

## RACIAL MIRRORING

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### ABSTRACT

*“Racial mirroring” refers to efforts by one group to match the primary racial composition of another group. In contrast to racial balancing, which takes place when two groups are adjusted simultaneously to achieve a desired degree of racial equilibrium between them, racial mirroring occurs when the racial makeup of one group is adjusted so as to reflect the predominant racial identity of the second group.*

*Employers and even federal courts engage in racial mirroring. For example, in order to generate trust among customers, employers have hired or promoted individuals of the same race as the employers’ primary customer base. Further, in order to ensure that attorneys can fairly and adequately represent the interests of their clients, a federal district court judge required counsel in class action cases to staff attorneys that reflect the racial diversity of the clients. Federal appellate courts have approved these twin forms of racial mirroring.*

*This Article challenges employer and judicial attempts to match the racial identity of one group to the primary racial identity of another. It argues that these practices, however intuitive and well-intentioned, violate the Equal Protection Clause, embody harmful racial stereotypes, and generate significant social costs.*

### TABLE OF CONTENTS

INTRODUCTION.....	1336
I. “EXTERNAL LEGITIMACY”.....	1341
A. <i>Judicial Support for “External Legitimacy”</i> .....	1342
B. <i>Academic Support for “External Legitimacy”</i> .....	1347
II. PROBLEMS WITH “EXTERNAL LEGITIMACY”.....	1349
A. <i>Individual Costs</i> .....	1351
1. <i>The Positive Presumption Problem</i> .....	1351
2. <i>The Performance Problem</i> .....	1358

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3. <i>The Negative Presumption Problem</i> .....	1361
4. <i>The Equal Consideration Problem</i> .....	1362
5. <i>The Race Defining Problem</i> .....	1366
B. <i>Social Costs</i> .....	1370
1. <i>The Stereotype Entrenchment Problem</i> .....	1370
2. <i>The Role Exclusion Problem</i> .....	1371
C. <i>Judicial Costs: The Judicial Validation Problem</i> .....	1375
III. APPLICATION .....	1380
A. <i>Law Enforcement</i> .....	1380
B. <i>Tribal Employment</i> .....	1382
C. <i>Affirmative Action</i> .....	1385
IV. THE REMEDY.....	1388
A. <i>The Rule</i> .....	1388
B. <i>Application</i> .....	1389
CONCLUSION.....	1392

## INTRODUCTION

The deaths of Michael Brown, an unarmed black teenager, in Ferguson, Missouri, and of Eric Garner, an unarmed black man, in Staten Island, New York, both at the hands of white police officers, have catalyzed racial tensions across the country. Recommendations for how those tensions may be eased, and for how a more harmonious multiracial nation may emerge, soon followed.

One suggestion concerns the racial composition of predominantly white police departments in predominantly African-American neighborhoods. Ferguson has 21,000 residents, 67% of whom are black.<sup>1</sup> Ferguson's police force has fifty-three officers, only four of whom, or 7%, are black.<sup>2</sup> Seizing on these figures, some have proposed that the Ferguson police department, and similar police departments in other

<sup>1</sup> See Rebecca Leber, *Ferguson's Police Force Is 94 Percent White—And That's Basically Normal in the U.S.*, THE NEW REPUBLIC (Aug. 13, 2014), <http://www.newrepublic.com/article/119070/michael-browns-death-leads-scrutiny-ferguson-white-police>.

<sup>2</sup> News outlets reported that African Americans only made up 5.6% of the Ferguson police force, which is three officers out of the fifty-three on the force. See, e.g., *id.* With focus on the racial composition of the Ferguson police department, other news outlets clarified that there are four black officers on the fifty-three-member force. See, e.g., Steve Contorno et al., *PunditFact Fact-Checks The Aug. 17 News Shows*, POLITIFACT (Aug. 17, 2014, 5:41 PM), <http://www.politifact.com/truth-o-meter/article/2014/aug/17/punditfact-checks-aug-17-news-shows/>.

cities, should reflect the racial demographics of their served communities. Former NYPD Commissioner Ray Kelly, for example, encouraged this mutuality of racial identity, claiming that it makes for “easier” and “smarter” policing.<sup>3</sup>

This argument may be restated in general terms: Trust is the touchstone of effective policing.<sup>4</sup> In communities of color, that trust has been undermined by the painful legacy and stubborn persistence of actual or perceived racial discrimination in law enforcement. Accordingly, communities of color confronted by a predominantly non-black police force may assume that the police force is biased and that such bias will work its way into adverse law enforcement decisions. This view erodes confidence in the police which, in turn, makes communities of color less inclined to communicate with and support law enforcement.

By contrast, communities of color may be more receptive to a police force that looks like them and that does not embody actual or perceived bias. A shared racial makeup thereby may help foster trust which, in turn, may facilitate cooperation between law enforcement and people of color. In other words, a mutuality of racial identity may yield better policing outcomes, the argument goes.

From this overview, it seems tough to argue with the proposed matching of the racial identity of the police force with the predominant racial makeup of the town or city, or with the U.S. Court of Appeals for the Seventh Circuit’s conclusion that “[t]he composition and operation of an effective police force should be in as complete harmony as possible with the community from which it springs.”<sup>5</sup> It seems similarly difficult to contest the “external legitimacy” doctrine, the general principle behind the specific police department suggestion. Under this doctrine, employers may give special consideration to job applicants of the same race as the clients that the employer serves because employees of the same race will be able to generate

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3 *This Week with George Stephanopoulos: Aftermath of the Darren Wilson Grand Jury Decision* (ABC News television broadcast Nov. 30, 2014), available at <http://abc.go.com/shows/this-week-with-george-stephanopoulos/listing/2014-11/30-this-week-1130-aftermath-of-the-darren-wilson-grand-jury-decision>.

4 BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, UNDERSTANDING COMMUNITY POLICING: A FRAMEWORK FOR ACTION, at vii (1994), available at <http://www.ncjrs.gov/pdffiles/commpp.pdf> (“A foundation of trust will allow police to form close relationships with the community that will produce solid achievements. Without trust between police and citizens, effective policing is impossible.”)

5 *Petit v. City of Chicago*, 352 F.3d 1111, 1115 (7th Cir. 2003), cert. denied, 541 U.S. 1074 (2004) (en banc) (alteration in original) (quoting *United States v. City of Chicago*, 663 F.2d 1354, 1364 (7th Cir. 1981)).

trust and cooperation among the clients and thus boost the “external legitimacy” of the employer.<sup>6</sup>

Attempts to ensure that individuals in one defined group reflect the racial composition of another group may be termed “racial mirroring.”<sup>7</sup> Suggestions that police departments echo the racial diversity of the city or town is an example of this practice. Despite the intuitive promise of racial mirroring, including in the police context, I am afraid that racial mirroring violates the Equal Protection Clause,<sup>8</sup> perpetuates harmful racial stereotypes, and therefore produces significant legal and social costs. The purpose of this Article is to explain this constitutional and extra-legal—and admittedly unwelcome—conclusion.

Racial mirroring produces three sets of distinction costs: (1) those affecting the individuals seeking particular opportunities (individual costs), (2) those affecting all others (social costs), and (3) those affecting the courts (judicial costs).

First, racial mirroring imposes costs on individuals who are candidates for particular opportunities. With respect to the individual who is given the position for “external legitimacy” reasons, racial mirroring enables decisionmakers to categorically presume that the candidate, solely because of his or her racial identity, has the qualities

<sup>6</sup> See, e.g., *Petit*, 352 F.3d at 1114–15 (discussing how minority representation in the police force is critical for its effective operation because the minority population will exhibit greater trust and confidence in the police force). The term “external legitimacy” in this context may be attributed to Professor Cynthia Estlund’s important article in this area. Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 22 (2005) (referring to the “external legitimacy” argument, or the “business case for diversity,” which “points to the increasingly diverse nature of firms’ external constituencies—its clientele and contractors—and the credibility, legitimacy, and cultural knowledge that a diverse workforce brings to the project of capturing and cultivating those external constituencies”).

<sup>7</sup> “Racial mirroring” is distinct from “racial balancing.” In “racial balancing,” the racial composition of two groups is adjusted with the purpose of achieving an acceptable range of racial diversity within the two groups. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 710–12, 720–22 (2007) (striking down the school districts’ policy which made transfer decisions between schools on the basis of race—in order to ensure that no school was racially isolated (i.e., having insufficient numbers of students from racial minority groups) or racially concentrated (i.e., having insufficient numbers of non-minority students)—because it was not narrowly tailored to a compelling government interest). The Court has held that when the racial mixing is done “for its own sake,” it is discrimination. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.). In contrast, “racial mirroring” occurs when the racial composition of only one side is adjusted to reflect the racial composition of some other, ostensibly static group. Further, the purpose is usually to derive some benefit from the racial identities being in lockstep.

<sup>8</sup> U.S. CONST. amend. XIV § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

tending to produce “external legitimacy” among clients of the same race, without regard to the actual characteristics of the candidate. This problem is one of using and perpetuating racial stereotypes as to the existence of some desired quality (the “positive presumption” problem).

Racial mirroring also expects this candidate, once hired or otherwise retained, to “perform” or exhibit the traits and behaviors—presumed to exist on account of his or her race—that may foster trust and cooperation. This is a problem of demanding performance based on race (the “performance” problem).

With respect to the candidate who is denied the opportunity, racial mirroring enables decisionmakers to presume that only individuals of the shared race can produce external trust, and thereby presumes as a corollary that individuals of other races lack the desired ability to generate external trust and cooperation. This is a problem of using and perpetuating racial stereotypes as to the non-existence of some desired quality (the “negative presumption” problem).

In addition, the operation of these presumptions is the functional exclusion of the second candidate from equal consideration. This is a problem of denying equal opportunity on the basis of race (the “equal consideration” problem).

With respect to both candidates, in invoking a categorical or automatic presumption, the decisionmaker not only drives whether an individual’s race is taken into account but also determines the substantive meaning of the individual’s race in that decision-making process. The decisionmaker imposes meaning on the racial identities of both candidates. This is a problem of defining for the individual whether, and how, his or her race matters (the “race defining” problem).

Second, the “external legitimacy” doctrine imposes costs on others. Racial mirroring precludes decisionmakers, the decisionmakers’ clients, and the broader public from understanding and appreciating that an individual of any race may possess the qualities and attributes that may produce trust and cooperation, even if the individual is of a race that differs from the predominant race of the served community. This problem is one of actively feeding and fostering, rather than dismantling and breaking down, racial stereotypes (the “stereotype entrenchment” problem).

Racial mirroring also eases the pathway for individuals of the desired race to possess an opportunity, as if the role is the presumptive or exclusive province of individuals of the desired race, and also stands as a barrier to entry for individuals of other racial identities who aspire to have the same opportunity. This is a problem of de-

termining whether social roles are reserved for members of a given race (the “role exclusion” problem).

Third, with respect to the courts, racial mirroring uses the judicial system as an instrument to validate the racial presumptions relied upon by the decisionmaker. This problem is one of utilizing the courts as a conduit for privately held racial stereotypes (the “judicial validation” problem).

These points indicate, individually and in combination, that there are cognizable harms to mirroring the racial identity of the individuals with that of the served constituency, and these harms extend to the desired racial group, the undesired racial group, society at large, and the courts. It confirms the Supreme Court’s prophetic warning to be wary of simple fixes to issues of race.<sup>9</sup> As these harms are of a constitutional order, they necessarily outweigh any social interest in or exigent desire for racial mirroring.

This Article proceeds in the following steps:

Part I provides an overview of the “external legitimacy” doctrine and summarizes judicial and scholarly opinion finding that the doctrine is consistent with the Equal Protection Clause.

Part II details the three categories of harms previously mentioned and suggests that the “external legitimacy” doctrine cannot be sustained, in an equal protection challenge, because of those harms.

Part III then applies this analysis of the “external legitimacy” doctrine to the police department suggestion made by former Commissioner Kelly and others, finding that there are serious constitutional problems with the suggestion. This Part also identifies two limitations on the reach of objections to racial mirroring. While the problems with racial mirroring apply in principle to both the tribal employment and affirmative action contexts, neither context may be challenged with reference to these problems. For tribal employment, this is because special statutory protections shield employers on or near tribal lands from the ordinary operation of pertinent anti-discrimination principles. For affirmative action, this is because permissible race-conscious admissions is not premised upon an interest in ensuring that the racial diversity of a student body reflects the racial diversity of the local or general population, which would constitute racial mirroring, but is instead allowed on another basis, namely producing the educational benefits of a diverse student body.

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<sup>9</sup> See *Beauharnais v. Illinois*, 343 U.S. 250, 262 (1952) (“Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race.”).

Part IV answers the question of what next. It suggests that race may not be considered pursuant to categorical presumptions. Instead, employers and others should probe whether the individual possesses the desired traits in actuality; this inquiry should be based on the individual's demonstrable record and not inferred from his or her race.

While the Supreme Court has addressed the constitutionality of racial balancing,<sup>10</sup> it has never squarely confronted the constitutionality of racial mirroring. It is hoped that this Article may be useful to the bench and the bar in considering challenges to the practice of racial mirroring. In light of calls for racial mirroring in the policing context, the moment seems ripe for such guidance.

### I. "EXTERNAL LEGITIMACY"

The Equal Protection Clause generally guarantees that similarly situated individuals be treated equally by public institutions.<sup>11</sup> That said, a public institution may be allowed to treat similarly situated individuals differently provided that there is a sufficient justification for the different treatment and the means used bears a sufficiently close relationship to that justification.<sup>12</sup> If the different treatment is premised upon race, the justification must be "compelling" and the means must be "narrowly tailored" to the compelling purpose.<sup>13</sup> This form of review—strict scrutiny—is to be searching and exacting—fatal in form, but not in fact.<sup>14</sup>

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<sup>10</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) ("[R]acial balancing . . . is patently unconstitutional."); *Bakke*, 438 U.S. at 307 (opinion of Powell, J.) ("If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.")

<sup>11</sup> See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike.")

<sup>12</sup> See *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 602 (2008) ("When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to ensure that all persons subject to legislation or regulation are indeed being 'treated alike, under like circumstances and conditions.'" (citations omitted)).

<sup>13</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) ("Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest." (citations omitted)).

<sup>14</sup> See *id.* at 237 ("[The court] wish[es] to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (citations omitted)).

Public employers have claimed, under this equal protection rubric, that promoting the employer's credibility among the local community is a compelling reason to use race in employment decisions. In particular, these employers have argued that buy-in from the local community is necessary to the effective operation of the employer's services, and as a result the employers should be able to give special consideration in hiring or promotion to an employee of the same, predominant race of the local community members.<sup>15</sup> This Part provides an overview of judicial and academic support for this argument, and of their specific determinations that the "external legitimacy" doctrine is consistent with the Equal Protection Clause.

#### A. *Judicial Support for "External Legitimacy"*

Perhaps one of the more significant examples of "external legitimacy's" use and approval is *Petit v. City of Chicago*.<sup>16</sup> In this case, the Chicago Police Department ("CPD") sought to promote racial minorities to the rank of sergeant.<sup>17</sup> A number of non-minority officers who were denied the promotion filed suit under the Equal Protection Clause.<sup>18</sup> The CPD defended its actions on the grounds that the promotions "were necessary to maintain the operational effectiveness of the CPD."<sup>19</sup> The district court agreed,<sup>20</sup> and the U.S. Court of Ap-

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<sup>15</sup> In this respect, the "external legitimacy" doctrine is not "racial balancing," which occurs when the racial composition of a body is done to reflect a static group "for its own sake." *Bakke*, 438 U.S. at 307 (opinion of Powell, J.). The "external legitimacy" doctrine falls under the banner of "racial mirroring" because the reflection is accomplished ostensibly to achieve trust and cooperation among the served constituents. This suggests that "racial mirroring" can be a form of racial capitalism. See Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2152 (2013) (defining racial capitalism as "the process of deriving social and economic value from the racial identity of another person").

<sup>16</sup> 352 F.3d 1111, 1114–15 (7th Cir. 2003), *cert. denied*, 541 U.S. 1074 (2004). I highlight this case in part because it not only embodies the "external legitimacy" principle, but also because it has been singled out by others for its importance. See, e.g., Jared M. Mellott, Note, *The Diversity Rationale for Affirmative Action in Employment After Grutter: The Case for Containment*, 48 WM. & MARY L. REV. 1091, 1129 (2006) ("*Petit*'s reference to *Grutter* signified a more expansive understanding of the diversity rationale in employment than the earlier Seventh Circuit cases had embraced."); Ronald Turner, *Grutter, The Diversity Justification, and Workplace Affirmative Action*, 43 BRANDEIS L.J. 199, 221 (2004) ("*Petit* is an important example of the way in which *Grutter* can be extended beyond the educational context and into the public sector workplace.").

<sup>17</sup> *Petit*, 352 F.3d at 1112.

<sup>18</sup> *Id.* ("[N]onminority Chicago police officers . . . alleged that the affirmative action plan implemented in connection with that examination deprived them of the equal protection of the law.").

