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The Aesthetics of Affirmative Action

Brian Soucek

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The Aesthetics of Affirmative Action

Brian Soucek

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[PLEASE NOTE: I've put this piece on hold for a while in anticipation of this Term's affirmative action case: Fisher v. University of Texas. As a result, what follows is still very much a draft—not just in the sense of a work under revision, but in the sense of an article still being written. The Introduction remains partly aspirational: in certain instances, it points to sections or arguments that have yet to be added. Wherever possible, I have tried to indicate within the text any gaps still to be filled—and to give at least an outline of how I might go about filling them.]

The Aesthetics of Affirmative Action

*Brian Soucek**

INTRODUCTION

During the current Term, the most visibly diverse Supreme Court in history will revisit *Grutter v. Bollinger*, its 2003 decision on the constitutionality of affirmative action in university admissions. To say this is to stress just one of the many forms of diversity on the current Court: that which can be seen. Paradigmatically (but not unproblematically) including race and gender, the visible forms of diversity differ from those, like religious or geographic diversity, that long drove judicial nominations.¹ Yet the very visibility of the former types of diversity might be their most widely popular feature. Whereas the suggestion that increased racial or gender diversity on the Court might lead to different, perhaps better² decisions is often vilified,³ the *image* of a diverse Court is one that receives praise across the political spectrum.⁴

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¹ See Susan Navarro Smelcer, Congressional Research Service, *Supreme Court Justices: Demographic Characteristics, Professional Experience, and Legal Education, 1789-2010* (2010), at 4.

² See Hon. Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (“Justice O’Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. . . . I am . . . not so sure that I agree with the statement. . . . I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”).

³ Peter Baker & Jeff Zeleny, *Obama Hails Judge as ‘Inspiring,’* N.Y. TIMES (May 26, 2009) (“Judge Sotomayor’s past comments about how her sex and ethnicity shaped her decisions . . . generated instant conservative complaints that she is a judicial activist.”).

⁴ See, e.g., Mike Sacks, *Elena Kagan: Would She Turn Supreme Court into We the People?*, CHRISTIAN SCI. MONITOR, June 25, 2010, available at <http://www.csmonitor.com/layout/set/print/content/view/print/309291> (“As a minority, it is gratifying and yes, important, for me to see people of color on the Supreme Court and in other positions of leadership,” says Viet Dinh, a law professor at Georgetown

This image is what concerned Justice O'Connor in 2010 when she talked about the appointment of the Court's third female Justice:

[A]t the end of the day, on a legal issue, I think a wise old woman and a wise old man are going to reach the same conclusion. . . . [P]robably in outcomes it's not critical. But in terms of having the American people *look at the court* and think of it as being fair and appropriate for our nation, it helps to have women, plural, on the court.⁵

Justice Ginsburg said much the same thing after O'Connor left the Court: "My basic concern about being all alone was the public got the wrong perception of the court. It just doesn't look right in the year 2009."⁶ Their sentiment has been echoed by President Obama, who, according to the current White House counsel, "wants the federal courts to look like America. . . . He wants people who are coming to court to feel like it's their court as well."⁷ Similar claims frequently get voiced at the state level as well.⁸

University in Washington, D.C., and a former high-ranking official in George W. Bush's Department of Justice.").

⁵ *Sandra Day O'Connor Interviews John Paul Stevens*, NEWSWEEK, Dec. 17, 2010, available at <http://www.newsweek.com/2010/12/17/former-supreme-court-justice-sandra-day-o-connor-interviews-john-paul-stevens.print.html> (emphasis added). In response to Justice O'Connor's comment, Justice Stevens responded: "I think that's dead right. I agree with that completely." *Id.*

⁶ Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES, July 7, 2009, available at <http://www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html?pagewanted=all>. Significantly, Justice Ginsburg's interviewer followed up: "Why on a deeper level does it matter? It's not just the symbolism, right?" The pervasiveness of claims about visibility's importance paired with this kind of resistance to it as "just" symbolism is very much the subject of this Article. Justice Ginsburg's own opinion about the value of visible diversity is undeniable. Emily Bazelon's article claimed that Justice Ginsburg attended the President's 2009 State of the Union address three weeks after an operation for cancer because "she wanted the country to see that there was a woman on the Supreme Court." *Id.*

⁷ John Schwartz, *For Obama, a Record on Diversity But Delays on Judicial Confirmations*, N.Y. TIMES, Aug. 7, 2011, at A17 ("The president wants the federal courts to look like America," said Kathryn Ruemmler, the White House counsel. "He wants people who are coming to court to feel like it's their court as well.").

⁸ See, e.g., Kate Zernike, *Christie Names a Gay Man and an Asian for the Top Court*, N.Y. TIMES, Jan. 23, 2012 ("[T]he Senate president, Stephen M. Sweeney, said last year that he hoped the governor would build 'a racially diverse court that looks like the state of New Jersey' . . ."); Mark Panziokas, *For a Diverse Judiciary, Malloy Willing to Buck Tradition*, CONN. MIRROR, Jan. 19, 2012 (quoting Connecticut Governor Dannel P. Malloy: "The judiciary needs to look like the state of Connecticut that it serves.");

Common to these claims is their emphasis on the visible. Courts are to *look* like America; they *appear* more fair when the public *sees* diversity on the bench. Generalized, the argument is that visible diversity in elite groups bolsters their legitimacy. Seeing minorities in selective institutions helps validate the place of those institutions in a democratic society. In what follows, I call this the “perceived legitimacy” rationale for diversity.⁹

Despite the wide acceptance of this claim when it is made *about* the Court, it has been largely ignored when made *by* the Court, as it was in *Grutter* in regard to affirmative action in higher education.¹⁰ As Justice O’Connor phrased it in her opinion for *Grutter*’s majority: “In order to

Humberto Sanchez, *Diversity Comes to the Judiciary*, ROLL CALL, July 24, 2012 (quoting Senator Mark Pryor of Arkansas on nominees in that state: “[P]eople, in my state at least are fine with diversity on the bench. I think they see the value in it. They understand that it’s good for the system and it’s good to have a court that looks like Arkansas.”); Jan Pudlow, *Chatting with the Crist Court; Governor Charlie Crist’s Newest Appointees*, FL. BAR NEWS, Nov. 1, 2009 (“I just feel our institutions should look like America looks... If all of us were present, you could look at the court and say, “This is pretty much how America looks.” And, in my case, sounds,’ said [Justice Jorge] Labarga, with a Spanish accent.”). *But see* Dahlia Lithwick, *Diversity Jurisdiction: Do We Really Need a Woman or Minority To Fill O’Connor’s Shoes*, SLATE.COM, http://www.slate.com/articles/news_and_politics/jurisprudence/2005/09/diversity_jurisdiction.html (“The most commonly voiced argument for giving O’Connor’s seat to a diversity candidate is appearances, pure and simple. As [one] editorial puts it: ‘[W]e believe it’s important for the American people to see themselves reflected in the Supreme Court as much as possible.’ Given that the American people see the members of the Supreme Court maybe once every 10 years, this is a little tough to accept. Still, having a court that looks like America confers some sort of public legitimacy on the institution, at least in theory.”).

⁹ The term is used in a related context in Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearance After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993). *See id.* at 493 (describing a theory of voting rights that “centers on the perceived legitimacy of structures of political representation, rather than on the distribution of actual political power between racial or political groups”); 587 (“When jurisdictions create ‘bizarre’ territorial districts, in single-minded pursuit of enhancing minority representation, they compromise the perceived legitimacy of political institutions.”).

¹⁰ The recent Guidance issued by the Obama’s Departments of Justice and Education omits any mention of this claim, despite its careful listing of the many other benefits of diversity mentioned in *Grutter*: heightened academic and social discourse inside and outside the classroom; better preparation for the global marketplace; and opening doors to all segments of society. *See* U.S. Dept. of Justice & Dept. of Educ., *Guidance on the Voluntary Use of Race To Achieve Diversity in Postsecondary Education*, available at <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-pse-201111.html>.

cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open.”¹¹

Treating this line as a metaphor is one cause of its neglect. Taken metaphorically, the claim is just that that public institutions should be open to all races—the uncontroversial argument made by the Bush Administration in its brief in *Grutter*.¹² To say this is only to disclaim disparate treatment, not to endorse affirmative action. But Justice O’Connor’s claim is no metaphor. Her “eyes” are real, and they see paths to power that are not just open, as the Bush Administration had urged, but “visibly” so.

This Article takes O’Connor’s claim about appearances seriously—as seriously as Justice Thomas did in his dissent in *Grutter*, where diversity is repeatedly labeled and attacked as an “aesthetic,” and those who practice affirmative action are derided as “aestheticists.” In Thomas’s blistering words: the University of Michigan’s “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.”¹³ To be aesthetic, for Thomas, is to be at once superficial,¹⁴ ineffectual,¹⁵ and deceptive.¹⁶ Worse still, a concern for aesthetics can lead to objectification, as persons and tables come to be treated interchangeably as objects of aesthetic value.¹⁷

¹¹ *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (majority opinion) (emphasis added).

¹² *Id.* at 331-32 (“The United States, as *amicus curiae*, affirms that “[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.”)

¹³ *Grutter*, 539 U.S. at 354 n.3 (Thomas, J., concurring in part and dissenting in part).

¹⁴ *Id.* (“Because the Equal Protection Clause renders the color of one’s skin constitutionally irrelevant to the Law School’s mission, I refer to the Law School’s interest as an ‘aesthetic.’”).

¹⁵ *Id.* (“I also use the term ‘aesthetic’ because I believe it underlines the ineffectiveness of racially discriminatory admissions in actually helping those who are truly underprivileged.”).

¹⁶ *Id.* (“[T]he Law School’s racial discrimination does nothing for those too poor or uneducated to participate in elite higher education and therefore presents only an illusory solution to the challenges facing our Nation.”).

¹⁷ *Cf.* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. ____ (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009877 (describing the commodification of racial identity by schools and businesses that value diversity).

For O'Connor, appearances promote legitimacy and perceptions of fairness. For Thomas, they distract from, or paper over, the lack of both. The dispute between the majority and the dissent in *Grutter* can thus be seen as an argument about the role of appearances in American public life.

Legal theory gives us little help in navigating this dispute.¹⁸ As Professor Adam Samaha says—in a recent Article that markedly departs from the law's usual disdain for aesthetics—"the special logic of appearance arguments is not well theorized, particularly with respect to legal institutions."¹⁹ Seeking assistance outside the law, this Article looks instead to philosophy's long engagement with aesthetic theory. Included in this are discussions and warnings, dating to Plato, about the political force and moral danger of constructed appearances.²⁰ But also relevant are modern accounts—Kant's and Schiller's,²¹ most notably—of aesthetic judgment and the making of aesthetically successful appearances. The perceived legitimacy argument turns on exactly this, after all: the creation

¹⁸ Nor does the law itself, which generally treats the aesthetic as either trivial or false. For instances of the former, see *Collins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) ("[T]he Court has chosen to deregulate the [administration of the death penalty], replacing, it would seem, substantive constitutional requirements with mere esthetics. . . .") or the Supreme Court's environmental standing case law, which once described "[a]esthetic and environmental well-being" as "important ingredients of the quality of life in our society," see *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972), but more recently have invoked "mere esthetic interests" as the flimsiest injuries still (barely) cognizable under Article III, see *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) (allowing for standing when a harm "affects the recreational or even the mere esthetic interests of the plaintiff") (emphasis added). For examples of the falsity of the aesthetic, we need only look to the way the law contrasts appearances to something "real," as when the law distinguishes a person's perceived race, religion, or sexuality with the person's *actual* one, or offers protections for perceived disabilities that do not, in fact, exist. See, e.g., 18 U.S.C. § 249 (defining hate crimes as "[o]ffenses involving actual or perceived race, color, religion, or national origin"); 42 U.S.C. § 12102 (including both "actual" and "perceived physical or mental impairment[s]" within the Americans with Disabilities Act); Employment Non-Discrimination Act, H.R. 1397, 112th Cong. §§ 4, 8, 9 (2011) (proscribing employment discrimination motivated by a person's "actual or perceived sexual orientation or gender identity).

