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# Affirmative Action in the Workplace: The Significance of *Grutter*?

BY REBECCA HANNER WHITE\*

## INTRODUCTION

The Supreme Court's decision last term in *Grutter v. Bollinger*<sup>1</sup> answered important questions about the affirmative use of race in the educational context. I have been asked by the editors of the *Kentucky Law Journal* to explore the impact the decision is likely to have on affirmative action in a different context—employment. Simply put, to what extent does *Grutter* affect a public or private employer's ability to voluntarily adopt an affirmative action plan in order to diversify its workforce?<sup>2</sup>

The short answer, of course, is that the *Grutter* decision does not directly apply to the affirmative use of race or other protected characteristics in the workplace.<sup>3</sup> The Court was careful to limit its discussion to the

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<sup>1</sup> *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).

<sup>2</sup> My focus thus is not on affirmative action as a court-ordered remedy or on the scope of affirmative action under Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965). Instead, it is on the extent to which an employer may choose to employ race-conscious measures to increase diversity in the workplace.

<sup>3</sup> Immediate reaction to the decision from some commentators was that *Grutter* would have little impact. Michael R. Triplett, *Affirmative Action: Lawyers, Scholars Differ on Likely Impact Split Decision will have on Workplaces*, DAILY LABOR REPORT No. 121, at AA-5 (June 24, 2003). According to Professor Sam Estreicher, "the decisions have 'no legs beyond educational diversity' and that the workplace would likely be unaffected by the ruling." *Id.* Another commentator, Edward Blum, agreed, viewing the decision as "a 'narrow opinion,' with little impact on the workplace." *Id.* Others saw the decision as more influential. According to Paula Brantner of Workplace Fairness, "while the decision did not have a direct connection to employment law, the ruling allows employers and employees to understand how the Supreme Court views discrimination and workplace diversity." *Id.* As the following suggests, my own views are closer to that of Ms. Brantner.

question before it, specifically “[w]hether diversity [was] a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities.”<sup>4</sup> The Court pointedly stated that “[c]ontext matters”<sup>5</sup> when deciding whether race-based classifications were constitutional. Whether it would consider racial diversity a compelling enough reason to justify race conscious decision-making in other contexts, including employment, was left for another day.

Nonetheless, I believe the decision will be front and center, as it should be, in discussions about affirmative action in the workplace.<sup>6</sup> The affirmative use of race in employment is one of this country’s most contentious issues, and while the Court has addressed affirmative action as a remedy for prior discrimination, it has not addressed the extent to which an employer may base decisions on the desire to obtain or maintain a racially diverse workforce. However, the *Grutter* Court’s acceptance of diversity as a compelling state interest in the educational context suggests it may be receptive to that argument in the workplace as well. Complicating matters is the extent to which a constitutional analysis of diversity in the workplace may vary from a statutory one.

This essay will not attempt a normative discussion concerning the affirmative use of race by employers. Rather, I hope to provide an overview of some of the legal issues that distinguish affirmative action in the employment context from affirmative action in the educational context, with a particular look at Title VII of the Civil Rights Act of 1964<sup>7</sup> and with

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<sup>4</sup> *Grutter*, 123 S. Ct. at 2335.

<sup>5</sup> *Id.* at 2338.

<sup>6</sup> Peter Schuck defines affirmative action as “a program in which people who control access to important social resources offer preferential access to those resources for particular groups that they think need special treatment.” Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL’Y REV. 1, 5 (2002). That definition works well for the purposes of this Article.

<sup>7</sup> Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (2000). Another statute, § 1981, 42 U.S.C. § 1981 (2000), prohibits race discrimination in the making and enforcement of contracts. Because the employment relationship is contractual, § 1981 applies to race discrimination in the workplace. It appears that if an affirmative action plan is valid under Title VII, racially motivated decisions made in conformance with the plan will not violate § 1981. *See Schurr v. Resorts Int’l Hotel, Inc.*, 196 F.3d 486, 498-99 (3d Cir. 1999). If, however, affirmative action would be permissible under the Constitution but impermissible under Title VII, *see infra* note 8, *Grutter* suggests no violation of § 1981 would exist. Challenges to the law school’s affirmative action plan in *Grutter* had been brought under § 1981 and Title VI, as well as under the Fourteenth Amendment. *Grutter*, 123 S. Ct. at 2332.

a particular focus on diversity as a justification for workplace affirmative action.

