have not raised the complaint themselves.<sup>175</sup> Particularly when, as addressed shortly,<sup>176</sup> the focus seems to have changed to the opinions of others besides the beneficiary group, this metamorphosis could be seen as a naked attempt to add a stigmatization arrow to the anti-affirmative action quiver. Basically, the statement to minority-group members seems to be, “We know you receive benefits under affirmative action programs, but others think poorly of you when you do so. Because it is their opinions, and not your own, that are legally relevant, you are forbidden from receiving such benefits.”

Second, an argument could be constructed that stigmatization is an unsound basis on which to decide equal protection issues, particularly in the affirmative action context. The *Brown* Court, dealing with the issue of segregation, carried the concept of stigma into the modern era and may be considered its true progenitor.<sup>177</sup> Accordingly, the *Brown* conception of stigma should govern. Although the *Brown* Court invoked stigma in holding segregation unconstitutional, the Court invalidated segregation because the practice resulted in inferior treatment of African Americans

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171. See *supra* Part I.A.4.

172. See *supra* Part I.A.1.

173. Moreover, as previously pointed out, it seems unlikely that the beneficiaries of affirmative action would have standing to challenge such programs. See *supra* note 42 and accompanying text.

174. See *supra* note 163 and accompanying text.

175. See Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2141 (1989) (“It is demeaning to be told what we find demeaning.”).

176. See *infra* Part III.A.2.

177. See *supra* notes 58-67 and accompanying text.

precisely because they were African American.<sup>178</sup> Thus, the *Brown* Court's utilization of the concept was a necessary device to justify ending school desegregation while paying lip service to traditional *stare decisis* principles in light of *Plessy*. Thus, using stigmatization where something other than inferior treatment, and in fact preferential treatment, is at issue may pervert the concept's constitutional relevance.

Third, in the same way that the powerful group may suffer less from the effects of stigmatization precisely because of its power, both the beneficiary group and its individual members may suffer less from the effects of stigmatization because the group or individuals receive the sought-after benefits of the classification. In effect, they may be said to "trade" some level of stigmatization for a greater level of benefits. Indeed, simple economic analysis would suggest that minorities generally would decline to participate in affirmative action programs if the effects of stigmatization outweighed the benefit of obtaining the job in question or being admitted to law school, for example. Assuming that minorities are utility maximizers, one would not expect them to participate in programs that result in a net decrease in utility. For the same reasons, one would not expect minorities *as a group* to advocate politically for affirmative action programs if the result is a net loss in group utility, assuming that the group's leaders' interests coincide with those of a majority of the individual members. Where stigmatization of the nonbeneficiary group is at issue, however, as in *Brown*, that stigmatization is perhaps of greater concern: not only does the nonbeneficiary class by definition receive no benefit from the classification, it may also experience adverse stigmatizing effects.

## 2. The Shift in Focus as to the Underlying Negative Attributions' Source

While the *Plessy/Brown* strain of stigma focused upon self-imposed negative attributions, or self-stigma, the Court's predominant focus in the affirmative action cases has become the attributions by others, or other-stigma. In addition to the theoretical differences between self- and other-stigma described previously,<sup>179</sup> there are practical ones as well. The issue is these differences' impact on the shift in constitutional focus from one to the other.

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178. See Aleinikoff, *supra* note 40, at 1113 (*Brown* "can quite sensibly be read to proscribe not the mere use of race, but rather systemic state practices that impose harm on a subordinated group"). See generally Washburn, *supra* note 3, at 1124-25.

179. See *supra* Part I.A.2.



There are arguments that a constitutional focus on other-stigma is sound. First, from a strictly economic perspective, the forced integration of racial groups may decrease the utility functions of Whites in at least two ways: employers may have to pay higher wages to white employees who prefer separation of the races and have alternative opportunities (a pecuniary cost to the employers) or white employees who prefer not to associate with minorities but have no feasible alternatives will be forced into an unwanted association (a nonpecuniary cost to white employees).<sup>180</sup> Thus, as a *purely* economic matter, affirmative action may create both pecuniary and nonpecuniary costs which are traceable, essentially, to other-stigma.

