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Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace

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I. INTRODUCTION

The Supreme Court’s recent decision in Grutter v. Bollinger\(^1\) gave a blinking yellow light to affirmative action programs in higher education. A majority of the Court recognized that racial and ethnic diversity within a student body was a “compelling state interest” that, if pursued by appropriate means, could justify some race-based preferences for underrepresented groups in university admissions.\(^2\) Universities have accordingly turned their attention to the design of admissions procedures that are both lawful and practicable means of producing a diverse student body out of the thousands of applications that must be processed during a short admissions season.

The next front in the legal battle over affirmative action may well be the workplace, where diversity has become a widely endorsed desideratum of organizational life. That upcoming showdown may have been on the minds of the numerous “major American businesses” that lined up in support of affirmative action in Grutter.\(^3\) Arguing in defense of the elite and integrated institutions from which these firms draw much of their managerial workforces, these business leaders persuaded the Court that “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”\(^4\) But their briefs may also have planted the seeds for a defense of the corporate amici’s own employment policies. Affirmative action, including preferential consideration of women and people of color, undoubtedly plays some role in the hiring and promotional decisions that go into creating the diverse workforces whose virtues these companies tout.\(^5\)

A day of reckoning in the courts cannot be far off. The legality and limits of affirmative action in employment has not

2. Id. at 325.
3. See id. at 330 (citing Amicus Briefs of 3M et al. and of General Motors Corp). No major American corporation—indeed, virtually no major American institution of any kind—filed a brief in opposition to affirmative action.
4. Id. at 330.
5. See infra Section I. I make no effort here to quantify the role of such preferences in hiring and promotions. I simply posit that some employers sometimes engage in such preferences, and may be faced with a challenge to their legality.
been the subject of Supreme Court scrutiny since its 1987 decision in \textit{Johnson v. Transportation Agency}, which upheld an affirmative action plan under Title VII.\footnote{Johnson v. Transp. Agency, 480 U.S. 616 (1987).} One reason for this long silence is the paucity of lower court decisions on the legality of affirmative action in employment.\footnote{Another reason is the deliberate decision of the civil rights bar to settle the \textit{Taxman} case, after the Supreme Court agreed to hear the case, rather than risk a bad decision. \textit{Taxman} v. Bd. of Educ., 91 F.3d 1547 (3d Cir. 1996). \textit{See infra} note 63-64 and accompanying text.} “Reverse discrimination” claims are fairly rare to begin with,\footnote{John J. Donohue III & Peter Siegelman, \textit{The Changing Nature of Employment Discrimination Litigation}, 43 STAN. L. REV. 983, 1033 (1991).} and employers rarely defend them by pointing to a lawful affirmative action plan. They are more likely to pursue their tried-and-true defense of contesting the illegal motive, a defense with which they have had much successful experience in ordinary discrimination litigation.\footnote{See Stover v. Martinez, 382 F.3d 1064, 1076–77 (10th Cir. 2004); Woods v. Perry, 375 F.3d 671, 676 (8th Cir. 2004); Edmund v. MidAmerican Energy Co., 299 F.3d 679, 684 (8th Cir. 2002). These cases represent a few recent examples of “reverse discrimination” claims in which the employer prevailed by denying that race or sex was a motivating factor.} Ironically, the difficulties that all employment discrimination plaintiffs face in proving an unlawful discriminatory motive may have helped to shield affirmative action programs from legal scrutiny.

Employers' reluctance to mount an affirmative action defense is also due in part to the problematic nature of the only firmly established justification for race and gender preferences. Public employers, constrained by the equal protection analysis of \textit{Wygant v. Jackson Board of Education},\footnote{United Steelworkers v. Weber, 443 U.S. 193 (1979).} found no firm support for anything other than a remedial argument—and a rather narrow remedial argument at that. That is, “some showing of prior discrimination by the governmental unit involved” was required to justify even “limited use of racial classifications.”\footnote{Johnson, 480 U.S. at 631.}

Private employers, governed by Title VII, found somewhat more space for affirmative action in the Supreme Court’s few and aging Title VII precedents—\textit{Johnson} and its predecessor \textit{Weber}.\footnote{Johnson, 480 U.S. at 631.} Those decisions allowed the preferential hiring or promotion of minorities or women (provided the preferences are not too rigid or too burdensome on the dispreferred) where there is a “manifest imbalance” reflecting underrepresentation of the relevant group in “traditionally segregated job categories.”\footnote{Johnson, 480 U.S. at 631.} That formulation might point toward the sheer \textit{fact} of underrepresentation, without regard either to the discriminatory \textit{origins} of such underrepresentation or the employer’s \textit{purpose} of remedying it. But the more permissive reading of \textit{Johnson} has been strained by the passage of...
time, the changing composition of the Court, and the subsequent decisions in *Croson*\textsuperscript{14} and *Adarand*,\textsuperscript{15} which struck down minority contractor set-asides under the Constitution. In the private sector as in the public sector, there has been no reliable defense of affirmative action for employers who are unwilling or unable to suggest their own complicity in past segregation and current inequities. Few employers have chosen to go down that road.

The other problem with the remedial argument is that it does not match up with the contemporary rhetoric surrounding most workforce diversity programs. Within the corporate world, remedial arguments are largely passé. They have been supplanted—at least in firms’ public pronouncements—by the “business case for diversity”: the proposition that a diverse workforce is essential to serve a diverse customer base, to gain legitimacy in the eyes of a diverse public, and to generate workable solutions within a global economy.\textsuperscript{16} An employer’s public embrace of workforce diversity for its competitive virtues might undercut the employer’s defense against a white employee’s discrimination suit; whether an employer defends by denying that race played a role in the challenged decision or by claiming a valid (remedial) affirmative action plan, the employer’s overt support of workforce diversity as a positive value might be taken as evidence that the employer’s explanation is pretextual. The upshot is that, while corporate America may dodge the issue for a while longer, there is a perilous gap between the precedent and the articulated purpose and practice of affirmative action in the workplace.

Does *Grutter* help to fill that gap? In recognizing legitimate non-remedial justifications for affirmative action in higher education, *Grutter* may suggest an alternative defense of affirmative action in employment that better fits both what employers are doing and what they are proclaiming under the banner of diversity.\textsuperscript{17} My focus here is on racial and ethnic preferences, not gender preferences, in employment; whatever *Grutter* has to say about the former, it has less to say about the latter. In particular, I will focus on *Grutter*’s reframing of the value of diversity within a social institution: its shift from variety and difference to connectedness and integration, and from what happens inside the classroom to what spills

outside into civil society. That shift may, or at least should, portend greater solicitude toward employers’ affirmative efforts to integrate predominantly white workplaces as well, for cooperation and communication among diverse co-workers within integrated workplaces can produce a rich societal payoff in the form of interracial social capital and connectedness. 18

Unfortunately, the good that workplace integration does in civil society seems to provide neither a reason for employers themselves to pursue integration nor a clearly viable legal justification for employers’ own voluntary use of preferences in pursuit of racial integration. My conclusion is that Grutter may not so much add to employers’ arsenal of potential rationales for the affirmative pursuit of diversity as it may alter the legal landscape on which the defense of affirmative action will take place. Grutter works a shift from backward-looking and inward-looking perspectives on voluntary affirmative action to forward-looking and outward-looking perspectives. It works a shift as well from a posture of suspicion to one of cautious approval, and from a primary focus on motive to greater attention to consequences. All of these aspects of Grutter should be helpful in framing the defense of voluntary employer efforts to integrate workplaces in which racial minorities are manifestly underrepresented.

II. AFFIRMATIVE ACTION AND DIVERSITY IN THE WORKPLACE

There is little doubt that discrimination against non-white minorities in hiring and promotions persists. 19 There is equally little doubt that it is far less widespread and overt than it was in 1964, when the Civil Rights Act was passed. Indeed, since the 1960s, many employers—especially in the public sector and in large private firms—have made an affirmative commitment to hiring and promoting racial minorities into workplaces and positions in which they have historically been only sparsely represented. That commitment has gone beyond simply seeking consciously to avoid discrimination against minorities. 20 It has sometimes taken the uncontroversial form of “outreach” and other efforts to identify and recruit

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20. That is itself easier said than done, given the embeddedness of racial biases both within individuals and within predominantly white organizations. For a helpful review of the evidence, see Linda Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 Stan. L. Rev. 1161 (1995). Indeed, in practice it may not be possible to distinguish between the efforts an organization must make to avoid invidious discrimination and the efforts an organization makes to affirmatively seek greater diversity and to make diverse organizations function better.
qualified minority job candidates. But some employers have also given conscious preferences to underrepresented minority candidates for hiring and promotion. That is, they consciously make race or ethnicity itself a “plus-factor” in those decisions, resulting in the hiring or promotion of some qualified minority candidates over white candidates who, based on the otherwise-relevant criteria, would be deemed more qualified.

Given voluminous empirical evidence of the prevalence of unconscious biases against non-white minorities, some conscious preferences in their favor may be necessary to approximate unbiased decision making. But if the decisionmakers themselves—usually predominantly white—are consciously favoring minority candidates over marginally more-qualified white candidates, it seems fair to say that those decisions involve “preferences.” Hiring and promotional decisions reflecting such preferences—the only ones at issue here—are vulnerable to challenge as “reverse discrimination.”

Why do employers sometimes make these preferential decisions? In particular, why do private sector employers engage in the conscious use of “affirmative action” preferences that, by hypothesis, favor marginally less qualified applicants? The arguments for such preferences can be roughly sorted into three categories: “compliance” and litigation avoidance; social justice; and the economic benefits of diversity. The first harkens to externally-imposed legal norms and obligations; the second to the felt demands of morality in light of history and social conditions; and the third to organizational self-interest. Roughly speaking, the public posture of firms has shifted over the last few decades away from compliance and social justice and toward “diversity.”

