

Affirmative Action Against Racism: Reducing Prejudice and Remediating Stigmas

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Introduction

Despite the anti-discrimination efforts of the past 50 years, affirmative action in education is still necessary today. The Supreme Court made this clear in *Grutter v. Bollinger* by recognizing a compelling interest in diversity.¹ However, two years later, the meaning of *Grutter*'s diversity is still ambiguous; recent decisions applying *Grutter* to other schools have had mixed results.² This paper argues that diversity must be interpreted broadly to support the Supreme Court's holding in *Grutter*, and this broad interpretation can be used to support a new generation of affirmative action policies. By incorporating social psychology research into the law, these policies can attack the root causes of racism by reducing prejudice and remediating stigmas. Affirmative action over the past 25 years has focused on the socioeconomic and educational disparities that are the results of racism, but if race-conscious policies are to realistically sunset within the next 25 years, affirmative action will have to target racism itself. This will require renewed efforts on all levels of education, but the foundation for these policies can be found within the *Grutter* opinion.

This paper begins in Part I by comparing the *Grutter* majority's diversity with Justice Powell's diversity in *Bakke* and Justice Thomas's arguments in his *Grutter* dissent. These comparisons reveal a compelling interest in diversity with three distinct underlying interests and a narrow tailoring process that can be unified under a single concept. Despite the possibility of this expansive interpretation, the explicit precedent of *Grutter* was a single interest in diversity and this has artificially limited its application. Part II of this paper considers recent social psychology research and proposes two ways to incorporate that research into the *Grutter* diversity. The first proposal is a re-formulation of the diversity interest as a compelling interest in remediating stigmas. The second is a cautious expansion of affirmative action doctrine that aims to reduce prejudice within the framework of diversity. These two new theories recognize the neglected aspects of the *Grutter* diversity and provide ways to implement affirmative action programs that target the causes of racism rather than its effects.

I. Deconstructing Diversity

In *Grutter v. Bollinger*, the Supreme Court resolved a longstanding conflict in the Circuits by recognizing that diversity can be a compelling interest for race-based affirmative action.³ This was a landmark decision for Equal Protection doctrine because it was the first time the Court had explicitly upheld a racial classification for a non-

¹ *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

² *Compare* *Smith v. University of Washington*, 392 F.3d 367 (9th Cir. 2004) *with* *Parents Involved in Community Schools v. Seattle School District, No. 1*, 377 F.3d 949 (9th Cir. 2004).

³ *Grutter*, 539 U.S. at 328.

remedial purpose outside of wartime.⁴ *Grutter* was a breakthrough for affirmative action proponents, because it stands broadly for the principle that race-conscious policies can be legal when pursuing diversity.⁵ However, the meaning of diversity in this context can be elusive.⁶ The compelling interest recognized by the Court may not be best understood as a monolithic diversity but as a bundle of interests. One of these is the viewpoint diversity recognized by Justice Powell in *Bakke*,⁷ but the other interests are inventions of the *Grutter* majority. Deconstructing diversity into its underlying components may be the best way to understand *Grutter*'s compelling interest.

A. From *Bakke* to *Grutter*: Viewpoint Diversity

Diversity was first identified as a compelling interest for affirmative action by Justice Powell in *Regents of the University of California v. Bakke*.⁸ The Medical School sought to admit students that would contribute most to the “robust exchange of ideas,” and Justice Powell felt this constituted a compelling interest.⁹ He believed that “[t]he freedom of a university to make its own judgments as to education includes the selection of its student body.”¹⁰ This academic freedom right thus invoked the First Amendment, which gave Constitutional force to the university’s pursuit of diversity to counterbalance the Equal Protection claim.¹¹ Although backed by this compelling interest, the Medical School’s policy failed the narrow tailoring prong of strict scrutiny because it “focused solely on ethnic diversity ... rather than further attainment of genuine diversity.”¹² In Powell’s view, race could “tip the balance” or be a “plus” in an applicant’s file, but it could not “insulate the individual from comparison with all other candidates for the available seats.”¹³

Powell was the only Justice in *Bakke* to cite a compelling interest in student body diversity,¹⁴ so the Court was not bound by precedent to recognize such an interest when it considered *Grutter* in 2003.¹⁵ Conducting its own independent review, the *Grutter* Court

⁴ See *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (The two previous cases were *Korematsu v. United States*, 323 U.S. 214 (1944) and *Hirabayashi v. United States*, 320 U.S. 81 (1943)).

⁵ *Grutter*, 539 U.S. at 328 (“Today, we hold that the Law School has a compelling interest in attaining a diverse student body”).

⁶ See, e.g. James Lindgren, *Conceptualizing Diversity in Empirical Terms*, 23 YALE L. & POL’Y REV. 5,5 (2005) (“I find most conceptualizations of diversity so empirically implausible that I can’t tell whether those who advocate them really believe them”).

⁷ *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-12 (1978).

⁸ *Id.*

⁹ *Id.* at 313.

¹⁰ *Id.* at 312.

¹¹ *Id.* at 313.

¹² *Id.* at 315.

¹³ *Id.* at 316-17.

¹⁴ Marcia G. Synnot, *The Evolving Diversity Rationale in University Admissions: From Regents v. Bakke to the University of Michigan Cases*, 90 CORNELL L. REV. 463, 467 (2005) citing *Regents*, 438 U.S. at 327 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part), 408 (Stevens, Stewart, Rehnquist, JJ., with Burger, C.J., concurring in part and dissenting in part). The Brennan bloc believed the policy was a benign racial classification subject only to intermediate scrutiny while the Stevens bloc believed all such racial classifications violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause.

¹⁵ *Grutter*, 539 U.S. at 325 (“We do not find it necessary to decide whether Justice Powell’s opinion is binding”).

held that “the Law School has a compelling interest in attaining a diverse student body.”¹⁶ Writing for the Court, Justice O’Connor touted a long list of benefits attributed to diversity: Diversity “promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’”¹⁷ The Court noted that “numerous studies show that student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’”¹⁸ *Grutter* also affirmed Powell’s narrow tailoring constraints, emphasizing that “individualized consideration in the context of a race-conscious admissions program is paramount.”¹⁹

Justice Powell’s diversity, adopted in *Grutter*, can be more specifically characterized as *viewpoint diversity*. Viewpoint diversity is the idea that a “student with a particular background – whether it be ethnic, geographic, culturally advantaged or disadvantaged – may bring ... experiences, outlooks, and ideas that enrich the training of [the] student body.”²⁰ This is the kind diversity that most universities chose to pursue after *Bakke*,²¹ including the University of Michigan, which aspires to “achieve that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts.”²² Racial classifications are a necessary element of viewpoint diversity because of the “unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”²³ Racial classifications thus promote an educational goal through viewpoint diversity, hence Justice O’Connor follows Powell’s lead in deferring to the academic freedom of the university, relying on the Law School’s “experience and expertise” in determining that affirmative action “is necessary to further its compelling interest in securing the educational benefits of a diverse student body.”²⁴

B. Three Questions about *Grutter*’s Diversity

While the majority purports to simply uphold Justice Powell’s viewpoint diversity, a close reading of the opinion reveals that *Grutter*’s diversity is qualitatively different. Justice Thomas uncovers some of these differences in his dissent, where he seeks to clarify the majority’s compelling interest.²⁵ In Part I of his dissent, he asks whether diversity is compelling enough to justify racial classifications.²⁶ In Part II, he criticizes the majority for departing from strict viewpoint diversity into what he calls “racial aesthetics.”²⁷ In Part VI, he questions whether affirmative action is beneficial to minorities at all.²⁸ These three questions raised by Justice Thomas were not addressed

¹⁶ *Grutter*, 539 U.S. at 328.

¹⁷ *Id.* at 330 quoting App. To Pet. For Cert. 246a.

¹⁸ *Id.* quoting Brief for American Educational Research Association et al. as *Amici Curiae* 3.

¹⁹ *Id.* at 337.

²⁰ *Bakke*, 438 U.S. at 314.

²¹ See, e.g. Lindgren, *supra* note 4 at 6-8 (discussing the diversity statements of Yale, Harvard, and Princeton).

²² *Grutter*, 539 U.S. at 315 quoting App. 111.

²³ *Id.* at 333.

²⁴ *Grutter*, 539 U.S. at 333.

²⁵ *Id.* at 351-356 (Thomas, J., dissenting).

²⁶ *Id.* at 351-354.

²⁷ *Id.* at 354-356.

²⁸ *Id.* at 371-374.

explicitly by the majority, but the answers can be found in dicta. If these answers are to be taken seriously, they broaden the definition of diversity beyond viewpoint and provide the basis for a broader approval of affirmative action.

1. Is Diversity a Compelling Interest?

In his article analyzing *Grutter*,²⁹ Professor Lackland H. Bloom notes that the majority conducted “little if any independent judicial review” on the question of diversity as compelling state interest.³⁰ Justice Thomas takes the majority to task for this oversight in Part I of his *Grutter* dissent.³¹ He writes that before *Grutter* there were “only two circumstances where ‘pressing public necessity’ or a ‘compelling state interest’ [could] possibly justify racial discrimination by state actors.”³² The pressing public necessity was the “national security” interest invoked in *Korematsu*, and the compelling state interest was “a government’s effort to remedy past discrimination.”³³ Justice Thomas goes on to list the numerous interests that the Court has rejected in prior affirmative action cases.³⁴ His conclusion is that the only acceptable non-remedial justifications for racial classifications should be those that “provide a bulwark against anarchy or “prevent violence.”³⁵ In his opinion, viewpoint diversity could not possibly provide an educational benefit that is compelling enough to meet this standard.

