
Civil Rights

RACIAL MIRRORING

By Dawinder S. Sidhu

Note from the Editor:

This article argues that attempts to engineer public work forces to match the racial makeups of the communities they serve violate the Equal Protection and cause social harm.

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- Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African-American Staff Attorneys*, 18 CORNELL J.L. & PUB. POL'Y 1 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1298440.
- Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1 (2005), available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1344&context=bjell>.
- Tara Lai Quinlan and Deborah Ramirez, *A Blueprint for Local Police Reform to Improve Legitimacy*, THE HUFFINGTON POST (Dec. 24, 2014), available at http://www.huffingtonpost.com/tara-lai-quinlan/a-blueprint-for-local-pol_b_6369706.html.
- Emily Badger, Dan Keating and Kennedy Elliott, *Where minority communities still have overwhelmingly white police*, WASHINGTON POST (Aug. 14, 2014), available at <https://www.washingtonpost.com/news/wonk/wp/2014/08/14/where-minority-communities-still-have-overwhelmingly-white-police/>.
- Batya Ungar-Sargon, *Lessons For Ferguson In Creating A Diverse Police Department*, FIVE THIRTY EIGHT (Jan. 5, 2015), available at <http://fivethirtyeight.com/features/lessons-for-ferguson-in-creating-a-diverse-police-department/>.
- *Martin v. Blessing*, 134 S. Ct. 402 (2013) (Statement of Alito, J.), available at http://www.supremecourt.gov/opinions/13pdf/13-169_197d.pdf.

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INTRODUCTION

In response to police shootings and broader calls for criminal justice reform, public officials, commentators, activists, and former police commissioners have proposed that police departments, particularly those in predominantly African-American areas, should reflect the racial demographics of the communities they serve. Their argument may be restated in general terms: Trust is the touchstone of effective policing.¹ In communities of color, that trust has been undermined by the legacy and persistence of actual and perceived racial discrimination in law enforcement. Accordingly, a community of color confronted by a predominantly white police force may assume that the police force is biased and that such bias will work its way into discriminatory law enforcement decisions. This view erodes confidence in the police that, in turn, makes communities of color less inclined to communicate with and support law enforcement. By contrast, communities of color may be more receptive to police forces that look like them, as the assumption of bias is absent. A shared racial makeup may thereby help foster trust that, in turn, may facilitate cooperation between law enforcement and people of color. In other words, the matching of racial identity may yield better policing outcomes.

This argument is based on the “external legitimacy” doctrine, under which employers may give special consideration to job applicants of the same race as the clients that the employer serves on the theory that employees of the same race will be able to generate trust and cooperation between the employer and its clients and thus boost the external legitimacy of the employer.² Federal appeals courts have endorsed this doctrine in the police³

- 1 Bureau of Justice Assistance, U.S. Dep’t Justice, *Understanding Community Policing: A Framework for Action*, at vii (1994), available at <http://www.ncjrs.gov/pdffiles/commpp.pdf> (“A foundation of trust will allow police to form close relationships with the community that will produce solid achievements. Without trust between police and citizens, effective policing is impossible.”).
- 2 The term “external legitimacy” in this context may be attributed to Professor Cynthia Estlund’s important article in this area. Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 22 (2005).
- 3 *Petit v. City of Chi.*, 352 F.3d 1111, 1115 (7th Cir. 2003), cert. denied, 541 U.S. 1074 (2004); *Talbert v. City of Richmond*, 648 F.2d 925, 931 (4th Cir. 1981); *Detroit Police Officers’ Ass’n v. Young*, 608 F.2d 671, 695-96 (6th Cir. 1979); *Patrolmen’s Benevolent Ass’n v. New York*, 310 F.3d 43, 52 (2nd Cir. 2002); cf. *Cotter v. City of Boston*, 323 F.3d 160, 172 n.10 (1st Cir. 2003).