<sup>19</sup> *Id.*

<sup>20</sup> *Petit v. City of Chicago*, 239 F. Supp. 2d 761, 788 (N.D. Ill. 2002) ("Consistent with the instructions given at the trial, the Seventh Circuit subsequently held that a police de-



peals for the Seventh Circuit affirmed, stating that there is a “compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city like Chicago” and that the “City of Chicago has set out a compelling operational need for a diverse police department.”<sup>21</sup> The Seventh Circuit, favorably recounting the testimony of a criminal justice and community policing expert, noted that

[t]he reality of urban policing is that minorities are frequently mistrustful of police and are more willing than nonminorities to believe that the police engage in misconduct . . . . [N]onminorities have more favorable opinions about the CPD than do minorities. Distrust and a lack of confidence in the police, in turn, reduce the willingness of some community members to cooperate with the police. On the other hand, when police officers are routinely supervised by minorities, the fears that the police department is hostile to the minority community will naturally abate.<sup>22</sup>

The Seventh Circuit also cited approvingly to “high-ranking CPD officials,” who

confirmed the need for diversity at the sergeant rank and [asserted] that sergeants are in a unique position to influence officers on the street. These officials testified that the presence of minority sergeants has not only improved police-community cooperation, but also defused potentially explosive situations, such as the tense racial situation following riots in the 1980’s in a predominately Hispanic community . . . [and] recounted the growth in the minority population of the City and the fact that minority representation at the sergeant rank had not kept pace with that growth.<sup>23</sup>

Finally, the Seventh Circuit referred to two of its prior decisions for the proposition that “a visible presence of minorities in supervisory positions is critical to effective policing in a racially diverse city like Chicago because supervisors set the tone for the department.”<sup>24</sup> In one of those cases, the circuit court stated that “[e]ffective police work, including the detection and apprehension of criminals, requires that the police have the trust of the community and they are more likely to have it if they have ‘ambassadors’ to the community of the same [race or] ethnicity.”<sup>25</sup> In the second, the Seventh Circuit noted that “[t]he composition and operation of an effective police force should be in as complete harmony as possible with the commu-

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partment’s operational need for diversity in its workforce can be a compelling interest for engaging in affirmative action promotions.” (citations omitted)).

21 *Petit*, 352 F.3d at 1114.

22 *Id.* at 1115.

23 *Id.*

24 *Id.* (internal quotation marks omitted).

25 *Id.* (alteration in original) (quoting *Reynolds v. City of Chicago*, 296 F.3d 524, 530 (7th Cir. 2002)).

nity from which it springs.”<sup>26</sup> The Seventh Circuit therefore concluded that the “CPD had a compelling interest in a diverse population at the rank of sergeant in order to set the proper tone in the department and to earn the trust of the community, which in turn increases police effectiveness in protecting the city.”<sup>27</sup> For the narrowly tailored prong of the strict scrutiny analysis, the court focused on the fact that the CPD “standardized the scores based on race” after noticing that the promotion test scores would have resulted in modest promotions for minority officers.<sup>28</sup> The Seventh Circuit held that adjustment was a permissible means to effectuate its compelling interest in a racially diverse sergeant corps.<sup>29</sup>

Elsewhere, the Seventh Circuit has sanctioned employers’ use of race on “external legitimacy” grounds.<sup>30</sup> For example, the circuit court ruled that, under the Equal Protection Clause, a correctional facility in search of lieutenants for a “boot camp” aimed at younger inmates could prefer African Americans where the inmates were overwhelmingly African American.<sup>31</sup> Judge Richard A. Posner, writing for the court, credited defense experts who claimed that the “boot camp . . . would not succeed in its mission of pacification and reformation with as white a staff as it would have had if a black male had not been appointed to one of the lieutenant slots.”<sup>32</sup>

Other courts of appeals have joined the Seventh Circuit in endorsing race-based considerations for external legitimacy/internal operations reasons in the law enforcement context.<sup>33</sup> The U.S. Court of Appeals for the Fourth Circuit, for instance, ruled that a city police

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26 *Petit*, 352 F.3d at 1115 (alteration in original) (quoting *United States v. City of Chicago*, 663 F.2d 1354, 1364 (7th Cir. 1981) (en banc)).

27 *Id.*

28 *Id.* at 1117.

29 *Id.* at 1117–18.

30 It is worth emphasizing that, in these cases, the government’s rationale for using race is not tied to any past, intentional discrimination that it is now attempting to remedy. For one such case, see, e.g., *McNamara v. City of Chicago*, 138 F.3d 1219, 1224 (7th Cir. 1998) (approving the remedial use of race upon evidence of the “City’s discrimination against blacks and Hispanics in the past . . .”). Rather, the government’s argument is founded on the forward-looking belief that the employee of the same race as the clients will improve the relationship between the employer-clients, and will thereby enhance the ability of the employer to do its job. For example, in *Alexander v. City of Milwaukee*, the Seventh Circuit specified that the interests of the police department were to “creat[e] a truly representative force and better prepar[e] all officers for culturally-diverse interaction in the community they serve.” 474 F.3d 437, 445 n.10 (7th Cir. 2007).

31 *Wittmer v. Peters*, 87 F.3d 916, 917–19 (7th Cir. 1996).

32 *Id.* at 920.

33 At least one circuit stated specifically that it is not expressing any opinion as to whether it agrees with *Petit*. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 377 F.3d 949, 964 n.18 (9th Cir. 2004), *overruled*, 551 U.S. 701 (2007).

department could give preference to an African-American applicant for major, as the appointment of an African American to this “policy-making position would benefit a city whose population was approximately 50% black.”<sup>34</sup> In reaching this decision, the Fourth Circuit quoted approvingly from a Sixth Circuit opinion in a similar case involving the “operational needs of an urban police department serving a multi-racial [sic] population”<sup>35</sup>:

The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public’s desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public’s perception of law enforcement officials and institutions.<sup>36</sup>

In an oft-cited case in this area of law, the Second Circuit struck a similar chord. The court “recognized that a law enforcement body’s need to carry out its mission effectively, with a workforce that appears unbiased, is able to communicate with the public and is respected by the community it serves, may constitute a compelling state interest” in satisfaction of the Equal Protection Clause.<sup>37</sup> To be sure, the Second Circuit has insisted that “[t]he mere assertion of an ‘operational need’ to make race-conscious employment decisions does not . . . give a police department *carte blanche* to dole out work assignments based on race if no such justification is established.”<sup>38</sup> Rather, the need must be factually supported and the decisions themselves must be narrowly tailored to the need.<sup>39</sup> Moreover, in another case concern-

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<sup>34</sup> Talbert v. City of Richmond, 648 F.2d 925, 931 (4th Cir. 1981).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* (quoting Detroit Police Officers’ Ass’n v. Young, 608 F.2d 671, 696 (6th Cir. 1979)).

<sup>37</sup> Patrolmen’s Benevolent Ass’n of N.Y. v. City of New York, 310 F.3d 43, 52 (2nd Cir. 2002) (internal quotation marks omitted) (quoting Barhold v. Rodriguez, 863 F.2d 233, 238 (2nd Cir. 1988)). *But also* Baker v. City of St. Petersburg, 400 F.2d 294, 300 (5th Cir. 1968) (holding that “a Department’s practice of assigning Negroes solely on the basis of race to a Negro enclave” offends the Equal Protection Clause of the Fourteenth Amendment); Murray v. Vill. of Hazel Crest, No. 06–C–1372, 2011 WL 382694, at \*6 (N.D. Ill. Jan. 31, 2011) (holding that while “it is proper to consider the race of applicants, the racial makeup of the community, and diversity when selecting police personnel . . . in certain circumstances,” the state, in this case, had “not made any showing of a compelling interest, nor ha[d] they established that the existence of a compelling interest is an undisputed fact”).

<sup>38</sup> *Patrolmen’s*, 310 F.3d at 52.

<sup>39</sup> *See id.* at 53 (“The justification must be substantiated by objective evidence—mere speculation or conjecture is insufficient . . . Further, the race-based measure must be narrowly tailored to serve the identified interest.”). The court ultimately agreed with the jury that the race-based assignments were not narrowly tailored to meet the compelling state inter-

ing the promotion of African-American police officers, the First Circuit stated that it was “sympathetic to the argument that communities place more trust in a diverse police force and that the resulting trust reduces crime rates and improves policing.”<sup>40</sup>

The Third Circuit in *Lomack v. City of Newark* did not, however, extend the “external legitimacy” doctrine to fire departments.<sup>41</sup> The Third Circuit pointed out that there was no evidence that “diversity within individual fire companies is in any other way necessary, or even beneficial, to the Fire Department’s mission of fighting fires, *i.e.*, that the Department has an operational need for diverse fire companies . . . .”<sup>42</sup> Similarly, the Second Circuit invalidated an assignment by a civil service commission, where the assignment was “based on a racial stereotype that blacks work better with blacks,” “on the premise that [the plaintiff’s] race was directly related to his ability to do the job,” and on the belief that “his race . . . specially qualif[ied] him for the work.”<sup>43</sup> Insofar as the courts are concerned, these two cases speak to the limits of the “external legitimacy” doctrine outside of the police and prison contexts.

That said, one judge has not only validated, but mandated, racial mirroring even outside of these two contexts. Federal Rule of Civil Procedure 23 requires federal district court judges to “appoint class counsel” and authorizes said judges to consider, in appointing class counsel, “any . . . matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class.”<sup>44</sup> Pursuant to this rule, U.S. District Judge Harold Baer, Jr., issued an order stating that “[i]n consideration of other matter pertinent to counsel’s ability to fairly and adequately represent the class, [class counsel] should ensure that the lawyers staffed on the case fairly reflect the class composition in terms of relevant race . . . metrics.”<sup>45</sup> The Second Circuit af-

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est in operational need, particularly as there was no evidence supporting the operational need here. *Id.* at 52–54.

<sup>40</sup> *Cotter v. City of Boston*, 323 F.3d 160, 172 n.10 (1st Cir. 2003).

<sup>41</sup> 463 F.3d 303, 310 (3d Cir. 2006).

<sup>42</sup> *Id.*; *see also* *Dietz v. Baker*, 523 F. Supp. 2d 407, 423 (D. Del. 2007) (ruling that summary judgment was inappropriate where a question of fact existed as to whether race could be justified for operational needs purposes).

<sup>43</sup> *Knight v. Nassau Cnty. Civil Serv. Comm’n*, 649 F.2d 157, 162 (2nd Cir. 1981).

<sup>44</sup> Fed. R. Civ. P. 23(g)(1)(B).

<sup>45</sup> *Blessing v. Sirius XM Radio Inc.*, No. 09–CV–10035, 2011 WL 1194707, at \*12 (S.D.N.Y. Mar. 29, 2011). The class certification order extended to “race and gender metrics,” *id.*, though the legality or propriety of ensuring that employees reflect the gender of clients is beyond the scope of this Article. It should be noted that Judge Baer has issued similar orders in previous cases. *See* *Martin v. Blessing*, 134 S. Ct. 402, 403 (2013) (citing *Public Employees’ Retirement Sys. of Miss. v. Goldman Sachs Group, Inc.*, No. 09 CV 1110, 280

firmed the order<sup>46</sup> and the Supreme Court denied certiorari.<sup>47</sup> Justice Samuel A. Alito issued a statement on the denial of certiorari in a class action suit.<sup>48</sup> Justice Alito found it necessary to clarify that while the Court denied certiorari, “the meaning of the Court’s denial of the petition should not be misunderstood.”<sup>49</sup> He signaled to Judge Baer—and all other federal judges—that the class certification order was both unjustifiable and impractical. Unjustifiable, as Justice Alito stated that he was “hard-pressed to see any ground on which Judge Baer’s practice can be defended”<sup>50</sup> and he found it “quite farfetched to argue that class counsel cannot fairly and adequately represent a class unless the race. . . of counsel mirror[s] the demographics of the class.”<sup>51</sup> Impractical, as Justice Alito suggested that the order, if enforced, would “complicate” the appointment process and produce “bizarre results.”<sup>52</sup> Ultimately, Justice Alito cautioned that, if the order was not sufficiently addressed on remand, “future review may be warranted.”<sup>53</sup>

Racial mirroring in class certification may be seen as anomalous. Federal courts have routinely endorsed racial mirroring in the policing and prison contexts. Scholars, as with Judge Baer, are not as constrained in their assessment as to the desirable scope of racial mirroring.

### B. Academic Support for “External Legitimacy”

The logic of the “external legitimacy” doctrine reaches any position where external trust or cooperation is important to the internal

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F.R.D. 130, 142 n.6 (S.D.N.Y. Feb. 3, 2012); N.J. Carpenters Health Fund v. Residential Capital, LLC, Nos. 08 CV 8781, 08 CV 5093, 2012 WL 4865174, at \*5, n.5 (S.D.N.Y., Oct. 15, 2012); In re Gildan Activewear Inc. Sec. Litig., No. 08 Civ. 5048 (S.D.N.Y. Sept. 20, 2010)).

46 Blessing v. Sirius XM Radio, Inc., 507 Fed. App’x 1, (2d Cir. 2012). The panel held that the appellants lacked standing to challenge the order. *Id.* at 6.

47 *Martin*, 134 S. Ct. at 402.

48 *Id.*

49 *Id.* at 402.

50 *Id.* at 403.

51 *Id.*

52 *Martin*, 134 S. Ct. at 403–04.

53 *Id.* at 405. Prior to Justice Alito’s involvement, other scholars had been critical of Judge Baer’s attempts to ensure that class counsel reflect the racial diversity of the clients. *See, e.g.*, Michael H. Hurwitz, *Judge Harold Baer’s Quixotic Crusade for Class Counsel Diversity*, 17 CARDOZO J.L. & GENDER 321, 327–29 (2011) (describing problems with Judge Baer’s “class counsel diversity requirement”).

operation of the employer.<sup>54</sup> Indeed, some scholars are of the opinion that *Petit* should permeate other areas of employment.<sup>55</sup> Ivan E. Bodensteiner suggests, for example, that *Petit* ostensibly could be extended to all municipal services: “credibility and trust are important to the successful operation of a municipality, [and] expert testimony may establish a compelling need for diversity in departments of a municipality that provide municipal services.”<sup>56</sup> David Orentlicher likewise contends that “diversity in the workplace would be beneficial in other public agencies whose employees have frequent interaction with a diverse public.”<sup>57</sup>

Perhaps the strongest appeal for the use of race by an employer for “external legitimacy” purposes outside of the police and penal contexts has been put forward by Shani M. King.<sup>58</sup> In particular, Professor King argues that “legal services organizations that serve large populations of African-American clients should employ staff attorneys who are most likely to engender trust and facilitate communication with their clients. Consequently, these organizations should employ African-American staff attorneys.”<sup>59</sup> Professor King posits, “If [legal services] organizations reflect the racial and ethnic make-up of the

54 See Michael Selmi, *Understanding Discrimination in a “Post-Racial” World*, 32 CARDOZO L. REV. 833, 847–48 (2011) (“There is no reason to believe African American or Latino firefighters perform their jobs differently from white firefighters, and there is no particular reason to believe that the community might be concerned with the race of firefighters. Unlike a police department, where community cooperation and language skills can be central to effective operations, no one is likely to turn away a fire truck because of the race of the firefighters, and other than in fire investigations, there is not a strong need for community cooperation.”); Harv. L. Rev. Ass’n, *The Supreme Court, 2008 Term—Leading Cases III: Federal Statutes and Regulations—Civil Rights Act, Title VII*, 123 HARV. L. REV. 282, 292 (2009) (“[T]he racial composition of a fire department is largely irrelevant to its ability to protect the public from fire.”).

55 See Angela Brouse, *The Last Call for Diversity in Law Firms: Is it Legal?*, 75 UMKC L. REV. 847, 847–48 (2007) (private law firms); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1076 n.67 (2006) (military and business organizations); Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 98–99 (1997) (state trial court judges); Stuart J. Ishimaru, *Fulfilling the Promise of Title VII of the Civil Rights Act of 1964*, 36 U. MEM. L. REV. 25, 39 (2005) (law enforcement, the judiciary, the media, and education).

56 Ivan E. Bodensteiner, *Although Risky After Ricci and Parents Involved, Benign Race-Conscious Action is Often Necessary*, 22 NAT’L BLACK L.J. 1, 28 (2009).

57 David Orentlicher, *Diversity: A Fundamental American Principle*, 70 MO. L. REV. 777, 804, 805 n.145 (2005).

58 See Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African-American Staff Attorneys*, 18 CORNELL J.L. & PUB. POL’Y 1 (2008).