Behind the scenes, “compliance” and social justice arguments still play a role. Large private firms are sensitive to the risk of discrimination litigation, as well as the bad publicity that may attend such litigation. Indeed, litigation and bad publicity may even add up to punishment in the stock market, as appears to have occurred after a federal judge certified a 1.6 million member class of sex discrimination plaintiffs in their lawsuit against Wal-Mart.22 It is noteworthy that some of the most damning evidence in that case is the statistical evidence of women’s underrepresentation in managerial positions.23 In the meantime, Wal-Mart has announced that it is beefing up its diversity programs and rewarding managers for meeting diversity goals.24 Clearly, firms may reduce their

exposure to discrimination litigation by maintaining a diverse workforce.\(^{25}\) These compliance-related concerns do not feature prominently in firms’ public statements about their human relations strategy (beyond the boilerplate assurance that they are “equal opportunity employers”); but they surely drive some of whatever preferential hiring is going on.\(^{26}\)

Concerns about social justice also continue to play a role in the commitment to increasing minority representation within organizations. Many corporate executives and human relations managers are motivated by a desire to do right (and perhaps by a desire to be seen as doing right) in giving an edge to individuals from groups long marginalized and excluded from positions of authority and privilege in society. These arguments remain, for many observers, the most powerful justification for affirmative action.\(^{27}\) However, both within firms and especially in their public pronouncements, these arguments have been largely supplanted by arguments based on “diversity,” and in particular the “business case for diversity.”

The “business case for diversity,” which seeks to link workforce diversity to the organization’s bottom line, has several strands.\(^{28}\) One is based simply on the recognition that the available talent pool is increasingly diverse, and that firms cannot hope to hire the most talented workforce without reaching beyond traditional demographic boundaries. That is plainly true, but it points more toward outreach efforts than toward preferences. I will focus on three other strands of the “business case for diversity.” First, a diverse workforce is necessary to appeal to and deal effectively with increasingly diverse external constituencies, especially in an increasingly global marketplace. Second, diversity within a firm’s leadership enhances its competence and legitimacy with the increasingly diverse workforce that it leads. Third, diversity within an organization contributes to the creativity and productivity of group decision-making processes.

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25. Most large firms also seek access to public contracts, the award of which may depend on firms’ official reports of their workforce demographics. The Office of Federal Contract Compliance Programs requires the filing of “affirmative action” reports and demographic data by firms that seek federal contracts.

26. That may seem ironic, in that “reverse discrimination” presumptively violates the employment discrimination laws. But whether and when it does so is of course the very question at issue in discussions of the legality of affirmative action.


I will return to these arguments below. But first let us take a brief doctrinal detour to see how the various arguments in support of affirmative action fared in the courts before Grutter.

III. DEFENDING AFFIRMATIVE ACTION BEFORE GRUTTER

The legality of affirmative action was first squarely put to the Court in Regents of the University of California v. Bakke, in which a rejected white applicant challenged a state medical school's reservation of spaces for minority applicants under both the Constitution and Title VI of the Civil Rights Act. Four justices would have upheld the program on the ground that it aimed "to remedy disadvantages cast on minorities by past racial prejudice" and inflicted no stigma on rejected white applicants. Four justices would have struck down the program on the ground that Title VI foreclosed the race-based exclusion of applicants from certain seats. Justice Powell provided the fifth vote to strike down the program, as well as the fifth vote to overturn the injunction against taking race into account altogether. In so doing, he also provided the blueprint for the next quarter-century for universities seeking to increase the representation of racial and ethnic minority groups in what they hoped would be a lawful manner.

Powell rejected several proffered justifications for the program: the pursuit of greater minority representation (illegitimate "discrimination for its own sake"); the redress of "societal discrimination" (too "amorphous" and "ageless"); and the delivery of medical services to underserved communities (not clearly advanced by racial preferences). But Powell found that the medical school did have a "compelling state interest" in the educational benefits to be gained from a diverse student body. Still, its program of rigid "quotas" was an impermissible means of seeking diversity. Powell went to some lengths, however, to describe the kind of flexible case-by-case consideration of race by which universities could permissibly seek a diverse student body.

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32. Id. at 421 (Stevens, J., concurring in the judgment in part and dissenting in part; joined by Burger, C.J., Stewart, J., and Rehnquist, J.)
33. Id. at 271–72 (Powell, J., plurality opinion).
34. Id. at 305–11.
35. Id. at 315–19, 321–24. Justice Powell appended to his opinion a lengthy description of the “Harvard Plan,” which elaborated why and how Harvard College sought to assemble a diverse student body. In the opinion itself he explicitly approved the Harvard approach, both in its rationale and in its implementation.
Public employers encountered a less accommodating constitutional standard. In *Wygant v. Jackson Board of Education*, another splintered Court struck down a public school system's preferential layoff policy, under which some white teachers were laid off ahead of black teachers with less seniority. Justice Powell, writing for three justices, reaffirmed *Bakke*’s rejection of “societal discrimination” as “too amorphous a basis for imposing a racially classified remedy”; and rejected as similarly amorphous the “role model theory,” by which minority pupils would benefit from the presence of minority teachers. As for the school board’s claimed remedial justification, the plurality required significant evidence of prior discrimination by the employer itself. But even such evidence would have failed to justify preferential layoffs, given their heavy burden on the dispreferred. Justice O’Connor concurred, emphasizing that the decision did not rule out all non-remedial rationales for affirmative action, and articulating a less rigorous standard for establishing the remedial justification: She would have required a sufficient disparity between the make-up of the workforce and that of the relevant labor force to raise an inference, or a prima facie case, of discrimination. Justice White supplied a fifth vote against the program based on a more categorical disapproval of preferential layoffs.

The *Wygant* plurality seemed to point toward a “remedial only” theory of affirmative action in employment under the Constitution, under which public employers were entitled to remedy only the underrepresentation to which they—the particular agency, that is—had at least arguably contributed. The “remedial only” theory of affirmative action under the Constitution, and the focus on particularized evidence of past discrimination, gained credence with the Court’s decisions striking down minority business set-asides in public contracting in *Croson* and *Adarand*. By the time the spotlight returned to higher education, *Bakke*, and Powell’s diversity rationale in particular, appeared vulnerable. The Fifth

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37. Id. at 276.
38. Id. at 277.
39. Id. at 282–83.
40. Id. at 294–95.
41. City of Richmond v. J.A. Croson, Inc., 488 U.S. 469 (1989). *Croson*’s version of the remedial theory is not quite as narrow as commonly understood, for it allowed state or local governments to remedy discrimination by private actors in the relevant market, provided that discrimination was shown with sufficient particularity. Id. at 509; see also Ian Ayres & Fredrick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577 (1998).
Circuit declared its demise in *Hopwood v. Texas*, which struck down race-based preferences in admissions by the University of Texas School of Law.\(^{43}\) *Hopwood* cited *Wygant* for the “remedial only” theory and against the legitimacy of a “diversity” rationale for affirmative action.\(^{44}\) Powell’s solitary decision in *Bakke*, said the court, was not the law.\(^{45}\) Moreover, *Hopwood* rendered a very stingy accounting of the University’s remedial debts, and found no valid remedial purpose on the part of the very same state law school that had produced *Sweatt v. Painter*\(^{46}\) (too many years ago) within a state most of whose urban public school districts (but not the University itself) were still operating under desegregation decrees.

The plot line of the affirmative action story runs a bit differently under Title VII. A thin majority in *United Steelworkers v. Weber* in 1979 upheld a collectively-bargained apprentice program that brought African-American workers into traditionally segregated craft jobs in the steel industry, a major target of discrimination litigation.\(^{47}\) Finding congressional support for “voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy,”\(^{48}\) a bare majority approved voluntary racial preferences in hiring that were designed to “eliminate manifest racial imbalances in traditionally segregated job categories.”\(^{49}\) Such programs were “consistent with Title VII’s objective of break[ing] down old patterns of racial segregation and hierarchy.”\(^{50}\)

Given the history of discrimination and the pendency of litigation in the steel industry, *Weber* would not have been hard to square with a “remedial only” theory of affirmative action under Title VII, a theory that gained momentum with the subsequent constitutional ruling in *Wygant*. But a year after *Wygant*, a majority of the Court in *Johnson* held that Title VII affords more room for affirmative action than does the Constitution.\(^{51}\) Where the employer defends against a discrimination suit on the basis of a valid affirmative action plan, the plaintiff must prove that the plan either lacks a valid purpose or “unnecessarily trammels” the interests of the dispreferred.\(^{52}\) Relying on *Weber*, the Court held that a valid purpose exists

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43. 78 F.3d 932 (5th Cir. 1996).
44. *Id.* at 951.
45. *Id.* at 944.
46. 339 U.S. 629 (1950) (holding that separate state law school for blacks was not equal to University of Texas School of Law).
48. *Id.* at 204.
49. *Id.* at 197.
50. *Id.* at 208.
51. Johnson v. Transp. Agency, 480 U.S. 616, 628 n.6 (1987). Johnson involved preferences for women, but the majority made it clear that the same standards would apply to racial preferences challenged under Title VII. *Id.* at 635 n.13.
52. See *id.* at 627 (on burden of proof); *id.* at 631 (on valid purpose); *id.* at 637 (on the effect of “unnecessary trammeling”).
where there is a “manifest imbalance” in “traditionally segregated job categories.”

The Court might have spun Weber in a remedial direction, calling for inquiry into the discriminatory origins of such underrepresentation or the employer’s remedial purpose. But the Court showed little interest in tracing the underrepresentation of women to discrimination by anyone in particular. The Court echoed the employer’s assertion that “limited opportunities . . . have existed in the past . . . for women to find employment in certain job classifications,” and that there were few women in higher-level jobs within the agency—administrators, professionals, technicians, and skilled craft workers. As for the cause, the Court declared that “a plethora of proof is hardly necessary to show that women are generally underrepresented in such positions and that strong social pressures weigh against their participation.” Needless to say, taking judicial notice of “social pressures” affecting women’s occupational choices is a far cry from requiring evidence that the employer itself had erected discriminatory barriers to their choices.

As for purpose, Johnson does speak of the employer’s “purpose of remedying underrepresentation.” But that is not the same as a purpose of remedying discrimination; it seems to mean only a purpose of integrating job categories in which members of the relevant group have been conspicuously underrepresented. The employer’s reason or motive for doing so—whether to redress past wrongs or to gain the benefit of diverse perspectives—appears to be irrelevant. Indeed, Justice Stevens opined in his concurrence that Weber and Johnson permitted an employer “to hire members of minority groups for any reason that might seem sensible from a business or social point of view.” In particular, he cited “forward-looking considerations”—those that “aspire to a racially integrated future”—as valid reasons for affirmative action preferences.

