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STEPPING THROUGH *GRUTTER*'S OPEN DOORS: WHAT THE UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION CASES MEAN FOR RACE-CONSCIOUS GOVERNMENT DECISIONMAKING

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In *Grutter v. Bollinger*¹ and *Gratz v. Bollinger*,² the Supreme Court added to the very short list of interests considered sufficiently compelling to justify government's race-based decisionmaking.³ In these decisions, a majority of the Court identified a "forward-looking"⁴ or "instrumental"⁵ justification as compelling—specifically, the University of Michigan's interest in attaining a diverse student body to achieve a range

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1. 539 U.S. 306 (2003).

2. 539 U.S. 244 (2003).

3. *Grutter*, 539 U.S. at 325 (finding a law school's goal of achieving diverse student body sufficiently compelling to justify race-based decisionmaking).

4. Justice Stevens has referred to diversity-based rationales as "forward-looking" because they describe strategies to capture the benefits of racial diversity to society now and in the future. *Johnson v. Transp. Agency*, 480 U.S. 616, 646-47 (1987) (Stevens, J., concurring); see also Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80 (1986) (characterizing employers' affirmative action programs intended "less to purge their past than to build their future" as "forward-looking").

5. See Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677 (2004) (discussing certain affirmative action programs as "instrumentally rational strateg[ies] used to achieve the positive effects of racial and gender diversity in modern society"). Throughout this Article, I use the terms "forward-looking" and "instrumental" interchangeably.

of educational benefits.⁶ In so holding, the Court—for the first time in years⁷—expanded, rather than narrowed, the circumstances under which governmental affirmative action programs could be upheld.

Before the University of Michigan cases, the Supreme Court had significantly restricted such programs in several ways. Perhaps most important, the Court had insisted that all race-based government actions were equally suspicious, regardless of their motive, and were thus subject to the same rigorous strict scrutiny.⁸ Despite our nation's historically asymmetrical treatment of race, whereby people of color—and not whites—have experienced race-based disadvantage, the majority has consistently rejected the suggestion that “[t]here is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.”⁹

Moreover, before *Gratz* and *Grutter*, a majority had recognized only a narrow range of “remedial” or “moral” justifications¹⁰ for affirmative action as sufficiently

6. *Grutter*, 539 U.S. at 325. Years earlier, Justice Powell had found higher educational institutions' goal of achieving a diverse student body to be compelling when he provided a fifth vote both for invalidating the UC-Davis Medical School's racial set-aside program and for reversing the state court's injunction forbidding the school from considering race in any way. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313-15, 320 (1978). For more than two decades, public universities and other government entities modeled their programs on Justice Powell's views. See *Grutter*, 539 U.S. at 323 (citing *amici* briefs that noted that admissions programs at law schools, colleges, and universities employ methods based on Powell's opinion in *Bakke*). But not until the University of Michigan decisions did a majority adopt as the Court's holding his conclusion that universities have a compelling interest in a diverse student body. *Id.* at 325.

7. The Court had last upheld an affirmative action program in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). Holding that the federal government's “benign” use of race-based classifications need satisfy only intermediate scrutiny, the Court upheld the FCC's minority ownership enhancement as substantially related to achieving government's important interest in broadcast diversity. *Metro Broadcasting* was overruled a few years later in *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995) (holding that all governmental race-based action—both benign and invidious—must satisfy strict scrutiny).

8. *Adarand*, 515 U.S. at 227; *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (plurality opinion). As Derrick Bell has written, “[T]he Court now treats all race-conscious efforts to eradicate racial inequality as conceptually equivalent to acts designed to install racial hierarchy.” Derrick A. Bell, Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. L. REV. 1053, 1055 (2005).

9. *Adarand*, 515 U.S. at 243 (Stevens, J., dissenting); see also *Gratz*, 539 U.S. at 301 (Ginsburg, J., dissenting) (“Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.”).

10. Remedial rationales are often also described as “moral” justifications for affirmative action because they seek to remedy ongoing racial injustice stemming from slavery, segregation, and other forms of discrimination. See David B. Wilkins, *From “Separate is Inherently Unequal” to “Diversity is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1553 (2004) (discussing the shift in the justifications for affirmative action from morality-based arguments to economic arguments); see also Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WTS. L. REV. 795, 839-53 (2005) (distinguishing “moral” or “remedial” from “business” or “instrumental” rationales for diversity); Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 690 (2004) (noting reasoning frequently used by conservative opponents of affirmative action to support a societal obligation to remedy effects of past racial injustice). Kathleen Sullivan has also referred to remedial rationales as “backward-looking,” because they require courts to look backwards to assess past discrimination and its continuing effects. Sullivan, *supra* note 4, at 82.

compelling to survive strict scrutiny. For example, the Court repeatedly rejected the government's asserted interest in addressing societal discrimination, maintaining that the remedies for such discrimination are potentially limitless and thus impose unfair burdens on nonminorities:

No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.¹¹

Focusing solely on those potential drawbacks, the Court failed to consider any benefits—to persons of color specifically or to the nation generally—that might derive from governmental efforts to tackle such discrimination.¹²

The Court instead accepted as compelling only an interest in correcting government's own past discrimination¹³ or specifically-identified private discrimination within that government's particular jurisdiction.¹⁴ Moreover, the Court declined to defer to the government's judgment as to the continuing effects of such racial wrongs, instead demanding very specific evidence for believing that present ills are in fact attributable to identified past injustice.¹⁵

As courts applied these exacting standards to reject governments' proffered remedial justifications, many advocates of affirmative action turned to instrumental rationales to support race-conscious government decisionmaking.¹⁶ This strategy, however, was not uncontroversial even among the programs' supporters, as a number

Throughout this Article, I use the terms "remedial," "moral," and "backward-looking" interchangeably.

11. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion); *see also Croson*, 488 U.S. at 505 ("To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group.").

12. *See Wygant*, 476 U.S. at 276 (asserting that past discrimination alone is not enough to warrant a race-based remedy); *Bakke*, 438 U.S. at 310 (1978) (asserting that helping members of certain groups perceived to be victims of societal discrimination "does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered"); Seth Harris, *Innocence and the Sopranos*, 49 N.Y.L. SCH. L. REV. 577, 608 (2004) ("The Supreme Court has never explained why serving the interests of 'innocents' is 'compelling,' while serving the interests of the victims of societal discrimination, or even society's interest in eliminating the vestiges of societal discrimination, is not.").

13. *Wygant*, 476 U.S. at 274 (1986) (plurality opinion).

14. *Croson*, 488 U.S. at 491-92 (plurality opinion).

15. *Id.* at 493-94, 507-08 (requiring government to demonstrate a strong basis in evidence for its conclusion that race-conscious action was necessary to remedy ongoing effects of past discrimination).

16. *See, e.g., Frymer & Skrentny, supra* note 5, at 678-79 (discussing reasons for the legal shift to a more instrumental and forward-looking approach to defending affirmative action); Monique C. Lillard et al., *The Effect of the University of Michigan Cases on Affirmative Action in Employment: Proceedings of the 2004 Annual Meeting, Association of American Law Schools, Sections on Employment Discrimination Law, Labor Relations and Employment Law, and Minority Groups*, 8 EMP. RTS. & EMP. POL'Y J. 127, 146 (2004) (explaining that diversity is not a "defensive formulation for an affirmative action plan, but is a positive statement"); Wilkins, *supra* note 10, at 1569 (discussing the ABA's program to increase the number of minority lawyers by stimulating demand for their work at large law firms).

of thoughtful commentators questioned whether a focus on forward-looking rationales signaled a retreat from articulating the moral justification for affirmative action. Derrick Bell, for example, argued that diversity-based rationales are “a serious distraction in the ongoing efforts to achieve racial justice” because they, among other things, enable “courts and policymakers to avoid addressing directly the barriers of race and class that adversely affect so many applicants.”¹⁷

The Supreme Court joined this debate in *Gratz* and *Grutter*, where the University of Michigan did not offer¹⁸—and the Court did not assess—any remedial defense of its affirmative action programs. Instead, a majority for the first time identified a forward-looking justification as compelling—specifically, a public law school’s interest in attaining a diverse student body that contributes to a range of educational benefits, such as promoting cross-racial understanding, breaking down racial stereotypes, enlivening classroom discussion, and preparing students for an increasingly diverse society.¹⁹

Taking care to “dispel the notion” that “remedying past discrimination is the only permissible justification for race-based government action,”²⁰ *Grutter* recognized the value of diversity in higher education in terms that leave open the possibility that the Court might also find other forward-looking justifications compelling. This Article explores the extent to which *Grutter* and *Gratz* have thus changed the Court’s equal protection landscape in ways that may be relevant to other governmental decisions and decisionmakers. More specifically, this Article tests *Grutter*’s observation that “[c]ontext matters when reviewing race-based government action under the Equal Protection Clause.”²¹

Part I examines a decisionmaking context very similar to that presented in the University of Michigan cases: race-based financial aid decisions by public institutions of higher education. It observes that *Grutter* opens many doors for race-based scholarships, while closing some others. First, it suggests that the Court’s embrace of forward-looking rationales may enable governments to rely on more generalized—and thus more relaxed—factual predicates to justify race-based decisionmaking motivated by instrumental concerns.²² Second, instrumental justifications may also help reshape courts’ understanding of undue burden to include an assessment of diversity’s countervailing benefits, again increasing the possibility that an affirmative action program will survive strict scrutiny.

17. Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622 (2003); see also Frymer & Skrentny, *supra* note 5, at 681 (characterizing instrumental rationales as “ignoring historical discrimination and in turn, ignoring structural power differences”); Daria Roithmayr, *Tracking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191, 220 (2004) (“[I]t is important that we not abandon the more expansive view of racial justice in the quest to preserve the limited remedy of affirmative action.”).

18. See *Gratz*, 122 F. Supp. 2d 811, 816 n.5 (E.D. Mich. 2000), *reversed in part by* 539 U.S. 244 (2003) (noting that unlike the Defendant-Interveners—who included minority students who applied or intended to apply for admission to the University—the Defendant University itself never invoked a remedial basis for its admissions programs).

19. *Grutter*, 539 U.S. at 330.

20. *Id.* at 328.

21. *Id.* at 327.

22. See *infra* notes 44-47 and accompanying text for a discussion of how *Grutter* seems to have relaxed the required factual predicate for race-conscious admissions programs designed to further diversity.

Part I concludes that schools can establish the requisite strong basis in evidence for concluding that race-conscious scholarships further their compelling interest in attaining a diverse student body. It further observes that race-conscious financial aid decisions that adhere to the sort of “whole file” approach endorsed in *Grutter* almost certainly pass strict scrutiny.²³ It predicts, however, that many race-exclusive scholarships face substantial—but not necessarily insurmountable—barriers to a finding of narrow tailoring.²⁴

Part II pushes farther afield to examine a very different set of choices by a different set of government decisionmakers: public entities' employment decisions.²⁵ Here, too, *Grutter* opens new doors to race-based decisionmaking, some more promising than others.

This Part concludes that forward-looking rationales may well extend to the employment context, although their application may be limited and occasionally dangerous.²⁶ For example, justifications for affirmative action that rely on race and national origin as proxies for other attributes that can and should be measured more directly—e.g., skill in managing a diverse workforce or anticipating the needs of a diverse consumer base—are themselves steeped in the sort of discriminatory stereotypes that remedial rationales seek to challenge.

Particularly intriguing, on the other hand, is the rationale suggested in an amicus brief filed in *Grutter* by a variety of retired military leaders and cited by the Court with apparent approval.²⁷ Under this approach, race-conscious employment decisions may be justified when a diverse leadership team visibly communicates a rejection of racial caste systems that otherwise undermine a public entity's legitimacy—and thus its effectiveness.

This rationale demonstrates how racial diversity can be instrumentally valuable precisely because it is morally justified: government entities that challenge racial castes are not only acting morally, but also more effectively by engaging the trust, cooperation, and commitment of a racially diverse community. The Article concludes by urging policymakers, advocates, and courts to identify with precision the justifications offered to support government's race-based decisionmaking, taking care to parse permissible race-conscious action that challenges racial scripts from decisionmaking that reinforces such stereotypes.²⁸

23. See *infra* note 77 and accompanying text for a discussion of the “whole file” approach as analyzed in *Grutter*.

24. See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987) (upholding remedial court decree requiring fifty percent of Alabama state police promotions to go to African Americans until approximately twenty-five percent of rank was comprised of African American troopers). See also *infra* notes 103-05 and accompanying text for examples of a permissible narrowly tailored, race-exclusive approach.

25. See *infra* notes 115-18 and accompanying text for a discussion of the Court's acknowledgement of the benefits of a diverse workforce in *Grutter*.

26. See *infra* notes 207-16 for a discussion of the limits of instrumental rationales for affirmative action in the employment context.

27. See *Grutter*, 539 U.S. at 331 (citing amici curiae brief of Lt. Gen. Julius W. Becton, Jr. et al., stating the need for a racially diverse military as support for maintaining racial diversity in other selective U.S. institutions).