¹⁹ Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1566-67 (2012).

²⁰ See PLATO, THE REPUBLIC, bks. II, III, and X.

²¹ See, e.g., IMMANUEL KANT, CRITIQUE OF THE POWER OF JUDGMENT (Paul Guyer & Eric Matthews, trans., 2000) (1790); Friedrich Schiller, *Kalías or Concerning Beauty: Letters to Gottfried Körner*, in CLASSIC AND ROMANTIC GERMAN AESTHETICS 145 (J. M. Bernstein, ed., 2003).

of a constructed appearance—a vision of diversity—that is perceived by its beholders with approbation. Aesthetic theory has much to say about what this process requires.

At the end of the day, this Article’s willingness to examine the aesthetic logic of the perceived legitimacy argument for diversity has concrete payoffs—in fact, four specific, original contributions to the enormous literature on affirmative action. A quick summary of them at the outset will hopefully alleviate readers’ worries that this Article’s detours into Plato’s *Republic* and Kant’s *Third Critique* might not be worth the trouble.

First, this Article isolates the perceived legitimacy rationale as an independent argument for affirmative action, analytically distinct from the ones far more commonly discussed by courts and commentators: claims that diversity promotes better outcomes (more vibrant classroom discussions, better sales in the global marketplace, more empathetic opinions in the judiciary); that it fosters cross-cultural understanding and harmony; or that it produces inspiring role models for minorities.

This is not the first time the perceived legitimacy argument has been identified.²² But the few previous discussions have failed to note the rationale’s distinctive provenance, and have thereby missed the historical evidence that led Justice O’Connor to believe that perceived legitimacy is not just desirable, but “necessary.” Her belief was based on the cautionary tale of perceived *illegitimacy* told to the Court by members of the U.S. military. And as I will argue, their story continues to serve as an effective rejoinder to those who assume that aesthetic interests cannot withstand the withering glance of strict scrutiny.

As the Supreme Court revisits the constitutionality of affirmative action in higher education, it is worth knowing what arguments are still viable. Yet commentators and courts—including the Fifth Circuit in *Fisher v. University of Texas*, the case the Supreme Court is set to hear—have largely run the perceived legitimacy rationale together with with less successful arguments for affirmative action, some previously rejected by the Supreme Court. Part I of this Article seeks to reverse this trend.

²² See ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 148-154 (2010); Peter H. Schuck, *Response to the Symposium Participants*, 23 YALE L. & POL’Y REV. 75 (2005); Robert Post, *Affirmative Action and Higher Education: The View from Somewhere*, 23 YALE L. & POL’Y REV. 25 (2005); Lani Guinier, *Admission Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113 (2003); Joshua M. Levine, Comment, *Stigma’s Opening: Grutter’s Diversity Interest(s) and the New Calculus for Affirmative Action in Higher Education*, 94 CALIF. L. REV. 457 (2006).

Second, as Part II shows, even those who acknowledge the perceived legitimacy fail to understand its scope. Judge Garza of the Fifth Circuit—whose special concurrence in *Fisher* reads as a blueprint for overturning *Grutter*—dismissed it as a “compelling interest without bounds.”²³ Yet this is incorrect; Garza, like others, fails to note the rationale’s two defining emphases: on elitism and aesthetics. The force of the perceived legitimacy rationale is tied to both the *selectivity* and the *visibility* of the institution involved.²⁴ Already this suggests a distinction between *Grutter*, focused on one of the country’s most prominent law schools, and its successor, *Parents Involved*, involving neighborhood elementary schools.²⁵

That said, if the scope of the perceived legitimacy rationale is not boundless, neither is it confined, as other rationales for diversity are, to the context of education. Instead, its logic extends to other visible elites such as boards of directors, the media, officer corps, and even prison guards. As the *Grutter* Court emphasized, “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause.”²⁶ As I argue in Part II, the contextual factors that matter to perceived legitimacy are a group’s selectivity and visibility, not the field—public versus private, education versus employment, etc.—in which it operates. Recognizing this helps clarify where *Grutter*’s logic should and should not be extrapolated.

Third, the aesthetic character of the perceived legitimacy rationale offers an answer, previously missing, to the main objection commentators have lodged against *Grutter* and its companion case, *Gratz v. Bollinger*: those cases’ apparent preference for obfuscation. Why, many have wondered, did the Court strike down Michigan’s undergraduate admissions scheme, which was explicit about the points awarded on the basis of race, but allow the law school’s scheme, which camouflaged race’s impact in talk of holistic, individualized review? As Justice Ginsburg wrote in dissent in *Gratz*: “surely Michigan’s accurately

²³ *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 258 (5th Cir. 2011) (Garza, J., specially concurring). Notably, however, it was the special concurrence of Judge Garza—*Grutter*’s opponent—rather than Judge Higginbotham’s majority opinion that acknowledged and engaged with the perceived legitimacy rationale.

²⁴ This, of course, is related to the prevalence of this argument in discussions of the Supreme Court, as elite and visible a group as perhaps any in the Nation.

²⁵ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

²⁶ *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.”²⁷

This Article justifies the opacity that even *Grutter*'s supporters have criticized by stressing the aesthetic character of the perceived legitimacy argument. As I argue in the first half of Part III, when diversity is meant to promote ends like robust classroom discussion or cross-cultural understanding, it can and should be achieved through transparent means. But transparency of means is the enemy of aesthetic effect. As philosophers have long argued, constructed appearances are aesthetically successful only insofar as they look as if they came about naturally. The means by which perceived legitimacy is obtained would become self-defeating if fully revealed—as anyone knows who has complained of a heavy-handed author, or praised an actor or pianist's seemingly effortless technique. The puppet's strings must not be seen if the show is to have its intended effect.

Fourth and finally, since minority students are *not* puppets, the second half of Part III is forced to confront the thorny moral questions that arise when persons become the material used to produce aesthetic effects. Worries about objectification and deception—which, as I discuss, might amount to the same thing—must therefore always accompany the positive account I give regarding the political capacity of appearances. To borrow categories usefully suggested by Professor Samaha, we have to keep asking whether visible diversity in elite institutions is more like a bank—where the appearance of solidity helps to prevent panic and bolster financial security—or a bridge, whose visible strength may or may not mask its actual stability.²⁸ But fears about bridges shouldn't keep us from acknowledging the possibility of banks—that is to say, from recognizing

²⁷ *Gratz v. Bollinger*, 539 U.S. 244, 305 (2003) (Ginsburg, J., dissenting); see also Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 559 (2007) (“[T]he Court has adopted a ‘Don't Tell, Don't Ask’ approach to individualized consideration: if universities don't *tell* how much weight they give to race by quantifying racial preferences, then courts won't *ask* probing questions about whether the preferences are differentiated and not excessive.”); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 74 (2003) (“Although transparency is ordinarily prized in the law, the Court in *Grutter* and *Gratz* constructs doctrine that in effect demands obscurity.”).

²⁸ See *supra* note 19 at 1574-75 (using bridges, banks, and clocks to embody “(1) reality insulated from appearance, (2) appearance driving reality over time, and (3) reality collapsing into appearance from the outset.”).

and using the law to manage the ways that appearances might productively, and non-deceptively, drive reality.²⁹

Before turning to these points, though, I want to note at the outset that my efforts here to evangelize on the perceived legitimacy rationale's behalf have their limits. My claim is not that perceived legitimacy constitutes a sufficiently compelling interest to independently justify the use of affirmative action under the Supreme Court's current standard of review. It is not clear that *any* of the rationales for diversity given in *Grutter* can bear that weight alone. The legal argument for affirmative action in higher education is (at least) a three-legged stool. But given the near invisibility of the perceived legitimacy leg—which, I claim, stems from the law's distaste for appearances—it is hardly surprising that this stool should lately have been seen to teeter.

I. THE PERCEIVED LEGITIMACY RATIONALE

A. Diversity and Affirmative Action

Diversity moved to the center of the affirmative action debate because of Justice Powell's opinion in *Regents of the University of California v. Bakke*, a challenge to racial set-asides at the U.C. Davis Medical School.³⁰ Writing only for himself, Justice Powell deemed “the educational benefits that flow from an ethnically diverse student body”³¹ to be a “constitutionally permissible goal for an institution of higher education.”³² A diverse student body, Powell claimed, contributes to a university's “atmosphere of speculation, experiment and creation”;³³ in the medical school context, diversity also helps prepare doctors for the “heterogeneous population” they will be called upon to serve.³⁴ In accepting diversity as a

²⁹ For a model of the latter, see Christopher S. Elmendorf, *Empirical Legitimacy and Election Law*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 117 (Guy-Uriel E. Charles, Heather K. Gerken, & Michael S. Kang eds. 2011). Taking as his starting point the Supreme Court's emphasis on (what I would call) perceived legitimacy in its election law jurisprudence, Elmendorf goes on to examine empirically how certain election laws and reforms might bolster—or lessen—such legitimacy.

³⁰ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

³¹ *Bakke*, 438 U.S. at 306.

³² *Id.* at 311-12.

³³ *Id.* at 312 (internal quotation marks omitted).

³⁴ *Id.* at 314.

compelling interest, Powell rejected arguments that the Davis program was needed to aid “victims of ‘societal discrimination,’” or that it would help to increase medical services in minority communities.³⁵

Sanford Levinson has compared the influence of Powell’s opinion to a game of “Simon Says”: “if Simon says, ‘Start talking about diversity—and downplay any talk about rectification of past social injustice,’ then the conversation proceeds exactly in that direction.”³⁶ Simon’s—or Powell’s—instructions were not followed immediately, however. In *Wygant v. Jackson Board of Education*,³⁷ for example, a 1986 case involving layoffs in which minority teachers were given preference over more senior white teachers. Jackson’s Board of Education justified its race-conscious layoff plan not because it would help maintain a diverse faculty, but instead by what Justice O’Connor called the “very different goal”³⁸ of “remedy[ing] societal discrimination by providing ‘role models’ for minority schoolchildren.”³⁹ Writing for himself and three other Justices, Justice Powell claimed that the role model theory had “no logical stopping point.”⁴⁰ While the percentage of minority teachers in a school might be compared to the percentage of qualified minority teachers in a geographical area in order to determine whether discrimination was still afoot, a comparison to the percentage of minority *students*, Powell argued, would require constant calibration; race-conscious hiring and firing would have to continue indefinitely.⁴¹

The Supreme Court next returned to affirmative action in education seventeen years later: in *Grutter v. Bollinger*⁴² it examined the University of Michigan Law School’s admissions plan, while in *Gratz v. Bollinger*⁴³ it looked at Michigan’s undergraduate admissions. The Law School’s race-conscious but “highly individualized, holistic review” was upheld;

³⁵ *Id.* at 310-11.

³⁶ Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 578 (2000).

³⁷ 476 U.S. 267 (1986)

³⁸ *Id.* at 288 n.* (O’Connor, J., concurring).

³⁹ *Id.* at 272 (opinion of Powell, J.).

⁴⁰ *Id.* at 275 (opinion of Powell, J.).

⁴¹ *Id.*

⁴² *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁴³ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

the undergraduate plan, which awarded twenty points to every underrepresented minority applicant, was struck down.⁴⁴

Writing for the majority in *Grutter*, Justice O'Connor "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."⁴⁵ Yet, as others have noted, O'Connor's rationales for diversity in higher education went well beyond Powell's classroom-benefits approach. As Judge Garza wrote in *Fisher*—the case in which *Grutter* is currently being reexamined—"Grutter replaced *Bakke*'s emphasis on diversity in educational *inputs* with a new emphasis on diversity in educational *outputs*."⁴⁶ Though *Grutter* recalled and endorsed *Bakke*'s emphases on improved classroom discussion and better cross-cultural understanding,⁴⁷ Justice O'Connor's opinion also "conceived of education as instrumental for the achievement of extrinsic social goods like professionalism, citizenship, or leadership."⁴⁸ Because of its importance to the discussion that follows, this aspect of the *Grutter* opinion deserves quotation at some length.

