

Note

Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond

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INTRODUCTION

In *Grutter v. Bollinger*, the much-anticipated case challenging affirmative action practices at the University of Michigan Law School, the Supreme Court held for the first time that “obtaining the educational benefits that flow from a diverse student body” represents a compelling state interest.¹ Adopting much of Justice Powell’s analysis from the landmark *Bakke* case,² the *Grutter* majority emphasized that racial diversity within a student body promotes the “robust exchange of ideas,”³ and renders classroom discussions “more enlightening and interesting.”⁴ The Court further reasoned that universities deserve substantial leeway in making admissions decisions because they are uniquely positioned to assess the pedagogical values associated with racial diversity.⁵

Notably, however, the Court did not confine its analysis of the educational benefits of diversity to matters concerning the quality of the educational experience at the University of Michigan. Rather, it relied heavily on a separate strand of argument that emphasized the need to

1. 123 S. Ct. 2325, 2347 (2003).

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

3. *Grutter*, 123 S. Ct. at 2336 (quoting *Bakke*, 438 U.S. at 313 (Powell, J.)).

4. *Id.* at 2340 (quoting Petition for Certiorari app. at 246a, *Grutter* (No. 02-241)).

5. *Id.* at 2339 (“Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”).

produce students whose training or experience “prepares them as professionals” to function effectively within “an increasingly diverse workforce.”⁶ To underscore this point, the *Grutter* majority described the American military’s reliance on race-conscious recruitment and admissions policies for its service academies and Reserve Officer Training Corps (ROTC) programs. Citing claims raised by a group of retired military personnel in an amicus filing,⁷ the Court intimated that the return to a racially homogenous officer corps would compromise the military’s ability to provide national security.⁸ From here, “only a small step” was required for the Court to conclude that the “country’s other most selective institutions” likewise depend on racially diverse leadership to ensure their continued success.⁹ Hence, the majority explained that in the realm of business, “exposure to widely diverse people, cultures, ideas, and viewpoints” cultivates skills necessary to succeed in today’s “increasingly global marketplace.”¹⁰ Likewise, it described the visible presence of minority lawyers in the upper echelons of politics and the judiciary as crucial to the public’s continued confidence in these institutions.¹¹

What is striking about these claims is that they regard the project of diversifying higher education as a means of populating the professional ranks with a new generation of racially diverse, or at least racially attuned, leaders. In effect, it is the Court’s appeal to these *occupational needs* for diversity, as opposed to the intrinsic importance of cross-racial understanding, that forms much of the basis for its conclusion that the educational benefits of diversity constitute a compelling state interest. The notion that racially diverse leadership contributes to the functionality of certain professions is not a recent innovation. Rather, such claims have been advanced by numerous industry leaders,¹² sociologists,¹³ and

6. *Id.* at 2340 (quoting Brief of the American Educational Research Association et al. as Amici Curiae in Support of Respondents at 3, *Grutter* (No. 02-241)).

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

8. *Grutter*, 123 S. Ct. at 2340.

9. *Id.* (quoting Becton Brief, *supra* note 7, at 29).

10. *Id.*

11. According to the Court,

[U]niversities, 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.

Id. at 2341.

12. See, e.g., R. Roosevelt Thomas, Jr., *From Affirmative Action to Affirming Diversity*, in DIFFERENCES THAT WORK: ORGANIZATIONAL DIFFERENCE THROUGH DIVERSITY 27 (Mary C. Gentile ed., 1994) (surveying industry techniques for managing diversity); Joan Crockett, *Winning Competitive Advantage Through a Diverse Workforce*, HR FOCUS, May 1999, at 9 (extolling the occupational benefits of a more culturally diverse workforce).

13. See, e.g., Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589 (2001) (tracing the growth of occupational need justifications for

historians.¹⁴ In the legal context, occupational need arguments have most often arisen as defenses against allegations of racially biased hiring practices. Accordingly, both Congress and the courts have grappled with the question of how to strike the proper balance between catering to important occupational needs and upholding the law's broader prohibition against racial discrimination. During the legislative debate over Title VII of the Civil Rights Act of 1964, Congress resolved this dilemma by unambiguously rejecting the concept that a person's race could ever constitute a "bona fide occupational qualification" (BFOQ).¹⁵ Underpinning this decision was the overriding fear that employers might otherwise hire only whites, claiming that this was essential to the smooth functioning of their businesses.

In light of this statutory barrier, no court has ever accepted occupational need defenses where racially discriminatory employment practices have been challenged under Title VII.¹⁶ Paradoxically, however, where such practices have instead been challenged on Fourteenth Amendment grounds, courts have increasingly allowed a small number of professions—such as law enforcement and prison administration—to raise valid occupational need defenses.¹⁷ On these occasions, judges have distinguished between employers merely catering to client preferences and those whose race-conscious decisionmaking reflects a genuine concern about the functionality of their profession.

As a result of these developments, the statutory and constitutional frameworks governing racial discrimination now provide contradictory responses to occupational need defenses raised by certain professions. This inconsistency was prominently on display in the recent case of *Patrolmen's Benevolent Ass'n v. City of New York*, in which Judge Scheindlin found that racially motivated employment decisions furthered the state's compelling interest in effective law enforcement—thereby satisfying the first prong of the court's equal protection analysis—yet held that the police were

affirmative action); Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management*, 41 AM. BEHAV. SCIENTIST 960 (1998) (same).

14. See, e.g., JOHN P. FERNANDEZ & MARY BARR, *THE DIVERSITY ADVANTAGE: HOW AMERICAN BUSINESS CAN OUT-PERFORM JAPANESE AND EUROPEAN COMPANIES IN THE GLOBAL MARKETPLACE* (1993) (concluding that Americans are well-positioned to reap productivity gains from diversity); Jennifer Lee, *Cultural Brokers: Race-Based Hiring in Inner-City Neighborhoods*, 41 AM. BEHAV. SCIENTIST 927 (1998) (outlining past practices of relying upon occupational need in inner-city hiring).

15. See 110 CONG. REC. 2563 (1964) (tallying the vote, 108 to 70, in which an amendment that would have added race to the list of potential BFOQ characteristics was defeated).

16. See *Patrolmen's Benevolent Ass'n v. City of New York*, 74 F. Supp. 2d 321, 337 (S.D.N.Y. 1999) ("[N]o court has actually approved of a race-based BFOQ."); see also cases cited *infra* notes 70-71, 73 (confirming the statutory barrier against race-based BFOQ defenses).

17. See, e.g., *Reynolds v. City of Chicago*, 296 F.3d 524, 530-31 (7th Cir. 2002) (accepting a police department's occupational need defense in response to alleged equal protection violations); see also *infra* Subsection IV.B.1.

nonetheless barred from mounting an occupational need defense under Title VII.¹⁸

Against this backdrop, the *Grutter* Court further expanded the boundaries of the constitutional occupational need defense in two important respects. First, it suggested that a profession's reliance on racially diverse representation may warrant use of race-conscious admissions procedures at the stage of professional education. Logically, those professions citing an occupational interest in the continued use of affirmative action at universities should be doubly justified in granting preferences to racial minorities who have actually graduated and entered the labor market. Rather than consider the tensions that this reasoning would generate with current Title VII law, however, the Court simply reiterated that its holding reaches only educational—rather than hiring—decisions. Second, the *Grutter* Court identified occupational needs for diversity in fields such as business and law, which differ substantially from the more public-safety-oriented occupations that have successfully raised occupational need defenses in the past. By grouping together professions such as business and law with the military, whose unique features have entitled it to a special exemption under Title VII,¹⁹ the Court proceeded on the questionable assumption that these professions are equally dependent on racially diverse leadership.

These problematic implications of the *Grutter* Court's approach were not lost on the dissenting Justices, who warned that occupational need logic could not be easily cabined within formal educational settings or confined to the field of law. Instead, as Justice Scalia lamented, the Court's reasoning might be used to support discriminatory hiring on the ground that it injects minority representation into a profession solely to enhance the "cross-racial understanding" of nonminority coworkers.²⁰ Wary of the potential for occupational need defenses to shield discriminatory practices across a limitless array of professions, the dissenting Justices in *Grutter* sided with the framers of Title VII by resisting such arguments altogether.

For all its intellectual clarity, however, the *Grutter* dissent's categorical rejection of occupational need claims proved no more nuanced than the majority opinion. Justice Scalia's scathing critique of the Court's logic, while useful in highlighting the extremes to which occupational need arguments may be taken, recognized no contexts in which such claims

18. 74 F. Supp. 2d at 329, 339 (Scheidlin, J.).

19. See, e.g., *Coffman v. Michigan*, 120 F.3d 57, 59 (6th Cir. 1997) ("[U]niformed members of the armed forces have no remedy under Title VII of the Civil Rights Act of 1964."); *Gonzalez v. Dep't of the Army*, 718 F.2d 926, 927-29 (9th Cir. 1983) (concluding that the term "military departments" in Title VII applies only to civilian employees of the military and not to servicemembers).

20. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2349 (2003) (Scalia, J., dissenting) (quoting *id.* at 2339 (majority opinion)).

could be appropriate. Conspicuously absent from his dissent was any mention of the military's distinctive justification for affirmative action.²¹ Likewise, no consideration was given to other professions that might raise compelling arguments along similar lines.

Taken as a whole, the Supreme Court's discussion of occupational need in *Grutter* proved unsatisfactory in two respects, both of which this Note addresses. First, both the majority and the dissent adopted a polarized, all-or-nothing approach to occupational need defenses instead of acknowledging the possibility that such arguments may be persuasive in certain contexts while pernicious in others. As an alternative to the Court's stark approach, what is needed is a theoretical framework for determining when occupational need arguments should be accepted as compelling state interests and when they should be rejected as pretextual grounds for racial discrimination.

This Note begins to develop such a framework through the case study of the military, the profession that has most often framed its defense of affirmative action in terms of occupational need. Once the link between racial awareness and occupational performance is more precisely understood, we may then consider what institutional features make the military particularly dependent on racial diversity. To the extent that similar features exist in other contexts, the military experience should be seen as translatable, rather than entirely exceptional.

Rather than draw an arbitrary line between higher education and work settings, this Note proposes that occupational need arguments should be evaluated according to the characteristics of each profession. Taking into account the social urgency of a profession as well as the degree to which its basic functionality depends on race-conscious decisionmaking, I argue that occupational need defenses should generally be limited to a small subset of professions that address public safety matters rather than extended to encompass professions such as business and law.²² While the appropriate outer bounds of the occupational need defense will undoubtedly remain subject to disagreement, the *Grutter* Court's treatment of occupational need claims clearly overlooks crucial differences in the nature and degree to which various professions rely on racially diverse leadership.

21. Understandably, the *Grutter* Court could not have addressed every secondary issue relating to affirmative action. Still, considering the prominence of the military's justification for affirmative action in the media and in oral arguments, the dissent's silence on the matter is noteworthy. See Transcript of Oral Argument at 12, 19-22, *Grutter* (No. 02-241), http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-241.pdf.

22. Although this Note distinguishes between "public safety" and "non-public safety" occupations, these labels are used as heuristics and do not imply the existence of rigid categories. Instead, the strength of occupational need claims must ultimately be evaluated on a case-by-case basis, looking to the qualities of each individual profession. For instance, a fire department, despite its public safety orientation, might rely less on a diverse workforce than would a boot-camp-style prison or a police precinct.

The second shortcoming of the *Grutter* decision lies in its failure to address the growing divide between statutory and constitutional approaches to occupational need defenses.²³ Where racial discrimination has been alleged, there is now a pressing need for a more unified legal response to such defenses. As a simple matter of intellectual coherence, Congress and the courts should agree on the extent to which American law recognizes that a person's race may affect her ability to perform certain tasks within an organization or profession. From a judicial perspective, the current inconsistency between the statutory and constitutional precedents in this area creates unnecessary confusion, undermining the clarity and force of opinions that must address occupational need claims.²⁴ Finally, in the context of public employment discrimination, where Title VII and the Fourteenth Amendment are most obviously in tension, the success of occupational need defenses turns primarily on the nature of the allegations raised, which may be a function of little more than the plaintiff's degree of legal sophistication. Rather than countenance such anomalies, we should reconsider the proper place of such arguments within antidiscrimination law more broadly.

Accordingly, this Note proposes that Congress amend the language of Title VII to remove the statutory barrier against race-based bona fide occupational qualification defenses. Courts should then permit occupational need defenses only in those narrow circumstances where a profession establishes that racial discrimination is vital to the essence of its business. Where state actors differentiate on the basis of race, courts should impose the additional requirement that a profession demonstrate how its disruption would compromise public safety. By building upon the doctrinal approach used in response to similar arguments in the sex discrimination context, courts could construct a limited occupational need defense that would reduce the potential for abuse while still allowing racial preferences where they legitimately further a compelling state interest.

The *Grutter* Court's turn toward occupational need as a prominent justification for race-conscious decisionmaking is unsettling, even for

23. While this Note primarily addresses the interplay between Title VII and the Equal Protection Clause, this is not to suggest that these represent the only two modes of challenging racially discriminatory practices under American law. Another important tool in the antidiscrimination arsenal is Title VI of the 1964 Civil Rights Act, which dictates that persons may not be excluded from participating in federally funded programs or activities on the basis of "race, color, sex [or] national origin." 42 U.S.C. § 2000d (2000). Beginning with *Bakke*, however, the Supreme Court has maintained that Title VI merely incorporates constitutional standards, and therefore affirmative action plans that satisfy equal protection inquiries have not been thought to independently violate Title VI. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (Powell, J.); *id.* at 352 (Brennan, White, Marshall, and Blackmun, JJ.) ("Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's . . .").

24. See, e.g., *Patrolmen's Benevolent Ass'n v. City of New York*, 74 F. Supp. 2d 321 (S.D.N.Y. 1999) (finding that race-based police assignments were constitutionally defensible but statutorily impermissible due to the Title VII prohibition against race-based BFOQ claims).

proponents of affirmative action. The doctrine of occupational need is malleable and may be used to defend forms of racial discrimination that do not comport with societally held conceptions of racial justice. Insofar as we would balk at the notion of discriminating against racial minorities for the sake of preserving an occupation's survival, we should question whether concern over occupational needs is what truly motivates our support for affirmative action policies at institutions such as the University of Michigan Law School. If instead our commitment to affirmative action stems from some deeper value,²⁵ then this value should be openly acknowledged and discussed rather than hidden behind the guise of an occupational need rationale. Indeed, occupational need arguments risk diverting attention from the social justice claims that would otherwise underpin the campaign for affirmative action.²⁶ For these reasons, I sympathize with the outcome in *Grutter* yet remain wary of expanding the occupational need rationale as it pertains to race.

