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## ARTICLES

### THE DIVERSITY RUSE: HOW *GRUTTER* UPHELD AFFIRMATIVE ACTION BY FAILING TO APPLY STRICT SCRUTINY

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#### I. INTRODUCTION

In *Grutter v. Bollinger*, the Supreme Court ruled that colleges are allowed to make “narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”<sup>1</sup> The *Grutter* majority was supposed to apply strict scrutiny to affirmative action.<sup>2</sup> Strict scrutiny applies because the Equal Protection Clause of the Fourteenth Amendment prohibits treating people differently on the basis of their race.<sup>3</sup> Yet, the *Grutter* majority explicitly designated nonminorities as “nonfavored groups.”<sup>4</sup> This opprobrious designation is in conflict with strict scrutiny. Strict scrutiny provides that racial classifications are constitutional “only if they are narrowly tailored to further compelling

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<sup>1</sup> *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

<sup>2</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (holding that strict scrutiny is the proper standard of review for racial classifications); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (concluding that strict scrutiny is the equal protection standard applicable under Fourteenth Amendment for reviewing race-based classifications).

<sup>3</sup> The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. This has been interpreted to mean that “government may treat people differently because of their race only for the most compelling reasons.” *Grutter*, 539 U.S. at 326 (quoting *Adarand Constructors*, 515 U.S. at 227).

<sup>4</sup> *Grutter*, 539 U.S. at 320.

governmental interests.”<sup>5</sup> The compelling government interest ostensibly furthered by affirmative action is a set of supposed “educational benefits that flow from a diverse student body.”<sup>6</sup> This article offers a critique of the nine supposed educational benefits named in *Grutter*, demonstrating that the supposed benefits are paltry, nonexistent, or worse. In some cases, the supposed benefits are in fact thinly veiled expressions of racial favoritism, or judicial endorsements of what Justice Scalia and several scholars call “tribalism.”<sup>7</sup> Significantly, several of the presumed educational benefits are predicated on negative stereotypes about nonminorities. Moreover, the *Grutter* majority abandoned narrow tailoring in favor of judicial deference,<sup>8</sup> characterized by glaring logical errors and severe empirical flaws.

*I. A compelling state interest in the educational benefits of student body diversity*

The *Grutter* majority made clear exactly how critical the “educational benefits” rationale was to its ruling, observing that the University of Michigan Law School asserted “only one justification for their use of race in the admissions process: obtaining

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<sup>5</sup> *Id.* at 326.

<sup>6</sup> *Id.* at 328 (quoting Brief for Respondent at i, *Grutter*, 539 U.S. 306 (No. 02-241)).

<sup>7</sup> Justice Scalia noted that some schools practice “tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.” *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part). The term “tribalism” is widely used by scholars and accurately captures the intensity of racial in-group favoritism and race-based identification. See ARTHUR SCHLESINGER, JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* 14 (rev. ed., W.W. Norton & Co. 1998) (warning that the “virus of tribalism” was spreading throughout the globe); see also Amitai Etzioni, *The Perils of American Tribalism*, WASH. POST BOOK WORLD, Sept. 8, 1991, at 4 (reviewing ARTHUR SCHLESINGER, JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* (Whittle Books 1991)). Liberals at times speak of American tribalism as a social force that we must move beyond. See generally Roger Cohen, Op-Ed., *Tribalism Here, and There*, N.Y. TIMES, Mar. 10, 2008, <http://www.nytimes.com/2008/03/10/opinion/10webcohen.html> (comparing various political divisions in American society around the 2008 election to those abroad).

<sup>8</sup> As will be discussed throughout this article, Justice Kennedy criticized the majority decision for reviewing racial preferences in a manner “nothing short of perfunctory.” *Grutter*, 539 U.S. at 388–89 (Kennedy, J., dissenting).

‘the educational benefits that flow from a diverse student body.’”<sup>9</sup> Both supporters and opponents of the ruling agree that certain supposed educational benefits were the compelling state interest at issue in *Grutter*.<sup>10</sup> Therefore, at the heart of affirmative action policy is the notion that diversity leads to specific, identifiable educational benefits, and those benefits amount to a “compelling state interest.”<sup>11</sup> However, as Justice Thomas pointed out in dissent, the Supreme Court has found only two circumstances where racial discrimination is justified. First, national security is a “pressing public necessity” that justifies narrowly tailored racial classifications in public policy.<sup>12</sup> Second, a government entity can remedy past discrimination, but only discrimination for which that government entity itself is responsible.<sup>13</sup> Countering government-backed racial prejudice and countering violence are each compelling state interests, synonymous with the predecessor phrase “pressing public necessity.”<sup>14</sup>

The *Grutter* majority offered no fewer than nine educational benefits that supposedly flow from a diverse student body.<sup>15</sup> Those benefits are asserted to comprise “a compelling state interest in student body diversity.”<sup>16</sup> Following from the Court’s explicit recognition that supposed educational benefits constitute the ostensible compelling state interest, scholars recognize that “[i]f diversity produces no educational benefits, then diversity cannot be a compelling interest of an institution of higher education.”<sup>17</sup> As Terrel asserts, “if the university’s compelling

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<sup>9</sup> *Id.* at 328 (majority opinion) (quoting Brief for Respondent Bollinger et al. at i, *Grutter*, 539 U.S. 306 (No. 02–241)).

<sup>10</sup> *Id.* at 354–55 (Thomas, J., dissenting) (“Attaining ‘diversity,’ whatever it means, is the mechanism by which the Law School obtains educational benefits, not an end of itself.”); see also Patrick M. Garry, *How Strictly Scrutinized?: Examining the Educational Benefits the Court Relied Upon in Grutter*, 35 PEPP. L. REV. 649, 652 (2008) (“It is the educational benefits deriving from diversity that were the real compelling interest behind the Law School’s race-based admissions policy. Diversity, in effect, is only the means to the end.”).

<sup>11</sup> *Grutter*, 539 U.S. at 328 (majority opinion).

<sup>12</sup> *Id.* at 351 (Thomas, J., concurring in part and dissenting in part) (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

<sup>13</sup> *Id.* at 351–52.

<sup>14</sup> See *id.* at 351.

<sup>15</sup> See *infra* Part II.

<sup>16</sup> *Grutter*, 539 U.S. at 328.

<sup>17</sup> Garry, *supra* note 10, at 652.

interest is in the educational *benefits* of diversity, an admissions plan must *actually produce* those benefits to be constitutionally valid.”<sup>18</sup> In short, if the supposed educational benefits do not constitute a compelling state interest, or diversity does not lead to the supposed benefits, then an affirmative action plan is unconstitutional.

On the core question of whether “diversity is essential to [the university’s] educational mission,” *Grutter* states that “‘good faith’ on the part of a university is ‘presumed’ absent ‘a showing to the contrary.’”<sup>19</sup> This approach is fundamentally inconsistent with strict scrutiny, which requires “searching judicial inquiry into the justification for such race-based measures” as affirmative action.<sup>20</sup> Even staunchly liberal commentators acknowledge that “[*Grutter*] respects the prerogatives of nonjudicial institutions; it refuses to use judicial power to overturn the decisions of countless educational institutions throughout the nation.”<sup>21</sup> Respecting the prerogatives of nonjudicial institutions is contrary to the requirement that racial classifications be a “last resort.”<sup>22</sup> *Fisher* did not address *Grutter*’s holding that the benefits of student body diversity constitute a compelling state interest.<sup>23</sup> However,

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<sup>18</sup> Mark T. Terrel, *Bucking Grutter: Why Critical Mass Should Be Thrown Off the Affirmative Action Horse*, 16 TEX. J. C.L. & C.R., 233, 246 (2011).

<sup>19</sup> *Grutter*, 539 U.S. at 329 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318–19 (1978) (plurality opinion)).

<sup>20</sup> *See id.* at 326 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

<sup>21</sup> Cass R. Sunstein, Contribution to *Has the Supreme Court Gone Too Far?: A Symposium*, COMMENTARY, Oct. 1, 2003, available at <http://www.commentarymagazine.com/article/has-the-supreme-court-gone-too-far/>; see also Dahlia Lithwick, Contribution to *Has the Supreme Court Gone Too Far?: A Symposium*, COMMENTARY, Oct. 1, 2003, available at <http://www.commentarymagazine.com/article/has-the-supreme-court-gone-too-far/> (“[A] majority of the Court respectfully deferred to the will of the state of Michigan—which had found a compelling interest in continuing these programs.”).

<sup>22</sup> *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007) (quoting *Croson*, 488 U.S. at 519).

<sup>23</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013). The *Fisher* Court did not address the question of whether the supposed educational benefits of diversity constitute a compelling state interest, pointing out that “the parties here do not ask the Court to revisit that aspect of *Grutter*’s holding.” *Id.* The Court did, however, note that “[t]here is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity . . . . But the parties here do not ask the Court to revisit that aspect of *Grutter*’s holding.” *Id.*

the *Fisher* Court did potentially clarify *Grutter*'s "good faith" presumption that the benefits of diversity are essential to the educational mission. The *Fisher* Court stated that, in defining a compelling state interest—but not in applying narrow tailoring—"some, but not complete, judicial deference is proper under *Grutter*."<sup>24</sup> While *Fisher* did not review the merits of the compelling state interest prong, it explained that courts "should ensure that there is a reasoned, principled explanation for the academic decision" to define compelling state interests in a certain manner.<sup>25</sup> This article argues that if courts fail to scrutinize colleges' definitions of a compelling state interest, then courts are exempting colleges from equal protection requirements with regard to the first prong of strict scrutiny. As a matter of constitutional logic, courts are ill prepared to determine whether educational benefits are a compelling state interest unless courts first inquire into the actual substance of those benefits.<sup>26</sup> On that point, this article will demonstrate that the alleged educational benefits of student body diversity do not comprise a compelling state interest.

## 2. *Narrow tailoring to achieve the educational benefits of diversity*

Strict scrutiny demands that the policy of affirmative action must not only serve a compelling state interest, but must also be narrowly tailored to achieve that compelling interest.<sup>27</sup> Assuming *arguendo* that the educational benefits flowing from diversity are substantial, affirmative action is not narrowly tailored to create those benefits. Justice Kennedy, in the context of race-based preferences in education, plainly stated that "individual racial classifications . . . may be considered legitimate only if they are a last resort to achieve a compelling interest."<sup>28</sup> However, as

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 & n.9 (1982) (noting that, in strict scrutiny analysis, "the validity and importance of the objective may affect the outcome of the analysis").

<sup>27</sup> *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) ("[T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose.") (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996)).

<sup>28</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789–90 (2007) (Kennedy, J., concurring in part).

demonstrated below, racial preferences are far from a “last resort” to obtaining the supposed educational benefits of diversity.

State actors should, according to *Grutter*, engage in “serious, good faith consideration of workable race-neutral alternatives” before using racial classifications.<sup>29</sup> To that end, it is not apparent that the Court applied its own stated standard.<sup>30</sup> *Grutter* allows colleges to circumvent the constitutional requirement of race-neutral alternatives, to the point that “visible examples of higher education institutions fulfilling this legal requirement are almost non-existent.”<sup>31</sup> *Fisher* should, if interpreted correctly, remedy this dismal state of affairs. *Fisher* unequivocally held that “[t]he reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.”<sup>32</sup>

“Racial and ethnic distinctions of any sort,” Justice Powell established in *Bakke*, “are inherently suspect and thus call for the most exacting judicial examination.”<sup>33</sup> In direct contrast, Justice O’Connor’s majority opinion in *Grutter* openly announced: “We take the Law School at its word that it would ‘like nothing better than to find a race-neutral admissions formula’ and will terminate its race-conscious admissions program as soon as practicable.”<sup>34</sup> Following *Grutter*, scholars from a variety of perspectives concluded that “[t]he Constitution does not countenance the deference the Court eagerly accorded the university.”<sup>35</sup> Justice Kennedy, in his *Grutter* dissent, stated bluntly that the Court

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<sup>29</sup> *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

<sup>30</sup> Douglas M. Raines, Comment, *Grutter v. Bollinger’s Strict Scrutiny Dichotomy: Diversity is a Compelling State Interest, but the University of Michigan Law School’s Admissions Plan is Not Narrowly Tailored*, 89 MARQ. L. REV. 845, 868 (2006) (“[T]he Court accepted that the university had considered such alternatives without requiring it to explain precisely which alternatives it had considered.”).

<sup>31</sup> George La Noue & Kenneth L. Marcus, *Serious Consideration of Race-Neutral Alternatives in Higher Education*, 57 CATH. U. L. REV. 991, 1042 (2007).

<sup>32</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013).

<sup>33</sup> *Bakke*, 438 U.S. at 291 (1978) (plurality opinion).

<sup>34</sup> *Grutter*, 539 U.S. at 343 (quoting Brief for Respondent at 34, *Grutter*, 539 U.S. 306 (No. 02-241)).

<sup>35</sup> Raines, *supra* note 30, at 871; accord Colin S. Diver, *From Equality to Diversity: The Detour from Brown to Grutter*, 2004 U. ILL. L. REV. 691, 721 (2004) (concluding that *Grutter* “fails to satisfy the very test—strict scrutiny—that the Court applies to racial classifications”).

“[did] not apply strict scrutiny.”<sup>36</sup> He insisted that the majority “refuses to be faithful to the settled principle of strict review,” and was “nothing short of perfunctory” in applying a “feigned” version of strict scrutiny.<sup>37</sup> Deference towards colleges’ narrow tailoring efforts has been the order of the day. However, *Fisher* dramatically sharpened this prong of strict scrutiny, holding that “the University [of Texas] receives no deference” regarding narrow tailoring.<sup>38</sup>

This article will demonstrate that *Grutter* offered a superficial gesture towards strict scrutiny, in the process of enumerating the nine supposed educational benefits of a diverse student body. Because the *Grutter* majority neglected to apply strict scrutiny, the Supreme Court has failed thus far to account for the constitutional, practical, empirical, and moral defects of affirmative action. Moreover, because of liberal hegemony within the academy,<sup>39</sup> scholars have not treated affirmative action with the

<sup>36</sup> *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting) (“The Court [majority opinion] . . . does not apply strict scrutiny.”).

<sup>37</sup> *Id.* at 388–89, 394 (“The majority today refuses to be faithful to the settled principle of strict review designed to reflect these concerns [about racial preferences].”); *id.* at 388 (“The Court, in a review that is nothing short of perfunctory, accepts the University of Michigan Law School’s assurances that its admissions process meets with constitutional requirements.”); *id.* at 394 (“It is but further evidence of the necessity for scrutiny that is real, not feigned, where the corrosive category of race is a factor in decisionmaking.”).

<sup>38</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013). Some scholars have interpreted the *Fisher* decision to require an enhanced version of narrow tailoring. This article’s thesis concurs with, but does not depend on, an enhanced version of narrow tailoring post-*Fisher*. Compare Ilya Somin, *Preliminary Thoughts on Fisher v. University of Texas*, VOLOKH CONSPIRACY (June 24, 2013, 11:31 AM), <http://www.volokh.com/2013/06/24/preliminary-thoughts-on-fisher-v-university-of-texas/> (asserting that *Fisher* is “at odds with the dominant understanding of *Grutter* by most lower court judges, university administrators, and legal scholars,” and “is much less deferential” than *Grutter*), with Jonathan R. Alger, *A Supreme Challenge: Achieving the Educational and Societal Benefits of Diversity after the Supreme Court’s Fisher Decision*, 6 J. DIVERSITY IN HIGHER ED. 147, 149–50 (2013) (“[T]his is really not a new standard . . . . The Court has once again made clear (and in more stark terms than ever) that institutions face a substantial burden to demonstrate that they have seriously considered all possible race-neutral alternatives . . . .”).

<sup>39</sup> William Graham Sumner, one of the founders of American sociology, criticized the ideological bias of sociologists. He had this to say concerning the Forgotten Man and Woman, meaning the people who are “independent, self-supporting, and asks no favors”:

It is plain enough that the Forgotten Man and the Forgotten Woman are the very life and substance of society. They are the ones who ought to be

skepticism it deserves.<sup>40</sup> In response, this article seeks to contribute a sociologically grounded perspective to the debate about affirmative action. Upon strict scrutiny, the nine educational benefits listed in *Grutter* are either paltry, nonexistent, or worse. In some cases, the supposed benefits are thinly disguised expressions of racial favoritism or judicial endorsements of discriminatory tribalism. This article will suggest the outline of a strict scrutiny analysis faithful to both *Grutter* and *Fisher*. Following is a critique of each of the nine supposed educational benefits identified in *Grutter*, applying established Supreme Court strict scrutiny jurisprudence in light of extant empirical work.

## II. THE SUPPOSED EDUCATIONAL BENEFITS OF STUDENT BODY DIVERSITY

The supposed benefits of diversity are discussed below in the order that they appear in *Grutter*.<sup>41</sup> While several of the supposed benefits are largely similar to—or derivative of—one another, this article will discuss each separately, as they were in the

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first and always remembered. They are always forgotten, by sentimentalists, philanthropists, reformers, enthusiasts, and every description of speculator in sociology, political economy, or political science.

WILLIAM GRAHAM SUMNER, *THE FORGOTTEN MAN AND OTHER ESSAYS*, 476, 492–93 (1919). *See also* REINHOLD NIEBUHR, *REINHOLD NIEBUHR ON POLITICS* 44 (Harry R. Davis & Robert C. Good, eds., 1960) (“While the ideological taint upon all social judgments is most apparent in the practical conflicts of politics, it is equally discernible, upon close scrutiny, in even the most scientific observations of social scientists.”). Lipset and Ladd concluded that the “evidence definitely suggests that there is a much higher proportion of radicals among sociologists than among any other occupational group.” Seymour Martin Lipset & Everett Carl Ladd, Jr., *The Politics of American Sociologists*, 78 *AM. J. SOC.* 67, 86–87 (1972); *see, e.g.*, John Tierney, *Social Scientist Sees Bias Within*, *N.Y. TIMES*, Feb. 7, 2011, <http://www.nytimes.com/2011/02/08/science/08tier.html> (reporting on research finding a “hostile climate” created by social scientists towards non-liberals).

<sup>40</sup> *See* William R. Beer, *Resolute Ignorance: Social Science and Affirmative Action*, 24 *SOC'Y* 63, 69 (1987) (“Politically, many social scientists are left of center, and are disinclined to put to empirical scrutiny a policy that has become a sacred cow of American liberalism.”); *see also* NICHOLAS CAPALDI, *OUT OF ORDER: AFFIRMATIVE ACTION AND THE CRISIS OF DOCTRINAIRE LIBERALISM* 2 (1985) (asserting that “doctrinaire liberalism is the entrenched philosophy of academic social science”).

<sup>41</sup> *See Grutter v. Bollinger*, 539 U.S. 306 (2003).

opinion. In so doing, this article seeks to highlight the inappropriate judicial deference,<sup>42</sup> glaring logical errors, and severe empirical flaws, and normative pitfalls at the foundation of affirmative action.

A. *Classroom diversity* “promotes ‘cross-racial understanding.’”<sup>43</sup>

Affirmative action, the *Grutter* majority agreed, “promotes ‘cross-racial understanding.’”<sup>44</sup> The problem with this claim is that it is sometimes factually wrong.<sup>45</sup> Where classroom diversity is irrelevant to or does not promote cross-racial understanding, there is no “reasoned, principled explanation for the academic decision”—as required by *Fisher*—to define cross-racial understanding as a compelling state interest.<sup>46</sup> Where classroom diversity does not or cannot promote cross-racial understanding, no compelling state interest exists. Whether diversity actually produces the touted benefits is, to a significant degree, an empirical question. However, legal scholarship is constrained in answering this question due to academics’ uncritical support for affirmative action. As sociologist William Beer recognized decades ago, “It is as if affirmative action has assumed the status of a religious article of faith, and professionals choose to avoid studying its effects for fear of what they might find.”<sup>47</sup>

While social scientists rarely challenge affirmative action head on, dissidents and reluctant liberals have pointed to the cracks in affirmative action’s underlying assumptions. For instance, Thernstrom and Thernstrom reject the notion that mere

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<sup>42</sup> As will be discussed throughout this article, Justice Kennedy criticized the majority decision for reviewing racial preferences in a manner “nothing short of perfunctory.” *Id.* at 388 (Kennedy, J., dissenting).

<sup>43</sup> *Id.* at 330 (quoting Petition for Writ of Certiorari app. at 246a, *Grutter*, 539 U.S. 306 (No. 02-241)).

<sup>44</sup> *Id.*

<sup>45</sup> See JOHN MCWHORTER, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* 89, 229–30, 236 (2000) (noting that one reason blacks self-segregate in college is that they feel whites and Asians may not respect their academic backgrounds); DOUGLAS S. MASSEY ET AL., *THE SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMEN AT AMERICA’S SELECTIVE COLLEGES AND UNIVERSITIES* 138–45 (3d ed. 2006) (observing that Asians and whites report a significant “social distance” regarding minority “affirmative action beneficiaries”).

<sup>46</sup> See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013).