[N]umerous 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."

. . . .

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in

⁴⁴ See *id.* at 276-7 (O'Connor, J., concurring) ("The law school considers the various diversity qualifications of each applicant, including race, on a case-by-case basis. By contrast, the Office of Undergraduate Admissions relies on the selection index to assign every underrepresented minority applicant the same, automatic 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant. And this mechanized selection index score, by and large, automatically determines the admissions decision for each applicant.") (internal citations omitted).

⁴⁵ *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

⁴⁶ *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 258 (5th Cir. 2011) (Garza, J., specially concurring).

⁴⁷ Compare *Grutter*, 539 U.S. at 330, with *Bakke*, 438 U.S. at 312-14.

⁴⁸ Post, *supra* note 27, at 60. See also *Fisher*, 631 F.3d at 258 (Garza, J., specially concurring) ("*Grutter* is concerned . . . with role that higher education plays in a democratic society, and the Court suggests that affirmative action at public universities can advance a societal goal of encouraging minority participation in civic life.").

maintaining the fabric of society. . . . The United States, as *amicus curiae*, affirms that “[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.” And, “[n]owhere is the importance of such openness more acute than in the context of higher education.” Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders. . . .

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.⁴⁹

Robert Post has identified three justifications for affirmative action lurking in these paragraphs.⁵⁰ The first allows for affirmative action when “it is functionally necessary” to achieve a school’s education mission, including its mission to train participants in a diverse workforce.⁵¹ The second stems from the need to maintain the country’s heritage and social fabric. For this to happen, knowledge and opportunity needs to be broadly distributed to a diverse group of citizens. Thirdly, Post writes, “*Grutter* suggests that it is not enough for America to be integrated; the potential for integration must also be *seen*.”⁵²

This last claim is the argument this Article seeks to explore: the argument that visible diversity is necessary to promote (what I am calling) perceived legitimacy. Without visible diversity in elite institutions,

⁴⁹ *Grutter*, 539 U.S. at 331-32 (internal citations omitted).

⁵⁰ Post, *supra* note 27, at 26.

⁵¹ *Id.* at 26-27. Though Post claims that the functional necessity claim was new in *Grutter*, Justice Powell seems to have anticipated it in *Bakke*. See 438 U.S. at 314 (“Physicians serve a heterogeneous population. . . . [A school’s diversity may] enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.”)

⁵² Post, *supra* note 27, at 29.

minority groups that do not see themselves represented there will cease to think of those institutions, and the power they wield, as legitimate. As Post explains the idea:

Grutter believes [minority groups] will interpret their exclusion from elite educational institutions as evidence of denigration. *Grutter* regards this possibility as a serious threat to American democracy, because the legitimacy of national institutions depends upon all citizens accepting ‘the dream of one Nation, indivisible.’ . . . *Grutter* suggests that the visible embrace of minorities by elite educational institutions is indispensable for the maintenance of that dream among the growing numbers of America’s minority citizens.⁵³

Importantly, the “dream” in Post’s description, as in O’Connor’s, is that of a nation unrent by discrimination; it is *not* a dream of individual achievement. On the perceived legitimacy account, visible diversity is not meant to inspire individual minority participation in higher education so much as to assure minorities that their participation is welcome.

B. Distinguishing Perceived Legitimacy

As this last point suggests, to clarify the perceived legitimacy rationale, it sometimes helps to clarify what the perceived legitimacy rationale is *not*.

For one thing, the rationale is not an argument that favors diversity in higher education because of its benefits to those being educated. Whereas *Bakke* valued diversity because it bettered students’ education, the perceived legitimacy argument centers on broader public benefits. Diversity’s value is in the “eyes of the citizenry.”

In this regard, however, it is easy to confuse the perceived legitimacy argument with a related reason for visible diversity: the role modeling argument struck down in *Wygant*.⁵⁴ “The role model argument, in simplest form, holds that affirmative action is justified in order to provide communities of color with exemplars of success, without which they

⁵³ *Id.* See also Guinier, *supra* note 22 at 176 (“For Justice O’Connor, public confidence is associated with democratic values of fairness, upward mobility, and representative leadership, and diversity—within the classroom and among those who graduate—is one of the means to achieve those democratic values.”)

⁵⁴ See Post, *supra* note 27, at 62 n.287 (“The ‘role model’ rationale is quite close to *Grutter*’s argument that the state has a compelling interest in maintaining ‘a set of leaders with legitimacy in the eyes of the citizenry.’”).

might conclude that certain social roles and professional opportunities are closed to them.”⁵⁵ Diversity is important on the role model theory because the sight of minorities in power is thought to inspire other minorities to achieve similar success.⁵⁶ By contrast, the perceived legitimacy rationale does not require imitation. Visible diversity is not meant to motivate an individual’s particular course of conduct, but to increase citizens’ faith in the system. Put more concretely, a court or cabinet that “looks like America”⁵⁷ might be valuable because it inspires people of all races to attain high office. That would be the role model theory. But diversity in the upper echelons of government could also be valuable to those who have no interest in public service at all. To them, visible diversity would offer evidence of what Lani Guinier calls “representative leadership”;⁵⁸ it would provide reassurance that one’s group is not a stranger to the law. This is perceived legitimacy.

Given the similarity between the two arguments, it is easy to run them together.⁵⁹ But it is important not to do so, given the decisive rejection of the role model theory in *Wygant*.⁶⁰ Here it is worth recalling Justice O’Connor’s admonition in *Wygant* that “[t]he goal of providing ‘role models’ discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty.” Justice O’Connor did not go on to explain the difference, so we are left wondering why she saw role modeling as something other than a diversity argument. (I am, instead, treating it and perceived legitimacy as distinct arguments *for* diversity.) The difference likely stems from the fact that

⁵⁵ Richard Delgado, Essay, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want To Be a Role Model*, 89 MICH. L. REV. 1222, 1223 n.5 (1991).

⁵⁶ *But see id.* (offering five arguments against being a role model); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000) (“By their very nature, role models promote the legitimacy of the status quo. They serve as examples of those who have successfully navigated their way through the existing system to achieve success.”)

⁵⁷ See Gwen Ifill, *The Transition; Clinton’s High-Stakes Shuffle To Get the Right Cabinet Mix*, N.Y. TIMES, Dec. 21, 1992 (discussing President Clinton’s campaign promise to “create an administration that ‘looks like America’”).

⁵⁸ See note 53 *supra*.

⁵⁹ See, e.g., Levine, *supra* note 22, at 472 (“[L]egitimacy depends not only on society at large viewing minorities’ path to leadership and concluding that society is legitimate, but also on people outside of college—specifically, younger racial minorities—being able to see themselves years from today, and thus view their own futures with hope and work toward a now more realistic goal.”)

⁶⁰ 476 U.S. 267 (1986).

Wygant considered the role model theory as a guide to what *remedial* race-conscious employment actions were constitutionally acceptable.⁶¹ Diversity, by contrast, is a largely forward-focused goal.⁶²

To say this is to challenge Robert Post's claim that *Wygant's* holding is inconsistent with the "eyes of the citizenry" passage in *Grutter*.⁶³ The two can be distinguished in a constitutionally significant way. Whereas Justice Powell faulted the role model theory for assuming that black students are better off with black teachers,⁶⁴ the perceived legitimacy rationale entails no such thing. On the perceived legitimacy account, visible diversity is valuable not because the students that minorities see at elite universities think like they do; minority groups value the sight of those students because it reassures them that elite universities, and institutions of power more generally, are not closed to people of that race.

Courts, like scholars, have often lost sight of these distinctions. An early post-*Grutter* decision from the Ninth Circuit missed the perceived legitimacy argument entirely. It noted only two benefits to diversity in the *Grutter* opinion: the enhanced educational experience and the need for "all members of our heterogeneous society" to participate in the "education necessary to succeed in America."⁶⁵ This second claim—that all must participate—differs from the perceived legitimacy argument, which requires only that people of all races be *seen* to participate. Furthermore, it is nonsensical, at least in the context of elite higher education. Not everyone can go to Michigan Law School.

Judge Higginbotham's opinion for the Fifth Circuit in *Fisher* similarly blurred the distinction between diversity's legitimating and other functions.⁶⁶ After quoting the "eyes of the citizenry" passage from *Grutter*, Judge Higginbotham explained that "efforts to educate and to encourage future leaders from previously underrepresented backgrounds will serve not only to inspire, but to actively engage with many woefully underserved communities, helping to draw them back into our national

⁶¹ See Levine, *supra* note 22, at 474 (quoting *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 497-98 (1989) (O'Connor, J., plurality opinion)).

⁶² See generally Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60 (2004).

⁶³ Post, *supra* note 27, at 62.

⁶⁴ See *Wygant*, 476 U.S. at 276 (opinion of Powell, J.).

⁶⁵ *Smith v. Univ. of Wash.*, 392 F.3d 367, 373 (9th Cir. 2004) (quoting *Grutter*).

⁶⁶ *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 220 (5th Cir. 2011).

fabric.”⁶⁷ The ambiguity in this turns on what, exactly, diversity is thought to “inspire.” If it is meant to inspire members of “underserved communities” to *become* leaders, this argument is difficult to distinguish from role-modeling. If it is meant rather to inspire *confidence* in our leaders, the argument shifts to perceived legitimacy. Both accounts provide ways—though importantly different ones—of drawing minority communities “back into our national fabric.” Interestingly, it is Judge Garza’s critique of *Grutter*, not Judge Higginbotham’s more sympathetic opinion, that presented the perceived legitimacy argument accurately, if critically: Garza acknowledged the *Grutter* Court’s anxieties about a “minority community [that] sees our nation’s leaders as illegitimate or lacks confidence in the integrity of our educational institutions.”⁶⁸

C. The Origins of O’Connor’s Perceived Legitimacy Rationale

A close reading of the paragraphs from *Grutter* quoted in Section I.A shows how the Court transformed the arguments presented to it. In particular, the passage shows how far Justice O’Connor went beyond the arguments urged on the Court by the Solicitor General. As the opinion notes, the Bush Administration had insisted, innocuously, that “[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.”⁶⁹ Strikingly, this claim gets rephrased just two paragraphs after it is quoted as a necessity “that the path to leadership be *visibly open* to talented and qualified individuals of every race and ethnicity.”⁷⁰ The Solicitor General’s open institutions became Justice O’Connor’s visibly open ones.

What explains this shift? The most obvious source is a brief that was submitted by twenty-nine retired, high-ranking military officials⁷¹—what one commentator claims “may have been the most influential amicus brief

⁶⁷ *Id.*

⁶⁸ *Id.* at 258 (Garza, J., specially concurring). Garza disagreed, however, that the University of Texas’s limited affirmative action efforts were “likely to foster renewed civic participation.” *Id.*

⁶⁹ *Grutter*, 539 U.S. at 331-32; see *supra* note 49 and accompanying text.

⁷⁰ *Id.* at 332 (emphasis added).

⁷¹ Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents, *Grutter*, 539 U.S. 306 (No. 02-241) [hereinafter Military Brief].

in the history of the Court.”⁷² Clearly the Court viewed the government’s official position through the Military Brief’s lens. At oral argument in *Grutter*, Justice Stevens interrupted the Solicitor General before he had finished even his second sentence in order to ask his “view of the strength of [the retired officers’] argument.”⁷³ A full forty percent of the Solicitor General’s ensuing presentation was spent discussing that argument.⁷⁴

The brief’s central claim is that “the military must be selective in admissions for training and education for the officer corps, and it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting.”⁷⁵ Diversity is needed for more than the educational benefits touted in *Bakke*, however. The Military Brief is more centrally concerned with legitimating officers’ authority, and with the role visible diversity plays in achieving that legitimacy.