To respond to Thomas’s concerns, the majority simply followed Justice Powell’s deference to academic freedom, concluding that “a diverse student body is at the heart of the Law School’s proper institutional mission, and that ‘good faith’ on the part of a university is ‘presumed’ absent ‘a showing to the contrary.’”³⁶ Professor Bloom argues that academic freedom can not be the sole justification for diversity, because this would allow future defendants to claim that “whatever interest they may happen to be trying to promote is compelling.”³⁷ In his view, “there needs to be some objective legal means by which the Court can distinguish true compelling interests from pretenders.”³⁸ Such an objective test was developed by Goodwin Liu, whom correctly predicted that the Supreme Court would recognize diversity as a compelling interest five years before *Grutter*.³⁹

Liu creates his analytic framework by finding the factors that make the remedial interest compelling, starting with a policy judgment on moral and Constitutional

²⁹ Lackland H. Bloom, *Grutter and Gratz: A Critical Analysis*, 41 Hous. L. Rev. 459, 467 (2004) (Professor Bloom’s article included a subsection entitled, “Is Diversity a Compelling State Interest?”).

³⁰ *Id.* at 479.

³¹ *Grutter*, 539 U.S. at 351-354 (Thomas, J., dissenting).

³² *Id.* at 351.

³³ *Id.* citing *Korematsu v. United States*, 323 U.S. 214 (1944). quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989).

³⁴ *Id.* at 352-353 citing *Wygant v. Jackson Bd. Of Ed.*, 476 U.S. 276 (1986); *Palmore v. Sidoti*, 466 U.S. 429 (1984). Thomas list includes: providing “role models” for minority students, faculty diversity to improve education, the best interests of a child in a custody dispute, and remedying general societal discrimination.

³⁵ *Id.* at 353.

³⁶ *Id.* at 329 quoting *Bakke*, 438 U.S. at 318-319.

³⁷ Bloom, *supra* note 25 at 478.

³⁸ *Id.*

³⁹ Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381 (1998).

foundations.⁴⁰ The remedial interest is “compelling” because it rests on a moral foundation of compensatory justice,⁴¹ with “particularized discrimination”⁴² or “passive participation”⁴³ necessary to satisfy the tort-like causation requirement. Liu argues that diversity rests on its own moral imperative to combat “the evils of private prejudice.”⁴⁴ The Constitutional foundations for remedial interests are found in the Fourteenth Amendment duty to eradicate the vestiges of prior discrimination.⁴⁵ Liu claims a Constitutional interest for diversity because “[e]fforts to combat prejudice are ... vital to the maintenance of democracy.”⁴⁶ The second part of Liu’s analytic framework considers a “substantive policy judgment about the proper balance between benefits and burdens.”⁴⁷ This balancing rejects “societal discrimination” as a remedial interest,⁴⁸ but Liu concludes that under a diversity rationale, the burden on non-minorities is no greater than under approved remediation,⁴⁹ the burden on minorities is lessened because of the consideration of additional diversity factors,⁵⁰ and the logical stopping point for diversity is no different from that for remediation.⁵¹ The final part of Liu’s framework requires that the interest be supported with “a strong basis in evidence.”⁵² This is the requirement of “particularized findings of past discrimination” from *Wygant*,⁵³ and Liu believed that empirical evidence of the positive effects of diversity would be sufficient to satisfy this standard.⁵⁴

Although the Court did not adopt an explicit framework to determine whether or not diversity is compelling, each element of Liu’s analysis appears somewhere in the *Grutter* majority opinion. The moral foundations for diversity are in the first three benefits the Court attributes to diversity: “cross-racial understanding,” “break[ing] down racial stereotypes,” and “enabl[ing] students to better understand persons of different races.”⁵⁵ Although the Court cites these as educational benefits, they are strikingly similar to Liu’s moral imperative in reducing prejudice. Liu’s Constitutional interest in maintaining democracy finds support in the Court’s desire to “cultivate a set of leaders with legitimacy in the eyes of the citizenry.”⁵⁶ The Court almost endorses this democratic interest directly in writing that “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”⁵⁷ Liu’s balancing of benefits and burdens is

⁴⁰ *Id.* at 401.

⁴¹ *Id.* at 401-406.

⁴² *Id.* at 406; *See Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 276 (1986).

⁴³ *Id.* at 404 *quoting* *City of Richmond v. J.A. Croson*, 488 U.S. 469, 492 (1989).

⁴⁴ *Id.* at 413 *quoting* *Croson*, 488 U.S. at 492.

⁴⁵ *Id.* at 415 *citing* *United States v. Fordice*, 505 U.S. 717, 728 (1992).

⁴⁶ *Id.* at 422.

⁴⁷ *Id.* at 401.

⁴⁸ *Id.* at 406; *See Wygant*, 476 U.S. at 276 (rejecting “remedying general societal discrimination” as a compelling interest”).

⁴⁹ *Id.* at 422.

⁵⁰ *Id.* at 425-426.

⁵¹ *Id.* at 427-428.

⁵² *Id.* at 430 *citing* *Croson*, 488 U.S. at 500 (*quoting* *Wygant*, 476 U.S. at 277).

⁵³ *Id.* at 498 *quoting* *Wygant*, 476 U.S. at 276.

⁵⁴ *Id.* at 433-441.

⁵⁵ *Grutter*, 539 U.S. at 330.

⁵⁶ *Id.* at 331.

⁵⁷ *Id.*

considered in the Court's narrow tailoring analysis.⁵⁸ Finally, Liu's empirical evidence requirement is satisfied by "numerous studies" and *amici* that show the "educational benefits that flow from student body diversity."⁵⁹ The reality of this evidence is not that diversity improves academic achievement for all students.⁶⁰ What social scientists have found is an improvement in minority student achievement⁶¹ and a clear positive impact on interracial and intercultural relations.⁶² This evidence is most compelling not for the educational benefits of Powell's viewpoint diversity but for Liu's social and political benefits of reducing prejudice.

Justice Thomas may be correct in concluding that "marginal improvements in legal education do not qualify as a compelling state interest,"⁶³ but if properly understood, the majority's compelling interest in diversity does not rest solely on educational benefits. Broader benefits in business and national security are also at stake,⁶⁴ and the *Grutter* diversity has a moral and Constitutional justification in reducing prejudice and maintaining faith in democracy.

2. *Is Grutter's Diversity Limited to Viewpoint Diversity?*

In Part II of his dissent, Justice Thomas criticizes the majority for departing from strict viewpoint diversity into consideration of "racial aesthetics."⁶⁵ Thomas seeks clarification between the majority's "interest in attaining a diverse student body"⁶⁶ and their "interest in securing the *educational benefits* of a diverse student body."⁶⁷ Educational benefits are grounded in Powell's viewpoint diversity, but Thomas believes that unqualified diversity is indistinguishable from an aesthetic goal.⁶⁸ Diversity for its own sake is no different from racial balancing,⁶⁹ which was banned by *Bakke's* prohibition on quotas.⁷⁰ The Court affirmed this principle in *Freeman v. Pitts*, writing

⁵⁸ *Id.* at 333-343.

⁵⁹ *Id.* at 331.

⁶⁰ Barbara Lauriat, *Trump Card or Trouble? The Diversity Rationale in Law and Education*, 83 B.U. L.REV. 1171, 1185 (2003) citing Harry J. Holzer & David Neumark, *Assessing Affirmative Action*, 38 J. ECON. LITERATURE 483, 553 (2000).

⁶¹ Marcia G. Synnott, *The Evolving Diversity Rationale in University Admissions: From Regents v. Bakke to the University of Michigan Cases*, 90 Cornell L. Rev. 463, 488-92 (2005) citing William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 51, 256-58 (1998).

⁶² Lauriat, *supra* note 20.

⁶³ *Id.* at 357 (Thomas, J., dissenting).

⁶⁴ *Id.* at 330-331 citing Brief for 3M et al. as *Amicus Curiae* 5; Brief for General Motors Corp. as *Amicus Curiae* 3-4; Brief for Julius W. Becton, Jr. et al. as *Amici Curiae* 27 ("American business have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience, "a highly qualified, racially diverse officer corps ... is essential to the military's ability to fulfill its principle mission to provide national security.")

⁶⁵ *Id.* at 355 (Thomas, J., dissenting) (Thomas uses the term "racial aesthetics" instead of diversity when referring to plan).

⁶⁶ *Id.* quoting *Grutter*, 539 U.S. at 328.

⁶⁷ *Id.* quoting *Grutter*, 539 U.S. at 333 (emphasis added).

⁶⁸ *Id.* n.3 ("the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them").