On the other hand, many Whites favor affirmative action programs or, at least, suffer no disutility from associating with minorities. Indeed, some Whites may receive a net utility increase (usually in nonpecuniary form) from the existence of affirmative action, negating some or (perhaps) all of the negative effect of other-stigma felt by other Whites. On balance, it may be difficult to determine whether the negative effects of other-stigma are significant as a practical matter. In any event, other-stigma does capture some potentially significant pecuniary and nonpecuniary costs associated with affirmative action and for that reason could be a legitimate consideration.

Second, some degree of self-stigma may arise from other-stigma, for if other-stigmatization

occurs, it can have far-reaching consequences for the careers of those targeted by affirmative action efforts. The negative expectations of these individuals that would be spawned by a stigma of incompetence could cause distorted perceptions of their behavior and work performance and, if internalized by them, could actually create self-fulfilling prophecies that bring about the very behavior others expect.<sup>181</sup>

Thus, to the extent other-stigma may cause self-stigma, focusing on other-stigma focuses on both.

The arguments against giving constitutional import to other-stigma, however, seem stronger than those supporting it. First, because it is far clearer that other-stigmatization of beneficiaries arises from affirmative action than that self-stigmatization does, focusing on other-stigma makes it easier to invalidate affirmative action programs. The empirical evidence of stigmatization's existence in the affirmative action context may not be as contradictory as it ap-

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180. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 659 (4th ed. 1992).

181. Heilman et al., *supra* note 7, at 543-44.

pears.<sup>182</sup> To an uncertain (and perhaps small) degree, it appears that evidence cited to support stigmatization's existence tends actually to refer to other-stigma,<sup>183</sup> while that cited to support its nonexistence tends actually to refer to self-stigma.<sup>184</sup> Further, the proposed explanations underlying the empirical evidence are more supportive of other-stigma's existence than self-stigma's. Other-stigma may be linked to the resentment felt by nonbeneficiaries in losing (or their perceptions of losing) opportunities for position or advancement,<sup>185</sup> misperceptions about affirmative action in general,<sup>186</sup> or other sources. But self-stigma may not arise, given a particular beneficiary's starting self-image, attitude toward affirmative action in general (including viewing it as a remedy for past discrimination) and identification of himself or herself with the beneficiary group impact whether the beneficiary will think less of himself or herself as a result of a particular program.<sup>187</sup>

The *discounting principle* aptly accounts for the existence of other-stigma in the affirmative action context. That principle essentially holds that with each additional plausible alternative explanation for a phenomenon, belief in prior alternative explanations must diminish.<sup>188</sup> Other-stigma, although it may exist independently in the form of racist stereotyping,<sup>189</sup> arises or

182. See sources cited *supra* note 7.

183. See, e.g., Auerbach, *supra* note 2, at 1257; Garcia et al., *supra* note 7, at 436; Heilman et al., *supra* note 7, at 543. Some of the literature suggests that many courses may be taken to lessen other-stigma arising from affirmative action. See, e.g., Crosby & Clayton, *supra* note 7, at 68-69; Harris & Narayan, *supra* note 40, at 29-31; Nacoste, *supra* note 7, at 186-87. This proposition, if accepted, undermines the argument that focusing on other-stigma automatically leads to affirmative action's invalidation, for other-stigma may not exist in a particular case. The Supreme Court, however, has shown no interest in considering such measures or in adopting a highly case-specific approach to affirmative action, and perhaps for good reason. For if other-stigma exists, at all, it seems an ill-advised and inappropriate standard for measuring the constitutionality of affirmative action programs. Indeed, as we articulate in the textual discussion following this note, it is not at all clear that other-stigma in general is of any practical significance.