Dramatically, the brief describes a history of racial turmoil in the 1960s and 70s that brought the U.S. military to “the verge of self-destruction.”⁷⁶ “Throughout the armed forces,” the brief claims, “the overwhelmingly white officer corps faced racial tension and unrest. . . . In Vietnam, racial tensions reached a point where there was an inability to fight. African-American troops, *who rarely saw members of their own race in command positions*, lost confidence in the military as an institution.”⁷⁷ Emphasizing the perceived legitimacy point still further, the brief goes on to argue that “African-American servicemen were *looking* for African-American officers both for support and as a *visible indication* that the military recognized African-Americans as valuable contributors.”⁷⁸

As Justice O’Connor herself would do in *Grutter*,⁷⁹ the retired military leaders extrapolated from the experience of the armed forces to that of society in general. “In a highly diverse society, the public, including

⁷² JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 224 (2007).

⁷³ Transcript of Oral Argument at 19, *Grutter*, 539 U.S. 306 (No. 02-241).

⁷⁴ *See id.* at 19-22.

⁷⁵ Military Brief, *supra* note 71, at 29.

⁷⁶ *Id.* at 16.

⁷⁷ *Id.* (emphasis added and internal quotation marks and citations omitted).

⁷⁸ *Id.* at 16 n.5 (emphasis added).

⁷⁹ *See Grutter*, 539 U.S. at 331 (“We agree that “[i]t requires only a small step from this analysis to conclude that our country’s other most selective institutions must remain both diverse and selective.”) (quoting Military Brief, *supra* note 71, at 29).

minority citizens, must have confidence in the integrity of public institutions, particularly those educational institutions that provide the training, education and status necessary to achieve prosperity and power in America.”⁸⁰ This, of course, is nothing but the perceived legitimacy argument: the derivation of public confidence from the visible presence of minorities in positions of power.

The Military Brief’s widely noted influence stems from the fact that, by portraying a moment of perceived *illegitimacy* in the military’s recent history, it made the perceived legitimacy argument concrete. The breakdown of order and morale in the armed forces during the 1960s and ‘70s shows ‘legitimacy’ to be something more than what Peter Schuck has derided as a law professor’s “all-purpose, gap-filling, *dues ex machina* [used] to rescue arguments that lack much empirical support”⁸¹ Whereas Schuck has claimed that “[t]here is no evidence that Americans . . . did not view the United States as a legitimate regime” until affirmative action programs took effect,⁸² the military officers offered evidence of almost exactly that. And whereas Judge Garza claimed in *Fisher* that Justice O’Connor’s arguments for diversity “remain[] suspended at the highest levels of hypothesis and speculation” and “rest[] almost entirely on intuitive appeal rather than concrete evidence,”⁸³ the military’s historical experience provides a specific example of the dangers of perceived illegitimacy. The threat faced by the military—of racial tension so high that “there was an inability to fight”⁸⁴—may explain why Justice O’Connor saw diversity not just as important, but “necessary”⁸⁵ to perceived legitimacy.⁸⁶

⁸⁰ Military Brief, *supra* note 71 at 29.

⁸¹ Schuck, *supra* note 27, at 78.

⁸² Schuck, *supra* note 27, at 78.

⁸³ *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 255 (5th Cir. 2011) (Garza, J., specially concurring).

⁸⁴ Military Brief, *supra* note 71, at 16.

⁸⁵ *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

⁸⁶ The military’s historical experience recalls that of Jackson, Michigan, the school district sued in *Wygant*. As Justice Marshall noted—partially on the basis of material beyond the thin record in that case—there were so few minority faculty members in Jackson in 1972 that “racial tensions in the school had escalated to violent levels.” *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 298 (1986) (Marshall, J., dissenting). School officials and the teachers’ union developed a joint plan for integrating the faculty—the plan struck down in *Wygant*—only after “[r]acially motivated violence had erupted at the schools, interfering with all educational objectives.” *Id.* at 306.

Here again, it is useful to distinguish the Military Brief's argument from those surrounding it. Justice O'Connor's opinion appears to equate the argument of the Military Brief with those made by "major American businesses."⁸⁷ Yet the briefs from General Motors and "65 Leading American Businesses" only invoke the perceived legitimacy argument once, in General Motors' claim that "[i]n a county in which minorities will soon dominate the labor force, . . . [a] stratified work force, in which whites dominate the highest levels of the managerial corps and minorities dominate the labor corps, may foment racial divisiveness."⁸⁸

A more representative argument from the business briefs is GM's claim that "valuing diversity has helped [businesses'] bottom line."⁸⁹ According to their briefs, businesses find diversity in education to be profitable for a number of reasons. First, given an increasingly multicultural workforce, employees need to get along with those of different backgrounds; diverse universities prepare them for this.⁹⁰ (Like the *Bakke* vibrant-classroom rationale, this is a benefit that applies as much to white students as to minorities.) Second, having employees of diverse backgrounds leads to innovation; companies thus need universities to provide a diverse hiring pool.⁹¹ Finally, having a diverse set of employees enables companies to better serve their increasingly diverse and multinational markets.⁹² This last reason for diversity can be unpacked still further. As GM asserts in its brief, a diverse set of employees will better anticipate the needs of a diverse (indeed global) set of customers.⁹³ But diversity is also potentially valuable because members of a particular race or culture will be more effective at serving or selling to others of that race or culture.⁹⁴

Because this last claim raises issues of legitimacy, it is worth lingering a moment longer to consider why minorities might respond favorably to

⁸⁷ See *Grutter*, 539 U.S. at 330-31; Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *Grutter*, 539 U.S. 306 (No. 02-241) [hereinafter 3-M Brief]; Brief of General Motors Corporation as Amicus Curiae in Support of Respondents, *Grutter*, 539 U.S. 306 (No. 02-241) [hereinafter GM Brief].

⁸⁸ GM Brief, *supra* note 87, at 23-24.

⁸⁹ *Id.* at 24.

⁹⁰ 3-M Brief, *supra* note 87, at 7; GM Brief, *supra* note 87, at 15.

⁹¹ GM Brief, *supra* note 87, at 24.

⁹² 3-M Brief, *supra* note 87, at 7; GM Brief, *supra* note 87, at 13-15.

⁹³ GM Brief, *supra* note 87, at 14.

⁹⁴ See Levinson, *supra* note 36, at 587-88; *cf.* GM Brief, *supra* note 87, at 14.

seeing people of their race or culture in business. Addressing what they call the “access-and-legitimacy paradigm,” scholars have noted how “organizations have pushed for access to—and legitimacy with—a more diverse clientele by matching the demographics of the organization to those of critical consumer or constituent groups.”⁹⁵ This description pairs perceived legitimacy with yet another reason for promoting diversity in business: access. Imagine, for example, an African-American customer who would prefer to buy from a company with African-American employees because she is more comfortable, or simply prefers, working with someone of her own race. This is the access paradigm—which, as Sanford Levinson points out, comes troublingly close to now-unavailing “customer preference” defenses in employment discrimination cases.⁹⁶ Now imagine the same customer choosing to buy from that same company because, having seen its African-American employees, she thinks of the company as an inclusive or non-discriminatory one. The company would have gained legitimacy in the consumer’s eyes as a result of the visible diversity within its workforce.

This hint of a perceived legitimacy argument in the business briefs should not mask the fact that the majority of big business’s arguments for diversity are distinct from those so vividly described in the Military Brief. Because the GM, 3-M, and Military Briefs are so often spoken of in the same breath, it is easy to run their arguments together as well. Doing so, however, risks losing the concrete, historical evidence of perceived legitimacy’s importance—the Military Brief’s distinctive contribution—in the more trendy but fuzzier diversity-speak common in the contemporary corporate world.⁹⁷

In distinguishing perceived legitimacy arguments from others made on diversity’s behalf, I do not mean to suggest that the boundaries cannot sometime be straddled. A good example of line-crossing comes from Judge Richard Posner’s well-known decision in *Wittmer v. Peters*,⁹⁸ a case that challenged the race-conscious hiring of a black lieutenant at a “boot

⁹⁵ Levinson, *supra* note 36 (quoting David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV., Sept.-Oct. 1996, at 83).

⁹⁶ *Id.*

⁹⁷ See, e.g., Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. ____ (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009877; cf. *Grutter v. Bollinger*, 539 U.S. 306, 354 n.3 (Thomas, J., concurring in part and dissenting in part) (deriding diversity as a “fashionable catchphrase”).

⁹⁸ 87 F.3d 916 (7th Cir. 1996).

camp” program for young criminals. Though 68% of the inmates were black, only two (out of forty-eight) correctional officers and another two (out of ten) lieutenants were black. “The black lieutenant is needed,” the Seventh Circuit enigmatically held, “because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp.”⁹⁹

This single sentence encapsulates many of the distinctions that have emerged so far. Why, according to Judge Posner, do black inmates need to see blacks in authority? Not as role models: Posner makes clear that no one expects that the inmates will aspire to penological careers.¹⁰⁰ Robert Post believes *Wittmer* uses the kind of “functional necessity” rationale that businesses invoke when they praise educational diversity as a prerequisite for a smoothly coexisting multi-cultural workforce.¹⁰¹ On this account, diversity—and the affirmative action needed to achieve it—is justified because it plays a functional role in achieving the institution’s mission.

But hiring black lieutenants in *Wittmer* is not like hiring policemen for an undercover unit, where “looking the part” is a functional necessity. If diversity is a functional necessity in *Wittmer*, it can only be because “the correctional game” at the boot camp requires the inmates’ acceptance and participation. This cannot be obtained if the “game” loses its perceived legitimacy. Inmates, in other words, need to see “some blacks in authority”¹⁰² in order to perceive the drill-sergeant routine as legitimate training rather than abuse. As in the military, and as in elite higher education (according to *Grutter*), seeing minorities in positions of power or privilege provides onlookers with a sense that the institutions conferring that power and privilege are inclusive, and therefore democratically legitimate. Importantly, the institutions themselves need not be democratic: prison boot camps and the military certainly are not, and “leading American businesses” are not necessarily either. It is these institutions’ power *within* our democracy that is justified insofar as their visible diversity leads, in the “eyes of the citizenry,” to perceptions of legitimacy.

⁹⁹ *Id.* at 920.

¹⁰⁰ *Id.*

¹⁰¹ See Post, *supra* note 22, at 26.

¹⁰² *Wittmer*, 87 F.3d at 917.

II. THE SCOPE OF THE RATIONALE

In Part I, I argued that perceived legitimacy is a distinct rationale for diversity, conceptually separate from the educational benefits, cross-cultural understanding, or role-modeling arguments that co-exist (and are sometime confused) with it in *Grutter v. Bollinger*. The question of Part II is how far and in what contexts this rationale extends. This question in turn raises a still broader point about how affirmative action, and diversity, might serve different goals in different contexts.¹⁰³

A. Affirmative Action Outside Higher Education

In the “special concurrence” to *Fisher* that provides both a call and a blueprint for the overruling of *Grutter*, Judge Garza alleged: “By expanding Justice Powell’s original viewpoint diversity rationale to include diversity’s putative benefits in the workforce and beyond (i.e., inspiring a sense of civic belonging in discouraged minority communities), the Court has endorsed a compelling interest without bounds.”¹⁰⁴

Judge Garza’s complaint would be true if the perceived legitimacy rationale reduced to a desire for racial balancing—a calibration of every group to ensure a racial mix similar to that of society at large. Were balancing the real societal interest at play in the perceived legitimacy argument, it would not only require constant recalibration (thus lacking temporal bounds), but it would also presumably apply to all schools, workplaces, juries, electoral districts, and governmental bodies (thus lacking contextual boundaries).

But this is not the case. The perceived legitimacy argument concerns the democratic legitimacy of *powerholding elites*. Thus, it only applies in contexts involving elite, powerful, or selective institutions—those which possess authority that requires legitimation within democratic society.

This point has important implications for *Grutter*’s precedential reach. The perceived legitimacy rationale has little application, for example, in a case like *Parents Involved*, which considered racial preferences in elementary and high schools.¹⁰⁵ It would be a stretch to claim that the

¹⁰³ See *Grutter*, 539 U.S. at 327 (“Context matters when reviewing race-based governmental action under the Equal Protection Clause.”).

¹⁰⁴ *Fisher v. Univ. of Tex. at Austin*, No. 09-50822, slip op. at 73-4 (5th Cir. Jan. 18, 2011) (Garza, J., specially concurring). Justice Powell made a similar complaint against the role model theory in *Wygant*: it “has no logical stopping point.” *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986) (opinion of Powell, J.).

