

12-1-2006

The Diversity Rationale for Affirmative Action in Employment After Grutter: The Case for Containment

Jared M. Mellot

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Civil Rights and Discrimination Commons](#)

Repository Citation

Jared M. Mellot, *The Diversity Rationale for Affirmative Action in Employment After Grutter: The Case for Containment*, 48 Wm. & Mary L. Rev. 1091 (2006), <https://scholarship.law.wm.edu/wmlr/vol48/iss3/6>

NOTE

THE DIVERSITY RATIONALE FOR AFFIRMATIVE ACTION IN EMPLOYMENT AFTER *GRUTTER*: THE CASE FOR CONTAINMENT

TABLE OF CONTENTS

INTRODUCTION	1093
I. NARROW RANGE OF INTERESTS THAT JUSTIFIED AFFIRMATIVE ACTION UNDER EQUAL PROTECTION BEFORE <i>GRUTTER</i>	1097
<i>A. National Security</i>	1098
<i>B. Diversity of Viewpoints in Public Higher Education</i> ..	1099
<i>C. Remediation of Identifiable Past Discrimination</i>	1101
II. EXCLUSIVE NARROW REMEDIAL EXCEPTION TO TITLE VII BEFORE <i>GRUTTER</i>	1103
<i>A. Narrow Remedial Exception to Title VII</i>	1104
<i>B. Other Possible Title VII Exceptions</i>	1109
1. <i>Concurring Opinions in Johnson</i>	1109
2. <i>Taxman v. Board of Education</i>	1110
III. <i>GRUTTER</i> 'S EXPANDED DIVERSITY RATIONALE FOR AFFIRMATIVE ACTION	1113
<i>A. The Opinion</i>	1113
<i>B. Resulting Opening for Expanded Affirmative Action After Grutter</i>	1116
IV. UNITED STATES COURTS OF APPEALS CASES EVALUATING DIVERSITY JUSTIFICATIONS IN EMPLOYMENT	1119
<i>A. United States Courts of Appeals Cases Anticipating the Grutter Rationale</i>	1121
1. <i>Wittmer v. Peters: Employment Diversity Interest in Boot Camp Penal Institutions</i>	1121

2. <i>Reynolds v. City of Chicago: Recognition of Workforce Diversity and Operational Effectiveness as Compelling Interests in Police Forces</i>	1124
B. <i>The Seventh Circuit's Application of Grutter to the Diversity Rationale in Police Forces</i>	1127
V. UNCONSTITUTIONALITY OF EXPANDING THE DIVERSITY RATIONALE TO PUBLIC EMPLOYMENT UNDER EQUAL PROTECTION	1130
A. <i>Summary of the Case for Workforce Diversity</i>	1131
B. <i>Absence of Independent Countervailing Constitutional Interests Supporting Workforce Diversity</i>	1132
1. <i>Lack of First Amendment Connection to General Diversity Interest in Public Employment</i>	1132
2. <i>Inapplicability of Security Interests to Public Workforce Diversity</i>	1135
C. <i>Inherent Tendency of Affirmative Action in Public Employment To Fail Narrow Tailoring Requirement of Strict Scrutiny</i>	1139
1. <i>Severe General Burdens of Affirmative Action</i>	1139
2. <i>Exacerbated Injuries of Affirmative Action in Employment</i>	1140
3. <i>Ability To Achieve Workforce Diversity Without Affirmative Action</i>	1142
VI. ILLEGALITY OF A DIVERSITY RATIONALE IN PRIVATE SECTOR EMPLOYMENT UNDER TITLE VII	1144
A. <i>Categorical Wording of Title VII's Text</i>	1145
B. <i>Congressional Intent for a Broad Antidiscrimination Principle in Title VII</i>	1147
C. <i>Inadequacy of Equitable Considerations To Justify a Diversity Exception to Title VII</i>	1152
1. <i>Relatively Insubstantial Nature of Benefits of Diversity in Private Business</i>	1153
2. <i>Relatively More Severe Nature of Some Injuries from Private Sector Affirmative Action</i>	1154
CONCLUSION	1157

INTRODUCTION

In recent years, American employers expanded racially preferential "affirmative action"¹ policies geared toward hiring, retaining, and promoting racial minorities for positions that they might otherwise not gain in a more color-blind society.² The less sweeping affirmative action policies of an earlier era were based on remedial justifications.³ But as past acts of invidious discrimination collectively became a more distant memory,⁴ employers began justifying the expansion of affirmative action in terms of a very different rationale: diversity.⁵ Colleges and universities used a similar rationale for affirmative action for decades before employers embraced the diversity rationale. A series of court battles has defined the permissible bounds for the use of such policies in the university context.⁶ But judicial guidance on the new type of diversity-based affirmative action in employment has been almost nonexistent.

This new type of diversity-based affirmative action in employment initially seems suspect as a matter of law. The Equal Protection Clause renders all racial discrimination in the public

1. The term "affirmative action" as used throughout this Note refers to policies that advantage racial minorities who are in direct competition with nonminorities for educational and employment positions. The term does not refer to the less controversial practice of race-sensitive outreach efforts to encourage minorities to apply for positions without preferential treatment at the "point of competition." See Transcript of Oral Argument at 12, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

2. See PETER W. WOOD, *DIVERSITY: THE INVENTION OF A CONCEPT* 204 (2003).

3. See *id.* at 209-10; *infra* Parts I.C, II.A.

4. See Paul Burstein & Mark Evan Edwards, *The Impact of Employment Discrimination Litigation on Racial Disparity in Earnings: Evidence and Unresolved Issues*, 28 *LAW & SOC'Y REV.* 79, 107-08 (1994) (concluding that the modern legal antidiscrimination regime has drastically curtailed discrimination toward racial minorities); John R. Sutton & Frank Dobbin, *The Two Faces of Governance: Responses to Legal Uncertainty in U.S. Firms, 1955 to 1985*, 61 *AM. SOC. REV.* 794, 800-01 (1996) (discussing employers' increased use of formalized personnel procedures and other compliance mechanisms to ensure nondiscrimination against racial minorities). For a critical review of modern social science literature that asserts the existence of continuing pervasive discrimination against racial minorities, see RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 55-58 (1992).

5. See WOOD, *supra* note 2, at 204.

6. See *infra* Parts I.B, III.A.

sector presumptively invalid, including discrimination in favor of minorities.⁷ Similarly, Title VII of the Civil Rights Act of 1964 protects individuals of all races from racial discrimination in the private sector, apparently subject only to narrow remedial exceptions.⁸ Yet, in the absence of judicial guidance, affirmative action programs aimed toward achieving diversity in employment have endured and expanded.

Recent judicial guidance on affirmative action in a nonemployment setting, however, may have profound consequences for the legal status of affirmative action in employment. *Grutter v. Bollinger*, the landmark 2003 Supreme Court case on affirmative action in higher education, altered the equal protection framework for assessing the legality of affirmative action.⁹ Though seemingly confined to the educational mission of universities, the Court's reasoning in *Grutter* did not center on the claimed First Amendment value of ensuring a diversity of perspectives in the student body, as it had in *Regents of the University of California v. Bakke*.¹⁰ Instead, the Court in *Grutter* recognized an expanded version of the diversity rationale that suggested that nonremedial affirmative action to achieve diversity may also be valid in the employment context.¹¹ *Grutter* suggested that a series of generic

7. See U.S. CONST. amend. XIV, § 1 ("No state shall ... deny to any person within its jurisdiction the equal protection of the laws."); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that the same principle of presumptive invalidity applies to all government racial classifications that burden any individual, including programs that benefit minorities and burden nonminorities).

8. See Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (2000), which states: It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

Id.; see also *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 201-04, 208 (1979) (recognizing a remedial exception to Title VII); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) (holding that Title VII bars racial discrimination against whites on the same terms as discrimination against blacks).

9. See *Grutter v. Bollinger*, 539 U.S. 306, 327-33 (2003) (approving affirmative action program that a law school implemented to achieve "the educational benefits of a diverse student body").

10. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-14 (1978) (opinion of Powell, J.).

11. See *Grutter*, 539 U.S. at 327-33.

postgraduate educational benefits of diversity were themselves sufficient to justify affirmative action apart from any uniquely educational benefits.¹² The Court in *Grutter*, however, did not expressly address the applicability of that rationale to employment.¹³ Furthermore, lower courts have not yet squarely addressed the general applicability of *Grutter* to employment. A momentous unanswered question thus remains: does either equal protection or Title VII restrict the modern tendency of employers to use affirmative action to achieve workforce diversity?

As the Supreme Court has defined the validity of affirmative action, the academic literature generally has not addressed this momentous question. Though affirmative action generally has been a popular subject of academic debate, many authors have advanced broad arguments for remedial affirmative action in all areas of society rather than in employment specifically.¹⁴ In view of the Supreme Court's preference for narrowly framed reasoning on affirmative action,¹⁵ this scholarly omission is noteworthy. Many authors have addressed the diversity rationale, but this scholarship tends to focus only on the educational context.¹⁶ A small number of articles have focused on the diversity rationale for affirmative action in employment.¹⁷ Like the academic literature on affirmative action generally,¹⁸ these authors' analyses tend to be uniformly

12. *Id.* at 330-33.

13. *See id.*

14. *See, e.g.,* Michael Selmi, *Remedying Societal Discrimination Through the Spending Power*, 80 N.C. L. REV. 1575, 1576-82 (2002).

15. *See, e.g., Grutter*, 539 U.S. at 327 ("Context matters when reviewing race-based governmental action under the Equal Protection Clause.").

16. *See, e.g.,* Tanya Y. Murphy, *An Argument for Diversity Based Affirmative Action in Higher Education*, 1995 ANN. SURV. AM. L. 515, 541-46; Derek Black, Comment, *The Case for the New Compelling Governmental Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923, 943-63 (2002).

17. *See, e.g.,* Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 2-38 (2005); Ronald Turner, *Grutter, the Diversity Justification, and Workplace Affirmative Action*, 43 BRANDEIS L.J. 199, 200, 210-21, 232-36 (2004-2005).

18. *See Grutter v. Bollinger*, 288 F.3d 732, 810 (6th Cir. 2002) (Boggs, J., dissenting) (noting that the majority of academics who favor affirmative action are unlikely to have economically disadvantaged nonminority children who are often adversely affected by such policies); Robert P. George, *Gratz and Grutter: Some Hard Questions*, 103 COLUM. L. REV. 1634, 1636 n.13 (2003) (noting the scarcity of academic viewpoints opposed to affirmative action). *But see generally* Terry Eastland, *The Case Against Affirmative Action*, 34 WM. &

favorable to an expanded diversity rationale,¹⁹ despite the Court's announced principle of "skepticism" toward any race-based classifications.²⁰ These authors argue that because the *Grutter* rationale is rooted in a series of nonconstitutional policy interests rather than First Amendment academic freedom, it should justify an expanded use of affirmative action beyond the educational context.²¹ Many of these articles focus on *Grutter*'s ramifications for equal protection interpretation.²² Some articles also address the possible implications of *Grutter* for Title VII jurisprudence and the validity of affirmative action predicated on private workforce diversity, but they tend to downplay the equal protection and Title VII questions.²³ These articles also do not thoroughly analyze the limited though instructive equal protection case law from the United States Courts of Appeals that either anticipates or applied *Grutter*'s reasoning in employment.²⁴

This Note argues that a proper construction of equal protection and Title VII demands that, even within the new *Grutter* framework, the Supreme Court declare many of these diversity-based affirmative action programs unlawful outside the university context. It adds to the legal scholarship on affirmative action in several ways. First, it thoroughly analyzes the limited, though important and often overlooked, affirmative action case law that uses the *Grutter* rationale in the employment setting. Second, this Note analyzes the legality of the expansion of affirmative action in employment in both the public and private sectors. This analysis takes into account the differences in equal protection and Title VII jurisprudence that many writers overlook or downplay.²⁵ Third, the analysis of this Note, though not challenging the outcome in

MARY L. REV. 33 (1992) (arguing generally against affirmative action).

19. See *supra* note 17.

20. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223 (1995).

21. See, e.g., Estlund, *supra* note 17, at 14-17, 19-31; Turner, *supra* note 17, at 206-21, 232-36.

22. See Turner, *supra* note 17, at 210-19.

23. See Estlund, *supra* note 17, at 35-38; Cynthia Estlund, *Taking Grutter to Work*, 7 GREEN BAG 2D 215, 218-24 (2004); Turner, *supra* note 17, at 232-36.

24. See Turner, *supra* note 17, at 220-21. Turner only generally refers to these appellate cases' use of *Grutter* to evoke the relevance of observations about an expanded rationale for affirmative action. See *id.*

25. See Estlund, *supra* note 17, at 35-38.

Grutter, applies an exacting scrutiny to affirmative action in employment. This exacting scrutiny challenges the majority academic position that is deferential toward affirmative action.²⁶ Because the Supreme Court has stated that the principle of “skepticism” should apply to all affirmative action,²⁷ apart from the actual result of applying this principle, this Note’s skeptical analysis of this momentous unresolved issue is more consistent with prevailing case law than the challenged prevailing academic view.

This Note proceeds as follows. Part I of this Note summarizes the Supreme Court’s affirmative action jurisprudence under equal protection before *Grutter*. Part II summarizes the affirmative action jurisprudence under Title VII before *Grutter*. Part III reviews the significant equal protection developments of *Grutter* itself. Part IV reviews the few lower court decisions on affirmative action programs in employment based on a diversity rationale, both in anticipation of the reasoning in *Grutter* and following that case. Part V analyzes the constitutionality of expanding the *Grutter* diversity rationale to employment in public sector positions subject to equal protection. Part VI analyzes the legality of a diversity rationale in private sector employment subject to Title VII. The Conclusion summarizes the jurisprudential choice the Court must make regarding affirmative action and recommends that the Court confine *Grutter* to the educational context.

I. NARROW RANGE OF INTERESTS THAT JUSTIFIED AFFIRMATIVE ACTION UNDER EQUAL PROTECTION BEFORE *GRUTTER*

Before *Grutter*, the Supreme Court recognized only a narrowly confined range of policies that could withstand the two-pronged strict scrutiny test that it uses to evaluate all governmental burdens imposed on the basis of race.²⁸ First, to withstand this strict scrutiny test, a racially discriminatory policy must serve

26. See *supra* notes 17-19 and accompanying text.

27. See *supra* note 20 and accompanying text.

28. See *Grutter v. Bollinger*, 539 U.S. 306, 323-28 (2003); H.L. POHLMAN, CONSTITUTIONAL DEBATE IN ACTION: CIVIL RIGHTS AND LIBERTIES 35-91 (2d ed. 2005).

governmental interests that are sufficiently "compelling."²⁹ Second, the means the government uses must be "narrowly tailored" to serve such an interest.³⁰ Interests that the Court has deemed sufficiently "compelling" have been national security,³¹ educational diversity,³² and remedying specific past discrimination.³³ None of these interests ostensibly justifies an expanded use of affirmative action in employment for purposes that are not narrowly remedial or related to national security.

A. National Security

The first interest that the Supreme Court recognized as sufficiently compelling to override the equal protection guarantee was national security. The Court recognized this interest in *Korematsu v. United States*, decided at the height of America's involvement in World War II.³⁴ *Korematsu* arose in response to the forced evacuation of Japanese Americans, a class the government generally suspected of presenting a heightened risk of disloyalty after the Japanese attack on Pearl Harbor.³⁵ Applying a "most rigid scrutiny," the Court held that national security was a "pressing public necessity."³⁶ Given the constitutionally rooted war "power to wage

29. *Grutter*, 539 U.S. at 326. Although the Court has never offered a clear definition of a "compelling interest," such an interest at least must be more than merely a legitimate or important governmental interest. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (articulating "important" governmental interests as sufficient to withstand the less strict intermediate scrutiny test under equal protection).

30. *Grutter*, 539 U.S. at 326. The Court has interpreted the "narrow tailoring" requirement of equal protection strict scrutiny to mean that racially discriminatory policies must closely fit the compelling interest, avoid unduly burdening adversely affected individuals, avoid using rigid quotas or mechanical formulas, be limited in duration, and consider race-neutral means of achieving the compelling interest. *Id.* at 333-43.

31. *Korematsu v. United States*, 323 U.S. 214, 217-20 (1944).

32. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-14 (1978) (opinion of Powell, J.).

33. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-92 (1989) (O'Connor, J., joined by Rehnquist, C.J., and White, J.).

34. See *Korematsu*, 323 U.S. at 215-17.

35. *Id.* at 219-20.

36. *Id.* at 216. This "most rigid scrutiny" is the historical equivalent of "strict scrutiny," and "pressing public necessity" is the historical analogue of the compelling interest prong of strict scrutiny. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 214-15 (1995); *Korematsu*, 323 U.S. at 216.

war successfully,"³⁷ and the reality that a lost war against a dictatorial imperial power would eviscerate any constitutional guarantees, this holding is sound in the abstract.³⁸ It does not necessarily riddle the equal protection guarantee with a myriad of easily satisfied exceptions, so long as the judiciary does not loosely define the bounds of the constitutionally compelling national security interest. In the years since *Korematsu*, the Supreme Court has not recognized any expansive form of the national security interest as a rationale to override the equal protection guarantee against racial discrimination.³⁹ This absence of an expansive interpretation thus indicates the narrowness of equal protection exceptions before *Grutter*.