and prison⁴ contexts. While circuit courts have declined to extend the argument to additional areas,⁵ other courts and scholars contend that the external legitimacy rationale applies to other areas in which trust is relevant, including class representation,⁶ municipal services,⁷ public agencies,⁸ and legal services,⁹ among many others.¹⁰

The external legitimacy doctrine is seemingly sensible and intuitively appealing, but it is unconstitutional and counterproductive. The external legitimacy doctrine, as practiced in policing and other contexts, is itself part of what I call “racial mirroring,” which attempts to ensure that the racial composition of one defined group reflects that of another group.¹¹ In what follows, I will suggest that racial mirroring violates the Equal

Protection Clause,¹² perpetuates harmful racial stereotypes, and produces significant legal and social costs.

While the Supreme Court has addressed the constitutionality of racial balancing,¹³ it has never squarely confronted the constitutionality of racial mirroring. This essay may be useful to the bench and the bar in considering challenges to the practice of racial mirroring. In light of calls for racial mirroring in the policing context, the moment seems ripe for such guidance.

I. PROBLEMS WITH RACIAL MIRRORING

A running hypothetical may be helpful in conceptualizing the harms that counsel against racial mirroring. Let us assume that an urban elementary school in a predominantly African-American neighborhood has an opening for a second-grade teacher. The school has two qualified applicants—an African-American and an Asian-American. The threshold requirements to be qualified are a college degree and an active teaching certificate. The school principal and the rest of the hiring committee want to hire the African-American candidate for reasons that amount to the external legitimacy argument. The concern over external legitimacy stems from the school officials’ perception that there has not been enough cooperation between parents and the school. The officials believe that the African-American candidate will increase parental engagement, and that this will yield enhanced educational outcomes in two respects. First, they have a strong sense that parental engagement will enhance the possibility that parents—most of whom are African-American—will trust the educational choices of the teachers, become more involved in school governance and policy development, and enrich the educational and extra-curricular activities of the school (e.g., through volunteering to coach sports teams or advise student clubs). Second, they assume that parental engagement will cause parents to implement teachers’ suggestions for supporting students at home, to invest in creating optimal educational conditions for students, and to actively assist students with their daily assignments.¹⁴ The school officials contend that parental engagement, presumably to be facilitated by the African-American candidate, will enable the school to do its job more effectively. Accordingly, the African-American

4 Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996).

5 Lomack v. City of Newark, 463 F.3d 303 (3rd Cir. 2006); Knight v. Nassau Cnty. Civil Serv. Comm’n, 649 F.2d 157, 162 (2nd Cir. 1981).

6 Blessing v. Sirius XM Radio Inc., No. 09-CV-10035, 2011 WL 1194707, at *12 (S.D.N.Y. Mar. 29, 2011); Public Employees’ Retirement Sys. of Miss. v. Goldman Sachs Group, Inc., No. 09 CV 1110, 280 F.R.D. 130, 142, n.6 (S.D.N.Y. Feb. 3, 2012); N.J. Carpenters Health Fund v. Residential Capital, LLC, Nos. 08 CV 8781, 08 CV 5093, 2012 WL 4865174, at *5, n.5 (S.D.N.Y., Oct. 15, 2012); In re Gildan Activewear Inc. Sec. Litig., No. 08 Civ. 5048 (S.D.N.Y. Sept. 20, 2010). Justice Samuel A. Alito issued a statement on the denial of certiorari in *Blessing*. Martin v. Blessing, 134 S. Ct. 402 (2013) (Statement of Alito, J.). Justice Alito signaled to Judge Baer—and all other federal judges—that the class certification order was both unjustifiable and impractical. Unjustifiable as Justice Alito stated that he was “hard-pressed to see any ground on which Judge Baer’s practice can be defended,” *id.* at 403, and he found it “quite farfetched to argue that class counsel cannot fairly and adequately represent a class unless the race... of counsel mirror[s] the demographics of the class.” *Id.* Justice Alito cautioned that, if the order was not sufficiently addressed on remand, “future review may be warranted.” *Id.* at 405.