59 *Id.* at 3–4; see also *id.* at 54–55 (“[L]egal services organizations that represent large populations of black Americans should be race conscious and hire more black lawyers”).

populations that they serve, African-American clients are more likely to consider these organizations credible and legitimate.”<sup>60</sup>

From this overview, it is clear that the “external legitimacy” rationale for race-conscious hiring—the notion that an individual of the same race as the clients or customer base will enhance the credibility of the employer and allow the employer to be more effective—has been embraced by courts and scholars alike, with the latter generally advancing a more expansive view of the doctrine than the former.<sup>61</sup>

## II. PROBLEMS WITH “EXTERNAL LEGITIMACY”

In this Part, I will introduce the reader to three categories of harms that counsel against the use of the “external legitimacy.”<sup>62</sup>

A running hypothetical may be helpful in conceptualizing these problems. The courts have found the “external legitimacy” doctrine constitutional in the law enforcement and prison contexts, and scholars have argued for the constitutionality of the doctrine’s use in other areas in which trust and cooperation from the served community are deemed essential. The hypothetical uses another field in which that relationship is important to the effectiveness of the service provider’s functions.

Let us assume that an urban elementary school in a predominantly African-American neighborhood has an opening for a second-grade teacher.<sup>63</sup> The school has two qualified applicants—an African

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60 *Id.* at 38; *see also id.* at 40 (“[Legal services] organizations should hire African-American attorneys in order to establish the external legitimacy which is necessary if they are to gain their clients’ trust.”).

61 Public commentators have argued in favor of “external legitimacy” outside of the domestic employment context. For example, in the foreign policy space, some have suggested that the United States must counter violent extremism by giving support to locals “who can credibly deflate extremists’ messages . . . .” Manal Omar, *The United States Will Never Win the Propaganda War Against the Islamic State*, FOREIGN POLICY, Jan. 9, 2015, available at <http://foreignpolicy.com/2015/01/09/the-united-states-will-never-win-the-propaganda-war-against-the-islamic-state/>.

62 The only exception is in tribal employment, as tribes are protected by special considerations owing to their unique status. *See infra* Part IV.B.

63 This hypothetical is selected for four reasons. First, it is the type of non-commercial, community-based employers that advocates of the external legitimacy doctrine suggest have the greatest claim to this theory. *See* Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of Grutter?*, 92 KY. L.J. 263, 267 (2003–2004). Second, it is similar to the legal services organization example used by Professor King, though deliberately different in order for the reader to view and appraise the application of the external legitimacy argument in another non-commercial, community-based context. Third, it attempts to depart from the traditional frame of white (the “insider” racial group) and minorities (the “outsider” racial group), where this white/minority paradigm itself tends to

American and an Asian American—where the threshold requirements to be “qualified” are a college degree and a valid, active teaching certificate. The school principal and the rest of the school’s hiring committee express interest in hiring the African-American candidate, resting this interest on the “external legitimacy” argument. In particular, as to the current state of affairs, the school officials perceive that cooperation between the parents and the school has been modest. But the officials believe that the African-American candidate will increase buy-in from parents and this buy-in will yield enhanced educational outcomes in two respects: first, focusing on the school itself, the officials have a strong sense that will enhance the possibility that predominantly African-American parents will trust the educational choices of teachers, will become more involved in school governance and policy development, and will enrich the educational and extra-curricular activities of the school, for example, through volunteering to coach sports teams or advise student clubs; second, focusing outside of school, the school officials assume that engaged parents will implement the teacher’s suggestions as to how they can best support the student at home, will be invested in creating optimal educational conditions for the student, and will actively assist the students with their daily assignments.<sup>64</sup> The school officials contend that the buy-in, facilitated by the African-American candidate, will enable the school to do its job more effectively.<sup>65</sup> Accordingly, the African-American candidate is hired.<sup>66</sup>

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predetermine the merits of the doctrine. Fourth, and practically speaking, this hypothetical is based on the actual experiences of a good friend and former colleague who is a grade school teacher, thanks to Teach for America, in a major metropolitan majority-minority city.

64 The school officials’ assumptions are not uncommon. At least historically, school districts believed that “minority teachers were better teachers for minority students.” Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L. REV. 1, 13 (2008). Further, African-American teachers preferred to teach African-American students. *See id.*

65 Even if there is the possibility of improved educational outcomes for students and diminished expectations by teachers, state action must still remain within the bounds of the Constitution. For a discussion of the constitutional costs of racial matching, see Thomas S. Dee, *The Race Connection: Are Teachers More Effective with Students Who Share Their Ethnicity?*, EDUC. NEXT, 53 (2004) (“Black students learn more from black teachers and white students from white teachers, suggesting that the racial dynamics within classrooms may contribute to the persistent racial gap in student performance. . . .”); Thomas S. Dee, *A Teacher Like Me: Does Race, Ethnicity, or Gender Matter?*, 95 AM. ECON. REV. 158, 159 (2005) (determining that teachers of different races than the students tend to have lower expectations of those students).

66 The potential for this racial matching is not merely hypothetical. *See* Alan M. Lerner, *Law & Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solver*, 32 AKRON L. REV. 107, 107–08 (1999) (describing a sit-



This scenario runs afoul of the following principles that stem from the Supreme Court's equal protection jurisprudence.

A. *Individual Costs*

1. *The Positive Presumption Problem*

The school officials are presuming, solely on the basis of race, that the African-American candidate will generate trust and cooperation from African-American parents. The presumption does not rest on the actual qualities of the candidate, for example his or her social skills, his or her ability to work with parents, or a demonstrated commitment to students or minorities. Instead, the race of the applicant is used as a proxy for these qualities.<sup>67</sup>

The employer's action is inconsistent with prevailing Supreme Court Equal Protection Doctrine. In the seminal case of *Shaw v. Reno*, the Supreme Court considered the constitutionality of a North Carolina reapportionment plan that would have included two majority-black congressional districts.<sup>68</sup> The plan ostensibly was designed to give voting strength to African-American voters in North Carolina, who were otherwise dispersed throughout the state.<sup>69</sup> In other words, the plan had its root in a purpose beneficial to African-American voters.

The Court held that the districts, which were oddly shaped in order to encompass prospective African-American voters "who are otherwise widely separated by geographical and political boundaries,"<sup>70</sup> gave rise to a valid claim of improper racial gerrymandering under the Equal Protection Clause.<sup>71</sup> The Court reasoned that the majority-minority redistricting plan "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the

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uation in which the only African-American students in a particular class were all assigned to a section taught by the only African-American teacher available in that grade).

67 Social science indicates that individuals exhibit in-group bias, including the belief that members of the same group are more trustworthy. See Claire A. Hill & Erin Ann O'Hara, *A Cognitive Theory of Trust*, 84 WASH. U. L. REV. 1717, 1739–40 (2006). The employer in this hypothetical could be acting pursuant to this bias and/or, citing to such studies, operating under the supported belief that the customer base will possess this bias.

68 509 U.S. 630, 633–34 (1993).

69 *Id.* at 634–35.

70 *Id.* at 647.

71 *Id.* at 657–58.

polls.”<sup>72</sup> “[S]uch perceptions,” the Court continued, must be rejected “as impermissible racial stereotypes.”<sup>73</sup> Indeed, the Court explained that “racial bloc voting and minority-group political cohesion never can be assumed . . . .”<sup>74</sup> The Court made clear that “the individual is important, not his race, his creed, or his color.”<sup>75</sup>

Two years later, the Court, in *Miller v. Johnson*, assessed the constitutionality of a Georgia redistricting plan that would have created three majority-black voting districts.<sup>76</sup> The Court struck down the plan, applying and reaffirming the rule announced in *Shaw*.<sup>77</sup> According to the *Miller* Court, “[w]hen the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, ‘think alike, share the same political interests, and will prefer the same candidates at the polls.’”<sup>78</sup> Further, the Court noted, “Race-based assignments ‘embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.’”<sup>79</sup> More directly, the Court explained that “[t]he idea is a simple one: ‘At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.’”<sup>80</sup> *Shaw* and *Reno* are examples of the Court’s recognition of the diversity of viewpoints within a race and thereby examples of the operation of a constitutional rule that rejects the notion that there are monolithic racial views, attitudes, or behaviors.<sup>81</sup>

Voting is not the only context in which this rule has been recognized by the Supreme Court. In *Batson v. Kentucky*, the Court deter-

<sup>72</sup> *Id.* at 649.

<sup>73</sup> *Miller*, 509 U.S. at 649.

<sup>74</sup> *Id.* at 652. *But see* Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1468 (1991) (“The assumption that blacks, wherever they reside, tend to be politically cohesive is supported both anecdotally and empirically.”).

<sup>75</sup> *Shaw*, 509 U.S. at 648 (citations omitted) (internal quotation marks omitted).

<sup>76</sup> 515 U.S. 900 (1995).

<sup>77</sup> *Id.* at 913.

<sup>78</sup> *Id.* at 911–12 (quoting *Shaw*, 509 U.S. at 647).

<sup>79</sup> *Id.* at 912 (citations omitted) (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting)).

<sup>80</sup> *Id.* at 911 (internal quotation marks omitted) (quoting *Metro Broad., Inc.*, 497 U.S. at 602 (O’Connor, J., dissenting)) (citations omitted).

<sup>81</sup> *See also* *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 434 (2006) (“We do a disservice to . . . important goals by failing to account for the differences between people of the same race.”).

mined that a defendant could object on equal protection grounds to a prosecutor's use of peremptory challenges, where the challenges excluded potential jurors of the same race as the defendant.<sup>82</sup> The Court held that the prosecutor could not, consistent with the Equal Protection Clause, categorically assume that jurors would be sympathetic to a defendant of the same race: "[The] Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."<sup>83</sup> Moreover, the Court said, it "prohibits a State from taking any action based on crude, inaccurate racial stereotypes . . . ."<sup>84</sup> The Court clarified that attorneys could "obtain possibly relevant information about prospective jurors,"<sup>85</sup> but, quoting Justice Felix Frankfurter, the Court announced that "[a] person's race simply 'is unrelated to his fitness as a juror.'"<sup>86</sup>

Whereas *Batson* concerned a situation in which the defendant (black) was the same race as the excluded jurors (black), the Court later took up the open question of whether the Equal Protection Clause permits a defendant (white) to use peremptories to exclude jurors of a different race (black).<sup>87</sup> The Court held that "the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race . . . ."<sup>88</sup> In doing so, the Court emphasized that an individual of a given race cannot be deemed categorically unable to serve on a jury: "[r]ace cannot be a proxy for determining juror bias or competence."<sup>89</sup> Again, "where racial bias is likely to influence a jury, an inquiry must be made into

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82 476 U.S. 79, 89 (1986).

83 *Id.*

84 *Id.* at 104.

85 *Id.* at 89 n.12.

86 *Id.* at 87 (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)); see also *Holland v. Illinois*, 493 U.S. 474, 484 n.2 (1990) (noting that a prosecutor's "assumption that a black juror may be presumed to be partial simply because he is black" violates the Equal Protection Clause).

87 *Powers v. Ohio*, 499 U.S. 400, 409 (1991).

88 *Id.*

89 *Id.*; see also Christo Lassiter, *The O.J. Simpson Verdict: A Lesson in Black and White*, 1 MICH. J. RACE & L. 69, 80 (1996) ("The view that Black jurors vote for Black defendants regardless of the evidence assumes that a monolith of values exists among Blacks based on a shared demographic feature, such as race, and ignores a wide diversity among Blacks on the same list of issues which diversifies Whites, including political, social, and economic status.").

such bias,” rather than presumed solely because of the racial identity of the prospective juror.<sup>90</sup>

Such negative presumptions, regrettably replete in American history,<sup>91</sup> are no longer tolerated. In the words of the Supreme Court, they “force[] individuals to labor under stereotypical notions that often bear no relationship to their actual abilities” and they “deprive[] persons of their individual dignity . . . .”<sup>92</sup> The presumptions brand members of a race with blanket attributes, reduce the individual to an undifferentiated part of a racial whole, consider the individual fungible, and fail to honor the autonomy and distinctiveness of the individual.<sup>93</sup>

Perhaps the most pernicious example of a rule prohibiting the attachment of a stereotypical meaning on racial identity, ironically, is when the Court fell woefully short of honoring it.<sup>94</sup>

<sup>90</sup> *Powers*, 499 U.S. at 415.

<sup>91</sup> For example, as to African Americans, see *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857) (“[African Americans] had been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . .”); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, vol. 1 ch. XVIII (1835) (“[T]he European is to the other races of mankind what man himself is to the lower animals: he makes them subservient to his use, and when he cannot subdue he destroys them. Oppression has, at one stroke, deprived the descendants of the Africans of almost all the privileges of humanity.”). As to Native Americans, see *United States v. Sandoval*, 231 U.S. 28, 39 (1913) (“Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetishism, and chiefly governed according to the crude customs inherited from their ancestors, [Native Americans] are essentially a simple, uninformed, and inferior people.”); *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877) (stating that Native Americans belong to “an ignorant and dependent race”). As to Asian Americans, see *United States v. Wong Kim Ark*, 169 U.S. 649, 731 (1898) (Fuller, J., dissenting) (opining that Chinese Americans belong to “a distinct race and religion, remaining strangers in our land,” claiming that they were “unfamiliar with our institutions, and apparently incapable of assimilating with our people”); *People v. Hall*, 4 Cal. 399, 404–05 (Cal. 1854) (describing the Chinese as “a distinct people . . . whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown . . . [and] between whom and ourselves nature has placed an impassable difference”).

<sup>92</sup> *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984).

<sup>93</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“To whatever racial group these citizens belong, their ‘personal rights’ to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.”) (plurality opinion). Justice William Brennan, for example, said, “[G]overnment may not, on account of race, insult or demean a human being by stereotyping his or her capacities, integrity, or worth as an individual.” MARK TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961–1991*, at 126 (1997) (citation omitted) (internal quotation marks omitted).

<sup>94</sup> See generally Stephen G. Breyer, Address to the Association of the Bar of the City of New York: Liberty, Security, and the Courts (Apr. 14, 2003), available at <http://www>.

In *Korematsu v. United States*, the Court was asked to review the constitutionality of President Franklin Delano Roosevelt's infamous executive order authorizing the removal of "all individuals of Japanese ancestry" from certain western areas of the nation.<sup>95</sup> The Court dismissed the suggestion that the order was grounded in blanket racial animus against the Japanese, holding instead that the order was based on the pressing military reality that the United States was "at war with the Japanese Empire."<sup>96</sup> Similarly, shortly before *Korematsu*, the Court in *Hirabayashi v. United States* upheld the conviction of an American citizen of Japanese ancestry for violating curfew requirements imposed on individuals of Japanese descent in those same western regions.<sup>97</sup> In doing so, the Court observed, "We cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry."<sup>98</sup>

The dissenting Justices in *Korematsu* did not buy the argument that the internment of over 120,000 individuals of Japanese ancestry could be constitutionally sanitized by military realities. They expressed doubt that the government could append categorical concerns to an entire race of individuals without particularized evidence of individual wrongdoing. In his dissent, Justice Robert Jackson declared that "if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable."<sup>99</sup> Justice Frank Murphy, in his dissent, observed that the "forced exclusion was the result in good measure of this erroneous assumption of racial guilt, rather than *bona fide* military necessity."<sup>100</sup> As proof, Justice Murphy pointed to a military report which categorized "all individuals of Japanese descent as 'subversive,' as belonging to 'an enemy race . . .'"<sup>101</sup>

*Korematsu* and *Hirabayashi* may be contrasted with *Ex Parte Mitsuye Endo*, in which an individual of Japanese ancestry filed a writ of habeas corpus, seeking to be released from an internment camp located in California.<sup>102</sup> As the government conceded that Endo was "a loyal

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supremecourt.gov/publicinfo/speeches/sp\_04-15-03.html (describing *Korematsu* as a "decision we now recognize as shameful" and observing that "*Korematsu* now represents the kind of constitutional decision that courts should seek to avoid").

95 323 U.S. 214, 216–17 (1944).

96 *Id.* at 223.

97 320 U.S. 81, 86 (1943).

98 *Id.* at 101.

99 323 U.S. at 243 (Jackson, J., dissenting).

100 *Id.* at 235–36 (Murphy, J., dissenting) (emphasis added).

101 *Id.* at 236 (Murphy, J., dissenting).

102 323 U.S. 283, 284–85 (1942).

and law-abiding citizen,”<sup>103</sup> the Court ordered that Endo be released.<sup>104</sup> Rather than making decisions upon individual circumstances, as in *Endo*, or otherwise presume innocence in the absence of any evidence to the contrary, the government in *Korematsu* and *Hirabayashi* presumed disloyalty and subversive tendencies of members of an entire community. *Korematsu* and *Hirabayashi* serve as distressing examples of the dangers of using race as a proxy for negative characteristics.

In short, the Court has stated that, under the Equal Protection Clause, it is impermissible to hold that individuals of the same race think or act alike, or that race can be used as a proxy for certain ideas, attitudes, or experiences.<sup>105</sup> Qualities or traits instead must be determined on an individual basis. In the words of Ralph Richard Banks, “[T]reat[ing] individuals on the basis of group generalizations that might not apply to any particular individual, perhaps represents the paradigmatic harm that antidiscrimination law, including [the] Equal Protection Clause, is thought to guard against.”<sup>106</sup>

In our hypothetical, the school does precisely this by presuming the African-American candidate’s ability to generate trust and cooperation solely on the basis of racial identity and without regard to individual traits. The “external legitimacy” rationale embodies such a racial presumption and thus cannot be squared with a rule that forbids a state actor from attaching a monolithic meaning on a given race.<sup>107</sup>

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103 *Id.* at 294.