B. Diversity of Viewpoints in Public Higher Education

The next interest that the Supreme Court recognized as constitutionally compelling under equal protection, though not necessarily under Title VII, was encouraging a diversity of viewpoints in educational settings. A decisive Supreme Court opinion first recognized this interest as compelling in 1978 in *Bakke*.⁴⁰ In that

37. *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943) (quoting Charles Evans Hughes, *War Powers Under the Constitution*, 42 A.B.A. REP. 232, 238 (1917)).

38. Whether the national security interest was genuinely served by the evacuation policy is a separate matter upon which subsequent information has cast doubt. See *Adarand*, 515 U.S. at 236; see also *infra* note 183 and accompanying text (discussing failure of *Korematsu* Court to conduct a narrow tailoring inquiry). This level of doubt, however, only undermines the holding in *Korematsu* insofar as it upheld the particular means at issue rather than the national security interest itself.

39. Later, the Court later stated that "*Korematsu* demonstrates vividly that even the most rigid scrutiny can sometimes fail to detect an illegitimate racial classification." *Adarand*, 515 U.S. at 236.

40. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-14 (1978) (opinion of Powell, J.). Although a majority of the Court in *Bakke* did not join Justice Powell's opinion in recognizing diversity as compelling, Powell's opinion did decide the outcome of that case. Two separate groups of four Justices in that case adopted opposite positions on affirmative action. Powell's opinion agreed with part of both of these groups of Justices on the disposition of the case, but not their reasoning. Powell's opinion thus became the basis for the use of affirmative action in higher education up until *Grutter*. See WOOD, *supra* note 2, at 210. Colorable arguments on the legally binding nature of Powell's opinion before *Grutter* exist on both sides. Compare *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1199-200 (9th Cir. 2000) (holding that Justice Powell's *Bakke* opinion was binding), with *Hopwood v. Texas*, 78 F.3d 932, 944-46 (5th Cir. 1996), *vacated*, 95 F.3d 53 (5th Cir. 1996) (unpublished table decision), and *Hopwood v. Texas*, 236 F.3d 256, 274-75 & n.66 (5th Cir. 2000) (reaching the

opinion, Justice Powell rooted the diversity interest in another part of the Constitution: "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes selection of its student body."⁴¹

Justice Powell, however, did not view the perceived constitutional interest in diversity as granting a broad license to universities to adopt any kind of affirmative action policy. Because he rooted the interest in the First Amendment, he narrowly defined the permissible use of racial diversity in terms of genuine viewpoint diversity.⁴² His opinion stated, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."⁴³ The racial diversity interest approved in *Bakke* thus concerned only an academic freedom interest in encouraging the "robust exchange of ideas" among students in the university setting.⁴⁴ Accordingly, the importance of diversity rested mainly on its internal campus educational value, not on any postgraduation benefits attributable to racial diversity.⁴⁵ This concept of diversity as a compelling interest remained unchanged until *Grutter*.⁴⁶

opposite conclusion about Powell's opinion).

41. *Bakke*, 438 U.S. at 312 (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment), and *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (discussing academic freedom as "a special concern of the First Amendment")).

42. *See id.* at 313-15.

43. *Id.* at 315.

44. *Id.* at 313.

45. The means that the medical school in *Bakke* chose to advance this diversity interest, however, did not meet with Justice Powell's approval. Because the medical school used a rigid sixteen-percent racial quota, Justice Powell concluded that the policy at issue did not advance his narrow definition of diversity and thus was unconstitutional. *Id.* at 315-20.

46. The Supreme Court did not again squarely address affirmative action in higher education until *Grutter*. The only case before *Grutter* and after *Bakke* that addressed any kind of affirmative action based on diversity was *Metro Broadcasting, Inc. v. FCC*, which evaluated affirmative action in awarding broadcast licenses under the intermediate scrutiny standard. 497 U.S. 547, 554-55, 564-65 (1990). Though a narrow majority upheld the program as serving "broadcast diversity" under intermediate scrutiny, the Court in *Adarand* later overturned *Metro's* holding that intermediate scrutiny was the proper equal protection standard, but it did not reevaluate the interest of broadcast diversity. *Adarand Constructors,*

C. Remediation of Identifiable Past Discrimination

Before *Grutter*, the Supreme Court also recognized the interest of remediation of specific acts of past discrimination against minorities as sufficiently compelling to justify affirmative action under equal protection.⁴⁷ The Court's pre-*Grutter* strict scrutiny framework only recognized this interest as compelling within narrow confines, as it did for other asserted interests.⁴⁸ These narrowing principles in evaluating remedial affirmative action have extended to direct employment by governmental entities as well as indirect public employment of private entities through public contracts.⁴⁹

For all affirmative action programs advanced on remedial grounds, the Supreme Court has uniformly rejected claims that government may use affirmative action broadly to remedy past *societal* discrimination. The Supreme Court since the 1970s, therefore, consistently has invalidated policies predicated on the interest of remediation of societal discrimination as too amorphous.⁵⁰ Such policies carry the danger of serving as a permanent justification for racial discrimination against innocent non-minorities because those policies are, in the words of Justice Powell, "ageless in their reach into the past, and timeless in their ability to affect the future."⁵¹ Describing the effect of such policies, Justice O'Connor later added: "The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and

Inc. v. Pena, 515 U.S. 200, 227 (1995).

47. See *infra* notes 53-59 and accompanying text.

48. See *infra* notes 53-59 and accompanying text.

49. See *infra* note 53 and accompanying text.

50. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 477-83, 495-506 (1989) (invalidating a thirty-percent set-aside for minority contractors absent particularized evidence of discrimination); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 271-72, 274-84 (1986) (plurality opinion) (invalidating a public school district's policy of terminating white teachers in order to retain black teachers with less seniority absent particularized evidence of discrimination); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 272-77, 307-10 (1978) (opinion of Powell, J.) (disapproving societal discrimination as a permissible rationale for a rigid sixteen-percent quota for a public medical school admissions program).

51. Wygant, 476 U.S. at 276.

achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs."⁵²

Consistent with these principles, the Court in its most comprehensive treatment of remedial affirmative action, *City of Richmond v. J.A. Croson Co.*, held that remedial affirmative action is only justifiable under narrow circumstances.⁵³ First, it must address past discrimination from within the geographical area that attempts remedial action, rather than past discrimination in society at large.⁵⁴ Second, it must only benefit those groups that have suffered discrimination in that geographical area, rather than any group with any minority status.⁵⁵ Governmental remedial affirmative action within this narrow conceptual framework might be constitutionally acceptable if the governmental entity could present evidence of a "gross statistical disparit[y]" between the local number of minorities who are hired in a given employment area and the local number who are qualified, willing, and able to perform the work.⁵⁶ Such evidence could raise an inference of past governmental discrimination,⁵⁷ as could, in the case of government contracting, a governmental entity's past passive participation in a system of private discrimination in an industry that must conform to government standards.⁵⁸

Croson's demanding standards, designed "to 'smoke out' illegitimate uses of race" for even purportedly remedial affirmative action policies,⁵⁹ does not allow an expansive use of affirmative action. This framework endured at least until *Grutter*.

52. *Croson*, 488 U.S. at 505-06.

53. *Croson* considered the City of Richmond's requirement that each of the City's prime contractors award thirty percent of the dollar amount of the contract to minority-owned businesses. *Id.* at 477; see *Turner*, *supra* note 17, at 214-15.

54. *Croson*, 488 U.S. at 505-09.

55. See *id.* at 506. The challenged plan in *Croson* benefitted not only blacks but also Hispanics, Asians, and Aleuts, despite the lack of any evidence of previous discrimination or even substantial presence of those groups in Richmond's public contracting industry. *Id.*

56. *Id.* at 501.

57. *Id.*

58. *Id.* at 492 (O'Connor, J., joined by Rehnquist, C.J., and White, J.).

59. *Id.* at 493.

II. EXCLUSIVE NARROW REMEDIAL EXCEPTION TO TITLE VII BEFORE *GRUTTER*

Similar to the Court's pre-*Grutter* jurisprudence on affirmative action in the public sector, the Court has also constrained the lawful bounds of affirmative action in the private sector.⁶⁰ This interpretation has derived from both the plain meaning of Title VII's text and a detailed interpretation of congressional intent in enacting Title VII. Title VII of the Civil Rights Act of 1964 bans *all* racial discrimination by employers who are engaged in interstate commerce.⁶¹ The Court recognized this plain meaning of Title VII only seven years after its enactment when it stated that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."⁶² Five years later, it applied this principle to allow white employees to challenge a discriminatory employment discharge in *McDonald v. Santa Fe Trail Transportation Co.*⁶³ In an opinion for a unanimous Court, Justice Thurgood Marshall, one of the staunchest judicial supporters of affirmative action,⁶⁴ noted the consistency of Title VII's legislative history and subsequent executive implementation with the principle that the statute "proscribe[s] racial discrimination ... against whites on the same terms as racial discrimination against nonwhites."⁶⁵ Accordingly, Justice Marshall's opinion for the Court held that Title VII's "terms are not limited to discrimination against members of any particular race."⁶⁶

60. See *infra* Part II.A.

61. See 42 U.S.C. § 2000e-2 (2000); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971).

62. *Griggs*, 401 U.S. at 431.

63. 427 U.S. 273 (1976). The unlawful discrimination occurred when the employer discharged white employees for misappropriating cargo but did not discharge a black employee who engaged in the same misconduct. *Id.* at 275-76, 280 ("We ... hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and Jackson White.").

64. See, e.g., *Croson*, 488 U.S. at 528-30 (Marshall, J., dissenting) (defending Richmond's rigid set-aside for minorities in public contracting under a deferential standard); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 387-402 (1978) (Marshall, J., concurring in the judgment and dissenting in part) (defending the use of rigid quotas in medical school admissions).

65. *McDonald*, 427 U.S. at 279.

66. *Id.* at 278-79.

Against this framework, the Supreme Court has recognized only one narrow exception to the otherwise categorical nondiscrimination command of Title VII.⁶⁷ This exception allows affirmative action programs that directly serve one of the same specific goals that motivated Congress to enact Title VII: a desire to remedy the effects of past blatant discrimination against minorities.⁶⁸ The Supreme Court has not considered any nonremedial justification for affirmative action under Title VII. In individual opinions that did not speak for a majority of the Court, however, several Supreme Court Justices have considered affirmative action for the nonremedial private interest in diversity.⁶⁹ Moreover, one major Third Circuit case directly addressed the diversity rationale for affirmative action under Title VII.⁷⁰

A. Narrow Remedial Exception to Title VII

In *United Steelworkers v. Weber*, the Supreme Court first recognized the remedial exception to Title VII.⁷¹ That case considered the legality of a voluntary private affirmative action plan⁷² by Kaiser Aluminum in its skilled craft worker training program.⁷³ In upholding the affirmative action plan, the five-Justice majority acknowledged the persuasive force of a literal reading of Title VII under its holding in *McDonald*, which it did not overturn.⁷⁴ It did,

67. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 200-02 (1979).

68. *Id.* at 201-02.

69. See *infra* Part II.B.1.

70. See *infra* Part II.B.2.

71. See *Weber*, 443 U.S. at 200-02; Turner, *supra* note 17, at 222-25.

72. Some practical uncertainty exists about the actual voluntariness of Kaiser's affirmative action program, given the federal government's threats to withhold public contracting business from Kaiser if it did not increase the number of racial minorities in its workforce. See *Weber*, 443 U.S. at 223 n.2 (Rehnquist, J., dissenting). The same uncertainty exists for many private affirmative action programs. By the early 1990s, almost every Fortune 500 company plus 250,000 others were subject to the requirement that federal contractors adopt affirmative action policies. See WOOD, *supra* note 2, at 209-10. The majority in *Weber* nevertheless assumed that the plan was voluntary for purposes of its Title VII analysis. See *Weber*, 443 U.S. at 200.

73. *Weber*, 443 U.S. at 197-99. The challenged program reserved fifty percent of the openings in the program for black workers, even if competing with white workers with greater seniority. *Id.*

74. See *id.* at 201.

however, engage in a thorough review of the legislative history of the entire Civil Rights Act of 1964 in general and Title VII in particular.⁷⁵ The majority's review of this legislative history indicated that Congress specifically intended the legislation to integrate blacks into the national economy by "break[ing] down old patterns of racial segregation and hierarchy."⁷⁶ The majority thus held that Kaiser's affirmative action plan reflected the remedial purposes of Title VII.⁷⁷

Although the majority did not more specifically delineate the permissible bounds of voluntary private sector affirmative action, it did focus on several characteristics of the challenged affirmative action plan that suggest that any remedial exception to Title VII must be very narrow. First, when it framed the question presented in the case, the majority characterized its holding as applicable to "traditionally segregated job categories."⁷⁸ It further took judicial notice of the longstanding history of exclusion of blacks from craft positions.⁷⁹ Although the majority did not define the degree of past segregation or discrimination that was necessary before remedial affirmative action was legally permissible, one member of the five-Justice majority preferred to narrow the scope of the holding to affirmative action programs that were "reasonable response[s] to ... 'arguable violation[s]' of Title VII" by individual employers.⁸⁰ The same concurring opinion further noted that the majority opinion's approach, involving statistical disparities in "traditionally segregated job categories," was unlikely, in practice, to allow affirmative action in the absence of an "arguable violation" of Title VII.⁸¹

Second, the Court approvingly observed that the challenged plan did not "unnecessarily trammel the interests of the white employ-

75. *Id.* at 201-08.

76. *Id.* at 208. *But see id.* at 228-53 (Rehnquist, J., dissenting) (discussing legislative history supporting a construction of Title VII that would forbid the affirmative action program at issue in *Weber*).

77. *Id.* at 208 (majority opinion).

78. *Id.* at 197.

79. *Id.* at 198 n.1 (citing six United States Courts of Appeals cases on discrimination in the industry, including one from the Fifth Circuit, within which the plaintiff's Louisiana plant was located).

80. *Id.* at 211 (Blackmun, J., concurring).

81. *See id.* at 213-14.

ees.”⁸² It did not create an “absolute bar to the advancement of white employees” and was a “temporary measure” that lasted only until “racial imbalance” was eliminated.⁸³ Together, these two limiting principles suggest the narrow remedial purposes to which affirmative action programs in employment must conform. *Weber* still did not expressly address the validity of affirmative action plans for nonremedial purposes.

Since *Weber*, the Supreme Court has considered only one other affirmative action plan in employment under Title VII. This consideration occurred eight years after *Weber* in *Johnson v. Transportation Agency*.⁸⁴ Like *Weber*, this case also concerned only a remedial affirmative action plan in a “traditionally segregated job classification” in which the preferred group was “significantly underrepresented.”⁸⁵ The six-Justice majority in *Johnson* affirmed the reasoning of *Weber*⁸⁶ and refined its application.⁸⁷ In affirming *Weber*, despite forceful arguments that it was wrongly decided,⁸⁸ the Court asserted that Congress would have overridden *Weber*’s construction of Title VII if Congress disagreed with that construction.⁸⁹ Because Congress did not override *Weber*, the Court in *Johnson* reasoned that *Weber* accurately interpreted Congress’s

82. *Id.* at 208 (majority opinion).

83. *Id.*

84. 480 U.S. 616 (1987).

85. *Id.* at 620-21. Unlike *Weber*, *Johnson* involved the affirmative action plan of a governmental transportation agency for road dispatcher positions, rather than a private employer. *Id.* at 619-21. The Court evaluated the plan under Title VII rather than equal protection, however, because the plaintiff apparently did not raise the constitutional issue in the lower court proceedings. *Id.* at 620 n.2. Also unlike *Weber*, *Johnson* concerned application of affirmative action based on sex, not race, but *Johnson* applied the same standard as *Weber* had, because both race- and sex-based employment discrimination are prohibited by the same Title VII provision. See Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a)(1) (2000). Consequently, sex discrimination in employment is arguably scrutinized more strictly than sex discrimination in areas subject only to equal protection. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (establishing intermediate scrutiny for gender classifications). This difference in scrutiny may have been the reason the plaintiff did not assert an equal protection claim.

86. *Johnson*, 480 U.S. at 629 n.7.

87. *Id.* at 631-42.

88. *Id.* at 670-74 (Scalia, J., dissenting); *Weber*, 443 U.S. at 219-55 (Rehnquist, J., dissenting).