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

8 David Orentlicher, *Diversity: A Fundamental American Principle*, 70 MO. L. REV. 777, 804-05 n.145 (2005).

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

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

11 “Racial mirroring” is distinct from “racial balancing.” In racial balancing, the racial composition of two groups is adjusted so as to achieve an acceptable range of racial diversity within the two groups. In contrast, racial mirroring occurs when the racial composition of only one side is adjusted to reflect the racial composition of some other, ostensibly static group (e.g., a company’s clients, a neighborhood’s residents). Further, the purpose is usually to derive some benefit from the racial identities being in lockstep.

12 U.S. CONST. amend. XIV § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”). The Equal Protection Clause applies only to state actors, see Civil Rights Cases, 109 U.S. 3, 11 (1883), and therefore this analysis focuses on governmental actors, such as city police departments and public schools. However, this analysis applies with some force to private actors given the relevance of equal protection jurisprudence to civil rights statutes governing private employment. See *Ricci v. DeStefano*, 557 U.S. 557, 582 (2009) (“Our cases discussing constitutional principles can provide helpful guidance in th[e] statutory context,” even though statutory protections may not “parallel in all respects” constitutional protections.”).

13 See *Gutter v. Bollinger*, 539 U.S. 306, 330 (2003) (“racial balancing . . . is patently unconstitutional.”).

14 The school officials’ assumptions are not uncommon. At least historically, school districts believed that “minority teachers were better teachers for minority students.” Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L. REV. 1, 13 (2008).

candidate is hired. The employer's action is problematic for a number of reasons.

A. The Racial Presumptions Problem

First, the school officials presume, solely on the basis of race, that the African-American candidate will generate trust and cooperation from African-American parents. Hiring her on the basis of that presumption is inconsistent with prevailing Supreme Court equal protection doctrine. In the seminal case of *Shaw v. Reno*, the Supreme Court considered the constitutionality of a North Carolina reapportionment plan that would have included two majority-black congressional districts.¹⁵ The plan was designed to give voting strength to African-American voters in North Carolina, who were otherwise dispersed throughout the state; thus, the plan was meant to benefit African-Americans.¹⁶ The Court held that the redistricting, which produced oddly-shaped districts in order to encompass prospective African-American voters “who are otherwise widely separated by geographical and political boundaries,”¹⁷ gave rise to a valid claim of improper racial gerrymandering under the Equal Protection Clause.¹⁸ The Court reasoned that the majority-minority redistricting plan “reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.”¹⁹ “[S]uch perceptions,” the Court continued, must be rejected “as impermissible racial stereotypes.”²⁰ Indeed, the Court explained, “racial bloc voting and minority-group political cohesion never can be assumed....”²¹ The Court made clear that, “the individual is important, not his race, his creed, or his color.”²²

Two years later in *Miller v. Johnson*, the Court assessed the constitutionality of a Georgia redistricting plan that would have created three majority-black voting districts.²³ The Court struck down the plan, applying and reaffirming the rule announced in *Shaw*.²⁴ According to the *Miller* Court, “[w]hen the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, ‘think alike, share the same political interests, and

will prefer the same candidates at the polls.”²⁵ Further, the Court noted, “[r]ace-based assignments ‘embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.’”²⁶ More directly, the Court explained that “[t]he idea is a simple one: ‘At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.’”²⁷ *Shaw* and *Reno* are examples of a constitutional rule that recognizes the diversity of viewpoints within a race and that therefore rejects the notion that there are monolithic racial views, attitudes, or behaviors.²⁸ This rule applies, as *Shaw* and *Reno* demonstrate, even in situations in which the monolithic view is considered “positive” for the relevant racial group.

What of the Asian-American applicant? The school officials are seeking a second-grade teacher who, among other things, will be able to produce trust and cooperation between the school and predominantly African-American parents. The employer presumes that an African-American candidate will be able to generate such trust and cooperation from the parents by virtue of traits she is presumed to have based on her race. The employer presumes at the same time that the Asian-American applicant, again solely on the basis of race, does not have traits that will build trust or cooperation with the African-American parents.