184. See, e.g., Crosby & Clayton, *supra* note 7, at 66; Strossen, *supra* note 7, at 975.

185. See, e.g., Feagins, *supra* note 2, at 10-11.

186. See Harris & Narayan, *supra* note 40, at 31; Nacoste, *supra* note 7, at 185-86.

187. See Crosby & Clayton, *supra* note 7, at 70-71. Compare GOFFMAN, *supra* note 20, at 6:

[I]t seems possible for an individual to fail to live up to what we effectively demand of him, and yet be relatively untouched by this failure; insulated by his alienation, protected by identity beliefs of his own, he feels that he is a full-fledged normal human being . . . He bears a stigma but does not seem to be impressed or repentant about doing so.

188. See, e.g., Heilman et al., *supra* note 7, at 543; Garcia et al., *supra* note 7, at 432.

189. See Morrison, *supra* note 22, at 343 ("[A]ffirmative action did not cause stigma to attach to selected racial groups; society had already taken care of that."); Crenshaw,

increases because "affirmative action does serve to discount the role of ability in explaining the success of minority group members and augment the lac[k] of ability in explaining their failure."<sup>190</sup> In other words, because some alternative to merit<sup>191</sup> reasonably explains the minority group member's position or promotion, merit, the presumptive explanation, necessarily diminishes as *the* explanation.<sup>192</sup>

The discounting principle does not require that beneficiaries self-stigmatize as a result of affirmative action. As far as the beneficiary group is concerned, a host of plausible explanations exist for the classification which are not exclusive of merit, but which are exclusive of inferiority. Among these are remedying past discrimination,<sup>193</sup> combating present (through exposure) and future

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*supra* note 56, at 1362. The argument that negative attributions toward affirmative action beneficiaries are merely manifestations of racial bias does not wholly ring true. Certainly some nonbeneficiaries are racist, and their opinions that beneficiaries are inferior arise from those pre-existing sentiments. But persons selected to positions on *any* ground other than proven merit or potential merit are subject to suspicions about their capabilities. This is true of the daughter of the rich alumnus who gains admittance to a prestigious academic program or the partner's son who is chosen for an associate position. The difference between these "beneficiaries" and those of affirmative action simply may be that the latter are easier to identify. The mere awareness that something other than merit was a factor suffices, even without any preconceived notions as to the capabilities of the individual.

190. Garcia et al., *supra* note 7, at 436; see also Auerbach, *supra* note 2, at 1257 (citing a 1975 Carnegie study indicating that a majority of professors and graduate students believe that "affirmative action labels minorities in such a way that they never can be judged on merit alone"); Heilman et al., *supra* note 7, at 542 (finding support for the idea "that a stigma of incompetence accompanies the affirmative action label"); PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* 134 (1993) ("[T]he reactions of white Americans to affirmative action are in no way unique. Proposing to privilege some people rather than others, on the basis of a characteristic they were born with, violates a nearly universal norm of fairness. It is in just this sense that differences over affirmative action go beyond race.").

191. See Morrison, *supra* note 22, at 330-34, for a discussion of the various possible meanings of "merit." In any organization in which output is the primary goal, of course, merit means only "actual results." See *id.* at 330. Thus, those who argue that "merit" may have alternative meanings that allow race to be positively taken into account, or those who argue that viewing "merit" in efficiency or productivity terms is merely a white construct, cf. Crenshaw, *supra* note 56, at 1358 ("The most significant aspect of Black oppression seems to be what is believed about Black Americans, not what Black Americans believe. Black people are boxed in largely because there is a consensus among many Whites that the oppression of Blacks is legitimate. This is where consensus and coercion can be understood together: ideology convinces one group that the coercive domination of another is legitimate."); GOFFMAN, *supra* note 20, at 131 ("the very notion of *shameful* differences assumes a similarity in regard to crucial beliefs."). Rightly or wrongly, White-based or Black-based, the alternative presented by selection based on race diminishes belief that selection was based on efficiency.

192. See Heilman et al., *supra* note 7, at 543.

193. Kennedy, *supra* note 2, at 50-51.

(through generational attitude adjustment) discrimination,<sup>194</sup> and promoting diversity.<sup>195</sup> But, discounting helps explain why powerless nonbeneficiaries of invidious racial classifications such as segregation experience self-stigma, for a sort of inverse discounting phenomenon may occur in which self-stigma arises because there is no alternative explanation to attributed inferiority for the classification. Essentially, the powerless nonbeneficiaries may think along the following syllogistic lines: "The other group wishes to exclude us. If we were their equal, they would want to include us. Thus, we must be inferior."