⁶⁹ *Id.*

⁷⁰ *Bakke*, 438 U.S. at 315.

that “[r]acial balance is not to be achieved for its own sake.”⁷¹ The majority in *Grutter* echoes this principle that “outright racial balancing ... is patently unconstitutional.”⁷²

Thomas’s criticism continues in Part VI of his dissent, where he focuses on the majority’s statement that “it is necessary that the path to leadership be *visibly open* to talented and qualified individuals of every race and ethnicity.”⁷³ The “visibly open” interest can not fall within the rubric of viewpoint diversity because it is irrelevant to the education of students within the law school. The majority does not attempt to obscure its emphasis on aesthetic appearances, writing that law schools must “cultivate a set of leaders with legitimacy in the eyes of the citizenry” and that “[a]ll members of our heterogeneous society must have confidence in the openness and integrity of ... educational institutions.”⁷⁴ Thomas criticizes this as an attempt to remedy societal discrimination,⁷⁵ which the Supreme Court has repeatedly rejected as a compelling interest for affirmative action.⁷⁶ However, this mischaracterizes the majority’s point, which is not a bare desire to cultivate more minority leaders but a fear that a minority public may not have faith in their leaders if they are products of a system that appears racist. This fear is related to Goodwin Liu’s Constitutional interest in maintaining democracy, and the majority’s appeal to the “path to leadership” may be best interpreted not as an endorsement of racial balancing but as part of the foundation that makes diversity compelling.

Grutter’s diversity is not simply Powell’s viewpoint diversity justified by academic freedom, but neither is it a license to pursue racial aesthetics. *Grutter* adds two distinct components to diversity. The first of these is an interest in reducing prejudice, which is the moral justification for diversity. Although closely related to the educational benefits of viewpoint diversity that create livelier classroom discussions, reducing prejudice has broader goals that extend beyond academics, seeking to promote cross-racial understanding and break down racial stereotypes. The second interest in the *Grutter* diversity is a broad desire to reduce societal stereotypes that impair the operation of democracy. *Grutter*’s diversity is thus three distinct interests: improving education through viewpoint diversity, improving race relations by reducing prejudice, and improving democracy by reducing general societal stereotypes.

3. Are There Unintended Consequences of Affirmative Action?

Part VI of Justice Thomas’s dissent argues that affirmative action hurts its intended beneficiaries more than it helps.⁷⁷ He first made this argument in *Adarand*, where he wrote in his concurrence that affirmative action “programs stamp minorities with a badge of inferiority.”⁷⁸ He reemphasized this point in his *Grutter* dissent, writing that “all are tarred as undeserving ... whether [or not] those stigmatized are actually the

⁷¹ *Freeman v. Pitts*, 503 U.S. 467, 494 (1992).

⁷² *Grutter*, 539 U.S. at 330.

⁷³ *Id.* at 373 citing *Id.* at 332 (emphasis added).

⁷⁴ *Id.*

⁷⁵ *Id.* at 373-74 (Thomas, J., dissenting).

⁷⁶ *Id.* at 374 citing *Wygant*, 476 U.S. at 276; *Croson*, 488 U.S. at 497, 520-521 (Scalia, J., concurring in judgment).

⁷⁷ *Id.* at 373.

⁷⁸ *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in judgment).

‘beneficiaries’ of [affirmative action].”⁷⁹ In his view, minorities that benefit from affirmative action are dismissed as “otherwise unqualified” and those that would have been admitted without preferences are unfairly questioned.⁸⁰ This stigmatization is a necessary side effect of affirmative action, but the majority does not address this point directly.

Like Justice Thomas’s other questions, minority stigmatization is addressed implicitly in the majority opinion. Minimizing such side effects is the focus of the majority’s narrow tailoring analysis.⁸¹ The prohibition on quotas and emphasis on flexibility minimizes stigmatization by ensuring that the policy does not make “an applicant’s race or ethnicity the defining feature of his or her application.”⁸² Narrow tailoring also requires consideration of race-neutral alternatives, which would avoid racial stigmatization altogether.⁸³ Minimizing the burden on non-beneficiaries minimizes the resentment that may lead to stigmatization.⁸⁴ Although not explicitly described as mitigating the effect of stigmas, these components of narrow tailoring analysis speak directly to Justice Thomas’s concerns.

While there is no discussion of stigmatization, the majority does explicitly consider one side effect of affirmative action. Rather than use a quota or a point system, the Law School sought to enroll a “critical mass” of minority students.⁸⁵ The University claimed that a critical mass would prevent minorities from being stereotyped as holding a “characteristic minority viewpoint.”⁸⁶ The majority finds that “diminishing the force of such stereotypes is both a crucial part of the Law School’s mission, and one that it cannot accomplish with only token numbers of minority students.”⁸⁷ Although the Court defers to the Law School in determining that critical mass “is necessary to further its compelling interest in securing the educational benefits of a diverse student body,”⁸⁸ critical mass is another point where *Grutter*’s diversity differs from viewpoint diversity. Avoiding a “characteristic minority viewpoint” does not detract from the educational benefits of multiple viewpoints; critical mass only makes sense as a prophylactic measure against a side effect of affirmative action.

Both critical mass and the narrow tailoring elements are efforts to control a very specific category of affirmative action side effects. Once race is a factor in admissions, stereotypes will inevitably form about the minority beneficiaries of the policy. Minimizing these stereotypes is essential to ensuring the efficacy of such programs. Thinking in terms of stereotypes also provides a way to unite the two additional elements of diversity discussed in the previous subsections. Reducing prejudice is an effort to directly reduce the racial stereotypes held by students entering the Law School. The “path to leadership” is an effort to reduce stereotypes that exist in society. Narrow tailoring and critical mass force the law school to consider the side effects of its actions,

⁷⁹ *Grutter*, 539 U.S. at 373 (Thomas, J. dissenting).

⁸⁰ *Id.*

⁸¹ *Id.* at 334-342.

⁸² *Id.* at 337.

⁸³ *Id.* at 339.

⁸⁴ *Id.* at 341.

⁸⁵ *Id.* at 333.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

mitigating the creation of new stereotypes while implementing its policy. This is the foundation for a coherent way to describe affirmative action as an effort to reduce stereotypes.

C. The Precedent in *Grutter*

The majority in *Grutter* did not answer Justice Thomas's questions directly and did not describe its compelling interest in terms of stereotypes. Although it is stereotype reduction that makes Michigan's policy compelling, and it is stereotype mitigation that makes the policy narrowly tailored, there is no question that the precedent set in *Grutter* is that "diversity" is a compelling interest for affirmative action. The Court could not have phrased its opinion in terms of stereotypes because existing affirmative action policies, legacies of Justice Powell's lone opinion in *Bakke*, all use the language of diversity. The consequence of an explicit doctrine of diversity is a limitation on the scope of stereotype reduction. Because the compelling interest is diversity, affirmative action can now only reach situations where the educational benefits of viewpoint diversity are salient.

This precedent has been easy to apply in situations analogous to the University of Michigan Law School. A year after *Grutter* was decided, the University of Washington Law School's admissions program was upheld by the Ninth Circuit.⁸⁹ Like Michigan, Washington considered racial and ethnic origin "among many other diversity factors,"⁹⁰ and the Ninth Circuit used the *Grutter* opinion as a "template of what educational institutions should do."⁹¹ The court identified only three areas where the Washington policy differed from Michigan's policy and found neither of them inconsistent with narrow tailoring.⁹² Designing a law school admissions program that withstands Constitutional scrutiny is relatively easy following *Grutter*.

The same principles generally apply to undergraduate admissions, but the status of voluntary integration programs in secondary schools is far more tenuous. Viewpoint diversity is a poor model for secondary schools, where classroom discussion is not an integral part of education and geographic limitations often preclude the consideration of other diversity factors. Voluntary integration programs also generally deal with a high volume of students in high-minority schools rather than seeking to admit a critical mass of minorities into a majority environment. Despite these differences, several District Courts have upheld race-conscious policies in secondary schools,⁹³ but the only two Circuit Courts to consider the issue since *Grutter* have struck down race-conscious policies.

In *Seattle School District No. 1*, the school district implemented a controlled choice program, where any student could choose to attend any one of the ten high schools

⁸⁹ *Smith v. University of Washington*, 392 F.3d 367 (9th Cir. 2004).

⁹⁰ *Id.* at 371.

⁹¹ *Id.* at 372.

⁹² *Id.* at 376 (The three differences were an ethnicity substantiation letter, which allowed minority students to expand on how race had impacted their views and experiences; a preference for Asian-American students, which focused on diverse Asian ethnicities for its preeminent Asian law program; and a statistical anomaly in the number of White applicants referred to the Admissions Committee).