To warn against the potential excesses of occupational need defenses is not to preclude their use under all circumstances, however. By advocating rigorous scrutiny of occupational need claims, this Note seeks to limit such claims to situations where race-conscious measures genuinely contribute to an occupation's functionality and where the smooth operation of that occupation is of paramount interest.

Part I of this Note situates the *Grutter* outcome within the context of the Supreme Court's earlier affirmative action jurisprudence. This Part begins by examining how the Court's understanding of what constitutes a compelling state interest has expanded to include forward-looking or nonremedial justifications for affirmative action. The remainder of the Part outlines the salient features of what I have identified as the *Grutter* Court's occupational need rationale for diversity.

Part II considers the most serious criticisms of the occupational need rationale, comparing claims that appear in the *Grutter* dissents with similar arguments that have arisen in previous cases and legislative debate. Part III evaluates the case for affirmative action in military higher education with an eye toward assessing which features make certain institutions better able to invoke occupational need arguments than others.

25. For instance, some scholars have defended the continued use of affirmative action on social justice grounds. See, e.g., Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 471 (1997) (advancing a constitutional justice argument for affirmative action). Others have distinguished between "anti-differentiation" and "anti-subordination" approaches to understanding American antidiscrimination law. See, e.g., Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1005-10 (1986). From within the anti-subordination paradigm, affirmative action advocates resist the notion that all racial discrimination is equally undesirable, regardless of the group being disadvantaged.

26. By "managerializing" legal claims, occupational need arguments may "undermine law's moral commitment to redressing historical wrongs." See Edelman et al., *supra* note 13, at 1632.

Drawing lessons from the military case study, Part IV suggests a framework for how to approach occupational need defenses in the future, arguing that a limited occupational need defense would strike the proper balance between preserving occupational performance and creating a dangerous precedent that invites invidious discrimination. Part V then advances a two-part proposal for harmonizing the statutory and constitutional approaches to occupational need defenses. It concludes by underscoring the important role that judges must play in limiting race-based occupational need defenses once the statutory barrier against such claims has been removed.

I. DEFINING "COMPELLING STATE INTEREST": BEFORE AND AFTER *GRUTTER*

It is now a settled principle that the "government may treat people differently because of their race only for the most compelling reasons" and only when there are substantial assurances that no invidious purpose is afoot.²⁷ Translated into the language of equal protection jurisprudence, all racial classifications imposed by public entities must satisfy "strict scrutiny."²⁸ In practice, this means that courts apply a two-prong test—the first prong requiring that the policy in question further a compelling governmental interest, and the second requiring that the policy be narrowly tailored to achieve that end. This Note does not address the narrow-tailoring dimension of the strict scrutiny test, yet this is not to overlook its importance in the constitutional debate over affirmative action. Indeed, the divergent outcomes in *Grutter* and its sister case, *Gratz v. Bollinger*,²⁹ can be explained primarily by perceived differences in how tightly the programs in those cases were tailored to achieve their objectives. Still, the question of what constitutes a compelling state interest is also important, as no affirmative action plan can survive constitutional scrutiny without articulating such an interest.

A. Remedial and Nonremedial Justifications for Affirmative Action

Until recently, the only justifications for affirmative action that a majority of the Court had deemed sufficiently compelling to satisfy strict scrutiny were backward-looking or remedial in nature.³⁰ Thus, where an

27. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

28. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).

29. 123 S. Ct. 2411 (2003).

30. The Court accepted a forward-looking rationale for affirmative action, namely the preservation of broadcast diversity, in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 566 (1990), *overruled by Adarand*, 515 U.S. 200. In *Metro Broadcasting*, the Court applied

institution could point to a specific instance of unlawful discrimination in the past, it was free to implement race-conscious measures to undo the harm it had caused.³¹ The basic appeal of this remedial logic was twofold. First, affirmative action plans targeted at redressing a particular quantum of harm had clearer, more finite endpoints. This reassured Justices who believed that the Court should not endorse open-ended schemes designed to engineer a more socially desirable racial balance.³² Second, remedial affirmative action plans adhered more closely to the legislative purpose behind Title VII of the 1964 Civil Rights Act. In *United Steelworkers of America v. Weber*, the Court established that only those racial classifications that mirror the remedial purposes of Title VII and “do not unnecessarily trammel the interests” of whites can survive constitutional challenge.³³

Prior to *Grutter*, it remained unclear under what circumstances, if any, the Court would accept nonremedial justifications for affirmative action. On this issue, Justice O'Connor suggested in her plurality opinion in *City of Richmond v. J.A. Croson Co.* that racial classifications should be “strictly reserved for remedial settings” lest they “in fact promote notions of racial inferiority and lead to a politics of racial hostility.”³⁴ The Court carefully adhered to this basic rule of thumb over the past two decades, rejecting affirmative action plans that sought to achieve more forward-looking results such as preserving a critical mass of minority role models.³⁵

intermediate rather than strict scrutiny on the ground that benign discrimination merited a lesser standard of review. *Id.* at 564-65. Five years later in *Adarand*, however, the Court reversed course, holding that strict scrutiny was the proper standard for all government-initiated racial classifications. 515 U.S. at 227. See generally Derek Black, Comment, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923, 930 (2002) (describing the Court's treatment of remedial and nonremedial justifications for affirmative action).

31. Public employers may remedy both their own past discrimination and that of private actors where the government has been a “passive participant” in the private actors' discriminatory practices. See *Croson*, 488 U.S. at 492 (plurality opinion); *id.* at 519 (Kennedy, J., concurring in part and concurring in the judgment).

32. Justice O'Connor in particular has emphasized the duration of affirmative action programs. See, e.g., *id.* at 498 (majority opinion) (explaining the Court's reluctance to endorse affirmative action plans with “no logical stopping point” (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986) (plurality opinion))); cf. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2347 (2003) (O'Connor, J.) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

33. 443 U.S. 193, 208 (1979); see also *Johnson v. Transp. Agency*, 480 U.S. 616, 630-31 (1987) (extending the logic of *Weber* to public affirmative action programs).

34. 488 U.S. at 493 (plurality opinion).

35. See, e.g., *Wygant*, 476 U.S. at 274-76 (plurality opinion) (denying a compelling state interest in hiring minority teachers to serve as role models for minority students); see also Kathleen M. Sullivan, *The Supreme Court, 1985 Term—Comment: Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 86-91 (1986) (situating the Court's response to the role model argument in *Wygant* within the context of its 1980s jurisprudence, which emphasized remedial justifications for affirmative action).

The lone context in which a nonremedial justification for affirmative action had persisted over time was higher education—and even there its legal position had become extremely precarious.³⁶ In recent years, courts had begun to chip away at the constitutionality of the diversity rationale articulated by Justice Powell in *Bakke*, questioning its weight as precedent³⁷ and prompting the Supreme Court to revisit the issue in the University of Michigan cases. Lower courts disagreed over how to interpret the Court's few pronouncements on the status of nonremedial justifications for affirmative action. In *Taxman v. Board of Education*, Judge Mansmann concluded on both statutory and constitutional grounds that “a non-remedial affirmative action plan, even one with a laudable purpose, cannot pass muster.”³⁸ By contrast, then-Chief Judge Posner reasoned that because the Court had not spoken categorically on the matter, nonremedial justifications could still be permissible under certain circumstances.³⁹

In *Grutter*, the Supreme Court explained that, notwithstanding certain language in past opinions, it had “never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.”⁴⁰ In a narrow sense, this statement enabled the Court to conclude that preserving a racially diverse student body represented a compelling state interest. More broadly, the Court's pronouncement opened the door to a host of forward-looking justifications for affirmative action that, until recently, would have been categorically rejected by many lower courts. Having laid to rest its insistence on remedial justifications, the Court will now face the delicate task of balancing the harms of racial stigmatization against policy benefits that are neither easily measured nor time-delimited.

B. *The Occupational Need Rationale*

The *Grutter* Court's discussion of compelling state interest was divided into two segments. The first of these addressed the pedagogical benefits of the law school's affirmative action policies, while the second concentrated on the “educational benefits that flow from a diverse student body.”⁴¹ In its initial analysis, the Court posited that cross-racial dialogue breaks down stereotypes and promotes “livelier, more spirited, and simply more enlightening and interesting” classroom discussions.⁴² Borrowing from Justice Powell's analysis in *Bakke*, the Court expressed the view that

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

37. *Id.* (citing *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996)).

38. 91 F.3d 1547, 1550 (3d Cir. 1996) (Mansmann, J.).

39. See *Wittmer v. Peters*, 87 F.3d 916, 918 (7th Cir. 1996) (Posner, C.J.).

40. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2339 (2003).

41. *Id.* at 2347.

42. *Id.* at 2339-40 (internal quotation marks omitted).

rigorous academic discourse most often takes place when students share a variety of viewpoints borne out of their diverse experiences.⁴³

After reviewing the pedagogical benefits of diversity, the *Grutter* majority turned to another line of arguments that in its view “further bolstered” the law school’s claim of a compelling state interest.⁴⁴ What these arguments shared in common was their recognition of the important role that universities play in preparing students to succeed in their chosen professions. Specifically, the Court described the pressing need for tomorrow’s leaders to interact capably with people from diverse cultural backgrounds. In order to cultivate those skills, students should be “expos[ed] to widely diverse people, cultures, ideas, and viewpoints.”⁴⁵ The Court did not dwell on the importance of racial sensitivity as a virtue in its own right. Rather, the development of greater cross-racial understanding was characterized as a means of promoting the smooth functioning of “today’s increasingly global marketplace,”⁴⁶ preserving “the military’s ability to fulfill its principle [sic] mission to provide national security,”⁴⁷ and cultivating a set of political and judicial leaders “with legitimacy in the eyes of the citizenry.”⁴⁸

Upon close examination, it is the broader societal importance of the professions themselves that renders these concerns compelling state interests. That is, because these underlying professions cannot function effectively under racially homogenous leadership, affirmative action programs are warranted.⁴⁹ This notion—which I have termed the Court’s occupational need rationale—is not new, even within the Supreme Court’s own affirmative action jurisprudence. In *Bakke*, Justice Powell hinted at the concept, stating that the “‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this

43. The Court carefully avoided the conclusion that a person’s race is determinative of her viewpoints: “Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in society . . .” *Id.* at 2341.

44. *Id.* at 2340.

45. *Id.*

46. *Id.*

47. *Id.* (quoting Becton Brief, *supra* note 7, at [5]).

48. *Id.* at 2341.

49. It is worth distinguishing certain aspects of the occupational need rationale for diversity from other nonremedial justifications for affirmative action that the Court has rejected in the past. For instance, with respect to the legal profession, the majority did not contend simply that children need more minority role models, but rather that the visible presence of racial minorities in positions of authority preserves public confidence in politics and the judiciary *as institutions*. Likewise, occupational need arguments should not be equated with past efforts to justify racial preferences as remedies for general societal discrimination. Here, the compelling state interest being described is fundamentally forward-looking: It asserts that professional training and experience must keep pace with particular societal changes and institutional demands.

Nation of many peoples."⁵⁰ In *Grutter*, however, the Court took this analysis several steps further, accepting the insights of amici whose briefs described in greater detail the need for racially attuned leaders in their respective professions.⁵¹

In particular, the *Grutter* majority cited the occupational need arguments raised by representatives in the fields of business, law, and the military. Listing these examples one after the next, the Court left several important questions unanswered: Do these professions share the same kinds of occupational needs for diversity? How acute are those needs in each case? Should occupational need arguments carry equal weight across all professional contexts? With regard to this last question, the Court seemed to generalize on the basis of the military example, needing "only a small step from [the military's] analysis to conclude that our country's other most selective institutions must remain both diverse and selective."⁵² Before turning to a more detailed analysis of the military case study, it is helpful to consider the most prominent criticisms of the occupational need rationale.

II. CRITIQUING THE OCCUPATIONAL NEED RATIONALE

A. *The Grutter Dissents*

The *Grutter* majority's invocation of a new line of occupational need arguments was readily apparent to the dissenting Justices. In response, these Justices expressed one overriding concern—namely that an occupational need rationale, when carried to its logical extreme, would threaten to engulf a substantial portion of antidiscrimination law by creating a new pretext for racial discrimination.⁵³

It follows logically from the *Grutter* opinion that occupational need arguments will be used to justify the continued use of race-conscious admissions procedures at other universities. If we suppose that all professions stand to benefit from the addition of more racially aware students to their ranks, then affirmative action programs at all types of universities presumably serve a compelling state interest. Even at undergraduate colleges, where students may not enter the workforce for some time, affirmative action proponents may shift gears and defend their policies on the grounds that they promote good citizenship and contribute to

50. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (Powell, J.) (quoting *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967)).

51. *Grutter*, 123 S. Ct. at 2340.

52. *Id.* (quoting Becton Brief, *supra* note 7, at 29).

53. Thus, Justice Thomas bemoaned the lack of "any theoretical constraints on an enterprising court's desire to discover still more justifications for racial discrimination" in the future. *Id.* at 2354 (Thomas, J., dissenting).

the smooth functioning of our democracy—our most important social institution.⁵⁴

Of greater concern to the dissenting Justices in *Grutter*, however, was the potential for occupational need arguments to spill over into other contexts beyond higher education. As Justice Scalia noted, if racial understanding is “properly considered an ‘educational benefit’ at all, it is surely not one that is either uniquely relevant to law school or uniquely ‘teachable’ in a formal educational setting.”⁵⁵ If the law school may make race-conscious admissions decisions “for the purpose of putting together a ‘critical mass’ that will convey generic lessons in socialization and good citizenship,” it follows that Michigan’s civil service system may do the same.⁵⁶ Indeed, as Justice Scalia warned, any employer could defend a discriminatory hiring scheme on the ground that it promotes greater racial understanding and awareness—the very traits that multinational corporations have deemed crucial to their occupational survival.⁵⁷

The majority did not respond to this criticism directly. At best, it sought to limit the scope of its occupational need claims by restricting their applicability to the university setting. To achieve this, the Court established that universities have traditionally enjoyed a unique degree of insulation from judicial criticism.⁵⁸ The difficulty with this analysis, however, is that it refers to those university decisions that bear on pedagogical matters, where universities possess special competence. The same arguments do not apply as persuasively to a university’s ability to gauge the long-term needs of various professions whose ranks its students will eventually join.