<sup>47</sup> Beer, *supra* note 40, at 63.

contact with other racial groups will result in greater racial tolerance and understanding, because that theory “has been discredited by more than half a century of research and is no longer accepted by any reputable social scientist.”<sup>48</sup> Harvard political scientist Robert Putnam, widely acknowledged as “a liberal academic,” led the largest study ever conducted on the impact of diversity on overall civic health in America.<sup>49</sup> His stark conclusion: “The more ethnically diverse the people we live around, the less we trust them.”<sup>50</sup> His findings deserve to be quoted at length:

[I]nhabitants of diverse communities tend to withdraw from collective life, to distrust their neighbors, regardless of the colour of their skin, to withdraw even from close friends, to expect the worst from their community and its leaders, to volunteer less, give less to charity and work on community projects less often, to register to vote less, to agitate for social reform *more*, but have less faith that they can actually make a difference, and to huddle unhappily in front of the television.<sup>51</sup>

The impact of diversity on students is no better.<sup>52</sup> The most recent research by Rude, Wolniak, and Pascarella suggests “that some experiences or conditions may actually challenge the relatively progressive racial views held by students when they enter college.”<sup>53</sup> Rude and his colleagues designed research specifi-

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<sup>48</sup> Brief for Abigail Thernstrom et al. as Amici Curiae in Support of Petitioners at 9–10, *Fisher*, 133 S. Ct. 2411 (No. 11-345) [hereinafter Thernstrom Brief]; see also Anil Rupasingha, Stephan J. Goetz & David Freshwater, *The Production of Social Capital in U.S. Counties*, 35 J. SOC.-ECON. 83 (2005) (finding that a high degree of ethnic homogeneity is associated with high social capital in American counties).

<sup>49</sup> Michael Jonas, *The Downside of Diversity: A Harvard Political Scientist Finds that Diversity Hurts Civic Life. What Happens When a Liberal Scholar Unearths an Inconvenient Truth?*, BOSTON GLOBE, Aug. 5, 2007, [http://www.boston.com/news/globeideas/articles/2007/08/04/the\\_downside\\_of\\_diversity/](http://www.boston.com/news/globeideas/articles/2007/08/04/the_downside_of_diversity/).

<sup>50</sup> Robert Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century*, 30 SCANDINAVIAN POL. STUD. 137, 147 (2007). Putnam was so reluctant to publicize his findings that he delayed publishing them for seven years. See Jonas, *supra* note 49. When Putnam finally did publish them, he did so in a Scandinavian journal. *Id.*

<sup>51</sup> Putnam, *supra* note 50, at 150–51.

<sup>52</sup> See, e.g., ARTHUR SCHLESINGER, JR., *supra* note 7, at 128–29 (criticizing the “multiculturalist” ethnocentrism and separatism that infuse the collegiate social milieu).

<sup>53</sup> JESSE D. RUDE ET AL., RACIAL ATTITUDE CHANGE DURING THE COLLEGE YEARS, ANNUAL MEETING OF THE AMERICAN EDUCATIONAL RESEARCH ASSOCIATION 19

cally to measure students' commitment to "racial understanding."<sup>54</sup> They studied freshmen attitudes about promoting racial understanding and measured the change in those attitudes over four years of college.<sup>55</sup> For about half of the students studied, the commitment to racial understanding did not change, and for those whose commitment did change, "more students reported a downgrading of their commitment" to promote racial understanding.<sup>56</sup> The papers' authors were very open in admitting that "[c]ontrary to our expectations, the average change in racial attitudes during the first year and over the entire four-year period is in a negative direction."<sup>57</sup> There can and should be a robust debate over why this is the case. Whatever the reason, the pertinent fact remains that the average change occurring in racial attitudes is negative.<sup>58</sup> Rothman, Lipset, and Nevitte similarly concluded that "the greater the school's diversity, the less students were satisfied with their own educational experience. In addition, greater diversity was associated with perceptions of less academic effort among students and a poorer overall educational experience."<sup>59</sup> They observed that "diversity appears to increase complaints of unfair treatment among white students without reducing them among black students."<sup>60</sup> If diversity does not yield cross-racial understanding, then the compelling interest is illusory; if affirmative action fails to produce the claimed benefit, then the policy is constitutionally invalid.

1. The compelling interest in cross-racial understanding

Supreme Court precedent requires that the government

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(2012), available at [http://www.education.uiowa.edu/docs/default-source/crue-publications/Racial\\_Attitude\\_Change\\_during\\_the\\_College\\_Years\\_AERA\\_2012.pdf?sfvrsn=0](http://www.education.uiowa.edu/docs/default-source/crue-publications/Racial_Attitude_Change_during_the_College_Years_AERA_2012.pdf?sfvrsn=0).

<sup>54</sup> *Id.* at 18.

<sup>55</sup> *Id.* at 7.

<sup>56</sup> *Id.* at 18.

<sup>57</sup> *Id.* at 12.

<sup>58</sup> *Id.* The authors nevertheless conclude with a call for greater "efforts to broaden students' racial views." RUDE, *supra* note 53, at 19.

<sup>59</sup> Stanley Rothman et al., *Racial Diversity Reconsidered*, PUB. INT., no. 151, Spring 2003, at 25, 36.

<sup>60</sup> *Id.*

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must prove “that racial classifications . . . further compelling governmental interests.”<sup>61</sup> The *Grutter* majority asserted such an interest in cross-racial understanding.<sup>62</sup> However, the majority overlooked the premise that there is a need for cross-racial understanding to begin with. Colleges, therefore, should have to define cross-racial understanding, establish that there is a need for such understanding, and prove that affirmative action provides it. Otherwise, the supposed need for cross-racial understanding could be based on exaggerated beliefs about the degree to which cross-racial understanding is lacking in our society.

The *Grutter* majority boldly proclaimed, “We apply strict scrutiny to all racial classifications to ‘smoke out’ illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.”<sup>63</sup> How well did the majority “smoke out” the use of race to achieve cross-racial understanding? One way to determine the answer is to identify what exactly it is that needs to be understood across racial boundaries, and by whom. *Grutter* provides no answers. *Grutter* does not even begin to define cross-racial understanding, much less offer proof of a need for cross-racial understanding. By neglecting to apply its own asserted standard, the *Grutter* majority looked past three flaws in the assumption that there is a need for cross-racial understanding. First, cross-racial understanding simply has little to do with many subjects, particularly in the science, technology, engineering, and mathematics (STEM) fields. Second, there is no reason to presume a deficit of cross-racial understanding among American college students as a whole to begin with. Third, educators and officials in many American schools are already enforcing a peculiar variety of cross-racial understanding.

First, supporters of affirmative action have not justified the use of racial preferences in entire fields of academic enterprise. Race is largely irrelevant to several important areas of study, such as STEM fields and—in many instances—legal education. Justice Scalia points out, in one of the *Grutter* dissent’s only crit-

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<sup>61</sup> *Johnson v. California*, 543 U.S. 499, 505 (2005) (internal quotation marks omitted).

<sup>62</sup> *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

<sup>63</sup> *Id.* at 326 (alteration in original) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)) (internal quotation marks omitted).

icisms of the underlying diversity rationale, that cross-racial understanding is not an educational benefit that relates to the objectives of law school.<sup>64</sup> Scalia notes that if “generic lessons in socialization and good citizenship” are considered a compelling benefit, then nothing should stop public and private sector employers from preferring favored minorities over non-diverse employees.<sup>65</sup> However, Justice Scalia did not engage with the diversity rationale further; his brief but incisive criticism could have been broadened. Specifically, in law school, the first-year topics of torts, contracts, civil procedure, and property normally do not lend themselves to the advancement of nebulous goals like cross-racial understanding. Granted, there are minority perspectives that feature prominently in constitutional and criminal law, as well as many electives, but those perspectives are covered amply in hornbooks or in classrooms, which are almost invariably led by liberal professors.<sup>66</sup> Further, a diverse array of leftist doctrine is promulgated in colleges.<sup>67</sup> Recent research by Inbar and Lam-

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<sup>64</sup> *Id.* at 347 (Scalia, J., concurring in part and dissenting in part).

<sup>65</sup> *Id.* at 347–48.

<sup>66</sup> See, e.g., John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculties*, 93 GEO. L.J. 1167, 1177 (2005) (discussing overwhelmingly liberal political campaign contributions of law professors); Jennifer Pohlman, *Law Schools Hiring Liberal Educators*, NAT'L JURIST, Nov. 2010, at 14–15 (noting the large imbalance between liberal and conservative faculty hires). The prevalence of left-liberal ideology in law schools is widely acknowledged. HEATHER MAC DONALD: HOW MODERN INTELLECTUALS MISSHAPE OUR SOCIETY 74 (2000) (observing that among law school faculty “race and feminist theory have achieved their position of dominance with little argument: their practitioners wear the impregnable mantle of victimhood”); Adam Liptak, *If the Law Is an Ass, the Law Professor Is a Donkey*, N.Y. TIMES, Aug. 28, 2005, <http://www.nytimes.com/2005/08/28/weekinreview/28liptak.html> (quoting liberal law professors admitting that the common presumption of the prevalence of liberalism in law schools is correct).

<sup>67</sup> To a considerable degree, the public views professors' political ideologies as a cause of concern. Neil Gross & Solon Simmons, *Americans' Views of Political Bias in the Academy and Academic Freedom* 11, 19, 24 (Working Paper, Harvard Univ. & George Mason Univ., 2006) (finding that “37.5 percent of respondents claim that political bias is a very serious problem” in the classroom; “68.2 percent agree that colleges and universities tend to favor professors who hold liberal social and political views; 61.8 percent agree that too many professors are distracted by disputes over issues like sexual harassment and the politics of ethnic groups”; and “a significant minority believe that colleges and universities are havens for liberals and ‘radicals,’ that conservative professors do not get a fair shake, and that professors are too distracted by identity politics.”), available at

mers found that liberal academics openly admit to discriminating against conservatives in hiring, distributing grants, and reviewing papers.<sup>68</sup> Given the ideological predispositions of academics and the tenuous relevance of cross-racial understanding to several academic fields, it is inevitable that numerous applicants are benefiting from a constitutional rationale that is unsuited to a multitude of individual circumstances.

Second, the promotion of “cross-racial understanding” presumes a lack of such understanding.<sup>69</sup> This presumption broadly attributes a negative trait to nonminority students, if not a pathology. On that point, a past president of the American Sociological Association wrote: “Re-education will need to be a routine part of the mass media and to operate within American families, especially white families.”<sup>70</sup> However, as Laurence Thomas writes, “[t]o speak as if the moral burden of understanding others falls only upon whites is to mischaracterize the moral and political reality of the day.”<sup>71</sup> Colleges should have to justify the sweeping, casual attribution of a defective mentality to nonminority students. Instead, affirmative action plans proceed on the

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[http://www.aaup.org/NR/rdonlyres/DC\\_F3EBD7-509E-47AB-9AB3-FBCFFF5CA9C3/0/2006Gross.pdf](http://www.aaup.org/NR/rdonlyres/DC_F3EBD7-509E-47AB-9AB3-FBCFFF5CA9C3/0/2006Gross.pdf). Students share the general public’s concerns. See AM. COUNCIL OF TRS. AND ALUMNI & UNIV. OF CONN. CTR. FOR SURVEY RESEARCH & ANALYSIS, POLITICS IN THE CLASSROOM: A SURVEY OF STUDENTS AT THE TOP 50 COLLEGES & UNIVERSITIES 2 (2004) (noting that 46% of students at U.S. News top 20 colleges and universities report that professors put forward their personal ideologies in the classroom, and 42% complain that course materials present only one side of controversial public issues). See generally Barbara Applebaum, *Is Teaching for Social Justice a “Liberal Bias”?*, 111 TCHR. C. REC. 376 (2009) (arguing that left-liberal academics should not be concerned about charges of bias but should instead focus on teaching social ideology); Neil Gross, Op-Ed., *The Indoc-trination Myth*, N.Y. TIMES, Mar. 4, 2012, <http://www.nytimes.com/2012/03/04/opinion/sunday/college-doesnt-make-you-liberal.html> (“There’s no doubt that in terms of overall curricular content and campus culture, most colleges and universities do skew more to the left than to the right.”).

<sup>68</sup> Yoel Inbar & Joris Lammers, *Political Diversity in Social and Personality Psychology*, 7 PERSP. ON PSYCHOL. SCI. 496, 500–01 (2012).

<sup>69</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (quoting Petition for Writ of Certiorari app. at 246a, *Grutter*, 539 U.S. 306 (No. 02-241)) (internal quotation marks omitted).

<sup>70</sup> Jaqueline Johnson, Sharon Rush & Joe Feagin, *Doing Anti-Racism: Toward an Egalitarian American Society*, 29 CONTEMP. SOC. 95, 104 (2000).

<sup>71</sup> Laurence Thomas, *Equality and the Mantra of Diversity*, 72 U. CIN. L. REV. 931, 947 (2004).

unfounded generalization that there is a lack of “cross-racial understanding” on the part of “nonfavored groups.”<sup>72</sup>

Third, schools currently enforce a version of cross-racial understanding. Given the ubiquity of left-liberal views in academia—especially in the social sciences<sup>73</sup>—minority perspectives are actually well represented in most courses that could plausibly be expected to provide any sort of opportunity for cross racial understanding.<sup>74</sup> In particular, the doctrine of Critical Race Theory (CRT) teaches a strident, overtly racialized resentment towards “the American social order.”<sup>75</sup> White privilege is described as “an invisible package of unearned assets which [whites] can count on cashing in each day.”<sup>76</sup> The influence of CRT is widespread.<sup>77</sup> Notably, CRT has a growing influence on teacher education.<sup>78</sup> Critics see CRT as an inflammatory dogma

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<sup>72</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 320–23, 330 (2003) (quoting Petition for Writ of Certiorari app. at 218a–20a, 246a, *Grutter*, 539 U.S. 306 (No. 02-241)) (internal quotation marks omitted).

<sup>73</sup> See *supra* note 40 and accompanying text.

<sup>74</sup> See *id.*

<sup>75</sup> Derrick Bell, *Who's Afraid of Critical Race Theory*, 1995 U. ILL. L. REV. 893, 906–08 (1995) (asserting that “the American social order is maintained and perpetuated by racial subordination”); see also Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 140 U. CHI. LEGAL F. 139, 162 (1989) (“[T]he social experience of race creates both a primary group identity as well as a shared sense of being under collective assault.”).

<sup>76</sup> Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 291, 291 (Richard Delgado & Jean Stefancic eds., 1997).

<sup>77</sup> For example, the Omaha, Nebraska public school system spent \$130,000 in federal stimulus funds to purchase “white privilege” training manuals, which were given to every employee in the entire school system. Joe Dejka, *Only in the World-Herald: Stimulus Money Buys for Every Staffer OPS Says it Won't Go Totally by the Book Criticism of “White Privilege” is a Key . . .*, OMAHA WORLD-HERALD, July 10, 2011, at 1, available at 2011 WLNR 14947663. The manuals claimed that advantages in American society “channel wealth and power to white people,” and prescribed that educators should “take action for social justice.” *Id.*

<sup>78</sup> CRT has a growing influence in schools of education and the field of professional education. See, e.g., Gloria Ladson-Billings, *Race . . . to the Top, Again: Comments on the Genealogy of Critical Race Theory*, 43 CONN. L. REV. 1439, 1444–47 (2011). As one proponent of the doctrine admits, “much of the teacher education research that uses CRT . . . frame[s] the pre-service teacher as an ultra-powerful entity that must be re-programmed through an understanding of Whiteness and the prevalence of racism before he/she is allowed to teach children.” Thandeka K.

of anti-white resentment:

“White Privilege” is not a pedagogical or scholarly concept but a politicized notion designed to empower blacks and other minorities through claims of victimhood and to instill guilt in white students in order to make them more malleable to the social engineering of left liberal experts. It is based on envy, resentment, false pride, false humility, and a desire to gain power over others without having to earn it.<sup>79</sup>

Whatever its merits, CRT is in ascendance. Together with the longstanding liberal bias of social science and humanities disciplines, CRT guarantees that non-white, non-moderate, and non-conservative viewpoints are featured prominently—if not exclusively—in significant numbers of academic courses. Affirmative action is itself a vivid illustration of ideological orthodoxy; among sociologists, “affirmative action has assumed the status of a religious article of faith.”<sup>80</sup>

In sum, nonminorities do not specifically need minority students to offer in-class summaries of perspectives that are in some fields extraneous to their academic training. Nor does each member of “nonfavored groups”<sup>81</sup> require additional repetition of perspectives that are already provided by liberal professors or left-leaning curricula.

## 2. Narrow tailoring to achieve cross-racial understanding

The *Grutter* majority set forth the principle that “racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands.”<sup>82</sup> To ensure that race is used “no more

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Chapman, *Critical Race Theory and Teacher Education*, MYRIAD 2011, at 9. Professor Wanda J. Blanchett claims “mainstream curriculum . . . and pedagogical practices in use in American schools are inappropriate for use with African American learners and are purposefully employed to maintain White supremacy.” Wanda J. Blanchett, *Disproportionate Representation of African American Students in Special Education: Acknowledging the Role of White Privilege and Racism*, EDUC. RESEARCHER, no. 6, Aug.–Sept. 2006, at 24, 26.

<sup>79</sup> Carol Iannone, *Is ‘White Privilege’ a Good Way to Teach About Race?*, NAT’L ASS’N OF SCHOLARS: ASK A SCHOLAR (May 03, 2011), [http://www.nas.org/articles/Ask\\_a\\_Scholar\\_Is\\_White\\_Privilege\\_a\\_Good\\_Way\\_to\\_Teach\\_about\\_Race](http://www.nas.org/articles/Ask_a_Scholar_Is_White_Privilege_a_Good_Way_to_Teach_about_Race).

<sup>80</sup> Beer, *supra* note 40, at 69.

<sup>81</sup> *Grutter v. Bollinger*, 539 U.S. 306, 320 (2003).

<sup>82</sup> *Id.* at 342.

broadly” than cross-racial understanding demands,<sup>83</sup> colleges should have to define cross-racial understanding, demonstrate that it is lacking, and establish that affirmative action will result in cross-racial understanding. *Grutter* made none of these three commonplace—yet essential—inquiries.<sup>84</sup>

“The purpose of the narrow tailoring requirement is to ensure that ‘the means chosen ‘fit’ th[e] compelling goal . . . closely.’”<sup>85</sup> Because the stated goal here is in part the benefit of cross-racial understanding, the Court should have ensured that affirmative action “fit” that goal. This would require that colleges define cross-racial understanding, establish that there is a need for it, and then prove that affirmative action fits the nebulous goal. *Grutter* made no such demands.<sup>86</sup> Governmental racial classifications are supposed to be subjected to “the most exacting judicial examination,” a rule that applies “regardless of ‘the race of those burdened or benefited by a particular classification.’”<sup>87</sup> Instead, *Grutter* asks that we place our faith in the conjectural benefits of pleasant-sounding phrases, through a judicial examination that is less than exacting. As discussed above, there is only a theoretical need for cross-racial understanding if we assume a caricature about nonminorities’ level of cross-racial understanding. Also, *Grutter* forces us to assume a second, more flattering caricature about minority students’ ability to confer cross-racial understanding.<sup>88</sup>

By the time many students reach law school, or numerous

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<sup>83</sup> *See id.*

<sup>84</sup> *See id.* at 348 (Scalia, J., concurring in part and dissenting in part) (pointing out that “[u]nlike a clear constitutional holding that racial preferences in state educational institutions are impermissible,” the *Grutter* decision “seems perversely designed” to encourage future lawsuits to answer the questions *Grutter* does not).

<sup>85</sup> *Id.* at 333 (majority opinion) (alteration in original) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

<sup>86</sup> *See id.* at 347 (Scalia, J., concurring in part and dissenting in part) (observing that Michigan law school educators and bar examiners likely would not evaluate a student’s “cross-racial understanding” as an outcome of their law school experience).

<sup>87</sup> *Miller v. Johnson*, 515 U.S. 900, 904 (1995) (citations omitted) (internal quotation marks omitted).

<sup>88</sup> *See Grutter*, 539 U.S. at 333 (majority opinion) (accepting as true the law school’s determination “based on its experience and expertise, that a ‘critical mass’ of underrepresented minorities” will secure the educational benefits of diversity by their mere presence alone).

other graduate programs, their capacity for cross-racial understanding has probably been met or exceeded. As Justice Scalia noted, cross-racial understanding “is a lesson of life rather than law,” a lesson learned “in institutions ranging from Boy Scout troops to public-school kindergartens.”<sup>89</sup> Put another way, if a student enters college lacking cross-racial understanding, there is no guarantee that student body diversity will enhance that student’s cross-racial understanding. In those cases, the means cannot fit the goal. Laurence Thomas describes how such a scenario could come about: “For young children, shorn of deep animosities, misconceptions, entrenched rationalizations for their mistaken views, and very visceral feelings, it is undoubtedly the case that exposure alone breaks down barriers between them. With adults, who come well ‘fortified’ with all these things, this happens far less often.”<sup>90</sup>

This is a vital point, because the entire thrust of narrow tailoring is “that ‘the means chosen ‘fit’ th[e] compelling goal . . . closely.”<sup>91</sup> *Fisher* made clear that colleges receive “no deference”<sup>92</sup> in their attempt to prove that affirmative action is narrowly tailored to achieve the goals of educational benefits, such as “cross-racial understanding.”<sup>93</sup> *Fisher* reinforced that narrow tailoring “requires that the reviewing court verify that it is ‘necessary’ for a university to use race to achieve the educational benefits of diversity,” meaning that there must be “a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications.”<sup>94</sup> If there is no way to verify that those lacking in cross-racial understanding are somehow gaining it in college, then it cannot be said that affirmative action is narrowly tailored to obtain the educational benefit of cross-racial understanding. Likewise, where an affirmative action beneficiary cannot or does not bestow cross-racial understanding, then narrow tailoring will not be met.