28. See *infra* notes 217-20 and accompanying text for this Article's conclusion.

I. CLOSE TO (*GRUTTER*'S) HOME: RACE-CONSCIOUS FINANCIAL AID DECISIONS

We start our look at equal protection's new terrain with a question close to that raised in the University of Michigan cases: what are the implications of *Grutter* and *Gratz* for race-conscious financial aid strategies to achieve public educational institutions' compelling interest in attaining a diverse student body? No consensus response has yet emerged. Shortly after the Michigan decisions, a number of schools dropped or modified their use of race-targeted scholarships,²⁹ while others declined to make any changes despite complaints by affirmative action opponents.³⁰

Schools struggle with these choices with almost no judicial guidance. *Podberesky v. Kirwan*³¹ remains the only decision to date addressing an equal protection challenge to race-conscious financial aid.³² The University of Maryland defended its race-exclusive scholarships solely on remedial grounds, only to see them struck down by the Fourth Circuit.³³ How, if at all, does the newly-recognized availability of forward-looking justifications change this landscape?

A. Race-Based Scholarships as a Means to Achieve the Educational Benefits of a Diverse Student Body: The Required Factual Predicate³⁴

Courts evaluating backward-looking rationales for race-based decisionmaking have required a very "strong basis in evidence" for the government's conclusion that

29. See Daniel Golden, *New Ways to Define Diversity*, WALL ST. J., Dec. 30, 2003, at A1 (reporting that Williams College, Indiana University, Carnegie-Mellon, "and other schools have opened their minority scholarships to all races"); Susan Thomson, *Schools Revamp Restrictive Scholarships*, ST. LOUIS POST-DISPATCH, Feb. 13, 2004, at A1 (reporting that St. Louis University and the University of Missouri at Columbia eliminated or changed their minority scholarship programs in response to *Gratz* and *Grutter*).

30. See Golden, *supra* note 29, at A1 (describing Seton Hall Law School's defense of its race-conscious scholarship program despite an investigation by the Office of Civil Rights); Peter Schmidt, *Bucking A Trend, U. of Wisconsin System Will Defend Race-Based Student Aid Program*, CHRON. OF HIGHER EDUC., Apr. 13, 2005 (describing University of Wisconsin's plan to defend its race-targeted scholarships under investigation by the Department of Education's Office of Civil Rights); Peter Schmidt, *Not Just for Minority Students Anymore*, CHRON. OF HIGHER EDUC., Mar. 19, 2004, at A17 (reporting that Pepperdine and Washington University had decided to retain their scholarships available only to African American students despite complaints by the Center for Equal Opportunity); see also Peter Schmidt, *Affirmative Action Remains a Minefield, Mostly Unmapped*, CHRON. OF HIGHER EDUC., Oct. 24, 2003, at A22 (reporting that the American Civil Rights Institute and the Center for Equal Opportunity "have contacted dozens of colleges and threatened to file federal complaints if the institutions did not open . . . programs up to members of any race"). Still other schools are likely wrestling with these decisions as well, as a 1994 survey by the General Accounting Office found that most institutions of higher education offered some form of race-conscious scholarships. See U.S. GENERAL ACCOUNTING OFFICE, HIGHER EDUCATION: INFORMATION ON MINORITY-TARGETED SCHOLARSHIPS, 1994 WL 810016, at *4 (1994) [hereinafter U.S. GENERAL ACCOUNTING OFFICE] (concluding that nearly two-thirds of all undergraduate institutions, one-third of all graduate schools, and almost three-fourths of all professional schools offer at least one minority-targeted scholarship).

31. 38 F.3d 147 (4th Cir. 1994) [*Podberesky II*], *vacating*, 838 F. Supp. 1075 (D. Md. 1993) [*Podberesky I*].

32. *Podberesky II*, 38 F.3d at 152.

33. *Id.* at 161.

34. See, e.g., *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (describing the "factual predicate" requirement under strict scrutiny for affirmative action programs).

remedial action was indeed justified.³⁵ In *Richmond v. J.A. Croson Co.*³⁶ and *Podberesky*, for example, the courts demanded that the government prove both that the contemporary problem it sought to remedy was in fact the result of past discrimination within that government entity's jurisdiction and that the problem was sufficiently serious to warrant a race-based solution.³⁷

Courts have generally applied this evidentiary requirement to block the government's remedial defense of its affirmative action programs, even when the history of race-based discrimination is clear.³⁸ In *Podberesky*, for example, the University of Maryland had excluded African-Americans entirely until 1951 and resisted desegregation for many years thereafter.³⁹ Yet the Fourth Circuit insisted that neither the University's poor present-day reputation in the African-American community nor the perception that the campus remained hostile to African-Americans could be attributed to the University's past discrimination.⁴⁰ The panel rejected the University's proffered factual predicate in part because the school could not show that the perception of on-campus racial hostility at Maryland varied from that at schools that did not have a history of segregation, even though those northern comparator schools carried their own history of race discrimination.⁴¹

Similarly, in *Croson*, the Supreme Court demanded that Richmond offer more than "a generalized assertion that there has been past discrimination in an entire industry" in defense of a minority contracting program, rejecting the city's reliance on congressional findings of nationwide discrimination in construction and insisting instead on evidence specific to Richmond's construction industry.⁴² The Court maintained that the city had failed to establish any past discrimination against minority contractors within its jurisdiction, much less that discrimination explained why

35. *Croson*, 488 U.S. at 507-08.

36. 488 U.S. 469 (1989).

37. See *Croson*, 488 U.S. at 499 (noting that the history of public and private discrimination standing alone cannot justify a rigid racial quota); *Podberesky II*, 38 F.3d at 153 ("To have a present effect of past discrimination sufficient to justify the program, the party seeking to implement the program must, at a minimum, prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program.").

38. These barriers, though challenging, are not insurmountable. For example, the Tenth Circuit found that the federal government had established a factual predicate sufficient to establish its compelling interest in remedying the effects of past discrimination in highway contracting. *Adarand Constructors, Inc. v. Slater (Adarand VII)*, 228 F.3d 1147, 1173-74 (10th Cir. 2000), cert. granted in part by *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 967, cert. dismissed as improvidently granted, 534 U.S. 103 (2001); see also *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950, 992 (10th Cir. 2003) (upholding Denver's affirmative action contracting ordinance as adequately supported by evidence of past discrimination in the construction industry).

39. *Podberesky I*, 838 F. Supp. at 1077-81.

40. *Podberesky II*, 38 F.3d at 153-55.

41. *Id.* at 154-55; but see *Podberesky I*, 838 F. Supp. at 1090-91 (noting that northern schools—even though never officially segregated—had also engaged in past discrimination that carried continuing effects).

42. *Croson*, 488 U.S. at 498 ("[The g]eneralized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."); but see *id.* at 529, 541 (Marshall, J., dissenting) (maintaining that Richmond's city council had relied not only on congressional findings of discrimination in the construction industry nationwide, but also on "localized, industry-specific" data).

minority contractors received less than one percent of city contracts even though African-Americans made up approximately half of Richmond's population.⁴³

But *Grutter* suggests that the factual predicate needed to support instrumental justifications may be relaxed compared to that required for remedial rationales.⁴⁴ In *Grutter*, the Court accepted generalized evidence that diversity is educationally beneficial rather than insisting that the school offer evidence specific to the University of Michigan. For example, the Court credited expert reports and other studies concluding that diversity "promotes learning outcomes" and prepares students for participating in a diverse workforce.⁴⁵ It found that these conclusions were further "bolstered" by a variety of amicus briefs submitted by employers and military leaders detailing their assessment of the benefits of education in a racially diverse environment.⁴⁶ Reviewing this evidence, the Court specifically concluded that the educational benefits of diversity—identified to include promoting cross-racial understanding, breaking down racial stereotypes, enlivening classroom discussion, and preparing students for an increasingly diverse society—are "not theoretical but real," and "substantial."⁴⁷

What might explain the Court's apparent willingness to accept a broader range of evidence in support of forward-looking, rather than backward-looking, rationales for affirmative action? Note that instrumental justifications do not require the specific finding of past discrimination that has so transfixed the Court in remedial contexts. Free from its narrow focus on determining institutional guilt by identifying specific incidents of wrongdoing to be remedied, the Court may feel more open to acknowledge that other institutions and other settings offer relevant evidence as to the benefits of diversity.⁴⁸

43. *Id.* at 498-506.

44. See JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS, REAFFIRMING DIVERSITY: A LEGAL ANALYSIS OF THE UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION CASES 18 (2003) [hereinafter JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS] (discussing *Grutter* evidentiary requirements). The Scholars found:

Unlike the Court's compelling interest requirement in remedial cases, where there must be a 'strong basis in evidence' to document an institution's compelling interest in remedying the present effects of its past discrimination, there was no comparable evidentiary requirement imposed by the *Grutter* Court. The Court did, however, reference a body of evidence supporting the benefits of diversity, contained in both the trial record and in the briefs of *amici curiae*; thus, one can expect that at least some quantum of evidence will be needed to support a holding that a non-remedial interest is compelling, even if the burden of producing a 'strong basis in evidence' is not imposed.

Id.

45. *Grutter*, 539 U.S. at 330.

46. *Id.* at 330-31.

47. *Id.* at 330.

48. *Grutter*'s acceptance of a relaxed factual predicate might also be explained by the Court's general willingness to "defer" to universities' educational judgments. See *id.* at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."); see also *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1977) (plurality) (noting First Amendment support for university's educational autonomy that includes freedom to select its student body). But the Court did not simply defer to the University's judgment that diversity is educationally beneficial: the majority found that the University's conclusion was "substantiated" and that diversity's educational value is "substantial" and "not theoretical but real." *Grutter*, 539 U.S. at 328, 330.

In any event, once the Court recognized the educational benefits of a diverse student body as compelling, the link between that end and the school's chosen means—considering race in admissions decisions—became clear.⁴⁹ Admitting a diverse group of students is, of course, a necessary step to actually attaining a diverse student body.

The link between financial aid decisions and student body diversity should be equally apparent. A student body's ultimate composition depends on the makeup of several overlapping but distinct groups: those who apply, those who are admitted, those who enroll, and those who stay and graduate.⁵⁰ Not surprisingly, the more generous the financial aid package offered, the more likely that a student will accept a school's offer of admission.⁵¹ The type of aid, as well as the amount, matters. Students are "nearly twice as likely to go to a school that offers them a merit scholarship as a school that offers the same amount in needs-based aid."⁵² Thus, once a school has identified its pool of admittees, its financial aid offers influence the admittees' decisions about whether to enroll (and, once enrolled, whether to stay).

Financial aid incentives in this way present an important tool to higher educational institutions seeking a diverse student body as they compete for a relatively small pool of minority students.⁵³ The yield rate (the likelihood that a candidate offered admission by a school will actually enroll there) differs significantly for comparably qualified white and black admittees; the average spread between black and white yields varies from eleven to fourteen percent.⁵⁴ The higher the candidate's qualifications, the greater this spread.⁵⁵ Race-conscious financial aid incentives thus

49. *Id.* at 330 (recognizing benefits such as breaking down racial stereotypes and enlivening class discussion).

50. See Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756 (Feb. 23, 1994) (finding that financial aid for minorities serves as a recruitment tool for schools and also encourages those students who are offered admission to enroll); JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS, *supra* note 44, at 21 ("Financial aid and support programs can be especially important because they can help ensure that a diverse student body is actually enrolled and is maintained during the academic year, and not just admitted.").

51. Andrew Braunstein et al., *Measuring the Impact of Income and Financial Aid Offers on College Enrollment Decisions*, 40 RES. IN HIGHER EDUC. 247, 248 (1999) (concluding that "[a]ll forms of financial aid (i.e., grants, loans, and work study) positively impact enrollment"); see also Geier v. Sundquist, 128 F. Supp. 2d 519, 538 (M.D. Tenn. 2001) ("One of the most important determinants for the majority of student enrollment decisions is the receipt of financial aid.").

52. Kim Clark, *Decision Time*, U.S. NEWS AND WORLD REP., Apr. 19, 2004, at 53 (citing 2003 Harvard study).

53. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: THE LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 33-34 (1998) (finding that highly qualified black students are often admitted by more schools than white applicants and thus have more options from which to choose); Dennis J. Shields, *A View from the Files: Law School Admissions and Affirmative Action*, 51 DRAKE L. REV. 731, 741-42 (2003).

54. BOWEN & BOK, *supra* note 53, at 34 n.18.

55. *Id.* fig.2.9; see also Shields, *supra* note 53, at 742 (discussing law student yield). Shields states: Here is what law schools know about yield. The stronger the academic profile of the applicant, based on the LSAT and cumulative academic average of a candidate, the less likely he or she will accept an offer of admission. This is because such candidates are admitted to several other peer institutions, thus have other excellent options and many ultimately decide to go to law school elsewhere.