Second, it seems at least odd and at most duplicitous to assign legal, and especially constitutional, significance to opinions that *others* may hold.<sup>196</sup> Doing so is certainly a departure from precedent. Also, in the same way that beneficiaries ought to be considered the primary authorities on whether they are stigmatized, the controlling type of stigma ought to be that experienced by beneficiaries themselves, not that experienced by others. If all that is required to invalidate a program is others' disfavor, then the program's opponents have an easy task indeed. After all, *every* classification discriminates, at least in the sense that some persons are treated differently than others.<sup>197</sup> It seems a novel proposition that the opinions of those "others" should be considered determinative or even germane as to whether the classification is constitutionally valid.

Third, assuming that inferiority is the relevant underlying negative attribution, other-stigma is definitely less relevant than self-stigma. A self-stigma of inferiority causes inequality almost by definition, for it seems to provide automatically negative and detrimental effects with the end result that the subject group effectively removes itself from equality.<sup>198</sup> Not only may other-stigma not even translate into action,<sup>199</sup> it has no necessary bearing on the equality issue. For example, consider an individual who has received a position through affirmative action. Even assuming that others view the

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194. See generally Nacoste, *supra* note 7, at 188.

195. See Aleinikoff, *supra* note 40, at 1092; Ward, *supra* note 88, at 100-101; see generally Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity"*, 1993 WIS. L. REV. 105.

196. But see Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 136 (1982) (discussing the severe psychological harms to the self that can be caused by racial stigmatization by others).

197. See Brest, *supra* note 59, at 11 ("[A] presumption prohibiting all decisions that stigmatize or cumulatively disadvantage particular individuals would affect an enormously wide range of practices important to the efficient operation of a complex industrial society.").

198. Cf. Delgado, *supra* note 196, at 136-39.

199. E.g., HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA 44 (1985) (citing survey data).

individual as inferior as a result, their negative view alone does not give rise to “inequality” in any meaningful or typical sense of that word, especially as compared to self-attributions of inferiority.

*B. Novel but Unfounded and Unsound Underlying  
Negative Attribution—Racism—Has Emerged*

Another stigmatic strain, one far removed from the origins of *Plessy* and *Brown*, also has surfaced in the affirmative action cases—that of *racism-type* other-stigma suffered by powerful nonbeneficiaries of a race-based classification.<sup>200</sup> This strain originated with Justice Stevens in his concurring opinion in *Croson*.<sup>201</sup> Both Stevens and Justice Kennedy raised it in their opinions in *Metro Broadcasting*,<sup>202</sup> and a majority of the Court recognized this strain in *Adarand*.<sup>203</sup>

The new focus on racism as a constitutionally significant underlying attribution is both unfounded and unsound. It is unfounded because, at a minimum, it is vastly different from the inferiority-type stigma emphasized in *Plessy* and *Brown*. Table 5 demonstrates the significance of the shift from inferiority to racism. The distinction between the two attributions is so clear that invoking what has become a legal term of art—“stigma”—to encompass both notions is at least disingenuous and at most deceptive.

The focus on racism stigma is unsound for several reasons. First, and broadly, it is unsound because it has nothing to do with the root issue of equality which explicitly underlies both the Fourteenth Amendment’s Equal Protection Clause and antidiscrimination statutes. A forced sense of inferiority, as discussed previously, is related intrinsically to equality. If the state proclaims one group inferior to another, the two groups cannot be legally equal. An attribution of racism, however, has no necessary bearing on *legal* equality; racist attitudes can exist without any outward official actions or legal consequences that necessarily subvert principles of equality.<sup>204</sup>

200. See Morrison, *supra* note 22, at 343-44.

201. See *Croson*, 488 U.S. at 516; *supra* notes 127-32 and accompanying text.

202. See *supra* notes 142, 149 and accompanying text.

203. See *supra* notes 157-158 and accompanying text.

204. Morrison proposes that

[t]he stigma arguments are in collision with essential individualism. Attempts to avoid that collision merely reveal that racial guilt is at the core of essential individualism. If society and history already have labeled African-Americans and other minorities as inferior, the driving force behind the stigma argument must be the concern about the stigma of racism applying to all Euro-Americans.