89. *Johnson*, 480 U.S. at 629 n.7.

remedial intent behind Title VII.⁹⁰ In refining the *Weber* doctrine, the Court in *Johnson* clarified that the statistical imbalance that might show the need for remedial action is the disparity between the preferred minorities in the employer's workforce and the same category of people in the qualified local labor force.⁹¹ The qualified local labor force for jobs requiring special training consists of the minorities who have those qualifications, rather than all minorities in the local labor market.⁹² Because such a statistical imbalance could exist because of previous societal attitudes rather than actual employer discrimination, a narrow and localized form of past societal discrimination could justify remedial affirmative action.⁹³ A broad and generalized justification of remedying national societal discrimination presumably would not be an adequate justification for remedial affirmative action under this reasoning, as in *Croson*.⁹⁴

This manner of computing statistical imbalance in fact seems very similar to the standard articulated in *Croson* under equal protection. In the constitutional context, such an imbalance allowed the inference of the employer/contractor's past passive participation in racial exclusion.⁹⁵ The majority opinion in *Johnson*, nevertheless, did state in a footnote, in response to a contention in the principal dissent, that the "statutory prohibition ... was not intended to extend as far as that of the Constitution."⁹⁶ The opinion did not indicate how its approach differed functionally from the equal protection framework. In fact, even beyond its definition of gross statistical imbalance, the majority opinion in *Johnson* reflected the equal protection approach to remedial affirmative action programs in other ways. In considering whether the policy "unnecessarily trammelled" the interests of nonminority workers, the majority stressed that the minority preferences were not quotas but rather were temporary and flexible "plus" factors in a holistic case by case

90. *Id.*

91. *See id.* at 632.

92. *Id.* Jobs not requiring special training, as with the position at issue in *Johnson*, would have a statistical imbalance based on the number of minorities in the general local labor force. *Id.*

93. *See Turner, supra* note 17, at 227; *supra* notes 78-81, 85-92 and accompanying text.

94. *See supra* notes 50-59 and accompanying text.

95. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501-02 (1989).

96. *Johnson*, 480 U.S. at 627 n.6.

analysis.⁹⁷ This analysis bore great similarity to the approach that Justice Powell approved under equal protection in his decisive *Bakke* opinion—an opinion the majority in *Johnson* cited with approval.⁹⁸ Moreover, Justice O'Connor's concurring opinion in *Johnson* expressly asserted that, at least for public employers, the Title VII approach is "no different from that required by the Equal Protection Clause."⁹⁹ On the other hand, the three Justices in dissent explicitly adopted a categorical nondiscriminatory interpretation that would make Title VII *more restrictive* of employer affirmative action plans than the Equal Protection Clause is of government affirmative action plans generally,¹⁰⁰ as those plans theoretically may be permissible if justified by a "compelling governmental interest."¹⁰¹

Accordingly, although Title VII may or may not reflect the same requirements as equal protection in all areas, no consensus exists on the Court, or even in the *Johnson* majority, that Title VII necessarily imposes a looser standard than the Equal Protection Clause does for affirmative action. Under any Justice's interpretation, Title VII, at the least, seems to incorporate an analysis similar to, if not exactly identical to, equal protection analysis. Any looser application of Title VII relative to equal protection, in the context of *Johnson*, may involve the extent of proof necessary to prove the need for a remedial purpose in line with Congressional Title VII

97. *See id.* at 638-39.

98. *Id.* at 638.

99. *Id.* at 649 (O'Connor, J., concurring in the judgment). Although Justice O'Connor's vote was not decisive in *Johnson*, changes in the Court's composition later made her the decisive vote in affirmative action matters. *See Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 276 (2003) (O'Connor, J., concurring); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204-05 (1995). Furthermore, Justice O'Connor's recent retirement likely places the more conservative Justice Kennedy in the role of the decisive vote on affirmative action matters. *See Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 631 (1990) (Kennedy, J., dissenting); *Croson*, 488 U.S. at 515 (Kennedy, J., concurring in part and concurring in the judgment). These changes in the Court's composition since *Johnson* suggest that either Justice O'Connor's view in *Johnson* on the limits of affirmative action under Title VII or an even stricter view would be more likely to prevail than the *Johnson* majority's view if the Court were to directly decide the question today.

100. *Johnson*, 480 U.S. at 657 (White, J., dissenting); *id.* (Scalia, J., dissenting).

101. *See Grutter*, 539 U.S. at 327.

intent, rather than the range of permissible interests that may justify discriminatory treatment under Title VII.

In refining the proper Title VII framework in affirmative action programs in employment, the majority opinion in *Johnson*, like in *Weber*, did not address the legality of affirmative action for non-remedial purposes, such as promoting racial diversity in the workforce.

B. Other Possible Title VII Exceptions

Though the Supreme Court has never decided the applicability of Title VII to affirmative action for nonremedial purposes, two noncontrolling Supreme Court opinions and one lower court case interpreting *Weber* and *Johnson* suggest possible approaches to the issue.

1. Concurring Opinions in Johnson

First, two concurrences in *Johnson* offered a window into two Justices' opinions on the validity of nonremedial affirmative action programs under Title VII. Justice Stevens's concurring opinion hinted that Title VII should allow employers the "managerial discretion" to adopt voluntary affirmative action programs "that might seem sensible from a business or a social point of view."¹⁰² He further suggested that employers might have permissible purposes for "forward-looking" affirmative action that would "improv[e] their services to black constituencies, avert[] racial tension over the allocation of jobs in a community, or increas[e] the diversity of a work force."¹⁰³ Justice O'Connor, however, disagreed with Justice Stevens's expansive understanding of permissible nonremedial purposes for affirmative action by employers under Title VII.¹⁰⁴ She responded:

102. *Johnson*, 480 U.S. at 645 (Stevens, J., concurring).

103. *Id.* at 647 (quoting Kathleen Sullivan, Comment, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 96 (1986)).

104. *See id.* at 649 (O'Connor, J., concurring in the judgment).

Contrary to the intimations in Justice Stevens's concurrence, this Court did not approve preferences for minorities "for any reason that might seem sensible from a business or a social point of view." ... Instead of a wholly standardless approach to affirmative action, the Court determined in *Weber* that Congress intended to permit affirmative action only if the employer could point to a "manifest ... imbalanc[e] in traditionally segregated job categories."¹⁰⁵

2. *Taxman v. Board of Education*

Second, in the 1996 case of *Taxman v. Board of Education*, the Third Circuit Court of Appeals squarely decided the approach that it believed should govern nonremedial affirmative action in employment under Title VII.¹⁰⁶ In *Taxman*, a school board fired one teacher in its business department because of budgetary constraints.¹⁰⁷ In order to promote the diversity of its workforce, the board decided to fire a white teacher so that the school could retain a black teacher with equal seniority and qualifications.¹⁰⁸ *Taxman*, the white teacher, filed a Title VII civil rights complaint.¹⁰⁹

In an en banc decision, the Third Circuit held that the school district's discriminatory layoff violated *Taxman's* civil rights under Title VII.¹¹⁰ The eight-judge majority started by reviewing the Supreme Court's Title VII jurisprudence in *McDonald*, *Weber*, and *Johnson*, noting the Court's reliance in each case on the congressional intent behind Title VII.¹¹¹ It then sought to determine whether racial diversity "mirror[ed] the purposes of the statute."¹¹² The court

105. *Id.* at 649-50 (quoting *id.* at 645 (Stevens, J., concurring); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197 (1979)).

106. 91 F.3d 1547 (3d Cir. 1996).

107. *Id.* at 1551.

108. *Id.*

109. *Id.* at 1552. Because *Taxman* concerned a public school district, just as *Johnson* concerned a public transportation agency, the equal protection clause would seem the most directly applicable rule of law for the case. But *Taxman* did not file suit against the district until the federal government, through the Equal Employment Opportunity Commission, unsuccessfully attempted to conciliate the parties. By that time, the statute of limitations for an equal protection claim based on 42 U.S.C. § 1983 had expired. *Id.* at 1552 n.5.

110. Justice Alito, then a judge on the Third Circuit, joined the majority opinion in *Taxman*. See *id.* at 1547.

111. *Id.* at 1553-57.

112. *Id.* at 1556.

concluded that only remedial forms of affirmative action justified unequal treatment in employment under Title VII; therefore, diversity did not justify discriminatory treatment.¹¹³ It explained:

The statute on its face provides that race cannot be a factor in employer decisions about hires, promotions, and layoffs, and the legislative history demonstrates that barring considerations of race from the workplace was Congress'[s] primary objective. If exceptions to this bar are to be made, they must be made on the basis of what *Congress* has said.... Here, there is no congressional recognition of diversity as a Title VII objective requiring accommodation.¹¹⁴

The court further reasoned that the Supreme Court's approval of diversity for universities under equal protection was irrelevant to Title VII analysis.¹¹⁵ It noted Justice Powell's reliance in *Bakke* on the role of universities and viewpoint diversity in the First Amendment framework of academic freedom.¹¹⁶ Unlike the university setting, the employment setting in *Taxman* did not clearly implicate the interest in diversity. The court also noted the difference of opinion between the concurrences of Justices Stevens and O'Connor in *Johnson* and dismissed Justice Stevens's comments about the permissibility of "forward looking" affirmative action as "not controlling."¹¹⁷

Finally, the Third Circuit evaluated diversity-based affirmative action under the second prong of *Weber*, which ascertained whether the affirmative action program "unnecessarily trammels" the interests of nonminorities.¹¹⁸ The court noted that, unlike remedial affirmative action, diversity-based affirmative action is not connected to a limited goal, and thus may be invoked whenever a lack of diversity, whatever the reason, existed in the workforce.¹¹⁹ Such a policy had the strong possibility of being "an established

113. *Id.* at 1557-58.

114. *Id.*

115. *Id.* at 1561-63.

116. *Id.* at 1561-62.

117. *Id.* at 1563.

118. *Id.* at 1564.

119. *Id.* The school board in *Taxman* had formulated its affirmative action policy in 1975, two decades before the case was decided, thereby indicating its possible limitless duration. *Id.*

fixture of unlimited duration."¹²⁰ The court concluded that, even if diversity were a permissible discriminatory purpose under Title VII, the diversity-based affirmative action program in *Taxman* unnecessarily trammelled the interests of others.¹²¹

The majority decision in *Taxman* produced several vehement dissents that presented arguments in favor of diversity-based affirmative action in employment that may have more force in the post-*Grutter* legal environment. The principal dissent began with the questionable assumption, based on Justice Brennan's footnote in *Johnson*,¹²² that, across the board, Title VII imposes a less demanding restriction on employers than does equal protection.¹²³ From this assumption, and from the Supreme Court's failure in *Weber* and *Johnson* to adopt a wholly literal interpretation of Title VII, the *Taxman* dissent concluded that Title VII did not preclude employers from using nonremedial affirmative action.¹²⁴ It further noted that the Court in *Weber* and *Johnson* never held that the remedial purpose of the policies it upheld was the only permissible purpose for affirmative action under Title VII.¹²⁵ These observations in the principal dissent overlooked the broader nondiscrimination Title VII framework established in *Griggs* and *McDonald* that *Weber* and *Johnson* only modified but did not overrule.¹²⁶

The principal dissent then sought to ascribe to the Congress that initially adopted Title VII in 1964 a speculative, "forward-looking" intent that was broader than a merely narrow remedial one.¹²⁷ This intent included several perceived benefits of racial diversity, including eliminating causes of future discrimination against racial minorities,¹²⁸ dispelling notions of white supremacy, and preparing

120. *Id.*

121. *Id.* at 1564-65. The court also discussed the considerably greater burden of being fired, as *Taxman* was, than of merely not being hired. *Id.* at 1564. It analogized the burden *Taxman* suffered to the burden suffered by the plaintiff in *Wygant*, in which the Supreme Court, applying equal protection analysis, also emphasized the greater burden of termination than of not being hired. *Id.*

122. *Johnson v. Transp. Agency*, 480 U.S. 616, 627 n.6 (1987).

123. *Taxman*, 91 F.3d at 1568 (Sloviter, C.J., dissenting).

124. *See id.* at 1569.

125. *Id.* at 1569-70.

126. *See id.*; *id.* at 1553 (majority opinion); *see also* *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 201 (1979) (citing *McDonald* without general disapproval).

127. *Taxman*, 91 F.3d at 1571 (Sloviter, C.J., dissenting).

128. *Id.* at 1571 (citing H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963)).

students for good citizenship in an increasingly pluralistic society.¹²⁹ The majority characterized this broad reading of imputed congressional intent as “a dramatic rewriting of the goals underlying Title VII [without] support in the Title VII caselaw.”¹³⁰ The dissent also argued that Justice Powell’s recognition of universities’ interest in student body diversity as compelling under equal protection in *Bakke* justified finding, at the least, that the interest in faculty diversity was likewise sufficiently weighty to override the guarantee of freedom from racial discrimination, whether under equal protection or Title VII.¹³¹

After *Weber*, *Johnson*, and *Taxman*, the Supreme Court’s opinion in *Grutter* threatened to undermine the carefully crafted framework of the Court’s earlier Title VII and equal protection cases.

III. GRUTTER’S EXPANDED DIVERSITY RATIONALE FOR AFFIRMATIVE ACTION

Grutter v. Bollinger was the landmark Supreme Court case that both reaffirmed and expanded the rationale for diversity-based affirmative action in higher education. Because the expanded rationale emphasized perceived societal benefits that racially diverse campuses produce after college graduation, it potentially also laid the foundation for expanded use of affirmative action to achieve diversity in employment.

A. The Opinion

Grutter decided an equal protection challenge to the affirmative action policy of the University of Michigan Law School. This policy

129. *Id.* at 1572 (citing *Johnson v. Transportation Agency*, 480 U.S. 616, 647 (1987) (Stevens, J., concurring), and *Washington v. Seattle School District No. 1*, 458 U.S. 457, 473 (1982)).

130. *Id.* at 1558 n.9 (majority opinion).

131. *Id.* at 1573-74 (Sloviter, C.J., dissenting). The disagreements between the dissent and the majority over the important issue in the case attracted the Supreme Court’s attention and moved the Court to grant certiorari in *Taxman*. 521 U.S. 1117 (1997). The Court never heard the case, though, because after the Third Circuit’s decision against the affirmative action policy, a coalition of pro-affirmative action groups, anticipating an unfavorable ruling, offered *Taxman* a cash settlement in exchange for withdrawal of her suit. *Turner*, *supra* note 17, at 231-32.

aimed to achieve a “critical mass” of three racial minority groups, namely blacks, Hispanics, and Native Americans.¹³² The law school’s affirmative action program purportedly did not use a formal quota or automatically award application points to minority applicants. The law school instead designed its system to use race as merely a “plus” factor among many other considerations.¹³³ Yet the law school suspiciously admitted a percentage of preferred minority students that varied little from year to year, and in fact was almost identical to the percentage of each preferred minority group in each year’s applicant pool.¹³⁴ Like other affirmative action programs, this program regularly admitted members of preferred minority groups with substantially lower undergraduate grades and standardized test scores than rejected white and non-preferred minority applicants.¹³⁵ A bitterly divided Court held that the achievement of the “educational benefits that flow from a diverse student body” was a “compelling [governmental] interest” that justified racial discrimination under the Equal Protection Clause, and that the law school’s policy was “narrowly tailored” to that “compelling interest.”¹³⁶

Justice O’Connor’s opinion for the five-Justice majority in *Grutter* affirmed Justice Powell’s holding in *Bakke* that student body diversity constituted a countervailing compelling interest rooted in First Amendment academic freedom.¹³⁷ Her use of the First Amendment, however, was much more muted than Justice Powell’s reliance on it in *Bakke*. In a considerably briefer exposition than Justice Powell’s *Bakke* analysis, Justice O’Connor summarized Justice Powell’s understanding of a constitutional conception of

132. *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003). The law school’s policy preferred members of these racial minority groups over other minority groups such as Asians, who did not receive a similar “plus” benefit in their applications. *See id.* at 319.

133. *Id.* at 334-35. The law school’s policy stood in contrast to the University of Michigan undergraduate institution’s affirmative action program, which used a point system that automatically awarded minority candidates one-fifth of the points needed for admission. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). The Supreme Court declared this policy unconstitutional. *Id.*

134. *Grutter*, 539 U.S. at 383-86 (Rehnquist, C.J., dissenting); *id.* at 390-91 (Kennedy, J., dissenting). These statistical conditions at least suggested a disguised quota that considered race as more than a mere “plus” factor.

135. *See* Brief of Petitioner at 7, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

136. *Grutter*, 539 U.S. at 343-44.

137. *Id.* at 329.

academic freedom that encompasses the freedom of universities to select their student body.¹³⁸ This conception of academic freedom, as Justice Powell previously stated, promoted a “robust exchange of ideas.”¹³⁹ But beyond this brief exposition of academic freedom, as one legal scholar later observed, “Justice O’Connor never explicitly rested her own conclusion on the First Amendment. Her references to the First Amendment cited what the Court or Justice Powell had done in the past; she did not explicitly adopt those sources as reflecting the *Grutter* Court’s interpretation.”¹⁴⁰

Instead, Justice O’Connor’s majority opinion in *Grutter* emphasized the more generic benefits of educational diversity rather than its purely educational value. These benefits included, in addition to “livelier” class discussions, such benefits as promoting “cross-racial understanding,” breaking down racial stereotypes, and generally preparing students for “work and citizenship” in a global economy.¹⁴¹ The majority opinion specifically noted the importance that major American businesses, such as General Motors, placed on having a diverse workforce trained in a diverse setting.¹⁴² Another perceived benefit was an improvement in civic legitimacy that would flow from increasing the number of minorities in positions of business and political leadership.¹⁴³ Justice Powell’s *Bakke* opinion, in stark contrast, made only one passing reference to the broader benefits of racial diversity to life after graduation from institutions of higher education.¹⁴⁴

Apart from the majority’s understanding of the compelling benefits to diversity, the use of greater deference in assessing the

138. *Id.* (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (Frankfurter, J., concurring), and *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

139. *Id.* (quoting *Keyishian*, 385 U.S. at 603).