Id.

increase the prospects of a diverse student body by encouraging students of color to accept offers of admission.⁵⁶

Moreover, school administrators also believe that race-targeted financial aid helps recruit and retain students of color by sending an especially tangible example of the school's commitment to diversity.⁵⁷ Administrators further report that, when successful, such strategies carry a spill-over effect: the more minorities a school successfully encourages to enroll, the more attractive that school becomes to still other prospective minority students as critical mass increases and the possibility of isolation lessens.⁵⁸

This use of financial aid to attract students of color is entirely consistent with an emphasis on merit-based aid. A school's assessment of a candidate's merit hinges on his or her ability to help the school achieve its educational mission.⁵⁹ The University of Michigan, for example, identified its mission as "'producing classes both diverse and academically outstanding, classes made up of students who promise to continue the tradition of outstanding contribution by Michigan Graduates to the legal profession.'"⁶⁰

56. See Dave Gershman, *Minority Scholarships to Face Legal Critique*, ANN ARBOR NEWS, June 22, 2004 (describing surveys by the University of Michigan finding that the "vast majority" of minorities reported that financial aid was "very important" or "the primary reason" for their decision to attend the University); but see Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 477 (2004) (finding a decline in aid to African Americans likely to have little effect on yield). Sander states:

It is certainly possible that a decline in aid for blacks, if it occurs, could discourage some black applicants. On the other hand, Hispanic law students currently receive far less scholarship aid than blacks (even though Hispanic law students tend to come from less affluent backgrounds) but apply to law school in very similar proportions to their numbers among college graduates.

Id.

57. See U.S. GENERAL ACCOUNTING OFFICE, *supra* note 30, at *7 (finding that financial aid helps to establish "a critical mass of minority enrollment and send[s] a message that the schools sincerely want to attract such students"). Moreover, financial aid may be an especially important tool for schools located in areas with relatively few minorities that may face additional challenges in attracting students of color. See, e.g., Rachel Spector, Note, *Minority Scholarships: A New Battle in the War on Affirmative Action*, 77 IOWA L. REV. 307, 340 (1991) (examining the difficulty in attracting minorities to the University of Iowa). Spector notes:

In order to attract an adequate percentage of minority students in a state with only a four percent minority population, the University of Iowa must target students from outside the state. Because out-of-state students incur higher living expenses and pay higher tuition rates, they require more money to finance their education Because the population in Iowa is overwhelmingly white, minority students may be discouraged from attending the University of Iowa because they fear a racially hostile environment.

Id.

58. See U.S. GENERAL ACCOUNTING OFFICE, *supra* note 30, at *7.

59. See ARTHUR L. COLEMAN ET AL., *FEDERAL LAW AND FINANCIAL AID: A FRAMEWORK FOR DIVERSITY-RELATED PROGRAMS* 5 (2005) (describing goals of financial aid to include "helping colleges and universities promote their core missions by enrolling students who can best help institutions achieve their educational goals").

60. *Grutter*, 539 U.S. at 316; see also *Bakke*, 438 U.S. at 321-22 (appendix to opinion of Powell, J.) (referring to Harvard's admissions policy, in which Harvard states that if "scholarly excellence" were the sole or primary measure of merit, Harvard "would lose a great deal of its vitality and intellectual excellence and that the quality of the educational experience offered to all students would suffer") (quoting FINAL REPORT OF W. J. BENDER, CHAIRMAN OF THE ADMISSION AND SCHOLARSHIP COMMITTEE AND DEAN OF ADMISSIONS AND

To accomplish this mission, the University sought to admit individuals with “substantial promise for success in law school” . . . ‘a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others’” and “varying backgrounds and experiences who will respect and learn from each other.”⁶¹ Schools evaluate candidates’ merit based on their potential for contributing to these goals, and make scholarship decisions—like admissions decisions—that reflect that appraisal. A more attractive financial aid package thus increases the likelihood that a meritorious student—e.g., a student who can help achieve the school’s mission by, among other things, contributing to the racial diversity that engenders a range of valuable educational benefits—will accept an admission offer.

B. Race-Based Scholarships as a Means to Achieve the Educational Benefits of a Diverse Student Body: The Narrow Tailoring Requirement

Once the factual predicate for race-based financial aid as a means to achieving a diverse student body is established, the question for schools seeking to adopt these strategies then becomes not whether, but how to consider race in their decisions.⁶² More specifically, do race-exclusive scholarships available only to students of color remain viable after *Grutter* and *Gratz*, as opposed to race-conscious financial aid decisions that consider race as one of several measures of diversity?

Recall that the Court’s narrow tailoring analysis in *Gratz* and *Grutter* assessed Michigan’s compliance with five requirements. First, race-based quotas for admissions are prohibited.⁶³ Second, each candidate must receive an individualized review of his or her qualifications, including an assessment of his or her ability to contribute to the school’s interest in diversity.⁶⁴ Third, the school must consider, but not necessarily exhaust, race-neutral alternatives.⁶⁵ Fourth, the program must not impose an undue burden on nonminorities.⁶⁶ Finally, the program must be limited in time.⁶⁷

Shifting majorities of the Court applied these standards to uphold the law school’s admissions program⁶⁸ while invalidating the undergraduate program,⁶⁹ despite

FINANCIAL AID (1960)).

61. *Grutter*, 539 U.S. at 313-14 (quoting *Grutter*’s petition for certiorari).

62. Of course, many critics object to race-targeted scholarships on policy, as well as legal grounds, and thus would counsel schools to forego race-conscious scholarships even absent any legal questions. See, e.g., Kirk A. Kennedy, *Race-Exclusive Scholarships: Constitutional Vel Non*, 30 WAKE FOREST L. REV. 759, 790-93 (1995) (objecting to race-based scholarships as “impel[ling] minority students to attend universities where the academic standards exceed their capabilities” and fostering feelings of resentment by white students).

63. *Grutter*, 539 U.S. at 334 (holding that a race based admission program cannot constitutionally use a quota system).

64. *Id.* at 336-37 (finding that individual evaluation is a vital characteristic of a constitutional race-based admission program).

65. *Id.* at 339 (requiring good faith consideration, but not necessarily exhaustion, of race-neutral alternatives).

66. *Id.* at 341 (requiring race-conscious admissions to “not unduly harm members of any racial group”).

67. *Id.* at 341-42 (requiring race-based admissions to have “a logical end point”).

68. *Grutter*, 539 U.S. at 343 (holding that University of Michigan Law School’s race-conscious admission program was narrowly tailored and thus not prohibited by the equal protection clause).

69. *Gratz*, 539 U.S. at 275 (holding that the University of Michigan’s race-based undergraduate admission policy was not narrowly tailored and thus violated the Equal Protection Clause).

considerable skepticism as to whether the two were different in any legally significant manner.⁷⁰ Indeed, only Justice O'Connor⁷¹ and apparently Justice Breyer⁷² found them distinguishable; the other seven justices would have either sustained both programs or struck them both down.

But schools attempting to navigate these shoals can cling to a couple of possible distinctions for safety. First, Justice O'Connor was especially disturbed that the undergraduate program *automatically* conferred a bonus—quantified as twenty points when one-hundred points guaranteed admission—to *all* members of underrepresented groups.⁷³ In contrast, the law school's program did not automatically award a plus factor to every member of an underrepresented group.⁷⁴ Second, the twenty points awarded to applicants of color under the undergraduate program were apparently outcome-determinative, because all minority candidates with a certain minimum range of qualifications were admitted.⁷⁵ However, the law school's plus factor was not always outcome-determinative because nonminority applicants were sometimes admitted over minority applicants who had higher grades and test scores.⁷⁶

The law school's successful "whole file" approach to diversity in admissions appears readily transferable to financial aid decisions. This approach requires an individualized review that includes consideration of each candidate's potential contribution to the school's diversity objectives in a way that values measures of diversity in addition to race and national origin—e.g., age, employment history, and other life experiences.⁷⁷

70. See, e.g., Robert P. George, *Gratz and Grutter: Some Hard Questions*, 103 COLUM. L. REV. 1634, 1634 (2003) (expressing doubt as to whether the programs can be distinguished on a principled basis); Wendy Parker, *The Legal Cost of the "Split Double Header" of Gratz and Grutter*, 31 HASTINGS CONST. L.Q. 587, 596 (2003) ("The most obvious open question is distinguishing between what makes the undergraduate system unconstitutional and the law school program constitutional."); Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT. 221, 248 (2004) ("There is no constitutionally significant difference between the *Grutter* and *Gratz* programs.").

71. See, e.g., Sander, *supra* note 56, at 391 (pointing out that only Justice O'Connor found the difference between the two programs to be legally significant).

72. Justice Breyer joined in *Gratz's* judgment striking down the undergraduate program, but not the majority opinion. *Gratz*, 539 U.S. at 281-82. He joined *Grutter's* majority upholding the law school's program. *Grutter*, 539 U.S. at 310.

73. *Gratz*, 539 U.S. at 276-77 (O'Connor, J., concurring); see also Lillard et al., *supra* note 16, at 129 (unlike Michigan's undergraduate admissions program, the law school engaged in "individualized, quite non-standardized, quite subjective, and very non-quantitative" decisionmaking); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 74 (2003) (hypothesizing that fixed point values for race in undergraduate admissions process "sends a message" encouraging members of racial minorities to feel entitled to a set bonus).

74. *Grutter*, 539 U.S. at 337.

75. *Gratz*, 539 U.S. at 272.

76. *Grutter*, 539 U.S. at 341; see also *Smith v. Univ. of Wash.*, 392 F.3d 367, 371 (9th Cir. 2004) (upholding as narrowly tailored the law school's consideration of a variety of forms of diversity that resulted in the admission of "whites scoring at or below every index score level from which minorities were admitted").

77. See *Grutter*, 539 U.S. at 338 (stating that the law school considers each candidate's ability to contribute to the diversity of the school through his or her own unique characteristics and experiences).

Because *Grutter* makes clear that schools need not exhaust race-neutral alternatives before engaging in race-conscious action,⁷⁸ schools need not first resort to purely needs-based scholarships in their efforts to achieve student body diversity, as class-based approaches have already proven ineffective in achieving a racially diverse student body.⁷⁹ For these reasons, many schools now consider race when assessing candidates for certain merit-based financial aid.⁸⁰

Given that race-conscious financial aid policies adopting a “whole file” approach appear readily defensible, why might some schools prefer to retain race-exclusive scholarships to achieve a racially diverse student body?⁸¹ What does race-exclusivity add, other than increased litigation risk?

First, race-exclusive scholarships may be even more effective than race-conscious scholarships in communicating to prospective students of color the school's commitment to racial diversity and thus may be more successful in encouraging a racially diverse yield of enrolled students.⁸² Second, race-exclusive scholarships may be easier to implement than “whole file” reviews because they may not require the time and resources necessary to evaluate all of the possible ways each individual may contribute to the school's diversity.⁸³ Finally, private donors—who provide a sizable portion of scholarship funds—may place race-based restrictions on their gifts, thus creating a pool of student aid that would not necessarily exist unless available only for race-exclusive purposes.⁸⁴

78. See *id.* at 339 (finding that narrow tailoring requires good faith consideration, but not necessarily exhaustion, of race-neutral alternatives).

79. As William Bowen and Derek Bok point out: “While blacks and other minorities are much more likely than whites to come from poor families, they still make up a minority of all college-age Americans with low incomes.” BOWEN & BOK, *supra* note 53, at 47, 50-51 (“[T]he problem is not that poor but qualified candidates go undiscovered, but that there are simply very few of these candidates in the first place.”); Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452, 471 (1997) (concluding that class-based affirmative action is unlikely to achieve meaningful levels of racial diversity in educational institutions); Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241, 2248 (2000) (concluding that Boalt's class-based admissions program primarily benefited whites and Asian Americans and “did little to boost the representation of Blacks and Latinos”); Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472, 473 (1997) (reporting that “UCLA's class-based preferences had only mixed success in preserving racial diversity at the law school[,]” with the enrollment of African Americans and American Indians dropping by more than seventy percent from the levels achieved under race-based affirmative action).

80. See Thomson, *supra* note 29 (reporting that St. Louis University replaced its race-exclusive scholarship with a Martin Luther King scholarship available to students who demonstrate the potential for promoting Dr. King's dream of a “diverse but unified” America).

81. See U.S. GENERAL ACCOUNTING OFFICE, *supra* note 30, at *29 (reporting that a number of school administrators stated that they believed race-exclusive scholarships to be more effective in achieving their diversity goals than race-conscious programs).

82. *Id.* at *34 (reporting that some school leaders believe that race-exclusive scholarships add credibility to their stated commitment to diversity).

83. See *Gratz*, 539 U.S. at 275 (describing University of Michigan's undergraduate school's contention that the law school's “whole file” approach was too burdensome to implement when assessing larger numbers of applicants); Spann, *supra* note 70, at 226 (suggesting that “the Court's insistence on holistic considerations of admissions files may increase the administrative burden imposed on admissions offices enough to reduce the amount of affirmative action that schools can afford to undertake”).

84. See U.S. GENERAL ACCOUNTING OFFICE, *supra* note 30, at *5 (concluding that nearly three-fifths of

Are any of these justifications—alone or in combination—likely to enable race-exclusive scholarships to survive narrow tailoring analysis?