104 *Id.* at 297.

105 See Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2060 (1996) (“A huge chunk of equal protection law (and antidiscrimination law more generally) is aimed precisely at barring the use of reasonable, unbigoted judgments that race is a valid proxy for experiences, outlooks, or ideas.”); *id.* at 2062 (“One of the great tasks of antidiscrimination law over the past thirty years has been to persuade people that they ought not use race and sex as proxies, even when race and sex are statistically plausible proxies.”).

106 R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1091–92 (2001).

107 A thoughtful commentator asks whether an individual who benefits from the positive racial presumptions may effectively “waive” any constitutional objections to the application of the “external legitimacy” to his or her circumstances. To this, it may be answered that such a waiver was not contemplated by the Court in any of its seminal decisions relating to race-based presumptions. For example, a Japanese-American citizen’s acquiescence to forced exclusion or an African American’s willingness to go along with segregation without raising a fuss does not change the problematic constitutional nature of the underlying actions. Moreover, and in any case, there are other harms that extend beyond the advantaged race which cut against the “external legitimacy” doctrine, even if the concerns associated with the beneficiary of the presumptions are neutralized.

In addition, social norms reinforce the problematic nature of presuming that individuals of a particular race possess certain desired qualities. In *The Office*, a popular, recently completed depiction of an ordinary workplace, the manager, Michael Scott, characteristically crosses social boundaries and his breaches include various presumptions tied to race.<sup>108</sup> For example, Scott presumes that Stanley Hudson, an African-American salesman, is good at basketball<sup>109</sup> and has an “urban vibe.”<sup>110</sup> Scott presumes that Darryl Philbin, an African-American foreman-turned-executive, is familiar with rap music,<sup>111</sup> and has experience with gangs.<sup>112</sup> Further, Scott presumes Oscar Martinez, an Mexican-American accountant, will bring his “famous Hispanic cleaning ethic” to the office’s spring cleaning efforts,<sup>113</sup> and Scott presumes that Kelly Kapoor, an Indian-American customer relations representative, knows the origins of a Hindu religious holiday.<sup>114</sup> It is precisely because of the audience’s understanding of prevailing social norms governing race that Scott’s lack of self-awareness as to racial matters is so evident and discomforting.

More recently and back in the realm of real world situations, an Asian American wrote an essay on his own experiences with identity-based presumptions. The author acknowledged that he initially struggled as a computer programmer, but that he was given the benefit of the doubt because he had the “privilege of implicit endorsement.”<sup>115</sup> This slack was based on the presumption that he was capable at programming because, as an Asian American, he “fit society’s image of a young programmer.”<sup>116</sup>

These social examples demonstrate the problematic nature of presuming, without an inquiry into the actual qualities of the individual, that a member of a given race has certain favorable or desired qualities. These social norms therefore support the constitutional

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108 See Bill Chappell & Carolyn Beeler, *Should ‘The Office’ Be Used In HR Training?*, NPR (Jan. 14, 2010, 6:15 PM), <http://www.npr.org/templates/story/story.php?storyId=122494690> (suggesting that, because of the offensive comments made in the series, “*The Office* can be seen as a primer for everything you *shouldn’t* do at work”).

109 *The Office: Basketball* (NBC television broadcast Apr. 19, 2005).

110 *The Office: Local Ad* (NBC television broadcast Oct. 25, 2007).

111 *Id.*

112 *The Office: Did I Stutter?* (NBC television broadcast May 1, 2008).

113 *The Office: The Secret* (NBC television broadcast Jan. 19, 2006).

114 *The Office: Diwali* (NBC television broadcast Nov. 2, 2006).

115 Philip Guo, *Silent Technical Privilege*, SLATE (Jan. 15, 2014, 11:33 AM), [http://www.slate.com/articles/technology/technology/2014/01/programmer\\_privilege\\_as\\_an\\_asian\\_male\\_computer\\_science\\_major\\_everyone\\_gave.single.html](http://www.slate.com/articles/technology/technology/2014/01/programmer_privilege_as_an_asian_male_computer_science_major_everyone_gave.single.html).

116 *Id.*

rule that a monolithic understanding of racial identity has no place in our legal system or society.

## 2. *The Performance Problem*

Another problem with the hypothetical situation offered is that the school will not only *presume* that the African-American teacher possesses the desired traits, as described above in Part II.A.1, but will effectively *demand* that the employee activate those traits in order to achieve the outcome sought by the employer. In other words, the African-American teacher will be expected to act according to the set of characteristics presumed to be held by the employee. Indeed, an employer may hire an individual not because of his or her qualities alone, but because of how those qualities manifest themselves for the benefit of the employer. In other words, the employee will be expected to “perform.”<sup>117</sup> Contemporary understandings of race indicate that racial performance is a tangible phenomenon and identifiable harm in law and society.

In academic literature, “performance” refers to the extent to which an individual conforms to social expectations tied to the individual’s race. These social expectations relate to both an individual’s thoughts and ideologies, and to the individual’s behavior or appearance. If an individual aligns with such expectations to a satisfactory extent, he or she attains credibility commensurate with the degree of conformance. By contrast, an individual who fails to conform may be deemed to be not truly or genuinely part of the analyzed racial category.<sup>118</sup>

Devon Carbado and Mitu Gulati, perhaps the most preeminent legal scholars on the subject of performance,<sup>119</sup> explain that these external expectations impose pressure on the individual to “work” his

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117 See, e.g., *Zhao v. State Univ. of N.Y.*, 472 F. Supp. 2d 289 (E.D.N.Y. 2007) (denying summary judgment in a Title VII case, in which a Chinese employee was expected to live up to expectations, in the words of the employer, that “Chinese work very hard, and for a long time, and the people who really produce results are these Chinese people”).

118 See Catherine E. Smith, *The Group Dangers of Race-Based Conspiracies*, 59 RUTGERS L. REV. 55, 79 (2006) (“[R]acial identification arms identifiers with a unique ‘constellation of manifestations’ that exacerbate in-group favoritism and out-group derision.”).

119 Their scholarship on performance includes: Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103 (2000); Devon W. Carbado & Mitu Gulati, *Interactions at Work: Remembering David Charny*, 17 HARV. BLACKLETTER L.J. 13 (2001); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003) (reviewing FRANCISCO VALDES ET AL., *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (2002)).



or her racial identity: to maximize behavior that lines up with the external expectations and to minimize or downplay conduct that does not accord with the external expectations.<sup>120</sup> (The latter practice of hiding elements of racial identity that may be less palatable to others is what Kenji Yoshino has coined “covering.”)<sup>121</sup> An individual, in other words, is not free to act but is compelled to respond to external expectations about how an individual of his or her race should behave. Those restraints, and the commensurate adjustments, are problematic in that they are the product of presumptions of standard racial thought or action and inhibit the ability of the individual to think or act according to the dictates of individual conscience.<sup>122</sup>

Expectations of performance abound in contemporary American society. This is perhaps no more evident than in persistent conversations about the “blackness” of President Barack Obama. President Obama’s emergence on the political stage and ascendance to the presidency were accompanied by charges that he was “too black” or not “black enough.”<sup>123</sup> For example, one commentator declared, “when black Americans refer to Obama as ‘one of us,’ I do not know what they are talking about,” suggesting that President Obama has not “lived the life of a black American.”<sup>124</sup>

The challenge to President Obama’s racial identity is but one recent example of a long line of such inquiries as to the sufficiency of racial performance of public figures. These examples follow charges that U.S. Supreme Court Justice Clarence Thomas,<sup>125</sup> former Secre-

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120 Devon Carbado & Mitu Gulati, *Acting White? Re-thinking Race in Post-Racial America* 1–16 (2013).

121 See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002) (explaining that covering occurs when someone downplays underlying parts of their identity).

122 It is true that society may shape or at least inform individual thought and action such that it would not be realistic to conceive of the individual as an abstract organism entirely independent of social influences. But where those influences are tied to race, a social construct, and suspect and highly dangerous trait that is irrelevant to the individual’s abilities, those particular restraints are of a different, and problematic nature.

123 See, e.g., Ta-Nehisi Paul Coates, *Is Obama Black Enough?*, TIME, Feb. 1, 2007, available at <http://www.time.com/time/nation/article/0,8599,1584736,00.html>; Rachel L. Swarns, ‘African-American’ Becomes A Term for Debate, N.Y. TIMES, Aug. 29, 2004, available at <http://www.nytimes.com/2004/08/29/us/african-american-becomes-a-term-for-debate.html>.

124 Stanley Crouch, *What Obama Isn’t: Black Like Me*, N.Y. DAILY NEWS, Nov. 2, 2006, available at <http://www.nydailynews.com/archives/opinions/obama-isn-black-race-article-1.585922>.

125 See DINESH D’SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* 479 (1996) (listing criticisms of the Justice Thomas’s blackness, including the view that he has “ceased to be an African American”).

tary of State Colin Powell,<sup>126</sup> and former Secretary of State Condoleezza Rice,<sup>127</sup> to name just a few, fell short of social expectations of “blackness.”

Such demands of racial authenticity are not exclusive to African Americans. Mitt Romney<sup>128</sup> and Rudolph Giuliani<sup>129</sup> encountered views that they are not “white enough,” Ted Cruz<sup>130</sup> and Miguel Estrada<sup>131</sup> that they are not “Hispanic enough,”<sup>132</sup> and Elizabeth Warren that she is not “Native enough.”<sup>133</sup> Biracial individuals stand at the crossroads of these expectations, being, for example, neither “black enough” nor “white enough” at the same time.<sup>134</sup> Notions of racial performance are found in elements of popular culture. In contemporary modern culture, perhaps no character was weighed by expectations of racial performance more than Carlton Banks—the affluent, well-educated, well-dressed, and articulate, Tom Jones-loving Repub-

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126 See Chris Cillizza, *Colin Powell's (Overlooked) Call to Action on Race*, WASH. POST, Jan. 14, 2003, available at <http://www.washingtonpost.com/blogs/the-fix/wp/2013/01/14/colin-powells-overlooked-call-to-action-on-race/>; see also *Condoleezza Rice is a House Negro*, SUEDE (2005), reprinted in TOURÉ, NEVER DRANK THE KOOL-AID: ESSAYS 317 (2007).

127 See *id.*

128 See Alex Pareene, *Romney: Not White Enough?*, SALON (Nov. 9, 2012), [http://www.salon.com/2012/11/09/weekly\\_standard\\_republicans\\_must\\_play\\_white\\_identity\\_politics\\_better\\_next\\_time/](http://www.salon.com/2012/11/09/weekly_standard_republicans_must_play_white_identity_politics_better_next_time/).

129 See Terry Moran, *Is Giuliani "White" Enough?*, ABC NEWS (Feb. 16, 2007, 4:15 PM), [http://abcnews.go.com/blogs/headlines/2007/02/is\\_giuliani\\_whi](http://abcnews.go.com/blogs/headlines/2007/02/is_giuliani_whi).

130 See Aaron Blake, *Bill Richardson: Ted Cruz Should Not 'Be Defined as a Hispanic'*, WASH. POST, May 6, 2013, available at <http://www.washingtonpost.com/blogs/post-politics/wp/2013/05/06/bill-richardson-ted-cruz-should-not-be-defined-as-a-hispanic/>.

131 See 149 CONG. REC. S2085 (daily ed. Feb. 10, 2003) (citing Byron York, *Dems to Miguel Estrada: You're not Hispanic Enough*, NAT'L REV., Feb. 6, 2003, available at <http://www.nationalreview.com/articles/205824/dems-miguel-estrada-youre-not-hispanic-enough/byron-york>).

132 Though “Hispanic” describes an ethnicity, I treat it, as other scholars have, as a race for purposes of this Article. See, e.g., Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U. L. REV. 469, 470 n.2 (2010) (adopting a “functional definition” of Latino/Latina as a race).

133 See Stephanie Siek, *Who's a Native American? It's Complicated*, CNN (May 14, 2012), <http://inamerica.blogs.cnn.com/2012/05/14/whos-a-native-american-its-complicated/comment-page-1> (discussing the cultural and ancestral components of Native American tribal citizenship).

134 See KATHLEEN ODELL KORGAN, FROM BLACK TO BIRACIAL: TRANSFORMING RACIAL IDENTITY AMONG AMERICANS 63 (1998) (“There are hardships . . . that are unique to biracial individuals. They may experience a sense of isolation, feeling ‘not quite black enough’ when around black people and ‘not quite white enough’ when around white individuals. In turn, both blacks and whites may encourage this sense of isolation by either declaring outright or implying that biracial people are not white or black enough.”).

lican from the popular, now off-air *Fresh Prince of Bel-Air* television series.<sup>135</sup>

In our running hypothetical, the school has hired an African American on the premise that the African American has the necessary qualities that will produce trust and cooperation amongst parents (the issue of monolithic racial meaning described in Part II.A.1). Moreover, the employer expects the African-American employee, once hired, to demonstrate those traits, such that trust and cooperation can flourish in actuality. The African-American employee thus has external pressure to act in accordance with those expectations and exhibit the desired traits, even if the individual himself or herself does not have, or is not inclined to express, those traits. The employee, furthermore, may face adverse consequences if he or she does not conduct himself or herself in the manner that comports with the employer's expectations.

In general, it is the expectation of conduct based on race that gives rise to a cognizable issue under the "performance" rationale. To be clear, the problematic nature of the performance described here does not change because the expectation here is "positive," which is to say the employer expects the employee to act in a prized manner advantageous to the employer. The impermissible aspects of race-based performance are with the expectation of action, the pressure to so act, and the tangible consequences that lie above the head of the employee should he or she deviate from those expectations.

### 3. *The Negative Presumption Problem*

To recap thus far, the school officials' employment action is problematic because it presumes that African Americans categorically possess a desired trait due to race, without regard to the individual qualities or abilities of the candidate (Part. II.A.1) and expects the African-

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<sup>135</sup> Throughout the run of *The Fresh Prince of Bel-Air*, Carlton's blackness was front and center. Will Smith, the protagonist of the series, poked fun at Carlton's blackness, quipping, for example, "Roses are red, violets are blue, Jazz and I are black, but Carlton, what are you?" *The Fresh Prince of Bel-Air: Def Poet's Society* (NBC television broadcast Oct. 22, 1990). In one particularly serious episode, Carlton pledged a black fraternity, only to be rejected because a frat elder did not want to include someone characterized by "Ralph Lauren shirts, wing-tipped shoes, and corporate America," declaring finally that he would not admit a "sell-out" into his fraternity. *The Fresh Prince of Bel-Air: Blood is Thicker than Mud* (NBC television broadcast Nov. 1, 1993). Carlton responded, "Being black isn't what I'm trying to be, it's what I am." *Id.* The episode offered the poignant observation that an individual need not perform in a certain or specified way in order to be an accepted or authentic member of a racial group.

American employee, once hired and because of race, to perform the presumed trait (Part II.A.2). What of the Asian-American applicant?

The school officials are seeking a second-grade teacher that, among other things, will be able to produce trust and cooperation from a predominantly African-American parent population. Further, as noted in Part II.A.1, the employer presumes that an African-American candidate, solely because of this candidate's race, has the coveted trait that will be able to generate such trust and cooperation from the parents. Necessarily, the employer presumes that the Asian-American applicant, again solely on the basis of race, does not have the trait that may enhance trust or cooperation from the African-American parents.

The problem with presuming that the Asian American does not have certain favored qualities is the same as with the presumption that the African American does: the presumption that certain traits categorically follow racial identity—that person of race  $x$  reliably has characteristic  $y$ , or that person of race  $z$  reliably does not have characteristic  $y$ , without regard to the particulars of the person and relying solely on racial identity to make these twin judgments. As explained in Part II.A.1, these viewpoints are inconsistent with a constitutional principle that monolithic qualities cannot be presumed on the basis of race. Part II.A.3 indicates that when this principle is violated, the violation is double: members of a given race are deemed to possess a sought-after quality, and, simultaneously, the decisionmaker presumes that individuals of other races do not possess that same desired quality.

#### 4. *The Equal Consideration Problem*

There are tangible consequences from the operation of these dual presumptions. In particular, an individual presumed, on the basis of race, to possess a valued characteristic (as noted in Part II.A.1) will be favored in hiring. Individuals who are presumed, on the basis of race, to not possess a desired trait (as noted in Part II.A.3) are at a disadvantage in the hiring process. In our hypothetical, the Asian-American applicant, who may have the qualities that are preferred by the school and that may give rise to a strengthened relationship between the school and the parents, is denied equal consideration for the position and may be excluded from the employment opportunity. This effect cannot be squared with the Constitution.

“The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike.”<sup>136</sup> But this guiding principle that similarly situated individuals be treated the same is not absolute. Indeed, there are circumstances under which a state actor may treat similarly situated individuals differently in a manner consistent with the Equal Protection Clause.<sup>137</sup> The question becomes whether the denial of equal opportunity to an individual who is presumed not to possess a coveted characteristic—the Asian-American applicant in our hypothetical—falls within one of those circumstances and thus is valid for constitutional purposes.