140. Joel K. Goldstein, *Beyond Bakke: Grutter-Gratz and the Promise of Brown*, 48 ST. LOUIS U. L.J. 899, 925 (2004).

141. *Grutter*, 539 U.S. at 330-31.

142. *Id.*

143. *Id.* at 332-33. Some legal academics have described these operational interests as part of a collective interest in the further racial connectedness and integration of American society. See Estlund, *supra* note 17, at 15-17, 23-31.

144. Regents of the Univ. of Cal. v. *Bakke*, 438 U.S. 265, 314 (1978) (opinion of Powell, J.) (“An otherwise qualified medical student with a particular background ... may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.”); Goldstein, *supra* note 140, at 946.

diversity rationale was another prominent feature of the majority opinion in *Grutter* that distinguished it from Justice Powell's *Bakke* opinion. The strict scrutiny test for any racial discrimination by the government, including affirmative action in public universities, is by definition a "most searching judicial inquiry"¹⁴⁵ that "smoke[s] out illegitimate uses of race."¹⁴⁶ In the past, strict scrutiny rendered all governmental racial discrimination "presumptively invalid."¹⁴⁷ Yet Justice O'Connor in *Grutter* approached the University of Michigan Law School's judgment that diversity was vital to its operational mission as "one to which we defer."¹⁴⁸ In so doing, her opinion for the Court presumed the law school's good faith in implementing its program, and also required only "good faith consideration of workable race-neutral alternatives" in achieving diversity.¹⁴⁹ Because of the Court's increased deference, one legal academic has described this version of strict scrutiny as a "curious methodology" and "something of an oxymoron."¹⁵⁰ Justice Kennedy, in dissent, similarly described Justice O'Connor's approach as one that "distort[ed]" and "manipulated" conventional strict scrutiny.¹⁵¹

B. Resulting Opening for Expanded Affirmative Action After Grutter

Justice O'Connor's majority opinion in *Grutter* did not explicitly articulate a more deferential approach for any affirmative action in contexts other than higher education. But Justice Scalia's brief dissenting opinion pointedly highlighted the expansive nature of the Court's diversity rationale:

The "educational benefit" that the University of Michigan seeks to achieve ... is a lesson of life rather than law—essentially

145. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995).

146. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (O'Connor, J., joined by Rehnquist, C.J., and White, J.).

147. *Adarand*, 515 U.S. at 234.

148. *Grutter*, 539 U.S. at 328.

149. *Id.* at 339, 343. The majority did not deem this presumption to have been rebutted by the statistical evidence that the means the law school used to advance its diversity interest closely resembled mere racial balancing rather than the use of race as only one of many factors. *See id.* at 338-39; *id.* at 383-85 (Rehnquist, C.J., dissenting).

150. Goldstein, *supra* note 140, at 924.

151. *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting).

the same lesson taught to ... people three feet shorter and 20 years younger than the full-grown adults at the University of Michigan Law School, in institutions ranging from Boy Scout troops to public-school kindergartens. 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.¹⁵²

Justice Scalia's opinion then sarcastically applied the majority's reasoning to affirmative action in public and private employment:

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.... 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.¹⁵³

Actual employment practices in recent times validate Justice Scalia's concern that the Court's expansive diversity rationale in *Grutter* may validate an increase in discriminatory affirmative action policies outside of higher education. *Bakke's* approval of diversity-based affirmative action, perhaps because it was limited, did not have this effect on employers; many businesses, consistent with *Weber*, instead justified any limited affirmative action policies as remedying the effects of past local discrimination.¹⁵⁴ But by the

152. *Id.* at 347 (Scalia, J., concurring in part and dissenting in part). Justice Scalia's opinion, which Justice Thomas joined, concurred only in the majority's concluding suggestion that public sector affirmative action might be unconstitutional after twenty-five more years. *Id.*; *id.* at 375-78 (Thomas, J., concurring in part and dissenting in part). But Justice Scalia also believed the policies were equally unconstitutional at the time. *Id.* at 346 (Scalia, J., concurring in part and dissenting in part). Because the dissenting portion comprised most of Justice Scalia's opinion, this Note refers to it as a dissent.

153. *Id.* at 347-48.

154. WOOD, *supra* note 2, at 210.

late 1990s, the remedial justification likely became difficult for employers to justify, as the Court made clear that societal discrimination would not suffice as a legal rationale¹⁵⁵ and as patterns of identifiable discrimination became increasingly rare.¹⁵⁶ Public sector employers and private sector businesses presumably took note of their constricted legal options for pursuing preferential policies. At the same time, birth and immigration patterns were leading to a more racially heterogeneous workforce and consumer market. Sometime exaggerated projections of the magnitude of these increasing percentages of racial minorities in the population and workforce led to a panic of sorts in the business world about its ability to satisfy consumer and labor markets.¹⁵⁷ And any racial imbalance, from whatever cause, continued to attract threats of boycotts and activists such as Reverend Jesse Jackson.¹⁵⁸ These actions thereby threatened businesses' bottom lines, regardless of any intrinsic value of a diverse workforce from their perspective.¹⁵⁹

By the 1990s, under these demographic and political influences, the generalized concept of diversity, with an emphasis on racial diversity, became a fashionable part of business and popular culture. *Fortune* magazine made diversity a criterion in its annual rankings of American businesses.¹⁶⁰ Employers' affirmative action policies adapted and expanded to become diversity-focused policies. Businesses hired consultants to serve as "diversity trainers" for their employees.¹⁶¹ They also conducted targeted recruitment of minorities at elite universities.¹⁶² Affirmative action in the form of racial discrimination in hiring decisions was a natural byproduct of this culture.¹⁶³ The Supreme Court's decision to hear *Grutter*

155. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499-500 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-76 (1986) (plurality opinion).

156. See *supra* note 4.

157. WOOD, *supra* note 2, at 204-09.

158. See, e.g., KENNETH R. TIMMERMAN, *SHAKEDOWN: EXPOSING THE REAL JESSE JACKSON* 127-30, 132-34, 273-78, 280-84 (2002) (discussing boycotts or lawsuits against Coca-Cola, Anheuser-Busch, Texaco, and Viacom that extracted affirmative action policies from those companies).

159. WOOD, *supra* note 2, at 214.

160. *Id.* at 215.

161. *Id.* at 204.

162. See Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents at 1, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516).

163. See WOOD, *supra* note 2, at 211, 217, 223.

then provided an opportunity for businesses to demonstrate their commitment to racial diversity and affirmative action. Some of the largest American businesses, such as General Motors, Microsoft, 3M, and Boeing, submitted amicus briefs in support of the University of Michigan's affirmative action policies.¹⁶⁴ Justice O'Connor's majority opinion in *Grutter* specifically noted these briefs in defining its expansive instrumental version of the diversity rationale for affirmative action.¹⁶⁵ The convergence of *Grutter*'s expansion of the diversity rationale and American business's apparent embrace of diversity as a rationale for affirmative action thus render the potential application of *Grutter* to affirmative action in employment a ripe legal issue.

IV. UNITED STATES COURTS OF APPEALS CASES EVALUATING DIVERSITY JUSTIFICATIONS IN EMPLOYMENT

The Supreme Court has not yet decided an affirmative action case on the diversity rationale in employment.¹⁶⁶ The United States Courts of Appeals, however, have decided a handful of cases dealing with affirmative action in employment. These cases either anticipated the *Grutter* rationale or, after *Grutter*, applied it to affirmative action in public sector employment.¹⁶⁷ All such cases have been

164. See Brief for Amici Curiae 65 Leading American Business in Support of Respondents, *supra* note 162, at 1; Brief of General Motors Corp. as Amicus Curiae in Support of Respondents at 1, *Grutter*, 539 U.S. 306 (2003) (No. 02-241).

165. See *Grutter*, 539 U.S. at 330-31.

166. The Supreme Court granted certiorari in *Parents Involved in Community Schools v. Seattle School District No. 1*, 126 S. Ct. 2351 (2006) (mem.), which deals with the application of the expanded *Grutter* diversity rationale to K-12 education. The Court's decision in that case may indicate the Court's general receptiveness to that rationale in nonuniversity settings. Additionally, Justice Scalia, joined by Chief Justice Rehnquist, wrote a post-*Grutter* opinion in response to the Court's denial of certiorari in a public contracting case involving a deferential application of strict scrutiny to an affirmative action plan promoted under a remedial interest. See *Concrete Works of Colo., Inc. v. City & County of Denver*, 540 U.S. 1027, 1027 (2003) (mem.) (Scalia, J., dissenting from denial of certiorari).

167. Two other cases dealing with public contracting by private business entities have used deference similar to *Grutter*'s in applying strict scrutiny to public contracting affirmative action, even though it was premised on remedial rather than diversity grounds. See *Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.*, 345 F.3d 964, 973-74 (8th Cir. 2003) (upholding a remedial affirmative action program in public contracting after applying the deferential form of "strict scrutiny," using specific language from *Grutter*, in considering race neutral alternatives and the closeness of the fit between the remedial interest and chosen

decided under equal protection; no cases on diversity-based affirmative action in private sector employment under Title VII have yet arisen.¹⁶⁸ All these cases addressed a particular form of the diversity rationale, namely that diversity in the workplaces examined—correctional institutions and police forces—creates profession-specific benefits of increased operational effectiveness. This rationale, however, rests on the purported ability of minority correctional and police officers to address the needs of racial minorities with whom they interact better than white officers could. This reasoning is substantially parallel to the general employment diversity and effectiveness rationale that has emerged more clearly with *Grutter*. The reasoning in these cases, therefore, presages the later arguments for a more expansive application of

means); *Concrete Works of Colo., Inc. v. City & County of Denver*, 321 F.3d 950, 959 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027 (2003) (mem.) (applying deference similar to *Grutter* in finding a compelling remedial interest and in placing the burden on the plaintiff to show the absence of the compelling interest); Teresa Lee Brown, Note, *Deceived by Disparity Studies: Why the Tenth Circuit Failed To Apply Croson's Strict Scrutiny Standard in Concrete Works of Colorado*, 81 DENV. U.L. REV. 573 *passim* (2004); *see also Concrete Works*, 540 U.S. at 1027 (Scalia, J., dissenting from denial of certiorari) (suggesting that the Supreme Court's failure to reverse a deferential lower court decision on remedial affirmative action in public contracting signified that *Grutter* silently overrode the strict holdings of *Croson* and *Adarand*). *But see* Hershell Gill Consulting Eng'rs, Inc. v. Miami-Dade County, 333 F. Supp. 2d 1305, 1318-32 (S.D. Fla. 2004) (invalidating a remedial affirmative action program as not advancing remedial interest and as not narrowly tailored, given imprecise statistical proof and county's failure to consider race-neutral alternatives as required under both *Croson* and *Grutter*).

168. The United States Courts of Appeals have also decided several cases applying *Grutter* to diversity-based affirmative action in primary and secondary education. The general tendency in these cases is to allow the diversity rationale in these schools, though they are different from the university setting. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, No. 1, 426 F.3d 1162, 1166 (9th Cir. 2005), *cert. granted*, 126 S. Ct. 2351 (2006) (mem.) (upholding a "racial tiebreaker" in evaluating transfer applications within a K-12 public school system as narrowly tailored to a compelling interest in student diversity); *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 6 (1st Cir. 2005) (upholding the use of a similar "racial tiebreaker" in a public K-12 school system); J. Kevin Jenkins, *Are Federal Courts Comfortable with Diversity Rationale in K-12 Public Schools?*, 198 ED. LAW. REP. 21, 22 (2005) (noting the tendency toward expansion of the diversity rationale to affirmative action in K-12 public education). The Supreme Court may soon halt this tendency. *See Parents Involved*, 126 S. Ct. at 2351 (granting certiorari in the Ninth Circuit K-12 case). Additionally, the Ninth Circuit has upheld another affirmative action policy based on a diversity interest in a public law school as narrowly tailored, despite the law school's policy of segregating all applicants who fall within the intermediate "discretionary" zone and making decisions on minorities' applications before any nonminority candidates in the "discretionary" zone. *Smith v. Univ. of Wash.*, 392 F.3d 367, 380 (9th Cir. 2004).

the diversity rationale for affirmative action in the employment context generally.

A. United States Courts of Appeals Cases Anticipating the Grutter Rationale

Two notable pre-*Grutter* cases from the Seventh Circuit anticipated the *Grutter* diversity rationale in public employment cases. These cases, concerning corrections institutions and police forces, considered the asserted justifications for the affirmative action policies under the *Adarand* standard for strict scrutiny of all forms of racial discrimination.

1. Wittmer v. Peters: Employment Diversity Interest in Boot Camp Penal Institutions

The first important case that recognized as compelling a diversity rationale for affirmative action in an area other than higher education was *Wittmer v. Peters*.¹⁶⁹ This 1996 case from the Seventh Circuit, seven years before *Grutter*, involved a challenge to the practice of an Illinois military-style “boot camp” that served as an alternative form of punishment for young convicts without extensive prior criminal histories.¹⁷⁰ When the boot camp first opened in 1993, sixty-eight percent of the 200 inmates were black, while only two of the forty-eight correctional officers and two of the ten lieutenants were also black.¹⁷¹ Because the facility was newly constructed, any claims of past discrimination against minorities as the basis for remedial affirmative action would have been implausible. Instead, the state implemented an affirmative action policy to hire more black employees to advance the interest of “penological necessity.”¹⁷² The state denied a lieutenant position to the three white plaintiffs in favor of a black applicant, despite the plaintiffs’ significantly better performance on a standard test given to all

169. 87 F.3d 916 (7th Cir. 1996).

170. *Id.* at 917.

171. *Id.*

172. *Id.*

applicants.¹⁷³ The three white plaintiffs claimed that the state policy violated their constitutional rights to equal protection.¹⁷⁴

In Judge Richard Posner's brief five-page opinion for the three-judge panel—a relatively short opinion for such an important and novel constitutional question¹⁷⁵—the Seventh Circuit upheld the affirmative action employment program.¹⁷⁶ Applying what purported to be strict scrutiny, Judge Posner insisted that any governmental entity asserting a nonremedial compelling governmental interest, including penological necessity, must clearly substantiate the need for that interest.¹⁷⁷ Judge Posner also stated “common sense is not enough; common sense undergirded the pernicious discrimination against blacks now universally regretted.”¹⁷⁸ Then, without the benefit of guiding Supreme Court precedent on any permissible nonremedial compelling interests, he concluded that the state could more effectively rehabilitate the predominantly black convicts with high-ranking black employees, given the institution's purpose of “pacification and reformation” of its inmates.¹⁷⁹ The state in *Wittmer* had presented expert witnesses who testified to the necessity of black corrections officers.¹⁸⁰ This evidence, in the court's view, satisfied the government's evidentiary burden of establishing a compelling interest based on more than mere speculation.¹⁸¹ Finally, Judge Posner limited the court's holding to penal institutions that have the stated demonstrable need, rather than “ordinary prison[s], in which the guards do not interact with the inmates in the same fierce intimacy as in a boot camp.”¹⁸²

173. *Id.* The plaintiffs ranked third, sixth, and eighth on the test, while the black applicant ranked *forty-second*. *Id.*

174. *See id.*

175. Compare *id.* at 917-21, with *Grutter v. Bollinger*, 539 U.S. 306, 311-44 (2003) (occupying thirty-three pages of the U.S. Reports), and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269-324 (1978) (opinion of Powell, J.) (occupying fifty-five pages of the U.S. Reports).

176. *Wittmer*, 87 F.3d at 921.

177. *Id.* at 918.

178. *Id.* at 919.

179. *Id.* at 920.