¹⁰⁵ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

“paths to power” in our nation run through Seattle’s Nathan Hale High School or Louisville’s Bloom Elementary.¹⁰⁶ Since its perceived legitimacy argument was inapposite, *Grutter* was therefore distinguishable, even though it and *Parents Involved* are both education cases.

At the same time, the perceived legitimacy rationale can retain its full force in contexts outside of education. The Military Brief and, to a lesser extent, the corporate briefs in *Grutter* suggest other contexts in which perceived legitimacy has proven important. The boot camp at issue in *Wittmer* proves another example.¹⁰⁷ The general point is that leadership cadres, especially within public institutions, make issues of legitimacy and diversity especially salient.

Ricci v. DeStefano,¹⁰⁸ the Supreme Court’s recent foray into the interaction of Title VII’s disparate treatment and disparate impact provisions, provides an important example of this within the public employment context. Writing in dissent, Justice Ginsburg complained that “New Haven, a city in which African-Americans and Hispanics account for nearly 60 percent of the population, must today be served—as it was in the days of undisguised discrimination—by a fire department in which members of racial and ethnic minorities are *rarely seen in command positions*.”¹⁰⁹ It is easy to miss what Justice Ginsburg saw: the fact that *Ricci* was not just about racial preferences in government hiring in general; *Ricci* was about the racial makeup of New Haven Fire Department’s *officer* ranks. As Justice Kennedy wrote for the majority: “An agency’s officers command respect within the department and in the whole community”¹¹⁰ It is the elite status—the respect and power—that officers enjoy that makes perceived legitimacy a particular concern, and affirmative action a more needed measure, in contexts like *Ricci*’s.¹¹¹

¹⁰⁶ *Id.* at 713, 717.

¹⁰⁷ See *supra* notes 98-102 and accompanying text.

¹⁰⁸ 129 S. Ct. 2658 (2009).

¹⁰⁹ *Id.* at 2690 (Ginsburg, J., dissenting) (emphasis added). In light of the discussion in to come in Part III, *infra*, *Ricci* is also significant for the unusually visible, and heavy handed, means that the city tried to use in promoting diversity. See Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1345 (“[W]ithin the category of formally race-neutral actions intended to improve the position of disadvantaged racial groups, equal protection doctrine may well distinguish between those that have visible victims and those whose costs are more diffuse.”)

¹¹⁰ *Ricci*, 129 S. Ct. at 2664.

Perceived legitimacy should do more work in justifying affirmative action there than it does when it comes to hiring rank-and-file firefighters.

To say that perceived legitimacy argument does less work in rank-and-file hiring cases is not to say, as I said about *Parents Involved*, that it is inapplicable. After all, firefighters might still be seen as part of a selective institution no matter their rank. The real point is that the power and elitism of institutions lies on a spectrum. We know from *Grutter* that visible diversity is important at Michigan Law School because it is such a selective school. But what about Wayne State—a school Justice Thomas invokes in his dissent in *Grutter*?¹¹² Even if it lacks the University of Michigan's national reach, Wayne State undoubtedly provides a respected path to the Bar, itself an elite institution. So perceived legitimacy remains relevant, particularly on a local level, even if it may be somewhat less a concern at Wayne State than at more nationally-visible institutions. The more eyes that are upon you, the more perceptions presumably matter.

This points to a second crucial limitation on the perceived legitimacy rationale's scope: since it concerns perception, the elites in which diversity is seen must be visible. Like exclusivity, visibility too lies on a spectrum. To return to the *Ricci* example, my intuition—an empirically testable one, though certainly not one that I have tested—is that perceived legitimacy matters someone less for rank-and-file firefighters than it does, say, for police officers. Even (or perhaps especially) low-ranking police officers are highly visible in their communities, and the force they wield makes legitimacy, for them as for the prison guards in *Wittmer*, an especially pressing concern.

This latter limitation goes some distance in answering a concern expressed by Robert Post, who has wondered whether “each American institution has a compelling interest in assembling a diverse and therefore legitimate set of leaders.”¹¹³ Describing the implications, were that the case, Post continues: “If police are ‘leaders’ in their communities, there is

¹¹¹ Because *Ricci* concerned the disparate impact of an promotional test, it is not necessarily accurate to describe it as an affirmative action case. If the test's disparate impact stemmed, for example, from a flawed design, rejecting the test would not count as affirmative action or race-based preferencing.

¹¹² See *Grutter v. Bollinger*, 539 U.S. 306, 360 (2003) (Thomas, J., concurring in part and dissenting in part) (comparing Michigan and Wayne State).

¹¹³ There is a question also addressed by Elizabeth Anderson, whose sophisticated treatment of affirmative action focuses on how integration is valuable for its own sake, not (as discussed here) for the perceptions to which it gives rise. Her argument thus has a broader scope than mine; it extends beyond elite institutions. See ANDERSON, *supra* note 22.

a compelling interest in ensuring diverse police departments; if doctors are leaders, there is a compelling interest in ensuring a diverse medical profession.”¹¹⁴ I agree with Post about the way the perceived legitimacy argument goes well beyond the education context with which *Grutter* dealt. But I add a crucial limitation which Post misses: the perceived legitimacy rationale really is driven by perception—the perception that an elite group is (visibly) diverse. Police are seen on city streets; students are grouped on campuses and in viewbooks; drill sergeants and military officers regularly appear before their subordinates. In each of these cases, the group’s diversity can be fairly readily perceived. On the contrary, it is not clear to me that we often see Post’s other example, doctors, as a group, rather than just a series of individuals. Visible diversity is less salient when the group itself is seldom visible *qua* group.

So there are limits to the perceived diversity rationale after all. Coming at the affirmative action question from different sides, Dean Post and Judge Garza are both right to note that *Grutter*’s argument goes well beyond higher education. In that respect, it is broader than the classroom benefits argument offered in *Bakke*. But even as the perceived legitimacy argument reaches beyond education, it still has its limits. It applies with less force in less elite contexts, and it does not apply at all in institutions that lack power or selectivity. Nor does the argument do much to promoting diversity in groups that do not cohere as groups. IRS agents might wield power, but it is not clear that their diversity (or lack of it) is visible enough to matter. The cabinet that looks like America is important not just because that group is so elite, but also because it is so highly visible as a group.

B. Racial Aesthetics Elsewhere in the Law

[The following Section is a remnant of an earlier draft. It may eventually get eliminated or incorporated into other parts of the Article. I haven’t quite decided what to do with it, frankly.]

The previous section suggested that affirmative action might be justified in different ways in different contexts—or in different types of groups (more or less elite, more or less visible) within a given context. This Section looks briefly at two arguments beyond the affirmative action debate which share *Grutter*’s concern for aesthetics. As it turns out,

¹¹⁴ Post, *supra* note 27, at 61. Post sees this logic as in tension with *Wygant*, since if teachers are leaders to their students, there should be a compelling interest in having racially diverse faculties. *Id.* at 62 n.287.

affirmative action is not the only place in the law where racial aesthetics matter.

Cases involving electoral redistricting provide an obvious example, if only because Justice O'Connor flatly declared in one of them that "reapportionment is one area in which appearances do matter."¹¹⁵ In redistricting cases, aesthetic concerns trigger strict scrutiny.¹¹⁶ To quote Justice Stevens: "One need not use Justice Stewart's classic definition of obscenity—"I know it when I see it"—as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation."¹¹⁷ The "uncouth twenty-eight-sided figure" that was struck down as a city boundary in *Gomillion v. Lightfoot*¹¹⁸ looms large in election law as an example of what must be avoided.¹¹⁹

The problem with such shapes is that they appear unnatural—that is, constructed. This forces courts to ask why they were constructed that way, and what racial motivations might have been involved. On the other hand, districts that exhibit compactness and contiguity appear almost as if they came about naturally—even though this is no less a fiction than those we will soon see in Part III.¹²⁰ In *Shaw v. Reno*, Justice O'Connor worried that irregularly shaped districts, too obviously constructed to lump together people of the same race, lead to *perceptions* that members of the same racial group think and vote alike.¹²¹ Appearances matter in election law because bad aesthetics lead to bad perceptions.

¹¹⁵ *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

¹¹⁶ See Elmendorf, *supra* note 29, for other examples.

¹¹⁷ *Karcher v. Daggett*, 462 U.S. 725, 755 (1983) (Stevens, J., concurring) (citations omitted).

¹¹⁸ 364 U.S. 339, 340 (1960).

¹¹⁹ See, e.g., *Shaw*, 509 U.S. at 640, 644; *id.* at 670-72 (White, J., dissenting) (noting the majority's "simultaneous discomfort and fascination with irregularly shaped districts" and accusing it of "focusing on looks rather than impact").

¹²⁰ See Section III.A; see also *Shaw*, 509 U.S. at 647 (describing compactness and contiguity as "objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines").

¹²¹ *Shaw*, 509 U.S. at 647 ("A reapportionment plan that includes in one district individuals who belong to the same race, but who . . . may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It 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 polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.").

A second example of racial aesthetics comes from the Fair Housing Act, which makes it unlawful to “make, print or publish . . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference . . . based on race”¹²² In 1989, a group of plaintiffs alleged that *The New York Times* had published decades worth of real estate advertisements in which “virtually none” of the human models depicted as potential buyers or renters were black.¹²³ In *Ragin v. New York Times*, the Second Circuit confirmed that the Fair Housing Act prohibited the “use of models as a medium for the expression of a racial preference.”¹²⁴ In other words, federal law prohibits advertisements which collectively give the appearance that certain races are favored over others in housing. Showing no black faces in the *Times* ads—or showing black faces only in servile situations¹²⁵—itself constitutes housing discrimination.

The *Ragin* court was unmoved by the defendant’s argument that requiring racially balanced appearances in its ad pages would necessitate an industry-wide quota regime. Advertising, the Second Circuit recognized, is inherently a realm of constructed appearances. It is always fair to assume that the choices made in constructing those appearances—including choices about race—were made for a reason. In the court’s words: “If race-conscious decisions are inevitable in the make-up-your-own world of advertising, a statutory interpretation that may lead to some race-conscious decision-making to avoid indicating a racial preference is hardly a danger to be averted at all costs.”¹²⁶

The Second Circuit’s reading of the Fair Housing Act as, in part, an aesthetic regulation creates another area where “appearances do matter”¹²⁷ when it comes to race. The case also suggests an interesting counterargument to those who disparage the role of appearances in the quest for equality. Writing, for example, about racial diversity in the judiciary, Sherrilyn Ifill has derided “the questionable aim of strengthening the *appearance* of justice, rather than . . . the goal of increasing *actual* fairness in the administration of justice.” Doing so, she argues, “suggests that the *appearance* of justice is the best we can

¹²² 42 U.S.C. § 3604 (a), (c) (2006).

¹²³ *Ragin v. New York Times Co.*, 923 F.2d 995, 998 (2d Cir. 1991).

¹²⁴ *Id.* at 1000.

¹²⁵ *Id.* at 998.

¹²⁶ *Id.* at 1001.

¹²⁷ *See supra* note 115.

achieve.”¹²⁸ In the fair housing context, the parallel claim would be that the FHA should ensure that black families are not excluded from actual housing, not just advertisements for housing. It is always possible, after all, that advertisements might be more diverse than the apartment buildings and neighborhoods they advertise.

Yet there is an aspirational aspect to the Second Circuit’s reading of the FHA, just as there is in Justice O’Connor’s defense of affirmative action in *Grutter*. Psychologists have shown that pervasive negative images of a group can lead to their harassment, but so too can positive depictions combat implicit bias and reduce discrimination.¹²⁹ The aesthetic can be important in signaling the presence (*Shaw*) or absence (*Grutter*) of racial discrimination. But perhaps aesthetics can also play a role in reducing discrimination itself. If this is the case, then attending to the appearances placed before the “eyes of the citizenry” becomes all the more important.