Furthermore, an emphasis on educational autonomy does not respond to the dissent’s basic criticism that occupational need arguments are not logically limited to the educational arena. If the compelling state interest in question is the continued viability of certain institutions that depend on racially aware leadership, then all measures narrowly tailored to further this objective should presumably be treated alike, regardless of whether they originate from a university in the form of an admissions decision, or from an employer in the form of a hiring decision. In other words, the same “educational benefits” that flow from student body diversity in one case may accrue as a result of other measures that discriminate on the basis of

54. The majority referred to education as “the very foundation of good citizenship.” *Id.* at 2340 (majority opinion) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). In his dissent, Justice Scalia openly mocked the notion that the government should endorse the teaching of “good citizenship” through “patriotic, all-American system[s] of racial discrimination.” *Id.* at 2349 (Scalia, J., dissenting).

55. *Id.* at 2349.

56. *Id.*

57. *Id.*

58. *Id.* at 2339 (majority opinion) (“We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”).

race. If anything, racially discriminatory hiring or promotions are arguably *more* likely to have a demonstrable effect on occupational performance than are university admissions decisions.

B. *Historical Antecedents*

The debate over the proper place of occupational need arguments within antidiscrimination law has a much longer pedigree than the *Grutter* Court acknowledged. Since the passage of the 1964 Civil Rights Act, Congress and the federal courts have grappled with the question of whether race may constitute a bona fide occupational qualification under certain circumstances. A review of both the legislative debate over the language of Title VII and subsequent judicial interpretations of the statute reveals that the predominant tendency has been to reject such arguments. Many of the same fears raised by the *Grutter* dissent concerning the potential abuses of occupational need claims were voiced nearly four decades ago. Interestingly, the primary concern at that time was that biased whites would employ occupational need arguments in defense of racially homogenous hiring practices. Today, by contrast, the dissent in *Grutter* warns of the risk that such arguments will be used by affirmative action proponents with an unspoken desire to promote a particular vision of racial justice.

The well-known purpose of Title VII is to prevent any employer from discriminating against individuals on the basis of race, color, religion, sex, or national origin.⁵⁹ Less well-known, however, is that the statute contains one exception for intentional discrimination: Businesses may differentiate between employees on the basis of a person's "religion, sex, or national origin in those instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."⁶⁰ Notably, the statute does not make any allowance for occupational need defenses with respect to race.⁶¹ Speaking directly to the exclusion of race from the listed exemptions, one congressman stated simply: "We did not include the word 'race' because we felt that race or color would not be a bona fide

59. 42 U.S.C. § 2000e-2(a) (2000).

60. *Id.* § 2000e-2(e)(1). While the statutory exception for BFOQs applies in cases of *intentional* discrimination, the "business necessity" doctrine serves as a limited defense in cases where a facially neutral practice merely proves discriminatory in operation. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (explaining the scope of the "business necessity" defense).

61. See Note, *Race as an Employment Qualification To Meet Police Department Operational Needs*, 54 N.Y.U. L. REV. 413, 436 (1979) ("Race is simply not listed as one of the possible exceptions to [Title VII's] sweeping prohibition of employment discrimination. . . . [T]he legislative history of Title VII and the BFOQ exception clearly evidences a congressional intent to exclude BFOQ exceptions based on race from section 703(e).").

qualification, as would be 'national origin.' [Race] was left out. It should be left out."⁶²

Legislative debate over proposed amendments to Title VII left little doubt that Congress specifically intended to prevent civilian employers from making occupational need arguments based on race.⁶³ In the House, Representative John Williams introduced a provocative amendment that would have added race and color into the language of the occupational need exception. During the floor debate, Representative Williams and his supporters warned that without such a concession, many black-owned businesses, ranging from insurance companies to radio stations, would be forced to hire whites, thereby losing credibility with their clientele. In one memorable exhortation, Williams stated:

I doubt if many of our northern or western colleagues ever heard of such a thing as a pomade known as a "hair straightener" or a product known as skin whitener. These products are sold in every little store in the South. They are manufactured by Negroes and sold exclusively to Negroes. Do you want to put them out of business?⁶⁴

Apparently of greater interest to his colleagues was the fate of political parties, which without the amendment would no longer be permitted to hire only black electioneers to perform the function of recruiting black votes.⁶⁵ Opponents of the Williams amendment pointed out that such a provision would equally enable white businesses to hire only whites,⁶⁶ and this argument helped defeat the proposal.⁶⁷

An even broader amendment introduced by Senator John McClellan would have permitted an employer to use race-conscious hiring practices whenever "[he] believe[d], on the basis of substantial evidence, that the hiring of such an individual . . . would be more beneficial to the normal operations of his particular business."⁶⁸ Here again, however, opponents

62. 110 CONG. REC. 2550 (1964) (statement of Rep. Celler).

63. See William R. Bryant, Note, *Justifiable Discrimination: The Need for a Statutory Bona Fide Occupational Qualification Defense for Race Discrimination*, 33 GA. L. REV. 211, 215-18 (1998) (describing in greater detail the legislative history behind Title VII's BFOQ exemption).

64. 110 CONG. REC. 2550 (1964) (statement of Rep. Williams).

65. *Id.* at 2553 (statement of Rep. Fulton) (discussing the effects of the proposed Title VII on political parties).

66. For instance, Representative Emanuel Celler warned that an occupational need exemption for racial discrimination threatened to establish a loophole "that could well gut this title." *Id.* at 2556 (statement of Rep. Celler); see also *id.* at 2559 (statement of Rep. Corman) ("The only logical conclusion would be that we would do the same thing for white . . . companies that want to hire only white people.").

67. *Id.* at 2563 (tallying the vote in which the amendment was defeated 108 to 70).

68. *Id.* at 13,825.

warned that such a measure would undermine the efficacy of the Civil Rights Act, and the amendment was defeated.⁶⁹

Since the language of the Civil Rights Act was first negotiated on the floor of Congress, judges have considered numerous cases in which defendants have sought to shield racially discriminatory hiring practices from Title VII challenges by raising occupational need defenses. Courts have universally rejected these arguments, citing Title VII's specific prohibition of occupational need defenses in cases involving racial discrimination.⁷⁰ For instance, in the Second Circuit case of *Knight v. Nassau County Civil Service Commission*, a black employee successfully sued his employer under Title VII for transferring him to the minority recruitment department against his preference and solely on the basis of his race.⁷¹ Judge Oakes explained:

No matter how laudable the Commission's intention might be in trying to attract more minority applicants to the Civil Service the fact remains that Knight was assigned a particular job (against his wishes) because his race was believed to specially qualify him for the work. This is a violation of Title VII.⁷²

In a similar case in the Fifth Circuit, Judge Simpson suggested that a state board of inspections may have violated Title VII by assigning a black employee to inspect only black barbershops because his race made him less likely to be subjected to physical violence in dangerous inner-city neighborhoods.⁷³ As these opinions demonstrate, even when presented with cogent arguments as to why race furthers an occupational interest, federal courts have deferred to Congress's judgment that those accused of violating Title VII by engaging in racially discriminatory hiring shall have no recourse to occupational need defenses.

C. *An Absence of Theory*

Given concerns over the potentially limitless scope of occupational need arguments, what is lacking is a rigorous doctrinal framework to help

69. *Id.* at 13,825-26 (tallying the vote in which the amendment was defeated 61 to 30).

70. *See, e.g.,* *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1308 (7th Cir. 1989) ("Title VII's defense of bona fide occupational qualification . . . is unavailable where discrimination is based on race, color, or ethnicity." (citation omitted)), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071-72 (codified at 42 U.S.C. § 1981 (2000)); *Burwell v. E. Air Lines, Inc.*, 633 F.2d 361, 370 n.13 (4th Cir. 1980) ("The statutory BFOQ defense . . . is not permitted as a defense to race discrimination in employment.").

71. 649 F.2d 157 (2d Cir. 1981) (Oakes, J.).

72. *Id.* at 162.

73. *Miller v. Tex. State Bd. of Barber Exam'rs*, 615 F.2d 650, 651 (5th Cir. 1980) (Simpson, J.).

distinguish between legitimate and illegitimate occupational need claims in the area of race. Without a theory of what makes certain professions more dependent on racial diversity and racial sensitivity than others, courts must either accept or reject occupational need arguments on a categorical basis. To jettison the concept entirely would be to ignore the reality that racial awareness can play a vital role within certain professional contexts. On the other hand, to embrace the concept without qualification, or to generalize reflexively across all professions, would be to risk precisely the kinds of abuses that Congress warned of during the Title VII debate and that the dissent in *Grutter* has recently revisited.

One way to develop a workable doctrinal framework in this area is to study professions that have made strong occupational need arguments in the past, with an eye toward understanding what features make them particularly reliant on racially diverse leadership. Taking this approach, I now turn to the case study of the military, a profession regarded by many as having a legitimate need for racial diversity in its officer corps. Because of the unique history of race relations between black and white servicemembers, the African-American military experience serves as the focal point of my inquiry.

III. THE HISTORY OF AFFIRMATIVE ACTION IN MILITARY HIGHER EDUCATION: A CASE STUDY

A. *From Segregation to Affirmative Action*

African Americans have fought in every war the United States has waged,⁷⁴ yet throughout most of American history, black soldiers were relegated to segregated units, assigned primarily menial tasks, and denied recognition of their sacrifices.⁷⁵ In the wake of World War II, the American military abolished its longstanding practice of racial segregation in accordance with President Truman's Executive Order 9981, which mandated "equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin."⁷⁶ This pronouncement, while unmistakably progressive for its era, was

74. MICHAEL LEE LANNING, *THE AFRICAN-AMERICAN SOLDIER: FROM CRISPUS ATTUCKS TO COLIN POWELL* 292 (1997).

75. See generally BERNARD C. NALTY, *STRENGTH FOR THE FIGHT: A HISTORY OF BLACK AMERICANS IN THE MILITARY* (1986) (describing the treatment of black soldiers from colonial times through the Vietnam War).

76. Exec. Order No. 9981, 3 C.F.R. § 617.1 (1948). For an excellent history of the racial integration of the American military, see NAT'L DEF. RESEARCH INST., RAND, *SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT* 158 (1993), <http://www.rand.org/publications/MR/MR323/index.html> (under "5. Potential Insights from Analogous Situations Integrating Blacks into the U.S. Military" hyperlink).

motivated in part by the military's assessment that an integrated force would be more efficient and combat-ready.⁷⁷ Shortly thereafter, pressing shortages of manpower during the Korean War ensured the demise of quotas restricting African Americans from entering the armed forces.⁷⁸ Although the military announced the integration of its last segregated unit on October 30, 1954⁷⁹—just five months after the Supreme Court's ruling in *Brown v. Board of Education*—military culture was slow to adapt, evolving gradually against the backdrop of the civil rights movement. In the meantime, black servicemen continued to encounter profound discrimination, and residual tensions sparked “a wave of serious race riots at military installations in the United States and around the world between 1941 and 1946.”⁸⁰

If desegregation represented the military's most important racial reform, it was soon followed by another challenge—that of integrating the leadership ranks. In the three decades following President Truman's desegregation order, African Americans never comprised more than four percent of the military's commissioned officers, despite a growing proportion of black troops in the enlisted ranks.⁸¹ Only 116 black officers graduated from the three major service academies in 1968, yet this represented an enormous increase over the fifty-one black officers who had graduated between 1963 and 1968, and the sixty who had graduated between 1877 and 1963.⁸² While ROTC programs were then, as now, a major source of black officers, only a tiny percentage of all such commissions were granted to students at historically black colleges and universities throughout the 1960s.⁸³

As the enlisted personnel grew increasingly diverse, the presence of an almost exclusively white officer corps exacerbated racial tensions, occasionally to the point of jeopardizing the common sense of purpose necessary for military effectiveness.⁸⁴ Lieutenant General Frank Petersen,

77. See MORRIS J. MACGREGOR, JR., *INTEGRATION OF THE ARMED FORCES, 1940-1965*, at 397, 428 (1981).

78. *Id.* at 459.

79. *Id.* at 473.

80. NAT'L DEF. RESEARCH INST., *supra* note 76, at 179.

81. Thus, African Americans comprised 2.3% of all military officers in 1971, 3.4% in 1976, and 4% in 1978. NALTY, *supra* note 75, at 313, 340. Over this time period, the proportion of black troops in the enlisted ranks rose to 18.4% in 1978. *Id.* at 340. Aggregate statistics mask significant differences across service branches. For example, in 1976 the Army enrolled 23.7% black enlisted soldiers and 5.2% black officers, compared to the Navy's 8% black enlisted soldiers and just 1.6% black officers. *Id.*; see also MACGREGOR, *supra* note 77, at 568 (providing statistics for the 1960s by branch).

82. MACGREGOR, *supra* note 77, at 569.

83. *Id.* at 570.

84. See NAT'L DEF. RESEARCH INST., *supra* note 76, at 180 (“Armed forces experienced numerous outbreaks of racial hostility and violence in a worldwide pattern . . . Riots and protests at bases in the United States and abroad, and even on Navy ships at sea, reached a level that clearly undermined morale and threatened to impede the smooth functioning of military units.”).

Jr., recalled the state of race relations within the Marine Corps during the Vietnam War, saying, "In Vietnam, racial tensions reached a point where there was an inability to fight . . . We were pulling aircraft carriers off line because there was so much internal fighting. . . . Platoons that were 80 percent minority were being led by lieutenants from Yale who had never dealt with ghetto blacks."⁸⁵

In 1969 and 1970 alone, the Army catalogued more than 300 race-related internal disturbances, which resulted in the deaths of seventy-one American troops.⁸⁶ The racial politics of the era, and the unpopularity of the draft in particular, contributed to heightened levels of dissension within the ranks throughout the Vietnam War. Yet in drawing lessons from this era, the military also concluded that officers' difficulties interacting with racial minorities within their charge substantially impaired their ability to anticipate, forestall, and subdue such uprisings.⁸⁷ The military further surmised that the dearth of black officers had weakened morale by depriving young black servicemen of role models and confirming their suspicions that the military had no place for African Americans within its leadership ranks.⁸⁸

The need to recruit more black officers, though widely acknowledged, did not immediately prompt the Department of Defense to establish a coordinated affirmative action strategy.⁸⁹ Instead, the military branches developed ad hoc internal policies designed to spark minorities' interest in military careers and expand the pool of applicants to service academies or ROTC programs.⁹⁰ In 1988, the Department of Defense issued Directive 1350.2, requiring each branch to formulate, maintain, and review

85. David Maraniss, *U.S. Military Struggles To Make Equality Work*, WASH. POST, Mar. 6, 1990, at A1 (internal quotation marks omitted).