### I. TITLE VII AND THE VOLUNTARY USE OF AFFIRMATIVE ACTION

Title VII of the Civil Rights Act of 1964 prohibits public and private employers<sup>8</sup> from discriminating “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of . . . race, color, religion, sex, or national origin.”<sup>9</sup> As originally enacted, no exception for the “affirmative” use of race was contained on the face of the statute. But the Supreme Court, in *United Steelworkers v. Weber*,<sup>10</sup> held that in certain circumstances race could be considered in the workplace without violating Title VII.

At issue in *Weber* was Kaiser Aluminum’s decision<sup>11</sup> to reserve fifty percent of the openings in a craft training program to black employees. The company’s plan was to continue setting aside the openings until the percentage of black craftworkers in the company mirrored the percentage of blacks in the surrounding labor market. At the time the plan was adopted, Kaiser’s craft workers were almost all white. Kaiser previously had hired only persons with craft work experience, and because blacks had been excluded from craft unions, very few blacks had the necessary experience to be hired by Kaiser into the craft positions. The training program, and the reservation of fifty percent of the places in it to blacks, was an effort to “eliminate traditional patterns of racial segregation.”<sup>12</sup>

Rejecting an argument that the literal language of Title VII prohibited this consideration of race, the Court held the plan “falls within the area of discretion left by Title VII to the private sector voluntarily to adopt

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Finding that § 1981 and Title VI’s prohibitions were “co-extensive with the Equal Protection Clause,” the Court dismissed those claims as well. *Id.* at 2347 (discussing *Gen. Bldg. Contractors Ass’n v. Pennsylvania*, 458 U.S. 375, 389-91 (1982)). Accordingly, for purposes of this Article, my focus will be on the Equal Protection Clause and Title VII.

<sup>8</sup> 42 U.S.C. § 2000e(b). The statute, as originally enacted, reached only private employers but was amended in 1972 to reach public employers as well. Thus, public employers must conform their conduct not only to the Constitution but to Title VII as well.

<sup>9</sup> *Id.* § 2000e-2(a)(1).

<sup>10</sup> *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

<sup>11</sup> The company did not act unilaterally but adopted this program through collective bargaining with the employees’ union. *Id.* at 197-98.

<sup>12</sup> *Id.* at 201.

affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories.”<sup>13</sup> In so holding, the Court emphasized the purpose of the statute,<sup>14</sup> which was to “integrat[e] blacks into the mainstream of American society” by opening job opportunities “in occupations which have been traditionally closed to them.”<sup>15</sup> “It would be ironic indeed,” said the Court,

if a law triggered by a Nation’s concern over centuries of racial injustice and intended to improve the lot of those who had ‘been excluded from the American dream for so long,’ constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.<sup>16</sup>

In upholding the plan, the Court further noted the plan, aimed at remedying prior discrimination against black workers, did “not unnecessarily trammel the interests of the white employees.”<sup>17</sup> The plan would not result in the termination of white workers; it was temporary, remaining in place only until racial imbalance had been eliminated; and while the plan was in place, one-half of the openings in the training program were available to white workers.<sup>18</sup>

Eight years later, in *Johnson v. Transportation Agency*,<sup>19</sup> the Court upheld *Weber* and extended it to a public employer’s voluntary affirmative action plan aimed at remedying sex discrimination.<sup>20</sup> Santa Clara County had adopted an affirmative action plan aimed, in part, at increasing the number of women in skilled trade positions; of the 238 skilled craft workers in the county, none were women. When an opening arose for a dispatcher in the Roads Division, a skilled trades job, Diane Joyce was selected for the position, although a male co-worker, plaintiff Paul Johnson, had been recommended for the job by a group of supervisors. Finding both candi-

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<sup>13</sup> *Id.* at 209.

<sup>14</sup> *Id.* at 201. Quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892), the Court noted “[i]t is a ‘familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.’”

<sup>15</sup> *Weber*, 443 U.S. at 202-03 (citations omitted).

<sup>16</sup> *Id.* at 204 (citations omitted).

<sup>17</sup> *Id.* at 208.

<sup>18</sup> *Id.*

<sup>19</sup> *Johnson v. Transp. Agency*, 480 U.S. 616 (1987).