⁹³ *See, e.g.* *Comfort v. Lynn School Committee*, 283 F.Supp.2d 328 (D.Mass. 2003); *Doe v. Kamehameha Schools*, 295 F.Supp.2d 1141 (D.Haw. 2003); *McFarland v. Jefferson County Public Schools*, 330 F.Supp.2d 834 (W.D.Ky. 2004).

in the district.⁹⁴ Since some schools would be more popular than others, the district developed a policy of tiebreakers to determine the school assignment. The first tiebreaker goes to students who had siblings attending their target high school, but the second tiebreaker uses race.⁹⁵ Schools with fewer than 45% minority enrollment would prefer minorities over whites. Schools with more than 75% minority enrollment would prefer whites over minorities.⁹⁶ The Ninth Circuit accepted diversity as a compelling interest, writing that “we cannot identify a principled basis for concluding that the benefits the Court attributed to the existence of educational diversity in universities cannot similarly attach in high schools.”⁹⁷ However, the policy was struck down because it failed “virtually every one of the narrow tailoring requirements.”⁹⁸ There was no individualized review and the strict percentages resemble a mechanical quota.⁹⁹ The district did not earnestly consider race-neutral alternatives, such as a random lottery, socioeconomic diversity, or the creation of magnet schools.¹⁰⁰ There was also no effort to minimize the impact on third parties.¹⁰¹ The policy did, however, satisfy the last narrowly tailoring element requiring a time limit.¹⁰² The Ninth Circuit concluded that the policy “cannot possibly be squared with the demands of the Equal Protection Clause.”¹⁰³

In *Caddo Parish School Board*, a magnet school maintained its race-conscious admissions policy from a previous era of court-ordered desegregation.¹⁰⁴ After meeting minimum academic requirements, the admissions policy for the Caddo Middle Magnet School, like the *Seattle School District* plan, gave priority to those with siblings in the school.¹⁰⁵ The second priority goes to Black students who would otherwise attend a school with over 90% Black enrollment.¹⁰⁶ The policy then ranks Black and White students separately and fills the remaining seats to achieve “a racial mix of 50% white and 50% black, plus or minus 15 percentage points.”¹⁰⁷ The school district attempted to justify its policy based on a remedial interest from a 1981 court order, but judicial supervision of the school had been withdrawn in 1990, and the court found “no evidence in the record of current segregation ... or vestiges of past discrimination.”¹⁰⁸ The court rejected the evidence of single-race schools and test score gaps because they were not “traceable to past segregation.”¹⁰⁹ The court does not decide whether the policy could survive under a compelling interest in diversity, but notes that such a claim would likely

⁹⁴ *Parents Involved in Community Schools v. Seattle School District, No. 1*, 377 F.3d 949, 955 (9th Cir. 2004).

⁹⁵ *Id.* at 955-956.

⁹⁶ *Id.* at 969.

⁹⁷ *Id.* at 964.

⁹⁸ *Id.* at 969.

⁹⁹ *Id.* at 969-970.

¹⁰⁰ *Id.* at 970-975.

¹⁰¹ *Id.* at 975.

¹⁰² *Id.* at 976 note 32.

¹⁰³ *Id.* at 976.

¹⁰⁴ *Cavalier ex rel. Cavalier v. Caddo Parish School Board*, 403 F.3d 246, 248 (5th Cir. 2005)

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 250-258.

¹⁰⁹ *Id.* at 259 note 14.

fail in the secondary school context.¹¹⁰ The Fifth Circuit labeled the policy a “quota” and found that it failed the narrow tailoring requirements of *Grutter*.¹¹¹ Like the controlled choice program in *Seattle School District*, the *Caddo Parish* magnet school admissions policy was declared unconstitutional.¹¹²

Both the *Seattle School District* and *Caddo Parish* decisions were divided 3-judge panels with passionate dissents,¹¹³ and this reflects the ambiguity inherent in applying *Grutter* to the secondary school context. By relying primarily on academic freedom to justify its compelling interest, the *Grutter* Court specifically excluded secondary schools. By emphasizing viewpoint diversity, the Court limited affirmative action to situations where classroom discussion is an important element of education. While this may have some relevance to high schools,¹¹⁴ this excludes elementary and middle schools as well as higher education in academic fields where classroom discussion may be less important, such as science or engineering. Explicit consideration of stereotypes could overcome some of these limitations, but it is not clear how best to incorporate these concepts into affirmative action jurisprudence. The remainder of this paper will develop a reformulation of diversity that explicitly considers stereotypes and suggest a coherent method of applying the *Grutter* precedent to cases like the *Seattle School District* and *Caddo Parish*.

II. Reducing Prejudice and Remedying Stigmas

Although consideration of prejudice and stereotypes is implicit in the *Grutter*, these concepts were not explicitly incorporated into Equal Protection doctrine. With no existing judicial framework for analyzing stereotypes in the case law, this should have been expected. Social psychology has generally been disfavored by judges, but these concepts have been increasingly accepted by legal scholars.¹¹⁵ As the field of social psychology advances, there is a growing justification, if not an obligation, to incorporate its findings into legal doctrine. As Professor Linda Hamilton Krieger has said, “A civil rights policy uninformed by relevant insights from social psychology may fall prey to the law of unintended consequences.”¹¹⁶ With the Supreme Court’s explicit consideration of stereotypes in *Grutter*, affirmative action jurisprudence is ripe for the formal adoption of concepts from social psychology. This could take the form of a novel doctrine, such as a

¹¹⁰ *Id.* at 259 note 15.

¹¹¹ *Id.* at 260.

¹¹² *Id.*

¹¹³ *Seattle School District No. 1*, 377 F.3d at 989-1014 (Graber, J., dissenting); *Caddo Parish School Board*, 403 F.3d at 262-271 (Weiner, J., dissenting).

¹¹⁴ *See supra* note 97.

¹¹⁵ Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1538 *citing* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164-65 (1995); Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 499 (2001); Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1274 (2002); Jody David Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733 (1995); Jody David Armour, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* (1997).

¹¹⁶ Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1257 (1998).

compelling interest in remedying stigmas, or it could inform current doctrine, by incorporating stereotypes into the compelling interest in diversity.

A. Social Psychology

More than fifty years ago, Dr. Kenneth Clark completed his famous “doll study” and testified as an expert in *Brown v. Board of Education*.¹¹⁷ This led Chief Justice Warren to conclude that segregation “generates a feeling of inferiority as to [Black children’s] status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”¹¹⁸ Since that time, the social psychology of stereotypes and stigmas has played a part in many of the Court’s cases.¹¹⁹ Several legal scholars have argued for a more explicit adoption of psychology in Equal Protection doctrine. Professor Charles Lawrence pioneered this approach almost two decades ago with his article, *The Id, The Ego, and Equal Protection*.¹²⁰ This section will explore three more recent articles with particular relevance to affirmative action.

1. Implicit Bias

“Controlled, deliberative, rational processes are not the only forces guiding our behavior.”¹²¹ This is the conclusion that Professor Jerry Kang draws from the results of recent research that seeks to understand the cognitive processes behind human behavior. The results of these studies are “stunning, reproducible, and valid by traditional scientific metrics.”¹²² Kang calls the discovery of these implicit biases a “revolution” with far-reaching implications for race and the law.¹²³

In the early 1980’s, social psychologists Samuel Gaertner and John McLaughlin devised a study to test subconscious bias.¹²⁴ They primed their subjects with the word “White” or “Black” then immediately replaced the word with a string of letters that were sometimes gibberish and sometimes words, asking the participants to decide as quickly as possible whether the letters spelled a word.¹²⁵ The chosen words were associated with

¹¹⁷ William J. Rich, *Betrayal of the Children With Dolls: The Broken Promise of Constitutional Protection for Victims of Race Discrimination*, 90 CORNELL L. REV. 419, 419-20 (2005) citing Kenneth B. Clark, *The Effect of Prejudice and Discrimination on Personality Development*, WHITE HOUSE MIDCENTURY CONFERENCE ON CHILDREN AND YOUTH (1950); Kenneth B. Clark, *PREJUDICE AND YOUR CHILD* (2d ed. 1955); See also *Brown v. Board of Education*, 347 U.S. 483, 494 n.11 (1954) (Dr. Clark’s study showed that Black girls of all ages preferred white dolls over black dolls).

¹¹⁸ *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

¹¹⁹ R. A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 865 n. 314 (2004) citing *Powers v. Ohio*, 499 U.S. 400, 410 (1991); *Croson*, 488 U.S. at 493; *Allen v. Wright*, 468 U.S. 737, 755 (1984); *Rose v. Mitchell*, 443 U.S. 545, 554-56 (1979); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 155 (1994); *Columbus Bd. of Educ. v. Penic*, 443 U.S. 449, 509 (1979) (Rehnquist, J., dissenting); *But see Bakke*, 438 U.S. at 294 n.34 (opinion of Powell, J.) (“The Equal Protection Clause is not framed in terms of ‘stigma.’ Certainly the word has no clearly defined constitutional meaning.”).

¹²⁰ Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

¹²¹ Kang, *supra* note 115 at 1514 citing Dovidio, et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 519-20 (1997).

¹²² *Id.* at 1493.

¹²³ *Id.*

¹²⁴ *Id.* at 1509 citing Samuel L. Gaertner & John P. McLaughlin, *Racial Stereotypes: Associations and Ascriptions of Positive and Negative Characteristics*, 46 SOC. PSYCHOL. Q. 23 (1983).