On one hand, race-exclusive scholarships may run afoul of *Grutter*'s ban on quotas. *Grutter* defined an impermissible quota as "a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.'"⁸⁵ Race-exclusive scholarships intended to achieve a diverse student body may be characterized as quotas because they represent some percentage of scholarship money that is reserved for students of color.

The response, of course, points out that race-exclusive scholarships generally represent a small proportion of total scholarship money, most of which is available to white students as well: if the amount of race-conscious aid "represents only a fraction of the total aid available to all students," then any burden on nonminorities may be seen as too "small and diffuse" to frustrate equal protection principles.⁸⁶ The General Accounting Office's 1994 survey found that race-targeted scholarships comprised only about five percent of all undergraduate and graduate school scholarships and scholarship dollars.⁸⁷ Race-conscious scholarships represented a somewhat larger proportion of grants at professional schools: fourteen percent of professional school scholarship dollars—including nearly one-third of all scholarship dollars at public law schools—were race-targeted.⁸⁸

But recall that the Court struck down the University of California at Davis' reservation of sixteen medical school seats for minorities even though Allen Bakke and other white applicants could still compete for the great majority (eighty-four percent) of all slots.⁸⁹ Similarly, in *Croson*, the Court invalidated Richmond's set-aside for minority contractors even though white contractors could still compete for the bulk (seventy percent) of city contracts.⁹⁰ Automatically excluding nonminorities from consideration for a specific opportunity—even if many other opportunities remain open to them—seems to be the equal protection injury that most troubles the Court.⁹¹

Schools may also argue that funds distributed pursuant to private donors' race-based preferences should not run afoul of narrow tailoring analysis because those funds might not be available unless reserved for race-exclusive purposes.⁹² For state action

minority-targeted scholarships at undergraduate schools are funded by private endowments); Ryan O'Quinn, *Pepperdine Maintains Has Right to Offer Minority Scholarship*, Malibu Times, Jan. 28, 2004 (describing privately funded scholarships at Pepperdine where donors insisted on race-exclusivity).

85. *Grutter*, 539 U.S. at 335 (quoting *Croson*, 488 U.S. at 496).

86. COLEMAN ET AL., *supra* note 59, at 48; *see also* Spector, *supra* note 57, at 330 ("Minority scholarship programs do not unduly harm nonminorities because they do not bar them from attending college or university. Many alternative financial aid programs exist which are not restricted to minority students.").

87. U.S. GENERAL ACCOUNTING OFFICE, *supra* note 30, at *7.

88. *Id.* at *17.

89. *Bakke*, 438 U.S. at 289 (finding that the University did not meet its burden of showing that its race-based admissions program was narrowly tailored).

90. *Croson*, 488 U.S. at 493.

91. *See id.* at 493-95 (discussing the Court's objection to programs that "deny certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race").

92. *See* Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756, 8763 (Feb. 23, 1994) (suggesting that some private donors wish to support only race-exclusive scholarships and thus add to the total pool of financial aid that would otherwise be available).

purposes, however, donors' race-based restrictions may well be attributed to a public school that administers the privately-funded grant, thus triggering the same strict scrutiny accorded any governmental action based on race.⁹³ Even absent a finding of state action, race-based grants administered by private donors are subject to 42 U.S.C. § 1981 and its prohibition on racial discrimination in the making and enforcement of contracts; indeed, in *Gratz* the Court found that Michigan's undergraduate admissions program violated section 1981, as well as Title VI and the Equal Protection Clause.⁹⁴

Race-exclusive scholarships designed to facilitate student body diversity may also be vulnerable under narrow tailoring analysis because they do not allow for individualized consideration of every admitted student: some candidates are not eligible to be considered for certain scholarships because of their race. Again, the fundamental equal protection offense identified by the Court appears to be the race-based exclusion from consideration for any significant opportunity.⁹⁵

But whether an opportunity is "significant" for these purposes is not always clear. On one hand, almost any amount of scholarship money might be considered a significant opportunity, because the difference between a grant and a loan—let alone the difference between aid and no aid—may affect an individual's decision about whether and where to attend school.⁹⁶ Post-graduation career choices and other life decisions may similarly be affected by a student's debt load.⁹⁷

On the other hand, the opportunity to tap into a particular scholarship fund can be distinguished from the opportunity to attend a particular school. As the U.S. Department of Education concluded, unlike admissions decisions, "[t]he use of race-targeted financial aid . . . does not, in and of itself, dictate that a student would be foreclosed from attending a college solely on the basis of race."⁹⁸ Indeed, the courts

93. See *Pennsylvania v. Bd. of Dir. of City Trusts*, 353 U.S. 230, 231 (1957) (finding state agency that denied black applicants' admission to a school pursuant to private donor's race-based restriction engaged in state action prohibited by equal protection clause); *In re Certain Scholarship Funds*, 575 A.2d 1325, 1327 (N.H. 1990) (public school's participation in administering trusts that discriminated on the basis of religion and gender constituted impermissible state action); but see B. Andrew Bednark, Note, *Preferential Treatment: The Varying Constitutionality of Private Scholarship Preferences at Public Universities*, 85 MINN. L. REV. 1391, 1394 (2001) (advocating that public universities should be able to administer privately-funded scholarships that include race-exclusive restrictions without triggering state action analysis).

94. *Gratz*, 539 U.S. at 275-76.

95. See *Bakke*, 438 U.S. at 318 n.52 (opinion of Powell, J.) ("The denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program.").

96. JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS, *supra* note 44, at 22 (noting that "[s]cholarships and other forms of financial aid . . . may determine whether an individual can attend the university.").

97. See *Clark*, *supra* note 52, at 53 (describing student decisions to attend certain undergraduate schools based on whether they could graduate debt-free and thus be in a better position to then choose to attend graduate school); *Kennedy*, *supra* note 62, at 790 (discussing the impact of finite scholarship resources on student admissions); but see Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 915-16 (1995) (concluding that potential salary, rather than debt load, is a primary factor influencing law students' career decisions).

98. Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964, 59 Fed. Reg. 8756, 8762 (Feb. 23, 1994); see also *Spector*, *supra* note 57, at 328 (distinguishing race-based financial

have recognized that not all opportunities are equally significant—and not all burdens thus equally undue—for equal protection purposes. The Supreme Court, for example, noted that adverse hiring decisions inflict lesser burdens than do lay-offs, explaining that such hiring decisions “impose a diffuse burden, often foreclosing only one of several opportunities.”⁹⁹ Similarly, the First Circuit found that the denial of a transfer within a school district is “markedly different from the denial of a spot at a unique or selective educational institution;” this “diminished” burden contributed to the panel’s willingness to find that the district’s race-based transfer plan was narrowly tailored.¹⁰⁰

Grutter’s embrace of an instrumental rationale for affirmative action may add a new wrinkle to this debate. Because forward-looking justifications acknowledge the benefits, as well as any costs, of racial diversity, they may temper the role of “undue burden” as a barrier to a finding of narrow tailoring. Recall that in holding that race-based solutions to societal discrimination unacceptably burdened innocent nonminorities, the Court failed to consider any countervailing benefits from the government’s commitment to remedial racial justice, nor did it attempt to assess the costs of *failing* to address societal discrimination.¹⁰¹ But the instrumental rationale recognized in *Grutter* may create opportunities for addressing this omission by embracing diversity’s educational value to all—white students as well as students of color. Whether any burden borne by whites is undue should thus only be assessed after balancing race-conscious decisionmaking’s gains as well as its costs. While a white student may experience some disadvantage if unable to compete for a race-exclusive scholarship, that burden may be outweighed by the benefits—to students of all races as well as the government institution and thus society at large—of attending an institution that delivers a more valuable educational experience precisely because of the increased racial diversity facilitated by such scholarships.¹⁰²

aid programs as having only minimal adverse consequences for nonminorities as compared to race-based admissions decisions that may deny matriculation altogether).

99. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-83 (1986) (plurality opinion) (discussing how the denial of a future employment opportunity is less of a burden than losing one’s current job).

100. *Comfort v. Lynn Sch. Comm.*, 2005 WL 1404464, at *16 (1st Cir. June 16, 2005) (en banc).

101. See *supra* note 10 and accompanying text for discussion of the Supreme Court’s previous focus on burden of remedial programs.

102. See, e.g., Brief for Sixty-Five Leading American Businesses as Amici Curiae Supporting Respondents at 5-7, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516) [hereinafter Brief for Sixty-Five Leading American Businesses] (explaining that success in today’s increasingly diverse economy requires education in a racially diverse environment); Sanford J. Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 575 (2000) (noting white students suffer harm by attending a nondiverse institution). Although this argument presents opportunities for affirmative action programs’ successful defense, Derrick Bell has written forcefully of the dangers of what he calls “Interest-Convergence,” where courts uphold affirmative action plans “that minimize[] the importance of race while offering maximum protection to whites and those aspects of society with which [the Court] identifies,” cautioning that “blacks and Hispanics are the fortuitous beneficiaries of a ruling motivated by other interests [e.g., the interests of elites like employers, schools, and the military, rather than the interests of people of color] that can and likely will change when different priorities assert themselves.” Bell, *Diversity’s Distractions*, *supra* note 17, at 1625; see also Jack Greenberg, *Diversity, the University, and the World Outside*, 103 COLUM. L. REV. 1610, 1615-16 (2003) (finding irony in arguments supporting affirmative action on grounds that racial diversity contributes to learning because they suggest “that admitting blacks is good because it helps whites”).

In sum, *Grutter* expands some avenues for race-conscious financial aid strategies, while narrowing others. In particular, governments may rely on more generalized factual predicates to support forward-looking rationales for race-conscious decisionmaking. An embrace of instrumental justifications may also help reshape the courts' understanding of undue burden to include an assessment of diversity's countervailing benefits, again increasing the possibility that affirmative action programs can survive strict scrutiny.

And while schools can confidently implement a "whole file" approach to race-conscious financial aid, those defending race-exclusive approaches face formidable obstacles in showing that such approaches are narrowly tailored in a particular context. These barriers are not necessarily insurmountable, however, as is the case with race-exclusive remedies for government's own discrimination.¹⁰³ Virginia, for example, recently authorized a new scholarship program available to students who were locked out of public schools during the state's "massive resistance" campaign against desegregation in the 1950s and 1960s when it chose to close four public school systems rather than integrate them.¹⁰⁴ When such discrimination targets African-Americans exclusively, equally race-exclusive remedies are appropriate.¹⁰⁵

Race-exclusive approaches may also remain necessary to achieve other compelling objectives, such as capturing the educational benefits of students' reduced racial isolation and increased interracial contact. The First Circuit recognized this possibility when it upheld a school district's transfer policy driven largely by "the requesting student's race and the racial makeup of the transferor and transferee schools."¹⁰⁶ Because the policy sought to reduce the burdens suffered by students experiencing racial isolation, the en banc panel found that the benefits of racial integration could be achieved only by relying on race in voluntary student transfer requests.¹⁰⁷

Similarly, race-exclusive scholarships may provide the only means for achieving any meaningful measure of racial diversity for schools facing unusual challenges in attracting students of color, especially small institutions and/or institutions in communities with few minorities.¹⁰⁸ The Department of Education's Office of Civil

103. See, e.g., *United States v. Paradise*, 480 U.S. 149, 185-86 (1987) (upholding as permissible under the equal protection clause a remedial court decree requiring fifty percent of Alabama state police promotions to go to African Americans until approximately twenty-five percent of rank was comprised of African American troopers); Sean M. Scott, *Justice Redefined: Minority-Targeted Scholarships and the Struggle Against Racial Oppression*, 62 UMKC L. REV. 651, 661 (1994) (arguing that minority-targeted scholarships are a small but important step towards remedying racial discrimination).

104. Sandhya Somashekhar, *Va. Scholarships Aim to Aton for Abuses During Desegregation*, WASH. POST, June 21, 2005, at A3.

105. Although motivated by animus against African Americans, Virginia's actions also disadvantaged some white students who were locked out of their local public schools as a result of the racially-motivated closures. *Id.* Thus, the scholarship program as proposed would apparently also be available to white Virginians who moved or dropped out when their local public schools were closed. *Id.*

106. *Comfort*, 2005 WL 1404464, at *6.

107. See *id.* at *16-17.

108. See, e.g., Spector, *supra* note 57, at 340 (arguing that because the University of Iowa must recruit students from other states in order to achieve sizeable minority enrollment, the school must provide financial assistance to minority students to attract them to a school where they will pay higher out-of-state tuition and

Rights (“OCR”) recognized this in its 1997 resolution of a Title VI complaint, concluding that Florida Atlantic University’s scholarships targeted exclusively to African-Americans were narrowly tailored to achieve its interest in a diverse student body.¹⁰⁹ While OCR advised the University that race-conscious (rather than race-exclusive) measures rested on even stronger legal grounds,¹¹⁰ it found that the school’s targeted scholarships were justified in light of evidence that earlier non-race-exclusive efforts had proved effective in recruiting white, Latino, and Asian/Pacific Islander students, but less successful in recruiting black students.¹¹¹ To be sure, schools should tread especially carefully when considering race-exclusive scholarships in light of the Court’s clear preference for an “inclusive” understanding of diversity.