180. *Id.*

181. *Id.*

182. *Id.*

Wittmer was a pioneering case involving a unique situation with conceivably profound consequences. It did not purport to directly apply even the *Bakke* precedent on diversity as a compelling interest in higher education. It also did not have the benefit of *Grutter* to channel its analysis on the benefits of greater numbers of minorities in the workforce. Its analysis instead derived from the court's own independent judgment of the merits of the penological necessity interest, which was very similar to the general employment diversity interest. *Wittmer* did not, however, claim that the underlying penological interest was sufficiently rooted in a counter-vailing constitutional interest that could override the guarantee against governmental racial discrimination. It also did not explain why rehabilitation of the relatively small number of inmates in the boot camp system was sufficiently weighty an interest to override a fundamental constitutional right. Unlike *Korematsu*, the *Wittmer* situation did not involve national or internal security that would be in danger without racial discrimination.¹⁸³

Wittmer thus anticipated the freewheeling manner of judicial reasoning used in *Grutter*. The *Wittmer* court employed an employment diversity rationale that is potentially generalizeable to other employment settings. But it also approved diversity-based affirmative action in employment only at an institution with particular racial sensitivities beyond those that exist in the general employment setting. It did not, in contrast to the later decision in *Grutter*, articulate a diversity-based rationale for affirmative action that on its own swept beyond the facts of the case. Though improved operational service arguably may be an important interest for all

183. Cf. *supra* Part I.A (discussing *Korematsu*). The opinion in *Wittmer*, however, did bear a striking resemblance to a discredited component of *Korematsu*. See *Adarand Contractors, Inc. v. Peña*, 515 U.S. 200, 215, 236 (1995) (disapproving the case-specific disposition of *Korematsu* on narrow tailoring grounds). Neither opinion conducted a narrow tailoring inquiry. See *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944). After finding the security interests to be compelling, the courts did not go on to determine whether the government could pursue the same security interest in a less burdensome manner. This unexplained absence of any narrow tailoring inquiry stands in marked contrast to even the otherwise deferential approach to strict scrutiny the *Grutter* Court later adopted. Presumably, even the *Grutter* framework would have considered race-neutral ways of achieving the security interest, as well as employment policies that offered less mechanical preferences in favor of minority applicants. See *Grutter v. Bollinger*, 539 U.S. 306, 333-43 (2003).

types of employment, the reasoning in *Wittmer* is readily confineable to the boot camp context.

2. *Reynolds v. City of Chicago: Recognition of Employment Diversity and Operational Effectiveness as Compelling Interests in Police Forces*

In *Reynolds v. City of Chicago*, the Seventh Circuit addressed a diversity-based affirmative action program in the hiring practices of the Chicago police department.¹⁸⁴ *Reynolds*, decided just one year before *Grutter*, involved an equal protection challenge of the promotion of twenty black and Hispanic officers to lieutenant and captain over white policemen who were more objectively qualified.¹⁸⁵ The Seventh Circuit, in another opinion authored by Judge Posner, upheld the discriminatory promotions policy.¹⁸⁶ It upheld the promotions of the black police officers on a conventional version of the remedial rationale, based on a jury's finding that the police department discriminated against blacks in hiring during a period of racial tensions in the 1960s in Chicago.¹⁸⁷ Because no evidence of such discrimination against Hispanics existed, however, the court did not use the remedial rationale to uphold the affirmative action plan as applied to Hispanics.¹⁸⁸ Instead, the court upheld the program under the City's alternate rationale of enhancing the "operational needs of the police force."¹⁸⁹

Judge Posner's opinion for the court, remarkably brief as in *Wittmer*, accepted the City's assertions on the purported operational benefits of greater diversity among police supervisors. First, greater numbers of Hispanic lieutenants and captains would "set the tone for the department" in making it "sensitized to any special problems

184. 296 F.3d 524 (7th Cir. 2002).

185. Assessment of objective qualifications of the competing police officers was based on performance on the police department's standardized test. *Id.* at 525-26. The challenged promotion decisions also included objectively less qualified female police officers. *Id.* These promotions involve sex-based affirmative action policies that are beyond the scope of this Note.

186. *See id.* at 528-30.

187. *Id.* at 528-29.

188. *Id.* at 529.

189. *Id.* at 529-30.

in policing Hispanic neighborhoods.”¹⁹⁰ Second, these Hispanic supervisors would allow the police to function as better “‘ambassadors’ to the various communities that make up Chicago, of which the Hispanic community is an important one.”¹⁹¹ These “ambassadors” purportedly would be better able to gain the “trust of that community.”¹⁹²

In assessing these benefits, Judge Posner began with a seemingly stringent statement on the dangers of recognizing nonremedial justifications for affirmative action as constitutionally compelling:

Justifications of discrimination that are based on a public employer's operational needs are suspect, because they seem to have no natural limits, unlike remedial justifications, which cease when the last traces of the discrimination that gave rise to the remedy have been eliminated.... To allow discrimination on the basis that it was efficient or expedient would cause inroads into equal protection that the courts are unwilling to countenance.¹⁹³

Judge Posner, however, went on to approve the City's nonremedial affirmative action policy with only somewhat perfunctory scrutiny in only two paragraphs of text that occupied less than one page of the Federal Reporter.¹⁹⁴ His opinion simply noted that courts had occasionally allowed nonremedial forms of affirmative action for police and correctional institutions, as in *Wittmer*.¹⁹⁵ It then applied a balancing test that resembled intermediate scrutiny more than strict scrutiny. This balancing test weighed the need for effective police work in an era of public fears of “international terrorism” against the injury suffered by the white plaintiffs in the case.¹⁹⁶

The court's application of this balancing test both overstated the benefits of the affirmative action program and understated its human costs on adversely impacted individuals and on society:

190. *Id.*

191. *Id.* at 530.

192. *Id.*

193. *Id.*

194. *See id.* at 530-31.

195. *Id.* at 530.

196. *Id.*

If it is indeed the case that promoting one Hispanic police sergeant out of order is important to the effectiveness of the Chicago police in protecting the people of the city from crime, the fact that this out-of-order promotion technically is "racial discrimination," though its impact, incidence, and motivation are remote from the impact, incidence, and motivation that have shaped the current legal view of racial discrimination, does not strike us as an impressive counter-weight.¹⁹⁷

The court then ended with the conclusory statement that "the city proved that it has a compelling need to increase the number of Hispanic lieutenants."¹⁹⁸ The court did not indicate why it believed the City met this high burden, whether through reliance on expert witnesses, as in *Wittmer*, or on a genuinely independent constitutional analysis of the asserted governmental interest. Like in *Wittmer*, the court also did not conduct an explicit narrow tailoring analysis. Instead, it simply noted that the case involved the promotion of only one less objectively qualified Hispanic officer.¹⁹⁹

Judge Posner's opinion in *Reynolds* thus contained many of the same lax analytical qualities as his opinion in *Wittmer*. Like *Wittmer*, *Reynolds* did not apply directly even the *Bakke* precedent on diversity as a compelling interest. It did not define with particularity the precise interest that the Chicago policy served, nor did it define that interest as rooted in the Constitution. It also did not apply a narrow tailoring analysis. Like *Wittmer*, however, *Reynolds*'s interest in operational effectiveness was confined to the particular context of the case, not a broad diversity interest in employment analogous to the interest at issue in *Grutter*.

197. *Id.*

198. *Id.* at 530-31.

199. *See id.* at 531 ("[T]he increase it defended ... is the smallest increase it could have made."). Even under *Grutter*, such an analysis at least would have required that the City of Chicago consider each police officer as an individual, without placing a reflexive premium on minority status. A more holistic evaluation could consider each supervisor candidate's individual sensitivity to diverse ethnic communities, on the assumption that particular white police officers might, like minorities, also be able to serve as effective "ambassadors" to diverse communities.

B. The Seventh Circuit's Application of Grutter to the Diversity Rationale in Police Forces

Only one U.S. appellate court, again the Seventh Circuit, has addressed an affirmative action program in public sector employment based on operational effectiveness grounds after *Grutter*. The Seventh Circuit again addressed a preferential promotions policy of the Chicago police department in *Petit v. City of Chicago*.²⁰⁰ This preferential policy involved the City's handling of another series of sergeant promotion in the mid-1980s.²⁰¹ Unlike the promotions in *Reynolds*, the City based these promotions almost entirely on standardized test results, including a written examination, an oral examination, and a performance evaluation.²⁰² But in order to increase the number of blacks and Hispanics given promotions the City "standardized" all scores on the basis of each officer's race so that members of minority groups who generally underperformed would receive an automatic boost in their scores.²⁰³ More than one hundred black and Hispanic officers won promotions based on either the standardized test scores or out-of-rank-order promotions.²⁰⁴ Eighty-two white police officers whom the City denied promotions claimed that the City's policy violated their equal protection rights.²⁰⁵ The City claimed both remedial and operational effectiveness justifications for its affirmative action policy.²⁰⁶ Because of the complex procedural posture of the case,²⁰⁷ the court considered only the diversity rationale based on the claimed benefit of enhanced operational effectiveness.²⁰⁸

The question before the court then resembled the portion of *Reynolds* that approved the promotion of the single Hispanic officer on operational effectiveness grounds. But *Petit* involved a greater

200. 352 F.3d 1111 (7th Cir. 2003).

201. *Id.* at 1116.

202. *Id.*

203. *Id.* at 1117.

204. *Id.*

205. *Id.* at 1113, 1117. Three-hundred twenty-six nonminority police officers originally sued, but the court allowed only eighty-two officers to proceed with the suit because of standing issues. *Id.* at 1112-13.

206. *Id.* at 1112.

207. *See id.* at 1113.

208. *See id.* at 1114.

number of promotions, for diversity purposes and the *Petit* court explicitly tailored its analysis to conform to the standards of *Grutter*.²⁰⁹ In explicating its understanding of the compelling interest prong of strict scrutiny, the *Petit* court first noted the *Grutter* Court's deference to the university in defining its own educational mission in relation to the value of student body diversity.²¹⁰ It also emphasized *Grutter*'s dicta that a racially diverse military officer corps was vital to national security.²¹¹ It then invoked a portion of the expansive language in *Grutter* that exalted civic inclusiveness and societal legitimacy as benefits of increased racial diversity.²¹² But it did not cite any language from *Bakke* or *Grutter* about a constitutionally rooted countervailing interest in higher education.

Applying the compelling-interest prong of strict scrutiny as refined by *Grutter*, the *Petit* court applied a parallel "degree of deference" to the police experts' and executives' understanding of their own operational needs.²¹³ The court did not explain why police forces were entitled to the same degree of deference accorded to universities, but it did discuss the nature of the asserted diversity rationale in somewhat greater detail than in *Reynolds*. The court credited the testimony of a professor of criminal justice that, absent police diversity, racial minorities have a greater tendency than nonminorities to distrust the police and refrain from cooperating with them.²¹⁴ Moreover, it credited the testimony of a police chief from another city that racial diversity among police supervisors would "internally ... chang[e] the attitudes of officers."²¹⁵ The court further favorably acknowledged the testimony of Chicago police

209. See *id.* at 1112 ("Today, odd as it may seem, we must evaluate the hoary examination based on the standards set out just this year by the United States Supreme Court in two affirmative action cases involving student admissions at the University of Michigan."). The second affirmative action case was *Gratz v. Bollinger*, which invalidated the University of Michigan undergraduate affirmative action policy as not narrowly tailored and as the functional equivalent of a quota system. 539 U.S. 244, 270 (2003); see *supra* note 133.

210. *Petit*, 352 F.3d at 1114.

211. *Id.*

212. *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) ("Furthermore, in the Court's words, the '[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.'")).

213. *Id.* at 1114 (quoting *Grutter*, 539 U.S. at 328).

214. *Id.* at 1114-15.

215. *Id.* at 1115.

executives that “the presence of minority sergeants has not only improved police-community cooperation, but also diffused potentially explosive situations, such as the tense racial situation following riots in the 1980’s in a predominately Hispanic community.”²¹⁶ This rationale thus reflected the *Reynolds* reasoning that a diverse police force would better be able to serve as “ambassadors to the community” who could win the “trust of the community” and “detect[] and apprehend[]” more criminals.²¹⁷ The court did not demand any more concrete evidence that race, rather than other factors, was needed to achieve operational effectiveness for any specific community problems that existed in the social context at the time the city adopted its preferential policy. Based on the expert witnesses’ claims, the court simply held that diversity in the police force was a compelling governmental interest under *Grutter*.²¹⁸

The Seventh Circuit’s evaluation of Chicago’s employment diversity rationale in *Petit* was a significant application and expansion of *Grutter*. For the first time after that landmark Supreme Court case, a federal court had applied it to an affirmative action program in the employment context based on a diversity rationale. And in contrast to *Reynolds*, which used diversity to justify the promotion of only one officer, it applied the diversity rationale to uphold a promotion of many minority employees. Furthermore, *Petit*’s reference to *Grutter* signified a more expansive understanding of the diversity rationale in employment than the earlier Seventh Circuit cases had embraced. Although the court

216. *Id.*

217. *Id.*

218. *Id.* Regarding the post-*Grutter* narrow tailoring prong of strict scrutiny, the *Petit* court asserted that the preferred minority officers and the rejected nonminority officers “were fairly uniformly qualified for promotion” in view of the proximity of their scores and the examination’s standard error. *Id.* at 1117. It did not condemn the automatic, mechanical nature of the “plus” that the standardization procedure provided *all* minority officers, regardless of actual contributions of community relations ability to the force. It noted that the results of the challenged examination policy had not been used since 1991 and that “no race-conscious promotions have been made since that time.” *Id.* Because this purportedly limited affirmative action policy met the *Grutter* requirement of being “limited in time,” the court held that the Chicago police’s policy was narrowly tailored and thus did not violate equal protection. *Id.* at 1117-18. In so doing, the court did not examine any race-neutral alternative means that the City may have considered to achieve its goal of operational effectiveness, such as preferring officers with language skills or community relations excellence regardless of racial identity.

addressed the diversity rationale in the context of a profession concerned with internal security, as in *Reynolds* and *Wittmer*, it rooted this rationale in *Grutter*'s much broader dicta on civic inclusiveness and societal legitimacy—concepts that may not be readily confineable to either universities or law enforcement. And the Seventh Circuit so reasoned without reference to any countervailing constitutional interest in security or in the First Amendment. Moreover, *Petit*'s reasoning, although somewhat more elaborate than that in *Wittmer* and *Reynolds*, replicated the loose scrutiny in application of some aspects of the affirmative action program, particularly those related to the unsubstantiated claim of a compelling security interest. *Petit* thus was a sweeping affirmation of affirmative action that, despite its more accurate acknowledgment of the strict scrutiny test, was somewhat broader than both *Reynolds* and *Wittmer*.

These cases from the courts of appeals thus show the ripeness of several important issues that *Grutter* raised but did not answer. What is the proper scope of the racial diversity rationale for affirmative action under equal protection? More specifically, should the courts expand the diversity rationale to the employment context? If so, should the expansion encompass employment generally or only a select subcategory of employment in which racial sensitivities are particularly important? Furthermore, how should *Grutter* and the debate over the diversity rationale in public employment affect the interpretation of Title VII? Is the general diversity rationale important enough to imply a diversity exception to Title VII? What is the proper influence of the legislative history and purpose of Title VII on the consideration of a possible diversity exception to the statute? These questions invite eventual resolution by the Supreme Court. The following two Parts of this Note suggest that the appropriate resolution of these questions is in favor of containing the diversity rationale of *Grutter*.

V. UNCONSTITUTIONALITY OF EXPANDING THE DIVERSITY RATIONALE TO PUBLIC EMPLOYMENT UNDER EQUAL PROTECTION

The case for expanding the diversity rationale to public employment is fairly straightforward and arguably plausible under *Grutter*. But the countervailing constitutional interests that the

Court used to justify its decision in *Grutter* are not present in the employment-diversity context. And, apart from any countervailing constitutional interests, even if the policy interests supporting diversity-based affirmative action in employment were significant, the expansiveness of the interest is too sweeping. Moreover, the use of affirmative action in employment to achieve substantial racial diversity may not even be needed, given the workforce diversity that diversity in higher education already encourages. Furthermore, the omnipresent dangers of divisiveness and market distortion inherent in government-sponsored racial discrimination generally outweigh its marginal benefits. Consequently, the Court should cabin the scope of *Grutter* in equal protection to the higher education context and disapprove its expansion to public employment.

A. Summary of the Case for Workforce Diversity

The benefits of greater workforce diversity that proponents of affirmative action in employment cite are not facially insubstantial. Some of these benefits may favorably impact society as a whole. As discussed in *Grutter*, workforce diversity may increase the perception of the inclusiveness and legitimacy of diverse institutions.²¹⁹ Just as many in society perceive diversity in elite educational institutions as a particularly valuable signal of inclusion to people outside of those institutions, society may favorably perceive diversity in public workplaces that diverse taxpayers fund and with which they interact. Individuals who do not directly benefit from workplace affirmative action may know family, friends, and neighbors who do. This perception of inclusiveness and legitimacy may produce a greater sense that opportunities are open to all, thereby encouraging others to seize new opportunities that they may have previously thought were beyond their grasp. Then the United States may more closely resemble “one Nation, indivisible.”²²⁰

Other benefits may also accrue within the parts of the workforce that become more racially diverse. These benefits are not necessar-

219. See *Grutter*, 539 U.S. at 332-33.

220. See *id.* at 332.

ily unique to public employment; they are also part of the business case for private workforce diversity.²²¹ Workforce diversity may increase tolerance for differences among individuals.²²² This tolerance then may lead to greater workforce cohesion that inspires employees to produce a greater range of ideas that in turn inspire a better overall quality of work.²²³ Work output from the diverse ideas of a diverse workforce, in turn, may better accommodate an increasingly diverse constituent or customer base in an increasingly diverse society and global economy.²²⁴ These benefits increase the representativeness of both government and business.

B. Absence of Independent Countervailing Constitutional Interests Supporting Workplace Diversity

Despite the arguable importance of the above benefits from a policy perspective, they do not rise to the level of a constitutionally rooted countervailing interest sufficient to outweigh the right of *all* Americans to be free from racial discrimination by their own government. The First Amendment does not seem to justify racial discrimination to achieve workforce diversity, nor does any interest in internal or national security. Any broad interest in increased societal integration is not specifically constitutionally rooted so as to justify racial discrimination.