¹²⁵ *Id.*

stereotypes and the researchers found that their subjects were faster at recognizing a positive word such as “smart” if they were primed with the word “White” rather than “Black.”¹²⁶

Later studies found similar effects with pictures of Black and White faces,¹²⁷ and a subsequent flurry of implicit bias research has led to the development of a tool known as the Implicit Association Test (IAT).¹²⁸ There have been literally hundreds of IAT studies conducted, and unconscious biases have been found against Blacks, Latinos, Jews, Asians, non-Americans, women, gays, and the elderly.¹²⁹ When given surveys after IAT experiments, there is no correlation between self-reported bias and measured implicit bias. People who self-report positive attitudes towards minorities and even minorities themselves often show an implicit negative bias on the IAT.¹³⁰

Although these results are restricted to a laboratory environment, a new wave of research has uncovered the behavioral consequences of implicit bias.¹³¹ Behavioral economists and social psychologists have shown that implicit bias can make a significant difference when interpreting resumes and conducting job interviews.¹³² Social psychologists have also documented the effect of “stereotype threat” on academic performance.¹³³ Recent research has established a correlation between IAT scores and

¹²⁶ *Id.*

¹²⁷ *Id.* citing John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 534 (1997) (finding “clear evidence” that the race of the face with which participants were primed – Black or White – influenced how quickly they could identify positive versus negative words).

¹²⁸ *Id.* at 1509-10 citing Project Implicit, IAT Home, <http://implicit.harvard.edu/implicit/demo> (2005) (Readers are invited to take sample IAT tests themselves at the web site). The IAT measures how tightly any two concepts are associated in a subject’s mind. In a typical experiment, there are two identity categories, for example “Black” and “White.” There are also two sets of stimuli, for example good words and bad words. In the first round of the experiment, labels on the screen indicate that the participant should hit a key on the left side of the keyboard if they see a White face and the right side if they see a Black face. After the subject has become accustomed to the system, the labels are changed to say “White or Good” and “Black or Bad.” The images of White and Black faces are then interspersed with words like “violent,” “lazy,” “smart,” or “kind.” In the second round of the experiment, participants are again primed with White and Black faces, and then the labels are changed to “White or Bad” and “Black or Good.” The experimenter measures the time it takes to hit the correct key, and for the vast majority of subjects, the “White or Good; Black or Bad” part of the experiment goes much quicker than the opposite.

¹²⁹ *Id.* at 1512 citing Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 147 (2004) (describing the work of B.R. Levy).

¹³⁰ *Id.* at 1512-13 citing John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 510, 517 (1997).

¹³¹ *Id.* at 1514.

¹³² *Id.* at 1515-19 citing Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 2 NAT’L BUREAU OF ECON. RESEARCH, Working Paper No. 9873 (2003) (Stereotypically White names on resumes fared much better than stereotypical Black names with equivalent qualifications); Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743, 747-48 (2001) (For jobs requiring cooperative behavior, agentic women that emphasized self-promotion and competence fared worse than men with identical interviews).

¹³³ *Id.* at 1519-23 citing Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (1997) (When told that a test measures intelligence, Black students perform worse than White students, but when told that it is diagnostic, students performed equally); Margaret Shih et al., *Stereotype Performance Boosts: The Impact of Self-Relevance and the Manner of Stereotype Activation*, 83 PERSONALITY & SOC. PSYCHOL. 638 (2002) (Asian-American females performed

nonverbal behavior when interacting with people of different races.¹³⁴ In a series of studies following the Amadou Diallo shooting in 1999, researchers found an even more disturbing manifestation of implicit bias.¹³⁵ When asked to identify guns and tools, subjects primed with Black faces were able to identify guns more quickly than those primed with White faces.¹³⁶ In a videogame environment, subjects shot Black targets with guns more quickly than White targets and mistakenly shot Black targets with cell phones more often than White targets.¹³⁷ Kang calls these implicit biases “Trojan Horses.”¹³⁸ These studies show that stereotypes and stigmas, although intangible and not necessarily under our control, can affect employment decisions, academic performance, social interaction, and law enforcement. Limiting the law to conscious and deliberate actions ignores an entire category of real-world harms.

2. Stereotypes

Five years before *Grutter* came to the Court, Professor Linda Hamilton Krieger highlighted several studies at the intersection of affirmative action and social psychology.¹³⁹ Social cognition research has verified Justice Thomas’s concern that the beneficiaries of affirmative action suffer from a self-denigrating evaluation effect, but these effects “vary considerably depending on who the beneficiaries are, how they feel about affirmative action, and how specific policies are described and implemented.”¹⁴⁰ Research has also verified Justice Thomas’s stigmatization effect, but the attitude of non-beneficiaries of affirmative action “depends not only on the presence of a preference, but also on the existence of negative stereotypes associated with the preferred group.”¹⁴¹

better on a math test when unconsciously primed about their Asian identity and worse when unconsciously primed about their gender).

¹³⁴ *Id.* at 1523 citing Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435, 435-36 (2001) (“Larger IAT effect scores predicted greater speaking time, more smiling, more extemporaneous social comments, fewer speech errors, and fewer speech hesitations in interactions with the White vs. Black experimenter”).

¹³⁵ *Id.* at 1525.

¹³⁶ *Id.* at 1525-28 citing Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 1314 (2002) (An implicit association was established between Black faces and guns); Charles M. Judd et al., *Automatic Stereotypes vs. Automatic Prejudice: Sorting Out the Possibilities in the Payne (2001) Weapon Paradigm*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 75 (2004) (Establishing that the Payne results were due to a stereotypical association of Blacks and guns rather than bare prejudice against Blacks).

¹³⁷ *Id.* at 1527 citing Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity To Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314 (2002) (Black and White characters in a videogame were either holding guns or cell phones, and participants were told to shoot as fast as possible).

¹³⁸ *Id.* at 1497.

¹³⁹ Krieger, *supra* note 116 at 1257.

¹⁴⁰ *Id.* at 1263 (Beneficiaries’ responses to affirmative action depend on the number of minorities in a profession and the consideration of merit along with classification. Black females showed more job excitement when benefiting from affirmative action while Black males were less excited).

¹⁴¹ *Id.* at 1266 citing Brenda Major et al., *Attributional Ambiguity of Affirmative Action*, 15 BASIC & APPLIED SOC. PSYCHOL. 113, 118 (1994); Madeleine E. Heilman et al., *Intentionally Favored, Unintentionally Harmed? Impact of Sex-Based Preferential Selection on Self-Perceptions and Self-Evaluations*, 72 J. APPLIED PSYCHOL. 62 (1987) (While women rated their own competence lower when

Social cognitionists also confirm the necessity of “critical mass” because selective memory effects, expectancy-confirming attribution biases, and a process known as “subtyping” severely limit the capacity of a token population of minorities to break down racial stereotypes.¹⁴² The efficacy of an affirmative action program is thus highly dependent on individual details of the policy, and a more explicit consideration of stereotype effects can create more effective programs while minimizing side effects.

Social justice theory confirms many of the narrow tailoring requirements of affirmative action jurisprudence. Individualized consideration is advantageous because negative stereotypes “weaken substantially when both group membership and personal qualifications play a role in selection decision making.”¹⁴³ Remedial interests are favored because people are more accepting of affirmative action “where an historical pattern of discrimination against the preferred group is made salient in the description of the procedure.”¹⁴⁴ This is also true “where rigid numerical quotas are avoided.”¹⁴⁵ These studies confirm that a narrowly tailored affirmative action policy is generally also one that minimizes stereotypes.

3. Stigmas

Professor R.A. Lenhardt argues that “racial stigma, not intentional discrimination or unconscious racism, is the true source of racial injury in the United States.”¹⁴⁶ Lenhardt defines stigmas as “dishonorable meanings socially inscribed on arbitrary bodily marks [such as skin color], or ‘spoiled collective identities.’”¹⁴⁷ While stereotypes are generalizations that perpetuate negative attitudes, stigmas inflict the negative meanings themselves.¹⁴⁸ She proposes “a structured judicial analysis for identifying racially stigmatic meaning and harm.”¹⁴⁹

told they received a sex-based preference, men did not show this effect when told they were selected because of their sex).

¹⁴² *Id.* at 1267 citing Susan T. Fiske & Shelley E. Taylor, *SOCIAL COGNITION* 57-95 (1991); Patricia W. Linville et al., *Stereotyping and Perceived Distributions of Social Characteristics: An Application to Ingroup-Outgroup Perception*, in *PREJUDICE, DISCRIMINATION, AND RACISM* 165, 166 (John F. Dovidio & Samuel L. Gaertner eds., 1986) (Selective-memory effects cause people to readily recognize stereotype-consistent data as relevant); Jennifer Crocker et al., *Person Memory and Causal Attributions*, 44 *J. PERSONALITY & SOC. PSYCHOL.* 55, 63-64 (1983) (People tend to associate stereotype-inconsistent information about a target individual with external, situational factors rather than internal dispositional factors relevant to the stereotype’s accuracy); Marilyn B. Brewer & Roderick M. Kramer, *The Psychology of Intergroup Attitudes and Behavior*, 36 *ANN. REV. PSYCHOL.* 219, 221 (1985) (If disconfirming information is concentrated in a single individual or in a small or otherwise discrete group, such individuals are “subtyped” and disassociated from the larger category with which they are otherwise associated).