The Supreme Court has made clear that such negative racial stereotypes, in which members of a racial group are categorically deemed to not possess a desired trait, are unconstitutional. Jury selection is one context in which the Court has applied this rule. In *Batson v. Kentucky*, the Court determined that a defendant could object on equal protection grounds to race-based peremptory challenges used to exclude potential jurors of the same race as the defendant.²⁹ The Court held that the prosecutor could not, consistent with the Equal Protection Clause, categorically assume that jurors would be sympathetic to a defendant of the same race: “[The] Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State’s case against a black defendant.”³⁰ Moreover, the Court said, it “prohibits a State from taking any action based

15 509 U.S. 630 (1993).

16 *See id.* at 634-35.

17 *Id.* at 646.

18 *See id.* at 646-69.

19 *Id.* at 647.

20 *Id.*

21 *Id.* at 653; *but see* Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1468 (1991) (“The assumption that blacks, wherever they reside, tend to be politically cohesive is supported both anecdotally and empirically.”).

22 *Shaw*, 509 U.S. at 648 (internal quotes and citation omitted).

23 515 U.S. 900.

24 *Id.* at 913.

25 *Id.* at 911-12 (quoting *Shaw*, 515 U.S. at 647).

26 *Id.* at 912.

27 *Id.* at 911 (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting) (internal quotation marks and citations omitted)).

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

29 476 U.S. 79 (1986).

30 *Id.* at 89.

on crude, inaccurate racial stereotypes....”³¹ The Court clarified that attorneys could “obtain possibly relevant information about prospective jurors,”³² but, quoting Justice Felix Frankfurter, the Court announced that “[a] person’s race simply ‘is unrelated to his fitness as a juror.’”³³

Whereas *Batson* concerned a situation in which the defendant was the same race as the excluded jurors (both were black), the Court later took up the open question of whether the Equal Protection Clause permits a prosecutor to exclude jurors of a different race than the defendant.³⁴ The Court held that “the Equal Protection Clause prohibits a prosecutor from using the State’s peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race....”³⁵ In doing so, the Court emphasized that “[r]ace cannot be a proxy for determining juror bias or competence.”³⁶ Further, “where racial bias is likely to influence a jury, an inquiry must be made into such bias,” rather than presumed solely because of the racial identity of the prospective juror.³⁷ These negative presumptions “force[] individuals to labor under stereotypical notions that often bear no relationship to their actual abilities” and they “deprive[] persons of their individual dignity....”³⁸ The presumptions brand members of a race with blanket attributes, reduce the individual to an undifferentiated part of a racial whole, consider the individual fungible, and fail to honor the autonomy and distinctiveness of the individual.³⁹

In short, the Court has stated that, under the Equal Protection Clause, it is impermissible for the government to act as though individuals of the same race think or act alike merely by virtue of their race, or to use race as a proxy for certain ideas, attitudes, or experiences.⁴⁰ Qualities or traits instead

must be determined on an individual basis.⁴¹ In the words of Ralph Richard Banks, “treat[ing] individuals on the basis of group generalizations that might not apply to any particular individual, perhaps represents the paradigmatic harm that antidiscrimination law, including [the] Equal Protection Clause, is thought to guard against.”⁴²

In our hypothetical, the school twice violates this principle. First, it presumes that the African-American candidate will be able to generate trust and cooperation solely on the basis of racial identity and without regard to individual traits.⁴³ The school also presumes, solely on the basis of race, that the Asian-American candidate does not have the desired qualities. More broadly, racial mirroring embodies these racial presumptions and thus cannot be squared with the constitutional rule that prohibits state actors from acting as if certain traits categorically follow racial identity.