When the different treatment is premised on race, courts require that the state actor advance a “compelling” justification for the differential treatment and show that the means chosen are “narrowly tailored” in service of the compelling end.<sup>138</sup> The Supreme Court has identified a limited set of reasons that are sufficiently “compelling” to justify race-based differential treatment. First, the Court has held that an institution of higher education may take race into account in admissions in order to achieve the educational benefits of a diverse student body.<sup>139</sup> Second, whereas colleges and universities may engage in this form of forward-looking race-conscious admissions, the Court has held that a state employer may only use race in hiring for backward-looking reasons; that is, to remedy past discrimination for which it is responsible.<sup>140</sup> Third, the Court has deferred to national security

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<sup>136</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

<sup>137</sup> *See Enguist v. Or. Dep’t of Agric.*, 553 U.S. 591, 602 (2008) (“When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to ensure that all persons subject to legislation or regulation are indeed being ‘treated alike, under like circumstances and conditions.’” (citation omitted)).

<sup>138</sup> *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (“Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.”).

<sup>139</sup> *See Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (holding that universities can take race into account when making admissions decisions where the “narrowly tailored use of race” is “to further a compelling interest in obtaining the educational benefits” of a diverse student body).

<sup>140</sup> *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510–11 (1989) (holding that a city cannot take race into account when making procurement decisions without identifying past discrimination that is in need of remediation). The Equal Protection Clause applies only to governmental actors. Title VII of the Civil Rights Act of 1964 applies to all employers, public or private, with at least fifteen employees. 42 U.S.C. § 2000e(b). Title VII is read to be narrower and stricter than the Equal Protection Clause. *See Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 628 n.6 (1987) (noting that Congress intended Title VII principles to apply to both governmental and private employers). Accordingly, private employers as compared to public employers enjoy no more opportunity, other than this single remedial exception, to use race in its decisionmaking.

exigencies and permitted the government to consider race in the execution of wartime policies, such as the curfew imposed on and internment of individuals of Japanese ancestry.<sup>141</sup>

It is worth noting that five Justices of the Supreme Court would have found a fourth compelling justification for racial discrimination: public school districts' use of race-conscious assignments as a response to racial imbalances in the districts' schools, where the districts' use of race would be voluntary, that is to say not directed by a court-ordered desegregation decree.<sup>142</sup> As these five Justices' views were not part of the holding of the Court, this particular justification for race-based discrimination is not the law of the land.<sup>143</sup>

On the other side of the coin, the Court has explicitly rejected a "role model" rationale as a constitutional justification for a racial classification. In *Wygant v. Jackson Board of Education*, a school board argued, in defense of its race-conscious employment policies, that it had a compelling state interest "in providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination race . . . ."<sup>144</sup> The Court ruled, however, that this justification could only support a racial classification if the school board's policies were designed to remedy "particularized findings" of the school board's prior racial discrimination.<sup>145</sup>

The three available reasons to treat individuals differently on the basis of race—race-conscious admissions in higher education, race-conscious remedies in employment for past discrimination for which

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141 See *Korematsu v. United States*, 323 U.S. 214, 217 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 102 (1943). It should be added that in *Johnson v. California*, the Court held that strict scrutiny was the proper standard that governed the use of race by penal institutions. 543 U.S. 499, 509 (2005). The Court did not rule, on the merits, that the use of race in the penal context constituted a compelling state interest. *Id.* at 515.

142 See *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue."); *id.* at 803 (Breyer, J., dissenting) (noting, with the support of Justices Stevens, Souter, and Ginsburg, that the Court has "approved of 'narrowly tailored' plans that are no less race conscious" than the one at hand).

143 Justice Anthony Kennedy, who concurred in part and concurred in the judgment of the Court, thus giving the Court a majority for purposes of striking down the assignment plans on narrow tailoring grounds, would have held, along with the dissenting justices that public school districts possess a compelling state interest in eliminating de facto racial isolation. *Id.* at 797.

144 476 U.S. 267, 274 (1986).

145 *Id.* at 276; *id.* at 274 ("This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."). Whether the "external legitimacy" rationale survives post-*Wygant* is highly debatable.

the employer is responsible, and race-conscious national security practices<sup>146</sup>—do not encompass the race-based different treatment contemplated by the “external legitimacy” doctrine, which is a forward-looking enterprise that is attractive for the benefits it may achieve among an external constituency and is not a backward-looking remedial response to a state actor’s own past racial discrimination.<sup>147</sup> Accordingly, without needing to proceed to the narrowly-tailored prong of the equal protection analysis, it appears that the “external legitimacy” doctrine cannot be reconciled with prevailing constitutional jurisprudence.<sup>148</sup> The denial of equal consideration of the hypothetical Asian-American candidate, therefore, would be a cognizable constitutional problem.<sup>149</sup>

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<sup>146</sup> Leading constitutional scholars agree that there are only three such acceptable departures from the constitutional ban on the use of race by state actors. *See, e.g.*, MICHAEL STOKES PAULSEN ET AL., *THE CONSTITUTION OF THE UNITED STATES* 1403 (2d ed., 2013) (enumerating the same three compelling state interests).

<sup>147</sup> *See* *Hershell Gill Consulting Eng’rs, Inc. v. Miami-Dade Cnty.*, 333 F. Supp. 2d 1305, 1317 (S.D. Fla. 2004) (suggesting that the Supreme Court’s jurisprudence in higher education affirmative action does not modify the Court’s rulings on racial classifications in employment).

<sup>148</sup> Indeed, courts blessing the “external legitimacy” doctrine have seemingly applied an odd form of strict scrutiny that arguably does not conform to this exacting, searching review. *See* *Wittmer v. Peters*, 87 F.3d 916, 918 (7th Cir. 1996) (asking whether the government’s operational needs argument is “motivated by a truly powerful and worthy concern” and whether “the racial measure that they have adopted is a plainly apt response to that concern”). The Court has insisted that strict scrutiny be applied correctly. *See* *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2415 (2013) (remanding the case because the circuit court improperly deferred to state university on narrowly tailoring prong of the strict scrutiny analysis).

<sup>149</sup> It would present a statutory problem as well. Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race in employment. 42 U.S.C. § 2000e-2(a). An employment action predicated on the notion that only members of one race shall be given special consideration amounts to a view that the racial identity of the applicant or employee is a “bona fide occupational qualification,” or BFOQ. *Id.* § 2000e-2(e). Title VII permits an employer to treat individuals differently on account of a protected trait if the trait “is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .” *Id.* That said, race is not among the traits which Title VII recognizes under the BFOQ exception to discrimination, thus excluding by implication race as a valid BFOQ in employment. *See id.* Accordingly, an employer may not use race as a BFOQ as a shield from general statutory prohibitions on employment discrimination. At most, race in employment can be used only in truly extraordinary circumstances. *See, e.g.*, JOEL WM. FRIEDMAN & GEORGE M. STRICKLER, JR., *THE LAW OF EMPLOYMENT DISCRIMINATION* 173–74 (5th ed. 2001) (suggesting that race may be a BFOQ in the hiring of actors where physical appearance is critical to the role).

### 5. *The Race Defining Problem*

The external legitimacy doctrine not only presumes that individuals of a given race possess certain desired characteristics (Part II.A.1) and presumes that individuals of other races do not possess those same desired characteristics (Part II.A.3), but also affixes a particular (not just monolithic) meaning on the individuals' races, thus withdrawing from these individuals the ability to determine what their race means for external purposes. In other words, the "external legitimacy" doctrine bestows on the decision maker, such as the employer, the power to ascertain the substantive contents of a particular racial identity.<sup>150</sup>

In our hypothetical, the employer is able to presume, simply on the basis of racial identity, that an African-American candidate is able to produce affection among African-American parents and that an Asian-American candidate is unable to generate that similar relationship. In other words, the employer is categorically assuming from the race of the applicant that an individual has or does not have a personal attribute, without the applicant having done or said anything in reference to or support of that link. The employer instead has relied on the actual or perceived racial identity of the applicant to make a determination and in that sense has attached a specific meaning to the applicant's race.<sup>151</sup>

Yet, it should be the candidate who should define not only what race he or she wishes to be affiliated with, but also what it means to be a member of that identified race.<sup>152</sup> For example, an employer may presume that, 'Because an applicant is race  $x$ , he or she possesses

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150 The Court in *Grutter* said, "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters." *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003). While this may be true, it should be the province of the individual to determine whether and how it matters inasmuch as he or she is being evaluated by others. The individual may articulate some or all of those "unique experiences," or may make a conscious decision to mark some or all of those experiences as private and "off-limits" for external knowledge or consideration.

151 Indeed, the employer has not only reduced the applicant's race to a singular interest in ascertaining whether a desired trait is present, but in doing so has commodified that racial identity. This "instrumental" use of race, Nancy Leong points out, "is antithetical to a view of . . . race . . . as a personal characteristic intrinsically deserving of respect." Leong, *supra* note 15, at 2155.

152 Even if racial identity is not developed in a vacuum, and instead is developed in relation to external realities, this Part addresses itself to the dangers of imposing meaning of racial identity on an individual and to limiting that undue outside influence on identity formation.



trait *y*,’ and that ‘Because an applicant is race *z*, he or she does not possess trait *y*.’ The possession or non-possession of *y* should be for the applicant to demonstrate, rather than be categorically presumed on account of his or her racial identity.<sup>153</sup> More specifically, the African-American candidate should be able to make plain that he or she has the interest in and abilities to provoke trust and cooperation among parents, and the Asian American should be able to make that same showing as well—on equal terms as other applicants, that is without the benefit or hindrance of any constructions of, or presumptions tied to, racial identity.

In the modern day, it is improper to impose a fixed, particular meaning on the racial identity of another. This contemporary principle is best illustrated, as with *Korematsu* and *Hirabayashi* in Part II.A, by reference to historical cases in which the principle was flouted.

In *Plessy v. Ferguson*,<sup>154</sup> the Supreme Court in 1896 reviewed the constitutionality of a Louisiana statute that required “‘all railway companies carrying passengers in their coaches in this State’” to “‘provide equal but separate accommodations for the white, and colored races,’” and that prohibited any individual from “‘occupy[ing] seats in coaches, other than, the ones, assigned, to them on account of the race they belong to.’”<sup>155</sup> Homer Plessy sought to occupy the coach designated for white passengers,<sup>156</sup> but was “required by the conductor . . . to vacate said coach and occupy another seat in a coach assigned . . . for persons not of the white race . . . .”<sup>157</sup> Plessy asserted that “he was entitled to every right, privilege, and immunity secured to citizens of the United States of the white race”<sup>158</sup> because he

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153 In the admissions context, the ability of colleges and universities to make judgments about whether an applicant has valuable viewpoints on the basis of racial self-identification alone and not the record perhaps helps explain Chief Justice John Roberts’s questions at oral argument in the *Fisher v. University of Texas at Austin* case, in which he referred repeatedly to the fact that racial self-identification is on the front of an individual’s application for admission to the University of Texas. See Transcript of Oral Argument at 32, 33, 36, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11–345) (questioning by Chief Justice Roberts concerning an applicant’s checking of a box to identify with a particular race); *id.* at 54 (asking “whether race is the only . . . holistic factors that appears on the cover of every application”); see also *id.* at 35 (questioning by Justice Antonin Scalia on the same topic); *id.* at 52 (exchange with Justice Alito on the same topic).

154 163 U.S. 537 (1896).

155 *Id.* at 540 (citations omitted).

156 *Id.* at 538.

157 *Id.*

158 *Id.* at 541.

was “seven[-]eighths Caucasian and one[-]eighth African blood”<sup>159</sup> and “the mixture of colored blood was not discernible in him . . . .”<sup>160</sup>

The Court disagreed. First, the Court held that Plessy’s racial identity was for Louisiana to decide: Whether a person is white or black, the Court claimed, is “to be determined under the laws of each [s]tate,” and that whether Plessy in particular “belongs to the white or colored race” is a matter reserved for Louisiana.<sup>161</sup> Second, the Court held that the segregation of the railcars on the basis of race does not offend the Equal Protection Clause.<sup>162</sup>

*Plessy* warrants criticism for many reasons. Most relevant here, the Court removed from Plessy the ability to define his racial identity (white or black) and the meaning of that identity for external purposes (fit or unfit for sitting in particular railcars), and placed such definitional and interpretive responsibilities in the hands of the State. As Jonathan Kahn observes, the Court “depriv[ed] Plessy of control over his own racial self-definition and subject[ed] him to forced separation based on that definition.”<sup>163</sup> “Thus,” Professor Kahn adds, “*Plessy* was not just about segregating people based upon their racial identity, it was also about establishing a legal framework for allocating power to determine racial identity.”<sup>164</sup> In short, *Plessy* imposed a state-determined racial identity on Plessy, and exposed him to adverse consequences as a result of that imposed racial identity.

In *United States v. Thind*,<sup>165</sup> the Supreme Court in 1923 explored whether Bhagat Singh Thind—who was described as a person “of high caste Hindu stock, born in . . . India, and classified by certain scientific authorities as of the Caucasian or Aryan race”<sup>166</sup>—was white.<sup>167</sup> This question was of significance because, under the federal immigration framework in place at the time, naturalization extended

<sup>159</sup> *Plessy*, 163 U.S. at 541.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 552.

<sup>162</sup> *Id.* at 550–51; see also Bd. of Educ. of Okla. City Pub. Sch., Indep. Sch. Dist. No. 89 v. Dowell, 498 U.S. 237, 257 (1991) (Marshall, J., dissenting) (referring to the “ugly legacy” of *Plessy*, specifically its holding that racially segregated schools may be equal under the Equal Protection Clause).

<sup>163</sup> Jonathan Kahn, *Controlling Identity: Plessy, Privacy, and Racial Defamation*, 54 DEPAUL L. REV. 755, 758 (2005).

<sup>164</sup> *Id.* at 765; see also Joshua Herman, *Identifying Privacy: An Introduction*, 54 DEPAUL L. REV. 657, 664 (2005) (observing that “identity was central to *Plessy* and by allowing the states . . . to determine who was white and who was black, the courts enabled the states to control identity by defining it and conditioning benefits on those determinations”).

<sup>165</sup> 261 U.S. 204 (1923).

<sup>166</sup> *Id.* at 210.

<sup>167</sup> *Id.* at 206.

only to “aliens being free white persons, and to aliens of African nativity and to persons of African descent.”<sup>168</sup> Thind did not claim to be African, as he was born in India.<sup>169</sup> Accordingly, the Court noted quite simply, “If the applicant is a white person . . . [,] he is entitled to naturalization; otherwise not.”<sup>170</sup>

In ascertaining whether Thind was white, the Court relied on the “common” or “popular” usage of the term “white” because, in the words of the Court, it is this meaning, not any scientific or formal interpretation, that “was within the contemplation of the framers of the statute or of the people for whom it was framed.”<sup>171</sup> Conceding that this amounted to a “racial test,”<sup>172</sup> the Court held that “white” was “intended to include only the type of man whom [the framers of the statute] knew as white,”<sup>173</sup> specifically immigrants primarily “from the British Isles and Northwestern Europe, whence they and their forbears had come.”<sup>174</sup> The Court explained that it was not establishing any racial hierarchy, but merely acknowledging the “racial difference” between the whites and Indian Hindus that “the great body of our people instinctively recognize . . . .”<sup>175</sup>

*Thind* and *Ozawa v. United States*, a similar case involving an individual from Japan who sought naturalization,<sup>176</sup> have been discredited because, in these cases, the Court defined (or allowed the state to define) the racial identity of an individual, withdrawing from the individual that solemn and personal determination.<sup>177</sup> “As *Ozawa* and *Thind* hinged on the matter of classification itself, they also provide a unique opportunity to observe the Court-as-institution participating

168 30 U.S.C. § 2169 (1901) (originally enacted as Act of Feb. 18, 1875, ch. 80, 18 Stat. 316, 318).

169 *Thind*, 261 U.S. at 206.

170 *Id.* at 207.

171 *Id.* at 209; *see also id.* (“The words of the statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken.”).

172 *Id.*

173 *Thind*, 261 U.S. at 213.

174 *Id.*

175 *Id.* at 215.

176 260 U.S. 178, 198 (1922) (holding that a Japanese person is not Caucasian).

177 *See, e.g.,* Rose Cuison Villazor, *The Other Loving: Uncovering the Federal Government’s Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361, 1392 (2011) (“These cases did more than define who was Asian (rather than White) and thus ineligible for naturalization, however. They also reflected citizenship law’s power to construct and reify White domination and supremacy.”). To be sure, in *Thind* the Court “defined ‘white’ through a process of negation, systematically identifying who was non-White.” IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 27 (1996); *see Thind*, 261 U.S. at 215 (holding that “a negative answer must be given to the . . . question” of whether Thind is white and therefore entitled to naturalization).

in the process of racial formation,” Donald Braman writes.<sup>178</sup> In these cases, the individual is both denied the ability to define his racial identity and subject to adverse consequences as a result of the externally-dictated racial identity, namely the denial of naturalized citizenship.