<sup>20</sup> *Id.* at 620 n.2. Although the defendant was a public employer, suit was brought only under Title VII. No constitutional violation was asserted.

dates well-qualified for the job, the Agency's Director selected Joyce for the position in accordance with the county's affirmative action plan.<sup>21</sup>

The Supreme Court upheld the plan and the decision to promote Joyce. In so doing, the case followed the two step analysis established in *Weber*. First, the Court determined that the plan was aimed at "eliminat[ing] manifest racial imbalances in traditionally segregated job categories."<sup>22</sup> In determining whether a manifest imbalance existed, the Court compared the number of women working in skilled craft positions for the county with the number of women in the local labor force who had the requisite skills. Such a comparison, said the Court, "provides assurance both that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination, and that the interests of those employees not benefiting from the plan will not be unduly infringed."<sup>23</sup> Although the Court did not define what was meant by a "manifest imbalance," it made clear the imbalance need not be great enough to support a *prima facie* case of discrimination against the employer.<sup>24</sup> Thus, an employer would not need a *prima facie* showing of its own past discrimination to support adoption of an affirmative action plan; a showing of societal discrimination would suffice.<sup>25</sup>

Second, the Court determined that the county's plan did not "unnecessarily trammel[ ] the rights of male employees or create[ ] an absolute bar to their advancement."<sup>26</sup> No positions were set aside for women, and sex was but one factor considered in selecting who was to receive a job. In this respect, "[t]he Plan," said the Court, "thus resembles the 'Harvard Plan' approvingly noted by Justice Powell in [*Bakke*], which considers race along with other criteria in determining admission to the college."<sup>27</sup> Additionally,

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<sup>21</sup> *Id.* at 624-25. For an interesting discussion of the facts surrounding the case, see SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 388-93 (1991).

<sup>22</sup> *Johnson*, 480 U.S. at 628 (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 197 (1979)).

<sup>23</sup> *Id.* at 632.

<sup>24</sup> *Id.* See *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977).

<sup>25</sup> This statutory standard differs from the standard that the Court has adopted for constitutional challenges to affirmative action, where the Court has rejected a societal discrimination theory as sufficient to support an affirmative action plan. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>26</sup> *Johnson*, 480 U.S. at 637-38.

<sup>27</sup> *Id.* at 638.

the plaintiff had no "absolute entitlement"<sup>28</sup> to the position but instead was only one of a number of applicants qualified for the job. Finally, the plan was "intended to *attain* a balanced work force, not to maintain one."<sup>29</sup> Finding the plan consistent with both prongs established in *Weber*, the Court rejected the plaintiff's attack on the plan.<sup>30</sup>

*Johnson* is the Supreme Court's last word to date on affirmative action under Title VII. The Court has approved affirmative action under the statute when a remedial justification exists and when the interests of majority group members are not "unnecessarily trammled." The Court, however, has not addressed the legality of affirmative action under Title VII when no remedial justification has been put forward to support the plan.

The Court had agreed to confront this issue when it granted certiorari in *Taxman v. Board of Education*.<sup>31</sup> There, the School Board needed to lay off one teacher in its business education department. Two teachers, one white and one black, had identical seniority and were viewed as equally qualified. Invoking an affirmative action plan, the Board chose to lay off the white teacher in order to maintain diversity. The black teacher was the only African-American in the department, and the School Board cited its interest in the educational benefits of racial diversity as justifying the use of race as a tie-breaker in the case.<sup>32</sup>

The Third Circuit, en banc, rejected the diversity rationale.<sup>33</sup> The Third Circuit viewed affirmative action under Title VII as permissible *only* when a remedial justification is asserted.<sup>34</sup> Viewing affirmative action as a very limited exception to the statute's prohibition against race-based employment decisions, the court found the exception justified only when Title VII's "secondary" purpose of "ending the segregative effects of discrimination" was furthered:

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 639.

<sup>30</sup> The *Johnson* Court made clear it is the plaintiff's burden to prove an affirmative action plan is invalid. Affirmative action is not an affirmative defense. Essentially, taking race or sex into account in conformance with a lawful affirmative action plan is not "discrimination" within the meaning of the statute. *Id.* at 641-42.

<sup>31</sup> *Taxman v. Bd. of Educ.*, 91 F.3d 1547 (3d Cir. 1996) (en banc), *cert. granted*, 521 U.S. 1117, *cert. dismissed*, 522 U.S. 1010 (1997). As in *Johnson*, 480 U.S. at 616, suit was brought under Title VII; no constitutional claim was asserted.

<sup>32</sup> *Taxman*, 91 F.3d at 1551.

<sup>33</sup> *Id.* at 1550.