Justice O’Connor, whose concurrence supplied a sixth vote to uphold the program, objected to Stevens’ characterization of Weber, but not to his characterization of the Johnson majority, which she took to task for straying from a more strictly remedial approach. On her view, Title VII allowed affirmative action “only as a remedial device to eliminate actual or apparent discrimination or the lingering effects of this discrimination.” She concurred because she found a “statistical disparity sufficient to support a

53. Id. at 631.
54. Id. at 634.
55. Id. at 634 n.12 (quoting the 9th Circuit’s decision in the case) (emphasis added).
56. Id. at 634.
57. Id. at 645 (Stevens, J., concurring).
58. Id. at 646–47.
59. Id. at 649 (O’Connor, J., concurring in the judgment).
prima facie claim under Title VII”—that is, a significant disparity between the composition of the workforce or job category and the composition of the qualified local labor pool.60 The Johnson majority, however, required no such finding, and indeed no close analysis of the composition of the “qualified” local labor force. It required only a “manifest” or “conspicuous” underrepresentation of the preferred group.

So Johnson could be read to permit preferences for non-white (or female) employees in jobs heretofore occupied exclusively or overwhelmingly by white (or male) employees, without regard to either the cause of underrepresentation or the employer’s reason for redressing it. The question becomes closer once firms moved beyond “token” minority representation. The imbalance in Johnson—the “inexorable zero” for women in the relevant job category—was too conspicuous to require any further specification of how much underrepresentation it takes to justify preferences, and conspicuous enough to draw the vote of Justice O’Connor even under a stricter remedial standard.61 But workforce diversity programs that award preferences past the point of “token” minority representation raise that question.

Moreover, the more permissive reading of Johnson has come under pressure in recent years, given the intervening decisions in Croson and Adarand and changes in the Court’s make-up. Although lower courts rarely count heads as overtly as did the Fifth Circuit in Hopwood, there is no escaping the fact that Justice O’Connor, who took a more restrictive view of affirmative action in Johnson itself and voted against the set-asides in Adarand and Croson, has become a crucial vote for affirmative action plans under both Title VII and the Constitution. Citing those intervening precedents, several courts of appeals have cast doubt on the broad reading of Johnson and on the legitimacy of any non-remedial justification for affirmative action under Title VII.62

For example, the Third Circuit, sitting en banc in Taxman v. Piscataway Board of Education, read Johnson to require a remedial purpose and to foreclose reliance on the goal of “diversity” within the faculty.63 The facts of Taxman—the lack of any “manifest racial imbalance” between the

60. Id.
61. Id. at 657.
62. See, e.g., Bass v. Bd. of County Comm’rs, 256 F.3d 1095 (11th Cir. 2001); Schurr v. Resorts Int’l Hotel, Inc., 196 F.3d 486 (3d Cir. 1999); Hill v. Ross, 183 F.3d 586 (7th Cir. 1999); Taxman v. Bd. of Educ., 91 F.3d 1547 (3d Cir. 1996).
63. Taxman, 91 F.3d at 1550–51. Finding no “intention of remedying the results of any prior discrimination or identified underrepresentation of minorities,” the court struck down the preferential retention of a black teacher—the only one in her department—over an equally senior white teacher. The court’s insistence on a remedial purpose is made ambiguous by its finding that there was no overall underrepresentation to remedy—that “the percentage of Black employees in the job category which included teachers exceeded the percentage of Blacks in the available work force.”
teacher corps and the workforce as a whole, and the overt reliance on race in an individual layoff decision—made it a hard case under any theory of affirmative action. When the Supreme Court granted certiorari, civil rights advocates intervened to help settle the case, averting what they feared might be a disastrous result and leaving *Johnson* standing for another day.\(^6^4\)

One lesson from the cases is the permeability of the doctrinal lines between employment and other settings for affirmative action, and between constitutional and statutory standards governing its legality. The standards differ, but each affirmative action decision by the Supreme Court, whatever its legal or factual context, reverberates across the board. And across the board, the remedial-only theory, albeit in broader and narrower versions, was gaining ground before *Grutter*.

At the same time, the remedial theory itself was losing traction as a justification for preferences. Institutions that had been engaged in the practice of affirmative action for decades were ever more poorly positioned to assert their own complicity in producing current patterns of segregation. That is not to say there was nothing left to remedy. Centuries of slavery, apartheid, and overt exclusion had obviously left deeply entrenched patterns of segregation and economic inequality, especially between black and white Americans. But the causes of continuing inequality were often too numerous, too deep, and too interconnected to tie to any one institution’s decisions; they added up to “societal discrimination” that no one institution could claim as a justification for voluntary remedial action. In a sea of “societal discrimination,” the contribution of particular institutions—even those that had once participated in active and conscious racial exclusion—was becoming increasingly untraceable.

The remedial theory was losing political traction as well, as the white majority grew impatient with appeals sounding in guilt and obligation and harkening to an increasingly remote past of overt exclusion and *de jure* segregation.\(^6^5\) Many employers and educational institutions, public and private, remained committed to the practice of some degree of affirmative action, but they began to move away from the language of justice and redress toward the affirmative embrace of “diversity”—of the proposition that a heterogeneous workforce with a mix of different backgrounds, perspectives, and experiences contributes to the institution’s mission or bottom line. The shift in rhetoric—away from remediation, compliance, and justice, and toward diversity—represents not just a different mode of justification for the same programs; it also justifies different programs. A firm’s need for diverse workers to appeal to diverse customers may be

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\(^{64}\) *See* comments of Elaine Jones, Legal Director, NAACP Legal Defense Fund, at [http://www.law.berkeley.edu/cenpro/csj/Olmos%20Lecture.doc](http://www.law.berkeley.edu/cenpro/csj/Olmos%20Lecture.doc).

\(^{65}\) *See generally* PAUL M. SNIDERMAN & EDWARD G. CARMINES, REACHING BEYOND RACE (1997) (examining public attitudes, and especially white attitudes, about affirmative action preferences).
met—indeed, it may even be better met—by hiring recent immigrants or foreign nationals rather than African-Americans. The shift away from the language of remediation and justice may divert energy and attention from the groups most afflicted by segregation and discrimination.

The shift to "diversity" rhetoric also put employers on a collision course with the precedents on which they would need to base a defense of their hiring policies. Under Taxman, for example, "workforce diversity" is an impermissible rationale for preferring underrepresented racial and ethnic groups. Employers' public proclamations of the affirmative virtues of racial and ethnic diversity might thus become ammunition for the plaintiff in a "reverse discrimination" suit, whatever the employer's defense. If the defense were that the decision was not based on race but on some legitimate non-racial consideration, the employer's overt support for racial diversity might be evidence (though not of course proof) that the non-racial explanation was a pretext for discrimination. And if the defense were based on the existence of a valid affirmative action plan, those same statements might contradict the employer's claim of a remedial purpose.

The mismatch between corporate rhetoric and emerging law may help explain the paucity of court decisions on the legality of affirmative action: few employers have been willing either to put on a remedial case implying their own responsibility for the underrepresentation of people of color in their ranks or to become a test case for the legality of diversity-based preferences, and to put at risk institutional practices with a hard-won corporate constituency.

IV.

**GRUTTER's INNOVATION**

Along comes *Grutter*. In the higher education setting, *Grutter* placed a solid if slim Supreme Court majority behind the diversity rationale that animated Justice Powell's solo opinion in *Bakke*. That is important both because of what the diversity rationale *is* and because of what it is *not*. It is instrumental and forward-looking; it is decidedly *not* a remedial argument. It is about making a better future, and not about making up for the sins of the past. *Grutter's* diversity rationale is not oblivious to history, as I will discuss shortly. But the majority decisively rejected the narrowly remedial paradigm of affirmative action—the notion that institutions were permitted to do only what they were virtually obliged to do to rectify past wrongs. The remedial-only paradigm, at least in its more draconian form,

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67. See, e.g., Bass v. Bd. of County Comm'rs, 256 F.3d 1095 (11th Cir. 2001).
pronounced a virtual death sentence for affirmative action in higher education; *Grutter’s* embrace of a diversity rationale gave universities, at least, a reprieve.\(^70\)

*Grutter* addressed not only the “why” of affirmative action, but also the “how” and the “how much.” My focus here will be chiefly on the “why”—on the justifications for affirmative action under *Grutter*. But the “how” and the “how much”—the use of race as an unquantified “plus factor” versus rigid and categorical preferences and the crucial concept of “critical mass”—have important implications for workplace affirmative action as well.

### A. Why Affirmative Action? From Diversity to Integration

In elucidating the value of diversity, Justice O’Connor’s majority opinion began by citing extensively and approvingly from Justice Powell’s opinion in *Bakke* on the “paramount importance” of assembling a body of “students as diverse as this Nation of many peoples,” who can “contribute the most to the ‘robust exchange of ideas.’”\(^71\) *Grutter* reinforced this argument, accepting the law school’s contention that “‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds.’”\(^72\)

But *Grutter* did more than parrot Justice Powell’s views in *Bakke*. The Court elaborated a broader conception of the value—indeed the point—of diversity. Racial and ethnic diversity, though often identified as a *goal* of affirmative action programs, is better seen as a *means* to other legitimate and compelling ends. The traditional Powellesque argument for diversity in higher education pointed to the educational value of interaction among students with varied backgrounds, experiences, and viewpoints; it regards racial and ethnic diversity within a student body as a means of securing that variety—a proxy of sorts. This claim seems unexceptionable, as the *Grutter* majority observed, “in a society, like our own, in which race unfortunately still matters.”\(^73\) Racial identity does correspond to a different array of experiences and perspectives. But the conventional diversity argument was easy to caricature, especially when it was rhetorically stripped of any reference to the past and present facts of racial subordination and segregation.\(^74\) Proponents’ efforts to present the diversity argument as an alternative to the remedial argument—and indeed to extend

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\(^{70}\) *Id.* at 343 (suggesting reprieve will last for 25 years).