86. See NALTY, *supra* note 75, at 309.

87. See, e.g., *Hearings Before the Spec. Subcomm. on Disciplinary Problems in the U.S. Navy of the Comm. on Armed Servs.*, 93d Cong. 16-17 (1973) [hereinafter *Disciplinary Problems*] (testimony of Admiral E.R. Zumwalt, Jr.) (recommending enhanced racial sensitivity training for commanders and enlisted men alike as a means of reducing racial uprisings aboard naval vessels); see also ALAN L. GROPMAN, *THE AIR FORCE INTEGRATES: 1945-1964*, at 159-63 (2d ed. 1998) (describing the May 1971 race riot at Travis Air Force Base and the impetus it provided for greater racial sensitivity training of officers); NALTY, *supra* note 75, at 317 ("Violence and even death proved necessary to drive home the realization that . . . even commanding officers had only the faintest idea what the black man and woman in the service were thinking.").

88. 1 U.S. DEP'T OF DEF., *REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES 57-59* (1972), *reprinted in* 13 *BLACKS IN THE UNITED STATES ARMED FORCES: BASIC DOCUMENTS* 455, 529-31 (Morris J. MacGregor & Bernard C. Nalty eds., 1977).

89. In fact, the 1962 Committee on Equality of Opportunity in the Armed Forces (the Gesell Committee) considered and rejected an early proposal to provide preferential treatment for blacks to achieve better representation in the leadership ranks. MACGREGOR, *supra* note 77, at 539.

90. See *id.* at 567-69 (discussing various innovative recruitment practices unveiled in the 1960s).

affirmative action plans with “established objectives and milestones.”⁹¹ To the present, each branch remains free to develop its own policies provided it achieves the common goals of promoting diversity and fostering racial sensitivity within the officer corps.

Setting aside direct professional appointments, such as those for JAG and medical personnel, most military officers begin their training either in one of the three major service academies or in an ROTC program.⁹² Although each service branch operates its own affirmative action scheme, racial minority status is almost universally used as a “plus factor” in admissions.⁹³ At West Point, the U.S. Military Academy (USMA) sets targets for minority admissions based on “minorities’ representation in the national population and in the national pool of college bound people, and their representation in the Army.”⁹⁴ Similarly, the U.S. Naval Academy (USNA) has stated that “[b]ecause of the lower qualification rate of minorities, the Academy makes offers of appointment to the majority of qualified minorities to achieve the Chief of Naval Operations’ commissioning goals for minorities.”⁹⁵ Thus, the Navy actively monitors USNA actions to ensure the commissioning of “at least seven percent Black Navy officers annually starting with USNA Class of 1994.”⁹⁶ The U.S. Air Force Academy (USAFA) suggests that its admissions standards are the same for minorities and whites. However, it notes that between 1991 and 1995, 28% of white applicants met the minimum criteria compared to 18% of minority applicants, yet 76% of eligible minorities received offers compared to 51% of eligible whites.⁹⁷ Finally, the U.S. Coast Guard, while insisting that it does not accept academy candidates on the basis of race, nonetheless provides special scholarships and training programs available exclusively for college students enrolled “at an approved institution with a minimum 25% minority population.”⁹⁸

91. U.S. DEP’T OF DEF., DIRECTIVE 1350.2 § 4.4 (2003), http://www.dtic.mil/whs/directives/corres/pdf/d13502wch1_081895/d13502p.pdf (reciting the text of the 1988 directive).

92. Approximately 17% of officers hail from an academy, 40% from ROTC, 17% from Officer Training/Candidate School (OTS/OCS), 21% from direct appointment, and 5% from other sources. OFFICE OF THE UNDERSECRETARY OF DEF. PERS. & READINESS, U.S. DEP’T OF DEF., CAREER PROGRESSION OF MINORITY AND WOMEN OFFICERS 18 (1999).

93. *See id.* at 19-20 (describing the relationship between broader Department of Defense goals and individual branch policies).

94. U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-94-95, MILITARY ACADEMY: GENDER AND RACIAL DISPARITIES 13 (1994).

95. U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-93-54, NAVAL ACADEMY: GENDER AND RACIAL DISPARITIES 38 (1993).

96. U.S. DEP’T OF THE NAVY, OPNAV INSTRUCTION NO. 5354.3D, NAVY AFFIRMATIVE ACTION PLAN 10 (1991), <http://neds.nebt.daps.mil/Directives/5354d3.pdf>.

97. U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-93-244, AIR FORCE ACADEMY: GENDER AND RACIAL DISPARITIES 34-35 (1993).

98. U.S. Coast Guard & Coast Guard Reserve, U.S. Dep’t of Homeland Sec., College Student Pre-Commissioning Initiative (CSPI), at <http://www.gocoastguard.com/cspi.html> (last visited Dec. 1, 2003).

In addition to adjusting their admissions criteria, service academies target minorities in their preapplication recruiting and training efforts. In particular, academy preparatory schools play a major role in boosting the number of racial minorities qualified to enter the service academies. Originally created to prepare enlisted personnel for redeployment into the officer corps, these preparatory schools now train substantial numbers of racial minorities who need an additional year after high school to develop their academy credentials.⁹⁹ In 1990, for instance, the three major preparatory academies—the U.S. Military Academy Preparatory School (USMAPS), U.S. Naval Academy Preparatory School (USNAPS), and U.S. Air Force Academy Preparatory School (USAFAPS)—admitted a combined total of 905 students, a robust number considering that only 3963 cadets and midshipmen were admitted to the actual service academies in the same year.¹⁰⁰ Racial minorities comprise nearly one-quarter of the class at USMAPS and nearly half of the class at USNAPS and USAFAPS.¹⁰¹ Correspondingly, about one-third of all minorities admitted to the service academies have benefited from a year of boot-camp-style training at an academy preparatory school.¹⁰² As a result of this additional training, service academies ensure that their incoming classes are more uniformly qualified, with everyone meeting certain baseline requirements of knowledge and physical fitness. At a cost of between \$40,000 and \$60,000 per student, these fully subsidized schools represent a substantial government investment.¹⁰³ Although admission to preparatory academies is open to all students, preference is given on the basis of race.¹⁰⁴

Likewise, ROTC scholarships are disproportionately allotted to racial minorities as enticements to consider a career in the armed forces. In the Army, for instance, black applicants are two times more likely to be awarded an ROTC scholarship than white applicants due to the large number of scholarships earmarked for historically black colleges and universities.¹⁰⁵ In 1996, historically black colleges and universities

99. See U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-92-57, DOD SERVICE ACADEMIES: ACADEMY PREPARATORY SCHOOLS NEED A CLEARER MISSION AND BETTER OVERSIGHT 11 (1992).

100. *Id.* at 9. In 1990, USMAPS enrolled 303 students, USAFAPS enrolled 256 students, and USNAPS enrolled 346, 36 of whom were preparing for admission to the Coast Guard Academy. *Id.*

101. *Id.* at 13 fig.2.1. These data are drawn from the preparatory school classes of 1988-1989 and 1989-1990. *Id.* at 12.

102. See OFFICE OF THE UNDERSECRETARY OF DEF. PERS. & READINESS, *supra* note 92, at 35-39 (providing disaggregated statistics for the Army, Navy, and Air Force).

103. See CHARLES C. MOSKOS & JOHN SIBLEY BUTLER, ALL THAT WE CAN BE 91 (1996).

104. See Becton Brief, *supra* note 7, at 24 (“Each preparatory academy uses a race-conscious admission policy.”).

105. MOSKOS & BUTLER, *supra* note 103, at 84. This disparity exists despite the significantly lower SAT scores and high school grade point averages of candidates at historically black colleges and universities. CADET COMMAND HEADQUARTERS, U.S. ARMY, SCHOLARSHIP FACT

accounted for over forty percent of all ROTC commissions awarded to African Americans in the Army, Navy, and Marines, and one-third of all such commissions in the Air Force.¹⁰⁶ To raise awareness about ROTC opportunities, Junior ROTC programs have been introduced to a growing number of high schools in minority communities. Between 1992 and 1999, enrollment in such programs increased by nearly 65%.¹⁰⁷ As a final recruiting device, recently commissioned minority officers may be assigned the full-time task of persuading underrepresented minorities to apply for ROTC programs.¹⁰⁸

Affirmative action efforts have opened the door to military education for record numbers of African Americans, helping to ensure that the American officer corps is far more racially diverse than it was a generation ago. Whereas 110 African Americans were admitted to all three service academies in 1968, nearly the same number are currently enrolled in just the West Point Class of 2004.¹⁰⁹ Of the entire corps of active duty officers, approximately 19% are racial minorities, including nearly 9% African Americans.¹¹⁰ This figure, while unprecedented, remains disproportionately low compared to the nearly 22% of African Americans currently occupying the enlisted ranks.¹¹¹ Without aggressive race-conscious measures designed to boost enrollment in the service academies and ROTC programs, military officials assert that the leadership gap would widen once again, reinstating a nearly all-white officer corps just as the enlisted ranks become more racially diverse.¹¹²

B. *The Military's Occupational Need Rationale*

The arguments that military experts have invoked in defense of affirmative action differ substantially from the standard diversity rationale that emerged in the two decades after the Supreme Court's *Bakke*

SHEETS: 2001 PROFILES imgs.1-2, at http://www.rotc.monroe.army.mil/scholarship_HPD/Scholarships%20Fact%20Sheets/2001%20Profiles.ppt (last visited Nov. 24, 2003).

106. OFFICE OF THE UNDERSECRETARY OF DEF. PERS. & READINESS, *supra* note 92, at 32. Overall, black students were awarded ten percent of all ROTC commissions in 1996. *Id.*

107. *Id.* at 40. For a description of the mechanics of JROTC programs, see LAWRENCE M. HANSEN & ABBY E. ROBYN, RAND, IMPLEMENTING HIGH SCHOOL JROTC CAREER ACADEMIES 4-10 (2000).

108. One such program is the Air Force Gold Bar program, which places one minority recruiter at each affiliated historically black college or university. OFFICE OF THE UNDERSECRETARY OF DEF. PERS. & READINESS, *supra* note 92, at 42.

109. See U.S. Military Acad. at W. Point, Class of 2004: Class Profile, at <http://www.usma.edu/Class/2004/profile.asp> (last visited Nov. 24, 2003).

110. STATISTICAL SERIES PAMPHLET NO. 02-2, SEMIANNUAL RACE/ETHNIC/GENDER PROFILE BY SERVICE/RANK OF THE DEPARTMENT OF DEFENSE & U.S. COAST GUARD 5 (2001), <https://www.patrick.af.mil/DEOMI/Observances%20&%20Demographics/Deomographics/9-01.pdf>.

111. *Id.*

112. See Becton Brief, *supra* note 7, at 5, 7, 30.

decision.¹¹³ Unlike their civilian counterparts, military officials have placed relatively little emphasis on the intrinsic benefits students derive from taking part in a vibrant intellectual atmosphere characterized by the exchange of diverse viewpoints. Nor have they advanced social justice claims suggesting that officer commissions are scarce public employments that should be allocated more fairly across different segments of society. Instead, the military's chief contention has been that a racially diverse officer corps is indispensable for ensuring unit cohesion and preserving high morale among active duty troops.¹¹⁴

The military has traditionally advanced two distinct theories of how a racially diverse officer corps furthers critical military objectives, both of which featured prominently in the brief filed by retired military officers in *Grutter*. Although conceptually distinct, these strands of reasoning are often interwoven and used interchangeably in military and court documents. By examining the implications of each strand separately, we may arrive at a clearer understanding of how racially diverse leadership affects military performance.

1. *Race as a Bona Fide Occupational Qualification*

Because military officers are responsible for managing relationships within a diverse company of troops, sensitivity toward racial matters is considered an invaluable job qualification. A climate of racial discrimination, when left unchecked, has proven detrimental to the common sense of purpose necessary to motivate soldiers in a combat theater.¹¹⁵ In the opinion of military historian Bernard Nalty,

[T]he outbreaks of racial violence [prior to the 1970s] . . . could be seen as manifestations of a general collapse of morale At the root of the problem was a loss of confidence in the military as an institution, its officers, and its values. Mistrust gave way to contempt, and contempt to disobedience and revenge.¹¹⁶

113. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-13 (1978) (Powell, J.).

114. See Becton Brief, *supra* note 7, at 5 (asserting that a "racially diverse officer corps . . . is essential to the military's ability to fulfill its principle [sic] mission to provide national security"); see also U.S. DEP'T OF DEF., DIRECTIVE NO. 1440.1, THE DOD CIVILIAN EQUAL EMPLOYMENT OPPORTUNITY PROGRAM § 5.2.3 (1987) (describing affirmative action programs as "essential elements of readiness that are vital to [the] accomplishment of the national security mission").

115. See NALTY, *supra* note 75, at 305-11, 321-24. See generally Holly O'Grady Cook, *Affirmative Action: Should the Army Mend It or End It?*, 151 MIL. L. REV. 113, 156-60 (1996) (citing historical examples of racial tensions undermining unit morale from World War II through more recent incidents of racial extremism at Fort Bragg).

116. NALTY, *supra* note 75, at 309.

Similarly, military experts responsible for overseeing several Army studies relating to unit cohesion have testified before Congress that the quality of relationships among soldiers continues to be “a critical factor in combat motivation.”¹¹⁷ Commanding officers alerted to this reality seek to foster an environment conducive to racial sensitivity, avoiding stereotypical judgments and punishing instances of racial intolerance. Because discrimination often occurs in ways imperceptible to most officers, preserving open lines of communication between soldiers and their superiors is also critically important.¹¹⁸ Above all, soldiers must feel confident that their grievances will be recorded and taken seriously. As the Army Affirmative Action Plan asserts, “Leaders at all levels promote individual readiness by developing competence and confidence in their subordinates. A leadership climate in which all soldiers perceive they are treated with fairness, justice, and equity is crucial to the development of this confidence.”¹¹⁹

The emphasis on racial sensitivity as a skill useful in crisis management is understandable given the military’s recent history of racial confrontations. However, this conception does not capture the extent to which minority officers experience frustrations with their career environment.¹²⁰ For instance, survey data reveal that black servicemen often resent having to fit into a dominant white culture, in part by self-consciously adjusting their mannerisms and speech patterns.¹²¹ Some insist that the lack of black officers limits their opportunities for mentoring because white officers find it more difficult to relate to their experiences.¹²² At a minimum, such disaffection, while perhaps not sufficient to spark race

117. *Policy Concerning Homosexuality in the Armed Forces: Hearing Before the Senate Comm. on Armed Servs.*, 103d Cong. 248 (1993) [hereinafter *Policy Concerning Homosexuality*] (testimony of William Darryl Henderson, former Commander of the Army Research Institute).