<sup>34</sup> *Id.*

The significance of this second corrective purpose cannot be overstated. It is only because Title VII was written to eradicate not only discrimination *per se* but the *consequences* of prior discrimination as well, that racial preferences in the form of affirmative action can co-exist with the Act's antidiscrimination mandate.

Thus, based on our analysis of the Title VII's two goals, we are convinced that unless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute, and, therefore, cannot satisfy the first prong of the *Weber* test.<sup>35</sup>

In rejecting the diversity rationale, the Third Circuit distinguished affirmative action under Title VII from that permissible under the Constitution and also distinguished the employment setting, even in the educational context, from "the diversity that universities aspire to in their student bodies."<sup>36</sup> The court thus viewed *Bakke* as inapposite to the employment situation before it.

The court went on to find that the layoff of a tenured nonminority did not meet the second prong of the *Weber* test. Quoting the Supreme Court's decision in *Wygant v. Jackson Board of Education*,<sup>37</sup> the court observed that "[w]hile hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives."<sup>38</sup>

After the Supreme Court agreed to hear the *Piscataway* case, the case settled and was dismissed by the Court.<sup>39</sup> Thus, the issue of racial diversity in the workplace as a justification for affirmative action under Title VII (or under the Constitution) has yet to be addressed by the high Court.

## II. DIVERSITY AND THE WORKPLACE

Now that the Supreme Court has confirmed that racial diversity is a compelling state interest in the context of university admissions, what does that mean for this country's workplaces? Certainly, had the *Grutter* Court held that *only* a remedial justification is sufficiently compelling to justify governmental use of race, *Grutter* would have precluded public employers

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<sup>35</sup> *Id.* at 1557.

<sup>36</sup> *Id.* at 1562.

<sup>37</sup> *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

<sup>38</sup> *Taxman*, 91 F.3d at 1564 (quoting *Wygant*, 476 U.S. at 283).

<sup>39</sup> *Piscataway Township Bd. of Educ. v. Taxman*, 522 U.S. 1010, 1010 (1997).



from relying upon a diversity rationale for race-based decision-making. The *Grutter* Court's willingness to embrace diversity as a compelling state interest in the context of student admissions undoubtedly leaves the door open for similar arguments to be made in other contexts, including employment.

The *Grutter* Court's decision was carefully limited. In embracing the diversity rationale proffered by the University, the Court relied on the strong deference it has previously extended to academic decisions, noting the "special niche" universities occupy in our society and the First Amendment's protection of "educational autonomy."<sup>40</sup> The Court went on to identify the educational benefits engendered by diversity, such as "promot[ion of] 'cross-racial understanding,' . . . break[ing] down stereotypes, and 'enabl[ing] students to better understand persons of different races.'"<sup>41</sup> The Court pointed to studies showing that a diverse student body promotes better learning outcomes and provides for "more enlightening and interesting" classroom discussions.<sup>42</sup> These educational benefits led the Court to find the University's interest in taking race into account in its admissions decisions compelling for purposes of strict scrutiny analysis.

#### A. *Workplace Diversity and the Constitution*

So what does *Grutter* mean for public employers seeking to rely upon a diversity rationale while conforming their conduct to the requirements of the Fourteenth Amendment? Certainly it means that a public employer may argue in favor of race-based employment decisions that are not aimed at remedying the employer's own prior discrimination. *Grutter* embraces and envisions a more forward looking use of race, and while the decision is issued in the context of student diversity, its approach is not necessarily so limited.

Although the *Grutter* Court did rely upon the special deference academic institutions receive in upholding the University's view that its interest in student diversity was compelling, this does not mean employers may not rely upon *Grutter*. Employers, too, have received considerable deference from the courts. Employer prerogatives have been recognized and deferred to repeatedly by the Court in both constitutional and statutory

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<sup>40</sup> *Grutter v. Bollinger*, 123 S. Ct. 2325, 2339 (2003).

<sup>41</sup> *Id.* at 2339-40 (quoting *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 850 (E.D. Mich. 2001)).

<sup>42</sup> *Id.* at 2340.

contexts.<sup>43</sup> Whether this deference will be on a par with that extended to educators in *Grutter* remains to be seen, but judicial deference to their decision-making is something educators and employers have in common.