Similarly, with respect to the “external legitimacy” doctrine, an employer commits these double fouls: first, the employer dictates for a candidate the meaning of his or her racial identity (i.e., that he or she, because of his or her race, can or cannot trigger trust and cooperation); and second, the employer adds a tangible consequence to the imposed construction of the applicant’s racial identity by denying equal consideration for the position.

## *B. Social Costs*

### *1. The Stereotype Entrenchment Problem*

The harms of the “external legitimacy” doctrine explored thus far concern the presumptions and operation of those presumptions as to the existence or non-existence of a desired trait. What if the individual presumed to not have the particular trait does, in fact, have the trait? In our hypothetical, what if the Asian-American applicant has the demonstrated interest in and ability to generate trust and cooperation among predominantly African-American parents? For starters, due to the presumption that Asian-Americans cannot generate trust or cooperation among African-American parents, the Asian-American applicant may be unable to make that case at all, or at a minimum has more ground to cover in order to overcome the presumption.

Moreover, and most relevant here, to the extent that the Asian American actually possesses, but is not afforded equal consideration and denied employment, the harms of the “external legitimacy” doctrine extend beyond the Asian-American applicant to the school officials, students, and parents. In particular, the school officials, students, and parents are deprived of the opportunity to understand and appreciate that a teacher of a different (and really any) race may exhibit the concern and talents that are coveted and that may produce the affection wanted by and helpful to the school officials.

With the “external legitimacy” doctrine, the presumption that only individuals of the same race are going to care and be effective is re-

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<sup>178</sup> Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375, 1401 (1999).

inforced and hardened. At the same time, the knowledge that individuals of any race can serve the school's needs and be successful partners with parents is lost on various constituents and the opportunity to break down racial stereotypes is missed. Indeed, students, who arguably may be the greatest beneficiaries of this lesson,<sup>179</sup> are not able to interact with, learn from, and be exposed to individuals of different races, where that contact can be helpful to the development and maturation of students in an increasingly diverse society and world.<sup>180</sup>

As the Court has suggested, racial classifications, if used, must tear down, and not build up or strengthen, racial barriers to understanding.<sup>181</sup> Indeed, if the value of diversity is to facilitate cross-racial engagement and awareness, it would stand to reason that a policy keeping individuals of the same race together and individuals of different races apart would actively stifle the prospects for these social benefits.<sup>182</sup>

## 2. *The Role Exclusion Problem*

Social roles should be open to individuals of all races, without socially-imposed racial barriers to entry. For example, Doug Williams, the first African American to be the starting quarterback of a Super Bowl-winning team, where professional quarterbacks were generally white, recalled how he was discussed prior to his historic victory:

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179 See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 865 (2007) (Breyer, J., dissenting) (observing that, compared to higher education, "there is even more to gain," with respect to racial diversity in public primary and secondary schools); *id.* at 840, 843 (commenting on the importance of "helping our children learn to work and play together with children of different racial backgrounds," "teaching children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of 300 million people one Nation," and "help[ing] create citizens better prepared to know, to understand, and to work with people of all races and backgrounds"); *id.* at 842 ("Primary and secondary schools are where the education of this Nation's children begins, where each of us begins to absorb those values we carry with us to the end of our days."); *Milliken v. Bradley*, 418 U.S. 717, 783 (1974) (Marshall, J., dissenting) ("[U]nless our children begin to learn together, there is little hope that our people will ever learn to live together.").

180 See Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 744–46, 745–46 nn.70–76 (1998) (summarizing social science evidence on the benefits of interracial interactions in the elementary and secondary school context).

181 See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (acknowledging the importance of "cross-racial understanding," breaking down racial stereotypes, and enabling students to better understand persons of different races).

182 See *id.* at 331–32 (recognizing the importance of ensuring a diverse workforce and military leadership).

“every article that was written, every adjective was ‘Tampa’s black quarterback’ or ‘black quarterback Doug Williams . . . .’<sup>183</sup> Today, however, “you don’t read about [quarterbacks] being black. They just happen to be their quarterback, and I think that’s the way it should be.”<sup>184</sup> Williams’s reflections speak to a transition that he helped achieve and that should occur within each social role. While progress has been made as to some roles, such advancements are not complete.

Indeed, certain social roles remain the presumptive or exclusive province of members of particular races. For example, basketball player Jeremy Lin faced questions about his basketball bona fides due to his Asian-American identity.<sup>185</sup> As Williams suggests, Lin should be assessed on the basis of his basketball skills, without his skills being second-guessed on account of his identity. Eminem, who is Caucasian, has been seen as an “interloper” in the rap world.<sup>186</sup> Similarly, *American Idol* contestant Gurpreet Singh Sarin, a turbaned Indian American, was called “turbanator” and “turb” during his first appearance on the series.<sup>187</sup> Sarin should have been evaluated on the basis of his singing ability and personality, without encountering comments about his turban as a cost of competing.<sup>188</sup> In short, certain public arenas or spheres of activity should not be seen as dominant or exclusive domains of particular races, and those of other races who

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183 Greg Garber, *Doug Williams Embraces History*, ESPN.COM (Jan. 29, 2013), [http://espn.go.com/nfl/playoffs/2012/story/\\_/id/8884695/super-bowl-xlvi-doug-williams-embraces-history](http://espn.go.com/nfl/playoffs/2012/story/_/id/8884695/super-bowl-xlvi-doug-williams-embraces-history).

184 *Id.*

185 See Touré, *Jeremy Lin’s Triumph Over Stereotype Threat*, TIME, Feb. 28, 2012, available at <http://ideas.time.com/2012/02/28/jeremy-lins-triumph-over-stereotype-threat/> (noting Lin’s difficulty convincing NBA teams of his abilities due to “the societal script that does not expect Asian Americans to be pro-level basketball players”).

186 Nekesa Mumbi Moody, *Feud Between Eminem and The Source Magazine Wounds on Both Sides*, ONLINE ATHENS (Feb. 7, 2004), [http://onlineathens.com/stories/020704/ent\\_20040207005.shtml#.VSH6tBPF9v4](http://onlineathens.com/stories/020704/ent_20040207005.shtml#.VSH6tBPF9v4).

187 See *Gurpreet Singh Sarin American Idol Audition*, YOUTUBE (Jan. 16, 2013), <http://youtu.be/FzbBmjxPODc> (dubbing Sarin the “turbanator” and discussing his turban).

188 This aspiration is not limited to the racial context. Michael Sam, the college football player who came out as homosexual prior to the National Football League draft, should be assessed by professional teams on the basis of his football acumen and abilities, not his sexual orientation. See Jeff Legwold, *John Elway Says He Applauds Michael Sam*, ESPN.COM (Feb. 10, 2014), [http://espn.go.com/blog/denver-broncos/post/\\_/id/5041/john-elway-says-he-applauds-michael-sam](http://espn.go.com/blog/denver-broncos/post/_/id/5041/john-elway-says-he-applauds-michael-sam) (quoting Elway as saying, “we will evaluate Michael just like any other draft prospect—on the basis of his ability, character and NFL potential. His announcement will have no effect on how we see him as a football player”). Nor should it.

do not fit preconceived notions of proper inhabitants should not be seen as exotic trespassers.<sup>189</sup>

The Court's equal protection jurisprudence from the gender context helps explain that social roles should be open irrespective of race. Two cases are particularly instructive in this regard. In *Mississippi University for Women v. Hogan*,<sup>190</sup> the Court considered whether the Mississippi University for Women's nursing school could deny admission to men and "limit[] its enrollment to women."<sup>191</sup> The university argued that its admissions policy "compensates for discrimination against women . . . ."<sup>192</sup>

The Court was unpersuaded. The Court determined that the university had failed to demonstrate that sufficient discriminatory conditions existed to justify a single-sex admissions policy.<sup>193</sup> More importantly for our purposes, the Court held that the university's purportedly benign justification for the admissions policy had the effect of entrenching archaic and stereotypical views of women and female roles: "Rather than compensate for discriminatory barriers faced by women," the Court said, the university's "policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."<sup>194</sup> *Hogan* stands for the proposition that even benign explanations for categorical gender-based classifications may not be sustainable if the classifications embody and entrench harmful stereotypes about the presumptive place of men or women in our society. As racial classifications are subject to more demanding constitutional scrutiny as

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189 As a recent example, prior to the 2014 Winter Olympics, an African-American reporter for the *Washington Post* addressed how his interest in figure skating subverts stereotypical notions that African Americans are not fans of the sport. See Robert Samuels, *I'm Black. I'm a Guy. And I'm Obsessed With Figure Skating*, WASH. POST (Jan. 30, 2014), available at [http://www.washingtonpost.com/opinions/im-black-im-a-guy-and-im-obsessed-with-figure-skating/2014/01/30/1ddfafae-8819-11e3-833c-33098f9e5267\\_story.html](http://www.washingtonpost.com/opinions/im-black-im-a-guy-and-im-obsessed-with-figure-skating/2014/01/30/1ddfafae-8819-11e3-833c-33098f9e5267_story.html). That the author felt it necessary to dispel the notion that African Americans do not like figure skating speaks to the stubborn, wrongful belief that certain activities are proper, or not proper, for certain races.

190 458 U.S. 718 (1982).

191 *Id.* at 720.

192 *Id.* at 727.

193 See *id.* at 729 ("Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the [nursing school] opened its door or that women currently are deprived of such opportunities.").

194 *Id.*

compared to gender-based classifications,<sup>195</sup> *Hogan* applies with greater force in the racial context.

In *United States v. Virginia*, the Court appraised whether the Virginia Military Institute (“VMI”), a public undergraduate institution whose mission was to produce “citizen-soldiers,” could, consistent with the Equal Protection Clause, limit enrollment to males.<sup>196</sup> Virginia explained that VMI needed to categorically exclude females because “the unique VMI method of character development and leadership training, [referred to as] the school’s adversative approach, would have to be modified were VMI to admit women.”<sup>197</sup>

The Court rejected the argument that “VMI’s adversative method. . . cannot be made available, unmodified, to women,”<sup>198</sup> holding that Virginia could not “constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords.”<sup>199</sup> The Court reasoned that even if “most women would not choose VMI’s adversative method,”<sup>200</sup> Virginia could not categorically assume that no women would be unable or unwilling to satisfy VMI’s rigorous program designed for men and therefore exclude all women from admission. The Court pointed out, for example, that women have successfully entered “federal military academies,” “participat[ed] in the Nation’s military forces,” and “graduated at the top of their class at every federal military academy.”<sup>201</sup>

The Court emphasized that Virginia “may not exclude qualified individuals based on ‘fixed notions concerning the roles and abilities of males and females,’”<sup>202</sup> or “rely on overbroad generalizations to make judgments about people that are likely to. . . perpetuate historical patterns of discrimination.”<sup>203</sup> That is precisely what Virginia did, however. The Court concluded that Virginia’s “great goal” of maintaining an all-male military academy that uses the adversative method “is not substantially advanced by women’s categorical exclusion, in to-

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195 See *United States v. Virginia*, 518 U.S. 515, 532 (1996); *id.* at n.6 (“The Court has thus far reserved most stringent judicial scrutiny for classifications based on race or national origin . . .”).

196 See *id.* at 519 (framing the question before the Court as whether “the Constitution’s equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords”).

197 *Id.* at 535 (citation omitted) (internal quotation marks omitted).

198 *Id.* at 540.

199 *Id.* at 542.

200 *Virginia*, 518 U.S. at 542.

201 *Id.* at 544; *id.* at 544 n.13.

202 *Id.* at 541 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

203 *Id.* at 542 (citation omitted) (internal quotation marks omitted).



tal disregard of their individual merit . . .”<sup>204</sup> *Virginia* establishes that gender-based stereotypes cannot justify gender-based classifications and that institutions must base decisions on the actual individual qualities of applicants rather than categorical assumptions. Again, this principle is only stronger in the race context due to the more rigid standard of review that applies to racial classifications.<sup>205</sup>

The “external legitimacy” doctrine runs afoul of the principles announced in *Hogan* and reinforced in *Virginia*. In particular, it operates on the premise that certain positions should be available (only or preferably) to individuals who share the same racial identity as the predominant racial identity of the community to be served. Following our hypothetical, the African-American applicant will be selected for the position because of the marginal increase in the harmony between the racial identity of the teachers and the parents. In practical terms, therefore, the position is functionally available to the applicant who can enhance the extent to which the employer reflects the racial composition of the parents.

But, all other qualities being equal, the African-American and Asian-American applicants should stand on the same footing as it pertains to their prospective ability to be effectively teach and be members of the educational community. In short, the employment role should be open to both on full and equal terms, without the position being the presumptive or exclusive position of the applicant who happens to have the same racial identity as the clients or customers.

### C. *Judicial Costs: The Judicial Validation Problem*

The reality is that assumptions about race still exist in the world.<sup>206</sup> Race informs, whether consciously or not, a variety of judgments and decisions, from opinions about people (e.g., whether they are dangerous or trustworthy, whether they are hard-working or lazy, whether they are “legal” or not, etc.),<sup>207</sup> informal behaviors (e.g., whether

<sup>204</sup> *Id.* at 546. At oral argument, counsel for the Department of Justice suggested that VMI advanced stereotypical views of men as well: “[I] don’t think that you can have single sex education that offers to men a stereotypical view of this is what men do,” i.e. participate in the military and engage in rigorous training. Transcript of Oral Argument at 14, *United States v. Virginia*, 116 S. Ct. 2264 (1996) (Nos. 94–1941, 94–2107).

<sup>205</sup> See *Virginia*, 518 U.S. at 532 n.6 (“The Court has thus far reserved most stringent judicial scrutiny for classifications based on race or national origin . . .”).

<sup>206</sup> See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated.”).

<sup>207</sup> See Muneer I. Ahmad, *A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1311 (2004) (holding that certain races or ethnic groups

we are going to cross the street or tighten our grip on our belongings when a member of a given race approaches, whether we are going to stop and help a pedestrian or stranded driver, whether we are going to monitor with greater care a worker who is in or around our home, etc.),<sup>208</sup> and more formal judgments (e.g., whether we are going to hire or promote someone, whether we are going to extend an offer of admission to someone, whether we are going to vote for someone, etc.).<sup>209</sup> It is undeniable that race continues to matter in a host of daily and important ways.<sup>210</sup>

The Supreme Court has understood that racial stereotypes persist in modern American society. But, in addressing its role in relation to these stereotypes, the Court has made clear that the courts cannot endorse or facilitate the operation of those stereotypes. In *Palmore v. Sidoti*, the Court was faced with a case in which a white mother had the custody of her child revoked because she remarried a black man.<sup>211</sup> The courts below ruled that the custody determination was appropriate because the interracial remarriage was against the wishes of the father, and would subject the child to social harms.<sup>212</sup> The Su-

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have been and continue to be stereotyped as disloyal); Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1548–49 (2011) (“[L]argely absent from these debates is the fact that law enforcement personnel routinely employ Latino racial identity as a basis for determining whether a person is undocumented or illegal.” (internal quotation marks omitted)); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1038 (2010) (noting that “[i]mmigration officers today often rely on crude undocumented immigrant profiles with race at their core”); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 (2002) (suggesting that post-September 11, “persons who appear ‘Middle Eastern, Arab, or Muslim’ . . . are identified as terrorists, and are disidentified as citizens”).

208 See Regina Austin, *Beyond Black Demons & White Devils: Anti-Black Theorizing and the Black Public Sphere*, 22 FLA. ST. U. L. REV. 1021, 1025 (1995) (commenting that when white couples encounter a black male on the street, “men often clutch their women while the women clutch their purses”); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555, 1580–82 (2013) (noting that individuals are generally more likely to “perceive mildly aggressive behavior as more threatening when performed by a Black person than when performed by a White person”).

209 See Carbado & Gulati, *Working Identity*, *supra* note 119 at 1292–93 (stating that attempts to repudiate certain stereotypes may result in confirming another); Emma Reece Denny, *Mo’ Claims Mo’ Problems: How Courts Ignore Multiple Claimants in Employment Discrimination Litigation*, 30 LAW & INEQ. 339, 347–48 (2012) (“Research focusing on stereotypes of those who fall into more than one minority category show that non-White women and men face different stereotypes than White women and men, and that these stereotypes are more likely to lead to negative discrimination.”).

210 See *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (observing that, in our society, “race unfortunately still matters”).

211 466 U.S. at 430–31.

212 *Id.* at 431.

preme Court reversed, holding that the father's or potential social reactions were insufficient to divest the mother of custody. In particular, the Court acknowledged that racial stereotypes exist generally and that the child in question may be stigmatized,<sup>213</sup> but declared that "[t]he Constitution cannot control such prejudices but neither can it tolerate them."<sup>214</sup> Put differently, the Court declared, "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."<sup>215</sup>

Justice Jackson similarly expressed concern in *Korematsu* that the courts were being used as an instrument to enshrine into the Constitution the stereotype that individuals of Japanese race were disloyal and suspicious. He wrote, "[I]f we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. That is what the Court appears to be doing, whether consciously or not."<sup>216</sup> Further into his *Korematsu* dissent, Justice Jackson explained that "once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination" that could be expanded in future circumstances.<sup>217</sup> That principle will not only grow in substantive form, but will not be constrained temporally by the exigencies of the moment: "if we review and approve [racial discrimination], that passing incident becomes the doctrine of the Constitution."<sup>218</sup> We now know that Justice Jackson was correct,<sup>219</sup> and the Court as an institution and the Constitution as a shield of liberty suf-

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213 *See id.* at 433 ("It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.").