II. FARTHER AFIELD: RACE-CONSCIOUS EMPLOYMENT DECISIONS

Next, what does *Grutter*’s acceptance of a forward-looking justification mean for other government decisionmakers’ ability to consider race when making very different decisions? The Ninth Circuit found *Grutter*’s extension from university admissions to high school assignment decisions an easy reach: “We simply do not see how the government’s interest in providing for diverse interactions among 18 year-old high school seniors is substantially less compelling than ensuring such interactions among 18 year-old college freshmen.”¹¹² The First Circuit reached the same conclusion in upholding a school district’s race-conscious transfer policy,¹¹³ when it found the compelling educational benefits of a racially diverse student body to include not only “breaking down racial barriers, promoting cross-racial understanding, and preparing students” for a racially diverse society, but also reducing students’ racial isolation that may impose “psychological burdens that can lead to poor attendance and academic woes.”¹¹⁴

But *Grutter* noted the benefits of diversity outside the educational context as well: “American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”¹¹⁵ The Court’s acknowledgment of employers’ interest in a workforce educated in a racially diverse environment suggests that the decision may carry implications for government employment decisions.¹¹⁶

To be sure, the employers’ briefs in the University of Michigan cases focused primarily on their need for workers *educated* in a racially diverse environment, and

may “fear a racially hostile environment”).

109. Letter from U.S. Dep’t of Educ., Office for Civil Rights, Region IV, to Dr. Anthony J. Catanese, President, Fla. Atlantic Univ. (Feb. 21, 1997) (on file with author) (regarding resolution of complaint #04-90-2067).

110. *Id.* at 1.

111. *Id.* at 4 & n.6.

112. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 377 F.3d 949, 964 (9th Cir. 2004).

113. *Comfort v. Lynn Sch. Comm.*, 2005 WL 1404464, at *1, *18 (1st Cir. June 16, 2005) (en banc).

114. *Id.* at *12.

115. *Grutter v. Bollinger*, 539 U.S. 406, 330 (2003).

116. *See, e.g., id.* at 348 (Scalia, J., dissenting) (expressing concern that the *Grutter* majority’s rationale for diversity was so broad as to support its extension to employment, as well as educational, decisions).

thus better prepared for a racially diverse workplace and society.¹¹⁷ But some went further, also asserting an interest in a workforce that is *itself* racially diverse.¹¹⁸ A variety of instrumental rationales have been offered in support of this distinct interest, some promising and others troubling.

A. Rationales for Racially Diverse Workforces: Improved Problem-Solving

The justification most commonly proffered for a racially diverse workforce simply mirrors that made by schools: just as the exchange of viewpoints in an educational setting is enriched by diverse perspectives, so too is the circulation of ideas in the workplace. Just as the *Grutter* Court was persuaded that diversity fosters classroom discussion that “is livelier, more spirited, and simply more enlightening and interesting,”¹¹⁹ diversity may similarly enhance workplace dialogue and debate. Indeed, a growing body of evidence indicates that racially diverse groups make better decisions than racially homogenous groups because they are informed by a greater array of perspectives.¹²⁰

This rationale may resonate most powerfully for employers that prefer decisions fully informed by a free flow of perspectives to decisions made quickly and efficiently. While heterogeneous groups may be more creative, some evidence suggests that they may also experience conflict, tension, and greater transition costs as diverse individuals take time to build comfort with each other.¹²¹ Perhaps this particular justification is thus most persuasive when articulated by employers that can show that they truly value

117. Brief for Sixty-Five Leading American Businesses, *supra* note 102, at 2, 7 (arguing in support of diversity in higher education as crucial preparatory exposure that increases likelihood of students' workplace success); Brief for General Motors Corporation as Amici Curiae Supporting Respondents at 2, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516) [hereinafter Brief for General Motors] (arguing that only a workforce educated in a racially diverse environment can “maintain America’s competitiveness” in an increasingly diverse and interconnected world economy); *but see* Larry Alexander & Maimon Schwarzschild, *Grutter or Otherwise: Racial Preferences and Higher Education*, 21 CONST. COMMENT 3, 5 n.9 (2004) (arguing that corporate support for affirmative action “should carry little or no weight,” because corporations are simply responding to activists’ pressure, advancing personal rather than business agendas, and/or attempting to undermine smaller employers).

118. *E.g.*, Brief for General Motors, *supra* note 117, at 23-24 (citing numerous benefits to corporations “of having a significant number of people of color and varying ethnicities in their upper ranks”).

119. *Grutter*, 539 U.S. at 330 (internal quotations omitted).

120. *See* Brief for General Motors, *supra* note 117, at 24 (surveying evidence that “heterogeneous work teams create better and more innovative products and ideas than homogenous teams,” which tend to suffer from “group think”); Fairfax, *supra* note 10, at 832 (concluding that “both the quality of their [heterogeneous groups’] analysis and the quality of their ultimate decision are likely to be superior to homogeneous groups”).

121. *See* Fairfax, *supra* note 10, at 834 (describing studies concluding that “diverse groups not only experience more communication problems, but also tend to report higher levels of anxiety and frustration with their workgroup”). Of course, educational diversity may ameliorate this dynamic by helping students develop the ability to build trust and comfort with a wide range of people in advance of their entry into a diverse workplace. *See Grutter*, 539 U.S. at 330-31 (citing reports and studies highlighting the advantages of diversity in promoting “learning outcomes” and better preparing students for the workforce); Brief for General Motors, *supra* note 117, at 12-13, 15-16 (stating that diverse educational institutions provide great opportunities for students to acquire the skills necessary to perform major tasks in the workplace).

exchanges enhanced by diverse perspectives¹²²—as is likely the case, for example, for a public university’s faculty hiring decisions.¹²³

B. Rationales for Racially Diverse Workforces: Race-Matching¹²⁴ Workers to Customers and/or Co-Workers

Many also contend that a racially diverse workforce (distinct from a workforce educated in a racially diverse environment) is valuable because it ensures the availability of minorities who are seen as necessary to appeal to or work with a racially diverse consumer base or workforce.¹²⁵ Under this rationale, for example, an employer would be justified in hiring Latinos based on its belief that Latino customers are more comfortable with fellow Latinos and/or that Latino workers better understand the tastes of a Latino consumer base.

However benignly-motivated, this rationale invites a return to long-discredited “customer preference” defenses where employers sought to justify discriminatory choices as necessary to accommodate the prejudiced tastes of others.¹²⁶ As Cass Sunstein has observed, market pressures like customer preference “do not check discrimination but instead increase the likelihood that it will continue.”¹²⁷ Indeed, this approach only indulges the sort of stereotypes that antidiscrimination principles seek to counter—i.e., stereotypes that members of the same race belong together, work better

122. See Cynthia Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 84 (2000) (commenting that diverse perspectives are less likely to enhance work product in “jobs that primarily involve the application of technical skills or physical abilities”); Lillard et al., *supra* note 16, at 132 (suggesting that this rationale might be limited to employment settings structured for the free exchange of ideas); Wilkins, *supra* note 10, at 1587-89 (suggesting that law firms and other employers do not necessarily welcome diverse or challenging opinions).

123. The judiciary may offer another example of an institution that thrives on diverse approaches and perspectives. See Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 410-11 (2000) (maintaining that racial diversity improves judicial decisionmaking by including traditionally excluded perspectives and ensuring that judicial decisions are not dominated by a single set of approaches); Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5, 26 (2005) (suggesting that racial diversity improves judges’ decision-making processes as they interact with colleagues in chambers and on appellate panels).

124. See Wilkins, *supra* note 10, at 1594-96 (describing employers’ “race-matching” strategies).

125. See, e.g., Brief for Sixty-Five Leading American Businesses, *supra* note 102, at 7 (asserting that racially diverse, culturally aware managers are desirable and effective representatives for national and international businesses); BOWEN & BOK, *supra* note 53, at 12 (“[A] diverse corporate leadership can be valuable both to understand the markets in which many companies sell and to recruit, manage, and motivate the workforce on which corporate performance ultimately depends.”).

126. See, e.g., *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 474 (11th Cir. 1999) (finding that private employer’s race-matched assignment of black telemarketers to black homes was based on a racial stereotype and could not be considered an “affirmative action” exception under Title VII); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981) (rejecting private employer’s claim that its refusal to promote female plaintiff was justified under Title VII because of its belief that its Latin American customers would not do business with a woman); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388-89 (5th Cir. 1971) (rejecting, under Title VII, private employer’s attempt to justify its policy of hiring only women as flight attendants based on customer surveys showing that passengers preferred female flight attendants).

127. Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2415 (1994); see also Frymer & Skrentny, *supra* note 5, at 712-13 (discussing various employers’ discriminatory race-matching strategies).

together, and are “especially good at certain tasks.”¹²⁸ As David Wilkins has explained, this rationale thus invites tracking or steering workers of color into narrowly defined roles—for example, in law firms where lawyers of color may be typecast for certain assignments (such as employment defense litigation, municipal bond practice, or service on their firms’ “diversity committees”) regardless of their interests or expertise.¹²⁹

Moreover, this particular defense of diversity invites parallel race-matching when the relevant consumer base or workforce is predominantly white. Recently, for example, Abercrombie and Fitch settled a large class action lawsuit¹³⁰ where the plaintiffs alleged that Abercrombie expressly preferred whites and rejected minority job applicants pursuant to its requirement that employees exhibit the “A&F Look,” a “virtually all-white image that Abercrombie uses not only to market its clothing, but also to implement its discriminatory employment policies.”¹³¹ Similarly, a suburban Philadelphia hospital assigned only white health care personnel to a female patient after her husband requested that no African-American employees assist in her delivery,¹³² and African-American drivers alleged that UPS assigned them to less desirable routes in minority neighborhoods based on their race.¹³³

Racial equality requires that employers screen directly for the skill they purport to seek in individual applicants—e.g., the ability to manage diverse groups or the ability to anticipate the needs of a diverse consumer base—rather than assume race to be an acceptable proxy¹³⁴ for these talents and skills.¹³⁵ Relying on such proxies engenders

128. See Frymer & Skrentny, *supra* note 5, at 722 (noting the potential benefits and burdens of instrumental affirmative action).

129. Wilkins, *supra* note 10, at 1594-96; see also Frymer & Skrentny, *supra* note 5, at 708-13 (noting that stereotyping job roles on account of race perpetuates employers’ racial perceptions and impedes minorities from competing for certain jobs).

130. Jenny Strasburg, *Abercrombie to Pay \$50 Million in Bias Suits*, S.F. CHRON., Nov. 10, 2004, at C1.

131. Third Amended Class Action Complaint at 1-2, *Gonzalez v. Abercrombie & Fitch Stores*, No. 03-2817 (N.D. Cal. June 10, 2004).

132. *Philadelphia Hospital Apologizes for Racial Incident*, JET, Oct. 20, 2003, at 16.

133. Anastasia Hendrix & Zachary Coile, *Blacks Charge Racial Bias at UPS*, S.F. EXAMINER, May 1, 1997, at A6.

134. Deborah Hellman has described “proxy” discrimination as that where race or sex “is used as a proxy for another trait,” while “non-proxy” discrimination values race and/or sex in and of themselves, rather than as “stand-ins” for other traits. Deborah Hellman, *Two Types of Discrimination: The Familiar and the Forgotten*, 86 CAL. L. REV. 315, 316 (1998). For example, she would characterize President Clinton’s interest in a Cabinet that “looks like America” as an example of proxy classification if he sought to use race as a screen for diversity of viewpoint and/or experience; she would characterize such a goal as a non-proxy classification if instead Clinton sought racial diversity to “promote the appearance of inclusiveness, an important goal for the President to seek.” *Id.* at 321.

135. See Estlund, *supra* note 122, at 83 (arguing that for more individualized employment decisions, it is more possible and sensible “to make individualized inquiries into the actual experiences and attitudes of the applicant, rather than to use the proxy of racial identification”); Sunstein, *supra* note 127, at 2416 (describing race and gender as “so highly visible and thus so cheaply used as [proxies] for other things. Different characteristics—for example, educational attainment—might be more accurate as proxies but less efficient to use because the cost of gaining accurate information is higher.”); see also *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311 (1978) (Powell, J.) (rejecting medical school’s asserted interest in race-based admissions to increase the number of doctors committed to serving underrepresented communities as unsubstantiated and suggesting that schools could more effectively identify those likely to serve disadvantaged communities by

workplace separation and exclusion by pigeonholing persons of color into narrowly defined roles while insulating certain attractive job opportunities for white candidates.¹³⁶ Moreover, race can be a poor indicator of such qualities, not only thwarting equal opportunity, but also grooming candidates for failure and undermining the employer's ultimate goals.¹³⁷

Such race-matching not only facilitates consciously discriminatory decisions, it also reinforces unconscious bias, as revealed by a developing body of cognitive psychology literature that sheds further light on the power of stereotypes. According to this research, individuals of all races often unconsciously use stereotypes as cognitive short-cuts to make sense of an information-laden world by placing newly-encountered items into previously-created categories with ascribed meanings.¹³⁸ Just as we put foods encountered in the grocery store aisle into mental categories, like "fruit," "vegetable," and "meat"—attaching meaning to those categorizations that affect our decisions about what and how much to buy—so too do we automatically sort people into categories, including racial categories linked to meanings that often shape our interactions with those individuals. For example, one study reported that resumes randomly assigned with white-signaling names (like "Emily" or "Greg") generated higher callback rates from employers than equally qualified resumes with assigned African-American-signaling names (like "Jamal" or "Lakisha").¹³⁹ Another study found that video game players of all races who "were instructed to decide as quickly as possible whether to shoot" a given target "were more likely to mistake a Black target as armed when he in fact was unarmed" and "to mistake a White target as unarmed when he in fact was armed."¹⁴⁰ Similarly, computer users exposed to subliminal flashes of a black face before a computer crash responded to the crash with greater hostility than

assessing applicants' demonstrated commitment and interest).