Because “cross-racial understanding” could mean just about

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<sup>89</sup> *Id.* at 347 (Scalia, J., concurring in part and dissenting in part).

<sup>90</sup> Thomas, *supra* note 71, at 951.

<sup>91</sup> *Grutter*, 539 U.S. at 333 (alteration in original) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

<sup>92</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (plurality opinion)).

anything, we can safely say that there is—for some undefined people in some unknowable variety of circumstances—a need for more of it. But it is factually unsound to broadly presume that a significant number of students across educational levels in many colleges are lacking in any particular attribute, including cross-racial understanding. Colleges should have to provide some evidence that they educate students who are in need of cross-racial understanding. Otherwise, affirmative action applies in blunderbuss fashion to disadvantage all members of “nonfavored groups”<sup>95</sup> at every level of higher education, geographic region, and socioeconomic level. Conversely, the policy advantages all members of favored groups, at every level of higher education, geographic region, and socioeconomic level—a grossly overbroad application of what should be a narrowly tailored policy.

If it means anything to say that “the government has the burden of proving that racial classifications ‘are narrowly tailored measures,’”<sup>96</sup> then there should be a burden placed upon colleges that use affirmative action to establish that minority racial groups, or individual members of those groups, have a high likelihood of bringing about a touted educational benefit. Unfortunately, as Laurence Thomas notes, “in the name of diversity, precisely what many minority students do not want is exposure to other traditions and peoples.”<sup>97</sup> However, if a student has a personal record of advancing racial understanding, for instance, then that is an attribute that could easily be considered in admissions without utilizing affirmative action. Absent such a showing, it makes little sense to assume that the mere presence of a minority student in the classroom will automatically produce the desired educational benefit. Even in courses where cross-racial understanding could theoretically be enhanced, that interest will not automatically be enhanced by the presence of minority students.

Cross-racial understanding is a nebulous goal. At best, it is uncertain whether students admitted under affirmative action are advancing that goal. Whether students admitted under af-

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<sup>95</sup> *Grutter*, 539 U.S. at 320.

<sup>96</sup> *Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

<sup>97</sup> Thomas, *supra* note 71, at 952.

firmative action are advancing the goal of cross-racial understanding is an empirical question. Any institution asserting the benefits of cross-racial understanding should be put to the burden of supplying appropriate empirical evidence. In the absence of such evidence, incantation of the phrase “cross-racial understanding” does not meet the exacting standard of narrow tailoring.<sup>98</sup> Even if there is some modicum of cross-racial understanding to be achieved in a specific setting, that benefit does not necessarily outweigh the burden of denied opportunities to “nonfavored groups,”<sup>99</sup> the Orwellian term *Grutter* uses to describe nonminorities. Laurence Thomas’s admonition bears special consideration: “Advocates of affirmative action treat diversity as if it were a moral good in and of itself, when the truth of the matter is that diversity stands as a moral good, if that is the correct characterization, only insofar as it is regulated by the precepts of morality.”<sup>100</sup>

It must also be borne in mind that the Supreme Court has sought to ensure that racial classifications not be overinclusive.<sup>101</sup> “In the context of affirmative action, a classification is overinclusive if it benefits individuals who fall outside the scope of the plan’s stated interest.”<sup>102</sup> Affirmative action bestows benefits on minority applicants in the absence of proof that any given applicant’s racial identity will confer the supposed educational benefit. Accordingly, gross overinclusion results when minorities, without any individualized inquiry, are presumed to bestow a cornucopia of benefits merely because of their race. *Grutter* failed to consider the fatal defect of overinclusion a fundamental flaw in the judicial analysis of each supposed benefit named in the decision.

Whether cross-racial understanding rises to a compelling

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<sup>98</sup> See *Grutter*, 539 U.S. at 330 (quoting Petition for Writ of Certiorari app. at 246a, *Grutter*, 539 U.S. 306 (No. 02-241)) (internal quotation marks omitted).

<sup>99</sup> *Id.* at 320 (citing Petition for Writ of Certiorari app. at 218a–20a, *Grutter*, 539 U.S. 306 (No. 02-241)).

<sup>100</sup> Thomas, *supra* note 71, at 953.

<sup>101</sup> See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505–07 (1989) (plurality opinion) (finding a minority set-aside benefiting numerous racial groups from around the country was not narrowly tailored to remedying past discrimination against blacks in the city of Richmond because the broad beneficiary group was overinclusive).

<sup>102</sup> Raines, *supra* note 30, at 866.

state interest must necessarily be a mystery in numerous educational contexts. *Grutter* asks that we accept racial discrimination against “nonfavored groups” in order to promote a goal that may very well be a mirage.<sup>103</sup> Furthermore, cross-racial understanding is immaterial to many academic subjects and unnecessary for learning those subjects. In the absence of proof that affirmative action applicants advance the supposed benefit of cross-racial understanding, admissions plans do not meet the narrow tailoring requirement.

*B. Diversity “helps to break down racial stereotypes.”*<sup>104</sup>

*Grutter* asserted that affirmative action “helps to break down racial stereotypes.”<sup>105</sup> Yet, the Court neglected to substantiate the “break[ing] down [of] racial stereotypes” as a compelling interest, or to even identify the stereotypes that need to be broken down, with one unpersuasive exception.<sup>106</sup> The notion of stereotypes, when used as a metric for establishing a compelling state interest, suffers from grievous empirical and conceptual difficulties.

Thomas Sowell, among others, criticizes “the widespread use of the term ‘stereotypes’ to dismiss whatever observations or evidence may be cited as to distinguishing features of particular aggregate group behavior patterns.”<sup>107</sup> Sowell counts the “stereotype” accusation as “[o]ne of the obstacles to understanding” some of our most vital societal and cultural concerns, such as educational and income differences among racial groups.<sup>108</sup> Consequently, skepticism is warranted when the state invokes “stereotypes” to justify racial classifications and affirmative action.

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<sup>103</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 320 (2003).

<sup>104</sup> *Id.* at 330.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* One stereotype the Court identifies as a target of the Law School’s diversity policy is the supposed stereotype that “minority students always (or even consistently) express some characteristic minority viewpoint on any issue.” *Id.* at 333 (citation omitted). There are very consistent, empirically measured opinions shared by vast majorities of minority group members that can be fairly described as consistent minority viewpoints. See *infra* Part II.I.

<sup>107</sup> THOMAS SOWELL, RACE AND CULTURE: A WORLD VIEW 11 (1994).

<sup>108</sup> *Id.*

1. *The compelling interest in breaking down racial stereotypes*

*Grutter* held that breaking down stereotypes is part of a compelling state interest, justifying racial classifications.<sup>109</sup> Yet, with one vague exception, the *Grutter* majority does not identify the stereotypes to be broken down. Without knowing which stereotypes need to be broken down, we have no idea whether there actually is a compelling state interest in breaking down stereotypes. Therefore, narrow tailoring can only proceed as a façade.

If “breaking down stereotypes” is a compelling state interest, then the *Grutter* majority should have made some effort to identify stereotypes that need to be broken down.<sup>110</sup> Yet, a significant conceptual difficulty would arise if courts sought to define and analyze stereotypes. Namely, how do we distinguish between a stereotype and a valid observation about group behavior? Remarks about crime,<sup>111</sup> parenting habits,<sup>112</sup> high school academic performance,<sup>113</sup> or varying career preferences and expectations between women and men<sup>114</sup> could fit into either category. Without identifying the stereotype that is presumed to exist, the Court is unable to effectively analyze whether diversity

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<sup>109</sup> *Grutter*, 539 U.S. at 330.

<sup>110</sup> See generally *id.* at 334–35 (instead limiting the narrow tailoring analysis to whether the Law School policy implemented a fixed, mechanical quota system).

<sup>111</sup> James Q. Wilson, *Character and Culture*, PUB. INT., no. 159, Spring 2005, at 43, 45 (asserting that “the problems of welfare use, crime rates, and school achievement reflected a defect of character”).

<sup>112</sup> Hector Becerra, *Trying to Bridge the Grade Divide*, L.A. TIMES, July 16, 2008, <http://articles.latimes.com/print/2008/jul/16/local/me-lincoln16> (noting that in a public meeting of Asian and Hispanic students from the same school, “the students agreed” that “Asian parents are more likely to pressure their children to excel academically”).

<sup>113</sup> JOHN U. OGBU, BLACK AMERICAN STUDENTS IN AN AFFLUENT SUBURB: A STUDY OF ACADEMIC DISENGAGEMENT xix (2003) (presenting findings that “[b]lack students in Shaker Heights do not work hard or to their full capacity. Their low-effort-syndrome is a significant part of their academic disengagement”).

<sup>114</sup> See Lawrence H. Summers, President, Harvard Univ., Remarks at NBER Conference on Diversifying the Science and Engineering Workforce (Jan. 14, 2005) (transcript available at [http://www.harvard.edu/president/speeches/summers\\_2005/nber.php](http://www.harvard.edu/president/speeches/summers_2005/nber.php)) (observing that “the most prestigious activities in our society expect of people who are going to rise to leadership positions in their forties near total commitments to their work. . . . And it is a fact about our society that that is a level of commitment that a much higher fraction of married men have been historically prepared to make than of married women”).

will “break down” the unnamed “racial stereotypes.”<sup>115</sup> If stereotypes are not being assessed properly, then the supposed compelling interest in breaking down stereotypes rests on a flawed premise. *Fisher* noted that, in pursuing the supposed educational benefits of diversity, “some, but not complete, judicial deference is proper under *Grutter*.”<sup>116</sup> Unless courts give complete deference to schools, there are few scenarios under which breaking down stereotypes rises to the level of a compelling state interest.

Stereotype is a dubious analytical category, particularly when introduced into the constitutional interpretation of compelling interests. The charge of stereotyping is common in the affirmative action discourse, but the charge usually founders upon challenge. For instance, Massey asserted that Asian and white students held “stereotypes” about minority students’ intelligence and academic achievement.<sup>117</sup> However, as Thernstrom and Thernstrom note, what Massey called “stereotypes” were “in fact simply accurate perceptions of group differences in academic skill.”<sup>118</sup> In *Grutter*, the majority repeated the unsubstantiated charge that stereotyping is prominent enough to warrant a drastic, racially conscious response.<sup>119</sup>

The specter of “stereotypes” arises in myriad debates concerning social issues—particularly racial group disparities in various life outcomes.<sup>120</sup> The reigning ideological climate could interfere with sober public discussion of what is or is not a

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<sup>115</sup> See *Grutter*, 539 U.S. at 330.

<sup>116</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013).

<sup>117</sup> MASSEY, *supra* note 45, at 145–53.

<sup>118</sup> See Thernstrom Brief, *supra* note 48, at 20–21 (citing MASSEY, *supra* note 45, at 138–45).

<sup>119</sup> See *Grutter*, 539 U.S. at 323–34.

<sup>120</sup> E.g., Daniel Patrick Moynihan, U.S. DEP’T LABOR, OFFICE OF POL’Y PLANNING & RES., *The Negro Family: The Case for National Action* ch. IV (1965), available at <http://www.dol.gov/oasam/programs/history/moynchapter4.htm> (noting the vitriolic reaction to Moynihan’s Report, which concluded that black family structure was largely responsible for the social problems within the black community and that the “tangle of [black] pathology is capable of perpetuating itself without assistance from the white world”); see also Brief of Stuart Taylor, Jr. and Richard Sander as Amici Curiae in support of Neither Party at 22 n.58, *Fisher*, 133 S. Ct. 2411 (No. 11-345) (“In his annual address to Duke faculty, [Duke’s president] attacked three eminent social scientists on the faculty simply for documenting, in a careful and thoughtful analysis, the problem of science mismatch at Duke.”) (citing K.C. Johnson, *Brodhead’s Extraordinary Address*, DURHAM-IN-WONDERLAND (Mar. 23, 2012,

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stereotype. This would not be the first time liberal orthodoxy stifled intellectual inquiry and constricted policy research.<sup>121</sup> The philosopher Allan Bloom wrote, “[a]ny research, however dispassionate, which might tend to reveal differences among nations, races, or sexes which are counter to the prevailing dogma is risky indeed to the scholar.”<sup>122</sup> The actual experience of students throughout the country is that racial differences are a taboo topic for nonminorities; even though the government provides special privileges for minorities, sometimes at the expense of nonminorities.<sup>123</sup> Of course, there is a separate rule for groups, racial or otherwise, who can claim victim status. Stereotypes are welcome when expressed by minority groups. For instance, it has been considered “eloquent, profoundly original,” and even “brilliant” to attribute “spirit-murder” to “white society.”<sup>124</sup> The dominant academic paradigm of Critical Race Theory posits that the American legal system is “designed to support White supremacy and the subordination of people of color.”<sup>125</sup>

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12:45 P.M.), <http://durhamwonderland.blogspot.com/2012/03/brodheads-extraordinary-address.html> (describing the social scientists’ study that found black enrollees at Duke with lower admissions test scores disproportionately migrated away from “majors (the hard sciences, engineering) widely considered as more challenging”).

<sup>121</sup> See FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 7 (1981) (noting that, among mid-century criminologists, “[r]esearch into such fundamental problems as the deterrent efficacy of penal sanctions was avoided and even scorned[,] . . . strikingly illustrat[ing] how an ideology ensconced in an academic discipline may dictate what questions are to be investigated”); Patricia Cohen, *‘Culture of Poverty’ Makes a Comeback*, N.Y. TIMES, Oct. 17, 2010, <http://www.nytimes.com/2010/10/18/us/18poverty.html> (reporting that for the last several decades “in the overwhelmingly liberal ranks of academic sociology and anthropology the word ‘culture’ became a live grenade, and the idea that attitudes and behavior patterns kept people poor was shunned”).

<sup>122</sup> Allan Bloom, *The Failure of the University*, 103 DAEDALUS, no. 4, Fall 1974, at 58, 64.

<sup>123</sup> This explains why 56% of whites ages 18–24 “[a]gree that the government has paid too much attention to the problems of blacks and other minorities.” See ROBERT P. JONES ET AL., PUB. RELIGION RESEARCH INST. & GEO. U. BERKLEY CTR. FOR RELIGION, *A GENERATION IN TRANSITION: RELIGION, VALUES, AND POLITICS AMONG COLLEGE-AGE MILLENNIALS: FINDINGS FROM THE 2012 MILLENNIAL VALUES SURVEY* 36 (2012).

<sup>124</sup> Robin West, *Murdering the Spirit: Racism, Rights, and Commerce*, 90 MICH. L. REV. 1771, 1771, 1787–88 (1992) (reviewing PATRICIA L. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: THE DIARY OF A LAW PROFESSOR* (1991)).

<sup>125</sup> See Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 WASH. & LEE L. REV. 1485, 1485–86 (2004).

It is commonplace to read that “the American social order is maintained and perpetuated by racial subordination,” as Derrick Bell wrote.<sup>126</sup> One does not criticize a society without criticizing the people who comprise that society. Universities are teaching the stereotype that a substantial number of nonminorities — meaning “white society” — are uncaring or malicious towards minorities. How many admissions programs would offer preferences to students who refute that stereotype? In a political context where opprobrious terms like “White supremacy” are used loosely, we should treat with skepticism the casual use of the concept of “stereotypes.” Simply consider Matsuda’s doctrine, which criticizes “righteous indignation against ‘diversity’ and ‘reverse discrimination’” as being one of the “implements of racism” for upper-class whites.<sup>127</sup> In an intellectual milieu where “righteous indignation against diversity and reverse discrimination” are considered “implements of racism,” it is safe to say that some key terms have lost their analytical moorings.<sup>128</sup> The invocation of unnamed “stereotypes” should be subject to critique.

Affirmative action actually plays a role in perpetuating stereotypes about minorities rather than countering them,<sup>129</sup> which further complicates the ostensibly compelling interest in countering racial stereotypes. In the important racial quota case, *City of Richmond v. J.A. Croson Co.*, Justice O’Connor warned that racial classifications should be “strictly reserved for remedial settings” lest they “in fact promote notions of racial inferiority and lead to a politics of racial hostility.”<sup>130</sup> Similarly, Justice Douglas

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<sup>126</sup> Bell, *supra* note 75, at 907.

<sup>127</sup> Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2334 (1989).

<sup>128</sup> *See id.*

<sup>129</sup> *See* Shelby Steele, *A Victory for White Guilt*, WALL ST. J., June 26, 2003, <http://online.wsj.com/articles/SB105658322953473200> (pointing to affirmative action’s “racial divisiveness, its stigmatization of blacks as inferior, its facilitation of identity politics, its encouragement of a victim-focused identity in minorities, its reverse discrimination against whites and Asians, its preference for precisely the least needy minorities,” and a litany of other problems).

<sup>130</sup> 488 U.S. 469, 493 (1989) (plurality opinion). This undesirable outcome was surely contemplated by the Fifth Circuit in *Hopwood v. Texas*, where the court warned that the use of diversity to justify racial classifications “may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility.” 78 F.3d 932, 945 (5th Cir. 1996).

once noted, “[a] segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions.”<sup>131</sup> Jencks notes that affirmative action “can have catastrophic psychological effects” and “blunt the internal drive for excellence.”<sup>132</sup> As one famous British school principal remarked about affirmative action in his country, the practice effectively assures “[t]he creation of a formally established second-rate citizenry.”<sup>133</sup> Through affirmative action, the government simultaneously stigmatizes minorities and discriminates against nonminorities. Affirmative action teaches that white society is inherently unfair and that only special preferences will even the odds. Racial preferences place burdens on “innocent third parties” who bear no responsibility for the plight of minorities.<sup>134</sup> This is not the way to create a unified, multiracial society. Affirmative action breeds tribalism and racial resentment.<sup>135</sup>

Unlike the approach taken in *Grutter*, a court using strict scrutiny would “conduct an independent, skeptical inquiry into the stated rationales for the government’s action.”<sup>136</sup> That the *Grutter* majority would uncritically concern itself with the exaggerated specter of stereotypes is especially troubling considering the heightened scrutiny called for by narrow tailoring.

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<sup>131</sup> DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting).

<sup>132</sup> Christopher Jencks, *Affirmative Action for Blacks*, 28 AM. BEHAV. SCIENTIST 731, 753 (1985).

<sup>133</sup> See Ray Honeyford, *Multi-ethnic Intolerance*, SALISBURY REV., June 1983, at 28–29, reprinted in ANDREW BROWN, TRIALS OF HONEYFORD: PROBLEMS IN MULTICULTURAL EDUCATION, CTR. FOR POL’Y STUD. 45 (1985), available at <http://www.cps.org.uk/files/reports/original/111028092533-TrialsofHoneyford1985.pdf>.

<sup>134</sup> Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1211, 1238 (2002).

<sup>135</sup> Affirmative action remains unpopular, with 55% saying it should be abolished, according to independent Quinnipiac polling. Quinnipiac University National Poll, *U.S. Voters Disagree 3–1 With Sotomayor On Key Case*, QUINNIPIAC UNIV. (June 3, 2009), <http://www.quinnipiac.edu/news-and-events/quinnipiac-university-poll/national/release-detail?ReleaseID=1307>; see also *Trends in Political Values and Core Attitudes: 1987–2009*, PEW RES. CENTER 58 (May 21, 2009), <http://www.peoplepress.org/files/legacy-pdf/517.pdf> (“Most Americans continue to reject the use of preferential treatment as a way to improve the position of blacks and other minorities. And the substantial gap between blacks and whites over this issue has remained relatively constant in recent years.”).

<sup>136</sup> See Garry, *supra* note 10, at 650 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

2. *Narrow tailoring to achieve the goal of breaking down racial stereotypes*

Racial classifications, no matter how compelling their goals, may be used no more broadly than the supposed interest demands.<sup>137</sup> The supposed interest here is in breaking down racial stereotypes.<sup>138</sup> We do not know the contours of this supposed interest, and consequently we cannot determine how broadly racial classifications should be used. Because the Court neglected to substantiate the “break[ing] down of racial stereotypes” as a compelling interest, or identify the stereotypes that need to be broken down,<sup>139</sup> narrow tailoring has an opaque objective.

Strict scrutiny is supposed to guarantee “that ‘the means chosen ‘fit’ th[e] compelling goal . . . closely.’”<sup>140</sup> Adhering to *Fisher*, schools are to receive “no deference”<sup>141</sup> in their attempt to prove that affirmative action is narrowly tailored to achieve the breakdown of racial stereotypes.<sup>142</sup> Through narrow tailoring, schools should first have to show that a particular stereotype is prominent in a given context, such as the locality or district in which the school was located. Then, schools should be made to prove that affirmative action counters a specific stereotype. Instead, the *Grutter* majority gave uncritical deference to schools’ broad, unsubstantiated claims about stereotypes—a point Justice Kennedy and the conservative justices rightly criticized.<sup>143</sup> As Justice Kennedy insisted in dissent, “[t]he Court confuses deference to a university’s definition of its educational objective with deference to the implementation of this goal.”<sup>144</sup> He argues, “[d]eference is antithetical to strict scrutiny, not consistent with

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<sup>137</sup> *Grutter v. Bollinger*, 539 U.S. 306, 342 (2002).

<sup>138</sup> *Id.* at 330.

<sup>139</sup> *See id.*

<sup>140</sup> *Id.* at 333 (alteration in original) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

<sup>141</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013).