1. Lack of First Amendment Connection to the General Diversity Interest in Public Employment

Grutter concerned higher education and the purported zone of heightened First Amendment protection of a conception of academic freedom that included the selection of the student body in order to produce a robust exchange of ideas.²²⁵ Employment, by contrast,

221. See *supra* notes 160-65 and accompanying text.

222. See Katherine Y. Williams & Charles A. O'Reilly, III, *Demography and Diversity in Organizations: A Review of 40 Years of Research*, 20 RES. IN ORGANIZATIONAL BEHAVIOR. 77, 112 (1998).

223. *Id.*

224. See Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *supra* note 162, at 7; Brief of General Motors as Amicus Curiae in Support of Respondents, *supra* note 164, at 4, 12-13; Williams & O'Reilly, *supra* note 222, at 112.

225. See *Grutter v. Bollinger*, 539 U.S. 306, 328-30 (2003).

generally does not implicate a First Amendment interest in fostering the interchange of diverse ideas. Work offices, assembly lines, lunch rooms, lounges, and other common workplace venues are not as likely forums for academic discussion of societal conditions as are classrooms. Casual conversations about societal concerns indeed may occur in these workplace venues just as they do in university dormitories, dining halls, and campus social facilities. But in the university setting, these conversations supplement the classroom learning in a usually residential forum dedicated primarily to intellectual development. In the comparable venues for conversation and interaction in the workplace, the opportunity for such conversations is much more incidental and necessarily less a part of the day of each employee, who has a fuller life outside of the workplace than a student does outside of a residential university.

Although the First Amendment roots of *Grutter* may have been muted, they were the single element in the Court's reasoning that moored the diversity rationale in the Constitution. *Bakke*, on which *Grutter* at least partially relied, used a rationale almost completely devoted to the First Amendment penumbras of academic freedom as a compelling interest in the abstract.²²⁶ This rationale claimed that racial diversity was one component of the lively interchange of diverse ideas that was the core of academic freedom.²²⁷ *Grutter*, as indicated above, used that framing of the diversity rationale as the doctrinal foundation, though not the limit, for its conception of the diversity rationale.²²⁸ It specifically quoted from *Bakke* the notion that institutions of higher learning occupy "special niche[s] in our constitutional tradition."²²⁹ The dicta in *Grutter* about diversity as a benefit to broader society thus can be understood as a supplemental policy rationale for recognizing the academic freedom exception under strict scrutiny rather than an independent rationale for the exception.

Without any mooring in the First Amendment, the racial diversity rationale in employment is merely an interest in non-academic operational effectiveness. A generalized affirmative action

226. See *supra* notes 41-45 and accompanying text.

227. See *supra* notes 41-45 and accompanying text.

228. See *supra* notes 138-43 and accompanying text.

229. *Grutter*, 539 U.S. at 329; see *id.* at 324.

of this type then amounts to discrimination against people because of their race for the purpose of more effectively spending public money. The Supreme Court rejected a similar purpose as insufficient to withstand even intermediate scrutiny of sex discrimination under equal protection. Styling the rationale for discrimination in *Craig v. Boren* as a formal sounding interest in "administrative ease and convenience," the Supreme Court rejected this interest as not even being "important," let alone compelling.²³⁰

Advocates of the expanded diversity rationale surely do not minimize the importance of the interest by characterizing it as merely related to more effectively spending money. Rather, they cast the claimed increased operational effectiveness in terms of breaking stereotypes within work groups and enhancing the perception of civic inclusiveness among the broader public.²³¹ But aside from the speculative nature of these claimed benefits to workforce diversity, changing the way people think about other people and society does not seem to be a constitutional interest, under the First Amendment or otherwise. The primary American civil rights laws, the Equal Protection Clause and the Civil Rights Act of 1964, address state action and employment discrimination, respectively. They do not directly seek to change people's private thoughts, stereotypical or otherwise.²³²

Advocates of the expanded diversity rationale also cast the benefits of workforce diversity in terms of improved service directly to the public.²³³ In a representative democracy, effective governmental service in addressing public "customers" may be more significant than merely internally performing a bureaucratic function with greater efficiency in a manner that conserves public money. But this argument questionably assumes that a racially homogeneous public workforce is unable to serve the public effectively, regardless of the proficiency of nonminorities in community relations. If a public workforce is sensitive to community differences in both

230. 429 U.S. 190, 198 (1976).

231. See Estlund, *supra* note 17, at 15-17, 23-31; Goldstein, *supra* note 140, at 946, 953; Turner, *supra* note 17, at 217, 219.

232. Moreover, if the law required such private thought control, it arguably would violate free speech as invalid content discrimination. See Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1887-900 (1996).

233. See Estlund, *supra* note 23, at 219; Turner, *supra* note 17, at 217.

dealing with the public and internal problem solving, the only apparent major advantage of a diverse public workforce in its relation to the public does not exist unless the members of the public themselves are uncomfortable or unwilling to conduct business with someone of another race. Yet the Supreme Court has expressly disavowed racial discrimination in order to satisfy other people's private prejudices.²³⁴ Even if members of the public were more satisfied with their government when staffed by members of their own race, therefore, such a nonconstitutional policy interest is not only not compelling, but facially illegitimate.

As a general nonconstitutional interest, racial diversity is too insubstantial to justify racial discrimination. Diversity in places of employment does not implicate academic freedom or any other First Amendment concern and therefore has no First Amendment or other constitutional mooring. If probed to the degree that strict scrutiny requires, the interest is facially illegitimate.

2. Inapplicability of Security Interests to Public Workforce Diversity

Cases such as *Korematsu*, *Wittmer*, *Reynolds*, and *Petit* suggest that internal security may be a compelling interest for racially discriminatory affirmative action.²³⁵ This assertion may be correct in the abstract. Regarding national security as a compelling interest, Congress and the President have sweeping constitutional "power to wage war successfully."²³⁶ Unlike a generalized diversity interest, this power is deeply rooted in both the text and structure of the Constitution.²³⁷ Additionally, the text and structure of the

234. See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (invalidating a lower court's discriminatory award of custody of a white child to his father because his mother, also white, had married a black man, and holding impermissible the lower court's consideration of presumed likely prejudice the child would face growing up in an interracial family); *Buchanan v. Warley*, 245 U.S. 60, 81 (1917) (invalidating a racially discriminatory zoning ordinance in spite of pleas that the ordinance was necessary to "promote the public peace by preventing racial conflicts").

235. See *supra* Part IV.A-B.

236. See *supra* note 37.

237. U.S. CONST. art. II, §§ 1-2 ("The executive Power shall be vested in a President of the United States of America.... The President shall be Commander in Chief of the Army and Navy of the United States"); U.S. CONST., art. I, § 8 ("The Congress shall have Power To ... provide for the common Defence and general Welfare of the United States; ... To define and

Constitution, along with the general overriding principle of self-preservation inherent in self-government, provide some support for internal security as a compelling interest.²³⁸ Consequently, the security interest provides the foundation for a substantially narrower conception of the diversity rationale for affirmative action than the general diversity interest in employment. This security interest only would justify affirmative action plans in employment contexts that implicate specific security concerns, such as the military, corrections institutions, police forces, and perhaps fire-fighting units.

Moreover, the internal security interest could justify affirmative action only when actual events genuinely raise profound security concerns. Otherwise, as the inappropriately loose application of strict scrutiny in *Korematsu* indicates, a generalized security interest would become a rationale for invidious racial discrimination without a sufficient factual basis or any real need.²³⁹ As the Second Circuit rightly recognized in *Patrolmen's Benevolent Ass'n v. City of New York*, and as the Seventh Circuit overlooked in *Wittmer, Reynolds, and Petit*, marginal security concerns related to the race of public employees are not automatically sufficient to justify racial discrimination.²⁴⁰ A diverse security-related workforce may be more adept at interacting with and serving a diverse society, but a homogeneous security workforce is also presumably capable of dealing adequately with such a diverse society, absent an

punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies ...; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces....").

238. See U.S. CONST. art. I, § 8 ("The Congress shall have power To ... provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States"); U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.").

239. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995).

240. See *supra* Part IV.A-B; see also *Patrolmen's Benevolent Ass'n v. City of New York*, 310 F.3d 43, 50-54 (2d Cir. 2002). In *Patrolman's Benevolent Ass'n*, New York sought unsuccessfully to transfer black police officers to an area of recent racial unrest, on operational effectiveness grounds, but with no clear evidence that the transfers were necessary for continued security. See *id.* at 47-48.

emergency situation that requires the utmost urgency to community relations. And the principle remains that mere discomfort with interacting with members of other races, in service by law enforcement or by public bureaucracy, does not rise to the level of a "pressing public necessity"²⁴¹ absent a genuine emergency. In fact, as noted above, the Supreme Court has stated in other contexts that mere private prejudice is an insufficient reason for abridging equal protection.²⁴²

Aside from any purported benefit of eliminating prejudicial discomfort, even if diversity in police forces and other security-related workforces would substantially reduce the level of crime, Supreme Court doctrine in criminal procedure nevertheless strongly suggests that such a security-related gain does not justify overriding equal protection. The Constitution provides various procedural protections for individuals accused of crimes. These protections include the Fourth Amendment right to have evidence the police obtained through an unlawful search excluded from trial²⁴³ and the Fifth Amendment right to remain free from coercive interrogations.²⁴⁴ In recognition of these principles, the Supreme Court developed the exclusionary rule and the *Miranda* warnings despite the likelihood that such doctrines would result in the acquittal of, or failure to charge, people who have committed crimes.²⁴⁵ These constitutional protections are deemed so fundamental as to be even more important than a marginal security interest that alternative measures perhaps could, but in fact might not, achieve. Because the right to be free from racial discrimination is at least as fundamental to the American constitutional system as the exclusionary rule and the *Miranda* doctrine, marginal and speculative security gains are not sufficient to justify affirmative action in public law enforcement.

A general security interest that is overwhelming may be more compelling than a marginal security interest. If the absence of diversity in the civil service, law enforcement, or the military would cause either massive breakdowns within those entities or massive

241. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

242. See *supra* note 234 and accompanying text.

243. *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

244. *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966).

245. See *id.* at 500 (Clark, J., dissenting); *Mapp*, 367 U.S. at 659.

racial unrest in society, then affirmative action might be appropriate. But *Wittmer*, *Reynolds*, and *Petit* did not claim that chaos would result from homogeneous correctional institutions and police forces.²⁴⁶

The Becton Brief, filed by retired (but not current) military officers in *Grutter*, did claim that effective military cohesion depended on a racially diverse officer corps.²⁴⁷ The brief cited several incidents of racial violence that occurred within the military during the Vietnam War before the officer corps became racially heterogeneous.²⁴⁸ But this evidence is too weak to justify affirmative action in the military. Racial unrest during the Vietnam War era did exist, but it also was part of a broader countercultural rebelliousness of which race was one of many factors.²⁴⁹ No evidence indicates that racial homogeneity in the officer corps generally corresponded with a lack of cohesion in an otherwise heterogeneous military. The Becton Brief cited no incidents of racial unrest in the military at any time before the Vietnam War, during the early stages of that war when societal unrest was less common, or during any earlier American military conflict.²⁵⁰ This omission might not be as material if the rank and file of the American military had not been integrated before the period of racial unrest during the Vietnam War that the brief cited. But the military rank and file had been integrated since President Truman's 1948 executive order and the Korean War.²⁵¹ While racial diversity in the officer corps of the military may promote a marginally greater level of internal cohesion than the preexisting diversity in the rank and file, this level is not demonstrably weighty enough to justify abridging equal

246. See *supra* Part IV.A-B.

247. Consolidated Brief of Lt. Gen. Julius Becton, et al., as Amici Curiae in Support of Respondents at 5, 14, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-242).

248. *Id.* at 14-17. Although the armed forces were officially integrated in 1948, the officer corps was not functionally integrated until later; in 1962, for instance, only 1.6% of commissioned officers were black. *Id.* at 11, 14.

249. See ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 17-33 (1996) (discussing the generalized grievances of the 1960s counterculture, which extended to countries such as Sweden with no racial assimilation problems comparable to those of the United States).

250. See Consolidated Brief of Lt. Gen. Julius Becton, et al., as Amici Curiae in Support of Respondents, *supra* note 247, at 14-17.

251. MICHAEL R. GARDNER, *HARRY TRUMAN AND CIVIL RIGHTS: MORAL COURAGE AND POLITICAL RISKS* 111-21 (2002).

protection. Given the U.S. government's official *opposition* to the program that the Becton Brief endorsed in *Grutter*,²⁵² the status of the Becton Brief as a document presented only by *retired* officers no longer affiliated with the military reflects this logical attenuation.

Accordingly, while the security interest is constitutionally compelling in the abstract, it is far too attenuated for the judiciary to properly consider it as a genuinely compelling constitutional interest in the employment context in all but the most urgent circumstances.

C. Inherent Tendency of Affirmative Action in Public Employment To Fail Narrow Tailoring Requirement of Strict Scrutiny

Even if employment diversity has some compelling constitutionally rooted value, affirmative action in employment is not a constitutionally appropriate means to advance that interest. The generally counterproductive results of affirmative action that courts have always considered when evaluating such programs are present in the employment context. Affirmative action in employment also imposes significantly greater burdens on adversely affected individuals than does affirmative action in higher education.²⁵³ Additionally, affirmative action in higher education is likely to produce significant diversity in the public workforce to a degree that makes affirmative action in employment unnecessary to achieve the benefits of significant workforce diversity.²⁵⁴

1. Severe General Burdens of Affirmative Action

The Supreme Court and observers of American law and culture have long recognized that affirmative action has the dangerous potential to ingrain race within the collective and individual consciousness of the American people.²⁵⁵ Because the government is the "omnipresent teacher," this race consciousness is particularly

252. See Brief for the United States as Amicus Curiae Supporting Petitioners at 10-12, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

253. See *infra* notes 263-65 and accompanying text.

254. See *infra* notes 267-74 and accompanying text.

255. See, e.g., *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 637 (1990) (Kennedy, J., dissenting).

egregious when the government promotes it.²⁵⁶ Affirmative action thereby tends to place a vicious stigma of inferiority on the benefitted individuals that creates the impression that they require the paternalism of others to succeed.²⁵⁷ It also spurs resentment and animosity toward the beneficiaries of affirmative action by those who stand to suffer from affirmative action.²⁵⁸ This resentment may spread to other tolerant and unbigoted individuals who do not directly suffer but who may suffer in the future or who know family members, friends, and neighbors who suffer from affirmative action. In a country that prides itself on being a meritocracy without official ranks of nobility attached at birth, affirmative action seems especially perverse.²⁵⁹ Racial conflict, self-segregation, and perhaps racial violence remain ubiquitous specters with such policies.²⁶⁰ Because these general injuries undermine some of the asserted benefits of racial diversity, they are relevant in assessing diversity-based affirmative action programs.

2. *Exacerbated Injuries of Affirmative Action in Employment*

Beyond the general injuries that affirmative action may inflict, the specific injuries it inflicts on adversely affected individuals in employment are also relevant in the narrow tailoring inquiry. The

256. *Fullilove v. Klutznick*, 448 U.S. 448, 531-32 & n.15 (1980) (Stewart, J., dissenting).

257. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 516-17 (1989) (Stevens, J., concurring in part and concurring in the judgment); SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* 116-19 (1990).

258. *Metro Broadcasting*, 497 U.S. at 636 (Kennedy, J., dissenting); *Croson*, 488 U.S. at 493-94 (O'Connor, J., joined by Rehnquist, C.J., and White, J.); BORK, *supra* note 249, at 241-42 (attributing increasing racial separatism on college campuses to affirmative action). See JOHN MCWHORTER, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* 164-83 (2000).

259. See *Fullilove*, 448 U.S. at 532-33 (Stevens, J., dissenting).

260. See *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment); *Fullilove*, 448 U.S. at 532-33 (Stevens, J., dissenting) (noting the connection between resentment over titles of nobility fixed at birth and the beginning of the French Revolution); ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS FAILED DEMOCRACY AND IMPOVERISHED THE SOULS OF TODAY'S STUDENTS* 91-96 (1987); William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 804-10 (1979). See generally THOMAS SOWELL, *AFFIRMATIVE ACTION AROUND THE WORLD: AN EMPIRICAL STUDY* (2004) (discussing the effects of affirmative action in the United States and several other countries).

Supreme Court in *Grutter* clearly did not interpret the general pitfalls of affirmative action discussed above as fatal to affirmative action in higher education.²⁶¹ But the Supreme Court long has recognized that depriving an individual of a job because of his race is a qualitatively more egregious burden under equal protection than merely depriving him of a particular opportunity in higher education.²⁶² An individual who loses a desired opportunity for higher education loses an opportunity for future advancement but does not lose his ability to work and provide basic necessities of life for himself and his family. An individual who does not attain employment, on the other hand, loses a more immediate opportunity to earn the money to provide for himself and his family.