¹⁴³ *Id.* at 1270 citing Brenda Major et al., *Attributional Ambiguity of Affirmative Action*, 15 *BASIC & APPLIED SOC. PSYCHOL.* 113, 133 (1994); *See also Id.* at 1271 citing Rupert Barnes Nacoste & Darrin Lehman, *Procedural Stigma*, 17 *REPRESENTATIVE RES. SOC. PSYCHOL.* 25 (1987) (People are more accepting of policies “where beneficiaries are described as qualified under applicable merit-based criteria”).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* citing James R. Kluegel & Eliot Smith, *Affirmative Action Attitudes: Effects of Self-Interest, Racial Affect and Stratification Beliefs on Whites’ Views*, 61 *SOCIAL FORCES* 797 (1983).

¹⁴⁶ R. A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 *N.Y.U. L. REV.* 803, 809 (2004).

¹⁴⁷ *Id.* at 809 quoting Glenn C. Loury, *THE ANATOMY OF RACIAL INEQUALITY* 61 (2002).

¹⁴⁸ *Id.* at 830.

¹⁴⁹ *Id.* at 810.

Lenhardt's analysis applies to any policy with potential stigmatizing effects and starts with the standard inquiry into the context surrounding the constitutional provision that is implicated, most likely the Equal Protection Clause.¹⁵⁰ Next, the court considers "the social and historical context implicated by the challenged policy or action."¹⁵¹ Third, the court considers the current context of the policy, focusing on "citizenship harms," which have a "negative impact on a racially stigmatized individual's ability to belong."¹⁵² The final step of the analysis is a consideration of the future effect of the policy on citizenship harms.¹⁵³

Lenhardt applies her analysis to the affirmative action policy in *Grutter*, where "the majority made no mention of racial stigma whatsoever."¹⁵⁴ She argues that the question "the *Grutter* majority should have addressed is whether affirmative action programs such as the one employed by the Michigan Law School exacerbate the baseline stigma that already exists in society."¹⁵⁵ Consistent with the results cited by Linda Hamilton Krieger, Lenhardt's analysis determines that "the Law School's policy minimizes the risk of racial stereotyping and stigmatization for underrepresented minority students in the current context."¹⁵⁶ She concludes that "affirmative action programs such as Michigan's do not exacerbate racial stigma and in fact serve to counteract some of the marginalizing effects of racial stigma on racial minorities."¹⁵⁷

B. Remedying Stigmas

The social psychology discussed in the preceding section provides a set of tools for incorporating stereotypes into affirmative action jurisprudence. Using Kang's implicit bias tests, stereotypes can be identified and measured. Krieger's social cognition theory can provide effective methods for reducing those stereotypes, and continued empirical tests could monitor their progress. Lenhardt's stigma analysis provides a way to apply these concepts to the law.

1. Choosing Stereotypes

Stereotypes are a necessary component of human cognition,¹⁵⁸ and the government could not and should not reduce any and all stereotypes. This would ignore Justice Powell's concern in *Bakke* that without a requirement of "identified discrimination," an institution could grant benefits "to whatever groups are perceived as victims of societal discrimination."¹⁵⁹ Government action must be limited to a certain subset of stereotypes, and *Grutter*'s diversity interest is one demarcation, choosing

¹⁵⁰ *Id.* at 891.

¹⁵¹ *Id.* at 892.

¹⁵² *Id.* at 893.

¹⁵³ *Id.* at 894.

¹⁵⁴ *Id.* at 909 (Lenhardt suggests the silence of the majority may stem from a reluctance to question Justice Thomas on issues or race).

¹⁵⁵ *Id.* at 911.

¹⁵⁶ *Id.* at 914.

¹⁵⁷ *Id.* at 916.

¹⁵⁸ Lenhardt, *supra* note 143 at 830 *citing* Monica Biernat & John F. Dovidio, *Stigma and Stereotypes*, in *THE SOCIAL PSYCHOLOGY OF STIGMA* 95 (Todd F. Heatherton et al. eds., 2000) ("stereotypes [] have been historically defined as inaccurate or overbroad generalizations, but have more recently come to be understood as "cognitive categories" employed in processing information.").

¹⁵⁹ *Bakke*, 438 U.S. at 309-10.

educational situations where viewpoint diversity can be justified. This selection is arbitrary, borne from a lone justice's opinion in *Bakke* and a history of litigation that has focused on higher education. If this choice had been made with careful consideration, one logical conclusion would be to target those stereotypes for which the government may be held responsible. This would be a compelling interest in *remediating stigmas*.

Proponents of affirmative action have been reluctant to rely on remedial interests,¹⁶⁰ but by expanding racial injury to include stigmatic harm,¹⁶¹ remediation has the potential to reach further than diversity. R.A. Lenhardt contends that affirmative action policies should be upheld under strict scrutiny because such policies are racial classifications that do not carry racially stigmatic meanings.¹⁶² This is similar to the “banned meanings” conception of Equal Protection developed by Jerry Kang, which only strikes down a suspect classification where “the challenged government practice conveys an objective social meaning of stigma.”¹⁶³ These conceptions of stigma derive in part from the concurrence in *Bakke*, where Justice Brennan wrote that “any statute must be stricken that *stigmatizes* any group.”¹⁶⁴ The stigma approach was rejected by Justice Powell because “the word [stigma] has no clearly defined constitutional meaning.”¹⁶⁵ However, recent developments in social psychology now allow the precise identification and measurement of stereotypes, and *Grutter* has opened the door for a legal doctrine of stigmas.

A compelling interest in remedying stigmas reverses the approach of Lenhardt, Kang, and Brennan. Rather than upholding affirmative action because it does not stigmatize, a compelling interest in remedying stigmas would uphold affirmative action because it seeks to undo past government stigmatization.¹⁶⁶

A government entity seeking to implement an affirmative action policy under this interest would first have to claim responsibility for past racial stigmatization. This can be any case of prior discrimination or “passive particip[ation] in a system of racial exclusion.”¹⁶⁷ All “[c]lassifications based on race carry a danger of stigmatic harm,”¹⁶⁸ so almost any past racial classification could qualify, although not every government

¹⁶⁰ See, e.g., Liu, *supra* note 39 at 383; Krieger, *supra* note 116 at 1256.

¹⁶¹ Lenhardt, *supra* note 143 at 809 (“racial stigma, not intentional discrimination or unconscious racism, is the true source of racial injury in the United States ... perhaps the most comprehensive theory of racial harm advanced thus far”).

¹⁶² *Id.* at 902-916.

¹⁶³ Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 30 (1996).

¹⁶⁴ *Bakke*, 438 U.S. 265 at 361 (Brennan, White, Marshall, & Blackmun, J., concurring in the judgment and dissenting in part) (emphasis added).

¹⁶⁵ *Id.* at 294 (Powell, J.) (“The Equal Protection Clause is not framed in terms of “stigma.” Certainly the word has no clearly defined constitutional meaning. It reflects a subjective judgment that is standardless. All state imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened.”)

¹⁶⁶ Remedying stigmas fits well within the compelling interest framework proposed by Goodwin Liu. As a remedial interest, there is a moral foundation for compensatory justice to accompany the moral imperative in reducing prejudice. To the extent that stigmas are the result of illegal discrimination, there is a clear Constitutional duty of remediation under the Equal Protection Clause, as well as the democratic interest that supports diversity. The substantive policy judgments and evidentiary standards are met by the extensive social science research of stigmas and stereotypes. See Goodwin Liu, *supra* note at 401-406.

¹⁶⁷ *Croson*, 488 U.S. at 492.

¹⁶⁸ *Grutter*, 539 U.S. at 870 quoting *Croson*, 488 U.S. at 493-94 (citing *Bakke*, 438 U.S. at 298).

entity may be held responsible for stigmatization of every racial group. After claiming responsibility for past stigmatization, the government entity would need to present evidence that the effects of those stigmas persist in the present day. These present effects are not the socioeconomic disparities that are the focus of other affirmative action programs. Stigmas are a psychological harm and their psychological effects are present-day stereotypes.

As discussed in the preceding section, these stereotypes can be empirically measured and specifically identified. Affirmative action policies informed by social psychology can then reduce the targeted stereotypes while mitigating the creation of new stereotypes. The entire *Grutter* narrow tailoring analysis can be derived from a compelling interest in remedying stigmas. Rather than answer a laundry list of criteria, narrow tailoring for stigma remediation would borrow from Professor Lenhardt's stigmatic harm test and simply ask whether a policy creates more stereotypes than it eliminates.¹⁶⁹ This stigmatic harm test subsumes all the elements of current narrow tailoring analysis. Flexibility,¹⁷⁰ individualized consideration,¹⁷¹ holistic review,¹⁷² and minimizing harm to non-minorities¹⁷³ all seek to avoid stigmatizing affirmative action beneficiaries. Consideration of race-neutral alternatives¹⁷⁴ is consideration of alternatives that have no stigmatic effect. A time limit¹⁷⁵ is inherent in a remedial interest: Affirmative action will no longer be necessary when the target stereotypes no longer exist: when the implicit bias is zero. Stigmas are a single concept that can unite the compelling interest of strict scrutiny, which is to remedy stigmas, with the narrow tailoring elements, which measure the harm of new stigmas that form.