<sup>142</sup> *Id.*

<sup>143</sup> *See Grutter*, 539 U.S. at 350 (Thomas, J., concurring in part and dissenting in part) (“Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of ‘strict scrutiny.’”); *id.* at 380 (Rehnquist, C.J., dissenting) (faulting the majority’s “unprecedented . . . deference”); *id.* at 388 (Kennedy, J., dissenting) (criticizing the majority for not applying strict scrutiny and reviewing racial preferences in a manner “nothing short of perfunctory”).

<sup>144</sup> *Id.* at 388 (Kennedy, J., dissenting).

it.”<sup>145</sup>

Likewise, *Croson* demands “the close examination of legislative purpose” when racial classifications are at issue.<sup>146</sup> Close examination is supposed to ensure that “the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.”<sup>147</sup> Breaking down stereotypes could be a benign purpose. However, the Court never addresses which stereotypes are at issue, or where those unnamed stereotypes are prevalent. Without knowing which actual stereotypes are countered by diversity, the rhetorical invocation of “stereotype” represents a conjuring of fears.

Without a definition of “stereotype,” it is exceedingly difficult to gauge whether breaking down stereotypes is feasible, much less whether breaking down stereotypes rises to a compelling interest. Moreover, it is difficult to see how racial stereotypes are diminished by a policy that gives special advantages to people merely because of the color of their skin. Narrow tailoring is not achieved by deference to school administrators.

C. Diversity “enables [students] to better understand persons of different races.”<sup>148</sup>

Enabling students “to better understand persons of different races”<sup>149</sup> may sound similar to the promotion of “cross-racial understanding.”<sup>150</sup> Repetition is one hallmark of an effective fallacy.<sup>151</sup> However, “the mere recitation of a ‘benign’ or legitimate purpose for a racial classification is entitled to little or no weight.”<sup>152</sup> Even upon rudimentary scrutiny, it is evident that affirmative action policies will not enable any appreciable number of students “to better understand persons of different

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<sup>145</sup> *Id.* at 394.

<sup>146</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion).

<sup>147</sup> *Id.* (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975)).

<sup>148</sup> *Grutter*, 539 U.S. at 330 (quoting *Petition for Writ of Certiorari* app. at 246a, *Grutter*, 539 U.S. 306 (No. 02-241)).

<sup>149</sup> *Grutter*, 539 U.S. at 330 (quoting *Petition for Writ of Certiorari* app. at 246a, *Grutter*, 539 U.S. 306 (No. 02-241)).

<sup>150</sup> *See id.*

<sup>151</sup> *See* ROBERT J. GULA, *NONSENSE: A HANDBOOK OF LOGICAL FALLACIES* 16 (2002).

<sup>152</sup> *Croson*, 488 U.S. at 500 (quoting *Weinberger*, 420 U.S. at 648 (1975)).

racess.”<sup>153</sup>

1. The compelling interest in better understanding persons of different races

In his critical exploration of *Grutter*'s key premise—that student body diversity leads to certain educational benefits—Garry quite logically posits that “diversity is valuable only if it produces the designated educational benefits.”<sup>154</sup> With that in mind, mounting evidence indicates that minority students are self-segregating in various ways,<sup>155</sup> calling into question whether affirmative action actually produces “better understanding.”<sup>156</sup> In fact, the very colleges seeking to justify racial preferences on the basis of better understanding will actively encourage racial segregation when it suits their ideology.<sup>157</sup> Garry observes that, “[i]ncreasingly, universities are allowing dorms that house only certain racial groups; academic departments are emerging that serve primarily to enroll certain racial groups; and social and extracurricular groups are becoming more segregated.”<sup>158</sup> Furthermore, as Taylor and Sander demonstrate, “admitting students with large racial preferences is not an effective strategy for diversifying classrooms. The larger the preference, the more ill-prepared students will self-segregate into soft majors and courses.”<sup>159</sup> Where minorities are self-segregating socially and academically,<sup>160</sup> then there is a serious empirical question as to whether student body diversity in fact creates the educational

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<sup>153</sup> *Grutter*, 539 U.S. at 330 (quoting Petition for Writ of Certiorari app. at 246a, *Grutter*, 539 U.S. 306 (No. 02-241)).

<sup>154</sup> Garry, *supra* note 10, at 652.

<sup>155</sup> This tendency towards racial in-group congregation has been present for decades. See, e.g., Mary Jordan, *College Dorms Reflect Trend of Self-Segregation*, WASH. POST, March 6, 1994, at A1, available at 1994 WLNR 5675879 (noting that a Brown University dormitory called “Harambee House, Swahili for ‘the coming together of community,’” was “set aside chiefly for African Americans”).

<sup>156</sup> See *Grutter*, 539 U.S. at 330.

<sup>157</sup> See Brian T. Fitzpatrick, *The Diversity Lie*, 27 HARV. J.L. & PUB. POL’Y 385, 393 (2003) (“[M]any elite universities go out of their way to facilitate and encourage racial segregation outside the classroom.”).

<sup>158</sup> Garry, *supra* note 10, at 653.

<sup>159</sup> Brief of Stuart Taylor, Jr., and Richard Sander as Amici Curiae Supporting Petitioner at 18–19, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345).

<sup>160</sup> See *id.*

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benefits that theoretically comprise a compelling interest. Under such circumstances, there is no “reasoned, principled explanation for the academic decision,”<sup>161</sup> to define better understanding as constitutive of a compelling state interest.

Because the *Grutter* majority accepted sweeping generalities about minority experiences and the classroom benefits of diversity, it is quite fitting here to note several uncontroversial and intuitive generalities about social interaction in the contemporary United States. Through early education and life experiences, many people have interacted with diverse individuals as friends, teammates, coworkers, neighbors, family members, or fellow students.<sup>162</sup> A substantial number of Americans have already experienced diversity and achieved a better understanding of persons from different races.<sup>163</sup> If better understanding of persons of different races is indeed part of a compelling state interest, then colleges should be able to provide some assurance that such understanding is missing from the lives of defined groups of students. Next, colleges should prove that classroom diversity actually promotes the understanding, which is presumably missing. Assurances in this regard seem unlikely in the classroom context of self-segregation and separatism.

It is paternalistic and naïve to suggest that sharing a classroom with a minority student is an experience so profoundly beneficent that it constitutes a compelling state interest. For non-minorities who possess the attribute of racial understanding, it is burdensome to demand that they continue to be disadvantaged by racial preferences in order to reinforce an attribute that they already have, or perhaps never lacked.

2. *Narrow tailoring to achieve better understanding of persons of different races*

The *Grutter* majority promulgated a crude version of the discredited “contact hypothesis,” which asserts that more time

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<sup>161</sup> *Fisher*, 133 S. Ct. at 2419.

<sup>162</sup> See Ronald Brownstein, *Diversity Now*, NAT'L J. (Apr. 18, 2012), <http://www.nationaljournal.com/thenextamerica/demographics/diversity-now-20120418>.

<sup>163</sup> See *id.*

spent with members of other racial groups leads to greater understanding between those groups.<sup>164</sup> Putnam inadvertently disproved this hypothesis, to his dismay, as have others.<sup>165</sup> Laurence Thomas observes, “it is in no way a part of the logic of diversity that people of different ethnic and racial backgrounds are naturally disposed to respect one another.”<sup>166</sup> Few would oppose the pursuit of better understanding, but better understanding does not automatically result from the mere presence of minorities in a classroom.<sup>167</sup>

The *Grutter* majority insisted that “racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands.”<sup>168</sup> If affirmative action is to be employed “no more broadly” than needed,<sup>169</sup> then it follows that certain fields of academic research should be immunized from affirmative action. *Fisher* reinforced that narrow tailoring “requires that the reviewing court verify that it is ‘necessary’ for a university to use race to achieve the educational benefits of diversity,” meaning that there must be “a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications.”<sup>170</sup> It is not necessary to use race to create better racial understanding in certain fields of academic exploration because some fields simply do not lend themselves to any benefit that could plausibly be described as “better understanding.” If computer science, medical, or engineering school courses will facilitate better understanding of persons of different races, then the burden is on the state to establish as much.<sup>171</sup> Strict scrutiny de-

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<sup>164</sup> See, e.g., Thernstrom Brief, *supra* note 48, at 9–10; see also *Grutter v. Bollinger*, 539 U.S. 306, 330 (2002).

<sup>165</sup> Putnam, *supra* note 50, at 147; see also Thernstrom Brief, *supra* note 48, at 16 (citing studies indicating that the existence of racial preferences strengthens racial barriers, rendering the contact theory inapplicable to university settings where such preferences are employed).

<sup>166</sup> Thomas, *supra* note 71, at 949.

<sup>167</sup> See sources cited *supra* note 165.

<sup>168</sup> *Grutter*, 539 U.S. at 342.

<sup>169</sup> See *id.*

<sup>170</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (plurality opinion)).

<sup>171</sup> “[T]he government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling government interests.’” Johnson

mands no less. Furthermore, to the extent that minority students who have benefited from racial preferences self-segregate into soft majors and courses,<sup>172</sup> the supposed benefit of diversity materializes to a lesser degree within those pockets of self-segregation. The empirically observable behavior of students, in some cases, undermines the asserted state interest in better understanding. The interest in better racial understanding is inapposite to certain academic disciplines, putting racial classifications at odds—to varying degrees based on particular circumstances—with narrow tailoring.

D. Diversity makes classroom discussion “livelier, more spirited, and simply more enlightening and interesting.”<sup>173</sup>

The *Grutter* majority asserted that “classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds,’”<sup>174</sup> especially racial backgrounds.<sup>175</sup> The majority’s assertion is no less offensive than the proposition that classroom discussion is more orderly, and simply more intellectually serious and engaging when students are racially homogeneous.

The *Grutter* majority alludes to benefits created when “students have ‘the greatest possible variety of backgrounds,’” but the function of affirmative action is not to admit minority students from “the greatest possible variety of backgrounds.”<sup>176</sup> Bok and Bowen note that 86% of blacks at selective colleges are

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v. California, 543 U.S. 499, 505 (2005) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

<sup>172</sup> See, e.g., Brief of Stuart Taylor, Jr., and Richard Sander as Amici Curiae Supporting Neither Party at 27–28, *Fisher*, 133 S. Ct. 2411 (No. 11-345).

<sup>173</sup> *Grutter*, 539 U.S. at 330 (quoting Petition for Writ of Certiorari app. at 246a, *Grutter*, 539 U.S. 306 (No. 02-241)) (internal quotation marks omitted).

<sup>174</sup> *Id.* (quoting Petition for Writ of Certiorari app. at 246a, 244a, *Grutter*, 539 U.S. 306 (No. 02-241)).

<sup>175</sup> Diver, *supra* note 35, at 703 (noting that Justice O’Connor is “careful to avoid attaching the adjective ‘racial’ to the word ‘diversity.’ But it is plain from the surrounding context that racial diversity is what she is really considering. In discussing the educational benefit of diversity, she refers almost solely to benefits flowing from racial forms of diversity.”).

<sup>176</sup> *Grutter*, 539 U.S. at 330 (quoting Petition for Writ of Certiorari app. at 244a, *Grutter*, 539 U.S. 306 (No. 02-241)).

either middle or upper class.<sup>177</sup> This outcome violates the principle enunciated in *Orr* that suspect classifications “cannot be permitted” when “the choice made by the State appears to rebound . . . to the benefit of those without need for special solicitude.”<sup>178</sup> Kahlenberg writes that “[d]iversity for [top law schools] means having relatively wealthy kids of all colors.”<sup>179</sup> It has long been understood that those who “need affirmative action the most are benefiting from it the least, and vice versa.”<sup>180</sup> Affirmative action does not create “the greatest possible variety of backgrounds,”<sup>181</sup> but instead bestows a state privilege on designated, mostly affluent minorities.<sup>182</sup> As Columbia Law School Professor Samuel Issacharoff bluntly concludes, “The commitment to diversity is not real . . . . None of these universities has an affirmative-action program for Christian fundamentalists, Muslims, orthodox Jews, or any other group that has a distinct viewpoint.”<sup>183</sup> Moreover, there is an astonishing lack of socioeconomic diversity at top schools, despite class background being at least as relevant to life experience as race.<sup>184</sup>

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<sup>177</sup> DEREK BOK & WILLIAM BOWEN, *THE SHAPE OF THE RIVER* 341 (tbl.B.2, 49 fig.2.12 (2d ed. 2000)); see also Anderson, *supra* note 134, at 1211 (noting that most affirmative action opportunities benefit those already “best qualified and most advantaged among the preferred class”).

<sup>178</sup> See *Orr v. Orr*, 440 U.S. 268, 283 (1979).

<sup>179</sup> Richard D. Kahlenberg, *Race to the Flop—the Problem with Affirmative Action*, NEW REPUBLIC (Oct. 10, 2012), <http://www.newrepublic.com/book/review/mismatch-affirmative-action-fisher-university-texas> (reviewing RICHARD H. SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT* (2012)).

<sup>180</sup> See Beer, *supra* note 40, at 68.

<sup>181</sup> See *Grutter*, 539 U.S. at 330 (quoting Petition for Writ of Certiorari app. at 244a, *Grutter*, 539 U.S. 306 (No. 02-241)).

<sup>182</sup> See sources cited *supra* note 177.

<sup>183</sup> Daniel Golden, *Affirmative-Action Ruling Could Outlaw Minority Internships—Some Backers of Racial Preferences Take Diversity Rationale Further: Society Wins with Integrated Elite*, WALL ST. J., June 13, 2003, at B1.

<sup>184</sup> See Anthony Carnevale & Stephen Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in AMERICA’S UNTAPPED RESOURCE: LOW INCOME STUDENTS IN HIGHER EDUCATION 101, 102, 118 (Richard Kahlenberg ed., 2004); Richard H. Sander, *Listening to the Debate on Reforming Law School Admissions Preferences*, 88 DENV. U. L. REV. 889, 912 (2011) (arguing that giving preferences to less privileged applicants would enhance diversity far more meaningfully than giving racial preferences to privileged minorities).

Affirmative action does not provide a “variety of backgrounds.”<sup>185</sup> As former Democratic Senator James Webb wrote, affirmative action policies have “expanded so far beyond their original purpose that they now favor anyone who does not happen to be white.”<sup>186</sup> Affirmative action arbitrarily grants preferences to minorities for having a certain skin color, regardless of their perspective, class background, privilege, or experiences.<sup>187</sup> Affirmative action asks us to presume that minorities’ perspectives comprise a compelling state interest, merely by virtue of their skin color. This is a pernicious form of institutionalized racial favoritism.

1. *The compelling interest in enhanced classroom discussion*

Contrary to what the *Grutter* majority asserted, affirmative action does not provide students with “the greatest possible variety of backgrounds.”<sup>188</sup> Again, affirmative action exposes affluent nonminorities to predominantly affluent minorities with similar socioeconomic backgrounds.<sup>189</sup> Indeed, affirmative action frequently leads to the problem of “phantom minorities”:

[T]hey *look* white, have Anglo names, and come from backgrounds void of racial-life experience, but nevertheless, exploit race-based affirmative action. Like a phantom that passes through a crowded room undetected, they are otherwise unidentifiable as minorities; their ethnicity emerges only momentarily when filling out applications for work or school . . . and [they] use their marginal minority status to reap the benefits of affirmative action without contributing to racial diversity.<sup>190</sup>

Where the problem of “phantom minorities” arises, there is

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<sup>185</sup> See *Grutter*, 539 U.S. at 330 (quoting Petition for Writ of Certiorari app. at 244a, *Grutter*, 539 U.S. 306 (No. 02-241)).

<sup>186</sup> See James Webb, Op-Ed., *Diversity and the Myth of White Privilege*, WALL ST. J., July 22, 2010, <http://online.wsj.com/articles/SB10001424052748703724104575379630952309408>.

<sup>187</sup> See *id.* (explaining the original intent and purpose of affirmative action and noting the difference in today’s society’s understanding of affirmative action).

<sup>188</sup> See *Grutter*, 539 U.S. at 330 (quoting Petition for Writ of Certiorari app. at 244a, *Grutter*, 539 U.S. 306 (No. 02-241)).

<sup>189</sup> See BOK & BOWEN, *supra* note 177, at 49 fig.2.12 (charting socioeconomic backgrounds of white and black students).

<sup>190</sup> Edward C. Thomas, *Racial Classification and the Flawed Pursuit of Diversity: How Phantom Minorities Threaten Critical Mass Justification in Higher Education*, 2007 BYU L. REV. 813, 816 (2007).

no contribution to better classroom discussion.<sup>191</sup> The *Grutter* majority's invocation of "the greatest possible variety of backgrounds"<sup>192</sup> is a potential non sequitur with serious constitutional flaws.

Those minority students who are expected to provide the "enlightening and interesting"<sup>193</sup> classroom environment at times are not thrilled about fulfilling their assigned role in the "educational benefits" charade. For example, the undergraduate-written *Black Guide to Life at Harvard* bluntly states: "We are not here to provide diversity training for Kate or Timmy before they go out to take over the world."<sup>194</sup> Perhaps being ushered into schools as a racial group representative to provide "enlightening and interesting"<sup>195</sup> classroom experiences is not actually conducive to classroom discussion after all.

The thrust of the classroom discussion theory is that discussion will be insufficiently "enlightening and interesting" unless minorities are in the classroom.<sup>196</sup> Yet, the notion that minorities make discussion "livelier" and "more spirited"<sup>197</sup> sounds oddly like a stereotype. Furthermore, there is an overt smear directed at nonminority students: class discussion is "simply more enlightening"<sup>198</sup> when nonminority students are graced by the presence of minority students. A classroom without officially-designated minorities is insufficiently lively, spirited, and enlightening. This is what Tom Parker, the Dean of Admissions at Amherst College, conveyed when he told the *New York Times*: "If the court says that any consideration of race whatsoever is

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<sup>191</sup> *See id.*

<sup>192</sup> *Grutter*, 539 U.S. at 330 (quoting Petition for Writ of Certiorari app. at 244a, *Grutter*, 539 U.S. 306 (No. 02-241)) (internal quotation marks omitted).

<sup>193</sup> *Id.* (quoting Petition for Writ of Certiorari app. at 246a, *Grutter*, 539 U.S. 306 (No. 02-241)).

<sup>194</sup> John McWhorter, *Who Should Get Into College?*, 13 CITY J., no. 2, Spring 2003, at 60-67 (internal quotation marks omitted), available at [http://www.city-journal.org/html/13\\_2\\_who\\_should\\_get.html](http://www.city-journal.org/html/13_2_who_should_get.html).

<sup>195</sup> *Grutter*, 539 U.S. at 330 (quoting Petition for Writ of Certiorari app. at 246a, *Grutter*, 539 U.S. 306 (No. 02-241)) (internal quotation marks omitted).

<sup>196</sup> *See id.* (quoting Petition for Writ of Certiorari app. at 246a, *Grutter*, 539 U.S. 306 (No. 02-241)) (internal quotation marks omitted).

<sup>197</sup> *Id.* (quoting Petition for Writ of Certiorari app. at 246a, *Grutter*, 539 U.S. 306 (No. 02-241)) (internal quotation marks omitted).

<sup>198</sup> *Id.* (quoting Petition for Writ of Certiorari app. at 246a, *Grutter*, 539 U.S. 306 (No. 02-241)) (internal quotation marks omitted).

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prohibited, then we're in a real pickle. Bright kids have no interest in homogeneity. They find it creepy."<sup>199</sup> If affirmative action supporters consider a classroom full of white and Asian students to be "creepy," then it is time to direct our concerns about stereotypes in a different direction. It often passes without comment that a major premise of affirmative action is the notion that white and Asian students cannot be trusted to generate an enriching educational experience. Bear in mind why the Supreme Court made it so difficult for racial classifications to withstand scrutiny: "The purpose of the narrow tailoring requirement is to ensure that 'the means chosen "fit" th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."<sup>200</sup>

Of all the overlooked defects of affirmative action, perhaps the worst is the implicit aspersion it casts upon nonminorities. When the Dean of Admissions at a major American school can call the presence of nonminorities "creepy,"<sup>201</sup> then we have reached the point where illegitimate stereotypes are acting to disadvantage nonminorities. The Amherst Dean of Admissions expressed one of the permissible stereotypes in modern America.<sup>202</sup>

Moreover, the reigning academic dogma actually discourages open debate on matters related to race,<sup>203</sup> exposing the hollowness of *Grutter's* classroom discussion canard. Indeed, "[a] number of elite universities profess to support racial preferences in order to create 'livelier' classroom discussions yet simultaneously censor those discussions."<sup>204</sup>

By agreeing that nonminorities are insufficiently "enlightening and interesting,"<sup>205</sup> the *Grutter* majority used the concept

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<sup>199</sup> See Tamar Lewin, *Colleges Worry that Court Could Make Diversity Harder to Maintain*, N.Y. TIMES, Feb. 21, 2012, at A13.

<sup>200</sup> *Grutter*, 539 U.S. at 333 (alteration in original) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

<sup>201</sup> See Lewin, *supra* note 199, at A13.

<sup>202</sup> See *id.*

<sup>203</sup> Fitzpatrick, *supra* note 157, at 392 ("These efforts have included speech codes directed at quashing any comments that might offend students of certain racial groups.").