B. The Equal Consideration Problem

Not only are stereotypical presumptions unconstitutional, they also produce tangible consequences for the people who are subject to them. An individual presumed on the basis of race to possess a valued characteristic will be favored in hiring, while an individual presumed on the basis of race to not possess a desired trait will be disfavored. In our hypothetical, the Asian-American applicant, who may actually have the qualities that are preferred by the school and that may give rise to a strengthened relationship between the school and the parents, is denied equal consideration for the position and may be excluded from the employment opportunity. This denial cannot be squared with the Constitution.

The Supreme Court has approved three reasons to treat individuals differently on the basis of race: race-conscious

31 *Id.* at 104.

32 *Id.* at n.12.

33 *Id.* at 87 (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946)) (Frankfurter, J., dissenting); *see also* *Holland v. Ill.*, 493 U.S. 474, 484 n. 2 (1990) (That “a prosecutor’s ‘assumption that a black juror may be presumed to be partial simply because he is black’ . . . violates the Equal Protection Clause” is “undoubtedly true.”).

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

35 *Id.* at 409.

36 *Id.*

37 *Id.* at 415.

38 *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984).

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

40 *See generally* Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 *UCLA L. REV.* 2059, 2060 (1996) (“A huge chunk of equal protection law (and antidiscrimination law more generally) is aimed precisely at barring the use of reasonable, unbigoted judgments that race is a valid

proxy for experiences, outlooks, or ideas.”); *id.* at 2062 (“One of the great tasks of antidiscrimination law over the past thirty years has been to persuade people that they ought not use race and sex as proxies, even when race and sex are statistically plausible proxies.”).

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

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

43 Indeed, the employer has not only reduced the applicant’s race to a singular interest in ascertaining whether a desired trait is present, but in doing so has exploited that racial identity. This “instrumental” use of race, Nancy Leong points out, “is antithetical to a view of . . . race . . . as a personal characteristic intrinsically deserving of respect.” Nancy Leong, *Racial Capitalism*, 126 *HARV. L. REV.* 2151, 2155 (2013).

admissions in higher education,⁴⁴ race-conscious remedies in employment for past discrimination for which the employer is responsible,⁴⁵ and race-conscious national security practices.⁴⁶ None of these covers racial mirroring, which is a forward-looking enterprise that seeks to benefit an external constituency (e.g., clients), and not a backward-looking remedial response to a state actor's own past racial discrimination.⁴⁷ Accordingly, the external legitimacy doctrine cannot be reconciled with prevailing constitutional jurisprudence, and the denial of equal consideration to the disfavored party (i.e., the hypothetical Asian-American candidate) is a constitutional violation.

C. The Performance Problem

There are also consequences for those who are positively stereotyped, like the African-American applicant in our hypothetical. The school not only presumes that the African-American teacher possesses the desired traits, but will effectively demand that, once hired, she activate those traits in order to achieve the parental engagement sought by the employer. In other words, the African-American teacher will be expected to act according to the set of characteristics she is presumed to have, without regard to whether she actually has them. An employer who hires an individual because of the way his or her racially stereotyped qualities might manifest themselves for the benefit of the employer will expect the employee to "perform."⁴⁸

In academic literature, "performance" speaks to when an individual acts "in the manner expected of a member of her group," above and beyond any "subjective intent to belong."⁴⁹ These expectations, grounded in racial stereotypes, harm the individual. The ability of the individual to assert or explain the meaning of her racial identity is displaced by a set of characteristics imposed on her by the employer. Put differently, the concern here is not just that the individual is subject to automatic stereotypes attached to her racial identity, but that the operation of these stereotypes cuts off the ability of the

individual to advance her particular attributes, which may or may not line up with the presumed bucket of attributes. Faced with such racial presumptions, the individual may develop concerns about whether she is unwittingly affirming the external presumptions and may even internalize the racial presumptions, skewing the individual's own process of racial formation.⁵⁰