Although an individual so deprived does not suffer the greater burden of losing a job he already had, as in *Wygant*,²⁶³ his injury is profound nonetheless. If such an individual is an entry-level or recently unemployed job seeker, he must endure a renewed or extended period of unemployment. If he is already employed and seeking more desirable employment, he must continue working in a less desirable work atmosphere. In any of these scenarios, the aggregate exposure of individuals to the injuries of racial discrimination is greater than in the higher education and remedial employment contexts. The effect is also more widespread: the number of people applying for jobs at any given point is greater than the number applying for admission to institutions of higher learning.²⁶⁴ The stigma and resentment thus are likely to be greater

261. See *supra* Part III.A.

262. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 & n.11, 284 (1986) (plurality opinion).

263. *Id.*

264. In 2002, slightly over 2.5 million first-year students were enrolled in degree-granting postsecondary institutions. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS, 2004, tbl. 181, available at http://nces.ed.gov/programs/digest/d04/tables/dt04_181.asp. In the same year, the number of people who were unemployed but actively seeking employment was slightly less than 8.4 million. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CURRENT POPULATION SURVEY 203 tbl. 1 (2006), available at <http://www.bls.gov/cps/cpsaat1.pdf>. Both figures are imperfect indicators of the number of people seeking employment and the number of people applying for admission to universities. The postsecondary enrollment figure does not include people who applied to but did not enroll in universities, while the unemployment figure does not include people who are currently employed but are seeking other employment simultaneously. But because both figures understate the numerical value they represent in this comparison, the comparison itself remains presumably accurate in view of the large difference. The number of people,

with affirmative action in employment than in higher education, thereby rendering the operational benefits of employment diversity even more marginal. Furthermore, the shift from the remedial to the diversity rationale causes more of these harms in more parts of the workforce than occurred before.²⁶⁵ This intermediate type of injury, more severe than losing a chance at higher education but less severe than termination from an existing job, is substantial enough to warrant a strict assessment of the fit between the particular means employed to achieve the end of workforce diversity.

3. Ability To Achieve Workforce Diversity Without Affirmative Action

Additionally, affirmative action in employment logically is not necessary to produce the marginal benefits of diversity in employment. This paradoxical truth arises because universities now very aggressively use affirmative action.²⁶⁶ Diversity in higher education trains students in diverse settings and produces diversity in the ever-growing college educated labor market, which in turn produces employees trained in diversity and employees of diverse backgrounds. Affirmative action in higher education thus is a less restrictive means of achieving the benefits of diversity in employment. One requirement of a narrowly tailored policy under equal protection is that the asserted compelling interest must not be

therefore, who are seeking employment is approximately three times the number of people seeking a post-secondary education.

265. See *supra* notes 1-5 and accompanying text.

266. Before *Grutter*, one United States Court of Appeals had invalidated most affirmative action in higher education. See *Hopwood v. State of Texas*, 78 F.3d 932, 941-48 (5th Cir. 1996). The increasing stringence of Supreme Court doctrine in this area signified by *Croson* and *Adarand* likely made uncertain the viability of affirmative action in higher education in other circuits. *Grutter* removed this uncertainty in those circuits and reversed course in the Fifth Circuit, in which schools promptly reinitiated affirmative action. See, e.g., Robert D. Meckel, *UT-Austin Changes Policy on Use of Race and Ethnicity in Admissions*, 15 HISPANIC OUTLOOK ON HIGHER EDUC. 25 (2004) (describing the University of Texas's reintroduction of preferential affirmative action after *Grutter*). Moreover, the large number of colleges that supported the policy in *Grutter* indicates the willingness of most schools to use the *Grutter* decision to aggressively use affirmative action. See, e.g., Brief for Harvard University, et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

attainable by readily available means that do not harm others.²⁶⁷ Because relying on diversity in education can now produce the benefits of diversity in employment without any discrimination in employment, discriminatory affirmative action in employment is not narrowly tailored.

In *Grutter*, both the Supreme Court and advocates of the diversity rationale in higher education acknowledged the unique role of education in providing the wide range of benefits they associated with diversity. Justice O'Connor's opinion for the Court specifically cited the opportunities that minorities would gain to become leaders in the government and business only as a benefit of diversity in competitive educational institutions.²⁶⁸ Similarly, General Motors, in its amicus brief supporting affirmative action in higher education, described universities as "ideal" settings to realize the benefits of diversity.²⁶⁹ Training in diverse settings would inculcate tolerance of others and break stereotypes, without the benefit of diversity in employment to teach the same messages.²⁷⁰ The General Motors brief also stated, "[h]igher education, by making up for educational inequities at early stages in life, can be the ramp up to a level playing field—with no further affirmative action—for the rest of one's future."²⁷¹ Moreover, the General Motors brief tried to support its position by asserting that affirmative action in higher education based on diversity would *not* lead to expanded affirmative action in employment:

Contrary to [the plaintiff's] argument, the point that an education in a diverse setting results in "benefits accruing to students after they have graduated from college" *does not* "demonstrate that there is no principle that confines the interest to the education context" and thereby enable[s] diversity to "become a justification for using race to treat people differently in many walks of life."²⁷²

267. *Grutter*, 539 U.S. at 341.

268. *Id.* at 330-32.

269. Brief of General Motors Corp. as Amicus Curiae in Support of Respondents, *supra* note 164, at 18-23 (citation omitted).

270. *Id.*

271. *Id.* at 23 (emphasis added) (quoting Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1749 (1996)).

272. *Id.* at 18 n.10 (emphasis added) (citation omitted).

Accordingly, the Supreme Court should not recognize an expanded diversity rationale for affirmative action in public employment. The purported general employment benefits of diversity are not rooted in any independently fundamental countervailing constitutional principle such as the First Amendment. The purported security benefits from such specific forms of affirmative action in corrections institutions, law enforcement units, and the military are too amorphous. Further, affirmative action policies in public employment suffer from several intrinsic narrow tailoring problems. Both the general and the specific injuries that affirmative action in the public employment context inflicts negate the benefits of workforce diversity. The benefits of diversity from affirmative action in higher education are also sufficient to achieve diversity in employment without inflicting the counterproductive injuries of racial discrimination through affirmative action in employment.²⁷³ Containment of the diversity rationale for affirmative action to the higher education context is thus the proper constitutional course.

VI. ILLEGALITY OF A DIVERSITY RATIONALE IN PRIVATE SECTOR EMPLOYMENT UNDER TITLE VII

General Motors's arguments in *Grutter* notwithstanding, General Motors and other businesses do use affirmative action programs to increase the racial diversity of their workforces.²⁷⁴ Though the courts have not yet announced any exception to Title VII beyond a remedial interest,²⁷⁵ private businesses have been able to use affirmative action thus far without legal constraints under Title VII in most jurisdictions. The potentially expansive diversity rationale in *Grutter* and its relevance to private businesses' practices portend

273. This proposition is empirically difficult to evaluate because employers have utilized affirmative action at the same times as have universities. A quantitative comparison of the levels of diversity in employment with and without affirmative action in employment, holding diversity in universities constant, is not realistic in view of the concurrent use of affirmative action in both employment and education. *See supra* Part III.B. The conclusion in the text nevertheless is supported by the logical relationship between the college educated labor market and the actual workforce.

274. *See supra* Part III.B.

275. *See United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197 (1979).

a possible shift in Title VII doctrine.²⁷⁶ Many of the arguments for the diversity rationale in private employment are similar to arguments for the diversity rationale for public employment.²⁷⁷ Likewise, private business affirmative action programs geared toward diversity are contrary to Title VII for most of the same reasons that public employer affirmative action geared toward diversity are contrary to the Equal Protection Clause.²⁷⁸ Nevertheless, Title VII analysis, while similar, is not identical to equal protection analysis.²⁷⁹ Title VII's more categorical wording, its clear legislative history, and the even more marginal nature of the interest in racial diversity in business make the case for containment of exceptions in Title VII doctrine even clearer than it is under equal protection doctrine.

A. Categorical Wording of Title VII's Text

Title VII's principal text unequivocally states that private employers involved in interstate commerce may not discriminate against anyone because of race, nor because of sex, religion, and national origin.²⁸⁰ In this regard, it is much more specific than the Equal Protection Clause, which does not explicitly reference racial classifications and does not define the perhaps vague concept of "equal protection."²⁸¹ The actual meaning of the Equal Protection Clause derives from its history following the Civil War²⁸² and judicial analogies of nonracial characteristics to race.²⁸³ A few sound judicially crafted exceptions to the equal protection rule for race and more for protected nonrace characteristics thus are not per se

276. See *Johnson v. Transp. Agency*, 480 U.S. 616, 646-47 (1987) (Stevens, J., concurring) (suggesting that diversity justifications for workplace affirmative action jurisprudence under Title VII may be appropriate); *id.* at 650-51 (O'Connor, J., concurring in the judgment) (suggesting that Title VII analysis of racial discrimination is not doctrinally different from equal protection evaluation of racial discrimination).

277. See *supra* Part V.A.

278. See *supra* Part V.B-C.

279. See *supra* Part II.

280. Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a)(1) (2000).

281. See U.S. CONST. amend. XIV, § 1.

282. See PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 505-07 (1997).

283. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 684-99 (1973) (plurality opinion) (determining the proper level of equal protection scrutiny for public sex discrimination by analogizing sex to race).

inconsistent with the text of the Equal Protection Clause. Title VII exceptions in the statutory text, however, are nonexistent for racial classifications and textually explicit for nonracial but otherwise protected classifications. Title VII contains an exception for "bona fide occupational qualifications" that allows some discrimination based on sex, religion, and national origin, but it contains no such exception for race.²⁸⁴

This textual analysis indicates that the judiciary should disfavor any unwritten Title VII exceptions. In construing another statute, Justice Thurgood Marshall, one of the staunchest judicial supporters of affirmative action,²⁸⁵ expressed well for a unanimous Court the need to plainly construe categorical statutes:

When construing a statute so explicit in scope, a court must act within certain well-defined constraints. If a legislative purpose is expressed in "plain and unambiguous language, ... the ... duty of the courts is to give it effect according to its terms." Exceptions to clearly delineated statutes will be implied only where essential to prevent "absurd results" or consequences obviously at variance with the policy of the enactment as a whole.²⁸⁶

The fact that the Supreme Court did not adhere to a literal interpretation of Title VII in *Weber* and *Johnson* indicates that such an interpretation alone is not sufficient to decide the validity of a possible Title VII diversity exception.²⁸⁷ But literal textual construction of Title VII should also at least inform courts' construction of Title VII.

284. This textual exception states that employers may discriminate on the basis of religion, sex, or national origin "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business enterprise." Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(e) (2000); Turner, *supra* note 17, at 234.

285. See *supra* note 64.

286. *United States v. Rutherford*, 442 U.S. 544, 551-52 (1979) (internal citation omitted) (construing a statute other than Title VII).

287. See *supra* Part II.A.

B. Congressional Intent for a Broad Antidiscrimination Principle in Title VII

Because of the Court's divergence in *Weber* and *Johnson* from the natural textual interpretation of Title VII, a fuller understanding of Congress's statutory intent is more likely decisive of the validity of a possible diversity exception than statutory text alone. The legislative history of the Civil Rights Act of 1964, which enacted Title VII, is relevant to this inquiry. The competing explications of congressional intent that Justices Brennan and Rehnquist advanced in *Weber* are thus important beyond the remedial exception that emerged from that case. For many of the same reasons that the Third Circuit articulated in *Taxman*,²⁸⁸ congressional intent does not support a diversity exception to Title VII.

As indicated above, the plain meaning of Title VII's text reflects a congressional intent for a broad nondiscrimination principle that protects members of all races.²⁸⁹ The Supreme Court first recognized this principle in *McDonald* when it held that Congress intended Title VII to protect whites on the same terms by which it protects blacks and other racial minorities.²⁹⁰ The competing perspectives in *Weber*, however, reflect the uncertainty surrounding Congress's intent regarding certain narrow kinds of remedial affirmative action programs. As Justice Rehnquist articulated with remarkable thoroughness, Congress specifically foresaw reverse discrimination against whites and sought to forbid such discrimination.²⁹¹ At the same time, as Justice Brennan's majority opinion articulated, Congress more specifically intended to elevate the economic status of blacks who had suffered previous discrimination.²⁹²

This recognition, which validated a *remedial* exception to Title VII, should not entirely negate the value of Justice Rehnquist's explication of the legislative history in evaluating other possible

288. See *supra* Part II.B.2.

289. See *supra* notes 60-66 and accompanying text; Part VI.A.

290. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-80 (1976).

291. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 226-53 (1979) (Rehnquist, J., dissenting) (quoting extensive portions of the Senate and House floor debates on the Civil Rights Act of 1964).

292. *Id.* at 201-08 (majority opinion).

exceptions. Although Justice Rehnquist's opinion was a dissenting opinion joined only by Chief Justice Burger, the majority did not expressly repudiate its essential description of Title VII's purpose apart from the remedial rationale.²⁹³ In fact, one of the members of the *Weber* majority and a staunch supporter of affirmative action, Justice Blackmun,²⁹⁴ stated in a concurring opinion in *Weber*, "I share some of the misgivings expressed in Mr. Justice Rehnquist's dissent concerning the extent to which the legislative history of Title VII clearly supports the result the Court reaches today."²⁹⁵ Further, one of the members of the majority in *Weber*, Justice White, later repudiated his support of Justice Brennan's opinion, embraced Justice Rehnquist's view, and voted to overrule *Weber*.²⁹⁶ Additionally, Justice Stevens, who voted in *Johnson* to retain *Weber*, stated his view that as an original matter he agreed with Justice Rehnquist's *Weber* dissent, but he did not vote to overrule that case on stare decisis grounds.²⁹⁷ Justice Stevens also authored an earlier opinion in *Bakke*, in which he was joined by three other Justices, that interpreted Title VI of the Civil Rights Act of 1964, governing the standard for educational institutions that receive federal funds, in a way that mirrored Justice Rehnquist's later general antidiscriminatory construction of Title VII in *Weber*.²⁹⁸ These positions of other Justices indicate that Justice Rehnquist's dissent in *Weber* may have been more persuasive to others on the court than the small number of Justices who joined that opinion would suggest.

The present members of the Supreme Court are likely more sympathetic to the Rehnquist perspective on Title VII and affirmative action than the Court has been in recent history. Although Chief Justice Burger, Chief Justice Rehnquist, and Justice White are no longer on the Court, Justice Scalia, who joined the Court after *Weber* and signed onto the Rehnquist *Weber* position in voting

293. *See id.*

294. *See, e.g.,* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 561 (1989) (Blackmun, J., dissenting); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 402-03 (1978) (Blackmun, J., concurring).

295. *Weber*, 443 U.S. at 209 (Blackmun, J., concurring).

296. *Johnson v. Transp. Agency*, 480 U.S. 616, 657 (1987) (White, J., dissenting).

297. *See id.* at 642-44 (Stevens, J., concurring).

298. *Bakke*, 438 U.S. at 413-18 (Stevens, J., concurring in the judgment in part and dissenting in part).

to overturn it in *Johnson* remains.²⁹⁹ Several new members have since joined the Court without expressing an opinion on the proper scope of *Weber*. Based on their opinions thus far, Justices Kennedy and Thomas likely are sympathetic to the Rehnquist position on *Weber*.³⁰⁰ Chief Justice Roberts and especially Justice Alito are also likely to be sympathetic to this perspective,³⁰¹ though they have not authored or joined any opinions on affirmative action as Supreme Court Justices. These four Justices may form a natural coalition with Justice Scalia that is more sympathetic to a narrow reading of any Title VII exceptions for affirmative action. The Rehnquist dissent in *Weber* thus merits serious consideration in construing the scope of proposed additional exceptions to Title VII, apart from those in the remedial context in which a majority of the Court has halfheartedly rejected it.

Accordingly, the Rehnquist position should at least be reconciled with the Brennan position in evaluating possible additional exceptions to Title VII. A more complete understanding of the legislative history of the Civil Rights Act of 1964 supports the view that Congress's intent was to enact a general nondiscrimination principle with only narrow exceptions. Any exceptions therefore should reflect the basic intent of the legislation.³⁰² Supporters of a diversity exception have argued that Congress's intent should be

299. *Johnson*, 480 U.S. at 657-58 (Scalia, J., dissenting).

300. See *Grutter v. Bollinger*, 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting) (concluding that the University of Michigan Law School's affirmative action policy was not narrowly tailored); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 633 (1990) (Kennedy, J., dissenting) (arguing that "broadcast diversity" is not a compelling interest for the federal government); see also *Grutter*, 539 U.S. at 350 (Thomas, J., concurring in part and dissenting in part) (arguing that all public forms of affirmative action in higher education are unconstitutional); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment) (asserting the moral equivalency of discrimination against minorities and discrimination against nonminorities in the form of affirmative action policies).