Moreover, the benefits diversity brings to the classroom—cross-racial understanding, elimination of stereotypes, and better understanding of others<sup>44</sup>—would seem to be of significant benefit to the workplace as well. This line of reasoning was not lost on Justice Scalia, who proclaimed in dissent:

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.<sup>45</sup>

The majority did not necessarily disagree. Justice O’Connor’s majority opinion went out of its way to cite amicus briefs filed by major employers and by military leaders that stressed the importance of diversity if industry and the military are to accomplish their goals.<sup>46</sup>

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<sup>43</sup> See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that if an employer can prove by a preponderance of the evidence that the same decision would have been made, the employer will not be liable even though the plaintiff proves that gender played a role in an employment decision); *Connick v. Myers*, 461 U.S. 138 (1983) (holding that when a public employee speaks on matters of personal interest, the federal courts are not the appropriate forum to review the employer’s decision regarding the employee’s speech). For discussion and criticism of the deference courts have paid to employer prerogatives in the context of discrimination claims, see Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to “No Cause” Employment*, 81 TEX. L. REV. 1177 (2003).

<sup>44</sup> *Grutter*, 123 S. Ct. at 2339.

<sup>45</sup> *Id.* at 2349 (Scalia, J., dissenting).

<sup>46</sup> Citing to briefs filed by 3M and by General Motors Corp., the Court stated, “[t]hese benefits [of a diverse classroom] are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” *Id.* at 2340. A brief filed by high ranking military officers seemed particularly persuasive to the Court; it was discussed at some length during oral argument, and the Court’s opinion noted that “[w]hat is more, high-ranking retired officers and civilian leaders of the United States military assert that, ‘[b]ased on [their] decades of experience,’ a ‘highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle

In the wake of *Grutter*, it appears likely the Court would view a public employer's need to take account of race in at least some situations that go beyond remedying the employer's own prior discrimination as compelling. Justice O'Connor previously had suggested she may view a racially diverse workforce as a compelling interest, at least in the educational setting.<sup>47</sup> Justice Stevens has gone even further. In his concurring opinion in *Johnson*, he noted the importance of embracing "forward looking considerations" regarding the affirmative use of race and quoted with approval the achievement of racial diversity as an example of such a goal.<sup>48</sup>

When called upon to address the issue, the Court undoubtedly will take the particular employment context into account. A sweeping ruling concluding that a racially diverse workforce is a compelling interest for all public employers, Justice Scalia's prediction to the contrary notwithstanding,<sup>49</sup> appears unlikely. For example, it may be a compelling state interest for a public school to employ a racially diverse faculty to enhance the educational experience of its students.<sup>50</sup> This rationale would be similar, although not identical, to that embraced by the *Grutter* Court and has been supported by educational experts.<sup>51</sup> Moreover, a prison's need for a racially diverse correctional staff has been viewed as compelling by a circuit court,<sup>52</sup> as has a police department's need for Hispanic officers.<sup>53</sup> And it appears highly unlikely the Court is prepared to strike down the military's

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mission to provide national security.' " *Id.* (quoting Consolidated Brief of Amici Curiae Lt. Gen. Julius W. Becton at 5, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241)).

<sup>47</sup> See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 289 n.\* (1986) (O'Connor, J., concurring) (distinguishing the remedy of societal discrimination and providing role models, two rationales that Justice O'Connor viewed as insufficiently compelling from "the very different goal of promoting racial diversity among the faculty").

<sup>48</sup> See *Johnson v. Transp. Agency*, 480 U.S. 616, 647 (1987).

<sup>49</sup> *Grutter*, 123 S. Ct. at 2349 (Scalia, J., dissenting) (concluding that "[i]f 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 . . . it is . . . particularly appropriate—for the civil service system of the State of Michigan to do so").

<sup>50</sup> See Ann C. McGinley, *Affirmative Action Awash in Confusion: Backward-Looking-Future-Oriented Justifications for Race-Conscious Measures*, 4 ROGER WILLIAMS U. L. REV. 209 (1998) (describing the amicus briefs filed in *Piscataway* documenting the educational benefits of a racially diverse faculty).

<sup>51</sup> *Id.* at 228.

<sup>52</sup> *Wittmer v. Peters*, 87 F.3d 916 (7th Cir. 1996).

<sup>53</sup> *Reynolds v. City of Chicago*, 296 F.3d 524 (7th Cir. 2002).

admitted use of affirmative action to increase the number of minority officers.<sup>54</sup> But what is decidedly more difficult is determining when such compelling circumstances exist. Suffice it to say that after *Grutter*, it appears that public employers, in at least some settings, will be able to successfully argue they have a compelling interest in a racially diverse workforce. As Justice O'Connor observed in *Grutter*, "context matters,"<sup>55</sup> and the particular workplace context will likely be outcome determinative.