118. See NALTY, *supra* note 75, at 282 (describing the 1960s as a time when “communication between the largely white officer corps and black enlisted men could be so tenuous that a commander might remain blissfully unaware of patterns of racial discrimination that black servicemen found infuriating”); see also GROPMAN, *supra* note 87, at 157 (reporting the Air Force’s assessment that a lack of communication between its officers and airmen accounted for a pattern of racial tensions).

119. U.S. DEP’T OF THE ARMY, PAMPHLET 600-26, DEP’T OF THE ARMY AFFIRMATIVE ACTION PLAN § 1-4 (1990), http://www.usapa.army.mil/pdffiles/p600_26.pdf.

120. Based on two thousand interviews, a congressional task force reported sharp differences in how enlisted personnel from different racial backgrounds rated the equal opportunity climate. See GEORGE STEPHANOPOULOS & CHRISTOPHER EDLEY, JR., AFFIRMATIVE ACTION REVIEW: REPORT TO THE PRESIDENT § 7.3 (1995), <http://clinton2.nara.gov/WH/EOP/OP/html/aa/aa07.html>.

121. See SUSAN D. HOSEK ET AL., MINORITY AND GENDER DIFFERENCES IN OFFICER CAREER PROGRESSION 61 (2001). See generally OFFICE OF THE UNDERSECRETARY OF DEF. PERS. & READINESS, *supra* note 92, at 82-88 (summarizing the findings of numerous surveys).

122. In the words of one black officer, “The biggest hang-up in finding a mentor is that the [commanding officer] has to see himself as a young [junior officer] in you. [White officers] don’t see us that way.” HOSEK ET AL., *supra* note 121, at 60 (alterations in original) (internal quotation marks omitted).

riots, creates powerful disincentives for minority soldiers to exert maximum effort in their jobs.

The notion that racial sensitivity should be considered a bona fide occupational qualification does not imply that white officers can never suitably interact with minorities in their company. On the contrary, much of the support for affirmative action in military higher education stems from the belief that white officers become more attuned to racial concerns by training in an environment that brings them into constant contact with qualified minorities.¹²³ Such experiences are thought to be particularly important for white students who have not had prolonged interactions with minorities in the past. While this line of reasoning makes a clear case for admitting more African-American students into military education programs, its downside is in seeming to treat the presence of black students as a mere means toward the end of racial sensitivity training. Behind this view lies the assumption that all officers, regardless of race, can ultimately develop the race-relationship skills necessary to prepare them for a leadership role in the future.

Instead, minority officer candidates may, by virtue of their life experiences, be inherently better positioned to understand and respond to racial dynamics than are their white peers. Thus, while immersion in a multicultural environment might conceivably help disabuse white officers of glaring misconceptions about racial minorities, it is doubtful whether such training could ever substitute for a lifetime of confronting racial prejudice and learning to relate to other marginalized members of society. According to this logic, African Americans should be admitted to officer training programs not simply because they facilitate useful diversity training, but also because they bring certain indispensable insights to the leadership pool.

In the military, higher education serves as the gateway into the officer corps.¹²⁴ Affirmative action at the university level therefore represents a crucial means of populating the officer corps with leaders who possess the capacity to manage increasingly diverse enlisted personnel. By highlighting the importance of diversity within the context of urgent military operations, the military has attempted to establish a clear link between affirmative action and a compelling occupational need.

123. See Becton Brief, *supra* note 7, at 28 (“[P]reparing officer candidates for service, let alone *command*, in our racially diverse military is extraordinarily difficult in a racially homogenous educational setting.”).

124. MICHAEL R. THIRTLE, RAND, EDUCATIONAL BENEFITS AND OFFICER-COMMISSIONING OPPORTUNITIES AVAILABLE TO U.S. MILITARY SERVICEMEMBERS 8 (2001) (“[R]oughly 98 percent of all officers in the military had at least a 4-year college degree in 1996.”), <http://www.rand.org/publications/MR/MR981/index.html>.

2. *Diversity as a Matter of Institutional Legitimacy*

A second strand of argument in defense of military affirmative action asserts that the mere presence of African Americans in positions of leadership within the U.S. military helps to dispel perceptions of institutional bias, reassuring black soldiers and prospective recruits that their careers will not be artificially constrained by glass ceilings. Given the slow pace at which the U.S. military has desegregated, it is hardly surprising that minority soldiers might now look to the current composition of the officer corps to see how fully the institution has embraced the notion of equality of opportunity. Without continuing evidence that minorities are permitted to advance within the leadership ranks, both enlisted personnel and young officers would be more readily discouraged from excelling in their duties, to the detriment of company morale.¹²⁵ While it may seem implausible that troops carefully monitor annual promotion statistics for minority officers, it is not difficult to imagine that a reversion to commissioning a negligible percentage of African-American officers would have powerful effects on soldiers' overall perceptions.

Notably, the argument that a diverse officer corps helps to preserve the military's credibility does not necessarily depend on any actual interaction between soldiers and minority officers. Instead, this rationale imagines minority officers inspiring others from afar, much in the way Colin Powell symbolizes for many Americans the military's more progressive attitude toward race relations.¹²⁶ Thus, during the early planning of the Navy's affirmative action program, one naval commander reasoned:

[I]f I . . . can be the best naval officer that the U.S. Navy has ever seen, but just happened to be black, I think that in itself will have more impact on the black community, my black contemporaries, and the young blacks that are following, than anything else. If they realize that . . . a black can make it . . . then they are going to look twice at the possibilities of establishing a [military] career.¹²⁷

As this observation suggests, the preservation of a diverse officer corps is relevant not only to an audience of current soldiers but also to an audience of prospective recruits. In other words, racial diversity sends external as well as internal signals regarding the openness of the military as

125. See Cook, *supra* note 115, at 157 ("If soldiers do not believe . . . that they have an equal chance to progress, then morale and discipline problems will arise which interfere with the military mission.").

126. See, e.g., Robert Worth, *Beyond Racial Preferences*, WASH. MONTHLY, Mar. 1998, at 28, 28 (describing a town meeting at which President Clinton defended affirmative action by making reference to Colin Powell).

127. *Disciplinary Problems*, *supra* note 87, at 595 (testimony of Commander B.W. Cloud).

an institution. It is not surprising that affirmative action programs rapidly gained momentum at a time when the U.S. military had just shifted away from the draft and toward an “All Volunteer Force.”¹²⁸ Forced to compete with the private sector as it tried to attract young minorities into the enlisted ranks, the military not only engaged in an “energetic public relations” campaign, but also redoubled its efforts to recruit minority officers.¹²⁹

Finally, it follows logically from the concern for the military’s institutional credibility that white officers—no matter how racially sensitive—cannot serve interchangeably as inspiration for black troops or prospective recruits. Here, the desired result depends on the actual presence of minorities in the officer corps. Military higher education is thus seen as a critical device for placing minorities into the officer corps and ultimately into the public eye.

C. *The Occupational Need for Racial Preferences Beyond Higher Education*

The notion that occupational need arguments can be logically contained within the sphere of higher education is unsupported by the military case study. Just as service academies rely on race-conscious admissions and recruiting tactics to attract more racial minorities to the military profession, promotion boards over the past thirty years have taken special measures to ensure that racial minorities advance into higher, more visible positions of authority within the command structure.¹³⁰ Specifically, boards have applied guidelines to ensure both that past discrimination is considered when evaluating candidates and that minorities are selected at a rate comparable to the selection of nonminorities.¹³¹

From an occupational need standpoint, the use of affirmative action in promotions is justified for precisely the same reasons outlined in the context of service academy admissions—namely, improved racial dynamics between the leaders and the led, role modeling and perceived advancement opportunities, and the maintenance of positive societal impressions. Notwithstanding this logic, military promotion guidelines designed to accelerate the advancement of minority officers have attracted criticism.¹³²

128. See STEPHANOPOULOS & EDLEY, *supra* note 120, at 45.

129. MACGREGOR, *supra* note 77, at 567-68. One sign that the Army is aggressively pursuing new recruits is that it spends nearly \$100 million annually on advertising and has retained two public relations firms that specifically target minority audiences. Joe Nicholson, *U.S. Army Enlists Burnett Agency*, EDITOR & PUBLISHER, July 10, 2000, at 20, 20.

130. For a detailed description of military affirmative action in the promotion context, see Cook, *supra* note 115, at 140-45.

131. All services except the Air Force set a goal of equality in their selection rates. Yet these are aspirations rather than fixed quotas. See HOSEK ET AL., *supra* note 121, at 24.

132. See, e.g., Cook, *supra* note 115, at 117 (arguing that the Army’s pre-1995 promotion policy violates the strict scrutiny standard as articulated in *Adarand*).

In March 2002, a federal judge declared unconstitutional the Army's "equal opportunity" promotion instructions,¹³³ although this position now seems at odds with the *Grutter* Court's dicta suggesting that the military has a legitimate occupational interest in preserving a racially diverse leadership class.

Despite the *Grutter* majority's emphasis on the special status of universities, we have observed that the logical boundary between the use of occupational need arguments in higher education and work settings is highly permeable. This conclusion does not necessarily imply that occupational need arguments should be categorically rejected. Instead, it underscores the need for a better set of guidelines to determine which occupational need defenses should be embraced and which should be treated with skepticism. As I propose in the next Part, a sensible basis for making such determinations would be to consider the characteristics of each occupation and weigh the merits of occupational need defenses in these distinct settings.

IV. DETERMINING THE PROPER SCOPE OF THE OCCUPATIONAL NEED DEFENSE

A. *Salient Features of the Military Case*

Although the *Grutter* majority saw fit to generalize broadly from the military example,¹³⁴ its assumption that other selective institutions share a similar occupational profile is problematic. While the military's occupational need for diversity is instructive, it should not be reflexively mapped onto other contexts without first understanding what makes the military's claims rise to the level of a compelling state interest. This analysis may proceed along two dimensions. The first of these weighs the importance of the military's occupational success to the public, while the second assesses the strength of the military's claim that racial diversity affects its operational viability.

Perhaps the most defining feature of the military as a profession is that its occupational needs carry life-and-death consequences. Insofar as the military's race-conscious admissions and recruiting policies support important national security objectives, the state has a strong interest in exempting it from the law's broader prohibition against race-based classifications. As the Court observed in *Haig v. Agee*, "It is 'obvious and

133. *Saunders v. White*, 191 F. Supp. 2d 95, 124 (D.D.C. 2002). In this case, the Army favored racial minorities in promotions to preserve the perception of equal treatment. Judge Lamberth found that amorphous public perceptions did not rise to the level of a compelling state interest.

134. *See Grutter v. Bollinger*, 123 S. Ct. 2325, 2340 (2003).

unarguable' that no governmental interest is more compelling than the security of the Nation."¹³⁵

While the consequences of poor battlefield discipline may be measured in terms of mission outcomes, it is somewhat harder to assess the importance of continued public confidence in the military as an institution. The most concrete effect of negative public perceptions would be a drop in minority enlistment. At a time when the military must contend with competing enticements in the private sector while also satisfying the demanding troop requirements of our overseas commitments, a dramatic drop in minority enlistment could seriously impair national security interests.¹³⁶

In addition to the basic urgency of its operations, the military can mount a strong claim that racially diverse leadership tangibly improves its ability to perform basic tasks. In place of mere speculation about the value of diversity in an increasingly globalizing world, military experts, along with scores of retired professionals, have pointed to a steady stream of historical episodes that caution against returning to an era of racially homogenous leadership.¹³⁷ While more systematic research on the effects of racially diverse leadership on modern military performance outcomes would be useful, military leaders have ample evidence from the past half-century to suggest that racially sensitive leadership has helped soldiers overcome a sense of racial alienation while preserving public confidence in the military. Further lending credibility to the military's argument is the fact that from the outset of its affirmative action programs, the military has defined such initiatives in terms of combat readiness and other tactical considerations.¹³⁸

The military's heavy reliance on racial diversity can be attributed to several of its more salient characteristics. First, military leaders in a combat setting face extraordinary motivational challenges stemming from the dangerous nature of war and the fact that soldiers are often expected to follow orders that do not coincide with their natural instincts of self-preservation. While others have identified the hierarchical nature of the military as a primary distinguishing characteristic,¹³⁹ this feature is best understood as an organizational response to the deeper motivational

135. 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Sec'y of State*, 378 U.S. 500, 509 (1964)).

136. See Michael Hirsh & John Barry, *Casualties of War*, NEWSWEEK, Nov. 17, 2003, at 22 (describing manpower constraints and the need for continued troop recruitment).

137. See *supra* text accompanying notes 80-88, 115-116.

138. See *supra* text accompanying note 119 (describing a key purpose of the Army Affirmative Action Plan as the promotion of individual combat readiness).

139. See, e.g., Chris Black, *Military's Efforts Produced Achievements and Lessons*, BOSTON GLOBE, May 25, 1995, at 25 ("[The military] is a hierarchical model. . . . You can only push it so far. It does not really resemble a civilian model." (internal quotation marks omitted)).

dynamics that inhere in military work. In a battlefield environment, willingness to follow orders thoroughly and promptly without second-guessing their motivation is of paramount importance.¹⁴⁰ Where mistrust breeds delay or hesitation, the strategic consequences may be dire. Underpinning the military's emphasis on unit cohesion is the basic behavioral insight that soldiers under conditions of duress will adhere to the group mission with greater intensity insofar as they feel themselves to be equal and respected members of their immediate community.¹⁴¹ Recognizing that race might otherwise become a divisive focal point, the military seeks leaders who, by virtue of their personal experiences, are adept at anticipating and defusing these tensions.

Second, the nature of the military's command structure is such that where tensions arise between soldiers and their leaders, these frustrations cannot be dissipated through the normal means of exiting the professional relationship. Because soldiers deployed overseas represent a kind of captive audience, they have no choice but to interact repeatedly and in close quarters with their superior officers throughout the duration of their posted assignments. In the past, this situation has proven conducive to racial uprisings in the sense that open revolt has been perceived as the only means of expressing dissatisfaction with the racial attitudes of the military establishment. It is not surprising, then, that many racially motivated military uprisings from the Vietnam era took place on naval carriers, which are particularly isolated and tightly confined communities.

A third factor tending to strengthen the military's occupational need for diversity is the presence of a large pool of racial minorities in the enlisted corps coupled with a conspicuous absence of minorities within the officer ranks.¹⁴² The current extent of racial bifurcation between officers and soldiers enhances the military's immediate occupational need for affirmative action insofar as it suggests that a large proportion of minority servicemembers are not exposed to leaders who are attuned firsthand to the challenges of being a minority in the armed forces. From an occupational need standpoint, a return to an all-white officer corps would have fewer ramifications were the soldier base similarly uniform in its ethnicity. Since that is not the case, proponents of affirmative action in the military possess a stronger claim.