136. Sunstein, *supra* note 127, at 2416.

137. See Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1647 (2004) (questioning whether minorities are well-positioned to groom other minorities for corporate success: "The types of racial minorities most likely to succeed may not be the ones most likely to perform door-opening activities for other minorities."); Hellman, *supra* note 134, at 322-23 (describing how the factual predicate for such generalizations may be inaccurate, thus excluding non-minorities who possess the desired trait while including minorities who do not).

138. See, e.g., Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 733 (1995) (describing stereotypes as "well-learned internal associations about social groups that are governed by automatic cognitive processes"); Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1110-11 (2004) (describing cognitive short cuts and their behavioral and legal consequences); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1499 (2005) (summarizing recent social cognition research and concluding that most persons automatically sort other persons into racial categories and assign racial scripts to those categories).

139. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* 2-3 (Mass. Inst. of Tech. Dep't of Econ. Working Paper Series, No. 03-22, 2003); see also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1165 (1995) (suggesting that many discriminatory employment decisions result not from conscious prejudice, but from unconscious judgments that are common features of cognitive categorization functions).

140. See Kang, *supra* note 138, at 1493 (summarizing Joshua Correll's social cognition study).

did users to whom white faces had been subliminally flashed.¹⁴¹ Using race as a proxy for characteristics that reinforce pre-existing racial scripts only encourages such implicit bias and its attendant behavioral consequences.

Paul Frymer and John Skrentny have expressed concern that *Grutter* invites a troubling reliance on customer preference and related race-matching rationales.¹⁴² Although I share their discomfort with these particular justifications for affirmative action, I read *Grutter* as taking care to avoid them. While the opinion cited with approval employers' contention that they need a workforce educated in a racially diverse environment,¹⁴³ the Court did not adopt arguments suggesting that employers also need a racially diverse workforce to match the race of clients or colleagues. This omission is perhaps not surprising, given the Court's earlier rejection of a race-matching "role model" rationale¹⁴⁴ for affirmative action in part because it might also be used to justify discrimination against historically excluded groups:

[B]ecause the role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices, it actually could be used to escape the obligation to remedy such practices by justifying the small percentage of black teachers by reference to the small percentage of black students. Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown*¹⁴⁵

Instead, *Grutter* suggested yet another possible rationale for diversity as valuable in and of itself—rather than as a proxy for some other quality—when it cited with apparent approval the conclusion that the military “must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting.”¹⁴⁶

141. See *id.* at 1491 (summarizing John Bargh's social cognition study).

142. See Frymer & Skrentny, *supra* note 5, at 680-82 (suggesting that the shift to instrumental rationales for affirmative action has distracted from America's unique historical and social-political justifications for affirmative action and instead focuses on race in uncritical biological terms).

143. *Grutter*, 539 U.S. at 330-31.

144. In *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274, 277 (1986) (plurality) (Powell, J.), a school board defended its race-conscious teacher layoffs as motivated by its interest “in providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination,” as well as by its interest in remedying its own past discrimination. *Wygant*, 476 U.S. at 274, 277.

145. *Id.* at 276 (internal citations omitted); see also *id.* at 288 n.* (O'Connor, J., concurring) (“The goal of providing ‘role models’ discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty.”). Although Justice O'Connor did not explain her understanding of the difference between the two rationales, the “role model” rationale apparently contends that black students will benefit from the presence of same-race teachers. *Id.* at 274. In contrast, the “faculty diversity” rationale appears to mirror the “student body diversity” rationale accepted in *Grutter*. With that understanding, a “faculty diversity” rationale does not promote race-matching but instead suggests that the faculty—and/or the student body—as a whole will benefit from the exchange of diverse perspectives that is enhanced by racial diversity.

146. *Grutter*, 539 U.S. at 331 (quoting Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents at 14, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241)).

C. *Rationales for Racially Diverse Workplaces: Enhancing Institutional Legitimacy and Effectiveness*

A group of high-ranking retired military officers and civilian leaders filed a brief in the University of Michigan cases that described their experiences from the 1960s and 1970s, when “an overwhelmingly white officer corps” commanded racially diverse enlisted ranks.¹⁴⁷ The brief characterized this dynamic as creating racial tensions so great as to “undermine[] military effectiveness,”¹⁴⁸ triggering pervasive perceptions of discrimination, lack of trust, low morale, heightened racial polarization and tension, widespread disciplinary problems, and racially motivated incidents.¹⁴⁹ The leaders asserted that, “[b]ased on our decades of experience,” a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principal mission to provide national security.”¹⁵⁰

The military leaders concluded that “[t]he absence of minority officers seriously threatened the military’s ability to function effectively and fulfill its mission to defend the nation,” leaving it “on the verge of self-destruction.”¹⁵¹ They identified the underlying cause of these tensions as follows:

In the 1960s and 1970s, the stark disparity between the racial composition of the rank and file and that of the officer corps fueled a breakdown of order that endangered the military’s ability to fulfill its mission. That threat was so dangerous and unacceptable that it resulted in immediate and dramatic changes intended to restore minority enlisted ranks’ confidence in the fairness and integrity of the institution. In a highly diverse society, the public, including minority citizens, must have confidence in the integrity of public institutions, particularly those educational institutions that provide the training, education and status necessary to achieve prosperity and power in America.¹⁵²

But why, more precisely, did this dynamic play out so as to undermine the military’s effectiveness? The brief explained that African-American enlisted personnel who observed no African-Americans in leadership positions concluded that the military had no respect for African-American contributions nor any commitment to African-Americans’ successful military careers, and thus lost confidence in the military as an institution.¹⁵³ The further, unstated, premise seems to be that an all-white leadership presiding over a racially diverse community will be seen as mirroring the race-based master-servant dynamic too often played out in this country.¹⁵⁴ A racially diverse staff may thus be less likely to trust and work with a leadership that appears to be

147. Brief of Lt. Gen. Julius Becton et al. as Amici Curiae Supporting Respondents, *supra* note 146, at 14.

148. *Id.*

149. *Id.* at 6.

150. *Id.* at 5.

151. *Id.* at 7.

152. Brief of Lt. Gen. Julius Becton et al. as Amici Curiae Supporting Respondents, *supra* note 146, at 28-29.

153. *Id.* at 16, n.5.

154. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 273 (1995) (Ginsburg, J., dissenting) (describing lingering effects of discrimination as “reflective of a system of racial caste only recently ended”).

maintaining a racial caste system,¹⁵⁵ thus frustrating that leadership's effectiveness.

Grutter itself noted the link between visible diversity and effective, legitimate government:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.¹⁵⁶

"Legitimacy" in this context may be understood as the belief "that an authority is the appropriate decision maker and should have discretionary power to make decisions for a community."¹⁵⁷ Jack Balkin has similarly described legitimacy in this context as including "sociological legitimacy – whether people believe that the system is sufficiently fair and just that they can support it."¹⁵⁸ Legitimacy thus measures individuals' trust in leaders' authority and their willingness to comply with those leaders' directives.¹⁵⁹ Under these terms, the more legitimate a government institution, the more trust and cooperation it engenders, and thus the more effective it becomes.¹⁶⁰ For this reason, a racially diverse leadership team may more effectively manage a racially diverse workforce than an all-white leadership corps—not because it is necessarily composed of more talented or experienced managers but because the team's visible diversity communicates a rejection of the racial caste systems that undermine institutional legitimacy.¹⁶¹

Moreover, repeating patterns that mirror a history of racial caste—with whites in positions of leadership exerting authority over persons of color—reinforces racial

155. When referring to a "caste system," I adopt Cass Sunstein's understanding of such a system as "a social status quo that, through historical and current practices, creates second-class status." Sunstein, *supra* note 127, at 2436. See also Sullivan, *supra* note 4, at 96 (noting that employers "might adopt affirmative action simply to eliminate from their operations all de facto embodiment of a system of racial caste").

156. 539 U.S. at 332.

157. Tom R. Tyler & Peter Degoey, *Collective Restraint in Social Dilemmas: Procedural Justice and Social Identification Effects on Support for Authorities*, 69 J. OF PERSONALITY AND SOC. PSYCH. 482, 482-83 (1995). Legitimacy in this context has also been described as "the dynamic relationship between the entitlement of one party to exercise authority and the obligation of another party to obey." Timothy Casey, *When Good Intentions are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1489 (2000) ("[L]egitimacy describes the authority of the [governmental entity] to make binding decisions, and the extent to which people adhere to the decisions of the [entity] or recognize [it] as a proper locus for decisional power.").

158. Jack M. Balkin, Plessy, Brown, and *Grutter: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1720 (2005) (noting that "[l]egitimacy comes from the appearance (if not the reality) that positions of leadership are open to different groups in society").

159. See Tyler & Degoey, *supra* note 157, at 483 (examining how authorities' actual or perceived legitimacy influences group members' decisions when facing social dilemmas).

160. See Brief for General Motors, *supra* note 117, at 23-24 (warning that a fixed corporate hierarchy dominated by whites may lead to racial divisiveness); BOWEN & BOK, *supra* note 53, at 12 (asserting that, in a "healthy" society, challenging leadership and career opportunities are available to all races); Post, *supra* note 73, at 61 (positing that authorities' legitimacy may require actual racial diversity among their leaders).

161. See, e.g., *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 696 (6th Cir. 1979) (reasoning that a racially diverse police force helps foster public support and confidence among a racially diverse community that in turn enhances effective law enforcement).

stereotypes along these lines.¹⁶² As discussed above, an emerging body of behavioral research reveals that common human cognitive functioning includes heavy reliance on stereotypes as mental shortcuts to organize and thus make sense of the world around us.¹⁶³ Selecting leaders whose racial identity challenges these racial scripts destabilizes those racial stereotypes, and thus may be a powerful antidote to unconscious bias held by individuals of all races.¹⁶⁴

Unlike the race-matching justifications discussed above, this legitimacy-enhancing rationale does not rely on race as a screen for some other quality.¹⁶⁵ A diverse officer corps that works with and on behalf of the institution as a whole represents a visible commitment to racial inclusion, rather than exclusion, for which there is no more direct proxy. Legitimacy-enhancing rationales can and should thus be distinguished from race-matching justifications: government has a compelling interest in a racially diverse workplace that counters the dynamics of a perceived racial caste, fostering its legitimacy and, ultimately, its success.

Government, on the other hand, does not have a compelling interest in reinforcing racial separation and exclusion by matching officers with other officers or communities of the same race. As Justice Stevens has observed:

The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle. . . . [C]onsideration of whether the consciousness of race is exclusionary or inclusionary plainly distinguishes . . . valid purpose[s] in this case from a race-conscious decision that would reinforce assumptions of inequality.¹⁶⁶

Race-based assignments of commanders to certain military units due to the racial preferences, real or perceived, of its personnel remain unjustifiable because they exclude individuals from certain duties or territories simply because of race-based

162. See, e.g., *Adarand*, 515 U.S. at 274 (Ginsburg, J., dissenting) (noting that unconscious, as well as conscious, bias sustains racial discrimination in society and impedes its correction).

163. See *Armour*, *supra* note 138 at 759-72 (urging explicit challenges to racial stereotypes and discriminatory tendencies as an antidote to implicit bias).

164. See *id.* (promoting immediate and overt acknowledgment of racial stereotypes as a method of combating them); Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 *UCLA L. REV.* 1241, 1279 (2002) (noting that awareness of “counterstereotypical exemplars” can erode the power of racial stereotypes).

165. Prior to *Grutter*, Cynthia Estlund suggested a related but distinct argument, contending that government may have a compelling interest in racially diverse workforces because such workplaces build qualities and experiences—including “the cultivation of empathy and understanding and friendship, the formation of social capital, and the promotion of communication among citizens across social cleavages”—that are valuable to a thriving democracy. Estlund, *supra* note 122, at 84. This rationale similarly values racial diversity in and of itself, rather than as a proxy for some other attribute, because of its value to all participants, and society, of a diverse workforce:

The integration argument does not use race as a proxy; it does not turn on any assumption that individuals necessarily exhibit cultural or other group differences or that those differences are necessarily more important or more valuable to the organization than other differences in background and experience. It turns on the sheer fact that group membership has been a source of division and hostility.