Consider an example from the admissions context. The University of Texas-Austin has stated that it seeks to admit underrepresented minority students who "play against racial stereotypes," such as the "African American fencer" and "the Hispanic who has... mastered classical Greek."⁵¹ In this statement, the University not only relies on racial presumptions, but, as to the details of those stereotypes, perpetuates the stereotypical notions that African-Americans are not fencers and that Hispanics are not capable of mastering classical Greek. As a result, students from these racial groups are placed in a bind: they may gravitate towards these areas to be more racially palatable and invite greater consideration in admissions, or they may be pushed further from these areas in order to create distance between themselves and the imposed expectations even if they were otherwise interested in fencing or classical Greek.⁵² In either instance, the students' interests in these areas may be affected or influenced by the external stereotypes. But their interests should not be impaired by the operation of governmental racial presumptions. The individual, in other words, should be free of that bind.⁵³

In our running hypothetical, the school has hired an African-American teacher based on the presumption that she has qualities that will produce trust and cooperation between the school and parents. The employer expects the African-American employee, once hired, to demonstrate those traits, such that the desired trust and cooperation will develop. The African-American employee thus experiences external pressure to act in accordance with those expectations and exhibit the desired traits, even if she does not have, or is not inclined to express, those traits. The employee, furthermore, may face adverse consequences if she does not conduct herself in the manner that comports with the employer's expectations. That response, in turn, affects the meaning developed by the candidate and employee of her racial self.

D. The Stereotype Entrenchment Problem

If the Asian-American applicant actually possesses the qualities the hiring committee wants, but is denied equal consideration and therefore employment, the harms of the external legitimacy doctrine extend beyond the applicant herself

44 See *Grutter*, 539 U.S. 306 (holding that universities can take race into account when making admissions decisions).

45 See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510–11 (1989) (holding that a city cannot take race into account when making procurement decisions without identifying the city's own past discrimination that is in need of remediation).

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

47 Leading constitutional scholars agree that there are only three such acceptable departures from the constitutional ban on the use of race by state actors. See, e.g., PAULSEN, ET AL., *THE CONSTITUTION OF THE UNITED STATES* 1469 (1st ed., 2010) (enumerating the same three compelling state interests).

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

49 Jessica A. Clarke, *Identity and Form*, 103 CAL. L. REV. 747, 757 (2015).

50 See R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 839–44 (2004).

51 Tr. Oral Argument, *Fisher v. Univ. of Texas*, No. 11-345, at *61 (U.S. Oct. 10, 2012).

52 See *Pricewaterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (recognizing this catch-22 faced by employees to conform to institutional stereotypes and be more accepted, on one hand, and to express individuality and risk institutional marginalization, on the other).

53 See *id.* (noting that Title VII of the Civil Rights Act of 1964 was intended to "lift" this bind).

to the school officials, students, and parents. In particular, these other stakeholders are denied the opportunity to interact with someone of a different race and the benefit of her talents for building cooperation. The external legitimacy doctrine—and the racial mirroring it is used to justify—reinforces the presumption that only individuals of the same race are going to care about each other and effectively work together. Implementing policies based on the doctrine will result in missed opportunities to break down racial stereotypes. Indeed, students may be denied the chance to interact with, learn from, and be exposed to individuals of different races; such contact can be helpful to the development and maturation of students in an increasingly diverse society and world. As the Supreme Court has suggested, racial classifications, if used, must tear down, and not build up or strengthen, racial barriers to understanding.⁵⁴ If the value of diversity is to facilitate cross-racial engagement and awareness, it would stand to reason that a policy keeping individuals of the same race together and individuals of different races apart would actively stifle the prospects for these social benefits.⁵⁵

E. The Role Exclusion Problem

The Court's equal protection jurisprudence demands that social roles should be open to individuals of all races. Two cases dealing with gender stereotyping are particularly instructive in establishing this principle. Because racial discrimination is scrutinized even more closely than gender discrimination,⁵⁶ the principle derived from these cases applies with even greater force in the racial context.