140. See NORMAN DIXON, ON THE PSYCHOLOGY OF MILITARY INCOMPETENCE 174-75 (1976) (describing historical consequences of poor battlefield discipline).

141. *Policy Concerning Homosexuality*, *supra* note 117, at 248-51 (testimony of William Darryl Henderson, former Commander of the Army Research Institute) (describing military theories of unit cohesion).

142. See *supra* text accompanying notes 110-111 (comparing percentages of minority officers to minority enlisted personnel).

B. *Extending Occupational Need Arguments Beyond the Military Context*

If the military's distinctive features account for the strength of its occupational need defense, we must then consider whether the military case has any meaningful professional analogies. I begin this Section by describing the military's unique status within antidiscrimination law. After briefly assessing the case for military exceptionalism, I then turn my attention to a small number of other public-safety-oriented professions that share several of the military's salient characteristics. On the basis of these similarities, I suggest that professions such as law enforcement and prison administration are well-positioned to mount persuasive occupational need defenses. Finally, I assess two other professions that feature prominently in the *Grutter* decision, namely business and law. While affirmative action proponents in these fields have fashioned cogent occupational need claims, I contend that such arguments generally do not carry the same indicia of reliability and therefore should not be accepted as compelling state interests within the meaning of antidiscrimination law.

The case for military exceptionalism often begins with the observation that courts have traditionally granted substantial deference to the military where its internal decisionmaking has been concerned.¹⁴³ Judges have typically offered two sets of justifications for such deference. The first relates to the constitutional separation of powers regarding military affairs;¹⁴⁴ however, the lack of any congressional mandate for affirmative action policies in the military renders this concern of limited application here.¹⁴⁵ The second is that the military represents a specialized community that is particularly inscrutable to judges, who lack experience in matters

143. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (“[C]ourts must give great deference to the professional judgment of military authorities”); *Parker v. Levy*, 417 U.S. 733, 758 (1974) (“[T]he different character of the military community and of the military mission,” including its “necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.”).

144. See, e.g., *Solorio v. United States*, 483 U.S. 435, 447 (1987) (“Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military.”); *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) (“[J]udicial deference to such congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.”). See generally John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 307-11 (1998) (delineating and critiquing the two main strands of the military deference doctrine).

145. Were Congress to mandate military affirmative action in the future, separation-of-powers arguments could theoretically be used to justify accepting the military's occupational need for diversity while rejecting similar claims in other professional contexts. In response, however, other professionals might insist that traditional deference is not necessary to provide a check against the misuse of occupational need claims. Rather, the application of the business essence and client preference tests, borrowed from the sex discrimination context, would suffice. See *infra* Part V (discussing judicial treatment of sex-based BFOQ defenses).

such as battlefield tactics.¹⁴⁶ This argument, while sound, ultimately fails to distinguish the military from other institutions whose inner workings are equally inscrutable to the average judge. For instance, a prison administrator with years of experience in correctional settings presumably has far greater insight than most judges into the dynamics that make the guard-prisoner relationship function effectively. In the military, as in other contexts, courts may elect either to defer as a matter of course or to hear expert testimony and evaluate the strength of the occupational need claims for themselves.

Just as courts have been reluctant to criticize military determinations within the Fourteenth Amendment context, they have also held that Title VII carries no binding force with respect to military servicemembers: As the law stands, therefore, military employers may freely discriminate on the basis of race without running afoul of the 1964 Civil Rights Act, provided that their hiring decisions concern noncivilian personnel.¹⁴⁷ This special exemption within existing employment law reflects courts' awareness that the military, unlike most professions, has legitimate occupational requirements that require the use of discriminatory hiring practices.

1. *Prison Guards and Police*

The professions of prison administration and law enforcement possess many of the same characteristics that render the military's occupational need for racially diverse leadership particularly compelling.¹⁴⁸ From a social urgency standpoint, although neither profession implicates national security, both perform the analogous social function of minimizing violence and preserving order. By preventing prison uprisings and deterring dangerous criminal activity, these professions help forestall "social emergenc[ies] rising to the level of imminent danger to life and limb."¹⁴⁹

146. See, e.g., *Swaim v. United States*, 165 U.S. 553, 562 (1897) ("[For] questions not depending upon the construction of the statutes, but upon unwritten military law or usage . . . military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law." (quoting *Smith v. Whitney*, 116 U.S. 167, 178 (1886))).

147. See cases cited *supra* note 19; see also *Cook*, *supra* note 115, at 136 ("Title VII does not apply to service members.").

148. The similarities between the military and domestic law enforcement have been well-documented. See NAT'L DEF. RESEARCH INST., *supra* note 76, at 107-08 (under "4. Analogous Experience of Domestic Police and Fire Departments" hyperlink) (listing characteristics that make the police one of the "closest possible domestic analogues" to the U.S. military).

149. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment) (defining compelling state interest); see also *Grutter v. Bollinger*, 123 S. Ct. 2325, 2351 (2003) (Scalia, J., dissenting) (recognizing national security and the remedying of past racial discrimination as the only two compelling state interests sufficient to justify race-conscious policies).

Thus, their continued functionality satisfies even the most conservative definitions of compelling state interest.

Furthermore, both prison administrators and law enforcement officers face significant motivational challenges, whether in the form of overcoming inmate intransigence or persuading community residents to cooperate with police requests. Where respect for authority wavers in either of these settings, disobedience may prevail at the expense of social order. Reflecting the fact that elements of the officer-soldier dynamic are present, both prison guards and police interact with audiences that afford them respect within the context of a jointly recognized hierarchical relationship. For inmates, the lack of an exit alternative is obvious. Yet one might also make a similar argument with respect to law enforcement. Where residents perceive local police to be racially biased, they cannot easily extricate themselves from that hierarchical relationship in favor of some more palatable alternative. Lacking other outlets, public uprisings may seem the only way of expressing community outrage with racially insensitive police practices. Finally, the very fact of high minority representation in many prison populations and neighborhood communities renders it more difficult for an all-white supervisory corps to discharge its duties effectively. As in the military example, the stark racial bifurcation between guards and their captive audiences creates conditions that make affirmative action seem more pressing from an occupational need standpoint.

Taking the foregoing characteristics into account, there is ample reason to believe that professionals in the fields of prison administration and law enforcement may depend on racial diversity to a degree approximating that of the military. While a profession's basic profile supports certain logical presumptions about the strength of its occupational need claims, the substance of those claims can only be understood by examining individual cases. It is therefore instructive to consider those occasions on which lower courts have accepted occupational need defenses for racial discrimination.

In *Wittmer v. Peters*, then-Chief Judge Posner upheld the constitutional right¹⁵⁰ of a prison warden to take race into account when hiring guards in a boot-camp-style prison because "the black inmates [we]re believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there [we]re some blacks in authority in the camp."¹⁵¹ By

150. *Wittmer's* finding of an occupational need defense pertained only to the equal protection challenge brought against the prison's hiring practices. Because the plaintiffs did not allege a Title VII violation, Judge Posner's opinion did not reach the statutory BFOQ question. 87 F.3d 916, 921 (7th Cir. 1996) (Posner, C.J.). Elsewhere, however, Judge Posner has verified that "Title VII's defense of bona fide occupational qualification . . . is unavailable where discrimination is based on race, color, or ethnicity." *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1308 (7th Cir. 1989) (Posner, J.), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071-72 (codified at 42 U.S.C. § 1981 (2000)).

151. *Wittmer*, 87 F.3d at 920.

underscoring the importance of the boot camp dynamic to its analysis, the court strengthened its support for an occupational need defense by drawing an analogy to the military.¹⁵² White correctional officers were not seen as having the interpersonal skills necessary to motivate minority inmates, many of whose life experiences had engendered deep skepticism of white authority figures. Although African-American guards were not regarded as role models in the traditional sense,¹⁵³ their presence was nonetheless thought to have quelled inmates' fears that the prison administration was racist and had no real interest in rehabilitating them.

In the realm of law enforcement, several courts and commentators have suggested that police forces should be given special leeway to consider race in their hiring and staffing decisions.¹⁵⁴ Judge Posner aptly summarized this position in *Reynolds v. City of Chicago*:

Especially in a period of heightened public concern . . . effective police work must be reckoned a national priority that justifies some sacrifice of competing interests. If it is indeed the case that promoting one Hispanic police sergeant out of order is important to the effectiveness of the Chicago police in protecting the people of the city from crime, the fact that this out-of-order promotion technically is "racial discrimination" . . . does not strike us as an impressive counter-weight.¹⁵⁵

The question of how racially diverse leadership facilitates police work has generally elicited three types of explanations. First, the presence of racial minorities on the police force alters the perceptions of white officers who might otherwise harbor unhelpful racial stereotypes.¹⁵⁶ Because many interactions with minorities occur in a criminal context, white officers may be at greater risk of developing unhealthy biases that would lead them to

152. *Id.*

153. *Id.*

154. *See, e.g.,* *Barhold v. Rodriguez*, 863 F.2d 233, 238 (2d Cir. 1988) (outlining the "occupational need" defense of affirmative action in the police context); Note, *supra* note 61, at 415 (recommending that Congress amend Title VII to create a limited exception for law enforcement). An occupational need theory was argued before the Supreme Court in a case involving police promotions, but the Court declined to reach the issue. *See United States v. Paradise*, 480 U.S. 149, 167 n.18 (1987) ("We need not decide if either the generalized governmental interest in effective law enforcement or the more particularized need to overcome any impediments to law enforcement created by perceptions arising from the egregious discriminatory conduct of the Department is compelling.").

155. 296 F.3d 524, 530 (7th Cir. 2002) (Posner, J.). It bears repeating that in this case, as in others recognizing a similar occupational need defense for police work, such outcomes have only been possible because plaintiffs brought constitutional, rather than statutory, challenges. Thus, in both *Reynolds* and *Barhold*, plaintiffs sued under the Equal Protection Clause of the Fourteenth Amendment and did not raise Title VII challenges, despite alleging employment discrimination.

156. *See, e.g., id.* at 529-30 ("If there are negligible numbers of Hispanics in [the police] ranks . . . non-Hispanic police officers are less likely to be sensitized to any special problems in policing Hispanic neighborhoods.").

overly rely on racial profiling in their work. Second, minority police representation dispels public skepticism of law enforcement, particularly within minority communities.¹⁵⁷ Because police work depends heavily on the cooperation of the surrounding community, a strong sense of mistrust can severely impair officers' ability to investigate crimes and preserve public safety.¹⁵⁸ Basing his conclusions on several empirical studies, one scholar has observed:

A predominantly white police force may face a serious barrier to its law enforcement activities in the hostility of members of the black community. . . . This hostility can be expressed in a variety of ways, from passive non-cooperation with police investigative efforts to active rejection of the rule of law; in its most extreme form, hostility can be manifested in mass rioting or widespread looting and random violence.¹⁵⁹

Finally, courts have recognized that a person's race can affect the performance of undercover work. For instance, a police department hoping to infiltrate a drug ring run primarily by whites would prefer to take race into account when hiring or assigning agents for the job. Because authenticity hinges on racial similarity, discriminatory hiring has been seen as justified under these circumstances.¹⁶⁰

For simplicity's sake, I have thus far conceived of occupational need solely in terms of the relationship between prison guards or police and those in their care, be they inmates or the residents of a community. A separate theory might address the occupational need for greater minority representation within a profession's leadership ranks. In other words, having a critical mass of racial minorities on the police force may foster a more tolerant work environment, thereby creating conditions for more

157. See PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 167 (1967) ("In order to gain the general confidence and acceptance of a community, personnel within a police department should be representative of the community as a whole.").

158. See *Reynolds*, 296 F.3d at 530 ("Effective police work, including the detection and apprehension of criminals, requires that the police have the trust of that community and they are more likely to have it if they have 'ambassadors' to the community of the same ethnicity."); *Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Serv. Comm'n*, 482 F.2d 1333, 1341 (2d Cir. 1973) ("[T]he visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement.").

159. Note, *supra* note 61, at 413-14; see also *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 695 (6th Cir. 1979) (describing racially motivated uprisings against Detroit police in 1967).

160. See, e.g., *Baker v. City of St. Petersburg*, 400 F.2d 294, 301 n.10 (5th Cir. 1968) (identifying undercover work as one arena in which race-conscious hiring might be justified).

effective law enforcement.¹⁶¹ Without having discussed every possible permutation of occupational need claim, it is clear that certain features of law enforcement and prison administration support those professions' efforts to demonstrate a strong occupational reliance on racial diversity.

2. *Business and Law*

Advocates of affirmative action in other, non-public safety professions have also crafted various occupational need arguments to defend their continued use of racial preferences, whether in hiring or higher education. In the following discussion, I address the case studies of business and law because those categories were specifically cited by the *Grutter* majority as examples of elite professions whose occupational reliance on diversity mirrors that of the military.

Applying the theoretical framework constructed after reviewing the military case, there are several reasons to suspect that occupational need arguments may be less persuasive in the fields of business and law. First, these professions lack the same degree of social urgency as public-safety-oriented occupations. While the state theoretically has an interest in the smooth provision of economic services, impairment of this interest generally does not jeopardize personal safety, engender civil disobedience, or otherwise rise to the level of a social emergency. Therefore, even were there a strong occupational dependency on racial diversity within the fields of business and law, some question would remain as to whether these professions, even when functional, further compelling state interests.

Second, within most business and legal workplaces, the challenge that leaders face in motivating their subordinates is less daunting than that facing military or police officers. In these environments, less emphasis is placed on compliance with basic orders because independent financial incentives exist to encourage coworkers to perform their job tasks and because the tasks themselves are generally more palatable. As a result, low-level racial antipathy is unlikely to trigger outright abandonment of workplace tasks to the detriment of occupational performance. Moreover, where dissatisfaction with workplace culture becomes acute, private sector employees may exit a firm without significantly disrupting the functionality of the business. Along similar lines, clients dissatisfied with the lack of cultural awareness or consideration on the part of service providers are unlikely to revolt in protest. Instead, they will generally either tolerate this reality or take their business elsewhere.

161. Applying similar reasoning to the military example, one could examine the impact of affirmative action on the working relationship between officers rather than focusing exclusively on the officer-soldier dynamic.