Id. at 83.

166. *Wygant*, 476 U.S. at 316-17 (Stevens, J., dissenting).

assumptions about individual skills and roles.¹⁶⁷ Indeed, assignments based on African-Americans' actual or assumed preference for other African-Americans encourage the same stereotypes as decisions catering to white troops' demands to be led by white officers. Officers and personnel of different races must work with—and learn to work with—each other.¹⁶⁸

D. Applying These Rationales for Racially Diverse Workforces to Other Contexts: Law Enforcement

Courts may well seek to limit the legitimacy-enhancing rationale to contexts like the military, which is of course a unique institution that tends to receive a great deal of deference.¹⁶⁹ But perhaps this rationale need not be so cabined.¹⁷⁰ Might this approach have any relevance for government employers outside the military?

In *Petit v. City of Chicago*,¹⁷¹ the Seventh Circuit found that it does.¹⁷² After discussing *Grutter*, including the Court's citation to the military experience, the panel held that "there is an even more compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city like Chicago."¹⁷³ The panel found that the city had adequately supported this interest through expert studies and testimony that minorities were frequently distrustful of predominantly white police forces and that the presence of minority sergeants encourages community trust.¹⁷⁴ According to the Seventh Circuit, greater numbers of minorities within the department build the public's perception of and willingness to cooperate with it, which in turn enhances the department's ability to prevent and solve crimes.¹⁷⁵ Indeed, the Kerner Commission reached a similar conclusion years earlier, finding that mostly white police departments foster perceptions among minority communities that they are "not being policed to maintain the civil peace but to maintain the status quo."¹⁷⁶

Even before *Grutter*, a number of courts acknowledged this interest with respect

167. See *Bridgeport Guardians, Inc. v. Delmonte*, 553 F. Supp. 601, 611 (D. Conn. 1983) (noting that a department's practice of matching officers by race to neighborhoods' racial composition is based on impermissible stereotypes that African Americans work better with other African Americans).

168. See Estlund, *supra* note 122, at 79-83 (discussing government interest in integrated workplaces where employees of different races learn from and with each other).

169. See *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) (noting great deference due congressional decisions regarding national security and military affairs and stressing courts' lack of competence in such matters).

170. See *Grutter*, 539 U.S. at 348 (Scalia, J., dissenting) (predicting rationale's extension to other contexts); Estlund, *supra* note 122, at 84-85 (noting that a similar rationale based on the government's interest in the democratic benefits of integrated workplaces is potentially applicable to any employer).

171. 352 F.3d 1111 (7th Cir. 2003).

172. *Petit*, 352 F.3d at 1111, 1114.

173. *Id.* at 1114.

174. *Id.* at 1115.

175. *Id.*

176. NAT'L ADVISORY COMM'N ON CIVIL DISORDER, REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, 165-66, 315 (1968); see also Lillard et al., *supra* note 16, at 140 ("If the people with guns are all white and they tend to use them against minority populations, we have a real democratic legitimacy problem or, at least in O'Connor's words, an appearance of a democratic legitimacy problem.").

to law enforcement agencies' employment decisions. For example, in *Wittmer v. Peters*,¹⁷⁷ the Seventh Circuit upheld race-based hiring by a prison warden using a boot camp approach to rehabilitating prisoners, "in which harsh regimentation, including drill-sergeant abuse by correctional officers, is used to break down and remold the character of the trainee."¹⁷⁸ The panel credited the testimony of experts in the field of prison administration that "[t]he black lieutenant is needed because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp."¹⁷⁹ The opinion did not explain why this might be so (nor did it question whether "brutalization" is an effective strategy for rehabilitation), but the answer seems apparent: an all-white officer corps "brutalizing" a predominantly black prison population is all too "reflective of a system of racial caste only recently ended."¹⁸⁰

Similarly, in *Talbert v. City of Richmond*,¹⁸¹ the Fourth Circuit upheld the Richmond Police Department's consideration of race as one factor among several in promoting a black officer over the white plaintiff.¹⁸² *Talbert* powerfully demonstrates how race may be properly included as one of several measures of merit in an employment context. Both candidates met the department's minimum qualifications for promotion, while the black officer had more relevant experience and the white officer had a higher test score (although the black officer had the same or higher test score than other white officers who had previously been promoted).¹⁸³ The police department also concluded that "appointing for the first time a qualified black officer to a top level policy-making position would benefit a city whose population was approximately 50% black."¹⁸⁴ Rather than imposing a quota or lowering standards, the police department considered both candidates' full range of qualifications, including race as one among several assessments of merit.¹⁸⁵ *Grutter* may add some support to this trend.

While these decisions lend weight to the notion that law enforcement has a compelling interest in enhancing its legitimacy through race-conscious leadership selections, these cases do not support officers' race-based assignment to certain neighborhoods based on residents' perceived or actual preference for officers of their own race.¹⁸⁶ Given our nation's history of racial discrimination, minorities who have experienced or observed poor treatment by whites in power may well prefer interactions with authority figures of their own race.¹⁸⁷ But those understandable

177. 87 F.3d 916 (7th Cir. 1996).

178. *Wittmer*, 87 F.3d at 917.

179. *Id.* at 920.

180. *Adarand*, 515 U.S. at 273 (Ginsburg, J., dissenting).

181. 648 F.2d 925 (4th Cir. 1981).

182. *Talbert*, 648 F.2d at 931-32.

183. *Id.* at 927-28.

184. *Id.* at 931-32.

185. *See id.* (noting that factors considered in decision to promote police officer included test scores and prior experience, along with race).

186. *See Bridgeport Guardians*, 553 F. Supp. at 611 (rejecting police assignments matching officer with neighborhood to be patrolled according to race).

187. *See, e.g.,* Gerald P. Lopez, Keynote Address, *Living and Lawyering Rebelliously*, 73 FORDHAM L.

concerns can and should be accommodated without engaging in race-matched assignments that only lock in exclusionary patterns. For example, as discussed above, a racially diverse leadership corps can facilitate trust and cooperation by visibly communicating a commitment to racial equality.¹⁸⁸ Moreover, emphasizing cross-cultural competence—enhanced by education and training in a racially diverse environment—as a measure of merit in hiring and promotion helps ensure that officers of all races engage their responsibility to serve a diverse community effectively.

On the other hand, a legitimacy-fostering rationale would not support the government's positive consideration of white racial status when hiring in a predominantly white community. Such use of race does not further an asserted interest in increased governmental legitimacy—and thus effectiveness—by eliminating perceptions of a racial caste system, simply because no racial caste system has historically denied whites access to positions of leadership.¹⁸⁹

E. Applying These Rationales for Racially Diverse Workforces to Other Contexts: Health Care

Decisionmaking in the health care context raises particularly thorny challenges, especially in light of the mounting evidence that “minority populations suffer greater health problems than nonminorities,” yet are much less likely to have access to quality health care.¹⁹⁰ What role, if any, should race-conscious decisionmaking involving health care personnel play in addressing these crises?

First, because cross-cultural competence—defined as “the knowledge, skills,

REV. 2041, 2045-46 (2005) (describing his experiences with Los Angeles law enforcement as a young Latino growing up in East Los Angeles); see also *Patrolmen's Benevolent Ass'n v. City of New York*, 74 F. Supp. 2d 321, 327-28 (S.D.N.Y. 1999) (stating that certain instrumental rationales for race-based decisionmaking by police departments can be established by showing law enforcement's past discrimination against African American citizens engendered hostility to the department that now undermines effective policing).

188. See, e.g., *Petit*, 352 F.3d at 1114-15 (reasoning that legitimacy-enhancing rationale supports pro-diversity promotion policies in Chicago police department).

189. See Estlund, *supra* note 122, at 80 (positing in related context that the integration rationale “cannot justify preferences that disfavor historically disadvantaged groups”); Hellman, *supra* note 134, at 361 (arguing for an “anti-caste principle” in affirmative action decisions that would allow policies benefiting traditionally disadvantaged groups); Sunstein, *supra* note 127, at 2433 (contending that a “castelike” system operates when traditional modes of discrimination manifest in present social and legal structures). *But see* Sullivan, *supra* note 4, at 98 (suggesting whites might have a claim for affirmative action when they themselves are victims of racial subordination—“as it is especially clear they are not when white-dominated governments, unions, or employers choose affirmative action”).

190. Brief for Association of American Medical Colleges et al. as Amici Curiae Supporting Respondents, at 6, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 398338 [hereinafter Brief of Amici Curiae Association of American Medical Colleges]; see also Jordan J. Cohen et al., *The Case for Diversity in the Health Care Workforce*, 21 HEALTH AFF. 90, 93 (2002) (contending that increased racial diversity among medical practitioners would benefit heterogeneous American society); Miriam Komaromy et al., *The Role of Black and Hispanic Physicians in Providing Health Care for Underserved Populations*, 334 NEW ENG. J. MED. 1305, 1307 (1996) (reporting that minority communities are more likely to suffer from shortage of doctors); Shankar Vedantam, *Racial Disparities Found in Pinpointing Mental Illness*, WASH. POST, June 28, 2005, at A1 (discussing a study revealing that “blacks in the United States were more than four times as likely to be diagnosed” with schizophrenia as whites, even though schizophrenia affects all racial groups at the same rate).

attitudes, and behavior required of a practitioner to provide optimal health care services to persons from a wide range of cultural backgrounds”¹⁹¹—is key to providing quality health care, exposure to a racially diverse environment helps providers acquire such competence.¹⁹² For this reason, medical schools have particularly strong grounds for admitting a racially diverse student body.¹⁹³ But because the process of attaining cross-cultural competence does not end with a diploma, this interest extends beyond medical schools to support employers’ race-conscious decisionmaking to achieve the diversity that contributes to a vibrant exchange of approaches to patient care.¹⁹⁴

Thornier, in my view, is the contention that race-conscious hiring of health care professionals is justified to accommodate the preferences of patients of color who feel more comfortable with same-race doctors.¹⁹⁵ Proponents of this approach point to data demonstrating that many minorities prefer,¹⁹⁶ and report more satisfactory interactions with,¹⁹⁷ same-race doctors. Furthermore, studies indicate that patient satisfaction correlates with positive health outcomes.¹⁹⁸

Again, these preferences may well be understandable for a variety of reasons, including our government’s legacy of discrimination. For example, one study found that African-American men reported a reluctance to participate in clinical trials based on their distrust of the government medical research establishment stemming from the Tuskegee syphilis experiment.¹⁹⁹ Other studies have confirmed that significant

191. Cohen et al., *supra* note 190, at 92.

192. *Id.*

193. *See, e.g.*, Brief of Amici Curiae Association of American Medical Colleges, *supra* note 190, at 14-18 (arguing racially diverse medical school student bodies help develop more effective clinicians and offer expanded perspectives for addressing health care management issues).

194. *See id.* (noting myriad benefits derived from diversity in medical profession); Cohen et al., *supra* note 190, at 94 (contending diversity of perspectives fostered by racial diversity will also facilitate broadened medical research agenda including attention to health care needs of minorities).

195. Brief of Amici Curiae Association of American Medical Colleges, *supra* note 190, at 12 (stating that certain patients’ satisfaction with treatment increases when doctor is of same race); Somnath Saha et al., *Do Patients Choose Physicians of Their Own Race?*, 19 HEALTH AFF. 76, 82 (2000) (suggesting medical schools “may justify the consideration of race in admissions as a means toward providing the physician workforce that health care consumers want”).

196. *See* Frederick Chen et al., *Patients’ Beliefs About Racism, Preferences for Physician Race, and Satisfaction with Care*, 3 ANNALS FAM. MED. 142 (“nearly one quarter of African Americans and one third of Latinos preferred that their personal physician was of their same race or ethnicity”); Saha, et al., *supra* note 195, at 80 (concluding minority health care consumers disproportionately choose minority health care providers).

197. *See* Chen et al., *supra* note 196, at 141-42 (reporting “association between patient preference, racial concordance, and patient satisfaction”); LISA COOPER & NEIL POWE, DISPARITIES IN PATIENT EXPERIENCES, HEALTH CARE PROCESSES, AND OUTCOMES: THE ROLE OF PATIENT-PROVIDER RACIAL, ETHNIC, AND LANGUAGE CONCORDANCE 4-8 (2004), available at http://www.cmwf.org/publications/publications_show.htm?doc_id=231670 (reporting patients in race-concordant relationships generally reported higher levels of satisfaction than patients in race-discordant relationships).

198. *See* Brief of Amici Curiae Association of American Medical Colleges, *supra* note 190, at 12 (citing research indicating patients who are more satisfied with their doctors are more likely to seek preventive care and to follow necessary treatment); *but see* COOPER & POWE, *supra* note 197, at 10 (noting limited evidence linking race-concordance with better health outcomes).