\(^{71}\) *Id.* at 324.

\(^{72}\) *Id.* at 330.

\(^{73}\) *Id.* at 333.

\(^{74}\) *See, e.g.*, *Hopwood v. Texas*, 78 F.3d 932, 946–47 (5th Cir. 1996).
the diversity argument to groups for which no remedial argument could plausibly be made—may have helped to produce a concept of diversity that was vulnerable to attack. For when it is reduced to a paean to the value of variety, “diversity” is an awkward argument for racial and ethnic preferences.

For some thoughtful observers, the “diversity as difference” argument for racial preferences risked reflecting and promoting stereotypical generalizations about individuals and imposing expectations about their contribution to classroom debate that were narrowing rather than liberating. For others, racial and ethnic preferences seemed a blunt instrument for securing diversity of experiences and viewpoints; why not look directly for the latter? Did African-Americans and Latinos—or at least the last few admittees from those groups—contribute greater diversity of views than, for example, fundamentalist Christians on a campus where the latter were sparse? And how exactly did diversity of views and experiences contribute to graduate education in physics or mathematics? The diversity argument, standing alone, didn’t explain especially well either the choice of beneficiaries for preferences or the scope of the programs.

The Grutter majority deflected many of those concerns by broadening its vision of what is at stake, and by including in that vision some recognition of the inequality and segregation that is not yet past. Grutter recognized that what is at stake is the possibility of an integrated future in a still-unequal and still-divided society. Student body diversity contributes to that compelling goal in two ways. First, it both signals and insures the openness of public institutions “to all segments of American society, including people of all races and ethnicities.” The Court proclaimed that “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.” Second, student body diversity operates at an interpersonal level. It “promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’”

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78. See Bollinger, supra note 27, at 1591–92. Broadening the Court’s vision in this way was a deliberate element of the University of Michigan’s litigation strategy and briefing.

79. Grutter, 539 U.S. at 331–32.

80. Id. at 332.

81. Id. at 330.
diverse student body not only encounter different perspectives, but also bridge differences and make connections in a divided society. Grutter partially recast diversity as a means of furthering integration.

The shift of focus from difference and variety to integration and connectedness is subtle but important. In a society in which race still divides people, both geographically and psychically, convening people of different races to cooperate in pursuit of shared objectives helps build a more integrated society. That proposition cannot be twisted into an endorsement of stereotypes as some articulations of the diversity argument have been. As I observe elsewhere, "[t]he integration argument does not use race... as a proxy for distinct experiences or views... Rather, it recognizes that race... as such triggers stereotypes, biases, and divisions, and that intergroup cooperation can help to overcome those social ills."82 If this is the aim of affirmative action, it explains why preferences go chiefly to African-Americans and Latinos: It is not that they are somehow more "diverse," but that they belong to large ethnic groups that have been plagued by a history of segregation, hostility, and prejudice, and that are accordingly underrepresented in the upper strata of American society. The proliferation of interpersonal bonds across these historically-fraught lines of division is "essential if the dream of one Nation, indivisible, is to be realized."83 Grutter's integration argument looks to the future, but its vision is suffused with memory and conscience.

Grutter's diversity rationale thus has two distinguishable strands: a familiar Powellesque appeal to the instrumental value of differences within an institution devoted to learning, and a newer integration argument that is informed by both history and the needs of civil society.84 With these two strokes, Grutter simultaneously broke the stranglehold of the conventional remedial paradigm, in which history was reduced to a parsimonious reckoning of institutional debts owed, and cured the historical amnesia of the conventional diversity argument. It brought social justice, and the legacy of "societal discrimination" and segregation, back into the justificatory framework by allowing institutions—at least some institutions—to set their sights on a more integrated and egalitarian future.85

82. See ESTLUND, supra note 18, at 148.
83. Grutter, 539 U.S. at 332.
84. Professor Post also highlights the shift from Bakke's internal educational understanding of diversity to Grutter's outward-looking civic-educational understanding of diversity. He points out that "the Law School can have a compelling interest in using diversity to facilitate the attainment of these social goods only if there is an independently compelling interest in the actual attainment of these goods. Grutter's justifications for diversity thus potentially reach far more widely than do Powell's." Post, supra note 27, at 60.
85. My colleague Jack Greenberg makes a similar point in characteristically plain language: Justice O'Connor's "eye is on the condition of society and what affirmative action can do to help fix it, not what caused the condition." Jack Greenberg, Diversity, the University, and the World Outside, 103 COLUM. L. REV. 1610, 1621 (2003).

On other crucial issues addressed in *Grutter*, I will be brief. First, when are preferences justified? And what level of preferences is justified? Both of these questions were answered in *Grutter* with the concept of “critical mass,” which the University of Michigan Law School successfully defended as an appropriate benchmark for the use of preferences: If a “critical mass” of underrepresented minority students would not otherwise be admitted under race-neutral criteria, the Law School was entitled to award a preference in favor of those groups sufficient to produce a “critical mass.”

So what is “critical mass”? The term was defined in *Grutter* in several complementary ways, as “‘meaningful representation,” representation that was sufficient to “encourage[] underrepresented minority students to participate in the classroom and not feel isolated,” or “like spokespersons for their race”; 86 and sufficient to secure “the educational benefits that diversity is designed to produce,” and that are discussed above. 87 The endorsement of the University’s goal of “critical mass” further illuminates the Court’s understanding of what was at stake:

The Law School does not premise its need for critical mass on “any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.” To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School’s mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a “critical mass” of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body. 88

Critical mass is, in essence, an operational definition of integration in the educational context. It means something more than token representation and something other than proportional representation. 89 The concept of

87. See supra notes 71–85 and accompanying text.
88. *Grutter*, 539 U.S. at 333 (citations omitted).
89. The dissenters ridiculed the concept of critical mass as “a sham to cover a scheme of racially proportionate admissions.” *Id.* at 347 (Scalia, J., dissenting); see also *id.* at 383, 385 (Rehnquist, J., dissenting). In particular, Rehnquist questioned how “critical mass” could differ for each targeted minority group, and pointed out how closely in practice admissions (though not final enrollments) tracked the proportion of each such group in the applicant pool in the relevant year. *Id.* I will return to this issue below. See infra notes 149–151 and accompanying text.
critical mass serves both to indicate when preferences are justified and to
gauge how much of a preference is justified.

Still, universities face some constraints on how they can go about securing a critical mass of underrepresented minority students. They may not set a quota or assign a fixed weight to race or ethnicity. A constitutional admissions program “may consider race or ethnicity only as a ‘plus’ in a particular applicant’s file.’ . . . [It] must be ‘flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.’” The Law School’s program passed muster because it included “a highly individualized, holistic review of each applicant’s file, giving serious consideration to all of the ways an applicant might contribute to a diverse educational environment.”

_Grutter_ thus addressed why, when, how much, and how to engage in lawful affirmative action. All of these elements of _Grutter_ may have implications for workplace affirmative action. But my focus here will be chiefly on the “why” question: the permissible justifications for racial or ethnic preferences on behalf of underrepresented minority groups in employment.

V. DOES _GRUTTER_ WORK AT WORK? SOME INITIAL PUZZLES

So what difference does _Grutter_ make to the legality of workforce diversity programs that give an edge in hiring and promotions to members of underrepresented racial and ethnic groups? Answering that question will require us to cross both the line between education and employment and the line between the Constitution and Title VII. But we have already seen the courts do that; the emanations of the Supreme Court’s affirmative action decisions are so not easily cabined. I will focus initially on the carryover from higher education to employment, and reserve for later a discussion of the differences between constitutional and statutory standards.

On the one hand, _Grutter_ is studded with references to the particular context of higher education admissions and to the distinct role and prerogatives of universities. In holding that “student body diversity is a compelling state interest that can justify the use of race in university admissions,” the Court emphasized the role of universities and law schools in the shaping of young (adult) minds and in the “formation,”

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91. _Grutter_, 539 U.S. at 334.

92. _Id._ at 337.

93. _See infra_ notes 135–52 and accompanying text.

94. _Grutter_, 539 U.S. at 325.
"preparation," and "training" of future leaders. 95 Moreover, the Court relied expressly on the academic freedom that such institutions enjoy under the Constitution. 96 The first few pages of any brief against importing Grutter into the workplace will be easy to write.

On the other hand, the valence and atmospherics of Grutter are plainly encouraging for the proponents of workforce diversity programs. The majority's express reliance on the arguments of corporations and of the retired generals97 in support of affirmative action in higher education implies some recognition of and receptivity to the existence of affirmative action beyond higher education. Indeed, the majority seems to endorse the "business case for diversity" itself.98 The proponents of workforce diversity will rightly take comfort in the majority's affirmation that student body diversity "better prepares students for an increasingly diverse workforce and society," and in its reliance on corporate amici's contention that "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."99

On a more doctrinal level, the Court's acceptance of non-remedial arguments for affirmative action breaks with the highly constraining remedial-only paradigm, and with the idea that institutions are permitted to take race into account only to the extent that they are virtually obligated to do so by their own past wrongdoing. Grutter puts more than a bump in the road in front of the remedial-only juggernaut that some courts saw in the post-Johnson affirmative action decisions.100

But what of the particular compelling interests approved in Grutter? In their focus on "diversity," they resonate with the prevailing shape and rhetoric of contemporary workforce diversity programs better than conventional remedial arguments do. It is surely true that racial diversity within a workforce contributes both to a stimulating diversity of perspectives and to connectedness and mutual respect among diverse workers. And these workplace dynamics in fact contribute to the very civic

95. Id. at 332-33.
96. Id. at 328.
97. The majority was especially impressed, it appears, with the brief of the retired generals, Brief of Amici Curiae Julius W. Becton Jr. et al. at 27, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) [hereinafter Becton Brief]. The Court was persuaded that a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." Grutter, 539 U.S. at 332. Further, that "it requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective." Id. at 331, citing Becton Brief at 27.
98. Professor Wilkins contends that this aspect of Grutter will put "strong pressure" on employers, "not only to argue in the language of diversity but also to justify diversity in terms of the efficient functioning of institutions and the market." Wilkins, supra note 16, at 1558.
99. Grutter, 539 U.S. at 308.
100. See supra notes 36-46, 62-64 and accompanying text.
objectives that *Grutter* certified as compelling. But the parallel to *Grutter* soon runs into difficulty. For it is unclear whether employers, private or public, are entitled to rely upon the broader civic benefits of workplace diversity and integration as a justification for preferences; yet the private benefits of workplace diversity and integration—the various “business arguments” for diversity—may be too self-interested (at least under Title VII) to justify racial preferences.