In *Mississippi University for Women v. Hogan*, the Court considered whether the Mississippi University for Women's nursing school could "limit[] its enrollment to women."⁵⁷ The university argued that its admissions policy "compensate[d] for discrimination against women."⁵⁸ The Court held that the university's purportedly benign justification for the admissions policy had the effect of entrenching archaic and stereotypical views of women and female roles: "Rather than compensate for discriminatory barriers faced by women," the Court said, the university's "policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."⁵⁹ *Hogan* stands for the proposition that even benign explanations cannot justify categorical gender-based classifications if the classifications

embody and entrench stereotypes about the presumptive place of men or women in our society.

In *United States v. Virginia*, the Court appraised whether the Virginia Military Institute (VMI), a public undergraduate institution whose mission was to produce "citizen-soldiers," could, consistent with the Equal Protection Clause, limit enrollment to males.⁶⁰ Virginia explained that VMI needed to categorically exclude females because "the unique VMI method of character development and leadership training, the school's adversative approach, would have to be modified were VMI to admit women."⁶¹ But the Court determined that Virginia "may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females,'"⁶² or "rely on overbroad generalizations to make judgments about people that are likely to... perpetuate historical patterns of discrimination."⁶³ The Court concluded that Virginia's "great goal" of maintaining an all-male military academy that uses the adversative method "is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit."⁶⁴ *Virginia* establishes that gender-based stereotypes cannot justify gender-based classifications and that institutions must admit applicants based on their actual individual qualities rather than categorical assumptions. Again, this principle is only stronger in the race context due to the more rigid standard of review that applies to racial classifications.⁶⁵

Racial mirroring runs afoul of the principle announced in *Hogan* and reinforced in *Virginia*. It operates on the premise that certain positions should be available (only or preferably) to individuals whose racial identities mirror the predominant racial identity of the community to be served. Even where the Supreme Court has accepted racial classifications in the employment context, it is because the employer in question has engaged in discrimination in the past. That acceptance has not applied to all employers or because of any broad, forward-looking objectives.

In our hypothetical, the African-American applicant is selected for the position because her racial identity matches that of most parents. The position was therefore only functionally

54 See *Grutter*, 539 U.S. at 330 (acknowledging the importance of "cross-racial understanding," "break[ing] down racial stereotypes," and "enabl[ing] students to better understand persons of different races") (internal quotation marks and citations omitted).

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

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

57 458 U.S. 718, 720 (1982) (holding the state-supported university could not deny qualified males the right to enroll in the nursing school).

58 *Id.* at 727.

59 *Id.*

60 See *Virginia*, 518 U.S. at 519 (framing the question before the Court as whether "the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords").

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

62 *Id.* at 541 (quoting *Hogan*, 458 U.S. at 725).

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

64 *Id.* at 546. At oral argument, counsel for the Department of Justice suggested that VMI advanced stereotypical views of men as well. "[I] don't think that you can have single sex education that offers to men a stereotypical view of this is what men do," in other words participate in the military and engage in rigorous training. Transcript of Oral Argument, *United States v. Virginia*, Nos. 94-1941, 94-2107, at *14 (S. Ct. Jan. 17, 1996).

65 See *supra* note 57. To the extent that racial classifications approved by the Supreme Court embody such general views of race, I would emphasize that these limited areas—i.e., admissions in higher education, remedial employment decisions, and national security—do not cover racial mirroring.

available to the applicant who could enhance the extent to which the employer reflected the racial composition of the parents. But under the Supreme Court's equal protection jurisprudence, the employment role should be open to both on full and equal terms, without the position being the presumptive or exclusive entitlement of the applicant who happens to mirror the racial identity of the parents (or, in other situations, clients or customers).