2. *Answering Potential Criticism*

Recognizing a compelling interest in remedying stigmas would be an unprecedented reformation of affirmative action doctrine. Courts would likely be hesitant to recognize stigmas as real injuries, but remedial action under the Equal Protection Clause borrows heavily from common tort law, and emotional injuries have long been accepted as torts.¹⁷⁶ A majority of jurisdictions have recognized an independent tort of intentional infliction of emotional distress, and all jurisdictions award damages for mental anguish for other torts.¹⁷⁷ R.A. Lenhardt proposes racial stigma as a means to determine whether regulations create racial harms,¹⁷⁸ but the compelling interest in remedying stigmas does not require a new cause of action for racial injury. Remedying stigmas is limited to voluntary affirmative action programs initiated by government entities. This framework provides a method for upholding such actions, not a right that would allow plaintiffs the right to force mandatory action.

¹⁶⁹ Lenhardt, *supra* note 143 at 891-894.

¹⁷⁰ *Grutter*, 539 U.S. at 334.

¹⁷¹ *Id.* at 337.

¹⁷² *Id.*

¹⁷³ *Id.* at 341

¹⁷⁴ *Id.* at 339.

¹⁷⁵ *Id.* at 343.

¹⁷⁶ *Modern Status of Intentional Infliction of Mental Distress as Independent Tort*, 38 A.L.R. 4TH 998 (2005).

¹⁷⁷ *Id.* at §§ 3-4.

¹⁷⁸ Lenhardt, *supra* note 143 at 895.

Personal prejudices are held within the minds of individuals, and government-sponsored actions to change peoples' thoughts may infringe upon personal liberty. However, the lesson of Jerry Kang's implicit biases is precisely that individuals are often powerless to prevent the formation of stereotypes and its consequences.¹⁷⁹ Remedying stigmas would not be "thought control," which is prohibited in First Amendment cases,¹⁸⁰ because affirmative action does not prohibit any activity. Affirmative action does not generally implicate the First Amendment, because it does not create prior restraints or punitive consequences. Affirmative action to remedy stigmas only seeks to reduce stereotypes by exposing society to diverse ideas, not to force any of those ideas on individuals.

Critics may contend that it is simply impossible to change unconscious stereotypes that are learned from life experiences. However, a simple consideration of history shows that stereotypes, and racial stereotypes in particular, are fluid. One-hundred-fifty years ago, the Chinese were viewed as "a race of people whom nature has marked as inferior,"¹⁸¹ but today they are viewed as a "model minority."¹⁸² It is clear that racial stereotypes can change over time, but there may be a bias in favor of one's own race that can not be undone – an "ingroup" bias.¹⁸³ However, the ingroup bias research shows that even if this is true, some disturbing patterns still exist. Explicit surveys have generally shown that minorities have higher self-reported ingroup bias than Whites.¹⁸⁴ However on implicit measures, minorities do not show ingroup bias and some even favor Whites.¹⁸⁵ In general, all subjects, regardless of race, show a greater implicit bias in favor of Whites than they report explicitly.¹⁸⁶ Even if it is permissible that Whites show a slight ingroup bias, the unconscious minority preference for Whites can not be explained without the effects of discrimination, especially where minorities consciously favor themselves. Prejudice certainly still exists and should be corrected.

All prejudice can not properly be blamed on the government because many stereotypes are formed by directly observing disparities. However, under strict scrutiny, sole causation is not necessary and "passive participation" is sufficient.¹⁸⁷ Remedying stigmas does not suffer from the imprecision and indefiniteness of remedying societal discrimination because stereotypes can be specifically identified. Unlike the economic and achievement disparities that were the focus of earlier remedial claims, the government has never explicitly attempted to remedy stigmas, so these harms can not

¹⁷⁹ Kang, *supra* note 115 at 1530 ("My point is not that self-correction of bias is impossible. Rather, it is that such compensation may be difficult and, in quotidian situations, unlikely").

¹⁸⁰ See, e.g. *American Booksellers Association v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (Indianapolis enacted an ordinance criminalizing pornography after being presented with compelling psychological evidence that pornography perpetuates gender subordination, which was struck down by Judge Easterbrook on First Amendment grounds).

¹⁸¹ *People v. Hall*, 4 Cal. 399, 405 (1854).

¹⁸² See Keith Aoki, "Foreign-ness" and Asian American Identities: *Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 Asian Pac. Am. L.J. 1 (1996).

¹⁸³ Kang, *supra* note 115 at 1530.

¹⁸⁴ *Id.* at 1534 note 229.

¹⁸⁵ *Id.* note 227.

¹⁸⁶ *Id.* note 229-230.

¹⁸⁷ See *supra* 18.

have been remedied “to the extent practicable.”¹⁸⁸ Stigmas have been largely ignored in civil rights doctrine and a meager attempt to address this un-remedied harm should be no less compelling than earlier remediation efforts. These are real injuries and significant progress is possible. Although there would inevitably be critics, this interest is no less compelling than diversity and the benefits could be substantial.

3. *Applying the Compelling Interest*

If stigma remediation was applied to the facts of *Grutter*, the University of Michigan would be permitted to assert a compelling interest in remedying the stigma inflicted upon Blacks by their past exclusion from legal practice. The Court would then verify, through empirical evidence, the existence of present-day stereotypes marking Black students as unqualified. These can be stereotypes held by students at the Law School, such as a lack of “cross-racial understanding,”¹⁸⁹ or general societal stereotypes like the “path to leadership.”¹⁹⁰ With these conditions being met, the Court would proceed to the narrow tailoring analysis. The utilization of “critical mass” would be approved as an attempt to mitigate the formation of new stereotypes. The holistic review would similarly be approved as a way to mitigate any stigmatization that may occur. The language of diversity itself could be interpreted as a way to lessen the racial overtones of the policy, and the admissions procedure would be upheld.

Remedying stigmas would not substantially change the higher education cases, but this compelling interest could expand affirmative action to many other areas. For example, while secondary schools have little use for viewpoint diversity, the stigmatization effect of past school segregation is well-documented.¹⁹¹ The negative stigmas that form through competitive higher education admissions do not apply to secondary schools where merit has no significance in school placement. Eliminating stereotypes is easiest during childhood, and integrated schooling has proven to be an effective method for breaking down racial stereotypes.¹⁹² When the compelling interest is remedying stigmas and the narrow tailoring analysis focuses on stereotypes, many more voluntary integration policies could withstand strict scrutiny. The *Seattle School District* policy would likely survive intact because an open choice policy has no negative stereotype effect. The *Caddo Parish* policy may still be struck down because competitive magnet school enrollment may have a stigmatic effect and the school district did little to satisfy narrow tailoring. The strict quota in *Caddo Parish* could certainly do more to mitigate stereotypes. However, modifying the policy to reduce stereotypes would be far easier for a middle school than pursuing viewpoint diversity.

Stigmas are the unrecognized harms of past discrimination, and the effects still linger today in the form of stereotypes. A compelling interest in remedying stigmas provides a strict scrutiny framework for recognizing these past harms and designing present-day solutions. Unlike viewpoint diversity’s limitation to higher education,

¹⁸⁸ *Missouri v. Jenkins*, 515 U.S. 70, 103 (1995) (School desegregation litigation where a district was declared unitary despite not remedying all effects of segregation).

¹⁸⁹ *Grutter*, 539 U.S. at 332.

¹⁹⁰ *Id.* at 333.

¹⁹¹ *See, e.g. Brown*, 347 U.S. at 493.

¹⁹² *See, e.g. W. Hawley*, *DESIGNING SCHOOLS THAT USE STUDENT DIVERSITY TO ENHANCE THE LEARNING OF ALL STUDENTS* 5 (forthcoming); M. Killen, D. Crystal, and M. Ruck, *THE SOCIAL DEVELOPMENTAL BENEFITS OF HETEROGENEOUS SCHOOL ENVIRONMENTS* 2 (forthcoming).

remedying stigmas can extend to all racial harms where the government is at fault. This remedial interest has a strong legal and moral foundation, as well as empirical support in psychological research. Remedying stigmas would be affirmative action against the root causes of racism, and this compelling interest has the potential to be far more effective than any other formulation of affirmative action consistent with *Grutter*.

C. Reducing Prejudice and Stereotypes through Diversity

It is not likely that lower courts could explicitly recognize a new compelling interest for affirmative action nor that the Supreme Court, after a 5-4 decision in *Grutter*, would seek to reformulate its affirmative action doctrine. However, schools, litigators, and judges can still interpret the *Grutter* diversity to incorporate social psychology into affirmative action. Compelling interests in diversity can include the underlying interests in prejudice and stereotypes, and narrow tailoring arguments can focus on mitigating stereotypes within each of the enumerated elements. There is strong support in *Grutter* for a broader application of affirmative action and several explicit references to stereotypes. Rather than creating a new compelling interest in remedying stigmas, it is possible to apply many of the same concepts by reducing prejudice and stereotypes through the existing compelling interest in diversity.

The University of Michigan's policy sought to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts."¹⁹³ Other universities also generally phrase their diversity policies in terms of viewpoint diversity.¹⁹⁴ Instead of this narrow language that caters to Justice Powell's diversity, schools should now recognize the three distinct interests of the *Grutter* diversity: improving education through viewpoint diversity, improving race relations by reducing prejudice, and improving democracy by reducing general societal stereotypes.