Surveying both the relevant business literature and numerous amicus filings in *Grutter*, there emerge several distinct strands of argument concerning the occupational benefits of racial diversity in business settings. The first of these focuses on intra-firm racial dynamics and their effect on workplace productivity. In a brief filed on behalf of sixty-five American businesses, amici asserted that “a racially diverse group of managers with cross-cultural experience is better able to work with business partners [and] employees [I]ndividuals who have been educated in a diverse setting are likely to contribute to a positive work environment, by decreasing incidents of discrimination and stereotyping.”¹⁶² Other scholars and industry representatives have echoed this observation, stressing the link between racially sensitive work cultures and firms’ capacity for recruitment, labor retention, and long-term productivity.¹⁶³

A second strand of argument posits that employees who have been either educated or raised in multicultural environments tend to be more adept at “facilitat[ing] unique and creative approaches to problem-solving arising from the integration of different perspectives.”¹⁶⁴ This argument strongly resembles the conventional diversity rationale within higher education, which assumes that racial minorities bring distinctive viewpoints to a discussion, helping organizations to challenge conventional assumptions and transcend stale solutions.¹⁶⁵

A final category of claims concentrates on the employee-client relationship, arguing that racial minorities play a valuable role in developing products and services that appeal to an increasingly diverse customer base.¹⁶⁶ Thus, in its amicus filing, General Motors explained the pressing need for “managers and employees who understand that people from diverse backgrounds manifest diverse interests and who know how to translate that understanding into creative product development, community outreach, and marketing and advertising campaigns.”¹⁶⁷ To illustrate this phenomenon, scholars have often pointed to Avon Products, which used

162. Brief for Amici Curiae 65 Leading American Businesses at 7, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241) [hereinafter 3M Brief].

163. See, e.g., Brief of General Motors Corp. as Amicus Curiae at 15-16, *Grutter* (No. 02-241) [hereinafter GM Brief] (“Managers’ and employees’ cross-cultural competence augments not only recruiting and retention of employees, but also work force creativity and productivity. The best ideas and products are created by teams of people who can work together without prejudice or discomfort.”); FERNANDEZ & BARR, *supra* note 14, at 284-89 (summarizing recommendations for more racially sensitive leadership techniques).

164. 3M Brief, *supra* note 162, at 7.

165. See Crockett, *supra* note 12, at 10.

166. See Brief for Graduate Management Admission Council and the Executive Leadership Council as Amici Curiae in Support of Respondents at 2, *Grutter* (No. 02-241) [hereinafter ELC Brief] (“Employees from different racial and ethnic backgrounds can enhance the development of products and services for today’s diverse marketplace.”).

167. GM Brief, *supra* note 163, at 14.

input from its diverse workforce to market cosmetics more successfully to minority communities.¹⁶⁸

While the aforementioned occupational need arguments are cogent, such defenses should not be accepted without stronger assurances that business needs genuinely depend on race-conscious decisionmaking. Mere generalities concerning the benefits of racial diversity in the workplace are insufficient to establish that the central mission of a business would be truly jeopardized by more racially homogenous leadership. While many commentators and amici attest to the importance of racial diversity in the global economy, they provide little evidence to support this proposition.¹⁶⁹ This is not to suggest that no studies have been conducted on this subject.¹⁷⁰ However, even the most convincing data available predict further productivity gains to be reaped from America's diverse workforce rather than warn of the severe consequences associated with a loss of diversity.¹⁷¹ Furthermore, studies purporting to show the benefits of diversity in the workforce often reconfirm the benefits of diverse viewpoints in problem-solving settings without establishing a persuasive connection between diversity and productivity.¹⁷²

The popular notion that an increasingly diverse consumer base demands employees of matching diversity rests on the largely undocumented assumption that only racial minorities can develop products and marketing strategies that appeal to minorities. Even assuming this insight were accurate, the business consequences of having an all-white marketing team

168. See, e.g., Thomas, *supra* note 12, at 41-42; Don McNerny, *The Bottom-Line Value of Diversity*, HR FOCUS, May 1994, at 22, 23.

169. Thus, GM's amicus brief contains only one footnote related to this proposition, and it concerns the effects of ethnicity on consumer tastes. GM Brief, *supra* note 163, at 13 n.9. The ELC brief contains no supporting authority. See ELC Brief, *supra* note 166, at 5. The 3M brief contains five such references; however, some of these allude only to business surveys about the effects of diversity in the workforce. 3M Brief, *supra* note 162, at 7 n.5; see also Quentin Reade, *Diversity Helps To Deliver Better Business Benefits*, PERSONNEL TODAY, June 18, 2002, at 2 (reporting businesses' perceptions of diversity benefits without providing any empirical confirmation).

170. See, e.g., Taylor H. Cox & Stacy Blake, *Managing Cultural Diversity: Implications for Organizational Competitiveness*, EXECUTIVE, Aug. 1991, at 45, 47-52 (reporting studies on the effect of diversity on problem solving); Robert L. Lattimer, *The Case for Diversity in Global Business, and the Impact of Diversity on Team Performance*, COMPETITIVENESS REV., 1998 No. 2, at 3, 8-14 (reporting research findings showing positive effects of workplace diversity on productivity).

171. See, e.g., Lattimer, *supra* note 170, at 13-14. Pointing to demographic trends, some have argued that a racially homogenous business leadership will prove unsustainable in the future. See FERNANDEZ & BARR, *supra* note 14, at 11-15. Yet such arguments are more rhetorical than helpful in explaining how significantly business practices would be impaired.

172. See, e.g., Lattimer, *supra* note 170, at 6-7. To explain why the occupational benefits of racial diversity have been so widely accepted in business circles without substantial supporting data, sociologists have suggested that advocates of affirmative action have gradually recast the meaning of diversity initiatives, emphasizing their occupational benefits as a means of preserving their longevity amid a hostile political environment. See Kelly & Dobbin, *supra* note 13, at 972, 975.

in a globalizing economy have not been established by reference to any historical data, making it difficult to evaluate the occupational need for a diverse workforce. Where businesses assert that clients simply prefer working with people of a particular race, such arguments should not be accepted as a basis for an occupational need theory. To allow preexisting societal prejudices to dictate discriminatory hiring practices would be antithetical to the fundamental purpose of the 1964 Civil Rights Act.

Within the field of law, occupational need arguments operate in substantially similar fashion, with an added emphasis on the importance of continued public confidence in legal institutions as a whole. In the words of the *Grutter* majority, “[C]ultivat[ing] a set of leaders with legitimacy in the eyes of the citizenry [requires] that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”¹⁷³ Although this theme was expounded upon by numerous amici,¹⁷⁴ its rhetorical force substantially outweighs its persuasiveness as an occupational need claim. It remains unclear precisely how a more skeptical public would threaten the basic functionality of the legal profession in the future. Whereas the military posits that negative public perceptions would exacerbate serious recruitment challenges, the private sector presents no parallel claim.

The Boston Bar Association’s amicus filing took a somewhat different approach, revisiting many of the same arguments raised by leading American businesses:

Law firms want a diverse staff of lawyers to be better situated to respond to the needs of their corporate clients and the demands those clients face in the global market. . . . Research has identified a positive correlation between the level of integration among a law firm’s attorneys and the demographics of a law firm’s client base.¹⁷⁵

Yet these claims do not, strictly speaking, concern matters of occupational survival, nor do they escape the kinds of client preference criticisms raised above.

Whereas the Boston Bar Association conceptualized the law in terms of its provision of an economic service to corporate clients, we might usefully distinguish this from the final scenario described by the American Bar

173. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2341 (2003).

174. See, e.g., Brief for Amicus Curiae American Bar Association at 13, *Grutter* (No. 02-241) [hereinafter ABA Brief] (“Without effective participation by all segments of society, the legitimacy of our legal system will be imperiled.”); Brief of the Harvard Black Law Students Association et al. as Amici Curiae Supporting Respondents at 14, *Grutter* (No. 02-241) (“If the legal profession regresses toward racial homogeneity, public confidence in the justice system will suffer.”).

175. Brief for Amicus Curiae Boston Bar Association at 10, *Grutter* (No. 02-241) (citations omitted).

Association, which focused instead on indigent clients. In its amicus filing, the ABA noted that

[m]any marginalized members of society understandably put their trust more readily in lawyers who possess a shared background or heritage. It is not simply that the availability of such lawyers affects the quality of representation that minority clients receive; it may determine whether that person seeks legal assistance at all.¹⁷⁶

Assuming this model of attorney-client interaction, one could more easily imagine a scenario in which a lawyer's race might strongly affect her occupational performance. To satisfy the requirement of social urgency, we might speculate that the quality of an attorney-client interaction could affect the outcome of a murder trial, or alternatively, that public confidence in the racial fairness of the legal profession might help forestall social unrest. Furthermore, we might argue that just as soldiers are forced to operate within the hierarchical structure of the military, indigent clients often possess no exit mechanism through which they may escape instances of racial bias in the legal system.

Such thought exercises are valuable insofar as they challenge the stark division between public safety and non-public safety professions, reminding us that occupational need claims should be evaluated on a case-by-case basis. Where a particular legal scenario shares more in common with the military, it lends itself to more plausible occupational need defenses. Of course, any attempt to generalize about all subcomponents of any given profession is inherently subject to criticism as circumstances change and exceptions emerge.

Despite these exceptions, it is nonetheless true that certain work environments lend themselves more naturally to occupational need arguments than others. And while one should resist the temptation to create a rigid taxonomy of all professions, it is nonetheless valuable to generate a basic framework for approaching occupational need claims in different contexts. Thus, we may fairly conclude that while a lawyer's race may sometimes be indispensable to achieving a compelling occupational goal, such claims are generally more speculative than those raised by the military or law enforcement. Unlike these latter institutions, it is doubtful whether most lawyers can demonstrate how race affects their occupational performance on a regular basis and in a socially urgent manner.

The foregoing analysis about the strength of occupational need claims in the fields of business and law does not imply that such professions could never mount a compelling occupational need defense. In fact, one goal of analyzing the military's justification for affirmative action has been to

176. ABA Brief, *supra* note 174, at 12-13 (footnote omitted).

illustrate the kinds of proofs that other professions would need to make to analogize themselves more convincingly to more traditional public safety professions in the future. The question of whether additional pockets of professional life may raise compelling occupational need claims represents an interesting avenue for future research in this area.

V. TOWARD A UNIFIED FRAMEWORK FOR OCCUPATIONAL NEED ARGUMENTS

Having developed a sense of where occupational need defenses are most persuasive, there remains the task of bringing the statutory and constitutional approaches to these arguments into greater alignment. While state actors can insulate their use of racial preferences from Fourteenth Amendment challenges by raising occupational need defenses, neither government nor private actors have similar recourse under Title VII law. Aside from generating an obvious intellectual inconsistency within the law, such a divergence between the constitutional and statutory standards perversely affords state action greater leniency than private actors where racial discrimination is concerned. One obvious way of eliminating this disparity would be to take the approach recommended by the *Grutter* dissent, namely to prohibit occupational need defenses even with respect to equal protection challenges. While this would make constitutional law more consistent with statutory provisions, it would have the undesirable consequence of forbidding professions such as the military and law enforcement from using race-based measures to further socially urgent occupational interests.

For this reason, a more sensible approach entails removing the Title VII barrier against occupational need defenses in cases alleging racial discrimination. Such proposals have been advanced in the past, though scholars have disagreed over the precise contours of the congressional amendment that would be required. These proposals can be divided into two basic camps, the first of which advocates including a narrowly worded exception to allow specific professions to raise occupational need defenses, while the second recommends that Congress take the broader step of adding race to the list of permissible characteristics in the BFOQ provisions of Title VII.

Exemplifying this first class of arguments, one scholar has proposed the following statutory language:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for a municipality to use race as an employment qualification to integrate its law enforcement agency so as to reflect the racial composition of the

municipal population when such integration is necessary to ensure the agency's effective operation.¹⁷⁷

One advantage of this approach is that it confines the reach of occupational need defenses to law enforcement settings, where they are more likely to be legitimate. A clear disadvantage of this proposal is that it relies on overly rigid occupational categorizations. As I have discussed throughout this Note, professions often have subcompartments that are more or less conducive to occupational need defenses. While generalizations along the lines of public safety and non-public safety professions serve as useful heuristics in an academic context, we should be wary of transforming these into binding statutory classifications. An additional danger associated with this approach is that it might prove difficult to adjust the law *ex post* in light of changing circumstances. Given the fluid nature of occupational need defenses, a more flexible approach is advisable.

As an alternative, William R. Bryant has proposed a broader amendment that would simply add race to the language of Title VII's BFOQ exception.¹⁷⁸ Bryant's approach is predicated on the understanding that courts would then restrict the scope of permissible BFOQ defenses by adopting a set of doctrinal tests similar to those used in the sex discrimination context.¹⁷⁹ A standards-based approach, described in further detail below, would enable courts to distinguish between valid and invalid occupational need defenses in light of uniform criteria while also facilitating more flexible, case-by-case review of occupational need claims. But Bryant's proposal is vulnerable to the charge that it does not provide adequate safeguards against pernicious forms of state-initiated racial discrimination. Critics could also argue that Bryant places too much faith in courts' ability to recognize and reject specious occupational need claims.

In light of these concerns, a suitable compromise would be to adopt Bryant's proposal for removing the statutory barrier against race-based occupational need defenses yet exhort courts to apply a more rigorous level of scrutiny to race-based BFOQ claims. In particular, where state action is concerned, courts should not only consider how substantially a profession depends upon racial preferences but also whether the smooth operation of that profession preserves public safety or forestalls social unrest. To further harmonize statutory and constitutional approaches to government-initiated occupational need defenses, the social urgency test should be applied not only as one component of an equal protection analysis but also in the

177. Note, *supra* note 61, at 442.

178. See Bryant, *supra* note 63, at 241 ("Congress should amend Title VII to include an express, race-based BFOQ.").

179. *Id.* at 220-28, 240-41.

instances where only a Title VII violation is alleged.¹⁸⁰ In this way, courts could allow for occupational need defenses only in those narrow circumstances where the most compelling of state interests is at stake, and then only where racial discrimination would unambiguously further such interests. For guidance, courts may also wish to consider whether a given profession shares any of the salient characteristics we have identified as tending to contribute to more persuasive occupational need claims. Where the motivational dynamics, exit alternatives, and racial composition approximate those found in the military, law enforcement, and prison administration, occupational need claims will likely be stronger.

The addition of race to the list of characteristics that can form the basis of a BFOQ defense should not be undertaken lightly. At the inception of the 1964 Civil Rights Act, legislators specifically considered and rejected this very option when it was presented as a proposed amendment to the original bill. As we have seen, this decision was not the product of mere oversight but rather the outcome of reasoned debate in both the House and Senate.¹⁸¹ Notwithstanding the reservations expressed by the framers of Title VII and echoed by Justice Scalia in his *Grutter* dissent, there is now ample reason to believe that courts are capable of distinguishing between genuine occupational needs and pretextual abuses of the occupational need defense.