F. *The Judicial Validation Problem*

It is undeniable that race continues to matter in a host of daily and important ways. Race informs for example, judgments about whether people are trustworthy or intelligent, informal behaviors such as walking faster near someone deemed dangerous, and formal decisions such as whether to hire someone. The Supreme Court has understood that racial stereotypes persist in modern American society.⁶⁶ In addressing its role in relation to these stereotypes, the Court has made clear that courts cannot endorse or facilitate the operation of those stereotypes. In *Palmore v. Sidoti*, the Court was faced with a case in which a white mother had the custody of her child revoked because she remarried a black man.⁶⁷ The courts below ruled that the custody determination was appropriate because the interracial remarriage was against the wishes of the father, and would subject the child to social harms.⁶⁸ The Court reversed, holding that the father's wishes and potential social reactions could not justify divesting the mother of custody for racially stereotypical reasons. The Court acknowledged that racial stereotypes exist generally and that the child in question may be stigmatized,⁶⁹ but declared that "[t]he Constitution cannot control such prejudices but neither can it tolerate them."⁷⁰ The Court also said that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."⁷¹ In other words, the courts cannot give legal credit or practical effect to racial stereotypes, even though such biases continue to exist and inform decisions in society.⁷²

Racial mirroring violates this constitutional principle, as our hypothetical demonstrates. The school wants to hire

an African-American employee because it thinks this will satisfy a predominantly African-American parent base. This decision may be predicated on school officials' beliefs that the parents may hold positive views of African-American teachers or negative views of applicants of other races, and not on the school officials' personal beliefs. There may even be an empirical foundation for the belief that African-American parents respond better to African-American teachers. But the rulings of the Supreme Court command that the courts cannot sanction social assumptions about the attributes of members of a particular race, regardless of who makes those assumptions, regardless of whether those assumptions are considered positive or beneficial, and regardless of whether the assumptions are backed by data. Racial stereotypes may exist, but the courts cannot actively validate or perpetuate them.

II. THE REMEDY

If employers are not allowed to use racial mirroring to obtain benefits, such as cooperation and trust between employees and clients, how can they obtain those benefits? Decision makers interested in ensuring that employees have certain traits (e.g., an ability to generate trust and cooperation) for purposes of realizing certain benefits from those traits (e.g., greater effectiveness in educating students) should assess whether there is any particularized evidence from applicants' records or materials that show that they have or do not have the desired traits. As Eugene Volokh rightly states, "even when race is correlated with a relevant job characteristic... one should just look at that characteristic and not use race as a proxy."⁷³

This rule has several values. It takes off the table race-based presumptions that are harmful themselves and that give rise to additional harms. It restores the individual as the determinant of whether and to what extent his or her racial identity matters, and what meaning may attach to that racial identity. It affords greater respect to the individual, as it does not treat him or her as a person with predetermined or monolithic attitudes, attributes, or experiences. It also pays more honest tribute to the constitutional command that individuals be treated as individuals, not as undifferentiated members of a racial group.⁷⁴ Counseling against the practice of racial mirroring does not pretend that race does not matter in our society, nor does it suggest that we should close our eyes to racial realities. Rather, it recognizes the harms of racial presumptions, identifies them, and urges academics and the courts to avoid promoting or adopting those presumptions.

III. CONCLUSION

This essay identifies constitutional and social harms that stem from the practice of racial mirroring, defined as engineering the racial composition of one group to reflect or match the racial composition of another group. The narrow conclusion that this essay seeks to prove is that the external

66 See *Grutter*, 539 U.S. at 333 (observing in 2003 that, in our society, "race unfortunately still matters"); see also *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated.").

67 *Palmore*, 466 U.S. at 430-31.

68 See *id.* at 431.

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

70 *Id.*

71 *Id.*

72 See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) ("The impact [of race-based segregation] is greater when it has the sanction of the law[.]").

73 See Volokh, *supra* note 41 at 2061.

74 See *Grutter*, 539 U.S. at 337 ("[A] university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual[.]").

legitimacy doctrine, along with the practice of racial mirroring that it supports, is unsustainable on constitutional and social grounds. The broader ambition of this essay is to help lay the groundwork for a constitutional and social rule that forbids the use of all categorical racial presumptions. It endeavors to make the case that, because of the harms described, categorical racial preferences must cede to individualized evaluations. The Supreme Court has recognized that, “[i]f our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury.”⁷⁵ This essay seeks to give full meaning to this principle and to thereby accelerate the moment when individuals will be treated as individuals.

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