Reducing prejudice is promoting "cross-racial understanding" and "break[ing] down racial stereotypes."¹⁹⁵ Considered as a distinct interest, reducing prejudice pursues psychological and sociological benefits in addition to the educational benefits of viewpoint diversity. It is these benefits that made "critical mass" important to Michigan's policy, and emphasizing this aspect of diversity could justify many additional policies in both admissions and curriculum development. Cross-racial understanding and

¹⁹³ *Grutter*, 539 U.S. at 315.

¹⁹⁴ *See, e.g.* Lindgren *supra* note at 6 n. 4-6 (Yale's Gradual School Statement states: "The Office of Diversity and Equal Opportunity was established with the premise that expanding the diversity within the student body enhances the intellectual experience and understanding of the entire scholarly community"; Harvard's Statement on Diversity reads: "Diversity contributes to educational excellence by enabling outstanding students, faculty, and staff of all backgrounds to come together and learn from one another"; Princeton's Statement on Diversity and Community reads: "By incorporating a broad range of human experiences and a rich variety of human perspectives, we enlarge our capacity for learning, enrich the quality and texture of campus life, and better prepare for life and leadership in a pluralistic society"); *But see* EMBRACING DIVERSITY IN PURSUIT OF EXCELLENCE, Report of the President's Committee on Diversity and Equity (University of Virginia 2004) ("But to achieve genuine mutual respect, we also need to study the idea of human variety in the classroom, and we must experience it in a variety of contexts in our lives—through sustained service to our wider communities, through learning and participation in the rich variety of cultural events in and around the University, and—not least—by engaging in genuine, open, and sustained dialogue").

¹⁹⁵ *Grutter*, 539 U.S. at 330.

racial stereotypes are relevant at all levels of education all the way down to kindergarten, and may be particularly salient at younger ages when stereotypes form.¹⁹⁶ Incorporating this language from the *Grutter* opinion could provide a stronger justification for many existing policies and permit the development of new programs.

Reducing general societal stereotypes is dangerously similar to the interest in remedying general societal discrimination rejected by the Court in *Wygant*¹⁹⁷ and *Croson*.¹⁹⁸ The “path to leadership” is also very similar to the rejected “role model” justification.¹⁹⁹ However, in the decades since those cases were decided, social psychologists have developed a much deeper understanding of the stereotypes that underlie societal discrimination, and these stereotypes can be quantified with verifiable and repeatable results. Societal discrimination was rejected as a vague and unworkable standard, but societal stereotype reduction may be practicable if social psychologists can target and measure specific stereotypes. This question has not been tested in the courts, but asserting an interest in reducing general societal stereotypes among other legitimate interest should not be detrimental to litigation.

To justify racial classifications in its admissions, the University of Michigan emphasized a commitment to “one particular type of diversity,” that is, “racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against.”²⁰⁰ Instead of referring to race and ethnicity in terms of historical exclusion, this policy could instead tie these interests to diversity. One possible statement could be: “The University is committed to racial and ethnic diversity in particular for its potential to promote cross-racial and cross-cultural understanding, to break down racial stereotypes, and to ensure that the University is open to qualified individuals of every race and ethnicity.” This would highlight the particular benefits of racial diversity cited by the Supreme Court and would assert interests that could be supported by strong social science evidence.

Broadening the compelling interest in diversity would also have an effect on the narrow tailoring analysis. Rather than trying to connect every aspect of a policy to viewpoint diversity, some concepts, such as “critical mass,” could be justified because they “diminish the force of [] stereotypes.”²⁰¹ Although the prohibition on quotas and individualized consideration would still be in place, these should be relaxed in light of *Grutter*’s approval of “critical mass.” Other loose quotas, like the one in *Seattle School District*, could be upheld as well if related to the broader compelling interest. Just as the University of Michigan justified critical mass to avoid a characteristic minority viewpoint, the Seattle School District might justify its percentage ranges as optimal for building cross-racial understanding. Race-neutral alternatives would be far less effective when the compelling interest is race-specific, and the burden on non-minorities could be counterbalanced by the benefits of cross-racial understanding and reducing stereotypes.

Using the full precedential power of the *Grutter* diversity will allow schools to implement more aggressive programs to reduce prejudice in their students and in society.

¹⁹⁶ See *supra* note 192.

¹⁹⁷ *Wygant v. Jackson Bd. Of Ed.*, 476 U.S. 267, 276 (1986).

¹⁹⁸ *Croson*, 488 U.S. at 496-498.

¹⁹⁹ *Wygant*, 476 U.S. at 315.

²⁰⁰ *Grutter*, 539 at 315.

²⁰¹ *Id.* at 333.

Rewriting policies to reduce prejudice and stereotypes through diversity can give schools at all levels much broader leeway to pursue socially valuable goals. In secondary schools, this could allow approval for more voluntary integration programs. In higher education, this could justify not simply admissions policies but broader efforts such as open forums, educational programs, and community outreach programs.²⁰² Reducing prejudice and stereotypes, whether justified by remedying stigmas or through diversity, is affirmative action against racism itself. Prejudice is the source of racism, and targeting the cause should be far more effective than trying to correct its socioeconomic effects.

Conclusion

The greatest benefit of reducing prejudice and remedying stigmas may not be substantive but rhetorical. Opponents of affirmative action often contend that the “Constitution is color blind.”²⁰³ This is used as an argument against race-conscious measures, but it can be an argument in favor of affirmative action when couched in terms of prejudice. Prejudice is precisely the loss of colorblindness. The quantifying of implicit bias is proof that we are not colorblind despite our best intentions. If colorblindness is a virtue, prejudice is a vice, and efforts to eliminate stereotypes should be justified.

There are vast racial disparities in the United States with regard to academic achievement and socioeconomic status,²⁰⁴ but intense disagreement prevails about the extent to which these disparities arise from discrimination and how much the differences are a result of personal choices.²⁰⁵ Some who blame personal choices contend that minority culture is responsible for disparities.²⁰⁶ Some have even suggested that genetics may play a part in the achievement gaps.²⁰⁷ Society will have to face these questions sooner rather than later, as social psychology increases in precision and genetics begins to link race with various characteristics.²⁰⁸ Although this dispute is often at the center of affirmative action debates, its resolution is irrelevant to *Grutter*’s diversity. Viewpoint diversity, reducing prejudice, and reducing societal stereotypes are all compelling interests regardless of the cause of disparities. In fact, the existence of persistent

²⁰² See, e.g., EMBRACING DIVERSITY IN PURSUIT OF EXCELLENCE 4-10, Report of the President’s Committee on Diversity and Equity (University of Virginia 2004) (Recommending residentially based dialogue groups and open forums on topics of race and culture, academic programs that expose students to diversity and equity issues in the community, minority student mentoring, a diversity requirement for graduation, an expansion of academic offerings on racial/ethnic diversity issues, and expanded community outreach, among other recommendations).

²⁰³ See, e.g. *Grutter*, 539 U.S. at 378 (Thomas, J., dissenting); *Croson*, 488 U.S. at 521 (Scalia, J., concurring) (both quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

²⁰⁴ Lenhardt, *supra* note at 808.

²⁰⁵ See, e.g. Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 686 (2004).

²⁰⁶ See, e.g. Richard D. Kahlenberg, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION 20, 218 n. 21 (1996) (suggesting that black culture substantially causes the lack of educational and financial achievement among blacks); Eleanor Brown, *Black Like Me? “Gangsta” Culture, Clarence Thomas, and Afrocentric Academies*, 75 N.Y.U. L. Rev. 308 (2000) (arguing that “gangsta” norms have overrun inner city communities, leading black youth to reject educational achievement and law abidance).

²⁰⁷ Stephen J. Dubner, *Toward a Unified Theory of Black America*, NEW YORK TIMES § 6 (March 20, 2005) (Roland Fryer, Jr., an economist at Harvard asks, “could the black-white test-score gap be genetics?”)

²⁰⁸ Francis S. Collins, *What we do and don't know about 'race', 'ethnicity', genetics and health at the dawn of the genome era*, 36 NATURE AND GENETICS S13 (2004).

disparities may exacerbate the need for greater cross-racial understanding. Even if a group underachieves on average, not every individual member of that group will underachieve, so a stereotype would be particularly dangerous.

The penultimate goal of the civil rights movement is not to eliminate socioeconomic disparities but to create a society where our children are “not [] judged by the color of their skin but by the content of their character.”²⁰⁹ For a half-century, desegregation and affirmative action have worked to undo the effects of past discrimination. It is time now to turn towards the cause of that discrimination. The Supreme Court has opened the door in *Grutter* by recognizing a diversity that seeks not only to improve education through viewpoint diversity, but to improve race relations by reducing prejudice and improve democracy by reducing general societal stereotypes. Affirmative action programs can serve these interests by remedying government-imposed stigmas or by reducing prejudice and stereotypes through diversity. Eliminating stereotypes and prejudice is eliminating racism itself. Equality will not come from trying to balance racial statistics nor will it come from turning a colorblind eye. To eliminate racism, we must take affirmative action against racism itself.

²⁰⁹ Martin Luther King, Jr., *I Have a Dream* (Lincoln Memorial August 28, 1963).