### B. Diversity and Title VII

Even if the Court were to embrace diversity as a compelling state interest for public employers in the context of a *constitutional* challenge to affirmative action, the Title VII claim, applicable to public and private employers alike, would remain. Public employers thus face two distinct challenges to their use of affirmative action—a constitutional challenge and a statutory one. Private employers must contend only with statutory constraints.

As the law presently stands, the constitutional standards for affirmative action in the workplace differ from those under Title VII. Recall that in *Johnson v. Transportation Agency*,<sup>56</sup> the Court upheld the county's affirmative action plan even though there was no showing of prior discrimination by the employer; a societal discrimination theory sufficed under Title VII to support the employer's adoption of the plan.<sup>57</sup> And yet the Court has found that societal discrimination is *not* a compelling enough state interest to justify affirmative action under a constitutional analysis.<sup>58</sup> Thus, as the law presently stands, employers have more freedom under Title VII to engage in *remedially*-based affirmative action than the constitution permits. Put simply, a private employer can engage in affirmative action in situations where a public employer, constrained by the Constitution, cannot.

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<sup>54</sup> "The U.S. military establishment is the work setting where affirmative action has been particularly pervasive and arguably most successful." Schuck, *supra* note 6, at 9. During oral argument in *Grutter* and *Gratz*, the Court paid particular attention to the military's use of affirmative action, and the Court cited the military's practice with apparent approval in *Grutter*. See *Grutter*, 123 S. Ct. at 2340.

<sup>55</sup> *Id.* at 2338.

<sup>56</sup> *Johnson v. Transp. Agency*, 480 U.S. 616 (1987).

<sup>57</sup> *Id.* at 641-42.

<sup>58</sup> See sources cited *supra* note 25.

This analysis would suggest that were the Court, employing strict scrutiny, to view diversity as a compelling state interest for a public employer, it necessarily would find the public (and private) employer's use of race statutorily permissible as well. After all, *Johnson* provides more freedom to engage in affirmative action under Title VII than the Constitution permits. Thus, if diversity is a compelling interest for a public employer, *Johnson* could be read to suggest the statute will be at least as accommodating as the Constitution.

But that is not necessarily the case. In *Piscataway*, the Third Circuit's focus on the statutory language and legislative history of Title VII caused it to find a diversity rationale inconsistent with Title VII.<sup>59</sup> That court viewed *Weber* and *Johnson* as approving a very limited exception to the literal language of Title VII prohibiting racially motivated decisions, an exception justified only because it furthered the statutory purpose of remedying past discrimination. Thus, without a remedial purpose, the Third Circuit found the affirmative use of race statutorily prohibited.<sup>60</sup>

Neither *Weber* nor *Johnson* categorically holds that affirmative action must be remedially-based to be statutorily permissible.<sup>61</sup> The question simply was not before the Court in either case. Nevertheless, it is true that the *Weber* Court, and even Justice Stevens' concurrence in *Johnson*, frankly acknowledged that affirmative action appeared to conflict with the literal language of the statute.<sup>62</sup> This is an important point, given the Court's increasingly textualist approach to statutory interpretation.

Nor is the issue clarified by Congress' reference to affirmative action in the 1991 amendments to Title VII, in which the following provision was added:

Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.<sup>63</sup>

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<sup>59</sup> See *supra* notes 30-36 and accompanying text.

<sup>60</sup> *Taxman v. Bd. of Educ.*, 91 F. 3d 1547 (3d Cir. 1996) (en banc), *cert. granted*, 521 U.S. 1117, *cert. dismissed*, 522 U.S. 1010 (1997).

<sup>61</sup> As Justice Stevens observed in his *Johnson* concurrence, the case "does not establish the permissible outer limits" of affirmative action under Title VII. *Johnson*, 480 U.S. at 642.

<sup>62</sup> See Michael J. Yelnosky, *Whither Weber?*, 4 ROGER WILLIAMS U. L. REV. 257, 258-61 (1998) (noting the grudging approach to affirmative action in both *Weber* and *Johnson*).

<sup>63</sup> The Civil Rights Act of 1991 § 116, 102 Pub. L. No. 166, 105 Stat. 1071, 1079 (1991).