A. Diversity Arguments for Workplace Affirmative Action

Take first the traditional *Bakke* rationale: the educational value of confronting different perspectives and experiences, of discussions that are “livelier, more spirited, and simply more enlightening and interesting” because of the diverse backgrounds and viewpoints of the participants. For both undergraduates and law students, both inside and outside the classroom, the educational value of such discussions is obvious; it hardly needed to be sanctified, as it was in *Grutter*, by the invocation of academic freedom.\(^{101}\) Indeed, the educational value of such discussions does not depend on the educational setting or the age of the participants. Discussions among diverse adult co-workers are also sure to be “livelier, more spirited, and simply more enlightening and interesting.” Such discussions, and the exchange of information and perspectives that they enable, contribute immeasurably—that is, both significantly and unquantifiably—to the quality of public discourse and public opinion in a diverse society. And the workplace is one of the only places where such discussions are likely to take place.\(^{102}\)

That makes workforce diversity a great societal good; but does it justify an employer’s own pursuit of workforce diversity? Unlike universities, few employers—even public employers—could credibly embrace as their mission or purpose the edification of their employees or the promotion of stimulating workplace discourse for their own sake.\(^{103}\) I will return to the question of whether employers either may or must rely on their particular institutional mission to justify affirmative action efforts. But assuming they either may or must do so, can they make the necessary factual showing that a diversity of viewpoints and the enrichment of employee discourse is critical to achieving instrumental goals of producing and distributing goods or services?

Some proponents of workforce diversity argue that employee knowledge, learning, and problem-solving are improved by demographic

\(^{101}\) See *Grutter*, 539 U.S. at 329.

\(^{102}\) See ESTLUND, supra note 18, at 118–23.

\(^{103}\) Though Justice Scalia in *Grutter* anticipated (in characteristically sarcastic terms) that they would try to do so. See infra note 113.
diversity among participants.\textsuperscript{104} We may call this the internal face of the “business case for diversity.” Unfortunately, the empirical evidence on this point is mixed.\textsuperscript{105} There is some evidence that workgroup diversity—including racial diversity—helps to expand the range of ideas considered and of alternatives generated at early stages of decision making. But diversity can also bring friction, along with “lower levels of satisfaction and commitment . . . and higher levels of absenteeism and turnover.”\textsuperscript{106} One review of the research concluded that, on balance, “[u]nless steps are taken to actively counteract [the negative] effects, . . . by itself, diversity is more likely to have negative than positive effects on group performance.”\textsuperscript{107}

Of course, steps can be taken to counteract the negative and cultivate the positive potential of workforce diversity. Organizations that learn to “manage diversity” effectively may be better managed organizations all around, and may perform better as a result.\textsuperscript{108} And where diversity within an organization or an organization’s constituencies is a given, the experience of intergroup cooperation has been shown to improve intergroup relations and attitudes.\textsuperscript{109} But that is a different claim—one that resonates more with the integrationist strand of \textit{Grutter}, and that I will return to shortly. If proof is needed for the proposition that racial diversity as such improves workplace decision making and productivity, it may be found wanting.

Another oft-cited facet of the “business case for diversity” points to the increasingly diverse nature of firms’ external constituencies—its clientele and contractors—and the credibility, legitimacy, and cultural knowledge that a diverse workforce brings to the project of capturing and cultivating those external constituencies. There is no gainsaying the demographic and economic realities underlying this “external legitimacy” argument. As

\begin{itemize}
  \item \textsuperscript{104} These arguments were prominent in the corporate amicus briefs in \textit{Grutter}. They argued that “a diverse group of individuals educated in a cross-cultural environment has the ability to facilitate unique and creative approaches to problem-solving arising from the integration of different perspectives.” Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents at 7, Grutter v. Bollinger, 539 U.S. 306 (2003), 2003 WL 399056. They also argued that “heterogeneous work teams create better and more innovative products and ideas than homogeneous teams,” Brief of General Motors Corporation as Amicus Curiae at 24, Grutter v. Bollinger 539 U.S. 306 (2003), 2003 WL 399096. Furthermore, that “innovation . . . can only come from encouraging true diversity of styles and ideas while leveraging multiple talents,” Motion for Leave to File Brief Amicus Curiae Out of Time and Brief of BP America Incorporated as Amicus Curiae in Support of Neither Party at 2, Grutter v. Bollinger 539 U.S. 306 (2003)(No. 02–241).
  \item \textsuperscript{105} See Wilkins, supra note 16, at 1587.
  \item \textsuperscript{106} See Katherine Y. Williams & Charles A. O’Reilly III, \textit{Demography and Diversity in Organizations: A Review of 40 Years of Research}, 20 RES. IN ORG. BEHAV. 77, 112 (1998).
  \item \textsuperscript{107} \textit{Id.} at 120.
  \item \textsuperscript{109} See \textit{ESTLUND}, supra note 18, at 69–83.
\end{itemize}
already noted, however, this argument has its limitations as a justification for racial preferences. While it looks beyond white Anglo constituencies, it may be skewed toward those who hale from, or are only a generation or two removed from, more economically vibrant parts of the world such as East and South Asia. It may do little to justify—and might even work against—the preferential hiring of African-Americans.\textsuperscript{110} Indeed, as Professor Malamud pointed out recently, to the extent this argument invokes the preferences of those with market power for dealing with “their own kind,” it echoes employers’ discredited efforts to cite discriminatory “customer preferences” as a justification for their own discrimination.\textsuperscript{111} While workforce-wide diversity programs are a far cry from the exclusionary hiring practices that Title VII targeted, the echo is still an eerie one.

Both the internal “improved decision making” and external “market legitimacy” arguments for workforce diversity gain some breathing room from \textit{Grutter’s} rejection of the remedial-only paradigm. But the Court’s affirmation of the value of “diversity as difference” in the context of higher education translates only very imperfectly to the employment context. Indeed, the most analogous elements of the “business case for diversity,” when translated into a defense of affirmative action, amount to an assertion of economic self-interest as a justification for racial preferences. It is unclear both whether employers could make the requisite showing that “diversity as difference” contributes to their economic or organizational goals, and whether such a showing would be sufficient to justify preferences.

\section*{B. The Integration Argument for Workplace Affirmative Action}

That brings us to \textit{Grutter’s} innovation. \textit{Grutter} recognizes that diversity among participants in a shared endeavor promotes integration, connectedness, and cross-racial understanding in a society still suffering from segregation, division, and prejudice. As I develop at length elsewhere,\textsuperscript{112} workplace diversity promotes this same compelling interest.\textsuperscript{113}

\begin{itemize}
  \item \textsuperscript{110} Even where African-Americans are the apparent beneficiaries of what David Wilkins calls “race-matching,” they may find themselves pigeonholed, limited to less favored neighborhoods of the corporate community. See Wilkins, supra note 16, at 1594–95.
  \item \textsuperscript{112} See ESTLUND, supra note 18, at 60–83.
  \item \textsuperscript{113} This point, and the support that \textit{Grutter} might offer to diversity-based preferences in the workplace, was explicitly anticipated by Justice Scalia in dissent. He observed that the benefits of
Cooperation among diverse co-workers builds interpersonal bonds, combats stereotypes, and promotes understanding and empathy across racial lines. Indeed, the experience of working together may do these things more effectively (and certainly for more people over a longer period of their lives) than the experience of attending college with diverse classmates. College classmates are rarely compelled to cooperate directly with others whom they do not choose to work with; yet that happens all the time in the workplace.

It happens in the workplace partly because the process of working together both depends on and helps to produce relatively constructive intergroup relations. To take just one example of these dynamics, consider Katherine Newman’s rich ethnographic account of urban fast-food restaurants and their diverse—albeit largely non-white—workforces. She finds “a living laboratory of diversity,” where poor workers who “live in segregated spaces . . . work side by side with people whom they would rarely encounter on the block.” And these workers do manage to work together:

In a world where residential segregation is sharp and racial antagonism no laughing matter, it is striking how well workers get along with one another. Friendships develop across lines that have hardened in the streets. Romances are born between African-Americans and Puerto Ricans, legendary antagonists in the neighborhoods beyond the workplace.

To be sure, Newman finds that labor market competition between ethnic groups still fosters resentments. “Even so, workers of different ethnic backgrounds are able to reach across walls of competition and cultural difference.” That is because they have to:

“cross-racial understanding” and the ability to work in “an increasingly diverse workforce and society” are matters of “good ‘citizenship,”’ not just education:

[I]t is a lesson of life rather than law . . . . If 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. And therefore: If it is appropriate for the University of Michigan Law School to use racial discrimination for the purpose of putting together a “critical mass” that will convey generic lessons in socialization and good citizenship, surely it is no less appropriate—indeed, particularly appropriate—for the civil service system of the State of Michigan to do so. There, also, those exposed to “critical masses” of certain races will presumably become better Americans, better Michiganders, better civil servants. And surely private employers cannot be criticized—indeed, should be praised—if they also “teach” good citizenship to their adult employees through a patriotic, all-American system of racial discrimination in hiring. The nonminority individuals who are deprived of a legal education, a civil service job, or any job at all by reason of their skin color will surely understand.

Grutter v. Bollinger 539 U.S. 306, 347–48 (2003) (Scalia, J., dissenting). Sarcasm aside, I would have to say that Justice Scalia hit the nail on the head, though here I recognize a few impediments to the translation of Grutter to the workplace setting that he did not. See infra Section VI.