214 *Id.*

215 *Id.* Public discrimination only facilitates private discrimination, creating a harmful feedback loop. *See* I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 26–27 (2011) (noting in particular that "police profiling creates damaging feedback loop effects").

216 *Korematsu v. United States*, 323 U.S. 214, 244–45 (1944) (Jackson, J., dissenting).

217 *Id.* at 246 (Jackson, J., dissenting).

218 *Id.* (Jackson, J., dissenting).

219 *See* 50 U.S.C. app. § 1989a (2006) (apologizing for internment of individuals of Japanese ancestry during World War II); 50 U.S.C. app. § 1989, (recognizing that "a grave injustice was done to both citizens and permanent residents of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II" and that these actions "were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership").

ferred as a result of the Court's willingness to tolerate categorical views premised on race.<sup>220</sup>

In the public accommodations context, the Court has refused to credit external, customer racial preferences, even when grounded in evidence. For example, in *Katzenbach v. McClung*, the Court addressed the application of the Civil Rights Act of 1964 to a restaurant in Birmingham, Alabama that refused to serve African Americans in the restaurant.<sup>221</sup> The proprietor of the restaurant stated that only serving African Americans outside was premised on external reactions, not internal bias: permitting African-American customers inside, he said, would repel white customers and result in a loss of a "substantial amount of business."<sup>222</sup> "I would refuse to serve a drunken man or a profane man or a colored man or anyone I felt would damage my business," he added.<sup>223</sup> If the inside portion of the restaurant were to be opened to African Americans, he claimed, "his restaurant would be flooded with black customers . . . and his white customers would cease their patronage as a result."<sup>224</sup>

The Court held that the statute applied to the restaurant, and was unmoved by the externally-justified exclusion of African-American customers from inside service.<sup>225</sup> Deborah Rhode explains the courts' refusal to accept private bias in cases of racial discrimination, particularly in the employment context:

During the early Civil Rights era, Southern employers often argued that hiring blacks would be financially ruinous [as] white customers would go elsewhere. In rejecting such customer preference defenses, Congress and the courts recognized that the most effective way of combating prejudice was to deprive people of the option to indulge it.<sup>226</sup>

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220 See Breyer, *supra* note 94.

221 379 U.S. 294, 295–97 (1964).

222 *Id.* at 297.

223 Dov Fox, Note, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844, 1855 n.52 (2009) (quoting RICHARD C. CORTNER, CIVIL RIGHTS AND PUBLIC ACCOMMODATIONS: THE HEART OF ATLANTA MOTEL AND MCCLUNG CASES 78 (2001)).

224 *Id.* (quoting CORTNER, *supra* note 223 at 66).

225 *Katzenbach*, 379 U.S. at 303–05.

226 Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1065 (2009). For a modern example of courts rejecting customer preferences as a valid justification for race-based employment actions, see *Ray v. Univ. of Arkansas*, 868 F.Supp. 1104, 1126–27 (E.D. Ark. 1994) ("[I]t is clear that there are some students at UAPB with a predisposition of racial animus toward white officers . . . . This form of 'client' preference is no more permissible than any other, and will not justify the different treatment of white officers.").

In short, the courts cannot give legal credit or practical effect to racial stereotypes, to the extent that such biases continue to exist and inform decisions in society.<sup>227</sup>

This principle easily reaches the “external legitimacy” doctrine, as our hypothetical demonstrates. An employer may want to hire an African-American employee to ostensibly satisfy a predominantly African-American parent base. And this decision may not be predicated upon any personally-held positive view of African Americans or negative view of applicants of other races, such as Asian-Americans. Moreover, there very well may be an empirical foundation for the belief that African-American parents respond better to African-American teachers.

But, the rulings of the Court command that the courts cannot sanction social assumptions about the attributes of members of a particular race, whether the assumptions are held by school officials or the parents, or whether the assumptions are backed by data. In short, racial stereotypes may exist, but the courts cannot actively validate or perpetuate them. The “external legitimacy” embodies racial stereotypes, as Part II.A.1 (viz. desired race) and Part II.A.3 (viz. non-desired race) suggest.

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To summarize the problems with the “external legitimacy” doctrine: with respect to the candidates, it presumes solely on the basis of racial identity that an employee will generate good will on the part of constituents who share the same race, compels this employee to act and perform according to these race-based presumptions, presumes solely on the basis of racial identity that an applicant of a different race cannot generate to the same degree buy-in from the external community, imposes a fixed meaning on racial identity of the applicants, and denies equal consideration to the non-desired applicant and excludes that applicant from the position. With respect to society, it deprives the employer and the external constituency of the opportunity to understand that an individual of a different race may be able to serve the interests and needs of the constituency, and reserves social roles for members of particular races. With respect to the courts, it draws the courts in to validate and advance private stereotypes predicated on race.

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<sup>227</sup> See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (“The impact [of race-based segregation] is greater when it has the sanction of the law . . .”).

### III. APPLICATION

Part II discussed the constitutional and social issues with the “external legitimacy” doctrine to show the problematic nature of racial mirroring. In Part III, I will apply the principles of Part II to the situation described at the beginning of this Article: the suggestion that police departments reflect the racial composition of the served communities. Placing the requirement against these principles may help explain exactly why this seemingly straightforward and sensible proposal is constitutionally unsound and counterproductive. This analysis also may help us further conceptualize the contents of and problems with racial mirroring more generally.

This Part also identifies important limits on the application of the problems with racial mirroring. The problems with racial mirroring apply, in theory, to hiring preferences in the tribal context and to race-conscious admissions in higher education. But Congress has made clear that tribal hiring preferences are shielded from anti-discrimination provisions. And race-conscious admissions policies are justified on the basis of the educational benefits that flow from a diverse student body, not a matching of the racial diversity of the student body to the racial diversity of the local community or nation. Racial mirroring considerations may be useful nonetheless in identifying the costs of these approved forms of discrimination.

#### A. Law Enforcement

Each of the principles articulated in Part II applies to the suggestion that police officers should reflect the primary racial identity of the communities which they serve.

To begin, the suggestion presumes that officers who reflect the racial composition of the residents possess the ability to build trust and generate good will among the served public, or at least do so to a greater degree than officers of other races. This belief lacks evidentiary support. In the aftermath of Michael Brown’s death in Ferguson, Missouri, the *Washington Post* reported that “there’s no conclusive evidence to show that white and black police officers treat suspects differently . . . .”<sup>228</sup> “[I]f anything,” the report continued, “some of the studies show that black officers can be harder on

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<sup>228</sup> Lydia DePillis, *Do Diverse Police Forces Treat Their Communities More Fairly Than Almost-All-White Ones Like Ferguson’s?*, WASH. POST, Aug. 22, 2014, available at <http://www.washingtonpost.com/news/storyline/wp/2014/08/22/do-diverse-police-forces-treat-their-communities-more-fairly-than-all-white-ones-like-fergusons/>.

black criminal suspects.”<sup>229</sup> Accordingly, the presumption about officer buy-in would be predicated upon race alone and not upon the individual qualities of the officers or upon evidence of officer behavior.

Next, performance is expected of the hired officers and these expectations arise only by virtue of the shared racial identity of the officers and the residents. An officer, in other words, would not be hired or promoted merely because of the shared racial identity, but because of what may spring from that shared racial identity. The hired or promoted officer would be expected to produce the trust and goodwill desired by the police department.

Moreover, the suggestion presumes that officers of races that do not align with the primary race of the residents are not as able to engender trust among the served community. If there was not a belief that officers of a different racial composition could not develop this affection, the suggestion would be superfluous. The flip-side of the premise that racial alignment would produce a healthy police force is the presumption that officers out of sync with the residents’ racial composition would not yield that assurance of effective and fair policing.

In addition, officers may be reassigned, not promoted, or not hired on account of the presumption that they lack the ability to create “external legitimacy.” Equal opportunity in employment is thereby denied. It is true that, in circumstances other than termination or a refusal to hire, officers may still be employed and that the harm may be limited to reassignment as opposed to employment altogether. But one can imagine a situation in which departments, such as smaller departments, have a limited ability to shuffle officers around to match the racial composition of the community. In this situation, the “external legitimacy” principle, if implemented, could lead to non-promotion or non-hiring.

The suggestion also attaches an attribute—ability to produce positive relationships, or not—to the officers’ race. The suggestion therefore removes from the officers the authority to determine whether their race will be assessed, and to define the meaning of their race.

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<sup>229</sup> *Id.* Put bluntly by *The Atlantic’s* Ta-Nehisi Coates, referencing police officers in a majority-black suburb of Washington, DC, “Black Cops Can Be Brutal, Too.” Transcript Interview by Norah O’Donnell with Ta-Nehisi Coates, CBS FACE THE NATION (Nov. 30, 2014), available at <http://www.cbsnews.com/news/face-the-nation-transcripts-november-30-2014-crump-tillis-peters-cupich/>.

Racial identity and the contents of that identity should be left to the individual.<sup>230</sup>

Moving to social costs, the residents are deprived of the opportunity to appreciate that officers of any race may be able to effectively and fairly serve them. The suggestion thus perpetuates harmful beliefs that only individuals of the same race can do so, and reinforces, rather than breaks down, barriers to cross-racial understanding.

In addition, the suggestion would effectively require that spaces on the force be functionally reserved for individuals on the basis of race, and specifically the racial composition of the residents. It is true, however, that this general concern is that social *roles*—not assignments once those roles are obtained—are deemed to be the exclusive or presumptive province of members of a particular race. In the police department context, one may say that the social role of police officer is open to all, and only particular assignments are closed off or open to individuals on the basis of race. Accordingly, the relationship between this particular issue and the “external legitimacy” principle may be seen as limited. But, as noted above, when the department is small or the served community racially homogeneous, re-assignment may not be possible and the role of police officer may be reserved altogether.

The third general problem with racial mirroring—the use of courts as conduits for racial stereotypes—is applicable to the suggestion if the courts condone the suggestion. As noted in Part I, courts have bought the external legitimacy rationale in the police context.

In sum, the “external legitimacy” doctrine applied to law enforcement embodies racial stereotypes, retards social progress, and breaches the Equal Protection Clause’s essential command that individuals be treated as individuals rather than members of a racial group with monolithic attributes, abilities, or experiences.

### *B. Tribal Employment*

The “external legitimacy” doctrine may reach other practices or policies in which the racial composition of one group is adjusted so as

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<sup>230</sup> See RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 333 (2003) (“A well-ordered multiracial society ought to allow its members free entry into and exit from racial categories, even if the choices they make clash with traditional understandings of who is ‘black’ and who is ‘white,’ and even if, despite making such choices in good faith, individuals mislead observers who rely on conventional racial signaling.”).



to reflect the racial composition of another group. But it is important to recognize the limits of the reach of the doctrine.

First, the principles of racial mirroring apply to tribal employment, but, by statute, Congress has insulated tribes and other employers “on or near” Indian tribes from general anti-discrimination provisions. Title VII of the Civil Rights Act of 1964 (“Title VII”), by its own terms, exempts tribes from Title VII<sup>231</sup> and also authorizes employers “on or near” Indian lands to favor Native-American applicants. More specifically, to promote tribal sovereignty<sup>232</sup> and the economic independence<sup>233</sup> of Native Americans,<sup>234</sup> Title VII expressly provides that the statute’s prohibition against discrimination in employment shall not “apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.”<sup>235</sup> Accordingly, to the extent that a tribal employer engages in racial mirroring, Title VII cannot provide any relief for aggrieved parties. In addition, according to the Supreme Court, “Indian” is not a racial classification, but a political one.<sup>236</sup>

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<sup>231</sup> 42 U.S.C. § 2000e(b) (2012).

<sup>232</sup> See *Morton v. Mancari*, 417 U.S. 535, 545–46 (1974) (“This [preference] reveals a clear congressional recognition, within the framework of Title VII, of the unique legal status of tribal and reservation-based activities.”). The author of the preference, Senator Karl Mundt, declared that the preference “would provide to American Indian tribes in their capacity as a political entity . . . to conduct their own affairs and economic activities without consideration of the [anti-discrimination] provisions of [Title VII].” *Dille v. Council of Energy Res. Tribes*, 801 F.2d 373, 375 (10th Cir. 1986) (quoting 110 CONG. REC. 13702 (1964)).

<sup>233</sup> The Senate sponsor, Hubert Humphrey, stated that the preference “is consistent with the Federal Government’s policy of encouraging Indian employment . . . .” *Morton*, 417 U.S. at 546 (quoting 110 CONG. REC. 12723 (1964)). Senator Mundt stated that the preference “will assure our American Indians of the continued right to protect and promote their own interests and to benefit from Indian preference programs now in operation or later to be instituted.” *Malabed v. N. Slope Borough*, 335 F.3d 864, 871–72 (2003) (emphasis omitted) (citations omitted).

<sup>234</sup> This bifurcated understanding also is noted by a federal district court. See *Dille v. Council of Energy Resource Tribes*, 610 F. Supp. 157, 158 (D. Colo. 1985) (outlining the two purposes of the federal statute).

<sup>235</sup> 42 U.S.C. § 2000e-2(i) (2008).

<sup>236</sup> See *United States v. Antelope*, 430 U.S. 641, 646 (1977) (“Federal regulation of Indian tribes . . . is governance of once-sovereign political communities; it is not to be viewed as legislation of a ‘racial’ group consisting of ‘Indians.’”); *Morton*, 417 U.S. at 553 n.24 (“The preference is not directed towards a ‘racial’ group consisting of ‘Indians’; instead, it applies only to members of ‘federally recognized’ tribes. This operates to exclude many individuals who are racially to be classified as ‘Indians.’ In this sense, the preference is political rather than racial in nature.”).

While the Indian preference is protected from challenge under Title VII, the preference is not without significant costs. It is important to acknowledge the constitutional and social problems with the preference. This is not to suggest that the purported benefits to tribal sovereignty or tribal economic independence are not worth these costs; only that the costs at least must be understood and appraised in any substantive discussion of the preference. The racial mirroring conception is useful therefore as a means by which to appreciate these costs, even if the preference itself cannot be contested in the courts by reference to racial mirroring.

Indeed, an employer “on or near” tribal lands may, as with any other employer, hire or promote a member of a federally enrolled tribe in order to cater to the predominantly Native-American clientele that the employer serves.<sup>237</sup> Writing about a precursor to the Indian preference in Title VII, Felix S. Cohen—revered as the “Blackstone of American Indian law”<sup>238</sup>—explained that:

[M]ost American communities pick their own teachers, village clerks, policemen, and other public servants, giving a preference to whatever local talent is available. In an Indian community, however, such jobs . . . are generally filled . . . by persons . . . who have no familiarity with local conditions, customs, ways, and people, and who often cannot even understand the community’s language.<sup>239</sup>

An employer of similar mind may elect to hire or promote a Native-American candidate on the reasoning that the Native-American candidate has this knowledge, where the employment decision is premised on the Indian status of the candidate and not any particularized evidence about the candidate’s interest in or experience with tribal members. Accordingly, the Indian preference may, at least in some circumstances, allow employers to make an employment decision on the categorical presumption that Native Americans possess

<sup>237</sup> While the preference itself enables eligible employers to hire “any individual,” 42 U.S.C. § 2000e-2(i), in reality it has been invoked to hire members of federally enrolled tribes. See *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.*, 154 F.3d 1117, 1118 (9th Cir. 1998) (presenting an example of a preference given to member of Navajo tribe for hiring purposes and deciding it did not fall within the statutory exception); *Morton*, 417 U.S. at 555 (upholding preference open to any qualified “Indian”).

<sup>238</sup> Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 650 (2006); see also FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 51 (1995) (“[P]ractitioners and scholars of Indian law owe [a huge debt] to the late Felix Cohen.”).

<sup>239</sup> Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 361 (1953). As an example, Freya Ray writes that the “Indian requirements” may “include factors such as cultural awareness and language skills.” Freya Ray, Comment, *Preserving Indian Preference for Native American Self-Governance*, 36 AM. INDIAN L. REV. 223, 239 (2012).

certain valued qualities. The employer will expect the candidate to exhibit those presumed traits, for example, the familiarity and language skills mentioned by Cohen. The employer, at the same time, presumes the absence of this familiarity and language skills in non-Native candidates. In giving effect to these presumptions, the employer denies equal consideration to the non-Native candidate. The employer ties specific content to the status of the candidate, depriving the candidate of the ability to determine whether and how the status matters.