<sup>204</sup> *Id.*

<sup>205</sup> See *Grutter*, 539 U.S. at 330 (quoting Petition for Writ of Certiorari app. at 246a, *Grutter*, 539 U.S. 306 (No. 02-241)) (internal quotation marks omitted).

of diversity as a tool to institutionalize stereotypes against “non-favored groups.”<sup>206</sup> The aggressive legal imposition of diversity promotes the stereotype that nonminorities are hopelessly narrow-minded or uninspiring, and that minorities have a special ability to enliven the benighted majority. Affirmative action perpetuates this ruse, which stands in stark contrast to the rigorous analysis demanded by strict scrutiny.

2. *Narrow tailoring to achieve enhanced classroom discussion*

Narrow tailoring requires that the use of race have more than a “minimal impact” on the compelling interest the government is trying to further.<sup>207</sup> On the level of practical reality, the classroom discussion theory does not reflect actual classroom dynamics. Laurence Thomas observes, “It would be marvelous if it were true that minorities were particularly inclined to learn and explore across their boundaries. The unvarnished truth, though, is that parochialism knows no boundaries.”<sup>208</sup> Admissions departments cannot ensure that an admitted student will make an enlightening and interesting contribution to any particular classroom or department. This lack of assurance conflicts with *Fisher*’s demand “that the reviewing court verify that it is ‘necessary’ for a university to use race to achieve the educational benefits of diversity.”<sup>209</sup>

*Fisher* further requires that “[i]f ‘a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,’ then the university may not consider race.”<sup>210</sup> Courts should restrict colleges to nonracial approaches to promoting the interest in classroom discussion, particularly when Justice Kennedy’s strict scrutiny framework is taken into consideration. Justice Kennedy would have courts scrutinize the guidelines of admission programs to “prove their

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<sup>206</sup> *Id.* at 320.

<sup>207</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 733–35 (2007).

<sup>208</sup> Thomas, *supra* note 71, at 950.

<sup>209</sup> See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (plurality opinion)).

<sup>210</sup> *Id.* at 2420 (citation omitted) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)) (internal quotation marks omitted).

process is fair and constitutional in every phase of implementation.”<sup>211</sup> If an admission process should be fair and constitutional in every phase of implementation, then narrow tailoring should be applied at three levels: departmental, classroom, and individual applicant levels. Otherwise, the risk of over-inclusion arises.

First, colleges should have to demonstrate which departments require racial diversity in order to achieve enlightening discussion. *Grutter* set forth the principle that “racial classifications . . . may be employed no more broadly than the interest demands.”<sup>212</sup> The asserted interest here is the need for enlightening classroom discussion.<sup>213</sup> To ensure that race is used “no more broadly” than enlightening discussion demands, colleges should have to demonstrate which departments require racial diversity in order to achieve this benefit. Few schools could meet the burden of showing that “no workable race-neutral alternatives would produce the educational benefits”<sup>214</sup> of lively classroom discussion in STEM fields, for instance. Schools should then be required to establish that affirmative action will ensure more enlightening discussion at that department level. Varying academic departments deal with diverse subject matter, methodologies, and cannon. Some departments, like those in the STEM fields, may provide little opportunity for race-based classroom discussion. On this point, the *Grutter* majority failed to apply its own standard—that “racial classifications . . . may be employed no more broadly than the interest demands”—to the supposed benefit of enlightening discussion.<sup>215</sup>

Second, individual classroom outcomes should be included within the scope of strict scrutiny. The nature of classroom discussion, especially in professional schools, varies widely between and among various fields. In majors or fields where race-based perspectives have minimal or no relevance to discussion, affirmative action should be curtailed.

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<sup>211</sup> *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting).

<sup>212</sup> *Id.* at 342 (majority opinion).

<sup>213</sup> *See id.* at 330.

<sup>214</sup> *Fisher*, 133 S. Ct. at 2420.

<sup>215</sup> *See Grutter*, 539 U.S. at 342.

Finally, if affirmative action is supposed to create more interesting and enlightening classroom discussion,<sup>216</sup> then there should be an individualized assessment of minority applicants who benefit from racial preferences. To show narrow tailoring, the state should provide a mechanism to verify that students admitted under affirmative action can convey the supposed benefits of affirmative action. Supreme Court precedent holds that “the government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling governmental interests.’”<sup>217</sup> If affirmative action is supposed to create classroom benefits, then only students who are likely to confer those classroom benefits should receive affirmative action. Students who plan on cloistering into ethnic studies majors, effectively shutting themselves off from many nonminority students, will not generally be conferring classroom benefits upon nonminorities. As Laurence Thomas laments, “in the name of diversity, precisely what many minority students do not want is exposure to other traditions and peoples.”<sup>218</sup> Affirmative action preferences are, therefore, completely inapposite for students who will major in ethnic studies programs, as just one example.

As it stands, *Grutter* leaves a critical empirical question unanswered: How does the racial identity of any given minority student enable them to contribute to a more enlightening and interesting discussion? One premise of affirmative action is that minorities, but only certain minorities, “may bring to [schools] a perspective different from that of members of groups which have not been the victims of [historical] discrimination.”<sup>219</sup> However, strict scrutiny is supposed to guarantee “that ‘the means chosen “fit” th[e] compelling goal” closely.”<sup>220</sup> Strict scrutiny should not permit racial preferences in exchange for the mere prospect that minority students “may” bring a “different” perspective. Moreover, a *different* perspective is not necessarily a valuable perspective; diverse perspectives might provide enrichment, but race is

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<sup>216</sup> See *id.*

<sup>217</sup> *Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

<sup>218</sup> Thomas, *supra* note 71, at 952.

<sup>219</sup> *Grutter*, 539 U.S. at 319 (emphasis added).

<sup>220</sup> *Id.* at 333 (alteration in original) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

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an extremely poor proxy for perspective. If providing different perspectives is part of a compelling interest, then surely it must matter whether those different perspectives meet some minimal definition of value. Any given different perspective could range from worthless to priceless. A court that genuinely expects “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks”<sup>221</sup> would not be satisfied with the mere possibility that certain minorities “may” bring a “different” perspective.

We know nothing of relevance to strict scrutiny by pointing to different perspectives. If there is only a possibility that minorities may bring a different perspective to the classroom, then there is an extremely poor fit between the means of racial preferences and the stated goal of enlightening discussion. By the logic of affirmative action, students who have never experienced discrimination are standing in for groups that have “been the victims of [historical] discrimination.”<sup>222</sup> If the goal is to convey the historical experience of discrimination in America, as the majority implied, then there are numerous means available to obtain that goal without resort to racial classifications.

Additionally, the presence of “phantom minorities” exemplifies the overinclusion characteristic of racial classifications. Overinclusion occurs where affirmative action “benefits individuals who fall outside the scope of the plan’s stated interest.”<sup>223</sup> The presumption that minorities have a corporate power to confer educational benefits is bound to be overbroad for some individual applicants. Applicants who do not facilitate racially-im-bued enlightening discussion should not benefit from affirmative action, unless they confer some other supposed educational benefit under *Grutter*. Where applicants benefit from affirmative action policy but do not confer the supposed educational benefits, the policy is mere racial favoritism. Worse yet, affirmative action bestows racial favoritism upon those who need it least: advantaged minority students.<sup>224</sup> Sander concludes that

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<sup>221</sup> *Id.* at 339.

<sup>222</sup> *See id.* at 319.

<sup>223</sup> Raines, *supra* note 30, at 866.

<sup>224</sup> *See* Anderson, *supra* note 134, at 1211 (noting that most affirmative action opportunities benefit those already “best qualified and most advantaged among the preferred class”).

“[i]t is hard to justify giving large preferences to blacks and Hispanics from privileged backgrounds while ignoring the needs of [less privileged] applicants of all races.”<sup>225</sup> In the same vein, Kahlenberg asks, “Why is it ‘progressive’ to support a college admissions program that favors the son of a wealthy black doctor over the child of a poor white waitress?”<sup>226</sup> Race-based preferences at top schools may in fact result in reduced diversity at lower-ranking colleges.<sup>227</sup> Ultimately, the supposed commitment to better classroom discussion is belied by one-dimensional racial preferences and rigid racial favoritism. There must be a fit between the system of affirmative action and the goal of enhancing classroom discussion. That relationship can be substantiated by evidence, not by platitudes. Absent evidence that affirmative action enhances classroom discussion, all that can be said is that affirmative action provides “racial aesthetics” in the classroom.<sup>228</sup>

As with the other purported bases of affirmative action, the *Grutter* majority gave uncritical deference to colleges’ unsubstantiated claims about enhanced classroom discussion. In so doing, the majority employed the antithesis of strict scrutiny, as Justice Kennedy wrote in dissent.<sup>229</sup> In many departments and classes, race is irrelevant to any legitimate interest in classroom discussion. To the extent that admissions plans rely on the classroom discussion benefit, only applicants who are likely to promote that goal should receive affirmative action. If students admitted under affirmative action are not making the contribution that they are supposed to make, then affirmative action programs are unjustifiably discriminating against nonminorities. Once more, the *Grutter* majority did not apply strict scrutiny in evaluating the supposed benefits of affirmative action.<sup>230</sup>

<sup>225</sup> Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 664 (2011).

<sup>226</sup> Richard D. Kahlenberg, *Invisible Men: Race Is No Longer the Unacknowledged Dividing Line in America. Class Is.*, WASH. MONTHLY (Mar. 1, 2007), <http://www.washingtonmonthly.com/features/2007/0703.kahlenberg.html>.

<sup>227</sup> Peter Arcidiacono, Shakeeb Khan & Jacob L. Vigdor, *Representation Versus Assimilation: How Do Preferences in College Admissions Affect Social Interactions?*, 95 J. PUB. ECON., Feb. 2011, at 1, 2, 8–9.

<sup>228</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 355, 364 (2003) (Thomas, J., concurring in part and dissenting in part).

<sup>229</sup> *Id.* at 394 (Kennedy, J., dissenting).

<sup>230</sup> See generally *id.* at 387–95 (“The Court . . . does not apply strict scrutiny.”).

- E. Diversity “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals” in a “global marketplace.”<sup>231</sup>

The *Grutter* majority did not even attempt to substantiate a compelling interest in preparation for a “diverse workforce” or “global marketplace.”<sup>232</sup> *Grutter* provides no clear guidance about which students require this preparation, which students confer this preparation, what the ostensible preparation consists of, or why the preparation could not be had without racial classifications.<sup>233</sup> Moreover, the majority did not explain why projected benefits obtained *after* graduation should be given constitutional protection as a justification for racial classifications in college admissions.<sup>234</sup>

1. *The compelling interest in preparing for a diverse, global workforce*

The majority never explained what tangible job skill arises from a student body formed by affirmative action, much less how that unidentified skill would apply to a diverse workforce or global marketplace. In determining the soundness of the affirmative action-global marketplace link, it is important to take a conceptual step back and consider what affirmative action does; it places largely middle and upper class minorities into classrooms with middle and upper class nonminorities.<sup>235</sup> The result is that students with largely similar class backgrounds, but with different skin colors, learn a subject in the same room. How is that arrangement germane to a globalized economy? The *Grutter* majority insists that a diverse student body prepares students for their careers, as “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”<sup>236</sup> The

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<sup>231</sup> *Id.* at 330 (majority opinion).

<sup>232</sup> *See id.*; *see also id.* at 347–48 (Scalia, J., concurring in part and dissenting in part).

<sup>233</sup> *See generally Grutter*, 539 U.S. at 349–74 (2003) (Thomas, J., concurring in part and dissenting in part) (criticizing the majority’s treatment of racial classifications and failure to precisely define the interest being asserted).

<sup>234</sup> *See id.*

<sup>235</sup> *See BOK & BOWEN, supra* note 177, at 49 fig.2.12, 341 tbl.B.2.

<sup>236</sup> *Grutter*, 539 U.S. at 330 (citing Brief for 3M et al. as Amici Curiae 5; Brief for General Motors Corp. as Amicus Curiae 3–4).

Court never names those “skills,” or connects any necessary skills with the practice of affirmative action.<sup>237</sup> Business students, for instance, are not going to gain insight into balance sheets because of racial diversity in a classroom. The majority seemed unconcerned with whether a compelling interest would exist in any given department or classroom.

*Fisher* clarifies that, in pursuing the supposed educational benefits of diversity, “some, but not complete, judicial deference [to universities] is proper under *Grutter*.”<sup>238</sup> Affirmative action depends on judicial extension of deference to schools, in classifying preparation for global commerce as part of a compelling state interest.<sup>239</sup> This classification could easily be challenged as a factual matter. Many college students will go on to work with middle- or upper-class professionals, as the most popular majors are business related.<sup>240</sup> For those students, it matters little whether they were educated alongside people of different skin color. On the other hand, some students will go on to work with minority, working-class, or truly disadvantaged people. With respect to workforce preparation, those specific students have little to gain by having middle- or upper-class minorities in their classrooms. Nonminorities might, under some limited circumstances, benefit from exposure to lower-class minorities in the classroom. However, as a measurable fact, affirmative action generally does not place lower-class minorities in college classrooms.<sup>241</sup> Besides, if an applicant’s noteworthy racial background has enhanced his or her life experience and might benefit others, then that background can be considered individually. Otherwise, the workforce preparation benefit is purely illusory.

2. *Narrow tailoring to achieve preparation for a diverse, global workforce*

*Grutter* neither requires proof that minority students admitted under affirmative action will confer better preparation for a global workforce, nor proof that “nonfavored groups” have a

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<sup>237</sup> See *id.* at 347–48 (Scalia, J., concurring in part and dissenting in part).

<sup>238</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013).

<sup>239</sup> See *Fisher*, 133 S. Ct. at 2419–20.

<sup>240</sup> See ANTHONY P. CARNEVALE ET AL., GEORGETOWN UNIV. CTR. ON EDUC. & THE WORKFORCE, WHAT’S IT WORTH?: THE ECONOMIC VALUE OF COLLEGE MAJORS 13 tbl.1 (2011).

<sup>241</sup> See BOK & BOWEN, *supra* note 177, at 49 fig.2.12, 341 tbl.B.2.

need for such preparation by minority students admitted under affirmative action. Narrow tailoring requires that the use of race have more than a “minimal impact” on the compelling interest the government is trying to further,<sup>242</sup> which in part is preparation for a diverse, global workforce.<sup>243</sup> If narrow tailoring is to be taken seriously, several inquiries must logically follow. The first pertains to the student body writ large, and the second to those students admitted under affirmative action. First, is affirmative action having more than a minimal impact on preparation for a diverse society or global workforce? Second, are the specific students admitted under affirmative action having more than a minimal impact on preparation for a diverse society or global workforce?

*a. Preparing Students Writ Large for a Diverse, Global Workforce*

First, how does a nonminority student obtain a commercially-salient skill from a minority student? The mechanism suggested by the majority borders on the absurd. We are to believe that upper-class American minorities are going to somehow prepare nonminorities for the global marketplace.<sup>244</sup> Again, the defunct “contact hypothesis”<sup>245</sup> rears its head. The majority neither explains why such preparation is needed, nor what the preparation consists of.

*Grutter* tells us that preparation is needed before “nonfavored groups”<sup>246</sup> can interact with minorities.<sup>247</sup> The assumption is that nonminorities are so bigoted or socially inept that they cannot function around minorities without receiving training first. Even taking this assumption as fact, there is no reason to

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<sup>242</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 734 (2007).

<sup>243</sup> *See Grutter*, 539 U.S. at 330.

<sup>244</sup> *See id.* *See also* Anderson, *supra* note 134, at 1211 (noting that most affirmative action opportunities benefit those already “best qualified and most advantaged among the preferred class”).

<sup>245</sup> *See* Thernstrom Brief, *supra* note 48, at 16 (citing studies indicating that the existence of racial preferences strengthens racial barriers, rendering the contact theory inapplicable to university settings where such preferences are employed).

<sup>246</sup> *Grutter*, 539 U.S. at 320.

<sup>247</sup> *See supra* notes 236–37 and accompanying text.

believe that a typical college classroom will prepare nonminorities for interaction with minorities in the diverse workforce. Schools should have to demonstrate that nonminorities are so incapable of interacting with racial minorities that they will be incompetent in the diverse, global workforce. Only under such an extreme scenario would affirmative action be necessary to further the state's interest in workforce preparation.<sup>248</sup>

Narrow tailoring requires that the use of race have more than a "minimal impact" on the interest the government is trying to further.<sup>249</sup> Perhaps on occasion a nonminority student will become "better prepared" for the "global marketplace" thanks to classroom diversity.<sup>250</sup> A benefit that occurs once in a while for some students in some subject areas does not have more than a minimal impact. A modicum of scrutiny immediately reveals why this is so—studying with Americans of different skin colors may or may not prepare a student for the global marketplace. The global marketplace theory only makes sense if one rashly assumes that American ethnicities approximate international peoples, and that there will be ample opportunities in some appreciable number of classes for American ethnic groups to make relevant contributions based on their heritage or experience. Again, the classroom reality does not always lend itself to learning about the global marketplace in this manner. Where there is any doubt that the racial classification fits the purported goal "closely,"<sup>251</sup> the issue of narrow tailoring arises.<sup>252</sup>

Crucially, the majority did not explain why projected benefits obtained *after* graduation should be given constitutional protection as a justification for racial classifications in admissions.<sup>253</sup> According to Greenberg, "Justice O'Connor structures her argument so that preparation for the world beyond graduation has

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<sup>248</sup> See generally *Grutter*, 539 U.S. at 351–53 (Thomas, J., concurring in part and dissenting in part) (reviewing the Court's development of the "pressing public necessity" or "compelling governmental interest" standard, particularly with regard to what measures—however good-intentioned—have been rejected).

<sup>249</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 734 (2007).

<sup>250</sup> See *Grutter*, 539 U.S. at 330.

<sup>251</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).

<sup>252</sup> See *id.*

<sup>253</sup> See *Grutter*, 539 U.S. at 347–48 (Scalia, J., concurring in part and dissenting in part).

the constitutional protection of being a subset of academic freedom.”<sup>254</sup> If benefits to global commerce obtained after graduation can justify racial classifications, then affirmative action in any sector would seem to be permissible so long as the racial preference generates benefits to global commerce. As it stands, *Grutter* creates a gaping carve-out, allowing colleges to wield racial classifications under the guise of promoting generic post-graduation benefits. This “turn toward occupational need as a prominent justification for race-conscious decisionmaking is unsettling, even for proponents of affirmative action.”<sup>255</sup>

“[R]acial classifications . . . may be employed no more broadly than the interest demands.”<sup>256</sup> If preparation for a diverse, global workforce does not demand exposure to middle- or upper-class American minorities, then affirmative action is being employed more broadly than the interest demands.

*b. Students Admitted under Affirmative Action and Their Impact on Preparation for a Global Economy*

The majority’s most central misapplication of narrow tailoring is the lack of inquiry into whether the students admitted under affirmative action create the conjectured benefits. With regard to global commerce, *Grutter* does not require the state to verify that students admitted under affirmative action will prepare other students for the workforce.<sup>257</sup> The asserted link between affirmative action and global commerce is analogous to the argument Justice Powell rejected in *Bakke*.<sup>258</sup> In *Bakke*, the university argued that admitting minorities into medical school would benefit health in minority communities, because it would improve “delivery of health-care services to communities currently underserved.”<sup>259</sup> Justice Powell’s response to this argument speaks directly to *Grutter*’s supposed educational benefits:

It may be assumed that in some situations a State’s interest in

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<sup>254</sup> Jack Greenberg, *Diversity, the University, and the World Outside*, 103 COLUM. L. REV. 1610, 1619 (2003).

<sup>255</sup> Bryan W. Leach, Note, *Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond*, 113 YALE L.J. 1093, 1098–99 (2004).

<sup>256</sup> *Grutter*, 539 U.S. at 342.

<sup>257</sup> See discussion *supra* Part II.E.2.a.

<sup>258</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978) (plurality opinion).

<sup>259</sup> See *id.*

facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal.<sup>260</sup>

Driving the point home, Justice Powell approvingly noted that "there are more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race."<sup>261</sup>

As with "the state's interest in facilitating the health care of its citizens," asserted in *Bakke*,<sup>262</sup> "[i]t may be assumed that in some situations"<sup>263</sup> the state's interest in preparing students for global commerce is compelling.<sup>264</sup> However, there is no evidence that affirmative action "is either needed or geared to promote that goal."<sup>265</sup> There are "more precise and reliable ways to identify applicants"<sup>266</sup> that would directly promote the supposed interest in preparing students for global commerce.

Narrow tailoring demands that if special preparation is required in order for nonminorities to work in a professional environment with diverse peoples, then the government must prove as much. *Grutter* gave uncritical deference to a handful of studies on workforce preparation and global commerce<sup>267</sup> instead of asking simple questions about the proffered rationale. As Justice Kennedy noted, "Deference is antithetical to strict scrutiny, not consistent with it."<sup>268</sup> *Grutter* failed to ask the most rudimentary questions about cause and effect. For instance, what exactly is it about classroom diversity that promotes the skills needed in global trade? Undeniably, in a global economy, some Americans will work with people of varied ethnic and racial backgrounds. One can imagine any conceivable profession

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<sup>260</sup> See *id.*

<sup>261</sup> *Id.* at 311 (quoting *Bakke v. Regents of Univ. of Cal.*, 553 P.2d 1152, 1167 (Cal. 1976)).

<sup>262</sup> *Id.* at 310.

<sup>263</sup> *Id.*

<sup>264</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

<sup>265</sup> See *Bakke*, 438 U.S. at 310.