115. Id. at 145.

116. See id. at 147, 234–36.

117. Id. at 145; see also id. at 88, 179.
This is an important reason why interethnic cooperation flourishes in these workplaces, even when there is competitive tension under the surface. Workers have to get along or they cannot deliver the goods; those who are recalcitrant are ultimately squeezed out. But no manager . . . wants those tensions to dominate the workplace, and they all try hard to smooth them over while getting the hamburgers flipped.118

When racial and ethnic diversity is a fact of workplace life, managers and workers themselves, and the psychology and economics of workplace relationships, do much of the work of making those relationships constructive, even amicable, much of the time.119

Undoubtedly, any number of stories of intergroup cooperation and amity, whether in fast food or factories or offices, could be countered with tales of tension, conflict, resentment, and exclusion. But it is important to keep in mind two points: First, outside the workplace there is not much close interracial interaction at all, at least among adults; maybe even frictional relationships are better than no relationships. Second, the workplace setting exerts a powerful pressure toward cooperation and harmony, at least on the surface and often below it. Those dynamics within integrated workplaces produce positive civic spillover for the whole society. Conversations and relationships among diverse co-workers—whether friendly or merely constructive—contribute to interracial connectedness, to cross-racial understanding and empathy, and to a more integrated future. In short, working together across racial lines does many of the very things that in Grutter added up to a compelling societal interest in the context of higher education.

This argument might be translated into a “business argument for diversity”: Where diversity is a given among the multiple constituencies with which a firm’s employees interact—suppliers, contractors, customers, and employees scattered throughout the far-flung units of a global enterprise—the experience of working with diverse co-workers will prepare employees to deal more effectively with those constituencies. Indeed, where some diversity is a given within the workforce itself, the greater diversity that is achievable through race-consciousness may yield better group effectiveness than the minimal diversity that otherwise exists. Real integration, with a “critical mass” of non-white employees, may yield better intergroup relations and internal cohesiveness than token levels of non-white representation, and it may do so precisely by combating stereotypes and building cross-racial understanding and competence.120

This argument is distinct from the “improved decisionmaking” claim.

118. Id. at 179.
119. See ESTLUND, supra note 18, at 69–83.
120. See id. at 79–80 (discussing evidence on stereotyping and its salience in evaluation and interaction with “token” members of minority groups).
For whether or not diversity within workgroups improves the quality of decisionmaking and performance, it does improve the capacity to cooperate and communicate within diverse groups. That may sound contradictory, but it is not: The claim that diversity within workgroups improves performance requires a comparison between diverse and non-diverse groups; the evidence for the superior performance of the former is equivocal. But if diversity is a given within an organization, or within the organization’s web of constituencies, the relevant comparison is between the level of diversity that would exist without affirmative action preferences and the greater diversity and potential for integration that exist with affirmative action. And there is ample evidence that the cultivation of interracial learning, cooperation, and connectedness within an integrated organization will tend to improve intergroup relations and break down stereotypes and divisions over time. A diverse and integrated organization with good intergroup relations will surely perform better than a (minimally) diverse organization with poor intergroup relations.

Something is lost in this translation, however. The “business case” version of the argument again amounts to an assertion of economic self-interest as a justification for racial preferences. It does not tap into the reservoir of support that Grutter evinces for the civic imperative of building a more integrated and egalitarian society, and it does not make use of the powerful evidence that interracial cooperation in the workplace contributes to that very goal. It jettisons the broader civic appeal of Grutter, and it seems to do so unnecessarily, for the integration of predominantly white workplaces or layers of the workplace—for whatever reason it is done—does in fact contribute to the bridging of stubborn historical cleavages and to a more integrated and egalitarian future.

VI. CAN EMPLOYERS ASSERT THE CIVIC VALUE OF INTEGRATION TO JUSTIFY AFFIRMATIVE ACTION?

So the “business case for diversity,” even in its most nuanced form, seems to miss the point of Grutter by virtue of its focus on employer self-interest and the “bottom line.” It also seems to elevate mere profit (or, in the public sector, efficiency) above the law’s presumptive disapproval of racial preferences. That raises concerns at least under Title VII\textsuperscript{121} and possibly under the Constitution as well.\textsuperscript{122} But what we might call the “civic case for workplace diversity”—the direct invocation of the societal

\textsuperscript{121} See infra notes 145–47 and accompanying text.

\textsuperscript{122} If a “compelling state interest” is required to justify racial preferences, then the diffuse and uncertain contributions of workforce diversity to organizational effectiveness—the public sector version of the “business case for diversity”—may well fall short.
PUTTING GRUTTER TO WORK

benefits recognized by Grutter—faces a different hurdle. Fostering interracial discourse and bridging racial divisions clearly happens in the workplace, and it is, says Grutter, both a compelling societal interest and a compelling educational interest. But is it one that an employer, public or private, can assert in support of its affirmative action program? Even assuming the demise of the remedial-only paradigm, the question remains: Does the law permit an employer to defend pro-integration preferences based on the interracial bonds and cross-racial empathy that employees carry outside the workplace into civic life?

Grutter itself emphasized the contribution of diversity to the defendant institution’s own particular mission of higher education as well as to the society as a whole.123 But there was no dichotomy in Grutter between the pursuit of the greater social good and the pursuit of institutional objectives. Building cross-racial understanding and breaking down stereotypes, though obviously accruing to the benefit of the whole society, are just as obviously educational processes. Indeed, anything of value that students learn contributes both to the educational mission of their institution and to the society they enter as graduates. The societal benefits are not merely incidental but integral to the educational mission. Whatever stray doubts might have remained about the educational value of cross-racial understanding were quelled in Grutter by invoking universities’ “academic freedom” to define their educational mission to include the cultivation of these civic virtues.124 Employers, by contrast, enjoy no particular constitutional privilege to define their own mission, and would be hard-pressed in any event to claim a mission of preparing their employees for a more integrated and egalitarian civic life. The civic contribution of workplace interactions among diverse workers, though powerful, is entirely incidental to the primary organizational objectives.

Given the great social good that flows from workplace integration, it may seem perverse to bar employers from claiming that social good as a justification for the affirmative pursuit of integration. But if we step up one level of abstraction, and ask whether employers may assert broad societal interests to justify overriding individual rights claims, the paradox begins to acquire a certain logic. One catches glimpses of such a logic in a range of settings. Within Title VII, for example, the Court in Johnson Controls rejected an employer’s professed concern for “the welfare of the next generation” as a justification for excluding fertile women from certain jobs; protecting potential fetuses from the risk of toxic exposure in utero is simply not “part of the ‘essence’ of [the employer’s] business,” and could not justify discriminatory exclusion.125 The employer was constrained to

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123. See supra notes 72–85 and accompanying text.
argue for strict “business necessity” in order to show that the exclusion of women fit within the statutory exception for “bona fide occupational qualification.”

In the public sector, too, institutions seeking to counter rights claims of individuals within (or seeking to join) their ranks are often required to justify their actions in terms of the agency’s particular mission and not some broader notion of the public good. For example, to justify punishing an employee’s otherwise-protected speech, a public employer must show that the speech interfered with “the effective functioning of the public employer’s enterprise,” given the employee’s particular job within the enterprise; it is not enough to point to some interest of the public at large. Similarly, random drug testing that infringes employees’ Fourth Amendment right to be free from unreasonable searches may be justified by an agency’s “special needs” and the employees’ particular job, but not by a desire by the state to “display[ ] its commitment to the struggle against drug abuse,” however important that struggle may be. In general the government is accorded greater deference in managing its own employees than in regulating its citizens; they can justify overriding employees’ constitutional rights based on managerial interests that fall short of a “compelling state interest.” But the public employer appears to merit that deference only within its particular sphere of institutional responsibility.

The particular cases in which this principle seems to make an

distinguishable: the facially exclusionary (not integrative) nature of the employer’s policy called for applying the unusually strict test for “bona fide occupational qualification.” Moreover, the employer’s exclusionary policy clearly burdened women’s reproductive choices.

126. Discussion of the “bona fide occupational qualification” (BFOQ) standard begins to take us into the lacunae of Title VII, to which I will return below. Infra Section VII.B. For now, I simply observe that there is no BFOQ exception for racial preferences.


129. The best explanation of that greater deference, at least in the speech context, is in Waters v. Churchill, 511 U.S. 661, 674–75 (1994):

[The extra power the government has [in controlling its employees’ speech] comes from the nature of the government’s mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency’s effective operation begins to do or say things that detract from the agency’s effective operation, the government employer must have some power to restrain her. . . . The key to First Amendment analysis of government employment decisions, then, is this: The government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.
appearance are obviously distinguishable. Women’s employment opportunities, as well as public employees’ free speech rights and privacy rights, may enjoy, or may deserve, more solicitude than the rights of white applicants and employees to be free from racial considerations in employment. Still, the cases suggest skepticism toward employers, public or private, relying on broad societal interests as a justification for overriding individual employee rights.

Indeed, something like that skepticism is echoed within affirmative action jurisprudence itself in the Court’s rejection of “remedying societal discrimination” as a justification for racial preferences under the Constitution. While remedying an institution’s own past discrimination remains an unimpeachable justification for preferences, the aim of remedying “societal discrimination”—for which the institution was not obliged to answer and had no potential liability—has long been held to be “too amorphous” and too remote from the institution’s own interests and obligations to justify affirmative discrimination. In condemning reliance on “societal discrimination,” the Court’s opinions question the competence of individual agencies to judge and redress the societal debt; but the overarching concern appears to be the boundlessness of that debt and of the resulting license for racial preferences.

That brings us to what might be the point of an insistence on institutional self-interest (or, perhaps more to the point, a rejection of broad societal interests that are untethered to institutional interests) as a justification for overriding competing rights claims. Such a principle might be an indirect way of giving substance to the competing rights. Where individual rights claims can be trumped, the law may protect the rights partly by limiting the class of potential trumping justifications to those that are bounded and testable. Institutional interests probably fit that bill better than broad public interests. Alternatively, the point of insisting on a legitimate self-interested justification might be to flush out illegitimate motives. Bad ulterior motives might find readier refuge behind broad public-regarding arguments than behind concrete institutional interests. Or perhaps we simply do not believe that institutions act out of broad public-regarding reasons; claimed reasons of that sort may not convincingly counter suspicion of an ulterior motive.