III. RACIAL AESTHETICS

The multiple arguments for diversity traced in Part I were not lost on Justice Thomas in *Grutter*. Yet across the board, his response was the same: “the Equal Protection Clause renders the color of one’s skin constitutionally irrelevant to the Law School’s mission” Diversity is not a compelling governmental interest, but merely an “aesthetic.”¹³⁰

Thomas’s charge—that “the Law School wants a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them”¹³¹—may be disquieting to anyone familiar with the ways American colleges and universities make themselves visible: that is, anyone acquainted with the admissions brochures or websites for American colleges and universities. In fact, as Figure 1 shows, the University of Michigan Law School’s webpage from about the time Barbara Grutter filed her complaint provided an example of the exact

¹²⁸ Ifill, *supra* note 56, at 481; *See also id.* at 480 (“This emphasis draws attention to the racial ‘face’ of the judge, rather than to the substance of a judge’s decision-making or contribution to broadening the scope of judicial decision-making.”).

¹²⁹ *See* Christine Jolls & Cass R Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 983-84 (“[I]n the real world, if portraiture in the workplace or elsewhere consistently reflects positive exemplars, it is likely—though certainly not guaranteed—that those present will show less implicit bias”).

¹³⁰ *Grutter v. Bollinger*, 539 U.S. 306, 354 n.3 (2003) (Thomas, J., concurring in part and dissenting in part)

¹³¹ *Id.*

appearance Justice Thomas described. The page's text, meanwhile, touted the school's "diverse faculty," its "[s]tudents from around the world," and, in an explicit nod to aesthetics, its "unmatched . . . beauty."



Figure 1. University of Michigan Law School internet webpage, circa 1997-98.

Justice Thomas's criticism of classroom aesthetics amounts to the claim that diversity is ineffective—and deceptive and manipulative to boot. To confront his critique is to ask whether visible diversity really does bolster legitimacy; whether, even if it does, it might do so through deceptive means; and, finally, whether those means include the objectification and stigmatization of the minority students who are made visible—or, less charitably, put on display.

For Justice Thomas, these charges all follow from his labeling of diversity as an "aesthetic." And given the *Grutter* majority's concern for aesthetics—for appearances constructed by admissions offices and perceived by the citizenry—Thomas's label is not misplaced. To answer

his charges is thus, at least in part, to give a defense of the aesthetic. In what follows, I draw on aesthetic theory to do exactly that.

I begin, briefly, in the first Section by showing how the aesthetic character of the perceived legitimacy rationale helps it avoid two of Justice Thomas's constitutional objections to diversity: that it fails to provide educational benefits and that it consists of illicit balancing. I then turn to the heart of Justice Thomas's charge: what aesthetic diversity actually puts before the "eyes of the citizenry" is the stigma that affirmative action places on its beneficiaries.

Even affirmative actions defenders have worried that the stigma of which Justice Thomas complains is made worse by the non-transparent means which *Grutter* and *Gratz* together seem to require. Yet the transparency concern, so often expressed in the literature on affirmative action, is, I argue in Section B, the one that aesthetic theory can be most helpful in addressing. Aesthetic theory helps to explain why a lack of transparency need not be equated with obfuscation. Obfuscation is a choice, an attempt to cloud something which might otherwise be clearer. But as an aesthetic goal, diversity in service of perceived legitimacy—unlike diversity used for other ends (such as improved discussions or cross-cultural understanding)—may *require* that non-transparent means be employed to achieve that goal.

Necessary or not, the means of achieving perceived legitimacy should still give us pause if they objectify the very people that affirmative action is meant to help. And the end which these means serve—the visible diversity that promotes perceived legitimacy—might itself be called into question if it deceives and distracts us from an underlying reality that is not, in fact, a legitimate or desirable one. I confront these questions in Section C.

A. Justice Thomas's Critiques of Diversity

Justice Thomas's dissent begins with the justified complaint that the majority in *Grutter* fails to specify exactly what compelling governmental interest is at stake.¹³² Thomas notes how interchangeably the majority treats diversity and the educational benefits that flow from diversity.¹³³ Echoing Justice O'Connor's visibility metaphors, Thomas derides the majority's "'we know it when we see it' approach to evaluating state

¹³² *Id.* at 354.

¹³³ *Id.* at 355.

interests.”¹³⁴ Thomas himself limits compelling state interests to “only those measures the State must take to provide a bulwark against anarchy, or to prevent violence.”¹³⁵ Yet since the majority employs a more capacious, if less explicit, set of interests, Thomas marshals arguments against each.

1. Against Diversity’s Educational Benefits

Thomas’s first attack targets the educational benefits argument, which he summarizes: “Classroom aesthetics yields educational benefits, racially discriminatory admissions policies are required to achieve the right racial mix, and therefore the policies are required to achieve the educational benefits.”¹³⁶ Thomas disputes both of the argument’s premises. He doubts the educational benefits of diversity, and cites historically black colleges as a counterexample.¹³⁷ But putting that aside, Thomas’s main claim is that the universities could achieve the diversity they say they need if they did not also aim to be elite—a goal which requires them to employ admissions criteria (such as the LSAT and legacy preferences) which have a disparate racial impact. A university that was less selective, Thomas writes, would not need affirmative action to achieve its “classroom aesthetic.”¹³⁸ Having an elite law school cannot be a compelling state interest, Thomas adds, given the fact that only three states run one.¹³⁹

It is not necessary to evaluate Justice Thomas’s arguments against the *Bakke* educational benefits approach to see that they do not reach the perceived legitimacy rationale. This, in fact, is one of the latter’s strengths: it explains why an institution like University of Michigan Law School would want to be at once elite *and* diverse. Without diversity, institutions that confer or possess power would be seen as illegitimate. But without

¹³⁴ *Id.* at 357.

¹³⁵ *Id.* at 353. Justice Thomas does not consider whether the perceived legitimacy of public institutions might itself provide a “bulwark” against anarchy or violence. Certainly this was the claim we saw being made in the Military Brief. *See supra* Section I.C.

¹³⁶ *Id.* at 355.

¹³⁷ *Id.* at 364-65.

¹³⁸ *Id.* at 361 (“[T]he Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions system—it cannot have it both ways.”).

¹³⁹ *Id.* at 360.

selectivity, those institutions would not retain power requiring legitimation.¹⁴⁰

2. Racial Balancing and Generalized Discrimination

If the perceived legitimacy rationale sidesteps Justice Thomas's arguments against selectivity—and his doubts about diversity's educational benefits¹⁴¹—it fares less well against the charge that diversity efforts amount to racial balancing intended to remedy general societal discrimination.¹⁴² As he notes, the *Grutter* majority clearly disclaimed “outright racial balancing” as “patently unconstitutional.”¹⁴³ In doing so, it drew on a passage in *Bakke* where Justice Powell rejected “the historic deficit” of minorities in medicine as sufficient justification for admitting “some specified percentage of a particular group.”¹⁴⁴ In *Wygant*, Powell expanded this prohibition to include all remedies for general “societal discrimination.”¹⁴⁵ Yet this is exactly the motivation Justice Thomas discerns in *Grutter*, where he writes that “what lies beneath the Court’s decision today [is] the benighted notion[] that . . . racial discrimination is necessary to remedy general societal ills.”¹⁴⁶

It is all too easy to characterize the perceived legitimacy rationale both in terms of racial balancing and as a remedy for past societal discrimination. The latter, of course, is not the *intent* of those promoting perceived legitimacy. They want institutions to be seen as democratically legitimate because visibly diverse. But therein lies the worry: if legitimacy requires minority numbers roughly akin to those of society at large, it sounds like balancing. And if past societal discrimination is what depressed those numbers previously, then bringing the numbers back up starts to sound a lot like a remedy.¹⁴⁷

¹⁴⁰ Cf. Military Brief, *supra* note 71, at 9 (“The military must *both* maintain selectivity in admissions *and* train and educate a racially diverse officer corps to command racially diverse troops.”).

¹⁴¹ See *Grutter*, 539 U.S. at 356 n.4 (Thomas, J., concurring in part and dissenting in part).

¹⁴² *Id.* at 353, 355, 371.

¹⁴³ *Id.* at 330 (majority opinion).

¹⁴⁴ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 306-07 (1978).

¹⁴⁵ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (opinion of Powell, J.); see also *id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment).

¹⁴⁶ *Grutter*, 539 U.S. at 371.

¹⁴⁷ See *id.* at 374 (Thomas, J., concurring in part and dissenting in part) (“For those who believe that every racial disproportionality in our society is caused by some kind of

Under current doctrine, the balancing and societal-remedy objections are likely the most difficult legal challenges to the perceived legitimacy argument for diversity. On the current Court, Chief Justice Roberts and Justice Alito have made it clear that they share Justices Scalia and Thomas's antipathy towards racial balancing, which, Roberts wrote in 2007, "would justify the imposition of racial proportionality throughout American society" ¹⁴⁸ "Racial balancing," Roberts claimed, "is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'" ¹⁴⁹

The Chief Justice's opinion in *Parents Involved*, a case involving race in primary schooling, provides a test for illicit balancing. According to Roberts, the *Grutter* Court found that Michigan had worked forward from the level of diversity deemed necessary to provide the claimed benefit; the schools in *Parents Involved* had instead, unconstitutionally, worked backward from the demographics of their districts to determine how many minority students to enroll. ¹⁵⁰

It is not entirely clear whether the perceived legitimacy rationale passes the test. On the one hand, its goal is not balancing; it is legitimacy. And the number of minorities needed for legitimacy does not necessarily match the demographics of society at large. We might wonder how much additional legitimacy Barack Obama, for example, conferred on Harvard Law School because of his heightened visibility as President of the Law Review, or later as President of the United States. Visibility levels may count as much as pure diversity numbers when it comes to establishing perceived legitimacy. Further, diversity programs premised on perceived legitimacy are designed to express, even exhibit, an absence of *present* discrimination, not to remedy discrimination of the past.

On the other hand, as Justice Thomas argued in *Grutter*, if you "believe that every racial disproportionality in our society is caused by some kind of racial discrimination," ¹⁵¹ then any discrepancy between demographic numbers and diversity numbers could be seen as a sign of

racial discrimination, there can be no distinction between remedying societal discrimination and erasing racial disproportionalities in the country's leadership caste.")

¹⁴⁸ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007). Lacking Justice Kennedy's support, this portion of the Chief Justice's opinion did not command a majority of the Court.

¹⁴⁹ *Id.* 732 (opinion of Roberts, C.J.).

¹⁵⁰ *See id.* 729 (opinion of Roberts, C.J.).

¹⁵¹ *See Grutter*, 539 U.S. at 374 (Thomas, J., concurring in part and dissenting in part).

illegitimacy; balancing would follow. As a legal matter, perceived legitimacy's best hope is the fact that the four members of the Court who are most likely to see diversity as balancing relabeled¹⁵² are also the ones *least* likely to attribute all disproportionality to discrimination.

A related challenge to the perceived legitimacy rationale is the worry—expressed by the Chief Justice in *Parents Involved*, Justice O'Connor in *Croson*, and Justice Stevens in *Wygant* and *Fullilove*—that it will cause race to “always remain relevant in American life” so that the goal of race-blind governmental decisionmaking “will never be achieved.”¹⁵³ If the worry here is that perpetual affirmative action will be needed to achieve the diversity sufficient for perceived legitimacy, the reply must be that in time, as increasing numbers of minorities travel the “path to leadership,”¹⁵⁴ diversity will start to occur “naturally” and racial preferences will no longer be needed. The problem, of course, is that this answer assumes that something—presumably general societal discrimination—has kept diversity from naturally arising up until now. On this account, the perceived legitimacy rationale starts to sound uncomfortably like a remedy for past societal discrimination.¹⁵⁵ Perhaps the best thing that can be said in its defense is that other diversity rationales—including the educational benefits approach of *Bakke*—fare no better. This, at least, is the belief of Jack Balkin, who has written that “[i]n the context of educational affirmative action, I understand “diversity” to be a code word for representation in enjoyment of social goods by major ethnic groups who have some claim to past mistreatment.”¹⁵⁶ Diversity on this account is *always* tied to “past mistreatment”; the need to remediate societal discrimination is always a premise, though not always the stated goal, of efforts to achieve diversity.