This statutory language is ambiguous, even in the context of *Weber* and *Johnson*. It certainly could be read as a congressional incorporation of those decisions into the statutory framework, endorsing the rationale of the Court, or the statute could be viewed as taking no position on affirmative action at all.<sup>64</sup> In any event, since the Court had not addressed the use of diversity as a justification for affirmative action under the statute, Section 116 provides little guidance on how best to resolve the issue.

Nonetheless, the *Grutter* Court's refusal to restrict affirmative action only to remedial purposes in interpreting the Fourteenth Amendment suggests it will follow a similar approach in interpreting the statute. It seems unlikely the Court would interpret a statute aimed at achieving equal opportunity as precluding a public employer's use of race in situations where its need to do so is compelling.

An additional issue merits discussion. Will the Court interpret Title VII as permitting employers *more* flexibility than is constitutionally available? In other words, even if diversity is not a compelling state interest in the context of a constitutional claim, might the statute permit an employer to make employment decisions aimed at achieving racial diversity? The *Johnson* Court's view that the affirmative use of race under the statute was more permissive than under the Constitution, at least for remedial purposes, suggests the answer is yes. After all, private employers are not constrained by the Constitution and thus, absent statutory limits, would be free to engage in race-based decision-making. Moreover, as mentioned above, the Court has repeatedly emphasized Congress' intent to preserve employer prerogatives to the greatest extent possible.<sup>65</sup> An expansive approach to affirmative action under the statute, permitting employers to voluntarily decide whether or not to affirmatively take race or sex into account for diversity purposes, would be consistent with this statutory aim.<sup>66</sup>

This wide-ranging use of "diversity" by private employers, as a result of the *Grutter* decision, was also predicted by Justice Scalia. As he caustically noted, "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."<sup>67</sup>

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<sup>64</sup> For discussion of this statutory provision, see Michael J. Zimmer, *Taxman: Affirmative Action Dodges Five Bullets*, 1 U. PA. J. LAB. & EMP. L. 229, 230-33 (1998).

<sup>65</sup> See sources cited *supra* note 43.

<sup>66</sup> See Schuck, *supra* note 6, at 86-87, who advocates allowing private employers more flexibility in their use of racial preferences.

<sup>67</sup> *Grutter v. Bollinger*, 123 S. Ct. 2325, 2349 (2003) (Scalia, J., dissenting).

Employers in recent years have promoted diversity as a means of maximizing profits. As has been observed, “[r]ather than taking steps to increase the representation of women and minorities in their work forces to redress previous discrimination, employers are increasingly asserting the right to make race and sex-conscious decisions to reap the competitive advantages associated with a more diverse work force.”<sup>68</sup> In other words, diversity is often good for business, and thus many employers would welcome the opportunity to make employment decisions aimed at increasing the diversity in their workplaces.<sup>69</sup> To that end, it is not surprising that a number of corporations and other business entities filed amicus briefs with the Court in *Grutter* on behalf of the University of Michigan.<sup>70</sup>

Two statutory provisions in Title VII, however, are problematic. First, the 1991 Civil Rights Act amended Title VII to provide that business necessity is not a defense to a claim of intentional discrimination.<sup>71</sup> The statute generally does not permit an employer to discriminate even when it has very good business justifications for doing so. Second, the statute does permit an employer to discriminate on the basis of sex, religion or national origin if a bona fide occupational qualification (“BFOQ”) exists.<sup>72</sup> The BFOQ defense is a very narrow one, permitting an employer to make employment decisions based on protected characteristics only when the essence of the employer’s business demands that sex, religion, or national

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<sup>68</sup> Ann C. McGinley & Michael J. Yelnosky, Board of Education v. Taxman: *The Unpublished Opinions*, 4 ROGER WILLIAMS U. L. REV. 205, 207 (1998).

<sup>69</sup> As Professor Schuck has observed, business leaders emphasize the benefits of ethno-racial diversity in a global market, and the programs are promoted by powerful internal and external constituencies, including some customers. The programs also tend to advantage large companies by imposing onerous reporting, staffing, and other compliance costs on smaller competitors who cannot bear them as easily. Firms also see affirmative action as a safe harbor sheltering them from Title VII claims, helping them to ‘keep the peace’ and avoid adverse publicity. Schuck, *supra* note 6, at 61 (citations omitted).