Morrison, *supra* note 22, at 344.

TABLE 5

| IDENTITY  |  | UNDERLYING CHARACTERISTIC   |   |   |           |
|---|--|---|---|---|-----------|
|   |  | Inferiority   |   | Other   |           |
|   |  | POWER   |   | POWER   |           |
|   |  | Powerful  | Powerless   | Powerful  | Powerless |
| Self  |  | Other   |   |   |           |
| DISTRIBUTIVE POSTURE  |  | DISTRIBUTIVE POSTURE  |   |   |           |
| Beneficiary   | Nonbeneficiary   | Beneficiary   | Nonbeneficiary  |   |           |
|   | <i>Bakke</i> (1978) (Brennan)<br><i>Fullilove</i> (1980) (Marshall)          | <i>Metro</i> (1990) (O'Connor)  | <i>Bakke</i> (1978) (Brennan)<br><i>Fullilove</i> (1980) (Marshall)<br><i>Metro</i> (1990) (O'Connor) | <i>Crosron</i> (1989) (Stevens)<br><i>Metro</i> (1990) (Stevens & Kennedy)<br><i>Adarand</i> (1995) |           |
| <i>DeFunis</i> (1974) (Douglas)<br><i>Adarand</i> (1995) (Thomas & Stevens) | <i>Plessy</i> (1896)<br><i>Brown</i> (1954)<br><i>Bakke</i> (1978) (Brennan) | <i>Bakke</i> (1978) (Powell & Brennan)<br><i>Fullilove</i> (1980) (Marshall, Stewart & Stevens)<br><i>Crosron</i> (1989) (O'Connor & Stevens)<br><i>Metro</i> (1990) (the Court, Stevens, O'Connor & Kennedy)<br><i>Adarand</i> (1995) (the Court & Thomas) |   |   |           |

Second, and more narrowly, the stigmatic strain raised by Justice Stevens, Justice Kennedy, and the *Adarand* majority is one of *past* racism. Even if one accepts the proposition that a stigma of present racism may have negative effects perhaps by, for example, causing those so stigmatized to engage in a self-fulfilling prophecy or by lowering their social standing or self-esteem, it seems a stretch to fear genuine, palpable negative effects from a stigma of past racism. Indeed, such a “mark” or attribution may have salutary effects such as causing the previously discriminating group to improve its conduct in the future.

Third, again applying economic analysis, it is difficult to see why the *powerful* group would, in effect, voluntarily do itself more harm than good. Indeed, the notion that Whites as a group would create affirmative action programs that result in significant decreases in Whites’ utility as a group seems fanciful, at best. Rather, it appears more likely that Whites as a group either receive utility gains from affirmative action or, at the least, suffer no significant decrease. In either event, the Court’s newly discovered racism-type stigma should not provide a justification for dismantling affirmative action.

C. *Is the Supreme Court Consistent in Its Reliance on Stigma as a Constitutional Concept in Affirmative Action Cases?*

Our final observations regarding the model deal with the question whether the Supreme Court and individual Justices have acted consistently in relying on stigma as a constitutional concept. Table 3 provides the essential information. From Table 3, three propositions of some interest emerge.

First, it is difficult to say whether *the Court* has been *consistent* in its recognition of constitutionally significant strains of stigma. As Table 3 reveals, the Court has endorsed at least three different strains: (1) inferiority-type self-stigma suffered by powerless nonbeneficiaries (*Plessy* and *Brown*); (2) inferiority-type other-stigma suffered by powerless beneficiaries (*Metro Broadcasting*); and (3) other-type others-stigma suffered by powerful nonbeneficiaries (*Adarand*).<sup>205</sup> Individual Justices have endorsed no less than eight strains of stigma.<sup>206</sup> These various strains, however, are not necessarily inconsistent in any analytical sense; they are simply different. Thus, the model does not really tell us whether the Court

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205. See *supra* Table 3 at p. 269.