199. Nancy Stark et al., *Increasing Participation of Minorities in Cancer Clinical Trials: Summary of the ‘Moving Beyond the Barriers’ Conference in North Carolina*, 94 J. NAT’L MED. ASS’N 31, 35 (2002).

numbers of minority patients perceive racism in the health care setting.²⁰⁰

These concerns are substantial, as lives are at stake. But addressing them by indulging in race-matching threatens to revive the concept of customer preference as a defense to job discrimination. Recall, for example, the Pennsylvania hospital that made race-based job assignments in response to a white family's preference for same-race health care personnel.²⁰¹ The same studies demonstrating that many patients of color favor same-race doctors also found that significant numbers of minorities prefer *not* to have doctors of their own race,²⁰² perhaps reflecting ingrained racial stereotypes that would only be reinforced by accommodating such preferences.

Fortunately, other solutions remain available if we look to the root of patient concerns. First, emphasizing cross-cultural competence as a primary measure of merit in hiring and promotion decisions directly addresses minority patients' concern, and often their experience, that race-discordant doctors are not cross-culturally competent. Rather than assume that race or national origin is a perfect proxy for the presence or absence of such competence, we should directly value (and thus more accurately measure) that essential skill set—and do so without relieving white doctors of their responsibility to learn to serve all communities.²⁰³ Second, to the extent that minority patients' dissatisfaction with white doctors stems from real or perceived discrimination, the legitimacy-enhancing rationale would support race-conscious decisionmaking in selecting a visibly diverse leadership team to communicate a commitment to racial equality, thus assuaging concerns that disasters like Tuskegee will be repeated. Because doctors are often seen as community leaders, if not heroes, such diversity also helps explode stereotypes—held by patients of all races—about competence and authority.²⁰⁴

Also problematic is the argument that race-conscious hiring of health care professionals is justified because doctors of color are more likely to choose to practice in underserved communities.²⁰⁵ Again, addressing the shortage of doctors serving

200. See Chen et al., *supra* note 196, at 140 (finding African Americans who preferred African American doctors had especially strong beliefs about racial discrimination in health care); Rachel Johnson, et al., *Racial and Ethnic Differences in Patient Perceptions of Bias and Cultural Competence in Health Care*, 19 J. GEN. INTERNAL MED. 101, 106 (2004) (reporting minorities “are more likely to perceive bias and a lack of cultural competence in the health system overall than are whites”).

201. See *supra* note 132 and accompanying text.

202. Chen et al., *supra* note 196, at 140 (reporting thirteen percent of African Americans preferred a non-African American physician and nineteen percent of Latinos preferred a non-Latino doctor).

203. See, e.g., Saha et al., *supra* note 195, at 81 (stating that in ideal circumstance, all medical practitioners would possess cultural competency).

204. Ronald Chen and Jon Hanson remind us of the power of stereotypes in the medical field when they recount the following riddle: “A father and his son are out driving. They are involved in an accident. The father is killed, and the son is in critical condition. The son is rushed to the hospital and prepared for the operation. The doctor comes in, sees the patient, and exclaims, ‘I can’t operate, it’s my son!’” Chen & Hanson, *supra* note 138, at 1113-14. As the authors note, this riddle proved impossible to solve for many Americans in the 1970s (and perhaps thereafter), who were unable to imagine the possibility that the category of “doctor” could include a woman (much less a mother). *Id.*

205. See Komaromy et al., *supra* note 190, at 1308-09 (“Black and Hispanic physicians locate their practices in areas with higher proportions of residents from underserved minority groups. In addition, they care for higher proportions of patients of their own race or ethnic group and patients who are uninsured or are covered by Medicaid.”); Ernest Moy & Barbara Bartman, *Physician Race and Care of Minority and Medically*

communities of color is unquestionably imperative. But providers' commitment to such communities can and should be assessed directly, rather than assuming that such commitment perfectly correlates with race (although to be sure, screening for such a commitment will likely result in a racially diverse workforce because providers of color will often be able to articulate past endeavors or future plans that demonstrate their interest in serving communities of color). To do otherwise again threatens to segregate health care providers by race.²⁰⁶

In sum, *Grutter* supports race-conscious decisionmaking to achieve several compelling interests that would be advanced by a racially diverse health care workforce: facilitating providers' training in cross-cultural competence by enabling interactions among racially diverse colleagues, contributing to the exchange of diverse perspectives and approaches to improve patient care, and enhancing institutional legitimacy—and thus patient trust and satisfaction—by demonstrating a commitment to racial equality through diverse leadership. These rationales for racial diversity, however, can and should be parsed from race-matching strategies that may inadvertently perpetuate racial stereotypes.

F. *The Legitimacy-Enhancing Rationale: Some Limits*

Courts may be reluctant to extend a legitimacy-enhancing rationale beyond *Grutter's* higher education focus for fear that—once unleashed—forward-looking justifications cannot be constrained. Indeed, this particular ground for racial diversity may resonate most powerfully for government entities that depend on public trust and investment for their legitimacy, and thus their effectiveness. For example, the American Bar Association's amicus brief in *Grutter* suggested that such concerns extend to the legal profession itself, maintaining that fewer minority lawyers in an increasingly diverse nation “may foster a perception of illegitimacy of the legal system.”²⁰⁷ The ABA urged the Court to guard against perceptions that “cast doubt on the integrity of the judicial process,”²⁰⁸ noting that “public confidence in the courts depends upon avoiding the perception of unfairness that results from lack of participation.”²⁰⁹ To the extent that a particular governmental entity engages in limited public contact or interaction, arguments that that entity's visible diversity enhances its legitimacy—and thus its effectiveness—are considerably less persuasive.

This rationale's reach is also limited by attention to the evidentiary basis for the claimed forward-looking benefits. The requisite factual predicate helps sort rationales that challenge stereotypes from those that indulge them. Merely asserting, without

Indigent Patients, 273 J. AM. MED. ASS'N. 1515 (1995) (reporting results of study concluding nonwhite physicians are more likely to care for minority, medically indigent, and sicker patients).

206. Such assumptions may also create financial disadvantages for doctors of color steered or locked into certain practices. See Moy & Bartman, *supra* note 205, at 1515 (noting that nonwhite physicians who primarily treat less affluent patients may face capitation arrangements and other forms of financial penalty).

207. Brief of Amicus Curiae American Bar Association at 5, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

208. *Id.* at 14 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979)).

209. *Id.* at n.30; see also Johnson & Fuentes-Rohmer, *supra* note 123, at 6-7, 28-29 (arguing that a racially diverse judiciary is more likely to achieve judicial legitimacy in a heterogeneous society).

evidence, that diversity is instrumentally valuable in a given context is thus insufficient.²¹⁰

As Judge Posner took care to note when writing for the Seventh Circuit in *Wittmer*: “It is not enough to say that *of course* there should be some correspondence between the racial composition of a prison’s population and the racial composition of the staff; common sense is not enough; common sense undergirded the pernicious discrimination against blacks now universally regretted.”²¹¹ The panel thus required expert testimony or other specific evidence supporting the instrumental link between visible racial diversity in leadership and effective law enforcement.²¹² Similarly, the military leaders’ brief in *Grutter* presented their specific experience from the 1960s and 1970s, rather than relying on speculation or even “common sense.”²¹³

Applying this requirement, the Seventh Circuit rejected instrumental justifications for race-conscious promotions by the Chicago Fire Department absent evidence supporting the city’s contention that nondiverse firefighting teams would lack credibility and be denied cooperation in minority neighborhoods: “Racial discrimination cannot survive challenge without compelling evidence; even highly plausible speculation will not do.”²¹⁴

Narrow tailoring’s demanding requirements further restrain the reach of such instrumental rationales. For example, including race as a measure of merit that enhances a government employer’s effectiveness should be part of an individualized review, where each candidate is assessed as to his or her capacity to contribute to effective policing (or whatever governmental function is at issue). An individual’s ability to contribute to leadership’s racial diversity—with the attendant benefit of increased legitimacy—can be included as a positive factor in assessing that individual’s qualifications for the job. Recall, for instance, *Talbert v. City of Richmond*,²¹⁵ where the city considered both candidates’ full range of qualifications, including, but not limited to, their ability to contribute to the department’s racial diversity and thus its effectiveness in serving a diverse community.²¹⁶

210. But note that generalized, rather than institution-specific, evidence should be sufficient when demonstrating the instrumental benefits of racial diversity. See *supra* note 44 and accompanying text for a discussion of how the factual predicate required to support instrumental justifications may be relaxed compared to that required by the courts in remedial contexts.

211. *Wittmer*, 87 F.3d at 919 (7th Cir. 1996).

212. *Id.* For these reasons, the court distinguished the role model rationale for diversity due to its “lack of substantiation and a well-nigh unlimited reach.” *Id.* at 920.

213. See *supra* note 146 and accompanying text for a discussion of the specific experiences articulated by military leaders; see also *Comfort*, 2005 WL 1404464, at *11 (relying on expert testimony on the educational benefits of reducing students’ racial isolation); *Petit*, 352 F.3d at 1114-15 (relying on testimony linking racially diverse police departments to improved community trust and cooperation).

214. *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998).

215. 648 F.2d 925 (4th Cir. 1981).

216. *Talbert*, 648 F.2d at 925. To be sure, questions remain about how other elements of narrow tailoring might play out in this context. For example, consider the notion of critical mass. In educational settings, critical mass refers to the number of students of color necessary to prevent students’ racial isolation and demonstrate the spectrum of diverse views held among students of color. *Grutter*, 539 U.S. at 318-21. The *Grutter* court was reluctant to press Michigan for a specific number; indeed, the Court seemed persuaded that the law school had no quotas in part because it had not numerically identified its targeted critical mass.

III. CONCLUSION

As *Grutter* explained: “Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.”²¹⁷ By embracing an instrumental justification for government’s race-based action, the Supreme Court—for the first time in years—cracked open the door to race-conscious decisionmaking.

But while *Grutter* offers support for a range of rationales for affirmative action, the decision should not be understood as an invitation to race-conscious decisionmaking that assumes that particular races have certain skills or proclivities or that indulges discriminatory customer preferences. One of my objectives here is to urge advocates, policymakers, and courts to sort carefully through the justifications offered for government’s race-based action. We should challenge ourselves to be clear about what and who we value when making important decisions: are we attacking stereotypes that perpetuate inequality or are we reinforcing them?

For many, the Supreme Court’s reluctance to embrace moral rationales for affirmative action is bewildering, if not maddening. Some of the Court’s critics have thus expressed concern that *Grutter* offers more of a symbolic rather than a practical victory for advocates of racial justice.²¹⁸ But perhaps *Grutter*’s acceptance of an instrumental justification for race-conscious government decisionmaking also opens the door to revisiting the moral roots of affirmative action. *Grutter* itself observes that racial diversity can be valuable going forward precisely because race has made—and continues to make—a difference: “Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”²¹⁹ Indeed, as the military experience illuminates, diversity can be instrumentally valuable because it is morally justifiable: public entities’ diverse leadership may be more effective because it visibly addresses

See id. at 318, 335-36 (stating that the admissions program’s goal of achieving a critical mass was distinguishable from use of a fixed quota). But what is the critical mass necessary to demonstrate that a government employer’s leadership is visibly open to all? *See Estlund, supra* note 122, at 88 (suggesting the critical mass necessary to achieve benefits of racially integrated workforce is that number necessary to correct “manifest imbalance” or “serious and persistent underrepresentation of minority groups”). Perhaps courts will defer to the judgments of at least some government decisionmakers like the military and law enforcement, just as the *Grutter* court deferred to the University’s assessment of critical mass.

217. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

218. *See Roithmayr, supra* note 17, at 208-09; Spann, *supra* note 70, at 249 (arguing that recent Supreme Court jurisprudence constrains affirmative action from remedying economic status quo or ongoing societal discrimination).

219. *Grutter*, 539 U.S. 306, 333, 338 (2003) (“By virtue of our Nation’s struggle with racial inequality, such students are both more likely to have experiences of particular importance to the Law School’s mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.”). *See also* Lee C. Bollinger, *A Comment on Grutter and Gratz v. Bollinger*, 103 COLUM. L. REV. 1589, 1591 (2003) (“A primary reason why colleges and universities have embraced the educational policy of racial and ethnic diversity—the reason why it works educationally—is that society has been and is still segregated, with all the attendant perceptions and confusions that arise from that painful social condition.”).

the moral imperative of dismantling racial castes.²²⁰ In this way, attending to the past allows us, finally, to move forward.

220. Cynthia Estlund also recognized a connection between forward-looking rationales and backwards-looking justifications in her integration argument, explaining that:

The interest in integration is more closely related to, though still distinct from, the interest in overcoming the effects of generalized past 'societal' discrimination, which the Court has rejected as a seemingly limitless license for preferences. The arguments are related, first, because the importance of workplace integration is based on the *fact* of widespread prejudice and de facto segregation among racial and ethnic groups in the society; but the integration argument is forward-looking and does not require us to sort out the admittedly complex causes of these social facts.

Estlund, *supra* note 122, at 80 (citations omitted).