<sup>70</sup> Amicus briefs were filed on behalf of over 75 companies including 3M, American Airlines, Boeing, Coca-cola, DaimlerChrysler, Dow Chemical, Hewlett-Packard, Microsoft, Nike, Pepsi, and Xerox. These briefs argued that “individuals who have been educated in a diverse setting are more likely to succeed, because they can make valuable contributions to the workforce.” Brief for Amici Curiae 65 Leading American Business at 7, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-241 & 02-516).

<sup>71</sup> 42 U.S.C. § 2000e-2(k)(2) (2000).

<sup>72</sup> *Id.* § 2000e-2(e).

origin be taken into account and only when all or substantially all members of the protected group would be unable to perform the job.<sup>73</sup> Thus, the focus is on the worker's ability to perform tasks that go to the essence of the employer's business. If the employee can do the job, no BFOQ will exist, even if the employer could make more money by following an exclusionary hiring policy. More important, there is no BFOQ for race.

Congress's decision not to provide a BFOQ for race may suggest it was unwilling to permit employers to take race into account even when strong business justifications for doing so were present. Furthermore, a diversity rationale motivated by profit maximization, when applied to race- or sex-based diversity efforts, looks much like rationales proffered and rejected in the BFOQ context.<sup>74</sup> Thus, employers wishing to employ racial preferences for the sake of diversity will need to show something other than a profit rationale. That a car dealer could sell more cars with a racially diverse workforce than with a more racially homogenous one is unlikely to convince a court that the employer is entitled under the statute to prefer members of one race over another when hiring new additions to its sales staff.<sup>75</sup>

Does Congress's rejection of a BFOQ for race, and the very narrow BFOQ that exists for sex and national origin, doom a diversity-based approach to affirmative action under the statute? Not necessarily.<sup>76</sup> After all, the *Johnson* Court did not view lawful affirmative action as discrimination within the meaning of Title VII. Rather than viewing an affirmative action plan as an affirmative defense, it viewed affirmative action as a legitimate, *nondiscriminatory* reason.<sup>77</sup>

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<sup>73</sup> See *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (holding that the BFOQ exception was meant to be an extremely narrow exception to the general prohibition of sex discrimination contained in Title VII); see also *W. Airlines, Inc. v. Criswell*, 472 U.S. 400 (1985); *Dothard v. Rawlinson*, 433 U.S. 321 (1977). The BFOQ analysis is not unlike the compelling state interest analysis employed in equal protection clause claims. See William R. Bryant, Note, *Justifiable Discrimination: The Need for a Statutory Bona Fide Occupational Qualification Defense for Race Discrimination*, 33 GA. L. REV. 211, 219-28 (1998).

<sup>74</sup> See *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (rejecting sex discrimination as a BFOQ rationale); *Smallwood v. United Airlines, Inc.*, 661 F.2d 303 (4th Cir. 1981) (rejecting economic considerations as the basis for a BFOQ with respect to age discrimination).

<sup>75</sup> See, e.g., *Ferrill v. Parker Group, Inc.*, 168 F.3d 468 (11th Cir. 1999).

<sup>76</sup> See Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1216 (2002).

<sup>77</sup> See discussion *supra* notes 57-64.



One thus could attempt to distinguish the affirmative and *nondiscriminatory* use of race or sex for diversity purposes from the discrimination the BFOQ defense is aimed at sheltering.<sup>78</sup> But courts must be careful not to permit a diversity-based approach to affirmative action to eviscerate the narrow boundaries of the BFOQ or to permit employers to take race into account under a “business necessity” rationale. Perhaps only in situations in which the employer’s interest could be viewed as compelling within the meaning of strict scrutiny analysis should a diversity-based approach to affirmative action be statutorily acceptable.

#### CONCLUSION

*Grutter*’s impact on the workplace is an open question. In thinking about the issue, it is important to distinguish constitutional claims from statutory ones. It may be, however, that the result under both claims will and should be parallel. No doubt there will be instances in which a compelling need will exist for an employer to engage in race-conscious decision-making, even when no remedial interest is present. *Grutter* suggests the Court will be sympathetic to such needs, whether the claim is constitutionally or statutorily based. The challenge will be to identify a diversity rationale that can co-exist with Title VII’s goal of eliminating intentional discrimination, even when “good business reasons” to discriminate are present.

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<sup>78</sup> See Schuck, *supra* note 6, at 6 (asking whether affirmative action is “simply another form of non-discrimination”); see also John Hasnas, *Equal Opportunity, Affirmative Action and the Anti-Discrimination Principle: The Philosophical Bases for the Legal Prohibition of Discrimination*, 71 FORDHAM L. REV. 423 (2002).