Along these lines, a moderate skeptic of affirmative action might

130. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305–07; Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986). In fact, the narrowest rendition of the remedial rationale, in which the institution seeks to remedy its own past discrimination, and must itself put on much of the discrimination case that could be made against it, begins to merge with the institution’s self-interest in preempting litigation.

contend that, in order to give substance to the right of white employees to be free from racial discrimination and to guard against the covert and illicit pursuit of "racial balance . . . for its own sake," only concrete and compelling institutional justifications—either institutional remedial obligations or institutional needs—should be admitted. The skeptic would contend that broad societal objectives—whether the forward-looking objective of promoting integration or the backward-looking objective of redressing past societal discrimination—are dangerously boundless. For if an employer can point to the broad societal interest in promoting racial integration (or to the broad societal obligation to redress past injustice) to justify affirmative action, then all employers could do so, whatever their "real reasons." The equality rights of whites would wither, and "outright racial balancing" would flourish.

This reasoning begs one question and leads to another. It begs the question of how robustly the law should define the individual right to be free from race-conscious preferences that promote the integration of predominantly white institutions. Grutter's recognition of the compelling societal interest in integrating institutions and bridging racial divisions effectively narrows the right of white college applicants to be free from consideration of race in admissions. So, too, might the right of employees and applicants to be free from considerations of race in employment decisions be narrowed to make room for preferences that promote the diversification and integration of predominantly white workplaces.

As for guarding against the illicit pursuit of "racial balance . . . for its own sake," the question is this: Is there really much reason to worry that institutions with jobs to do and bottom lines to watch—especially private firms with profits to maximize—will covertly pursue "racial balance . . . for its own sake"? At least in the private sector, can we not rely on the employer's own compelling interest in pursuing productivity and profits to constrain the excessive use of hiring preferences that, by hypothesis, operate in favor of marginally less-qualified job candidates? An organization's self-interest may temper the "excessive" pursuit of diversity in ways that it does not temper efforts to control the speech of its employees or to subject them to intrusive drug tests.

Still, as long as we posit a presumptive right to be free from racial preferences even when they tend toward the integration of predominantly white institutions, we may have to reckon with some skepticism—even some warranted skepticism—toward institutions' relying on broadly public-oriented justifications for trumping individual rights claims. If that is so, then employers may not be heard to assert the public interest in integration.

in support of their workforce diversity programs. If that is so, then *Grutter*’s ringing recognition of the good that racially integrated institutions do in our society seems to do little to fortify directly the defense of affirmative action in employment.

VII.

HOW GRUTTER CHANGES THE EQUATION

The foregoing suggests something of a Catch-22 for the proponents of affirmative action in employment: Merely self-interested claims of the sort embodied in the “business case for diversity” may be insufficient to justify racial preferences; yet broad claims of societal benefits, untethered to institutional needs, evoke a different sort of skepticism. Universities may be uniquely positioned to thread this particular needle with what I have called the integration argument, for their institutional mission is to produce the public good of educated and broad-minded citizens. Employers may be no better off after *Grutter* than before.

But perhaps the integrationist dimension of *Grutter* enters the equation at a different point. Indeed, it may alter the equation altogether. Rather than simply expanding the repertoire of justifications that employers can cite in support of their programs, it may counsel both a reconstruction of the right at stake and a more deferential judicial approach to the review of pro-integration preferences. At this point, some doctrinal differentiation is unavoidable. I will begin with the constitutionality of preferences within public sector employment.

A. *Grutter in the Public Sector Workplace (and the End of Color-Blind Equal Protection?)*

*Grutter* itself offers both a reason for courts to take a more benign view of integrationist preferences within predominantly white institutions, and a demonstration of that approach within the sphere of higher education. The dissenters observed that *Grutter*’s version of “strict scrutiny,” with its invocation of academic freedom and deference to institutions’ own definition of their educational mission, does not look very strict at all. One might equally say, however, that what paraded as “deference” in *Grutter* wasn’t very deferential at all. No one believes that universities—especially state universities—would be accorded the academic freedom to pursue a white-supremacist educational mission by giving a preference to white applicants. The majority did not so much defer to the Law School’s

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133. Professor White similarly sees in *Grutter* intimations of “sympathy” toward employer arguments in favor of affirmative action preferences, but identifies some hurdles to the now-standard business arguments. See White, *supra* note 17, at 276–78.

view of its educational mission as it was convinced of that view—
convinced that “attaining a diverse student body is at the heart of the Law
School’s proper institutional mission,” and that powerful social good has
come from the integration of major American institutions—universities,
corporations, and the military among them. In short, the majority was
less than strict in its scrutiny of the University’s goals because it was more
than convinced of the social good that flowed from the integration of elite
universities.

Does that make the Court’s talk of “deference” and “academic
freedom” disingenuous? Not necessarily. But it does suggest a skewed
invocation of deference—one that makes room for integrationist
preferences but not segregationist preferences. There are good reasons—
reasons grounded in democracy and freedom of expression and inquiry, as
well as in practical concerns of governability and efficiency—to accord a
measure of autonomy to universities in their decisions about admission to
and governance of those institutions. These concerns normally dictate some
degree of deference to universities as against the rights claims of
individuals who lose out under those decisions. But such deference
properly gave way to the equal protection claims of groups, especially
African-Americans, that were the persistent targets of caste-like
institutional exclusion and accumulated disadvantage. On the rather
formalistic, quasi-color-blind model of equal protection law that has held
primacy through the past few decades, that lack of deference infected the
Court’s analysis of voluntary affirmative action as well.

While dutifully reciting the familiar symmetrical formulas of equal
protection doctrine, Grutter strikes a blow against symmetry and against
color-blindness. Grutter appears finally to recognize, fifty years after
Brown and twenty-five years after Bakke, that the contemporary pursuit of
racial and ethnic diversity within predominantly white institutions is a
fundamentally and recognizably different enterprise than the segregationist
practices against which equal protection law forms a crucial bulwark.
Racial preferences that in fact tend to diversify and integrate a major
university that would otherwise remain predominantly white are part of that

135. Id. at 308 (emphasis added).
136. For a defense of “deterrence” as it was manifested in Grutter, see Luis Fuentes-Rohwer and
Guy-Uriel E. Charles, Symposium From Brown to Bakke to Grutter: Constitutionalizing and Defining
137. Or in the words of Professor Reva Siegel, Grutter uses “anticlassification” discourse while
advancing “antisubordination values.” Reva Siegel, Equality Talk: Antisubordination and
Anticlassification Values in Constitutional Struggles over Brown, 117 HARV. L. REV. 1470, 1538–40
(2004). In the view of one commentator, however, Grutter does not go far enough in repudiating color-
blindness, which he calls “the culture’s preferred form of racial discrimination.” See Girardeau A.
Spann, Symposium From Brown to Bakke to Grutter: Constitutionalizing and Defining Racial Equality,
The Dark Side of Grutter, 21 CONST. COMMENT 221, 222 (2004).
fundamentally different enterprise. Institutions engaged in that enterprise
should not be completely shielded from scrutiny—at a minimum they must
show that the preferences in fact have the requisite tendency to integrate—
but they should regain the “normal” deference that academic institutions
enjoy in a pluralistic democratic society.

What kind of academic freedom is that, one might ask, that can only be
exercised in one direction? It is the freedom to decide whether to
affirmatively seek greater diversity than race-neutral admissions would
produce, and to what ends. 138 Arguably it should also entail considerable
freedom to decide how to seek diversity—more freedom than the Court
allowed to the University in Grutter’s companion case, Gratz. 139 The
decision whether to use a more holistic, case-by-case admissions model of
the sort upheld in Grutter or to apply more systematic preferences of the
sort struck down in Gratz is a judgment that might better be left to
universities themselves. But about that I am less certain. 140

Many other little demons lurk in the details of this asymmetrical
conception of academic freedom, and in the asymmetrical conception of
equal protection that underlies it. For the moment I will leave them lurking.
But if Grutter is understood along these lines, then it suggests a model for
how courts can bring a recognition of the positive social spillover from
integrated workplaces to bear upon the assessment of affirmative action in
employment without necessarily allowing employers to invoke the public
interest in integration and interracial connectedness directly.

Courts that follow the logic of Grutter into the public sector workplace
might accord deference toward employers’ institutional justifications for
preferences that in fact tend to diversify and integrate predominantly white
workplaces. Such deference would be grounded not in any special
constitutional privilege of employers to define their own mission or needs,
but in the ordinary deference that government employers are accorded in
determining what their institutional mission and needs require. 141 That

138. That freedom would be constrained of course, if the university had itself discriminated against
underrepresented minorities so as to give rise to mandatory remedial measures.
140. Professor Post observes that an insistence on individualized consideration of candidates in
which race is merely one of many factors made sense in the context of Justice Powell’s version of the
diversity rationale, but does not follow naturally from Grutter’s integrationist rationale. Post, supra note
27, at 69–70. It may, however, be grounded in legitimate concerns about the routinization and
bureaucratization of racial decision making and the proliferation of precisely measurable racial
entitlements. Id. at 74–75. On the other side lie institution-specific considerations such as the number
of applications and the time and institutional resources that are available for processing them, and the
particular value the institution assigns to transparency, rationality and consistency, efficiency, and
legitimacy within the student body. Perhaps universities that are engaged in the enterprise of integrating
what would otherwise be a predominantly white student body should be entitled to balance these
considerations for themselves.
141. See supra notes 127–30 and accompanying text.
deference—which often makes an appearance when employees’ constitutional rights claims conflict with the needs of their government employers—has heretofore been largely absent from the analysis of employees’ equal protection claims. That followed from the Court’s insistence on applying the same strict scrutiny to segregationist racial preferences as to integrationist preferences. But *Grutter*, and its recognition that racially integrated institutions do great social good and advance the cause of equality, departs from that symmetrical view, and should allow public employers to recover their “normal” entitlement to deference in the defense of employment decisions that help to advance that project of institutional integration.