3. Stigma

Justice Thomas's third line of critique is the one that most centrally concerns appearances. Affirmative action programs, he claims, “stamp

¹⁵² See *supra* note 149 and accompanying text.

¹⁵³ See *Parents Involved*, 551 U.S. at 730 (opinion of Roberts, C.J.).

¹⁵⁴ *Grutter*, 539 U.S. at 332.

¹⁵⁵ Cf. Post, *supra* note 27 at 67 n.306 (“The time-limitation requirement announced by *Grutter* . . . makes theoretical sense only if the justifications for diversity that it announces are taken to be quasi-remedial.”).

¹⁵⁶ Levinson, *supra* note 30, at 601 (quoting an Email from Jack Balkin, Professor, Yale Law School, to Sanford Levinson, Professor, University of Texas Law School (Mar. 18, 1999)).

minorities with a badge of inferiority.”¹⁵⁷ Explaining what he means, Thomas refers back, cuttingly, to Justice O’Connor’s language about perceived legitimacy:

When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed “otherwise unqualified,” or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination. *Is this what the Court means by “visibly open”?*¹⁵⁸

For Thomas, what is “visible” in diverse elite institutions is not O’Connor’s legitimacy, but the stigmatic mark of racial preference. More than just superficial or ineffectual, racial aesthetics here effect a “positive injury.”¹⁵⁹

Perhaps it is to lessen this injury that the Court has demanded admissions decisions that are individualized and holistic rather than formulaic or mechanical. As Paul Mishkin argued in the wake of *Bakke*, “The use of overt numbers, whether stated as literal quotas or as ‘set-asides’ for qualified applicants . . . tends continually to keep alive consciousness of the program and the relevance of race therein.”¹⁶⁰ Mishkin was focused primarily on how “indirectness” could “enhance the acceptability of” affirmative action programs and avoid backlash and resentment.¹⁶¹ The same argument could be made, though, in terms of stigma. Reducing the visibility of affirmative action programs is a way not just of making those programs less contested in society at large, but also of reducing the stigma that attaches to those programs’ beneficiaries.

Putting minority students on a separate admissions track, as in *Bakke*, or awarding them a set “bonus,” as in *Gratz*, inevitably leads to questions about whether those minority students would have been admitted under the procedures used for non-minority applicants. The question itself is the

¹⁵⁷ *Grutter*, 539 U.S. at 373 (Thomas, J., concurring in part and dissenting in part).

¹⁵⁸ *Id.* (emphasis added).

¹⁵⁹ *See id.* at 350.

¹⁶⁰ Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 928 (1983).

¹⁶¹ *Id.*

stigma, as Justice Thomas said,¹⁶² and as Mishkin might have added, overt numbers keep the stigmatizing question continually alive in people's minds. If the bonus points at issue in *Gratz* truly were sufficient to admit all minimally qualified minority applicants,¹⁶³ minority applicants might not feel the need to surpass Michigan's minimal qualifications; non-minority applicants might begin to assume (and resent the fact) that their minority classmates were only minimally qualified. Obviously, neither outcome is desirable. Individualized, holistic admissions decisions such as those at Michigan Law School are meant instead to avoid the perception that there is one admissions process for minorities and another process for everyone else.

That said, the opacity of these decisions compared to the transparently mechanized index scores used in *Gratz* prompts criticism on two fronts. Lani Guinier has powerfully argued that this opacity actually exacerbates the stigma associated with affirmative action. In her words:

As long as the process of decisionmaking by elites remains opaque, race will remain the lens through which disgruntled white applicants understand it. Race is the neon light, the one variable that remains highly visible. Race, in other words, is an easy mark for the frustration of those who are excluded by admissions choices – choices that have little to do with race and much to do with discretionary, even arbitrary, decisionmaking. The historical stigma associated with people of color lends further momentum to this backlash, particularly since other discretionary choices to convert social status into merit were never subject to open debate and are still relatively camouflaged.¹⁶⁴

For Guinier, opaque admissions processes make race more salient, not less. Insofar as opacity is promoted in order to reduce the stigma of affirmative action, it fails to achieve its goal.

The second critique, which comes from Mishkin, is not that opacity fails, but that its success might come at too high a cost. For Paul Mishkin as for others,¹⁶⁵ the charge is that opacity is really obfuscation. Justice

¹⁶² *Grutter*, 539 U.S. at 373 (Thomas, J., concurring in part and dissenting in part).

¹⁶³ See *Gratz v. Bollinger*, 539 U.S. 244, 272 (2003).

¹⁶⁴ Guinier, *supra* note 22, at 189-90 (citations omitted).

¹⁶⁵ See Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1495-97 (2007).

Ginsburg made the claim in *Gratz*: “If honesty is the best policy, surely Michigan’s accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.”¹⁶⁶

Here again, the debate comes turns on a question of aesthetics—on what is and should be seen. Justice Ginsburg sees “[t]he stain of generations of racial oppression . . . still visible in our society”;¹⁶⁷ Justice Thomas sees stigmatic badges of inferiority; Justice O’Connor sees “visibly open” paths to power. Perhaps it is because of these differences that Ginsburg and Thomas see Court-approved affirmative action plans as obfuscation while O’Connor views them, approvingly, as individualized and holistic. The question this raises, and which the following Section addresses, is whether Justice O’Connor’s perceived legitimacy rationale somehow allows us to look differently at the charges of obfuscation which are so often made against affirmative action plans in the wake of *Grutter*.

B. Obfuscation

1. Does *Grutter* Obfuscate?

Ian Ayres and Sydney Foster have argued empirically that race proved decisive for minority admissions more often under the upheld *Grutter* plan than under the one struck down in *Gratz*.¹⁶⁸ Even without their data, it is clear that under the *Grutter* plan, race must remain the decisive factor for admissions at least for minority students on the margin.¹⁶⁹ So the difference between *Grutter* and *Gratz* cannot be that *Gratz*’s twenty points often proved decisive¹⁷⁰ or that the *Gratz* plan treated applicants as members of a racial group rather than individuals.¹⁷¹ Instead, the difference must be that the *Gratz* plan quantified and communicated the effect of race on admissions; the *Grutter* plan did neither.¹⁷²

¹⁶⁶ *Gratz*, 539 U.S. at 305 (Ginsburg, J., dissenting); see also *id.* at n.11 (“Among constitutionally permissible options, those that candidly disclose their consideration of race seem to me preferable to those that conceal it.”).

¹⁶⁷ *Id.* at 304.

¹⁶⁸ Ayres & Foster, *supra* note 27, at 562.

¹⁶⁹ Post, *supra* note 27, at 72 (“It does not seem that universities can assemble a critical mass of minority students unless race is the defining factor in a student’s application, even if it is ‘decisive’ only at the margins.”)

¹⁷⁰ Cf. *Gratz*, 539 U.S. at 272.

¹⁷¹ Cf. *id.* at 271; see also Post, *supra* note 27, at 73-74.

¹⁷² Ayres & Foster, *supra* note 27, at 559.

Commentators have widely assumed that the *Grutter* plan amounts to obfuscation. This is true whether they are sympathetic to the obfuscation or critical of it. As such, on the more-or-less positive side, Paul Mishkin, Samuel Issacharoff, and others have stressed how unclarity can reduce racial balkanization.¹⁷³ Relatedly, Robert Post has argued that the Court “insists on deliberately obscurantist processes of individualized consideration” in order to keep minorities from feeling entitled to particular benefits.¹⁷⁴

More critically, Peter Schuck has alleged that non-transparency allows educational institutions to avoid the “reputational, market, and other informal mechanisms” that would otherwise force it to bear the costs of adopting preferences rather than “shifting them to innocent third parties.”¹⁷⁵ Ayres and Foster have made the similar objection that non-transparency is anti-democratic; citizens cannot judge a university’s policy choices when these are not made explicit.¹⁷⁶ Lani Guinier has offered an expanded version of this complaint, praising *Grutter* for recognizing that admissions decisions are “political acts,” but calling on universities to take “the views of various constituencies into account” through “larger public conversation” about the admissions processes they employ.¹⁷⁷ Ayres, Foster, and Guinier have further alleged that opacity can breed arbitrariness, as well as “elite self-replication.”¹⁷⁸ Finally, though in the context of employment rather than education, Ayres has invoked the Kantian principle that that “[a]ll actions relating to the right of other human beings are wrong if their maxim is incompatible with publicity.”¹⁷⁹ Transparency here becomes a moral imperative, not just a policy decision.

Crucially, what *all* of these accounts share is an assumption that affirmative action plans face a choice about how transparent to be. In other

¹⁷³ See, e.g., Post & Siegel, *supra* note 165, at 1494-95; Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 691 (1998); Mishkin, *supra* note 160, at 928.

¹⁷⁴ Post, *supra* note 22, at 31; see also Post, *supra* note 27, at 74.

¹⁷⁵ PETER H. SCHUCK, *DIVERSITY IN AMERICA* 197-98 (2003).

¹⁷⁶ Ayres & Foster, *supra* note 27, at 568.

¹⁷⁷ Guinier, *supra* note 22, at 208.

¹⁷⁸ Ayres & Foster, *supra* note 27 at 568-69; Guinier, *supra* note 22, at 194-96.

¹⁷⁹ Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1794 (1996) (quoting David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2648 (1995)).

words, it is thought that increased minority representation in a school or at a workplace can be achieved through various means, some transparent, some obfuscating. The arguments just canvassed concern the political or moral values at stake in the choice of those means. So, for example, if schools want to enroll a critical mass of minority students in order to make class discussions more vibrant or to better prepare students for a multicultural world, those schools might choose the transparent point plan in *Gratz* or the more shadowy holistic process approved in *Grutter*. Either of the plans could produce a diverse student body; the choice turns on whether one plan or the other carries with it some externality, such as provoking backlash or reducing political accountability. Importantly, however, these externalities do not effect the ultimate goal—they do nothing to diminish the educational benefits of a diverse student body.

These arguments do not work, however, when perceived legitimacy is the goal. On the perceived legitimacy argument, the sight of diversity in elite institutions leads to perceptions of legitimacy because it indicates that those institutions are open to people of all races. Visible diversity suggests an absence of discrimination and a meritocracy in which minorities' talents are recognized and rewarded. Diversity loses this effect, however, if it appears artificial or rigged. A cabinet that "looks like America" would prove less inspiring if the President suggested that he had not picked the most qualified candidates for each position.¹⁸⁰ Similarly, perceived legitimacy would be lost if the Michigan Law School began selecting its students through a random lottery. The perceived legitimacy rationale requires both diversity *and* selectivity. Transparent racial quotas or bonuses would make the institution appear less selective for precisely those groups whose inclusion matters for legitimacy. Put another way, the transparency (or non-transparency) of means has a direct effect on the goal when the goal is perceived legitimacy.

This insight offers an answer to a question recently posed in the *Harvard Law Review*: "[I]f maintaining visibly open paths to leadership was compelling [in *Grutter*], one might wonder why a quota system, where transparency of accessibility is paramount, would not be narrowly

¹⁸⁰ Cf. *The Supreme Court; Excerpts From News Conference Announcing Court Nominee*, N.Y. TIMES, July 2, 1991 (quoting President George H.W. Bush on his nomination of Clarence Thomas: "I kept my word to the American people and to the Senate by picking the best man for the job on the merits. And the fact he's minority, so much the better. But that is not the factor, and I would strongly resent any charge that might be forthcoming on quotas when it relates to appointing the best man to the court.").

tailored to meet this goal.”¹⁸¹ The question misunderstands what the *Grutter* Court found compelling about visibility—and, importantly, what it meant to make visible. Justice O’Connor’s visible “path to leadership” was the law school itself, not the admissions process leading to the law school. The *Grutter* Court’s goal was the visible inclusion of minorities within elite institutions. Yet this inclusion would lose its legitimating function if it were seen as unconnected to achievement. When perceived legitimacy is the goal, the means matter in a way they don’t when other ends are at stake.