<sup>266</sup> *Id.* at 311.

<sup>267</sup> *Grutter*, 539 U.S. at 330.

<sup>268</sup> *Id.* at 394 (Kennedy, J., dissenting).

where cultural differences would have an impact in the workplace, but there is no guarantee that affirmative action would provide preparation for such a workplace. An MBA student may one day transact business in a foreign country, but American minorities will not necessarily prepare that student for such interactions. It is not as if students fresh out of business school will fumble through negotiations with Taiwanese or Kenyans unless they have sat in a classroom with Asian or black students. A doctor working in Los Angeles might benefit from Spanish fluency, but Spanish fluency is not gained by sitting in a classroom with someone of Hispanic ancestry. An engineering major may have occasion to interact with blue collar workers whose style of expression varies widely from his own, but engineering schools will not prepare students for those interactions by filling classrooms with students of different skin colors.

In fact, the Michigan admissions plan at issue in *Grutter* offers a prime example of a dramatically underinclusive racial classification. Michigan's admissions plan specifically favored African Americans and Mexicans born on the U.S. mainland; the plan "ostensibly excludes blacks hailing from other parts of the globe," as well as, Hispanics not from Mexico.<sup>269</sup> Therefore, the very minorities left out of the admissions plan are in fact the minorities who would confer the benefit of preparation for a global workforce. Moreover, affirmative action does very little to promote exposure to diverse ideas or viewpoints. College prepares young people for largely middle-class professions, and in many middle-class professions, a modicum of socioeconomic—if not racial—homogeneity can be expected.<sup>270</sup> The notion that affirmative action is intended to expose students to a broad variety of backgrounds is belied by the facts. As Issacharoff observes, there is no affirmative-action program for Christians, Muslims, Jews, or any other significant ideological grouping.<sup>271</sup>

In keeping with *Fisher*, schools are to receive "no deference"<sup>272</sup> in their attempt to prove that affirmative action is narrowly tailored to prepare students for participation in global

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<sup>269</sup> Raines, *supra* note 30, at 867.

<sup>270</sup> The most popular college majors are business-related. CARNEVALE ET AL., *supra* note 240, at 13 tbl.1.

<sup>271</sup> Golden, *supra* note 183, at B1.

<sup>272</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013).

commerce.<sup>273</sup> By completely removing deference from the analysis, the global commerce argument becomes quite fragile. Viewed without undue sentiment, affirmative action provides little if any preparation for global trade. What particular cultural bond, tribal affinity, or body of knowledge can be taught to a student to make them an asset in the globalized economy? How does a nonminority student learn a commercially-salient skill from a minority student? Institutions using affirmative action should be required to answer these questions because Supreme Court precedent holds that “the government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling governmental interests.’”<sup>274</sup> If affirmative action cannot be traced to an intellectually-serious, tangible educational benefit vis-à-vis the “global marketplace” or “diverse workforce,” then narrow tailoring is not met. As the Court observed in *Croson*, “the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry” into the constitutionality of government action.<sup>275</sup>

Strict scrutiny is meant to guarantee that “the means chosen ‘fit’ th[e] compelling goal” closely.<sup>276</sup> Courts should require colleges to make a showing that their affirmative action plans develop a skill needed in a global marketplace. If there were an academic major and profession with a demonstrated need for exposure to diverse racial groups, then affirmative action should narrowly apply to that major and profession. Again, the burden of proof must be on the government to establish such a need because “the government has the burden of proving” that affirmative action is narrowly tailored.<sup>277</sup> Colleges are not currently required to prove that race-based admissions programs further professional or global workforce-related goals. Yet, if affirmative action is not “necessary to further” workforce prepara-

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<sup>273</sup> *See id.*

<sup>274</sup> *Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

<sup>275</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion) (alteration in original) (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975)) (internal quotation marks omitted).

<sup>276</sup> *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (alteration in original) (quoting *Croson*, 488 U.S. at 493 (plurality opinion)) (internal quotation marks omitted).

<sup>277</sup> *Johnson*, 543 U.S. at 505.

tion, then racial preferences lack that constitutional justification.<sup>278</sup>

The Court was supposed to engage in “searching judicial inquiry into the justification for such race-based measures” as affirmative action.<sup>279</sup> Instead, *Grutter* offered bromides about how “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”<sup>280</sup> However, affirmative action is not designed to promote “exposure to widely diverse people, cultures, ideas, and viewpoints”;<sup>281</sup> 86% of blacks at selective colleges are middle- or upper-class.<sup>282</sup>

It would be a rare applicant who satisfies the criteria of true narrow tailoring. In the vast majority of cases, affirmative action will not be necessary to further an interest in students’ preparation for global commerce. If there is an individual who is able to offer something unique by way of foreign travel, business experience, or perspective gained through international background, then admissions officials can take those attributes into account. Race does not have to be a consideration in order to gain the benefit of any given applicant’s meaningful attributes. Additionally, other means are readily available to obtain this supposed benefit. Traditional study abroad programs, exchange programs, and video teleconferences with international groups could be used to more directly produce the targeted benefit of post-graduate preparation for global commerce.

There is a vast mismatch, theoretically and practically, between the goal of functioning in a global marketplace and the means of affirmative action. Even if some students could somehow be singled out as lacking in the skills needed for intercultural exchange, affirmative action programs do little to provide students with such preparation. Humans are social and resourceful creatures. Exposure to diverse races does not require advanced preparation. The majority did not establish a compelling state interest on this point, or even begin to apply narrow tailoring to the supposed goal of workforce preparation.

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<sup>278</sup> See *Adarand*, 515 U.S. at 237.

<sup>279</sup> *Croson*, 488 U.S. at 493.

<sup>280</sup> *Grutter*, 539 U.S. at 330 (citing Brief for 3M et al. as Amici Curiae 5; Brief for General Motors Corp. as Amicus Curiae 3–4).

<sup>281</sup> See *id.*

<sup>282</sup> BOK & BOWEN, *supra* note 177, at 49 fig.2.12, 341 tbl.B.2.

F. A “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.”<sup>283</sup>

A record number of amicus briefs were filed in *Grutter*,<sup>284</sup> but scholars acknowledge that the Court was “powerfully influenced” by one brief in particular: the amicus brief filed by an impressive set of retired military officials.<sup>285</sup> This amicus brief was submitted on behalf of twenty-nine noteworthy signatories, of whom twenty were retired generals, four were Senators with military experience or service on a military-related committee, and the remaining five were high-level appointees or bureaucrats with military service.<sup>286</sup> This amicus brief became known, quite incorrectly, as the “military’s amicus brief.”<sup>287</sup> The Military Brief is the *Grutter* majority’s sole source for its pronouncements on the supposed diversity-national security link.<sup>288</sup> The core of the supposed diversity-national security link are the following two passages, which the majority quoted directly from the Military Brief: a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security,”<sup>289</sup> and “the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies.”<sup>290</sup> *Grutter* and the Military

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<sup>283</sup> *Grutter*, 539 U.S. at 331 (quoting Brief for Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents at 5, *Grutter*, 539 U.S. 306 (No. 02-241) [hereinafter Military Brief]) (internal quotation marks omitted).

<sup>284</sup> See Marcia Coyle, *Amicus Briefs are Ammo for Supreme Court Gun Case; A Hefty Role in High Court Face-Off*, 30 NAT’L L.J., no. 26, Mar. 10, 2008, at 1, 1 (stating that the number of amicus briefs filed in the U.S. Supreme Court in the University of Michigan affirmative action cases was the record to date).

<sup>285</sup> Thomas H. Lee, *University Dons and Warrior Chieftains: Two Concepts of Diversity*, 72 FORDHAM L. REV. 2301, 2303 (2004) (“The Court was powerfully influenced . . . by an amicus brief filed by twenty-nine retired military officers and civilian leaders of the U.S. armed forces.”).

<sup>286</sup> Military Brief, *supra* note 283, at 1–4.

<sup>287</sup> See Sylvia H. Walbolt & Joseph H. Lang, Jr., *Amicus Briefs Revisited*, 33 STETSON L. REV. 171, 173 (2003).

<sup>288</sup> *Grutter*, 539 U.S. at 331.

<sup>289</sup> See *id.* (quoting Military Brief, *supra* note 283, at 5) (internal quotation marks omitted).

<sup>290</sup> *Id.* (quoting Military Brief, *supra* note 283, at 5).

Brief depend on the inexplicable assumption that only affirmative action will provide an officer corps sufficiently diverse to protect the nation. This supposed diversity-national security link is comprised of a causally dubious factual assertion, conjoined with a set of morally troubling social implications that deserve far more scrutiny than courts or commentators have issued thus far.

1. *The compelling interest in a diverse officer corps to provide national security*

From a factual standpoint, the supposed link between diversity and security is based on Vietnam-era fears about racial tension within the military's ranks.<sup>291</sup> Decades later, such fears have scant basis in race relations within the military today. As for the social implications, the *Grutter* majority uncritically accepts that racial tribalism<sup>292</sup> is so rife within the military that unnamed racial groups cannot effectively serve officers who do not share their skin color.<sup>293</sup> The *Grutter* majority concomitantly postulates that nonminority officers cannot provide effective leadership to the unnamed groups unless affirmative action policy is in place.<sup>294</sup> Both of these assertions are implicitly reinforced throughout *Grutter*, and each will be discussed below. This section will then describe how *Grutter* reasoned that affirmative action is required for national security, and why this reasoning falls woefully short of strict scrutiny.

a. *The Historical Roots of the Supposed Link Between Diversity and National Security*

The Military Brief starts with the story of President Truman's efforts to bring about a desegregated military.<sup>295</sup> The Military Brief then describes historical incidents and anecdotes of

<sup>291</sup> See Military Brief, *supra* note 283, at 13–17.

<sup>292</sup> See *supra* note 7 and accompanying text.

<sup>293</sup> See Military Brief, *supra* note 283, at 18 (asserting without evidence that “increased minority representation in the officer corps enhances our ability to recruit highly qualified minorities into the enlisted ranks”).

<sup>294</sup> See *id.* (“At present ‘the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies.’” (quoting Brief of Lt. Gen. Becton, *supra* note 283, at 5)).

<sup>295</sup> Military Brief, *supra* note 283, at 5.

Vietnam-era racial hostility.<sup>296</sup> From those bitter lessons, the military became convinced of the need to build trust and “unit cohesion” through increased racial diversity in the officer corps.<sup>297</sup> The Military Brief claims that “unit cohesion” continues to necessitate racial preferences, but offers no proof for that claim.

The supposed link between diversity and national security is plainly premised on outmoded fears of racial strife within the military. Those fears stem from the decades of experience brought to bear by officers who understandably shudder at the memory of race relations during the Vietnam era.<sup>298</sup> The brief explains that, during that past era “[t]he absence of minority officers seriously *threatened* the military’s ability to function effectively and fulfill its mission to defend the nation.”<sup>299</sup> The use of the past tense “threatened” is revealing.<sup>300</sup> Race-conscious policies remain in place, even though the racial tension that gave rise to those policies has almost entirely abated. The Military Brief’s time-warped logic is captured best in the following passage:

The crisis that resulted in integration of the officer corps is but a magnified reflection of circumstances in our nation’s highly diverse society. 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.<sup>301</sup>

The crises that resulted in the integration of the officer corps were Jim Crow, Segregation, the Civil Rights struggle, and the racial tumult of the 1960s and 1970s, all funneled into Vietnam. Those are certainly not the “circumstances in our nation’s highly diverse society”<sup>302</sup> today.<sup>303</sup> Our circumstances today are dramatically different, yet affirmative action remains in

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<sup>296</sup> *Id.* at 13–17.

<sup>297</sup> *See id.* at 17.

<sup>298</sup> *See id.* at 5–6.

<sup>299</sup> *Id.* at 7 (emphasis added).

<sup>300</sup> *See id.* at 7.

<sup>301</sup> Military Brief, *supra* note 283, at 28.

<sup>302</sup> *Id.*

<sup>303</sup> Political scientist Edward Banfield noted as early as 1974 that “racial prejudice today is of a different order of magnitude than it was prior to the Second World War; the change of attitudes in the last two decades alone has been so widespread and profound as to make meaningless comparisons between the two periods.”

place despite having long outlived its original rationale.

Moreover, during the Vietnam era, “the stark disparity between the racial composition of the rank and file and that of the officer corps,”<sup>304</sup> standing alone, did not fuel a “breakdown of order.” There was intense societal racial strife throughout every level of American public and private life, into which the military intersected. In 1971, respected Marine Colonel Robert D. Heinl, Jr., provided this devastating assessment:

It is a truism that national armies closely reflect societies from which they have been raised. It would be strange indeed if the Armed Forces did not today mirror the agonizing divisions and social traumas of American society, and of course they do. For this very reason, our Armed Forces outside Vietnam not only reflect these conditions but disclose the depths of their troubles in an awful litany of sedition, disaffection, desertion, race, drugs, breakdowns of authority, abandonment of discipline, and, as a cumulative result, the lowest state of military morale in the history of the country.<sup>305</sup>

Integration undoubtedly improved the armed forces. Later, throughout the 1990s, Department of Defense directives ordered affirmative action.<sup>306</sup> Integration and affirmative action are, however, legally and morally distinct. Today, there is not a Vietnam-era level of racial tension within the military. Nonetheless, the Military Brief insisted that “[t]he officer corps must continue to be diverse or the cohesiveness essential to the military mission will be critically undermined.”<sup>307</sup> The phrase “continue to be diverse” should be read “continue to use racial preferences.” Neither *Grutter* nor the Military Brief offer evidence that racial preferences will enhance cohesiveness, or that the absence of racial preferences in today’s military would undermine that

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EDWARD C. BANFIELD, *THE UNHEAVENLY CITY REVISITED* 78 (1974).

<sup>304</sup> Military Brief, *supra* note 283, at 28.

<sup>305</sup> Robert D. Heinl, Jr., *The Collapse of the Armed Forces*, *ARMED FORCES J.* (June 7, 1971), available at <https://msuweb.montclair.edu/~furr/Vietnam/heinl.html>.

<sup>306</sup> Military Brief, *supra* note 283, at 12.

<sup>307</sup> *Id.* at 7.

cohesiveness.<sup>308</sup> Indeed, there is no “reasoned, principled explanation for the academic decision,”<sup>309</sup> to define a diverse officer corps shaped by affirmative action as constitutive of a compelling state interest. The officer corps would be diverse without affirmative action, just as colleges have remained diverse where affirmative action is banned.<sup>310</sup>

It is a strong claim that “the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies.”<sup>311</sup> This central claim assumes that diversity within the officer corps cannot exist to a sufficient degree without affirmative action. That central claim is left unexamined by *Grutter*. *Grutter* surmised that a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.”<sup>312</sup> In their amicus brief, the pro-affirmative action retired officers asserted that “[t]he modern American military candidly acknowledges the critical link between minority officers and military readiness and effectiveness.”<sup>313</sup> However, the Military Brief does not explain why affirmative action is required for racial diversity, or what metric of racial diversity would ensure “military readiness and effectiveness.”<sup>314</sup> Instead, the highly influential Military Brief merely quotes a 1995 Department of Justice (DOJ) report, which asserted that “[r]acial conflict within the military during the Vietnam era was a blaring wakeup call to the

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<sup>308</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (accepting the assertion of the officers and civilian leaders who contributed to the brief); Military Brief, *supra* note 283, at 5 (arguing that colleges must use affirmative action policy to maintain “an officer corps that is both highly qualified and racially diverse”).

<sup>309</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013).

<sup>310</sup> See Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities*, 94 REV. ECON. & STAT. 712, 719–20 (2012) (presenting findings that “suggest that banning affirmative action at a public university in the top 50 of the U.S. News rankings is associated with a decrease in black enrollment of roughly 1.74 percentage points, a decrease in Hispanic enrollment of roughly 2.03 percentage points, and a decrease in Native American enrollment of roughly .47 percentage points”).

<sup>311</sup> *Grutter*, 539 U.S. at 331 (quoting Military Brief, *supra* note 283, at 5) (emphasis in original).

<sup>312</sup> See *Grutter*, 539 U.S. at 331 (quoting Military Brief, *supra* note 283, at 5).

<sup>313</sup> See Military Brief, *supra* note 283, at 17–18.

<sup>314</sup> See generally *id.*, at 16–17 (expressing the views of military leadership desiring a more diverse officer corps in light of the Vietnam experience).

fact that equal opportunity is absolutely indispensable to unit cohesion, and therefore critical to military effectiveness and our national security.”<sup>315</sup> At the time of its release, the 1995 DOJ report was widely regarded as a public relations product of the Clinton Administration.<sup>316</sup> Entitled *Review of Federal Affirmative Action Programs, Report to the President*, the report is clear about its purpose: “On March 7, 1995, President Clinton directed that a review be conducted of the Federal government’s affirmative action programs.”<sup>317</sup> As the mainstream liberal press observed, “[t]he Clinton administration’s five-month review of government affirmative action programs conclude[d] that the vast majority of them should continue.”<sup>318</sup>

This point cannot be overemphasized—the source for the central claim, in the most influential amicus brief filed in the *Grutter* case, was the a partisan document issued by the Clinton Department of Justice at the behest of then-president Clinton.<sup>319</sup> Essentially, a group of retired officials repeated a Clinton DOJ talking point, and the *Grutter* majority marched in lockstep.

Another fault of the Military Brief is that it repeatedly drew from a biased source: the Department of Defense (DOD).<sup>320</sup> DOD often promotes affirmative action as a matter of official policy.<sup>321</sup> Thus, citing the DOD in favor of affirmative action is

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<sup>315</sup> *Id.* at 17 (quoting DEP’T OF JUSTICE, REVIEW OF FEDERAL AFFIRMATIVE ACTION PROGRAMS, REPORT TO THE PRESIDENT § 7.5.1 (July 19, 1995)).

<sup>316</sup> See Ann Devroy, *Clinton Study Backs Affirmative Action*, WASH. POST, July 19, 1995, <http://www.washingtonpost.com/wp-srv/politics/special/affirm/stories/aa07195.htm> (noting that Clinton “ordered the review” and “called civil rights leader and potential presidential opponent Jesse L. Jackson to brief him on the report and try to enlist his support, and several other leaders of civil rights groups were asked to issue helpful public statements” regarding the review).

<sup>317</sup> DEP’T OF JUSTICE, REVIEW OF FEDERAL AFFIRMATIVE ACTION PROGRAMS, REPORT TO THE PRESIDENT § 1.1 (July 19, 1995), available at <http://clinton2.nara.gov/WH/EOP/OP/html/aa/aa-index.html> (concluding “that these [affirmative action] programs have worked to advance equal opportunity by helping redress problems of discrimination and by fostering the inclusion needed to strengthen critical institutions, professions and the economy”).

<sup>318</sup> See Devroy, *supra* note 316.

<sup>319</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003); Military Brief, *supra* note 283, at 17 (quoting DEP’T OF JUSTICE, REVIEW OF FEDERAL AFFIRMATIVE ACTION PROGRAMS, REPORT TO THE PRESIDENT, *supra* note 317, at § 1.1).

<sup>320</sup> See Military Brief, *supra* note 283, at 12 (quoting Dep’t of Def., Directive 1350.2 § 4.4 (Aug. 18, 1995), which describes affirmative action programs as a “military necessity,” critical to “combat readiness and mission accomplishment”).

<sup>321</sup> See, e.g., *Rothe Dev. Corp. v. Dep’t of Def.*, 545 F.3d 1023, 1050 (Fed. Cir. 2008)

unpersuasive. A better indicator of senior officers' views towards race preferences can be found in polling survey data, which shows 60% of senior officers opposed and only 15% in favor of race preferences.<sup>322</sup>

*b. Minorities' In-Group Favoritism Should be Accommodated*

The Military Brief claimed, "increased minority representation in the officer corps enhances our ability to recruit highly qualified minorities into the enlisted ranks."<sup>323</sup> Thus, the Military Brief is explicitly premised on the troubling notion that minorities would prefer more minority officers.<sup>324</sup> The brief provides no citation or other support for this notion.<sup>325</sup> Even if there were empirical support for such a notion, the underlying thought process is morally toxic—that highly qualified minorities will be more likely to enlist if there are more minority officers of their race. The Military Brief is describing what historian Arthur Schlesinger, Jr. called "tribalism,"<sup>326</sup> and is openly recommending that the armed forces accommodate minorities' preference to be led by members of their own racial in-group. While such a level of tribal favoritism may be welcome in ethnic studies departments,<sup>327</sup> we can and should expect better from the armed services. To the extent that racial affiliation motivates some recruits, that attitude should not be placated by affirmative action; it should be exposed and criticized. Instead, the *Grutter* majority tacitly endorsed tribalism as a justification for racial preferences.

A related, dubious premise of the Military Brief is that "preparing officer candidates for service, let alone *command*, in our racially diverse military is extraordinarily difficult in a racially homogenous educational setting."<sup>328</sup> What is wrong with the

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(finding part of National Defense Authorization Act unconstitutional to the extent it allowed the DOD to operate a race-based contracting program).

<sup>322</sup> JASON K. DEMPSEY, *OUR ARMY: SOLDIERS, POLITICS, AND AMERICAN CIVIL MILITARY RELATIONS* 64 (2010).

<sup>323</sup> Military Brief, *supra* note 283, at 18.

<sup>324</sup> *See id.*

<sup>325</sup> *See id.*

<sup>326</sup> *See* SCHLESINGER, *supra* note 7, at 14.