In defining which employment decisions are part of that integrationist enterprise, courts will need to make use of *Grutter’s* concept of “critical mass,” or the lack thereof.¹⁴² But they may wish to make use, as well, of *Johnson*’s concept of “manifest imbalance.”¹⁴³ I will return to that point below. Assuming that employers are found to be engaged in the project of workplace integration—in achieving “critical mass” or redressing “manifest imbalance”—deference is warranted.

The case for deference is fortified by two common sense observations about workforce diversity programs: First, even if public employers are not wholly driven by the pursuit of productivity and efficiency, they have limited latitude to depart from those legitimate institutional objectives. That is assuredly more true of actors within competitive product markets; but public employers also face mechanisms of accountability for their work product. Their top managers are either themselves elected or must answer to elected officials; one way or another they must account to the voters for their performance. Second, in a predominantly white workplace—and those are the workplaces in which I posit preferences may be justifiable—there is no reason to suspect that employers are using these programs to indulge or accommodate invidious prejudices against white applicants. In short, courts ordinarily have little ground to suspect the motive behind such efforts and little reason to fear they may run amuck. Finally, if we are still worried about restraining excesses in the name of “diversity”—as we might be if agencies are shielded from competition or other pressure to efficiently deliver public services—there remains the second branch of the analysis to do that work: the insistence (reinforced in *Grutter* and *Gratz*) that preferences not be too rigid or too burdensome on whites.¹⁴⁴

Courts might accordingly engage in a *Grutter*-like not-so-strict scrutiny of employers’ institutional arguments for diversification of a predominantly white workplace or job. They might view with solicitude

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¹⁴². *See supra* notes 86–89 and accompanying text.
¹⁴³. *See supra* notes 51–61 and accompanying text.
¹⁴⁴. *See supra* notes 82–92 and accompanying text.
rather than suspicion an employer’s claim that racial and ethnic diversity is necessary to serve the organization’s diverse constituencies, or to promote practical problem-solving in a diverse societal context. In particular, courts might find resonance within Grutter itself for the argument that, in a workforce in which some diversity is a given, the greater diversity that may be attainable only through race-consciousness—the “critical mass” of employees of color, and their diffusion throughout the organizational hierarchy—will help to cultivate a broader and more inclusive trust and mutual regard within the workforce.

B. Affirmative Action Under Title VII: How Grutter Fills in the Blanks of Johnson

Turning finally to the private sector and to Title VII, let us recall first the Court’s holding in Weber and Johnson that the statute affords more room than does the Constitution for “voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.”

Accordingly, Johnson can be read to permit affirmative action preferences (provided they are reasonable and flexible) whenever there exists in fact a “manifest imbalance” reflecting underrepresentation of the relevant group in “traditionally segregated job categories”—that is, without regard to the employer’s purpose or motive for redressing that imbalance.

There is one statutory hitch to that reading: The 1991 Civil Rights Act, enacted just after Johnson, amended Title VII to provide that business necessity is not a defense to a claim of intentional discrimination. There is no reason to believe that this provision was meant to affect Johnson, and the ordinary reading of the statutory provision would not do so: The existence of a valid affirmative action plan operates not as an affirmative defense along the lines of “business necessity” or a “bona fide occupational qualification”; it is treated as a legitimate, non-discriminatory basis for the challenged employment decision. Johnson thus makes room in the statute for affirmative action not by creating an affirmative defense but by narrowing the scope of what courts view as “intentional discrimination.” Still, there is some tension between this provision and the “business case for diversity” as a justification for preferences. The accommodating reading of Johnson for which I am contending skirts that problem: Employers need not cite any particular reasons for addressing a “manifest imbalance” in a predominantly white workplace or job; it is enough that the “manifest


146. Johnson, 480 U.S. at 631.


148. See Johnson, 480 U.S. at 616; see also White, supra note 133, at 276–78.
imbalance” exists. While there is more than one reading of Johnson—some pre-Grutter courts read it to require a remedial purpose—Grutter’s recognition of the civic and societal value of integrated institutions provides ample reason for choosing the more accommodating reading.

At a minimum, Grutter should offset the restrictive intimations of Adarand and Croson to which some courts have alluded in questioning the vitality of Johnson. Those two decisions—constitutional decisions outside the employment arena—were thought by some courts to send hostile signals regarding the legitimacy of affirmative action in employment under Title VII. But Grutter sends the opposite signal from no more remote a site. Indeed, Grutter is a more pertinent precedent for workplace affirmative action than are decisions on the legitimacy of minority business set-asides. Voluntary affirmative action in both university admissions and in hiring and promotion decisions represents a judgment by institutions about their own internal composition and governance. Affirmative action in both settings also directly promotes the societal interest in integration—through side-by-side and face-to-face interaction across groups lines. Contractor set-asides typically do neither. Set-asides for minority-owned businesses such as those involved in Croson and Adarand do not affect agencies’ decisions about their own internal composition or governance, but rather their award of outside contracts; a much weaker claim of institutional autonomy can be made on their behalf. Moreover, the preferred businesses in Croson and Adarand, while minority-owned, may not have integrated workforces; they do not directly advance the integrationist objectives of Grutter as do hiring and promotional preferences within predominantly white workplaces.

The question under Title VII remains, as it did after Johnson: what is a “manifest imbalance”? Justice O’Connor faulted the Johnson majority for failing to supply a benchmark for the level of underrepresentation that it takes to justify preferences. She would have required a large enough disparity to make out a prima facie case of discrimination against the employer; the majority rejected that benchmark without supplying anything more precise than “conspicuous” and “manifest” imbalance. Johnson itself hardly required greater precision, given the complete absence of women in the relevant job category. But for that very reason, Johnson leaves a cloud of doubt over preferences that operate past the point of nominal desegregation, or “token” representation.

Grutter suggests a possible benchmark: Preferences may be permissible where a group’s representation falls short of a “critical mass.” But that of course simply shifts the focus of inquiry: What is “critical mass”? As noted above, “critical mass” in Grutter signifies something

149. See supra notes 62–64 and accompanying text.
150. Id.
151. See supra note 61 and accompanying text
different from “proportional representation” and something more than “token representation.” Not much else about it is clear. According to University witnesses, “critical mass” meant sufficient numbers of minority students “[t]o ensure that [they] do not feel isolated or like spokespersons for their race; to provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend; and to challenge all students to think critically and reexamine stereotypes.”

But Grutter’s notion of “critical mass” has come in for a heavy dose of criticism, beginning with Justice Rehnquist’s dissent. In particular, he questioned why—given the ostensible benefits of having a “critical mass”—the Law School’s admissions goals differed from one racial or ethnic group to another. Admissions for the three main preferred groups—African-American, Hispanics, and Native Americans—in fact correlated rather closely to the corresponding numbers in the applicant pool, suggesting to Rehnquist that the University was not seeking a “critical mass” of each group but was engaged in “outright racial balancing.” The majority dodged the question.

Ironically, though we started out aiming to give content to “manifest imbalance” by reference to “critical mass,” we may end up doing the converse: Perhaps Grutter’s concept of “critical mass” finds a useful complement in Johnson’s concept of “manifest imbalance.” And vice versa. Both “manifest imbalance”—a striking disparity between an institution’s demographics and the demographics of the surrounding society—and “critical mass”—sufficient numbers to enable frequent, comfortable, and normal intergroup interactions—help to identify “integration” and its absence. Numbers are inescapably relevant; they matter both from the internal psychological and social perspectives stressed by the University of Michigan in its defense of “critical mass,” and from the external perspective that is reflected in Johnson’s notion of “manifest imbalance.” Grutter itself recognizes the importance of external legitimacy: “All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.” That “outside-looking-in” perspective on integration, as well as the perspective of insiders looking out, cannot help but reflect something of the relative representation of different groups in society.

All that being said, Johnson and Grutter together supply insights into the meaning of “integration,” not a serviceable definition of it. Yet “integration” is what employers (and universities) should be permitted to

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153. Id. at 365–66.
154. Id. at 380.
seek. Where a workplace or layer of a workplace is not integrated—where there is a striking underrepresentation of racial and ethnic groups that have been historically excluded from such jobs, such that individuals from those groups are likely to feel isolated and intergroup interactions are exceptional rather than commonplace and normal—employers should be permitted to give a preference to such groups in hiring and promotions. I claim no greater precision for this formulation than the Court can claim for its own benchmarks of “critical mass” or “manifest imbalance.” But the forthright focus on “integration” points us in the right direction.

VIII.

CONCLUSION

Whether it goes under the name of “affirmative action” or “workplace diversity,” and whether it aims to appeal to an increasingly diverse customer base, to redress past injustice, or to promote interracial learning and social capital, a program of preferences that operates to integrate racial and ethnic minorities into predominantly white workplaces is fully consistent with Title VII’s objective of “break[ing] down old patterns of racial segregation and hierarchy,” as well as with the compelling societal interest in the creation of integrated social institutions proclaimed in Grutter.

The integration of elite institutions, public agencies, and corporate hierarchies is not the whole answer to the stubborn persistence of racial inequality and isolation. Affirmative action in employment and in higher education currently reaches only those who are at least “qualified” by conventional criteria, and those qualifications are virtually unattainable to many African-Americans who are caught in the deepest cycles of racial isolation and socioeconomic deprivation. More desperately needs to be done to break those cycles and improve the conditions of life and learning, especially for poor African-Americans. Affirmative action is not enough.

But neither is affirmative action and the racial integration of elite institutions merely a dangerous and counterproductive distraction from the compelling challenges of racial isolation and poverty, or a falsely reassuring sop to white liberal guilt. Integration, achieved in part through the use of affirmative action, has not only fostered the growth of the black middle class and professional strata and expanded opportunities and improved conditions for many racial minorities. Integration, and the experience of working together in educational institutions, in workplaces, and in civic settings, has also helped begin to build a sense of common fate and

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156. Professor Derrick Bell sees these dangers especially in the “diversity” conception of affirmative action. See Derrick Bell, Diversity’s Distractions, 103 COLUM. L. REV. 1622 (2003).
belongingness within a diverse but still divided society. Workplace integration, and a recommitment to further progress toward workplace integration, can help to break down the barriers of “otherness” that make it so difficult to find common ground in debates over issues involving race, including issues of poverty and segregation.