2. *Lessons from Aesthetics*

In understanding just how the means matter, Justice Thomas’s invocation of the aesthetic points the way. The “eyes of the citizenry” passage in Justice O’Connor’s *Grutter* opinion ties democratic legitimacy to a particular kind of appearance—visible diversity in elite institutions. These are constructed appearances, created to produce a certain effect on those who perceive it. And the making and judging of such appearances is the very subject of aesthetic theory.

Consider, for example, Kant’s famous claim that “Nature [is] beautiful, if at the same time it looked like art; and art can only be called beautiful if we are aware that it is art and yet it looks to us like nature.”¹⁸² Kant’s assertion is that successful aesthetic creations are those which look as if they came about naturally.¹⁸³ His theory explains why calling a novelist heavy-handed is an insult, or why musicians train exhaustively so

¹⁸¹ Note, *Educational Benefits Realized: Universities’ Post-Admissions Policies and the Diversity Rationale*, 124 HARV. L. REV. 572, 577 (2010).

¹⁸² IMMANUEL KANT, *CRITIQUE OF THE POWER OF JUDGMENT* 185 (Paul Guyer & Eric Matthews, trans., 2000) (1790). I emphasize Kantian thought in the paragraphs that follow not only because of its relevance for affirmative action, but also because of its centrality within aesthetic theory. On this, see Günter Zöller, *History of Kantian Aesthetics*, in 3 *ENCYCLOPEDIA OF AESTHETICS* 44 (Michael Kelly, ed. 1998) (“Immanuel Kant’s aesthetic theory, as presented in the *Critique of Judgment*, stands at the juncture of two main periods in the history of aesthetics. . . . [I]t belongs squarely in the eighteenth century, as the creative synthesis and culmination of that period’s multiform aesthetic culture. Yet, Kant’s aesthetics is also the starting point of the many forms of aesthetic discourse that have followed it in the past two centuries.”).

¹⁸³ Writing in Kant’s wake, Schiller applied this idea to human action, which he claimed is beautiful “only if it appears as an immediate outcome of nature.” “[T]he highest perfection of character in a person is moral beauty brought about by the fact that *duty has become its nature*.” Friedrich Schiller, *Kalías or Concerning Beauty: Letters to Gottfried Körner*, in *CLASSIC AND ROMANTIC GERMAN AESTHETICS* 145, 159 (J. M. Bernstein, ed., 2003).

that their performances look effortless. A successful work cannot appear forced. For Kant, a work appears natural when it shows no sign that the artist followed rules in creating it.¹⁸⁴

Kant's claim has several important lessons to teach about the aesthetics of affirmative action. The first is that aesthetic success cannot result from mechanistically applied formulas—the *Gratz* plan. In fact, to look natural, the appearance “must . . . not seem intentional;”¹⁸⁵ it must seem *as if* it came about unforced and without design. On this account, transparency of means is the enemy of aesthetic effect.

Importantly, though, lack of transparency here does not amount to deception. This is the second lesson. As Kant insists, “we are aware” that the work is art—that is, an intentional human product—even when it appears as if it were natural.¹⁸⁶ “As if” appearances do not equal trickery. This is a subtle but crucial point. For Kant, those who create works of art and those who judge them do not follow rules while denying or obfuscating the rules they are following. The processes of creating and judging aesthetic objects are irreducible to determinate rules or reasons by their very nature. No *ex ante* formulas (e.g., more blue than red = better painting) can ever capture what makes a work successfully appear natural.¹⁸⁷ A rule for naturalness would actually prove self-defeating, for once we knew the rule, the work would appear rule-bound instead of natural. As opposed to formulaic or mechanized judgments, Kantian aesthetic judgments are necessarily individualized and holistic¹⁸⁸—

¹⁸⁴ KANT, *supra* note 182, at 186.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 185. The willing suspension of disbelief often associated with theater provides a good example: since our participation in the “as if” is willing, we are not duped. But nor does our knowledge of the constructedness of what we see prevent us from responding to its effect. Thus, audiences might gasp when the hero is killed—the play might have its intended effect—yet no one rushes the stage to stop the killer. Audience members know that the action is not real even as they respond as if it were.

¹⁸⁷ *Cf.* KANT, *supra* note 182, at 165 (“If someone reads me his poem or takes me to a play that in the end fails to please my taste, he can adduce Batteux or Lessing, or even older and more famous critics of taste, and adduce all the rules they established as proofs that his poem is beautiful . . . : I will stop my ears, listen to no reasons and arguments, and would rather believe that those rules of the critics are false . . . than allow that my judgment should be determined by means of *a priori* grounds of proof . . .”).

¹⁸⁸ “[A]ll judgments of taste are singular judgments. For since I must immediately hold the object up to my feeling of pleasure and displeasure, and yet not through concepts, it cannot have the quantity of an objectively generally valid judgment If one judges merely in accordance with concepts, then all representation of beauty is lost.

precisely the terms the *Grutter* Court used to describe constitutionally acceptable admissions judgments.¹⁸⁹

If *Grutter*-like admissions decisions are akin to aesthetic judgments, it might seem that we avoid the charges of obfuscation at the cost of relativism. Perhaps Ayres, Foster, and Guinier were correct to brand *Grutter*'s decisionmaking regime as arbitrary. But this brings us to a third lesson of aesthetic theory, according to which a judgment can be at once subjective, unbound by rules, and universal.¹⁹⁰ According to Kant, "there can . . . be no rule in accordance with which someone could be compelled to acknowledge something as beautiful," yet when a person makes a judgment about beauty, "one believes oneself to have a universal voice, and lays claim to the consent of everyone".¹⁹¹ Judgments of beauty ("Milton is a great author"¹⁹²) can be deemed correct or incorrect in a way that mere judgments about the agreeable ("I like chocolate") cannot be.

The recent Fifth Circuit affirmative action case, *Fisher v. University of Texas*, provides a striking example of this. Though Texas employs a system in which the top ten percent of students at each Texas high school are guaranteed admission, the University has, since 2004, also made holistic, race-conscious evaluations of its remaining in-state applicants.¹⁹³ In addition to using a mechanized formula based on test scores and class rank, admissions officers award a "personal achievement" rating, scored from one to six, based on intangibles such as leadership, work experience,

Thus there can also be no rule in accordance with which someone could be compelled to acknowledge something as beautiful." KANT, *supra* note 182, at 100-01.

¹⁸⁹ *Grutter v. Bollinger*, 539 U.S. 306, 336 (2003) ("[T]he Law School engages in a highly individualized, review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. . . . Unlike the program at issue in *Gratz v. Bollinger*, the Law School awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity.").

¹⁹⁰ See KANT, *supra* note 182, at 96 ("The beautiful is that which, without concepts, is represented as the object of a *universal* satisfaction.").

¹⁹¹ *Id.* at 101.

¹⁹² DAVID HUME, *Of the Standard of Taste*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 230-31 (1985) (1757) ("Whoever would assert an equality of genius and elegance between OGILBY and MILTON, or BUNYAN and ADDISON, would be thought to defend no less an extravagance, than if he had maintained a mole-hill to be as high as TENERIFFE, or a pond as extensive as the ocean. Though there may be found persons, who give the preference to the former authors; no one pays attention to such a taste; and we pronounce without scruple the sentiment of these pretended critics to be absurd and ridiculous.").

¹⁹³ *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 227 (5th Cir. 2011).

socioeconomic status, family responsibilities, and race.¹⁹⁴ The judgment is subjective, but not arbitrary. As the Fifth Circuit noted:

Admissions officers undergo annual training by a nationally recognized expert in holistic scoring, and senior staff members perform quality control to verify that awarded scores are appropriate and consistent. The most recent study, in 2005, found that holistic file readers scored within one point of each other 88% of the time.¹⁹⁵

The lesson here is that rule-following is not necessary for consistency in admissions judgments. With adequate practice or training, even those making subjective, holistic judgments can converge in their results.

Aesthetic judgment's claim to "subjective universality" is admittedly controversial. In its Kantian guise, it relies upon the Enlightenment assumption that "the cognitive faculties of all human beings work the same way."¹⁹⁶ Insofar as it does so, however, it comes closer to Justice Thomas's colorblind universalism¹⁹⁷ than the kinds of assumptions about diversity found in *Bakke*. For Justice Powell in *Bakke*, diversity makes for vibrant classrooms presumably because people of different races are assumed to think differently based on their distinctive backgrounds. One of the strengths of the perceived legitimacy rationale for diversity is that it makes no such assumptions. It values diversity in elite institutions for making non-discriminatory meritocracy visible. It makes no difference whether or not the diverse populations within those institutions think alike or differently.

The point here is not that Justice Thomas must accept Kantian aesthetic theory because it shares his eighteenth-century universalist assumptions. The point of looking at aesthetics is rather to show how it carves out a space that both Thomas and his critics—those who argue for transparently operated affirmative action plans—fail to acknowledge. The aesthetic, both in theory and in our common sense understanding, offers forms of making and judging that are irreducible to rules. This is different

¹⁹⁴ *Id.* at 228.

¹⁹⁵ *Id.*

¹⁹⁶ Paul Guyer, *18th Century German Aesthetics*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/archives/fall2008/entries/aesthetics-18th-german> ("[Kant] assumes that the cognitive faculties of all human beings work the same way, that is, respond to particular objects in the same way . . .").

¹⁹⁷ See *Grutter v. Bollinger*, 539 U.S. 306, 378 (2003) (Thomas, J., concurring in part and dissenting in part) (linking the Declaration of Independence, the Equal Protection Clause, and colorblindness).

from making or judging something according to rules that are hidden. It is different, in other words, from obfuscation.

The “as if” naturalness of the aesthetic requires non-transparent means. My claim here is that perceived diversity does so too, if it is to have the kind of aesthetic effect Justice O’Connor envisions. Non-transparent means are thus justified under the perceived legitimacy rationale for diversity even if they cannot be when diversity is used for the other purposes that courts and commentators more frequently discuss.

C. Objectification and Deception

[This section remains to be written. But several things about it can still be said.]

To start, my defense of the non-transparent means necessary when perceived legitimacy is the desired end does nothing to defend against another worry: the fear that minority students might themselves be used as a means, the material out of which useful aesthetic appearances are constructed. Or, to use a helpful distinction from Kant’s moral theory, the concern is that minority students must not be used merely as a means. Kant’s point is that we use persons as means all the time—waiters bring us food, teachers impart knowledge—but we must also and at the time treat them also as ends in themselves.

The objectification problem thus rears its head in this area when universities or other elite groups include minorities merely for the aesthetic effects their presence imparts. The most egregious example of this are those cases—real ones, sadly—in which black students are photoshopped into pictures in schools’ admissions or other promotional materials.¹⁹⁸ In such cases, the minority student might not even be a student at all. He or she is just the raw material out of which an aesthetic object is made.

What this extreme case shows is that the objectification worry actually has deception at its root. Central to our moral objection to the photoshopping example is the fact that the student wasn’t really in the picture in the first place and thus doesn’t reflect the actual diversity (or lack thereof) in the environment that the picture is purporting to portray.

This egregious limit case is instructive in helping to see what it means to use minority students to create an appearance—as the perceived legitimacy rationale for diversity unavoidably does—without merely using

¹⁹⁸ See Leong, *supra* note 17, at 48-49 (describing such an example at the University of Wisconsin in 2000).

them. At a bare minimum, the students being used in this way must be real students. The aesthetic appearance on which perceived legitimacy depends must therefore not be deceptive in this basic sense. And once this is established, we can then go on to examine more deeply what it means to be a “real” student—what schools must do to ensure that minority students are full and successful members of the elite groups which they are helping to legitimate.]

CONCLUSION

[This also remains to be written. What I would like to do, though, is to look at what follows from our acceptance of perceived legitimacy as a compelling interest. The means that are narrowly tailored for achieving perceived legitimacy are quite different from those that would be necessary to achieve diversity’s other goals. By neglecting the Grutter Court’s perceived legitimacy rationale, we have likely also blinded ourselves to the types of affirmative action best suited to achieving it.]