301. See *Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1557-58 (3d Cir. 1996) (invoking a strict application of the *Weber* test, with Judge Alito joining the majority opinion). Although Chief Justice Roberts has not decided any cases on affirmative action as an appellate judge, as Justice Alito has, his close personal and general philosophical identification with Chief Justice Rehnquist may provide a clue of Chief Justice Roberts's probable understanding of affirmative action and Title VII. See Charles Lane, *Short Record as Judge Is Under a Microscope*, WASH. POST, July 21, 2005, at A1 ("[Chief Justice Roberts's] sparse judicial record resembles the conservatism of a man he once worked for at the Supreme Court, Chief Justice William H. Rehnquist.").

302. See *Taxman*, 91 F.3d at 1557.

read more broadly to include the purpose of expanding employment opportunities for all traditionally excluded individuals, regardless of any specific acts of past discrimination.³⁰³ Such an argument views diversity as an end sufficient in itself to justify discrimination rather than a means to achieve other benefits. Further, this proposal would amount to recognizing an exception for past societal discrimination, which the Supreme Court has uniformly rejected in the equal protection areas as a principle that would swallow the general nondiscrimination principle.³⁰⁴ Such a result would violate the principle of congressional intent that any exception to Title VII must be narrow and not undermine the general nondiscriminatory impact of Title VII for individuals of all races.³⁰⁵

Other advocates of a diversity exception to Title VII attempt to shoehorn the generic benefits of socialization into the congressional intent behind the Civil Rights Act of 1964. According to this perspective, Congress intended not only to eliminate present acts of discrimination, primarily against minorities, but also to eliminate the causes of *future* discrimination against those minorities.³⁰⁶ Diversity purportedly neutralizes this future discrimination by breaking stereotypes of minority inferiority and white supremacy and by increasing the ability of whites to work with minorities in all aspects of an integrated society.³⁰⁷ The Third Circuit in *Taxman* properly rejected this argument as a "dramatic rewriting of the goals underlying Title VII."³⁰⁸ But this brief rebuttal was only one footnote in the opinion of the *Taxman* majority.³⁰⁹ In light of the *Grutter* Court's favorable view of the generic social benefits of diversity,³¹⁰ the issue may call for a more thorough treatment than a single sentence in a single footnote.

The latter argument for a diversity exception has several significant flaws. First, this argument is highly speculative. It assumes that future discrimination against minorities is inevitable, despite the fact that the very legislation to which they seek an

303. *Id.* at 1577 (Lewis, J., dissenting).

304. *See supra* notes 50-52 and accompanying text.

305. *Taxman*, 91 F.3d at 1557.

306. *Id.* at 1571 (Sloviter, C.J., dissenting).

307. *Id.* at 1571-72.

308. *Id.* at 1558 n.9.

309. *Id.*

310. *See supra* notes 141-44 and accompanying text.

exception makes most of that discrimination illegal.³¹¹ It similarly assumes that allowing discrimination against nonminorities will be effective in reducing the willingness of nonminorities to countenance future discrimination against minorities. As stated above, the animosity engendered by such reverse discrimination is at least as likely, if not more likely, to engender hostility that may lead to more discrimination against minorities than such discrimination might prevent among people attuned to the values of diversity.³¹²

More fundamentally, however, the argument of preventing future discrimination relies on an overly generalized version of actual congressional intent that fundamentally alters the justification for the narrow remedial exception. The advocates of a diversity exception to Title VII do plausibly state that the *Weber* remedial rationale does not purport to exhaust the range of all possible exceptions.³¹³ Congress could have conceivably intended both a narrow range of exceptions to Title VII and some other narrow nonremedial exception. But this intent is not plausible in view of the huge gap in the nondiscrimination guarantee that such a diversity exception would produce. Because the absence of future discrimination can never be assured in any part of society, this and other conceptions of the diversity rationale would allow reverse discrimination in every part of society. Because employment discrimination can affect more people in a greater portion of their lives than discrimination in education, a diversity exception for employment under Title VII would be an egregious rewriting of Title VII's purpose.³¹⁴ The congressional intent behind Title VII, as stated in a hybridized Brennan-Rehnquist interpretation,³¹⁵ thus cannot permit this exception.

The specific textual wording of the bona fide occupational qualification exception provision of Title VII³¹⁶ buttresses this understanding that the diversity exception cannot exist among whatever limited Title VII exceptions are consistent with congressional intent. As noted above, Title VII generally prohibits discrimi-

311. See Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a)(1) (2000); *supra* note 4.

312. See *supra* Part V.B.1-2.

313. See *Taxman*, 91 F.3d at 1570 (Sloviter, C.J., dissenting).

314. See *supra* notes 265, 303-05 and accompanying text.

315. See *supra* notes 291-92 and accompanying text.

316. See *supra* note 284 and accompanying text.

nation in employment against people because of their sex, religion, and national origin, as well as race and ethnicity.³¹⁷ But it only contains a textual exception for sex, religion, and national origin when such characteristics are elements of a bona fide occupational qualification.³¹⁸ The wording of this provision strongly suggests that Congress did not intend for an exception to Title VII based on instrumental advantages of racial discrimination. It did foresee the need for such an exception for sex, religion, and national origin, which under some circumstances could be relevant to an employer's or society's interests.³¹⁹ If Congress wanted a similar exception for race, it simply could have added race to the list of bona fide occupational qualifications, as it did with the other protected characteristics.

C. Inadequacy of Equitable Considerations To Justify a Diversity Exception to Title VII

In spite of the clarity of the case for containing Title VII exceptions to the remedial rationale, some advocates of expanded affirmative action contend that the purported policy advantages of diverse workplaces outweigh this statutory meaning.³²⁰ This position then amounts to a claim that the judiciary should legislate from the bench to enact a law that Congress did not pass. But because the Supreme Court might be vulnerable to claims that its Title VII jurisprudence should somewhat more closely resemble its equal protection jurisprudence,³²¹ and because many of its members think so highly of the instrumental benefits of diversity,³²² the pitfalls of this equitable construction argument deserve more specific evaluation.

317. See *supra* note 280 and accompanying text.

318. See *supra* note 284.

319. Even for these nonracial classifications, the Court has held that this exception "was in fact meant to be an extremely narrow exception to the general prohibition of discrimination." *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977); see, e.g., *id.* at 336-37 (upholding a discriminatory hiring policy in a state prison only upon a showing that the conditions of the prison would have subjected women to an unacceptably high danger of assault by male sex offenders).

320. See *Estlund*, *supra* note 17, at 36-38; *Turner*, *supra* note 17, at 235-36.

321. See *Estlund*, *supra* note 23, at 215-16.

322. See *Grutter v. Bollinger*, 539 U.S. 306, 329-33 (2003).

Arguments for and against a Title VII exception under this mode of reasoning bear much similarity to arguments for a further diversity exception for public employment under equal protection. Private sector workforce diversity *may* increase personal tolerance among employees, enhance their ability to work together in an integrated society and global economy, and improve their ability to develop and market their products to the diverse public effectively.³²³ As stated in Part VI.B and Part VI.C of this Note, discriminatory affirmative action in employment may serve interests that are marginal in fact, cater only to people's private prejudices, inflict needless injury that inspires unfortunate levels of animosity, and advance generic social objectives that less restrictive means may achieve. Nevertheless, affirmative action in employment in the private sector advances the claimed benefits to a degree that is more marginal than in the public employment context. It also threatens to inflict harms greater than affirmative action in public employment.³²⁴

1. Relatively Insubstantial Nature of Benefits of Diversity in Private Business

Even if public workforce diversity advanced important interests, diversity in private sector employment does not have a plausible connection to increased societal legitimacy or perceptions of greater inclusiveness. Private sector employees are usually not as visible to the public as are public sector employees in broad representative capacities. Public sector employees represent the people at large. Public employees with direct contact with the public may affect the views that those members of the public have of their government. They may feel that a diverse public workforce truly speaks for them and causes the government to warrant their trust, while a public workforce that is not diverse may cause them to feel alienated from their government. Private workforces, whether racially diverse or not, likely do not have this similar exalted role in the public's conception of society. They represent usually for-profit employers who seek to make money by serving some of the populace's

323. *Id.* at 219.

324. *See infra* Part VI.C.2.

narrower private demands; they do not serve the people's collective concerns and aspirations. Marginal increases in operational effectiveness in private business may enhance their sensitivity to their own particular segment of the consumer population. Such enhancements may increase their private profitability. But private profit is not as important a policy as the public welfare.³²⁵ Though this profitability may spur stronger economic growth that benefits the macroeconomy and the public at large,³²⁶ this benefit is indirect and incidental. Fundamental civil rights are not appropriate tradeoffs for purely financial profit.³²⁷

2. Relatively More Severe Nature of Some Injuries from Private Sector Affirmative Action

The argument that racial diversity will improve business's bottom line,³²⁸ besides being insubstantial to justify affirmative action, overlooks the somewhat more severe additional injuries that affirmative action inflicts in private sector employment than in public sector employment. These injuries concern both the businesses themselves and the broader society.

Private sector employers are necessarily competitive enterprises. Unlike public sector employers who will exist as long as the legislature approves of their existence, private businesses are more fragile.³²⁹ Consequently, any negative impact on their ability to function may harm them more than a comparable negative impact on public employers. If greater diversity actually increased

325. See U.S. CONST. pmbl. ("We the People of the United States, in Order to ... promote the general Welfare ... do ordain and establish this Constitution for the United States of America.").

326. See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 352 (C.J. Bullock ed., P.F. Collier & Son 1909) (1776) ("By pursuing his own interest [a merchant] frequently promotes that of the society more effectively than when he really intends to promote it.").

327. Cf. *Craig v. Boren*, 429 U.S. 190, 198 (1976) (recognizing that administrative efficiency and convenience in public law enforcement do not justify sex discrimination).

328. See WOOD, *supra* note 2, at 214.

329. In 1997 and 1998, the numbers of businesses that failed were 84,342 and 71,857, respectively. U.S. CENSUS BUREAU, 2000 STATISTICAL ABSTRACT OF THE UNITED STATES: THE NATIONAL DATA BOOK 548 tbl. 876, available at <http://www.census.gov/prod/2001pubs/statab/sec17.pdf>. Government agencies, on the other hand, are less likely to have similar threats to their existence, with a near-constant flow of taxpayer revenue.

profitability, affirmative action might indeed be more important to businesses. But some evidence indicates that affirmative action severely costs private sector employers. Because the drive for diversity causes employers to hire minorities whose objective qualifications would otherwise not merit hiring, businesses lose the productive energies of some of the best qualified applicants for available employment positions.³³⁰ They must also expend the money necessary to administer their affirmative action programs. Businesses that contract with governmental entities, which impose affirmative action requirements on them, must pay added administrative costs of conforming their particular affirmative action programs to governmental specifications.³³¹ Approximately forty-two percent of the private American workforce falls within the scope of these federal requirements.³³²

A study by two economists placed dollar figures on these resulting losses.³³³ Their study estimates that affirmative action caused businesses to lose \$225 billion annually in direct, indirect, and opportunity costs.³³⁴ This figure was equivalent to a loss of four percent of the Gross National Product of the United States.³³⁵ While some of these costs are likely borne in analogous expenses of public employers, the destructive impact likely is greater on competitive business enterprises for which the price of lost opportunities is qualitatively more severe.

At least for businesses that voluntarily adopt affirmative action programs, advocates of a diversity exception to Title VII argue that

330. BORK, *supra* note 249, at 238.

331. WOOD, *supra* note 2, at 214; Peter Brimelow & Leslie Spencer, *When Quotas Replace Merit, Everybody Suffers*, FORBES, Feb. 15, 1993, at 82-94 (discussing compliance costs of affirmative action).

332. Brimelow & Spencer, *supra* note 331, at 90.

333. *Id.* Though the Brimelow and Spencer study was from the early 1990s, its underlying calculations retain validity in the early twenty-first century, given the continuation of the same underlying dynamics of affirmative action policies and legal assessments of their validity.

334. *Id.* at 99.

335. *Id.* at 82. Another analyst more recently referenced the Brimelow and Spencer study and added an estimate that affirmative action in public contracting with private businesses cost the taxpayers approximately \$2 billion in 2004, based on the higher bids submitted by minority subcontracting firms that primary contractors are induced to accept. Edwin S. Rubenstein, *Affirmative Action and the Costs of "Diversity,"* NAT'L POLICY INST., Sept. 12, 2005, at 9-10, available at http://www.nationalpolicyinstitute.org/pdf/analysis_100.pdf.

the operational benefits to diversity in fact motivate businesses to craft their affirmative action policies and that the profit motive encourages them to constrain those programs to not be counterproductive to their bottom line.³³⁶ But this argument overlooks the nonmarket societal factors that often motivate businesses to pursue affirmative action. Many businesses have adopted affirmative action not at their own initiation but under political pressure to adopt fashionable policies in favor of diversity.³³⁷ Many also may adopt such policies under threat of boycotts or lawsuits, based on unsubstantiated accusations of discrimination against minorities, unless those businesses promote greater diversity.³³⁸ Consequently, many businesses perhaps would suffer financially from an absence of diversity and affirmative action. But that injury would not result from the inability to realize any substantial benefits of operational effectiveness that flow from diversity. It would instead result from external societal factors.

In addition to the economic price for businesses, individuals and society experience greater injuries from private sector affirmative action than they do from similar policies in the public sector. A judicially recognized diversity exception to Title VII would exacerbate these injuries. Like their public sector counterparts, applicants for private sector positions who are unsuccessful because of affirmative action have suffered a severe injury that may undermine their livelihood.³³⁹ But in the American capitalist economy, the private sector employs more people than the public sector.³⁴⁰ Presumably, therefore, more people lose jobs because of affirmative action in the private sector than in the public sector. This greater degree of direct personal injury is thus more lamentable, and the danger for racial stigma, animosity, and polarization is

336. Estlund, *supra* note 23, at 219, 222.

337. See WOOD, *supra* note 2, at 214-15.

338. See TIMMERMAN, *supra* note 158, at 127-30, 132-34, 273-78, 280-84.

339. See *supra* Part V.C.2.

340. In 2003, 146.5 million individuals were employed. U.S. CENSUS BUREAU, 2006 STATISTICAL ABSTRACT OF THE UNITED STATES: THE NATIONAL DATA BOOK 387 tbl. 576, available at <http://www.census.gov/prod/2005pubs/06statab/labor.pdf>. All federal, state, and local governmental entities employed 21.3 million civilians. *Id.* at 307 tbl. 451, available at <http://www.census.gov/prod/2005pubs/06statab/stlocgov.pdf>. Accordingly, approximately 125.2 million people were employed in the private sector in 2003. This figure is almost six times the number of people employed in the public sector.

augmented.³⁴¹ Unlike public sector affirmative action, private sector discrimination indeed might not have the direct impact of alienating adversely affected individuals—and their families, friends, and neighbors—from their government. This contrast would lessen the relative injury of private sector employment discrimination. But private sector discrimination that occurs because the government makes a diversity exception to a fundamental civil rights principle is the government's responsibility almost as much as with public sector affirmative action. A societal awareness of this condition could well make the resentment that private sector affirmative action engenders similar in kind to and greater in degree than the resentment that public sector affirmative action engenders.

Accordingly, when combined with the insubstantiality of genuine business benefits to diversity,³⁴² the infliction of human injury should render a diversity exception to Title VII, with its clear textual and Congressional purpose, an inappropriate doctrine.

CONCLUSION

The Supreme Court's decision in *Grutter v. Bollinger* suggested that the government had affixed its seal of approval on the widespread use of affirmative action in employment. It created a potentially expansive diversity rationale for affirmative action that reaches beyond higher education and extends to employment in both the public and private sectors. Other courts anticipated this doctrinal shift before *Grutter* and also cautiously expanded it after *Grutter*.³⁴³ The Supreme Court will be forced to contend with these severe implications at some time in the future.

Though an expanded diversity rationale is a plausible result of the reasoning in *Grutter*, it is not a necessary outcome. *Grutter* concerned a factual context with arguable countervailing constitutional considerations that the employment contexts do not present.³⁴⁴ The Supreme Court will therefore confront a clear choice: will it preserve the guarantee of protection from racial discrimination, or will it instead adopt the more expansive components of its

341. See *supra* note 341; *supra* Part V.C.2.

342. See *supra* Part VI.C.1.

343. See *supra* Parts III.B-IV.2.

344. *Supra* Part III.B.

earlier diversity rationale in new areas? The latter, more permissive course appears consistent with the *Grutter* Court's policy views about the benefits of racial diversity, but the course of containment is more in line with the Court's longer established policy of confining the permissible bounds of exceptions to equal protection and Title VII. Furthermore, affirmative action in employment offers only marginal operational benefits to employers, needlessly injures innocent individuals, and promotes insidious group polarization. Accordingly, if it retains *Grutter*, the Supreme Court should confine *Grutter* to the context of higher education. The Court should declare affirmative action in public sector employment to be unconstitutional under equal protection, and it should declare affirmative action in private sector employment to be illegal under Title VII.

*Jared M. Mellott**

* Articles Editor, *William and Mary Law Review*; J.D. Candidate, William and Mary School of Law; B.A., Dickinson College. Special thanks to my family for their perpetual support and encouragement, to Professor Harry Pohlman for teaching me in college the foundational legal intricacies of affirmative action, and to the editors and staff of the *William and Mary Law Review* for their diligence in the editing process for this Note.