<sup>327</sup> *See, e.g.*, Jordan, *supra* note 155, at A1 (documenting self-segregation in college dormitories).

<sup>328</sup> Military Brief, *supra* note 283, at 28.

particular students in a “racially homogenous educational setting”? There must be something sub-par about nonminority students if they make it “extraordinarily difficult” to prepare future officers.<sup>329</sup> We see here a variation on the theme that classes full of white and Asian students are “creepy,” as expressed by the former Dean of Admissions at Amherst College.<sup>330</sup>

It is unsound to suggest that the military requires some form of racial balance or officially-approved racial mix in order to fulfill its mission. It was an insult and injustice to minorities to exclude them from service, but it is—to a lesser degree—an insult and injustice to nonminorities to claim that racial diversity is a prerequisite of effective leadership or national security. As a point of comparison, there was relatively scant racial diversity present during the D-Day landing.<sup>331</sup> By the logic of affirmative action, the D-Day landing would have been a greater success if there were fewer white soldiers. This logic should be rigorously challenged. For a more modern comparison, consider the famously non-diverse special operations units, like the Navy SEALs.<sup>332</sup> The SEALs are so nondiverse that the Navy is engaged in aggressive recruiting to find more minority SEAL recruits, an effort driven by Naval Special Warfare Command.<sup>333</sup> Despite the fact—or, more accurately, regardless of the fact—that SEAL units are almost entirely white, the SEALs excel at accomplishing their objectives.

Engineering a different racial composition in the military will continue to be largely futile. As Thomas Sowell observes, “[m]ilitary forces are seldom ethnically representative of their respective societies.”<sup>334</sup> That is a general rule, consistent across time and throughout the world, as Sowell documents.<sup>335</sup> There is absolutely no reason based in logic or history to expect that

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<sup>329</sup> *See id.*

<sup>330</sup> *See* Lewin, *supra* note 199, at A13.

<sup>331</sup> There was one all-black unit present at the D-Day landing, the 320th Antiaircraft Barrage Balloon Battalion, which deployed blimp-like balloons for coastal defense. Brian Knowlton, *Forgotten Battalion's Last Returns to Beachhead*, N.Y. TIMES, June 6, 2009, at A11.

<sup>332</sup> Gidget Fuentes, *Navy SEALs Seek Minority Candidates*, NAVY TIMES, Nov. 15, 2010, at 28, available at <http://www.navytimes.com/news/2010/11/navy-seal-diversity-110610w/>.

<sup>333</sup> *Id.*

<sup>334</sup> SOWELL, *supra* note 107, at 132.

<sup>335</sup> *See id.*

racial groups would be interested in military service in perfect proportion to their population percentages. The demographic baseline for military personnel is going to be skewed and not proportional to racial population percentages. To add racial preferences on top of that demographic baseline unnecessarily imposes social engineering where it is not needed. *Fisher* refines the analysis of compelling state interests by stating that, in pursuing the educational benefits of diversity, “some, but not complete, judicial deference [to universities] is proper under *Grutter*.”<sup>336</sup> It appears that *Grutter* granted complete deference to the assertion that a racially diverse officer corps is part of a compelling state interest, and that affirmative action is needed to create a diverse officer corps.<sup>337</sup>

Minority service members have made valuable contributions to our nation’s wars. In the past, those contributions many times went unsung. These facts do not, however, justify the use of racial classifications today.

2. *Narrow tailoring to achieve a diverse officer corps to provide national security*

As previously noted, the Supreme Court applies strict scrutiny to the governmental use of race or racial preferences.<sup>338</sup> Strict scrutiny requires “that ‘the means chosen “fit” th[e] compelling goal” closely.<sup>339</sup> Accordingly, in the military context this standard requires that the use of affirmative action fit the goal of national security closely.<sup>340</sup> Here, that constitutional requirement gives rise to two logically inescapable prerequisites of a constitutionally valid affirmative action program premised, in part, on the supposed link between diversity and national security. First, affirmative action must fit the goal of national security

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<sup>336</sup> See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013).

<sup>337</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003).

<sup>338</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (concluding that strict scrutiny is the equal protection standard applicable under Fifth Amendment for reviewing race-based classifications); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (concluding that strict scrutiny is the equal protection standard applicable under Fourteenth Amendment for reviewing race-based classifications).

<sup>339</sup> *Grutter*, 539 U.S. at 333 (alteration in original) (quoting *Croson*, 488 U.S. at 493 (plurality opinion)).

<sup>340</sup> See *id.* at 331.

by creating unit cohesion. Recall that the amici insisted that “[t]he officer corps must continue to be diverse or the cohesiveness essential to the military mission will be critically undermined.”<sup>341</sup> Second, affirmative action at non-military colleges must promote national security. Neither requirement is met.

First, to ensure that race is used “no more broadly” than the interest in national security demands, either schools or the military should have to demonstrate that affirmative action remains necessary for unit cohesion. Affirmative action policies must comply with the principle, set forth by the *Grutter* majority, that “racial classifications . . . may be employed no more broadly than the interest demands.”<sup>342</sup> On this point, the *Grutter* majority fails to apply its own standard to the national security interest of affirmative action. The majority did not require any of evidence that racial strife undermines unit cohesion in the modern military.<sup>343</sup> In short, the Military Brief’s invocation of “unit cohesion”<sup>344</sup> was precisely the “mere recitation of a benign or compensatory purpose” warned against in *Croson*.<sup>345</sup> The means of racial preferences must fit the goal of national security, yet the only proof of a fit was proof that there was once a fit during the Vietnam era and prior.<sup>346</sup> *Grutter* posited no contemporary rationale for maintaining affirmative action in the military.<sup>347</sup>

Second, even assuming that the Military Brief established that affirmative action fits the goal of national security, additional evidence is needed to prove that affirmative action should be used in non-military colleges. At the end of its interesting but legally irrelevant discussion of 60s-era racial tension in the military, the Military Brief baselessly concludes—and the *Grutter* majority approvingly quotes—that “[i]t requires only a small step

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<sup>341</sup> Military Brief, *supra* note 283, at 7 (citing Dep’t of Def., *Statistical Series Pamphlet No. 02-5, Semiannual Race/Ethnic/Gender Profile by Service/Rank of the Department of Defense & Coast Guard* 17 (Mar. 2002)).

<sup>342</sup> *Grutter*, 539 U.S. at 342.

<sup>343</sup> See *supra* note 319 and accompanying text.

<sup>344</sup> Military Brief, *supra* note 283, at 17.

<sup>345</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (plurality opinion).

<sup>346</sup> See Military Brief, *supra* note 283, at 5–6.

<sup>347</sup> See generally *id.* at 16–17 (expressing the views of military leadership desiring a more diverse officer corps in light of the Vietnam experience).

from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective."<sup>348</sup> *Grutter* cites that assertion, in its entirety, despite the fact that the Military Brief failed to justify the significant logical step from national security to society-wide affirmative action in colleges generally. The reason affirmative action is needed in service academies is to serve the purpose of national security.<sup>349</sup> Affirmative action does not, indeed cannot, serve the purpose of national security in civilian educational institutions' departments of literature or engineering, for example. Extending the constitutional power to use affirmative action to civilian institutions under the guise of promoting national security necessitates an extraordinary process of deduction. The supposed diversity-national security link provides no constitutional traction for the vast majority of schools seeking to use affirmative action.

Assuming that affirmative action is required for unit cohesion, affirmative action only meets strict scrutiny for the service academies. Non-military schools should have to prove that they serve a similar interest as service academies. "[T]he government has the burden of proving that racial classifications are narrowly tailored measures that further compelling governmental interests."<sup>350</sup> Racial classifications in service academy admissions ostensibly further unit cohesion and national security. Racial classifications in ordinary civilian college admissions do not generally further unit cohesion and national security. Genuine narrow tailoring would have required the state to explain how affirmative action in civilian schools serves a compelling state interest in national security. Instead, the Military Brief carelessly conflated the mission of service academies with the mission of civilian schools.<sup>351</sup> In the process, the Military Brief and *Grutter* majority illogically extended the constitutional significance of national security to every college in the nation.<sup>352</sup>

Justice Kennedy would have courts scrutinize the guidelines

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<sup>348</sup> *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (alteration in original) (quoting Military Brief, *supra* note 283, at 29).

<sup>349</sup> *Grutter*, 539 U.S. at 331 (quoting Military Brief, *supra* note 283, at 5).

<sup>350</sup> *Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)) (internal quotation marks omitted).

<sup>351</sup> See Military Brief, *supra* note 283, at 29–30.

<sup>352</sup> See *supra* notes 343–47 and accompanying text.

of admission programs to “prove their process is fair and constitutional in every phase of implementation.”<sup>353</sup> If an admission process should be fair and constitutional in every phase of implementation, then it should also be fair and constitutional within each department or program of the college. Even if there is a link between diversity and unit cohesion, that would only justify racial preferences at service academies or within ROTC programs at colleges. In keeping with Kennedy’s guideline, universities would be justified in using affirmative action for students in their ROTC programs, at most.<sup>354</sup> Even assuming that national security is promoted by diversity, racial preferences in admission should be sharply limited to ROTC programs and not extended to the humanities, social sciences or STEM fields. The service academies and ROTC serve the compelling state interest of providing for national security, but the remainder of undergraduate colleges typically do not.

Grutter granted undue deference to the Military Brief and the Law School. In dissent, Justice Kennedy insisted that “[d]eference is antithetical to strict scrutiny, not consistent with it.”<sup>355</sup> In a manner inconsistent with strict scrutiny, the *Grutter* majority gave uncritical deference to empirically baseless claims about the link between diversity and national security.<sup>356</sup> Justice Kennedy and the conservative justices scathingly criticized this level of deference as “unprecedented.”<sup>357</sup> *Fisher* unambiguously held that schools are to receive “no deference”<sup>358</sup> in their attempt to prove that affirmative action is narrowly tailored to achieve supposed educational goals.<sup>359</sup> Therefore, the notion that racial classifications enable the military to provide national security is significantly vulnerable to challenge.

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<sup>353</sup> *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting).

<sup>354</sup> *See id.*

<sup>355</sup> *Id.*

<sup>356</sup> *Id.* at 331 (majority opinion).

<sup>357</sup> *See id.* at 350 (Thomas, J., concurring in part and dissenting in part) (“Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of ‘strict scrutiny.’”); *id.* at 380 (Rehnquist, C.J., dissenting) (faulting the majority’s unprecedented deference); *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting) (criticizing the majority for not applying strict scrutiny and reviewing racial preferences in a manner “nothing short of perfunctory”).

<sup>358</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013).

<sup>359</sup> *Id.*

Legal scholars noted the *Grutter* majority's extremely permissive approach to strict scrutiny.<sup>360</sup> In contrast, the Court showed no such deference to the Virginia Military Institute (VMI) when it sought to maintain single-sex education.<sup>361</sup> VMI made some of the same arguments that the retired officers made for affirmative action, yet the Court offered no deference when the outcome would have been to maintain a conservative policy.<sup>362</sup> VMI, like the University of Michigan law school, argued that "single-sex education provides important educational benefits," as well as "character development and leadership training."<sup>363</sup> The test for evaluating gender-based classifications is "heightened scrutiny," which is a lighter constitutional burden than strict scrutiny.<sup>364</sup> It should, as a matter of basic constitutional interpretation, be easier to uphold a policy under heightened scrutiny than under strict scrutiny. Even though VMI's policy was scrutinized under the lighter burden of heightened scrutiny, the Court found VMI's policy unconstitutional.<sup>365</sup> The contrast between *Grutter* and *Virginia* illustrates a deeply political and ideological decision-making process.

The necessity for affirmative action among the officer corps during the Vietnam era was a function of that highly fraught time period. It is fallacious to claim that prior historical circumstances, which no longer exist, continue to justify affirmative action. Worse yet, affirmative action stokes the very tribalism which colorblind justice is meant to prevent. The current regime of racial preferences is driven by bureaucratic inertia, political

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<sup>360</sup> Michelle Adams, *Searching for Strict Scrutiny in Grutter v. Bollinger*, 78 TUL. L. REV. 1941, 1943 (2004) (the majority applied strict scrutiny "in an undeniably relaxed manner . . . consistent with a robust rather than restrained vision of judicial review."); Jack M. Balkin, *Plessy, Brown, and Grutter: A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1724 (2005) ("The fact that the Court engages in this sort of deference is a tell-tale sign that it is not applying a scrutiny as strict as it claims.").

<sup>361</sup> *United States v. Virginia*, 518 U.S. 515, 555 (1996).

<sup>362</sup> *Compare* Military Brief, *supra* note 283, at 23, 27, *with Virginia*, 518 U.S. at 535, 540.

<sup>363</sup> *Virginia*, 518 U.S. at 535 (quoting Brief for Cross-Petitioners at 20, 33, *Virginia*, 518 U.S. 515 (Nos. 94-1941, 94-2107)). *See also* *Grutter v. Bollinger*, 539 U.S. 306, 366 (2003) (Thomas, J., concurring in part and dissenting in part) (contrasting the levels of deference shown by the *Grutter* Court and the *Virginia* Court).

<sup>364</sup> *Virginia*, 518 U.S. at 533, 555.

<sup>365</sup> *Id.* at 558.

ideology, and undue judicial deference—not national security. Even if affirmative action is justified for service academies, it is not justified in civilian schools. The Military Brief and the *Grutter* majority made no effort to explain why nonmilitary schools should have the same constitutional leeway as service academies with regard to racial preferences. Between the two institutions, there is a difference in the career path of graduates and in the nature of the state interest served by those institutions. The diversity-national security link is so tenuous that it does not come remotely close to meeting the exacting standard of strict scrutiny.

G. Because “education . . . is the very foundation of good citizenship”<sup>366</sup> it follows that “[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.”<sup>367</sup>

To provide the full context for the above quote, the *Grutter* Court first described the importance of education; then noted that the “diffusion of knowledge” must be accessible to all regardless of race so that public institutions must be “open and available” to all regardless of race; and that this openness is especially important in higher education.<sup>368</sup> It is extremely hard to decipher what the Court was claiming with such amorphous language. Almost anyone with a high school degree or equivalent can be admitted to some form of college or university after high school.<sup>369</sup> Therefore, public institutions are “open and available” to qualified people of all races without affirmative action. Yet, the Supreme Court’s phrasing seems to suggest otherwise. The Court gives no evidence that public institutions are not “open and available” without affirmative action,<sup>370</sup> but con-

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<sup>366</sup> *Grutter*, 539 U.S. at 331 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

<sup>367</sup> *Id.* at 331–32 (quoting Brief for United States as Amicus Curiae Supporting Petitioner at 13, *Grutter*, 539 U.S. 306 (No. 02–241)).

<sup>368</sup> *Id.* at 331.

<sup>369</sup> See STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 390–91 (1997).

<sup>370</sup> See *Grutter*, 539 U.S. at 331–32.

cludes with the following pat observation: “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”<sup>371</sup> From these platitudes, *Grutter* conjured a “paramount government objective.”<sup>372</sup>

1. *The compelling interest in ensuring open public institutions*

Why would the Court even suggest that public institutions are insufficiently “open and available” to all, regardless of race? In the insinuation that public institutions are not open to all, we hear an echo of the oft-repeated claim that minorities feel unwelcome in higher education.<sup>373</sup> In rejoinder, Laurence Thomas fairly asks, “Why should only the unscrutinized subjective feelings of minorities be the guide here . . . . [M]inorities, like all human beings, are subject to making distortions with regard to their feelings.”<sup>374</sup>

To an even greater degree, the goal of reaching a “critical mass” relies on subjective emotions that do not deserve constitutional promotion. According to the definition apparently accepted in *Grutter*, “critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race.”<sup>375</sup> However, significant constitutional questions arise when racial classifications are based to any degree on minority students’ purported feelings.<sup>376</sup> Specifically,

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<sup>371</sup> *Id.* at 332.

<sup>372</sup> *See id.*

<sup>373</sup> Philip G. Altbach, *The Racial Dilemma in American Higher Education*, 5 J. FOR HIGHER EDUC. MGMT., no. 2, Winter–Spring 1990 at 3, 6 (“Minority students are the ones suffering racial slights, being affected by discriminatory practices in admissions and in general feeling alienated on many of America’s campuses.”); Samuel D. Museus, *Generating Ethnic Minority Student Success (GEMS): A Qualitative Analysis of High-Performing Institutions*, 4 J. DIVERSITY IN HIGHER EDUC., no. 3, Sept. 2011, at 147, 148 (“[A] large body of evidence supports the notion that many students of color encounter challenges connecting to the cultures of [predominantly White institutions], resulting in their feeling alienated, marginalized, and unwelcome in those cultures.”).

<sup>374</sup> Thomas, *supra* note 71, at 946–47.

<sup>375</sup> *Grutter*, 539 U.S. at 319 (citing Petition for Writ of Certiorari app. at 211a, *Grutter*, 539 U.S. 306 (No. 02–241)).

<sup>376</sup> Critical mass itself is a problematic metric. *See id.* at 380–81 (Rehnquist, C.J., dissenting) (pointing out that the critical mass of racial groups at the Law School was arbitrary, attracting only 13–19 Native American students, 91–108 black students, and 47–56 Hispanic students over five years, compared to 1,130 to 1,310

why should the state favor certain groups' feelings over others, and how many other constitutional protections will be abandoned to cater to feelings?

It seems that Grutter defines "open and available" public institutions by reference to the subjective impressions of favored racial groups. *Grutter's* invocation of "open and available" institutions is grand rhetoric, but does not elucidate a compelling state interest. Again, we see "the mere recitation of a 'benign' or legitimate purpose" that *Croson* repeatedly warned against.<sup>377</sup>

## 2. *Narrow tailoring to ensure open public institutions*

Laurence Thomas notes that despite decade's worth of affirmative action, supporters of affirmative action policy continue to believe that colleges are unwelcoming to minorities:

Notwithstanding the fact that the practice of affirmative action has been in place for over two decades, those who defend it do so on the grounds that the university is not yet a sufficiently hospitable environment for minorities. If this is so after more than twenty-five years, what reason is there to think that things will turn out for the better in this regard given an additional twenty-five years of it? Normally, the failure of a practice to produce the desired results after such a lengthy period of time constitutes a formidable reason to end it on the grounds that the practice is impotent with respect to producing the outcome that was claimed on its behalf.<sup>378</sup>

*Fisher* reasserted that narrow tailoring "requires that the reviewing court verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity."<sup>379</sup> "This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications."<sup>380</sup> Needless to say, alternatives are available to ensure that public institutions remain open to all, regardless of race. It would be exceedingly difficult for a college to show that "no workable race-neutral alternatives would produce the educational benefits" of

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students overall during the same period).

<sup>377</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490, 495, 500 (1989) (plurality opinion).

<sup>378</sup> Thomas, *supra* note 71, at 946.

<sup>379</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (plurality opinion)).

<sup>380</sup> *Id.*

open institutions.<sup>381</sup> Affirmative action is not required to ensure the admission of minorities into select institutions. Studies analyzing the results of affirmative action bans indicate that minorities continue to be admitted to select universities, only in slightly lower numbers.<sup>382</sup>

“[T]he dream of one Nation, indivisible”<sup>383</sup> seems inconsistent with reverse discrimination.<sup>384</sup> In fact, the Court provides no logic or evidence connecting affirmative action to “the dream of one Nation, indivisible.”<sup>385</sup> *Grutter*’s rhetoric about open institutions was irrelevant to strict scrutiny.

H. Schools “represent the training ground for a large number of our Nation’s leaders . . . with legitimacy in the eyes of the citizenry.”<sup>386</sup>

In listing the supposed benefits of student body diversity, the Court curiously noted that “universities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders.”<sup>387</sup> Additionally, “[i]n 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.”<sup>388</sup> These seemingly innocuous platitudes are put to a disturbing yet familiar purpose.

1. *The compelling interest in training national leaders with*

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<sup>381</sup> *Id.*

<sup>382</sup> Peter Hinrichs, *The Effects of Affirmative Action Bans on College Enrollment, Educational Attainment, and the Demographic Composition of Universities*, 94 REV. ECON. & STAT. 712, 719–20 (2012) (presenting findings that “suggest that banning affirmative action at a public university in the top 50 of the *U.S. News* rankings is associated with a decrease in black enrollment of roughly 1.74 percentage points, a decrease in Hispanic enrollment of roughly 2.03 percentage points, and a decrease in Native American enrollment of roughly .47 percentage points”).

<sup>383</sup> *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

<sup>384</sup> The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

<sup>385</sup> *See Grutter*, 539 U.S. at 332.

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*

*legitimacy in the eyes of the citizenry*

Why would the Court suggest that schools might lack “legitimacy in the eyes of the citizenry?” The answer the Court seems to provide is that the “path to leadership” is not “visibly open” to certain unnamed racial or ethnic groups, so leadership lacks “legitimacy in the eyes of the citizenry.”<sup>389</sup> The Court is not speaking on behalf of “the citizenry” as a whole. The Court does not even provide an anecdote to indicate that “the citizenry” has race-based concerns about the undefined “legitimacy” of unspecified “leaders.”<sup>390</sup> The Court is instead speaking on behalf of a particular, racialized perspective. The perspective of unnamed racial and ethnic groups’ demands, or so the Court posits, that their group be represented to a desired degree.<sup>391</sup> Until the desired degree of representation occurs, national leadership is illegitimate “in the eyes” of those unnamed racial and ethnic groupings. Here, the Court is again catering to rank tribalism.