To begin, courts have for the most part tightly restricted the use of BFOQ defenses with regard to sex discrimination. This has been achieved by applying a series of judicial tests to ensure that the discrimination is not based on mere stereotypical assessments of women or men.¹⁸² For instance, in the case of an airline wishing to hire only female flight attendants, the Fifth Circuit introduced a “business essence” test, stating that such claims could only pass muster if “the *essence* of the business operation would be undermined by not hiring members of one sex exclusively.”¹⁸³ Since the essence of an airline is “to transport passengers safely from one point to another,” the argument that women are more adept at providing courteous reassurances to anxious passengers was rejected.¹⁸⁴ The Supreme Court

180. In *Johnson v. Transportation Agency*, the Court rejected the notion that Title VII automatically incorporates the higher constitutional standard of scrutiny where government racial classifications are involved, explaining that Title VII “was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments.” 480 U.S. 616, 628 n.6 (1987). Nonetheless, for reasons of consistency, we may favor an interpretation of Title VII that requires more stringent analysis when considering government-initiated BFOQ defenses.

181. See *supra* Section II.B.

182. See generally Michael L. Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025 (1977) (describing the doctrinal approach to BFOQ claims in the sex discrimination context).

183. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971).

184. *Id.*

later embraced a similar formula in *Dothard v. Rawlinson*, a case involving a prison's refusal to hire women for certain guard positions.¹⁸⁵

When applying the business essence test, the Supreme Court has considered whether the "central mission of the employer's business" would be jeopardized by sex-neutral hiring.¹⁸⁶ As an important corollary to this test, courts have generally rejected "client preference" arguments, insisting that merely catering to the requests of coworkers or customers does not provide sufficient grounds for invoking an occupational need defense.¹⁸⁷ Thus, for instance, a company may not prefer men in its hiring process on the basis that its Latin American clients simply prefer to interact with males.¹⁸⁸ Likewise, cost has typically not been accepted as a legitimate basis for refusing to adhere to the nondiscrimination principle set forth in Title VII.¹⁸⁹

A second test that courts have adopted requires that an employer have a "factual basis" for believing that "all or substantially all" members of the excluded sex would be unable to perform the duties of a particular job safely or adequately.¹⁹⁰ This requirement ensures that an applicant's individual capacity to perform a job is considered before she may be discriminated against. As a final inquiry, courts have sought to ensure that no less discriminatory alternative is available.¹⁹¹

It should be noted, however, that courts have not uniformly applied the aforementioned tests with regard to all types of sex-based occupational need defenses. Instead, where same-sex privacy issues have been implicated, cost considerations and client preferences have been accepted as valid justifications for sex-based hiring in a variety of establishments

185. 433 U.S. 321 (1977).

186. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 203 (1991) (quoting *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413 (1985)).

187. This position tracks the guidelines issued by the EEOC stating that "refusal to hire an individual because of the preferences of his coworkers, the employer, clients or customers" does not constitute a legitimate BFOQ defense unless "necessary for the purpose of authenticity or genuineness . . . e.g. an actor or actress." EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a)(1)(iii), (2) (2003).

188. *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981) (specifying that "stereotyped customer preference" cannot justify a sexually discriminatory practice).

189. See Amy Kapczynski, Note, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1262-63 (2003) (arguing that "[a]s a rule, courts do not consider cost a legitimate justification for evading the requirements of antidiscrimination law" because to do so would "honor[] a self-perpetuating vehicle of discrimination" (footnote and internal quotation marks omitted)).

190. See, e.g., *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969) ("[I]n order to rely on the [BFOQ] exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.").

191. See Bryant, *supra* note 63, at 224.

ranging from nursing homes to youth centers.¹⁹² By taking existing biases into account when assessing whether members of both sexes could equally perform a task, courts have strayed from the business essence test as earlier articulated. For instance, in *Norwood v. Dale Maintenance System, Inc.*, an Illinois district court sanctioned the sex-based assignment of janitorial positions, noting that a defendant “may satisfy its burden . . . by showing that . . . guests of a particular business would [otherwise] stop patronizing the business.”¹⁹³ As Amy Kapczynski has observed, such analysis has not only permitted sex discrimination to persist but also reinforced “gendered stratification and hierarchy in the workforce.”¹⁹⁴

The history of same-sex BFOQ cases provides a valuable cautionary tale about the potential for judges to allow existing social prejudices to influence their assessment of occupational need claims. However, the lesson to take away from such cases is not that the existing doctrinal apparatus is inadequate, but that courts must more zealously apply the standards designed to prevent unsavory forms of discrimination from surviving legal challenge. Where the “business essence” and “all or substantially all” tests are faithfully applied, the risk of accepting pretextual occupational need defenses can be reduced to such a point that the benefits of a system responsive to valid occupational need arguments outweigh the costs associated with judicial fallibility.

One reason to believe that judges could apply a standards-based approach to occupational need claims is that they have already done so in a handful of cases. Often without saying so explicitly, judges confronted with race-based occupational need defenses have borrowed substantially from the doctrinal approach used to evaluate similar claims in the sex discrimination context. Notably, then-Chief Judge Posner’s opinion in *Wittmer* stressed that the occupational need defense in that case relied not on mere “generalities about racial balance or diversity” but rather on sound historical data demonstrating the link between racial identification and obedience within hierarchical settings of this nature.¹⁹⁵ Thus, the prison’s defense consisted of more than “just speculation” because it was “backed up by expert evidence . . . that the boot camp . . . would not succeed in its mission of pacification and reformation with as white a staff as it would have had if a black male had not been appointed to one of the lieutenant

192. See, e.g., *Fesel v. Masonic Homes of Del., Inc.*, 447 F. Supp. 1346, 1354 (D. Del. 1978) (holding that a predominantly female nursing home may decline to hire male nurses where a position calls for “intimate personal care” of residents), *aff’d mem.*, 591 F.2d 1334 (3d Cir. 1979).

193. 590 F. Supp. 1410, 1416 (N.D. Ill. 1984).

194. Kapczynski, *supra* note 189, at 1264.

195. *Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996) (Posner, C.J.). In particular, Judge Posner referred to reports and testimony by defense experts documenting the relationship between racial diversity and orderly behavior in prisons. *Id.* at 917-20.

slots.”¹⁹⁶ This analysis amounted to an application of the business essence test as commonly used in the sex discrimination context. Before allowing an occupational need defense, the court first assured itself that the race-conscious hiring was genuinely required for the prison to perform its main function. Judge Posner also noted that his opinion did not stand for the proposition “that prison authorities are entitled to yield to extortionate demands from prisoners for guards of their own race.”¹⁹⁷ This assurance represented a kind of rejection of the client preference rationale, bringing the analysis into line with the doctrinal approach to occupational need defenses in other areas of antidiscrimination law.

Likewise, in the law enforcement context, courts accepting occupational need defenses for racial discrimination have done so only after applying the equivalent of the business essence test. For instance, when considering whether New York City could reassign minority officers to primarily minority neighborhoods in the wake of the Abner Louima scandal,¹⁹⁸ Judge Scheindlin stipulated that a successful “‘operational needs’ defense” requires the defendant to “show a compelling governmental interest by establishing: (1) that discrimination against the black community has characterized law enforcement in the past; (2) that this discrimination has engendered hostility between black community members and the police; and (3) this hostility has made law enforcement in the community ineffective.”¹⁹⁹ Similarly, in the *Reynolds* case Judge Posner reiterated that occupational need in the police context must “be proved and not merely conjectured,” elaborating that “[i]t would not have done for the City merely to have presented plausible argumentation or to have appealed merely to common sense. . . . It proved that it has a compelling need to increase the number of Hispanic lieutenants”²⁰⁰ Correspondingly, courts have deliberately eschewed client preference arguments in law-enforcement-related decisions. Thus, Judge Lively of the Sixth Circuit noted: “The argument that police need more minority officers is not simply that blacks communicate better with blacks Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police.”²⁰¹

196. *Id.* at 920.

197. *Id.*

198. See Vivian S. Toy, *Confidence in Police Has Fallen, a Poll Finds*, N.Y. TIMES, Oct. 3, 1997, at B7 (describing the Abner Louima incident and public reaction to it in New York City).

199. *Patrolmen’s Benevolent Ass’n v. City of New York*, 74 F. Supp. 2d 321, 327 (S.D.N.Y. 1999) (Scheindlin, J.).

200. *Reynolds v. City of Chicago*, 296 F.3d 524, 530-31 (7th Cir. 2002) (Posner, J.).

201. *Detroit Police Officers’ Ass’n v. Young*, 608 F.2d 671, 696 (6th Cir. 1979) (Lively, J.); see also *Talbert v. City of Richmond*, 648 F.2d 925, 931 (4th Cir. 1981) (quoting Judge Lively’s language in *Young*). Along similar lines, a federal judge ruled that student preferences for more

Nor have courts automatically accepted occupational need defenses where public safety professions have been concerned. In *McNamara v. City of Chicago*, Judge Posner rejected an occupational need claim raised by a fire department on the ground that there was insufficient evidence produced at trial to support the theory that an all-white force would impair public cooperation with firefighters.²⁰² Likewise, in *Hayes v. North State Law Enforcement Officers Ass'n*, the Fourth Circuit accepted the occupational need premise in a law enforcement case, yet declined to embrace the claim due to insufficient evidence.²⁰³

Just as courts have applied a version of the business essence test to determine the extent of an occupation's dependence on racial diversity, they have also considered the social urgency of the profession in question.²⁰⁴ Not coincidentally, the few instances in which courts have accepted race-based occupational need defenses have involved professions whose central functions entailed the preservation of social order or public safety. It is an open question how narrowly courts should construe the meaning of compelling state interest for the purpose of future occupational need defenses. While a particular racial composition may be critically important to numerous professions, not all of those professions perform functions that are indispensable to the state. A conservative definition requiring a potential danger to public safety would have the advantage of narrowly confining BFOQ arguments. Yet regardless of how courts construe the compelling state interest requirement, the simple fact of their taking the social urgency of a profession into account will ensure that only certain professions are eligible to invoke occupational need defenses.

Although my focus has primarily been on the disparity of legal approaches to government-initiated occupational need defenses, it is also worth considering the implications of a Title VII amendment for private actors. Were race added to the list of BFOQ characteristics, private actors wishing to raise occupational need defenses would need to establish only that racial preferences are "reasonably necessary to the normal operation of that particular business or enterprise,"²⁰⁵ without regard to the social urgency of that enterprise. In practice, this would require that private employers pass the "business essence" and "all or substantially all" tests

minority officers were insufficient to justify discriminatory hiring of campus police. *See Ray v. Univ. of Ark.*, 868 F. Supp. 1104, 1126-27 (E.D. Ark. 1994).

202. 138 F.3d 1219, 1222 (7th Cir. 1998) (Posner, C.J.).

203. 10 F.3d 207, 214 (4th Cir. 1993) ("If this is found to be enough evidence to justify the need for race-conscious policies, we fear others could use this same rationale for a much less benign purpose.").

204. *See, e.g., Patrolmen's Benevolent Ass'n*, 74 F. Supp. 2d at 329 ("Upon careful consideration, it is my conclusion that the need for effective law enforcement can be a compelling state interest.").

205. 42 U.S.C. § 2000e-2(e)(1) (2000). The language of the BFOQ exception within Title VII makes no reference to the nature of the profession invoking the defense.

just as they have done in the sex discrimination context. Assuming that courts rigorously inquire into the relationship between racial preferences and stated occupational needs, such an arrangement would still provide adequate safeguards against unwanted prejudice.²⁰⁶ The mere fact that private discriminatory conduct would be subject to somewhat less stringent judicial review than state action should not raise concerns, particularly in light of the Court's past assessment of the relative potency of Title VII and the Equal Protection Clause where race is concerned.²⁰⁷

For proponents of affirmative action, the development of a race-based occupational need rationale represents an enticing new means of defending an old policy. Still, many of its strongest advocates would recoil at the remarks of congressmen who used similar logic to defend white southern businesses in the 1960s. The fact that perceptions change when the race being advantaged is swapped suggests that the occupational need rationale often provides intellectual cover for a set of more deeply held beliefs. Allowing this trend to continue risks establishing a series of loopholes within antidiscrimination law that may outlast the immediate circumstances of their creation. We should therefore narrowly construe the occupational need defense to ensure that where the core premise of antidiscrimination law is suspended, it is not without good reason. This would have the added benefit of encouraging advocates of affirmative action in fields such as law and business to acknowledge the extent to which other considerations animate their thinking. By resisting the intellectual detour that occupational need arguments present, proponents of affirmative action, whether in higher education or in the workplace, would be better able to defend their position in terms of the social justice claims that lie at its core.

CONCLUSION

Following the Supreme Court's announcement that it would revisit the issue of affirmative action in higher education for the first time in a generation, numerous amici filed briefs in support of the University of Michigan Law School's race-conscious admissions procedures. Relying on these filings, the *Grutter* Court embraced the notion that various professions have important occupational interests in perpetuating racially diverse higher education, and suggested that these considerations could rise to the level of compelling state interests.

The purposes of this Note have been to trace the roots of, further delineate, critique, and consider potential applications of what I have

206. See Bryant, *supra* note 63, at 228.

207. See *supra* note 180. Thus, while Title VI has been deemed coterminous with the Equal Protection Clause, see *supra* note 23, the same has not been said of Title VII, at least with respect to race.

termed the Supreme Court's "occupational need rationale." Through an in-depth study of the military and its reliance on occupational need logic, I have sought to develop a more concrete understanding of how racial diversity facilitates occupational performance and to assess which other professions have raised the most convincing occupational need defenses.

In place of the Court's current all-or-nothing approach to occupational need defenses, I have proposed a more fact-driven inquiry into the characteristics of each profession raising such arguments. By considering the extent of the public's interest in a given occupation's continued viability, as well as the degree of that occupation's dependence on racially diverse leadership, we may capture the valuable insights of the *Grutter* majority while responding to the most serious criticisms raised by the dissent.

In order to bring greater intellectual coherence to this area of the law, Congress should amend Title VII to remove the statutory barrier against race-based occupational need defenses. Armed with greater flexibility, judges should tightly construe these defenses, requiring that they satisfy doctrinal tests even more rigorous than those currently used to guard against illegitimate forms of sex discrimination. While such an approach is not without its risks, there is substantial reason to believe that courts are capable of distinguishing between authentic and pretextual occupational need claims.

Under such a system, I anticipate that certain public safety professions would emerge as the most likely candidates to raise successful occupational need defenses. Yet regardless of how the future unfolds, forty years of debate in both statutory and constitutional contexts suggests that the time is ripe to reconsider the proper place of occupational need arguments within antidiscrimination law.