206. *Id.* For purposes of applying the model, we attribute the views of stigma set forth in any particular opinion only to the author of the opinion and not to any Justice who simply joined the opinion.

and individual Justices should be considered consistent or inconsistent in this respect.

Second, looking solely at voting records, and putting to one side Justice Douglas (who participated only in *DeFunis*) and Justices Souter, Thomas, Ginsburg and Breyer (who have participated only in *Adarand*), it is apparent that virtually all of the Justices have been consistent with respect to *outcome*. For example, Rehnquist, O'Connor, Scalia and Kennedy have always voted against the constitutionality of affirmative action programs that have come before the Court while Brennan, Marshall, Stewart, Powell and Blackmun always voted in favor of them. Only White and Stevens have voted to uphold some programs while voting to strike down others. Thus, in terms of outcome, individual Justices have been remarkably consistent.<sup>207</sup>

Third, and lastly, Justice Thomas and Justice Douglas, despite their vastly differing judicial philosophies, are the two Justices who have most strongly and clearly invoked a *Plessy/Brown* strain of stigma in the affirmative action context. Indeed, both identified inferiority-type self-stigma as the critical inquiry. Although Justice Thomas' strongly worded opinion in *Adarand* has much to commend it as a statement against wide-ranging affirmative action policies, his reliance on inferiority-type self-stigma—when the stigmatized group is the *beneficiary* of the discrimination—runs into significant difficulties under current standing doctrine, as discussed previously.<sup>208</sup> In any event, Justice Thomas' *Adarand* concurrence provides the clearest exposition of the *Plessy/Brown* concept of constitutionally relevant stigma in the affirmative action context.

## CONCLUSION

The Supreme Court frequently has invoked "stigma" as a significant factor in determining the constitutionality of race-based classifications, including both segregation and affirmative action. A review of the cases, however, reveals that "stigma" has meant different things to different Justices, to the Court as a whole, and at different times, depending on four elements: (1) the *negative attribution* underlying the stigma charged, (2) the *source* of that negative attribution relative to the stigmatized group, (3) the *power* held by that group, and (4) the *distributive posture* of that group. The Court's initial constitutional concept of "stigma," which originated in *Plessy*

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207. The foregoing propositions, that individual Justices have invoked many strains of stigma while voting for consistent outcomes, bring to mind the venerable maxim of judicial opinion writing: "Any stick to beat a dog."

208. See *supra* notes 42, 174.



*v. Ferguson* and *Brown v. Board of Education*, focused upon the particular strain of inferiority-type self-stigma suffered by powerless nonbeneficiaries.

In the affirmative action cases of the past twenty years, however, the Court's concept of "stigma" has developed differently in two critical respects. First, the predominant view in the affirmative action cases, as demonstrated in Table 4 above, is that the constitutionally significant strain of stigma is inferiority-type other-stigma by powerless beneficiaries, i.e., members of the preferred minority group. This strain differs from the *Plessy/Brown* strain in both the source of the underlying negative attribution—others besides the stigmatized group make the attribution, generally Whites—and the distributive posture of the stigmatized group—they are the beneficiaries of affirmative action rather than the nonbeneficiaries of, for example, state-enforced segregation. Second, the Court has conferred constitutional significance on an entirely new strain of stigma. This new "racism" strain is one in which inferiority is *not* the "mark" conferred upon the group at issue, but rather is one where the issue is perceived past *racism* of the powerful nonbeneficiary group (i.e., Whites).

Each of these fundamental changes is subject to serious criticism; we have not attempted to exhaust the potential difficulties. An important point is that the Court itself generally has not explained or justified these changes. Rather, the Court, as well as individual Justices, has invoked the talisman of "stigma" carelessly and sometimes in apparent pursuit of outcome-driven ends. We conclude by inquiring: Is it too much to expect the Supreme Court of the United States to specify and explain its real concerns in affirmative action cases, even if that means an end to the talismanic effect of the terms "stigma" and "stigmatization"?