Implicit in the Court’s reasoning is a presumption that members of unnamed racial or ethnic groups are looking at national leadership, not seeing sufficient numbers of their in-group, and accordingly, the racially imbalanced leadership lacks legitimacy. In other words, unnamed racial and ethnic groupings will not believe that unspecified leaders have undefined legitimacy unless members of those unnamed racial and ethnic groupings see racial balance among leaders. In short, *Grutter* gave constitutional credence to the racialized definition of legitimacy held by certain groups.<sup>392</sup> *Grutter* does not require any factual showing that the “path to leadership” is closed to some groups. Instead, *Grutter* implicitly agrees that unnamed racial groups are underrepresented, and then gives constitutional imprimatur to their tribalism. However, there is no “reasoned, principled explanation for the academic decision,”<sup>393</sup> to define nebulous perceptions of legitimacy as constitutive of a compelling state interest.

Somewhat humorously, the *Grutter* majority could muster

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<sup>389</sup> See *id.*

<sup>390</sup> See *id.*

<sup>391</sup> See discussion *supra* Part II.D.

<sup>392</sup> See *Grutter*, 539 U.S. at 332.

<sup>393</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013).

only one example of the “leaders” trained in law schools: politicians.<sup>394</sup> Assuming that it is a compelling state interest to train politicians in law school, why does affirmative action also apply to science, technology, engineering, or mathematics programs? The “training ground” argument only makes sense if one presumes that leadership is not fostered unless nonminorities have other races in their classrooms. Why this should be the case at law schools “in particular” is left unexplained by the Court, other than to say that lawyers often become politicians—a questionable measure of leadership.<sup>395</sup> For better or worse, lawyers fill many political positions. It is not a compelling interest that we facilitate that process by discriminating against nonminorities.

2. *Narrow tailoring to achieve the interest in training national leaders*

Law schools, along with other educational programs, can serve as training grounds for leaders without affirmative action. It should not need to be pointed out that minorities are perfectly free to attend colleges and law schools, and become leaders, in the absence of racial preferences. Surely “a nonracial approach . . . could promote the substantial interest” in training future leaders “about as well and at tolerable administrative expense”<sup>396</sup> compared to affirmative action, making racial considerations unnecessary and constitutionally impermissible. The relationship between national leadership and diversity is a philosophically and factually complex one, and affirmative action policies further complicate that relationship. In his trenchant critique of affirmative action, Laurence Thomas asserts that, in college admissions, “the very idea that diversity should be a first principle that competes with recruiting talent is both ludicrous and morally bankrupt.”<sup>397</sup> It seems problematic to expect that

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<sup>394</sup> *Grutter*, 539 U.S. at 332.

<sup>395</sup> *See id.*

<sup>396</sup> *Fisher*, 133 S. Ct. at 2420 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (internal quotation marks omitted)).

<sup>397</sup> Thomas, *supra* note 71, at 931, 948 (arguing that “those who support diversity under the aegis of affirmative action are making a quite extraordinary claim, namely, that diversity should be on a par with attracting and educating talent,” when, Thomas argues, diversity “cannot be on a par with talent”).

national leadership would gain “legitimacy in the eyes of the citizenry”<sup>398</sup> via a flawed, divisive policy like affirmative action.

The Court projected onto unnamed racial and ethnic groups the view that unspecified leaders are illegitimate unless they reflect the desired level of racial representation. The principle of equal protection is thus rendered subservient to insatiable racial grievances.<sup>399</sup> *Grutter*’s subtle descent into “simple racial politics”<sup>400</sup> evaded the fundamental test of strict scrutiny.

- I. A “crucial part” of a school’s mission is “diminishing the force of . . . stereotypes” such as the stereotype that “minority students always (or even consistently) express some characteristic minority viewpoint on any issue.”<sup>401</sup>

The majority’s one quasi-example of a stereotype was the notion that “minority students always (or even consistently) express some characteristic minority viewpoint on any issue.”<sup>402</sup> The majority did not endeavor to distinguish between supposed stereotypes about minority viewpoints and valid observations about patterns of belief.<sup>403</sup> Nonetheless, even where stereotypes about minority viewpoints do exist, affirmative action is not designed so that racial diversity in the classroom diminishes those stereotypes. Even where a stereotype exists, and racial diversity could diminish the stereotype, that outcome is not necessarily a compelling state interest—especially in light of the equal protection principle that must be sacrificed to obtain the outcome.

- I. *The compelling interest in diminishing the force of stereotypes*

*Grutter* does not tell us precisely where it exists, but somewhere there is a stereotype that “minority students always (or even consistently) express some characteristic minority viewpoint on any issue.”<sup>404</sup> Without knowing which particular “minority viewpoint” stereotype is being countered by classroom diversity, it is impossible to assess whether countering that

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<sup>398</sup> *Grutter*, 539 U.S. at 332.

<sup>399</sup> *See id.*

<sup>400</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).

<sup>401</sup> *Grutter*, 539 U.S. at 333 (citation omitted) (internal quotation marks omitted).

<sup>402</sup> *Id.*

<sup>403</sup> *See id.*

<sup>404</sup> *Id.*

stereotype is a compelling interest. The majority seems to suggest that it would be a stereotype to believe that “consistently” held views present themselves in well-established racial and ethnic patterns.<sup>405</sup> However, Sowell concludes that “the presupposition of an absence of distinguishing group values and traits is as arbitrary as any stereotype.”<sup>406</sup>

On certain matters of broad social significance there are “consistent” belief patterns, including long-standing and widely recognized racial trends. For instance, in the 2012 presidential election, ninety-three percent of blacks voted for the same major party candidate.<sup>407</sup> Seventy-one percent of Latinos voted for the same candidate.<sup>408</sup> This is a significant level of ideological unanimity, which could be labeled a “characteristic minority viewpoint” on partisan affiliation. Partisan affiliation, in turn, surely has ramifications for a broad range of ideological positions between and among ethnic groups. Yet, the *Grutter* majority was unable to countenance that there are “consistently” expressed viewpoints among minority students.<sup>409</sup> Furthermore, the Court did not provide a single instance of any actual stereotype concerning a “characteristic minority viewpoint” on any particular issue.<sup>410</sup> It would be a stereotype to say that “student A is black

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<sup>405</sup> *See id.*

<sup>406</sup> SOWELL, *supra* note 107, at 12.

<sup>407</sup> Peter Grier, *Election Results 2012: Who Won It for Obama?*, CHRISTIAN SCI. MONITOR (Nov. 7, 2012), <http://www.csmonitor.com/USA/DC-Decoder/Decoder-Wire/2012/1107/Election-results-2012-Who-won-it-for-Obama-video>. By an astonishing 94% to 0% chasm, blacks favored President Obama over Mitt Romney, according to one NBC News/Wall Street Journal poll taken prior to the 2012 election. Mark Murray, *NBC/WSJ Poll: Heading into Conventions, Obama Has Four-Point Lead*, NBC NEWS (Aug. 21, 2012, 3:30 PM), <http://firstread.nbcnews.com/news/2012/08/21/13399788-nbcwsj-poll-heading-into-conventions-obama-has-four-point-lead>. In the 2008 presidential election, 95% of black voters chose the same major party candidate. MARK HUGO LOPEZ & PAUL TAYLOR, PEW RESEARCH CTR., *DISSECTING THE 2008 ELECTORATE: MOST DIVERSE IN U.S. HISTORY* iii (2009).

<sup>408</sup> Donna St. George & Brady Dennis, *Growing Share of Hispanic Voters Helped Push Obama to Victory*, WASH. POST, Nov. 7, 2012, [http://www.washingtonpost.com/politics/decision2012/growing-share-of-hispanic-voters-helped-push-obama-to-victory/2012/11/07/b4087d0a-28ff-11e2-b4e0-346287b7e56c\\_story.html](http://www.washingtonpost.com/politics/decision2012/growing-share-of-hispanic-voters-helped-push-obama-to-victory/2012/11/07/b4087d0a-28ff-11e2-b4e0-346287b7e56c_story.html).

<sup>409</sup> *See Grutter*, 539 U.S. at 333 (quoting Brief for Respondent Bollinger et al., *Grutter*, 539 U.S. 306 (No. 02–241)) (internal quotation marks omitted).

<sup>410</sup> *Id.* (quoting Brief for Respondent Bollinger et al., *Grutter*, 539 U.S. 306 (No. 02–241)) (internal quotation marks omitted).

therefore student A is a Democrat.” It is not a stereotype to recognize patterns of self-reported minority opinions borne out by polls and surveys. This observation applies to college-aged students.

Millennials, meaning people between the ages 18 and 24, break down on racial lines on several key issues. Ninety-two percent of black Millennials preferred that Obama win the 2012 election, along with 61% of Hispanics.<sup>411</sup> Only 33% of white Millennials preferred Obama in 2012.<sup>412</sup> In addition, 56% of white Millennials “agree that the government has paid too much attention to the problems of blacks and other minorities,” versus just 24% of blacks.<sup>413</sup> Next, 58% of white Millennials “believe that discrimination against whites has become as big a problem as discrimination against blacks and other minorities,” versus just 24% of blacks.<sup>414</sup> The commonalities continue: 70% of black youths versus 56% of white youths agree that “[g]enerations of slavery and discrimination have created conditions that make it difficult for blacks to work their way out of the lower class.”<sup>415</sup> Sixty-six percent of black youths versus 45% of white youths believe that “[o]ver the past few years, blacks have gotten less than they deserve.”<sup>416</sup> Seventy-three percent of black adults “feel strongly that affirmative-action programs are needed to counteract discrimination,” while only 22% of whites agree.<sup>417</sup> Seventy-five percent of black Millennials support affirmative action to “[r]edress [p]ast [d]iscrimination,” as do 63% of their Hispanic peers, joined by only 19% of whites.<sup>418</sup> Young Hispanics are very

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<sup>411</sup> JONES ET AL., *supra* note 123, at 15.

<sup>412</sup> *Id.*

<sup>413</sup> *Id.* at 36.

<sup>414</sup> *Id.* at 36–37.

<sup>415</sup> See *Racial Attitudes of Young Americans*, HAMILTON C. NAT’L YOUTH OP. POLL, app. at 2 (Aug. 1999), [http://www.hamilton.edu/news/polls/RacialAttitudes/Racial\\_Attitudes\\_Survey\\_Appendix.pdf](http://www.hamilton.edu/news/polls/RacialAttitudes/Racial_Attitudes_Survey_Appendix.pdf).

<sup>416</sup> *Id.* at 3–4.

<sup>417</sup> Gary Fields, *Racial Lines*, WALL ST. J., Jan. 20, 2010, at R7.

<sup>418</sup> ROBERT P. JONES ET AL., PUB. RELIGION RESEARCH INST. & GEO. U. BERKLEY CTR. FOR RELIGION, PEACE, & WORLD AFFAIRS, DIVERSE, DISILLUSIONED, AND DIVIDED: MILLENNIAL VALUES AND VOTER ENGAGEMENT IN THE 2012 ELECTION 26 (2012), available at <http://publicreligion.org/site/wp-content/uploads/2012/10/Millennials-Election-2012-Report-For-Web.pdf>.

likely to support amnesty programs (63% support, 13% oppose).<sup>419</sup> Those with a passing familiarity with public opinion research understand that there are racial patterns in voting behavior and political views, several of which could be appropriately described as a “characteristic minority viewpoint.” It would be a stereotype to assume that *all* members of any given racial group hold a particular view. Crucially, there is no evidence that any significant number of nonminorities hold such a stereotype.

Moreover, it is important to note that there are numerous fields of study with no pertinence to race or ethnic background at all. There is no need to counter stereotypes about characteristic minority viewpoints about the subject matter found in STEM fields; there are no stereotypes at play because these topics cannot be analyzed through a racial lens. The benefits of diversity only come into play—if ever—when there are racially pertinent political, social, or cultural issues involved in a given academic field or course.

*Grutter*, by invoking fears of “stereotypes,” does nothing to establish a compelling interest justifying racial classifications. It is not a compelling state interest to counter the notion that there are frequent commonalities in racial groups’ opinions. Because we have no idea how many students harbor stereotypes, there is no reliable way to gauge to what degree countering stereotypes is a compelling interest.

The *Grutter* majority offered no proof that stereotypes exist to a degree warranting racial classifications, or that any given view is a stereotype as opposed to a valid observation about belief patterns. Countering stereotypes should not justify discrimination against “nonfavored groups.”<sup>420</sup>

## 2. *Narrow tailoring to diminish the force of stereotypes*

Strict scrutiny is supposed to guarantee “that ‘the means chosen “fit” th[e] compelling goal . . . closely.’”<sup>421</sup> Thus, affirmative action must fit the goal of countering stereotypes closely.<sup>422</sup>

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<sup>419</sup> *The 14th Biannual Youth Survey of Politics and Public Service*, HARVARD UNIV. INST. OF POL. (Spring 2008), <http://www.iop.harvard.edu/spring-2008-survey-executive-summary>.

<sup>420</sup> *Grutter v. Bollinger*, 539 U.S. 306, 320 (2003).

<sup>421</sup> *Id.* (alteration in original) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

<sup>422</sup> *See id.*

If colleges are genuinely in the business of countering stereotypes, then they should identify the stereotype to be countered, and select applicants who counter the identified stereotype. If schools are not identifying real stereotypes to be countered, then affirmative action cannot possibly “fit” the goal of countering stereotypes. Moreover, courts following *Fisher* should give “no deference”<sup>423</sup> to schools attempting to prove that affirmative action is narrowly tailored to diminish the force of stereotypes.<sup>424</sup>

Taking diversity logic seriously would require liberal school administrators<sup>425</sup> to grant admissions preferences largely to people they regard as “Uncle Tom[s].”<sup>426</sup> By *Grutter*’s logic, minority students with a “characteristic minority viewpoint” should not be allowed to benefit from affirmative action. Students with such a viewpoint—i.e., liberals, progressives, anti-colonialists—would only reinforce the stereotype that there is a “characteristic minority viewpoint.” Minorities who espouse doctrinaire liberalism are in conformity with the bulk of their peers. Conservative minorities, on the other hand, have a truly unique perspective. Their beliefs stand in the face of “sell out” or “Uncle Tom” smears, and immense peer pressure. Therefore, if we are applying *Grutter*’s diversity logic in light of narrow tailoring, then politically dissenting minorities—i.e., independents, libertarians and conservatives—are among the only proper beneficiaries of racial preferences. Some minorities will have a noteworthy perspective or experience based on their race—one example would be a victim of actual discrimination. These students have a potentially valuable perspective to offer, and admissions officials can take account of that independently of broad racial preferences.

Affirmative action is premised on the notion that minority students make “unique contributions” to their schools.<sup>427</sup> This premise forces the Court into a logical bind: it is a thought crime (“stereotype”) to suggest that minorities have a “characteristic

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<sup>423</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013).

<sup>424</sup> *Id.*

<sup>425</sup> See Pohlman, *supra* note 66.

<sup>426</sup> Cf. Jack E. White, *Uncle Tom Justice*, TIME, June 26, 1995, at 36 (labeling Clarence Thomas’s conduct on the Supreme Court as “Uncle Tom Justice”).

<sup>427</sup> See *Grutter*, 539 U.S. at 316 (quoting Joint Appendix at 120–21, *Grutter*, 539 U.S. 306 (No. 02–241)) (internal quotation marks omitted).

minority viewpoint,<sup>428</sup> yet the majority also claims that minorities offer “a perspective different from that of”<sup>429</sup> nonminority groups. The Court asserts that it is a stereotype to say that there is such a thing as a “characteristic minority viewpoint.”<sup>430</sup> Yet, the majority declares that minorities bring “a perspective different from that of members of groups which have not been the victims of [past] discrimination.”<sup>431</sup> *Grutter* postulates that minorities have a range of specifically minority opinions, discernibly “different from that of” nonminority opinions, none of which can be labeled “characteristic” of minorities. The Court is describing a very fine line. The constitutional difficulty with this approach is that affirmative action does not target students who walk this fine line; racial preferences apply to entire minority groups with no requirement that they offer a different perspective, or take part in classes where that perspective is aired.

Under strict scrutiny analysis, “the government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling governmental interests.’”<sup>432</sup> Here, the government must prove that racial classifications somehow serve to counter stereotypes about “characteristic” views. To the contrary, the *Grutter* majority turned a blind eye to the practical reality that there is no mechanism in affirmative action programs to provide the touted educational benefits. When schools do not establish a mechanism to counter stereotypes, then such schools are bypassing narrow tailoring. In fact, the *Grutter* majority approved of the notion that minority students “may bring . . . a perspective different from that of members of groups which have not been the victims of such [historical] discrimination.”<sup>433</sup> Of course, if there is only a possibility

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<sup>428</sup> See *id.* at 333 (quoting Brief for Respondent Bollinger et al., *Grutter*, 539 U.S. 306 (No. 02-241)) (internal quotation marks omitted).

<sup>429</sup> *Id.* at 319 (citing Petition for Writ of Certiorari app. at 213a, *Grutter*, 539 U.S. 306 (No. 02-241)).

<sup>430</sup> See *id.* at 333 (quoting Brief for Respondent Bollinger et al., *Grutter*, 539 U.S. 306 (No. 02-241)) (internal quotation marks omitted).

<sup>431</sup> *Id.* at 319 (citing Petition for Writ of Certiorari app. at 213a, *Grutter*, 539 U.S. 306 (No. 02-241)) (reviewing the testimony of the chair of the faculty committee that drafted the Law School’s admissions policy).

<sup>432</sup> *Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

<sup>433</sup> See *Grutter*, 539 U.S. at 319 (citing Petition for Writ of Certiorari app. at 213a, *Grutter*, 539 U.S. 306 (No. 02-241)).

that minorities “may bring” a different perspective, then there is an extremely poor fit between the means chosen (affirmative action) and the compelling goal (educational benefit of different perspectives).<sup>434</sup> The result is an utter lack of narrow tailoring.

*Grutter* asserts that “diminishing the force of such stereotypes is . . . a crucial part of [a school’s] mission.”<sup>435</sup> What other stereotypes is it a “crucial part” of schools’ missions to diminish? *Grutter* listed none. We are supposed to simply presume—as if it were not a stereotype—that nonminority students harbor such a significant number of stereotypes that schools must make it a “mission”<sup>436</sup> to diminish the legion of unidentified stereotypes. Courts should not defer to baseless invocations of unidentified problems like stereotypes when equal protection principles are at stake. As Justice Kennedy noted in dissent, “[d]eference is antithetical to strict scrutiny, not consistent with it.”<sup>437</sup> *Grutter*, in contrast, gave complete deference to the plethora of unexamined assumptions underlying the stereotype argument.<sup>438</sup>

If countering stereotypes is part of a compelling state interest, then colleges should have to establish that their student body harbors stereotypes, and that applicants admitted under racial classifications effectively counter stereotypes. As the presidential politics example shows, what is called a stereotype may be a valid observation about measured patterns of partisan belief. Even given the existence of some stereotypes, it is disingenuous to assert that affirmative action programs are designed to counter them.

### III. CONCLUSION

Colleges must provide evidence of a compelling state interest, met through narrow tailoring, to justify the violation of equal protection principles.<sup>439</sup> Courts, for their part, are responsible

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<sup>434</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (stating that a means of achieving a goal must “fit” or be likely to accomplish the said goal under a strict scrutiny test).

<sup>435</sup> *Grutter*, 539 U.S. at 333.

<sup>436</sup> *Id.* at 333 (majority opinion).

<sup>437</sup> *Id.* at 394 (Kennedy, J., dissenting).

<sup>438</sup> See *id.* at 318–20 (majority opinion) (impliedly adopting testimony supporting the Law School).

<sup>439</sup> *Fisher*, 133 S. Ct. at 2420.

for applying strict scrutiny to colleges' affirmative action policies.<sup>440</sup> The Supreme Court has consistently held that racial classifications are "presumptively invalid and can be upheld only upon an extraordinary justification."<sup>441</sup> Grutter severely overstated the educational benefits of diversity. To the limited degree that an affirmative action program may at times produce supposed benefits, those benefits are not an "extraordinary justification" for racial preferences. *Grutter's* reliance on diversity as an extraordinary justification demonstrates the Court's failure to apply strict scrutiny.

Under actual strict scrutiny, the nine supposed educational benefits named in *Grutter* do not comprise a compelling state interest. Racial classifications do little to promote meaningful educational benefits, much less a compelling state interest. On that prong of strict scrutiny, *Fisher* should be read to place a slight but discernible restraint on *Grutter's* deferential approach.

Moreover, racial preferences are not narrowly tailored to bring about any of the nine supposed benefits of a diverse student body. The *Grutter* court gave undeserved deference to colleges, without requiring the slightest fit between racial classifications and the supposed goals of affirmative action. In the process, the *Grutter* majority entrenched negative stereotypes about nonminorities, and those stereotypes remain an integral part of affirmative action plans. On the narrow tailoring prong, *Fisher* rightly reestablished the bulwark of equal protection that strict scrutiny is supposed to provide. Given the carefully crafted admissions mechanisms that would be required to meet narrow tailoring and justify racial preferences, few affirmative action programs would survive true strict scrutiny.

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<sup>440</sup> *See id.*

<sup>441</sup> *Shaw v. Reno*, 509 U.S. 630, 643–44 (1993) (citing *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).