Moreover, Native Americans are deprived of the opportunity to understand that non-Natives may possess the desired familiarity and language skills despite their different status. The presumptions effectively reserve employment positions for Native candidates. Finally, the employer can use the courts as conduits for these presumptions, by way of the courts simply recognizing that these practices are outside of the bounds of Title VII's anti-discrimination standards. The courts likely also cannot invoke the Equal Protection Clause as a way to address these employment decisions, unless the employers are state actors.<sup>240</sup>

In sum, while Title VII and the Equal Protection Clause are generally unavailable as the vehicles for mounting any challenge to this practice, there are numerous costs that lie on a side of the ledger.<sup>241</sup>

### C. *Affirmative Action*

There may be interest in ascertaining whether a doctrine dealing with race can be used as an instrument to challenge race-conscious admissions policies. The simple answer is that racial mirroring cannot be employed to invalidate race-conscious admissions in higher

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<sup>240</sup> See *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) ("It is State action of a particular character that is prohibited [by the Fourteenth Amendment]. Individual invasion of individual rights is not the subject-matter of the amendment.").

<sup>241</sup> A thoughtful commentator asks whether the Indian preference should be accepted, not as a means by which to effectuate a preference for individuals from federally enrolled tribes, but as a "jobs program." To this, I offer two responses. First, this neutral construction of the preference still leaves open the very real possibility that an employer may select a candidate because of a blanket bias and not because of the individualized characteristics of the candidates. Second, and relatedly, the costs of the preference would still exist even if the preference has an economic or development justification. Indeed, tribal sovereignty and tribal economic independence are, by themselves, worthy goals. The addition of a third objective—tribal employment—is also important, though does not eliminate the costs enumerated herein. Whether those goals offset the costs is beyond the scope of this Article. This Article only identifies some costs of the preference without making any comment on the merits of the purposes of the preference or their significance relative to the costs.

education insofar as how such admissions policies are specifically authorized by the Supreme Court.

In 1978, Justice Powell, writing the controlling<sup>242</sup> opinion for the Court in *Regents of the University of California v. Bakke*,<sup>243</sup> found only one compelling state interest for taking race into account in higher education admissions: producing the educational benefits of a diverse student body.<sup>244</sup> Twenty-five years later, in 2003, the Court in *Grutter v. Bollinger* reviewed the constitutionality of the University of Michigan Law School's race-conscious admissions plan and in doing so reaffirmed that student body diversity in higher education is a compelling reason to use racial classification.<sup>245</sup> The Court appreciated, for example, that racial diversity in higher education facilitates cross-racial understanding, breaks down racial stereotypes, and allows graduates to be better prepared for a diverse workforce and for leadership positions in diverse employment contexts, including in the military.<sup>246</sup> The Court, paying special attention to the relationship between the First Amendment and institutions of higher education, asserted that it would defer to the law school's view that diversity, broadly defined, is essential to its educational mission.<sup>247</sup>

The *Grutter* Court also deemed the law school's admissions policy to be narrowly tailored in furtherance of its compelling state interest. The law school sought to admit a "critical mass" of underrepresented minority groups, e.g., African Americans, Hispanics, and Native Americans.<sup>248</sup> A "critical mass," according to the law school, is the point at which a student from an underrepresented minority group does not feel isolated or that he or she feels compelled to express views stereotypical of his or her racial group.<sup>249</sup> Once a "critical mass" is present, the law school argued, a student from an underrepresented minority group no longer feels isolated or compelled to be a spokesperson for his or her race; the student instead is free to articulate individual viewpoints that may differ from the stereotypical view-

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242 See *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003) ("Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies.").

243 438 U.S. 265 (1978).

244 *Id.* at 311–15 (Opinion of Powell, J.).

245 *Grutter*, 539 U.S. at 328.

246 *Id.* at 330–32.

247 *Id.* at 328.

248 *Id.* at 316.

249 *Id.* at 318–19.

point associated with his or her race.<sup>250</sup> In that sense, the educational benefits of diversity may be achieved because other students may come to realize that students from the underrepresented minority community do not hold stereotypical or monolithic ideas.<sup>251</sup>

The “critical mass” theory nonetheless has problems. For example, it presumes that a student from an underrepresented minority group possesses viewpoints that will enrich the student body or that will break down stereotypes; expects the student from an underrepresented minority group to articulate those unique viewpoints in order for the benefits of diversity to flourish; presumes that individuals from other racial groups do not have viewpoints that will enrich student body diversity or that will break down stereotypes; denies equal consideration in admissions to applicants from these racial groups; drives the meaning of the applicants’ racial identity by presuming the existence or non-existence of viewpoints on the basis of racial identity alone; and utilizes courts as a means by which to validate the stereotypes.<sup>252</sup>

While the principles animating racial mirroring may apply to some degree to race-conscious admissions, affirmative action is not racial mirroring which occurs when the racial composition of one group is adjusted so as to reflect the racial composition of a second group. Affirmative action, as allowed by the Court in *Bakke* and *Grutter*, is not an attempt by colleges and universities to match the racial composition of the student body to the racial composition of the local or national community.<sup>253</sup> Instead, such policies are permissible

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<sup>250</sup> *Grutter*, 539 U.S. at 318–19; *see also* *Grutter v. Bollinger*, 288 F.3d 732, 747 (6th Cir. 2002) (explaining how a critical mass aims to ensure that minority students “feel comfortable discussing issues freely based on their personal experiences”).

<sup>251</sup> *Grutter*, 539 U.S. at 333.

<sup>252</sup> It may not deprive students of the understanding that individuals from non-underrepresented minority groups have unique and valuable viewpoints, as those students may be admitted by way of a race-neutral admissions policy. It also does not reserve social roles for individuals of certain races. While admissions in higher education is a zero-sum game, a student at a certain school may not itself be a “social role,” though student at an elite university or in college as a whole may be.

<sup>253</sup> To the extent that any race-conscious actions by schools are premised on attempts to reflect the racial makeup of the student body with the local or national population, such actions should be invalidated as impermissible racial mirroring. *See* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 766–77 (2007) (Thomas, J., concurring) (arguing that, even with “an interest in producing an educational environment that reflects the pluralistic society in which our children will live,” to prefer “members of any one group for no reason other than race” is unconstitutional); *see also* *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24 (1971) (“The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.”).

to the extent they are designed to produce the educational benefits of a diverse student body.<sup>254</sup>

Accordingly, there are harms associated with race-conscious admissions, but this Article cannot be used as a way to undue affirmative action.

#### IV. THE REMEDY

If racial mirroring takes race off the table when decisionmakers try to obtain certain benefits by way of matching the racial composition of one group to that of the served constituency, the question becomes how decisionmakers can receive those same benefits without resorting to race. Put differently, how can decisionmakers select candidates who can generate trust and cooperation among clients in a race-neutral fashion? How else can police departments be assured that officers assigned to majority-minority neighborhoods will produce external affection, without directing that the officers reflect the racial makeup of the residents?

##### A. *The Rule*

To fashion an acceptable tool with which these entities can further their interests while at the same time avoid the problems of racial mirroring, it is necessary to delve deeper into the problems themselves. At its core, racial mirroring is harmful because entities presume, on the basis of racial identity alone, the existence or non-existence of certain traits. These are the first and third harms of those identified in this Article. These other identified harms are by-products of, and thus are secondary to these two, primary harms. It is only because of the operation of the presumptions that individuals are expected to perform, that they may be denied equal consideration, that an imposed meaning is given to the individuals' racial identities, that social roles are deemed the proper domain of a specific race, that prevents others from understanding that the presumptions are inaccurate, and that courts are brought in to validate the presumptions. These harms only spring from the presumptions themselves.

Accordingly, any remedy must be directed towards the presumptions that an individual, because he or she has a certain racial identity, categorically has or does not have certain attributes or traits. Decisionmakers interested in ensuring that individuals have certain

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<sup>254</sup> *Grutter*, 539 U.S. at 328.

traits (e.g., an ability to generate trust and cooperation) for purposes of realizing certain benefits from those traits (e.g., greater effectiveness in performing their functions) should assess whether there is any particularized evidence from the individual's record or materials that the individual has or does not have the desired traits. As Terrence Dodd, a black resident of Ferguson, said in response to questions about the diversity of the Ferguson police officers, "It don't make a difference what color they are . . . [I]t's not about race or none of that. We just need good police officers."<sup>255</sup> More generally, Eugene Volokh rightly states that "even when race is correlated with a relevant job characteristic . . . one should just look at that characteristic and not use race as a proxy."<sup>256</sup>

This rule has several values. It disabuses entities of race-based presumptions that are harmful themselves and that give rise to additional harms. It restores the individual as the determinant of whether and to what extent his or her racial identity matters, and what meaning may attach to his or her racial identity. It affords greater respect to the individual, as it does not treat the individual as a person with predetermined or monolithic attitudes, attributes, or experiences. It also pays more honest tribute to the constitutional command that individuals be treated as individuals, not as undifferentiated members of a racial group.<sup>257</sup>

This is not to pretend that race does not matter in our society. Nor is it to suggest that we should close our eyes to racial realities. But the harms of racial presumptions, when they occur, must be identified and both academics and the courts may be counseled against the promotion or adoption, respectively, of those presumptions.

### *B. Application*

It may be helpful to explore how this rule would function in actuality. Instead of relying on racial presumptions, the decisionmaker, such as an employer, would review the record (e.g., the applicant's résumé, letters of recommendation, other supporting materials, and interview performance) to assess whether the applicant has the inter-

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<sup>255</sup> Art Holliday, *Ferguson Police Department Diversity Questioned*, KSDK, Aug. 18, 2014, available at <http://www.ksdk.com/story/news/local/2014/08/12/ferguson-police-department-diversity-questioned-officers/13976879>.

<sup>256</sup> Volokh, *supra* note 105 at 2061.

<sup>257</sup> See *Grutter*, 539 U.S. at 337 ("[A] university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.").

est, ability, and experience to produce trust and cooperation among the served public. Put differently, the employer may examine whether—by reference to the applicant’s experience, abilities, and personality—the applicant has a demonstrated interest in the served community, has effective social skills, and is able to engender support and trust.

The class counsel orders issued by Judge Baer and discussed in Part I may exemplify how this rule is to apply. In the class counsel context, the touchstone for an inquiry as to whether class counsel may fairly and adequately represent the interests of the class is whether the attorneys are competent and have any conflicts that would impair the ability of any attorney to zealously advocate on behalf of the class.<sup>258</sup> Indeed, an Advisory Committee Note to Federal Rule of Civil Procedure 23(g)—a relatively new rule created in 2003 to govern the appointment of class counsel<sup>259</sup>—“articulates the obligation of class counsel to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members.”<sup>260</sup>

To appraise whether class counsel meet this standard, Rule 23(g)(1)(A) requires courts to examine the following factors: “the work counsel has done in identifying or investigating potential claims in the action,” “counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action,” “counsel’s knowledge of the applicable law,” and “the resources that counsel will commit to representing the class . . . .”<sup>261</sup> Linda Mullenix similarly notes that courts making class counsel adequacy determinations generally have demanded that counsel be “qualified, experienced, and generally able to conduct the litigation,” considering specifically “class counsel’s competence,” “particular expertise,”

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258 See *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992) (“[A]dequacy of representation is measured by two standards. First, class counsel must be qualified, experienced and generally able to conduct the litigation. Second, the class members must not have interests that are antagonistic to one another.” (citations omitted) (internal quotation marks omitted)); accord *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852–53 (1999) (pointing out that counsel’s ability to best represent the interests of the class were undermined by their “divergent interests” which were “patently at odds” with those of the class).

259 See *Sheinberg v. Sorensen*, 606 F.3d 130, 132 (3d Cir. 2010) (“Although questions concerning the adequacy of class counsel were traditionally analyzed under the aegis of the adequate representation requirement of Rule 23(a)(4) . . . those questions have, since 2003, been governed by Rule 23(g).”).

260 FED. R. CIV. P. 23(g) Advisory Committee’s Note.

261 *Id.* § 23(g)(1)(A).



“counsel’s resources,” “possible conflicts of interest with the class[,]” and any ethical conduct.<sup>262</sup>

To be sure, Rule 23(g)(1)(B) contains a catchall provision that enables a judge to weigh anything “pertinent” to class counsel’s ability to “fairly and adequately” represent the interests of the clients.<sup>263</sup> This is the precise provision that Judge Baer invoked in imposing a racial diversity requirement on class counsel.<sup>264</sup>

But rather than relying on presumptions premised on race as to the adequacy or inadequacy of class counsel premised upon race, judges should make individualized determinations as to whether counsel possess these general indicia of competence and are without conflicts that compromise their ability to fully represent their clients’ interests. As Professor Mullenix argues, “Courts should be required to develop a factual, evidentiary record on the adequacy requirement and to make findings of fact and conclusions of law based on those facts.”<sup>265</sup> The evidentiary record would be based on counsels’ “supporting evidence of competency, experience, resources, and conflicts”<sup>266</sup>—not presumptions tied to race.

In sum, an individualized, appraisal as to whether a candidate has the desired qualities allows the decisionmaker to realize the benefits from those qualities without running into the numerous problems with racial mirroring.<sup>267</sup>

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262 Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687, 1698–99 (2004) (citations omitted) (internal quotation marks omitted). The author adds that many courts do not engage in this searching inquiry, presuming instead the adequacy of counsel. *See id.* at 1699–1701.

263 FED. R. CIV. P. 23(g) Advisory Committee’s Note.

264 *See Blessing v. Sirius XM Radio, Inc.*, 507 Fed. App’x 1, 12 (2d Cir. 2012).

265 Mullenix, *supra* note 262 at 1734.

266 *Id.* at 1740.

267 The racial mirroring doctrine does not apply to race-conscious admissions as those admissions policies have been approved by the Court in *Bakke* and *Grutter*. That said, the rule offered here, if implemented, would require college and university admissions offices to base determinations as to whether an applicant will contribute to the diversity of the student body on an applicant’s file, such as the applicant’s personal statement, work history, letters of recommendation, or other similar aspects of the application. These materials would provide an individualized, evidentiary foundation for a conclusion that the applicant has diverse viewpoints, experiences, or attitudes, and thus is worthy of a “plus.” In other words, the file, not the racial self-identification of the applicant, would be the touchstone for the student body diversity inquiry. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 338 (2003) (upholding the constitutionality of an admissions system in which “[a]ll applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School”).

## CONCLUSION

Race is a social construct that, by itself, has no meaning.<sup>268</sup> An undeniable aspect of American history is the assignment of particular meanings to race: the divine dominance of whites, and the inferiority of all others, especially African Americans and Native Americans. In America's history, race was more than a social construct, but a dividing line between the "superior" and the subjugated. The painful past and its legacy should not be brushed aside, and shall remain an important lesson in the lasting flaws in the Framers' otherwise lofty concepts of liberty and equality, the deficiencies of the Framers themselves,<sup>269</sup> and what harm can come of categorical racial views and practices.

Today, the vestiges of that improper thinking and behavior remain; racial discrimination, while less pervasive and more implicit by nature, is not a relic of the past. Race continues to inform and affect views of others, and it opens and closes doors of opportunity. More than anything, race is not a social construct, but a powerful stimulant in American society—one that tends to excite and break apart the people. "[R]ace unfortunately still matters," the Supreme Court has stated.<sup>270</sup>

The question becomes, how do we become closer to the point in which racial differences are irrelevant to our abilities to perceive and treat each other?

In narrow form, this Article identifies three spheres of constitutional and social harms that stem from the practice of racial mirroring, defined herein as altering the racial composition of one group to reflect or match the racial composition of a second group. The specific conclusion that should be drawn from this Article is that the "ex-

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268 See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 73 (1996) ("Race is nothing more than what society and the law say it is."); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 10–16, 46–53 (1994) (discussing how race is not a foregone natural or biological determination, but rather a social phenomenon over which an individual has some degree of choice); *Managing an Identity Crisis: Forum Guide to Implementing New Federal Race and Ethnicity Categories*, NAT'L CTR. FOR EDUC. STATISTICS (Oct. 2008), available at [http://nces.ed.gov/pubs2008/rediguide/exhibit4\\_1.asp](http://nces.ed.gov/pubs2008/rediguide/exhibit4_1.asp) ("Assigning a race and ethnicity to an individual is a somewhat arbitrary exercise because these are not scientific or anthropological categories.").

269 See Dawinder S. Sidhu, *The Unconstitutionality of Urban Poverty*, 62 DEPAUL L. REV. 1, 28 (2012) ("The Framers' revolutionary and generous concept of liberty did not extend to 'blacks' or 'Negroes,' who were in the United States as slave laborers. Instead, it expressly permitted and perpetuated slavery." (citations omitted)).

270 *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

ternal legitimacy” doctrine is a form of racial mirroring and is thus unsustainable on constitutional and social grounds.

The broader ambition of this Article is to help lay the groundwork for a constitutional and social rule that forbids the use of all categorical racial presumptions. It endeavors to make the case that, because of these harms, categorical racial preferences must cede to individualized evaluations. The Court has recognized that “[i]f our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury.”<sup>271</sup> This Article seeks to give full meaning to this principle and to thereby accelerate the moment when individuals will be treated as individuals.

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271 *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630–31 (1991).